



Response to the European Commission's Green Paper on the Future Common European Asylum System



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This response consists of two parts. Part I contains UNHCR's views on the main components of a Common European Asylum System and suggestions for future directions. Part II elaborates on these proposals and responds to the specific questions set out in the Green Paper. The two parts of this submission are complementary and should be read together.

UNHCR's Response to the European Commission's Green Paper on the Future Common European Asylum System

INTRODUCTION

UNHCR welcomes the European Commission's Green Paper on the future Common European Asylum System¹, and commends the Commission for launching consultations on this subject with a wide group of stakeholders. UNHCR is pleased to note that the goals set by the Commission for the second phase of work towards a Common European Asylum System based on the full and inclusive application of the 1951 Convention relating to the Status of Refugees² are to achieve a higher common standard of protection and a greater degree of solidarity among EU Member States.

The Green Paper affirms – and UNHCR agrees – that harmonization is not an end in itself. The overriding objective of the Common European Asylum System should be to guarantee that persons in need of international protection are able to find this protection throughout the EU, in line with the 1951 Convention and other international instruments and standards. At present, this is not always the case. Although EU minimum standards should reflect high protection standards, in some instances transposition of the EU asylum instruments has resulted in a lowering of standards and continues to allow for a significant divergence in law and practice. This should be remedied, and international norms respected. In addition, the system needs to be able to deal fairly, humanely and efficiently with persons who do not need international protection. The external dimension, including capacity-building activities and refugee resettlement, should be a complement to, and not a substitute for, the provision of protection within the EU.

In UNHCR's view, a sound assessment of the results achieved during the first phase of work toward a Common European Asylum System is needed, in order to determine what adjustments or additions should be made to Community standards and institutions. However, it is difficult to make this assessment at a point when the transposition, monitoring and evaluation of experience with the first phase asylum instruments remain incomplete.

The short time frame (2010) foreseen for the completion of the Common European Asylum System, the fact that the Amsterdam Treaty continues to be the legal basis, and the hesitation of Member States to embark on further harmonization would appear to work against significant changes to the existing system. UNHCR nonetheless urges the Commission, Member States and all those interested in the development of the Common European Asylum System, to think beyond adjustments to the existing framework. The consultation launched by the Commission is an opportunity for more visionary and creative approaches to the unique objective of establishing a common asylum system

¹ COM(2007)301 final of 6.6.2007.

² This term also includes the 1967 Protocol relating to the Status of Refugees (hereafter, 'the 1951 Convention').

guided by fundamental protection principles and objectives, rather than by political considerations.

This unprecedented discussion is taking place against a backdrop of rising numbers of refugees worldwide, largely as a result of the crisis in Iraq. In the EU, however, the number of asylum applications fell in 2006 to 198,900 – the lowest level in two decades.³ This may reflect improved conditions in some countries of origin, and the absence of a major new displacement crisis in or on the borders of Europe. It may also reflect increased hurdles for persons seeking to reach the EU, or the decreased attractiveness of the asylum channel. In any case, the decline in numbers may offer a new opportunity to address refugee protection issues in a less politicized atmosphere than has been the case in recent years.

Although migration has become a more dominant topic of public discourse in the EU than asylum, it remains important to raise awareness of the fact that refugees and asylum-seekers are part of today's migratory flows. Migration strategies should be sensitive to this reality, which entails both challenges and opportunities for refugee protection. Rather than addressing migration and asylum in a compartmentalized way, a comprehensive approach is required.

³ This figure does not necessarily reflect the actual number of asylum-seekers who arrived in the EU in 2006, as it includes double counting of persons who lodged more than one application.

PART I: THE EUROPEAN UNION AND REFUGEE PROTECTION: LOOKING TOWARDS 2010

1. The institutional framework: Supplementing national asylum institutions with European monitoring and quality control

In the current framework, responsibility for assessing applications for protection rests with the Member States and their national asylum institutions (including first instance decision-making authorities, review instances and courts). The role of EU institutions is limited to monitoring and supervising compliance with European standards and international standards forming part of the *acquis*. This role is shared by the Commission, the European Court of Justice (ECJ) and the European Parliament. There are also limited platforms for exchange and discussion among the Member States (for instance, EURASIL, Contact Committees, etc.).

This framework has advantages and disadvantages, which have also been brought to the fore through the transposition of relevant EU instruments. On the one hand, it allows the Member States, which are ultimately responsible for granting protection, to decide within the framework of agreed standards who will be allowed to stay on their territory. On the other hand, national practice remains worryingly divergent, in particular in the areas of reception of asylum-seekers and decision making on protection claims. Shortcomings are not always identified, quality control remains limited, and national structures may be constrained by political interests. Responsibility sharing within the EU is limited and decisions taken in one Member State are not automatically accepted in the others.

It is up to the Member States to decide whether these shortcomings could best be addressed by the establishment of a centralized EU structure for reception and decision-making on protection needs, or through the strengthening of Community institutions to ensure better monitoring and quality control across the Union. For UNHCR, the most important consideration is the outcome, which should be the achievement of quality protection across the EU for persons who need it.

1.1 A European Asylum Support Office

The European Commission, according to the Treaties, is responsible for monitoring compliance with Community law. However, in the asylum field, the Commission lacks the resources and structures for this challenging task. UNHCR is therefore in favour of the proposed creation of a European Asylum Support Office and would be ready to collaborate with such an Office, in line with UNHCR's mandate.

UNHCR envisages an Asylum Support Office as institutionally attached to the Commission. It would not have a normative role but would assist the Commission with evaluation, monitoring and quality control, the identification of areas requiring new legislation and the administration of additional tasks (see Part II, questions 21-22).

1.2 European Court of Justice

In other areas of law, the ECJ has proven to be an important promoter of a rights-based interpretation of Community legislation. So far, its role in the development of the Common European Asylum System has been limited, with no asylum cases having reached the Court so far, although this is expected to change progressively after all the first phase instruments are transposed and applied. UNHCR believes the role of the Court could be strengthened.

Under the current system, the Court's jurisdiction in asylum matters is more limited than in other areas of Community law. According to Article 68(1) of the Treaty establishing the European Community, only a court of last instance is empowered to request a ruling on questions of interpretation of asylum law, and only where it considers an ECJ ruling is necessary for it to render judgment. Although the reduction in asylum-seekers' appeal rights in a number of States may result in lower Courts being qualified to submit requests for a ruling, UNHCR supports the proposal in the Draft Reform Treaty⁴ to align the Court's jurisdiction in asylum matters to the generally applicable procedure in other areas of law, and to delete Article 68(1).⁵ This will also enable the Court to resolve conflicting interpretations of Community law between the highest Member State national courts. These changes would enable the Court to make a greater and faster contribution to rights-based harmonization of asylum law and practice in the EU.

Should the number of asylum cases before the Court increase significantly as a result of the proposed changes, further consideration should be given to adopting special measures to ensure that rulings can be delivered swiftly, bearing in mind the impact of asylum decisions on individuals. Possibilities could include an emergency written procedure, or the establishment of a special chamber for asylum matters at the Court of First Instance, which would also enable the Court to build up its expertise and authority in asylum matters.

UNHCR also supports the proposal in the Draft Reform Treaty to make legally binding the Charter of Fundamental Rights of the European Union⁶, which guarantees the right to asylum and reiterates the principle of *non-refoulement*. This would provide the ECJ with a legal basis to ensure that the Common European Asylum System is further developed in line with fundamental rights. Also, with the EU's proposed accession to the European Convention on Human Rights and Fundamental Freedoms (ECHR)⁷, the European Court of Human Rights (ECtHR) would become a more important partner of the ECJ in ensuring that the Common European Asylum System is in line with fundamental rights. Together, these Courts would contribute to a more consistent approach to international protection across the EU.

⁴ Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community (hereafter, 'Draft Reform Treaty'), at: <http://www.consilium.europa.eu/igcpdf/en/07/cg00/cg00001.en07.pdf>.

⁵ According to paragraph 65 of the Draft Treaty amending the Treaty on establishing the European Community, Articles 68 and 69 are to be deleted and replaced with provisions dealing with police cooperation.

⁶ UNHCR notes that the UK has decided not to take part in the Charter, and that a partial 'opt-out' applies to Ireland and Poland. It is arguable that this may limit the impact of jurisprudence which might be based specifically on Charter provisions. This is an issue which will require further examination.

⁷ See commitment in new Article 6(2) in paragraph 8 of the Draft Reform Treaty.

1.3 The European asylum institutions and UNHCR: Linking the EU and global levels

As guardian of the 1951 Convention and the agency mandated by the international community to ensure refugee protection, UNHCR enjoys a privileged relationship with the EU and its institutions. This relationship should be reinforced. Declaration 17 to the Amsterdam Treaty sets out the obligation of European Union institutions to consult with UNHCR on questions relevant to asylum policy. In the Common European Asylum System, this role should be further formalized in the context of EC instruments and processes, to ensure the connection is maintained between developments at EU level and international protection principles and policy. Consideration could for example be given to granting UNHCR advisory status with Council structures and working bodies, and with a European Asylum Support Office, as well as to providing formally for UNHCR input to the development of EU guidelines on all matters relevant to asylum and protection. EC law should also permit the formal possibility for UNHCR to provide its view to the ECJ in cases concerning international protection.

An enhanced relationship with UNHCR would assist the EU institutions to ensure that European asylum law and policy are in line with international norms and reflect worldwide best practice. It would furthermore help to ensure that European asylum policy takes account of global challenges and contributes to international refugee protection efforts.

1.4 Non-governmental organizations and other European civil society representatives

National and European non-governmental organizations (NGOs), academics and other civil society representatives continue to play an important role in the development of asylum systems at national and European levels. In many Member States, NGOs deliver key services to asylum-seekers and refugees (social and legal counselling, housing, food, medical aid, etc.). Through daily contact with asylum-seekers and refugees, NGOs have invaluable insight into protection realities and are indispensable partners for monitoring and quality control of asylum systems. UNHCR believes that their relationship with the EU institutions merits further strengthening and formalization, to ensure that their expertise and advice can be fully utilized.

2. The legal framework

Part II of this paper, responding to the Commission's questionnaire, contains suggestions for amendments and adjustments to the first phase instruments, in many cases reflecting comments published previously by UNHCR. In contrast, the suggestions below in Part I focus on cross-cutting issues relevant to the Common European Asylum System's legal framework. Not all of the elements discussed below are explicitly addressed in the Green Paper's questions. However, they are important considerations which should inform the further development of the Common European Asylum System.

With the conclusion of the first phase of the harmonization process, legal instruments are in place encompassing the most important areas of asylum law, and establishing European norms in some areas not previously addressed by international law. Nonetheless, UNHCR appeals to Member States to remain open to adopting new legislation in the asylum field, if and when required. Although a definitive assessment of the impact of the first phase

instruments is difficult while transposition remains incomplete, UNHCR in this context has four suggestions:

2.1 Maintain but redefine the concept of minimum standards

UNHCR sees advantages in maintaining the approach based on minimum standards, as it allows Member States to incorporate European standards into their diverse national legal systems, and to maintain or adopt higher standards than those which could be agreed at EU level. However, the concept of minimum standards needs to be properly defined and should not be equated with ‘the lowest common denominator,’ or the lowest possible standard of protection. Rather, it should reflect the standards necessary to ensure effective protection throughout the Union and to keep differences in law and practice within an acceptable margin. UNHCR considers that three changes are specifically needed to make sure that the minimum standards guarantee effective protection:

a. Ensure that minimum standards reflect international norms, and remove exceptions to basic protection principles

Some provisions in the first phase instruments, notably in the Qualification Directive⁸ and the Asylum Procedures Directive⁹, do not or do not fully reflect international standards or may lead to breaches of international law.¹⁰ UNHCR has pointed this out in its commentaries on the relevant provisions, and urges the Commission and Member States to remedy this situation. Agreed international standards generally reflect a minimum consensus of the international community, which involves a much broader range of systems, values and practices than within the EU. Where not already the case, these international standards should therefore by default be considered as EU minimum standards and be incorporated into Community legislation, without derogation. Breach by EU Member States of agreed international legal standards would set a highly problematic precedent and risk lowering protection standards globally.

b. Eliminate the possibility for Member States to maintain national standards below EU standards

Several of the first phase Directives allow Member States to maintain lower standards than those adopted at EU level. This is most notably the case in the Asylum Procedures Directive.¹¹ While such possibilities are not the only reason for the absence of a ‘level playing field’, they are an important impediment to high protection standards and to consistency in the practice of Member States. UNHCR recommends eliminating the possibilities to derogate from the Directives’ minimum standards.

⁸ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [OJ L204/12, 30.09.2004].

⁹ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [OJ L326/13, 13.12.2005].

¹⁰ For example, Article 24 of the Asylum Procedures Directive on the possibility to derogate from basic principles and guarantees, and Article 35(2) of that Directive on the possibility to maintain border procedures derogating from basic principles and guarantees.

¹¹ For example, Article 30(3): possibility to retain national designation of third countries as safe countries of origin, Article 35: possibility to maintain national border procedures, Article 36(7): possibility to maintain national lists of countries corresponding to the ‘European Safe Third Country’ concept.

c. Supplement binding minimum standards with recommended ‘best practice’ provisions

As the concept of minimum standards is currently understood and applied in many Member States, it tends to reflect the minimum consensus and thus does little to promote higher international protection standards. There is a concern that the minimum standards have served to drive standards and practices down in some States which had higher levels of procedural and substantive protection before the EU provisions were negotiated. One possibility to address this problem would be to add to EC instruments, where appropriate, recommended optional provisions reflecting best practices from those States which have maintained or introduced more favourable standards on protection.

2.2 Mainstream beneficiaries of subsidiary protection into the international protection system by introducing a single protection status valid throughout the EU

Applicants for and/or beneficiaries of subsidiary protection are excluded from the scope of some of the first phase instruments.¹² Furthermore, the Qualification Directive allows Member States to accord beneficiaries of subsidiary protection a substantially lower level of protection than that provided to refugees.¹³ In UNHCR’s view, these differences are not justified. The protection needs of beneficiaries of subsidiary protection are as compelling and may be as long in duration as those of refugees. Their entitlements should therefore be aligned with the protection standards applicable to refugees.

UNHCR favours the establishment of a single status for refugees and beneficiaries of subsidiary protection, governed by the 1951 Convention and international human rights law. This status should be valid throughout the EU and entitle its holders, at least after a defined period, to the same rights as other third country nationals who are long term residents. In UNHCR’s view, a single status would not only clearly signal the protection needs of its beneficiaries, but it would also facilitate their integration.

2.3 Adopt implementation guidelines to narrow divergences in interpretation

The Common European Asylum System is premised on the assumption that any individual seeking protection has comparable prospects of finding protection, no matter where in the EU he or she applies for it. In reality, however, there continue to be tremendous differences in assessment of protection needs from one Member State to another. Research done by UNHCR shows for instance that asylum-seekers from Iraq, Sri Lanka and Somalia have very different prospects of finding protection, depending on where in the EU their applications are examined. This undermines the credibility of European efforts to build a common asylum system. In addition, more consistent interpretation of protection

¹² For example, Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [OJ L31/18, 6.2.2003] (hereafter, ‘Reception Conditions Directive’) and Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification [OJ L251/12, 3.10.2003] (hereafter, ‘Family Reunification Directive’).

¹³ See, for example, Article 23(2): status of family members; Article 24(2): length of residence permits; Article 26(3): access to employment; Article 28(2): social assistance; Article 29(2): health care; and Article 33(2): integration.

needs in different jurisdictions can be expected to reduce the incentive for onward secondary movement.

Training of decision makers, the provision of qualified interpreters and high quality legal aid are essential to addressing this problem. A further legal approach would be to develop and adopt guidelines for the application of certain parts of the Qualification Directive. Such guidelines should be based on the guidance contained in UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status,¹⁴ Guidelines on International Protection¹⁵ and other advice. EU guidelines should incorporate relevant jurisprudence of the ECJ and the ECtHR. Guidelines could also be adopted for other Directives as required, as well in the context of specific country situations. UNHCR would wish to play an advisory role in the elaboration of EU guidelines.

3. Access to territory and to asylum procedures: a European commitment to protection-sensitive migration strategies – UNHCR's '10-Point Plan' as a framework for action¹⁶

International protection can only be provided if individuals have access to the territory of States where their protection needs can be assessed properly. The best quality asylum system will be of little use if it is not accessible. It is therefore important to ensure that surveillance of the EU's external borders, as well as interception and migration control measures taken outside EU territory, including under the aegis of Frontex, do not impede access to the Common European Asylum System. UNHCR invites the EU to make an explicit commitment to ensuring that protection-sensitive border systems are in place in all Member States, at all external borders – land, sea and air – in order to take due account of the fact that refugees often move alongside irregular migrants.

As a framework for action, UNHCR has developed a '10-Point Plan', which offers suggestions to States on how to integrate refugee protection considerations into migration and border control policies.¹⁷ UNHCR would welcome more concrete discussions about how elements of this Plan could be implemented by Member States. There are good practice examples in several Member States, which could constitute elements of a broader European strategy. More specific suggestions are outlined in Part II, questions 33 and 34.

¹⁴ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, Geneva, January 1992, at: <http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf>.

¹⁵ UNHCR issues Guidelines on International Protection pursuant to its mandate as contained in the 1950 Statute of the Office, in conjunction with Article 35 of the 1951 Convention relating to the Status of Refugees. The Guidelines are complementary to the Handbook and are available at: <http://www.unhcr.org/doclist/publ/3bc17bbc4.html>.

¹⁶ This section outlines problems of access to the asylum procedure specifically in the context of border control measures and irregular migration. Effective access to procedures is, however, a problem more broadly. Suggestions as to how to better ensure effective access to procedures are outlined in Part II (question 2).

¹⁷ UNHCR, Refugee Protection and Mixed Migration: A 10-Point Plan of Action, revision January 2007, at: <http://www.unhcr.org/home/RSDLEGAL/44ca0eda4.pdf>.

3.1 Adoption of protection safeguards in the context of entry management

To ensure that basic protection safeguards are incorporated into national entry management systems across the Union, UNHCR suggests adopting safeguards to be included in relevant EU instruments, such as the Schengen Borders Code.¹⁸

If the success of border control operations is measured only by the number of persons refused entry or deterred from travelling to the EU, protection objectives will not be met. Border guards and other personnel must be made aware of and responsible for the application of protection safeguards, including in the context of Frontex operations. Relevant, regular training is needed to ensure that border guards, coast guards and other officials have the necessary knowledge to fulfil their tasks in a way which respects international protection requirements. Training in cross-cultural communication skills and gender- and age-sensitivity is also important. The border guard training curriculum being developed by Frontex will be a key measure, and UNHCR is pleased to participate in this effort.

3.2 Arrangements for initial reception at external borders

UNHCR suggests that increased attention should be devoted to initial reception arrangements at the external borders of the Union. This could benefit from increased EU financial support. Some Member States, and in particular those at the EU's southern border, are periodically confronted with large-scale arrivals. Persons who have undertaken an often life-threatening journey – whether by sea or land – may need particular care. Initial reception facilities should be able to address the immediate material, medical and counselling needs of new arrivals and be equipped with a profiling mechanism (see below point 3.3 and Part II, question 33).

The management of initial reception centres could be assisted by multifunctional teams, including government officials, UNHCR, IOM and other relevant international or national organizations. Persons identified as asylum-seekers could then be transferred to other in-country reception facilities.

3.3 Profiling mechanisms and Asylum Expert Teams

The establishment of profiling mechanisms could, in UNHCR's view, facilitate the management of larger numbers of arrivals at the EU's external borders. By profiling, UNHCR means a non-binding process which is to be distinguished from the asylum procedure. Its core elements would include: the provision of information to new arrivals (i.e. on their status in the host country and available options); the gathering of information on new arrivals (through questionnaires and/or informal interviews); the establishment of a preliminary profile for each person (e.g. is the person an asylum-seeker, a victim of trafficking, or an unaccompanied child? Is he or she seeking employment opportunities or to join family members? - recognizing that different categories may overlap); counselling

¹⁸ Council Regulation 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (also known as the 'Community Border Code' or 'Schengen Borders Code') [OJ L105/1, 13.4.2006].

and referral to differentiated processes and procedures, including asylum procedures for those seeking international protection.

Personnel undertaking profiling at national level should include those with a range of relevant skills, and include government experts as well as experts from international and non-governmental organizations. UNHCR would be willing to be part of such exercises, as is already the case in some locations.

Profiling activities could also be supported by joint ‘Asylum Expert Teams’, as proposed by the European Commission as a possible tool to strengthen management of the Union’s maritime borders.¹⁹ Such teams, involving experts from various Member States who could include interpreters, caseworkers and country of origin experts, and with potential participation from UNHCR, could be deployed to assist with profiling in Member States facing particular pressures (see also point 4.1 below).

3.4 Allocation of responsibility for persons rescued and intercepted at sea

UNHCR believes that a new EU mechanism is needed which clearly delineates Member States’ protection responsibilities when their vessels intercept or rescue persons on the high seas or in the territorial waters of third countries. While a Member State’s protection responsibility is clear in the case of people intercepted or rescued in its territorial waters, there seems to be difference of opinion as regards the application of protection obligations outside the territorial waters of the intercepting/rescuing State. This is even more so where non-EU countries are involved in interception and/or rescue operations. The responsibility of States, including respect for the principle of *non-refoulement*, is engaged wherever they assert jurisdiction, and it would be important to articulate how this responsibility should translate into good operational practice.²⁰ There appear also to be substantive differences in what are considered by Member States to be emergency situations which would require Search and Rescue operations. This issue could also be addressed.

Furthermore, clarification is needed as regards Member States’ responsibilities to allow for disembarkation and further processing of people rescued at sea by merchant vessels. UNHCR is aware of cases where States have refused to permit disembarkation of rescued persons, despite the fact that recent amendments to relevant maritime Conventions²¹ have strengthened States’ duties to cooperate to this effect. This has not only created dire situations for the rescued persons, but also long and costly delays for merchant vessels.

4. New mechanisms for responsibility sharing within the EU

At present, responsibility sharing within the EU takes the form of financial support provided by Community funds. This should be reinforced by the new scope given to the

¹⁹ See chapter 2.3 of the Commission Communication on Reinforcing the Management of the European Union’s Southern Maritime Borders, COM(2006) 733 final of 30.11.2006.

²⁰ See UNHCR, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, January 2007, at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=45f17a1a4&page=search>.

²¹ Amendment to Regulation 33 of the International Convention for the Safety of Life at Sea (SOLAS Convention) and Chapter 3.1.9 of the International Convention on Maritime Search and Rescue (SAR Convention).

European Refugee Fund covering the period 2008-2013, and the establishment of the External Borders, Integration and Return Funds. However, financial support is not always sufficient to respond to urgent needs, especially in the event of large numbers of irregular arrivals at the EU's borders, nor does it necessarily result in a fair allocation of responsibilities for asylum-seekers and refugees. Toward this end, UNHCR suggests the following four additional measures:

4.1 Asylum Expert Teams

While decision making on protection needs remains a national responsibility, UNHCR supports the proposal of the Commission to develop the concept of 'Asylum Expert Teams', to be drawn from a pool of qualified personnel available on short notice to help States to meet the needs of new arrivals at external borders, and to conduct profiling (see also point 3.3). This pool could include interpreters, country specialists, child welfare and medical personnel, etc.²² UNHCR would be willing to be part of such teams, for which funding could be sought from Community sources such as the External Borders Fund. The inclusion of non-governmental personnel in these teams could help to ensure civil society's confidence in the manner in which the needs of irregular migrants and asylum-seekers are being addressed.

4.2 Amendment of the Dublin II Regulation

The Dublin II Regulation may result in unequal distribution of responsibility for persons seeking protection, particularly at the EU's external borders (see Part II, questions 23-24). UNHCR therefore recommends consideration of ways of amending the Dublin II Regulation to take account of this fact. One option could be to release a Member State which is facing disproportionate pressures, under certain conditions, from its responsibility to readmit asylum-seekers who have moved on to another Member State, and to assign responsibility to that latter Member State. A further, more far-reaching option would be to consider arrangements for reallocation of asylum-seekers wherever significant pressures apply, subject to the affected persons' consent.

While such reallocation possibilities could help to achieve more responsibility sharing in Europe, the need is apparent to examine carefully the legal, practical and human considerations that would come into play. In the context of a wide-ranging debate on the way forward to strengthen protection in the EU, however, UNHCR considers such possibilities merit further examination.

4.3 An intra-EU reallocation mechanism for people in need of protection

Another approach could involve the establishment of a mechanism for redistribution of persons who have been found to be in need of protection. It would have to be clearly defined under which conditions such reallocation would occur and reallocation should take place with the consent of the person concerned. A reallocation "pool" of places, which would be distinct from Member States' resettlement quotas for refugees from third countries, could be made available through voluntary or assigned contributions from Member States, and could be administered by a European Asylum Support Office.

²² See footnote 19.

4.4 Support for the voluntary return of persons not in need of protection

Member States face challenges arising from the difficulty to ensure the return of persons not in need of international protection. To date, the EU's approach to this issue has focused heavily on conclusion of readmission agreements and the establishment of the Return Fund. Experience shows that intensified and more collaborative international efforts are needed to facilitate the sustainable return, in safe and humane conditions, of persons who have taken significant risks to reach Europe. UNHCR is prepared to consider its own potential role in this area with the EU and its Member States.

UNHCR suggests that the EU explore new ways in which voluntary return of persons not in need of protection can be promoted and supported, including through post-return monitoring, micro-credit and community-based assistance. This will require collaboration with governmental and non-governmental actors in the EU and in countries from which irregular migrants originate, including in the development sector. There is also an outstanding need for common EU standards on removal which respect fundamental rights and refugee protection principles. UNHCR strongly encourages the Council and Parliament to continue their efforts to reach agreement in this area.

5. Durable solutions: reinforced integration efforts

One of the main issues being addressed by Member States today is how to promote the integration of newcomers, including beneficiaries of international protection. Integration in general has been identified as an important topic for further discussion at EU level. UNHCR recommends that refugees and beneficiaries of subsidiary protection be included in general integration programmes, with targeted measures to address their specific needs. Improved and institutionalized dialogue with asylum-seekers and international protection beneficiaries would help to ensure that integration initiatives are properly crafted and reach their intended audience.

People who are granted protection are in a better position to recommence their lives and engage effectively with their host communities if they have a sense of security about the future, which requires a form of status which is durable. In Part II of this paper (question 17), UNHCR proposes a number of amendments to existing instruments which, in its view, would facilitate integration.

6. The external dimension: cooperation and responsibility sharing with third countries through capacity building and resettlement

The overwhelming majority of the world's refugees and other forcibly displaced people are located outside the EU, often in developing countries whose resources are limited. The readiness of the EU to share the responsibility these countries face is vitally important to strengthening and preserving refugee protection worldwide.

EU humanitarian assistance provides essential emergency relief in refugee situations around the globe. A further objective, shared by UNHCR, is to strengthen the capacity of countries outside the EU to protect refugees and to find lasting solutions to refugee problems. EU financial and political help continues to be needed to raise protection standards in third countries. Capacity-building activities should be developed in

consultation and cooperation with the concerned countries, as well as with development actors. Such support, whether in countries in the European neighbourhood or further afield, should not be seen as a substitute for asylum within the EU, but as an expression of burden sharing in recognition of joint responsibilities. In this spirit, the Commission's support for UNHCR's Strengthening Protection Capacity project has helped several countries to develop tools and strategies to reinforce their ability to receive and protect refugees. This has improved refugees' access to fundamental rights, enhanced their means of self-reliance and expanded opportunities for durable solutions.²³

In the same spirit, the Hague Programme proposed the establishment of pilot Regional Protection Programmes. UNHCR has been involved in the first two efforts, in Tanzania and in Belarus, Moldova and Ukraine. From this experience it emerges that a coherent approach, involving not only actors in the Justice and Home Affairs arena, but also those engaged in humanitarian aid, development and external relations, would help to ensure that the Regional Protection Programmes do not remain fragmented and limited in scope.

The Hague Programme also encouraged greater EU involvement in refugee resettlement. While fewer than one per cent of the world's refugees may be resettled in any given year, resettlement is an important protection tool, a durable solution and a concrete manifestation of responsibility sharing. Yet Europe's contribution to the global resettlement effort remains modest, with a total of around 5,500 resettlement places per year offered by seven countries. Several additional Member States have announced recently that they are interested in launching new programmes, and UNHCR hopes that the support for resettlement offered by the new European Refugee Fund will encourage more Member States to engage in resettlement.

A European resettlement programme would add value if it would bring more EU Member States into the resettlement process, increase the number of places available, and simplify the management of resettlement for UNHCR. UNHCR urges the Commission to work toward this objective. In the meantime, UNHCR calls on the EU institutions to continue to encourage and provide funding and other support to national resettlement programmes. UNHCR further hopes that the Commission and Member States will support the proposed establishment, within the EU, of an Evacuation Transit Facility²⁴ for resettlement processing of refugees in need of resettlement who cannot safely remain in their country of first asylum.

7. Concluding comment

UNHCR looks forward to the discussions in the course of the Green Paper consultation process, involving all stakeholders and the fullness of their perspectives and ideas. UNHCR reiterates its commitment to work with EU Member States and institutions to develop further the concepts and consensus which will be required to build the Common European Asylum System, based on the 1951 Convention and other international refugee and human rights law instruments, as envisaged at Tampere and The Hague.

²³ For more information on this project, see <http://www.unhcr.org/protect/43d644142.html>.

²⁴ Discussions are ongoing concerning the establishment of this facility in Romania.

PART II: RESPONSES TO QUESTIONS ASKED IN THE GREEN PAPER

LEGISLATIVE INSTRUMENTS

Processing of asylum applications

1. How might a common asylum procedure be achieved? Which aspects should be considered for further law approximation?
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In UNHCR's view, before these questions can be addressed in detail, Member States need to reach political agreement on what constitutes 'a common European asylum system', and how much power they are prepared to confer upon the Union in the area of asylum policy.

The Hague Programme affirmed the Council's commitment to the goal of a common asylum system, including a common asylum procedure, which should be effective in identifying persons requiring international protection and addressing their protection needs. Yet it did not provide guidance as to the degree of centralization, or level of EU regulation of Member States' procedures, which reaching this goal would entail. Different approaches are possible to these fundamental issues.

Furthermore, in UNHCR's view, it is necessary to differentiate between the asylum *system* and the asylum *procedure* as one component of the system. The overriding objective of the Common European Asylum System is to guarantee that persons in need of international protection are able to find this protection throughout the EU, in line with the 1951 Convention and other relevant international and European standards.

A common *system* and a certain degree of harmonization of Member States' *procedures* are needed to ensure an appropriate level of consistency. The current system, in which responsibility for assessing applications for protection rests with Member States and their national asylum institutions, produces very different results from one country to another. As a result, persons in need of international protection have varying chances of finding protection, depending on where they apply. A centralized institutional structure for adjudication of asylum applications would be one way to remedy this problem.

However, in a climate in which Member States are cautious about far-reaching changes and transfers of procedural competence, the development of an EU asylum procedure under a single EU institution would seem unrealistic, at least in the current phase which aims to complete the Common European Asylum System by 2010. Nor is it necessary. UNHCR believes that the existing system based on national institutions and procedures could be strengthened and could achieve more consistent and more satisfactory outcomes if Community institutions were able to ensure better monitoring and quality control, and providing that Community instruments guarantee appropriate standards across the Union.

As set out in Part I of this submission, UNHCR recommends that the Commission and Member States concentrate on addressing the shortcomings of the current minimum standards, raising asylum standards where necessary, and developing quality control mechanisms capable of reducing both the gap between law and practice and the divergence in national practice. Fair and efficient national procedures across the Union

would also form the best basis for the development of a common procedure in the years to come. UNHCR therefore urges the Commission to establish mechanisms for monitoring and quality control, taking into account the guidance provided by UNHCR and other authoritative sources, and is willing to participate in initiatives to improve the quality of asylum procedures across the EU.

2. How might the effectiveness of access to the asylum procedure be further enhanced? More generally, what aspects of the asylum process as currently regulated should be improved, in terms of both efficiency and protection guarantees?

In past commentaries, UNHCR has expressed its disappointment at the modest level of harmonization achieved by the Asylum Procedures Directive, as well as the relatively low level of the safeguards it contains. UNHCR believes that some of the Directive's provisions may result in breaches of the *non-refoulement* principle. In addition to a number of problematic procedural devices, the Directive's 'Basic Principles and Guarantees'²⁵ are qualified by extensive exceptions, limitations and discretions.²⁶ As a result, UNHCR continues to be concerned about the fairness and effectiveness of asylum procedures in several Member States, and these procedures remain widely divergent in their operation and outcomes. An important step toward more harmonized approaches would be the elimination of all provisions in the Asylum Procedures Directive which permit States to derogate from the agreed minimum standards, and which could in some cases lead to breaches of international law.

UNHCR's detailed comments on Asylum Procedures Directive²⁷ contain suggestions for amendment which remain valid, including in particular:

- Abolition, or at least limitation, of the 'safe third country' concept, which must include an effective opportunity to rebut a presumption of safety (see question 3);
- Appropriate use of the 'safe country of origin' concept;
- Where accelerated procedures contain reduced procedural safeguards, their use should be limited to clearly abusive or manifestly unfounded cases;
- The need for a reinforced catalogue of procedural guarantees which are not susceptible to restriction in an arbitrary way or for reasons unrelated to the strength of a person's claim to international protection;
- Revision of the provisions on withdrawal of asylum applications and the lodging of repeat (subsequent) applications, to guarantee that each application is examined on its merits at least once;
- Introduction of common provisions guaranteeing an effective remedy with automatic suspensive effect across the EU. UNHCR's view on this issue is supported by a recent decision of the European Court of Human Rights, in which the Court concluded that the absence of an automatic right to appeal in one Member

²⁵ See chapter II of the Asylum Procedures Directive, *op.cit.*, note 9.

²⁶ See footnote 11.

²⁷ UNHCR, Provisional Comments on the Proposal for a Council Directive on Minimum Standards for Procedures in Member States for granting and withdrawing refugee status, 10 February 2005, at: <http://www.unhcr.org/protect/PROTECTION/43661ea42.pdf>.

State's border procedure violated the right to an effective remedy according to Article 13 of the European Convention on Human Rights.²⁸

UNHCR is concerned that there are serious shortcomings in the quality of asylum decision making in several Member States. Improvements, in particular in first instance procedures, could be achieved through improved practical cooperation and better monitoring and evaluation by the Commission, with the help of the proposed European Asylum Support Office (see questions 21-22). UNHCR would also propose and be ready to contribute to the following further measures:

- Incorporation of a provision in the Asylum Procedures Directive requiring Member States to introduce mechanisms for quality control and improvement;
- Work towards the establishment of common criteria and mechanisms for quality control and improvement among Member States and stakeholders;
- Adoption of guidelines as regards training and qualification of personnel involved in decision-making on protection claims.

In many instances, effective access to asylum procedures is linked to access to the territory of Member States. While protection-sensitive entry management is an essential requirement which should be more clearly entrenched in EC law and practice (see questions 33 and 34), existing provisions in the Asylum Procedures Directive and other asylum instruments should be amended to ensure effective access to Member States' asylum procedures for people seeking international protection. As regards the Asylum Procedures Directive, this would entail more explicit provisions to:

- Establish the obligation to grant access to the asylum procedure and clarify the responsibility of the competent authority;
- Strengthen the obligation to provide information about asylum processes in a language the asylum-seeker actually understands;
- Ensure that border procedures meet international standards. People seeking asylum may have completed a difficult journey and arrive with little or no knowledge of Member States' languages and legal systems, or indeed awareness of their own rights. Yet under the current provisions of the Asylum Procedures Directive, people requesting protection at the border may be afforded a significantly lower level of procedural safeguards than those who apply inland. Vulnerable people should in principle be exempted from border procedures, and handled in-country where their special needs can be met more effectively;
- Ensure that persons held in pre-removal detention, including those detained at land, air and sea borders, have access to the asylum procedure;
- Ensure that state-sponsored legal assistance is available for applicants without resources, including for the first instance procedure;
- Remove practical barriers to the asylum procedure, such as unreasonably short filing deadlines and lack of competent translators/interpreters.

²⁸ See *Gebremedhin (Gaberamadhien) v. France*, no. 25389/05, ECHR (26.4.07).

3. Which, if any, existing notions and procedural devices should be reconsidered?

As suggested above, various provisions in the Asylum Procedures Directive would need to be amended to ensure a fair and efficient procedure. The ‘safe third country’ notions contained in the Directive are, in UNHCR’s view, particularly problematic.

As a matter of principle, UNHCR does not support safe third country devices which rest on the *unilateral* decision of one State to invoke the responsibility of another to examine an asylum request. UNHCR favours bilateral or multilateral agreements to allocate responsibility for examining protection needs and ensuring protection. UNHCR has noted with concern that some States which are bound by the Dublin II Regulation nonetheless sometimes apply the safe third country notion to other Dublin II States, which can imply fewer procedural safeguards. In UNHCR’s view, the Regulation should be amended to exclude this possibility.

Where Member States apply the ‘safe third country’ notion to countries outside the Dublin system, European minimum standards must ensure that application of this notion is in line with international law and does not lead to violations of the principle of *non-refoulement*. All asylum-seekers must therefore have an effective opportunity to rebut the presumption that a third country is safe in their particular case. UNHCR in particular recommends:

- Abolition of the ‘European Safe Third Country’ rule (Article 36 of the Asylum Procedures Directive) or at least the introduction of an obligation for an individual examination for applicants within its scope;
- Examination of individual risks extending beyond the minimum of Article 27(2)c;
- Caution as regards the identification of ‘safe third countries’.

4. How should a mandatory single procedure be designed?

UNHCR supports the use by Member States of a single procedure, conducted by a single asylum authority,²⁹ to determine protection needs. As nearly all Member States are already implementing single procedures,³⁰ UNHCR expects that a Common European Asylum System would incorporate this approach. In UNHCR’s view, a single procedure should:

- Be designed in a way which does not impede a thorough assessment of protection needs or undermine refugee status under the 1951 Convention. This can be achieved through a mandatory sequence for examining claims, whereby relevance of the 1951 Convention criteria is examined first. If it is determined that the claimant is not a refugee, his or her need for subsidiary protection should then be assessed. This sequence will remove the risk that refugees are given subsidiary protection simply because the criteria are seen as broader, or because of a less

²⁹ UNHCR Observations on the Commission Communication on ‘A More Efficient Common European Asylum System: the Single Procedure as the Next Step’ (COM(2004) 503 final, 15 July 2004), issued 30 August 2004, at: <http://www.unhcr.org/protect/PROTECTION/43661f6f2.pdf>; UNHCR Observations on the Commission Communication on Strengthened Practical Cooperation – New Structures, New Approaches: Improving the Quality of Decision Making in the Common European Asylum System (COM(2006) 67 final, 17 February 2006), issued 25 April 2006, at: <http://www.unhcr.org/protect/PROTECTION/445f0abe2.pdf>.

³⁰ Ireland is the only Member State which has not yet implemented the practice; legislation introducing a single procedure is expected to be presented in Ireland in autumn 2007.

rigorous examination. The same authority or decision-maker should consider ex officio, and in the appropriate sequence, the eligibility of a claim for both forms of protection;

- Incorporate a high level of procedural safeguards;³¹
- Not permit use of an accelerated procedure in the case of an applicant who manifestly does not qualify for refugee status, but who might qualify for subsidiary protection. Article 23(4) of the Asylum Procedures Directive would need to be amended accordingly;
- Require the provision of reasons for decisions on claims. This includes cases where refugee status is refused, but subsidiary protection is granted. Reasoned decisions are needed to enable the claimant to challenge the refugee status rejection if required;³²
- Not permit Member States to refrain from examining claims for protection where the person has a status with the same rights and benefits as refugee status.

5. What might be possible models for the joint processing of asylum applications? Under what circumstances could a mechanism for joint processing be used by Member States?

The Hague Programme calls for examination of the ‘appropriateness, the possibilities and the difficulties, as well as the legal and practical implications’ of joint processing of asylum applications within the European Union.³³ Joint processing would imply joint decision making. As suggested earlier, it seems unlikely that Member States at this stage would readily relinquish the current system, which is based on national decision making.

Several legal and practical hurdles would have to be overcome before joint processing could be envisaged. What would be the legal basis? Which procedural standards would apply – those of the Member State on whose territory the operation takes place? How would asylum officials be made familiar with the national rules and decision making practice of other Member States? Would Member States be prepared to agree on European processing standards? How could language barriers be overcome?³⁴

At this stage, UNHCR sees potential for joint operations in the preparatory (profiling) phase of the asylum procedure (see question 33), which does not involve binding decision-making. Although profiling would generally be undertaken by national personnel, their work could be reinforced by support from other Member States via ‘Asylum Expert Teams’, as proposed by the European Commission³⁵, who could assist with profiling where useful, for example in the context of Frontex or other joint border or rescue at sea operations.

³¹ See also question 2.

³² See also question 12.

³³ The Hague Programme: Strengthening Freedom, Security and Justice in the European Union [OJ C53/1, 3.3.2005], paragraph 1.3.

³⁴ UNHCR examined some of the potential modalities and challenges around possible joint processing ideas in the EU in its December 2003 Working Paper, ‘A Revised “EU Prong” Proposal’, at:

<http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl-RSDLEGAL&id=400e85b84>.

³⁵ *Op.cit.*, note 19.

UNHCR would welcome further exploration of the concept of ‘Asylum Expert Teams’, which foresees the establishment a pool of experts available on short notice, to assist States in responding to the needs of new arrivals at external borders, including potentially through conducting registration and profiling. This pool could include interpreters, country specialists, child welfare experts and medical personnel, among others. Financial support for the Asylum Expert Teams concept could be sought from Community sources, including the External Borders Fund and/or the European Refugee Fund.³⁶

Reception conditions for asylum-seekers

6. In what areas should the current wide margin of discretion allowed by the Directive's provisions be limited in order to achieve a meaningful level-playing field, at an appropriate standard of treatment?

In general, the Reception Conditions Directive³⁷ includes reasonable minimum standards and has played a role in raising reception standards in some Member States.³⁸ However, significant differences remain in reception conditions across the EU. These result from diverging interpretation of the Directive’s standards, as well as from incomplete transposition and implementation of the Directive. Ongoing secondary movements throughout the Union are at least in part related to the failure to secure further harmonization of reception arrangements, which in some locations remain below standard.

There are certain inadequacies in the Directive itself which UNHCR believes should be corrected. In particular, UNHCR recommends amendment of those passages which allow Member States:

- To exclude applicants for subsidiary protection from reception arrangements (Article 3 (4));³⁹
- To restrict freedom of movement (Article 7(1) and (2)) or confine an applicant ‘when it proves necessary’(Article 7(3)). These provisions allow for nearly unlimited application of what should be exceptional detention measures;
- To reduce or withdraw reception assistance (Article 16);
- To provide different reception conditions for persons in detention or at the borders (Article 14(8)). This is particularly problematic where Member States systematically detain all asylum-seekers;
- To deny reception assistance to asylum-seekers who have appealed against a negative first instance decision, if the appeal does not have suspensive effect (Article 3(1)).

³⁶ The Commission has recommended use of Community resources for Asylum Expert Teams, COM(2006) 733 final, 30.11.2006. See also Decision 573/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Refugee Fund for the period 2008-2013 and Decision 574/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the External Borders Fund [OJ L 144, 6.6.2007]. See also question 34 below.

³⁷ *Op.cit.*, note 12.

³⁸ See UNHCR Annotated Comments on Council Directive 2003/9/EC laying down minimum standards for the reception of asylum-seekers, at: <http://www.unhcr.org/protect/PROTECTION/43661ff52.pdf>.

³⁹ This would become moot as soon as all Member States would have a single procedure.

In addition, there is a need for clarification of the interaction between provisions of the Reception Conditions Directive on the one hand and the Asylum Procedures Directive and the Dublin II Regulation on the other. Indeed, in some Member States, reception conditions differ, depending on the stage or nature of the procedure (e.g. admissibility phase, awaiting a Dublin transfer, or accelerated procedure). Article 14(8) authorizes Member States to apply different reception conditions to asylum-seekers at the border but the Directive's applicability to the initial phase of the asylum procedure or to closed centers remains unclear.

With regard to Dublin II cases, Article 3 of the Reception Conditions Directive should be amended to specify clearly that its provisions apply to asylum-seekers who are subject to the Dublin system, unless they have received final decisions on their asylum claims.

7. In particular, should the form and the level of the material reception conditions granted to asylum-seekers be further harmonized?

UNHCR believes the EU should define common indicators for the notion of 'adequate standard of living' referred to in Article 14 of the Reception Conditions Directive. This would help to harmonize conditions. UNHCR further believes that asylum-seekers should have the explicit right to appeal against decisions with regard to their reception conditions.

Article 13(5) of the Reception Conditions Directive stipulates that assistance may be provided in kind or in the form of financial allowances or vouchers. UNHCR has reservations with regard to vouchers, due to apparent prejudices and discrimination against asylum-seekers using such vouchers. Cash assistance must be sufficient for asylum-seekers to meet basic needs for housing, food, clothing and health care. In-kind assistance invariably has to be supplemented by cash grants, to enable asylum-seekers to meet specific personal needs.

Wherever possible, the delivery of basic services to asylum-seekers should be integrated into existing community services. Insofar as accommodation is provided in collective centers, this should be for the shortest possible duration and accommodation should always be adapted to the family situation.

UNHCR believes that procedures for identification of asylum-seekers with special needs (Article 17(2)) need further elaboration. Of particular concern is the limited availability in some Member States of suitably qualified medical, psychological and counselling assistance to persons with special needs, especially persons who are mentally ill, minors and victims of trauma and torture (see questions 15-16). UNHCR recommends intensified practical cooperation among Member States regarding reception facilities, in particular for asylum-seekers with special needs.

Independent monitoring of conditions of reception is an important safeguard. UNHCR and specialized NGOs should have full access to reception centres and can play an important role in ensuring that standards are upheld.

8. Should national rules on access to the labour market be further approximated? If yes, in which aspects?

Access to employment is in the interest of both the host country and the asylum-seeker. It removes the incentive of unofficial employment, contributes to self-reliance, promotes integration in the host community for persons who will be permitted to remain and offers others an opportunity to develop their skills and experience.

UNHCR therefore believes that asylum-seekers should have access to the labour market, in any case no later than six months after lodging their application, if a final decision on the claim has not been taken during this time. The sectors in which employment is authorized should be broad enough effectively to allow entry into the labour market, permitting work in areas where jobs are available in practice. This would require amendment of the Reception Conditions Directive (Article 11).

9. Should the grounds for detention, in compliance with the jurisprudence of the European Court of Human Rights, be clarified and the related conditions and its length be more precisely regulated?

Freedom from arbitrary detention is a fundamental human right. Therefore, as a general principle, asylum-seekers should not be detained. Detention of asylum-seekers should be resorted to only where necessary to achieve a legitimate purpose and where provided for by law. What constitutes a ‘legitimate purpose’ should be rigorously interpreted; for example, a marginal risk of absconding should not suffice to justify systematic detention, and detention should not automatically be used in all Dublin II cases. Proportionality is a general principle of law and detention measures must be proportionate to the objectives to be achieved, applied in a non-discriminatory manner and for a minimal period. The need for detention should be established clearly and precisely in each individual case,⁴⁰ after consideration of alternative options, which Member States should actively seek to provide.

Administrative detention of asylum-seekers (‘immigration detention’) takes place to varying degrees in all Member States. In line with the jurisprudence of the European Court of Human Rights, any confinement in a restricted area is considered to be detention.⁴¹ It can be observed that immigration detention is often subject to less regulation and fewer safeguards than detention under penal law, notwithstanding the fact that most asylum-seekers have committed no crime and may need international protection. Detention of asylum-seekers can also have the negative effect of creating a perceived link between asylum and criminality.

Grounds for and conditions of immigration detention differ widely, and this gives rise to concern. Conditions of immigration detention are in many cases in need of improvement and should, in UNHCR’s view, be better monitored and regulated.

⁴⁰ See *Amuur v. France*, no. 19776/92, ECHR, 25.6.1996, para. 50: “Quality in this sense implies that where a national law authorizes deprivation of liberty – especially in respect of a foreign asylum-seeker – it must be sufficiently accessible and precise in order to avoid all risk of arbitrariness.”

⁴¹ *Ibid.*, paras. 21-43 and 48.

UNHCR welcomes the reiteration in Article 18(1) of the Asylum Procedures Directive of the general principle that asylum-seekers shall not be detained.⁴² However, UNHCR believes that there is a need:

- To strengthen the safeguards which apply to immigration detention, including of asylum-seekers, as the only safeguard presently stipulated in Article 18 (1) of the Directive is the possibility of ‘speedy’ judicial review. As a minimum the safeguards should include:
 - Reference to principles of necessity, proportionality and non-discrimination in the use of detention;
 - Automatic and periodic judicial review of the lawfulness of detention;⁴³
 - Possibility for detained asylum-seekers to appeal to a Court speedily to examine the detention order;⁴⁴
 - Determination of the permissible duration of detention;
 - Information to be provided to detained persons (in a language they understand) about the legal and factual reasons for detention and the available remedies, with access to qualified and free legal advice in connection thereto;⁴⁵
 - Independent monitoring of detention conditions to ensure compliance with general international rules relating to detention.⁴⁶
- To ensure effective access to the asylum procedure for persons who are in detention including:
 - Conditions for the release of persons who apply for asylum while in pre-removal detention; and
 - Access to qualified, free legal advice for detained asylum-seekers.⁴⁷
- To provide for exceptions to detention measures in relation to children,⁴⁸ survivors of torture or sexual violence and traumatised individuals;

⁴² See also UNHCR, Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-seekers, February 1999, p. 3, Guideline 2: ‘As a general principle asylum-seekers should not be detained’, at: <http://www.unhcr.org/au/pdfs/detentionguidelines.pdf>.

⁴³ *Ibid.*, p. 5, Guideline 5, Procedural Safeguards.

⁴⁴ Article 5(4) ECHR: ‘Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.’

⁴⁵ See European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), The CPT Standards [“Substantive” sections of the CPT’s General Reports], IV Foreign nationals detained under aliens legislation, Extract from the 7th general report (CPT/Inf (97)10), 30. ‘Immigration detainees should (...) be expressly informed, without delay and in a language they understand, of all their rights and of the procedure applicable to them’, at http://www.cpt.coe.int/en/documents/eng-standards.doc#_Toc83607171.

⁴⁶ For instance through periodic and ad hoc visits by the CPT to examine the treatment of persons deprived of their liberty, according to Article 1 of the 1987 Council of Europe Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

⁴⁷ *Op.cit.*, note 45, 31. ‘The right of access to a lawyer should apply throughout the detention period (...)’.

⁴⁸ Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989, entry into force 2 September 1990, Article 37(b): ‘No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time’, available at: <http://www.unhcr.ch/html/menu3/b/k2crc.htm>.

- For Member States to provide for alternatives to detention, in particular for Dublin II cases.⁴⁹

Additionally, UNHCR would recommend consideration of minimum standards or at least guidelines for immigration detention on the basis of the recommendations of the European Committee for the Prevention of Torture. While general international rules relating to detention⁵⁰ apply also to immigration detention, they are frequently not respected. In addition to setting physical standards for conditions of immigration detention, regulation should encompass psychological and medical support to detainees; education facilities in the event that children are detained; and access to places of detention for non-governmental, intergovernmental and international organizations.

Granting of protection

10. In what areas should further law approximation be pursued or standards raised regarding the criteria for granting protection and the rights and benefits attached to protection status(es)?
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UNHCR has welcomed the fact that many of the provisions of the Qualification Directive reflect international standards and best practice, and that it creates a European legal basis for subsidiary protection. In its detailed commentary on the Qualification Directive, UNHCR has outlined where it considers amendments to be necessary.⁵¹

As regards the determination of eligibility for protection, UNHCR recommends:

- Clarification that the 1951 Convention and international refugee law are the framework for the guidance provided in the Directive, and that the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and UNHCR's Guidelines on International Protection⁵² are authoritative sources for the interpretation of the 1951 Convention;
- Clarification of the primacy of protection on the basis of the 1951 Convention;
- Insertion of a provision calling on Member States to take UNHCR's recommendations relating to particular groups of applicants or legal issues into account in the decision-making process;
- Amendment of all provisions which deviate from the 1951 Convention or provide interpretative guidance not in line with that Convention. These include:
 - Recognition of *sur place* claims even if the refugee may have acted in a manner designed to create a refugee claim;

⁴⁹ *Op.cit.*, note 42, p. 5, Guideline 4, Alternatives to detention.

⁵⁰ See Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN General Assembly Resolution 43/173 of 9 December 1988 at: http://www.unhcr.ch/html/menu3/b/h_comp36.htm.

⁵¹ UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection granted (OJ L 304/12, 30.9.2004).

⁵² *Op.cit.*, notes 14 and 15.

- Application of the internal flight/relocation alternative only if the applicant has a genuine protection alternative in an identified location which is safely accessible in legal and practical terms;
- Providing for a sufficiently flexible and open approach to the interpretation of persecution;
- Defining the social group concept in a flexible manner so as to include inter alia groups based on gender and sexual orientation, age, disability and health status as defining characteristics;
- Bringing the conditions for exclusion from refugee status under the Directive into line with Article 1F of the 1951 Convention;
- Eliminating the possibility to deny recognition based on the argument that protection can be provided by non-state agents;
- Clarification of the grounds for subsidiary protection, including for persons fleeing generalised violence, through deletion of the terms ‘and individual’ and ‘in situations of internal or international armed conflict’ from Article 15(c). This is supported by a recent decision of the European Court for Human Rights;⁵³
- Broadening the definition of “family member” contained in the Qualification Directive in order to respect family unity and the introduction of derivative status for dependent family members.

From its initial review of jurisprudence in some EU Member States since transposition of the Qualification Directive, UNHCR notes the effect of the wide margin of appreciation which the Directive leaves in many areas. It remains to be seen whether the observed differences in interpretation can be addressed by adjusting the Directive’s standards. The adoption of common interpretative guidelines might help to keep differences in interpretation and recognition practice within an acceptable margin. In particular, UNHCR would recommend the elaboration of guidelines for Member States relating to:

- The gathering, interpretation and use of evidence, taking into account among other things the principle of ‘equality of arms’, the shared burden of proof and the circumstances faced by a person at the time of pursuing his or her claim;
- The assessment of credibility, in view of the importance of this for the outcome of an asylum claim and the vastly different approaches taken across Member States. Without appropriate guidance on how to assess the credibility of a claimant’s statements, there is a risk of arbitrariness and incorrect decisions.⁵⁴

With respect to the rights and benefits attached to international protection, UNHCR is in favour of eliminating the differences in treatment of refugees (as governed by the 1951 Convention) and beneficiaries of subsidiary protection, and therefore recommends:

- Extending to beneficiaries of subsidiary protection the right to family reunification, which in the Family Reunification Directive⁵⁵ is limited to refugees within the meaning of the 1951 Convention;

⁵³ See *Salah Sheeq v. The Netherlands*, no. 1948/04, ECHR, 11.1.07. In this case of a member of a Somali minority who faced treatment contrary to Article 3 ECHR, the Court considered: ‘It might render the protection offered by that provision illusory if, in addition to the fact that he belongs to the Ashraf – which the Government have not disputed –, the applicant be required to show the existence of further special distinguishing features.’

⁵⁴ See also question 19 on Practical Cooperation.

⁵⁵ *Op.cit.*, note 12.

- Deletion of the possibility to condition the status of family members of beneficiaries of subsidiary protection according to Article 23(2) of the Qualification Directive;
- Deletion of the restriction of social assistance to “core benefits” for beneficiaries of subsidiary protection under Article 28 of the Qualification Directive;
- Deletion of the limitation of health care for beneficiaries of subsidiary protection and their family members under Article 29 of the Qualification Directive;
- Ensuring that beneficiaries of subsidiary protection have access to integration programmes, are allowed to work and have access to vocational training under the same conditions as refugees.

- 11. What models could be envisaged for the creation of a "uniform status"? Might one uniform status for refugees and another for beneficiaries of subsidiary protection be envisaged? How might they be designed?**
- 12. Might a single uniform status for all persons eligible for international protection be envisaged? How might it be designed?**

Questions 11 and 12 cover several complex, interrelated questions about the status and rights of persons whose international protection needs have been recognized by a Member State. These questions relate to the extent to which the status accorded to refugees and beneficiaries of subsidiary protection should be uniform across the EU; whether a single status should be established to encompass both categories⁵⁶; and to the legal consequences of recognition decisions in other Member States (also addressed in question 14).

To the extent that the EU retains two separate statuses – one for refugees and another for beneficiaries of subsidiary protection – as envisaged in the draft Reform Treaty, UNHCR believes that these should indeed be uniform across the Member States. As regards Convention refugees, an adequate level of harmonization of status and rights is already provided by the 1951 Convention,⁵⁷ which was adopted specifically to ensure common standards of treatment for persons who cannot return to their countries of origin because of international protection needs. UNHCR recommends to incorporate these standards fully into the Qualification Directive and to ensure their transposition in Member States (see question 10).

As regards beneficiaries of subsidiary protection, there is no specific international instrument binding on Member States which sets out international standards for their treatment. The level of harmonization of their rights required by the Qualification Directive is substantially lower than is the case for refugees. This situation would need to be remedied, to obtain a uniform status across the EU for beneficiaries of subsidiary protection. Furthermore, it is UNHCR’s longstanding position that the rights of beneficiaries of subsidiary protection should correspond to those of refugees. Since the international protection needs of beneficiaries of subsidiary protection are equally compelling and generally as long in duration as those of refugees, there is no reason for

⁵⁶It is possible to design different models for the status for beneficiaries of international protection. The Hague Programme envisages, without further specification, the introduction of a uniform status for those who are granted asylum or subsidiary protection. Article 69 a (2) of the draft Reform Treaty calls for the introduction of a uniform status for refugees and a uniform status for beneficiaries of subsidiary protection.

⁵⁷ These standards need to be interpreted in light of international human rights law.

the differentiated treatment currently permitted under the Qualification Directive. Aligning their rights with those of refugees would reduce incentives for appeals. It is also questionable whether the existing differential treatment is justifiable in light of the principle of non-discrimination.⁵⁸

However, UNHCR's preference is not for two parallel statuses but rather for a single, uniform status across the EU, to be granted equally to all persons, whether recognized as refugees or as beneficiaries of subsidiary protection. This status should be based on international refugee and human rights law, most notably the 1951 Convention. Although the same objective could be achieved through two parallel statuses with identical rights, a single status would be a more rational approach. This single status should have European legal consequences (see question 14).

If all beneficiaries of international protection are granted the same rights, it would be logical to adopt one set of terminology and documentation which attests to their international protection needs, even though the recognition of these needs may rest on different legal bases. Consistency of terminology and documentation would make it easier for the beneficiaries to understand the authorities' decisions, enable authorities and others to identify the beneficiaries as persons with specific protection needs and ensure respect for their rights. The refugee terminology of the 1951 Convention could be used for this purpose. If this is not done, and in order not to undermine the 1951 Convention, it will be important that documentation clearly outlines the basis (refugee status or subsidiary protection) on which the single status has been accorded.

13. Should further categories of non-removable persons be brought within the scope of Community legislation? Under what conditions?
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UNHCR regularly encounters persons whose applications for protection have been rejected but who in fact have international protection needs. As indicated elsewhere in this submission, this is evidence of shortcomings in Member States' asylum systems, which are not always able to identify all persons with international protection needs. Furthermore, some Member State asylum systems lack adequate devices to recognize international protection needs which arise after the conclusion of the asylum procedure or during removal processes.

These problems need to be remedied. In UNHCR's view, persons who are considered 'non removable' because of a risk to their safety in their country of origin should receive a formal status. Member States currently tolerate the stay of many such persons, but without according them a clear formal status. The absence of such a status is not only detrimental to the individuals concerned, it is likely to encourage secondary movements.

⁵⁸ The UN Human Rights Committee (General Comment No. 18: Non-discrimination, para. 13) expressed a general principle of human rights law according to which differentiation of treatment is only allowed if "the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant". This approach has essentially also been taken by the European Court on Human Rights, affirming that in the exercise of a right laid down in the Convention the "principle of equality of treatment is violated if the distinction has no objective and reasonable justification" (see *Belgian Linguistic case*, Judgment of 23 July 1968, Series A, No. 6, paragraph 10). In *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, the Court held that "a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realized'" (judgment of 28 May 1985, Series A, No. 94, para. 72).

Persons who, in the course of a full and fair procedure, are found *not* to have international protection needs do not fall under UNHCR's mandate, although they clearly enjoy basic human rights protections. Even in the case of such persons, there may be obstacles to removal which are beyond the individual's control. These obstacles may range from lack of access or transportation to the area of origin, to lack of cooperation from the country of origin in confirming a person's identity, to the *de facto* integration of persons who have been living in the Member State for long periods. While it is beyond the scope of UNHCR's mandate to comment on regularization measures for persons who are not in need of international protection, it is clear that this is an area in which increased EU coordination is needed.

14. Should an EU mechanism be established for the mutual recognition of national asylum decisions and the possibility of transfer of responsibility for protection? Under what conditions might it be a viable option? How might it operate?

Mutual recognition of national asylum decisions

Under current EU law, national asylum decisions have no European legal consequences. The fact that a person has been recognized as a refugee or a beneficiary of subsidiary protection by one Member State is not binding on another. This gives rise to numerous problems, for instance where the extradition is requested of a person whose refugee status has been recognized in one Member State but who is physically present in another Member State.

A Common European Asylum System needs to be built on mutual trust. Recognition decisions taken by one Member State should therefore generally be acknowledged by all other Member States. Indeed, in 1978 UNHCR's Executive Committee recommended that mutual recognition be accepted among the much more diverse group of all State Parties to the 1951 Convention.⁵⁹

Despite the current wording of Article 69a (2)(b) of the Draft Reform Treaty, which mentions the validity throughout the Union of a recognition decision only for those who have been recognized as refugees, UNHCR believes that mutual recognition should extend both to refugee status and subsidiary protection. Both should have European effect. While the same should in principle apply to decisions denying applications for protection, UNHCR believes that this will only be possible when comparable quality of decision making is assured across the EU.

Transfer of responsibility for providing international protection among Member States

The Schedule to the 1951 Convention (paragraph 11) in connection with Article 28 of that Convention determines the circumstances under which responsibility for providing protection to refugees recognized by one State Party is transferred to another State Party. Although the wording of this provision is restricted to responsibility for the issuance of a 1951 Convention travel document, it has been interpreted as encompassing responsibility for providing 1951 Convention rights more broadly. Paragraph 11 of the Schedule to the

⁵⁹ See UNHCR Executive Committee Conclusion on the Extraterritorial Effect of the Determination of Refugee Status, No. 12 (XXIX) 1978, at: <http://www.unhcr.org/excom/EXCOM/3ae68c4447.html>.

1951 Convention requires the establishment of lawful residence for the transfer of responsibility, but does not provide further guidance on this issue.

To address divergence in interpretation related to the transfer of responsibility among European States, the Council of Europe in 1980 adopted the European Agreement on Transfer of Responsibility for Refugees (European Agreement)⁶⁰ which has, however, been ratified by just eleven EU Member States.⁶¹ That Convention applies only to refugees and not to beneficiaries of subsidiary protection. Research initiated by the Commission shows a need for clarity on the conditions and procedures for transfer of responsibility.⁶²

UNHCR would therefore recommend the elaboration of rules clarifying under which circumstances responsibility for a refugee or beneficiary of subsidiary protection would be transferred to another Member State. These rules could be incorporated in the Directive on the status of long term residents⁶³ or be part of new provisions on a single European status. These provisions would include:

- Clarification of the conditions under which lawful residence is established and responsibility is transferred to another Member State. This should be built on and further develop the rules in the European Agreement;
- Clarification that responsibility for the issuance of the 1951 Convention travel document also entails responsibility for providing asylum;
- Extension of Article 25(1) of the Qualification Directive (conferring an entitlement to a Convention travel document) to beneficiaries of subsidiary protection.

Cross-cutting issues

Appropriate response to situations of vulnerability

15. How could the provisions obliging Member States to identify, take into account and respond to the needs of the most vulnerable asylum-seekers be improved and become more tailored to their real needs? In what areas should standards be further developed?

Although the first phase asylum instruments all contain provisions relating to especially vulnerable persons, UNHCR sees room for improvement in the following areas:

⁶⁰ Council of Europe, European Agreement on Transfer of Responsibility for Refugees (CETS No.: 107), opened for signature on 16.10.1980 and entered into force on 1.12.1980, at:

<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=107&CM=8&DF=9/7/2007&CL=ENG>

⁶¹ Denmark, Finland, Germany, Italy, Netherlands, Poland, Portugal, Romania, Spain, Sweden and the UK.

⁶² Study on 'The Transfer of protection status in the EU, against the background of the common European asylum system and the goal of a uniform status, valid throughout the Union, for those granted asylum', Nina M. Lassen, et al., European Commission, DG Justice and Home Affairs, Brussels 2004, at:

http://ec.europa.eu/justice_home/doc_centre/asylum/studies/docs/transfer_protection_status_rev_160904.pdf

⁶³ The Commission has left this question out of the scope of its proposed amendments of the Directive on the Status of Long Term Residents.

Identification of vulnerable persons:

- Article 17 of the Reception Conditions Directive requires Member States to take the situation of vulnerable persons into account, but not all Member States have systems in place to identify vulnerabilities. UNHCR recommends amendment of Article 17 to require States to establish mechanisms, staffed by appropriately qualified personnel, to identify and evaluate vulnerable asylum-seekers at any stage in the asylum procedure, as a prerequisite to the treatment and care required by Article 20 of the Reception Conditions Directive;
- Although the enumeration of categories of vulnerable persons in Article 17 is not intended to be exhaustive, UNHCR recommends adding persons with mental health needs to this list, as such persons are often overlooked;
- Guidelines for age assessment should be developed, in line with recommendations of UNHCR and the UN Committee on the Rights of the Child, in view of the varying approaches currently taken by Member States;⁶⁴
- Article 12(3) of the Asylum Procedures Directive and Article 4(3) of the Qualification Directive acknowledge the importance of medical examinations and professional documentation of torture. However, the importance of medical legal reports in the asylum procedure should be explicitly recognized.

Exemption of vulnerable persons from accelerated procedures and detention

UNHCR recommends amendment of the Asylum Procedures Directive to stipulate that asylum applications of persons who have been identified as especially vulnerable will not be channelled into accelerated or other shortened procedures including border procedures (Articles 23(4), 24 and 35). Adequate legal assistance and representation of such persons needs to be assured, and they should not be detained.

Determination of best interest of the child

Article 17(6) of the Asylum Procedures Directive reiterates the obligation of States to ensure that the best interest of the child is a primary consideration in all actions concerning children.⁶⁵ Yet few Member States have established specific mechanisms to determine what is in the best interest of asylum-seeking children, in particular those who are separated or unaccompanied. UNHCR recommends that EU guidelines for the determination of the best interest of asylum-seeking children be developed, based on the UNHCR's Guidelines.⁶⁶ These guidelines should encompass both substantive and procedural considerations and could also include recommendations on the appointment of guardians (as provided for under Article 19 of the Reception Conditions Directive), including their qualifications, scope of responsibilities, and the point in time at which guardians need to be designated.

⁶⁴ See UNHCR, *Refugee Children, Guidelines on Protection and Care*, 1994, p. 102 -103; UNHCR, *Children at Risk*, Doc. EC/58/SC/CRP.7, para. 19; The UN Committee on the Rights of the Child General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin, para.31, at: [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/532769d21fcd8302c1257020002b65d9/\\$FILE/G0543805.DOC](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/532769d21fcd8302c1257020002b65d9/$FILE/G0543805.DOC).

⁶⁵ *Op. cit.*, note 48, Article 3.

⁶⁶ UNHCR *Guidelines on Formal Determination of the Best Interests of the Child*, May 2006, at: <http://www.unhcr.org/protect/PROTECTION/4566b16b2.pdf>.

Family unity and family reunification

One of the most effective ways of responding to the needs of vulnerable persons is to ensure that they can receive family support. It is important to enable beneficiaries of international protection to reunite quickly with their family members. This would require amendment to existing legislation, including acceptance of a wider definition of family and of family reunion entitlements for beneficiaries of subsidiary protection, and the streamlining of existing, often cumbersome family reunification procedures.

16. What measures should be implemented with a view to increasing national capacities to respond effectively to situations of vulnerability?

UNHCR's experience shows that participatory assessment processes involving persons of concern, government actors, NGO partners and other stakeholders are very helpful in identifying issues requiring attention and developing strategies for effective responses.⁶⁷

Physical and mental health, child protection, violence against women, old age and other vulnerabilities are not issues which are specific to asylum-seekers and refugees. However, people in need of protection are more likely than others to have experienced traumatic events. This has to be taken into account in designing and implementing reception and integration policies. Inadequate reception as well as integration policies can exacerbate or prolong the effects of trauma. It is important to promote collaboration between authorities responsible for immigration and asylum and those responsible among other things for health care, child welfare and care of the elderly. To the extent possible, UNHCR recommends that services for asylum-seekers and beneficiaries of international protection be provided within mainstream services, with the help of cross-cultural mediators and interpreters.

National capacities to respond to situations of vulnerability vary, but in general need to be made more sensitive to the situation of persons seeking or in need of international protection. UNHCR frequently observes lack of consistent follow-up of asylum-seekers and refugees (including resettled refugees) with special needs, especially those with mental health care needs. More structured exchanges of information and experience among Member States and with expert NGOs on how to address particular needs could be useful. Work towards common approaches on the qualification, training and standard operating procedures for personnel working with vulnerable asylum-seekers may assist those States which are still developing their capacity.

UNHCR urges the Commission and Member States actively to support governments and NGO services working with asylum-seekers and refugees with special needs, and to train the necessary personnel to do so. Expert counsellors for victims of torture and trauma are scarce, and NGOs working in these areas face chronic funding problems. Project-based funding (for instance through the European Refugee Fund) does not resolve the difficulties NGOs face in ensuring funding of their ongoing core operational costs. Systematic monitoring arrangements potentially involving expert NGOs working with EU and

⁶⁷ UNHCR's age, gender and diversity mainstreaming approach may be helpful in this context. See UNHCR, Participatory Assessment in Operations, at: <http://www.unhcr.org/publ/PUBL/450e92a72.pdf>.

Member State officials could help highlight problem areas where work might be needed to address problems.

In addition, UNHCR would encourage the Commission and Member States to work to ensure that data on vulnerable people in the asylum system are more effectively and consistently collected and analysed across the Union. This would enable improved monitoring of where needs arise and how they are being met, including the areas where additional resources, instruments or policy initiatives are needed.

Integration

17. What further legal measures could be taken to further enhance the integration of asylum-seekers and beneficiaries of international protection, including their integration into the labour market?

While UNHCR does not expect the full range of integration support to be extended to asylum-seekers, it believes that reception policies have significant implications for later integration⁶⁸ and may also help to improve the individual's prospects in event of return to the country of origin. Further measures could include:

- Granting access to employment, taking into account the duration of asylum procedures. UNHCR suggests that six months be set as a maximum period beyond which a prohibition on access to the labour market should not extend, if a final decision on a claim has not been made by that time.⁶⁹ The one-year period included in Article 11(2) of the Reception Conditions Directive would need to be amended accordingly (see question 8);
- Language training should be provided upon commencement of the asylum procedure, unless it is reasonably foreseen that the asylum-seeker will not stay in the country for more than a few weeks. This would need to be provided for in the Reception Conditions Directive;
- Vocational training has an empowering effect as it enables asylum-seekers to meet the host population on equal terms, and facilitates access to employment. It also carries benefits in event of return. UNHCR believes that there should be greater access to vocational training under Article 12 of the Reception Conditions Directive.

With regard to the integration of refugees and beneficiaries of subsidiary protection, UNHCR supports aligning their entitlements through a uniform, single status (see also questions 11 and 12). However, in the framework of the current legislative structure, UNHCR makes the following recommendations:

⁶⁸ UNHCR, Reception of Asylum-seekers, including Standards of Treatment, in the Context of Individual Asylum Systems, paper prepared in the context of the Global Consultations on International Protection, EC/GC/01/17, 4 September 2001, para. 13. See also UNHCR's comments on the Reception Conditions Directive. The Reception Conditions Directive does not address the link between reception policies and integration.

⁶⁹ This would more accurately reflect the spirit underlying the European Social Fund's EQUAL project which aims inter alia to engage asylum-seekers in the labour market, but is limited by legal constraints on their rights to work in many Member States.

- Article 33 of the Qualification Directive requires States to provide refugees with access to integration programmes; this requirement should be extended to beneficiaries of subsidiary protection;
- UNHCR considers that residence permits of short duration are not conducive to integration and thus recommends amendment of Article 24 of the Qualification Directive, to provide for longer residence permits for beneficiaries of subsidiary protection. The possibility of shorter permits for family members remains problematic and should be addressed;
- UNHCR recalls Article 25 of the 1951 Convention on administrative assistance, and encourages Member States to put in place effective mechanisms to ensure that refugees have access to documents or certifications needed to exercise their rights. Criteria and assessment measures for the determination of primary, secondary and higher education qualifications need to be flexible. Vocational credentials and relevant work experience should be assessed against national standards by a competent national body. These provisions should be included in Chapter VII of the Qualification Directive;
- UNHCR encourages States to remove restrictions on employment of recognized refugees by granting them residency as soon as possible, and extending employment opportunities in the public sector;
- As indicated earlier, in UNHCR's view there is no reason to treat beneficiaries of subsidiary protection differently from refugees as regards access to employment. UNHCR recommends that beneficiaries of subsidiary protection be entitled to work under the same conditions as refugees, and to benefit from available vocational training, workplace experience and other employment-related educational opportunities. Article 26 of the Qualification Directive should be amended in this regard;
- Family reunification is of vital importance to the integration process. UNHCR does not see any justification for different treatment of refugees and beneficiaries of subsidiary protection in respect of family reunification, and recommends amendment of the Family Reunification Directive in this regard.⁷⁰ UNHCR further encourages Member States to adopt a pragmatic and flexible approach to requests for family reunification with dependent non-core family members who were living in the same household as the refugee prior to flight;
- The Family Reunification Directive includes some limiting provisions such as refusal on the grounds of public health. UNHCR encourages Member States to examine the special circumstances of international protection beneficiaries in this context, and to limit the grounds for refusal;
- UNHCR looks forward to the amendment of the Directive on the Rights of Long Term Residents, to include refugees and subsidiary protection beneficiaries in its scope. This will close a long-standing gap in the legal framework. Beneficiaries of international protection are in a more vulnerable position than other legally residing migrants, as they do not have the option to return to their country of origin. UNHCR therefore recommends that long-term resident status should be granted to beneficiaries of international protection at the latest at the end of three years rather than five years;

⁷⁰ See UNHCR, Note on the Integration of Refugees in the European Union, May 2007, para. 39, at: <http://www.unhcr.org/protect/PROTECTION/463b462c4.pdf>.

- Naturalisation signifies the conclusion of the legal dimension of the integration process, as it leads to cessation of refugee status or subsidiary protection status. UNHCR, aware that this is not a matter within EU competence, calls on Member States to apply requirements for naturalization to refugees and beneficiaries of subsidiary protection in a generous and flexible manner.

Ensuring second stage instruments are comprehensive

18. In what further areas would harmonization be useful or necessary with a view to achieving a truly comprehensive approach towards the asylum process and its outcomes?

UNHCR recommends concerted efforts to improve the quality of asylum decision making throughout the EU and to reduce the existing divergence in decision-making practice. UNHCR appreciates the endorsement of the quality-enhancing objective in the Green Paper and other recent EU documents.⁷¹ However, UNHCR considers that a common asylum system should have a systematic and obligatory quality monitoring mechanism.

A quality assurance provision, requiring periodic assessment of the performance of asylum authorities, including potentially by independent observers, would be a means to ensure that standards are maintained at an appropriate level. UNHCR would be prepared to contribute to development of a system which could draw inspiration from the Quality Initiative implemented in the United Kingdom, as well as from activities in other Member States.⁷² Common EU training packages for asylum personnel would be an essential element for building a more coherent approach. In addition to addressing the quality of initial decision-making, it would also be important to address the wide divergence in practice with regard to cessation and withdrawal of protection.

A more firmly entrenched role for UNHCR should be part of an effort to improve quality and consistency in asylum decision-making. UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status as well as UNHCR's Guidelines on International Protection⁷³ and country of origin information and positions published by the Office should be used as the foundation on which common EU guidelines could be built (see question 19). Strengthening of the consultative processes between UNHCR and the EU could help to ensure a more consistent focus on quality in asylum instruments, policy

⁷¹ See for example the Commission Communication on Strengthened Practical Cooperation, COM(2006) 67 final, 17.2.2006, at: http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2006/com2006_0067en01.pdf.

⁷² In the UK, UNHCR undertook an innovative project known as the 'Quality Initiative' in 2004-2005 at the request and with the support of the Home Office. UNHCR representatives worked in Home Office premises on a daily basis with asylum decision-making personnel. The project involved monitoring and one-on-one feedback to caseworkers, as well as discussions with management on how quality could be improved. Factors examined included interview techniques, drafting of decisions, cultural sensitivity and training, workloads, working environment, stress and risks of 'burn-out'. UNHCR's recommendations were received positively by the Home Office, which extended the initial project and instituted changes on the basis of its findings. More information is available at: <http://www.ind.homeoffice.gov.uk/aboutus/reports/unhcr>. A similar, more limited project was undertaken in Austria in 2007, also with positive outcomes. UNHCR is now planning a regional project encompassing eight Member States, seeking to lift the quality of decision making throughout the Eastern EU region.

⁷³ *Op.cit.*, notes 14 and 15.

discussions and procedures, including potentially through according advisory status to UNHCR with Council working bodies and an Asylum Support Office.

Asylum decision-making requires qualified personnel at all stages of the process. Labour market conditions and civil service culture vary, but UNHCR considers that more uniform standard of qualifications required of asylum personnel is important for future common standards. A form of accreditation for asylum decision makers could serve to ensure that they are equipped to undertake the demanding task of deciding on claims.

As the Common European Asylum System develops, a further possibility to explore would be that of a European appeal instance. Asylum-seekers whose applications were rejected at final instance at national level, and whose cases raise key questions of Community law, could have the possibility to apply to be heard by the ECJ's Court of First Instance. Leave could be granted where the legal questions involved were found to be of fundamental importance, and had not previously been decided by the Court. This could help ensure that a European body of asylum jurisprudence could evolve in a systematic and timely way, thus providing guidance and clarity to lower instances in the Common European Asylum System.

Effective oversight and guidance from the EU's highest judicial level, the ECJ, will be necessary to ensure the quality of outcomes in the Common European Asylum System. Scope must exist for key questions to come before the Court, to enable it to provide authoritative and binding interpretations of Community law, drawing from relevant international and regional principles and jurisprudence. In this connection, UNHCR welcomes proposals in the Draft Reform Treaty to remove some present constraints on the ECJ's jurisdiction on asylum, and bring it into line with its role in other areas of Community law.⁷⁴ An important further step to facilitate the Court's decision-making in the asylum field would be the establishment of an entitlement for UNHCR to provide its opinion to the Court in asylum cases.

UNHCR also welcomes the Draft Reform Treaty's proposal to give legally binding effect to the Charter of Fundamental Rights, and for the EU to accede to the European Convention on Human Rights. These changes will provide the basis for further important checks and safeguards through judicial processes, which should improve the accuracy and consistency of asylum decision-making across the Union.

⁷⁴ *Op. cit.*, note 4.

IMPLEMENTATION - ACCOMPANYING MEASURES

- 19. In what other areas could practical cooperation activities be usefully expanded and how could their impact be maximized? How could more stakeholders be usefully involved? How could innovation and good practice in the area of practical cooperation be diffused and mainstreamed?**
- 20. In particular, how might practical cooperation help to develop common approaches to issues such as the concepts of gender- or child-specific persecution, the application of exclusion clauses or the prevention of fraud?**

Practical cooperation has been taking place in the context of Contact Committees, reviewing Member States' implementation of Directives; and EURASIL, focusing on Country of Origin Information (COI). Other networks such as ENARO⁷⁵ (on reception practice), GDISC⁷⁶ (on general management of asylum and migration processes) and the IARLJ⁷⁷ (on cooperation among refugee law judges) have allowed for exchange of expertise. However, these fora have generally been limited to information exchange, without a clear mandate to work towards more consistent approaches and higher standards of quality. Initiatives to align policy and practice should be supported, but must remain focused on best protection practices, in accordance with international law standards. The systematic involvement of UNHCR and other expert stakeholders would help to maintain a protection focus.

UNHCR also recommends that the Commission, when funding and otherwise supporting practical cooperation initiatives, require a clear articulation of protection objectives in project descriptions, and of protection outcomes in reporting.

With respect to practical cooperation in the area of COI, the development of a user-friendly common COI database as a follow-up to the intended common COI portal would be an important step towards harmonizing the basis for decision making. However, the legal principle of 'equality of arms' requires that all stakeholders in the asylum procedure, including the applicant or his/her representative, as well as the decision makers, have access to the same information. Transparency and public accessibility are key principles which should guide development of COI tools and collaboration.

UNHCR believes that cooperation on COI through joint missions by several Member States, resulting in joint COI reports, can be useful. The joint analysis and interpretation of information collected by Member States themselves and from independent sources (such as UNHCR and human rights organizations) will promote greater consistency towards particular groups or issues.

The EC-funded European Asylum Curriculum project (launched in the GDISC context) should be developed into a readily available, high-quality training programme for first-instance decision makers in all Member States. The EC should stimulate its use by facilitating translation, training of trainers and regular updating of its contents. These tasks could be undertaken by a European Asylum Support Office (see questions 21-22).

⁷⁵ www.enaro.eu

⁷⁶ www.gdisc.org

⁷⁷ www.iarlj.nl

Development of training curricula for and joint training of border guards (see question 33), interpreters, staff in reception facilities, legal aid providers, judges and others involved in the asylum process could also be facilitated and funded.

Although the Contact Committees are tasked with addressing the interpretation and application of first phase instruments, considerable differences in practice remain, particularly in interpretation of the criteria for granting protection. In the Qualification Directive, an administrative cooperation mechanism is proposed, consisting of national contact points⁷⁸, whose work could go beyond the limited discussion and exchange carried out in the Contact Committees. This network could provide a forum for the development of common guidelines on the interpretation and application of key procedural and substantive aspects of the EU *acquis*. For topics where UNHCR Guidelines already exist, these should serve as the starting point for practical cooperation to narrow the gaps in practice. UNHCR should be a leading participant in the development of EU guidelines, to ensure consistency with international standards.

Responding to the needs of especially vulnerable persons would be an important area for specific practical cooperation (see questions 15-16). UNHCR is concerned that vulnerable asylum-seekers and refugees are not always properly identified and often do not receive the care they need. The use and weight of medico-legal reports in asylum procedures⁷⁹ vary widely. Further, no formal procedure exists among Member States for determining the best interest of children. Practical cooperation initiatives aimed at identifying and developing good practices to address these challenges would be highly desirable.

Apart from legal measures to enhance integration (see question 17), practical cooperation could address the divergent approaches to integration support for international protection beneficiaries and (to a certain extent) asylum-seekers. UNHCR encourages participation of relevant professionals, e.g. teachers, social workers and health workers, in such efforts.

- 21. What options could be envisaged to structurally support a wide range of practical cooperation activities and ensure their sustainability? Would the creation of a European support office be a valid option? If so, what tasks could be assigned to it?**
- 22. What would be the most appropriate operational and institutional design for such an office to successfully carry out its tasks?**

The Treaties assign to the Commission the legal responsibility for ensuring Member State compliance with EU law, as well as for proposing legislation. However, as the Commission has limited resources to carry out monitoring, an Asylum Support Office could play a valuable supporting role. It could assist the Commission by gathering the information needed on Member States' practices and developing actions to assist Member States in meeting their obligations. Thus a European Asylum Support Office would not have normative or formal monitoring responsibilities. UNHCR could act as advisor to a

⁷⁸ *Op.cit.*, note 8, Article 35.

⁷⁹ See also: Istanbul Protocol - Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, at: <http://www.ohchr.org/english/about/publications/docs/8rev1.pdf>.

European Asylum Support Office, which would enhance the latter's credibility and provide it with expert guidance on protection principles and international refugee law.

A European Asylum Support Office could offer a number of administrative services, along with some clearly defined and agreed substantive functions in support of the Common European Asylum System.

The first category of administrative tasks could include, among others:

- Developing and maintaining the EU COI portal and envisaged common COI database;
- Setting up and administering Asylum Expert Teams to assist Member States facing particular challenges or in need of specific support (see Part I, section 4.1 and question 33);
- Providing administrative support and coordination for EURASIL and Contact Committees, as well as twinning arrangements to build Member States' asylum capacities, and exchange programmes;
- Serving as contact point for exchanges with and between existing networks outside EU structures such as ENARO, GDISC and the IARLJ;
- Facilitating discussions in a European Refugee Fund knowledge platform to strengthen effective use of EC funding (see question 25);
- Supporting EU collaboration on resettlement, including work towards an EU resettlement scheme, facilitating discussions among Member States and others in a consultative forum, knowledge sharing, and cooperation with NGOs, among other things (see questions 31-32).

At a substantive level, further activities contributing to the effective and consistent operation of Member States' asylum systems in the framework of the Common European Asylum System could also extend to:

- Assisting Member States to undertake quality control of their decision making on protection claims and address identified shortcomings;
- Identifying and analyzing reasons for divergences which are not acceptable in a Common European Asylum System and assisting the Commission and Member States to address these;
- Developing and updating training curricula for decision makers, second instance authorities, judges and others involved in the asylum process (including the European Asylum Curriculum, see questions 19-20), as well as coordinating the delivery of joint training events and seminars;
- Developing and analyzing COI information and guidelines;
- Implementing standard qualifications and developing an accreditation scheme for asylum decision makers (see question 18);
- Hosting an 'expert panel' to advise the Commission in connection with international protection issues on which Member States' approaches differ widely, and potentially to provide input to ECJ proceedings, where appropriate. The panel could consist of eminent persons from Member States with demonstrated experience and qualifications on asylum, as well as UNHCR.

SOLIDARITY AND BURDEN SHARING**Responsibility sharing**

- 23. Should the Dublin system be complemented by measures enhancing a fair burden sharing?**
- 24. What other mechanisms could be devised to provide for a more equitable distribution of asylum-seekers and/or beneficiaries of international protection between Member States?**

General Recommendations on the Dublin system

UNHCR has commented on the Dublin system on several occasions. While welcoming in principle the adoption of defined criteria for the allocation of responsibilities, UNHCR has expressed concern about the sequence of the criteria chosen, the fact that the Dublin system does not exclude the application of the safe third country principle among Dublin-participating States, the lack of sufficient procedural safeguards and the application of the humanitarian and sovereignty clauses, among other subjects.

The Dublin system is predicated on the assumption that the asylum laws and practices of the participating States utilize common standards and produce comparable results. In reality, asylum legislation and practice still vary widely from country to country, and as a result, asylum-seekers receive different treatment from one Dublin State to another. A transfer under the Dublin system may therefore lead to diminished prospects of protection. Asylum-seekers continue to have valid reasons related to their chances of finding protection, as well as to their personal circumstances, for wishing to lodge their asylum application in a specific Member State. Until and unless a consistently satisfactory level of protection is achieved across Europe, the Dublin system will continue to produce unsatisfactory results from both the protection and human viewpoints.

The limited data available shows that transfer of responsibility under the Dublin Regulation is requested in a relatively small proportion of asylum applications (around 17 per cent), while only 30 per cent of the accepted requests for transfer are actually effected, according to the Commission's Dublin System evaluation.⁸⁰ This raises the question of whether the results are worth the human and financial costs involved. One of the reasons why the system is not working as intended is that it almost entirely disregards the choice of the asylum-seeker, who may therefore try to circumvent the system. The lack of transparency and logic of the present system for asylum-seekers does not enhance its credibility or effectiveness. Moreover, the criteria for the allocation of responsibility may put a larger burden on the countries at the EU's external border.

UNHCR suggests that Member States may wish to reconsider the proposal previously made by UNHCR, the Commission and other actors, namely, to allocate responsibility to the Member State in which the first application for asylum was made. If the political will for such a fundamental change is absent, UNHCR would alternatively put forward a

⁸⁰ Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system, COM(2007) 299 final, 6.6.2007, at: <http://europa.eu/eur-lex/lex/LexUriServ/LexUriServ.do?uri=COM:2007:0299:FIN:EN:PDF>.

number of suggestions for amendment to the current system, based among other things on the study of state practice the Office undertook in 2006.⁸¹

From UNHCR's viewpoint, the following would be priority areas for amendment of the Dublin II Regulation:

- Prohibition against removal of an asylum-seeker to a third country before a full and fair examination of his or her asylum claim has taken place;
- Clarification that asylum-seekers returned to another country under the Dublin II Regulation will have access to the asylum procedure in that country upon return, if a final decision on the merits was not previously taken there;
- Obligation fully to inform asylum-seekers about the Dublin procedure, and to provide access to a legal remedy against a Dublin decision;
- Broadening of the criteria for family reunification;
- Clarification that the Reception Conditions Directive applies to Dublin cases;
- Restriction to the greatest extent possible of detention of Dublin cases;
- Reduction of time limits for replies and returns;
- Clarification of conditions of removal, to ensure that transfers are carried out humanely and with respect for the dignity of the persons involved.

Additionally, further implementing guidelines are necessary, in particular on the application of the principle of the best interest of the child and the sovereignty and the humanitarian clauses.

Amendments to the Dublin II Regulation to improve allocation of responsibilities for examining asylum requests

UNHCR has expressed concern about possible imbalance in the distribution of asylum applications among Member States resulting from the current system. UNHCR would urge an in-depth evaluation of the impact of the Dublin system on the distribution of asylum applications in the EU. Imbalances are visible, but for the determination of policy it would be important to examine this question more comprehensively. It could be argued that the total number of transfers among States does not give a clear picture of the impact of Dublin on external border States. It would appear that those States receive a higher number of people requiring a new, substantive claim examination (including many 'take charge' cases). Many of those returned to countries in Western or Northern Europe, by contrast, are people whose claims were rejected ('take back' cases), and thus do not require extensive further examination by the authorities. This implies a more significant challenge for the external border States under Dublin than the absolute number of transfers would suggest.

To address such imbalances, and in the absence of willingness to overhaul the Dublin system entirely, UNHCR would suggest consideration of the following:

- Article 16(1)a-c of the Dublin Regulation (responsibility to take back asylum-seekers) could be amended so that a Member State facing disproportionate

⁸¹ The Dublin II Regulation. A UNHCR Discussion Paper, April 2006, at: <http://www.unhcr.org/home/RSDLEGAL/4445fe344.pdf>.

pressures may, under certain conditions, exceptionally be released from its responsibility for the examination of asylum requests under Article 10(1). Responsibility would then according to Article 13 rest with the State in which the asylum application is lodged;

- Article 3(2) of the Dublin Regulation could be amended so that a Member State may voluntarily take over responsibility for the examination of asylum requests of persons present on the territory of another Member State, upon request of that Member State and with the consent of the asylum-seeker. Member States could make a pool of places available for such a mechanism, which could be administered by the Asylum Support Office, to which Member States facing particular pressures could apply. Criteria and conditions for its application would need to be defined. A financial compensation mechanism could be introduced for States willing to take over responsibility for the examination of an asylum request on the basis of Article 3(2) of the Dublin Regulation in situations where the State primarily responsible is facing particular pressures.

Apart from the Dublin system, reallocation arrangements could also be considered for asylum-seekers generally in States which are facing pressures exceeding the capacity of their asylum systems. Such arrangements would require the consent of the asylum-seeker, and should be based on clear criteria. While there are many complex legal, practical and other questions to be addressed in considering such a mechanism, UNHCR would support further examination of possible arrangements.

An intra-EU reallocation mechanism for people in need of protection

A further approach to responsibility sharing could involve the establishment of a mechanism for redistribution of persons who have been found to be in need of protection.⁸² The criteria for and conditions of such reallocation would require specific definition, but should include the refugee or subsidiary protection beneficiary's consent to relocation to another Member State. A reallocation "pool" of places made available through voluntary or assigned contributions from Member States could be administered by the European Asylum Support Office. Any such arrangement should be separate from Member States' resettlement quotas for refugees from third countries.

Financial solidarity

25. How might the ERF's effectiveness, complementarity with national resources and its multiplier effect be enhanced? Would the creation of information-sharing mechanisms such as those mentioned above be an appropriate means? What other means could be envisaged?

The European Refugee Fund (ERF) is intended to bring added value to national asylum systems. With this objective in mind, UNHCR encourages further efforts to ensure:

⁸² UNHCR examined questions around the potential need for responsibility sharing through reallocation of people granted protection as part of its 'A Revised "EU Prong" Proposal' of December 2003, *op.cit.*, note 34.

- That the ERF supplements and does not replace national resources. In some Member States, UNHCR is concerned that ERF support has become a substitute for adequate State budgetary provisions, and has resulted in reprioritisation of what States are prepared to support with national funds. For instance, UNHCR observes in some cases that States prefer to utilize national funds for activities which provide a residual benefit for the State, such as infrastructure improvement or increased staffing. This leaves other activities which directly support asylum-seekers and beneficiaries of international protection (such as social and legal assistance) highly vulnerable to the uncertainties of project funding, especially where other forms of public support are limited or inadequate;
- Sustainability of actions supported by the ERF: The 2008-2013 ERF allows for projects of up to three years' duration, but there needs to be an assurance that the action can be sustained beyond this period where necessary. Participation of independent actors such as UNHCR or relevant NGOs in the strategy-setting and selection process could help to ensure that this objective is achieved;
- That gaps in services are avoided: The competitive bidding process which pertains to ERF allocations does not ensure that gaps will be filled and all areas of need addressed; the possibility to address unforeseen needs without going through competitive bidding is therefore welcomed;
- Engagement of and improved communication with non-governmental stakeholders: UNHCR would welcome a standardized procedure for its own involvement in national ERF management, which varies from one Member State to another, as well as for that of NGO partners. UNHCR welcomes the obligation in the new ERF to establish ERF partnerships at national level, for instance with UNHCR and civil society actors. All Member States are encouraged to fulfil this requirement through systematic involvement of NGOs and UNHCR in strategically developing national ERF strategies. The transparency and effectiveness of national ERF programmes will be strengthened by the informed and experienced perspectives of these organizations;
- A minimum of predictable funding for national NGOs: NGOs are vital partners in refugee protection and assistance, but many NGOs active in the asylum field in Europe are having difficulties in finding sustainable sources of funding. In some Member States, NGOs have had difficulties accessing national ERF monies;
- Transparent management of national ERF funding,⁸³ including of the administration, selection and audit processes.

UNHCR would further encourage the Commission to increase the percentage of ERF resources allotted to Community Actions, in order to support cross-border activities which promote understanding and implementation of common European asylum standards. The new ERF allots 10 per cent to Community Actions (as compared with five per cent in the first ERF and seven per cent in the second ERF). This increase is welcome, but is still a modest amount.⁸⁴

⁸³ See European Court of Auditors, Special Report No 3/2007 concerning the Management of the European Refugee Fund (2000 - 2004), ECA/07/12, 17 July 2007. The Special Report, as adopted by the Court of Auditors, is available on the Court's website (<http://www.eca.europa.eu>) and will shortly be published in the C series of the Official Journal of the European Union.

⁸⁴ This recommendation is also valid for other JLS-administered funds for asylum and migration under the programme entitled Solidarity and Management of Migration Flows, namely the Return Fund, the External Borders Fund, and the Integration Fund.

UNHCR would also welcome the establishment of an ERF knowledge platform among Member States, ERF project implementers, refugee community organizations and other interested stakeholders, to facilitate exchange at EU level of experience and best practices gathered in the context of ERF-funded actions. Discussions in such a forum, which could be facilitated by the European Asylum Support Office, could promote best practices in planning and project selection, as well as provide guidance for Member States for whom the ERF mechanism is relatively new. It could also enable exchange of information among national authorities and potential NGO project partners.

26. Are there any specific financing needs which are not adequately addressed by the existing funds?

UNHCR reiterates the need for the EU and its Member States to ensure sustainable funding of NGO partners working in the EU with asylum-seekers and beneficiaries of international protection. ERF funding for NGO project activities is welcome, but these organizations also need core budgetary support.

In addition, systematic support for UNHCR's own activities in the EU would be welcome. Although the EU is a major donor to UNHCR's programmes in third countries, it would also be important for it contribute to UNHCR's work towards safeguarding protection standards within the EU.

With respect to ERF allocation to Member States, UNHCR is concerned that the current allocation based on numbers of asylum claims tends to favour larger Member States with well-established asylum systems. Attention is needed to ensure adequate support and capacity-building actions in other Member States. In this context, UNHCR welcomes the fixing of a higher minimum allocation for all new (post-2004) Member States under the ERF 2008-2013.

UNHCR also has concerns about the purely numerical approach taken to allocation of other funds under the Solidarity and Management of Migration Flows programme, which do not fix minimum allocations for new Member States or those with smaller numbers of target populations. Related problems with this approach include, for instance, basing the allocation key under the Returns Fund on the number of removal orders, particularly those which may not be final, which may discourage careful and exhaustive decision making in individual cases of persons seeking permission to remain.

UNHCR welcomes the fact that ERF funds may now be used to support certain resettlement actions, though it is unclear whether Member States can predict with accuracy (as required by Article 13 of the ERF Decision) the categories of persons they will resettle in the next year. In order further to encourage Member State participation in resettlement, consideration could be given to introducing a new, dedicated resettlement fund. UNHCR would also welcome extension of ERF support to contribute to the establishment and operation of an Evacuation Transit Facility in the EU.

Given the recent release of the four JLS funds for the period 2007-2013, it would be premature to make an assessment of their adequacy. However, UNHCR would emphasize that if a European Asylum Support Office is established, it will be essential to ensure that adequate funds will be available to support its effective operation. Further, UNHCR

believes that eligible actions in the External Borders Fund should explicitly include training of border personnel in international protection issues and monitoring of protection-sensitive entry management.

EXTERNAL DIMENSION OF ASYLUM

Supporting third countries to strengthen protection

- 27. If evaluated necessary, how might the effectiveness and sustainability of Regional Protection Programmes be enhanced? Should the concept of Regional Protection Programmes be further developed and, if so, how?**
- 28. How might the EU best support third countries to deal with asylum and refugees issues more effectively?**
- 29. How might the Community's overall strategies vis-à-vis third countries be made more consistent in the fields of refugee assistance and be enhanced?**

These questions have potentially very broad scope, touching on external relations, humanitarian and development aid, and other issues which have an impact on the protection of refugees outside the EU (see Part I, point 6 and question 35). The continued support of the EU and its Member States for UNHCR's work around the globe, and for the principles of international refugee law, is of fundamental importance. The credibility of EU actions to promote refugee protection and durable solutions in third countries also depends on the maintenance of access to fair and effective asylum systems in Europe. This is particularly important in light of the European Union's standard setting role.

With respect to the pilot Regional Protection Programmes (in Tanzania and in Belarus, Moldova and Ukraine), UNHCR believes that a more coherent approach would be beneficial, involving not only Justice and Home Affairs actors, but also those engaged in humanitarian aid, development, and external relations more broadly. Moreover, capacity-building is a long-term process which needs sustained support, as well as full consultation with and the engagement of all stakeholders in the countries concerned. UNHCR questions whether a competitive bidding process, such as applied to the Aeneas programme, is the best way to develop and implement coherent capacity-building strategies.

In order to support third countries to meet their refugee protection responsibilities, UNHCR urges the Commission and Member States, in their relations with these countries, to incorporate forced displacement as a cross-cutting concern. When elaborating development actions, UNHCR urges attention to the need for programmes which support durable solutions for refugees, including their self-reliance in countries of asylum as well as sustainable, voluntary repatriation. When addressing migration challenges with third countries, it is crucial to recognize that States have specific responsibilities for the protection of asylum-seekers and refugees, who often move alongside irregular migrants. Burden sharing through resettlement (see questions 30-31) is also an important sign of solidarity.

Resettlement

30. How might a substantial and sustained EU commitment to resettlement be attained?

31. What avenues could be explored to achieve a coordinated approach to resettlement at EU level? What would be required at financial, operational and institutional level?

UNHCR agrees with the Commission that resettlement is an important and integral part of the external dimension of EU asylum policy.⁸⁵ It is a concrete demonstration of responsibility sharing and provides refugees with protection and durable solutions.⁸⁶ However, resettlement must be a complement to – and not a substitute for – the provision of protection where needed to persons who apply for asylum in the EU or at its borders.

Political will is needed to reach a substantial and sustained EU commitment to resettlement which would result in additional resettlement places. At present, only seven Member States have annual resettlement programmes, although several others have indicated their interest in launching new programmes. UNHCR urges the Commission and those countries already engaged in resettlement to show leadership in encouraging and helping other Member States to join this international effort, on an equitable and proportionate basis, and in building public support for resettlement.

The ultimate objective of an EU resettlement scheme, with common criteria and centralized management, is one which UNHCR supports. An EU resettlement programme should result in additional resettlement places beyond what Member States currently provide, should offer a high standard of protection and integration support for resettled refugees and should not complicate the administration of resettlement by UNHCR. Indeed, UNHCR's task would be facilitated if there were ultimately a single referral and selection process for all EU resettlement countries, based on common criteria, as long as such a facility did not constitute another bureaucratic layer.

A more coordinated EU approach to resettlement, whether within or beyond the context of a Regional Protection Programme, would be a first step in working toward the objective of an EU resettlement scheme. A coordinated approach could include:

- Establishment of a consultative forum: The Commission could consider setting up a European consultative group on resettlement, including UNHCR, NGOs and Member State officials, for information exchange on resettlement. The Chair of that group should also participate in UNHCR's annual tripartite consultations on resettlement. Within this forum, EU countries could usefully coordinate among themselves and with UNHCR on priority groups and locations for resettlement and

⁸⁵ In these questions, UNHCR addresses resettlement from outside the EU. Intra-EU burden sharing is addressed in questions 23 and 24.

⁸⁶ See 'The feasibility of setting up resettlement schemes in EU Member States or at EU level, against the background of the Common European Asylum System and the goal of a common asylum procedure', by Erin Patrick, et al., Brussels (2004), at:

http://ec.europa.eu/justice_home/doc_centre/asylum/studies/docs/resettlement-study-full_2003_en.pdf.

on timing of selection missions, in order to facilitate UNHCR's preparation of dossiers and visits of delegations;

- Cooperation on preparation and delivery of pre-departure cultural orientation: While some pre-departure orientation for refugees awaiting resettlement is necessarily country-specific, a certain level of collaboration in this respect could be useful;
- Knowledge sharing: Technical cooperation and exchange of experience could take place among traditional and emerging resettlement countries, within and beyond the EU. Such cooperation could inter alia focus on enhancing the capacity of Member States to receive and support the integration of resettled refugees.

There are several requirements at the financial, operational and institutional levels to achieve a coordinated approach to resettlement at EU level. At the financial level, there is a need for more flexible provision of support for resettlement activities than is currently provided through the new ERF for 2008-2013. The Commission could consider broadening the criteria for ERF support for resettlement, the earmarking of part of the ERF for resettlement actions, or the introduction of a dedicated resettlement fund. At the operational level, there would be a need for administrative support. This could be one of the tasks of a European Asylum Support Office; the goal should be to bring added value through a coordinated approach. At the institutional level, the vital role of NGOs should be recognized. A number of European NGOs have strong expertise in resettlement and others are keen to develop this expertise.

The involvement of NGOs is particularly important in order to develop public support for resettlement and to underpin the integration of resettled refugees. One way to build public support for resettlement could be through the establishment of private sponsorship programmes, which enable refugees to be resettled with the support of private citizens or NGOs. Private sponsorship of resettled refugees could enhance cooperation among governments, NGOs and the private sector. The Commission and/or the Asylum Support Office could take the lead in promoting this model at European level.

EU support for UNHCR's proposed establishment within the EU of an Evacuation Transit Facility would be a strong sign of political support for resettlement. This facility would house refugees in need of resettlement who cannot safely remain in their country of first asylum. Resettlement processing by EU, as well as non-EU, countries would take place in this facility. The EU could also provide financial support for the facility and a commitment of resettlement places for persons transferred to it.

32. In what other situations could a common EU resettlement commitment be envisaged? Under what conditions?
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In addition to working toward the goal of a common EU resettlement programme, as discussed above, a common EU resettlement commitment could be envisaged in emergency situations, where UNHCR calls for a rapid resettlement response; and/or where the international community is seeking to resolve a protracted refugee situation.

In emergency situations, resettlement needs must be met rapidly. This is one of the reasons why UNHCR plans to establish an Evacuation Transit Facility. Beyond EU support for that facility, a common commitment to meet emergency resettlement needs would be

welcome. In addition to providing resettlement places for refugees who would be transferred to the Evacuation Transit Facility, the Commission and Member States may wish to revisit the notion of Protected Entry Procedures (PEPs).⁸⁷ Building on the existing practices of some Member States, PEPs could be used where regular resettlement process might be too slow or otherwise inappropriate for particularly urgent cases. However, the substantive and procedural aspects of PEPs would need to be clarified in order to benefit those truly in need of protection.

In protracted refugee situations, UNHCR may seek broad international support for the strategic use of resettlement, with the aim not only to use resettlement as a durable solution but to leverage other durable solutions. UNHCR encourages the Commission and Member States to review the ‘Multilateral Framework of Understandings on Resettlement’,⁸⁸ as a collective tool to provide effective responses to both protracted and emergency situations.

Addressing mixed flows at the external borders

33. What further measures could be taken to ensure that protection obligations arising out of the EU *acquis* and international refugee and human rights law form an integral part of external border management? In particular, what further measures could be taken to ensure that the implementation in practice of measures aimed at combating illegal migration does not affect the access of asylum-seekers to protection?

Persons in need of international protection account for a relatively small portion of the global movement of people. However, they frequently move in an irregular manner from one country or continent to another, alongside other people whose reasons for migrating are not protection-related.

In the context of these ‘mixed flows’, international protection can only be provided if individuals seeking protection have access to the territory of States where their claims can be assessed properly. The best quality asylum system will be of little use if it is not accessible.

Surveillance of the EU’s external borders, coupled with interception and migration control measures taken outside the EU and at its borders, including under the aegis of Frontex, may impede access to the Common European Asylum System. UNHCR calls on the EU to make an explicit commitment to protection-sensitive border management. This would require making sure that all EU instruments related to the management of external

⁸⁷ This notion is understood to allow a non-national to approach a potential host state outside its territory with a claim for asylum or other form of international protection, and to be granted an entry permit in case of a positive response to that claim, be it preliminary or final. See ‘Study on the feasibility of processing asylum claims outside the EU against the background of the Common European Asylum System and the goal of a common asylum procedure’ (published in 2002, as cited in the below-mentioned Communication). See also ‘Communication from the Commission to the Council and the European Parliament on the Managed Entry in the EU of Persons in Need of International Protection and the Enhancement of the Protection Capacity of the Regions of Origin: Improving Access to Durable Solution’, COM(2004)410 final, 4 June 2004.

⁸⁸ Multilateral Framework of Understandings on Resettlement, 17 June 2000, available at: <http://www.unhcr.org/protect/PROTECTION/414aa7e54.pdf>.

borders incorporate refugee protection safeguards, as well as making sure that measures are in place in all Member States, at all external borders – land, sea and air – which take account of the fact that refugees often move alongside other irregular migrants.

As a framework for action, UNHCR's '10-Point Plan'⁸⁹ provides suggestions to States on how to integrate refugee protection considerations into migration and border control policies. UNHCR would welcome more concrete discussions about how elements of this Plan could be implemented by Member States. There are good practice examples in several Member States, which could constitute elements of a broader European strategy. Some specific suggestions are outlined below.

A European commitment to protection-sensitive entry management could include:

Incorporating refugee protection safeguards in all EU border management instruments and actions

UNHCR acknowledges that most of the EU border management instruments include a general reference to international protection obligations and/or the principle of *non-refoulement*, but considers that these references could be strengthened and further guidance provided as to how this would be translated into practice. The specific situation of persons seeking international protection needs to be incorporated into national border control measures, but should also be taken into account when setting up joint operations, including under the auspices of Frontex, and in operational agreements with third countries.

*The Schengen Borders Code*⁹⁰

UNHCR welcomes the fact that the Code makes reference to Member States obligations as regards international protection and respect for the principle of *non-refoulement* (preambular paragraph (20)), Articles 3(b) and 13(1)). UNHCR also appreciates that the Code provides for the possibility to exempt third country nationals from entry conditions outlined in Article 4(1) on grounds of international obligations (Article 5(4)d). However, further safeguards are necessary fully to ensure respect of the *non-refoulement* principle. UNHCR would suggest:

- To include a reference to Article 31(1) of the 1951 Convention in Article 4(3);
- To adopt practical rules as regards implementation of Article 5(4)d, outlining under which circumstances asylum-seekers and refugees are exempted from the entry conditions laid down in Article 5(1);
- To include asylum-seekers and refugees in the categories outlined in Article 19 for which specific rules apply. These rules should be elaborated in Annex VII. Border guards should be obliged to refer persons applying for asylum to the competent asylum authority. For this purpose, they would have to permit them entry until their asylum request has been examined. Specific provisions could also be considered for victims of trafficking;

⁸⁹ *Op.cit.*, note 17.

⁹⁰ *Op.cit.*, note 18.

- To amend Article 13(5) and request Member States to include in their statistics the number of persons who have applied for asylum at the border, and in Annex II to register the information that a person has sought asylum;
- To introduce a provision requesting Member States to introduce independent monitoring mechanisms;
- To introduce a provision referring to Member States' obligations to cooperate with UNHCR under Article 35 of the 1951 Convention.

*The Regulation establishing a European Border Agency (Frontex)*⁹¹

UNHCR appreciates the willingness of Frontex to establish institutionalized cooperation with UNHCR. A regular dialogue and exchange of information should enable Frontex to provide guidance and training to Member States, among other things, to ensure that joint border operations contain adequate protection safeguards. However, UNHCR would encourage Member States to strengthen the legal basis for Frontex to ensure that its activities are protection-sensitive. Apart from the provisions of the Schengen Borders Code, which also applies to Frontex operations, UNHCR suggests:

- To incorporate a reference to international obligations, especially the principle of non-refoulement, into the Frontex Regulation and to clarify that it applies for all Frontex operations, including those involving third countries;
- To incorporate the development of protection-sensitive border control measures into Article 1 as one of the objectives of Frontex' assistance to Member States.

Furthermore, Frontex should include training on international human rights and refugee law in the revised Common Core Curriculum for border guards and otherwise in training activities in Member States, as well as in third countries.

*The Regulation establishing Rapid Border Intervention teams ('RABITS' Regulation)*⁹²

The references to Member States' obligations as regards international protection and *non-refoulement* in preambular paragraph 17 and Article 2 could be further strengthened by clarifying in Article 6(2) (Tasks and Powers of the Members of the Teams) that wherever they act, members of such teams should respect Member States' international protection obligations, including the principle of *non-refoulement*.

⁹¹ Council Regulation (EC) No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, [OJ L349/1, 25.11.2004].

⁹² Regulation (EC) No. 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams, [OJ L199/30, 31.7.2007].

*The Regulation on the Establishment, Operation and Use of the Second Generation Schengen Information System ('SIS II' Regulation)*⁹³

UNHCR welcomes the general reference to fundamental rights in recital 26 of the Regulation's preamble. However, UNHCR believes that these standards could be strengthened. UNHCR proposes:

- To include a more specific reference to international refugee law, especially the *non-refoulement* principle enshrined in Art. 33(1) of the 1951 Convention, in the operational part of the Regulation;
- To stipulate clearly that the application of the SIS II should not prejudice the right to seek asylum in the European Union.

Initial reception arrangements at external borders

Some Member States, in particular those at the EU's southern borders, are periodically confronted with large-scale arrivals, including of persons who have undergone a life-threatening journey and need particular care. Reception centres at the external borders need to be equipped to address the immediate material, medical and counselling needs of new arrivals. Beyond this, there will also be a need to conduct initial information gathering ('profiling') to enable persons to be channelled into appropriate procedures (see below). Reception centres should be staffed by personnel with a range of qualifications to meet the needs of new arrivals. This might include not only government officials, but also UNHCR, IOM and other relevant international or national organizations with particular expertise. Financial support from Community sources should be available for reinforcing such reception centres, including those located at the EU's external borders.⁹⁴

Profiling mechanisms and Asylum Expert Teams

The establishment of profiling mechanisms could, in UNHCR's view, facilitate the management of large-scale arrivals at the EU's external borders. By profiling, UNHCR refers to a non-binding process which is to be distinguished from the asylum procedure. It has four core elements: the provision of information to new arrivals (i.e. on their status in the host country and available options); the gathering of information on the new arrivals (through basic questionnaires and/or informal interviews); the establishment of a preliminary profile for each person (e.g. is the person an asylum-seeker, a victim of trafficking, an unaccompanied child? Does he or she need special care? Is he or she seeking to join family members? Seeking employment opportunities? - recognizing that these categories may overlap); and finally, the counselling and referral to differentiated processes, including to asylum procedures for those seeking international protection. Profiling teams should include qualified personnel in various fields and include

⁹³ Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), [OJ L381/4, 28.12.2006].

⁹⁴ An example of a successful collaborative initiative to support reception capacity is the EC-funded project undertaken on the Italian island of Lampedusa, involving the Italian Ministry of Interior, UNHCR, IOM and the Italian Red Cross. Initially supported by ARGO funding, this project has recently been continued and extended to other Italian locations through the 'Praesidium II' project.

government experts as well as experts from international and national organizations. UNHCR would be willing to be part of such teams.

In addition to profiling arrangements at national level, Asylum Expert Teams involving Member State personnel, as well as experts from UNHCR and other organizations could also be deployed to assist with profiling in Member States facing particular pressures (see also Part I, sections 3.3 and 4.1).

Incorporating protection safeguards into interception and rescue at sea measures, and the allocation of responsibility for persons rescued and intercepted at sea

UNHCR believes that a new EU legal instrument is needed which clearly outlines Member States' protection responsibilities when their vessels intercept or rescue persons at sea.⁹⁵ The need for clarity on these matters has also been recognized by the Commission.⁹⁶ Diversion of vessels to third countries, in the absence of refugee protection safeguards, as well as lack of agreement as to where persons intercepted or rescued should be disembarked, give rise to deep concern. At present, such situations are dealt with on an ad hoc basis, and there is little transparency in State practice.

As a further positive step towards clarification in this area, UNHCR encourages Member States to continue working towards the preparation of practical guidelines to assist Frontex in carrying out joint operations, to alleviate the many inconsistencies in approaches taken by Member States to interception and rescue. However, UNHCR considers that a binding instrument would provide the clearest and strongest guidance for Member State action in this complex field.

34. How might national capacities to establish effective protection-sensitive entry management systems be increased, in particular in cases of mass arrivals at the borders?

At the outset, UNHCR notes that more complete information is needed about the treatment of persons seeking protection at the EU's external borders. Independent monitoring of State practice at land, sea and air borders is difficult, and information is often anecdotal and incomplete. UNHCR would urge the EU and its Member States to cooperate with independent agencies to achieve greater transparency on practice at external borders and to identify necessary actions. Access for UNHCR and NGO partners to all external borders should be assured on a systematic basis. Ways should be explored to provide Community support for border monitoring projects potentially through the ERF and the External Borders fund.

Increased awareness of border officials about their international protection obligations could be achieved, if these are specifically recognized in the national laws or regulations governing border management.

⁹⁵ See UNHCR Executive Committee Conclusion on Protection Safeguards in Interception Measures, No. 97 (LIV) 2003, at: <http://www.unhcr.org/excom/EXCOM/3f93b2894.html>.

⁹⁶ See Commission Staff Working Document, Study on the International Law Instruments in relation to Illegal Immigration by Sea, SEC(2007) 691 of 15.05.2007.

Improved and ongoing training of border personnel is essential. Border guards, whether deployed at land, sea or air borders, need to be able to identify asylum-seekers and others who may be in need of protection, and to refer them to the appropriate systems. Border personnel should be aware of international protection obligations and how they can implement them. A request for protection may not always be clearly articulated, and persons with special needs are not always immediately apparent. The Common Core Curriculum for border guards, now under revision by Frontex, will be a key measure, and UNHCR is pleased to participate in this effort. Training in cross-cultural communication skills and gender- and age-sensitivity are also important.

As indicated above, the establishment of Asylum Expert Teams to help States which are confronted with large-scale arrivals at the external borders would be a way of ensuring that persons seeking international protection are identified. The presence in initial reception centres of qualified personnel will help to ensure that persons with special needs are identified and cared for in a protection-sensitive way (see question 33).

Where profiling mechanisms do not exist or cannot be applied, border personnel should be helped to identify asylum-seekers and other persons with special needs through the elaboration of guidelines or standardized questionnaires, protection hotlines and/or the possibility to consult with UNHCR. They should receive clear instructions that all asylum-seekers are to be referred to the responsible asylum authorities.

Strategic use of the External Borders Fund⁹⁷ could support activities resulting in better awareness and implementation of protection responsibilities in border management activities. Although neither training of border personnel in international protection issues nor protection-sensitive border management is specifically mentioned in the Decision establishing the Fund, these would not seem to be excluded from the Fund's objectives and would be important tasks in need of support.

The role of the EU as a global player in refugee issues

<p>35. How could European asylum policy develop into a policy shared by the EU Member States to address refugee issues at the international level? What models could the EU use to develop into a global player in refugee issues?</p>

The overwhelming majority of the world's refugees and other forcibly displaced people are located outside the EU, often in developing countries with limited resources. The EU is already a global player on refugee issues and the EU's support will continue to be of vital importance to strengthen the capacity of these host countries to respond to refugees' needs for humanitarian assistance, protection and durable solutions. This support, whether in countries in the European neighborhood or beyond, is not a substitute for asylum within the EU, but an important complement to Europe's own protection responsibilities.

EU asylum practice has considerable standard-setting value. Countries in other regions of the world frequently look to Europe as an example. Consistent reaffirmation of the principles of international refugee law which underpin the EU's asylum policy, and consistent observance of these in practice, can have an important multiplier effect.

⁹⁷ *Op. cit.*, note 36.

A key EU objective, shared by UNHCR, is to strengthen the capacity of third countries to protect refugees and to provide support to durable solutions. EU financial and political support continue to be needed to raise protection standards in third countries. However, capacity-building activities in third countries need to be developed in close consultation and cooperation with those countries, as well as with development actors.

The European Commission and the Member States together contribute more than 50 per cent of UNHCR's annual budget, and similarly large amounts to the operations of numerous other agencies which provide protection and assistance to refugees. The EU Presidency speaks on behalf of Member States at the annual meetings of UNHCR's Executive Committee, and the Presidency and Commission carry considerable political weight on refugee issues around the globe. In that context, it is important not to allow priorities of security and trade to overshadow questions of human rights and refugee protection.

The EU's strength as a global player on refugee issues will to a certain extent depend on its own ability to implement coherent strategies in the areas of immigration, asylum and development. If durable solutions to situations of forced displacement can be built into the EU's development policy and programmes, this will strengthen the EU's role as a global player on issues of forced displacement. UNHCR, in its work to protect and assist refugees around the world, counts on the European Union's continued support.