



EUROPEAN COUNCIL
ON REFUGEES AND EXILES

CONSEIL EUROPEEN
SUR LES REFUGIES
ET LES EXILES

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Comments of the European Council on Refugees and Exiles on Future Orientations for an Area of Freedom, Security and Justice¹

Introduction

The European Council on Refugees & Exiles (ECRE) represents 76 refugee-assisting NGOs working in 30 European countries towards humane and fair asylum policies and practice.

The Commission has invited comments on its *Communication on an Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations*² which presents an assessment of progress under the programme of action agreed by the European Council in Tampere in 1999 and outlines proposed priorities for the future of the area of freedom, security and justice. The Dutch Presidency has also issued its communication on *Preparation of the political orientations for the multiannual programme building the area of freedom, security and justice*.³ On 5 November 2004, the European Council will set out policy guidelines for the multi-annual programme aimed at ‘developing the EU as an area of freedom, security and justice’. The European Council will then be asked to endorse the next five-year JHA programme in December 2004.

¹ See also ECRE’s more detailed paper ‘Broken Promises – Forgotten Principles: An ECRE evaluation of the development of EU minimum standards for refugee protection’, of 20 June 2004; the ECRE Response to the Commission’s Communication on improving access to durable solutions of September 2004, and ECRE’s response to the Commission’s Communication on a single asylum procedure of September 2004

² COM (2004) 401 final of 2 June 2004. The Commission also issued the Staff Working Document “An Area of Freedom, Security and Justice: assessment of the Tampere programme and future orientations” SEC(2004)693 which includes the assessment by sector. The Commission Staff Working Document SEC(2004)680 contains a list of the most important instruments adopted within the framework of the Tampere programme (the “Scoreboard”).

³ Of 9 July 2004

ECRE welcomes the opportunity to comment on the Commission's Communication and its initiative to open a public consultation process, as well as to share our views with the Dutch Presidency.

In the light of the fact that in June this year, ECRE produced a more detailed evaluation of the development of EU standards in the field of asylum under the Tampere agenda, this paper will not focus on our assessment of the Tampere Programme but instead will concentrate on priorities for the next five year programme.⁴

Summary of key ECRE recommendations

Turning the tide of negativity

1. ECRE strongly urges the European Council and Member States to move away from policies aimed at deterring asylum seekers and shifting responsibility outside of the EU to countries that are often poorer and with less capacity to host refugees.
2. ECRE encourages Member States to take steps to promote and foster policies governed, in fact and not just rhetoric, by the principles of international solidarity and responsibility-sharing as well as by the spirit and letter of the Charter of Fundamental Rights which underlines the link between the creation of an area of freedom, security and justice and the promotion of the EU's values and fundamental rights.
3. ECRE calls on the European Council to agree a five-year programme which ensures that the 1951 Refugee Convention and other international obligations, including the Convention for the Protection of Human Rights and Fundamental Freedoms will be guaranteed to the highest standards; and which is protection-oriented.
4. ECRE urges the European Council to agree a five-year programme which ensures that European asylum policies serve to strengthen the global refugee protection system. A commitment to international solidarity, co-operation and responsibility sharing must underpin the multi-annual programme.

Addressing the root causes of displacement

5. ECRE calls on the European Council to further develop measures that effectively tackle the main causes of forced migration including development programmes and policies aimed at promoting human rights, bolstering democracy, combating poverty, preventing conflicts and improving the social and economic situation in countries of origin. This will require greater reconciliation of the issues of migration, development and external relations.

⁴ For an assessment of the Tampere programme, we refer the reader to ECRE's paper – 'Broken Promises-Forgotten Principles': An ECRE evaluation of the development of EU minimum standards for refugee protection, Tampere 1999-Brussels 2004, 20 June 2004

Informing public opinion

6. ECRE encourages the European Council to prioritise a policy of supporting public information in EU states so as to foster and promote a balanced understanding by the general public of issues relating to forced migration and asylum.

Transposition of EU legislation

7. ECRE urges Member States not to drop their standards to the minimum level set by the EU but to maintain or adopt higher standards in order to ensure standards in line with international law and to continue working towards the achievement of the Tampere commitments they signed up to. A commitment by the European Council to this aim would be most welcome by civil society.
8. ECRE encourages the Commission to consider and support a role for NGOs as important partners in monitoring the process of transposition.

Evaluation, review and amendment of EU legislation

9. The next five years will provide a critical opportunity for Member States to evaluate the impact on refugees and asylum seekers of all the minimum standards agreed to date, to review their compatibility with international human rights and refugee law and to make the required amendments in order to bring the adopted legislation into line with international law, and so as to ensure refugees have access to and enjoy effective protection with the European Union. ECRE encourages the Council and the Commission to consider and support a role for NGOs as important partners in this process of evaluation.

Improving mechanisms of co-operation and exchange of best practice

10. ECRE welcomes proposals from the Commission⁵ to agree and develop key principles of good practice in asylum procedures, and its plans to establish a mechanism to improve the training of practitioners.
11. ECRE similarly supports the exploration of EU measures for increased co-operation and exchange of best practice, for example, the development of a common network for the exchange of country of origin information.
12. ECRE urges the establishment of a resource capable of compiling accurate and transparent comparative statistical data that could positively impact on future policy-making.

Upholding the right to seek asylum

⁵ Paragraph 23 of Communication from the Commission to the Council and the European Parliament “A more efficient common European asylum system: the single procedure as the next step”, COM(2004) 503, 15 July 2004

13. ECRE urges that the EU Council Regulation listing the third countries whose nationals must be in possession of a visa to enter the EU be reviewed in order to ensure it excludes countries experiencing civil war, generalised violence or widespread human rights abuse.
14. ECRE supports the proposal of the Commission to further explore the facilitation of protected entry into the European Union as an ‘emergency strand’ of a EU-wide resettlement scheme.
15. The opportunity to apply for a humanitarian visa for nationals from countries where serious human rights violations are occurring should also be further explored.
16. ECRE urges the development of a shared understanding amongst EU Member States recognising which State is responsible for addressing the protection needs of persons intercepted at sea.
17. ECRE urges the Council to ensure that readmission agreements made by the EU with third countries include effective safeguards which ensure that people seeking protection are referred to the proper determining authorities and are able to have their claim for protection considered under the regular asylum procedure.
18. ECRE encourages the Council, in developing core training modules for border guards in the context of the establishment of a European Agency for the Management of Operation Co-operation at the External Borders, to ensure appropriate and continuous training with regards to the legal obligations of States under international human rights and refugee law, and the consequent responsibilities of border guards.

Improving national asylum procedures

19. ECRE wholeheartedly supports the Commission in its efforts to promote “frontloading” of national asylum procedures and to promote the need for a single asylum procedure.
20. ECRE has grave concerns with regard to the Proposal for a Directive on Asylum Procedures, and calls for its urgent review and amendment.

Integration of refugees in the European Union

21. ECRE recalls that integration is a two-way process and depends on the development of a tolerant, inclusive society just as much as on efforts by refugees to adapt to their environment. ECRE calls on the European Council and Member States to ensure that EU legislation, its implementation, national legislation and policies do not undermine and impede the integration of refugees – both those with Convention status as well as those with subsidiary protection.

22. ECRE calls for the review for both the EC Directive on Reception and the Qualification Directive so as to amend those provisions which undermine the integration of refugees.
23. ECRE calls for positive political leadership by EU governments and measures to encourage socially responsible media in order to promote a balanced understanding by the general public of issues relating to forced migration and asylum.
24. Given the role of education in shaping public perceptions, ECRE encourages the European Council and Commission to support the inclusion of training on human rights and refugee issues in relevant national educational curricula.
25. ECRE calls on the European Council and the Commission to support capacity-building in the refugee community organisation sector to enable refugees to create their own associations, delivering services to their members and engaging in dialogue with statutory and voluntary organisations on policy issues.

Ensuring adequate safeguards in European return policies

26. In the elaboration of a Directive on minimum standards for return, ECRE urges the European Council to ensure that adequate safeguards are built into States' return practices fully reflecting their obligations under international human rights law.
27. Detention prior to removal should only be used as a last resort, should normally be avoided and should only be resorted to in limited circumstances prescribed by law; and laws or their application, including the length of detention, should not be arbitrary. The right to challenge the legality of detention in court must also be guaranteed and access to free legal advice and relevant organisations should be ensured.

Dublin II and responsibility sharing

28. ECRE urges the European Council to ensure an evaluation of the impact of Dublin II so that the Regulation may be reviewed and replaced with a system that is fair to States and fair to asylum seekers.

Expanding resettlement opportunities in Europe

29. ECRE fully supports the development of and indeed stresses the urgent need for an EU-wide resettlement scheme.
30. ECRE reminds the European Council and Member States that any expanded use of resettlement does not replace Member States' responsibilities to consider and process asylum applications of persons arriving spontaneously on their territory.

Capacity building in regions of origin

31. ECRE supports concrete measures to support refugee-hosting countries and help them to provide a better quality of protection to refugees.
32. ECRE underlines the need for benchmarks used by the EU to include all existing international human rights standards as well as to establish the existence of a durable solution for each individual refugee.
33. ECRE warns Member States that the inclusion of the ‘safe third country’ concept as part of any EU Regional Protection Programme could put refugees at risk and exacerbate secondary movements, if people are sent back to countries before they have become providers of ‘effective protection’, or where the benchmarks used for effective protection are inadequate. Clear and adequate safeguards are essential.
34. ECRE further warns that any EU focus on measures to facilitate swift returns to third countries within a discussion on supporting those same countries becoming “robust providers of effective protection” risks undermining the promotion of fruitful partnerships with third countries.
35. ECRE reminds the European Council and Member States that any efforts to enhance protection capacities in regions of origin does not replace Member States’ responsibilities to consider and process asylum applications of persons arriving spontaneously on their territory.

What Priorities for the Future of the Area of Freedom, Security and Justice?

Turning the tide of negativity

What we witnessed, under the Tampere agenda, was five years of difficult negotiations driven not by the spirit of Tampere, but by most European governments’ aim to keep the number of asylum seekers arriving as low as possible and by their concerns to tackle perceived ‘abuses’ of their asylum systems. European States showed little sense of solidarity and pursued narrow national agendas at great cost to refugees and to the building of a fair and efficient European protection system. Negotiations mostly reduced standards to the lowest common denominator to allow countries to continue with their narrow national priorities in a way which has in some cases turned restrictive national practices into Community law.

Deterring persons fleeing persecution from seeking asylum in the EU seems to have become the only common European goal upon which all Member States are in agreement. Moreover, negotiations took place in a generally deteriorating public climate of growing hostility towards asylum seekers and refugees, and widespread irresponsible media reporting compounded by a lack of political leadership at national level.

The Union must move away from policies aimed at deterring asylum seekers and shifting responsibility outside of the EU to countries that are often poorer with less capacity to host refugees. Steps must be taken to match the EU's fine rhetoric with policies and practices founded on principles of international solidarity and responsibility-sharing as well as on the Charter of Fundamental Rights which underlines the link between the creation of an area of freedom, security and justice and the promotion of the EU's values.

If serious progress is to be made, governments will need to recognise that refugee protection is, and must always remain, a human rights issue. The 1951 Refugee Convention and other international obligations, including the Convention for the Protection of Human Rights and Fundamental Freedoms must be guaranteed to the highest standards. European States must not evade their international obligations by preventing refugees from reaching Europe or by flouting international human rights standards in an attempt to discourage refugees from coming. The primary focus of the next five year programme on asylum must be protection-oriented. A commitment to that objective must stand by itself as a litmus test for our European commitment to human rights.

EU Member States also need to recognise the global implications of their actions. Measures taken by the European Union which have the effect of restricting access to protection and shifting responsibility for refugees away from Europe, affect refugees in other regions of the world and weaken the global protection regime. Instead, the next five year programme should aim to ensure that European asylum policies serve to strengthen the global refugee protection system. A commitment to international solidarity, co-operation and responsibility sharing must underpin the multi-annual programme. This commitment must apply between European countries, both in and outside of the EU, as well as between Europe and those regions that bear the largest responsibility for refugee protection. Providing protection to refugees on the territory of European States is an essential part of this.

Addressing the root causes of displacement

The only valid policy which should be pursued with vigour and resolve in the next five years in order to reduce the number of refugees seeking protection is to address the root causes of their displacement. The simplicity of this statement does not overlook the complexity of effectively implementing such a policy nor does it fail to recognise that it is longer-term. Nevertheless, EU governments need to further develop measures that effectively tackle the main causes of forced migration including development programmes and policies aimed at promoting human rights, bolstering democracy, combating poverty, preventing conflicts and improving the social and economic situation in countries of origin. This will require greater reconciliation of the issues of migration, development and external relations.

Informing public opinion

The EU must also prioritise a policy of supporting public information in EU states so as to foster and promote a balanced understanding by the general public of issues relating to forced migration and asylum. In an environment of increasing racism and xenophobia, leadership is urgently needed to overcome the current confusion between

illegal immigration and seeking asylum, to counter myths and promote positive images of refugees. This must be accompanied by more positive political leadership in all countries in defence of refugees' rights and desistance from issuing hostile pronouncements which often appear to be motivated by primarily political or electoral considerations.

Transposition of EU legislation

During the last five years, some positive progress has been made in the agreement of certain minimum standards on asylum and in improving the capacity of existing and new Member States to meet their international obligations to refugees. The centrality of the 1951 Convention Relating to the Status of Refugees has been upheld through the adoption of a refugee definition as well as content of refugee status that broadly (though not wholly) reflects international obligations. The granting of a subsidiary form of protection has been set as a minimum standard in all Member States, as has the recognition of non-State actors, gender-specific and child-specific forms of persecution. Some meaningful minimum standards have been adopted with regard to the treatment of displaced persons in situations of mass influx. Binding responsibilities on Member States have been set in relation to the documentation and provision of material reception conditions for asylum seekers to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence. These developments have the potential to bring about some positive changes in refugee protection in the context of the enlarged European Union.

Transposition and implementation of the EU legislation at national level should lead to the raising of standards where they currently fall below the EU standard set. However, it is important that Member States recall that the EU legislation adopted does not have the objective of lowering existing standards. Where national standards are currently higher than the agreed EU standards, Member States are under no obligation to amend their legislation or to make use of the derogations allowed. Indeed, Member States should not drop their standards to the minimum level set by the EU but should maintain their higher standards in order to continue working towards the achievement of the Tampere commitments they signed up to. ECRE calls upon the European Council to make such a commitment at its meeting in November.

It is imperative that the necessary resources are made available in order to ensure that the Commission can fulfil its monitoring and reviewing role. The role of NGOs as important partners in this process is also crucial and should be strengthened and supported.

Evaluation, review and amendment of EU legislation

Regrettably, in its Tampere programme the EU has adopted a package of laws that will not ensure that asylum seekers and refugees will find effective protection across the whole of the newly enlarged European Union. Some of the legislation adopted under the Amsterdam agenda allows unacceptable derogations from the minimum standards which, if implemented, could lead States to breach their obligations under

international refugee and human rights law, in particular the 1951 Refugee Convention and the European Convention on Human Rights.⁶

By way of example, ECRE has particular concerns with regard to the Proposal on Asylum Procedures⁷, and amongst others, would urge the most urgent review of the following provisions:

- the use of the “safe countries of origin” concept which provides fewer procedural safeguards to some asylum seekers based solely on their country of origin;
- the use of the “safe third country” and “super safe third country” concept to shift responsibility for refugees to third countries, regardless of whether the applicants have meaningful links with such countries and to prevent an examination of whether there are particular circumstances that make the destination country unsafe for the particular applicant;
- the absence of an explicit right of all asylum seekers to remain in the asylum country pending a final decision on their cases, which could lead to the removal of applicants to countries where they may suffer torture or other human rights violations and in some cases amount to *refoulement* contrary to the 1951 Refugee Convention and other international human rights instruments;
- the failure to guarantee to all the right to a personal interview, access to free legal advice for all asylum seekers who require it, and sufficient time to allow for proper preparation of the asylum application.

With regards to the Qualification Directive⁸, ECRE would highlight the following provisions as requiring review:

- the limitation of the definition of a “refugee” to a “third country national” or “a stateless person” rather than any person;
- the inclusion of non-State authorities in the definition of actors of protection;
- a lack of key criteria for assessing whether an internal protection alternative is properly available, and the possible application of the internal protection alternative to deny refugee status “notwithstanding technical obstacles to return to the country of origin”;
- the lower level of rights permitted to beneficiaries of subsidiary protection as compared to those with refugee status. This is of particular concern in relation to benefits afforded to family members, the duration of residence permits, the provision of travel documents, entitlement to social welfare benefits and access to health care, the employment market, and integration facilities.

⁶ On this basis ECRE and other European NGOs, including Amnesty International and Human Rights Watch, called for the withdrawal of the draft Asylum Procedures Directive on several occasions. See Press Releases: ‘Refugee NGOs in more than 30 European countries reject draft directive on asylum procedures’, 28 Sept 2003, ‘Refugee and human rights organisations across Europe call on EU to scrap key asylum proposal’, 29 March 2004, ‘Refugee and human rights organisations across Europe express their deep concern at the expected agreement on asylum measures in breach of international law, 28 April 2004, www.ecre.org

⁷ Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status

⁸ Proposal for a Council Directive on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

ECRE believes that any rights afforded to Convention refugees should also be granted to all persons afforded subsidiary protection, as both categories of protected persons have similar needs and circumstances.

The next five years will provide a critical opportunity for Member States to evaluate the impact on refugees and asylum seekers of all the minimum standards agreed to date, to review their compatibility with international human rights and refugee law and to make the required amendments in order to bring the adopted legislation into line with international law, and so as to ensure refugees have access to and enjoy effective protection within the European Union. In the ECRE publication, 'Broken Promises – Forgotten Principles' of June 2004, ECRE has set out a number of the key provisions of the EU asylum legislation requiring review and amendment during the next five years. In addition, ECRE has produced more detailed Information Notes which highlight those provisions which we consider should be reviewed and amended⁹. Information Notes on the Qualification and Asylum Procedures Directives will be finalised shortly.

With its membership of more than 70 refugee-assisting non-governmental organisations throughout the Union, ECRE is uniquely placed to contribute to an evaluation of the impact of EU legislation on asylum seekers and refugees.

Improving mechanisms of cooperation and exchange of best practice

In order to foster greater solidarity between EU States, ECRE believes that the next five years should be used to review and improve mechanisms for strengthening co-operation, exchange of **best** practice and promoting mutual understanding, so as to nourish a better environment within which to move towards the development of a common European asylum system.

In this regard, co-operation, initiated through Eurasil, could be further developed and strengthened. Council Decision of 13 June 2002 adopting an action programme for administrative cooperation in the fields of external borders, visas, asylum and immigration (ARGO programme) (2002/463/EC) could be bolstered within the new financial perspectives to support this aim.

ECRE welcomes proposals from the Commission¹⁰ to agree and develop key principles of good practice in asylum procedures, and its plans to establish a Centre of Excellence to improve the training of practitioners. ECRE believes that such an approach could be a useful step working towards better and more consistent decision-making.

⁹ ECRE Information Note on the Council Directive 2003/9/EC of 27 January 2003 – Laying down Minimum Standards for the Reception of Asylum Seekers; and ECRE Information Note on the Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences

¹⁰ Paragraph 23 of Communication from the Commission to the Council and the European Parliament "A more efficient common European asylum system: the single procedure as the next step", COM(2004) 503, 15 July 2004

ECRE similarly supports the exploration of EU measures for increased co-operation and information sharing, for example the development of a common network for the exchange of country of origin information.

Despite the sensitivity of the area and volume of legislation being developed, the statistics that inform policy makers are inadequate. For example, data on recognition rates is often misleading due to differing countries' practice: some reject applications while not returning the applicant because of risks in their country of origin, others simply delay the determination of applications until a change of conditions has occurred in the country of origin. Equally, statistics may record decisions to return on Dublin or safe third country grounds as rejections, or may relate only to first instance decisions and thus not reflect recognition following appeals. ECRE would, therefore, urge the establishment of a resource capable of compiling accurate and transparent comparative statistical data (levels of application, recognition rates etc.) that could positively impact on future policy-making. Any such mechanisms must be transparently administered, and ensure that information is accessible not only to the national decision-making bodies, but also to the general public, in particular to relevant international actors, non-governmental organisations and lawyers.

These and other developments might provide a means to harmonise decision-making on applications relating to the same country of origin, which currently varies considerably between Member States, and may encourage movements of asylum seekers between EU countries.

Upholding the right to seek asylum

The 'absolute respect of the right to seek asylum', as reaffirmed at Tampere, has been totally undermined over the last five years. The EU's emphasis on the fight against illegal immigration has been to the detriment of the development of adequate safeguards for refugee protection or measures and procedures on admission and legal migration to the EU. With almost no legal means for asylum seekers to reach the EU, the situation is now one whereby the act of seeking asylum in Europe has effectively been criminalised.

Visa obligations are imposed on those coming from countries with gross and persistent human rights violations or generalised violence.¹¹ Carrier sanctions prevent refugees, who are not in a position to acquire valid papers, entry to the territory of European States.¹² A plethora of other migration and border control measures have been developed hindering refugees' ability to seek protection in the EU. Such measures have forced refugees to rely on smugglers to gain access to protection in the European Union. Sadly, the costs of these measures can be counted in lives, with thousands having met their deaths in the seas of Europe and concealed in vehicles.

ECRE urges that the EU Council Regulation listing the third countries whose nationals must be in possession of a visa to enter the EU be reviewed in order to

¹¹ Council Regulation 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

¹² Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985

ensure it excludes countries experiencing civil war, generalised violence or widespread human rights abuse.

Where Member States operate immigration controls overseas they must, at the very minimum, accept a corresponding responsibility to facilitate entry to the EU for those persons with protection needs. In this regard, ECRE supports the proposal of the Commission to further explore the facilitation of protected entry into the European Union as an ‘emergency strand’ of an EU-wide resettlement scheme as one way to begin to address this issue.¹³ The opportunity to apply for a humanitarian visa for nationals from countries where serious human rights violations are occurring should also be further explored.

In the specific case of interception measures at sea, these need to take into account the safety and needs of asylum seekers. International maritime law clearly sets out States’ obligations to come to the assistance of persons in distress at sea¹⁴. This obligation is unaffected by the status of the persons in question, their mode of travel, or the numbers involved¹⁵, but current practices of some EU States of interception risks undermining the humanitarian values of the International Law of the Sea¹⁶ and denies persons in need of protection access to the EU.

Asylum seekers and refugees need to continue to be rescued and need to have prompt access to a fair and regular asylum determination procedure. This will only be ensured if clear rules have been established as to which state is responsible. ECRE would urge the development of a shared understanding amongst EU Member States recognising which State is responsible for addressing any protection needs of intercepted persons¹⁷ and admitting asylum seekers whether interception takes place in international or national waters, in order to avoid chaotic scenarios and to allow for prompt disembarkation from vessels. Refusals to permit prompt disembarkation might seriously undermine rescue-at-sea and other international obligations.

The fight against illegal immigration has also resulted in a shift from an EU-focused/internal dimension to an external dimension currently focusing on shifting responsibility to third countries through the use of readmission agreements and other mechanisms which externalise migration control functions beyond the borders of the EU. With such objectives in mind Member States have expanded and created definitions of safe third countries in a way that endangers the safety of refugees and asylum seekers.

ECRE believes that readmission agreements made by the EU with third countries must include effective safeguards which ensure that people seeking protection are referred to the proper determining authorities and are able to have their claim for

¹³ Communication from the Commission to the Council and the European Parliament on the managed entry in the EU of person in need of international protection and the enhancement of the protection capacity of the regions of origin – Improving Access to Durable Solutions, COM(2004) 410

¹⁴ For example the United Nations Convention on the Law of the Sea of 1982, the International Convention for the Safety of Life at Sea of 1974 (as amended), the International Convention on Maritime Search and Rescue of 1979 (as amended).

¹⁵ UNHCR Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea March 2002

¹⁶ The recent difficulties surrounding the incident of the Cap Anamur highlight this problem.

¹⁷ UNHCR’s Conclusions on Protection Safeguards in Interception Measures, October 2003

protection considered under the regular asylum procedure¹⁸. In this regard, the EU, in developing core training for border guards in the context of the establishment of a European Agency for the Management of Operation Co-operation at the External Borders, should ensure appropriate and continuous training with regards to the legal obligations of States under international human rights and refugee law, and the consequent responsibilities of border guards.

Improving national asylum procedures

Few essential safeguards to ensure asylum seekers have access to fair and efficient asylum procedures have been agreed during negotiations on the draft Asylum Procedures Directive, and even those agreed are not guaranteed due to the many conditions under which Member States can derogate from them. States should never be exempt from implementing certain basic standards such as the right to a personal interview, access to free legal advice for all asylum seekers who require it, sufficient time to allow for proper preparation of the asylum application and an opportunity to appeal any negative decision to an independent body with suspensive effect.

All too frequently, proposals to reduce or remove protection safeguards are justified with reference to low recognition rates across the European Union, but ECRE believes that these figures are often the result of serious shortcomings in the asylum procedures of Member States.

The reliance on concepts such as the "internal protection alternative", "safe country of origin", and "safe third country"; a procedural framework whereby applications are channelled through admissibility and accelerated procedures which deny the applicant time to prepare the asylum application; a procedural emphasis on supporting evidence and the credibility of the applicant, and more generally, the under-resourcing of procedures and poor training of decision makers are all factors which might contribute to a system's failure to recognise refugees and grant protection to those in need. ECRE would therefore contend that it is in fact the failure of current asylum procedures to correctly determine asylum claims in an efficient way that threatens the credibility of the institution of asylum.

ECRE believes that there is a clear need to improve the quality of the examination of asylum applications in EU Member States and the speed of procedures, without sacrificing legal and procedural safeguards. Consequently, ECRE wholeheartedly supports the Commission in its efforts to promote "frontloading" of national asylum procedures and to promote the need for a single asylum procedure.

¹⁸ Concerns around the misapplication of EU readmission agreements to asylum seekers are strongly expressed by the EU Network of Independent Experts on Fundamental Rights who have said that it "would have been preferable if the scope of the readmission agreements had been defined more precisely by specifically asserting that the case of persons seeking international protection in the European Union is excluded and that their removal from the territory of the Union must be in keeping with the international obligations of the Member States", p28, Thematic Comment No2: Fundamental Rights in the External Activities of the EU in the fields of Justice and asylum and immigration in 2003, 4 February 2004.

Integration of refugees and those with complementary forms of protection in the European Union

Few concrete initiatives have been undertaken at European level during the past five years to facilitate the process of refugee integration in the European Union. Apart from some useful integration project activities funded by the European Refugee Fund, the promotion of an integration policy for refugees has been mostly rhetorical or limited to work on defining common basic principles, and the establishment of a network of National Contact Points on Integration to exchange information and examples of 'good practice'.¹⁹ Therefore, ECRE believes it is important that the Union steps up its efforts to promote refugee integration and put in place adequate measures in order to support the action of Member States.

In this respect, the reception phase is an integral part of the integration process of refugees and asylum seekers into their host societies. The quality of reception conditions during the examination of asylum claims is key to the facilitation of their integration as well as the content of the status granted to persons recognised in need of international protection.

The EC Reception Directive, despite its reasonable minimum standards, does not provide a framework which fully promotes the integration of refugees. For example, it allows Member States to "refuse reception conditions in cases where an asylum seeker has failed to demonstrate that the asylum claim was made as soon as reasonably practicable after arrival" which could result in the deprivation of basic health care, social assistance, food and accommodation essential for their survival. Such treatment may be inconsistent with human rights law. Faced with destitution asylum seekers will be at high risk of social exclusion, clearly impeding integration. Moreover, Member States should grant access to employment, as to limit access hinders asylum seekers' self-reliance and eventual integration as refugees. Such policies, including the detention of asylum seekers, totally undermine integration policies.

The Qualification Directive provides for social assistance and health care for refugees with refugee status in the same manner as EU nationals. However it does not do the same for beneficiaries of subsidiary forms of protection whose benefits can be reduced to so-called 'core benefits'²⁰ which are significantly lower than those enjoyed by EU nationals. Access to the labour market for persons with subsidiary protection is not guaranteed and the withholding of this right has no specified time limit. Employment restrictions upon status determination seriously hinder refugee integration in the long term as they risk pushing people into illegal work or encouraging dependency on public assistance.²¹ Member States may also limit social assistance, are not obliged to give access to health care under the same conditions as nationals and can restrict access to further education²² - a key element in fostering integration.

¹⁹ This work will culminate in the production of a Handbook on integration for policy makers and practitioners, covering the introduction of newcomers (in particular language learning), participation of migrants in civic and political life, and indicators.

²⁰ Core benefits are defined as income support, illness, pregnancy and parental assistance, Qualification Directive, Article 26.

²¹ See ECRE's Position on the Integration of Refugees in Europe, December 2002.

²² Qualification Directive, Articles 27, 28 and 29.

ECRE reminds Member States of the need to promote independence and facilitate the participation of *all* persons in need of protection in all aspects of the economic, social, cultural, civil and political life of the country of asylum as early as possible. Member States should implement Recommendation E contained in the Final Act of the Conference of Plenipotentiaries which adopted the 1951 Refugee Convention, and which states that individuals not covered by the terms of the Convention should be granted the treatment for which it provides.

Successful integration is a two-way process and depends on the development of a tolerant, inclusive society just as much as on efforts by refugees to adapt to their environment. For the next five years, more initiatives that reflect this two-way nature of integration are needed. For example, in order to foster a greater understanding of why refugees are forced to flee their countries of origin, and why Europe has a responsibility to protect refugees, more needs to be done to educate the public about these issues. Given the role of education in shaping public perceptions, training on human rights and refugee issues should be incorporated in relevant educational curricula. Education at schools, colleges and in the workplace should promote respect for differences, highlight the benefits of cultural diversity and prepare people to live in an increasingly diverse society and economy.

Political leadership and responsible media reporting are also needed to shift the balance of the debate. The focus should move from deterrence, numbers and costs to asking how to meet most effectively European states' international obligations, while acknowledging the fears and needs of host communities. It is essential to engage with local communities, raising awareness and building confidence, preparing for the arrival of newcomers and reassuring them that local services will be properly resourced. There is the need to promote positive images of refugees and their contribution to society both historically and contemporarily, and to formulate media messages based upon well-documented and comprehensive information, to improve public perceptions of refugees.

Finally, the role of refugee community organisations in highlighting the contributions refugees make to the society should not be underestimated. Therefore, greater efforts in capacity-building in the refugee community organisation sector is necessary to enable refugees to create their own associations, delivering services to their members and engaging in dialogue with statutory and voluntary organisations on policy issues.

Ensuring adequate safeguards in European return policies

Steps taken such as the development of a common return policy and the agreement of financial instruments for return activities at the EU level demonstrate EU States' interest in increasing collaboration on returns. Certain Member States are additionally co-operating on collective expulsions from their countries. The same level of interest has not been shown in the development of EU minimum standards on return procedures however, which would be a tool to safeguard against the inappropriate use of return and to ensure safe and dignified return procedures. ECRE therefore urges the development of such EU standards in the coming phase in order to ensure that adequate safeguards are built into States' return practices which fully reflect their obligations under international human rights law.

One of the main aims of such standards should be to ensure that persons who may be in need of protection or another humanitarian residence status are not returned. In addition they would have to consider the specific needs of vulnerable groups such as the elderly, children and those with serious medical conditions.

These standards would need to address the fact that the physical process of return should take place under dignified conditions. We would recommend that, if used, forced return should be effected in accordance with the standards set out in the Recommendation on the return of rejected asylum seekers of the Council of Europe's Committee of Ministers.²³ This states that return should take place "in a humane manner with full respect for fundamental human rights" and "without excessive use of force". The responsibility of States to ensure the safety of persons subject to removal proceedings cannot be transferred, formally or informally, to organisations assisting in the return process such as airlines.

Detention prior to removal would also need to be addressed. ECRE believes it should only be used as a last resort, in limited circumstances prescribed by law; that law and its application, including the length of detention, should not be arbitrary. The right to challenge the legality of detention in court must also be guaranteed and access to free legal advice and relevant organisations should be ensured.

European States also need to refrain from expelling, on a collective basis, persons who no longer have a legal basis for remaining in Europe.²⁴ In order to ensure full compliance with human rights obligations, expulsions need to be carried out in conditions of transparency and on the basis of individual decisions.²⁵ Further, facilities should be provided which enable persons subject to expulsion orders to pursue their right to an effective remedy as set out in international law.²⁶

Dublin II and burden and responsibility sharing

The recent dispute between Germany, Italy and Malta over who should take responsibility for the asylum applications of passengers on the Cap Anamur highlighted the absence of an equitable system for sharing responsibility between EU Member States that is also fair to asylum seekers. The Dublin II Regulation, just like its predecessor the Dublin Convention, works neither in the interests of Member States nor asylum applicants. The basis of the Regulation is based on the same flawed principle as the Dublin Convention i.e. responsibility for examining an asylum application lies with the Member State that allowed the applicant to enter the EU or failed to prevent their entry. While the number of asylum applications has gone down,

²³ Recommendation No. (99) 12.

²⁴ See also Article 19(1) European Charter of Fundamental Rights of the European Union.

²⁵ Paragraph 12, Recommendation of the Commissioner for Human Rights concerning the rights of aliens wishing to enter Council of Europe Member States and the enforcement of expulsion orders, 19 Sept 2001, CommDH/Rec (2001) 1

²⁶ See Committee of Ministers Recommendation on the right of rejected asylum seekers to an effective remedy, Council of Europe, Recommendation No. R (98) 13. Also, Article 2 (3) ICCPR provides a right to an effective remedy to persons whose human rights may have been violated under the Covenant. Further, the Human Rights Committee has stated that non-nationals "must be given facilities for pursuing (their) remedy against expulsion so that this right will in all circumstances be an effective one", Paragraph 19.2, *Hummel v Madagascar*, Communication No. 155/1983

on average, across the EU, it has increased in some States, particularly some of the new Member States. Responsibility for examining asylum applications is shifting to those States with extended land and sea borders in the south and east – the principal migration entry points. These States – the new Member States of central Europe and the southern European States – have the least developed asylum infrastructures in the European Union.

Dublin II, which places an unfair responsibility on Member States with long external borders, would appear to be contrary to the principle of solidarity between Member States. Furthermore, with standards and practice so divergent across the EU, Dublin II remains a ‘protection lottery’ for asylum seekers. Even once the instruments of the first stage of harmonisation have been fully transposed into national legislation, which will take some years, the latitude given to States is so great that there will be far from a level playing field.

The impact of Dublin II must be assessed and the Regulation reviewed and replaced with a system that is fair to States and fair to asylum seekers.

Durable solutions and the external dimension of JHA policies

The rest of the world is watching the EU’s ambitious project of creating an area of freedom, security and justice. It is vital that Europe is seen to uphold its own values in the way that it manages the core issues of asylum and immigration. States lacking the EU’s resources will be quick to follow suit if they see the EU attempt to shift or evade its responsibilities for refugee protection and safeguarding human rights.

It is in the EU’s own interest to foster support for the 1951 Refugee Convention and the international protection regime. It is, after all, a global safety net: 70% of the world’s refugees are hosted not within the EU, but by poorer, developing countries. It is in the EU’s interest to promote respect for human rights, not least because disrespect for human rights is the common denominator of the countries of origin of most asylum seekers arriving in Europe. It is also a key push factor for refugees who feel compelled to leave neighbouring countries and embark on the often dangerous journey to Europe.

The EU’s prioritisation of measures to fight illegal immigration over fighting the root causes of refugee flight and improving refugee protection in third countries has led to a sharp disparity between the EU’s efforts to integrate migration issues into external policies and its human rights and development co-operation policies and objectives.

Proposals to establish processing centres in countries outside of the EU, the emphasis the EU places on migration control in its relationship with partner countries and the undignified competition to lower procedural, protection and reception standards for refugees and asylum seekers within the EU may all be seen as attempts to shirk responsibility. The EU must be seen to practise what it preaches, or else the international protection regime is dangerously compromised.

On a more positive note ECRE welcomes the importance attached by the European Commission's recent Communication²⁷ to the search for durable solutions to refugee situations, namely local integration, voluntary return or resettlement to a third country. The Commission proposes ways in which the EU might strengthen the global refugee protection system by establishing an EU resettlement scheme and by enhancing the protection capacity of countries in refugees' regions of origin.

A greater commitment to resettling the most vulnerable refugees, as well as capacity building projects could strengthen international refugee protection and contribute to local integration in countries of first asylum and transit by showing that the EU is willing to give practical assistance to those countries that shoulder the greatest burden and responsibility.

Nevertheless, these activities must go hand in hand with improvements to national asylum procedures, reception conditions and the integration of refugees within Europe. The external dimension of the EU's JHA policies must not be undermined by asylum policy and practice within Europe. A welcome initiative to develop a more holistic and integrated European refugee policy does not lessen in any way Member States' obligations to consider and process asylum applications made by people who make their own way. Nor should the EU's desire to contain asylum seekers within their regions of origin detract from what should be the ultimate goal: to tackle the conflicts, poor governance and human rights abuses that cause people to flee their countries in the first place.

Expanding resettlement opportunities in Europe

ECRE wholeheartedly supports the rapid development of an EU-wide resettlement scheme. Firstly, it would contribute to the global resettlement effort that has three traditional roles: to act as a protection tool, a durable solution and a demonstration of solidarity with countries of first asylum. An EU-wide scheme should build on the character of national schemes operated by some Member States that play an important role in the international resettlement effort by focusing on the most vulnerable refugees. Secondly, the experience of traditional resettlement countries is that a resettlement programme can help foster public understanding and sympathy for the plight of all refugees. Such public support for the principle of asylum is vital to the credibility of the asylum system: without it, demands for ever tougher measures spiral inexorably. Nevertheless, great care must be taken to avoid promoting the idea of good refugees (resettled) and bad (those arriving as asylum seekers) which can lead to the development of iniquitous two-tier systems. Expanded use of resettlement does not replace Member States' responsibilities to consider and process asylum applications of persons arriving spontaneously on their territory.

Capacity building in regions of origin

The Commission has proposed the establishment by December 2005 of EU Regional Protection Programmes that would consist of a "tool box" of measures to help host countries in refugees' regions of origin become "robust providers of effective

²⁷ 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 solutions", COM (2004) 410 final

protection". ECRE underlines the need for benchmarks used by the EU to include all existing international human rights standards as well as to establish the existence of a durable solution for each individual refugee.

Concrete measures to support refugee-hosting countries and help them provide a better quality of protection are to be welcomed. ECRE is concerned, however, that the proposed "tool box" contains a return element that might lead to premature returns. The inclusion of the 'safe third country' concept could both put refugees at risk and exacerbate secondary movements, if people are sent back to countries before they have become providers of 'effective protection', or where the benchmarks of effective protection are inadequate. Clear and adequate safeguards in this area are essential. Any focus on measures to facilitate swift returns to third countries within a discussion on supporting those same countries becoming "robust providers of effective protection" risks undermining the promotion of fruitful partnerships with third countries.

Proposals by some Member States to establish 'refugee camps' outside the European Union

In recent months, some Member States and politicians have resurrected the idea of building 'refugee camps' or 'transit camps' in countries outside the European Union, similar to a UK proposal that met with strong opposition from NGOs and at the June 2003 Thessaloniki Council from other Member States. That proposal was strongly criticised by a UK parliamentary enquiry which heard evidence from several ECRE member agencies.²⁸

Ministers from Austria, Estonia, Latvia and Lithuania have recently suggested that a reception camp for Chechen refugees be built in the Ukraine. Both the German Interior Minister, Otto Schilly, and the incoming Commissioner for Justice and Home Affairs, Rocco Buttiglione, have proposed that camps might be built in North Africa, in Libya, for example, for people intercepted at sea. Mr Schilly's proposals appear to have been made in response to the Cap Anamur crisis, which highlighted the absence of an adequate mechanism for sharing responsibility for asylum seekers within the EU.

At present, these proposals are extremely vague. However, ECRE warns that any proposal to transfer responsibility for refugee status determination outside the territory of EU Member States to third countries at the borders of Europe or in the region of origin risks being incompatible with the fundamental right to seek and enjoy asylum enshrined in Article 14, 1 of the Universal Declaration of Human Rights (1948) and Article 18 of the Charter of Fundamental Rights of the European Union (2000). It may also seriously compromise a number of other fundamental rights of those fleeing persecution as included in the Refugee Convention and other international human rights treaties.

Key tests for such proposals include:

²⁸ Handling EU asylum claims: new approaches examined, HL 74, House of Lords, April 2004

- Are they legal? Do they comply with the 1951 Refugee Convention, ECHR and other applicable international human rights instruments?
- Do they guarantee protection and a durable solution to refugees, together with the return of those not in need of protection? If not, they will likely lead to long-term warehousing and the growth of “super Sangatte”-style camps.
- Are they aimed at sharing the responsibility for refugee protection or shifting it outside of the EU?
- Do they enhance the international protection regime or undermine it?
- Are they practical and proportionate? The costs of ‘off-shore’ processing by countries like Australia and the US have proved prohibitive in the past.
- Do they foresee the use of detention? How will it be compatible with the ECHR?
- Do they take into account as far as possible asylum seekers’ wishes as to the country of asylum, as recommended by UNHCR’s Executive Committee?

Conclusion

The community of refugee-assisting organisations is committed to increased and constructive dialogue with European governments, institutions and policy-makers in order to work towards the development of more humane and fair asylum policies within the European Union, and in order to support the EU’s role in strengthening the global refugee protection system. On this basis ECRE will be putting forward in the future a set of more comprehensive proposals on how Europe can more effectively achieve concrete improvements in refugee protection.

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