

Submission from the European Council on Refugees and Exiles in response to the
 Commission’s Green Paper on the Future Common European Asylum System
 (COM (2007) 301)

EXECUTIVE SUMMARY	1
1. INTRODUCTION.....	4
2. LEGISLATIVE INSTRUMENTS	5
2.1 Processing of asylum applications	7
2.2 Reception conditions for asylum seekers	12
2.3 Granting of Protection	17
2.4 Cross-cutting issues	22
2.4.1 <i>Appropriate response to situations of vulnerability</i>	22
2.4.2 <i>Integration</i>	25
2.4.3 <i>Ensuring second stage instruments are comprehensive</i>	29
3. IMPLEMENTATION - ACCOMPANYING MEASURES	31
4. SOLIDARITY AND BURDEN SHARING	35
4.1 Responsibility sharing	35
4.2 Financial solidarity	39
5. EXTERNAL DIMENSION OF ASYLUM.....	41
5.1 Strengthening protection in third countries	41
5.2 Resettlement	45
5.3 Addressing mixed flows at the external borders	47
5.4 The role of the EU as a global player in refugee issues	51

EXECUTIVE SUMMARY

The European Commission’s Green Paper on the future Common European Asylum System (CEAS) puts refugee protection back on the EU agenda, which for too long has been dominated by the fight against irregular migration. Border and migration control measures are making it increasingly difficult for asylum seekers to reach the EU, while those that do succeed are met with widely divergent asylum systems and standards, eight years after the European Council in Tampere set the objective of establishing a common system. Member States show little willingness to share the burden and responsibility of refugee protection with each other, let alone with the developing countries that shoulder the lion’s share of the global responsibility. Nor do they appear to recognise that restrictive EU asylum policies are highly contagious and weaken the global refugee protection regime.

Asylum applications in the EU have fallen to a 20 year low, partly attributable to migration control measures that effectively prevent refugees, alongside irregular migrants, from ever reaching EU territory. Operations by the Frontex borders agency and standing patrols in the Mediterranean are new additions to an immigration control arsenal that includes visa requirements, fines on carriers found to be transporting people with inadequate documents, measures to tackle human smuggling and human trafficking and cooperation with third countries. More transparency and monitoring is needed of these activities. The EU should recognise explicitly that the power to prevent access to the territory carries with it the responsibility to protect those in need. People seeking refuge in the EU need a reasonable alternative to risking their lives in a small boat on the Mediterranean.

Before embarking on the second phase of the creation of a CEAS, the inadequacies of the first phase must be addressed. The Commission must continue to carry out evaluations on the implementation of the core asylum instruments and propose amendments accordingly. In particular, to assess whether clauses in migration control instruments intended to safeguard against *non-refoulement* are given proper effect. Permanent monitoring mechanisms are needed to ensure that Community instruments guarantee consistent and appropriate standards across the Union.

Second phase legislation must raise EU standards, so that they at least meet international norms. Gaps and inconsistencies in the legislative package must be resolved and the goal must be to guarantee that Member States abide by their obligations. The current asylum lottery must end so that no person who would be recognised as in need of protection in one Member State is denied it in another. Reforms should aim to facilitate from the outset the integration of those asylum seekers who will be granted asylum and not to deter those who will not. The second phase should aim to create a system that delivers the same quick, efficient and fair procedure, wherever a claim is lodged and facilitates the integration of successful claimants by enabling them to move to the country where they have strongest links, such as extended family members, social networks, employment opportunities, and cultural or linguistic ties.

Immediate priorities include granting beneficiaries of subsidiary protection the same rights as refugees, as their needs are the same. In order to avoid being people being left destitute in a state of limbo, any person with a right not to be removed should be entitled to subsidiary protection. Once recognised, persons qualifying for protection should have the right to move within the EU. Resources should be front-loaded, focussed on deciding on the claim itself, and procedural obstructions to a fair hearing removed, such as ‘safe country’ notions, transit zones and special border procedures. More clarity and precision is needed on the permissible use of detention, as well as precise yardsticks on the minimum level and form of reception conditions, from which member states should not be permitted to derogate. Guidelines and resources are needed to ensure the correct treatment of vulnerable groups, such as children and victims of torture and sexual violence.

While protection gaps between member states remain so great, the Dublin Regulation should be radically revised to ensure that individuals are not forcibly transferred to Member States that do not offer a comparable prospect of protection or which lack adequate reception facilities. The human cost of implementation of the Dublin rules needs to be mitigated with reforms that ensure that families are kept together, the use of detention kept to a minimum

and asylum seekers are guaranteed access to a procedure. Complementary measures are also required to address the situation of those Member States who experience particular or extreme pressures as a result of their geographic location, including exploring the possibility of intra-EU reallocation, subject to the applicant's consent. Existing financial instruments should be adjusted or new ones created in order to ensure that Member States are compensated financially for the full cost of asylum procedures, integration and return measures.

Core to a common asylum system must be consistent, inclusive interpretation of EC law, as well as international standards. The process of judicial review would be accelerated and asylum seekers would have more rapid access to justice, if referrals to the European Court of Justice were not limited to courts of last instance. The new Fundamental Rights Agency should also play an important monitoring role. Alongside the judicial process, Member States should enhance the process of practical cooperation to ensure the exchange and application of best practice. This could be achieved by a well-resourced European Asylum Support Office whose activities would be founded on principles of democratic accountability, transparency and cooperation with UNHCR and civil society. They would include the development of a curriculum for decision makers, common qualifications and guidelines on deciding certain types of cases and dispatching expert support teams to assist member states in asylum determination. In the longer term, it could develop a stronger, more regulatory role by hosting a common country of origin database and independent country research function, and an advisory board of international experts that would develop mandatory guidelines and dispatch quality assurance teams where disparities in Member State procedures had given rise to concerns.

Responsibility-sharing within the EU has to be matched with a demonstrable willingness to share the burden and responsibility of refugee protection with third countries. While migration management ambitions should not be allowed to divert development assistance from core objectives, such as the alleviation of poverty, EU development assistance and foreign policy leverage could be used more effectively to achieve a comprehensive and coherent approach to refugee situations in developing countries. An increasing number of Member States are undertaking resettlement activities at the national level, but they should demonstrate their willingness to share responsibility by moving more rapidly towards a European resettlement scheme. An EU scheme could be used strategically to win protection dividends in the country of first asylum for those not resettled, to help resolve protracted refugee situations and to garner public understanding for refugees' situations.

ECRE looks forward to engaging with the Commission and all stakeholders, including refugees themselves, in a sensible, open discussion on how Europe can live up to its international duties, set standards on asylum that are consistent with fundamental rights and share responsibility for refugee protection fairly between member states as well as with the rest of the world.

1. INTRODUCTION

The European Council on Refugees and Exiles (ECRE) is a network of almost 80 non-governmental refugee-assisting organisations in 31 European countries. ECRE welcomes this opportunity to comment on the Green Paper on the future Common European Asylum System (CEAS) presented by the Commission in June 2007.

The Green Paper puts refugee protection on the EU agenda, which for too long has been dominated by the fight against irregular migration and, more recently, debates about the benefits to be gained from legal migration. EU action in these areas, while legitimate, must be conducted in a manner consistent with Europe's fundamental values and obligations. The risk is that human rights are pushed to the sidelines. Europe needs a sensible, open discussion on how to live up to its international duties, to share responsibility for refugee protection fairly between member states as well as with the rest of the world, and to set common standards on asylum that are consistent with fundamental rights. It is to be welcomed that the Green Paper opens up this discussion to all stakeholders, including NGOs and refugees and asylum seekers themselves.

These comments follow the order of the Commission's paper and the questions posed. Some recommendations are new while others draw on ECRE's Way Forward proposals¹, as well as other ECRE positions listed in Annex 1. In addition, ECRE is currently developing a policy position on the difficulties faced by refugees who wish to seek asylum in Europe, but who are not yet on the territory.

Background

ECRE's 2004 assessment of the first stage of the creation of a CEAS warned that the legislation adopted would not ensure that refugees would be guaranteed protection across the whole of the European Union. Nor would it effectively share the responsibility for receiving refugees between member states or contribute significantly to the approximation of national practices². While the harmonisation process has resulted in improvements in some member states, with several countries having to introduce major new legislation in order to meet the minimum standards required, serious flaws and divergences remain.

UNHCR figures show a global rise in the number of asylum applications made in 2006, the largest single increase in internally displaced people and the first increase in the global refugee population since 2002. Meanwhile the number of asylum claims made in Europe has fallen to a 20 year low, which can be attributed, in part at least, to migration control measures that effectively prevent refugees, alongside irregular migrants, from ever reaching EU territory. The NGO United has documented almost 9,000 casualties of the fight against illegal immigration,³ while the Spanish government estimated that 6,000 people died trying to enter Spain in 2006 alone.

¹ *Europe's role in the global refugee protection system. The Way Forward: An Agenda for Change*, ECRE, 2006

² *Broken Promises - Forgotten Principles: ECRE Evaluation of the Development of EU Minimum Standards for Refugee Protection*, ECRE, 2004 http://www.ecre.org/resources/policy_papers/228

³ http://www.united.non-profit.nl/pdfs/actual_listofdeath.pdf

The wide divergence in the quality of protection available in the EU, combined with the Dublin system that allocates responsibility for an asylum claim without regard to those disparities in protection, currently amounts to a dangerous lottery. In 2006, for example, Sweden recognised more than 80% of Iraqi asylum seekers as in need of protection, while in Germany only 11% of asylum seekers had positive outcomes; moreover Germany stripped more than 18,000 Iraqis of their refugee status. Effectively, the ‘Common European Asylum System’ becomes a ‘lottery’ for asylum seekers, with their chance of receiving protection dependent on which State is found to be responsible for assessing their claim. The harmonisation process, although not a panacea, could and should prevent the current divergences and lead to consistent decision-making in line with member states’ international obligations and humanitarian traditions.

ECRE’s interest lies more in member states adhering to their international obligations, than in whether they are unfairly burdened by doing so. But the absence of any mechanism to share responsibility equitably between member states simply encourages responsibility-shifting. The introduction of a mechanism for sharing responsibility more equitably would discourage member states from pursuing policies aimed at deterring asylum seekers or deflecting them to another member state.

The goal of the second stage of the creation of a Common European Asylum System, as formulated by the Commission, is “to achieve both a higher common standard of protection and greater equality in protection across the EU and to ensure a higher degree of solidarity between EU Member States.” Given the low current standards in a number of areas, the aim of achieving “higher” standards may be rather modest. The primary objective must be to ensure that EU asylum law is in accordance with the 1951 Geneva Convention and other relevant treaties. A secondary aim must be to ensure that no person who would be recognised as in need of protection in one part of the Union would face a risk of *refoulement* in another. Europe needs to recognise that the system fails not when a member state fails to expel a person who is in breach of immigration rules, but when a person is wrongly sent to a place where they face persecution, torture, serious harm as a result of armed conflict, inhuman or degrading treatment. People seeking protection should not be forced to risk their lives in order to reach a place of safety in the EU, and should not be left in a limbo, without a legal status or passed ‘in orbit’ from one member state to another, or to a third state.

2. LEGISLATIVE INSTRUMENTS

The Tampere Conclusions first articulated in 1999 the EU’s objective of a common asylum system, speaking of an area of freedom, security and justice, where people could enjoy the freedom to move freely in “conditions of security and justice accessible to all”. The Union would have to develop common policies on asylum and migration because “it would be in contradiction with Europe’s traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory.” By contrast, the most serious flaw ECRE sees in the system as it is developing, is the growing array of measures to tackle irregular migration that do prevent people from gaining access to the territory, no matter how justified they may be in their desire.

The target of achieving a common asylum system by 2010 is ambitious and may be unrealistic but until a common system is in place, member states will continue to be tempted to divert asylum seekers away with harsh national asylum policies. In order to help create a

more stable, secure world based on respect for fundamental rights, the EU needs to lead by example and show that member states can agree to live by the values they proclaim. Moreover, serious flaws in the current system require urgent attention.

Legislative base

Some of the language used in the Green Paper appears to go beyond the current base for legislation in this area. While the Tampere conclusions and the Hague Programme speak of a common asylum procedure and a uniform status for those who are granted asylum valid throughout the EU, the legal base is still Art 63 of the Amsterdam Treaty, which refers only to minimum standards.

The Intergovernmental Conference on the reform of the constitution is considering amending the relevant parts of the Treaties, in order to provide a legal base for a common system. Meanwhile, the Union should act quickly to remedy the serious flaws of the first stage, plugging the gaps and raising standards, particularly where those agreed so far fail to meet the requirements of international law.

Evaluation

The Commission has to date only published one evaluation relating to the first stage of the CEAS: a review of the Dublin Regulation. It must continue to carry out evaluations on the implementation of the core asylum instruments and propose amendments accordingly. Any second stage legislation must include reforms of the corresponding first stage instrument arising from those evaluations, as well as from judgments of the ECJ, the ECtHR, national courts and other relevant international treaty organs. This process should not be time-limited. Durable legal safeguards, permanent monitoring mechanisms, and continual reforms are needed to ensure that Community instruments guarantee consistent and appropriate standards across the Union.

Transposition

Member States have been slow to transpose even the minimum standards agreed in the first stage. Only six, for example, had notified the Commission that they had implemented the Qualifications Directive by the required deadline. The Commission, in return, has not been speedy in holding member states to account: its report on the implementation of the Dublin Regulation was more than a year late, while a report on the Directive on reception conditions was due in August 2006 and has not yet been published.

Timely and thorough reporting on implementation of directives and application of regulations is vital to the development of the CEAS. The Commission should be provided with the resources needed to fully involve civil society in carrying out this work.

European Court of Justice (ECJ)

In an exception to usual Community practice, referrals to the ECJ in the area of asylum law are permitted only from the court from where no further appeals are possible. Consequently the many contentious provisions of the first stage instruments have not yet been referred to the Court. In the absence of evaluations of the instruments and guidance from the ECJ, the basis for any second stage instruments is unclear.

The Draft Reform Treaty⁴ includes welcome proposals to amend rules that currently permit referrals to the ECJ only from courts of last instance. Allowing lower courts to refer questions of interpretation of EC law to the Court would bring this area into line with other areas of Community law. More importantly, it would improve access to justice for asylum seekers, accelerate the process of implementation of first stage asylum instruments and clarify more rapidly numerous issues that were deliberately left unresolved during the legislative process in order to overcome political differences between Member States.

In other new areas of Community competence, an initial flurry of litigation has proved useful and necessary in order to clarify fundamental principles. The Court might risk becoming overburdened as a result, but steps could be taken in order to deal with a potentially significant increase in asylum cases. Possible measures could include the establishment of a special chamber in the court of First Instance, or an emergency written procedure.

Fundamental Rights Agency

Asylum will be an important area of work for the new EU Fundamental Rights Agency, which this year replaced the EU Monitoring Centre on Racism and Xenophobia. In its draft multi-annual framework for the Agency⁵, the Commission has proposed that asylum should be one of the thematic areas to be covered by the agency, alongside visa and border control and immigration and integration of migrants amongst others. While the Agency's remit is limited to the implementation of Community law, within EU territory, it has the potential to play an important role in the monitoring and evaluation EC asylum law

2.1 Processing of asylum applications

The single most fundamental objective of a Common European Asylum System (CEAS) must be to end the current asylum lottery. Dramatically differing recognition rates are a product not only of differences in interpretation of criteria for qualification for a protection status, but also of variation in the quality of procedures, in spite of the instruments adopted at the first stage of the creation of a CEAS that seek to set minimum standards. Every person claiming asylum in the EU should have access to one fair and thorough asylum determination procedure that meets international standards.

(1) How might a common asylum procedure be achieved? Which aspects should be considered for further law approximation?

It is as yet unclear what might be envisaged by a common asylum procedure: whether it might be a system operated by an EU body or whether Member States' national procedures would be moulded to an EU template. An EU procedure would not have to be physically centralised: a system could be devised where EU adjudicators could sit anywhere in the Union. Currently, however, there is a little sign among Member States of an appetite for creating new EU structures.

⁴ Draft treaty amending the Treaty on the European Union and the Treaty establishing the European Community.

⁵ *Proposal for a COUNCIL DECISION implementing Regulation (EC) No 168(2007 as regards the adoption of a Multiannual Framework for the European Union Agency for Fundamental Rights for 2007-2012*, COM (2007) 0515 Final

Pending adoption of a legal basis for common procedural standards or a common asylum procedure, Member States are left with the urgent need to address the serious shortcomings of the minimum standards instruments and ensuring that national asylum systems produce more consistent outcomes. It is vital that any significant differences in recognition rates are due to the nature of the actual cases being presented, and not either to deficiencies in procedures and status determination in some Member States or to political decisions regarding certain countries of origin.

The Dublin system offers asylum seekers little or no choice in determining the country where their application will be considered. While there continues to be a wide divergence in protection practice and outcomes, the injustice of compelling a person to apply for asylum in country A, which has a low recognition rate and not in country B, which has a high one is obvious. One solution would be to allow asylum seekers more scope to choose the Member State, where they have the greatest chance of finding protection. Another, possibly more realistic political option, is to strive to achieve international standards of protection across the board.

Legislation is needed to address the flaws in the asylum procedures directive, while the courts carry out their ongoing function of clarifying the law, assessing its compatibility with international standards and Member States' implementation. Alongside that legal and judicial process, effective monitoring systems are needed, independent of Member States, to scrutinise and control asylum decisions and the procedures themselves. Analysis of recognition rates might indicate a wide variation between Member States in decisions on asylum claims from nationals of a particular country, or particular ethnic group. That might trigger interventions, such as an inspection by an independent expert team of the decision making process.

(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?

The EU has developed a plethora of measures to better manage migratory flows to the EU and protect its external borders from the arrival of irregular migrants. The objective is to achieve an integrated border management programme that ensures a high and uniform level of control – seen as an essential prerequisite for an area of freedom, security and justice. The common characteristic of these measures is that they fail properly to distinguish asylum seekers from other migrants.

Measures that prevent asylum seekers from reaching EU territory are dealt with in section 5 below. Asylum seekers who succeed in negotiating those hurdles and reach a Member State may be unaware of their right to seek asylum, deterred from making an asylum claim or find further practical and legal obstacles in their path.

At some external land borders, asylum seekers are immediately pushed back across the border, either in breach of domestic law or on the basis of readmission agreements and/or the safe third country principle. Alternatively they may face a border procedure that distinguishes the physical presence of an alien from his/her legal presence, and a decision as to the admission to the territory has to be taken for his/her presence to be officially recognised. In at

least one Member State there is a shortage of trained staff at the external land borders, including competent and professional interpreters, no possibility of access to legal counsellors, and instances of *refoulement* have been reported.

Access to the asylum system is inhibited at airports by special procedures designed for swift decisions and rapid removal of those whose asylum claims are rejected. Some member states, such as France, maintain a legal fiction, contrary to jurisprudence of the European Convention on Human Rights (ECHR), that ‘airport transit zones’ do not constitute the territory of the State and that, therefore, domestic and international obligations towards refugees and people in need of protection are not engaged.

Access to asylum procedures must be better safeguarded. Drawing on ECRE’s Guidelines on Fair and Efficient Procedures for Determining Refugee Status⁶ and its Information Note on the Procedures Directive⁷, the following are some of those amendments to the Asylum Procedures Directive necessary to properly guarantee access to procedures:

- Establish a clear obligation to provide access to the asylum procedure;
- Clarify that the only the competent authority may decide on asylum claims;
- Provide an explicit guarantee that border guards should have no role in determining applications, but rather have a positive responsibility to identify persons who may wish to apply for asylum, to register applications and refer them to the relevant determining authority;
- Remove the possibility for Member States to deny some asylum seekers’ basic procedural rights and guarantees, particularly those applying at the border, or coming from ‘safe European third countries’;
- Ensure that asylum seekers, including those who may not yet have articulated a claim, are provided with information about the asylum process in a language they understand;
- Ensure that persons in detention are able to apply for asylum, either by allowing applications to be made by a representative, or by designating prisons and other places of detention, including those at land and sea borders, as places where an application can be made;
- Ensure that dependent adults are entitled to a private interview and that they are informed in private of their right to make an individual claim for asylum at any stage;
- Ease the restrictions on access to legal assistance, so that applicants have the right to legal assistance and representation at all stages of the procedure, free of charge to those who lack the resources;
- Ensure that asylum seekers have access to competent interpreters.

NGOs working with asylum seekers and migrants are increasingly concerned that people in need of international protection who have arrived by irregular means are choosing not to claim asylum. While research is needed on this, it may be that such people are judging that harsh reception conditions, the increasing use of detention, lack of legal assistance, interpretation and adequate procedures mean that the risk of claiming asylum is too great, compared to living, undocumented, invisible to the authorities. Some politicians might argue

⁶ *Guidelines on Fair and Efficient Procedures for Determining Refugee Status*, ECRE, 1999

⁷ *ECRE Information Note on the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status*, ECRE, 2006

that asylum seekers with unfounded asylum claims are being successfully deterred, but if this were so recognition rates would have risen, yet there is little sign of any fall in the proportion of claims rejected. It is neither in the interests of persons in need of protection, nor of states if they are forced underground, where they cannot contribute properly as legal residents (e.g. by paying tax), and are vulnerable to exploitation.

The EU has recognised that irregular migration for economic benefit has to be tackled in a holistic way, so that alongside efforts to strengthen borders, irregular migrants are offered legal routes to come to the EU to work. A parallel recognition is needed that people seeking protection need a reasonable alternative to jumping in a *patera* boat.

Member States, should establish legal procedures for the presentation of asylum requests to diplomatic posts abroad (or, eventually, common EU consular posts) in order to provide the possibility for legal and safe access to Europe for refugees and people in need of protection. A feasibility study was carried out for the Commission on such Protected Entry Procedures (PEPs)⁸ in 2003, which put forward a range of options. Anticipating likely objections, the authors suggested ways in which the number of applications might be managed and procedural safeguards might be included. Any kind of PEP scheme must not undermine the situation of those with protection needs who arrive in an irregular manner and should not be considered as an alternative to resettlement. Consideration should also be given to establishing an EU PEP.

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

The EU should consider how to orientate the asylum procedure to determining the substance of an individual's claim and focus resources on giving them a fair hearing. Devices that prevent asylum seekers from simply being able to make their case, or deny them basic procedural safeguards should be abandoned.

One such device is the use of the safe country notion, which is found in the Procedures Directive in four forms: safe countries of origin, safe countries of asylum, safe third countries and safe European third countries. Member States have failed repeatedly to agree on lists of safe countries of origin – an indication that political motivations can conflict with an objective assessment of safety. The safe country of origin concept is inconsistent with the proper focus of international refugee law on individual circumstances.⁹ Refugee law is not about what happens generally, it is about the protection needs of individuals. A country may well provide generally effective remedies against violations of civil and political rights whilst denying remedy and persecuting a particular individual or group. Channelling certain nationalities into special accelerated procedures lacking essential safeguards creates a real risk of *refoulement* and may amount to discrimination among refugees in violation of international law.

Furthermore, application of the safe third country concept should be strictly limited in accordance with international law and to ensure that it does not lead to violations of the

⁸ See G. Noll, J. Fagerlund and F. Liebaut, *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*, European Communities, Luxemburg 2003.

⁹ *Comments on the Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, ECRE, March 2005.

principle of *non-refoulement*. In particular there must be an effective opportunity to rebut the presumption of safety, as well as a close link of the applicant with the third country and the explicit consent of the third country to re-admit the asylum-seeker and to provide full access to a fair and efficient determination procedure. The safe European third country concept should be abolished altogether as it denies basic procedural rights to asylum seekers and is incompatible with the ECHR and the 1951 Refugee Convention.

More generally, operating supposedly fast-track procedures for certain types of applicants and reducing their rights not only risks sending people back to face persecution but can lead to delays and appeal hearings to correct mistakes. The Directive permits member states to channel a broad range of categories of asylum applicant into accelerated procedures with reduced procedural safeguards. Yet there is little evidence that such procedures are either safe or even, in the long run, efficient.

The Procedures Directive should be revised and the use of safe countries of origin, safe European countries, transit zones, special border procedures, and accelerated procedures abandoned. A common asylum procedure must include fundamental safeguards, including the right to stay on the territory until the asylum claim is finally determined, a full suspensive appeal right, access to UNHCR/refugee-assisting NGOs, a full individual examination of the claim (including a personal interview), and free legal assistance and interpretation throughout the procedure.

ECRE has developed a model asylum procedure¹⁰ in which all asylum claims would be individually and thoroughly assessed at first instance under a single procedure, which is the same for all applicants.

(4) How should a mandatory single procedure be designed?

ECRE has consistently advocated that it is both in the interests of Member States and asylum applicants that a single ‘one stop’ procedure, with the same guarantees, determines whether an applicant may qualify for protection under the 1951 Geneva Convention or whether s/he may qualify for subsidiary or complementary protection on international human rights grounds¹¹. A system where all possible grounds for protection are considered in a single procedure is the most efficient means of identifying those in need of international protection. Almost all Member States already operate a single procedure and setting this as a common standard ought to be straightforward.

It must be emphasised, however, that a single procedure must deliver adequate protection standards, and be based on a full and inclusive interpretation of the 1951 Geneva Convention and other international human rights instruments. ECRE cautions against the extension of minimum standards contained in the Asylum Procedures Directive which could breach international law, and underlines the fundamental nature of the right of all applicants to an effective remedy with suspensive effect (see questions 1-3 above).

Furthermore, in order to avoid undermining the 1951 Geneva Convention refugee status, ECRE would recommend a predetermined sequence of examination so that claims for

¹⁰ *The Way Forward: Europe's Role in the Global Refugee Protection System 'Towards Fair and Efficient Asylum Systems in Europe*, ECRE, September 2005

¹¹ In particular, see *Comments of the European Council on Refugees and Exiles on the Communication from the Commission to the Council and the European Parliament on "A more efficient common European asylum system – the single procedure as the next step"* COM (2004) 503 final, ECRE, 2004

subsidiary protection are examined only after a negative assessment of 1951 Geneva Convention grounds and the provision of a properly reasoned decision for rejecting 1951 Geneva Convention status where subsidiary protection is granted. A judicial review mechanism must be accessible for refugees who feel that they were not granted the appropriate status in order to ensure the correct interpretation of the 1951 Geneva Convention and other international obligations and in order for relevant jurisprudence to develop.

(5) What might be possible models for the joint processing of asylum applications?

One possible model for a future CEAS would involve a system of jointly processing asylum applications. ECRE opposes any system that involves the forced transfer of asylum seekers to centralised joint processing centres or the use of detention other than as a last resort. This would be expensive, impractical and risk violating fundamental rights. However, ECRE would support further exploration of a system of joint processing comprising a single EU determining authority with decentralised offices in each Member State provided it guaranteed full respect for asylum seekers' rights under international law. This would likely entail providing an effective remedy in Community law and the Union itself signing the European Convention on Human Rights. However, numerous questions regarding the legal and financial basis for joint processing and the issue of democratic control and accountability must be addressed. The feasibility study foreseen in the Hague Programme must be undertaken before further steps are agreed.

Furthermore, given that the current political climate arguably renders such far-reaching proposals unrealistic at this stage (at least prior to 2010), the current focus should instead be on improving and harmonising standards through accompanying measures such as practical cooperation (see section 3 below). For example, in the shorter term, member states with large backlogs of asylum cases, or who are experiencing a sudden increase in asylum applications could benefit from the assistance of teams of experts to identify those applicants who qualified for protection under Community law.¹²

Similarly, the idea of profiling mechanisms has been suggested, in order to facilitate the management of large scale arrivals at the EU's external borders. The establishment of preliminary individual profiles would be helpful in identifying whether the person is seeking asylum, an unaccompanied minor or victim of trafficking and in ensuring that they are treated appropriately. However the fact that an individual has not been positively identified as an asylum seeker should not prevent them from accessing the procedure at a later stage or reflect negatively on any asylum claim.

2.2 Reception conditions for asylum seekers

ECRE regrets that the Commission has not yet published its report on the Reception Directive, which was due in August 2006, under Art 25 of the Directive. The Commission's

¹² See Section 2, *The Way Forward: Europe's Role in the Global Refugee Protection System 'Towards Fair and Efficient Asylum Systems in Europe'*, September 2005.

report is to be based on a study by the Odysseus academic network, which was completed in October 2006, which also remains unpublished. Although ECRE¹³ and other NGOs¹⁴ have carried out limited studies of the transposition of this directive, responses to the Green Paper would be better informed if the Commission's report were in the public domain.

(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?

The Reception Conditions Directive generally provides an adequate minimum standard of reception for applicants for asylum. Like other instruments of the first stage of the CEAS, however, the Directive gives member states broad latitude in numerous areas, exemplified by frequent use of 'may', rather than 'shall' clauses, notably in the nature and level of material reception conditions and access to work.

ECRE's own limited review of the implementation of specific articles of the Directive found Member States interpreting them restrictively and an alarming level of non-transposition and partial transposition. Moreover, it found specific shortcomings within the legal frameworks Member States are operating in. The absence of true harmonisation is likely to lead to situations where asylum seekers move irregularly from one Member State to another. People denied adequate means to live in dignity will naturally move in search of better treatment, precisely the kind of secondary movement the Directive was aimed at preventing.

The Reception Conditions Directive should be reviewed and attention given to the following areas:

- Widening the scope to include applicants for subsidiary protection
- Clarifying, either in the Directive, or in the Dublin Regulation that persons in the Dublin procedure are entitled to the same standard of reception conditions as beneficiaries of the Reception Directive
- Ensuring that asylum seekers continue to receive reception conditions, even after an asylum claim is rejected.
- Lifting the restrictions on movement within the Member State (Article 7)
- Removing the powers to restrict or withdraw reception conditions (Article 16), as the withdrawal or reduction of what are already minimum reception conditions is not consistent with the requirements of human rights law. No one should ever be deprived of basic social assistance, foodstuffs and housing, and the best interests of the child are paramount.
- Defining 'necessary treatment' for persons with special need, particularly victims of torture
- Requiring that the minimum standards be applicable wherever an asylum seeker is in the Member State, including at the border or in detention
- Establishing a right to legal assistance for appeals against a refusal of support.

¹³ *The EC Directive on the Reception of Asylum Seekers: Are asylum seekers in Europe receiving material support and access to employment in accordance with European legislation?*, ECRE, Nov 2005.

¹⁴ Information and Cooperation Forum (ICF): *Situation in the Reception Conditions and the Impact of the Reception Directive in the ICF Countries*, May, 2007.

(7) In particular, should the form and the level of the material reception conditions granted to asylum seekers be further harmonised?

Article 13 requires asylum seekers to be granted certain material reception conditions sufficient to ensure a standard of living “adequate for the health of applicants and capable of ensuring their subsistence”, while the preamble refers to conditions that “will normally suffice to ensure them a dignified standard of living”. Such terms are subject to wide interpretation and clearer, more precise yardsticks are needed, such as references to internationally agreed standards, to poverty or to parity with welfare support available to nationals.

Access to adequate housing has proved a major problem in many member states, with a shortage of spaces in reception centres, as well as in other kinds of state-sponsored accommodation. Asylum seekers frequently receive insufficient financial support to rent independent accommodation. The Directive permits the provision of vouchers, rather than cash, to purchase food and other items, yet voucher schemes have been shown to be bureaucratic and inefficient and impose hardship, stigma and humiliation on asylum seekers.

The negative effects of inadequate reception conditions on the well-being of asylum seekers and their families, and consequently on their integration, are exacerbated by the length of asylum procedures. This should be addressed by developing efficient asylum systems, but also by limiting the period that an asylum seeker may be excluded from the host community e.g. housed in a reception centre, without access to the labour market.

Social assistance should be given only in the form of money and on a par with the minimum social welfare provisions available to nationals of EU Member States¹⁵. Asylum seekers should have access to independent housing within six months of submitting an asylum application. Alternatives to reception centres should be explored, such as vouchers for independent housing.

The level of material reception conditions is set extremely low (adequate for the health of applicants and capable of ensuring their subsistence). That states should retain the power to withdraw them as punishment for “negative behaviour” (Article 16) is of great concern. To take steps that would put a person’s health at risk and possibly make them destitute should not be permissible in the CEAS.

The Directive makes a welcome provision that victims of torture and violence should receive “necessary treatment” but the types of services that Member States should make available need to be defined. ECRE has long argued for specialist treatment to be available for traumatised refugees and victims of torture, and for immigration officers and staff involved in provision of reception conditions to be trained on psychosocial care specific to the needs of asylum seekers. Steps need to be taken to increase the capacity to provide such services, particularly in newer Member States.

¹⁵ ECRE Information Note on the Council Directive 2003/9/EC (EIN), page 6

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

Work is a major factor in the integration of asylum seekers and refugees; any delay undermines their ability to become self-sufficient and contribute to the receiving community. The Reception Directive states¹⁶ that member states shall decide the conditions for granting access to the labour market for the applicant for asylum after a maximum period of one year. Some member states have taken this as authorisation to impose severe restrictions on access to the labour market and give priority to people other than asylum seekers, such as citizens of EU Member States.

The process of integration begins on day one: the day an asylum seeker arrives in a member state, not the day s/he is recognised as a refugee. Strong evidence from the EQUAL programme indicates that preventing asylum seekers from working reduces refugee employment opportunities, leads to increased social exclusion and discrimination, encourages illegal working and drains the resources of other support networks.

While member states are concerned that work may be a pull factor, they disregard the wider potential benefits. Removing barriers to work and helping asylum seekers find jobs reduces dependency on the State, encourages self-reliance, reduces social exclusion and promotes integration. An asylum seeker who has worked and learned new skills is also more likely to return home voluntarily and with dignity, and their return will be more sustainable, should their asylum claim be rejected, than one who has been locked up in detention, or forced to live on inadequate state handouts for a long period.

In order to achieve a level playing field with an appropriate standard of treatment for asylum seekers, and which is compatible with the EU's other agenda with respect to employment, non-discrimination, intercultural understanding and social inclusion, national rules on access to the labour market for asylum seekers must be addressed as a priority. Guidelines and exchange of good practice between member states on the issuing of work permits would help overcome severe practical obstacles that impede access to the labour market for asylum seekers in some Member States.

ECRE maintains its position, however, that all restrictions on working should be lifted within six months of an asylum seeker's asylum application and the Directive should be amended accordingly. DG Justice Liberty and Security should coordinate closely with DG Employment and Social Affairs on next steps in this area.

(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?

The right to liberty and security of the person is a fundamental principle of international human rights law and it is widely accepted that asylum seekers should not be detained except as a last resort in limited and clearly defined circumstances. Detention can have serious medical and psychological effects on asylum seekers, such that people who have fled physical

¹⁶ Article 11, Council Directive 2003/9/EC (EIN)

and psychological abuse can find themselves emerging more damaged from the asylum procedure than when they entered it¹⁷. Detaining a person is also costly for the state concerned.

Nevertheless, asylum seekers are increasingly being detained, particularly during the Dublin procedure, as the Commission noted in its recent review of the Dublin system.¹⁸ Recent missions by members of the European Parliament to visit detention centres¹⁹ in a number of member states have highlighted the divergent conditions in which detained asylum seekers are held, some extremely poor. MEPs considered conditions they found in some centres in Italy, Malta and Greece to be unfit for human habitation. As a general rule, there is less scrutiny of the immigration detention regime than of the prison regime for criminals. Clear standards must be set, backed up by better monitoring and regulation.

Action needs to be taken to address gaps and areas where states differ widely in their interpretation of their obligations. Detention is mentioned in the asylum procedures Directive (Article 18) and the Reception Conditions Directive²⁰ (Article 7), but safeguards are barely mentioned.

Necessary safeguards include:

- A definition of detention in community law in line with international standards;
- Clear criteria by which asylum seekers may be detained and then only as a last resort, in exceptional cases and where non-custodial measures²¹, which should be listed, have been proven, after examining the individual's circumstances and history, following a personal interview, not to achieve the stated, lawful and legitimate purpose;
- Information to the asylum seeker in a language s/he understands about the grounds for detention and his/her rights to appeal;
- Detention decisions should be made by a court, with the possibility to appeal before a higher court, which must have the power to consider the merits of the case to order the release of the detainee if the detention violates national law or international obligations of the state²²;
- Automatic and frequent judicial review of detention;
- Unrestricted access for asylum seekers to free, qualified and independent legal advice with qualified interpreters;
- Unrestricted access to UNHCR and NGOs, and visits from relatives and friends;
- Independent monitoring of the conditions in detention centres;
- Not detaining asylum seekers in prisons holding convicted criminals;

¹⁷ See for example: *"From Persecution to Prison: The Health Consequences of Detention of Asylum Seekers"*, Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture, June 2003; or *"Psychiatric Assessment of Children and Families in Immigration Detention"*, Sarah Mares & Jon Jureidini, 2004. Both available at: www.idcoalition.org

¹⁸ COM(2007) 299 final Brussels, 6.6.2007.

¹⁹ Report from the LIBE Committee Delegation on the Visit to Greece (Samos and Athens), Brussels, 17 July 2007; Report from the LIBE Committee Delegation on the Visit to Tenerife and Fuerteventura (ES), Brussels, 6 September 2006; Report by the LIBE Committee delegation on its visit to the administrative detention centres in Malta, Brussels, 30 March 2006.

²⁰ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers

²¹ In accordance with UNHCR Guidelines, in particular: *"monitoring requirements, provision of a guarantor/surety, release on bail and open centres"*

²² HRC A. v. Australia, appeal no. 560/1993

- Prohibiting the detention of unaccompanied children, and those whose age is disputed, until the issue is resolved. Nor should children accompanied by their primary caregivers be detained. The single exception to this rule is when the state authorities can prove that the sole primary caregiver must be detained for reasons of national security or other such exceptional reasons and that detention is therefore the only means of maintaining family unity, in the best interests of the child.

Furthermore, the following actions are needed:

- Clarification that the reception conditions set out in the Reception Directive do apply to persons in detention;
- A review of the Dublin system in light of the Commission's findings that it has led to an increase in detention and taking action to reduce the use of detention;
- The establishing an EU system, such as an Ombudsman, to monitor and report on national legislation on detention and detention practices.

2.3 Granting of Protection

- (10) In what areas should further law approximation be pursued or standards raised regarding**
- **the criteria for granting protection**
 - **the rights and benefits attached to protection status(es)?**

The adoption of the Qualifications Directive²³ represented a useful step towards European harmonisation in this area. ECRE particularly welcomed the following:

1. the inclusion of provisions recognizing persecution from non-state actors (Article 6);
2. the express obligation for Member States to grant subsidiary forms of protection (Article 15);
3. the recognition of child-specific and gender-specific forms of persecution (Article 9), and provisions aimed specifically at the needs of unaccompanied minors (Article 30);
4. the principle that the assessment of applications should be carried out on an individual basis (Article 4).

Nevertheless, there are significant flaws in the Directive that should be reviewed and remedied. With respect to qualification for protection, the following changes should be made to the text:

5. Any person should be able to qualify for refugee status, which should not be limited to a "third country national" or "a stateless person" (Article 2);
- references to non-State authorities as actors of protection (Article 7) should be deleted, as only states can be held accountable under international law for upholding human rights;

²³ Council Directive 2004/83/EC of 29 Apr. 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.

- criteria are needed for assessing whether an internal protection alternative is properly available, it should not be considered available, for example, when travel to the area concerned is not possible for technical reasons (Article 8);
- the provision should be deleted that allows national security grounds to be used to deny refugee status before an asylum claim has been determined, thus widening the exclusion clauses in the 1951 Geneva Convention, potentially in breach of Member States' obligations under the 1951 Geneva Convention (Article 14);
- the requirement to demonstrate that the risk from 'indiscriminate violence' is a 'serious and individual threat' in order to qualify for subsidiary protection (Article 15(c)) is contradictory, has proved problematic during the process of implementation and should be amended accordingly²⁴;
- clarification is needed that the concept of a social group should be interpreted in a broad and inclusive manner to ensure its proper application to vulnerable groups. In particular, that claimants need only satisfy either the *ejusdem generis* or the social perception test (Art 10d)

Finally, a significant number of asylum seekers whose claims have been rejected remain in the EU in a state of legal limbo, because they do not qualify for a protection status but do have a right to non-return. In order to ensure that such people are able to live in dignity, the Directive should be amended to ensure that subsidiary protection accrues to any individual entitled to a right of non-return under the European Convention on Human Rights (ECHR) or international human rights law instruments. This would reflect the international obligations of Member States under the ECHR to protect individuals against violations of fundamental rights that may take place, other than the prohibition of torture or inhuman or degrading treatment or punishment under Article 3 ECHR.

With respect to the rights attached to protection statuses, provisions in Chapter VII of the Qualifications Directive differentiate between those with refugee status and those with subsidiary protection by allowing Member States to withhold rights, or grant significantly lower levels of rights, to beneficiaries of subsidiary protection. Yet, there is no legal or logical reason to grant a person with a subsidiary form of protection fewer or lesser rights than Convention refugees²⁵. Their needs are equally compelling. Indeed, it is hard to find an objective justification for the situation established by the Qualification Directive, where a person fleeing widespread violence can be afforded a less secure status than a refugee fleeing persecution and can also be denied access to the labour market and vocational training and prevented from being reunited with family members.

The drafters of the 1951 Convention allowed for the possibility of granting refugee's rights to non-refugees; they expressed their hope that states would extend the benefits of the

²⁴ Consideration should be given to the Commission's original proposal that subsidiary protection be granted to persons who 'have a well founded fear of being subjected to a threat to his or her life, safety or freedom as a result of indiscriminate violence arising in situations of armed conflict, or as a result of systemic or generalised violence of their human rights'. Thus, in exceptional situations, people fleeing extremely repressive regimes such as Afghanistan under the Taliban or Iraq under Saddam Hussein, and who do not qualify for refugee Convention status or fall under an international prohibition of *refoulement*, would be entitled to protection.

²⁵ *The Way Forward: Europe's Role in the Global Refugee Protection System 'Towards Fair and Efficient Asylum Systems in Europe'*, September 2005, section 4.7, and other recent policy positions relating to the Qualifications Directive.

Convention to persons outside its scope.²⁶ 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.

- (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?**

ECRE supports the creation of a single uniform status for both refugees and beneficiaries of international protection for the reasons outlined in response to question 10 above. A further practical benefit of moving towards a single, uniform status is that the incentive for upgrade appeals is minimised, reducing the burden on the court system²⁷. However, some problematic areas need to be resolved. Firstly, and of paramount importance is that refugee status is clearly defined in international law and so should be preserved as a distinct category. A single procedure would still have two possible outcomes: refugee status or subsidiary protection status. Even if the rights attached to each status in a CEAS are identical the need to distinguish between refugees and other beneficiaries of international protection will remain. From a legal perspective, it is necessary in order that jurisprudence can develop internationally and consistency maintained on the correct interpretation of the 1951 Convention and other international obligations. More practically, refugees may wish to travel outside of Europe to countries that may not accept an EU protection status and find themselves needing to avail themselves of the rights set out in the 1951 Refugee Convention, which is recognized internationally.

Secondly, a problem which has emerged in the Netherlands, one of the first states to introduce a single status, differential treatment has occurred when status has been withdrawn: the government has argued that when the individual is not a Convention refugee, it does not need to show that there has been significant and enduring change in the country of origin, as the 1951 Refugee Convention requires. Any future single status should obviously retain this requirement for both refugees and beneficiaries of subsidiary protection.

- (13) **Should further categories of non-removable persons be brought within the scope of Community legislation? Under what conditions?**

The international legal instruments from which the Qualification Directive is derived are continually being reinterpreted by courts around the world. The drafters of the 1951 Refugee Convention, for example, may not have envisaged its applicability to people persecuted for

²⁶Chapter IV of the final Act of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: expressed the hope that states parties would “be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides.”

²⁷ These questions are addressed in *The Way Forward: Europe's Role in the Global Refugee Protection System Towards Fair and Efficient Asylum Systems in Europe*, ECRE, September 2005.

reasons of their sexual orientation, gender or young age. The text of the Directive is a snapshot of interpretation of the Refugee Convention, the ECHR and other human rights instruments at a particular point in time. But it is also selective, omitting some categories of persons, who may not be removed without breaching international law. There is a gap, therefore, between the text of the Directive and sources of fundamental rights law binding on Member States in their application of EC law, such as national and constitutional law, the Refugee Convention, ECHR and other international human rights law, and the general principles of Community law. A revised Qualification Directive should include within its scope all those with a right of non-return under international law.

Categories of persons will continue to emerge, nevertheless, for whom the risk from return does not reach the threshold that would establish a right to non-return. To varying degrees, Member States grant such people and others legal statuses (either temporary or permanent) on humanitarian, compassionate or other grounds. A new instrument is needed to harmonise practice on this, and also to create a legal status for asylum seekers whose applications have been rejected, but who cannot be returned for reasons beyond their control. Grounds might include the absence of safe routes or the refusal of their country to issue documents, being too ill to travel, pregnancy or the decision on a spouse's claim being pending.

Where it cannot be established that the rights of vulnerable people will be respected on return, or where delays in the return process become unreasonable, return should be postponed and a legal status granted.

When states are considering whether to issue a removal order, as provided for in the Returns Directive, the time spent in the receiving country should be taken into account. If an asylum seeker whose claim has been rejected has lived in the receiving country for 3 years or more and consequently started to put down roots in their host country, States should not enforce removals and should give people the opportunity to apply for a permanent legal status. A report under consideration by the Council of Europe²⁸ has found regularisation programmes can provide a solution for the human rights and human dignity of irregular migrants, as well as respond to labour market needs and promote increases in social security contributions and tax payments.

(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

Currently member states recognise each others' expulsion decisions, but not decisions to grant asylum. This imbalance is iniquitous, unjustified and needs to be remedied. Where a Member State recognises that a person qualifies for protection, including subsidiary protection, under the Qualifications Directive, that decision should be valid throughout the Union.

²⁸ *Regularisation programmes for irregular migrants*, Doc 11350, Council of Europe, 6 July 2007.

Transfer of responsibility

Unlike other third country nationals, refugees have been forced to migrate and may have had very little choice about where they reside in Europe. There is a natural logic that refugees will integrate more easily and most naturally into those countries where they have extended family members, social networks, good employment opportunities/labour market conditions, and cultural or linguistic ties. A system which delivers quick efficient status recognition wherever a claim is lodged, followed by an opportunity to relocate within the EU would provide an incentive to those in need of protection to lodge their claim as soon as possible after entering the European Union and reduce the incentive for secondary movement. Research²⁹ suggests that where recognised refugees have sought to transfer their status they aspire to move because they hope to fulfill their ‘life potential’ and rarely because of ‘passive’ pull-factors such as more generous welfare provision.

The Commission’s recent and long overdue proposal for an amendment to the Long Term Residence Directive (LTR) envisages that refugees who wish to exercise their right to free movement as long term residents will not be able to take their protection status with them. Member States may be reluctant to assume responsibility for protection of a refugee recognised in another Member State, but the creation of a CEAS requires a certain level of trust. If States believe that other Member States asylum systems are sufficiently robust that they do not risk conflict with their non-*refoulement* obligations when transferring asylum seekers under the Dublin system, then they can reasonably be expected to assume responsibility for protecting persons recognised by another Member State.

In response to Question 24 on the Dublin system below, ECRE makes a case for granting freedom of movement to reside and work in the EU to all persons granted protection at the time of recognition. An alternative system would allow mobility to refugees throughout the EU following the grant of protection, but which would be subject to certain criteria that might, for a certain period at least, exclude individuals from certain welfare provisions or other rights in the second state³⁰.

If the political climate is not yet conducive to free movement upon recognition, despite the clear interest for Member States in reducing irregular movement and residence, a third, less desirable alternative would be to confer to refugees and beneficiaries of subsidiary protection rights as third country nationals according to the Long Term Residents Directive. In that case, ECRE supports UNHCR’s view that beneficiaries of the Qualifications Directive should not have the wait for the five years suggested by the Commission, but should qualify for long term residence within three years.

Only 11 EU Member States have ratified a Council of Europe Agreement on the transfer of responsibility for refugees³¹. Clearer EU rules are needed, not least because the Council of Europe agreement does not apply to beneficiaries of subsidiary protection.

²⁹ See ‘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’ conducted on behalf of the European Commission by the Danish Refugee Council, Migration Policy Foundation and the Institution for Migration and Ethnic Studies (25 June 2004).

³⁰ *The Way Forward: Towards Fair and Efficient Asylum Systems in Europe*, ECRE, 2005, section 3.

³¹ European Agreement on Transfer of Responsibility for Refugees, CETS No. 107, entered into force 1/12/1980

2.4 Cross-cutting issues

2.4.1 *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?**
- (16) **What measures should be implemented with a view to increasing national capacities to respond effectively to situations of vulnerability?**

Practical cooperation offers opportunities to better meet the specific needs of vulnerable groups, such as separated children, older refugees, survivors of torture and victims of trafficking (see Section 3 below) through the issuing of guidelines (e.g. on child-specific forms of persecution), training (e.g. in child-sensitive procedures) and by sharing best practice and expertise. While the first stage instruments make reference to vulnerable groups, in particular Article 17 of the Reception Conditions Directive, the standards required are not always clear and many member states do not have the infrastructures to implement them. The Directive should be amended to require member states to establish, with the support of NGOs, the necessary facilities and trained personnel to identify vulnerable asylum seekers and assure them of the treatment required.

Other measures that would better meet the needs of all vulnerable groups include:

- exemption from expedited procedures, including special border procedures.
- access to specialised legal assistance, free of charge to those who lack means, and specialised interpreters of the same gender as the asylum seeker
- freedom from detention

Family Unity

The support of family members can be vital to the well-being of vulnerable asylum seekers and refugees. While the Directive on the right to family reunification envisages special treatment of refugees, (“More favourable conditions should therefore be laid down for the exercise of their right to family reunification.”³²), the reality is that in practice, family reunion is strictly limited to the nuclear family, and families are often subjected to extensive investigations into the family relationships. Many member states strictly exclude siblings and dependent adult unmarried children. Moreover, the definition of ‘family’ differs from directive to directive: people who would be granted protection under the Temporary Protection directive if they arrived in a mass influx would not meet the narrower criteria of the Qualifications Directive.

ECRE urges the Commission to produce its review on the family reunion directive on time, by October this year, with particular attention given to the specific provisions relating to family members of refugees. A broad and inclusive definition of ‘family’ should be implemented across all relevant EU legislation and the scope of the provisions of the Family Reunion directive that concern refugees should be broadened to include beneficiaries of Subsidiary Protection. Restrictive provisions should be relaxed for beneficiaries of international protection.

³² Para 8, Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification

The definition of family includes the following family members, regardless of whether they lived together or not at the time of leaving the country of origin:

- a) dependent relatives in the ascending line of legally married partners;
- b) children who are de facto members of a household through adoption, fostering or other forms of care arrangements, although not descending from a marriage or a relationship pertaining to that household;
- c) all dependent relatives in the ascending or descending line of cohabitating partners;
- d) dependent siblings when humanitarian reasons are invoked;
- e) relatives on whom the principal applicant is dependent due to health, age, disability or other reasons.

Dependence should be seen in both financial as well as psychological/cultural terms and consideration should be given to differences in the definition of "family" and "family life" which, in some cultures, might include near relatives and members of a household with whom there might not be a blood relationship. Beneficiaries of subsidiary protection should have the same rights to family reunion as refugees. Restrictive provisions should be relaxed for beneficiaries of international protection.

Children

Human Rights Watch has revealed how hundreds of migrant children arriving in the Canary islands are at risk of violence and ill-treatment, are not informed of their right to seek asylum, do not enjoy access to public education, have limited opportunity for recreation and leisure, and are unduly restricted in their freedom of movement³³. Spain has conducted illegal repatriations of separated children to dangerous situations in Morocco and has recently signed readmission agreements for separated children with Morocco and Senegal.

The EU needs to develop a common approach to separated children seeking asylum that recognises that the overriding obligation of Member States to give primary consideration to the best interests of the child, regardless of their immigration status, implies that any consideration of asylum matters should form part of broader issues concerning the treatment of separated children. A child-specific asylum system is needed, not an add-on to the procedure for adults, but one specifically designed to meet the needs of children fleeing persecution with the best interests of the child as its core guiding principle.

ECRE recommends the following specific measures:

- Guidelines on age determination should be developed, in line with recommendations of UNHCR and the UN Committee of the Rights of the Children, that require age assessments to be carried out by an independent medical paediatrician, take into account the child's physical appearance and psychological maturity as well as cultural and ethnical variation in these factors, include proper application of the benefit of the doubt principle and rule out unethical practices, such as the use of x-rays for non-therapeutic reasons;
- the best interests principle should be identified as the core guiding principle in all actions regarding children, and EU guidelines should be developed on best interest determination in line with UNHCR's;

³³ *Unwelcome Responsibilities: Spain's Failure to Protect the Rights of Unaccompanied Migrant Children in the Canary Islands*, Human Right Watch, July 26, 2007

- Member States should adopt a more generous and consistent approach to Article 15 of the Dublin Regulation which requires them to bring family members together;
- Member states should be more consistent and assiduous in their efforts to trace family members of separated children living elsewhere in the EU;
- the Procedures Directive should be amended to ensure that all children have the right to apply for asylum in their own right;
- the Reception Conditions Directive should be strengthened, to require the appointment of legal guardians for separated children, as well as the provision of free legal assistance;
- EU legislation and policy on returns should specifically address the needs and rights of separated children in the return process in line with the recommendations of the Separated Children in Europe Programme³⁴;
- Return should only go ahead where it is demonstrably in the child's best interests following careful assessment, planning and preparation;
- Children should be enabled to participate in decisions affecting them.

Survivors of Torture and sexual violence

While the Reception Directive requires Member States, to meet the “special needs” of survivors of torture, further clarification is needed on the nature of the services required. The International Rehabilitation Council for Torture Victims lists them as:

- Medical screening
- Mental health treatment
- Psychological and psychotherapeutic services
- Social assistance
- Legal assistance
- Continual access to treatment
- Secondary preventative measures
- The provision of qualified culturally sensitive and specially trained interpreters
- In those cases where there would otherwise be a lack of comprehension
- The option to choose a provider of the same gender as the client (particularly important for survivors of torture, but should be available to all asylum seekers)

In spite of the legal requirement in the Directive, many Member States are far from able to provide the necessary specialised services. They need to be encouraged and supported to build the necessary capacity as rapidly as possible.

ECRE members involved in the CARE FULL³⁵ initiative have been developing guidance on ways to identify a survivor of torture. With respect to asylum procedures, a person who has been traumatised is often unable to give a full and consistent account of their experiences. Yet, under the Procedures Directive, an asylum seeker can be channelled into accelerated procedures, with restricted procedural safeguards, if they have been deemed to have given insufficient or contradictory information about their claim (Article 23 (4) (g)). The Council of

³⁴ Returns and Separated Children, Separated Children in Europe Programme, 2004

³⁵ *Care Full. Medico-legal reports and the Istanbul Protocol in asylum procedures*

Europe has recommended that victims of torture and sexual violence be excluded from accelerated procedures due to their vulnerability and the complexity of their cases³⁶.

Consequently, where there is any doubt about an asylum seeker's mental health, the asylum procedure should feature a health check based on the Istanbul Protocol, which includes a report on the individual's mental health condition and other relevant information. Only (para)medical personnel have the expertise (and the right) to decide on medical, psychiatric and psychological issues. While unnecessary delay in the asylum procedure is in nobody's interest, sufficient time must be allowed to gather information about traumatic experiences. Traumatized patients sometimes need time to understand the puzzle of past events.

Officials involved in the asylum procedure must be properly trained so that the asylum authorities can give due consideration to the medical consequences that go together with traumatic experiences and that coincide with making an account of it. Medical staff must be trained so that they are able to supply appropriate reports to asylum determination authorities.

Member States should acknowledge the importance of medical examination and documentation of torture and ill-treatment within the asylum procedure. The Qualification Directive recognises that previous persecution is an indication of future persecution³⁷ but application of these principles needs particularly close monitoring by the European Commission.

Asylum seekers may be reluctant to reveal experiences of sexual violence for a variety of psychological, personal and socio-cultural reasons. Yet late disclosure in the asylum procedure can undermine their credibility and lead to their claim being rejected³⁸. Any EU asylum curriculum should include training in recognising the indicators of sexual violence, such as stress reactions, dissociative conditions and feelings of shame.

Trafficked persons

EU states should ratify the Council of Europe Convention on Action Against Trafficking in Human Beings as this provides minimum standards of protection and support. This would greatly assist in the identification of trafficked people and their access to appropriate advice and support would help them consider their options in terms of seeking either asylum, humanitarian protection or returning to their country of origin.

2.4.2 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?

In 2004 the European Council adopted Common Basic Principles (CBP) on Immigrant Integration which reflected many of ECRE's views on integration, with one notable exception: they fail to recognise that a refugee's process of integration begins the day they

³⁶ Resolution 1471 (2005) Parliamentary Assembly of the Council of Europe

³⁷ (See Article 4 (4) Qualification Directive (*supra*))

³⁸ See Home Office study at <http://www.medilexicon.com/medicalnews.php?newsid=75832>

arrive in a member state. Member States are reluctant to offer integration assistance to asylum seekers for fear of creating pull factors and undermining policies aimed at deterring asylum seekers with unfounded claims and impeding return policies.

A proportion of Europe's asylum seekers, however, will be recognised as in need of protection, granted asylum and will join new communities. Some of them will eventually become future citizens. Policies geared to deterrence are short sighted, as well as inhumane. Far from undermining voluntary return, integration measures such as vocational and language training empower people, giving them new skills to take with them and the confidence to make the difficult decision to return. Exclusion from the labour market and the increased use of detention, on the other hand, foster dependency, depression and other mental health problems. If they had the choice, asylum seekers are likely to try to reach the country where they have the best prospects for integration, for reasons such as the presence of family or friends, knowledge of the language or previous periods of study or work, but they are often prevented from doing so by the Dublin system.

The European asylum system should be re-examined in light of the recognition that future citizens should have a positive integration experience, from the moment of arrival, in order to foster in immigrant communities a sense of belonging and loyalty to the receiving state. Such a review would point to the need for changes, such as lifting restrictions on access to the labour market for asylum seekers (see question 8 above), reducing the use of detention (see question 9 above) and revising the Dublin system (question 23).

The support of family members plays a crucial role in the process of integration. Rights under the Family Reunification Directive should be extended as soon as possible to beneficiaries of subsidiary protection and the definition of family extended (see question 15).

ECRE members have long worked together to identify and foster good practice in refugee integration. In 2007 its Network of Integration Focal Points established in 2005 a set of policy briefings³⁹ on five themes: vocational training and higher education, introduction programmes, housing, employment, civic and political participation, and assessment of skills and recognition of qualifications. Most of the recommendations concern policy and best practice, but recommendations relating to EU legislation include the following:

- In order to implement Common Basic Principle (CBP) 9 on participation in the democratic process, EU Member States should sign up to, ratify and implement the Convention on the Participation of Foreigners in Public Life at Local Level. The right to vote and stand for election in local authority, regional and European elections should be granted to migrants and refugees who have been lawful and habitual residents in the state concerned for a minimum period of up to three years preceding the elections.
- Harmonisation is urgently needed in the area of naturalisation, where practice diverges widely between Member States despite the requirement on signatories to the 1951 Convention to "make every effort to expedite naturalization proceedings"⁴⁰. This might include legislation that requires member states to permit refugees and beneficiaries of subsidiary protection to have dual nationality. An obligation to renounce birth nationality is a serious barrier to naturalisation, as well as an impediment to eventual voluntary return.

³⁹ *Policy Briefings on the integration of refugees and migrants in Europe*, NGO Network of Integration Focal points, 2007 www.ecre.org.

⁴⁰ Art 34, 1951 Convention Relating to the Status of Refugees.

- Recognition of professional qualifications, or opportunities to do conversion courses can enable professional and highly skilled refugees as well as those from lower skilled professions, such as bus or lorry drivers, to put their skills to good use. A harmonised approach is needed to the recognition of third-country qualifications and experience, as regards beneficiaries of international protection. Member States should have a legal framework in place for the recognition of third country qualifications. Within this framework recognition procedures must be fast, transparent, simple, easily accessible, and free of charge. In addition, refugees should be able to take skills audits, leading to formal certificates, which can be used for the purposes of further education, vocational training and searching for a job.
- The scope of the EU Directive on the recognition of professional qualifications⁴¹ should be extended to beneficiaries of international protection, as refugees who re-qualify or otherwise obtain professional qualifications in one member state, do not have the rights that EU citizens have for those qualifications to be recognised elsewhere in the EU.
- Member States should be required to have an integration strategy. Introduction programmes form an important element of any integration strategy and should include individually tailored, high quality language course. Programmes should be open to asylum seekers and beneficiaries of subsidiary protection, as well as refugees.
- Accommodation in reception centres for asylum seekers should, where possible, be limited to a maximum of six months, after which access to independent housing should be facilitated. Any housing arrangements should provide legal, social and psychological services that take into account the individual needs of particular groups.

Discrimination⁴²

Racism, discrimination and inequality undermine integration. While refugees and other third country nationals are protected against discrimination on grounds of race or ethnicity, they may be treated differently from citizens because of their immigration status. The 1951 Refugee Convention requires its provisions to be applied “without discrimination as to race, religion or country of origin.”⁴³ In the European Union, equal treatment of third country nationals is derived from the general principle of equality in EU law, and also derives from the obligation of non-discrimination on grounds of nationality as set out in the jurisprudence of the European Court of Human Rights and the Human Rights Committee. It was reaffirmed as a political commitment, in the Common Basic Principles on Integration⁴⁴. Yet, asylum and immigration legislation has become a manifestation of institutional discrimination⁴⁵, often failing to meet the basic principle of equality before the law.

Asylum seekers currently face widespread discrimination both in terms of the legal framework and the practice followed in the member states.⁴⁶ The low standards set by the Reception Conditions Directive, for example, permit member states to treat asylum seekers in ways that leave them vulnerable to racism, discrimination and exploitation, rather than supporting their integration. Aside from legal restrictions and financial barriers, many newly recognised refugees are socially disadvantaged in terms of language, ethnicity, religion, size of their family, legal status etc. A coordinated approach by a range of stakeholders is needed

⁴¹ Directive 2005/36/EC, adopted on 7 September 2005.

⁴² ECRE is grateful to the European Network Against Racism (ENAR) for its contribution to this section.

⁴³ Art 3, 1951 Geneva Convention on the Status of Refugees.

⁴⁴ Council Document 14615/04 of 19 November 2004.Nov 2004.

⁴⁵ ENAR (2006) Shadow Report 2005, p. 9.

⁴⁶ ENAR Shadow Report 2006.

to tackle the discrimination and racism that this particular group faces, in a range of areas, including finding private housing and finding a job.

The European Monitoring Centre on Racism and Xenophobia (EUMC) recognised immigration and asylum policies as one of the key priorities in the ambition to make the EU an area free from racism.⁴⁷ Experts attending a recent seminar⁴⁸ on policy coherence in this area clearly identified a need to make anti-discrimination measures more visible in European policy on migration and integration. They took the view that the complex, highly individual and often local process of integration is not necessarily conducive to a legislative approach. A properly funded Open Method of Coordination, however, on anti-discrimination and integration would facilitate benchmarking, standard-setting and ensure a holistic approach. The European Parliament has called on the Council to reconsider a Commission proposal to introduce the Open Method of Coordination for integration⁴⁹.

The following legal measures should be taken to further enhance the integration of asylum seekers and beneficiaries of international protection:

- EU anti-discrimination laws should be fully incorporated and mainstreamed into the second stage of the CEAS, without any exceptions or derogations.
- Further harmonisation is needed in order for beneficiaries of international protection to enjoy equal treatment irrespective of nationality, race or ethnic origin with regard to all the rights provided under international and community law including access to employment, housing, education, health, social protection and access to goods and services. Member states should not be left any discretion to derogate from ensuring access to fundamental rights on the basis of their national laws or policies.
- Standards for reception conditions should be raised in order to live up to the basic principles and values of the European Union, including the principle of equal treatment.

Funding

While the new, amended European Refugee Fund (ERF) is welcome, an important source of funding for the refugee and asylum sector is about to end⁵⁰. Under ESF EQUAL more than 3 billion euros were allocated across Europe during the period 2001-2007; approximately 4% of this (117m euros) to projects specifically addressing the social and vocational integration needs of asylum seekers.

The old ESF Community Initiatives/EQUAL fund contained a specific strand supporting the social and vocational integration of asylum seekers, but EQUAL is to be mainstreamed into the new ESF programme, with no guarantee of support for asylum seekers. Models of good practice and lessons from working with asylum seekers throughout the EU have been strongly presented through the various European Thematic Group activities over seven years of

⁴⁷ See for example ENAR (2006) Shadow Report 2005; EUMC (2004) Comparative Report: Migrants, Minorities and Legislation.

⁴⁸ ENAR Policy Seminar 'Promoting Integration: Migration, integration, social inclusion and non-discrimination' held in March 2007.

⁴⁹ European Parliament resolution on strategies and means for the integration of immigrants in the European Union (2006/2056(INI))

⁵⁰ See http://ec.europa.eu/employment_social/equal/about/budget_en.cfm.

EQUAL projects⁵¹ and it is clear that this has been an important beneficiary group for ESF programmes. The loss of this important source of funding from DG employment is of serious concern to refugee-assisting organisations.

While the Commission holds⁵² that asylum seekers can still be designated as a target group in national development plans, member states have a good deal of discretion and some rule out asylum seekers. The picture is complicated by the variance permitted by the Reception Directive whereby some asylum seekers have permission to work and are eligible for training ESF-funded training, while others are not.

ESF plans for 2007-2013 should remain flexible, particularly in light of responses to this Green Paper. Guidelines are needed that would require the mainstreaming of EQUAL lessons, including the support for asylum seekers.

At the same time, refugees are excluded from the recently adopted Integration Fund, which seriously hinders the mainstreaming of integration support for refugees. ECRE agrees that refugees have some specific needs, which can be addressed by targeted projects supported by the ERF. Other needs, however, such as tailored professional training courses are identical to those of other third country nationals and should be supported by the Integration Fund.

To allow mainstreaming, ECRE calls upon the Commission to include projects targeted at both third country nationals and refugees in the Integration Fund. Specific refugee integration projects should still be supported by the European Refugee Fund.

2.4.3 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?

Study of first stage legislation

The asylum package contains numerous gaps and inconsistencies. Persons with subsidiary protection, for example, are not covered by the reception or procedures directive. Nor do they have a right to family reunion, in Community law and the definition of family differs from instrument to instrument. These are just a few examples. Alongside the slow process of implementation, a comprehensive study should be carried out on the texts of the first stage legislation to identify inconsistencies and gaps.

Quality Assessment Mechanism

In 2005⁵³ ECRE set out its vision of how Europe might move towards a more fair and efficient asylum system. Central to it was the idea that any system needs a mechanism of quality assurance, similar to UNHCR's Quality Initiative in the UK. ECRE supports UNHCR's submission that a common asylum system should have a systematic and obligatory

⁵¹ See http://ec.europa.eu/employment_social/equal/activities/etg5_en.cfm.

⁵² Peter Stub Jorgensen, the European Commission's Head of ESF, speaking at an EQUAL conference in Malmo, Sweden, May 2007.

⁵³ *The Way Forward: Towards Fair and Efficient Asylum Systems in Europe*, ECRE, 2005, section 2.

quality assessment mechanism that subjects Member States' national procedures to regular, independent and transparent review.

Quality assessments teams would need to be independent and have a clearly defined reporting role. UNHCR should play a central role in such initiatives in accordance with its supervisory function under Article 35 of the 1951 Geneva Convention and which is also expressly alluded to in Article 21 of the draft Asylum Procedures Directive. In addition, quality assessment teams should comprise a range of specialist personnel, including NGO staff and other independent experts.

Teams would be temporarily attached to state decision-making bodies and given access to a sample of randomly selected files in order to 'audit' the quality of decision-making. Such access should cover all country information and other materials available to the decision-maker as well as one-to-one interviews with the decision-maker him/herself. In this way failings or weaknesses could immediately be identified and remedial advice provided – thus constituting a form of 'embedded' training. Teams would make internal recommendations to decision-making bodies on the remedial action required. However, they would also deliver periodic public reports outlining key findings in order to ensure transparency, accountability, and a degree of leverage to ensure that findings are acted upon by the relevant authorities. The reports could then form the basis of future reviews in order to facilitate a systematic monitoring of progress.

Such mechanisms could also be extended to monitor border areas where there are often shortages of suitably trained officials with the requisite knowledge of refugee and international human rights law. Quality assessment teams could ensure that proper procedures are followed for receiving and guaranteeing the individual examination of all asylum claims, and thus identify and eradicate weaknesses in systems which otherwise could result in breaches of international law.

Monitoring, evaluation and involvement of civil society in the development of CEAS

As has been recognized many times by the European Commission, civil society has an essential contribution to make to the development of European Union policy and practice, and this is particularly true in the field of migration and asylum. NGOs can facilitate contact with 'users' of the system, refugees and asylum seekers themselves, knowledge and expertise on the impact and efficacy of such initiatives, and a voice for some of the least represented groups in society. Where the Commission facilitates expert meetings, such as EURASIL or the Committee on asylum and migration, it should consider NGO experts amongst potential contributors. Specifically, the Commission could establish expert groups to facilitate discussion between all stakeholders on themes relating to the Green Paper, such as the treatment of vulnerable groups.

One of the themes of the review of the Hague Programme during the Finnish Presidency was the need for better evaluation of JHA policies. NGOs wish to be involved in that process, but their resources are extremely limited. Evaluators need to be adequately funded and encouraged to reach out to NGOs, and not rely exclusively on responses to written questionnaires, or on NGOs producing a single, coordinated response. All possible methods should be explored in order to engage the broadest range of NGO contributions both to the consultation on the CEAS and on the various evaluations in the area of Justice, Freedom and Security due to take place in 2007.

For some time, ECRE has supported the development of a European network of refugee community organizations (RCOs)⁵⁴. ECRE stands ready to discuss with the Commission how these organizations and other refugee groups might be consulted and/or participate in the development of a CEAS.

3. IMPLEMENTATION - ACCOMPANYING MEASURES

(19) In what other areas could practical cooperation activities be usefully expanded and how could their impact be maximised? How could more stakeholders be usefully involved? How could innovation and good practice in the area of practical cooperation be diffused and mainstreamed?

ECRE has put forward a number of ways in which Member States can cooperate with each other in order to reduce the discrepancies in recognition rates, many of them endorsed by the Commission⁵⁵. They include:

- Common mandatory minimum qualifications for decision makers;
- Training: a common training manual, training courses and accreditation schemes for asylum decision makers and interpreters delivered by a centralised training body;
- EU guidelines modelled on the UNHCR's, on certain types of cases;
- Country information: common guidelines on researching, collecting and applying country information leading to the development of an independent EU Documentation Centre for the provision of country information;
- Independent national advisory boards on country information;
- Independent quality assessment teams to monitor Member States' procedures and advise on improvements;
- Expert support teams to assist member states experiencing increases in asylum numbers;
- Exchange of staff with expertise in a particular case load.

The European Asylum Support Office (EASO) proposed in the Green Paper could play an important role in the coordination such activities. The EASO could, for example, monitor decision-making, oversee evaluations and administer solidarity related funds.

Groups of Member States are already engaged in projects that take forward some of these ideas. EURASIL, for example, exchanges information on countries of origin and the use of country information, and the General Directors' Immigration Service Conference (GDISC) is developing a European asylum curriculum.

⁵⁴ The European Refugee Advocacy Organisation (www.erad-network.org) was launched in the European Parliament on 1 March 2007

⁵⁵ *The Way Forward: Europe's Role in the Global Refugee Protection System 'Towards Fair and Efficient Asylum Systems in Europe'*, ECRE September 2005 and also European Commission, *Communication from the Commission to the Council and the European Parliament on Strengthened Practical Cooperation. New Structures, New Approaches: Improving the Quality of Decision Making in the Common European Asylum System*. COM (2006) 67 final.

Depending on the success of such initiatives, some areas of practical cooperation could be taken to a higher level of approximation. For example, guidelines, advisory boards and the current work on developing a common portal on country information could lead to an independent EU Documentation Centre, possibly attached to the EASO, similar to the Canadian model⁵⁶. As well as producing generic country reports, the Centre could carry out research in response to specific requests from either decision makers or asylum seekers coordinated information-gathering missions. In order to avoid duplication of effort, and in order to guarantee quality and freedom from political influence, the process must be transparent and all information should be publicly accessible and kept distinct from its application by decision-makers, so that it remains impartial and free from political influence.⁵⁷ This would reduce the need for debate about the general situation in countries of origin, enabling a more efficient focus on the individual's situation.

Reliable, fair asylum decisions depend not only on high quality country information, but also on the correct assessment of that information, appropriate interview techniques and the correct application of the law. The GDISC project on a common European asylum curriculum could form the basis of a mandatory common training curriculum to be complemented by mandatory standards for qualifications of decision makers.

Best practice can usefully be shared between member states in relation to training and issuing guidance to decision-makers in complex areas, such as identifying survivors of torture, interviewing children and determining their age, assessing claims of persecution based on gender or sexual orientation, cessation, cancellation and revocation of refugee status and gathering and using country information. Guidance for decision makers as part of the training on establishing the facts of a claim for international protection should include the need to avoid confusion between assessing the type of claim and applying the accepted material facts to the refugee or ECHR criteria. States could also share resources such as experts on a particular asylum caseload or interpreters competent in a particular language.

The key to better quality decisions, however, is transparency and monitoring. Quality assessment mechanisms are needed, such as independent monitoring teams (see Question 18) who could identify gaps in existing decision-making procedures and the appropriate training and resources needed to fill these gaps. The participation of UNHCR and NGOs is essential to maintaining a focus on better identifying and protecting refugees.

If the EU is to develop a credible and human rights-respecting response to the challenge of mixed flows, the proposal for border control-orientated Rapid Border Intervention Teams (RABITs) needs urgently to be complemented by one for protection-focussed expert support teams to help meet any capacity shortfall in a state experiencing backlogs or unexpected increases in the number of asylum seekers.

(20) In particular, how might practical cooperation help to develop common approaches to issues such as the concepts of gender- or child-specific

⁵⁶ Research Directorate of the Immigration and Refugee Board of Canada.

⁵⁷ An illustration of this type of model is the recently established UK Advisory Panel on Country of Origin Information. This consists of 70% academics and representatives from UNHCR, IOM, British Refugee Council and other NGOs.

persecution, the application of exclusion clauses or the prevention of fraud?

Common approaches to issues such as these could be achieved through the development of common EU guidelines to assist decision-makers and promote consistency, fairness and transparency in certain types of complex case such as those involving gender-related persecution, civil war, torture survivors and children. Guidelines on gender-related persecution could be modelled on those produced by UNHCR and cover considerations caseworkers should take into account in relation to gender when assessing claims, including gender persecution and failure of state protection, as well as procedural issues such as the need for female interviewers and interpreters. Guidelines could be included in a common training curriculum and implemented with training delivered by independent experts and NGOs.

- (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 Commission's limited resources in the area of asylum need to be reinforced in order to properly carry out its role of monitoring transposition of asylum and immigration directives and managing the process of holding member states to account. Moreover, greater resources are urgently needed simply to coordinate practical cooperation between member states in forums such as the Committee for Immigration and Asylum (CIA) and EURASIL, as well as in specific projects. The knowledge and expertise of civil society could be engaged if the proceedings of the CIA and EURASIL were made completely transparent: agendas, documents submitted to or discussed at the meetings and outcomes of the meetings should be made publicly available on the internet. The expert views of NGOs and academics should be invited systematically, either in person or in writing.

European Asylum Support Office (EASO)

In the medium and long term it will be necessary to establish an independent EU Asylum Support Office (EASO) to facilitate a truly common and unified EU approach to asylum. The office could carry out administrative functions, such as:

- commissioning, monitoring and evaluating cooperation projects;
- coordination of Asylum Expert Teams;
- coordinating and servicing networks, such as Contact Committees on specific instruments and EURASIL;
- coordinating resettlement of refugees to the EU;
- hosting the embryonic EU country information service.

The EASO should also have a monitoring and regulatory function, including:

- Analysis of statistics and other data to identify decision making that is not consistent with the standards required by the CEAS;

- Assigning Quality Assessment Teams to assist States in improving their asylum procedures;
- Producing guidelines on particular types of cases;
- Developing the European Asylum Curriculum;
- Setting common accreditation standards for asylum decision makers;

The monitoring function will be particularly important. Analysis of accurate and comprehensive asylum statistics, for example on applications received, recognition rates (both at first instance and appeal), the duration of procedures, and other relevant aspects would highlight significant divergences between member states. In order to monitor and assess the quality of decisions and practical cooperation measures, more detailed statistics will be required (e.g. on recognition rates for particular categories of case), which are beyond the scope of the new regulation on asylum statistics⁵⁸.

Any new structures in this area must operate in a transparent manner, with public terms of reference and proper reporting functions. While ECRE supports an independent body, it should be subject to democratic oversight by the European Parliament. The process leading to its creation must be transparent, democratically accountable and conducted with the support of UNHCR and civil society.

Panel of Experts

Either separately or under the auspices of the EASO, consideration should be also be given to exploring UNHCR's suggestion of the creation of a panel of experts to advise the Commission on international protection issues. The experts could consist of eminent figures from Member States, UNHCR and, ECRE suggests, senior judges and other individuals with distinguished careers in refugee law and EC law, either as academics or practitioners. The role of the Panel would be to develop a common approach – possibly binding - to the assessment of certain categories of asylum claims, but it would not supplant in any way the role of the Courts.

The Panel could produce general guidelines on certain types of claim, guidance at the request of member states, and support the work of the Quality Assurance Teams. If a Member State were found to be departing from the guidance in a significant number of cases, it could be asked to explain or justify itself to the Panel.

The panel could be asked to intervene where it found significant discrepancies in the recognition rates between member states, with respect to particular groups of claimants or types of case, if there was a sudden rise in applications from a particular group, or where a difficult legal question arose for a particular group of claimants e.g. whether the internal flight alternative applied.

⁵⁸ Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers

4. SOLIDARITY AND BURDEN SHARING

An important phenomenon in recent years has been the increasing and concerted efforts to shift responsibility for asylum seekers outside of the EU. This section of the Green Paper, however, limits itself to consideration of the need for greater responsibility sharing between member states. Solidarity with the rest of the world, particularly developing countries, is addressed in Section 5.

4.1 Responsibility sharing

Within Europe patterns of ‘burden’ shifting are continuously at play as EU member states have sought to tighten their own legislation in an attempt to deflect those seeking refuge from their territories, as recently demonstrated by the treatment of Iraqi asylum seekers and the lack of solidarity shown towards Sweden in seeking to accommodate relatively high numbers of arrivals. This attitude of non-cooperation inhibits member states from finding common solutions to the challenges they all face. Even the limited form of responsibility sharing adopted under the Temporary Protection Directive has yet to be tested, and to date the only demonstrable evidence of solidarity among states is their willingness to share the burden of patrolling Europe’s southern sea borders.

While it is difficult to generalise, if given the choice, most refugees would live in the country where they feel most safe, where they are free from discrimination, racism and xenophobia and where they have the best opportunity to integrate, whether due to the presence of family members, social networks, employment opportunities or to cultural or linguistic ties.

EU legislation could and should help to provide a safe environment for refugees throughout the EU. A system that delivers quick, efficient and fair status determination, wherever a claim is lodged, followed by an opportunity for recognised refugees to relocate within the EU would provide an incentive to asylum seekers to claim asylum immediately upon entry into the Union and would facilitate the integration of successful claimants. Both asylum seekers and Member States would benefit from a system where asylum seekers have an incentive to register with the authorities rather than transit or reside irregularly, and which maximises refugees’ potential to integrate into the EU.

- (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?**

The operation of the Dublin system raises wider and more fundamental questions than simply whether each state is taking its fair share of responsibility. The central problem is that the system is premised on a level of harmonization that simply does not exist – and its own role has been to exacerbate some of the differences, pushing State practice further apart rather than playing a role in bringing asylum systems closer together. As conflicting policies have emerged at national level, the goal of harmonization has been undermined, as has progress towards a Common European Asylum System. What is more, those conflicting policies contribute to irregular secondary movement and the continuing high rate of multiple asylum claims lodged across the EU. Furthermore, the evidence available suggests that the

Regulation is not necessarily meeting its objective concerning the transfer of responsibility for claims. This further brings into question whether its performance is worth the huge financial and human cost involved.⁵⁹

For individuals, the human cost is very real and the lack of a level playing field has made claiming asylum in Europe a dangerous lottery. Reports by both ECRE and UNHCR⁶⁰ have demonstrated that some states have been denying those transferred under Dublin access to any asylum procedure. Other examples of the human cost include the increased use of detention and unnecessary suffering for families, children and survivors of torture.

ECRE has set out a range of short-term recommendations for amendments to the Dublin Regulation in order to:⁶¹

- Guarantee access or re-admittance to a full and fair procedure for all asylum seekers ‘taken back’ under Article 16;

 - guarantee the suspensive effect of appeal against transfer;

 - better ensure family reunification by extending the definition of ‘family member’, extending Article 7 to cover beneficiaries of subsidiary protection, and amending Article 8 to allow reunification with family members at any stage of the asylum procedure (where the applicant consents);

 - achieve a more uniform application of the humanitarian clause under Article 15 in order to achieve its objective of bringing families together;

 - exempt separated children from transfer under the Regulation unless this is in the best interests of the child;

 - avoid the disproportionate use of detention during Dublin procedures;

 - clarify that the Reception Conditions Directive applies to Dublin applicants.

In addition, and in the absence of a fully harmonised or common asylum system across EU member states, ECRE believes that Article 10 of the Dublin Regulation (the irregular entry criterion) should be suspended. Individuals should not be forcibly transferred back to a state which does not offer a comparable prospect of protection or which lacks adequate reception facilities. In parallel to these measures, a far greater and targeted input of financial resources to improve protection standards in certain states, combined with the recommendations outlined in section 3 of this response will be required to ensure that the next phase of developing a Common European Asylum System achieves a requisite degree of both quality and equality in terms of the protection provided across the EU. The safeguard of suspending Article 10 could then be reviewed at a specified time in the light of comprehensive and objective evaluation of progress in establishing equality of protection in the future CEAS.

Once the CEAS is more firmly in place an asylum seeker should be able to expect similar treatment in terms of status determination outcomes, procedures and reception wherever the application is lodged. However, refugees, unlike other third-country nationals, have been

⁵⁹ For the period covered, transfer of responsibility was only requested in 17% of all asylum applications lodged across the EU while only 30% of the accepted requests for transfer were actually effected. See Report from the Commission to the European Parliament and the Council on the Evaluation of the Dublin System, COM (2007) 299 final.

⁶⁰ *Summary Report on the Application of the Dublin II Regulation in Europe*, ECRE/ELENA, March 2006 is available at www.ecre.org; *The Dublin II Regulation, a UNHCR Discussion Paper*, UNHCR, April 2006.

⁶¹ *The Dublin Regulation: Ten Recommendations for Reform*, ECRE, March 2007 www.ecre.org.

forced to migrate and often have had little choice about where they reside in Europe. Refugees will integrate most easily and most naturally into those countries where they have extended family members, social networks, employment opportunities/good labour market conditions, and cultural or linguistic ties. A system that delivers quick, efficient and fair status determination, wherever a claim is lodged, followed by an opportunity for recognised refugees to relocate within the EU would provide an incentive to asylum seekers to claim asylum immediately upon entry into the Union, rather than transit or reside irregularly, and would facilitate the integration of successful claimants. Both asylum seekers and Member States would benefit.

This would require the adoption of EC legislation granting freedom of movement within the Union to all persons recognised as being in need of international protection. This could be achieved either through modification of the Qualification Directive or through the adoption of a separate instrument. Different models have been envisaged for a system permitting refugees and beneficiaries of subsidiary protection to move, reside and work throughout the EU⁶². ECRE favours a system that would attach a right to free movement and residence anywhere in the EU to any protection status recognised in an EU State. This would be ECRE's preferred model. Alternatively, a second system would allow mobility to refugees throughout the EU following the grant of protection but may be subject to certain criteria that might, for a certain period at least, exclude individuals from certain welfare provisions or other rights in the second state. In other words, the beneficiary of protection would have full rights in the state that determined status, but more limited rights in all other Member States (such as a demonstrable means of support through employment, savings or family networks).

Short of joint processing, in any system of allocating responsibility (be it current arrangements under Dublin or a system permitting greater applicant choice) there will continue to be variations in the number of asylum applications lodged from one state to another, although achieving a level playing field should help significantly reduce this. Therefore financial responsibility-sharing should take on a far greater dimension than is currently the case (see section 4.2 below). States need to be compensated to fully reflect not only the number of claims they house and determine, but also to support the return of individuals found not to be in need of international protection after a thorough and fair examination of their claims. The following burden sharing measures would need to be developed and could build on initiatives developed under the Hague Programme⁶³:

- 1) a well-resourced financial burden sharing instrument - based on the real costs of hosting and processing asylum claims which could compensate Member States receiving high volumes;
- 2) common structures coordinating the despatch of asylum expert teams comprising officials, experts, interpreters etc to assist overburdened states;
- 3) concrete programmes for joint responses to large scale humanitarian crises, whereby states undertake to grant protection to evacuees;
- 4) a well-resourced Return Fund;
- 5) a well-resourced Integration Fund.

⁶² See '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' conducted on behalf of the European Commission by the Danish Refugee Council, Migration Policy Foundation, and the Institution for Migration and Ethnic Studies (25 June 2004).

⁶³ *The Way Forward: Towards Fair and Efficient Asylum Systems in Europe*, ECRE Sept 2005.

Meanwhile, attention needs to be paid to this situation of those Member States who experience particular or extreme pressures as a result of their geographic location, and the impact of the Dublin system on Member States on the EU's external border has been acknowledged by the European Commission.⁶⁴ In 2006, the European Parliament called on the Commission to take the initiative as soon as possible to revise the Dublin II Regulation and introduce a fair mechanism for sharing responsibilities among the Member States.⁶⁵ Malta and Cyprus for example are particularly disadvantaged due to the fact that Dublin, along with EURODAC, means that irregular arrivals are more or less compelled to request asylum there. By its construction the Dublin Regulation is a responsibility-allocating mechanism rather than a responsibility-sharing system, and therefore while it is retained, the exploration of complementary measures to enhance burden-sharing is to be welcomed.

One possibility posed by the Commission is to consider the distribution of beneficiaries of international protection between Member States post-recognition. As outlined above, ECRE would instead favour a system of attaching a right of free movement to international protection status (i.e. wherever a claim is recognised). However, if and until this is realised, ECRE would cautiously welcome as an interim measure further exploration of the Commission's proposal for intra-resettlement where a Member State (e.g. Malta) exceeds its objectively evaluated absorption capacity (calculated with reference to size, population, GDP etc). However, as with arrangements under the Temporary Protection Directive, the principle of 'double voluntariness' should apply (i.e. both the protected person and the destination state consent) and other important questions should be resolved. In particular, intra-EU transfers should under no circumstances count against a member state's resettlement quota, as this would undermine solidarity with the non-EU countries from which refugees are resettled. For this reason alone ECRE favours the term 'intra-EU reallocation' rather than 'intra-EU resettlement'.

Consideration could also be given to exploring possibilities for reallocating asylum seekers from overburdened Member States prior to status determination. Such a solution could address exceptional strains on the reception and determination facilities if of a particular Member State. Such pressures can contribute to individuals being housed in inappropriate conditions and/or being placed at risk of *refoulement*. However, a number of questions would need to be addressed as to how such an arrangement could function in practice, including under what circumstances it would be invoked (i.e. the level of pressure required), and whether this would be done on a bilateral or multilateral basis. The principle of 'double voluntariness' would need to be respected following an informed choice by the applicant. Either in addition or separately to the establishment of such a mechanism, greater responsibility sharing could also be attained by adjusting Article 16 of the Dublin Regulation to relieve states who have exceeded their absorption capacity of their obligation to examine

⁶⁴ The Commission conceded that some states are 'unduly disadvantaged by their geographic location'. See Communication from the Commission to the Council and the European Parliament on Strengthened Practical Cooperation New Structures, New Approaches: Improving the Quality of Decision Making in the Common European Asylum System, Brussels, 17.2.2006 COM(2006) 67 final, available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0067en01.pdf para. 19.

⁶⁵ See *European Parliament Resolution on the situation with refugee camps in Malta*, 6 April 2006, P6_TA(2006)0136, paragraph 15.

cases under Article 10. Responsibility would then rest with the state in which the application has been lodged under Article 13.⁶⁶

As part of the process of introducing measures to replace, reform or complement the Dublin system, a far greater degree of objective evaluation is essential. Information is particularly needed on statistics, costs⁶⁷, what happens and the problems governments face, as well as asylum seeker motives and the true extent of and reasons for secondary movement. Justifications for the current Dublin System seem to be more based on ‘beliefs’ than on concrete evidence regarding all its aspects or what brings an asylum seeker to any particular EU State. It is vital for policy-makers to be aware of the actual impact of policy in its implementation, for on-going improvements to be made. It is also important for States to know the true costs of operating the Dublin system: even if financial efficiency is not the primary goal, Member States cannot (politically as much as economically) afford to be using significant amounts of public money for little practical outcome.

4.2 Financial solidarity

The financial burden sharing instruments proposed above could build on the European Refugee Fund (ERF). However, this fund should be significantly larger and reflect the real costs incurred in building and implementing asylum systems. Both the original ERF and ERF II distributed resources to Member States according to two principal mechanisms: first, a decreasing fixed amount per Member State and second, an amount based on the proportion of persons seeking or benefiting from international protection in each Member State. While welcoming the fact that ERF III (2008-2013) fixes a higher minimum amount for all new (post 2004) Member States, ECRE remains concerned that the continuing allocation based on numbers tends to favour Member States with well-established systems (and does not take proper account of absorption capacity).

To be a truly effective a burden sharing financial instrument the ERF should target an even greater proportion of its funding at states with historically less developed asylum systems while at the same time continuing to compensate states which receive a higher volume of asylum applications. Instead of a fixed dispensing element there should be a mechanism that is specifically designed to allow states with less developed asylum systems to catch up with more developed states. Secondly, the dispensation logic of any instrument should assess Member States’ responsibilities resulting from the relative rather than absolute number of protection seekers received. Thus resources would be distributed according to the degree of relative effort required by different states (i.e. relative to population size or GDP). Thirdly, and crucially, the fund would have to be large enough to realistically reflect the cost of processing an asylum claim. It must be recognised that the ERF was established to promote networking and innovative new ideas and practice rather than to recompense states for the full cost of running their asylum systems. As such, it is not surprising that the current typical level of contribution under the ERF reflects a fraction of the real costs per asylum seeker. It

⁶⁶ Of course if, and while, ECRE’s recommendation to suspend Article 10 of the Regulation (pending the attainment of greater equality of protection in the CEAS) were in force then this would be redundant.

⁶⁷ Both the European Commission’s 2001 Evaluation (*Commission Staff Working Paper: Evaluation of the Dublin Convention, Brussels, 13. June 2001, SEC(2001)756*) and its 2007 Evaluation (COM(2007) 299 final) have referred to the lack of information on the costs involved – and to States’ willingness not to be concerned about costs as far as this system is concerned.

therefore must be stressed that the objectives identified in this section would require a significantly greater degree of financial investment than that currently provided.

- (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?**
- (26) Are there any specific financing needs which are not adequately addressed by the existing funds?**

ECRE members have had many years of involvement with ERF Community Actions and have regularly advocated for a larger proportion of the funds to be earmarked for Europe-wide or transnational partnerships rather than be devolved to member states. Transnationality was an essential element in the EQUAL initiative for promoting the transfer of know-how and good practice between partnerships and between member states. The European Commission has made a strong case for retaining transnationality within the European Social Fund: "Exchange of information, sharing of good practice, and working together towards common solutions in a multi-cultural environment has an important multiplier effect to strengthen the capacities to innovate, to modernise, and adapt institutions to new social and economic challenges⁶⁸." These arguments apply equally to the ERF.

The increase from to 10% in ERFIII from 7% in ERFII is to be welcomed, but the proportion could be even greater. More opportunities for exchange are needed a practitioner level and through EU platforms and thematic networks, perhaps with a co-ordination role for the European Commission as a broker of good practice, as a catalyst for change, and as a supporter of exchanges of experience, awareness-raising activities, seminars, networking and peer reviews.

Control over disbursement of most of the European Refugee Fund (ERF) lies with member states. ECRE members have reported concerns with the way this is done, including disproportionate allocation to one particular objective and impossibly short deadlines for the submission of applications. ECRE would welcome more transparency in the way they allocate funds, and an ombudsman or other complaints mechanism to deal with NGOs' concerns.

Many NGOs and Refugee Community Organisations (RCOs) have serious problems to secure sufficient core funding for their activities. This lack of core funding seriously hinders these organisations to access community funding because of the match funding requirements. The match funding obligations in combination with delays in payments, bureaucratic reporting requirements and time consuming application procedures are also a barrier for more established civil society organisations to access funding.

NGOs, particularly RCOs would be greatly assisted by a reduction in the amount of match funding required and simplification of the procedures for applying for grants and reporting on them.

⁶⁸ *ESF support to transnational cooperation 2007-13*, see also *Making the most of transnational cooperation: EQUAL asylum seekers*.

5. EXTERNAL DIMENSION OF ASYLUM

5.1 Strengthening protection in third countries

- (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 development assistance be more effectively targeted with a view to underpinning and sustaining solutions for asylum seekers and refugees?**
- (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?**

Many countries struggle to provide protection to large numbers of refugees in contexts where their own nationals often do not enjoy basic human rights. ECRE has argued⁶⁹ that Europe can and must do more to assist these countries. EU Member States should share the responsibility for hosting and protecting the world's refugee population in a principled and rights-based manner and ensure that their asylum and immigration policies lead to them taking a fairer share of the responsibility rather than exacerbating the problem of unequal burdens.

Migration management, however, is becoming an increasingly important element in the EU's relations with third countries and ECRE is concerned that funding may be diverted away from core development goals, such as tackling poverty. Cooperation to prevent irregular migration to the EU and acceptance of the return of people who have entered the EU irregularly, including third country nationals, are increasingly being required of governments that would like a preferential relationship with the EU.

Regional Protection Programmes (RPPs)

ECRE looks forward to the Commission's evaluation of the effectiveness of the pilot Regional Protection Programmes (RPPs). Whilst ECRE welcomes the focus of these programmes on protection rather than the management of migration flows, until that report is published it is difficult to gauge any added value they might bring. The original intention was to improve refugee protection in refugees' regions of origin, yet the WNIS region was selected for a pilot RPP as a region of transit. This indicates that a driver behind RPPs may indeed be a desire to reduce the number of asylum seekers reaching the EU, effectively shifting the responsibility of protection to other countries with far less capacity than EU Member States.

ECRE is running a capacity building programme in the Western NIS, together with NGO partners from Belarus, Moldova and Ukraine. There needs to be more recognition of the scale of the problems experienced by refugees seeking protection in this region. In 2006 NGOs reported a routine lack of interpreters for refugees for many languages, including for those detained on the borders of Ukraine and the EU; cases of *refoulement* of refugees (for example

⁶⁹ *The Way Forward: Guarding Refugee Protection Standards in Regions of Origin*, supra.

from Ukraine to Uzbekistan); limited access to legal aid in all three countries; difficulties in accessing asylum procedures and in the case of Chechen refugees, difficulties accessing the territory of Ukraine; increasing racist and xenophobic attacks; a lack of a subsidiary protection status in Ukraine; and in all three countries extremely limited integration opportunities or programmes of assistance; a shortage of places in EU member states for resettlement for those who need it from these countries (particularly Ukraine)⁷⁰.

Meanwhile, UNHCR funding in the region is currently being reduced, leaving NGOs on the borders of Europe forced to cut their legal advice services for asylum seekers and refugees.

In these circumstances, it is not surprising that NGO lawyers working in detention centres in the Zakarpattya region of Ukraine meet the same clients detained for the second or third time, trying time and time again to reach the EU.

Clearly, significant financial support is required to refugee assisting NGOs and refugee community groups as well as state migration services in the region. Without wishing to preempt the result of the Commission's evaluation, it may be that a more coherent approach is needed, with better protection-focused coordination of existing large-scale EU funding programmes and political priorities in the area of development, humanitarian assistance and foreign affairs, rather than the establishment of a few, relatively small-scale projects that make up an RPP.

Development

While migration management ambitions should not be allowed to divert development assistance from core objectives, such as the alleviation of poverty, the use of development assistance represents an important element in a comprehensive and coherent approach to refugee situations in developing countries. The EU should fully involve those countries in developing programmes and projects, in a spirit of burden-sharing, so as to ensure that their needs and concerns are recognised, in order to create a sense of ownership and increase the likelihood of success. Nevertheless, the EU should use its influence, funds and the offer of resettlement places to ensure that all durable solutions are implemented, persuading sometimes reluctant host countries to consider not only return, but also self reliance strategies and eventual local integration for some of their refugee populations.

Enhancing protection in refugees' regions of origin cannot be seen as a quick fix for Europe's challenges, but requires significant investment of resources over time, in order to build the capacity of national structures and support services, for ongoing technical assistance and for the independent monitoring of performance. Long-term, detailed and comprehensive plans are needed, backed by significant technical and financial assistance, for their implementation in each major refugee hosting country in the developing world.

Important elements of such plans include:

Requiring that all partner States accede to and comply with their obligations under the 1951 Refugee Convention and the 1967 Protocol and the relevant human rights instruments;
assistance to host populations as well as refugees to guarantee an adequate standard of living and access to rights to shelter, food and water, health care, education, and employment;

⁷⁰ See ECRE *Country Reports 2006: Belarus, Moldova, Russian Federation and Ukraine. The Situation for Refugees, Asylum Seekers and IDPs*, July 2007.

- technical assistance and financial support to strengthen host country asylum systems and procedures in close consultation with UNHCR, and civil society;
- support for UNHCR, in particular in the development of national asylum systems;
- support for NGOs to share best practice in refugee protection and assistance;
- training programmes for State officials, judges, legal representatives and local civil society on refugee rights, reception conditions, protection, refugee participation and durable solutions;
- training in public education and advocacy in order to win political support for refugee protection-oriented programmes
- initiatives to understand and tackle the root causes of forced migration.

Relations with third countries

The Green Paper's recognition of the need to support third countries and adopt a coherent approach with respect to refugee assistance in those countries is welcome. It is imperative that human rights and refugee protection are not sidelined and remain a focus of international debates on the theme of migration.

The developing external dimension of European migration policy has seen the EU and Member States increasingly cooperating with third countries on the prevention of irregular migration and on promoting returns of irregular migrants, with potentially serious consequences for refugees.

In their use of immigration and airline liaison officers in foreign airports, or joint patrols with third countries, and other measures, European countries are extending their border controls beyond their physical frontiers. ECRE would urge the EU to acknowledge explicitly that all individuals under the effective control of Member States, not only those on their territory, must enjoy full respect for their human rights, including protection against *non-refoulement*.

Furthermore, the EU's Border Agency, FRONTEX, has the power to negotiate and conclude working arrangements with third countries⁷¹. A combined Frontex/Commission mission recently visited Libya to assess its need to reinforce its southern border, with neighbours that include Chad, Niger and Sudan.

ECRE would make the following recommendations with respect to Frontex' arrangements with third countries:

- The legal framework for Frontex-assisted operations in the territory of non-EU states should be clarified. The framework decision on how Frontex can cooperate with third countries, as referred to in the Frontex Annual Report 2006, should be publicly available.
- Frontex agreements, whether political or technical, which are liable to have an impact on the physical access to the EU for refugees and people in need of protection, should adequately address the issue of responsibility towards people who wish to seek asylum. This is particularly important in light of plans to intensify operational cooperation with third countries in Africa and Asia. Working agreements must not be concluded with countries that have not signed up to key international instruments that

⁷¹ Council Regulation (EC) 2007/2004 of 26 October 2004, Articles 13 and 14

guarantee protection for those seeking asylum. All future working arrangements with third countries must be publicly available and therefore subject to scrutiny for compliance with international and EC law.

Sustainable returns

A balanced approach to third countries would take more account of the need to ensure that returns of asylum seekers whose claims have been rejected are sustainable.

Experience has shown that even if people return after a final rejection (voluntarily or otherwise) many will leave their home country again. Even with new and improved systems to identify previous asylum seekers, it is not cost effective that these people keep leaving their own country and re-migrating to Europe and possibly applying for asylum.

Investment in return packages that enable people to build dignified lives in their home countries is cost-effective and shows solidarity with the countries concerned. Packages could include school or vocational training in the host country, but also post-return assistance. Information is an essential element: the decision to return often requires time to mature. If properly informed about the various options available, a person may choose not to live in limbo, while conducting a potentially drawn-out process to avoid being removed, and instead opt to attempt to rebuild their life in their country of origin.

It is in the EU's interest, as well as that of asylum seekers whose claims have been rejected, for returns to be voluntary, dignified and sustainable. Appropriate training pre-return, combined with post-return reintegration programmes, for example, could help make returns more durable. More coordination is needed at the EU and member state level to ensure that home affairs priorities do not undermine foreign and development policies.

Readmission agreements

An important feature of the EU's relationship with third countries has been the negotiation of readmission agreements. Such agreements are not necessarily in the interests of the countries or the individuals concerned, particularly as they feature a requirement to accept the return not only of citizens of the country concerned, but also of third country nationals. For example, people who might be self-supporting in Europe and even sending remittances back to their country of origin can become a burden on that country when forced to return.

The prospect of eventual membership of the EU, however, has been a particularly effective lever in the Western Balkans, where the EU speedily secured readmission agreements with all the countries in the region. Citizens of those countries were also offered easier access to visas for EU Member States, and Russia and the Ukraine have been offered similar visa facilitation agreements as an inducement. Such agreements are not necessarily in the interests of the countries or the individuals concerned.

The European Parliament has expressed a number of concerns about readmission agreements, including the absence of conditionality on human rights and democracy and human rights

safeguards in general.⁷² ECRE recommends that readmission agreements include a guarantee against *refoulement* in compliance with the ECHR and other human rights instruments; that they provide for return to take place in safety and dignity, include a range of procedural safeguards and should be suspended when returns have led to human rights abuses or *refoulement*.⁷³

5.2 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?**
- (32) In what other situations could a common EU resettlement commitment be envisaged? Under what conditions?**

Sitting alongside the asylum system and never substituting for the right to seek asylum, resettlement is an important tool of international protection, a means of providing a durable solution to refugees who would otherwise live out their lives in camps, as well as a practical mechanism for sharing more equitably the international responsibility for hosting the world's refugee population. It can bring additional benefits to host countries by fostering public understanding of the causes of refugees' plight.

Countries with large, long-term refugee populations or those coping with large scale influx of refugees want to see the EU doing more than offer financial assistance. The tangible gesture of burden-sharing represented by an offer of resettlement places, within a comprehensive package of assistance, could help encourage those countries not to close their borders to refugees, to meet their protection obligations and to allow refugees to integrate locally. This strategic use of resettlement should be further explored, both in the context of Regional Protection Programmes (RPPs) and beyond.

In 2005 ECRE set out its vision for a European resettlement⁷⁴ programme and the means to achieve it, which we urge the Commission to consider in greater detail when considering its priorities for 2008. Since then, a number of member states have shown themselves interested in establishing national resettlement schemes and receiving refugees through resettlement on an *ad hoc* basis, and the EU has amended the European Refugee Fund to allow more funding for resettlement. Those member states should be encouraged to establish schemes, with existing resettlement countries offering support and sharing expertise. Flexible and voluntary at first, an EU-wide resettlement scheme should lead to an increase in the opportunities for resettlement to Europe and engage the participation of all EU Member States and other European countries wanting to be associated with it.

⁷² Report on the proposal for a Council decision on the conclusion of the Agreement between the European Community and the Russian Federation on the facilitation of issuance of short-stay visas, European Parliament, A6-0028/2007.

⁷³ Position on Return, ECRE, 2003.

⁷⁴ The Way Forward: Europe's Role in the Global Refugee Protection System - 'Towards a European Resettlement Programme', ECRE, April 2005.

In the longer term an EU-wide resettlement scheme should be expanded into a truly joint European resettlement programme based on common criteria and the commitment of European States to make a significant number of resettlement places available every year. Member States would have to commit to collectively resettling a certain number of refugees, who would be dispersed across Europe according to a fair and equitable system. One model could be a process of voluntary bidding or pledging to meet a given commitment, similar to the US system.

Currently, the only possibility for resettlement at an EU level is in the context of RPPs. Consideration should be given to establishing a basis for EU-wide coordination of resettlement outside of RPPs.

In the short term an EU resettlement office could be established, possibly attached to the proposed European Asylum Support Office. It would support the development of new resettlement programmes in member states, ensure closer cooperation between European resettlement countries in collaboration with UNHCR, and facilitate the development of an EU resettlement scheme.

In the longer term, an EU resettlement office could take on a more operational role, placing representatives in regions, planning allocations, coordinating missions with UNHCR, and setting levels and resettlement priorities. NGOs have traditionally played an important operational role in international resettlement efforts, which are coordinated with UNHCR and states at an annual tripartite meeting. The EU office should build on this successful tripartite approach by engaging the support of NGOs, as well as member states and UNHCR. A recent survey conducted by ECRE indicated that there is great interest amongst European NGOs in advocating for resettlement and in undertaking or expanding involvement in resettlement activities.⁷⁵

A particularly important role played by NGOs, and refugees themselves is in providing cultural orientation, both pre-departure and after arrival. NGOs working with refugees in countries of asylum can add value by:

- providing knowledge about the policy, regulation, and the practice of settlement of refugees in the receiving country;
- demonstrating that society is welcoming the refugee, not only the government;
- winning trust more easily than State officials ;
- gathering information necessary for family reunion;
- collecting information on the profile of a new group of refugees and sharing it with those responsible for delivering integration programmes.
- the involvement of refugees, in particular those from the same background, can enhance credibility and ensure that the newcomers receive the information they need, in a language they understand.

ECRE would support further development of Europe's traditional role in international resettlement efforts of prioritising the most vulnerable cases. Some European countries, however have been introducing 'integration potential' into their selection criteria. ECRE would urge caution in the use of this criterion, without at least a clear evidence base. There is

⁷⁵ *Resettlement by Europe: the actual and potential role of European NGOs*, ECRE, 2007.

no evidence, for example, suggesting that those with the most work experience and education are most likely to integrate. Surprisingly, perhaps, refugees who may have been considered the most vulnerable and disadvantaged prior to resettlement, have integrated more successfully afterwards. Unlike asylum seekers, much is known about resettled refugees before they arrive. Rather than selecting according to integration potential, Member States should take advantage of the opportunity to plan reception programmes and integration programmes that meet refugees' needs. Research and debate is needed on integration potential.

5.3 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?

Between July and August 2006, the EU Borders Agency, Frontex, was involved in detecting and diverting over 6,000 "illegal migrants" from the Canary Islands⁷⁶, which have also seen a 60% drop in arrivals of undocumented migrants by boat in the past year⁷⁷. Any decreases in the number of illegal entries into the EU as a result of migration control measures is presented as a success by the EU and as a factor that contributes to saving human lives⁷⁸. Yet amongst those who are pushed back from EU waters or are prevented from leaving third countries there are likely to be refugees and people in need of protection. Whether refugees or not, they are prevented from leaving countries with poor human rights records, and many will take ever greater risks in the search for new routes to circumvent EU border control. The NGO United has documented almost 9,000 deaths of people attempting to enter the EU in recent years⁷⁹.

By preventing the arrival of refugees in Europe, EU member states fall short of the values they proclaim, particularly respect of human rights, and leave the responsibility for taking care of refugees to countries which often struggle to do so. Furthermore, they seek to circumvent their legal obligations under the 1951 Refugee Convention, the European Convention on Human Rights and other international human rights instruments while relying on the lack of transparency, democratic oversight and independent monitoring of the extraterritorial enforcement of immigration control. ECRE would welcome an explicit recognition by the EU that the power to prevent access to the territory carries with it the responsibility to identify those in need of protection and treat them accordingly. In UNHCR's terminology, ECRE would welcome a commitment to 'protection-sensitive' border controls.

While the responsibility for controlling the external borders lies with the Member States, since the Laeken European Council⁸⁰ the EU has tried to tackle three main challenges⁸¹:

⁷⁶ Frontex Annual Report 2006, p13.

⁷⁷ EU Observer: EU border agency cuts African migrant numbers.

⁷⁸ Presidency Conclusions of 21/22 June 2007, paragraph 18 and Frontex press release 'Joint Operation Nautilus 2007 the end of the first phase', 6 August 2007. Available at the following address: http://www.frontex.europa.eu/newsroom/news_releases/art28.html

⁷⁹ http://www.united.non-profit.nl/pdfs/actual_listofdeath.pdf.

⁸⁰ Conclusion 42 of the European Council of Laeken of 14 and 15 December 2001 reads: "Better management of the Union's external border controls will help in the fight against terrorism, illegal immigration networks and the traffic in human beings. The European Council asks the Council and the Commission to work out arrangements

- implementing a single corpus of legislation concerning border checks, uniform for all the external borders;
- ensuring operational coordination amongst Member States; and
- setting up a burden-sharing mechanism to redress the imbalances due to the different degree immigration pressure on different borders.

The responses to these challenges have been, respectively:

- the Schengen Border Code;
- the European Agency for the Management of Operation Cooperation at the External Borders (FRONTEX) and the Rapid Border Intervention Teams (RABITs);
- the External Borders Fund.

In the exercise of border control, Member States must respect the principle of *non-refoulement*. Similarly, Member States should comply with the European Convention on Human Rights and their obligations under the other human rights instruments to which they are parties, wherever they exercise that control in a manner that amounts to an exercise of jurisdiction. A correct interpretation of the Schengen Borders Code would require Member states to accept all asylum requests presented to them in the course of the enforcement of interception measures, ensure admission to the territory for the purposes of the asylum procedure and provide access to legal remedies against a refusal, including a refusal of admission to the procedure. There is no indication as to how this may be put into effect in the context of a Frontex operation.

In its first year of operations, FRONTEX appears to have paid little or no consideration to refugee protection concerns. The precise scope of its coordinating role and the way in which operations are conducted is unclear and, as it is an agency, there is limited opportunity for scrutiny of its activities and thus limited accountability⁸². It is also unclear how Member States can be held accountable for compliance with international and EC legal obligations in operations coordinated by Frontex. This is compounded by the lack of transparency, and the absence of independent monitoring.

ECRE would welcome the following:

- The insertion in to the Frontex Regulation of references to *non-refoulement* and other international human right obligations
- Regular reports from Frontex, e.g. to the Fundamental Rights agency, explicitly demonstrating how its activities fully respect fundamental rights;
- Regular cooperation between Frontex and international organisations with a mandate in the areas of asylum and/or human rights as allowed by its founding regulation (Art 13).
- Independent monitoring of Frontex and Member State border operations by relevant NGOs and international organisations, according to a jointly defined framework.

for cooperation between services responsible for external border control and to examine the conditions in which a mechanism or common services to control external borders could be created (...)."

⁸¹ As identified by the Commission in its Communication of 7 May 2002 "Towards integrated management of the external borders of the Member States of the European Union" and endorsed by the Council in its "Plan for the management of the external borders of the Member States of the European Union" of 14 June 2002.

⁸² See Dehousse, R., 'Regulation by networks in the European Community: the Role of European Agencies' (1997) 4 *Journal of European Public Policy* 2, 246-261.

- Training for Frontex staff and those participating in Frontex operations in international human rights and protection principles and obligations;
- Frontex risk analyses and feasibility studies, which form the basis for operations and the distribution of resources under the External Borders Fund, to be made publicly available;
- Frontex to refrain from involvement in joint return operations until the EU adopts common standards on return.

Member states can tackle the dangerous legal vacuum that is contributing to the loss of life at its sea borders is by ratifying relevant amendments to the 1979 Search and Rescue Convention and the 1974 Convention for the Safety of Life at Sea. Guidelines, possibly an EU instrument, are needed on issues not regulated by international law, such as the state responsible for receiving rescued passengers. Such agreements must facilitate states' ability to adhere to their protection obligations and preserve the right to seek asylum, and underline the imperative to preserve life at sea.

The lack of transparency is not restricted to the operations of Frontex or to maritime borders. ECRE would welcome more transparency and cooperation with UNHCR and NGOs at all external borders. One model for consideration would be the Memorandum of Understanding reached between the Hungarian Helsinki Committee, UNHCR and the Hungarian border authorities.

In recent years EU Member States have had increasing recourse to the practice of posting immigration staff abroad, either to diplomatic missions abroad, including in EU Member States (Immigration Liaison Officers, ILOs)⁸³, or to international airports or seaports abroad, including in EU Member States, with the task of assisting carriers and the relevant authorities to check that travellers are in possession of the necessary documentation (Airport Liaison Officers, ALOs).

By giving priority to illegal immigration concerns, ILOs/ALOs affect the ability of refugees to flee and find protection from persecution when not in possession of the necessary travel documents. They could, however, play a positive role in facilitating the entry into the EU of people who wish to seek asylum with whom they come into contact. ILOs/ALOs should be given the power to waive carriers' sanctions or facilitate the issuance of protection visas or access to a Protected Entry Procedure (PEP) where those possibilities exist. For this they need proper training, assisted by national asylum authorities, and their activities must be transparent and monitored.

ILOs and ALOs simply reinforce the effectiveness of visa requirements and carriers liability in preventing entry to the EU. The legislation on carriers' liability should be revised so as to ensure that sanctions are not enforced if a third-country national is admitted to the asylum procedure.

⁸³ The Council Regulation (EC) No. 377/2004, of 19 February 2004, on the creation of an immigration liaison officers network defines an ILO as "a representative of one of the Member States, posted abroad by the immigration service or other competent authorities in order to establish and main contacts with the authorities of the host country with a view to contributing to the prevention and combating illegal immigration, the return of illegal immigrants and the management of legal migration".

When conducting any evaluation of the implementation of carriers' liability and anti smuggling legislation particular attention needs to be given to measures taken to give effect to any safeguard clauses that were aimed at ensuring the rights of refugees were respected. Good practice in giving effect to these clauses should be collated.

(34) How might national capacities to establish effective protection-sensitive entry management systems be increased?

As part of the general programme 'Solidarity and management of migration flows', the External Borders Fund has been set up for the period 2007-2013⁸⁴. The instrument establishes a financial solidarity mechanism to support the states that endure, for the benefit of the Community, a lasting and heavy financial burden arising from the implementation of common standards on control and surveillance of external borders and visa policy.

The External Borders Fund should be used to enhance the incorporation of protection concerns into the management of external borders by:

improving the training and qualifications of border guards and immigration liaison officers as regards the implications of asylum and human rights law for access to the territory, and sensitizing carriers on these matters; and

improving the independent monitoring of border and pre-frontier controls by relevant international organisations and NGOs.

The training should include in particular a focus on gender and age-sensitivity in order to ensure that member states fully meet the requirements of the Qualification Directive. Independent oversight is urgently needed to ensure that officials facilitate access to asylum in the context of their implementation of an increasing gamut of sophisticated methods of immigration control, including the extra-territorial 'border' control close to/in refugee countries of origin.

The Community Actions part of the Fund in particular should be used to support pan-European and sub-regional activities which foster the sharing of good practice on border controls which are protection-sensitive.

⁸⁴ Decision of the European Parliament and of the Council establishing the External Borders Fund for the period 2007 to 2013 as part of the General programme "Solidarity and Management of Migration Flows", 18 April 2007. The other funds established under the Programme are the Integration Fund, the Return Fund and the European Refugee Fund.

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

- (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?**

The EU is already a global player in refugee issues. The Commission is the third largest donor to UNHCR and, together with individual Member States, Europe is UNHCR's largest source of funding. The EU and Member States should continue to support host countries in assisting and protection refugees, and to raise protection standards, but capacity building outside of Europe must never be seen as a substitute for the EU upholding its responsibilities to asylum seekers, or a mitigating argument in defence of migration control measures that make it increasingly difficult for refugees to reach EU territory.

States outside of the EU are highly sensitive to the EU's emphasis on migration control, when they shoulder so much more of the responsibility for refugee protection. This year a total of 50,000 Iraqis are expected to seek asylum in industrialised countries, including Europe, while 60,000 flee *every month*, mostly for countries in the region. The global refugee regime depends on all countries doing their duty and keeping borders open to refugees, even when resources are under severe pressure. The EU carries great weight in the international community and if it comes to be regarded as shirking or shifting its responsibilities the whole fragile structure is put at risk.

At a more practical level, when the EU seeks international partners for protection-focused programmes, such as RPPs, or broader partnerships, such as migration platforms, many States will be suspicious of the EU's motivations. Similarly, the EU's treatment of refugees and asylum seekers has great export value. Restrictive interpretations of international law born in Europe, such as the safe third country notion, spread quickly through the international community.

To maintain its credibility and to ensure coherence between its asylum policies at home and refugee policies abroad, the EU needs to be seen to be putting fundamental rights at the core of all of its activities.

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ANNEX I:

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http://www.ecre.org/resources/research_paper/897

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