The Way Forward
Europe's role in the global refugee protection system

The Return of Asylum Seekers whose applications have been rejected in Europe

ECRE European Council on Refugees and Exiles June 2005

Acknowledgements

This paper was written by Patricia Coelho (ECRE) and Ophelia Field.

ECRE wishes to express particular thanks to Mel Pickett (Refugee Action, UK) for acting as supporting expert in the process of developing this paper. We would also like to thank Ophelia Field for providing us with such a good starting point for that process.

Special thanks go to those individuals working in refugee-assisting organisations within the ECRE network, who gave their invaluable support by sharing their expertise and experience. These include Reyes Castillo (ACCEM Spain), Gary Bell, Gemma Juma, Richard Lumley, Jonathan Parr and Anna Reisenberger (British Refugee Council), Caroline Intrand (CIMADE, France), Anne La Cour Vaagen and Dorte Smed (Danish Refugee Council), Jurry Ekkelboom (Dutch Refugee Council), Xavier Richard and Frédérique Bourgeois (Forum Réfugiés, France), Patricia Schell (PHAROS - The Netherlands) and Juerg Schertenleib (OSAR - Swiss Refugee Council).

ECRE would also like to thank Catherine Phuong (University of Newcastle, UK) for providing comments.

Finally we would like to acknowledge ECRE staff who made significant contributions in shaping this paper: Clara Odofin, Chris Nash and Richard Williams.

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Executive Summary

If governments and refugee advocates agreed on other aspects of European asylum policy, such as the need for fair determination procedures and the required level of protection, and could do so in practice as well as principle, their differences on the subject of return would be relatively limited.

In recent years, however, European governments have used return as a tool to gain political advantage by appearing tough on asylum at the expense of fairness and efficiency. The drive to return has led to an increased use of detention in the case of asylum seekers whose cases have been rejected for unreasonably long and even indefinite periods of time to prevent absconding. It has also led to destitution for many asylum seekers whose cases have been rejected, from whom all types of support are withdrawn as an incentive to return. Even where it is recognised by the host country that an individual cannot be returned many of those whose applications have been rejected do not receive a legal status and find themselves in a limbo situation without the right to work to earn a leaving and without state support. The result is that asylum seekers whose applications have been rejected form a growing segment of vulnerable, poor and marginalised people in European societies.

In the public debate surrounding return its complexity is often ignored. Over-simplistic comparisons are drawn between the number of asylum seekers whose claims have been rejected and the smaller number of people removed. Yet, return is not always possible or desirable. Some states refuse to take back their nationals, particularly where their identity is in doubt. There are also humanitarian reasons for not returning a person which include particular vulnerability or a long period of residence in the host country. The failure to return is widely seen as a serious problem undermining asylum systems, yet there are no comprehensive, accurate and comparable statistics that could establish, for example, the extent to which asylum seekers whose claims have been rejected leave of their own accord, before steps are taken to remove them.

The credibility of a removal system and an asylum system is fundamentally undermined if it fails to protect those in need of international protection.

ECRE and its member agencies do not dispute the fact that governments have the right to return asylum seekers whose claims have been correctly rejected following a proper and fair asylum procedure. However, we cannot at present confidently assume that if someone's asylum claim has been rejected by a European country they are necessarily a person not in need of international protection in view of procedural deficiencies in European asylum systems or restrictive interpretations of the refugee definition.[1]

[1] See ECRE's forthcoming paper: *The Way Forward. Europe's role in the global refugee protection system. Towards fair and efficient asylum systems in Europe*.

Fair and efficient asylum systems are a pre-requisite to return. If states are concerned with being able to undertake successful returns they must address the fairness of their asylum procedures first, as wrong decisions may lead to people being persecuted and having to flee from their countries of origin again.

States must not enforce returns prematurely. Asylum seekers, those who are granted a status and those who are not granted a status in Europe all face the threat of return and experience the fear of premature return. There is an increasing trend across Europe to reduce the period of time between the declared end of hostilities in a given country/region and commencing or threatening return to that region. States sometimes also delay determination of asylum claims until the declared end of hostilities in the country of origin when claimants can be deemed not to be in need of international protection. Asylum seekers whose claims have been rejected have therefore been returned to unsafe conditions.

Obstacles and alternatives to return

Obstacles to the return of persons whose claims have been rejected can exist for a variety of reasons. These can be technical such as the practical impossibility of transporting a person to a country with no functioning airport. They can also be related to countries of origin being unwilling or feeling unable to cooperate with returns, although it is an established principle of international law that states have an obligation to receive back their own nationals.

International cooperation with countries of origin in a spirit of solidarity at all stages of the return process is a pre-requisite to achieving sustainable return. It is in the best interests of all parties for host countries to maintain a supportive relationship with countries of origin, through offering political, financial and economic support, to ensure that returns can take place and that returnees have a good chance of successfully re-integrating in their home countries. The use of punitive measures, such as the threat of withdrawing development aid and support, is unlikely to achieve this and ECRE strongly opposes it.

States should also resist penalising individuals for matters that are very often beyond their control where return is not possible. Instead, developing alternatives to return will often constitute a better solution for certain individuals as well as for the state that has considered and rejected their asylum application.

European states should not enforce removals and should grant a legal status to certain categories of persons, especially those who cannot be returned for reasons beyond their control. This would avoid asylum seekers whose cases have been rejected being left in unacceptable limbo situations, without support and with few rights in the host country. Legal statuses granted could be either temporary or permanent, as appropriate, and should in particular be considered for people who have been resident for 3 years or more in the host country, and for people considered vulnerable, namely the sick, older people, children (especially separated children), single women or female heads of households.

Increased efforts to enforce returns

An increase in efforts to enforce returns from Europe has resulted in increased returns. State authorities have no interest in making the process of return more distressing or difficult than necessary, so while return procedures should be efficient, all returns should be undertaken in a manner that is safe, dignified and humane**.** Individuals should be allowed to retain a sense of self-sufficiency and control over their own lives.

In undertaking returns European states must ensure their actions do not breach any of their human rights obligations under international and European law.

ECRE has defined three different categories of return: voluntary, mandatory and forced.[2] Enabling voluntary returns is always preferable but this term, according to ECRE, only applies in the case of persons with a legal basis for remaining in a host country.

ECRE defines forced return as the return of those who have not given their consent and who may be subject to sanctions or the use of force on removal. Cases where the use of force in deporting an individual has resulted in their death or serious injury have shocked the European public and led to legal actions against state authorities. If implemented by European states, forced return must be carried out in accordance with their human rights obligations. In developing European legal frameworks on return procedures the European Union should help ensure the implementation of such human rights standards within its Member States.

Some people who no longer have a legal basis for remaining in the host country for protection-related reasons consent to return. But it is increasingly common for European states to use methods to induce or coerce such people to consent to return. ECRE defines all these situations as mandatory return. Methods for inducing return can include: threat of detention or continued detention and withdrawal of support in the host country. Where consent to return is coerced in this way it cannot be said that a person has freely chosen to leave their host country.

Detention should only be used as a last resort, and should be in full compliance with international human rights law. Detention for the purposes of preventing absconding prior to return should only be used when absolutely necessary, for the minimum period required to organise return. Alternatives should always be explored. The trend in European states, however, is increasingly to detain, sometimes for indefinite periods, as a standard part of any removal procedure. There is little supporting statistical evidence, however, that people who are not detained will necessarily disappear and it is highly unlikely in the case of certain vulnerable persons, such as the sick, older people or families with young children.

[2] ECRE Position on Return 2003.

The denial of human rights and the withdrawal of support as a means of forcing asylum seekers whose applications have been rejected to cooperate with return procedures or compel them to leave of their own accord is unacceptable. Through such withdrawal of support states risk violating their obligations under the European Convention on Human Rights. Instead asylum seekers whose applications have been rejected should be adequately supported by the government of the host country through the provision of basic socio-economic benefits until it is really possible for them to leave that country.

Some European governments extend positive incentives such as financial assistance, available through voluntary repatriation programmes, to asylum seekers whose applications have been rejected. This is to be welcomed and should be developed across all European countries. However, it is important that states ensure that consent is informed and no coercive methods are used. States should also seek the increased participation of NGOs and refugee representatives, including those working in countries of origin, in assisted return.

ECRE strongly opposes in principle transfers to third countries of persons whose asylum applications have been rejected as a measure to enforce return.

Follow up to return

It is very often not known whether a person returned to their country of origin has arrived safely and has been able to re-integrate into the community. Systematic monitoring would provide a check on the correctness of decisions on asylum claims and would instil confidence in potential returnees. It could also be used to evaluate the success of return policies (measured in terms other than just total numbers returned).

Sending states should set procedures in place to check that returnees have reached their destination safely. There should also be follow-up and monitoring of returns to identify whether return policies are safe, effective and sustainable. States should establish their own monitoring systems, but it is important for NGOs and refugees to be involved in monitoring returns, including NGOs in regions of origin.

The support of the host country must not end once return has taken place. In order to ensure sustainable return, it is important for states to assist in reconstruction and development in countries of origin and to support the re-integration of returnees. Successful reintegration in the country of origin is a key factor in ensuring the sustainability of return.

The development of this paper on the return of asylum seekers whose applications have been rejected is part of the organisation's development of a series of proposals entitled ***"The Way Forward - Europe's Role in the Global Refugee Protection System"****, designed to provide constructive recommendations on a number of topical refugee policy issues and contribute to positively influencing the European debate. The other proposals address the issues of developing European resettlement activities, making refugee protection effective in regions of origin, creating fairer and more efficient asylum systems in Europe and improving solutions for refugees through integration.*

Introduction

If governments and refugee advocates agreed on other aspects of European asylum policy, such as the need for fair determination procedures and the required level of protection, and could do so in practice as well as principle, their differences on the subject of return would be relatively limited.

The European Council on Refugees and Exiles (ECRE) and its member agencies do not dispute the fact that governments have the right to return asylum seekers whose claims have been correctly rejected following a proper and fair procedure. Equally state authorities have no interest in making the process of return more distressing or difficult than necessary.

At the same time ECRE and its member agencies have serious concerns regarding the increasingly precarious situation of asylum seekers whose applications have been rejected[3] in Europe. These concerns stem from a number of issues such as poor decision-making, prolonged asylum procedures, unsafe and/or premature returns, the increased use of detention prior to return, inappropriate returns of vulnerable persons, the withdrawal of social assistance to enforce returns and inadequate return procedures, to name but a few. These issues exist in the context of increasingly widespread concerns which reinforce the view across Europe that asylum seekers whose claims have been rejected need to be removed, the increased efforts on the part of European governments to return more asylum seekers whose applications have been rejected in order to appear tough on asylum and immigration policies to their public and the growing attention paid to returns by the European Union (EU). This has so far focused on agreeing operational measures benefiting states' removal policies but it plans to address issues of return policies in Member States more comprehensively over the next five years.[4]

Most of the removal policies currently implemented by European states share a lack of concern for the long-term fate of those whose asylum applications have been unsuccessful. Many such people are detained as a matter of course and this can be for indefinite or unreasonably long periods of time. For Europe as a whole, especially Western Europe, the ability to deport continues to be seen as an essential, legitimate deterrent to those with no protection concerns trying to migrate to their countries. Although the idea that the routine deportation of irregular migrants will deter future irregular migrants is an assumption shared by many governments, it is one that few researchers have tested. One analyst has observed that it is far from clear *"to what extent the experience of lack of success in migration can undermine the migration momentum based on social networks, or more crudely, economic push and pull factors."*[5] To date there has been little demonstration of a direct correlation between low

[3] This group of persons are often described as 'rejected or failed asylum seekers' though clearly it is a person's claim to be in need of international protection that has been examined and rejected or has failed rather than the person himself or herself. Often this label is used even when a final decision has not yet been reached, usually when the determination procedure has been taking many years. It should be noted that \ claim has not been 'rejected' if any appeal is pending or any other legal avenue still exists.

[4] See Presidency Conclusions-Brussels, 4/5November 2004:Annex 1: The Hague Programme, Strengthening Freedom, Security and Justice in the European Union.

rates of return and the favoured destinations for asylum applicants in Europe either. Both Germany [6] and Switzerland,[7] for example, are relatively efficient in enforcing returns yet have attracted some of the highest levels of asylum applications throughout the 1990s. Persons whose asylum applications have been rejected are also often expected to leave the country without assistance and left to survive as illegal residents without state support. In fact there has been a noticeable and extremely worrying trend in European governments' policies towards this group in recent years of withdrawing access to any social support and benefits. This has driven a growing number of asylum seekers whose applications have been rejected into destitution and has been used as a lever to force them to leave 'voluntarily', either of their own accord or through governments' voluntary return programmes. However there are grave concerns that policies which allow the withdrawal of support are putting people in situations of extreme distress and are knowingly and insidiously blurring the definitions of voluntary return or repatriation[8] and mandatory return.[9]

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[5] *The Return and Reintegration of Rejected Asylum Seekers and Irregular Migrants: An analysis of government assisted return programmes in selected European countries*, Prepared for IOM by Khalid Koser, IOM Migration Research Series No.4, May 2001, p.42.

[6] German return/deportation programmes are on a larger scale than others in Europe but fail to keep up with numbers eligible for return. In 2000, it cost Germany some $US6,000,000 to deport 25,000 individuals. Confidential interview quoted in *Deportation and the liberal state: the forcible return of asylum seekers and unlawful migrants in Canada, Germany and the United Kingdom*, by Matthew J. Gibney and Randall Hanson, New Issues in Refugee Research Working Paper No.77, UNHCR Evaluation and Policy Analysis Unit, February 2003, p.11.

[7] Swiss return programmes are considered some of the most comprehensive in Europe. The overall return assistance budget for the period 2000-03 amounts to SFr.235 million. *Study on Comprehensive EU Return Policies and Practices for Displaced Persons under Temporary Protection, Other Persons whose International Protection has ended, and Rejected Asylum Seekers*, Prepared by ICMPD for the European Refugee Fund, Final Report, January 2002, p.50.

[8] The term 'voluntary repatriation' is here used for the return of Convention refugees, other persons with a complementary or temporary protection status, or persons still in the asylum procedure who freely choose to exercise their right to return to their country of origin or habitual residence. It can only be classified as voluntary when: an individual with a legal basis for remaining in a third country has made an informed choice and has freely consented to repatriate to their country of origin or habitual residence; and has given their genuine, individual consent, without pressure of any kind. When such consent is elicited as a result of lack of effective protection in the host country or because of an imposition of sanctions, this cannot be classified as voluntary repatriation. *ECRE Position on Return*, October 2003, paras 7 &8.

[9] The term 'mandatory return' is here used for persons who no longer have a legal basis for remaining in the territory of a country for protection-related reasons and are therefore required by law to leave. The term is being used to describe the situation whereby a person consents to return to his/her country of origin instead of staying illegally or being forcibly removed. It also applies to individuals who although not having freely consented to leave-have been induced to do so by means of incentives or threats of sanctions. *ECRE Position on Return*, October 2003, para 9.

Operational cooperation on returns has been the sole focus of EU harmonisation undertaken in the area of returns to date [10] (these have focused on forced returns but some measures are also relevant to voluntary returns). Measures have included legally binding agreements on mutual recognition of expulsion orders,[11] on assistance in cases of transit for the purpose of removal by air[12] and on organising joint flights for the removal of third-country nationals illegally present in the territory of two or more EU Member States with non-binding common guidelines on protection standards annexed.[13] In the context of calling for a EU Common Return Policy the European Commission has been making the case for the establishment of a legal framework as well as the need for closer cooperation with third countries. In addition to the ongoing efforts and importance attached to the signing of readmission agreements with countries of origin,[14] the Commission is about to issue a proposal for a directive on minimum standards for return procedures in 2005 which will be negotiated by Member States and become, if adopted, a legally binding measure.

The issue of return is a complex one and yet the hostile political climate towards refugees and asylum seekers in Europe has meant that it is often debated in a very simplistic and negative way. In addition, return enforcement measures are being developed without adequate human rights safeguards. ECRE's aim through this paper is to make a positive contribution to the return debate and to present some of the issues from the perspective of those fearing the prospect of return. By highlighting the rights and the vulnerabilities of certain groups of people within the broader category of asylum seekers whose asylum claims have been rejected, ECRE seeks to increase understanding of the problems they face and emphasise the potentially devastating consequences on the lives of individuals of return policies and practice which disregard the facts of each case. The aim is also to make suggestions to national governments and the European Union on the development of return policies that recognise and respond to the complexities of the issue and include all the necessary human rights safeguards. This is based on the view that Europe must effectively develop a humanitarian interest in the quality and sustainability of

[10] Harmonisation in this area is founded upon Article 63(3)b of the Treaty of the European Community which provides that the Council of Ministers shall adopt measures regarding illegal immigration and illegal residence, including repatriation of illegal residents.

[11] *Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals*, OJ L149/34.

[12] *Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air*, OJ L321/26.

[13] Council Decision 2003/C332/04 of 29 April 2004 for organising joint flights for the removal of third-country nationals illegally present in the territory of two or more EU Member States. It is important to note that the European Parliament (EP) adopted a report on 20 April 2004 in which it rejected this measure. The EP was mainly critical of the fact that the common guidelines on the state of health of returnees, a code of conduct applicable to escorts and the use of coercive measures were merely listed in an annex to the proposal -which was in no way binding - rather than in the proposal itself. Moreover, the EP noted that none of the provisions of the annex allowed for the operations to be monitored by organisations such as the Red Cross.

[14] Readmission agreements are binding measures through which a state's international obligation to readmit its own nationals is reinforced and technical rules for implementing the obligation are provided. In most cases these agreements are reciprocal.

return for those who can be returned, as well as fairer policies for those who cannot be returned.

In Section 1 this paper explores the links between asylum systems and return policies and concerns and perceptions regarding how they impact on each other's credibility. Section 2 addresses the obstacles states face with regard to implementing returns and proposes alternatives to return for certain categories of persons. Section 3 briefly discusses forced and mandatory returns and explores the methods used by states to coerce or encourage returns, highlighting the problematic aspects and the safeguards that should be put in place. The paper concludes by looking at the need for follow up to returns, such as monitoring, and the need for linkages to development policies to help ensure returns are sustainable and do not breach asylum seekers' human rights.

1 European Asylum Systems and Return Policies

1.1 Fair and efficient asylum systems as a pre-requisite to return

As a pre-cursor to its willingness to be constructively involved in the European returns debate, it is important to reiterate ECRE's concerns regarding the asylum systems in Europe and the increasing potential for premature returns of persons with protection concerns.

We cannot at present confidently assume that if someone's asylum claim has been rejected by a European country that they are necessarily a person not in need of international protection. In fact UNHCR has stated that aside from other subsidiary forms of protection or immigration statuses for which an asylum seeker whose claim has been rejected may be eligible: *"[T]he fact that a person has been found by the competent authorities of a State not to qualify as a refugee will not always mean that he or she is not in need of international protection".*[15] UNHCR has clearly set out when it considers someone can be defined as a "person not in need of international protection":

The term "persons not in need of international protection" (also known in this context as "rejected asylum-seekers") is understood to mean persons who, after due consideration of their claims to asylum in fair procedures, are found not to qualify for refugee status on the basis of the criteria laid down in the 1951 Convention, nor to be in need of international protection on other grounds, and who are not authorized to stay in the country concerned for other compelling reasons. The term covers persons who attempt to migrate for economic or other personal reasons by using asylum procedures. It does not, for this purpose, include individuals who have been rejected in a refugee status determination procedure on purely formal grounds (for example pursuant to the application of the safe third country concept), or on substantive grounds with which UNHCR cannot concur (such as in case of persecution by non-State agents, civil war refugees or because of an unreasonably high burden of proof). In the absence of a proper examination of the substance of the claim in a fair asylum procedure, or when the rejection, following a substantive examination of the claim, is not in conformity with UNHCR's interpretation of the criteria of the refugee definition, such persons continue to be of concern to UNHCR.[16]

The reality at present in Europe is that some claims are rejected for a number of reasons that according to ECRE do not establish conclusively whether a person is in need of international protection. Such reasons include early assumptions that claims are unfounded which often lead to the claim being consid-

[15] *Return of Persons Not in Need of International Protection*, UNHCR Executive Committee, Standing Committee 8th Meeting, May 1997 (EC/47/SC/CRP.28), para 17.
[16] *Return of Persons not in need of International Protection*, Executive Committee of UNHCR, Standing Committee 3rd Meeting, 28 May 1996, EC/46/SC/CRP, para 9.

ered through an accelerated procedure; non-compliance with deadlines imposed for the submission of applications; assumptions that an asylum seeker will be able to access protection in another part of their country (use of the so-called internal protection alternative); restrictive interpretations of the refugee definition; and the application of concepts such as 'safe country of origin' which deny a proper individual assessment of claims.[17] Such applicants are subsequently treated by states as persons not in need of international protection.

A country's asylum system must be thorough and fair however before we can be confident that all those whose applications are rejected in Europe do not have a case for refugee status or other subsidiary and humanitarian forms of protection. A recent study concluded that *"...return policies lack justification if preceding asylum procedures exclude persecuted persons to effectively receive protection. Consequently, efforts to enhance efficiency of return policies must be flanked simultaneously by improvements in the asylum systems themselves so as to afford protection to people in need of it."* [18]

Recommendation 1
If states are concerned with being able to undertake successful and sustainable returns they must address the fairness of their asylum procedures first. Wrong decisions may lead to people being persecuted and having to flee from their countries of origin again.

Recommendation 2
Under no circumstances should a person be returned until it has been clearly and definitely established that there are no protection needs relating to the individual case in question and that return will therefore not put their life at risk. Essential measures to ensure this cannot happen include the granting of a suspensive right of appeal and allowing a procedure to be re-opened if new elements arise in a particular case.

1.2 Premature Returns

ECRE's concerns are not limited to the fact that those ordered to return from Europe include persons who should have been recognised as refugees. Some developments across Europe are increasing the risk of premature returns.

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[17] See ECRE's forthcoming paper: *The Way Forward. Europe's Role in the Global Refugee Protection System. Towards fairer and more efficient asylum systems*.
[18] *Study on Different Forms of Incentives to Promote the Return of Rejected Asylum Seekers and formerly Temporary protected Persons*, Prepared by ICMPD for the European Refugee Fund, July 2003. More recently the Dutch Advisory Committee on Aliens' Affairs (ACVZ) recognised the need for procedures to be improved "so that decisions to reject asylum seekers inspire greater confidence", *Advisory Report on Return*, ACVZ, 2 February 2005.

- The period of time between the declared end of hostilities in a given country/region and the first threats of forced or mandatory returns by European governments are growing ever shorter.[19]
- Certain nationalities of asylum seekers whose claims are being rejected (for example, Ethiopians, Somalis and Sri Lankans) have been returned to unsafe conditions.[20]
- States sometimes employ delaying tactics with regard to a full examination of asylum claims by not determining claims at the time they are submitted but instead determining them later once the situation in the country of origin has changed, at which point they are not deemed to be in need of international protection.[21]

There are large numbers of persons in Europe who do not receive a positive decision on their asylum claim and who, for whatever reasons, face serious difficulties (these might be psychological, physical, social, financial or personal problems for example, and often is a combination of these) either due to their experiences in their country of origin and/or in the host country, and are facing the prospect of return. Refugees are also increasingly concerned by the possibility of being required to return by their country of asylum though they consider this would be unsafe and/or extremely traumatic for them. The psychological stress of the threat of return caused to asylum seekers whose applications have been rejected, refugees, and those living under less secure, subsidiary forms of status, are enormous.[22] Whatever the theory, the reality is that asylum seekers, those who are granted a status and those who are not granted any status are usually part of one community who together face the threat of return and experience the fear of premature return.

Recommendation 3
States should consider all asylum applications with a minimum of delay and should not suspend the processing of any asylum applications to avoid recognising refugees. States should not enforce returns prematurely.

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[19] Examples of this are the intentions expressed by the UK and Denmark regarding the return of Iraqis, see ECRE *ECRE Questionnaire on the treatment of Iraqi asylum seekers and refugees in Europe*, April 2004.

[20] An example is the Dutch government's recent decision to implement a policy of returning Afghans, Liberians and Chechens (including asylum seekers whose applications have been rejected) to their country of origin despite information from UNHCR and NGOs that these countries are unsafe and people should not be returned. In one case a Somali asylum seeker was killed in Mogadishu after having been deported by the Dutch authorities. The problem is that few such cases come to the attention of people back in the country where the asylum claim was lodged and not enough is known of the fate of returnees. See *Killing rekindles asylum row,* Radio Netherlands, 29 July 2004.

[21] This happened, for example, to many Afghans and Iraqis whose claims were awaiting assessment at the time of the US interventions. See *ECRE Questionnaire on the Treatment of Iraqi Asylum Seekers and Refugees in Europe*, April 2004.

[22] See Sundquist, J. Johansson, S. E. (1996). *"The Influence of Exile and Repatriation on Mental and Physical Health: A Population-based Study"* in: Social Psychiatry and Psychiatric Epidemiology (31) p. 21-28; Sinnerbrink I. et.al. (1997). *Compounding of pre-migration trauma and post-migration stress in asylum seekers.* The journal of Psychology, vol. 131, p. 463-470; Silove D. et.al. (2000). *Policies of deterrence and the mental health of asylum seekers*. Journal of the American Medical Association, vol. 284, p. 604-611.

Recommendation 4
States must more consistently take note of information provided by the UN and NGOs with knowledge and expertise on countries of origin and they should make the criteria on which they base their decisions to return people to certain countries (especially those previously considered unsafe) more transparent, as part of the process of ensuring that a person's safety can actually be guaranteed.

1.3 The issue of non-return

It is often alleged by different actors that it is the non-return of asylum seekers whose applications have been rejected which undermines countries' asylum systems. What is the point of complex asylum procedures, critics ask, if everyone gets to stay anyway? The most common supporting argument is that if potential migrants, with no grounds for seeking protection, perceive no real risk of deportation, then this will attract them into Europe's asylum channel causing overburdening.

It is crucial to note however that it cannot at present be established to what extent non-return is a problem across Europe. A 2002 report, based on predicted figures for 2001, estimated that some 60% of persons who apply for asylum in the European Union have their claims rejected and are required to leave the EU.[23] The average percentage of that group who are actually removed has been estimated, with many provisos and disclaimers, at around 20-30%.[24] In general however, available statistics are extremely patchy, and analysts have repeatedly regretted the absence or non-disclosure of more useful statistics in this area.

Simple refugee recognition rates (namely those found in need of protection under the 1951 Refugee Convention) always underestimate the number of asylum seekers allowed to remain for protection-related, humanitarian or other compelling reasons. They are also sometimes based on first instance decisions and not on the final outcome of a claim following appeal. Removal figures will often not only include asylum seekers whose applications have been rejected but also other categories of persons such as people who have stayed beyond the validity of their visas or third country nationals found to have been illegally residing in the country. Removal figures from a given year cannot provide a sense of the proportion of persons whose asylum applications have been rejected and are removed either, as they will include persons whose applications were rejected in previous years. Sometimes they will only reflect the number of removal orders issued and not actual removals (e.g Poland and Hungary). The number of removal orders issued to former asylum seekers is usually not a reliable indication of the number of people who actually leave since, in many countries, they are issued while appeals are pending.

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[23] *Study on Comprehensive EU Return Policies and Practices for Displaced Persons under Temporary Protection, Other Persons whose International Protection has ended, and Rejected Asylum Seekers*. Prepared by ICMPD for the European Refugee Fund, Final Report, January 2002, p.10.
[24] *Ibid* p.24.

In addition people are often officially categorised as having left the country when in fact they may have simply been evicted from accommodation centres onto the streets. For example in 2002, the Central Bureau of Statistics in the Netherlands concluded that somewhere between 11,000 and 41,000 asylum seekers whose applications had been rejected from Afghanistan, Iraq, Iran, Somalia and the former Yugoslavia remained clandestinely in the Netherlands, without any legal means of supporting themselves, despite the Ministry of Interior's categorisation of these persons as having 'departed'.[25]

Meanwhile, ironically, governmental angst about the numbers presumed to remain illegally within Europe may be exaggerated by the fact that many people leave a country without the knowledge of the authorities as few bother to inform them they have done so and there are no exit controls. For example a United States project that monitored a group of paroled asylum seekers and other migrants between 1997-2000 discovered, incidentally, that the US government was significantly underestimating the number departing of their own accord, as ordered.[26]

In April 2003 the European Commission recognised the need to improve the exchange of information and the quality of statistical collection on asylum of Member States.[27] It presented an action plan to develop and improve EU statistics and their analysis in the field of asylum and immigration and to launch a discussion on principles for future legislation to underpin statistical work.[28] However no proposals have since been adopted by the Council. Indeed the Commission's aim to make a formal proposal for a framework regulation on statistics by the end of 2003 has not materialised. A draft proposal is expected in 2005 which will set out a number of areas for which Member States will be obliged to provide data to the Commission.

In the meantime the issue of the return of asylum seekers whose applications have failed is increasingly being used for political advantage, with European governments announcing plans to effect more, faster and more efficient returns of persons whose asylum applications have been unsuccessful in order to, they claim, safeguard the integrity of their asylum systems and deter perceived 'abuse'. For example the UK government has recently stated that *"Swift removal is central to the credibility of our immigra*tion system."[29] Governments are thus fuelling the argument, with significant help from parts of

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[25] Report of the Central Bureau of Statistics, The Netherlands, 13 March 2002.

[26] *Testing Community Supervision for the INS: An evaluation of the Appearance Assistance Program*, Final Report to the Immigration and Naturalization Service, Vera Institute of Justice, August 2000.

[27] The EU's first annual report on asylum statistics in 2001 does not provide more useful information on the removal of asylum seekers whose applications have been rejected as it covers the broader category of how many 'aliens' were removed 1997-2001.

[28] *Communication from the Commission to the Council and the European Parliament to present an Action Plan for the collection and analysis of Community Statistics in the field of migration*, COM (2003) 179 final, 15.04.2003.

[29] *Controlling our borders: Making migration work for Britain. Five year strategy for asylum and immigration*, Secretary of State for the Home Dpt, February 2005, p.22.

the media, that the non-return of those whose asylum claims are unsuccessful is a major factor undermining their asylum systems.[30] This linkage affects the public's perception negatively by undermining their confidence in the whole asylum system.

In contrast the view put forward here is that the credibility of a removal system and an asylum system is fundamentally undermined if it fails to protect those in need of international protection.

Recommendation 5
Governments, politicians and the media should discuss and address the issue of the return of asylum seekers whose applications have been rejected in a more balanced way and base their arguments on facts, not assumptions or misconceptions.

Recommendation 6
States should open up legal migration channels for both refugees and migrants to deal with persons who are not seeking protection, in order to help guarantee that the asylum system (which remains ECRE's main concern) can provide protection in a more efficient way to those persons in need of it.

More and better statistics indicating the real extent of return and non-return from European countries of asylum seekers whose applications have been rejected are also needed in order to dispel wrong 'estimations' and assumptions on which the negative perceptions and debate are relying. More accurate statistics might also help to highlight some of the practical and resource-based difficulties which states face in trying to implement removals.[31]

Recommendation 7
European governments should increase their efforts to collect statistics on the return of asylum seekers whose applications have been rejected and increase transparency by improving public access to such information.

Recommendation 8
The EU should increase its efforts to actively guide Member States in collecting accurate, comparable and comprehensive asylum statistics and should also urge them to make these public.

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[30] The particular situation at the national level strongly influences perceptions around the non-return of asylum seekers whose applications have been rejected and in determining the extent to which it is regarded as a problem. Public perception is e.g. very influenced by the way national media report on the issue, which often misrepresent refugees to the public.

[31] The value of such data for analysis of return trends and problems is expressed in UNHCR's Executive Committee Conclusion, No96 (LIV) 2003 on the return of persons found not to be in need of international protection, paragraph (m).

2 Obstacles and Alternatives to Return

There is sometimes an apparent gap between the stated intentions of states to remove asylum seekers whose claims have been rejected and their actual implementation of removal decisions. Some states lack the resources and capacity to return asylum seekers whose claims have been rejected. But in other cases states are often simply unable to return persons.

There are different types of obstacles to the return of asylum seekers whose applications have been rejected including: the non-cooperation of countries of origin, problems establishing the identity and nationality of a person, insufficient cooperation on the part of the individual in question and a range of 'technical or other reasons'. It is useful to examine some of these obstacles in detail to highlight the complex nature of returns, the possible concerns of people facing the prospect of return, and to question approaches which favour the simple apportioning of blame.

2.1 Establishing identity and nationality

The frequent difficulties encountered with the process of establishing the identity and the nationality of asylum seekers whose applications have been unsuccessful and obtaining the required travel documents is a common obstacle to return.[32] The European Commission has described unclear identities and lack of valid travel documents as the "main obstacle" to efficient return. The fact is that persons fleeing persecution often do not have the time or cannot safely obtain valid visas or travel documents from the persecuting authorities before leaving their homes. Furthermore, in the absence of accessible legal channels into countries where they might be able to find international protection, many asylum seekers will often desperately resort to the services of human smugglers or traffickers in order to enter them illegally. Asylum seekers are then often instructed to destroy or hand back documents prior to landing or prior to application, either to protect the smugglers/traffickers, or so the documents can be re-used, or to disguise a travel route and thus prevent a third country return, or simply because the documents are sure to be detected as false.

2.2 The non-cooperation of countries of origin

The problem of the non-cooperation of countries of origin with the re-documentation and readmission of people who lack identity documents is also one commonly faced by host states. Though it is an established principle of international law that states have an obligation to receive back their own nationals,[33] this does not always happen. So why do countries not cooperate? In the absence of frank dialogue or analysis written from the perspective of the countries of origin, possible explanations include:

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[32] *Communication from the Commission to the Council and the European Parliament on a Community Return Policy on Illegal Residents*, 14 October 2002, COM (2002) 564 Final. See para 2.2.6.

[33] Article 13(2), Universal Declaration of Human Rights (1948); Article 12(4) of the International Covenant on Civil and Political Rights (1966); Article 5(d)(ii) of the International Covenant on the Elimination of All Forms of Racial Discrimination (1965). See also the 2000 UN Protocol against the Smuggling of Migrants by Land, Sea and Air, Article 18(1), the 1944 Convention on International Civil Aviation, Annex 9, and the 1954 Convention on the Prevention and Reduction of Statelessness (as reconfirmed in UNHCR Executive Committee Conclusion No.78 (XLVI)).

1 The genuine belief that an individual is not one of their nationals;
2 Lack of registration or public records for their own citizens and habitual residents, making confirmation of identity/nationality difficult or impossible;
3 Lack of administrative capacity to respond to European requests in a timely manner;
4 States' views of certain minorities or groups as undesirable elements in their populations;
5 Fear that returnees will only add to a fragile political situation;
6 Demographic pressures, both generally and in specific locales – for example, overcrowded labour and housing markets – resulting in a calculation of greater benefit than cost in the emigration of their citizens;
7 Slow processing as an unofficial means of staggering returns so that there is never a sudden group return that overwhelms absorption capacity or jeopardises reconciliation efforts in a certain area/city;
8 The wish to sustain net transfers provided by the remittances of expatriate workers (though less relevant in the case of claimants barred from working, or even held in detention, while in Europe);[34]
9 The perception of the issue as a bartering chip in larger economic and other negotiations with European states and the EU as a bloc (or, where non-cooperation is explicit, the failure of diplomatic relations);
10 Lack of domestic priority (in other words, having bigger problems of their own to worry about);
11 A sense that principles of distributive justice and international burden-sharing are offended by high-cost returns from Europe to regions hosting much larger refugee populations for prolonged periods.

This last point is very important when one considers the difficulties being experienced in finding durable solutions (voluntary repatriation; local integration or resettlement) for the millions of refugees in protracted refugee situations in poor, developing countries that are close to refugees' countries of origin.[35] Many of the other reasons listed are strongly linked to resource and administrative difficulties which developing countries constantly face. Many asylum seekers whose applications have been rejected are then being held responsible and effectively penalised for these impediments to their return that are entirely beyond their own control.

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[34] Remittances to Africa for example are the second highest form of financial support to the region after direct investment, *Presentation on the links between communities here and back home-Horn of Africa project*, Martinson Oturomoi, Refugee Action Voluntary Return National Conference, London, 25 February 2005.
[35] See ECRE papers in the series *The Way Forward. Europe's Role in the Global Refugee Protection System: Towards a European Resettlement Programme*, April 2005 and the forthcoming *Making Refugee Protection Effective in Regions of Origin*.

International cooperation with countries of origin in a spirit of solidarity at all stages of the return process is a pre-requisite to achieving sustainable return. Co-operation can be assisted by identification of and networking between key governmental and non-governmental actors both in European countries and in the countries of origin.

Recommendation 9
European host countries should engage in dialogue with countries of origin to establish whether they are willing to accept persons returning, and if so, under what conditions. Negotiations should aim at ensuring that any appropriate legal or bureaucratic requirements relating to the return of individuals to the country of origin are met. However host countries should not contact countries of origin regarding the return of an individual until it has been finally determined that he/she is not in need of international protection.

Recommendation 10
Return programmes, affecting large numbers of returnees, should be co-ordinated in order to ensure the sustainability of return. A careful and staged approach to return by host countries in co-operation with countries of origin will often be required.

Recommendation 11
The international community and/or responsible governments should maintain political, financial and economic support to countries of origin to ensure sustainable return with adequate guarantees of protection.[36] **Part of the international community's commitment to countries of origin must be the allocation of sufficient resources for development so as to provide a foundation for re-integration. ECRE is strongly opposed to the use of punitive measures, such as the withdrawal of development aid and support, to pressurise countries of origin to accept back persons whose asylum applications have been rejected.**

2.3 Concerns of potential returnees

A person whose asylum claim has been unsuccessful may subsequently still not cooperate with procedures initiated by the authorities with a view to effect their removal in a bid to avoid being returned. In many cases this may be due to feelings of extreme anxiety at such a prospect. The likely reasons for this are wide-ranging and may include:

[36] See also UNHCR, Global Consultations on International Protection, Voluntary Repatriation, 4th Meeting, 25 April 2002, EC/GC/02/5.

1 A continuing belief in their need for asylum or at least protection from imminent removal until there are conditions allowing for return in safety and dignity;[37]
2 Victims of civil war or persecution may be traumatised and not wish to live again in a country where they were persecuted, but international protection has been denied as the situation has changed;
3 A person may not want to live in a place they do not know and with which they have no connection, for example another area of their country of origin (their claim having been rejected after the determining state assessed the existence of an internal protection alternative) or another country;
4 Fear of penalties from their countries of origin, both legal and informal (e.g the demanding of bribes at airports), for having exited without authorisation, renounced nationality or for having claimed asylum in Europe - in some cases, penalties that may amount to persecution and make the applicant a refugee *sur place*;
5 The fact that a high number of asylum seekers whose applications are rejected originate from countries with serious human rights problems, often dwarfing their lack of rights while remaining illegally in Europe;
6 The existence of severe gender discrimination which women asylum seekers whose appli cations have failed often do not want to go back to;
7 The fact that a number of asylum seekers whose applications have been rejected have previously spent long periods living without legal status in countries of first asylum, to which they have no right to return, but this has weakened any ties to their country of origin;
8 Depression resulting from the failure of the migration attempt, including the waste of a some times enormous financial investment, combined with a sense that there is 'nothing to go back to' (eg. no home, no jobs);[38]
9 Lack of legal advice or counselling, or lack of independent, trusted information about the situation to which they would be returning;[39]
10 Loss of family back home, either through death or disappearance (especially pertinent to separated children);

[37] For elaboration on what ECRE considers "conditions of safety and dignity", see *ECRE Position on Return*, October 2003, paras 25-27.
[38] See *Prevention of mental disorders. Effective interventions and policy options. Summary Report*, World Health Organisation, Department of Mental health and Substance Abuse in collaboration with the Prevention Research Centre of the Universities Of Nijmegen and Maastricht, Geneva, Switzerland, 2004.
[39] This is especially true vis-a-vis non-state agents of persecution in local areas where information may not be internationally available.

11 Lack of education opportunities for young people to build themselves a brighter future;
12 Lack of specialised medical facilities for persons with special medical needs/ serious ill nesses and more generally lack of adequate access to medical care;
13 The asylum seeker whose application has failed is suffering from serious mental health prob lems, which can include suicidal feelings at the thought of return;[40]
14 Desire to work in order to send back remittances to family remaining in the country of origin, which are sometimes the only means of survival.

Recommendation 12
In view of the serious nature of the concerns of asylum seekers whose applications have been rejected and yet do not cooperate with removal procedures a better understanding of these concerns is needed in the devising and implementation of states' return policies.

2.3.1 Absconding

European governments often warn that people facing removal will disappear unless they are held in detention. But this may be less common than might appear. There is little supporting statistical evidence produced by states for this.[41] There can be no automatic assumption that an individual will abscond as soon as they have lost the prospect of obtaining a legal basis for remaining in a European country, though it is true that there will often be a higher risk of disappearance at that stage. Certain vulnerable persons, such as the sick, older people or families with young children,[42] remain highly unlikely to abscond even in such circumstances however.

2.4 Long periods of residence in the host country

Another reason why asylum seekers whose applications have been rejected may find it difficult to contemplate return is a sense of entitlement to stay in the host country due to having lived there for many years. A long period of residence may have been the result of a prolonged or backlogged asylum procedure.[43] Efficient return is certainly an argument in support of more efficient asylum procedures, as

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[40] See Willigen L.H.M. van (red) (1996). *Psychosocial Aspects of Repatriation of Former Yugoslavian Refugees and displaced persons*. Utrecht: Pharos; UNHCR, (2001). *Health Care in Bosnia and Herzegovina in the Context of the Return of Refugees and Displaced Persons*. Sarajevo: UNHCR and UNHCR, (2002). *The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*. Commission on Human Rights Resolution 2002/31 Geneva: UNHCR.

[41] There is a severe shortage of comparative data available within the EU. Research by the South Bank University in the UK found that, even amongst those bailed out while awaiting removal, 80% of asylum seekers whose applications had failed complied with bail conditions and thus remained available for removal. Irene Bruegel and Eva Natamba, Social Science Research Paper No.16: *Maintaining Contact: What Happens After Detained Asylum Seekers Get Bail?* South Bank University, London, June 2002.

[42] British research by Bail for Immigration Detainees found that families with young children are even less likely to abscond, even after a final rejection. *A Few Families Too Many: the detention of asylum seeking families in the UK*, Emma K.H. Cole, BID, March 2003.

[43] See *Study on Return – A Swiss Perspective*, Prepared by ICMPD, Final Report, October 2002, Section II, p.18 and p.100. This study includes a survey of average durations of asylum procedures in 2002.

asylum seekers will naturally develop stronger links to host states the longer they are present. In doing so they also acquire rights - or rather, restrictions upon their rights become less proportionate and so impermissible under international law. As an example of this an asylum seeker might be entitled under Article 8 of the ECHR to remain in a state in order to enjoy a private and family life developed over many years.

It should not take years to reach a final decision on the average claim. In calling for procedures to not be unduly long, ECRE has argued for 'frontloading' systems with good decision-makers and competent, free legal advice to be provided at the earliest opportunity in order to increase the percentage of correct decisions at the first instance stage. The European Commission also argues for 'frontloading',[44] but although governments might recognise there is room for improvement in their procedures, their views will often differ from those of refugee advocates with regard to the means of achieving efficiency whilst maintaining fairness in asylum procedures.

A sense of being integrated into the host society may also act as a barrier to return for persons whose refugee status has been withdrawn according to Article 1C (5) of the 1951 Refugee Convention. This will become an issue of increasing concern if the trend towards states developing rules that increasingly allow them to withdraw refugee status and to delay the granting of permanent legal statuses continues.[45]

2.5 Vulnerable Groups

Persecution or traumatic experiences, coupled with the experience of flight and the asylum procedure often leaves people in a fragile state of mind. This can lead to mental health problems, a feeling of being totally lost and marginalisation. For persons who are 'vulnerable' the likelihood and the scale of such negative consequences is greatly increased. During the asylum procedure the situation of a vulnerable person should be fully considered and their eligibility for refugee status, through an inclusive interpretation of the 1951 Refugee Convention, and subsequently for a subsidiary and humanitarian form of protection should be assessed. There are still many vulnerable persons however who receive decisions finding them ineligible for any such status and who are then subject to return.

In talking about 'vulnerable' groups we refer to people such as the sick, older people, children (especially separated children)[46], victims of torture, single women or female heads of households. Examples of people for whom being returned could have devastating implications are:

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[44] See Commission Communication on "*A more efficient common European asylum system – the single procedure as the next step*" COM (2004) 503 final.

[45] The UK government for example has announced that it will it will look into granting refugees temporary leave for the first 5 years and then review their situation before granting a permanent status. See p.22, *Controlling our borders: Making migration work for Britain. Five year strategy for asylum and immigration*, Secretary of State for the Home Dpt, February 2005.

[46] The definition here used is that of children under 18 years of age who are outside their country of origin and separated from both parents, or their previous legal/customary primary caregiver. *Statement of Good Practice*, Separated Children in Europe Programme, Third Edition, 2004, Save the Children and UNHCR.

- persons who have long-standing medical problems and would not be able to access adequate medical care in their country of origin;[47]
- those suffering serious mental health problems, who would not have access to adequate care and for whom return would clearly be detrimental to their conditions;[48]
- separated children whose parents are dead or cannot be traced and who have no close relatives in their country of origin;
- single women who would encounter huge re-integration problems such as discrimination and hostility by their family and/or community upon return.

Most European countries have obligations under international law towards vulnerable persons that would not be respected by enforcing their return. For example, some European governments are increasingly targeting unaccompanied asylum seeking children or are returning children to be cared for in institutions that they have helped build with financial support in their drive to implement more returns. Such actions will not always comply with states' obligations under the UN Convention on the Rights of the Child.[49] Establishing the best interests of a separated child with regard to return is complex and an issue that must be worked out on the basis of the individual case.[50] A blanket policy that pre-judges an individual child's best interest, cannot be appropriate.[51]

Recommendation 13
States should put in place humane return policies that are in line with international human rights obligations and take account of the specific needs and rights of vulnerable persons.

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[47] Note that some people falling within this category may qualify for a subsidiary form of protection e.g HIV/AIDS sufferers whose return would violate Article 3 of the ECHR.

[48] It was recently reported that two failed asylum seekers diagnosed as mentally ill and unfit to travel were about to be deported by the UK government in spite of the Home Office's IATA/CAWG Guidelines on Deportation and Escort. One of them had been in a prison for two and a half years and the other expressed the intention to kill himself if returned, *Home office due to deport 'ill men'*, Eric Allison, The Guardian, 18 October 2004.

[49] Note however that the UK and Germany have reservations to the UNCRC allowing them not to fulfil all their UNCRC obligations towards children on the basis of their immigration status - reservations which NGOs have continuously opposed.

[50] For a discussion of the interrelated factors which should be considered and balanced against each other to assess whether or not return to the country of origin is in a child's best interest, see Save the Children and the Separated Children in Europe Programme's *Position Paper on Returns and Separated Children*, September 2004, p. 5-10.

[51] The UK government e.g has recently stated that it does not believe it to be "in a child's best interests to remain in the UK separated from their parents or communities", parag 76, *Controlling our borders: Making migration work for Britain. Five year strategy for asylum and immigration*, Secretary of State for the Home Dpt, February 2005. The Separated Children in Europe Programme takes the view that if family reunification is not available then return is unlikely to be in the child's best interest unless the child has asked to return anyway. For more detailed recommendations on conditions which should be in place before a separated child is returned, see Section 13.6, *Statement of Good Practice*, Third Edition 2004, Separated Children in Europe Programme Save the Children and UNHCR.

2.6 'Technical or other' reasons

There may also be 'technical or other reasons' which may impede the return of asylum seekers whose claims have been rejected. The fact that a country is simply not safe in general terms for people to be returned there is a major obstacle to states' ability to enforce returns. States will often officially recognise a country is not safe enough for return and yet will neither grant any kind of protection status or other legal status to asylum applicants awaiting return. Such persons are then left in a legal 'limbo'.

Other reasons may include:

- the logistical and physical impossibility of transporting a person to the country of return due to e.g the lack of functioning airports;
- a person may be awaiting the decision on their spouse's claim;
- a person may be too ill to travel;
- a person may be in prison;
- pregnancy.

Persons in such circumstances clearly belong to the category of those who cannot be returned for reasons that are beyond their control. But there may also be other reasons why it would be more sensible and fair to delay a person's return, such as where:

- a person is undertaking studies or some form of training e.g an apprenticeship;
- a family has children in school about to sit exams;
- a person is contractually obliged to give notice e.g. before leaving a job or their accommodation.

2.7 Alternatives to return for certain categories of persons

Taking into consideration the many factors that currently exist that make return very difficult and traumatic for many asylum seekers whose applications have been rejected, states should not blindly pursue their return at all costs. Disproportionate hardships imposed by the deportation of people who are well settled in the country of asylum, with children being torn out of school, ill people removed from treatment, and extended families separated, have regularly led to public outcry. There may be alternatives, either of a temporary or permanent nature, which constitute a better solution for the individual as well as for the state that has considered and rejected the asylum application. This is likely to be the case for persons for whom return appears impossible in the short to medium term for reasons beyond their control as well as for persons for whom enforcing return would constitute unfair treatment.

Back in 2001 a UNHCR meeting, involving governments of central, eastern and south-eastern European countries, concluded that "those unsuccessful asylum seekers who cannot be returned through no fault of their own should have timely access to some form of lawful residence and legal status."[52] This does not currently happen in Europe. What sometimes happens is that a return decision or procedure may be suspended but this is usually not followed by the granting of any status. Many people who cannot be returned may thus find themselves in so-called 'limbo' situations, in an irregular situation with few or no rights and without any possibility of receiving support or permission to work in order to survive.[53] The result of this is the creation of a growing segment of vulnerable, poor and marginalised people in European societies.

Recommendation 14
In order to address the unacceptable 'limbo' situations in which increasing numbers of asylum seekers whose applications have been unsuccessful find themselves in Europe today, European states should not enforce removals and should grant a legal status to certain categories of asylum seekers whose applications have been rejected, especially those who cannot be returned for reasons beyond their control.

Recommendation 15
In the case of asylum seekers whose applications have been rejected and who have been resident in a host country for some years, due to for example an unduly long or backlogged asylum procedure, the time spent in the host country should be taken into account when states are considering whether to pursue their return and issue a removal order. In relation to persons in this situation who have been present in the host country for 3 years or more and have thus 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.

Recommendation 16
In the case of persons considered to be 'vulnerable' whose asylum applications have nevertheless been rejected, serious consideration should be given to the delaying of the return process where it cannot be established that the rights of an individual would be respected and their needs met through return to their country of origin. In this case, there should be no enforcement of removal and a temporary legal status granted instead. Delays that lead to uncertainty must not continue for unreasonable lengths of time however and if it cannot be established that the needs of an individual and/or their best interests would be met through return, states should grant them a permanent legal status.

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[52] Global Consultations on International Protection, 2nd Meeting, Budapest, 6-7 June 2001: Conclusions, 15 June 2001, EC/GC/01.91. - Conclusion No.8.
[53] In The Netherlands, the Advisory Committee on Aliens Affairs (ACVZ) has recommended that there be a provision making it clear in what cases asylum seekers whose applications have failed may still be eligible for a residence permit because they cannot leave The Netherlands, *Advisory Report on Return*, ACVZ, 2 February 2005.

Recommendation 17

In the case of persons whose asylum applications have been finally rejected but who cannot be returned for 'technical or other reasons', an official decision should be taken not to enforce removal and to grant the persons concerned a legal status which affords them their human rights and a dignified standard of living. This legal status could be temporary but should be granted as soon as is possible.

3 Increased Efforts to Enforce Returns

Efforts to enforce returns from Europe have increased and this has been followed by an increased number of returns taking place. Evidence supplied by the European Commission shows that there are several hundred thousand removals of aliens (not solely asylum seekers whose applications have been rejected) from the Union every year.[54] In 2004, for example, Spain repatriated a total of 119,164 persons (not only former asylum seekers but also others such as persons turned away at the border), which was 21% more than in 2003.[55] Belgium implemented 70% of ordered involuntary removals in 2001, as compared to only 15% in 1999 and 32% in 1998.[56] Norway has established a new unit of over 200 additional enforcement officers to concentrate on returning asylum seekers whose applications have failed and the country's first detention centre for asylum seekers opened in January 2004. In 2003 the UK government removed more asylum seekers whose applications had been rejected than ever before, a total of 18,000.[57]

ECRE has defined three different categories of return: voluntary,[58] mandatory and forced return.[59] In doing this it has always clearly stated the principle that enabling voluntary return is always preferable. But according to ECRE's definition, voluntary return can only be exercised by those with a legal basis for remaining in the host country, thus most asylum seekers whose applications have been rejected are subject to forced return or mandatory return that may rely on measures of coercion as well as incentives. The most successful return programmes with which ECRE's member agencies have cooperated

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[54] *Green Paper on a Community Return Policy on Illegal Residents, presented by the Commission*, 10 April 2002, COM (2002) 175 Final. See 3.4.1: 367,552 aliens were removed from reporting EU States in 2000, for example.

[55] *España expulsó el año pasado a menos extranjeros que en 2003, El total de repatriaciones aumentó un 21%*, Tomás Bárbulo, El PAÍS, 10 Jan 2005.

[56] *Study on Comprehensive EU Return Policies and Practices for Displaced Persons under Temporary Protection, Other Persons whose International Protection has ended, and Rejected Asylum Seekers*, Prepared by ICMPD for the European Refugee Fund, Final Report, January 2002, p.24.

[57] *Controlling our borders: Making migraton work for Britain. Five year strategy for asylum and immigration*, Secretary of State for the Home Dpt, February 2005, p.29

[58] There are important variations in definitions of 'voluntary return' between different organisations. For example, the self-evident gap between the International Organisation for Migration's definition ("the absence of refusal to return, e.g. by not resisting boarding transportation or not otherwise manifesting disagreement.") and that of UNHCR's *Handbook on Voluntary Repatriation* (and see UNHCR Excom Conclusion 65 XLII which provides that returns should take place "without harassment, arbitrary detention or physical threats during or after return.") The debate is between those who stress the impossibility of drawing a firm line between incentives, disincentives, coercion, force etc. and those who think that the fine distinctions are vital: for example, to clarify that a detainee, will always be suffering under some level of coercion. The view that voluntary return is only exercised by those with a legal basis for remaining if they so chose, is in fact at the heart of the gap between UNHCR and IOM's operationally-oriented definitions.

[59] ECRE uses the term forced return to describe the return of persons who are required by law to leave but have not consented to do so and therefore might be subject to sanctions or force in the form of restraints in order to effect their removal from a country. See *ECRE Position on Return*, 2003, para 10.

have allowed individuals to retain a sense of dignity, self-sufficiency and control over their own lives.

Recommendation 18
While return procedures should be efficient, all returns should be undertaken in a manner that is safe, dignified and humane, with full respect for fundamental human rights. Individuals should be allowed to retain a sense of self-sufficiency and control over their own lives.

3.1 Forced Returns

Physical resistance is often the last resort of an unwilling returnee. The instances of death or serious injury resulting from violent deportations involving disproportionate use of force have shocked the European public and led to legal actions against state authorities. While states do not have the resources to undertake the forced return of all those to whom they issue orders to leave their territory they still regard their right to do so as important and as a useful deterrent.

ECRE has called for conditions during the process of forced return to be consistent with European states' human rights commitments. It is not necessarily a question of developing new standards, but of consolidating and respecting those that already exist.[60]

Recommendation 19
If used by European states, forced return should be effected in accordance with all their human rights obligations and particularly in accordance with the standards set out in the European Convention on Human Rights, the Convention against Torture, the International Covenant on Civil and Political Rights as well as the Recommendation on the return of rejected asylum seekers and the Twenty Guidelines on forced return of the Council of Europe's Committee of Ministers.

Recommendation 20
In developing European legal frameworks on return procedures the European Union should help ensure the implementation of human rights standards within its Member States.

Recommendation 21
Independent bodies, such as national ombudsmen, and codes of conduct to reinforce standards of treatment should be established in order to undertake effective monitoring of forced return operations.

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[60] Relevant standards include, inter alia: the European Convention on Human Rights; IATA/CAWG Guidelines for Deportation and Escort; UNHCR Excom Conclusion 65 XLII; Council of Europe Committee of Ministers Recommendation No. (99) 12 on the return of rejected asylum seekers, Council of Europe Recommendation of the Commissioner for Human Rights concerning the rights of aliens wishing to enter a Council of Europe member states and the enforcement of expulsion orders, 19 September 2001, CommDH/Rec (2001)1and Ad hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR) Twenty guidelines on forced return, CM(2005)40 final, 9 May 2005.

3.2 Mandatory returns

The use of mandatory returns where the consent of the person being returned is induced or coerced is increasingly being used by European states. Worryingly some are also categorising such returns as 'voluntary' due to the eventual consent of the returnee, regardless of the circumstances under which this consent was given. NGOs and refugee representatives in Europe are increasingly seeing cases of people giving consent under duress. If people are signing up for voluntary return programmes in order to no longer be detained or to have food, this does not qualify as 'voluntary'. Rather it serves to blur the distinctions between voluntary and mandatory return and is dishonest and unfair. It is useful to explore the methods used by European countries in order to enforce, coerce or encourage returns, many of which are of concern to ECRE.

3.2.1 Detention prior to return

European countries are increasingly regarding the use of detention as an acceptable and standard part of any removal procedure.[61] Several European countries do not have time limits on pre-removal detention in their legislation e.g Denmark, Sweden, Finland, the Netherlands and the UK. In other countries the length of the time limits vary greatly, from 32 days in France to 18 months in Germany.[62] The use of indefinite or unduly prolonged detention to prevent absconding effectively penalises persons whose claims have been rejected for whom obstacles to return may exist. Even people who have consented to return are being detained indefinitely or their freedom of movement restricted. In some cases such people are being placed in normal prisons and are not always separated from criminals.[63]

Detention to prevent absconding while "action is being taken with a view to deportation or extradition"[64] should not, according to international law, be used except as a last resort, when it is necessary. This implies that other alternatives to detention have been tried and found insufficient in the individual case before detention takes place. In practice, this test of necessity, to protect the individual from arbitrariness, is rarely met. Even European states with alternative measures well articulated in their legislation often fail to implement such alternatives in cases involving adults.[65] The principle of propor-

[61] "We will move towards the point where it becomes the norm that those who fail can be detained", *Controlling our borders: Making migration work for Britain. Five year strategy for asylum and immigration*, Secretary of State for the Home Dpt, February 2005, parag 70.
[62] *Study on Return – A Swiss Perspective*, Prepared by ICMPD, Final Report, October 2002, see p.98
[63] See *Study on Comprehensive EU Return Policies and Practices for Displaced Persons under Temporary Protection, Other Persons whose International Protection has ended, and Rejected Asylum Seekers*, Prepared by ICMPD for the European Refugee Fund, Final Report, January 2002. For example at the end of 2003 12% of immigration detainees were being held in prisons in the UK, *Control of Immigration: statistics, UK 2003*, Home Office Statistical Bulletin, Jill Dudley, 24 August 2004.
[64] Article 5(1)(f), ECHR.
[65] These alternatives may range from reporting requirements or release on bond to the more intrusive measure of electronic tagging.

tionality also implies that any such detention is for the minimum period necessary, and never prolonged unduly or indefinitely where there is no prospect of removal[66] or where removal proceedings are not being conducted with due diligence.[67]

Recommendation 22
It should not be automatically assumed that because an individual no longer has a legal basis to remain in a European country that they are likely to abscond and should therefore be detained. Detention should only be used as a last resort, and be in full compliance with international human rights law.

Recommendation 23
The grounds and conditions for any detention prior to removal should be comprehensively set out in states' primary legislation. It should provide for a reasonable time limit on detention and be subject to effective review in a manner compatible with Article 5 of the European Convention on Human Rights, and other provisions under international law, and not prolonged unduly where there is no prospect of removal.

Recommendation 24
Vulnerable groups, especially separated children, should never be detained. Children who are with their primary care-givers should also not be detained.[68]

Recommendation 25
Alternatives to detention, such as bail, supervision systems or reporting requirements, should always be fully explored.

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[66] *Ali v Switzerland* (1999) 28 EHRR 304.
[67] *Quinn v France* (1997) EHRLR 167. Also *Singh v. the Czech Republic* (2005).
[68] The single exception to this rule is when the state authorities can prove that the sole primary care-giver 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. Such a situation should be extremely rare and occur for a very short period of time. Moreover, families including children must not be held in detention in prison-like conditions but should be held in separate areas with specific facilities for the children. See *ECRE Position on Refugee Children*, November 1996 and *ECRE Position on the Detention of Asylum Seekers*, April 1996. See also *No Place for a Child*, Trine Lester and Heaven Crawley, Save the Children 2005.

3.2.2 Denial of Support

There has been increasing interest in looking at whether asylum reception policies can be designed in a way that is, in practice, equally conducive to both integration and return. ECRE has argued that reception programmes should have the dual aim of preparing asylum seekers for integration in the host country and return to their country of origin. Several aspects of high-quality reception and integration policies have the advantage of enabling individuals to consider more readily the possibility of return - for example, family tracing, training and employment programmes, or access to medical services. The experience of ECRE's member agencies indicates that quality reception conditions have enabled persons whose asylum applications have been rejected to subsequently access better jobs and also train others once they have returned to their country of origin.

European states are looking to restrictive solutions, however, based on the notion that the withdrawal of non-essential reception services is supposed to keep asylum seekers psychologically prepared for rejection of their claim and return.[69] They are increasingly relying on exclusionary accommodation for those in accelerated or 'manifestly unfounded' asylum procedures, or for those in the final stages of appeal against a rejected claim. For example certain federal states in Germany are experimenting with return-oriented accommodation centres (*Ausreisezentren*) with the intention to 'induce' the cooperation of asylum seekers through the denial of anything but the most basic subsistence support. And in the Netherlands a new Regulation on Provisions for Asylum Seekers and other Categories of Aliens 2005 gives the Central Agency for the Reception of Asylum Seekers the authority to partially or completely deny provisions to an asylum seeker, who is still residing legally in the Netherlands, when he/she refuses to participate in programmes intended to inform, stimulate and make him/her aware of return.[70]

Furthermore there is a clear trend on the part of European governments of driving asylum seekers whose applications have failed into destitution through the withdrawal of all forms of support. In the Netherlands, asylum seekers whose claims have been rejected can be evicted from reception centres and denied all access to social support after 28 days, leaving them in a state of destitution intended to force them to leave of their own accord. Certain vulnerable persons (for example, those too physically ill to travel and those from countries to which there is a current moratorium on deportations) may appeal against this withdrawal of assistance, but only after they have been evicted. Similar provisions are contained in the United Kingdom's 2002 Act on Immigration and Asylum,[71] which allows the withdrawal of all welfare benefits from 'uncooperative' asylum seekers whose applications have been rejected, with the exception of those with families. The UK 2004 Act on Asylum and Immigration went on to remove that exception.[72] The Norwegian government has also taken measures to withdraw

[69] The findings of a recent UK-based study did not support the notion that restricting employment of asylum seekers increased the likelihood of return, nor did it indicate that granting permanent status reduced the likelihood of return, *Understanding Voluntary Return*, Home Office Online report 50/04, http://www.homeoffice.gov.uk/rds/pdfs04/rdsolr5004.pdf

[70] Chapter IV, Article 10 e, *Regulation on Provisions for Asylum Seekers and other Categories of Aliens 2005 (RVA 2005)*, 3 February 2005.

[71] UK Nationality, Immigration & Asylum Act 2002.

[72] The Asylum and Immigration (Treatment of Claimaints. etc) Act 2004.

material support to those whose applications have been rejected.[73]

Recommendation 26
ECRE strongly opposes the denial of human rights and the withdrawal of support as a means of forcing asylum seekers whose applications have been rejected into cooperating with return or compelling them to leave of their own accord. Through such withdrawal of support states risk violating their obligations under the European Convention on Human Rights, specifically Article 3 which provides that no-one shall be subjected to 'inhuman or degrading treatment or punishment'[74] and Article 8: the right to respect for one's private and family life (including physical and moral integrity).[75]

Recommendation 27
Asylum seekers whose applications have been rejected should be adequately supported by the government of the host country through the provision of basic socio-economic benefits until it is really possible for them to leave that country.

3.2.3 Return assistance

European governments extend some of the positive incentives from voluntary repatriation programmes to asylum seekers whose applications have been rejected and so provide assistance to stimulate rather than enforce return. By offering assistance to people facing mandatory returns (where consent is given in exchange for assistance), European states may be able to organise returns to a country of origin that only accepts back 'voluntary' returns, which for them is positive. This shift towards alternative methods of mandatory return is in recognition of the fact that large-scale returns using physical force are simply impractical and that incentives are not only more humane but also less costly, in every sense, than reliance upon threats, penalties and enforcement, and also that they support the sustainability of returns.[76] This trend is therefore to be welcomed and access to such programmes should be developed across all European countries.

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[73] At UNHCR's 55th Executive Committee meeting on 4 October 2004 Norwegian State Secretary Vidar Helgesen stated that "material safety standards may be legitimate in a voluntary repatriation context for persons who are legally in a host country, but they are not when it comes to the return of duly rejected asylum seekers, especially newly arrived ones".

[74] See *R(Q) v SSHD [2003] EWCA Civ 364, [2003] 2 All ER* which concluded that the UK Secretary of State would be in breach of the ECHR art. 3 if he failed to provide support to an asylum seeker in circumstances where he would not receive assistance from friends or charity.

[75] It has been recognised that this denial of support can invoke ECHR Article 8 where there is an unjustifiable interference with an individual's physical and moral integrity. See R (Razgar) v Secretary of State for the Home Department [2004] UKHL 27.

[76] In an IOM report all the states cited confirmed that assisted voluntary return is many times more cost effective than involuntary return, p.12, *Return Migration: Policies and Practices in Europe*, IOM, January 2004.

There are problematic aspects to how this policy is implemented, however, such as the fact that some states are making the provision of subsistence support until the time of departure dependent on whether a person signs up to leaving through a voluntary return programme, or that programmes aimed at persuading people to opt for so-called 'voluntary' return take place in places of detention (e.g Belgium and Sweden). The use of such measures call into question the extent to which a person has signed up to a voluntary return programme on the basis of informed consent and blur distinctions between consent and coercion, especially when they are presented by states as cases of 'voluntary return'.

Recommendation 28
The extension of positive incentives from voluntary repatriation programmes to asylum seekers whose applications have been rejected should be developed across all European countries. States should ensure however the consent is informed and that no coercive measures are used.

If based on such an approach the concerns of refugee-assisting NGOs and refugees would be significantly addressed and this would greatly facilitate their involvement as implementing partners. If involved, such organisations can perform a variety of useful roles such as conducting counselling on return, providing assistance and perhaps also post-return monitoring. The provision of independent advice to people before they have consented to their departure for example is important and NGOs can, and in some countries do, play a key role in this. For instance, the Danish Refugee Council, on behalf of UNHCR, is offering counselling to Afghani asylum seekers who, having had their applications rejected by the Danish government, have agreed to return to Afghanistan through a repatriation scheme with financial support.[77]

Recommendation 29
States should seek the increased participation of NGOs and refugee representatives, including those working in countries of origin, in the assisted return of asylum seekers whose applications have been rejected.

Recommendation 30
It is important that any return assistance offered to asylum seekers whose applications have failed addresses as far as possible the particular needs of the individual, especially in relation to vulnerable persons.[78]

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[77] The counselling is carried out in teams consisting of a legal advisor with knowledge of the rules and procedure of asylum, and a counsellor with expertise on repatriation. If the Danish Refugee Council find that the decision on asylum or humanitarian residence is not correct, they can assist in asking the relevant authorities to reopen the case. They have done so in a small number of cases.

[78] There are apparently "great differences among Member States so far as return of children is concerned" including the fact that the provision of assistance and protection is not consistent, Save the Children and The Separated Children in Europe Programme *Position Paper on Returns and Separated Children*, September 2004, p.3-4. In addition voluntary return programmes run by IOM are designed for adults and do not currently take the needs of unaccompanied minors into account.

Assistance should include adequate pre-departure services such as health care for the medically or mentally ill (assuming that their condition is not serious enough to warrant the granting of some humanitarian status or the delaying of their removal).

Recommendation 31
In the case of those whose applications have been unsuccessful and yet cannot immediately be returned, forms of assistance should be provided that help them prepare for their eventual return.

This could include the provision of appropriate training, so that persons awaiting return can acquire skills that will provide them with opportunities in their country of origin and help make their return sustainable. The granting of a temporary fixed-term legal status (as recommended in Section 2.7) allowing persons who are unable to return to work legally could also be explored. This would help them raise their own capital before return. These measures would contribute significantly to the sustainability of their return.

3.3 Transferring asylum seekers whose applications have been rejected to third countries

One response to the inability of states to return people to their countries of origin may be to transfer asylum seekers whose applications have failed to third countries. In April 2002, the European Commission's Green Paper floated the idea of return to countries of origin, or "where appropriate, of transit".[79] But mere transit through a country does not prove that that person has any meaningful link with that country and there is no obligation under international law for countries to accept persons who are not their nationals nor former habitual residents to be returned there.[80] There are many reasons to avoid this practice that relate to the sustainability of return: as with return to internal 'safe areas' that are not the homes of those returned, such a practice is likely to lead to putting refugees at risk and to cycles of displacement, exacerbating secondary movements.

There is also a risk that mixed couples may be treated differently if states are considering their removal to third countries. Even in cases of third countries connected with the ethnicity or nationality of one of the members of the couple, the particular situation of the couple concerned must be taken into consideration. There would still be a need to establish whether both persons would indeed be safe and would access the conditions described above, and whether they would face any discrimination from any communities in the third country (including their own) based on the fact that they are a mixed couple.

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[79] *European Commission Green Paper on a Community Return Policy on Illegal Residents, 10.04.02 COM(2002) 175 final,* 2.3 para 1.
[80] *Comments from the European Council on Refugees and Exiles on the Commission Green Paper on a Community Return Policy on Illega Residents,* ECRE, August 2002. Section 2.5. See also: *Immigration and Asylum Law and Policy of the European Union,* by Kay Hailbronner, 2000, p.482.

Recommendation 32

ECRE strongly opposes in principle a transfer to third countries of persons whose asylum applications have been rejected. If European countries choose to transfer asylum seekers whose applications have been rejected to third countries, very stringent conditions/safeguards should be put in place to ensure that states do not breach their obligations under international law and that this would lead to a sustainable life in that country. The right to family life in particular must be respected.[81] Such safeguards must include the following:

- **under no circumstances should the transfer entail the individual being sent (either directly or indirectly) to a country where their human rights might not be respected;**
- **the voluntary and informed consent of the inddividual must be obtained and access to information and advice from independent organisations, such as NGOs, must be provided before a decision to consent is taken;**
- **the individual must have a meaningful connection with the third country, such as for example family ties, a previous legal status or cultural background;**
- **there must the possibility for an individual to have a dignified standard of living in the third country and a legal residence status must be guaranteed;**
- **the particular potential risks faced by mixed couples must be carefully examined before any transfer;**
- **an agreement with the receiving country should be in place, but governments should not give inducements to third countries, whether in the form of development aid or otherwise, to take asylum seekers whose asylum applications have been rejected in Europe.**

[81] As provided for under Article 8 of the European Convention on Human Rights.

4 Follow up to return

No mechanisms are currently in place to adequately and systematically inform sending states or other stakeholders involved in or concerned with the return of asylum seekers whose applications have been rejected, of the impact and outcome of European return policies. For example, although governments of host states are responsible for ensuring the safety of returnees, it is not often possible to know whether a returnee has reached their destination safely. Despite states' obligations under international law to ensure protection from refoulement it is often not known whether a returnee has been refouled (directly by the host state or indirectly by the country to which they have been returned) or whether their human rights are being respected in the country they have been returned to. In the longer term, there is no systematically collected data whether returnees have been able to (re-)integrate in the country to which they have been sent and thus whether their return has been sustainable or if instead they have migrated once again.

Monitoring which collected such information would clearly be useful for all. Firstly it would operate as a check on the correctness of decisions to return individuals and on states' upholding of their obligations under international law. But it is also a matter of pragmatism, since such monitoring would instil confidence in potential returnees and could be used to later evaluate the success of a return policy (measured in terms other than just total numbers returned).

Recommendation 33
Procedures should be put in place to check that returnees have reached their destination safely, particularly where there are no border controls.

Recommendation 34
There should be follow-up and monitoring [82] of returned asylum seekers whose applications have been rejected to identify whether return policies prove to be effective and safe. This would help ensure the safety of returnees and act as a check on states' fulfilment of their obligations under international law to protect individuals from refoulement. It would also help evaluate the success of (re-) integration efforts and the sustainability of return.

States should establish their own monitoring systems but additional monitoring by independent international and non-governmental agencies would provide credibility. Refugee representatives or organisations could also usefully act as intermediaries in monitoring activities as they often have the trust of returnees. The allocation of resources would clearly be required.

[82] See *ECRE Position on Return* 2003, para 108, for further details of what such monitoring should consist of.

Recommendation 35
The rights of returnees will best be protected where a number of appropriate actors are involved in monitoring. In view of their responsibilities to the returnee, states should establish their own monitoring systems, however it is important for NGOs and refugees to be involved in monitoring returns. NGOs in the country of origin should also be involved.

Recommendation 36
Funds should be allocated by states through the design and implementation of specific funding proammes support the development of effective monitoring of returnees within countries of origin.

Recommendation 37
Any European Union funds earmarked for returns should also allocate resources to the monitoring of returnees within countries of origin.

Return should assist reconstruction and development in countries of origin rather than hinder it, and must be combined with measures to support the re-integration of returnees.[83] Return that considers its impact on the receiving community and benefits the community as a whole is therefore preferable to sending people back to their home countries with no means of supporting themselves.[84] It is also in the best interests of both the individuals concerned and European governments that returns are carried out in a way that guarantees sustainability. Successful reintegration in the country of origin is a key factor in ensuring the sustainability of return. To ensure this, it is important that the involvement of host countries does not end once return has been effected and that they recognise that in fact support to asylum seekers whose applications have failed may be necessary on return.

Recommendation 38
European states should support countries of origin to re-integrate persons whose asylum applications they have rejected and who they are returning.

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[83] This view has been expressed by the European Commission and the Council of Ministers. See Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the regions *Study on the links between legal and illegal migratio*n, COM (2004) 412**;** *Communication from the Commission to the Council and the European parliament integrating migration issues in the European Union's relations with third countries,* COM (2002) 703; *Council Conclusions on migration and development,* 19 May 2003 and *EC Green Paper on an EU approach to managing economic migration,* COM (2004) 811 and *European Parliament resolution on the links between legal and illegal migration and integration of migrants* (2004/2137(INI)), 9 June 2005.

[84] For example the impact on the receiving community is one of the elements looked at by IOM London in its evaluation of its Reintegration Fund, which found that its assistance had allowed "several more families to indirectly earn a living, *Voluntary assisted return and reintegration programme (VARRP), Re-integration Self-Evaluation Results,* June 2004, IOM, p.30.

Annex 1 List of Recommendations

Recommendation 1
If states are concerned with being able to undertake successful and sustainable returns they must address the fairness of their asylum procedures first. Wrong decisions may lead to people being persecuted and having to flee from their countries of origin again.

Recommendation 2
Under no circumstances should a person be returned until it has been clearly and definitely established that there are no protection needs relating to the individual case in question and that return will therefore not put their life at risk. Essential measures to ensure this cannot happen include the granting of a suspensive right of appeal and allowing a procedure to be re-opened if new elements arise in a particular case.

Recommendation 3
States should consider all asylum applications with a minimum of delay and should not suspend the processing of any asylum applications to avoid recognising refugees. States should not enforce returns prematurely.

Recommendation 4
States must more consistently take note of information provided by the UN and NGOs with knowledge and expertise on countries of origin and they should make the criteria on which they base their decisions to return people to certain countries (especially those previously considered unsafe) more transparent, as part of the process of ensuring that a person's safety can actually be guaranteed.

Recommendation 5
Governments, politicians and the media should discuss and address the issue of the return of asylum seekers whose applications have been rejected in a more balanced way and base their arguments on facts, not assumptions or misconceptions.

Recommendation 6
States should open up legal migration channels for both refugees and migrants to deal with persons who are not seeking protection, in order to help guarantee that the asylum system (which remains ECRE's main concern) can provide protection in a more efficient way to those persons in need of it.

Recommendation 7
European governments should increase their efforts to collect statistics on the return of asylum seekers whose applications have been rejected and increase transparency by improving public access to such information.

Recommendation 8
The EU should increase its efforts to actively guide Member States in collecting accurate, comparable and comprehensive asylum statistics and should also urge them to make these public.

Recommendation 9
European host countries should engage in dialogue with countries of origin to establish whether they are willing to accept persons returning, and if so, under what conditions. Negotiations should aim at ensuring that any appropriate legal or bureaucratic requirements relating to the return of individuals to the country of origin are met. However host countries should not contact countries of origin regarding the return of an individual until it has been finally determined that he/she is not in need of international protection.

Recommendation 10
Return programmes, affecting large numbers of returnees, should be co-ordinated in order to ensure the sustainability of return. A careful and staged approach to return by host countries in co-operation with countries of origin will often be required.

Recommendation 11
The international community and/or responsible governments should maintain political, financial and economic support to countries of origin to ensure sustainable return with adequate guarantees of protection.[36] Part of the international community's commitment to countries of origin must be the allocation of sufficient resources for development so as to provide a foundation for re-integration. ECRE is strongly opposed to the use of punitive measures, such as the withdrawal of development aid and support, to pressurise countries of origin to accept back persons whose asylum applications have been rejected.

Recommendation 12
In view of the serious nature of the concerns of asylum seekers whose applications have been rejected and yet do not cooperate with removal procedures a better understanding of these concerns is needed in the devising and implementation of states' return policies.

Recommendation 13
States should put in place humane return policies that are in line with international human rights obligations and take account of the specific needs and rights of vulnerable persons.

Recommendation 14
In order to address the unacceptable 'limbo' situations in which increasing numbers of asylum seekers whose applications have been unsuccessful find themselves in Europe today, European states should not enforce removals and should grant a legal status to certain categories of asylum seekers whose applications have been rejected, especially those who cannot be returned for reasons beyond their control.

Recommendation 15
In the case of asylum seekers whose applications have been rejected and who have been resident in a host country for some years, due to for example an unduly long or backlogged asylum procedure, the time spent in the host country should be taken into account when states are considering whether to pursue their return and issue a removal order. In relation to persons in this situation who have been present in the host country for 3 years or more and have thus 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.

Recommendation 16
In the case of persons considered to be 'vulnerable' whose asylum applications have nevertheless been rejected, serious consideration should be given to the delaying of the return process where it cannot be established that the rights of an individual would be respected and their needs met through return to their country of origin. In this case, there should be no enforcement of removal and a temporary legal status granted instead. Delays that lead to uncertainty must not continue for unreasonable lengths of time however and if it cannot be established that the needs of an individual and/or their best interests would be met through return, states should grant them a permanent legal status.

Recommendation 17
In the case of persons whose asylum applications have been finally rejected but who cannot be returned for 'technical or other reasons', an official decision should be taken not to enforce removal and to grant the persons concerned a legal status which affords them their human rights and a dignified standard of living. This legal status could be temporary but should be granted as soon as is possible.

Recommendation 18
While return procedures should be efficient, all returns should be undertaken in a manner that is safe, dignified and humane, with full respect for fundamental human rights. Individuals should be allowed to retain a sense of self-sufficiency and control over their own lives.

Recommendation 19
If used by European States, forced return should be effected in accordance with all their human rights obligations and particularly in accordance with the standards set out in the European Convention on Human Rights, the Convention against Torture, the International Covenant on Civil and Political Rights as well as the Recommendation on the return of rejected asylum seekers and the Twenty Guidelines on forced return of the Council of Europe's Committee of Ministers.

Recommendation 20
In developing European legal frameworks on return procedures the European Union should help ensure the implementation of human rights standards within its Member States.

Recommendation 21
Independent bodies, such as national ombudsmen, and codes of conduct to reinforce standards of treatment should be established in order to undertake effective monitoring of forced return operations.

Recommendation 22
It should not be automatically assumed that because an individual no longer has a legal basis to remain in a European country that they are likely to abscond and should therefore be detained. Detention should only be used as a last resort, and be in full compliance with international human rights law.

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ECRE strongly opposes the denial of human rights and the withdrawal of support as a means of forcing asylum seekers whose applications have been rejected into cooperating with return or compelling them to leave of their own accord. Through such withdrawal of support states risk violating their obligations under the European Convention on Human Rights, specifically Article 3 which provides that no-one shall be subjected to 'inhuman or degrading treatment or punishment'[75] and Article 8: the right to respect for one's private and family life (including physical and moral integrity).[76]

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ECRE strongly opposes in principle a transfer to third countries of persons whose asylum applications have been rejected. If European countries choose to transfer asylum seekers whose applications have been rejected to third countries, very stringent conditions/safeguards should be put in place to ensure that states do not breach their obligations under international law and that this would lead to a sustainable life in that country. The right to family life in particular must be respected.[82] Such safeguards must include the following:

- under no circumstances should the transfer entail the individual being sent (either directly or indirectly) to a country where their human rights might not be respected;
- the voluntary and informed consent of the inddividual must be obtained and access to information and advice from independent organisations, such as NGOs, must be provided before a decision to consent is taken;
- the individual must have a meaningful connection with the third country, such as for example family ties, a previous legal status or cultural background;
- there must the possibility for an individual to have a dignified standard of living in the third country and a legal residence status must be guaranteed;
- the particular potential risks faced by mixed couples must be carefully examined before any transfer;
- an agreement with the receiving country should be in place, but governments should not give inducements to third countries, whether in the form of development aid or otherwise, to take asylum seekers whose asylum applications have been rejected in Europe.

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Recommendation 34
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Recommendation 35
The rights of returnees will best be protected where a number of appropriate actors are involved in monitoring. In view of their responsibilities to the returnee, states should establish their own monitoring systems, however it is important for NGOs and refugees to be involved in monitoring returns. NGOs in the country of origin should also be involved.

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Recommendation 38
European states should support countries of origin to re-integrate persons whose asylum applications they have rejected and who they are returning.

Annex 2 Further ECRE Reading

Position on the Detention of Asylum Seekers, April 1996

Position on Refugee Children, November 1996

Guidelines on Fair and Efficient Procedures for Determining Refugee Status, September1999

Position on the Interpretation of Article 1 of the Refugee Convention, September 2000

Position on Complementary Protection, September 2000

Position on Return, October 2003

ECRE 2003 Country reports

Questionnaire and Guidelines for the treatment of Iraqi asylum seekers and refugees in Europe, April 2004

Guidelines for the treatment of Afghan asylum seekers and refugees in Europe, May 2004

Comments 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, September 2004

Comments on Future Orientations for an Area of Freedom, Security and Justice, September 2004

Renewing the Promise of Protection: Recommendations to the Brussels European Council, 5 November 2004 on the Multi-Annual Programme '*Strengthening Freedom, Security and Justice in the European Union'* and recent proposals to establish camps in the Mediterranean region, October 2004

Information Note on the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, October 2004

Comments on the Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, as agreed by the Council on 19 November 2004, March 2005

The Way Forward. Europe's role in the global refugee system. Towards a European Resettlement programme, April 2005

Guidelines on the Treatment of Chechen Internally Displaced Persons (IDPs), Asylum Seekers & Refugees in Europe, June 2005

Forthcoming papers in 2005:

The Way Forward. Europe's role in the global refugee system. Towards the Integration of Refugees in Europe

The Way Forward. Europe's role in the global refugee system. Towards Fair and Efficient Asylum Systems in Europe

The Way Forward. Europe's role in the global refugee system. Making refugee protection effective in regions of origin