ECRE

EUROPEAN COUNCIL
ON REFUGEES AND EXILES

CONSEIL EUROPEEN
SUR LES REFUGIES
ET LES EXILES

CO4/06/2003/ext/AS

Comments of the European Council on Refugees and Exiles on the Communication from the Commission to the Council and the European Parliament

Towards a more accessible, equitable and managed international protection regime

(COM(2003) 315 final)

Introduction

The European Council on Refugees and Exiles (ECRE) is a network of 74 non-governmental refugee-assisting organisations in 29 European countries. ECRE welcomes this opportunity to comment on the Communication *Towards more accessible, equitable and managed asylum systems.*

Summary

The Communication *Towards more accessible, equitable and managed asylum systems* was adopted by the European Commission on 3 June 2003. The Communication starts by analysing the UK proposals on *New international approaches to asylum processing and protection* and UNHCR's views with regard to measures to improve protection and solutions arrangements in regions of origin as well as proposing an EU-based approach to deal with certain caseloads. It proceeds by setting out the basic premises of any new approach to the international protection regime. It concludes by considering three specific but complementary policy objectives: a) the orderly and managed arrival of persons in need of international protection in the EU from the region of origin; b) burden and responsibility sharing within the EU as well as with regions of origin, enabling them to provide effective protection as soon as possible and as closely as possible to the needs of persons in need of international protection; and c) the development of an integrated approach to efficient and enforceable asylum decision-making and return procedures.

ECRE supports the ten basic premises that the Commission proposes should underpin any new approaches to the international protection regime. In particular, we welcome the assertions that any new approach should "need to fully respect international legal obligations of Member States", be complementary to the Common European Asylum System and be in line with the UNHCR's Agenda for Protection. We are also supportive of the development of

a genuine burden-sharing system within the EU and with host third countries that involves a "lasting process of confidence building and planning".

ECRE is also in principle in favour of proposals that alleviate the impact of immigration control measures on refugees by enabling them to travel legally to the EU to access protection and durable solutions. In this context, the Commission's proposals on exploring the possibility of an EU legislative framework on resettlement and the setting up of Protected Entry Procedures are to be welcomed. We further support proposals to strengthen protection capacity in regions of origin through a range of actions to develop institutional capacity, infrastructure and policies for reception, integration and return.

Lastly, we are in agreement with the Commission's proposal to intensify its work on "frontloading" through further study of the question of the single asylum procedure. In ECRE's view, under the single procedure, the determining authority should first examine whether the application for protection meets the criteria for refugee status under the 1951 Convention. Only where these grounds are not fulfilled, following a full and inclusive interpretation, should the determining authority proceed to examine claims in relation to complementary protection.

Notwithstanding, ECRE has a number of concerns as they relate to the Communication's proposals in relation to "setting up a complementary mechanism for examining certain categories of applications lodged in or at the border of the EU". ECRE considers such a mechanism to be unnecessary and a diversion from the Commission's purported aim to improve national asylum procedures and establish a single asylum procedure. It also considers the proposal for "closed processing centres" at particular locations to be legally and practically questionable risking seriously compromising Member States' obligations under refugee and international human rights law.

Comments on the Communication are presented in greater detail below. They follow the order of the paper and only address the three policy objectives put forward by the European Commission.[1]

1. BASIC PREMISES OF ANY NEW APPROACH TO THE INTERNATIONAL PROTECTION (PART V OF THE COMMUNICATION)

The Commission, in its Communication on the common asylum policy and the Agenda for protection[2] asserts that there is a crisis in the asylum system which is most striking in certain EU States and reflected in a growing malaise in public opinion. It purports that abuse of asylum procedures is on the rise as are “hybrid migratory flows, often maintained by trafficking practices involving both people with a legitimate need for international protection and migrants using asylum procedures to gain access to the Member States to improve their economic situation”. This phenomenon, the Commission maintains, represents a real threat to the institution of asylum which calls for a structural response in the form of new approaches to the international protection regime that complement the stage by stage approach adopted at Tampere.

[1] For a critical analysis of the UK Proposals, see the British Refugee Council's Briefing Unsafe havens, unworkable solutions, May 2003

[2] Communication on the common asylum policy and the Agenda for protection (Second Commission report on the implementation of Communication COM(2000)755 final of 22 November 2000), Brussels, 26.03.2003

ECRE agrees that there are mixed migratory flows, and that there are applicants for asylum who, assuming a fair asylum procedure based on a proper interpretation of the Refugee Convention, may be found not to be in need of protection. It would however caution the Commission against overstating the extent of this problem and using it as the central premise for the development of new approaches to the international protection regime.

To start with, the most significant nationality groups of asylum seekers come from countries experiencing widespread human rights abuses and conflict. In 2002, the majority of asylum seekers arriving in the European Union came from Iraq, Turkey, former Yugoslavia, Afghanistan and the Russian Federation. Interestingly, where there has been a change in conditions in certain countries of origin, this has influenced the size and composition of corresponding nationality groups as represented in national and EU-wide asylum statistics. During last year for example, there was a considerable decrease in the number of Afghan asylum claimants in EU Member States from 6,469 persons during the first quarter of 2002 to 3,568 persons to the fourth quarter of the same year. This trend has continued during 2003 and can also be observed in relation to arrival statistics of Iraqi asylum seekers.[3]

In addition, caution needs to be exercised when using statistics relating to recognition rates or number of rejected cases to confirm "abuse" in the asylum system. Some European states have to date used an often limited or even restrictive interpretation of the Refugee Convention definition to determine who is in need of international protection. Being channelled through inadequate asylum procedures lacking procedural and legal safeguards, persons who fill the criteria of a refugee under international law, do not have their status recognised. These might include applicants whose claim is based on serious violations of socio-economic rights amounting to persecution. They might also include claimants from countries such as Afghanistan and Iraq where there might be a mistaken presumption against the well-foundedness of their asylum applications on the basis of international intervention and presence in their countries. Or, they might include refugees engaging in onward movement from protracted refugee situations in search of effective protection and a durable solution. Also, in some national statistics, applications are considered to have been rejected, where the applicant has been returned to another EU State under the Dublin Convention or to a safe third country without a substantive examination of his/her case. Finally, even where an application has been considered unfounded by the first administrative instance, it is known that decisions are often overturned on appeal.

ECRE would argue that the crisis in the asylum system stems from the failure of Member States to build an effective protection system for refugees reaching the territory of Europe that is true to principles of responsibility sharing and to a meaningful harmonisation of protection standards at a level that is consistent with international human rights and refugee law principles. In this context, it welcomes the priorities for action to promote access to protection as they relate to the implementation of the Agenda for Protection.[4] It also supports the ten basic premises that the Communication *Towards more accessible, equitable and managed asylum systems* proposes should underpin new approaches.

2. POLICY OBJECTIVES AND APPROACHES FOR MORE ACCESSIBLE, EQUITABLE AND MANAGED ASYLUM SYSTEMS (PART VI OF THE COMMUNICATION)

[3] UNHCR, Asylum Applications lodged in industrialised countries: Levels and Trends, 2000-2002, March 2003 and UNHCR Asylum Levels and Trends in Industrialised Countries, First Quarter 2003, May 2003

[4] Para. 2.1 COM (2003) 152, final

A) The orderly and managed arrival of persons in need of international protection in the EU from the region of origin

The Commission outlines two areas which could be further explored as a means for facilitating the orderly and managed arrival of persons in need of international protection in the EU from the regions of origin: resettlement and protected entry procedures. ECRE is in principle in favour of proposals that alleviate the impact of immigration control measures on refugees by enabling them to travel legally to the EU to access protection and durable solutions.

In this context, ECRE supports the Commission's proposal to further explore the possibility of EU States agreeing a legislative basis for an **EU-wide resettlement programme**. Such a programme should not be viewed as part of a strategy of migration controls. Rather, it should seek to realise the time-tested fundamental purposes of third country resettlement: to provide rescue and durable solutions for refugees in need of protection, preserve the possibility of first asylum and act as a means of equitable responsibility sharing.

At present, seven of the current 15 EU Member States co-operate with global resettlement programmes.[5] Increased resettlement on the part of *all* EU States could be an important complementary factor in the development of future comprehensive solutions to protracted refugee situations and a positive gesture towards countries of first asylum in line with notions of international solidarity and responsibility sharing. It could also be an important tool for addressing the current discrepancy between the numbers of refugees eligible for resettlement and the number of resettlement opportunities available globally. It would lastly be a clear manifestation of responsibility sharing and solidarity within EU Member States, a stated aim of the Communication.

The Commission suggests that the proposed EU legislative framework could establish goals and the selection criteria, including the definition of those to be included in consideration for resettlement. ECRE would support the aim of defining criteria which focussed on vulnerability and those persons most in need of protection and durable solutions. In other words the criteria should be protection-oriented and not based on immigration-related considerations. Recent research conducted on behalf of ECRE found that the significant added-value of current European States' resettlement programmes is their willingness to concentrate on the resettlement needs of the most vulnerable. This should be upheld and further enhanced by an EU-wide resettlement programme.

The Commission proposes that legislation could also set the total annual target for resettlement but leave it to Member States to establish their own quota within that target. Whilst we recognise the vast complexities related to trying to establish quotas for each Member State, the obvious inherent flaw in the Commission's present proposal is that the annual target might not be met if national contributions are left to the discretion of Member States. ECRE would urge EU Member States to strive to reach an agreement on a co-ordination mechanism which would offer a guaranteed annual EU quota.

The Communication provides that Member States would establish their own selection procedures and organise their own policy relating to the arrival of resettled refugees, their reception and process of integration. ECRE would argue that any action undertaken by EU

[5] Denmark, Finland, Ireland, the Netherlands, Spain, the United Kingdom and Sweden.

States in selecting refugees to be resettled should be through tripartite cooperation involving resettlement countries, NGOs and UNHCR. Within this context of tripartite cooperation, UNHCR should continue to play a central facilitating and coordinating role in the planning and implementation of the proposed EU resettlement programme in accordance with its mandate and international responsibility for seeking durable solutions for refugees. With regard to NGOs, they have a significant role to play in the identification and referral of refugees in need of resettlement given that they often have direct contact with refugees in the field and are often better situated to identify vulnerable cases. This role should be maintained in the proposed EU resettlement programme. Finally, ECRE would be in favour of a more harmonised approach to the reception and integration of resettled refugees based on best practice.

Beyond resettlement, the Communication notes that orderly arrival can also be facilitated by setting up **Protected Entry Procedures** in regions of origin, preferably EU-wide. ECRE has long believed that there is an urgent need to investigate ways to alleviate the impact of EU immigration controls, and the consequential role of smugglers and traffickers, on refugees so as to extend the possibilities for persons in need of protection to obtain legal access to the EU. Any proposed processing systems that aim to facilitate legal access to protection should not in any way prejudice the treatment of asylum claims submitted by asylum seekers arriving spontaneously on the territory of a state operating a protected entry procedure. Their focus should be to facilitate access to protection for people in need rather than act as deterrence mechanisms for asylum applicants. ECRE remains committed to identifying alternative policies respectful of the rights of refugees and asylum seekers and we therefore are willing to further explore the feasibility of protected entry procedures in the coming months.

The Commission proposes to explore further the viability of setting up **EU Regional Task Forces** with responsibilities for information dissemination, processing, resettlement and protected entry procedures and procuring information for asylum determination. ECRE would in principle be in support of the development of EU focal points for refugee matters in regions of origin with sufficient resources to act strategically and effectively to coordinate EU Member States' engagement on behalf of refugees with host country governments, intergovernmental organisations and NGOs. Such bodies' main focus should be the coordination of EU Member States activities in ameliorating "the protection space" in regions of origin through capacity building with first asylum countries, local and international NGOs and UNHCR and the use of resettlement as a means of preserving the possibility of first asylum and means of equitable responsibility sharing. ECRE would consider any functions such bodies might exercise to deter persons in need of protection accessing Europe to claim asylum to be in contradiction with a primary focus on protection and capacity building.

B) BURDEN- AND RESPONSIBILITY SHARING WITHIN THE EU AS WELL AS WITH REGIONS OF ORIGIN

ECRE would be supportive of genuine efforts by EU States to "assist in developing the asylum systems of transit countries in order to turn these states into first countries of asylum." It is ECRE's opinion that both EU States and refugees will benefit from a more comprehensive engagement by EU States in regions of refugee origin. Such support should be given in the spirit of international solidarity and equity; it should not serve as an excuse to shift responsibility to regions of origin or renege on Member States' international obligations under the 1951 Convention or other international human rights legislation.

The Communication calls for a step-by-step approach which "implies long-term investments including capacity and institution building, facilitating the development of the asylum system of the countries in the region and effective protection capacity in regions of origin". ECRE would argue that the absence of investment and development aid in first asylum countries as well as the lack of funding for UNHCR have seriously undermined the development of protection oriented asylum regimes in Africa and Asia. Further, the absence of sufficient aid, private investment and insufficient debt relief to post conflict situations have tended to reproduce the general environment for conflict in many countries rendering refugee return not a durable solution in relation to a number of protracted refugee situations. Here, the case of Afghanistan is an example in point. ECRE would argue that a step-by-step approach should be based *inter alia* on the following principles:

1) **a protection and human rights-oriented approach** that has as its core the fundamental precepts of protection: non-refoulement, access to fair and efficient procedures for status determination, standards of reception that ensure the independence, personal dignity and physical security of asylum seekers and timely access to a durable solution including a clearly defined legal status;

2) **policy coherence** ensuring protection commitments are incorporated into the European Union's policies on Common Foreign and Security Policy, trade, humanitarian and development aid policy, and Common Agricultural Policy and the Union's work's in promoting human rights, good governance and the rule of law in regions of origin;

3) **partnership** between countries of first asylum, transit, EU Member States and where possible countries of origin;

4) **a strong emphasis on UNHCR's three durable solutions** of third country resettlement, local integration and voluntary repatriation. As the High Commissioner asserted in his closing statement at the 52nd Session of UNHCR's Executive Committee, "protection is no protection if there are no solutions";

5) Special attention on developing or supporting possibilities to facilitate the **local integration of refugees**. This could be done through, *inter alia*, identifying suitable parts of the country on the basis of ethnic composition of the population, availability of land or other economic opportunities and presence of other refugees who already have established strong social and economical links.

6) Complementary action of humanitarian and development assistance in post conflict situations to create the conditions for the **sustainable return** of refugees. Measures should be taken to prevent that the return of large numbers of refugees

will contribute directly or indirectly to the emergence of new conflicts. Return should be considered in relation to the reconstruction process and not interfere with processes that strengthen stability.

7) A **strengthened role for UNHCR** with sufficient resources to uphold its credibility as the principal organisation concerned with the protection, care and assistance of refugees.

ECRE views with concern the Commission's proposal that funding under Budget line "Co-operation with Third Countries in the area of migration (B7-667) could be used in relation to exploring legal, practical and financial questions related to Transit Processing Centres in third countries. We are against the development of any schemes by EU Member States individually or collectively through the EU that might seek to exclusively transfer asylum determination procedures from EU Member States to regions of origin. Not only such schemes would be contrary to the principle of responsibility sharing but they might not be feasible on legal, principled and pragmatic grounds. For example, a recent ECRE-USCR research report on "Responding to the Asylum and Access Challenge" questions the existence of the legal and institutional conditions that are necessary to ensure effective protection in countries such as Turkey and Kenya including the rule of law, democratic accountability and a strong civil society.[6]

C) THE DEVELOPMENT OF AN INTEGRATED APPROACH TO EFFICIENT AND ENFORCEABLE ASYLUM DECISION MAKING AND RETURN PROCEDURES

The Commission proposes that in order to promote the credibility and integrity of the asylum system and ensure the protection of genuine refugees, measures should be introduced that enable Member States "to quickly and correctly identify the persons genuinely in need of international protection and grant such protection" and "remove…persons who have been found not to be in need of protection". In achieving the first aim, the Commission proposes to intensify its work on "frontloading" through further study of the question of the single asylum procedure.

ECRE is strongly in favour of "frontloading" and of a single asylum procedure applicable to all asylum applications regardless of where the application is made, where the procedure is conducted or the nationality or ethnic origin of individual claimants. In considering this, it invites the European Commission to explore the possibility of EU common processing standards in the operation of such an asylum procedure. In ECRE's view, under the single procedure, the determining authority should first examine whether the application for protection meets the criteria for refugee status under the 1951 Convention. Only where these grounds are not fulfilled, following a full and inclusive interpretation, should the determining authority proceed to examine claims in relation to complementary protection. A number of procedural safeguards need to be in place to enable determining authorities to reliably, fairly and effectively identify persons in need of protection. These include for instance the right to a personal interview and free legal assistance and representation, a suspensive right of appeal to an independent appellate body against a negative decision and the right to be informed in writing of any decisions on an asylum application including the right to have stated in full the specific reasons why an applicant is considered not to fall within the terms of the Refugee Convention or other international treaties. Appropriate resources, well-trained personnel and quality information resources would be the necessary prerequisites for ensuring efficiency as

[6] ECRE-USCR, Responding to the Asylum and Access Challenge: An Agenda for Comprehensive Engagement in Protracted Refugee Situations, April 2003

they lead to better first instance decision making, limiting the use of more costly appeals procedures.

ECRE considers the proposal endorsed in the Communication for the development of a separate procedure for examining certain categories of applications lodged in or at the border of the EU to be unnecessary and a diversion from the Commission's and UNHCR's purported aim to improve national asylum procedures and establish a single asylum procedure. In this proposal, "closed processing centres" at particular locations in the EU would be used for more expeditious processing of certain categories of applications. In light of the underlying emphasis on detaining to deter, ECRE views this proposal as legally and practically questionable risking seriously compromising Member States' obligations under refugee and international human rights law.

Firstly, the Commission's proposals do not provide any indication as to the state responsible for considering an application for asylum and determining claims. Would state responsibility for processing lie with the sending state where the asylum seeker originally submitted a claim? Would it lie with the receiving state where the "closed centres" will be located? What would be the respective responsibility of sending and receiving States with regard to any failures of legal and administrative systems to enforce or guarantee the observance of international legal standards in particular as they relate to compliance with the principle of non-refoulement? Which State's judicial authorities would be responsible for dealing with appeals? In ECRE's view, the various legal and practical questions surrounding the issue of allocation of state responsibility need to be addressed comprehensively before further initiatives are developed on this issue. Moreover, the question of a possible risk of differentiated access to protection, resulting from differences in the standards for procedures and qualification for refugee status currently applied by Member States, would also need to be addressed in the light of an apparent failure of meaningful harmonisation of EU asylum standards to date. In this context, issues relating to a possible infringement of sending states' obligations under Article 3 of ECHR might arise.

Secondly, ECRE is most concerned by the proposed categories of applications which might be targeted for expeditious processing. According to the UNHCR proposals, these would include asylum seekers of a designated nationality with the exception of persons who are medically unfit to travel or stay in closed reception centres and unaccompanied or separated children. ECRE would consider that the identification of such groups on nationality grounds and the ensuing differences in treatment may amount to discrimination which is prohibited under Article 21 of the Charter of Fundamental Rights of the European Union and Article 26 of the International Covenant on Civil and Political Rights (ICCPR). The automatic detention of designated nationality groups may also infringe Articles 2 and 9 of ICCPR and Articles 5 and 14 taken together of the ECHR.

Thirdly, ECRE has serious concerns relating to the proposed detention of asylum seekers in closed processing centres. UNHCR considers detention as: "confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory".[7] Relevant international standards that Member States are under an obligation to respect, set out clearly the limited conditions under which the right to liberty and freedom of movement may be limited by

[7] UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999

resorting to detention.[8] Of particular relevance are Article 9(4) of ICCPR and Article 5(4) of the European Convention on Human Rights which provide for proceedings to be taken by which the lawfulness of detention shall be decided speedily by a court.[9] Here the question of the State responsible for upholding international standards in relation to the application of Article 5, ECHR and Article 9 of ICCPR need to be addressed. Beyond the pure legal point of view, there are a number of practical considerations, which would argue against the use of closed processing centres. In ECRE's view, the deprivation of liberty obstructs and undermines the operation of a fair and efficient procedure for the determination of refugee status. For example, the use of closed processing centres can physically interfere with the provision of legal advice to asylum seekers and create an intimidating atmosphere for persons undergoing the interview process. Further, Member States are reminded that asylum seekers may have already suffered imprisonment and torture in the country from which they have fled. Therefore, the consequences of being in a closed centre may be particularly serious potentially causing severe emotional and psychological stress.

Additionally, the procedure to be used as regards removal to the proposed closed centres could raise issues of collective expulsion which is prohibited in relation to aliens under Article 4 of the Fourth Protocol to the European Convention on Human Rights and Article 19 of the Charter of Fundamental Rights of the European Union.[10] The term, collective expulsion refers to "any measure of the competent authority compelling aliens as a group to leave the country, except where such measures are taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group".[11] The requirement to "genuinely and individually" take into account the "personal circumstances of each of those concerned" was confirmed in a recent judgement by the European Court on Human Rights in *Conka vs Belgium*.[12] Following this, an individual assessment of each case will need to be undertaken prior to removal.

Finally, beyond legal questions, a number of practical questions arise in relation to the transfer of individuals from destination Member States to Member States where the proposed detention facilities would be located. These relate to the financial costs of setting up and maintaining detention facilities. They also relate to the costs but also practical difficulties of forcibly transferring individuals to States where detention facilities will be located.

18 June 2003

For further information contact the European Council on Refugees and Exiles (ECRE) at:

ECRE Secretariat
Stapleton House
Clifton Centre – Unit 22

ECRE EU Office
205 rue Belliard
Box 14

[8] See Article 5(1) (f), ECHR. Also, ExCom Conclusion 44 (b) states the limited grounds detention may be resorted "on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees and asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum or to protect national security or public order".
[9] See also Amuur v. France, Case 17/1995/523/609
[10] Protocol No 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto, 16 September 1963
[11] Becker v Denmark No 7011/75, 4 DR 215 at 235 (1975)
[12] Conka vs Belgium, Judgement No. 51564/99

110 Clifton Street
London EC2A 4HT
United Kingdom

Tel +44 (0)20 7729 51 52
Fax +44 (0)20 7729 51 41
e-mail ecre@ecre.org

1040 Brussels
Belgium

Tel +32 (0)2 514 59 39
Fax +32 (0)2 514 59 22
e-mail euecre@ecre.be

http://www.ecre.org