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European Council
on Refugees and Exiles

ECRE Submission to the European Commission Consultation on the Future of Home Affairs Policies

An Open and Safe Europe – What Next?

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Introduction

The European Council on Refugees and Exiles (ECRE) is an alliance of 81 non-governmental organisations in 37 European countries, protecting and advancing the rights of refugees, asylum seekers and displaced persons. ECRE promotes the establishment of fair and humane European asylum policies and practices in accordance with international human rights law. ECRE's work is based on the input from its member organisations that are engaged in a variety of activities ranging from the provision of direct specialist assistance to asylum seekers and refugees in and outside Europe to monitoring, advocacy and public campaigning.

ECRE welcomes this opportunity to contribute to the debate launched by the European Commission on the future of EU home affairs policies and to submit its views on the challenges and priorities to be addressed by the EU in the area of asylum and migration, as the Stockholm Programme is coming to its final stages. The inclusion of the views of nongovernmental organisations (NGOs) in this debate is an essential part of developing policies that are evidence-based. Throughout and beyond the EU NGOs play a crucial role as direct service providers to those seeking protection and by doing so are well-placed to identify shortcomings and protection gaps as well as good practices. Moreover, the work of NGOs is supported by the relentless commitment of thousands of volunteers whose daily engagement with asylum seekers and refugees shows that respect for human rights of the most vulnerable is and remains of paramount importance for many EU citizens.

This contribution is addressed to both the upcoming Commission communication on the New Agenda for Home Affairs and the Strategic Guidelines for the legislative and operational planning within the area of freedom, security and justice which the European Council is due to define in June 2014. This submission is made bearing in mind the growing consensus on a proposed approach by some Member States and EU institutions of formulating broad strategic directions on a long term basis rather than a new detailed programme. Preparatory discussions within the Council on the strategic guidelines predominantly indicate the need for consolidation of the achievements of the Tampere, The Hague and Stockholm programmes and emphasise on quality, effectiveness and enforcement of EU action.[1] At the same time, reinforcing the external dimension of the EU's migration and asylum policies is invariably stressed as a key priority for the EU in the coming years.

In this contribution, ECRE's views on the future of the EU's asylum and migration policies are structured around the following themes: the implementation and monitoring of the Common European Asylum System, access to protection and border management, detention, integration, return and cooperation with third countries in the field of asylum and migration and funding.

[1] See e.g. Council of the European Union, Discussion Paper on the future development of the JHA area, Doc. Nr. 14898/13, Brussels, 16 October 2013, p. 4.

1. Making the Common European Asylum System a Reality for Asylum Seekers

After the adoption of the "asylum package" between 2010 and 2013, the EU is often said to be in an "implementing mode" with little or no need for additional legislative activity at EU level. ECRE shares the view that, after the adoption of the asylum package, the key priority for the EU in the coming years should lie with the transposition and implementation of the asylum *acquis* at the highest level of protection standards. However, additional steps will be necessary to clarify the adopted standards including through the use of interpretative guidelines. At the same time, upon evaluation, additional legislation to remedy remaining flaws and protection gaps and incorporate important developments in fundamental rights protection through the evolution of jurisprudence may be necessary to achieve the objectives of the EU's common policy on asylum.

1.1. Ensure Proper Transposition, Implementation and Monitoring of the Asylum *Acquis*

Member States are under an obligation to ensure that transposition and implementation of the asylum *acquis* is in accordance with the EU Charter of Fundamental Rights and general principles of EU law as interpreted by the CJEU. Also the jurisprudence of the ECtHR in relation to relevant provisions of the European Convention on Human Rights and Fundamental Freedoms (ECHR) sets important human rights standards that must be observed by EU Member States in their asylum and immigration policies. In ECRE's view, the inherent complexity and ambiguity of certain provisions in the recast legislation require further guidance from the Commission in order to ensure correct transposition and a sufficient degree of harmonisation in accordance with the 1951 Refugee Convention and other relevant human rights Treaties[2] as is stipulated in Article 78 TFEU as well as the EU Charter of Fundamental Rights.

EU institutions should in particular encourage Member States to take the necessary steps to provide for transparent transposition processes that ensure effective consultation with national NGOs and legal practitioners in order to guarantee that their expert views are duly taken into account. Furthermore the necessary resources should be dedicated to information and awareness-raising initiatives targeting asylum seekers and legal practitioners to ensure that asylum seekers are able to assert their rights under EU law and the EU Charter of Fundamental Rights.

Commission interpretative guidelines on specific provisions of the asylum *acquis* which require further clarification and relevant jurisprudence of the CJEU and the ECtHR could constitute a useful tool to provide further guidance in addition to targeted discussions with EU Member States in contact committee meetings.[3] In ECRE's view this should be considered for instance with regard to the provisions relating to the detention of asylum seekers in the

[2] Which include among others the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of Persons with Disabilities, the Convention against Torture and the Convention on the Rights of the Child (CRC) and the ECHR.

recast Reception Conditions Directive, the provisions on the assessment of special reception and procedural needs, the provisions relating to subsequent applications and the possibilities to derogate from the right to remain on the territory, the use of accelerated procedures and the guarantees with regard to unaccompanied children, in particular in the context of border and accelerated procedures. As transposition and implementation progresses and jurisprudence evolves, other areas may be identified where further guidance is needed in order to ensure both a sufficient degree of harmonisation and high standards of protection.

Effective and comprehensive monitoring of the performance of national asylum systems is crucial in order to ensure that the objectives of the CEAS are achieved. The Commission, as guardian of the Treaty, must be sufficiently resourced to monitor the correct implementation of the asylum *acquis*, gather reliable data and launch infringement procedures where necessary. In addition, further legislative amendments, must be considered to address remaining protection gaps and inconsistencies in the EU asylum *acquis* identified by means of in-depth monitoring.

Furthermore, the **possibility of reviewing Council Directive 2001/55/EC could be considered** as it has never been used until now.[4] So far, the Council has never concluded that a situation of mass influx or imminent mass influx as required by the Temporary Protection Directive occurred. The lack of definition or concrete guidance as to what constitutes a mass influx or imminent mass influx may be one of the reasons why the Directive's system of temporary protection was never triggered. In any case, the principle established in the Temporary Protection Directive, according to which persons enjoying temporary protection should be able to apply for asylum at any time as well as the level of rights attached in the current Directive for beneficiaries of temporary protection should be maintained. Its solidarity component could be further strengthened in order to achieve a more even distribution of efforts in the protection of persons arriving in the context of a mass or large influx.

EASO's role in supporting Member States' implementation of the CEAS must be clearly defined in close consultation with the Commission, in particular with regard to the drafting of handbooks and manuals related to the implementation of the revised EU asylum *acquis* as referred to in EASO's work programme for 2014.[5] Moreover, as a general rule, the **expert views of UNHCR, NGOs, the judiciary and academics should be systematically obtained and taken into account** when developing material supporting Member States with implementation, in order to aid full compliance with international refugee law and anticipate challenges in practice in a more effective manner. Such an approach has proven to be useful in the context of the EASO training modules as has been acknowledged by all actors involved.[6]

As much as the next phase of the CEAS is about proper transposition and implementation it is also necessary for EU Member States and institutions as well as EASO to focus on improving the quality of the asylum process in the CEAS and of individual decision-making in

[4] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (hereinafter 'Temporary Protection Directive'), *OJ* 2001 L 212/12.
[5] EASO, *Work Programme 2014*, 2013, p. 7.
[6] EASO, *EASO Annual Activity Report 2012*, 2013, p. 9.

asylum procedures in particular. In this regard it is important for the EU institutions and EASO to fully endorse and support the **frontloading of asylum procedures**. Frontloading is the policy of financing asylum determination systems with the requisite resources and expertise to make accurate and properly considered decisions at the first instance stage of the procedure. Ensuring quality first instance decision-making reduces the number of unnecessary appeals, and thereby saves time and resources.[7] The recast Asylum Procedures Directive already includes a number of provisions that may contribute to the frontloading of asylum procedures in the interest of fair and efficient decision-making, such as the increased requirements with regard to training of the determining authority (Article 4) and the possibility for asylum seekers to comment on or complement the interview report (Article 17). In addition to further developing EASO training modules and making them more accessible to all stakeholders, EU institutions and EASO should fully promote tools that contribute to better quality of first instance decision-making such as the provision of sufficient time for the applicant before the first interview to be properly informed about the procedure and have the possibility to gather documentation in support of their claim. **The objective should be to achieve speedier decision-making without compromising procedural fairness and quality by investing sufficient resources in first instance decision-making.**

EU Strategic Guidelines must call for effective transposition and implementation of the recast EU asylum *acquis* at a high level of protection in a transparent and inclusive manner, involving consultation with all relevant stakeholders at the national level, including NGOs and legal practitioners. Transposition of the new EU asylum standards into national legislation must be coupled with awareness raising and information resources to ensure that asylum seekers are able to assert their rights under EU law, including the Charter of Fundamental Rights. The use of Commission interpretative guidelines to provide further clarity on the recast asylum legislation, where necessary, must be considered in order to enhance correct implementation.

EU Strategic Guidelines must endorse the frontloading of asylum procedures as a key tool in enhancing fairness, efficiency and quality of decision-making.

[7] Moreover, if first instance decisions are coherently reasoned and clearly identify the issues at stake, then appeal bodies are enabled to hear appeals more quickly and therefore cost-effectively. Although such an approach facilitates quicker decision-making, it is not about acceleration of asylum procedures for the sake of acceleration and requires upholding all procedural safeguards from the start of the procedure. See also ECRE, *The Way Forward. Towards Fair and Effective Asylum Systems*, September 2005.

1.2. Establish a Permanent Health and Quality Check of the CEAS as a Means to Identify Protection Gaps and Appropriate Intra-EU Solidarity Measures

Both the establishment of an early warning and crisis management mechanism on the basis of Article 33 recast Dublin Regulation by the Commission and EASO's early warning and preparedness system constitute tools that may considerably strengthen capacities at EU level for the timely identification of protection and capacity gaps in Member States as well as the appropriate measures and responsibility-sharing tools to address them. The political consensus on the need for such a system in the context of the recast Dublin Regulation should be built upon to establish a system that enables **a permanent health and quality check of the CEAS, including an assessment of its quality, based on a comprehensive set of quantitative and qualitative indicators**.[8]

In order for such a tool to be effective and to provide the real picture of the performance of asylum systems and the treatment of asylum seekers within the CEAS, it **must be based on all relevant sources, including information provided by expert non-governmental organisations and legal practitioners**. As they assist asylum seekers on a daily basis they are uniquely well-placed to assess the functioning of the asylum system from the perspective of those for whom the system is built.[9] Initiatives such as the Asylum Information Database already provide an in-depth analysis of fourteen EU Member States' practice with regard to asylum procedures, reception conditions and detention of asylum seekers on the basis of evidence gathered by expert non-governmental organisations operational in the countries concerned.[10] In several judgments of the ECtHR concerning expulsion cases, the Court has emphasised that given the absolute nature of the protection afforded by Article 3 ECHR, the assessment made of the situation in the country of destination must be adequate and must be supported by governmental sources as well as by materials originating from other, reliable and objective sources, such as, for instance, other Contracting or non-Contracting States, agencies of the United Nations and reputable non-governmental organisations.[11] Also in the case of M.S.S. v. Belgium and Greece the ECtHR relied extensively on NGO and UNHCR-information to assess the level of reception conditions and the procedural guarantees for asylum seekers in Greece and find that the transfer of an Afghan asylum seeker from Belgium to Greece under the Dublin Regulation violated Article 3 ECHR. With reference to the M.S.S. judgment the CJEU in the case of N.S and M.E. confirmed that the reports of international non-governmental organisations were an important source of information "bearing witness to the practical difficulties in the implementation of the Common European Asylum System in Greece".[12] In addition, the results of monitoring of the human rights situation in EU Member States carried out by monitoring bodies set up by the Council of Europe such as the Committee for the Prevention of Torture or in the context of the Universal Periodic Review under the auspices of the UN Human Rights Council, must be part of the assessment of asylum systems.

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[8] For detailed recommendations see ECRE, *Enhancing Intra-EU Solidarity Tools to Improve Quality and Fundamental Rights Protection in the Common European Asylum System*, January 2013.

[9] The indispensable role of NGOs and legal practitioners in the CEAS has been acknowledged at various occasions by EASO.

[10] See www.asylumineurope.org.

[11] See EctHR, *Salah Sheekh v. the Netherlands*, Application No. 1948/04, Judgment of 11 January 2007, para. 136.

[12] CJEU, Joined Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, Judgment of 21 December 2011, par. 90.

Furthermore, in order to properly assess the quality of asylum processes within the CEAS, sophisticated data collection should be complemented by **regular on-the-spot visits** to verify reception and detention conditions and analysis of samples of individual decision-making by quality assessment teams with a prominent role of UNHCR on account of its expertise developed through the various quality initiatives it has implemented. All EU Member States should also commit to establish quality assurance mechanisms in their asylum authorities as a tool for continuous self-evaluation.

A permanent health and quality check as envisaged by ECRE would also contribute to a better informed debate at EU level on the need for solidarity tools in the field of asylum such as intra-EU relocation of beneficiaries of international protection, or the joint or supported processing of asylum applications on EU territory. In ECRE's view, both solidarity tools present risks and opportunities and further steps need to be taken in order to ensure that such tools maintain their proper focus on the protection of fundamental rights of asylum seekers and refugees and the improvement of the quality of the asylum systems of EU Member States.

In this respect, ECRE stresses that **intra-EU relocation** of beneficiaries of international protection should be made conditional on concrete steps to be taken in the Member State from which persons are relocated from in order to address protection gaps in its national asylum system. Moreover, it should always be based on the informed consent of the persons concerned, be clearly kept separate from resettlement programmes and prioritise the most vulnerable persons whose special needs require immediate relocation to another EU Member State.

The pilot project on the **supported processing** of asylum application called for in the Commission Communication on the work of the Task Force Mediterranean[13] should be used to properly evaluate its added value for the Member States concerned as well as it implications for the quality of decision-making and procedural safeguards for asylum seekers. For the purpose of ensuring that their focus remains on protection, supported processing models should involve a prominent role for UNHCR and guarantee access to the range of procedural guarantees and reception conditions as required under EU asylum law and international refugee law, including independent legal assistance and access to an effective remedy.[14] ECRE strongly opposes any model of supported processing that would include the detention of asylum seekers or the forced relocation of asylum seekers or beneficiaries of international protection within the EU. In particular where supported processing is launched in order to address the failure of a Member State to comply with its obligations under EU or international law or a situation of particular pressure as a result of the disembarkation of persons rescued at sea, supported processing must be coupled with suspension of any Dublin transfers to the Member State concerned.

Establishing a CEAS, where similar cases are treated alike and result in the same outcome, regardless of where the asylum application is lodged throughout the Union, while upholding

[13] See COM(2013) 869 final, *Communication from the Commission to the European Parliament and the Council on the work of the Task Force Mediterranean*, Brussels, 4 December 2013.
[14] For ECRE's views on various models of joint processing, see ECRE, *Enhancing Intra-EU Solidarity Tools to Improve Quality and Fundamental Rights Protection in the Common European Asylum System*, January 2013, pp. 36-43.

high standards of protection in accordance with international human rights law remains the final objective. In this regard, addressing the current disparities between EU Member States remains one of the key challenges for the EU in the coming years. In particular, it remains to be seen whether the current legal framework and the tools and resources for practical cooperation in the framework of EASO, including supported processing will suffice to achieving the required level of convergence of decision-making. Theoretically at least, **centralised EU decision-making** at the first instance by an EU asylum authority with national branches in all EU Member States, coupled with the creation of an appeals mechanism at the EU level, offering all guarantees of an effective remedy may constitute the most effective way to achieving the final objective of the CEAS. While important legal questions remain with regard to this option, it is in any case politically unrealistic in the short term. However, such an option should be revisited in the event that the current divergences in decision-making practice between the EU Member States continue to exist in the long term.

EU Strategic Guidelines must call for the development of existing early warning mechanisms into systems that allow for a permanent health and quality check of the CEAS beyond the mere functioning of the Dublin Regulation, that is based on comprehensive data gathering from all relevant sources, including expert non-governmental organisations and legal practitioners. It should include regular on-the-spot visits and evaluation of samples of individual decision-making to improve the quality of the CEAS.

EU Strategic Guidelines must premise the use of Intra-EU solidarity tools on the inclusion of strong safeguards to ensure that they maintain their proper focus on ensuring compliance with Member States' obligations to provide international protection to those in need and do not result in responsibility-shifting.

1.3. Revisit the Principles Underlying the Dublin Regulation in the Longer Term

Although the Stockholm Programme referred to the Dublin Regulation as a cornerstone in building the CEAS, recent research carried out by NGOs including ECRE has once more revealed that the system is seriously flawed and continues to result in violations of fundamental rights of asylum seekers. In this respect, the Dublin Transnational Network comparative report "Lives on Hold" contains various accounts of the harsh consequences of the Dublin Regulation for asylum seekers who find themselves detained, destitute or denied access to the asylum procedure, while families continue to be separated.[15]

[15] See e.g. European Network for Technical Cooperation on the Application of the Dublin II Regulation, *Dublin II Regulation - Lives on Hold – European Comparative Report* (hereinafter 'Lives on Hold'), February 2013 and see also JRS Europe, *Protection Interrupted. The Dublin Regulation's Impact on Asylum Seeker's Protection (The DIASP Project)*, June 2013.

National and European Courts have also confirmed that in certain circumstances the operation of the Dublin Regulation may result in human rights violations. For example, national courts have increasingly suspended transfers of asylum seekers under the Dublin Regulation to various EU Member States in recent years, including Malta, Italy and Hungary because of the real risk for the asylum seeker(s) concerned of being subjected to inhuman and degrading treatment in those countries, including as a result of substandard reception conditions and lack of sufficient safeguards against *refoulement*. In addition, interim measures have been imposed by the ECtHR on Member States in Dublin-related cases, while all Member States have suspended transfers to Greece following the *M.S.S. v. Belgium and Greece* judgment of the ECtHR.[16] Recently, UNHCR called for the suspension of transfers of asylum seekers under the Dublin Regulation to Bulgaria in light of the lack of access to adequate reception conditions and access to a fair and efficient asylum procedure, which is supported by NGOs, including ECRE and Amnesty International.[17] Furthermore, the jurisprudence of the ECtHR and the CJEU has clearly established that the Dublin Regulation cannot operate on the basis of a conclusive presumption that asylum seekers' fundamental rights will be observed in the responsible State and therefore that the principle of mutual trust between EU and Schengen Associated States is not absolute.

Almost 25 years after the system was set up, the efficacy and cost-effectiveness of the Dublin system remains highly questionable. Fewer than half of the agreed Dublin transfers are actually carried out and it still occurs that States exchange equivalent numbers of asylum seekers on the basis of the Dublin Regulation. In many cases the hierarchy of objective criteria laid down in the Regulation is not respected, as responsibility is often determined immediately on the basis of a EURODAC-hit without properly taking into account other relevant criteria such as the presence of family members in a particular Member State.[18] At the same time, there is little or no publicly available information on the financial cost of the system.

It is acknowledged that the recast Dublin Regulation includes a number of important changes that, if properly applied, may contribute to enhanced protection of asylum seekers' fundamental rights in Dublin procedures and may speed up procedures between EU Member States. However, the recast amendments do not alter the fundamental principles underlying the Dublin Regulation nor the fact that the Regulation is based on the flawed premise that protection standards and chances of getting protection are equal throughout the EU. The on-going divergences in recognition rates with regard to the same countries of origin of asylum seekers as well as with regard to reception conditions and procedural safeguards between States applying the Dublin Regulation continue to result in a protection lottery today in the EU. It is unlikely that the existing divergences will be completely erased by the second phase of harmonisation.

In the short term, Member States and the Commission must ensure that the recast Dublin Regulation is applied correctly, in particular with respect to the hierarchy of criteria and procedural safeguards contained therein.

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[16] ECHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgment of 21 January 2011.
[17] See UNHCR, *Observations on the Current Situation of Asylum in Bulgaria*, 2 January 2014 and ECRE, *ECRE joins UNHCR in a call for the suspension of Dublin Transfers to Bulgaria*, 8 January 2013.
[18] See European Network for Technical Cooperation on the Application of the Dublin II Regulation, *Lives on Hold*, at p. 6.

In the longer term, ECRE urges EU institutions to revisit the fundamental principles underlying the Dublin Regulation, as the Dublin Regulation seriously undermines the rights of refugees and asylum seekers, lacks efficacy and counteracts solidarity between EU Member States. In its 2011 Communication on intra-EU solidarity, the Commission already had acknowledged that the principles and functioning of the Dublin systems should be regularly reviewed, as other components of the CEAS and EU solidarity tools are built up.[19] It called for a comprehensive 'fitness check' "by conducting an evidence-based review, covering the legal, economic and social effects of the Dublin system, including its effects on fundamental rights". This has found sufficient political support from the Council and the European Parliament in recital 9 of the recast Dublin Regulation, which includes an explicit reference to the 'fitness check'. ECRE would welcome such a review and believes that such comprehensive evaluation should build on the already existing and extensive research conducted by both academia and NGOs on the application of the Dublin Regulation. As part of that 'fitness check' ECRE recommends to gather more quantitative and qualitative data on the impact of the Dublin system on family members as well as conducting a comprehensive audit of all the costs associated with the Dublin system.[20] EU institutions should also explore conducting a pilot study on alternatives to the current Dublin criteria taking into account the asylum seekers' preferences and their existing connections with Member States.

In ECRE's view, a system of allocation of responsibility between EU Member States that does not sufficiently take into account the asylum seeker's perspective, preferences and possible links to a specific Member State is doomed to fail as it will continue to generate considerable administrative, litigation and human costs. Eventually the Dublin Regulation must be replaced with a responsibility determination procedure which focusses on existing connections between asylum seekers and Member States and asylum seekers' own preferences and that is linked with a system of fair responsibility-sharing between Member States. Such an approach would likely reduce secondary movement prior to the examination of the asylum application in the responsible Member State and facilitate the integration of those granted international protection.

> EU Strategic Guidelines must acknowledge the need for revisiting in the longer term the principles underlying the Dublin Regulation and launch the debate on replacing it with a responsibility determination procedure by way of a pilot study, which focusses on existing connections between asylum seekers and Member States and asylum seekers' own preferences and that is linked with a system of fair responsibility-sharing between Member States.

[19] See COM (2011) 835 final, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on enhanced intra-EU solidarity in the field of asylum. An agenda for better responsibility-sharing and more mutual trust*, Brussels, 2 December 2011, p. 7.

[20] See recommendations in European Network for Technical Cooperation on the Application of the Dublin II Regulation, *Lives on Hold*.

1.4. Strengthen Access to Quality Legal Assistance Throughout the Asylum Procedure

Asylum seekers arriving on EU Member States' territories today are confronted with increasingly complex asylum procedures which do not necessarily ensure a substantive examination of their request for international protection. As they are not familiar with national legislation and procedures and in most cases do not speak the language of the Member State where their application is examined, asylum seekers are by definition in a disadvantaged position and in practice require legal assistance throughout the asylum procedure in order to effectively enforce their rights and ensure that all aspects of their asylum application are effectively taken into account.

The ECtHR has acknowledged the vulnerability of asylum seekers as such as well as the crucial role of legal assistance in ensuring compliance with the principle of *non-refoulement* in practice.[21] However, research shows that the trend in Europe seems to go towards less accessibility of legal assistance in asylum procedures, resulting from a range of practical, legal and institutional obstacles.[22] This results in a paradox whereby effective access to quality legal assistance is least available where it is most needed, such as in accelerated procedures, at the border or in detention. Furthermore, access to quality legal assistance is increasingly threatened by budget restrictions as a result of austerity measures in many Member States. Where free legal assistance at first instance is not required under national law, in practice, the only way for asylum seekers to receive free legal assistance is through NGOs or committed lawyers willing to take cases on a *pro bono* basis. Where legal assistance at the first instance is not part of the general legal aid system, such as in a number of Central and Eastern EU Member States, the provision of free legal assistance through NGOs is predominantly depending on EU funding (through the European Refugee Fund and its successor the Asylum, Migration and Integration Fund), which is often not sufficient to cover the need for legal assistance and is at times interrupted due to changing priorities set at national level.

This leaves many asylum seekers in practice without access to any legal assistance at the first instance of the asylum procedure as, often they do not have the financial means to pay for legal assistance. As argued above, in a policy based on frontloading of the asylum procedure it is important to ensure that first instance decisions are of high quality and take into account all aspects of the asylum application. Access to quality legal assistance from the start of the procedure contributes to quality decision-making as well as to the overall efficiency of the procedure. Legal aid providers can assist with collecting evidence supporting the applicant's case or relevant Country of Origin Information, and play an invaluable role in building trust between the asylum seeker and the asylum authorities, which is indispensable for a fair and efficient asylum procedure.

[21] See for instance ECtHR, *I.M. v. France*, Application No. 9152/09, Judgment, 2 February 2012 and ECtHR, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, Judgment, 23 February 2012.

[22] See Asylum Information Database, *Not There Yet: An NGO Perspective on Challenges to a Fair and Effective Common European Asylum System*, Annual Report 2012/2013, p. 64-71 and ECRE/ELENA, *Survey on Legal Aid for Asylum Seekers in Europe*, October 2010.

Early legal advice projects in the UK and Ireland[23] have shown the positive effects of providing legal assistance from the start of the procedure on the quality of decision-making and the effectiveness of the asylum procedure. **Additional pilot projects** should be funded by the Commission in EU Member States where free legal assistance is currently not available while targeted programmes should make the provision of legal assistance in asylum and immigration cases more sustainable. The **mid-term review of the Asylum, Migration and Integration Fund (AMIF)** should have **effective access to free legal assistance as a key focus** in order to adjust priorities set in the framework of the national policy dialogues where necessary.

> EU Strategic Guidelines should emphasize the importance of access to quality free legal assistance at all stages of the asylum procedure as an essential aspect of the frontloading of Member States' asylum systems. Access to quality free legal assistance must be considered a key priority for EU Member States and the Commission under the Asylum, Migration and Integration Fund.

1.5. Enhance Free Movement of Beneficiaries of International Protection

The free movement of beneficiaries of international protection within the EU is a key aspect of the CEAS. This is clearly reflected in Article 78 TFEU which states that the CEAS comprises a uniform status of asylum for nationals of third countries, *valid throughout the Union [emphasis added]*. Free movement within the EU enhances not only the integration of refugees in European societies, it may also contribute to alleviating pressures on certain Member States where persons granted international protection effectively take up residence in another Member State. Under the Stockholm Programme steps have been taken in the right direction with the amendment of the 2003/109/EC Long Term Residence Directive to extend its scope to those granted refugee or subsidiary protection status under the Qualification Directive.[24] However, important obstacles remain for this group to make effective use of their right to free movement under the directive, which are often difficult to overcome for refugees or beneficiaries of subsidiary protection in practice. In addition to stable resources and integration requirements, Member States do not have to take into account the entire duration of the asylum procedure, for the purpose of calculating the period of five years legal residence, which is required to obtain long term residence status. This not only causes further delays in effectively exercising their right to free movement, it also fails to take into account, in case of refugees, the declaratory nature of their status.

Furthermore, refugees and beneficiaries of international protection who make use of the right to free movement under the amended Long Term Residence Directive still face a number of

[23] See, for instance, the ongoing project of the Irish Refugee Council Independent Law Centre which aims to address an unmet legal need by providing early legal advice to asylum seekers, assisting them to fully present their claim at the beginning of the procedure. See for more information http://www.irishrefugeecouncil.ie/law-centre/services.

[24] Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection (hereinafter 'amended Long Term Residence Direcive'), *OJ* 2011 L 16/44.

legal problems as regards their right to family reunification. The Family Reunification Directive does not apply to beneficiaries of subsidiary protection while its special provisions that apply to refugees could only be invoked by refugees in the second Member State, after their refugee status is transferred, which in practice in most Member States can only be achieved after two years of legal residence on their territory.[25]

The next logical steps in the construction of the CEAS are to **eliminate the remaining obstacles to the free movement of persons granted international protection in the EU**, while ensuring the **transfer of protection statuses** and to establish a system of **mutual recognition of positive decisions on international protection**.

In the short to medium term, Member States should facilitate access to free movement rights by refraining from imposing integration requirements to beneficiaries of international protection to obtain long term residence status or take up residence in another Member State. Member States should also take into account the entire duration of the asylum procedure, including the Dublin procedure, when calculating the period of five years of legal residence as required under Article 4(1) of the Long Term Residence Directive. In the longer term, beneficiaries of international protection should have the right to move, reside and work within the EU immediately after their status has been granted and this should be a key objective under the strategic guidelines. This would require a further amendment of the Long Term Residence Directive to remove the requirement of 5 years of legal residence before long term residence status can be obtained.

At the same time, additional steps need to be taken to **ensure the transfer of protection status of beneficiaries of international protection who make effective use of the right to free movement and take up residence in another Member State**. This is not addressed as such by the amended Long Term Residence Directive and remains an important gap in the CEAS, in particular as the European Agreement on the Transfer of Responsibility for Refugees concluded in the framework of the Council of Europe exclusively deals with refugees, does not cover persons granted other forms of international protection and is currently only signed by eleven EU Member States. A future mechanism for the transfer of protection status within the EU should establish the same rules for refugees and beneficiaries of subsidiary protection in line with the approximation of both statuses under EU law, ensuring immediate and effective access to the full set of rights under EU and international human rights law, and be transparent and sufficiently flexible so as not to undermine exercising the right to free movement.

Finally, in ECRE's view, a **system of mutual recognition of positive decisions on international protection** should be an inherent part of a common area of protection and solidarity and a CEAS where similar cases should result in the same outcome, regardless of the Member State where the application is lodged. Such as system would take away the current asymmetry in EU law, whereby only negative asylum decisions are mutually recognised and would simplify the adoption of EU legislation on the transfer of protection statuses and facilitate free movement as discussed above. In the long term, the work on convergence and quality of decision-making by EASO should lead to a more harmonised interpretation of the eligibility criteria of international protection laid down in the Qualification

[25] See S. Peers, "Transfer of International Protection and European Union Law", *IJRL* Vol. 24 No. 3, 550-551.

Directive, which should reduce the reasons for Member States to question positive decisions taken by other Member States. It should be noted that the mutual recognition of protection statuses granted on the basis of the Qualification Directive in EU Member States is mentioned as a long term goal of the CEAS by the Commission in its Action Plan implementing the Stockholm Programme.[26] EU institutions should seize the opportunity of the debate on the future of Home Affairs policies to endorse mutual recognition of protection statuses granted in another EU Member State as a key aspect of a common area of protection and solidarity.

> EU Strategic Guidelines must endorse the mutual recognition of positive decisions on international protection as a long term goal of the EU's common policy on asylum and call for measures to ensure the transfer of protection status in parallel with the elimination of remaining obstacles in EU law to the free movement of beneficiaries of international protection.

2. Shaping and Implementing Protection Sensitive Border Management to Ensure Access to Protection

Establishing a CEAS based on high standards of protection serves no purpose if it is not accessible to those in need of it. Those fleeing human rights violations and conflict are increasingly facing serious obstacles to reach the territory of EU Member States and find safety. Restrictive visa policies, the posting of immigration liaison officers abroad, carrier sanctions and financial and technical support to transit countries in order to step up their capacity in preventing 'irregular' migration all constitute direct and indirect obstacles for refugees to access the EU territory and find protection.

With barely any legal migration routes into the EU from third countries, migrants and those fleeing persecution and conflict are forced to use irregular migration channels and place themselves in the hands of unscrupulous smugglers or traffickers and take life-threatening risks to reach Europe. This was once again illustrated by the tragedy off the coast of Lampedusa in October 2013, where a shipwreck claimed the lives of more than 360 migrants, asylum seekers and refugees in their bid to find safety in Europe. Unfortunately, this was not an isolated accident as many more have lost their lives in the Mediterranean in recent years.

The Task Force on the Mediterranean that was set up in the aftermath of the Lampedusa tragedy had identified a range of measures at the disposal of EU Member States to prevent such tragedies from happening in the future. Unfortunately, but perhaps unsurprisingly, its main focus was on stepping up cooperation with third countries in order to prevent migrants and refugees from leaving and heading for the EU and investing in more sophisticated border surveillance. However, the Commission Communication on the work of the Task Force also

[26] A Commission communication on the transfer of protection statuses and mutual recognition of asylum decisions is scheduled for 2014 in the abovementioned Commission Action Plan.

emphasised the importance of exploring creative solutions, including the need for alternative avenues of entry to potential asylum seekers, such as protected entry procedures and more legal channels for migration for the purpose of study and work as well as the increased use of resettlement.[27]

The **EU should rethink its policies and encourage the use of innovative approaches that help to reduce the need for refugees to put their lives in the hands of smugglers and human traffickers in order to reach the EU**. The adoption of strategic guidelines offer a unique opportunity for the European Council to give further political impetus to prioritising legal channels for those fleeing persecution and other serious human rights violations to access protection in the EU, the development and mainstreaming of protection-sensitive border controls that fully respect the right to asylum and the principle of *non-refoulement* and the adoption of measures that reduce the loss of life of migrants and refugees in the Mediterranean.

2.1. Promote and Support the Use of Legal Avenues to Access Protection in the EU

The creation or re-introduction of **legal channels for refugees and asylum seekers to access or claim protection on the territory of one of the EU Member States** is one concrete measure that would reduce the need for those in search of international protection to resort to unsafe and irregular methods to access the territory of an EU Member State. Protected entry procedures are arrangements allowing an individual to approach the authorities of a potential host country outside its territory with a view to claiming international protection and be granted an entry permit in case of a positive response to that claim, be it preliminary or final. In a number of Member States protected entry procedures have been laid down in national legislation and have been used in the past, while humanitarian visa are still being used on an *ad hoc* basis for protection reasons.[28] Resettlement to the EU can be considered another important legal avenue that effectively prevents persons in need of international protection from undertaking life-threatening journeys.[29]

Building on current and past experiences with systems for approaching embassies of EU Member States with a request for international protection, EU institutions and EASO should identify the most effective ways to support EU Member States in (re-)establishing such avenues. **EU guidelines on a common approach to the application of Article 25 of the EU Visa Code**,[30] allowing for the issuing of short-stay visa with limited territorial validity on humanitarian grounds could further promote the use of this provision as a concrete tool to ensure legal and safe access to the EU for protection purposes. At the same time, the pooling of resources to enhance the capacities of Member States' embassies and consular posts to process requests for humanitarian visa and/or protected entry procedures should be encouraged. This constitutes a way to overcome practical and political challenges for Member States to effectively implement protected entry procedures. In any case, the use and

[27] See COM(2013) 869 final, *Communication from the Commission to the European Parliament and the Council on the work of the Task Force Mediterranean*, Brussels, 4 December 2013.
[28] For an overview of Member State practice, see Project E.T. – Entering the Territory, *Exploring avenues for protected entry in Europe*, March 2012.
[29] This is further discussed under section 7 below.
[30] Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), *OJ* 2009 L 243/1.

promotion of legal avenues to access protection in the EU should always be premised on the principle that involvement in such procedure does not prevent a person from seeking asylum on EU territory afterwards. While being viable alternatives to dangerous and irregular travel routes to the EU, legal protection channels can never substitute for the processing of asylum applications lodged spontaneously and for the first time on EU territory.

Visa requirements continue to be imposed on most of the countries that produce refugees and constitute an important obstacle for persons fleeing persecution to enter the EU in a safe and regular way. Recently, the European Parliament and the Council agreed on a mechanism to temporarily reintroduce visa requirements for countries whose nationals are exempt from visa requirements, among others where there is a significant increase in the number of asylum applications.[31] Such measures create additional hurdles for asylum seekers and refugees and mainly benefit the cynical business of smugglers and human traffickers. A thorough assessment should be made of the EU's visa policy and its impact on access to protection in the EU. In particular the possibility of suspending visa restrictions for a determined period of time for nationals and residents of countries experiencing a recognised significant upheaval or humanitarian crisis should be explored. Additional measures to mitigate the obstacles to access to protection created by the current EU visa policies could include the waiver of visa fees as well as the exemption from transit visa obligations for persons fleeing conflict and generalised violence.

The Commission's communication on the Task Force Mediterranean calls for "a feasibility study on possible joint processing of protection claims outside of the European Union without prejudice to the existing right of access to asylum procedures in the EU" and furthermore mentions that EASO, FRA and FRONTEX and, where relevant, UNHCR, ILO or IOM, should be involved in the execution of these tasks. The meaning of joint processing of asylum applications outside the EU is open to many interpretations. ECRE strongly opposes any form of joint processing of asylum applications outside the EU that would include the forced transfer of asylum seekers who arrive on EU territory to processing centres outside the EU as has been proposed in the past by a number of Member States. Such systems would not only result in the shifting of EU Member States' responsibilities vis-à-vis persons in need of international protection to third countries that may already host large numbers of refugees, they would also undermine the right to asylum as laid down in Article 18 EU Charter and asylum seeker's rights under the asylum *acquis* and be inconsistent with international human rights law.

Should the possibility of joint processing outside the EU be further explored, it should be strictly framed as a tool to facilitate legal access to the EU for persons in need of international protection such as protected entry procedures, which is complementary to the processing of asylum applications lodged on the territory of EU Member States. In this respect ECRE welcomes the explicit reference in the Commission communication that joint processing outside the EU should always be without prejudice to the right to access asylum procedures in the EU and that it is raised in the context of legal avenues to access.[32] Any

[31] See Regulation (EU) No …/2013 of the European Parliament and of the Council of 11 December 2013 amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (text available at the Register of the Council at the time of writing).

[32] See COM(2013) 869 final, *Communication from the Commission to the European Parliament and the Council on the work of the Task Force Mediterranean*, Brussels, 4 December 2013, par. 2.4.

feasibility study on joint processing outside the EU should fully assess not only the legal, economic and social implications of joint processing for EU Member States and hosting countries alike but also its implications for the protection of the fundamental rights of the individuals whose asylum applications would be processed in such system. Whereas the joint processing of asylum applications inside the EU already raises a range of complex legal and practical questions, joint processing outside the EU by definition raises additional and even more complex questions. Processing asylum applications outside the territory does not absolve Member States from complying with their obligations under international human rights law. The ECtHR has clearly established that as soon as Member States have effective control over individuals, they are within their jurisdiction which implies the observance of a number of procedural safeguards, including access to legal assistance, interpretation and information and access to an effective remedy, to ensure full compliance with the principle of *non-refoulement*.[33] Also the EU's accession to the ECtHR has consequences for the accountability of EU institutions and agencies such as EASO and FRONTEX for possible human rights violations abroad.

In case the idea of processing asylum applications outside the EU is entertained, in light of the above-mentioned concerns, the feasibility of a model whereby the processing of asylum applications outside the EU is conducted by UNHCR and is linked to resettlement programmes to EU Member States should rather be explored.[34]

> EU Strategic Guidelines must prioritise and encourage the use of creative solutions, including protected entry procedures and humanitarian visas, which enable asylum seekers and refugees to access protection in the EU through safe and legal channels. Such legal channels must never substitute or negatively impact on asylum applications lodged on the territory of one of the EU Member States. If the processing of asylum applications outside the EU is to be pursued, a model whereby the processing of asylum applications outside the EU is conducted by UNHCR and is linked to resettlement programmes to EU Member States should be further explored rather than relying on State-led processing outside the territory in order to ensure its proper focus on enhancing access to protection.

2.2. Strengthen Human Rights Monitoring of the EU's External Borders and Ensure Effective Access to Protection at the EU's External Borders

The Stockholm Programme stated as an important guiding principle that *"[T]he strengthening of border controls should not prevent access to protection systems by those persons entitled to benefit from them, and especially people and groups that are in vulnerable situations."* However, NGO reports continue to document instances of *refoulement* at the EU's external borders, such as at the Greek/Turkish land and sea borders, including in areas where

[33] See ECtHR, *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Judgment, 23 February 2012.
[34] See UNHCR, *Proposal for a Central Mediterranean Initiative: EU Solidarity for rescue-at-sea, protection and comprehensive responses*, 16 October 2013, p. 7.

FRONTEX is operational.[35] The fact that today access to an asylum procedure is not guaranteed at the EU's external borders is simply unacceptable and undermines the credibility of the CEAS as a whole.

While it is true that final responsibility for border controls and entry to the territory lies with the Member States, FRONTEX's role in operational terms is growing and so is its responsibility. The observance of fundamental rights and in particular access to international protection is explicitly acknowledged in FRONTEX' revised mandate.[36]

However, further steps are needed to effectively mainstream the protection of fundamental rights of asylum seekers and migrants at the EU's external borders, both within and outside the framework of FRONTEX.

Fundamental rights monitoring within FRONTEX should be enhanced by strengthening the role of the Fundamental Rights Officer (FRO). The mandate of the FRO within FRONTEX is broadly defined in the FRONTEX Regulation and encompasses a variety of tasks, ranging from supporting training activities and training modules to monitoring joint operations coordinated by FRONTEX. The monitoring activities of the FRO currently include an incident reporting system, through which allegations of fundamental rights breaches are being archived and reported upon. However, this does not include an individual complaints mechanism for individuals who become the victims of fundamental rights violations during FRONTEX operations, as this is considered to be outside its mandate.

In ECRE's view, the **creation of an individual complaints mechanism within FRONTEX** in addition to existing possibilities under national law of the Member State hosting the joint operation, would enhance the protection of fundamental rights and contribute to a more effective monitoring of fundamental rights violations at the EU's external borders.[37] The ambiguity as regards the respective responsibilities of national border guards, guest officers deployed by other Member States and FRONTEX staff members coordinating joint operations has not been entirely resolved in the revised FRONTEX Regulation. Asylum seekers and migrants affected by FRONTEX operations cannot be expected to identify the authority competent to receive and process complaints about fundamental rights violations, whereas border guards participating in FRONTEX operations wear armlets inscribed "FRONTEX". Creating an individual complaints mechanism within FRONTEX would not only be logical and beneficial to those claiming to have been the victim of fundamental rights violations. It would also allow FRONTEX to swiftly investigate allegations of human rights violations and its Executive Director to take better informed decisions as regards the suspension or termination of joint operations in case of serious human rights violations as

[35] See e.g. Pro Asyl, *Pushed Back. Systematic Human Rights Violations against Refugees in the Aegean Sea and at the Greek-Turkish Land Border*, November 2013.

[36] The adoption of a fundamental rights strategy, the appointment of a Fundamental Rights Officer and the establishment of a Consultative Forum with the task of assisting FRONTEX in the further development of its fundamental rights strategy, including through the monitoring of some of its operations, constitute important steps in the right direction. See Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (hereinafter 'Amended FRONTEX Regulation), *OJ* 2011 L 304/1.

[37] See also *Draft recommendation of the European Ombudsman in his own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)*. The inquiry was closed on 12 November 2013 with a specific report to the European Parliament on the issue of an individual complaints mechanism.

required by the amended FRONTEX Regulation. The upcoming evaluation of FRONTEX and possible review of its mandate constitutes a good opportunity to set up such individual complaints mechanism.

Secondly, access to protection in the context of FRONTEX joint operations should be further enhanced through **systematic involvement of EASO, as an independent centre of expertise in the field of asylum, in the planning and implementation of FRONTEX joint operations at the border**. In addition to the already existing cooperation between the two agencies as far as training is concerned, this could also include involvement of EASO at the operational level. This would contribute to swifter and more accurate identification of operational needs and better access to protection, including through the deployment of EASO asylum support teams. The latter should be entrusted with core functions with regard to identification of persons in need of international protection including the provision of interpretation, the use of COI etc. The setting up of mixed teams of border management and asylum experts, as foreseen in the working arrangement between EASO and FRONTEX, with a prominent role for UNHCR, should be tested.

Also outside the context of FRONTEX-operations, necessary measures must be taken to ensure that border controls are carried out in a protection-sensitive manner. **Initial and follow-up training of border guards in human rights law** is key, as well as in their obligations under the EU asylum *acquis* to refer persons applying for international protection to the competent authorities, and should be prioritised. Moreover, **effective referral mechanisms** must be in place at the external borders, ensuring those arriving at the border immediate access to medical treatment where necessary, up-to-date information about their rights and obligations and access to the appropriate procedure and the competent authorities.

EU strategic guidelines must reaffirm the need for protection-sensitive external border controls that guarantee respect for fundamental rights of all migrants and ensure that the right to asylum can be exercised effectively. Measures to ensure effective access to information and legal assistance must be prioritised and effective mechanisms for the swift identification of protection needs and referral to appropriate procedures at the border must be mainstreamed in the EU's external border management. Access to protection within the context of FRONTEX operations must be further strengthened through increased involvement of EASO and UNHCR at an operational level. FRONTEX' fundamental rights strategy must be further enhanced by establishing an individual complaints mechanism.

2.3. Commit to an Action Plan on Mediterranean Sea Crossings that Prioritises Saving Lives at Sea while Ensuring Access to a Fair and Efficient Asylum Procedure

Mediterranean Sea crossings have been claiming the lives of many thousands of asylum seekers, refugees and migrants in search of international protection or a better life in the EU in the past years.[38] Reports in the media time and again provoke strong statements of EU leaders about the need for decisive action to stop the loss of lives at sea and for concrete solidarity between EU Member States in dealing with sea arrivals. So far the EU's response has focussed mainly to step up efforts in sealing off the EU's external borders and step up cooperation with third countries. Following the tragedy off the coast of Lampedusa in October 2013, the European Council took very much the same approach and put the emphasis in its December conclusions on reinforcing border surveillance and prioritising cooperation with third countries in an effort to save lives by primarily preventing migrants and refugees from moving on to the EU. At the same time, it called for a clear timeline for implementation of the 38 measures identified in the Commission Communication on the Task Force Mediterranean, which also includes a variety of measures that primarily focus at saving the lives of migrant and refugees in distress at sea and disembarking them in a place of safety.[39]

The loss of life at the EU's southern borders is unacceptable and requires an Action Plan at EU level that allows for a comprehensive approach which includes cooperation with third countries to enhance their protection capacities as discussed in section 8. Such an Action Plan should draw inspiration on the UNHCR Djibouti conclusions,[40] establishing a Model Framework for Cooperation with regard to search and rescue as well as UNHCR's recent proposal for a Central Mediterranean Sea Initiative.[41] However, it is paramount for such an EU Action Plan to unambiguously prioritise saving lives of those who have embarked on a life-threatening sea journey to EU territory. This means that measures to increase capacity at EU and Member State level for search and rescue and disembarkation in a place of safety in accordance with international and EU law, must be adopted as a matter of priority.

Currently FRONTEX already in reality provides support to Member States in coordinating SAR operations. EUROSUR and the use of modern technology in close cooperation with other expert bodies such as the European Maritime Safety Agency and the EU Satellite Centre can further contribute to a better situational picture and swifter action to assist those in distress at sea.[42] However, this must be unambiguously framed to **serve the objective of saving lives at sea and protection from *refoulement* in accordance with the EU Charter, the EU asylum *acquis* and international law**. The adoption of the Commission

[38] In January 2012 UNHCR and the Parliamentary Assembly of the Council of Europe estimated that more than 1,500 persons drowned or went missing in the Mediterranean Sea in 2011 while attempting to reach Europe. Quoted in Fundamental Rights Agency, Fundamental Rights at Europe's southern sea borders, 2013, at p. 30 and in *Lives lost in the Mediterranean Sea: Who is responsible*, report of Ms Strik to the Parliamentary Assembly of the Council of Europe, Doc. 12895, 5 April 2012.

[39] See European Council, European Council Conclusions 19/20 December 2013, Brussels 20 December 2013.

[40] See UNHCR, *Refugees and Asylum-Seekers in Distress at Sea – How best to respond? Expert Meeting in Djibouti, 8 to 10 November 2011. Summary Conclusions*.

[41] See UNHCR, *Proposal for a Central Mediterranean Initiative: EU Solidarity for rescue-at-sea, protection and comprehensive responses*, 16 October 2013.

[42] In line with the objectives of the EUROSUR Regulation which include "contributing to ensuring the protection and saving the lives of migrants". See Article 1 Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur), *OJ* 2013 L 295/11.

proposal for a Regulation for the surveillance of the external sea borders in the context of operational cooperation coordinated by FRONTEX with additional amendments, as suggested by ECRE and other NGOs, to reinforce respect for the principle of *non-refoulement* would contribute to more legal certainty surrounding FRONTEX joint operations at sea.

Moreover, efforts are also needed **to support the search and rescue capacity of Southern Member States and access to international protection**, in accordance with international human rights law *outside* the framework of FRONTEX-led operations. In this respect it is paramount for the EU Strategic Guidelines to urge all shipmasters to comply with their duty to assist any boat in distress at sea and to remove any disincentives in national or EU law for commercial vessels to do so. To achieve this, it would be an important step in the right direction to amend Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence to include a mandatory provision not to impose penalties on those assisting migrants in distress on humanitarian grounds.[43]

As suggested in the Djibouti Conclusions, **Mobile Response Teams**, composed of experts from States, international organisations and NGOs and ensuring a multi-disciplinary approach with regards to the identification of the needs of persons within mixed flows, should be created. Such teams could assist the Member State of disembarkation in a variety of tasks, ranging from swift referral to appropriate procedures to identification of vulnerable groups and addressing their special needs. In order to pool resources as efficiently as possible the feasibility of such mobile response teams to operate within the framework of EASO Asylum Support Teams or FRONTEX joint operations should be examined.

Finally, a **comprehensive Action Plan on Mediterranean Sea-crossings** will need to encompass concrete and pre-defined solidarity measures at EU level to anticipate additional pressures on Member States where those rescued at sea are disembarked. The range of measures that are already at the disposal of the Member States should be used, to the extent considered appropriate and necessary. Additional emergency funding, special and emergency EASO support, including the deployment of EASO Asylum Support Teams to the Member State concerned as well as use of the discretionary clauses in appropriate situations in the recast Dublin Regulation and possibilities for Member States to bring together any family relations with the consent of the applicants concerned on the basis of Article 17 of the recast Dublin Regulation constitute useful tools of concrete solidarity and could be used in such context.

In addition, more creative solutions should be considered where necessary to ensure that those rescued at sea have access to a fair and efficient asylum procedure. As discussed above, **supported processing of asylum applications** could potentially constitute a useful tool but its added value in this context will need to be assessed on the basis of an in-depth evaluation of the pilot project which EASO is expected to carry out.[44] Also the **relocation of beneficiaries of international protection** to other EU Member States, under the conditions

[43] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, *OJ* 2002 L 328/17.
[44] See COM(2013) 869 final, *Communication from the Commission to the European Parliament and the Council on the work of the Task Force Mediterranean*, Brussels, 4 December 2013, par. 5.4.

suggested by ECRE in section 3.2. Above, can be a useful tool to alleviate additional pressures on the EU Member State where disembarkation takes place.

EU Strategic Guidelines must call for the adoption of an Action Plan on Mediterranean Sea-crossings which has saving lives at sea and access to protection as its first priority and includes concrete measures to enhance the overall search and rescue capacity of EU Member States and FRONTEX and to alleviate additional pressure on the Member State of disembarkation through the use of appropriate solidarity measures that fully respect the fundamental rights of asylum seekers, refugees and migrants.

EU Guidelines must make an explicit call on Member States and shipmasters to comply with their internationally recognised duty to assist migrants in distress at sea and encourage Member States and EU institutions alike to remove disincentives for shipmasters to engage in search and rescue operations that still exist in national and EU law.

3. Make the Use of Immigration Detention a Measure of Last Resort instead of First Response and End the Immigration Detention of Children

EU law now sets detailed provisions on detention of third country nationals for the purpose of removal and during the examination of their asylum application and the procedure to determine the Member State responsible for the examination of the asylum procedure.[45]

Under Article 5 ECHR immigration-related detention is only allowed to prevent unauthorised entry or to ensure deportation or extradition. The recast Reception Conditions Directive includes additional grounds for detention, such as for the purpose of establishing elements of the asylum application which otherwise could be lost, in particular where there is a risk of absconding, for reasons of public policy or for the purpose of verifying nationality. Moreover, the Directive allows the detention of unaccompanied asylum-seeking children, albeit in exceptional circumstances as well as the detention of asylum seekers in prison accommodation. At the same time, the Directive usefully requires a necessity and proportionality test and requires that alternatives to detention, laid down in national legislation, cannot be applied effectively before detention can be used as a measure of last resort.

[45] See Articles 8 to 11 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (hereinafter 'recast Reception Conditions Directive'), *OJ* 2013 L 180/96; Article 28 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (hereinafter 'recast Dublin Regulation'), *OJ* 2013 L 180/31 and Article 15 to 17 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (hereinafter 'Return Directive') *OJ* 2008 L 348/98.

The use of immigration detention by EU Member States has increased in recent years. In some Member States third country nationals arriving at the border, including those applying for international protection, face automatic detention for long periods of time and often in appalling conditions.[46] Maximum periods of detention in national legislation of a number of Member States have been extended to 18 months, following transposition of the Return Directive, whereas no maximum time limit is laid down in the law in the UK, as it has opted out of the directive.

In ECRE's view, deprivation of liberty constitutes an extreme sanction for people who have committed no crime and should, therefore, be used only as a last resort and for the shortest period possible and only with full procedural safeguards in place. While governments often justify detention as the only way to ensure that removal takes place, research shows that, where comparative information is available, alternatives to detention are more cost-effective than detention itself.[47] Moreover, the devastating effects of detention on the mental and physical health of detention have been documented in numerous reports and not only on the most vulnerable groups among migrants and asylum seekers.[48]

Regardless of the procedural guarantees laid down in EU law to reduce the actual amount of time spent in detention for the purpose of removal, ECRE considers the 18-month maximum time limit for detention laid down in EU law to be excessive and setting an unacceptable standard. While the obligation to set a maximum time limit for detention in national law is an important guarantee, under no circumstances can the detention of persons for purposes of immigration control ever be justified. This is *a fortiori* the case where such maximum time limit is being applied to persons applying for international protection, pending the examination of their asylum application.

EU policies in the post-Stockholm period must **prioritise creating further incentives for EU Member States to pursue policies that promote the use of alternatives to detention** and that only use detention in very exceptional cases and **end the detention of vulnerable groups, in particular children**. Such policies must be guided by the presumption that exists in international law against the detention of asylum seekers and recognise that seeking asylum is not an unlawful act.[49]

The use of **alternatives to detention** by Member States must be supported and further promoted as a key priority in the transposition and implementation of relevant EU legislation. Alternatives to detention cover a wide range of measures, including the deposit of documents, reporting obligations, bail arrangements, the provision of a guarantor or surety and community supervision arrangements. While always preferable to detention as such, EU institutions should see to it that alternatives to detention fully respect the human dignity and fundamental rights of the individuals concerned and do not become alternative forms of detention. The potential of community supervision arrangements, whereby individuals and families are released into the community, with a degree of support and guidance, should be fully used as an alternative that has proven to be effective, while respecting the right to privacy of the individuals concerned.

[46] See for instance AIDA, *Not There Yet: An NGO Perspective on Challenges to a Fair and Effective Common European Asylum System*, September 2013, pp. 78-83.
[47] See, for instance International Detention Coalition, *There are Alternatives. A Handbook for preventing unnecessary immigration detention*, 2011.
[48] See for instance JRS Europe, *Becoming Vulnerable in Detention*, June 2010.
[49] As laid down in Article 31 1951 Refugee Convention.

The effective implementation of such policies could be supported at EU level through various means. Existing good practice should be identified by the Commission in close cooperation with NGOs, UNHCR and IOM and promoted in contact committee meetings organised in the framework of the recast Reception Conditions Directive and the recast Dublin Regulation, as well as the Return Directive. This is also an area that should be a priority issue for the Commission to address through **interpretative guidelines** as discussed in section 2. Furthermore, EASO should support the effective implementation of alternatives to detention of asylum seekers in Member States as a key part of its efforts to support Member States in the implementation of the *acquis*. Here too, the specific expertise of NGO with regard to alternatives to detention should be taken into account, including in the context of pilot projects. In this regard, Member States should also make full use of the possibilities under the Asylum, Migration and Integration Fund (AMIF) to receive funding for the establishment, development and improvement of alternative measures to detention.

Whereas detention has a negative impact on all detainees, it has a devastating effect on the physical, emotional and psychological development of children.[50] A situation of detention also interferes with the relationship between parents and their children where they are detained together, as parents may feel to have lost parental authority. At the same time, children should not be separated from their parents, unless this is decided upon the basis of an individual expert assessment of their best interests. In a number of cases the European Court of Human Rights has found that the detention of children amounted to inhuman and degrading treatment, making reference to the negative impact detention has on the physical and mental health of children, including when they are detained together with a parent.[51] The UN Working Group on Arbitrary Detention has furthermore concluded that "[g]iven the availability of alternatives to detention, it is difficult to conceive of a situation in which the detention of an unaccompanied minor would comply with the requirements stipulated in Article 37 (b) (2) of the Convention on the Rights of the Child, according to which detention can be used only as a last resort."[52] The extreme vulnerability of children is partly acknowledged in the recast Reception Conditions Directive which already emphasises the core principle that detention of asylum seeking children should only be used as a measure of last resort and where alternative measures cannot be applied effectively.[53] This should now be taken one step further. As part of an EU migration policy that is geared towards substantially reducing the use of immigration detention, **ending the immigration detention of children should be a key objective in future EU migration and asylum policies**.

> EU Strategic Guidelines must commit to developing EU immigration and asylum policies that avoid the detention of asylum seekers and migrants by promoting the use of alternatives to detention and exclude the detention of vulnerable persons, in particular children.

[50] See for instance JRS Europe, *Becoming Vulnerable in Detention*, June 2010, p. 98-100.
[51] See for instance ECtHR, *Muskhadzhiyeva and Others v. Belgium*, Application No. 41442/07, Judgment of 19 January 2010 and *Kanagaratnam and others v. Belgium*, Application No. 15297/09, Judgment of 13 March 2012.
[52] See United Nations Human Rights Council, *Report of the Working Group on Arbitrary Detention*, 18 January 2010, A/HCR/13/30, at para. 30.
[53] Moreover, all efforts must be made to release the detained children and place them in suitable accommodation (Article 11(2) recast Reception Conditions Directive). Unaccompanied children shall only be detained in exceptional circumstances (Article 11(3) recast Reception Conditions Directive).

4. Integration

The EU framework on integration is now composed of several substantive and institutional mechanisms and reflects the importance attached to integration in the Stockholm Programme. It includes a set of common basic principles on integration (CBPs), European modules, integration indicators, three Handbooks on Integration for Policy-makers and Practitioners, Annual Reports on Migration and Integration, two Communications on an EU agenda for integration, a network of National Contact Points on Integration (NCPI), a European integration forum, an integration website, as well as different European financial instruments, such as the European Social Fund and the New Asylum, Migration and Integration Fund (AMIF), which will replace the European Integration Fund and the European Refugee Fund.

ECRE acknowledges that a common and comprehensive approach of integration based on the principle of equal rights and opportunities has now been defined at EU level. The concept has also acquired an EU law meaning with its inclusion in the Long Term Residence Directive and Family Reunification Directive. It is positive that the 2011 European Agenda for the Integration of Non-EU Migrants stressed the need to take into account the specificity of refugee integration, as well as the **importance of the reception phase** in the whole process.[54] This is confirmed in several reports showing that targeted measures introduced at an early stage are key for successful integration.[55]

However, while in the current political climate both at EU and national level great emphasis is placed on the need for non-nationals to integrate, beneficiaries of international protection and asylum seekers are facing numerous obstacles to their integration in daily life. Recent research suggests that refugees, and particularly women, fare generally worse than other migrants in almost all areas identified at EU level as being key for integration (employment, education, social inclusion active citizenship and health).[56] Furthermore, NGOs report increasing destitution and poverty among asylum seekers and refugees in a number of countries.[57]

While a common EU framework on integration has been consolidated, integration policies and opportunities vary considerably from one EU Member State to another. The specific barriers most refugees face are rarely subject to targeted measures or are simply ignored by policy makers and service providers. As a consequence, beneficiaries of international protection are often forced to move to other EU Member States in order to avoid destitution and exclusion.

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[54] See COM(2011) 455 final, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. European Agenda for the Integration of Third-Country Nationals*, Brussels, 20 July 2011 and SEC(2011) 957 final, *Commission Staff Working Paper. EU initiatives supporting the integration of third-country nationals*, Brussels, 20 July 2011.

[55] See for instance UNHCR, *A New Beginning. Refugee Integration in Europe*, September 2013, p. 71-72. See also *The start of something new – preparatory initiatives for the establishment of asylum seekers* (RiR 2012:23), Swedish National Audit Report, 2012.

[56] See for instance UNHCR, *A New Beginning. Refugee Integration in Europe*, September 2013.

[57] See for instance Swiss Refugee Council, SFH-OSAR, *Reception Conditions in Italy. Report on the current situation of asylum seekers and beneficiaries of international protection, in particular Dublin returnees*, October 2013. See also AIDA, *Country Report Bulgaria*, Updated November 2013.

Besides the difficulties related to forced migration (poor physical and mental health, family separation, lack of social network, etc.), ECRE considers that refugee integration is seriously jeopardised by policies whose aim primarily is to reduce the presence of "unwanted" migration in Europe. In ECRE's view, **access to protection is a prerequisite for successful integration**. Therefore, all issues highlighted in the previous sections regarding access to the territory, access to adequate reception conditions, detention at arrival, the Dublin Regulation, and fairness in the asylum procedure are also affecting refugees' ability to settle and to become actors of their own integration, after they have obtained a protection status. The negative impact of detention and unfair and long asylum procedures on asylum seekers' mental and physical health are widely acknowledged.[58]

As integration is commonly defined as a two-way process, the **impact of certain policies that tend to criminalize migrants on host societies and their perception of migrants should not be ignored**. The promotion of democratic values and social cohesion is difficult to achieve when political messages spread an image of migrants and migration as being a threat.

Furthermore, refugee integration continues to be undermined by numerous obstacles resulting from restrictive national legislation in areas that are considered key for integration. Family reunification, access to citizenship and long-term residence are highly problematic in certain countries. Although employment is considered as a core issue, NGOs report numerous obstacles preventing asylum seekers to access the labour market.[59]

The situation of beneficiaries of subsidiary protection is of particular concern. Although the amended Long-term Residence Directive and the recast Qualification Directive represent a significant progress in the alignment of rights between refugees and beneficiaries of subsidiary protection, rights and opportunities for these groups are far from being equal in certain areas, in particular with regard to family reunification.

This gap between integration objectives and restrictive national legislation generates policy inconsistencies. Efforts to foster social inclusion are jeopardized by restrictive policies aiming at reducing legal migration or combating irregular migration. This also undermines the efficiency and consistency of the current EU framework on integration. A common reference framework is not useful if, on the other hand, fundamental rights that are at the core of the integration process are not respected. In this regard, the transposition and implementation of the asylum *acquis* in a protection-orientated way is important as it may contribute to creating the conditions for successful integration of beneficiaries of international protection in EU Member States.

[58] On the long-term impact of detention, see G.J. Coffey, I. Kaplan, R.C. Sampson, M. Montagna Tucci, *The meaning and mental health consequences of long-term immigration detention for people seeking asylum*, Social Science & Medicine 70 (2010), 2070-2079.

[59] These include administrative requirements to be fulfilled by employers, the fact that asylum seekers are in some countries only allowed to work for a limited period of time during the year and that they can only be employed in specific sectors. See AIDA, *Not There Yet: An NGO Perspective on Challenges to a Fair and Effective Common European Asylum System*, September 2013, pp. 88-90.

EU Strategic Guidelines must acknowledge the reception phase as an integral part of the integration process and the importance of treating asylum seekers with dignity and respecting their fundamental rights from the first day of arrival. Increased policy coherence is needed in order to ensure that integration objectives are not undermined by policies and practices that contribute to the criminalization of refugees and migrants.

EU Strategic Guidelines should call for targeted measures and the investment of meaningful resources to improve integration perspectives of beneficiaries of international protection and in particular women and to remove direct or indirect obstacles for beneficiaries of international protection to exercise their right to family reunification and long term residence.

5. Return

The establishment of an effective and sustainable return policy is marked in the Stockholm Programme as an essential element of a well-managed migration system within the Union.[60] It furthermore called for intensifying efforts to return irregular migrations including through increased cooperation with countries of origin and transit, increased practical cooperation between Member States in organising joint returns through FRONTEX and the conclusion of bilateral and EU readmission agreements. Importantly, the need for such policies to comply with the principle of *non-refoulement* and respect the fundamental rights and freedoms and the dignity of the returnees is emphasised.

Return of irregularly residing third country nationals will remain high on the political agenda of the EU Member States. In addition to the provisions on detention, the Return Directive establishes a set of common standards to be observed by EU Member States when returning persons who no longer have legal residence on the territory of the Member States. An in-depth evaluation of the implementation of the Return Directive has been conducted by the Commission but was not yet published at the time of writing. Depending of the outcome of such evaluation, further steps may be necessary at EU level to address possible protection gaps or diverging practices either through amendment of the Directive or other tools, including the adoption of interpretative guidelines by the Commission.

Efforts have been made in a number of EU Member States to develop **assisted voluntary return programmes that should be further strengthened** as part of an EU migration policy that effectively prioritises voluntary over forced return. In order to be effective it is important for national legislation to establish time periods for voluntary departure that are realistic and allow returnees to properly prepare their return. In this regard Member States should be encouraged to make full use of the possibility under the Return Directive to establish a period

[60] European Council, The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, *OJ* 2010 C 115/1, section 6.1.6.

of voluntary departure longer than 30 days, the latter not being sufficient in most cases.[61] Voluntary return programmes should also provide for access to professional counselling by NGOs and linked to assistance for the reintegration of third country nationals in the country of return in order to enhance the sustainability of voluntary return.

Establishing effective systems of monitoring of forced return operations, including in the context of FRONTEX joint return operations, which is an obligation under the Return Directive, remains an important challenge. In order to be effective, forced return monitoring needs to be conducted by independent bodies. Research by the Fundamental Rights Agency has shown that this was in 2012 the case in only a few EU Member States.[62] Further efforts are needed to further mainstream the implementation of **independent monitoring mechanisms of forced return**, which increasingly takes place by air. Forced return monitoring should not be limited to the preparation of the return flight, the conditions and treatment of returnees on board the aircraft during the flight and the hand-over to the local authorities at the airport. It should also include follow-up monitoring after such hand-over in order to verify whether the persons concerned were effectively allowed access to the territory and the conditions of their reintegration into the society. The Committee for the Prevention of Torture has monitored a removal operation of third country nationals by air in the United Kingdom[63] as well as a removal operation from the Netherlands co-ordinated and co-financed by FRONTEX.[64] The monitoring by the CPT of removal operations by air is a useful tool to complement and analyse national monitoring systems in an independent and transparent manner. In the context of joint return flights co-ordinated by FRONTEX, the effective mechanism to monitor the respect for fundamental rights in all activities of FRONTEX as required by Article 26 (a) FRONTEX Regulation, should tap into the CPT's expertise in this field.

The situation of **third country nationals who are staying irregularly on the territory of an EU Member State but cannot be returned** to their country of origin or former country of habitual residence for reasons that are beyond their control, poses specific challenges from a fundamental rights perspective. Migrants may be unreturnable for a variety of reasons including administrative reasons, statelessness and the possible violation of human rights such as return to a situation of conflict and violence or in breach of the right to family life. International human rights treaties guarantee the respect of basic human rights to all persons, irrespective of their legal status that are unfortunately not always respected in practice in EU Member States. The EU Return Directive only partly deals with this issue by determining the situations in which removal must or may be postponed and imposing an obligation for Member States to ensure that a number of principles (family, unity, emergency health care, access to the basic education system and special needs of vulnerable persons)

[61] See Article 7(2) Return Directive.
[62] See Fundamental Rights Agency, *Fundamental Rights: key legal and policy developments in 2012*, 2013, p. 9-10.
[63] See Council of Europe, *Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 22 to 24 October*, Strasbourg, 18 July 2013 and Council of Europe, *Response of the Government of the United Kingdom to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the United Kingdom from 22 to 24 October 2012*, Strasbourg, 18 July 2013.
[64] See Council of Europe, Newsflash. The European Committee for the Prevention of Torture examines treatment of foreign nationals during a removal operation by air from the Netherlands. At the time of writing the findings of the CPT were not publicly available.

are “taken into account”.[65] Apart from an obligation to issue a written confirmation that the return decision will temporarily not be enforced or that the period of voluntary departure is prolonged, the Directive does not address the legal status of the persons concerned.

A recent NGO-report on the situation of unreturnable migrants in 4 EU Member States highlights the fundamental rights implications of legal limbo situations for the individuals concerned, and in particular the fact that they are often detained despite the fact that they cannot be returned.[66] A recent Study on the situation of third-country nationals pending return or removal in EU Member States and Schengen Associated countries indicates that “the rights and situation of third-country nationals pending return are not very well established in legal terms” and reveals huge differences the way this group of migrants is dealt with in legislation and in practice throughout the EU.[67] While some EU Member States have introduced an official postponement or toleration status with additional rights, others have not or make access to additional rights dependent on cooperation during the return process.

The hardship and fundamental rights issues resulting from situations of legal limbo should be fully acknowledged at the EU level. EU Member States must be encouraged to take the necessary measures to **avoid situations of legal limbo for persons who cannot return for reasons that are beyond their control** and **exclude the use of detention** while ensuring effective access to their fundamental rights. This should include continued monitoring by the Commission of relevant provisions in the Return Directive and guidance on their interpretation and implementation with that purpose. Moreover, amendment of the Directive to strengthen in particular protection against arbitrary detention in such situations could be considered in the long term.

EU Strategic Guidelines must call on Member States to prioritise voluntary return over forced return and to take the necessary measures to ensure that all returns can take place in safety and support the migrants’ sustainable reintegration. Further steps must be taken to establish effective mechanisms for the independent monitoring of forced returns, where forced return is considered necessary in accordance with the Return Directive must be emphasised.

EU strategic guidelines must include a clear commitment to developing a rights-based approach to the situation of unreturnable migrants that aims at preventing legal limbo situations and excludes the use of detention with regard to unreturnable migrants.

[65] See Article 14 Return Directive.
[66] See Flemish Refugee Action, Detention Action, France Terre d’Asile, Menedek and ECRE, *Point of No Return. The futile detention of unreturnable migrants*, January 2014. The report is based on interviews with 39 persons. More information on their individual stories as well as fact sheets on the legal framework in the four countries concerned (Belgium, France, Hungary and the United Kingdom) can be found at www.pointofnoreturn.eu.
[67] See Ramboll and Eurasylum, *Study on the situation of third-country nationals pending return/removal in the EU Member States and Schengen Associated Countries*, March 2013.

6. Enhancing Refugee Protection in Countries of Origin and Transit

The last five years have marked a trend towards growing and strengthening the external dimension of EU migration and asylum policy. Initiated during the Hague Programme, the Global Approach to Migration expanded to the East and South and was strengthened through various tools. In 2012, triggered by the momentum created by the Arab Spring, the Communication on the Global Approach to Migration and Mobility (GAMM) was presented in conjunction with the Communication on the Southern Mediterranean and Europe's response to a changing Neighbourhood.[68] The GAMM, the EU's overarching framework for external migration policy, has four priority areas, promoting labour migration, addressing irregular migration, enhancing the links between migration and development, and supporting refugee protection in countries of origin and transit. The main vectors of the GAMM are migration dialogues with third countries leading to Mobility Partnerships and Common Agendas for Migration and Mobility, depending on the level of cooperation with each country.[69] A number of mobility partnerships have been concluded over the last years and more are in the pipeline. Capacity building for asylum in third countries has gradually been incorporated into the GAMM framework, either as a component of the mobility partnerships or through the Regional Protection Programmes (RPP). At the same time, cooperation with third countries in these areas is also conducted in the framework of development cooperation through the relevant geographic and thematic financial instruments.

6.1. A Rights-based Approach to the GAMM that is Monitored and Coherent with Other External Policies

As dialogue and cooperation with third countries in the framework of the GAMM is gaining more prominence it is important to ensure that all EU policy measures in this field serve the purpose of supporting orderly migration, ensuring access to protection and safeguarding the rights of migrants and refugees on the move, including the right to asylum.

ECRE has welcomed the GAMM approach to include migration and asylum in political dialogues with third countries as this can ensure partner countries' ownership of measures and policies, and can have a greater impact. Caution is needed however with regards to incentives to third countries for cooperation in the area of migration and asylum. Official development assistance should not be used as a means and an incentive to limit migration and restrict the rights of migrants, refugees and asylum seekers in third countries. The Commission itself in its 2013 report on Policy Coherence for Development recommends that the use of conditionality in migration dialogues should not negatively impact on EU and Member States development cooperation.[70] Nor should incentives be used to support returns to countries where the human rights and safety of migrants, refugees and asylum seekers

[68] COM (2011) 200 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. *A Partnership on Democracy and Shared Prosperity with the Southern Mediterranean*, Brussels, 18 November 2011 and COM (2011) 303, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, A new response to a changing Neighbourhood,* Brussels, 25 May 2011.

[69] For an analysis of the GAMM see ECRE Comments to the Commission Communication on the Global Approach to Migration and Mobility COM (2011) 743 final.

[70] See SWD (2013) 456 final, *EU 2013 Report on Policy Coherence for Development,* Commission Staff Working Document, Brussels 31 October 2013, p. 172. Conditionality here refers to the condition foreseen in the migration dialogues leading to Mobility Partnerships that countries cooperate in readmission in exchange for visa facilitation.

are not safeguarded. Instead, the EU and Member States should consider the human rights situation and the availability of a well-functioning asylum system in a partner country before entering into negotiations and implementing readmission agreements. At the same time, on the basis of an equal partnership the EU should first of all demonstrate its own determination to establish, in practice, quality asylum systems and ensure access to these systems for those seeking protection in its territory. Failure to do so inevitably undermines the EU's credibility in imposing human rights compliance on its partner countries in the field of in migration management and readmission.

In addition, the EU and its Member States should be more forthcoming to the needs of partner countries, by offering in the coming years more substantial legal migration opportunities than what they currently offer. Effective legal channels for labour migration to the EU at different skill levels will also take away the need for migrants without protection needs to resort to irregular migration channels in order to take up irregular employment in EU Member States, often at the expense of being exploited and abused. In this regard ECRE reminds the EU institutions that the **GAMM is based on the principle that the migrant is at the core of the analysis** and that all action must be empowered to **gain access to safe mobility and that it should strengthen respect for human rights of migrants in source, transit and destination countries alike**.

ECRE has welcomed the reference made in the GAMM to benchmarks that need to be fulfilled by partner countries in areas such as asylum, border management and irregular migration before visa liberalisation/facilitation is considered.[71] Benchmarks should include accession to the Geneva Refugee Convention and core international human rights treaties and observance in practice of the human rights standard they set.[72] The Commission could publish Guidelines with the benchmarks that should be used already at the initiation of migration dialogues with partner countries. These Guidelines should also include a system for regular monitoring and, where necessary, revision of the benchmarks.

As the Global Approach grew and expanded, the role of regional dialogues and processes became a driving force behind the external dimension of migration, in a way filling the gaps for limited dialogue on migration with third countries.[73] Such processes provide a space for information exchange and have the potential to initiate a discussion with countries that do not consider migration and asylum issues as a priority. In the post-Stockholm period, the Commission should **take stock of the function of regional dialogues and processes and identify targets for the future, setting objectives and making better use of their potential**. EU Member States should commit to include the protection of refugees and rights of migrants as priority topics in these processes.

Measures to enhance **migration management and asylum systems in third countries** should remain **closely coordinated with development policy, humanitarian aid and the European Neighbourhood Policy**. A coordination mechanism needs to be created inter-institutionally, both within the Commission and in the Council, to monitor coherence between policies and funding for migration and asylum in three different policy areas, the external

[71] COM (2011) 743 final, p.3

[72] For a detailed list of human rights standards to be included in the benchmarks see *ECRE Comments to the Commission Communication on the Global Approach to Migration and Mobility COM (2011) 743 final*.

[73] Budapest Process, Prague Process, Rabat Process in West Africa, Southern Mediterranean, Eastern Partnership, EU-Africa Partnership MME, EU-ACP dialogue, and now added through the GAMM (2012) a process for the Horn of Africa and a Brussels-based forum to discuss EU-Asia dialogue.

dimension of home affairs, development, and humanitarian aid. From their side, the EU Strategic Guidelines need to make specific references and create tools to ensure coherence. Cooperation under the GAMM needs to respect Policy Coherence commitments embedded in the European Consensus on Development. The latter emphasises that policy coherence is an overarching objective cutting across external and internal policies, and identifies migration as one if its five main challenges.[74] Policies affecting refugees in third countries, namely Regional Protection Programmes (RPP) and resettlement, will also need to be coherent with ECHO's annual strategies and operational priorities.[75]

Cooperation in the area of migration and asylum also needs to be compliant with international human rights standards including the ECHR, the 1951 Refugee Convention, the principle of *non-refoulement* as well as the EU asylum and immigration *acquis* and the EU Charter of Fundamental Rights. In the next years, more work needs to be done to **bring closer together the GAMM and the EU Strategic Framework and Action Plan for Human Rights and Democracy and more importantly, its successor Framework after 2014**. A rights-based approach to migration in the GAMM should mean that migration dialogues and GAMM programming are guided by human rights principles, and are coherent with human rights dialogues. The commitment to develop a **joint framework between the Commission and the European External Action Service (EEAS) for raising issues of statelessness and arbitrary detention of migrants with third countries**, stated in the EU Action Plan on Human Rights and Democracy, should be cross-referenced in the EU Strategic Guidelines. Another target in the next Human Rights Action Plan should be to develop a joint framework between EEAS and the Commission for the protection and rights of refugees and IDPs with third countries.[76]

EU Strategic Guidelines should reaffirm the importance of a rights-based GAMM that is migrant- centred, is guided by human rights principles and is coherent with human rights dialogues. Migration dialogues, as the main vectors in the GAMM, must be closely monitored and evaluated with a view to ensuring their coherence with development policy and the EU Human Rights Strategy. The EU Strategic Guidelines should include targets for a joint EEAS and Commission framework for raising issues of statelessness and arbitrary detention, as well as the protection of refugees and IDPs. EU Guidelines, establishing human rights benchmarks to be fulfilled by partner countries in the field of migration and refugee protection, should be adopted.

EU Strategic Guidelines should call for a clear strategy with regard to regional dialogues and processes, which includes identifiable targets and prioritises the protection of refugees and migrants' rights. EU Strategic Guidelines should also make clear reference to PCD commitments in the implementation of the GAMM and create tools to ensure and monitor this coherence.

[74] See in particular SEC (2010) 421 final, *Policy Coherence for Development Work Programme 2010-2013, accompanying the Communication A twelve-point EU action plan in support of the Millennium Development Goals*, Commission Staff Working Document, Brussels 21 April 2010, and SWD (2013) 456 final, pp. 122-141, making specific reference to PCD commitments in the area of migration at EU, member States and multilateral level.

[75] See for example SWD (2013) 503 final, *Annual Strategy for Humanitarian Aid in 2014: General Guidelines on Operational Priorities,* Commission Staff Working Document, Brussels 2 December 2013 that makes specific reference to forgotten refugee crises and protracted situations.

[76] Council of the European Union, *EU Strategic Framework and Action Plan on Human Rights and Democracy*, Luxembourg, 25 June 2012 , 11855/12 ,14(c), pp.13-14.

6.2. Review Regional Protection Programmes

Regional Protection Programmes (RPP) are designed to enhance the protection capacity in regions of origin and transit through three durable solutions, namely repatriation, local integration and resettlement. According to the Commission Communication that established them, they should be a 'policy toolbox' that is flexible and situation specific and consistent with Community humanitarian and development policies and other relevant activities.[77] The GAMM has now included RPP in its scope, suggesting that they should be strengthened and used as a main policy tool in the external dimension of asylum. Eight years since their inception, numerous RPP projects have been and continue to be implemented in different parts of the world, but with little policy reflection and review of their use as a cooperation and protection tool.

The EU Strategic Guidelines should call for the **review of the RPP in terms of their use, regional scope and potential as a policy tool and their impact on the protection capacity in the regions concerned**. This could be instigated by a Commission Communication or Guidelines on Regional Protection Programmes setting specific objectives to be achieved in the future, standards for the programming and monitoring of implementation and impact. Bearing in mind that Regional Protection Programmes can only address part of the needs, they should be better utilised as an entry point to initiate and strengthen the dialogue with partner countries. The RPP Guidelines should also make clear references to PCD commitments and the need for coherence with development and humanitarian aid. In addition, they should foresee indicators and standards to be used to monitor implementation in the areas of capacity building, access to protection and the quality of protection in the countries concerned. Finally, RPP monitoring should be conducted regularly.

So far RPP have consisted of small scale and ad hoc capacity building projects in different countries. There is scope to develop RPP into more substantial Programmes with specific objectives for the short, medium and long term, which can then be tailored to the needs of specific countries/regions. RPP need to be strengthened in funding terms, but perhaps more importantly, they need to be strengthened through political dialogues to ensure the partner countries' ownership and the commitment of both sides. RPP could take the form of a **partnership framework bringing together Member States, partner country authorities, UNHCR and NGOs**, and it would be important that Member States contribute to this commitment through resettlement offers and/or financial support. RPP would also need to be linked to human rights dialogues to ensure they are in line with external cooperation and the EU Human Rights strategy.

The recently adopted *Regional Development and Protection Programme* for refugees and host communities in Lebanon, Jordan and Iraq presents a more innovative step in this direction, as it is more development-oriented and involves the commitment by individual Member States and a variety of actors.[78] The Programme foresees activities aiming to benefit both refugees and host communities and open the way for further development support to

[77] COM (2005) 388 final, *Communication from the Commission to the Council and the European Parliament on Regional Protection Programmes*, Brussels 1 September 2005.
[78] See European Commission, Press Release, *New EU regional development and protection programme for refugees and host communities in Lebanon, Jordan and Iraq,* 16 December 2013.

enhance protection capacities and strengthen refugee self-reliance in the future. This Programme could be used as a test and an opportunity to create closer links between policy areas and to support sustainable solutions particularly in protracted situations.

Above all, supporting protection capacities and durable solutions in third countries should always be based on the **premise that countries need to comply with their international human rights obligations**. It should also emanate from a spirit of European solidarity with third countries hosting the majority of the world's refugees**,** and should not result in shifting European responsibilities to third countries. The possibility to seek asylum in regions of origin and transit and European programmes enhancing protection capacities in third countries do not replace Member States' obligations to process applications and to grant refugee protection.

EU Strategic Guidelines must call for a thorough review of the scope and objectives of Regional Protection Programmes and the publication of EU Guidelines on regional protection programmes setting their objectives, standards and criteria for monitoring their impact on protection capacities in the countries concerned, including PCD commitments. Regional Protection Programmes should be strengthened financially and reformulated to involve EU Member States, partner country authorities and international organisations/ NGOs. RPPs could be used as entry points to initiate more long term support through development cooperation.

6.3. Significantly Increase Resettlement Efforts

Resettlement is an important protection tool and the only durable solution for thousands of vulnerable refugees worldwide. Some Member States have been involved in resettlement for many years, but currently the number of places they offer still remains very modest compared to the global needs and the places offered by other countries, like the US, Canada and Australia. To be a global actor in refugee protection, in the next years Europe should make a serious effort to increase the number of places it offers. Six NGOs and international organisations, including ECRE, have launched a campaign calling for Europe to increase resettlement and reach the target of 20,000 places annually by 2020.[79] Most, if not all, of the 28 Member States should get involved in resettlement in the next years in order to reach this goal, and they should increase the number of places they currently offer. They should also work more effectively to fill their quotas, as it is often observed that for administrative reasons countries do not manage to meet the number of places they actually offer. **20,000 refugees resettled to Europe annually is a feasible target that can be reached progressively**, and it would make a significant contribution to the world's resettlement needs.

The adoption of a Joint EU Resettlement Programme in 2013 and the creation of a Union Resettlement Programme that will be funded by the Asylum, Migration and Integration Fund (AMIF) during the period 2014-2020 confirm the EU's commitment and constitute the basis

[79] The organisations participating in the campaign are ICMC, CCME, Amnesty, IOM, ECRE and Save Me, see http://www.resettlement.eu/page/resettlement-saves-lives-2020-campaign.

for a structured and coordinated European contribution in the next years. The financial support available under the ERF and consequently the AMIF aims to encourage Member States to resettle together; unfortunately, the amounts foreseen under the AMIF for the Union Resettlement Programme are modest. However, Member States should utilise these funds primarily with the aim to join forces and resettle together where a joint European effort has an added value**.** At the same time, it is important that Member States maintain and strengthen their individual resettlement programmes through their own and other financial support in addition to the Union efforts. A **midterm review of the Union Resettlement Programme should be foreseen to examine the use of Union priorities, funding and implementation, assess its impact and further promote the debate on EU resettlement**.

Apart from increasing the numbers, it is important that in the next years the EU places equal emphasis on **quality of resettlement**. There are currently no definitions and no commonly agreed standards and guidelines against which to assess the integration of resettled refugees in Europe. A framework of reference is needed for policies supporting reception and sustainable integration of resettled refugees, including a methodology to monitor implementation. The Commission should publish Guidelines on the reception and integration of resettled refugees, based on the ICRIRR principles and the ICMC Charter of Principles.[80] These Guidelines would provide a basis for the evaluation of EU funded programmes and orientation for future planning, through a set of indicators and standards. The experience and exchange of practices collected by NGOs and international organisations in this area over the last years should be utilised and strengthened. Due to the tripartite character of the resettlement cycle (states-UNHCR-NGOs) it is essential that NGOs are involved in the planning and evaluation of resettlement policies at EU level as much as they are at national level.

Finally, EASO with the support of the Commission should be entrusted to enable cooperation, information exchange and synergies between Member States, but also between Member States and NGOs. EASO could facilitate joint selection missions, trainings, sharing of best practices and the development of methodologies to assess resettlement programmes funded by the EU.

> The EU Strategic Guidelines should put forward a clear target for Europe to progressively reach the number of 20,000 refugees resettled annually by 2020. All Member States should make an effort to offer and increase the number of places for the world's most vulnerable refugees. The EU Strategic Guidelines should foresee a midterm review of the Union Resettlement Programme to examine the Union priorities, funding and implementation and further promote the debate on EU resettlement. The Commission should publish Guidelines on the reception and integration of resettled refugees for the planning of national programmes, with standards and indicators that can be used for the evaluation of EU funding. EASO together with the Commission should support coordination and joint efforts between Member States, but also between Member States and NGOs.

[80] See UNHCR (2001), *International Conference on the Reception and Integration of Resettled Refugees* (ICRIRR), 25-27 April 2001-Norrköping, Sweden, Proceedings Report, Geneva, as well as UNHCR *ExCom Conclusion on Local Integration* 7 October 2005, No. 104 (LVI) and UNHCR (2011), *UNHCR Resettlement Handbook*, Geneva; UNHCR. The ICMC Charter of Principles can be found in International Catholic Migration Commission Europe (2011), *Paving the way: a handbook on the Reception and Integration of resettled Refugees*, Brussels; ICMC.

7. Funding

EU funding plays a key role in supporting the efforts of the European Union and Member States in the field of asylum and migration. The Asylum, Integration and Migration Fund (AMIF) and the Internal Security Fund (ISF) foresee the possibility to fund a series of projects and activities that will have a clear impact on the lives of refugees and asylum seekers. Both these funds are about to be adopted and their programming is already on its way both at the EU and at the national level.[81] ECRE encourages the Member States and the European Commission to make the best use of the potential offered by these funds to address the needs of asylum seekers and refugees.

First of all, Member States and the European Commission should make sure that sufficient funding is allocated to activities that address the needs of all migrants, including refugees and asylum seekers. ECRE strongly believes that **sufficient resources need to be allocated to develop common European asylum policies, which reflect the highest international standards and strengthen integration**. In the area of returns, sufficient funding should be allocated for **independent monitoring of return operations**, for the **promotion of voluntary return as the preferred option**, and for the **sustainability of returns**. Funding in the area of border controls should support the implementation of protection sensitive procedures at borders and points of transit and should be allocated with a clear commitment to protect the human rights of migrants.

Secondly, Member States and the European Commission should take full advantage of the benefits of a **strong partnership with civil society organisations and international organisations**. Such a partnership would ensure that funding priorities match the real needs identified on the ground, but also that, at a time of austerity, EU funding can be used for actions that focus on persons and families that are most in need, and that offer the highest cost-benefit outcomes and the largest impact possible. This partnership should not be restricted to the provision of inputs to the programming process of the AMIF, but should also provide that NGOs and international organisations have a role with regard to the monitoring and evaluation of its implementation[82].

Finally, while the administration of the funds should be simplified, both the European Commission and the Member States should put great care, when implementing the funds, to **remove, to the extent possible, administrative barriers and obstacles for beneficiaries to access EU funding to support activities and projects**. Also, comprehensive training and information on the rules applicable to grants under the AMIF and ISF should be provided to beneficiaries before the start of projects and activities. This would significantly improve the quality of actions supported by the funds and positively impact on the situation of all migrants on the ground.

[81] DG Home, Funding home affairs beyond 2013, http://ec.europa.eu/dgs/home-affairs/financing/fundings/funding-home-affairs-beyond-2013/index_en.htm See also: ECRE, *Comments on the Commission Proposals on the future of EU Funding in the area of asylum & migration, August 2012*, August 2012.
[82] ECRE, *Statement on the Partnership Principle in the EU Asylum and Migration Fund*, May 2013.

EU Strategic Guidelines must call on EU Member States and institutions to ensure that sufficient resources are allocated to the implementation of asylum policies that reflect the highest possible standards of protection, support integration and promote voluntary return as the preferred option.

In order to ensure that funding priorities match needs identified on the ground and that EU funding is used for actions that offer the highest cost-benefit outcome and largest impact possible, EU Strategic Guidelines must call on the EU Commission and Member States to establish a strong partnership with civil society and international organisations and consult them on determining funding priorities.

Conclusion

As ECRE has stated before, there is a long way to go before the objective formulated in the Stockholm Programme, *similar cases are treated alike and result in the same outcome*, will be achieved. In particular for the men, women and children arriving in the EU searching for protection, that vision of a CEAS that guarantees the right to asylum, respects the human dignity of refugees and ensures access to a fair and efficient asylum procedure throughout the EU is far from being a reality today. At the same time, it becomes increasingly difficult for persons fleeing persecution and conflict to reach the EU through legal means and, as a consequence, they are forced to take ever greater risks to find protection. Decisive action is need to ensure that EU policies prioritises the saving of lives and the protection of fundamental rights of those migrating in mixed flows instead of containing them in transit countries where they may be at risk of serious human rights violations and hardship.

Greater solidarity between EU Member States as well as with third countries that already host the majority of the world's refugees and others fleeing persecution, human rights violation and hardship is needed. Concrete steps should be taken to review and further develop the GAMM as a migrant-centred policy framework that is coherent with human rights dialogues. Regional protection programmes should be reviewed and closely monitored with a view to enhancing their protection focus. Last but not least, the EU and its Member States should commit to significantly increase their resettlement efforts to progressively reach the number of 20,000 resettled refugees annually by 2020.

The adoption of Strategic Guidelines offers a unique opportunity for the European Council to put the fundamental rights protection of asylum seekers, beneficiaries of international protection and migrants at the heart of the EU's migration and asylum policies and provide new impetus for the establishment of a CEAS that is based on solidarity and fair sharing of responsibility that can serve as a model for other regions in the world.

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