

Memorandum to the JHA Council of 4/5 June 2009

Guaranteeing refugee protection and safeguarding respect for fundamental rights



Justice and Home Affairs Ministers will meet in Luxembourg on 4/5 June at a critical stage in efforts to build a Common European Asylum System, and against the backdrop of recent events in the Mediterranean which could threaten the international framework of refugee protection and gravely undermine respect for fundamental principles of human rights law and values that are enshrined in Article 6 of the Treaty of the European Union. Discussions are scheduled on proposals to reform the Dublin Regulation and the Reception Directive and create a European Asylum Support Office (EASO),¹ as well as the Mediterranean situation. The European Council on Refugees and Exiles (ECRE)² urges Member States to take this timely opportunity to work towards fairer and more efficient asylum systems, to safeguard fundamental principles and freedoms, and to reassure their citizens that Europe remains a body of rights-respecting nations.

Push-backs to Libya

From 7 to 10 May, over 500 migrants, including pregnant women and children, were intercepted by the Italian coast guard and forcibly returned to Libya without assessing their need for protection. According to media reports, the Italian Home Affairs Minister, Roberto Maroni, hailed the deportations as a “turning point” in the fight against irregular migration. States have a legitimate right to control their borders. However, forcibly returning people to countries where they may face serious violations of their human rights and be pushed back into the hands of their persecutors violates international law. The Council of Europe’s Commissioner for Human Rights and the United Nations High Commissioner for Refugees have expressed immediate and grave concern in response to Italy’s actions. United Nations High Commission for Refugees (UNHCR) has called on Italy to readmit any of those individuals returned who are determined to be in need of international protection.

Libya is not party to the 1951 Refugee Convention, cannot guarantee protection to refugees and has a very dubious human rights record. In Libya, people seeking protection are often detained, sometimes for long periods of time, in extremely poor conditions. Ill-treatment by police officials is common and persons are returned to their country of origin without first establishing whether it is safe. Similar concerns apply to other third countries with which Member States have or are in the process of agreeing bilateral and/or multilateral cooperation on border control. ECRE has consistently stressed that Member States’ obligations under international and European refugee and human rights law do not stop at the physical boundaries of the EU. Member States cannot abdicate their principles, values and legal commitments by doing outside their borders what would not be permissible in their territories. Furthermore, the obligation of non-*refoulement*, which prohibits returning refugees to countries where they may face persecution does not arise only when a refugee is within or at the borders of a state, but also when a refugee is under its effective or *de facto* jurisdiction outside its territory, including in international waters as well as in the territorial waters of another state.

Article 6 of the Treaty of the European Union (TEU) lays down the fundamental principles of liberty, democracy and respect for rights and the rule of law that shall be respected by the Union, including fundamental rights guaranteed by the European Convention on Human Rights (ECHR) and the common constitutional traditions of the Member States. As pointed out by now Italian Foreign Minister Franco Frattini whilst he was EU

¹ See ECRE, *Comments on the Proposal for a Regulation establishing a European Asylum Support Office*, April 2009 http://www.ecre.org/resources/Policy_papers/1343, *Comments on the European Commission Proposal to recast the Dublin Regulation*, April 2009 http://www.ecre.org/resources/Policy_papers/1342, *Comments on the European Commission Proposal to recast the Reception Conditions Directive*, April 2009 http://www.ecre.org/resources/Policy_papers/1344.

² ECRE is an alliance of 69 refugee-assisting organisations in 30 countries working towards fair and humane policies for the treatment of asylum seekers and refugees.

Commissioner for Justice and Home Affairs,³ Article 7 TEU provides for a mechanism to single out Member States that violate the fundamental principles of the EU enshrined in Article 6 TEU. This can encompass a warning to the Member State concerned or sanctions such as the suspension of voting rights. ECRE reiterates its grave concern about the recent push-backs to Libya, and calls for appropriate measures and sanctions to be implemented should any individual Member State flagrantly and persistently flout fundamental rights principles.

Ensuring that refugees can access protection in Europe

There are now fewer than 240,000 asylum applicants registered in the 27 Member States of the EU – by contrast, in 1992 some 700,000 persons applied for asylum in the then 15 EU countries. Current numbers arriving in Europe represent only a small fraction of a global population of refugees that UNHCR has recently estimated at over 11 million.⁴ ECRE has repeatedly voiced its concern that increasingly sophisticated and extraterritorial border management activities are rendering access to EU territory near impossible and the right to seek asylum meaningless. With barely any legal migration routes into the EU the impact on refugees is to force them to embark on ever more dangerous journeys or endure remaining in third countries that are unable to provide effective protection and where basic human rights are not respected. Furthermore, unlawful and/or restrictive practices by EU Member States risk being exported to third countries, thereby creating a risk of chain *refoulement*, and fundamentally undermining the international refugee protection framework. In order to credibly advocate for greater respect for human rights in developing countries then the EU must first set a better example at home.

That controls are conducted beyond the EU's physical frontiers does not legitimise governments to evade their obligations to people fleeing persecution. Member States must recognise that the power to prevent access to the territory carries with it the responsibility to protect those in need. As well as exploring the development of alternative legal routes for refugees to reach Europe, far greater and more robust monitoring is required of border controls, whether at the EU's external border or extraterritorially, in order to ensure compliance with Member States' obligations under international human rights law. At the same time, concrete solidarity and responsibility sharing measures are required to support Member States at the EU's external borders to meet their international obligations. In addition, far greater transparency and accountability is required in relation to the operation of the EU's External Border Management Agency (FRONTEX) as at present it is not publicly known how many of those intercepted during its operations have protection needs, and if so where they are disembarked. Democratic oversight of FRONTEX should be strengthened, including through greater supervision by and consultation with the European Parliament on its work programme and activities.

Such steps are necessary if Member States are to honour their express commitment when adopting the European Pact on Immigration and Asylum in September 2008 *"that the necessary strengthening of European border controls should not prevent access to protection systems by those people entitled to benefit under them"*.⁵

Improved responsibility sharing and the creation of a European Asylum Support Office

Since the idea of creating a European Asylum Support Office (EASO) was first mooted by the European Commission, it has received support from a range of stakeholders, including by the European Council in the European Pact on Immigration and Asylum. ECRE broadly welcomes the Commission's subsequent Proposal for a Regulation establishing EASO issued in February 2009 although cautions that the ultimate value of such an instrument will depend on its precise scope, mandate and financing arrangements. In particular, ECRE believes that the EASO must be founded strongly on principles of democratic accountability and transparency, including through proper oversight by the European Parliament and the involvement of UNHCR as well as independent experts. In its recent report on the Commission's proposal, the European Parliament has been particularly vocal

³ See <http://www.independent.co.uk/news/world/europe/eu-members-face-sanctions-over-secret-cia-prisons-517374.html>.

⁴ UNHCR, 2007 *Global Trends*, June 2008, <http://www.unhcr.org/statistics/STATISTICS/4852366f2.pdf>, p. 2.

⁵ Council (EC), 'European Pact on Immigration and Asylum', ASIM 72, 24 September 2008, p. 11.

in highlighting how the EASO could help facilitate greater responsibility sharing and solidarity towards Member States facing particular pressures on their asylum systems due to their geographical location. ECRE has long echoed this sentiment but at the same time cautions that any discussion on responsibility-sharing does not in the meantime absolve Member States on the EU's external border of their responsibility to invest appropriate resources in order to meet their obligations under the EU asylum acquis and international human rights law.

As suggested by the European Commission, and supported by the European Parliament, the EASO could play a valuable role in exchanging good practice and knowledge (including the pooling of relevant, reliable, transparent, accurate and up to date Country of Origin Information) and coordinating the despatch of expert support teams to support overburdened states. ECRE also supports EASO's potential involvement in the development of an intra-EU relocation mechanism for recognised refugees, provided that the principles of voluntary consent and mutual recognition of an individual's protection status are clearly enshrined in any such instrument. Furthermore, it is necessary to explore the question of how to better share responsibility for providing protection to those intercepted or rescued in international waters. In a Common European Asylum System this responsibility should not fall solely on states in the Mediterranean region. However, ECRE believes that the right to support should be conditional on requesting states to meet their established obligations under the EU asylum acquis, including through states opening up their asylum systems to independent monitoring in order to ensure compliance. The EASO, the European Commission and UNHCR should all be empowered to play a greater role in this regard. Careful financial auditing will also be required to ensure that funds are properly expended.

Reforming the Dublin Regulation

ECRE concurs with the conclusion of the European Parliament in its report on the EASO that this instrument could play an important role in developing greater consistency of approach in the implementation of the asylum acquis. Despite being almost ten years into the process of developing a CEAS, the need for greater consistency and quality of decision-making is as acute as ever. Statistics published for 2007⁶ reveal that Finland recognised 100% of Iraqi claimants as in need of protection compared to 0% in Greece. Similarly, while 63% of Chechen claimants received protection in Austria, the corresponding figure in Slovenia was 0%. This draws into sharp focus one of the fundamental flaws of the Dublin Regulation whose requirement that individuals must claim asylum in the first Member State they reach is premised on there being equal protection standards across the EU. As well as being unfair, the Dublin system is both resource-intensive and inefficient, and shifts still additional burden to certain Member States experiencing particular pressures due to their geographical position.

ECRE therefore welcomes the recognition by the European Commission (supported by the European Parliament) that these factors and the continuing existence of an asylum lottery in Europe require a mechanism enabling the temporary suspension of transfers to states which are experiencing particular pressures or failing to adhere to necessary reception and protection standards. However, ECRE cautions that such suspensions should be conditional on and combined with measures to address the failings of a particular state through effective monitoring and resource allocation. It is also necessary that all individuals be provided with a suspensive right of appeal against Dublin transfer if states are to ensure their compliance with their non-*refoulement* obligations under international law. ECRE also welcomes the Commission's proposals to better ensure the reunification of family members, to respect the rights of children and other vulnerable groups, and to restrict the detention of Dublin transferees.

Improving reception standards

The third proposal recently put forward by the Commission concerns amendment to the Reception Conditions Directive. ECRE broadly welcomes the proposed amendments which if adopted will go some considerable way to addressing many of the problems identified in relation to implementation of the first phase instrument, and

⁶ UNHCR, *Statistical Yearbook 2007*, <http://www.unhcr.org/statistics/STATISTICS/4981b19d2.html>.

which were graphically illustrated by the European Parliament's LIBE Committee during its recent visits to detention and reception centres in several Member States.⁷

Foremost among these amendments is the need to ensure that detention is used as a last resort, for the shortest period possible and that it be regularly and individually reviewed to ensure that its application is lawful, necessary and proportionate. ECRE particularly welcomes proposals to prohibit the detention of separated children and other vulnerable groups, as well as measures to safeguard rights concerning the conditions of detention. ECRE believes that proposed amendments to better identify vulnerable groups will not only protect the rights of these individuals but will also produce cost savings for states by reducing the number of subsequent applications as well as spiralling medical costs which can result from failing to properly treat illnesses or conditions before they become more acute. Similarly, proposals to allow asylum seekers to work after six months will not only bring EU standards into line with existing practice in several Member States, but will also enable individuals to become self-sufficient thereby achieving savings for their host state and better preparing individuals for outcomes of either recognition/stay or return.

Safeguarding fundamental rights and principles in the European Union

Europe has a longstanding commitment in the field of asylum and human rights. In over fifty years of application of the 1951 Refugee Convention and the ECHR it has established a solid system to respect the rights of individuals seeking sanctuary in Europe. Through the process of European integration the EU has explicitly endorsed human rights values that are considered the foundation of the Union, and their respect is a condition for new membership. This has been strengthened through the adoption of the EU Charter of Fundamental Rights and the establishment of the Fundamental Rights Agency in 2007. These principles should inform all aspects of the development of a CEAS. Furthermore, it is not consistent with this approach for the EU to act as if human rights and humanitarian principles stop at its physical borders. In this regard ECRE reminds Member States of their Conclusions at the Tampere European Council in 1999 that:

1. From its very beginning European integration has been firmly rooted in a shared commitment to freedom based on human rights, democratic institutions and the rule of law. (...) 3. This freedom should not, however, be regarded as the exclusive preserve of the Union's own citizens. Its very existence acts as a draw to many others world wide who cannot enjoy the freedom European citizens take for granted. It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory.⁸

Nearly ten years on from Tampere, Member States must take the opportunity in Luxembourg to reaffirm and safeguard these principles. Otherwise, while asylum seekers and other third country nationals may be the first to suffer, in the long term it is the fundamental freedoms of all EU citizens which are at stake.

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⁷ See Parliament (EC), 'Report on the implementation in the European Union of Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers and refugees: visits by the Committee on Civil Liberties 2005-2008' A6-0024/2009, 27 January 2009.

⁸ Council Presidency Conclusions, 15/16 October 1999, paras. 1 and 3.