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NOTE

from	:	the European Council on Refugees and Exiles (ECRE)
to	:	Asylum Working Party
Subject :		**Common Standards on Asylum Procedures**

Delegations will find attached comments made by ECRE on the working document of the European Commission : "Towards common standards on asylum procedures".

COMMENTS
FROM THE EUROPEAN COUNCIL ON REFUGEES AND EXILES (ECRE)

ON THE
WORKING DOCUMENT OF THE EUROPEAN COMMISSION :
'TOWARDS COMMON STANDARDS ON ASYLUM PROCEDURES'[1]

Introduction

This paper aims to provide input to the discussion, launched by the European Commission's Working Document, on asylum procedures which will take place in the Council and the European Parliament. It is for this reason that the paper's structure follows that of the Commission's Working Document.

The following observations do not address all the issues that are raised by the Commission. Instead, it focuses on those issues which are of most concern to ECRE. For further information on ECRE's position on asylum procedures, we would refer the reader to ECRE's comprehensive *Guidelines on Fair and Efficient Procedures for Determining Refugee Status*. These recommendations provide detailed recommendations relating to many aspects of the asylum procedure including: the request for asylum, the role of border officials, admissibility procedures, determination of State responsibility, the competent authorities, legal, social and other assistance, interviews (including establishing the facts and the credibility of the asylum claim), interpreters, decisions, priority applications, accelerated procedures, appeals and the implementation of procedures (training of officials, country of origin information, legal aid, data protection and transparency). These Guidelines will soon be distributed widely to all the institutions of the European Union.

ECRE hopes that this contribution represents the starting point for an on-going dialogue with the European Union institutions on this issue. We very much welcome the implementation of Declaration No. 17 to the Amsterdam Treaty, relating to consultation with UNHCR and other international organisations. This provides a basis for non-governmental organisations, such as ECRE, with a specific expertise to present their views clearly and provide valuable input to discussions within the European Union.

[1] SEC (1999) 271 final, 3 March 1999.

Scope of the proposal: the existing soft law

ECRE completely shares the view of the Commission that it is imperative that the European Union seize this opportunity to re-examine the 1995 Resolution on minimum guarantees for asylum procedures and the 1992 London Resolutions. The European Union should omit from the Community legal instrument on asylum procedures those provisions which place Member States at risk of violating their legal obligations under the 1951 Convention and international human rights instruments. Those derogations which weaken the resolutions should be removed. Specific examples will be highlighted below.

Finally, we fully support the intention to initiate a study of the feasibility of a single European Union asylum procedure in the future.

Prioritisation of the work on asylum procedures

As recalled in the Commission's Working Document, the Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice (December 1998) differentiates between those measures to be taken within two years and those to be taken within five. The Commission, in suggesting that the scope of the Community legal instrument on asylum procedures be restricted to applications for refugee status under the 1951 Convention, does so on the basis that the proposal on complementary forms of protection, which will require a significant amount of work, falls within the five year period whilst the measure on asylum procedures has a two year deadline.

ECRE recognises the need for an instrument which sets out minimum guarantees for asylum procedures and raises the standards of the non-binding inter-governmental agreements in this area. ECRE also applauds this initiative which has been taken by the Commission in preparation for such an instrument. However, we would urge the European Union to consider whether logically a measure on complementary forms of protection should not be agreed before adoption of a measure on asylum procedures, as explained below; and whether both should not be agreed during the two year period.

Scope of the proposal

The Commission has suggested, in the short term, restricting the scope of a Community legal instrument on asylum procedures to claims for protection under the 1951 Geneva Convention.

ECRE believes that it is both in the interests of Member States and asylum applicants that the same asylum procedure, with the same minimum guarantees, is able to determine not just whether an applicant qualifies for protection under the 1951 Geneva Convention but also whether s/he may qualify for protection under another national or international legal provision. The asylum procedure must be able to identify and grant an appropriate status to all persons in need of protection. Persons fleeing generalised human rights violations need no fewer legal safeguards against return than those fleeing persecution for reasons set out in the 1951 Geneva Convention.

If the European Union is unable to agree a proposal on complementary forms of protection prior to the adoption of a Community instrument on asylum procedures, ECRE would urge the European Union to make the Community legal instrument on asylum procedures applicable to all applications for asylum, be it under the 1951 Geneva Convention, under Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 3 of the UN Convention against Torture, Article 7 of the International Covenant on Civil and Political Rights or under national legal provisions for protection.

Admissibility procedures

ECRE welcomes the Commission's suggestion that the Community legal instrument should employ a concept of "admissibility" which is restricted to determining state responsibility for examining the asylum application. ECRE believes that neither the well-foundedness of an asylum claim nor the applicability of the exclusion clauses (under the 1951 Convention), nor the application of the concept of 'internal relocation' (sometimes referred to as 'internal flight alternative') should be assessed in admissibility procedures as these issues involve a complex examination of the merits of the asylum application.

ECRE emphasises the need to observe certain essential legal and procedural safeguards in applications considered under admissibility procedures to avoid the serious risk posed by the implementation of the concept of 'safe third countries' to the principle of non-refoulement. As a minimum, guarantees concerning access to legal advice, an interpreter, UNHCR/non-governmental organisations and an in-country appeal must apply without exception.

Safe third country concept

Between 1994 and 1996, ECRE and one of its member agencies, the Danish Refugee Council, undertook a substantial project to monitor 'safe third country' policies and practices in Europe. The project concluded that there was no consensus amongst States as to how to define the concept of 'safe', and that States did not apply the same criteria for denying access to asylum procedures on 'safe third country' grounds. It became evident that many removals on 'safe third country' grounds were based on nothing more than a general **assumption** on the part of the authorities that the host third country would abide by its obligations under the 1951 Geneva Convention. In most cases, States failed to seek **guarantees** from the host third country that the asylum applicant would be granted entry to the country and access to the asylum procedure. Furthermore, States failed to inform the host third country that the person being returned was an asylum applicant whose application had not been considered substantively. The result was chain deportations eventually exposing the asylum seeker to the risk of return to his/her country of origin.

Both from the perspective of ensuring that Member States do not risk violating their obligations under the 1951 Geneva Convention and international human rights instruments, and from the perspective of aiming for procedural efficiency, ECRE would agree with the Commission that there is an obvious need for additional guarantees and requirements for establishing a host third country. In addition to those set out by the Commission in its Working Document – with which we agree – ECRE would make the following recommendations with regards to the requirements and criteria for establishing whether a country should be considered a host third country:

(a) Member States should receive the explicit consent of the third country to (re)admit the asylum applicant and to provide the applicant with full access to the asylum procedure. (This would limit the possibilities of unnecessarily creating 'refugees in orbit' or chain deportations).
(b) The asylum applicant's rights to respect for his private and family life within the meaning of Article 8 of the European Convention on Human Rights must not be infringed and the principle of family unity must be respected. (Ensuring that family members are able to be together is not solely a question of human rights but it is also a question of procedural efficiency. Often, applications by members of the same family will raise the same or similar facts, legal and evidentiary issues. It makes administrative sense that applications for asylum by family members are considered by the same national authority.)
(c) The host third state is a party to and implements the 1951 Convention and 1967 Protocol in compliance with UNHCR standards.
(d) The asylum applicant should be informed, in a language s/he understands, and in writing, of the decision to transfer him/her to another state. The applicant should be provided with a document, in the language of the receiving state, stating that the application for asylum has not been examined on its merits but was rejected solely on third country grounds.
(e) The asylum applicant should have the right to appeal, whilst remaining in the Member State, to a judicial or other independent competent body against the decision to transfer him/her to another state.
(f) Any decision to return an asylum applicant to another state should be taken by qualified personnel of the central authority competent to take decisions in the field of asylum and refugee matters. These officials must have knowledge of the human rights situation and safety of the country to which the asylum applicant may be sent.

The Resolution on a harmonised approach to questions concerning host third countries includes, at paragraph 1 (e), that "Any Member State retains the right, for humanitarian reasons, not to remove the asylum applicant to a host third country". This is an important provision which should be included in any Community legal instrument. However, ECRE urges the European Union to consider the following issue. The implementation of the Dublin Convention has demonstrated that there is a need to clarify such provisions. What constitutes a humanitarian reason? If such clarification cannot be provided within the text of the instrument itself, we would recommend the immediate drafting of guidelines.

Speeding up asylum procedures

Although eradicating delays in the asylum process is an important feature of a fair and efficient asylum procedure, curtailing or eliminating procedural and legal safeguards does not achieve effective decision-making and may place Member States in breach of their international legal obligations.

Instead, the Commission has suggested that Member States should approach this issue from the starting point of increasing efficiency. ECRE would certainly agree that there is much that could be done to improve efficiency without weakening safeguards. However, we would like to suggest another complementary starting point. ECRE is of the opinion that asylum procedures will be both fairer and more efficient if protection remains their central focus.

Asylum procedures could be speeded up if measures were taken to facilitate early decisions on obviously well-founded applications. ECRE would argue that quicker decisions should and can be taken on applications which clearly meet the criteria for recognition of refugee status set out in the 1951 Convention. This could be done by prioritising such applications within the asylum procedure. Furthermore, national authorities should waive the need for an interview where the asylum application and supporting documentation provide sufficient evidence for an immediate grant of refugee status. It is clearly in the interests of both refugees and authorities that decisions on obviously well-founded applications are made as quickly as possible.

Applications from, or involving, unaccompanied children and families should also be prioritised. Keeping children in an insecure situation for long periods of time can be extremely harmful.

ECRE maintains that an effective asylum procedure depends on good quality initial decision-making. Too often, lengthy processing times are due to poor quality decisions in the first instance which are then successfully challenged on appeal. Better initial decisions will discourage appeals, or refine the issues to be dealt with at appeal, reducing the length and expense of the system as a whole.

An efficient asylum procedure can only be attained if supported by institutional capacity, good quality independent and accurate information and continuous training. With the allocation of sufficient resources, speedier decisions could be achieved without compromising procedural fairness. ECRE therefore welcomes any initiative within the Council to focus on good practice in relation to management, training and information technology etc.

With regards to time limits, ECRE would urge caution. The imposition of time limits could exert pressure on authorities to simply take a decision, rather than to take the right decision. As mentioned above, the central focus of the asylum process must be protection, and not meeting deadlines.

The 'manifestly unfounded' concept

Over the last decade, European asylum procedures have become increasingly complex as expedited procedures have been introduced to deal with applications considered to be so obviously without foundation as not to merit a substantive examination at every level of the determination procedure. These procedures, aimed at sifting out 'manifestly unfounded' applications speedily, are justified by States on the grounds that they ensure the speedy removal of persons with no claim to asylum and that they save resources.

However, these procedures are increasingly applied to asylum applications that are **not** obviously without foundation. They are applied to applications simply because, for example, the asylum seeker did not possess the required travel documents, the asylum seeker claimed asylum at the airport, the asylum seeker did not request asylum immediately on arrival in the country or because the asylum seeker is from a particular country of origin. Such circumstances clearly do not render an asylum application 'manifestly unfounded'. The European Union urgently needs to re-consider its interpretation of the concept of 'manifestly unfounded.'

ECRE is of the opinion that there are certain applications which should never be channelled into accelerated procedures as they require an in-depth examination of the merits. These include:

(a) applications raising the issue of 'internal relocation' (sometimes referred to as 'internal flight alternative');
(b) applications in which the exclusion clauses of Article 1.F. of the 1951 Geneva Convention have been invoked; and
(c) applications alleging gender-related persecution.

UNHCR Executive Committee Conclusion No.30 explains that procedural safeguards must be maintained even if an application is considered 'manifestly unfounded' because of the grave consequences of an erroneous determination. If the European Union does persist in further legislating on the implementation of accelerated procedures, we strongly support the Commission's indication that the Member States ought to resist the temptation to transfer the 1995 Resolution on Minimum Guarantees for Asylum Procedures without amending its terms. The Resolution is deficient not just with regard to the definition of cases which may enter accelerated procedures, but also with regard to the safeguards for such procedures. A Community instrument should guarantee the asylum applicant a right to appeal, on both the merits and legality of a decision, to an independent court or appellate body, whilst remaining on the territory of the Member State. As the Resolution presently stands, the lack of suspensive effect on appeal for cases rejected within accelerated procedures makes a mockery of an asylum appeal, where the action of deportation is very often irreversible and may constitute refoulement. UNHCR Executive Committee Conclusion No. 8 states that the asylum seeker should "be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending".

Safe country of origin concept

ECRE strongly believes that the 'safe country of origin' criteria for accelerating asylum claims is dangerous and, in any case, ineffective at relieving pressure on asylum determination procedures. While the analysis that a country is 'safe' is important, it is but one element to be taken into account. States should never resort to applying the notion of 'safe country of origin' in a way which effectively excludes certain nationals from having their asylum claim examined. As a minimum, individuals should always have the right to rebut the presumption of safety. European Union 'joint assessments' and other country of origin information used in determinations should always be in the public domain where its impartiality and reliability can be monitored.