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ON REFUGEES AND EXILES

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**Comments of the European Council on Refugees and Exiles on the
Communication from the Commission to the Council and the European
Parliament
on “A more efficient common European asylum system – the single procedure as
the next step”**

COM (2004) 503 final

Introduction

ECRE is an umbrella organisation of 76 refugee-assisting agencies in 30 countries working towards fair and humane policies for the treatment of asylum seekers and refugees.

In November 2000 the Commission published a Communication “*Towards a common asylum procedure and a uniform status valid throughout the Union for persons granted asylum*” COM (2000) 755 final which pointed to the move towards a “one-stop shop” type of procedure. ECRE took the opportunity to comment on this Communication¹, and broadly supported the concept of developing a single procedure, and welcomed other protection safeguards proposed in the Communication. In the Communication the Commission also undertook to launch a study as the basis for further reflection. The “*Study on the single asylum procedure “one-stop shop” against the background of the common European asylum system and the goal of a common asylum procedure*” was issued in January 2003.

At the Justice and Home Affairs Council in Luxembourg on 29 April 2004, the Council formally adopted the Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection (the Qualification Directive) and reached political agreement on the amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (the Asylum Procedures Directive). Formal adoption can take place

¹ See ECRE Comments on the Communication from the Commission to the Council and the European Parliament, *Towards a common asylum procedure and a uniform status, valid throughout the Union for persons granted asylum* COM (2000) 755 final, June 2001.

following the outcome of the consultation with the European Parliament. This will signal the end of the first stage of the legislative programme, and as such, under the terms of the Amsterdam Treaty the European Union is required to take a view both of what will be the characteristics of the second stage of the Common European Asylum System as well as to reflect on and assess the impact of the instruments agreed over the last four years. The Communication² therefore represents the next step in the continuation of this process, and is intended to launch further discussion on the single procedure that will take place in the Council and the European Parliament. After a preparatory phase has been completed the Commission proposes to bring forward a proposal for community legislation.

Summary of comments

ECRE reiterates its belief that EU Member States should take a holistic approach to the task of adopting legislation in order to ensure that the legal instruments are both complementary and coherent. ECRE has consistently advocated that it is both in the interests of Member States and asylum applicants that the same procedure, with the same minimum guarantees, determines whether an applicant may qualify for protection under the 1951 Geneva Convention or whether s/he may qualify for protection on international human rights grounds. ECRE therefore supports, in principle, the proposal for a single asylum procedure as the clearest and quickest means of identifying those in need of international protection. In particular ECRE,

- Supports the proposal for “frontloading” and other measures to improve the quality and harmonisation of decision-making, including the exploration of increased co-operation and information sharing in relation to country of origin information and other statistical data.
- Emphasises that a single procedure must deliver adequate protection standards, and be based on a full and inclusive interpretation of the 1951 Geneva Convention and other international human rights instruments. In this regard, ECRE cautions against the extension of minimum standards contained in the Asylum Procedures Directive which could breach international law, and underlines the fundamental nature of the right of all applicants to an effective remedy with suspensive effect.
- Endorses the need to safeguard the integrity of the 1951 Geneva Convention by ensuring that eligibility for subsidiary protection is only considered after a negative assessment of 1951 Geneva Convention grounds, including a requirement to provide detailed reasons for such refusal and access to a judicial review mechanism to challenge the decision to grant subsidiary protection only.
- Agrees that a single procedure would improve speed and efficiency to the benefit of both individual applicants and Member States, and help build public confidence in the management of asylum systems.

² Communication from the Commission to the Council and the European Parliament, ‘A more efficient common European asylum system: the single procedure as the next step’ COM (2004) 503 final (hereafter ‘Communication’).

The benefits of a single procedure

ECRE would broadly concur with the Commission's assessment of the various objective benefits of a single procedure. Firstly, it should increase the speed and efficiency of the procedure by avoiding the need for time-consuming parallel or subsequent procedures that are detrimental from the perspective of both states and individual applicants³. It should be underlined that individual asylum applicants are often themselves anxious to have their status resolved as quickly as possible. Secondly, a single integrated assessment avoids the unnecessary duplication of resources such as decision-making personnel, legal and country experts and interpreters, as well as assisting with file keeping unity (enabling claims to be processed under a single file/case reference number) that can in turn assist with the generation of representative statistical data based on harmonised definitions⁴. Thirdly, where provision is made to properly consider all possible protection obligations in a single procedure then this reduces the necessity of applicants raising protection-related obstacles at a later stage⁵.

Each of these three benefits could also in turn enhance public perception of and confidence in the efficiency and proper management of asylum systems⁶. However, ECRE would also wish to remind Member States of their direct responsibility to foster and promote a balanced understanding by the general public of issues relating to asylum, and to desist from issuing hostile pronouncements which often appear to be motivated by primarily political or electoral considerations.

Finally, the Commission identifies protection-related arguments in support of a single procedure. ECRE agrees that applicants can not reasonably be expected to evaluate whether their claims fall under the 1951 Geneva Convention or other subsidiary protection grounds⁷. For this reason, and as mooted in the Communication⁸, ECRE would reiterate its support for *ex officio* (automatic) consideration of subsidiary protection needs by the same body, once Convention refugee grounds have been exhaustively examined.

Safeguarding the integrity of the 1951 Geneva Convention

In the context of a single procedure, the asylum applicant would simply be required to make a claim for protection. It would be for the determining authority - after careful, proper and lawful consideration – to decide whether to:

- (a) recognise the person as a refugee under the 1951 Geneva Convention and grant asylum;
- (b) refuse to recognise the person as refugee, with fully stated reasons as to why, but grant subsidiary protection;

³ See paragraph 3 of Communication.

⁴ See paragraph 4 of Communication

⁵ See paragraph 8 of Communication.

⁶ See paragraph 7 of Communication.

⁷ See paragraph 5 of Communication.

⁸ See paragraph 24 of Communication.

- (c) refuse any protection status and require the person to leave the country if there are no other compassionate or practical grounds which would justify an applicant being allowed to remain.

ECRE recognises that there is a danger of downgrading the 1951 Geneva Convention under such a system. However, this danger can be mitigated by measures such as the following:

- (a) The determining authority should first examine whether the application for protection falls within the grounds set out in the refugee definition of the 1951 Geneva Convention. Only where these grounds are not fulfilled, following a full and inclusive interpretation, should it proceed to examine the application in relation to subsidiary protection.
- (b) A well resourced and efficient determination procedure meeting the standards promoted by ECRE should be assured in order to reliably identify refugees.
- (c) Any decision to deny refugee status under the 1951 Geneva Convention should state in full the specific reasons why the applicant is considered not to fall within its terms.
- (d) All applicants should have a right of appeal to an independent appellate body against the refusal of Convention refugee status even where subsidiary protection has been granted.

ECRE therefore welcomes the fact that the Communication explicitly recognises the importance of not undermining 1951 Geneva Convention refugee status, and recommends a predetermined sequence of examination so that claims for subsidiary protection are examined only after a negative assessment of 1951 Geneva Convention grounds and the provision of a properly reasoned decision for rejecting 1951 Geneva Convention status where subsidiary protection is granted⁹. However, ECRE would reiterate that a judicial review mechanism must be accessible for refugees who feel that they were not granted the appropriate status in order to ensure the correct interpretation of the 1951 Geneva Convention and other international obligations and in order for relevant jurisprudence to develop.

Ensuring adequate levels of protection in the procedure

ECRE underlines the fundamental importance that a single procedure delivers adequate and proper levels of protection, and which ensure full compliance with the 1951 Geneva Convention and other international human rights law instruments. ECRE shares the Communication's concern that a protection gap may arise if minimum procedural safeguards do not apply to the determination of subsidiary protection claims¹⁰. The Asylum Procedures Directive only applies to claims under the 1951 Geneva Convention, unless Member States employ or introduce a procedure under which asylum applications are examined not only as applications on the basis of the 1951 Geneva Convention but also as applications for subsidiary protection in

⁹ See paragraph 22 of Communication.

¹⁰ See paragraph 11 of Communication.

which case they shall apply the Directive throughout their procedure¹¹. During its negotiation, ECRE repeatedly advocated that the scope of the Directive be extended to all claims for international protection. ECRE would now repeat its support for this objective in principle, and notes the Communication's suggestion to extend the Asylum Procedures Directive to subsidiary protection claims¹².

However, ECRE is compelled to reiterate its grave reservations in relation to certain provisions of the finally agreed text of the Asylum Procedures Directive¹³. Many provisions agreed, such as those on the safe third country concept, the "super safe" third country concept, accelerated procedures and appeals, lack the necessary safeguards to ensure anyone seeking asylum cannot be sent to a country where they may face persecution, including death, torture and inhuman or degrading treatment. The Directive does not include essential safeguards to prevent the *refoulement* of individuals in breach of States' obligations under international law. These concerns would equally apply if the Asylum Procedures Directive were mandatorily extended to claims for subsidiary protection. It is perhaps instructive to recall that the November 2000 Communication¹⁴ actually explored the possible abandonment of concepts such as the notion of "safe country of origin" and "safe third countries" as part of efforts to create both a fairer and more efficient procedure. This powerfully illustrates the recent alarming drift of protection standards in the European Union. It is worth re-emphasising that the provisions outlined in the Asylum Procedures Directive are only minimum standards, and ECRE would urge Member States to adopt or retain higher standards in their national legislations in order to fully comply with their obligations under international law.

In this regard ECRE notes the suggestion mooted in the Communication to initially extend to subsidiary protection claims only those basic principles and guarantees contained in Chapter II of the Asylum Procedures Directive¹⁵. While this would avoid the extension of the problematic provisions outlined above, concerns would remain in relation to the provision of legal aid and personal interviews. Similarly, ECRE welcomes the Communication's recognition that the obligation to provide an effective remedy in the event of a negative decision affecting an individual's rights under Community law is a matter prescribed not only by the European Court of Justice but also by the European Court of Human Rights, and notes the identified need to assess how Member States implement the core principle of "effective remedy" contained in the Procedures Directive, and how this principle is interpreted by the European Court of Justice in the context of different national legal systems¹⁶.

¹¹ Article 3 of Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (political agreement reached 29 April 2004).

¹² See paragraph 11 of Communication.

¹³ ECRE and other European NGOs, including Amnesty International and Human Rights Watch, called for the withdrawal of the draft Asylum Procedures Directive on several occasions. For example, see ECRE Press Release: *Appalling flaws in Directive on Asylum Procedures still not addressed*, 25 November 2003 and ECRE joint letter to Commissioner Vitorino: *Call for withdrawal of Asylum Procedures Directive*, 22 March 2004.

¹⁴ *Towards a common asylum procedure and a uniform status, valid throughout the Union for persons granted asylum* COM (2000) 755 final.

¹⁵ See paragraph 16 of the Communication.

¹⁶ See paragraph 20 of Communication.

ECRE would wish to repeat and stress the importance of the fundamental principle that all applicants for international protection have an effective remedy against decisions to refuse protection, as provided by Chapter V of the Asylum Procedures Directive, and further emphasises the imperative requirement that appeals have suspensive effect, which is not explicitly guaranteed under Chapter V. In view of the potentially serious and extreme consequences of an erroneous first instance decision, a remedy is ineffective if an appellant is not permitted to remain on the territory of a Member State pending the outcome of the appeal.

ECRE supports the Communication's call for the scope of the Reception Conditions Directive to be extended to cover applications for subsidiary protection, particularly as and notwithstanding that many such applications will already be covered given that the Directive defines that any application for international protection is presumed to be an application for asylum unless another kind of protection that can be applied for separately is explicitly requested¹⁷. The majority of applicants will therefore already be included in the scope of the Directive by virtue of their application for asylum under the 1951 Geneva Convention.

ECRE has some observations concerning the Communication's assessment that there is no convincing reason not to extend the scope of the Dublin II Regulation, which currently applies only to applications under the 1951 Geneva Convention¹⁸. Firstly, although no timescale is indicated in the Communication, it is assumed that no extension of the scope of the Dublin II Regulation is envisaged at least until the Qualification Directive has been fully transposed by all Member States so that subsidiary protection status is available across the European Union. Secondly, even following transposition of the Qualification Directive, ECRE is concerned about whether it would be appropriate to extend the scope of the Dublin II Regulation to applications for subsidiary protection, given that under the Qualification Directive, Member States have a wide margin of discretion in determining the level of benefits granted to beneficiaries of subsidiary protection¹⁹. As a result, it is possible that there could be significant variations among Member States as to the benefits afforded to beneficiaries of subsidiary protection, for example, with regard to access to employment or the right to family reunification. Indeed, ECRE would suggest that this is a good illustration of how one of the benefits of achieving harmonisation at a sufficiently high level would be to negate such concerns in relation to the issue of the secondary movement of applicants for international protection.

Frontloading – Improving the quality of decision-making

ECRE agrees with the Commission that there is a clear need to improve the quality of the examination of asylum applications in EU Member States and the speed of procedures, without sacrificing legal and procedural safeguards. Consequently, ECRE wholeheartedly supports the Commission in its efforts to promote “frontloading” of national asylum procedures and to promote the need for a single or one-stop asylum

¹⁷ See paragraph 26 of Communication.

¹⁸ See paragraph 26 of Communication.

¹⁹ Articles 23-33 of Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, adopted 29 April 2004.

procedure. With fair and efficient asylum procedures in place, based on a full and inclusive interpretation of the 1951 Geneva Convention, new initiatives could be taken to facilitate the return of persons found not to be or no longer to be in need of international protection.

However, it is crucial that any such initiatives follow and be dependant on a proper and thorough determination of all asylum claims, and the existence of a competent and well-resourced decision-making body. All too frequently, proposals to reduce or remove safeguards are justified with reference to low recognition rates across the European Union, but ECRE believes that these figures often do not accurately depict the true position. Firstly, it should be appreciated that current national asylum statistics are not a reliable indicator of the percentage of asylum applicants in need of international protection. Some of the factors responsible for this include:

- States operate strategies of suspending or delaying the processing of asylum applications until a time when they deem that a decision to reject can be taken;
- Statistics may record decisions to return on Dublin or safe third country grounds as rejections;
- Toleration practices of rejecting applications but not returning persons because of risks in the country of origin have developed;
- Statistics relate only to first instance decisions and do not reflect recognition following appeals.

Secondly, serious shortcomings in the asylum procedures of Member States have a negative impact on recognition rates. The reliance on concepts such as the "internal protection alternative", "safe country of origin", and "safe third country"; a procedural framework whereby applications are channelled through admissibility and accelerated procedures which deny the applicant time to prepare the asylum application; a procedural emphasis on supporting evidence and the credibility of the applicant, and more generally, the under-resourcing of procedures and poor training of decision makers are all factors which might contribute to a system's failure to recognise refugees and grant protection to those in need. ECRE would urge governments to retreat from a "culture of disbelief" in the procedure and, rather than have their action governed by the desire to bring down numbers of recognised refugees, to provide for fair and efficient determinations which properly respect the protection principles of the 1951 Geneva Convention and other human rights treaties. ECRE would therefore contend that it is in fact the failure of current asylum procedures to correctly determine asylum claims in an efficient way that threatens the credibility of the institution of asylum.

The quality of first instance decision-making therefore needs to be tackled urgently, and ECRE has repeatedly argued for the "frontloading" of asylum procedures in order to help achieve this. Ensuring quality first instance decision-making should reduce the problem of unnecessary appeals, and thereby save time and resources. However, by definition, in order to be effective, "frontloading" requires allocation of adequate funding and sufficient numbers of well trained and qualified staff in order to help ensure that a correct decision is made at first instance.

ECRE welcomes proposals in the Communication to agree and develop key principles of good practice in asylum procedures, and plans to establish a Centre of Excellence

to improve the training of practitioners²⁰. ECRE believes that such an approach could be extremely valuable in working towards a positive approximation of standards. It also develops the Commission's recognition in its November 2000 Communication that there should be common (high) standards of the asylum determination processes of Member States, which must consequently be based on the same facts and evaluation of these facts. ECRE believes that the current divergence in systems of providing information to the decision-making bodies in and among Member States (or the lack of such systems) greatly adds to the injustice and inequality of asylum decisions, disadvantaging unrepresented or badly represented asylum applicants and providing for different standards of protection not only within countries, but also within the European Union as a whole.

ECRE would therefore support the exploration of EU measures for increased co-operation and information sharing, for example the development of a common network for the exchange of country of origin information. ECRE would also be interested in the idea of establishing a resource capable of compiling accurate comparative statistical data (levels of application, recognition rates etc) that could positively impact on future policy-making. Any such mechanisms must be transparently administered, and ensure that information is accessible not only to the national decision-making bodies, but also to the general public, in particular to relevant international actors, non-governmental organisations and lawyers. These and other developments might provide a means to harmonise decision-making on applications relating to the same country of origin, which currently varies considerably between Member States, and is a factor in encouraging secondary movements.

ECRE would encourage exchange of information and the development of these ideas during the "Preparatory Phase" advocated by the Commission, and welcomes the launch of Community actions of ERF II and the initiation of calls for projects under the ARGO programmes to help facilitate this²¹. ECRE understands the Communication as envisaging the potential for compensatory measures to be introduced in the interests of burden-sharing, potentially through ARGO or the European Refugee Fund II, and ECRE would likewise support further consideration in this area.

Conclusion

ECRE welcomes the proposal for steps towards the development of a single asylum procedure as further progress towards a Common European Asylum System. However, ECRE cautions that this must be based on the full and inclusive application of the 1951 Geneva Convention and other international human rights law instruments. In this respect, ECRE would wish to reiterate its grave concerns about the standards contained in the Asylum Procedures Directive, which are capable of interpretation and application in a manner inconsistent with international law. It is vital that Member States view developments towards a single asylum procedure as a means to improve both the quality and efficiency of decision-making, rather than as an opportunity to

²⁰ See paragraph 23 of Communication.

²¹ See paragraph 28 of Communication.

further reduce standards of protection to the lowest common denominator, thereby putting at risk the lives and safety of individuals fleeing persecution.

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