

**Memorandum to the Austrian Presidency:**  
**Cooperation, the key to refugee protection**



EUROPEAN COUNCIL  
ON REFUGEES AND EXILES  
CONSEIL EUROPEEN  
SUR LES REFUGIES  
ET LES EXILES

AD1/1/2006/EXT/RW

Austria has recently set out its priorities for the area of Justice and Home Affairs for its Presidency of the European Union, which began on 1 January. In the following memorandum, the European Council on Refugees and Exiles (ECRE)<sup>1</sup> comments on the areas of work relating to asylum and refugee policy. The memorandum also serves as a background note to this week's informal Justice and Home Affairs Council on 12-14 January, where ministers will discuss "Asylum and Migration Management".

According to the Presidency's web site<sup>2</sup>, Austria's plans to *assess the legal instruments in place* and, in particular, carry out the following projects in the area of asylum, migration and border control:

- *Work on a common European asylum system by enhancing practical cooperation between Member States, primarily by improving the exchange of information on countries of origin and work on a plan for an "EU support team";*
- *Cooperation with non-member countries in asylum and immigration issues, including carrying out pilot projects for protection in the region (Ukraine);*
- *Pushing for the introduction of common visa-application offices;*
- *Measures for an effective repatriation policy.*

For ECRE, key policy issues in the area of asylum and migration during the Austrian Presidency will include:

1. Practical cooperation to improve EU asylum systems
2. The Dublin II regulation
3. Long term residence for persons in need of protection
4. The proposed returns Directive
5. Cooperation with third countries and regional protection programmes

**1. Practical cooperation to improve EU asylum systems**

In 2004, Austria recognised more than 50% of asylum claimants as refugees, Greece just 0.3%.<sup>3</sup> It is unlikely that all those asylum seekers with well-founded claims made their applications in one country and those with weaker cases in the other. Rather, the differences in systems and political pressures to deter asylum seekers mitigate against high quality decision making which is consistent throughout the EU. Yet better decisions would not only create a fairer system, but would reduce the length and expense of procedures, by refining the issues to be dealt with at appeal and reducing the burden on the courts. Consistency between member states is essential when asylum seekers are unable to choose the country

---

<sup>1</sup> ECRE represents 77 refugee assisting NGOs from 30 countries working towards humane and fair asylum and refugee policies and practice

<sup>2</sup> [http://www.eu2006.at/en/Policy\\_Areas/Justice\\_and\\_Home\\_Affairs](http://www.eu2006.at/en/Policy_Areas/Justice_and_Home_Affairs)

<sup>3</sup> ECRE Country Report 2004, [www.ecre.org](http://www.ecre.org)

where they wish to make their claim and where a refusal of asylum in one member state means expulsion from all.

So far, the EU has attempted to achieve harmonisation through the legislative process. However, the asylum procedures directive, adopted at the beginning of December represents a catalogue of member states' worst practices, with some of the proposed standards set so low as to permit fundamental breaches of international refugee and human rights law<sup>4</sup>. It represents little progress towards the Hague Programme objective for the second phase of the Common European Asylum System, the *establishment of a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection [...] based on the full and inclusive application of the Geneva Convention on Refugees and other relevant Treaties*<sup>5</sup>.

While the qualification directive provided useful guidance on the interpretation of the 1951 Refugee Convention, in order to make real progress towards the Hague Programme objective, it is essential to look beyond the legislative process, which is inevitably slow and cumbersome. The Commission's forthcoming proposal on reinforced cooperation among Member States' asylum services presents a welcome opportunity to move more rapidly towards a more level playing field by putting in place asylum systems that are both fair and efficient.

ECRE has argued<sup>6</sup> that States, UNHCR, NGOs and other independent experts could usefully work together by sharing expertise, information and expertise. Best practice guidelines can be developed in relation to the training and accreditation of decision-makers, the treatment of unaccompanied minors and other vulnerable groups such as torture survivors, and country of origin information (COI). The common provision of reliable and accurate country information, open to scrutiny by academic and other experts, is an important component of achieving consistency and quality of decision-making across Europe. But good information is not enough, if it is ignored or improperly used by decision-makers. Independent monitoring mechanisms should be set up to identify flaws and gaps in decision-making and highlight the appropriate training and extra resources required. By adopting a policy of frontloading - investing and sharing resources in order to get decisions right first time - states can avoid unnecessary appeals and 'repeat' applications thereby cutting costs and delays while increasing public confidence in the management of asylum systems.

- *The Austrian Presidency should ensure that any measures to enhance cooperation between member states' asylum systems improve the quality of decision-making and do not repeat the sharing of worst practice seen in negotiations on the asylum procedures directive. This will require the involvement of UNHCR and other independent experts.*

## **2. Dublin II Regulation<sup>7</sup>**

According to the Presidency's web site<sup>8</sup>, Austria plans to *assess the legal instruments in place*. It is unclear which instruments the Presidency has in mind, but ECRE recalls that the Dublin II Regulation obliges the Commission to report to the Council and the Parliament on the application of the regulation within three years of coming into force in March 2003. While the Eurodac fingerprint database has been increasingly effective in identifying the Member States responsible for determining an asylum claim, a number of Member States are using domestic procedures to avoid considering the substantive

---

<sup>4</sup> *Comments from the European Council on Refugees and Exiles on the Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, as agreed by the Council on 19 November 2004, CO1/03/2005/ext/CN March 2003

<sup>5</sup> *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union* (2005/C53/01)

<sup>6</sup> *The Way Forward: Europe's role in the global refugee protection system. Towards Fair and Efficient Asylum Systems in Europe*, ECRE, September 2005.

<sup>7</sup> *Council regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, (EC) No 343/2003, 18.02.03

<sup>8</sup> [http://www.eu2006.at/en/Policy\\_Areas/Justice\\_and\\_Home\\_Affairs](http://www.eu2006.at/en/Policy_Areas/Justice_and_Home_Affairs)

case. For example, they may treat the claim as ‘interrupted’ and refuse to reopen the file, or treat it as a subsequent application, triggering an accelerated procedure that does not allow the asylum seeker to put the facts of their case. The risk of *refoulement* is clear. The core aim of any mechanism for allocating state responsibility for determining an asylum claim must be to ensure that the application is properly heard by one EU Member State.

As well as placing individual asylum seekers at risk of *refoulement*, the Dublin system is unfair, inefficient, resource-intensive and an obstacle to genuine responsibility sharing. The linkage of responsibility for an asylum claim to border control creates unequal burdens and works as a disincentive for states to give full access to fair asylum procedures or even to their territories. The review of Dublin II provides an opportunity to consider ECRE’s proposal of an alternative system for allocating responsibility based on two criteria: 1) the Member State where the asylum seeker has a family member is responsible, provided he or she agrees with a transfer to that state; or 2) the Member State where the asylum request was first lodged is responsible, unless there are compelling humanitarian considerations to prevent this<sup>9</sup>. Those Member States that received higher numbers of asylum claims could be supported via a burden-sharing instrument based on the real costs of hosting asylum seekers and determining claims and funding for integration and returns. Common structures could co-ordinate the despatch of expert support and quality monitoring teams to assist overburdened states, as well as concrete programmes for joint responses to large-scale humanitarian crises. Finally, those accepted as in need of protection should be granted the right of free movement throughout the EU. Refugees are likely to choose to live in the country where they have the best chance of integrating, whether due to the presence of family members, social networks, employment opportunities or to cultural or linguistic ties. Better, faster integration is not only good for the individual, but also for their host country and the EU as a whole

A system that delivers quick efficient fair status determination, wherever a claim is lodged, followed by an opportunity for recognised refugees to relocate within the EU would provide an incentive for those seeking protection to lodge their claim as soon as possible after entering the EU, while also being in tune with the free market principles that underpin the Union.

- *ECRE invites the Austrian Presidency to take steps to remedy the flaws in the implementation of the Dublin II Regulation and to begin a debate, in the context of the forthcoming review, looking beyond the current arrangements to a fairer, more efficient system based on responsibility sharing and meeting the needs of individual refugees as well as member states.*

### **3. Long term residence for persons in need of protection**

In the first quarter of 2006, the Commission plans to issue a long overdue proposal for legislation on long term residence for persons in need of protection, who were excluded from the directive on long term residents adopted in November 2003. It is perverse that refugees currently have fewer rights as long term residents under EC law than do other third country nationals, given that, since the time of the League of Nations, the international community has advocated privileged treatment of refugees over other aliens because of their need to substitute their own state’s protection with that of the international community. ECRE believes that European countries should be aiming to provide refugees with rights similar to those enjoyed by nationals as soon as possible following recognition of status. Granting refugees a secure legal status and durable residence permits is essential for refugees to gain the stability and predictability required in order to proceed with their lives.<sup>10</sup>

The scope of the new instrument must include both refugees and beneficiaries of subsidiary protection, whose integration needs are identical, whatever their grounds for international protection. Long term

---

<sup>9</sup> *The Way Forward: Europe’s role in the global refugee protection system. Towards Fair and Efficient Asylum Systems in Europe*, ECRE, September 2005.

<sup>10</sup> *The Way Forward: Europe’s role in the global refugee protection system - Towards the Integration of Refugees in Europe*, ECRE, 2005

residence status should guarantee access to the labour market and to education equal to nationals, enabling refugees to contribute to the host countries' economies and reducing welfare costs. Rights to freedom of movement must be included to allow refugees to relocate to a Member State where they have family or community links, or better language skills, accelerating their eventual integration into society.

- *ECRE calls on the Austrian Presidency to ensure that any negotiations on a forthcoming proposal on long term residence status for persons in need of protection result in a text that is consistent with refugees' rights under international law, and with the Union's objectives for integration.*

#### **4. Proposed Returns directive**

Initial discussions on the proposed returns directive<sup>11</sup> have witnessed some Member States questioning the necessity for an instrument that they see as potentially restricting their ability to return persons residing illegally in the EU. ECRE, on the other hand, sees Member States increasing their efforts to enforce returns, cooperating with each other operationally, such as joint charter flights, while differing greatly in their practice in other areas, such as the length of pre-removal detention. Most disturbingly, we have seen numerous instances of unsafe returns.

The key to safe, dignified and sustainable returns is fair and efficient asylum decisions. With Member States looking to establish consistency in the consequences of a refusal of asylum, including a possible ban on re-entry to any Member State, it is vital that asylum decisions are correspondingly consistent and correct, wherever they are made in the EU. This underlines the urgent need for measures to improve and monitor the quality of asylum decision-making.

The proposed Directive contains a number of safeguards, drawn from international and European law, and other welcome aspects, such as the principle that "voluntary return" should be the norm. Indeed, the safety, dignity and sustainability of mandatory returns will be maximised and costs minimised when consent is given and the use of force is avoided. However, the proposed Directive requires amendments to properly reflect international standards, including international human rights law, UNHCR<sup>12</sup> and Council of Europe guidelines<sup>13</sup>. The scope for member states not to apply the Directive's safeguards to people in 'transit zones', for example, conflicts with European Court of Human Rights jurisprudence. A penalty as harsh as a five year ban on re-entering the EU must carry a right to appeal, and mechanisms to ensure that it does not conflict with the right to seek asylum. The broad scope of the proposed Directive means more attention needs to be given to the rights of asylum seekers and refugees, particularly asylum seekers who have an appeal pending, asylum seekers who are to be transferred to a third country without their case being considered and refugees whose status has ceased or been withdrawn, as well as to the rights of children.

Last year ECRE highlighted the problem of the significant number of asylum seekers whose application has been rejected who find themselves in limbo when they cannot be returned for reasons beyond their control<sup>14</sup>. Without a legal status and barred from working, they are left destitute. Those people should be granted a legal status that would entitle them to material reception conditions and enable them to work.

- *Common standards that safeguard rights as well as make return procedures more effective are urgently needed. ECRE calls on the Austrian Presidency to lead the negotiations on the proposed*

---

<sup>11</sup> *Proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (COM(2005)291 final)*

<sup>12</sup> EXCOM Conclusion 96 (LIV) 2003 on the return of persons found not to be in need of international protection

<sup>13</sup> *20 Guidelines on Forced Return*, CM2005 (40); Recommendation 1542 (2002) *Expulsion procedures in conformity with human rights and enforced with respect for safety and dignity*, Parliamentary Assembly of the Council of Europe

<sup>14</sup> *The Way Forward: Europe's role in the global refugee protection system. The return of asylum seekers whose claim has been rejected in Europe*, ECRE 2005

*Directive to ensure that it is consistent with international standards and properly reflects the needs and rights of people who have or have had protection claims.*

The single most important test of a Common European Asylum System will be whether a person is sent to a place where they face persecution, torture, inhumane or degrading treatment. Member States have a responsibility to ensure that does not happen, yet nowhere in the current set of asylum and immigration legislation is any system foreseen to monitor what happens to people after they have been expelled from the Union.

- *ECRE urges the Austrian Presidency to ensure that the returns directive contains a requirement for Member States to monitor and report on the safety of asylum seekers who have been returned.*

## **5. Cooperation with third countries and regional protection programmes (RPPs)**

ECRE has recently called for Europe to play an active role in improving refugee protection in regions of origin<sup>15</sup>, providing it does not undermine the right to seek asylum in Europe. Accordingly, ECRE welcomes the prospect of regional protection programmes being established in Ukraine and neighbouring countries, and in Tanzania. Noting the emphasis to be placed on border control by the Austrian and Finnish Presidencies, however<sup>16</sup>, it is important to underline that helping to make refugee protection more effective beyond the EU does not substitute European countries' obligation to protect refugees who spontaneously arrive on their territory, nor does it justify the proliferation of blunt instruments to tackle 'illegal immigration' that effectively prevent refugees from ever reaching the EU.

The Austrian Presidency has placed JHA issues at the heart of external relations policy. The EU is seeking to persuade other countries to help it to 'manage migration'. If this is to amount to more than the export of border controls and measures aimed to deter irregular migrants, the EU must demonstrate its own commitment to human rights and refugee protection.

- *The Austrian Presidency should use its influence on Member States during its Presidency to ensure that the EU leads by example and demonstrates its commitment to refugee protection, all the more so, when faced with pressures on its external borders, such as at Lampedusa, Ceuta and Melilla.*

Regional Protection Programmes (RPPs) have the potential to contribute to improvements in refugee protection in regions of origin, if they are protection-oriented and adequately funded. While the proposed pilots appear to be focussed on protection, the funding envisaged is modest and expectations should be correspondingly limited. In order to be effective, they must comprise one element of a wider strategy for the region that is principled, holistic, comprehensive and aimed at ensuring that refugee protection standards are upheld and implemented. The strategy must be developed through dialogue with NGOs, UNHCR and refugees themselves, as well as with the States concerned.

ECRE has identified a number of elements necessary for protection to be considered effective<sup>17</sup>:

- a guarantee of non-*refoulement*, the essence of refugee protection and part of customary law;
- the safeguarding of all civil and political rights and not only rights such as freedom from torture, cruel, inhuman or degrading treatment or punishment;
- the enjoyment of economic, social and cultural rights;
- legal protection, including access to a legal status and necessary documentation, for as long as international protection is required and until a durable solution ensues;

---

<sup>15</sup> *The Way Forward: Europe's role in a global protection system - Guarding Refugee Protection Standards in Regions of Origin*, ECRE, 2005

<sup>16</sup> *Operational Programme of the Council for 2006 submitted by the incoming Austrian and Finnish Presidencies*, (16065/05) December 2005

<sup>17</sup> *The Way Forward: Europe's role in a global protection system - Guarding Refugee Protection Standards in Regions of Origin*, ECRE, 2005

- particular attention to the needs and rights of vulnerable groups, including women, children, the disabled and older persons, in accordance with the relevant international human rights instruments;
- timely access to a durable solution.

Local and international NGOs have shown how far Ukraine falls short of these standards. Human Rights Watch has documented how Ukraine regularly subjects asylum seekers (and migrants) to abuse, including extended detention in appalling conditions, violence, extortion, robbery and forced returns to face torture or persecution. It accuses the EU of exacerbating the situation by pressing Ukraine to prevent entry into the European Union and to accept the return of those who do reach EU territory.<sup>18</sup> EU policy in this area clearly needs to be better coordinated. Readmission agreements should be consistent with international refugee and human rights law standards and the process of reaching such agreements should be transparent and monitored, with their full content made publicly available.

ECRE member Oxfam GB welcomed the proposal for an RPP in Tanzania<sup>19</sup>, subject to important provisos, noting that currently even refugees' basic survival needs of food, security and shelter are not met, the principle of non-*refoulement* is not respected, restrictions on movement and poor educational infrastructure are preventing refugees from reducing their dependency on handouts, and opportunities for durable solutions are extremely limited. ECRE supports Oxfam's view that enhancing protection capacity in regions of origin is essential as a central pillar of genuine responsibility and burden sharing, independent of objectives to manage migratory flows to the EU. The EU should continue to develop concrete proposals on assisting refugees in regions of origin while targeting poverty reduction in host communities, and addressing the root causes of forced migration. This must be a key priority not just in those areas which represent major source regions of asylum seekers to the EU, but globally as poor countries continue to host both long-term refugee populations and face new influxes.

In a recent publication<sup>20</sup>, ECRE has identified activities that the EU can undertake to help build protection capacity in third countries:

- technical and financial assistance to strengthen asylum systems, in consultation with UNHCR, NGOs and civil society;
- funding for UNHCR and NGOs to develop national legislation consistent with international standards and train lawyers and judges;
- training programmes for host governments and civil society on refugee rights, reception conditions, protection, refugee participation and durable solutions;
- funding to facilitate the integration of refugees, including by helping to provide an adequate standard of living.

The Council intends to decide on the basis of an evaluation of the pilot RPPs in 2007 whether to take further steps towards an EU wide resettlement programme. Yet, ECRE understands that there is some reluctance amongst Member States to resettle refugees from Ukraine and its neighbours, despite UNHCR's estimate that 600 people will be in need of resettlement from Ukraine in 2006<sup>21</sup>. Without testing the potential of the strategic use of resettlement to help find comprehensive solutions to refugee situations, a key criterion on which to make that decision will be lost.

- *ECRE urges the EU to offer to resettle a number of the most vulnerable refugees in both pilot regions to Member States, as a gesture of solidarity and willingness to share the responsibility of protection, and as part as of a strategy to reduce the factors that push refugees to move on to the EU.*

<sup>18</sup> *On the Margins - Ukraine: Rights Violations Against Migrants and Asylum Seekers at the New Eastern Border of the European Union*, Human Rights Watch, 2005

<sup>19</sup> *Oxfam GB Comment on the Communication from the Commission to the Council and the European Parliament on Regional Protection Programmes*, October 2005

<sup>20</sup> *The Way Forward: Europe's role in a global protection system - Guarding Refugee Protection Standards in Regions of Origin*, ECRE, 2005

<sup>21</sup> *Projected Global Resettlement Needs 2006*, UNHCR, 2005

January 2006

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

**ECRE Brussels**  
**Richard Williams, EU Representative**  
Rue Belliard, 205 - Box 14  
B- 1040 Brussels  
Tel: +32 (0) 2.514.59.39  
Fax: +32 (0) 2.514.59.22  
E-mail: [eucre@ecre.be](mailto:eucre@ecre.be)

**ECRE London**  
**Peer Baneke, General Secretary**  
103 Worship Street  
London EC2A 2DF, UK  
Tel: +44 (0) 20 7377 7556  
Fax: +44 (0) 20 7377 7586  
E-mail: [ecre@ecre.org](mailto:ecre@ecre.org)

**Web : <http://www.ecre.org>**