

The **Promise**  
of **Protection:**  
Progress towards a  
European Asylum Policy  
since the **Tampere Summit** 1999

European Council on Refugees and Exiles



with the support of the King Baudouin Foundation (Belgium)

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# Executive Summary

The European Council on Refugees and Exiles (ECRE) is an umbrella organisation for co-operation between European non-governmental organisations concerned with asylum seekers and refugees. ECRE campaigns on behalf of its pan-European membership for humane and fair asylum policies. In this paper, ECRE has compiled the views of its member agencies with regard to their assessment of progress made in EU asylum and migration policy since the Tampere Summit of October 1999.

In October 1999, at a special European summit in Tampere, Finland, European leaders spoke proudly of their *shared commitment to freedom, based on human rights, democratic institutions and rule of law* and underlined their *absolute respect of the right to seek asylum*. In their Conclusions, they committed themselves to working towards establishing a Common European Asylum System based on the *full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution*.

ECRE believes that in the last two years, there have been some significant areas of progress. The European Commission's Justice and Home Affairs Directorate has drafted legislation in all the areas identified as the 'building blocks' of a European asylum system. In doing so, it is laudable that it consulted with Member States, the United Nations High Commissioner for Refugees (UNHCR) and relevant non-governmental organisations. A European Refugee Fund has been established to support States in their efforts to receive asylum seekers, facilitate the integration of refugees and assist with voluntary return. Legislation has also been adopted to establish a system for sharing responsibility for refugee protection in situations of mass influx.

Notwithstanding this progress, there are some significant areas of concern. In ECRE's view, measures taken or currently being considered to combat illegal immigration have failed to provide adequate guarantees and have, conversely, significantly diminished access for refugees. In contrast, to public rhetoric, Member States' approach to the legislative process has reflected a lack of political will to agree on common standards and move beyond national practice. Deterrence rather than protection remains the key concern of the majority of Member States.

The Amsterdam Treaty offers EU Member States a golden opportunity to set legislative standards which will not only approximate current diverging national asylum laws and practices but which also reflect existing best practice. It also offers an important opportunity to establish a system of responsibility sharing which will eventually go beyond the present boundaries of the European Union and extend to the candidate countries in Central and Eastern Europe. ECRE believes that the Laeken Summit should serve as a platform to reaffirm Member States' commitment to a principled and protection-oriented harmonisation process within the timeframe of the Amsterdam Treaty and the spirit of the Tampere Conclusions. Member States must agree to focus on the protection of refugees rather than deterrence; and to work towards legislation which bridges the gaps between national policies and raises standards in line with international refugee and human rights law. A long term European vision in the face of racism and xenophobia is urgently required. With political courage and commitment, Member States still have it within their power to stay true to the founding values of the European Union.

# Summary of Key Conclusions

## Building a Common Asylum System

1. The building blocks of a common asylum system for the European Union, must fully reflect the principles and obligations of international human rights and refugee law and Europe's humanitarian traditions.
2. The foundation of a common asylum system must be a common understanding of who qualifies for international protection under the Refugee Convention and an EU-wide complementary protection scheme. The adoption of a common definition should precede an agreement on common standards for asylum procedures and reception conditions.
3. Harmonisation should be linked to measures to strengthen the institutional capacity of Member States with a less developed asylum infrastructure and candidate countries via more generous funding through the European Refugee Fund and the PHARE Programme.

## Access to Protection

4. During the process of transposition of EU agreements into national legislation, Member States must reconcile the migration control measures agreed to date with their international legal obligations towards refugees and asylum seekers. The Tampere promise of guarantees to those who seek protection in or access to the European Union must be upheld.
5. A coherent approach must be adopted in the process of transposition of EU *acquis* to candidate countries that provides for a balance between humanitarian responsibilities, the enforcement of border controls and the fight against smuggling and trafficking.
6. ECRE calls for an open debate at EU level on the positive steps that need to be taken to ensure access to the European Union and thereby reduce the use of illegal immigration channels by people in need of international protection. This should include an EU commitment to participation in the UNHCR resettlement scheme and a careful consideration of other appropriate measures.

## The Integration of Refugees

7. EU Member States should commit to gearing arrangements during the asylum determination phase to the eventual integration of those who are ultimately offered protection in the country of asylum. Given the impact of reception conditions on the long-term integration of those granted protection, efforts should be made to facilitate early access to the labour market for asylum seekers and guarantee their right to freedom of movement.
8. The socio-economic rights of persons granted a complementary form of protection should be at the same level as those afforded to Convention refugees.

9. The development of a tolerant inclusive society is a key prerequisite to the successful integration of refugees. Politicians and decision makers should provide political leadership and set the tone in public debate on tolerance and non-discrimination. The need for such political leadership is even greater since the events of September 11<sup>th</sup>.

## Europe's Responsibility in the World

10. EU countries must use the opportunity of the Laeken Summit and the political will generated in the aftermath of the events of September 11<sup>th</sup> to urgently put into practice their commitment to a comprehensive approach to countries of origin. Such commitment should be reflected in a balanced approach to issues relating to Justice and Home Affairs co-operation, national security, foreign policy and humanitarian and development aid.
11. Future measures on co-operation with third countries should aim at addressing the root causes of voluntary and involuntary migration including poverty reduction, protection of human rights and promotion of democratic institutions.
12. The Member States need to recognise the global implications of their actions and ensure that common EU asylum policies serve to strengthen the global refugee protection system and responsibility sharing. Providing protection to refugees in the territory of the Union is an essential part of this.

## The Process of Decision Making

13. ECRE urges the European Council to pay due attention to the views of the European Parliament. In the spirit of the Tampere Conclusions, it also calls on national parliaments to insist on greater scrutiny of their governments' positions taken in their name in the Council.
14. An open and informed dialogue with civil society should not be confined to the deliberations of the European Commission and Parliament but should involve input during the course of negotiations among Member States. The Council needs to ensure greater transparency in its work by making public the working versions of documents under discussion. Individual Member States should undertake to consult civil society and national refugee agencies on the positions they adopt during Council negotiations.
15. Governments must commit to setting meaningful standards that may require them to change their domestic legislation. Proposals currently on the table allow governments to operate higher standards than those agreed. This should be strengthened, so that governments pledge not to lower their existing national standards and not to rush towards the lowest common denominator during the process of negotiation of key asylum directives.

*European Council on Refugees and Exiles  
November 2001*

# 1. Introduction

In 1997, EU Member States agreed to the Amsterdam Treaty amending the Treaty establishing the European Community, and thereby committed themselves to creating an “area of freedom, security and justice”. For the first time in the history of the European Union, it was agreed that common standards for asylum, based on solidarity and shared responsibility between States, had to be established.

In October 1999, at a special European summit in Tampere, Finland, European leaders gave political direction to the legislative process of standard-setting and spoke proudly of their *shared commitment to freedom, based on human rights, democratic institutions and rule of law*. The summit Conclusions underlined their absolute respect of the right to seek asylum and promised to work towards establishing a Common European Asylum System based on the *full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution*. Common policies on asylum and migration would *offer guarantees to those who seek protection in or access to the European Union*, while *taking into account* the need to combat illegal immigration.

At a parallel summit, ECRE and representatives of many of its 72 member organisations advocated fairness, adherence to human rights values and the full implementation of the Geneva Convention. At the time, we saw the Tampere Conclusions as signalling a new positive direction, provided they were implemented in the spirit in which they had been written. The Tampere European Council agreed to review progress at its December 2001 meeting in Laeken, Belgium.

ECRE has also decided to take stock of progress over the past two years to assess whether the spirit of Tampere is reflected in the EU asylum and migration legislation that is being developed and whether this legislation provides a sound foundation for further progress that will increase the protection of refugees in Europe. This assessment will focus on the impact of the harmonisation process on asylum seekers and refugees rather than on the wider migration debate and will consider progress against the Conclusions of the special European Council in Tampere<sup>1</sup> in four key areas of concern to ECRE: the development of a common asylum system; access to protection in Europe; the integration of refugees; and Europe's global responsibility. A table showing the state of play of the legislative process is attached (Annex A).

In the last two years, there have been some significant areas of progress. The European Commission's Justice and Home Affairs Directorate, established shortly after Tampere, has drafted legislation in all the areas identified as the ‘building blocks’ of a European asylum system<sup>2</sup>. It is laudable that in so doing, the European Commission consulted with Member States, the United Nations High Commissioner for Refugees (UNHCR) and relevant non-governmental organisations. A European Refugee Fund has been established to support States in their efforts to receive asylum seekers, facilitate the integration of refugees and assist with voluntary return; and legislation, absent at the time of the Kosovo crisis, has been adopted to establish a system for sharing responsibility for refugee protection in situations of mass influx<sup>3</sup>.

ECRE has welcomed the first draft of legislation defining who is a refugee as broadly fulfilling promises made at Tampere for a *full and inclusive application* of the Geneva Refugee Convention. The inclusion of a definition of other persons in need of international protection is a positive effort to extend protection to all persons facing fundamental human rights abuses if returned to their country of origin. Furthermore, the European Union adopted the Charter of Fundamental Human Rights of the European Union thereby guaranteeing the right to asylum<sup>4</sup>.

On a separate but related issue, the growing recognition of Europe's need for immigration represents a significant shift in the debate and one that ECRE hopes will create a welcoming environment for refugees and asylum seekers and lead to a more open approach to third country nationals, including asylum seekers’, access, to the European Union.

Looking forward to the future, the Commission also published two Communications in November 2000, one on asylum<sup>5</sup> and one on immigration<sup>6</sup> which constitute a useful framework for future work towards a Common European Asylum System.

However, there are significant areas of concern. ECRE is particularly concerned that contrary to EU leaders’ promise of *guarantees to those who seek protection in or access to the European Union*, measures taken or currently being considered to combat illegal immigration have failed to provide adequate guarantees and have, conversely, significantly diminished access for refugees. While the language of the Member States collectively continues to respect the need to provide protection for refugees, the focus of some governments has frequently been much more negative, urging deterrence rather than protection. Against this background, ECRE fears that Member States risk incorporating the worst aspects of national asylum systems and legitimising them as acceptable European standards. The recent events of September 11<sup>th</sup> raise further concerns that hurried government responses to address national security issues may result in misplaced restrictive proposals which undermine refugee protection.

The Amsterdam Treaty offers EU Member States a golden opportunity to set legislative standards which will not only approximate current diverging national asylum laws and practices but which also reflect existing best practice. It also offers an important opportunity to establish a system of responsibility sharing which will eventually go beyond the present boundaries of the European Union and extend to the candidate countries in Central and Eastern Europe. It would appear however that Member States are failing to grasp this opportunity. In contrast to public rhetoric, States’ approach to the legislative process reflects a lack of vision and political will to agree on common standards. Instead, during legislative negotiations, most States have exhibited a reluctance to move beyond national practice. ECRE believes that the Laeken Summit should serve as a platform to reaffirm Member States’ commitment to a principled and protection-oriented harmonisation process within the timeframe of the Amsterdam Treaty and the spirit of the Tampere Conclusions. Without such a commitment, ECRE fears that the EU risks adopting legislation which only reflects States’ agreement to disagree. This is neither in the interests of Member States nor refugees.

If responsibility for the protection of refugees is to be shared, on the basis of solidarity, throughout the European Union, Member States must agree in Laeken to focus on the protection of refugees rather than deterrence; and to work towards legislation which bridges the gaps between national policies and raises standards so that these are in line with international refugee and human rights law. A long term European vision in the face of racism and xenophobia is urgently required. Leadership must be provided to shape minimum standards for asylum which are based on human rights and protection principles. Agreement must be reached on migration control measures that offer guarantees to those who seek international protection in the European Union.

With political courage and commitment, Member States still have it within their power to stay true to the founding values of the European Union.

<sup>1</sup> Paragraph 3, The Presidency Conclusions, Tampere European Council, 15 and 16 October 1999.

<sup>2</sup> See section 2.1 ‘Building a Common Asylum System’.

<sup>3</sup> See section 2.1 ‘Building a Common Asylum System’.

<sup>4</sup> Article 18 of the Charter of Fundamental Human Rights of the European Union, 18 December 2000 (Charter 4487/00).

<sup>5</sup> Communication on a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union (COM (2000) 755 final, 22 November 2000).

<sup>6</sup> Communication on a common immigration policy (COM (2000) 757 final, 22 November 2000).

# 2. Taking Stock Since Tampere

## 2.1 Building a Common Asylum System

### A: Asylum Measures

Tampere presented an opportunity for governments to look at good practice across Europe and use it as the basis for co-ordinating their asylum legislation in a first step towards the development of a common asylum system. That first step would consist of two important elements. The first is a commitment to obligations under the Refugee Convention and other human rights instruments<sup>7</sup> and in particular to a “*full and inclusive*” interpretation of the Convention. The second is the concept of responsibility sharing between EU states, implicit in the phrase “*on the basis of solidarity*”. The early signs are that governments have not grasped the opportunity, determined instead to ensure that any agreements will not interfere with their national practice.

Two pieces of legislation relating to asylum have been formally adopted since the Tampere summit: the decision to establish a **European Refugee Fund**<sup>8</sup> in September 2000 and a directive on **temporary protection** in the event of a mass influx, in July 2001. Neither are integral to the first stage towards a common asylum system (which may have facilitated their agreement).

Indeed, none of the short-term objectives of the Amsterdam process have been concluded, although the Commission has drafted proposals in all the areas: a replacement for the **Dublin Convention**<sup>9</sup> to determine the state responsible for examining an asylum claim, together with minimum standards on **asylum procedures**<sup>10</sup>, **reception conditions** for asylum seekers<sup>11</sup> and the **definition of a refugee**<sup>12</sup>. The latter also defines those people who need protection, but who are not covered by the 1951 Refugee Convention. Critics of progress since Tampere have pointed to some of the obstacles in the process of adoption of these directives as they relate to differences of opinion regarding the scope of the instruments under discussion and Member States' unwillingness to adopt measures which exceed the scope of their national asylum legislation. Below is an overview of the asylum instruments introduced since the Tampere Summit.

The directive on **temporary protection** (TP) entered into force on 7 August 2001. ECRE welcomed the adoption of this instrument as representing a reasonable administrative policy in an emergency situation of mass influx where individual refugee status determination is not immediately practicable and where its application would enhance admission to the territory<sup>13</sup>. The directive contains a number of positive aspects: a reasonable standards of rights for TP beneficiaries; provisions for especially vulnerable groups; the establishment of a solidarity mechanism; guarantees of access to the asylum determination procedure. However, we consider that it falls short of acceptable standards in a number of areas. Even in an emergency situation, visa controls and other restrictions will not be lifted to ease access to the EU (other than via an evacuation programme). There is no right of appeal against a refusal of temporary protection, no guarantee of freedom of movement (despite the commitment at Tampere to a “right to move freely throughout the Union”)<sup>14</sup>, and temporary protection can be withdrawn from a person who applies for asylum (a considerable disincentive, as reception standards for asylum seekers are likely to be much lower than those available to people under temporary protection).

Standards slipped significantly during Council negotiations: by the time the directive was agreed, the maximum duration of a TP regime had been extended from two to three years and it would no longer deal exclusively with situations of *sudden* mass influxes likely to overburden national asylum systems. ECRE is concerned that Temporary Protection might be used in situations where the granting of refugee status or of another form of international protection is the more appropriate response. If Temporary Protection is used too freely and people who would otherwise be granted refugee status are either prevented or discouraged from applying for asylum for up to three years, the Refugee Convention will be severely undermined.

The directive on **asylum procedures** lies at the heart of the asylum system. ECRE has welcomed a number of the provisions contained in the proposal particular with regard to the regular procedure, which are in line with standards promoted by both the United Nations High Commissioner for Refugees and non-governmental organisations. However, ECRE regrets<sup>15</sup> that this very detailed proposal leaves in place most of the features of today's national asylum procedures that have been sharply criticised by NGOs and lawyers assisting asylum applicants. They include detention of asylum applicants and processing of asylum applications at borders, sea and airports; and the operation of accelerated procedures with insufficient legal and procedural safeguards to prevent *refoulement*.

Not only are key elements of this proposal far from the spirit of Tampere, but they risk violating either the Refugee Convention or the European Convention on Human Rights (ECHR) or both: notably in relation to the lack of a suspensive right of appeal; the grounds for detention; the criteria for determining a ‘safe third country’; the lack of a right to legal assistance; and the criteria for defining applications as manifestly unfounded, including the notion of safe country of origin. They are also far from the long-term goals set out in the Commission's Communication on Asylum, which for example, puts forward the possibility of abandoning entirely the safe country notions. With minimum standards as low as these, the prospect of achieving a workable European asylum system that conforms to the spirit of Tampere is remote. The Belgian Presidency's proposals aiming to unblock negotiations by introducing further restrictions in relation to the right of appeal and the scope of the admissibility and accelerated procedures reaffirm this point.

Several provisions of the proposed directive on the **reception of asylum seekers** set adequate minimum standards, notably the provision of information and documentation to asylum applicants; access to non-governmental organisations and legal advisors; access for asylum seekers under the regular procedure to primary health care; reaffirmation of the best interests of the child and their right to education; recognition of the need to maintain family unity; and recognition of the special needs of certain vulnerable groups<sup>16</sup>.

Some provisions fall below the threshold of what is acceptable, even as a ‘minimum standard’. The idea of punishing bad behaviour with the withdrawal or reduction of what are already minimum reception conditions violates international human rights law. The provision allowing governments to restrict asylum seekers to a specific area is unlikely to meet the safeguards contained in Protocol 4 of the ECHR. Obligatory medical screening may violate the right to a private life enshrined in article 8 of the ECHR.

<sup>7</sup> Paragraph 4, Tampere Conclusions: *The aim is an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity.*

<sup>8</sup> Council Decision establishing a European Refugee Fund (2000/596/EC), September 2000.

<sup>9</sup> Proposal for a 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 (MEMO/01/282, Date: 2001-07-27), July 2001.

<sup>10</sup> Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (IP/00/1032 Date: 2000-09-20), September 2000.

<sup>11</sup> Proposal for a Council Directive on minimum standards on the reception of applicants for asylum in Member State (COM (2001) 181), 3 April 2001.

<sup>12</sup> Proposal for a Council Directive on minimum standards on the qualification and status of third country nationals and stateless persons as refugees or as persons otherwise in need of international protection, 12 September 2001.

<sup>13</sup> Observations of the European Council on Refugees and Exiles on the European Commission's draft directive on temporary protection and responsibility sharing, ECRE, January 2001.

<sup>14</sup> Paragraph 2, Tampere Conclusions.

<sup>15</sup> See ECRE's Summary Comments on the Proposal on minimum standards on procedures in Member States for granting and withdrawing refugee status, April 2001 and ECRE's detailed comments on the proposal.

<sup>16</sup> For a more detailed critique, see Comments from the European Council on Refugees and Exiles on the Proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States, ECRE, 31 August 2001.



ECRE has noted some progressive changes in the proposal for **determining the Member State responsible for examining an asylum application**<sup>17</sup> specifically with regard to the primacy of family reunification and the prominence given to unifying children with their parents or guardians. However, there are several provisions, including the underlying rationale, which render this proposal as ineffective and unworkable as its predecessor, the Dublin Convention. Firstly, it is based on the very same flawed principles i.e. that responsibility for examining an asylum application lies with the Member State bearing responsibility for the asylum applicant's entry to or stay in the European Union. Secondly, it risks compromising EU governments' commitment to the principle of *non-refoulement*, enshrined in the Refugee Convention<sup>18</sup>. The preamble to the proposal acknowledges that a system based on applicant's choice and family unity, which has long been advocated by ECRE, would be better for governments and better for asylum seekers. However, this sensible, far-sighted view has been ignored in the short-term. Finally, it contains a number of provisions which restrict rather than promote family unity. The scope of the proposal is limited to providing only for reunification with a family member who has refugee status under the 1951 Refugee Convention. In light of the regrettable trend towards lower recognition rates under the Refugee Convention, and an increase in the use of complementary forms of protection, ECRE considers that reunification with family members afforded a complementary protection status is as important as reunification of asylum seekers with family members with refugee status.

The core of a common asylum system will be the **definition directive**<sup>19</sup>. Although this is the final 'building block' to have been published, it is difficult to see how agreement can be reached on the other directives without deciding who they apply to. In many aspects, this proposal is close to a 'full and inclusive' interpretation of the Refugee Convention in its definition of a social group, for example, and in its inclusion of persecution by non-state agents. It is sensible to have combined the interpretation of who is a refugee and the definition of others in need of protection in a single proposal. Any agreement on a complementary status will in itself be a recognition of obligations under human rights law and we welcome the proposal to grant similar rights to those people as enjoyed by refugees.

Nevertheless ECRE does have some concerns. The idea that "state" protection may be provided by international organisations and 'stable, state-like authorities that control a clearly defined territory' is not consistent with the Refugee Convention. Stable, state-like authorities cannot sign international human rights treaties, are not subject to international law and cannot be held responsible for ensuring that human rights standards are safeguarded. The recent history of Kosovo and Bosnia has shown the ineffectiveness of international organisations in maintaining peace and security and guaranteeing human rights in conflict areas. Additional areas of concern relate to differences in the rights granted to refugees and persons with subsidiary protection with regard to the duration of residence permits, access to employment and access to integration facilities.

**Conclusion:** *The minimum standards proposed represent a modest attempt towards the realisation of the 'vision' set out in Tampere and the development of a workable common European asylum system, as outlined in the Commission's Communications on Asylum and Immigration. Certain aspects of the proposals that are the 'building blocks' of the first stage of a common asylum system fail to meet the minimum requirements of the Refugee Convention and international human rights instruments. It is a rather ominous sign for the future that the Commission's modest proposals have been deemed to be 'too positive' by a number of Member States.*

**Recommendation 1:** *The building blocks of a common asylum system for the European Union must fully reflect the principles and obligations of universal human rights law and refugee law and Europe's humanitarian traditions. Member States should use the Commission's proposals as the foundation for the development of a common asylum system that fully reflects Europe's traditions of fairness and humanity.*

#### **B: The need for coherence**

Although the 'building blocks' of the first stage towards a common asylum system are on the table, they lack coherence. People with a subsidiary form of protection, for example, are not included in the proposal on the status of long-term residents<sup>20</sup>, while the definition directive<sup>21</sup> specifically states that people with subsidiary protection will be granted long-term residence status on the same terms as those applicable to refugees under that directive. The question of family reunion rights for people with subsidiary protection has been completely omitted from all proposals: there is no reference to people with subsidiary protection in the family reunion directive and the Dublin regulation and no reference to family reunion for people with subsidiary protection in the definition directive.

Given the wide variation in the granting of complementary (subsidiary) protection across Europe, it is unsurprising that it is excluded from the scope of proposed directives. ECRE is sympathetic to the recent initiative by Sweden, the Netherlands and Finland, suggesting that the scope of the proposals be extended accordingly. However, given the variation in state practice on complementary protection, ECRE believes such a move would be helpful only if the definition directive were adopted and harmonisation achieved before adoption of the other proposals.

**Conclusion:** *Now that all the 'building blocks' are on the table, there is no absolute requirement for each proposal to be negotiated piecemeal: the deadline of 2004 set by the Amsterdam treaty is still some way off. It is essential to take stock and draw up a sensible plan for negotiations that take into account the linkages that exist between the different directives.*

**Recommendation 2:** *Governments should work with the Commission to overcome inconsistencies, decide a sensible order for the negotiation and adoption of proposals and produce a plan of action that complies with the timeframe set by the Amsterdam Treaty.*

**Recommendation 3:** *ECRE believes that the foundation of a common asylum system must be a common understanding of who qualifies for international protection under the Refugee Convention and an EU-wide complementary protection scheme. The adoption of a common definition should precede an agreement on common standards for asylum procedures and reception conditions.*

<sup>17</sup> Proposal for a 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 (COM(2001)447 final), 26 July 2001.

<sup>18</sup> ECRE comments on a Proposal for a 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, (forthcoming).

<sup>19</sup> Proposal for a Council Directive laying down minimum standards for the qualification and status of third country nationals and stateless persons as refugees, in accordance with the 1951 Convention relating to the status of refugees and the 1967 protocol, or as person who otherwise need international protection, 12 September 2001.

<sup>20</sup> Article 3, Proposal for a Council Directive on the status of long-term residents.

<sup>21</sup> Article 22, Proposal for a Council Directive on minimum standards on the qualification and status of third country nationals and stateless persons as refugees or as persons otherwise in need of international protection.



### C: The Principle of Solidarity

The establishment of a permanent **European Refugee Fund (ERF)** was an important and necessary step to avoid repetition of a situation where work on the reception and voluntary return of refugees was cut back and delayed because funds had been diverted to emergency work with refugees from Kosovo. More significantly, it was also the first, concrete attempt at creating an equitable mechanism for sharing financial responsibility for supporting refugees between Member States. As such, the budget allocated was inadequate, and the mechanism chosen to distribute funds too retrospective. This favours countries that have received large numbers of asylum seekers in the past, instead of those countries likely to play a greater role in the future and therefore being in greatest need of support in developing their infrastructure. For the year 2002, Greece, Spain and Portugal have together been allocated just 5% of the total ERF budget, while Germany and the UK will receive 23% and 20% respectively.

ECRE also welcomed the **Temporary Protection directive** inasmuch as it represented an effort by Member States to establish a system for sharing the responsibility of refugee protection in situations of mass influx. That mechanism will enable refugees to be allocated, with their consent, to EU countries according to their capacity to receive them.

A step in the opposite direction is the proposal for **determining the Member State responsible for examining an asylum application**<sup>22</sup>, which has recently been put on the table. Like its predecessor, the Dublin Convention, it links the allocation of responsibility for asylum applications with responsibility for entry controls. That will result in a shift of responsibility for asylum applications to those States with extended land and sea borders in the south and east – the principal migration entry points to the EU. These States – the accession countries of central Europe and the southern European countries – are the very States with the most under-developed asylum infrastructures in the European Union. ECRE would argue that this is hardly consistent with the idea of solidarity as reflected in the Temporary Protection directive, and the logic underlying the allocation of funds under the European Refugee Fund. Faced with the responsibility of processing a great number of asylum applications under the new Dublin regulation and with limited resources to develop a proper asylum infrastructure, Member States at the principal migration points of the Union might be tempted to return people rather than process their asylum applications. This could result in a fundamental compromise of EU governments' commitment to the principle of *non-refoulement* as enshrined in the Refugee Convention.

**Conclusion:** *The ERF and the Temporary Protection directive represent important first steps towards sharing the physical, as well as the financial responsibility for refugees among EU countries. The principle of solidarity is however compromised by the proposal for a successor to the Dublin Convention. This places greater responsibility for asylum applications on those Member States with extended land and sea borders in the south and east – the very States with the most under-developed asylum infrastructures in the European Union.*

**Recommendation 4:** *ECRE views the linking of responsibility for immigration controls with responsibility for examining asylum applications to be counter to the principle of solidarity underlying the Temporary Protection Directive and the European Refugee Fund. It believes that an early harmonisation of substantive laws and their interpretation, asylum procedures and reception conditions can positively contribute to a reduction in the secondary movement of asylum seekers within the EU.*

**Recommendation 5:** *Harmonisation should be linked to measures to strengthen the institutional capacity of Member States with less developed asylum infrastructure and candidate countries via more generous funding through the European Refugee Fund and the PHARE Programme. The allocation of such funding should be based upon clear criteria that allow for an assessment of Member States' progress in this task.*

<sup>22</sup> Proposal for a 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 (COM(2001)447 final), 26 July 2001.

## 2.2 Access to Protection

*"It would be in contradiction with Europe's traditions to deny [the freedom Union citizens take for granted] to those whose circumstances lead them justifiably to seek access to our territory. This in turn requires the Union to develop common policies on asylum and immigration, while taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes. These common policies must be based on principles which are both clear to our own citizens and also offer guarantees to those who seek protection in or access to the European Union"*<sup>23</sup>.

In our observations on the Tampere Conclusions<sup>24</sup>, ECRE concluded that this meant *"that people in need of international protection should be able to access the territory of the EU and have an opportunity to gain protection" and that "immigration control measures must be in full compliance with absolute respect of the right to claim asylum."*

In reality, there has been no progress on access: the emphasis has been on immigration controls, with the adoption in December 2000 of a Regulation creating a European database of asylum seekers' fingerprints (EURODAC),<sup>25</sup> the adoption of a common visa list in March 2001,<sup>26</sup> and the adoption of, provisional 'political' agreement, of five other important pieces of legislation in May 2001: mutual recognition of expulsion decisions;<sup>27</sup> carriers' sanctions;<sup>28</sup> human trafficking;<sup>29</sup> and two on combating human smuggling.<sup>30</sup> The measures to combat human trafficking and smuggling are still going through a process of legal verification and translation and at the time of writing had not been formally adopted. In addition, the Commission has drafted a Communication on a Common Policy on Illegal Immigration that sets out a wide-ranging action plan to coordinate and reinforce actions in this area.<sup>31</sup> It plans to follow this with a Green Paper on the Community Return Policy and a Communication on European Border Management.

We note the recent conclusion by the Council of Europe's Commissioner for Human Rights that there has been "no significant improvement" in the "precarious legal and humanitarian situation of aliens wishing to enter (the territory of Council of Europe Member States)."<sup>32</sup>

<sup>23</sup> Paragraph 3, Tampere Conclusions.

<sup>24</sup> Observations by the European Council on Refugees and Exiles on the Presidency Conclusions of the Tampere European Council, 15 and 16 October 1999.

<sup>25</sup> Council Regulation concerning the establishment of EURODAC for the comparison of fingerprints for the effective application of the Dublin Convention, December 2000.

<sup>26</sup> Council Regulation listing the third countries whose nationals must be in possession of visas, March 2001.

<sup>27</sup> Council Directive on mutual recognition of decisions on the expulsion of third country nationals, May 2001.

<sup>28</sup> Council Directive 2001/51/EC supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, 28 June 2001.

<sup>29</sup> Framework decision on combating trafficking in human beings.

<sup>30</sup> Initiative of the French Republic with a view to the adoption of a Council Directive defining the facilitation of unauthorised entry, movement and residence (2000/0821/CNS); and Initiative of the French Republic with a view to the adoption of a Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry and residence.

<sup>31</sup> Communication on a Common Policy on Illegal Immigration, Brussels, 15.11.2001, COM(2001) 672.

<sup>32</sup> Recommendation of the Commissioner for Human Rights concerning the right of aliens wishing to enter a Council of Europe Member State and the enforcement of expulsion orders (CommDh/Rec (2001)1), Strasbourg, 19 September 2001.





### A: Legislation to Control Irregular Movement

ECRE and others have frequently noted how immigration control measures, including efforts to combat trafficking and smuggling, undermine the right to seek asylum.<sup>33</sup> Visa requirements, for example, can prevent people who cannot obtain documentation without putting themselves at increased risk of persecution from fleeing their country. We do not believe that the common visa list<sup>34</sup> adopted on 15 March 2001 reflects UNHCR's repeated plea for visas not to be imposed on countries in which there are civil wars, generalised violence or widespread human rights abuse. It includes, for example, countries such as Afghanistan, Sri Lanka and Iraq.

Visa controls have been reinforced since Tampere by an increase in the number of immigration officers sent overseas to ensure that people not carrying correct documentation are prevented from boarding flights to Europe. The UK and Italy announced a joint initiative on South Eastern Europe early in 2001 to send immigration officers to countries of origin and transit to train local officials and gather intelligence on trafficking and smuggling networks. It was followed by a Council agreement in June 2001 on stationing immigration offices abroad. Without doubt, people in fear of persecution are being prevented from leaving their countries, in violation of the "right to seek and enjoy asylum" as prescribed in Article 14 of the Universal Declaration of Human Rights.

EU visa policy not only acts as a deterrent and barrier to potential asylum seekers, but leads to an increasing reliance on illegal entry. Desperate people who have no legal means of reaching sanctuary will, inevitably, look for other ways. In May 2001, the European Council reached political agreement on four items of legislation aimed at controlling irregular movement across borders: on carriers sanctions (fines on airlines and shipping companies found to be carrying stowaways), on human smuggling (one on defining the offence and one setting penalties) and on human trafficking. The draft directive on carriers sanctions was formally adopted on 28 June and entered into force in August.

The prospect of fines of at least EURO 3000 introduced in the carriers sanctions directive will have the – intended – effect of making airlines and shipping companies more vigilant for stowaways and passengers without proper documents, but it will also make them less inclined to report their presence to the authorities. The directive offers only the weakest of safeguards for refugee protection. Article 4 (2) of the directive states that action taken under the directive should be "without prejudice to Member States' obligations in cases where a third country national seeks international protection" – little consolation to a survivor of torture who has been refused permission to board a flight because she is travelling on a forged passport. Unless she sets foot on EU soil, she cannot invoke her right under article 31 of the Refugee Convention not to be penalised for illegal entry.

UNHCR, ECRE and other NGOs had argued for a clause in the proposals on combating human smuggling that would exempt from prosecution NGOs, relatives and others who offer advice and assistance for humanitarian reasons, rather than profit. This met with strong resistance and was only agreed once it had been watered down and made optional. Despite the assurance given at Tampere that "the rights of the victims of such activities shall be secured",<sup>35</sup> governments can, if they so choose, punish NGOs for assisting them in securing those rights.

Human traffickers, like smugglers, take advantage of desperate people. The difference is that traffickers coerce or deceive their victims and exploit them sexually or through forced labour. ECRE supports the fight against human trafficking, but is concerned that the victims of traffickers include some of those in most need of international protection. Political agreement has been reached on a framework decision to combat trafficking, which, ECRE believes, offers significantly fewer safeguards to the victims of traffickers than does the trafficking protocol to the Convention against Transnational Organized Crime, signed by 124 members of the United Nations in December 2000. Observations made by UNHCR in June 2001 reflect ECRE's concerns that aspects of the proposal, "in particular those dealing with protection of victims and witnesses, fall considerably short of established international standards. The lack of reference to even basic protective measures for victims and witnesses of trafficking, as well as the omission of a saving clause concerning asylum-seekers and refugees, may create an impression that such protections are both unimportant and optional in the fight against trafficking".

### B: Guarding Europe's Borders

It is not only these legislative developments that have restricted refugees' access to the EU: they are physically kept out by all the means available to modern states: fences, helicopters with heat-detectors, border guards with night-vision equipment, high-speed patrol boats, X-ray scanners and movement detectors to search for stowaways in lorries, etc.

As Europe enlarges, so are the barriers mentioned above and the eastern borders of the candidate countries are being reinforced. ECRE welcomed the assertion in the Tampere Conclusions that human rights, democratic institutions and the rule of law "will serve as a cornerstone for enlargement of the Union"<sup>36</sup> as this held out the promise that migration policy would respect the absolute right to seek asylum and does not only concentrate on strengthening border controls in Central and Eastern Europe.<sup>37</sup> The emphasis does appear, however, to have been on border controls.

An example is expenditure under the European Commission's PHARE programme of financial and technical assistance to Central and Eastern European countries. Of the funds allocated in the period 1997-2000 to assisting candidate countries with meeting their obligation to adopt the whole *aquis* of EU legislation in the area of Justice and Home Affairs, EURO 230 million were allocated to border controls and just EURO 11 million to asylum and visa systems.

The Commission has recently published a review of the enlargement strategy.<sup>38</sup> The section on Justice and Home Affairs mentions a need to ensure that the candidate countries are equipped to meet acceptable standards on issues such as border control, judicial co-operation, data protection and the mutual recognition of court judgements, but there is no mention of the need to improve their asylum procedures or systems for receiving asylum seekers. The word 'asylum' is not mentioned.

<sup>33</sup> ECRE's general concerns are set out briefly in *Guarding Standards-Shaping the Agenda* published jointly with ENAR and MPG, May 1999, at pp.6-7.

<sup>34</sup> Council Regulation 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, ((EC) No 539/2001), 15 March 2001.

<sup>35</sup> Paragraph 23, Tampere Conclusions.

<sup>36</sup> Paragraph 1, Tampere Conclusions.

<sup>37</sup> Observations by the European Council on Refugees and Exiles on the Presidency Conclusions of the Tampere European Council, 15 and 16 October 1999.

<sup>38</sup> Communication from the Commission: Information Note to the European Council on a mid-term review of the implementation of the enlargement strategy, COM (2001) 553 final, 2 October 2001.

**Conclusion:** While the Tampere Conclusions set out an approach that balances border controls with measures to facilitate access for those in need of protection, governments have focussed exclusively on preventing all irregular movement into the EU, including that of people fleeing persecution.

**Recommendation 6:** During the process of transposition of EU agreements into national legislation, Member States must reconcile the migration control measures agreed to date with their international legal obligations towards refugees and asylum seekers. The Tampere promise of guarantees to those who seek protection in or access to the European Union must be upheld. National policies to combat irregular migration should be formulated with due respect for Article 31 of the Refugee Convention.

**Recommendation 7:** A coherent approach must be adopted in the process of transposition of EU acquis to candidate countries that provides for a balance between humanitarian responsibilities, the enforcement of border controls and the fight against smuggling and trafficking.

#### C: Facilitating Access to the EU

The Commission has addressed the question of access to the territory in its Communication on a Common Asylum Procedure,<sup>39</sup> suggesting that processing asylum requests and resettling refugees from outside the EU could tackle the problem.

ECRE believes this debate is long overdue, given that only four EU countries take part in UNHCR's resettlement scheme, and looks forward to the conclusions of the feasibility studies the Commission has undertaken to conduct. We support the Commission's contention that the use of resettlement channels "must be complementary and without prejudice to proper treatment of individual requests expressed by spontaneous arrivals." Under no circumstances, should an EU commitment to resettlement lead to a worse treatment of asylum seekers arriving independently, as has been the case in certain countries.

**Recommendation 8:** The Commission should publish as soon as possible its feasibility studies of asylum applications from outside the territory and EU resettlement programme. Following the publication of these findings, ECRE calls for an open debate at EU level on the positive steps that need to be taken to ensure access to the European Union and thereby reduce the use of illegal immigration channels by people in need of international protection.

**Recommendation 9:** This should include an EU commitment to participation in the UNHCR resettlement scheme and a careful consideration of other appropriate measures such as in-region processing and information campaigns in transit countries and countries of origin on the right of asylum and right of exemption from penalties for illegal entry if seeking protection.

## 2.3 Integration of refugees

**"A** common approach must also be developed to ensure the integration into our societies of those third country nationals who are lawfully resident in the Union."<sup>40</sup>

Progress in this field has been made with the establishment of a legal framework to ensure the fair treatment of third country nationals legally resident in the EU. New legislation includes the promotion of equal treatment irrespective of racial and ethnic origin and the combating of racism and discrimination.<sup>41</sup> The Commission has also introduced a proposal on the status of third country nationals who are long-term residents. With regard to refugee integration, the EU, through the European Refugee Fund and other integration-specific funding initiatives, has made considerable progress in promoting refugee integration as a two-way process placing demands on both receiving societies and refugees and their communities. Nevertheless, ECRE believes that there are still considerable barriers to the full integration of refugees into European societies.

Refugee integration is closely related to the quality and length of the asylum determination procedure and the conditions of reception. Years spent in a reception centre, or otherwise excluded from mainstream life in a host country, severely undermine refugees' integration potential once they have finally been recognised as such. Certain provisions of the draft Directive on **reception conditions** allow for restrictions in the rights of asylum seekers to freedom of movement and access to the labour market and vocational training and leave far from resolved the question of financial support to those applying for asylum.

Further, integration is closely related to legal status granted to persons in need of international protection. At present, most EU countries have low recognition rates and grant inferior legal statuses to persons not falling within an often limited or even restrictive interpretation of the 1951 Refugee Convention definition. These statuses carry limited socio-economic rights. The new draft Directive on the **qualification and status of third country nationals as refugees** goes some way towards addressing key NGO concerns with regard to status determination by including non state agents among the potential sources of harm and persecution of Convention refugees. It also includes a range of positive rights for people granted subsidiary protection status that are at the same standard to those accruing to Convention refugees. Certain provisions however still cause concern. From an integration perspective, these include the provisions relating to the duration of residence permits and restrictions with regard to access to employment, employment related education and integration facilities for persons granted subsidiary forms of protection.

In addition, the importance of swift and flexible family reunification procedures on refugee integration processes cannot be underestimated. In order to be able to begin building a new life in the country of asylum, it is often a pre-requisite that the family of the refugee is united in safety. The European Commission's Proposal for a Council Directive on the right to family reunification sets out a blueprint for what this right entail and re-affirms important principles such as always taking decisions in the best interest of children when they are involved. However, more needs to be done to ensure that an inclusive definition of family is adopted, including apart from the nuclear family of spouse and minor children, also unmarried partners and direct ascendants. Regarding the age of minor children who can benefit from family reunification, it is very important that it remains at 18 years.

Finally, integration can only take place in the context of a tolerant and welcoming environment for refugees. This is far from being the case in a number of European countries where during recent times, media outlets and political parties have repeatedly joined forces in expressing fears of Europe being under threat from "floods" of refugees. This has often been at the expense of any public attention being given to Europe's moral and legal obligations towards those who seek protection and the positive contributions to European societies made by refugees.

<sup>39</sup> 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".

<sup>40</sup> Paragraph 4, Tampere Conclusions.

<sup>41</sup> Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation; Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial and ethnic origin; Council Decision 2000/750/EC establishing a Community Action Programme to combat discrimination.

**Conclusion:** *Certain aspects of the proposals on reception conditions, family reunification, asylum procedures and definition of persons in need of protection are likely to undermine the integration of people who are eventually granted protection and inhibit their ability to contribute to their host societies.*

**Recommendation 10:** *EU Member States should commit to gearing reception arrangements during the asylum determination phase to the eventual integration of those who are ultimately offered protection in the country of asylum. Given the impact of reception conditions on the long-term integration of those granted protection, efforts should be made to facilitate early access to the labour market for asylum seekers and guarantee their right to freedom of movement.*

**Recommendation 11:** *The socio-economic rights of persons granted a complementary form of protection should be at the same level as those afforded to Convention refugees.*

**Recommendation 12:** *Family reunification procedures for refugees granted status must be made more flexible and centred on what is best for the refugee's well being, in order to facilitate the integration process.*

**Recommendation 13:** *The development of a tolerant inclusive society is a key prerequisite to the successful integration of refugees. Politicians and decision makers should provide political leadership and set the tone in public debate on tolerance and non-discrimination. The need for such political leadership is even greater since the events of September 11<sup>th</sup>.*

## 2.4 Europe's Responsibility in the World

### A: The Work of the High Level Working Group

ECRE welcomed the Tampere Conclusions on partnerships with countries of origin, in particular the emphasis placed on the need for a comprehensive approach to migration and the call for a greater coherence of the internal policies of the Union. Prior to Tampere, we had supported the establishment of the High Level Working Group on Asylum and Migration (HLWG) as a potentially important step towards a more comprehensive, EU cross-pillar approach to migration and asylum policy.

The Tampere Conclusions considered as a useful contribution the first Action Plans drawn up by the High Level Working Group on six countries (Albania and its neighbouring region, Afghanistan, Somalia, Iraq, Morocco and Sri Lanka)<sup>42</sup> and called for the drawing up of further plans. ECRE has not seen, however, the concrete measures to address root causes by improving human rights and alleviating poverty in countries of origin that it had hoped for. The emphasis has been almost exclusively on migration control, as was pointed out by one of the partner countries themselves – Morocco – in a progress report on the activities of the High Level Working Group.<sup>43</sup>

According to the Commission's Scoreboard, further action plans were to be presented in April 2001, but appear to be off the agenda while the six original Action Plans are yet to be implemented. The HLWG cites obstacles met in the implementation of these Action Plans of lack of co-ordination between national administrations, difficulties in integrating migration objectives into development assistance, lack of co-operation or dialogue with some beneficiary countries and lack of a financing mechanism to implement the measures proposed. The Commission has set up a new budget line of EURO 10 million to support the implementation of migration issues of the Action Plans. The Commission will present a draft legal basis on co-operation with third countries in the area of migration and asylum to the Council in 2002.

<sup>42</sup> Action Plan for Afghanistan and neighbouring region 11424/99 JAI 73 AG 28, Action Plan for Iraq 11425/99 JAI 74 AG 29, Action Plan for Morocco 11426/99 JAI 75 AG 30, Action Plan for Somalia 11427/99 JAI 76 AG 31, Action Plan for Sri Lanka 11428/99 JAI 77 AG 32, Action Plan for Albania and neighbouring region 7886/1/00 JAI 40 AG 41.

<sup>43</sup> High Level Working Group on Asylum and Migration report to the Council in Nice, 13993/00 JAI 152 AG 36.

ECRE believes that work relating to building partnerships with countries of origin needs to continue. We were therefore encouraged by the Swedish Presidency's endorsement of the link between migration and development. During Belgium's tenure of the Presidency, Prime Minister Guy Verhofstadt warmed to the theme of 'ethical globalisation' and Interior Minister, Antoine Duquesne, in his summing up of the European Conference on Migration, remarked on *"just how interdependent and complementary the societies of the North and South really are and how, therefore, we must work together in the spirit of a community of interests and with shared responsibilities. This must be what we mean by co-development."* However, we have yet to see these ideas put into practice.

### B: Europe's Role Post-11<sup>th</sup> September

The events of September 11<sup>th</sup> have cast a shadow on Commission and Council discussions on asylum, and have dominated much of the debate in the last two months. ECRE is concerned that the fundamental principles on which the Union is founded, including democracy and human rights, will not be compromised in the search for greater security. We hope that one positive consequence of the terrible events might be greater co-ordination of the foreign, home affairs and development policies of the Union and its Member States. Within this context, we fully support the final recommendation of the Commission's overview of EU action in response to the September 11<sup>th</sup> events calling for a *"a far-reaching reflection on medium and long-term political and foreign policy responses of the Union must be set train with the aim of strengthening global governance world-wide in order to ensure sustainable and equitable development, as well as promoting dialogue between civilisations."*<sup>44</sup>

Part of Europe's responsibility is to be aware of the export value of its asylum and immigration policies. Concepts such as the 'safe third country' and the allocation of responsibility for assessing an applicant's asylum claim to the country that allowed them entry are spreading eastwards. Both Bosnia and the Federal Republic of Yugoslavia expressed their fears at a UNHCR conference in June 2001 that they would become receptacles for large numbers of asylum seekers whose claims had either not been looked at or rejected, even though they had the fewest resources and least developed asylum systems in the region. In the search for greater security and protection, a considerable risk exists that this trend will only be intensified while EU Member States seek to enhance further their powers to exclude persons from international protection on the basis of broadly defined notions of terrorism and national security. The High Commissioner for Refugees, Ruud Lubbers has highlighted the difficulties in explaining to countries, such as Pakistan, why they should treat refugees better, when Europe so often sets a poor example: *"when some public figures in far richer industrialised countries treat asylum-seekers like a modern-day version of the plague."*<sup>45</sup>

**Conclusion:** *Little progress has been made since Tampere towards addressing root causes and adopting a holistic approach to countries of origin. EU asylum and immigration policies have great export value, particularly those that restrict access to protection.*

**Recommendation 14:** *EU countries must use the opportunity of the Laeken Summit and the political will generated in the aftermath of the events of September 11<sup>th</sup> to clearly reaffirm their commitment to a comprehensive approach to countries of origin. Such commitment should be reflected in a balanced approach to issues relating to Justice and Home Affairs co-operation, national security, foreign policy and humanitarian and development aid.*

**Recommendation 15:** *Future measures on co-operation with third countries should aim at addressing the root causes of voluntary and involuntary migration including poverty reduction, protection of human rights and promotion of democratic institutions.*

**Recommendation 16:** *Member States need to recognise the global implications of their actions and ensure that common EU asylum policies serve to strengthen the global refugee protection system and responsibility sharing. Providing protection to refugees in the territory of the Union is an essential part of this.*

<sup>44</sup> Report from the Commission: Overview of EU action in response to the events of the 11 September and their likely economic impact, COM (2001) 611 final, Brussels, 17 October 2001.

<sup>45</sup> "Dialogue: Asylum-seekers easy meat for the politics of hatred", Ruud Lubbers, New Zealand Herald, 26 November 2001.

<sup>46</sup> Paragraph 9, Tampere Conclusions.

# 3. The Process of Decision Making

At Tampere, European governments agreed to work “in close co-operation with the European parliament ... promote the full and immediate implementation of the Treaty of Amsterdam, the Vienna Action Plan”.<sup>46</sup> The following section will consider progress on this issue.

## 3.1 Transparency and Democratic Control

“The area of freedom, security and justice should be based on the principles of transparency and democratic control ... open dialogue with civil society...”<sup>47</sup>

ECRE has welcomed the adoption in some of the proposals of key protection principles as advocated by UNHCR and NGOs. We have also appreciated the opportunity to respond to draft proposals put forward by the Commission and subsequently discussed by the European Parliament. We have however been concerned by the absence of transparency once the majority of draft proposals have reached the Council: the deliberations of which so far point to a substantial transformation of some proposals behind closed doors.

ECRE believes that problems of democratic deficit in asylum and immigration issues continue to persist despite changes in the decision-making processes in relation to asylum matters in the EU. The limited scope of the European Parliament's role in the process of negotiating various directives represents a worrying fact. For example, in the case of harmonization of penalties on carriers transporting third country nationals into the EU, the European Parliament asked for this initiative to be withdrawn. It was however agreed at the Council meeting on 28/29 May 2001. The absence of national parliamentary involvement in the negotiating process makes the democratic deficit more pronounced.

**Conclusion:** *To date, Council negotiations have paid insufficient attention to the views of the European Parliament. The lack of transparency has inhibited scrutiny by national parliaments and hindered the involvement of civil society.*

**Recommendation 17:** *ECRE urges the European Council to pay due attention to the views of the European Parliament. In the spirit of the Tampere Conclusions, it also calls on national parliaments to insist on greater scrutiny of their governments' positions taken in their name in the Council.*

**Recommendation 18:** *An open and informed dialogue with civil society should not be confined to the deliberations of the European Commission and Parliament but should involve input during the course of negotiations among Member States. The Council needs to ensure greater transparency in its work by making public the working versions of documents under discussion. Individual Member States should undertake to consult civil society and national refugee agencies on the positions they adopt during Council negotiations.*

## 3.2 Council Negotiations

ECRE has observed with some alarm how proposals have been transformed during negotiations within the European Council. We have noted above how the maximum duration of **Temporary Protection** was extended from two to three years and how its emergency nature was undermined. Proposals on **combating human smuggling** were only agreed once a clause that exempted from prosecution anyone not motivated by financial gain was diluted and made optional for Member States to include or not in their own national legislation.

At present, efforts are being made to push forward negotiations on the **asylum procedures** by considering further limiting opportunities for appeals, speeding up the accelerated procedures, expanding the criteria for declaring a claim ‘manifestly unfounded’ and allowing the notion of ‘safe third country’ to be applied without assessing individual asylum applicants’ circumstances.

Further the Belgian Presidency recently attempted to unblock progress on the **Family Reunion Directive**, hindered by the lack of Member States’ agreement on the definition of family unit for the purposes of family reunification. As a compromise, Belgium proposed that the core definition should be no more than a married couple with dependent children, but that Member States should be free to define it more widely if they wished. This was vetoed by at least one Member State as a standard so low as to be meaningless, but also by another State for not accommodating its proposed national legislation.

In short, we see little sign that governments are prepared to agree to any standards that would require them to change substantially or improve their national legislation. At the heart of the problem is the widespread belief amongst governments that the solution to uneven flows of asylum seekers is for those countries with higher standards to lower them. At the time of this summer's dispute between France and the UK over a reception centre for irregular migrants in Sangatte, the French Ministry of Foreign Affairs urged the British government to “give consideration to anything that can reduce the difference between the laws and practices of the United Kingdom and those of the European Union countries” since such “differences render British territory particularly attractive for all would be immigrants.”<sup>48</sup>

**Conclusion:** *In the absence of a political commitment to adjust national legislation to meet higher standards, Council negotiations are resulting in compromises that permit differences in national policy, rather than setting standards. At best, they will result in business as usual. At worst, such is the fear among Member States that their system is more ‘attractive’ than the next country's, that once ‘standards’ have been set, those countries operating higher standards may rush to lower them to the agreed level under the guise of a European agreement. The evidence so far has vindicated ECRE's concerns that agreements would be reached only at the lowest common denominator.*

**Recommendation 19:** *Governments must commit to setting meaningful standards that may require them to change their domestic legislation. Proposals currently on the table allow governments to operate higher standards than those agreed. This should be strengthened, so that governments pledge not to lower their existing national standards and not to rush towards the lowest common denominator during the process of negotiation of key asylum directives.*

<sup>47</sup> Paragraph 7, Tampere Conclusions.

<sup>48</sup> Quoted in Migration News Sheet, Migration Policy Group, October 2001.



### 3.3 Co-ordination Between National and European Legislation

**W**orse than simply wishing to preserve the status quo, governments are rushing ahead with major changes to national legislation, without waiting for European agreements. Just one month after Tampere, the UK's wide-ranging 1999 Asylum and Immigration Act introduced compulsory dispersal of asylum seekers and replaced cash welfare benefits with vouchers. A new act is already being prepared to replace it in 2002. A new Aliens law was introduced in Greece in spring 2000 and was followed in June 2000 by a change in Danish law to allow asylum seekers suspected of a criminal offence to be detained indefinitely. In April 2001, the Dutch Aliens Act entered into force, introducing a single status for all those in need of protection and a single set of rights. Austria has recently amended its Asylum Act with respect to safe third countries. The Belgian government started working on new legislation shortly after Tampere, but has lost momentum since numbers of asylum seekers dropped sharply.

The question can justifiably be posed as to whether some governments are moving swiftly to create 'facts on the ground' to strengthen their negotiating positions or to drive down standards before they are agreed at the EU level.

One encouraging sign was the decision in July 2001 by Germany's independent commission on immigration, known as the Sussmuth Commission, to recommend that Europe should decide whether people fleeing persecution by non-state agents should be considered to be refugees. Another was the Swedish government's approach to Temporary Protection. It withdrew draft legislation when the Commission produced its proposal on Temporary Protection and, once agreement had been reached at the EU level, proposed new legislation based on the European directive.

**Conclusion:** *There is little co-ordination between the legislative process at national level and the process of harmonisation of European asylum and immigration legislation. Constant changes at the national level hinder progress at the EU level and drive down the standards under negotiation.*

**Recommendation 20:** *The development of national legislation should be in line with the European asylum legislative process. Within this context, ECRE supports the proposal by the Belgian Presidency for a 'loyalty clause' whereby Member States would commit themselves not to pass national laws that conflict with EU proposals under discussion.*

*European Council on Refugees and Exiles  
November 2001*

# 4. Annex A: Progress to Date

The following proposals have been adopted or are currently under discussion:

## ASYLUM POLICY

### Adopted

Council Directive 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 (2001/55/EC), 11 December 2000.

Council Decision establishing a **European Refugee Fund** as a solidarity measure to promote a balance in the efforts made by Member States in receiving and bearing the consequences of receiving refugees and displaced persons (2000/596/EC), 28 September 2000.

Council Regulation concerning the establishment of **EURODAC** for the comparison of fingerprints for the effective application of the Dublin Convention on the State responsible for examining applications for asylum lodged in one of the European Union Member States, (2725/2000/EC), 11 December 2000.

### Under discussion

Communication from the Commission to the Council and the European Parliament on a **common asylum procedure** and a uniform status, valid throughout the Union, for persons granted asylum COM (2000) 755 final of 22.11.2000.

Proposal for a Council Directive on **minimum standards on procedures in Member States for granting and withdrawing refugee status** COM (2000) 578 final of 20.09.2000.

Proposal for a Council Directive laying down **minimum standards on the reception of applicants for asylum** in Member States COM (2001) 181 of 3 April 2001.

Proposal for a 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. ('Dublin II'), COM (2001) 447 final of 26.07.2001.

Proposal for a Council Directive laying down **minimum standards for the qualification and status of third country nationals and stateless persons as refugees**, in accordance with the 1951 Convention relating to the status of refugees and the 1967 protocol, or as persons who otherwise need international protection. COM (2001) 510 final of 12.09.01.

## MIGRATION CONTROL AND PARTNERSHIP WITH COUNTRIES OF ORIGIN

### Adopted

Council Regulation 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, (2001/539/EC) 15 March 2001.

Council Directive on mutual recognition of decisions on the **expulsion of third country nationals**, (2001/40/EC), 28 May 2001.

Council Directive 2001/51/EC supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, (2001/51/EC), 28 June 2001.



### *Under discussion*

Initiative of the French Republic with a view to the adoption of a Council Directive on combating illegal immigration: **facilitation of unauthorised entry**, movement and residence (2000/0821/CNS) 3 August 2000; and French Initiative with a view to the adoption of a Council Framework Decision on combating illegal immigration: **penal framework** to prevent the facilitation of unauthorised entry and residence, (CNS/2000/0820) 3, August 2000.

Proposal for a Council Framework Decision on **combating trafficking** in human beings, COM (2000) 854 final/2 – CNS/2001/0024), 21 December 2000.

Communication from the Commission to the Council and the European Parliament on a common policy on **illegal immigration**, COM(2001) 672 final, 15.11.2001.

### *Pending*

Communication from the Commission to the Council and the European Parliament on a **Community return policy**.

Proposal for a Council Decision adopting an action programme for administrative co-operation in the fields of visas, asylum, immigration and other policies related to free movement of persons (ARGO).

## COMMON IMMIGRATION SYSTEM

### *Under discussion*

Proposal for a Council Directive on the right to **family reunification**, JO C 116 E/66 of 26.04.2000 and COM (1999) 638 final of **1.12.1999**.

Amended proposal for a Council Directive on the right to family reunification, COM (2000) 624 final of 10.10.2000.

Communication from the Commission to the Council and the European Parliament on a **Community Immigration Policy**, COM (2000) 757 final of 22.11.2000.

Proposal for a Council Directive concerning the status of third country nationals who are **long term residents**, COM (2001) 127 of 13 March 2001.

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## PENDING

Proposal for a Council Directive on the **conditions of entry and residence of third country nationals for the purpose of study and vocational training** (1<sup>st</sup> half 2002).

Proposal for a Council Directive on the **conditions of entry and residence of third country nationals for non-remunerated purposes** (1<sup>st</sup> half 2002).





# About ECRE

**T**he European Council on Refugees and Exiles (ECRE) is the European umbrella organization for co-operation between European NGOs concerned with refugees and asylum seekers. ECRE works through research, information, policy development and advocacy with and on behalf of its pan-European membership for humane, fair and comprehensive asylum policies. Founded in 1974, ECRE is still a growing organization with 71 member agencies in 28 central and western European countries. The ECRE Secretariat in London and its office in Brussels play a key role in monitoring the policies of the European Union (EU) in relation to asylum. ECRE undertakes studies and publishes policy papers in co-operation with its member agencies throughout Europe on issues relevant to the development of European refugee law and policy. A list of publications is available from the ECRE Web-site ([www.ecre.org](http://www.ecre.org)). Integral to the work of ECRE is the importance of dialogue between the civil society sector, the European Institutions and European governments.

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