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## **BROKEN PROMISES - FORGOTTEN PRINCIPLES**

**AN ECRE EVALUATION OF THE DEVELOPMENT  
OF EU MINIMUM STANDARDS FOR REFUGEE PROTECTION**

**TAMPERE 1999 - BRUSSELS 2004**

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## SUMMARY

Five years on from Tampere, the European Union (EU) finds itself in the wake of its historic enlargement to 25 countries and at the end of the first phase of harmonising its countries' asylum and immigration laws. It is therefore time for civil society to deliver its judgement on what has been achieved and it is time for the European Council on Refugees and Exiles (ECRE) to judge if refugee protection in Europe has been improved.

The promise of protection delivered by the EU Heads of State at the Tampere Summit in 1999 left many of us full of hope that harmonisation would bring better protection for persons fleeing persecution and better solutions to the problems faced by governments. What we went on to witness was five years of difficult negotiations not driven by the spirit of Tampere, but driven by most European governments' aim to keep the number of asylum seekers arriving as low as possible and by their concerns to tackle perceived abuses of their asylum systems. Countries showed little sense of solidarity and pursued their narrow national agendas at great cost to refugees and to the building of a fair and efficient European protection system. This took place in a generally deteriorating public climate of growing hostility towards asylum seekers and refugees, and widespread irresponsible media reporting compounded by a lack of political leadership at national level.

ECRE's assessment finds that the EU has adopted a package of laws that will not ensure that asylum seekers and refugees will get effective protection across the whole of the newly enlarged European Union. These laws will not be able to effectively tackle the need for countries to share the responsibility of receiving refugees and hardly approximate national practices.

- ❑ Progress towards the realisation of the commitments made at the 1999 Tampere Summit has been disappointing.<sup>1</sup> The last five years represent a missed opportunity to focus on the protection and integration of refugees, rather than deterrence, and to set standards in line with international refugee and human rights law.
- ❑ Many provisions agreed, such as those on the 'safe third country', 'super safe third country', safe country of origin, internal protection and appeals, lack the necessary safeguards to ensure anyone seeking asylum cannot be sent to a country where they may face persecution, including death, torture or degrading treatment. Unless Member States implement safeguards they may breach their *non-refoulement* obligations under international law.

*"The cumulative effect of these proposed measures is that the EU will greatly increase the chances of real refugees being forced back to their home countries."*

**Ruud Lubbers, UN High Commissioner for Refugees**

UNHCR Press Release: Lubbers calls for EU asylum laws not to contravene international law, 29 March 2004

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<sup>1</sup>The European Commission has in its own assessment acknowledged that *"the objectives set at Tampere have not yet all been achieved"*, Communication Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations, COM(2004) 4002 final, 2 June 2004, page 7.

- ❑ Some provisions allow unacceptable derogations from the minimum standards which, if implemented, would lead States to breach their obligations under international refugee and human rights law, in particular the 1951 Refugee Convention and the European Convention on Human Rights.<sup>2</sup> One example is the Directive on Family Reunification which has failed to guarantee the protection of the family and respect of family life as enshrined in the European Convention on Human Rights and the rights of the child as enshrined in the UN Convention on the Rights of the Child.<sup>3</sup> It was on this basis that the European Parliament requested the European Court of Justice to review the legality of the Directive.
- ❑ The ‘absolute respect of the right to seek asylum’, as reaffirmed at Tampere, has been totally undermined. There has been a significant emphasis in the EU’s work on the fight against illegal immigration to the detriment of the development of adequate safeguards for refugee protection or measures and procedures on admission and legal migration to the EU. The situation is now one whereby the act of seeking asylum in Europe has effectively been criminalised.

*“...when refugees cannot seek asylum because of offshore barriers, or are detained for excessive periods in unsatisfactory conditions, or are refused entry because of restrictive interpretations of the Convention, the asylum system is broken, and the promise of the Convention is broken, too.”*

**Kofi Annan, UN Secretary General**, Address to the European Parliament, 29 January 2004.

- ❑ Recognition of the 1951 Refugee Convention within EU legislation as the standard of reference reaffirms its continuing relevance as the instrument for refugee protection, which is particularly positive in light of the fact the legislation now applies to 25 countries in an enlarged EU.<sup>4</sup>
- ❑ Other developments have the potential to bring about positive changes in refugee protection in Europe, such as the requirement on all EU Member States to grant asylum to persons who qualify as a refugee according to the 1951 Refugee Convention, to grant subsidiary forms of protection and to recognise non-State actors of persecution.
- ❑ Few safeguards to ensure asylum seekers have access to fair and efficient asylum procedures have been agreed, and even those agreed are not guaranteed due to the many conditions under which Member States can derogate from them. States should never be exempt from implementing certain basic standards such as access to free legal advice for all asylum seekers who require it.

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<sup>2</sup> On this basis ECRE and other European NGOs, including Amnesty International and Human Rights Watch, called for the withdrawal of the draft Asylum Procedures Directive on several occasions. See Press Releases: ‘Refugee NGOs in more than 30 European countries reject draft directive on asylum procedures’, 28 Sept 2003, ‘Refugee and human rights organisations across Europe call on EU to scrap key asylum proposal’, 29 March 2004, ‘Refugee and human rights organisations across Europe express their deep concern at the expected agreement on asylum measures in breach of international law, 28 April 2004, [www.ecre.org](http://www.ecre.org)

<sup>3</sup> On this basis the European Parliament asked the European Court of Justice in December 2003 to review the legality of this legislation.

<sup>4</sup> The Protocol to the Amsterdam Treaty on Denmark leaves this country outside the scope of EU legislation on asylum and migration, while the Protocol on the UK and Ireland allows these countries to “opt-in” if they so wish in the negotiation and/or implementation of EU legislation on asylum and migration.

- ❑ The standards of protection agreed in relation to the reception of asylum seekers are for the most part adequate *minimum* standards. However the many aspects of these standards left to the discretion of Member States and the exceptions allowed will not ensure that differences in standards of protection between Member States are eliminated.
- ❑ Provisions have been agreed allowing Member States to deny asylum seekers support, and leave them destitute during the reception phase, unable to access social assistance, health care, employment and integration programmes. Such measures undermine the process of integration of persons recognised as in need of international protection in their host societies.
- ❑ The EU has clearly differentiated between persons with refugee status and those with subsidiary forms of protection by systematically according the latter a lower level of rights and excluding them completely from others such as the right to family reunification. This will negatively impact their ability to integrate into their host societies. Persons with subsidiary forms of protection may be fleeing the risk of serious harm, such as torture, and should be accorded the same rights as persons with 1951 Refugee Convention status.
- ❑ Responsibility-sharing between EU countries has not been sufficiently improved and in fact disproportionate responsibility will increasingly fall on Member States with southern and eastern EU external borders as a result of the mechanism agreed to allocate responsibility.
- ❑ The EU's prioritisation of measures to fight illegal immigration over fighting the root causes of refugee flight and improving refugee protection in third countries has led to a considerable lack of coherence between the EU's measures to integrate migration issues into external policies and its human rights and development co-operation policies and objectives.
- ❑ The minimum standards agreed should help raise protection standards in Central and Eastern European Member States. At the same time the criteria for the responsibility-sharing mechanism risk overwhelming these countries' asylum systems while they remain the most under-resourced and under-developed systems in the EU.
- ❑ The harmonisation process did not maintain sufficient transparency nor opportunities for effective democratic control or meaningful dialogue with civil society. This was in part due to the limited powers of the European Parliament under the decision-making process and also due to the Council of Ministers' frequent disregard of the views of the European Parliament and of civil society.
- ❑ The Amsterdam Treaty decision-making process has allowed for the 'worst practices' of individual States to be transposed into EU legislation, thus allowing their export to other EU Member States rather than fostering the sharing of best practice.

The Procedures Directive "*permits a number of other restrictive and highly controversial practices that are currently only contained in one or two member states national legislation but could, as of 1 May 2004, be inserted in the legislation of all 25 EU States*".

UNHCR Press Release: UNHCR regrets missed opportunity to adopt high EU asylum standards, 30 April 2004

- There has been a clear failure to achieve a significant level of harmonisation of asylum laws across the European Union. Far too many important provisions have been left to the discretion of Member States with either no guiding principles or very few, demonstrating how agreement has been reached at the lowest common denominator. Asylum seekers therefore continue to face a protection lottery in Europe.
- The minimal level of harmonisation has failed to produce the many potential benefits to refugees and to Member States that could have resulted from addressing the transnational issue of asylum at a European level. Governments have lacked the necessary political will and maturity as well as the vision to collectively tackle the challenges of forced migration.<sup>5</sup>

#### *What Next?*

- Transposition and implementation of the EU legislation at national level should lead to the raising of standards where they currently fall below the EU standard set. The EU legislation does not have the objective of lowering existing standards. Where national standards are currently higher than the agreed EU standards, Member States are under no obligation to amend their legislation or to make use of the derogations allowed. Indeed, Member States should not drop their standards to the minimum level set by the EU but should maintain their higher standards in order to continue working towards the achievement of the Tampere commitments they signed up to.
- The roles of the European Commission and European Court of Justice in the implementation phase are central. The necessary resources must be made available in order to ensure that the Commission can fulfil its monitoring and reviewing role. The role of NGOs as important partners in this process is also crucial and should be strengthened and supported.
- It is of crucial importance that the processes of transposition and monitoring be prioritised, in order to ensure that an adequate assessment of the impact of this set of minimum standards on refugees in Europe informs any further harmonisation.
- The community of refugee-assisting organisations is committed to increased and constructive dialogue with European governments, institutions and policy-makers. On this basis ECRE will be putting forward in the near future a set of comprehensive proposals on how Europe can more effectively achieve concrete improvements in refugee protection.

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<sup>5</sup> This has been acknowledged by the European Commission both in its Communication on the common asylum policy and the Agenda for protection, COM(2003) 152, 26 March 2003 and its recent assessment of the Tampere programme, where it states “*the original ambition was limited by institutional constraints, and sometimes also by a lack of sufficient political consensus*”, Communication Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations, COM(2004) 4002 final, 2 June 2004, page 5.

## INTRODUCTION

The adoption of the Amsterdam Treaty by the 15 Member States of the European Union in 1997 marked the beginning of a new era for asylum policy-making in Europe by establishing that EU-wide binding minimum rules on asylum and immigration should be developed. Following the Amsterdam Treaty's entry into force in May 1999, the EU's Heads of State or Government held a summit in Tampere, Finland, on 15-16 October 1999, and adopted the political guidelines that constituted the framework in which the EU's policies and legislation on asylum and immigration were to be developed. At the end of the first phase of this process, ECRE takes note of the European Commission's recent Communication comprising its own assessment of the results to date in establishing an area of freedom, security and justice. Through this report ECRE looks back and makes its own assessment of whether what has been achieved matches the EU's stated intentions at Tampere and contributes to improving refugee protection in Europe.

The Amsterdam Treaty set the course for the gradual transferral of asylum policies out of the purely intergovernmental decision-making processes. This was envisaged as a process with an initial five-year period, ending on 1 May 2004, during which legislation setting out minimum standards would be adopted under a decision-making system still weighted in favour of the Member States. After this time, measures strengthening the powers of the European Commission and the European Parliament could come into effect.

Title IV of the Amsterdam Treaty on visas, asylum, immigration and other policies related to the free movement of persons established a number of objectives for this five-year period. Article 63 sets the framework for the development of EU minimum standards in the following areas:

- criteria and mechanisms for determining which Member State is responsible for considering an application for asylum;
- the reception of asylum seekers;
- the qualification of nationals of third countries as refugees;
- procedures for granting or withdrawing refugee status;
- temporary protection to displaced persons and for persons who otherwise need international protection;
- promoting a balance of effort in receiving displaced persons between Member States.

Article 63 also foresees the development of provisions on immigration issues such as the issuing of long-term visas and residence permits, including for the purposes of family reunion, and defining the rights and conditions under which legally resident third country nationals in one Member State may reside in another Member State.<sup>6</sup>

The Tampere Conclusions represent an important watershed in the development of an EU refugee protection regime in the way they:

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<sup>6</sup> These immigration measures, as well as the balance of effort between Member States in receiving displaced persons, are exempt however from the five-year period rule in Article 63 of the Amsterdam Treaty.

- affirm the Union’s commitment to “an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention<sup>7</sup> and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity”.<sup>8</sup>
- noted the need for developing a comprehensive approach to migration that provides for greater coherence between the Union’s internal and external policies. Underpinning such an approach would be the Union’s work towards addressing political, human rights and development issues in countries and regions of origin through “combating poverty, improving living conditions and job opportunities, preventing conflicts and consolidating democratic states and ensuring respect for human rights, in particular rights of minorities, women and children”.<sup>9</sup>
- underlined the importance of upholding the principles of transparency and democratic control through an open dialogue with civil society in order to strengthen citizens’ acceptance and support of the policies.<sup>10</sup>

In the area of asylum, the Tampere Conclusions set some clear parameters for the Union’s work:

- they affirm an “absolute respect of the right to seek asylum” and of the need to ensure that nobody is sent back to persecution, i.e. maintaining the principle of *non-refoulement*;<sup>11</sup>
- the need for “a more vigorous integration policy” is highlighted that would grant such persons rights and obligations comparable to those of EU citizens while enhancing non-discrimination in economic, social and cultural life;<sup>12</sup>
- in the long term, the development of a common asylum procedure and a uniform status for those who are granted asylum valid throughout the EU is proposed.

With these mandates and guidelines, the EU engaged in the process of negotiating a range of legislative instruments setting minimum standards on asylum and immigration. The following were the key instruments adopted relevant to the protection of refugees within the EU:

- Temporary Protection Directive;<sup>13</sup>
- Reception Directive;<sup>14</sup>
- Dublin II Regulation;<sup>15</sup>

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<sup>7</sup> Convention relating to the Status of Refugees of 28 July 1951.

<sup>8</sup> Tampere European Council 15/16 October 1999, Presidency Conclusions, para 4.

<sup>9</sup> *ibid*, para 11.

<sup>10</sup> *ibid*, para 7.

<sup>11</sup> *ibid*, para 13.

<sup>12</sup> *ibid*, para 18.

<sup>13</sup> Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on the measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

<sup>14</sup> Council Directive 2003/9/EC of 27 January 2003 on laying down minimum standards for the reception of asylum seekers.

<sup>15</sup> Council Regulation (EC) No 343/2003 of 18 February 2003 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.

- Family Reunification Directive;<sup>16</sup>
- Qualification Directive.<sup>17</sup>

The Procedures Directive was not adopted within the 1 May 2004 deadline set but a ‘general approach’ was politically agreed just before on 30 April 2004. It is hoped by the European Commission (EC) and the Council of Ministers that the adopted document will not differ significantly from this text. ECRE’s comments are therefore based on this text.<sup>18</sup>

A second phase of harmonisation is due to follow in order to move forward on the longer term goals expressed at Tampere going beyond minimum standards.

This report examines whether, after the completion of the first phase of harmonisation on 1 May 2004, developments meet the original expectations and commitments made by EU Member states in October 1999 in Tampere. A series of key questions based on these commitments are posed, and provisions from the instruments adopted are drawn on to illustrate where they do and do not achieve the Tampere goals. In this way this evaluation seeks to assess:

- ❑ the progress made towards the effective development of the principles set out by the Tampere Summit;
- ❑ the level of compliance with international and regional human rights and refugee law principles and standards.

This report does not aim to be a comprehensive analysis of all the asylum and immigration measures adopted but rather a more general assessment of whether an adequate package of measures has been developed that enhances the cohesion and efficiency of asylum systems from the perspective of Member States while guaranteeing effective protection to individuals fleeing persecution.

A few case studies and hypothetical scenarios are also presented to illustrate how the application of certain provisions is likely to (or do) affect individual refugees.

Finally, the annex highlights the key measures of concern to ECRE in each of the instruments, why they are of concern and makes recommendations in relation to their transposition.<sup>19</sup>

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<sup>16</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

<sup>17</sup> Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, Doc: 8043/04, Asile 23, 27 April 2004.

<sup>18</sup> Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, Doc. 8771/04, Asile 33, 29 April 2004.

<sup>19</sup> The full texts of all the instruments referred to in this report as well as all ECRE’s comments and analysis are available on the ECRE website at: [www.ecre.org](http://www.ecre.org), under Policy and Research/EU Developments.

## **THE EU'S NEW MINIMUM STANDARDS: A REFLECTION OF THE TAMPERE GOALS?**

### **1. COMPLIANCE WITH THE *NON-REFOULEMENT* OBLIGATION**

**Has the EU maintained the fundamental principle and obligation of *non-refoulement* in such a way as to ensure that no person can ever be sent back to persecution?**

The right to protection against *refoulement* is enshrined in Article 33 of the 1951 Refugee Convention; Article 3 of the European Convention on Human Rights (ECHR); Article 3 of the Convention Against Torture; Article 7 of the International Covenant on Civil and Political Rights; and Articles 18, 19 and 47 of the Charter of Fundamental Rights of the European Union. This international human rights law demands, without any exception, that States do not send persons to countries to face death, torture, or degrading or inhuman treatment. Where States are considering sending an asylum seeker to another country, they must, therefore, undertake an individual examination of the particular circumstances of each asylum seeker and provide a right of appeal whilst the applicant remains in the country where asylum has been requested in order to ensure that the third country is indeed safe for that person before sending him/her to that country. It is of the deepest concern that the EU legislation agreed fails to adequately ensure these safeguards and, therefore, fails to ensure that EU States will not send persons to countries where they will face persecution. Unless EU Member States ensure that their national legislation does provide these safeguards, there is a clear risk that EU States will send persons to countries to face persecution, torture, and death in violation of international law.

In this regard, the Procedures Directive is gravely flawed as it permits Member States to deny an individual examination of the asylum application and to return asylum seekers to countries outside the EU without properly making sure that these countries are in fact safe for those persons.<sup>20</sup>

#### 'Safe Third Country' Concept

Under international refugee law, the primary responsibility for international protection remains with the State where the asylum claim is lodged. A transfer of such responsibility to a third country can only be envisaged under certain circumstances and in the case of their being a link between an asylum applicant and that third country, this link must be meaningful. However as agreed within the Procedures Directive, the concept of the 'safe third country' is aimed at helping Member States shirk the responsibility of processing asylum claims lodged within their territory and shifting it to other States outside the Union. Currently the Directive stipulates only four criteria as necessary for a third country to be considered 'safe': i) asylum seekers' lives or freedom must not be threatened on account of race, religion, nationality, membership of a particular social group or political opinion; ii) countries must respect the principle of *non-refoulement*; iii) there can be no risk of the person being removed to another country where they may face torture and cruel, inhuman and degrading treatment; iv) and they must be able to request and be granted refugee protection in that third country.<sup>21</sup> However these criteria are insufficient and fail to ensure that a person is only sent to a country which has ratified and implemented the 1951 Refugee Convention, adheres to other human rights standards and has an asylum procedure in place prescribed by law. The burden of proof regarding the safety of the third country for each applicant should also, in ECRE's view, lie entirely with the country of asylum. Rules governing the establishment of a meaningful link

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<sup>20</sup> ECRE is concerned that the right to an effective remedy provided for will remain a 'dead letter' in practice.

<sup>21</sup> Procedures Directive, Article 27.1

between an applicant and a third country have been left for Member States to define. The definition of a meaningful link may therefore vary widely from country to country and very weak criteria could be used such as mere transit.

#### ‘Super Safe Third Country’ Concept

The Directive has also formalised the ‘super safe third country’ concept, under the guise of an exceptional border procedure,<sup>22</sup> which up until now has been practised by just a couple of Member States. This concept allows no examination of an application or of the safety of an applicant, when they have travelled through a third country which has ratified the 1951 Refugee Convention and the European Convention on Human Rights, observes their provisions, and has an asylum procedure in place prescribed by law.<sup>23</sup> Despite the fact that Member States are required to take the principle of *non-refoulement* into account in devising the rules to implement this provision, it is unacceptable that Member States are allowed to outright deny access to an asylum procedure to all asylum seekers arriving from such countries and strip them of any rights to rebut the presumption of safety. The risks of *refoulement* are clear and given that under this ‘super safe third country’ provision Member States are also not obliged to obtain assurances that the third country will process the asylum claim. This could also lead to situations of refugees in orbit and to *chain-refoulement*, whereby they could be continually transferred between countries and eventually sent back to their country of origin without at any point having accessed an asylum procedure.<sup>24</sup>

#### ‘Safe Country of Origin’ Concept

The ‘safe country of origin’ concept, also already practised by some Member States at national level, is premised on the view that certain countries do not generally violate international human rights law and do not, therefore, produce refugees. The Procedures Directive exports the use of this concept across the EU by foreseeing a common list of safe countries of origin which would be binding on all Member States.<sup>25</sup> This concept allows applications from nationals of such countries to be considered ‘unfounded’, and Member States to restrict access to a regular asylum procedure by putting them through an ‘accelerated procedure’. Therefore, while the individual may rebut the presumption of safety, they may be required to do so during an ‘accelerated procedure’ and with the burden of proof lying exclusively on them. Member States who use this concept at the national level are also allowed to maintain their current lists of ‘safe countries of origin’. This provision fundamentally conflicts with the principle, enshrined in the 1951 Refugee Convention, that every person should have the right to lodge an asylum application and have it considered on an individual basis.

#### Suspensive Effect of Appeals

The right of asylum applicants to remain in the country processing their application pending a final decision on their case is essential for Member States to comply with their *non-refoulement* obligations. In the Procedures Directive however this right is seriously compromised by the failure to require the suspensive effect of appeals,<sup>26</sup> guaranteeing the right of all asylum seekers to remain in

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<sup>22</sup> *ibid*, Article 35A.

<sup>23</sup> *ibid*, Article 35A (2).

<sup>24</sup> See footnote 20.

<sup>25</sup> *ibid*, Article 30.

<sup>26</sup> *Ibid*, Article 38.

the territory of the EU until the final outcome of their claim and is therefore in breach of the ECHR.<sup>27</sup>

An applicant from the Roma community in Romania had been detained and ill-treated by the police in his local area as a result of his ethnicity and pro-Roma political activity. His numerous complaints to the Romanian authorities had been ignored and his persecution continued. He therefore fled to the UK to claim asylum with his wife and four children, where they were detained at a 'reception centre'. His claim was considered under an accelerated procedure, found to be "clearly unfounded" and rejected. This removed his right to remain in the UK during an appeal (no suspensive effect) and so despite lodging an appeal the applicant and his family were sent back to Romania. But the applicant encountered further problems with the police as a result of his high profile and continued political activities, so he and his family then fled to Italy. In the meantime his out-of-country appeal was allowed by an adjudicator in the UK on the basis that he was a refugee and that his rights under Article 3 of the ECHR had been violated by his removal from the UK. The Home Office lost its appeal on that decision and had to allow the applicant and his family back into the UK. The applicant and his family have now been granted refugee status in the UK.

*Case Study from the UK*

## **2. COMPLIANCE WITH THE 1951 REFUGEE CONVENTION AND HUMAN RIGHTS LAW**

**Can progress made since the Tampere Summit be said to reflect a European Union 'fully committed to the obligations of the 1951 Refugee Convention' and other relevant human rights instruments, and are the measures agreed based on a 'full and inclusive application of the Convention'?**

The EU has overseen the development of some provisions which seek to ensure that EU Member States fulfil their obligations under the 1951 Refugee Convention and which are based on a full and inclusive application of the Convention. Notably the Qualification Directive, which defines who falls under the definition of a refugee and what minimum rights and benefits they are entitled to, introduces an express obligation for Member States to grant asylum to individuals who fall under Article 1A of the 1951 Refugee Convention. Recognition of the fact that persecution or serious harm might emanate from non-State actors,<sup>28</sup> as well as recognition of child-specific and gender-specific forms of persecution<sup>29</sup> are also significant in the promotion of an inclusive application of the 1951 Refugee Convention, because although some countries already apply these principles, many favour restrictive interpretations of their obligations, so divergent practices should be mitigated.

### *Non-refoulement*

The fundamental obligation to not return persons seeking asylum to a place where they may face persecution (*non-refoulement*) in the 1951 Refugee Convention is not safeguarded by EU legislation and may result in Member States breaching not only their obligations under the 1951 Refugee Convention but also under the European Convention on Human Rights (ECHR). This is due in

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<sup>27</sup> It should here be noted that in some Member States an important number of decisions at appeal stage are in favour of the asylum applicant, e.g. in 2003 in Ireland though only 345 persons were recognised as refugees at first instance, 829 received a positive decision at appeal.

<sup>28</sup> Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, Doc: 8043/04, Asile 23, 27 April 2004, Article 6

<sup>29</sup> *ibid*, Article 9, 2 (f).

particular to the provisions in the Procedures Directive<sup>30</sup> on ‘super safe third countries’, ‘safe third countries’, and the lack of adequate appeal safeguards, which also do not comply with the right to an effective remedy in Article 13 of the ECHR.<sup>31</sup> ECRE has consistently expressed its strong concerns regarding breaches of international law in the Procedures Directive to the point of having called for this piece of legislation to be withdrawn from the EU negotiating table, together with many other NGOs.<sup>32</sup> UNHCR has also publicly stated that the Directive “may lead to breaches of international refugee law”.<sup>33</sup>

### Internal Protection

In the Qualification Directive Member States may refuse international protection if they judge that there is a part of the country of origin where the applicant would not be subject to persecution and the applicant “can be reasonably expected to stay” in that area.<sup>34</sup> However, no criteria to guide Member States in taking such a decision have been included.

Such criteria are needed to ensure that the asylum applicant would be able to reach the so-called safe area in secure conditions, access a level of protection equal to that accorded by the 1951 Refugee Convention in the area of the country of origin considered ‘safe’, and that there is clearly no risk that the asylum seeker could be forced back into the area where they fear persecution. Further points of concern are the fact that this internal protection alternative is not ruled out for cases where the persecution emanates from State actors and international protection can still be denied where a person cannot be returned to the area of the country of origin for technical reasons.

A Somali woman, belonging to the Reer Hamar minority in Somalia, fled from the south of Somalia where her father was killed and she was the victim of rape. She applied for asylum in the Netherlands and her claim was processed in a 48-hour accelerated procedure. The Dutch authorities found that the violence against her and her family was the result of ‘generalised violence’ in Somalia, that she was not individually targeted because of her ethnic background and therefore not a refugee. They rejected her claim and decided that internal protection would be available to her in northern Somalia, though the State’s own country reports acknowledge that the situation for single women with no clan or family ties in northern Somalia is extremely dangerous. The fact that she could not return directly to northern Somalia was not considered relevant as the Dutch authorities deport Somalis to Dubai, from where they have to travel by themselves into northern Somalia. She found herself on the streets and was offered just three hours to discuss her case with a lawyer in order to appeal the negative decision. During the appeal procedure she was not given any social assistance and the relevant court eventually upheld the negative decision.

*Case Study from The Netherlands*

### Subsidiary Protection

Some measures agreed do uphold States’ commitments in relation to human rights instruments. The elaboration of a common definition of what constitutes serious harm to qualify for subsidiary protection, for instance, represents an important step towards the recognition of Member States’ obligations under international human rights law to provide international protection to persons falling outside a full and inclusive interpretation of the 1951 Refugee Convention. However, the grounds that give rise to this status<sup>35</sup> do not reflect the full spectrum of these obligations as

<sup>30</sup> See Question 1 for full details.

<sup>31</sup> This is held by the European Court of Human Rights, see *Conka vs. Belgium*, Judgment of 5 February 2002 concerning the deportation of asylum seekers: “it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention”.

<sup>32</sup> See ECRE Press Release: *Appalling flaws in Directive on Asylum Procedures still not addressed*, 25 November 2003 & ECRE Letter: *Call for withdrawal of Asylum Procedures Directive*, 22 March 2004.

<sup>33</sup> UNHCR Press Release, *UNHCR regrets missed opportunity to adopt high EU asylum standards*, 30 April 2004.

<sup>34</sup> Qualification Directive, Article 8.

<sup>35</sup> *ibid*, Article 15

interpreted by the European Court of Human Rights and other international monitoring bodies. Protracted negotiations among Member States also undermined the moves towards providing protection to persons falling outside the scope of the 1951 Refugee Convention by failing to guarantee them the same level of rights to those granted full refugee status.<sup>36</sup>

#### Family Reunification and the Rights of the Child

A positive development is that some of the legislative texts mention the need for Member States to take the best interests of the child into consideration throughout and/or in the application of certain provisions to establish safeguards for unaccompanied minors, in accordance with the UN Convention on the Rights of the Child (UNCRC), such as the Reception Directive in relation to keeping siblings together and family tracing.<sup>37</sup>

Such gains are overshadowed by the adoption of measures which allow for potentially serious violations of other important principles and obligations under international human rights law. In the Family Reunification Directive, despite an assertion that “special attention should be paid to the situation of refugees” and “more favourable conditions should therefore be laid down”,<sup>38</sup> the provisions do not guarantee the protection of the family and respect for family life according to Article 8 of the ECHR and the Charter of Fundamental Rights.

Examples are the way Member States may require refugees and their spouses to be of a minimum and maximum age before the spouse can join them,<sup>39</sup> and the absence of family reunion rights for beneficiaries of a subsidiary form of protection. The Directive also contains provisions allowing Member States to subject children over 12 to an integration test before letting them join their parents, and to simply not grant the right to family reunification to children over the age of 15.<sup>40</sup> These provisions breach Article 10 of the UNCRC which provides that applications by any child to enter a State Party for the purpose of family reunification should be dealt with in a positive, humane and expeditious manner and they also do not conform with the principle under Article 1 of the UNCRC<sup>41</sup> defining a child (who is entitled to the rights therein) as every human being below the age of 18 years.

A girl of 16 arrived in France alone to claim asylum. She was fleeing life as a child soldier in Sierra Leone where she was also the victim of severe sexual persecution. During her asylum application she was housed in a centre together with adults where she felt very vulnerable especially because of the presence of other male asylum seekers. One year on she was granted a subsidiary form of protection. Though she had lost trace of her parents, with the help of the Red Cross an aunt was traced in nearby Belgium. Though her right to family reunification would not have been guaranteed before the entry into force of the EC Family Reunification Directive, due to the particulars of her case the French authorities would have considered the merits of granting family reunification. However the French government had started to implement the derogation allowing them to not consider claims from children older than 15, and her request was rejected. She has not been reunited with her aunt and will remain in a children's care home in France until the age of 18.

*Hypothetical Scenario*

The gravity of these breaches is reflected by the fact that the European Parliament has challenged the legality of this Directive before the European Court of Justice (ECJ).<sup>42</sup> The results of this action will

<sup>36</sup> See Question 7 for further details.

<sup>37</sup> Reception Directive, Article 19 2 & 3.

<sup>38</sup> Family Reunification Directive, Preamble, para. 2 and para. 8.

<sup>39</sup> *ibid* Article 4.5. See also ECRE Information Note on the Council Directive 2003/86/ EC of 22 September 2003 on the right to family reunification, October 2003.

<sup>40</sup> *ibid*, Article 4 (1) and (6).

<sup>41</sup> United Nations Convention on the Rights of the Child 1989 to which all EU Member States are signatories.

<sup>42</sup> On 16 December 2003, the President of the European Parliament instituted proceedings at the European Court of Justice to annul the directive on family reunification.

be of much interest in view of the fact that UNHCR and NGOs including ECRE have expressed equally grave concerns with regard to the Procedures Directive.<sup>43</sup>

### **3. ACCESS TO THE EUROPEAN UNION**

**At Tampere the EU firmly underlined the importance of the ‘absolute respect of the right to seek asylum’. Has the EU fulfilled this aim and do the measures agreed offer sufficient guarantees to allow any person fleeing persecution to access the EU territory?**

The message from the Tampere Summit was widely understood to have comprised a commitment on the part of the EU to ensure a balanced approach in full compliance with absolute respect of the right to seek asylum when introducing immigration control measures in the fight against illegal immigration. A European Commission proposal provided that “measures relating to the fight against illegal immigration have to balance the right to decide whether to accord or refuse admission to the territory to third country nationals and the obligation to protect those genuinely in need of international protection”.<sup>44</sup> In contrast with their laborious approach to developing asylum legislation, Member States have been prolific in the development of joint ‘migration management’ tools, such as the strengthening of external border checks and other immigration controls. Many of these measures are binding and have a potentially huge impact on refugees.

The increased use of control measures have severely hindered refugees from exercising their right to seek asylum in Europe. During the last five years, the EU has invested millions of Euros increasing the number of border guards, strengthening maritime surveillance, using helicopters and surveillance equipment such as infra-red detection devices, exploring the use of satellites to detect persons crossing borders, and using biometric and fingerprinting equipment.<sup>45</sup> In addition, there has been agreement to set up EU-wide agencies, such as a Border Management Agency, and agreement on several control focused pieces of legislation.

#### Visa Policy

The Council agreed a Regulation<sup>46</sup> establishing which non-EU nationals need a visa to enter the EU which includes a common list of 131 countries, among them a considerable number of refugee producing countries such as Afghanistan, Somalia, Sudan, and Iraq. Though exemptions can be implemented for persons admitted to the territory of a Member State as part of a temporary protection programme,<sup>47</sup> wider exemptions from visa requirements are clearly necessary for persons fleeing countries where there are civil wars or systematic abuses of human rights, to enable them to gain access to Europe legally.<sup>48</sup>

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<sup>43</sup> See footnote 30 for full details.

<sup>44</sup> Communication on a Common Policy on Illegal Immigration, European Commission, COM (2001) 672 final, 15.11.2001 (para. 3.2.)

<sup>45</sup> An EU-wide system of collecting the fingerprints of asylum seekers in a database called EURODAC was developed to work as a complementary tool to the Dublin II Regulation and prevent ‘asylum shopping’. It came into force on 1 January 2003.

<sup>46</sup> Council Regulation (EC) No 539/2001 of 15 March 2001 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.

<sup>47</sup> Temporary Protection Directive, Article 8.3.

<sup>48</sup> See Observations on the Presidency Conclusions of the Seville European Council Meeting, 21 and 22 June 2002 ECRE, 27 June 2002.

### Carrier Sanctions

The EC Directive on Carrier Sanctions lays down the obligations of carriers transporting third country nationals into the territory of EU Member States and sets a minimum level of financial penalties of €2,000 to be imposed on them if one of their passengers is refused entry into the EU.<sup>49</sup>

A man tried to board a plane from Egypt to Germany with the intention of claiming asylum on arrival, on the grounds that he had been tortured by the Egyptian authorities. The implementation of the EC Carrier Sanctions Directive allowed the airline company to stop him from boarding the plane on the basis that he did not have a valid visa to enter Germany. He therefore undertook the journey by sea and, having managed to land on European shores, went on by land to the German border. When he arrived there the border guard decided he should be removed to a non-EU country even before the competent authority had had the chance to look into his claim. This was possible due to Germany's application of the 'super safe third country' provision. Morocco, the third country involved, was not required to guarantee Germany that it would process the application. Indeed the Moroccan authorities went on to return the Egyptian national back to Egypt. Throughout, no country undertook to examine whether he had faced persecution in Egypt and would face it again if returned.

*Hypothetical Scenario*

Transport carriers are expected to assume responsibility for returning such persons to their country of origin or to a third country, and when they cannot be returned they must "take charge" of that person and "find means of onward transportation".<sup>50</sup> The Directive did not retain an express requirement for Member States to exempt carriers from paying penalties in these cases but it clearly states in the Preamble that financial penalties should not be applied if the third country national applies for asylum. Nevertheless the Directive does not ensure *non-refoulement* nor does it provide for any access to remedies for asylum seekers who have been refused permission to travel at their point of departure or are being forced to return to a country where they may face violations of their rights. Part of the responsibility for the screening of persons in need of international protection has effectively been transferred to staff of transport companies who are untrained in refugee and human rights law, and also unaccountable for their actions under these laws.

### Network of EU Immigration Liaison Officers

In early 2004 another Regulation was adopted setting out the functions and coordination mechanisms of a network of EU Immigration Liaison Officers (ILOs) based in countries of origin.<sup>51</sup> Its aim is to prevent and combat illegal immigration, facilitate the return of illegal immigrants, and help manage legal migration through the posting of immigration liaison officers in third countries.<sup>52</sup> Certain Member States already post immigration officers at diplomatic missions in countries from which they want to reduce population movements towards their borders. Some have also placed immigration and airline liaison officers at major international airports and seaports in countries of origin and transit to prevent the embarkation of undocumented and improperly documented travellers.<sup>53</sup> Under this Directive, ILOs will also be entitled to give "assistance in establishing the identity of third country nationals and in facilitating their return to their country of origin",<sup>54</sup> with the inherent risk that protection to refugees will be denied by Member States acting in co-operation with the actual country from which protection is being sought.

<sup>49</sup> Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, Article 4 (2).

<sup>50</sup> *ibid*, Article 3.

<sup>51</sup> Council Regulation (EC) No 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network

<sup>52</sup> *ibid*, Article 1.

<sup>53</sup> For example UK immigration officers posted abroad refused entry into the UK to almost 220,000 persons in 2002. In 2003 9,827 people travelling to the UK were turned back at Calais, France, and 33,551 people were stopped from coming to the UK by UK airline liaison officers, Speech by Tony Blair on migration to the CBI, 27 April 2004

<sup>54</sup> Council Regulation (EC) No 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network, Article 2.3.

The plethora of migration control measures adopted demonstrates an imbalance in the EU's approach, whereby the political will to adopt and implement measures to reduce illegal immigration took precedence over the need for adequate safeguards to ensure access to the EU's territory for persons justifiably seeking to enter for fear of persecution. Today it is virtually impossible for asylum seekers to enter Europe legally and it is estimated that 90% of asylum seekers have to rely on illegal entry methods to access the territory of the EU. Many asylum seekers place themselves or fall into the hands of smugglers and traffickers. In 2002 for example 35 bodies were discovered at sea in Spanish territorial waters.<sup>55</sup> Similarly 3,766 stowaways were found in lorries and containers crossing to the UK from Belgian ports. The situation has become one where the act of seeking asylum in Europe has been criminalised.

The use of tools such as the 'safe third country' rule<sup>56</sup> and readmission agreements<sup>57</sup> is also aimed at facilitating the return of third country nationals and hence impacts on the right to seek asylum.

#### **4. ACCESS TO A FAIR AND EFFICIENT ASYLUM PROCEDURE**

**Do the minimum standards around procedural mechanisms agreed to date ensure that persons fleeing persecution can access protection through a fair and efficient asylum procedure?**

Some limited safeguards have been provided within the Procedures Directive such as the fact that decisions on asylum applications are to be taken individually, objectively and impartially and are to be given in writing and state the reasons in fact and in law for a rejection including information on how to challenge a negative decision.<sup>58</sup> Precise and up-to-date information is to be made available to personnel processing claims who in turn must have knowledge of relevant standards in the field of asylum and refugee law.<sup>59</sup> In addition a concept of a general examination procedure is introduced to which all procedural safeguards included in the Directive apply (but which is still not applicable to all asylum seekers).

However there are many restrictions and exemptions allowed which provide limited rights to asylum seekers while safeguarding Member States' powers to derogate from the exercise of key obligations, meaning the Directive does not guarantee a fair and efficient asylum procedure for all. ECRE believes there are five minimum guarantees from which there should *never* be derogation (even in so-called accelerated procedures): access to free legal advice, access to UNHCR/NGOs, a qualified and impartial interpreter, a personal interview and a suspensive right of appeal. Four out of the five are not guaranteed by the Procedures Directive. The right to independent legal advice and representation is limited by the inclusion of a negative obligation merely requesting Member States not to deny claimants the opportunity to communicate with UNHCR<sup>60</sup> and by the absence of an express requirement to ensure the right to legal assistance of all asylum applicants.<sup>61</sup> Member States have a limited obligation to publicly fund legal assistance and representation at appeal level only - an obligation they are nevertheless allowed to restrict to a few categories of cases including

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<sup>55</sup> A figure concerning the number of bodies found and not all those who drowned while attempting to reach Spain by sea.

<sup>56</sup> See Question 1 for further information.

<sup>57</sup> See Question 9 for further information.

<sup>58</sup> *ibid* Article 7.2 (a), 8 1 & 2.

<sup>59</sup> *ibid* Article 7.2 (b) and (c).

<sup>60</sup> *ibid* Article 9.1(c).

<sup>61</sup> More positive is the related requirement in Article 5 of the Reception Directive providing that "*Member States shall ensure that applicants are provided with information on organisations and groups of persons that provide specific legal assistance...*"

ones where the appeal or review is likely to succeed.<sup>62</sup> Member States' obligation to inform applicants about the proceedings and the result of the decision by the determining authority extends only to informing them "in a language (claimants) may reasonably be supposed to understand".<sup>63</sup> Interpretation services at all phases of the asylum procedure and during all interviews including those conducted by border officials have not been guaranteed. The right to a personal interview can be disregarded on a range of grounds including "where it is not reasonably practicable".<sup>64</sup> The right for an appeal to have a suspensive effect is not guaranteed either. Finally, no grounds are specified setting out limits on Member States in detaining asylum seekers.<sup>65</sup>

## **5. STANDARDS OF PROTECTION**

### **Are the standards of protection agreed sufficient to ensure a more equitable treatment of asylum seekers across the European Union?**

The Reception Directive makes a more significant contribution to the harmonisation of standards of protection in that it provides for adequate minimum standards of reception for persons applying for asylum under the 1951 Refugee Convention. It includes a range of important legal obligations Member States must ensure concerning the provision of information, documentation,<sup>66</sup> education for minors,<sup>67</sup> and material reception conditions that "ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence".<sup>68</sup> In some countries such as Greece this will lead to substantial improvements in reception conditions and in France e.g. asylum seekers will now have a right to social benefits during the whole asylum procedure whereas it had so far been limited to one year. In addition the Directive provides for the right of appeal against negative decisions relating to the granting of benefits or restrictions to freedom of movement, albeit without a corresponding right of free legal assistance which is instead to be laid down by national law.<sup>69</sup>

But still national governments are left a substantial level of freedom in how to implement some of these rights. This includes having the possibility to provide material reception conditions in kind (such as in the form of vouchers which serve to stigmatise asylum seekers) and at a level that may be below the minimum social welfare provisions in each Member State, as the Directive fails to indicate what the minimum value of support to asylum seekers should be.<sup>70</sup> The option of placing asylum seekers in accommodation centres for longer than six months does not meet adequate standards either, despite the attached safeguards required. Placements in reception centres should be kept as short as possible in order to minimise the risks of 'institutionalisation', loss of personal initiative, aversion to the host society and dependency on State care as well as to better prepare asylum seekers for integration or possible return.<sup>71</sup>

Some progress towards bridging the gaps in capacity between Member States has been made as a result of the implementation of financial instruments such as the European Refugee Fund (ERF) or

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<sup>62</sup> Procedures Directive, Article 13 (3).

<sup>63</sup> *ibid.*

<sup>64</sup> *ibid.*, Article 10 (3).

<sup>65</sup> *ibid.*, Article 17.

<sup>66</sup> Reception Directive, Article 6.

<sup>67</sup> *ibid.*, Article 10.

<sup>68</sup> *ibid.*, Article 13 (though it should be noted that conditions are included in the Directive under which Member States can derogate from this obligation).

<sup>69</sup> *ibid.*, Article 21.1.

<sup>70</sup> *ibid.*, Article 13.5.

<sup>71</sup> See *ECRE Position on the Reception of Asylum Seekers*, June 1997. In addition at the time of the negotiations of the Directive ECRE had called for independent housing to be the basis of any reception system for asylum applicants.

in the case of the new Member States the PHARE Horizontal Programme. But the ERF budget allocation of €216 million over five years has been an inadequate contribution to the task of ensuring that all Member States achieve success in setting high standards of fairness and efficiency in the reception of asylum seekers. Considerable differences in practices will therefore be able to continue such that refugees and asylum seekers will not be guaranteed the same standards of protection whichever Member State they find themselves in.

## **6. THE INTEGRATION OF REFUGEES**

**Are the EU's measures adequate to facilitate the integration of refugees into the societies of EU Member States and are the rights and benefits granted comparable to those of EU citizens?**

Concrete initiatives have been undertaken at national and EU level under the ERF which represent important steps towards facilitating the process of refugee integration in the European Union. But the reception phase is an integral part of the integration process of refugees and asylum seekers into their host societies. Therefore the quality of reception conditions during the examination of asylum claims is key to the facilitation of their integration as well as the content of the status granted to persons recognised in need of international protection.

### Reception Conditions

The Reception Directive, despite its reasonable minimum standards, does not provide a framework which fully promotes the integration of refugees. For example it allows Member States to “refuse reception conditions in cases where an asylum seeker has failed to demonstrate that the asylum claim was made as soon as reasonably practicable after arrival”.<sup>72</sup> Meaning that applicants with valid reasons for claiming asylum with some delay, might be deprived of accessing basic social services essential for their survival.<sup>73</sup> If faced with destitution during the often lengthy period until a decision on their application is made, claimants are likely to find it very difficult upon recognition of status to settle, become self-sufficient and feel part of the host society. The provision allowing the education of asylum seeking children in accommodation centres rather than in mainstream educational facilities<sup>74</sup> is another example of a practice which acts as a huge barrier to the integration of children and which falls far short of the rights of EU nationals.

In relation to work it is positive that access to the labour market has been provided for due the importance of such a measure for the integration of refugees. However it is regrettable that Member States have been left the power to not grant this right for up to one year, after which they must determine conditions for such access but can still give priority to EU, European Economic Area citizens as well as resident third country nationals.<sup>75</sup> This allows the potential exclusion of asylum seekers from economic activity for long periods of time, hindering their self-reliance and eventual integration.

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<sup>72</sup> Reception Directive, Article 16.2. It should be noted too that Article 21 does provide applicants with the possibility to appeal decisions to withdraw benefits.

<sup>73</sup> These provisions reflect UK national legislation in relation to which a Court of Appeal recently stated that “*Although one may not be able to say of any particular individual that there is more than a very real risk that denial of food and shelter will take the individual across the threshold, one can say that collectively the current policy of the Secretary of State will have that effect in the case of a substantial number of people*”, Lord Justice Carnwarth, Case of UK Secretary of State for the Home Department and Wayoka Limbuela, Binyam Tefera Tesema and Yusif Adam, 2004.

<sup>74</sup> Reception Directive, Article 10.1

<sup>75</sup> *ibid*, Article 11.

### Persons with Subsidiary Protection Status

The Qualification Directive provides for social assistance and health care for refugees with refugee status in the same manner as EU nationals. However it does not do the same for beneficiaries of subsidiary forms of protection whose benefits can be reduced to so-called 'core benefits'<sup>76</sup> which are significantly lower than those enjoyed by EU nationals. Access to the labour market for persons with subsidiary protection is not guaranteed and the withholding of this right has no specified time limit. Employment restrictions upon status determination seriously hinder refugee integration in the long term as they risk pushing people into illegal work or encouraging dependency on public assistance.<sup>77</sup> Member States may also limit social assistance, are not obliged to give access to health care under the same conditions as nationals and can restrict access to further education<sup>78</sup> - a key element in fostering integration. Finally Member States are given discretion on whether to give access to integration programmes for persons with subsidiary forms of protection having also been given the freedom to decide what is "appropriate" in terms of specific programmes that they are obliged to provide.<sup>79</sup> This illustrates the lack of recognition of the need to promote independence and facilitate the participation of *all* persons in need of protection in all aspects of the economic, social, cultural, civil and political life of the country of asylum as early as possible.

### Long-Term Residents

To deny refugees who have already lived for at least five years in one Member State access to the more stable status of long-term resident results in denying them access to certain social and economic rights on equal terms with other third-country nationals and risks increasing the social exclusion of this already vulnerable group by limiting their opportunities to integrate into European societies. Long-term residence status would allow refugees to make an earlier contribution to the economy of their host society. It would also allow refugees to move freely within the Union, which no instrument adopted within the first phase provides, and thus contribute to the fulfilment of the Tampere commitment to ensure the right to move freely throughout the Union for all.<sup>80</sup> The Long-Term Residence Directive for Refugees currently under discussion in the EU will hopefully address these issues.

## **7. SUBSIDIARY FORMS OF PROTECTION**

### **Has an appropriate status for persons in need of subsidiary forms of international protection been developed?**

Overall equal rights should have been granted to Convention refugees and persons afforded subsidiary protection in view of the similarities of their needs and circumstances of forced migration.<sup>81</sup> In ECRE's view it is extremely difficult to justify any treatment that differentiates between persons fleeing persecution for Convention grounds and those fleeing their country because of risk of serious harm as a result of the "death penalty or execution," "torture or human or degrading treatment" or "a serious and individual threat to...life or person by reason of indiscriminate violence".<sup>82</sup> Yet this is precisely what EU legislation has done.

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<sup>76</sup> Core benefits are defined as income support, illness, pregnancy and parental assistance, Qualification Directive, Article 26.

<sup>77</sup> See ECRE's Position on the Integration of Refugees in Europe, December 2002.

<sup>78</sup> Qualification Directive, Articles 27, 28 and 29.

<sup>79</sup> *ibid*, Article 33.

<sup>80</sup> Tampere Conclusions, para 2.

<sup>81</sup> ECRE Position on the Integration of Refugees, December 2002.

<sup>82</sup> Qualifications Directive, Article 15.

Firstly the fact that Member States are given the freedom to decide whether the Reception Directive covers applicants for all forms of international protection (namely those likely to be considered for subsidiary forms of protection) is disappointing. As is the fact that the Family Reunification Directive does not apply to persons with a subsidiary form of protection<sup>83</sup> which means this category of refugee has no right to family reunification. Given the role of family unity and family life in the process of integration of persons in need of protection this is of grave concern.

The principal instrument which defines subsidiary forms of protection and the rights attached to that status (the Qualification Directive) introduces an express obligation for Member States to grant asylum to individuals and to grant subsidiary forms of protection, which is undoubtedly a significant step forward.

Nevertheless, the terms agreed do not constitute an adequate status for persons falling under this category. The fact that they are not guaranteed the right to social assistance, general health care or access to the labour market is not acceptable.<sup>84</sup> The Directive's limited provision of granting a renewable residence permit of at least one year to persons with subsidiary protection hardly represents a period of time that is sufficient to enable persons to develop a long-term perspective for the future.

A 30 year old Afghan woman claimed asylum in Spain on the basis that her family were trying to force her into a marriage following the death of her husband. During the nine months her asylum application took to be processed, she was placed in an accommodation centre with no access to education or employment. She was recognised as a person in need of international protection but was granted a subsidiary form of protection. She had no Spanish language skills or adequate education or work experience due to situation of women under the Taliban regime. However she was not given access to integration programmes or allowed to work, and received only 'core benefits', i.e. emergency health care and social assistance lower than the minimum income support granted to Spanish nationals. After 18 months, she had little prospect or hope of building a new, self-sufficient life.

*Hypothetical Scenario*

## **8. RESPONSIBILITY-SHARING WITHIN EUROPE**

### **How has the first phase of harmonisation contributed to the EU's aim to improve responsibility-sharing within Europe?**

The EU's efforts to improve responsibility-sharing within Europe centred around the revision of the 1990 Dublin Convention<sup>85</sup> which resulted in the adoption of the so-called Dublin II Regulation.<sup>86</sup> This piece of legislation sets out a hierarchy of criteria to establish the country which should bear the responsibility of processing an asylum claim. The first criteria are designed to support the maintenance of the principle of family unity. The second main criterion is based on the principle that the Member State responsible for a person's entry and presence on the territory of the Member State should be responsible for examining any subsequent asylum claim. An exception to this rule is introduced with regard to unaccompanied minors without family members in a Member State whose claims can now be examined in the country where they are lodged.<sup>87</sup> The likely result is that the Member State that plays the greatest part in an applicant's entry, namely those with key entry points to the EU or long external borders, will more often have to shoulder the responsibility of processing asylum applications. This not only demonstrates a lack of solidarity between Member States but will place ever increasing burdens on the Member States with southern and eastern

<sup>83</sup> Family Reunification Directive, Article 3.2(c)

<sup>84</sup> See Question 6 for further details.

<sup>85</sup> Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, European Communities No 40, 1991.

<sup>86</sup> See footnote 15.

<sup>87</sup> *ibid* Article 6, para. 2.

borders of the Union and with the weakest asylum infrastructures e.g. the new Member States and States with extended sea coasts such as Greece, Italy and Spain. Rather than foster responsibility-sharing, this may even stretch the resources of these countries to breaking point.

The Dublin II Regulation does not achieve its aim to develop a method for determining State responsibility based on “objective and fair criteria for the Member States and the persons concerned...guarantee(ing) effective access to the procedures for determining refugee status”.<sup>88</sup> Faced with the possibility of having to examine large numbers of asylum claims, Member States have taken (and seem likely to continue to take) measures to block access to their territories by strengthening border controls, and implementing a range of measures to intercept refugees while travelling to the EU. In addition the Regulation’s failure to provide guarantees that one EU Member State will finally be responsible for considering an application is a serious flaw. If real responsibility-sharing had been created through an EU mechanism this would have improved the situation for both refugees and European governments.

A Chechen refugee fleeing persecution in the Russian Federation crossed the Hungarian-Ukrainian border illegally and travelled onwards to Austria where he claimed asylum. The Austrian authorities however established that he had travelled through Hungary and put in a ‘Dublin’ request to the Hungarian authorities. Though this can take several weeks or months, this Dublin request was processed quickly and the man was promptly returned to Hungary. There his asylum application was processed under an accelerated procedure as the Hungarian authorities applied the ‘safe third country’ provision on the grounds that he had transited Ukraine. A negative decision was reached within the legal time limit of 15 days. The man did not request judicial review of the rejection, partly because he was unaware of his right to do so. As the date of the negative decision fell within the 90 days from the date he illegally crossed the Hungarian-Ukrainian border, the Hungarian-Ukrainian readmission agreement could be applied. A formal readmission procedure therefore took place. The Ukrainian authorities responded to the readmission request within 72 hours. The Hungarian border guard authorities transferred the man to the Ukraine where he was then detained in a deportation centre. There he remains unaware of whether he will be returned to the Russian Federation and hopes that his asylum claim will be considered.

*Hypothetical Scenario*

The establishment of a European Refugee Fund, though an important step towards creating a more sustained EU approach on refugees, saw the allocation of resources favouring countries which have received large numbers of asylum seekers and recognised refugees in the previous three years.<sup>89</sup> Although this arrangement is fair from a burden-sharing point of view, it does very little to redress the current uneven capacities in the Union, as it is precisely the countries that have not played their full role until now that have the greatest needs to build-up the necessary infrastructure.

## **9. THE EU’S INTEGRATION OF MIGRATION ISSUES IN ITS EXTERNAL POLICIES**

**Has the EU’s trend to integrate migration issues into its external policies produced any positive results for refugees?**

Since Tampere, the EU has significantly increased its efforts to integrate its internal Justice and Home Affairs policy agenda relating to asylum and immigration into all areas of its external policy, such as external relations and development co-operation policies. A key objective within this has been to develop co-operation with third countries in the management of migration flows while addressing their root causes.<sup>90</sup>

<sup>88</sup> *ibid*, Preamble, para. 4.

<sup>89</sup> Two Member States received close to 50% of the ERF in 2003.

<sup>90</sup> European Commission Communication Integrating Migration Issues in the EU’s relations with Third Countries, COM (2002) 703 final, 03.12.2002.

### High Level Working Group

In late 1998 the High Level Working Group on Migration and Asylum (HLWG) was established and tasked with preparing cross-pillar EU Action Plans and developing practical and operational proposals to increase co-operation with countries of origin and transit of asylum seekers and migrants. The first phase of the implementation of the HLWG Action Plans was characterised by an exclusive focus on migration controls.<sup>91</sup> And despite the inclusion in its mandate in 2002 to “promote the EU’s role in the efforts of the international community aimed at addressing the main causes for migration”, the HLWG failed to make any concrete suggestions as to how to better address the root causes of forced and voluntary migration.

### Migration and Development Policies and Financial Instruments

In their concern to step up the fight against illegal immigration, Member States decided in 2002 that all future agreements with third countries should include provisions on joint management of migration flows and compulsory readmission of illegal immigrants with a failure to co-operate hampering closer relations of that country with the EU.<sup>92</sup> The Commission’s subsequent policy proposals on implementing these aims<sup>93</sup> recognised the rights of refugees to seek asylum and have their asylum application examined but clearly prioritised the channelling of financial assistance towards the development of interception measures in third countries over the support to develop their asylum systems.<sup>94</sup> The financial instrument later agreed to support these policies however has a more balanced range of objectives (due in all likelihood to the ability of the European Parliament to exert greater influence through the co-decision procedure) which include the development of reception capacities and of national laws and practices to improve compliance with the Refugee Convention and the *non-refoulement* principle.<sup>95</sup>

### Readmission Agreements

Readmission agreements are another tool the EU is using to facilitate the return of people seeking asylum. In these agreements no procedure is foreseen that provides for the examination of the human rights record of countries people are being returned to, nor is a procedure foreseen for establishing whether the country asylum seekers are being returned to is willing or capable of providing effective protection. The need for such procedures is unquestionable when considering the poor human rights record of some of the countries targeted for such agreements.<sup>96</sup> Despite considerable protection gaps with regard to the treatment of refugees in countries such as Libya and Syria (which are notably not signatories of the 1951 Refugee Convention), the EU has in addition sought intensified cooperation with them,<sup>97</sup> having negotiated a “readmission clause” with Syria which compels it to take in illegal immigrants (which could include persons fleeing persecution) who have travelled through its territory before arriving in the EU.

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<sup>91</sup> A report evaluating the work of the HLWG underlined that “countries in which the plans are directed, feel that they are the target of unilateral policy by the Union focusing on repressive action.” High Level Working Group on Asylum and Migration, *Report to the European Council in Nice*, 13993/00 JAI 152, AG 76 (Brussels: 29 November 2000), para. 53.

<sup>92</sup> Conclusions of Seville European Council, 21-22 June 2002.

<sup>93</sup> European Commission Communication Integrating Migration Issues in the EU’s relations with Third Countries, COM (2002) 703 final, 03.12.2002.

<sup>94</sup> This is reflected in the allocation of funds e.g. in the CARDS programme for the Western Balkans where assistance for border management activities comprises a large majority of the budget for most of the countries.

<sup>95</sup> Regulation (EC) No491/2004 of the European Parliament and the Council of 10 March 2004 establishing a programme for financial and technical assistance to third countries in the areas of migration and asylum (AENEAS), Article 2 (c).

<sup>96</sup> Readmission agreements have been signed between the EU and Albania, Hong Kong, Macao and Sri Lanka while negotiations are under way or in the pipeline with Russia, Morocco, Ukraine, Turkey, China, Pakistan and Algeria.

<sup>97</sup> See General Affairs and External Relations 2463<sup>rd</sup> Council meeting, Brussels, 18 November 2002.

Much effort has gone into strengthening the linkages between the EU's immigration and external policies but this has not always led to greater coherence. Indeed the EU's prioritisation of measures to fight illegal immigration over fighting the root causes of refugee flight and improving refugee protection in third countries has led to a considerable lack of coherence in relation to the EU's human rights and development co-operation policies and objectives.

## **10. THE IMPACT OF TRANSPOSITION ON EU MEMBER STATES**

### **What will be the impact of EU legislation on Member States, in terms of whether it will result in the raising or lowering of current standards?**

It is difficult at this stage to have a complete picture of the likely impact of the EU legislation on standards in Member States. In part this is because there is a transposition period allowed and also many national governments are in the process of amending their national asylum/immigration legislation and so it is not yet clear to what extent, if any, they will use these processes to justify lowering their standards towards the minimum ones agreed at EU level. EU legislation requires some States to raise a few standards but does not require the lowering of standards. However the legislation has provided far wider scope to lower standards and some States have already declared they will do this.

#### Provisions that will raise standards in Member States

Where standards need to be raised governments are either already amending their legislation accordingly or will have to within the time limits set by each directive. Some examples of how the provisions will raise standards in some countries include:

- the establishment of a status for a subsidiary form of protection for persons falling outside of the Refugee Convention in Ireland and Belgium;
- the establishment of a temporary protection regime in Belgium;
- the recognition of non-State actors of persecution in Germany and Spain ;
- the recognition of gender-specific forms of persecution in Spain as well as ensuring that material reception conditions are available to applicants as soon as they make their application for asylum which is not currently the case;
- the need to allow asylum seekers who have been in an asylum procedure for one year and have not received a first decision access to the labour market in Hungary and the UK;
- a general improvement in reception conditions in Greece;
- the right of asylum seekers to social benefits during the whole asylum procedure in France where it is currently limited to one year.

#### Provisions below current standards in Member States

With regard to the possible lowering of standards, it must first be re-emphasised that EU legislation in no way requires a lowering of standards and indeed specifically allow Member States to retain more favourable conditions. But some Member States may try to go against the normal interpretation of 'minimum norms' and lower their present standards to the very minimum level set by the EU. Examples of such provisions which are below current standards in many EU countries:

- the 'super safe third country' concept;
- the criteria around the application of the 'safe third country' concept to countries outside the EU;
- the restriction of movement and of social benefits on the grounds of a claim being lodged 'late';
- the range of grounds on which an accelerated procedure can be applied;

- the absence of a guaranteed suspensive effect of appeal;
- allowing a decision on an asylum request from someone benefiting from temporary protection to be postponed for the maximum period of temporary protection (i.e. 3 years);
- the possibility to limit access to the labour market to temporary protection beneficiaries, and to asylum seekers for a period of up to one year;
- the 'safe country of origin' concept.

A key influencing factor on governments in relation to whether to lower standards will be their perception of whether the maintenance of higher standards is leading to secondary movements to their territory from other EU Member States with lower standards.<sup>98</sup> The potential domino effect of such a 'harmonising down' approach would create an unacceptable situation whereby standards which have been presented as a minimum would instead become the norm.

## **11. THE IMPACT ON ASYLUM SYSTEM IN NEW EU MEMBER STATES**

**The importance of achieving the Tampere milestones in the context of the EU's enlargement towards Central and Eastern Europe has been constantly reaffirmed by the EU. Are the outcomes to date likely to lead to a positive impact overall on the development of asylum systems and policies in the new EU Member States?**

The EU accession process just completed by the ten new Member States required governments of these countries to undertake reforms in order to comply with the EU *acquis* which includes criteria on asylum and immigration. The minimum standards agreed should help to raise standards in some areas in view of the comparative lack of experience in Central and Eastern European countries in receiving asylum seekers and processing their applications. The application of some of the standards included in the Reception Directive for example should strengthen the legal framework and improve reception conditions which have been under-resourced. But the outcomes to date also present some risks to the new EU States.

### Dublin II Regulation

The Dublin II Regulation risks overwhelming the asylum systems of the Member States which are now the new external borders of the Union,<sup>99</sup> as a result of the most commonly used criteria stating that the first EU country an asylum seeker enters is the one allocated responsibility for processing the application. In most cases these will be the very States with the most under-developed asylum systems in the EU,<sup>100</sup> where migration offices are not sufficiently equipped in terms of staff and training and where lack of training for border guards is also a problem. The processing of future 'Dublin cases' can be expected to lead to many difficulties in these countries, such as the risk that asylum seekers will be sent on beyond the new external borders to countries such as the Ukraine where protection standards are dire and *refoulement* commonplace.

Of course the European Refugee Fund is there to provide support but government agencies responsible for migration and asylum issues in new Member States are unused to distributing funds to the civil sector, and often lack structures and resources to carry out distribution and management

<sup>98</sup> The Dutch Minister for Immigration and Integration has explicitly stated that if the Dutch government noted such a trend, higher national standards would be lowered in direct reaction.

<sup>99</sup> This concern is supported by UNHCR statistics for 2003 showing that in Cyprus from 950 applications lodged in 2002 this number rose to more than 4,400 in 2003 – an increase of 400%, "Asylum levels and trends: Europe and non-European industrialized countries, 2003, UNHCR, February 2004.

<sup>100</sup> It should be noted that the southern European Member States are also vulnerable due to the criteria and may experience similar problems due to lack of experience and/or capacity.

at all. The challenges to the governmental refugee agencies in the administration of the ERF will not help the pace of necessary reforms and capacity-building.

The current lack of integration prospects for refugees in the new Member States are part of the reason why asylum seekers still regard them as transit countries and prefer to move on to other EU States. The progress made in terms of standards agreed concerning integration are also not significant enough to change this situation in the near future.

## **12. TRANSPARENCY AND DEMOCRATIC CONTROL**

### **Has an adequately open dialogue and process of timely and meaningful consultation with civil society been maintained by the EU, based on the principles of transparency and democratic control?**

Throughout the five-year period there has been communication between civil society representatives and the EU institutions on the development of the asylum policies and directives. The level to which this contact could be described as meaningful consultation however varies widely between the different institutions. The European Commission's approach to its work, sharing the power of legislative initiative as it does with the Member States,<sup>101</sup> has on the whole included maintaining a process of regular information-sharing and consultation with civil society. Comments and concerns expressed by NGOs have been acknowledged and the Commission has shown itself willing to explain the rationale behind its proposals and sometimes incorporate the views of NGOs with expertise in the issues at stake.

In contrast, while the key negotiations and final decisions have taken place in the Council of Ministers, this institution has shown little commitment to developing the open dialogue with civil society which governments called for at the Tampere Summit. While some Council documents have become more publicly available, the continuing restrictions have hindered the ability of civil society to keep fully abreast of all key developments. NGOs have persistently made the Council aware of its concerns, and still its decisions have been characterised by a marked disregard of not only the views of civil society but also those of the European Parliament. The Council has been willing to ignore the Parliament's already limited consultative role in this policy area, as accorded under the Amsterdam Treaty. One example being the way it adopted the Family Reunification Directive before the European Parliament had issued its Opinion on the text.<sup>102</sup> The European Parliament itself has maintained a very open and meaningful dialogue with civil society, regularly considering its views on the EU's asylum agenda and often expressing them when consulted by the Council. Some national parliaments have made efforts to ensure that adequate standards were agreed in exercising their powers of scrutiny over their government's actions at the Council<sup>103</sup> but these were too few and had little impact. Parliamentary bodies were therefore unable to effectively exercise proper democratic control over the Council whose lack of transparency has acted as the main block to the development of a meaningful consultation with civil society. In turn the EU's failure to live up to the ambition of developing an open dialogue with civil society based on transparency and

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<sup>101</sup> The Commission stated in its recent assessment of the Tampere programme that '*the right of initiative shared with the Member States sometimes had the effect that national concerns were given priority over Tampere priorities*', Communication Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations, COM(2004) 4002 final, 2 June 2004, page 4.

<sup>102</sup> The European Parliament in Feb 2004 went on to contest the legality of this piece of legislation to the ECJ based on its potential lack of compliance with international human rights law.

<sup>103</sup> For example the Dutch parliament and the UK House of Lords monitored the Tampere negotiations and made use of their parliamentary instruments.

democratic control has played a major role in facilitating the agreement of the many unsatisfactory measures highlighted in this report.

### **13. THE LEVEL OF HARMONISATION**

#### **Has the EU achieved an overall significant level of approximation of asylum laws between Member States?**

The level of harmonisation achieved has clearly been less than had been hoped for at the time of Tampere.<sup>104</sup> Member States lacked the political will to approximate their legislation and often simply could not agree a minimum standard. In fact many of the standards simply match existing practices, reflecting how governments endeavoured to agree standards which would require as little change as possible to their practices at national level. In a letter to ECRE Mr Vitorino, Commissioner for Justice and Home Affairs, described the harmonisation process as “disappointing”.<sup>105</sup>

For the exceptional circumstances of a mass influx of displaced persons into the EU for example, the Temporary Protection Directive establishes a reasonable standard of rights to be conferred on refugees and on the whole leaves few issues to the discretion of Member States. The fact that it was the first directive to be agreed back in mid-2001 is not insignificant. Since then, despite the continuous reaffirmations of a commitment to the Tampere principles, these have been contradicted by the frequent appearance of the formula “Member States may...” throughout the asylum instruments, which allows considerable national discretion in the treatment of some controversial issues and the adoption of the lowest common denominator as a Community standard of protection.

The fact that some Member States currently apply more restrictive criteria in determining refugee status than others has been addressed to some extent by the Qualifications Directive but, together with the Procedures Directive, it still provides limited scope for addressing the fact that different claimants have different chances of accessing protection and that significant differences in the standard of protection exist in the 25 EU Member States. The Procedures Directive in its current form is a catalogue of discretionary clauses and represents a piece of legislation with a negligible level of approximation on issues of fundamental importance for the guarantee of fairness in the determination of asylum claims across Europe, e.g. no criteria limiting the detention of asylum seekers were finally agreed. The Reception Directive did not achieve its broad aim of being an instrument which could ensure “comparable living conditions in all Member States”. The Qualifications Directive establishes few minimum requirements in relation to benefits granted to persons with subsidiary protection and in the case of their family members, governments have complete discretion as to what benefits to grant, if any. The absence of agreement on these and numerous other key aspects heavily undermines the few positive achievements of the instruments agreed during this first phase of harmonisation. Such lack of harmonisation reduces the impact of EU legislation and thus significantly reduces the benefits of asylum policies being addressed at the European level.

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<sup>104</sup> This situation is clearly acknowledged by the European Commission which saw the price of progress that has been made by mid-2003 to be “*a reduction in the effectiveness of the harmonisation or a very low level of agreed standards*” European Commission, Communication from the Commission to the Council and the European Parliament on the common asylum policy and the Agenda for Protection, (Second Commission report on the implementation of Communication COM(2000) 755 final of 22 November 2000), Brussels, 26.03.2003, COM (2003) 152 final.

<sup>105</sup> Letter to ECRE from Mr. Vitorino, Commissioner for Justice and Home Affairs, European Commissioner, dated 29 March 2004

## CONCLUSIONS

### PROGRESS MADE SINCE TAMPERE

There is no doubt that during the last five years, some positive progress has been made in the agreement of certain minimum standards on asylum and improving the capacity of existing and new Member States in meeting their international obligations to refugees. The centrality of the 1951 Convention Relating to the Status of Refugees has been upheld through the adoption of a refugee definition as well as content of refugee status that broadly (though not wholly) reflects international obligations. The granting of a subsidiary form of protection has been set as a minimum standard in all Member States, as has the recognition of non-State actors, gender-specific and child-specific forms of persecution. Some meaningful minimum standards have been adopted with regard to the treatment of displaced persons in situations of mass influx. Binding Member States' responsibilities have been set in relation to the documentation and provision of material reception conditions for asylum seekers to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence. These developments have the potential to bring about some positive changes in refugee protection, in particular in the context of the enlarged European Union.

At a level of concrete outcomes, most of the Amsterdam Treaty objectives have been met in relation to asylum. Namely the adoption of the Directives on Temporary Protection, Reception Conditions and the criteria on Qualification for international protection and the rights attached were achieved, as was agreement on other relevant instruments such as the Dublin II Regulation and the Directive on Family Reunification. Notwithstanding these developments, one of the most important instruments for refugee protection relating to the minimum standards in asylum procedures has yet to be adopted and the rush to agree a 'general approach' on it by the 1 May 2004 has led to a number of key provisions being left to the discretion of Member States, demonstrating a clear failure to achieve a significant level of harmonisation on this instrument. In fact the substantial deterioration of standards permitted by this Directive has been so alarming that ECRE and other NGOs called for the withdrawal of the proposal on the basis that if implemented some of its provisions would breach Member States' obligations under international refugee and human rights law, as well as the EU Charter of Fundamental Rights. Key measures referred to are the concepts of the 'safe country of origin', the 'safe third country' and the 'super safe third country' as well as the lack of appeal safeguards.<sup>106</sup>

Overall progress has been disappointing, hampered by a distinct lack of solidarity between Member States as well as their lack of political will to translate the commitments made at Tampere into binding obligations and thus collectively address the forced migration challenges facing the world today. The Tampere Council objectives are not adequately reflected in the text of most of the asylum instruments agreed. Instead the negotiations have mostly focused on upholding the lowest common denominator to allow countries to continue with their narrow national priorities in a way which has in some cases turned restrictive national practices into Community law. Detering persons fleeing persecution from seeking asylum in the EU seems to have become the only common European goal upon which all Member States are in agreement. A significant imbalance in the Union's work regarding the fight against illegal immigration and work on legal migration and admission can also be observed. This has impacted negatively upon public perceptions of the role of third country nationals in the societies of EU countries. In addition the fight against illegal

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<sup>106</sup> See ECRE press release 'Appalling flaws in Directive on Asylum Procedures still not addressed', October 2003 and Letter to Commissioner Vitorino 22 March 2004 at [www.ecre.org](http://www.ecre.org)

immigration has been linked to a shift from an EU-focused/internal dimension of asylum to an external dimension currently focusing on shifting responsibility to third countries through the use of readmission agreements and other mechanisms which externalise migration control functions beyond the borders of the EU. With such objectives in mind Member States have expanded and created definitions of safe third countries in a way which considerably endangers the safety of refugees and asylum seekers.

Growing public hostility towards asylum seekers, fuelled by hostile and inflammatory media coverage and a lack of political leadership on asylum across Europe, has contributed to the establishment of a trend of deterrence at EU level. The impact of global events in recent years leading to the 'war on terror' is also clear in the way it has pushed security concerns to the top of the agenda for States worldwide. Together with concern about the perceived abuse of asylum systems, these have clearly influenced asylum and immigration policy-making. This reactive, repressive approach underlies the lack of coherence which has emerged within the package of measures adopted. An example of this is the different definitions of family members eligible to access rights and benefits between different directives,<sup>107</sup> which strongly indicates that the content of the measures agreed have been influenced by the political climate at the time of negotiations of each legislative text, much more so than by any objectives set at the time of Tampere.

But the restrictive trend has also been encouraged by the system of unanimity voting at Council level, which ECRE has for long considered to be highly ineffective as a decision-making mechanism,<sup>108</sup> as well as the European Parliament's limited role with regard to asylum and immigration matters under Title IV of the Amsterdam Treaty during these five years. The proposed draft Constitution for Europe fully extending the powers of the European Parliament in the fields of immigration and asylum, together with the Amsterdam and Nice Treaties' provisions on the sole right of initiative for the Commission at the end of the five-year transition period, and the introduction of qualified majority voting may, when in force, go some way towards addressing the gap in transparency and democratic control which has prevailed.

To a large extent therefore ECRE considers this first phase of harmonisation to have been a missed opportunity, which is to be especially regretted in view of the fact that the provisions now also apply to the new EU Member States and will negatively influence the building of an asylum infrastructure. The level of harmonisation achieved is lower than what had been envisaged in 1999 and insufficient for the interests of both Member States and refugees, in terms of improving burden-sharing and creating more equitable access to protection across the EU.

But if all 25 Member States now adopt positive approaches to the transposition and implementation of these EU minimum standards, there is hope of limiting the potentially huge negative impact of the measures. Firstly, it is of paramount importance that Member States raise standards (legislative and practice) as necessary in areas where they are lower than those set by the EU as soon as possible. The new European Refugee Fund has the potential to play an important role in the essential work of building the institutional capacity of Member States, though it should be noted that the ERF is not supposed to cover for a lack of State funding of activities which should be States' responsibility but more directly support the transposition of EU asylum directives and assist with the process of raising standards and practices to meet European and international agreements.

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<sup>107</sup> See definitions of 'family members' in the Temporary Protection Directive, Reception Directive, Dublin II Regulation, Family Reunification Directive and Qualification Directive.

<sup>108</sup> See ECRE, ENAR and MPG, *Guarding Standards – Shaping the Agenda*, April 1999.

The raising of standards should be the principle result of transposition and not a parallel or subsequent dropping of national standards to the standards set as the bare minimum by the EU. Implementation should also follow this pattern and should not generally make use of the exceptional derogations allowed by EU legislation, some of which would breach the rights of persons seeking asylum under the Refugee Convention and many other international human rights instruments, including the European Convention on Human Rights. In this regard, ECRE stresses the central role of the European Commission and European Court of Justice in the implementation phase and calls for the provision of the necessary resources in order to ensure that the Commission can fulfil its monitoring and reviewing role. The role of NGOs as important partners in this process is also crucial and should be strengthened and supported. It is of crucial importance that the processes of transposition and monitoring be prioritised over the development of more harmonised standards in order to allow adequate assessment of the impact of this set of minimum standards on refugees in Europe.

The clear potential benefits of addressing asylum at European level were recognised at Tampere and are still widely acknowledged today, but have yet to be delivered to Europe's citizens and refugees. It is ECRE's hope that the European Union and its Member States will continue to strive to achieve the commitments made at the Tampere Summit by, first and foremost, implementing the initial minimum standards agreed in this first phase of asylum harmonisation in the spirit of those commitments.

## ANNEX

<p style="text-align: center;"><b>ECRE'S KEY CONCERNS</b> <b>ON</b> <b>ASYLUM AND IMMIGRATION INSTRUMENTS</b> <b>1999 - 2004</b></p>
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TEMPORARY PROTECTION DIRECTIVE - *Council Directive 2001/55/EC of 20 July 2001 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*

RECEPTION DIRECTIVE - *Council Directive 2003/9/EC of 27 January 2003 on laying down minimum standards for the reception of asylum seekers*

DUBLIN II REGULATION - *Council Regulation (EC) No 343/2003 of 18 February 2003 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*

FAMILY REUNIFICATION DIRECTIVE - *Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification*

QUALIFICATION DIRECTIVE - *Council Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*

PROCEDURES DIRECTIVE - *Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*

**TEMPORARY PROTECTION DIRECTIVE:****Council Directive 2001/55/EC of 20 July 2001 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**

Entered into force on 7 August 2000. Transposition deadline: 31 December 2002

<b>Provisions</b>		<b>Key Concerns and Recommendations</b>
<b>Article 4</b> <i>Duration and Implementation of Temporary Protection,</i>	The duration of temporary protection may be extended to a period of up to three years.	The duration of temporary protection should not be extended for longer than 2 years. After this period beneficiaries should be able to access a durable solution. This is key for people who qualify for international protection status as they must be able to access the full rights attached to that status.
<b>Article 12</b> <i>Obligations of the Member States towards persons enjoying temporary protection</i>	The right to work may be restricted by giving precedence to EU and EEA citizens as well as other legally resident third-country nationals.	Member States should grant unrestricted access to the labour market and not make use of the possibility to restrict access.
<b>Article 13.2</b>	Only access to 'emergency medical care and essential treatment of illness' is guaranteed.	Member States should grant all persons enjoying temporary protection access to general health care.
<b>Freedom of Movement</b>	There is no reference to the right of freedom of movement either within Member States or within the Union.	Member States should grant persons enjoying temporary protection the right to freedom of movement within their territory.

## RECEPTION DIRECTIVE

### Council Directive 2003/9/EC of 27 January 2003 on laying down minimum standards for the reception of asylum seekers

Entered into force on 6 February 2003. Transposition deadline: 6 February 2005

Provisions		Key Concerns and Recommendations
<b>Article 3</b> <i>Scope</i>	It is left to the discretion of Member State to apply the Directive to those applying for subsidiary forms of protection or to cases awaiting removal under the Dublin Convention.	The Directive should be applied in practice to cover applicants for all forms of international protection without exceptions at all stages of the asylum procedure, including those applying for subsidiary forms of protection and those awaiting removal under the Dublin II Regulation who are in need of assistance while procedures to return them to another Member State are underway.
<b>Article 7</b> <i>Residence and Freedom of Movement</i>	Member States are allowed discretion in limiting or prescribing the conditions of asylum seekers' freedom of movement and residence.	This article represents a significant departure from Article 2(3) of Protocol 4 of the European Convention on Human Rights, which states that no restrictions should be placed on the right to liberty of movement other than those which are strictly "necessary in a democratic society in the interests of national security or public safety, for the maintenance of public order, for the prevention of crime, for the protection of health or morals or for the protection of the rights and freedoms of others". This is subject to the principle of proportionality.
<b>Article 10</b> <i>Schooling and Education of Minors</i>	Member States are allowed to decide whether or not to provide education to children in accommodation centres, and whether or not to postpone access to the education system by up to one year.	Member States should provide education to asylum seeking children through mainstream educational facilities at the earliest opportunity, irrespective of where they are accommodated. Separate education provision for children of asylum seekers may hinder a child's learning and can lead to their social exclusion.
<b>Article 11</b> <i>Employment</i>	Gives Member States discretion in determining asylum applicants' access to the labour market for a period of up to one year.	Asylum seekers should not be excluded from the labour market for more than six months after they have lodged an application, to prevent exclusion from the host society, promote self-sufficiency, and facilitate integration or re-integration upon return.
<b>Article 13.5</b> <i>General Rules on Material Reception Conditions and Health Care</i>	Permits Member States to provide reception conditions in the form of vouchers, with no indication of what the minimum value of support to asylum seekers should be.	Vouchers should not be used as they support the stigmatisation of asylum seekers. As a rule, social assistance should be given in the form of money and in parity with the State's minimum social welfare provisions in order to ensure "a standard of living adequate for the health of applicants" and their subsistence.

*Reception Directive cont.*

<b>Provisions</b>		<b>Key Concerns and Recommendations</b>
<b>Article 15</b> <i>Health Care</i>	Only access to emergency health care, essential treatment of illness and care for applicants with special needs is guaranteed.	This provision is insufficient to meet the often complex health needs of asylum seekers who need access to general health care. In particular, mental health and primary health care are important and should be made available to them as early as possible.
<b>Article 16</b> <i>Reduction or Withdrawal of Reception Conditions</i>	Numerous conditions are listed under which Member States may reduce or withdraw reception conditions to asylum seekers, e.g. “where an asylum seeker has failed to demonstrate that the asylum claim was made as soon as reasonably practical after arrival in that Member State”.	Sanctions should never be imposed indefinitely, but should have a fixed time limit and relate specifically to the service where the individual has not complied with reception conditions. However, Member States should not make use of the possibility to reduce or withdraw access to these minimum reception conditions as these already are minimum and reducing them further is not consistent with the requirements of human rights law. No one should ever be deprived of basic health care, social assistance, food and accommodation, and the best interests of the child should prevail. Faced with destitution asylum seekers will be at high risk of social exclusion impeding integration.

## DUBLIN II REGULATION

**Council Regulation (EC) No 343/2003 of 18 February 2003 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**

Entered into force on 25 February 2003

Provisions		Key Concerns and Recommendations
<p><b>Articles 5- 14</b> <i>Hierarchy of Criteria</i></p>	<p>Chapter III, on the hierarchy of criteria establishes family links as the main criteria determining the responsibility of a Member State to examine an asylum application, thus allowing for family reunification. Article 6 allows for the reunification of a child with a family member legally present in a Member State. For all other asylum-seekers, Chapter III allows for their reunification with a family member resident in a Member State, provided that the family member is allowed to reside as a refugee (Article 7) or is currently in the first instance of an asylum determination procedure (Article 8). No other family links constitute sufficient grounds for responsibility to examine an asylum application. Articles 9-12 link the responsibility for examining applications to the responsibility for allowing illegal entry or presence.</p>	<p>The emphasis on immigration controls in what should be a refugee protection instrument risks overwhelming the asylum systems of Member States where the external borders of the European Union are located, many of which may not have strong asylum systems yet in place. Therefore, Member States should make extensive use of their rights under Article 3(2) and Article 15 to examine applications that are not their responsibility under the Directive by ensuring that their national legislations establish their responsibility to examine asylum applications where family members are residing in their territories, not only as refugees or in the first instance of an asylum determination procedure, but also when family members are resident there with other protection status (such as Complementary Protection or Temporary Protection) and with a legal residence status on other grounds.</p>
<p><b>Article 19.2</b> <i>Taking Charge and Taking Back</i></p>	<p>Any appeal or review of a transfer decision does not suspend the transfer except on a case-by-case basis and subject to national legislation.</p>	<p>Appeals against a decision to transfer should have suspensive effect in all cases in view of the risk of <i>refoulement</i> as a result of Dublin transfers.</p>

**FAMILY REUNIFICATION DIRECTIVE:**

**Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification**

Entered into force on 3 October 2003. Transposition deadline: 3 October 2005

Provisions		Key Concerns and Recommendations
<b>Article 3</b> <i>General Provisions</i>	Exempts the scope of the Directive from persons authorised to remain on the basis of a subsidiary form of protection and persons under temporary protection.	Persons enjoying subsidiary forms of protection and persons under temporary protection should be included in the scope of this Directive.
<b>Article 4</b> <i>Family Members</i>  <b>Article 10</b> <i>Family Reunification of Refugees</i>	This article defines ‘family members’ to which the Directive applies as: the sponsor’s spouse; the minor and unmarried children (including adopted children) of the sponsor and the spouse; and the minor, unmarried and dependent children (including adopted children) within the custody of the sponsor or the sponsor’s spouse. The Directive also provides for family reunification of an unaccompanied minor’s first-degree relatives in the direct ascending line. It allows Member States to require the sponsor and his/her spouse to be of a minimum age and a maximum of 21 years old before reunification. It also permits Member States to refuse applications for family reunification from minor children over the age of 15 and to require that any minor above the age of 12 sit an integration test.	These very restrictive provisions risk critically diminishing the effective integration of refugees into host societies. Furthermore, these provisions raise issues under international human rights instruments such as Article 8 of European Convention on Human Rights (ECHR), Article 7 of the Charter of Fundamental Rights and the Convention on the Rights of the Child, which have resulted in the European Parliament challenging the validity of this Directive before the European Court of Justice. <sup>109</sup> Member States should not make use of the derogations from the minimum standard permitted under the Directive but should ensure that under their national legislations the right to family reunification is not limited to nuclear family members, but extended to children who are <i>de facto</i> members of a household, to dependent first-degree relatives in the direct ascending line of the sponsor or his/her spouse and to dependent adult unmarried children of the sponsor or his/her spouse.
<b>Article 14</b> <i>Entry and Residence of Family Members</i>	Member States are permitted a (maximum) 12-month period in which they may set the conditions under which family members may work. They may also restrict access to employment to first-degree relatives in the direct ascending line or adult unmarried children.	Member States should allow family members of refugees access to the same socio-economic and other rights as the refugee in order to support self-sufficiency of the reunited family members as well as their integration in the host society.

<sup>109</sup> On 16 December 2003, the President of the European Parliament instituted proceedings at the European Court of Justice to annul the directive on family reunification on this basis.

**QUALIFICATION DIRECTIVE:**

**Council Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted**

Adopted 30 April 2004, not yet entered into force. Transposition deadline will be 24 months after the date of entry into force

Provisions		Key Concerns and Recommendations
<b>Recital 30</b>	Member States may require applicants to possess a residence permit in order to have access to benefits with regard to access to employment, social welfare, health care and access to integration facilities.	Refugees and persons with subsidiary protection and their family members may be <i>de facto</i> prevented from accessing these rights when a residence permit is not renewed or simply when its “issuance” is delayed. Access to benefits must be given immediately after recognition of status has taken place and until a final decision that status has ceased has been taken.
<b>Article 7</b> <i>Actors of Protection</i>	State-like authorities are included as actors of protection.	State-like authorities are not and cannot be parties to international human rights instruments and therefore cannot be held accountable for non-compliance with international refugee and human rights obligations. In considering whether an asylum applicant has access to protection in his country of origin, Member States should not automatically deny international protection on the basis that an international organisation is present but should carefully examine whether each individual actually has access to effective protection.
<b>Article 8</b> <i>Internal Protection</i>	Allows Member States to not consider an application for international protection if they deem that in another part of their country of origin the applicant will not face persecution and can be ‘reasonably expected’ to stay there. Also states that technical obstacles to return to the country of origin will not prevent a decision to apply this internal protection principle.	Key criteria for the application of internal protection are lacking, including following: -protection must be afforded by a <i>de jure</i> not just <i>de facto</i> authority; -the claimant must be able to access the area of internal protection in safety and dignity and legally, both from inside and outside the country of origin; -conditions in the area of internal protection must afford at least the same standard of protection of core human rights as the 1951 Refugee Convention does; -the needs of particularly vulnerable groups must be met; -the area of internal protection must be free from conditions which could force the claimant back into the area of risk of serious harm; -the absence of a risk of serious harm in the proposed area of internal protection must be objectively established .

*Qualification Directive cont.*

<b>Provisions</b>		<b>Key Concerns and Recommendations</b>
<p><b>Article 14</b> <i>Revocation of, ending of or refusal to renew status</i></p>	<p>Includes national security concerns as grounds not to grant refugee status.</p>	<p>The inclusion of national security concerns as grounds not to grant status to a refugee constitutes an expansion of the exclusion provisions in the 1951 Refugee Convention. Member States should restrict the application of the exclusion clauses to the grounds established by Article 1F of the Refugee Convention only.</p>
<p><b>Article 23</b> <i>Maintaining Family Unity</i> <b>Article 26</b> <i>Access to Employment</i> <b>Article 28</b> <i>Social Welfare</i> <b>Article 29</b> <i>Health Care</i> <b>Article 33</b> <i>Access to Integration Facilities</i></p>	<p>Persons enjoying subsidiary protection are provided substantially lower benefits and rights than those accorded to Convention refugees. This includes access to only emergency health care and so-called ‘core benefits’ and the possibility of more restricted access to the labour market.</p>	<p>Persons receiving subsidiary forms of protection should be granted benefits and rights equal to those with 1951 Refugee Convention status. If these derogations are applied they will hinder the integration of persons with subsidiary forms of protection. Member States should implement Recommendation E contained in the Final Act of the Conference of Plenipotentiaries which adopted the 1951 Refugee Convention, and which states that individuals not covered by the terms of the Convention should be granted the treatment for which it provides.</p>

## PROCEDURES DIRECTIVE

### Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status

A 'general approach' agreed on by the Council of the European Union, 29 April 2004. Not yet adopted.

Transposition deadline will be 24 months after the date of its adoption, and for Article 13, 36 months after the date of its adoption.

Provisions		Key Concerns and Recommendations
<p><b>Articles 13-14</b> <i>Right and Scope of Legal Assistance and Representation</i></p>	<p>The right to independent legal advice and representation is limited by the absence of an express requirement to ensure the right to legal assistance of all asylum applicants. Member States have a limited obligation to publicly fund legal assistance and representation at appeal level only - an obligation they are nevertheless allowed to restrict to a few categories of cases including ones where the appeal or review is likely to succeed.</p>	<p>In transposing this provision, ECRE urges Member States to ensure that as a minimum standard, each asylum applicant be provided with free independent and qualified legal advice and representation throughout all stages of the asylum procedure, including any appeals, where the financial situation of the applicant so requires.</p>
<p><b>Article 27</b> <i>The Safe Third Country Concept</i></p>	<p>Allows Member States to declare an application inadmissible if satisfied that a safe third country exists where the asylum seeker will be free from threats to their life and liberty in the third country concerned on account of race, religion, nationality, membership of a particular social group or political opinion; the asylum seeker will not be sent back to persecution, torture, or cruel, inhuman or degrading treatment; and the asylum seeker will be able to request and, if granted, enjoy protection as a refugee.</p>	<p>Under international refugee law, the primary responsibility for international protection remains with the State where the asylum claim is lodged. Member States should therefore ensure that all asylum claims presented in the EU are examined on their merits by a Member State.</p> <p>If Member States choose to apply the safe third country concept, the need for very strict criteria is paramount, in particular:</p> <ul style="list-style-type: none"> <li>- the decision to declare an application inadmissible on these grounds should be taken in a fair and efficient individual procedure</li> <li>- the presumption of safety must be <i>rebuttable</i> by the applicant in the particular circumstances of his/her case</li> <li>- for a third country to be considered safe it should have ratified and implement the 1951 Refugee Convention and other international human rights treaties, and have an asylum procedure in place leading to the recognition of refugee status;</li> <li>- the third state must have given its explicit consent to (re-)admit the asylum seeker and to provide him/her full access to a fair and efficient determination procedure before any transfer may take place;</li> <li>- the applicant must have a close link with the third country, such as family ties; mere transit through a country does not constitute a meaningful link.</li> </ul>

*Procedures Directive cont.*

Provisions	Key Concerns and Recommendations	
<p><b>Article 30</b> <i>Minimum common list of third countries as safe countries of origin</i></p> <p><b>Article 30B</b> <i>Application of the safe country of origin concept</i></p>	<p>These proposals foresee a common EU list of safe countries of origin binding on all Member States, which may be amended. Member States may also designate third countries other than those appearing on the minimum common list as safe countries of origin. The safe country of origin concept can be applied to applicants who have the nationality of the country or are stateless but were formerly habitually resident there, if the applicant “has not submitted any serious grounds for considering the country not to be a safe country of origin in his/her particular circumstances in terms of his/her qualification as a refugee....”</p>	<p>The use of the ‘safe country of origin’ concept can lead to discrimination among refugees in violation of Article 3 of the 1951 Refugee Convention, Article 21 of the Charter of Fundamental Rights of the European Union and Article 26 of the International Covenant on Civil and Political Rights. No country can be considered safe for all persons. It is for the Member State to establish that the country of origin can be considered safe in the particular circumstances of the applicant, by carefully and examining the applicant’s <i>individual</i> claim, a process most appropriately dealt with in regular procedures.</p>
<p><b>Article 35A</b></p>	<p>Allows Member States to deny access to the procedure to all asylum seekers “illegally” arriving from designated countries in the European region and strips them of any rights to rebut this presumption . Member States are therefore allowed to return asylum applicants to so-called ‘super safe third countries’ before any examination of their claim has taken place and regardless of whether they have meaningful links with the country and whether they will enjoy protection from <i>refoulement</i> and access to a fair and efficient asylum procedure.</p>	<p>This provision violates Member States’ international obligations to protect against <i>refoulement</i> and to guarantee an effective remedy, as enshrined in Article 33 of the 1951 Refugee Convention; Articles 3 and 13 of the European Convention on Human Rights; Article 3 of the Convention Against Torture; Article 7 of the International Covenant on Civil and Political Rights; and Articles 18, 19 and 47 of the Charter of Fundamental Rights of the European Union. ECRE is concerned that the right to an effective remedy provided for in relation to this measure will remain a ‘dead letter’ in practice. Member States should not implement the ‘super safe third country’ provision when transposing this Directive into their national legislation.</p>
<p><b>Article 38</b> <i>The Right to an Effective Remedy</i></p>	<p>Does not guarantee that appeals will have suspensive effect in all cases.</p>	<p>The right to an effective remedy before a court or tribunal is embodied in EC law, in Article 47 of the Charter of Fundamental Rights of the European Union and in Article 13 of the European Convention on Human Rights. As held by the European Court of Human Rights, it implies the right to remain in the territory of the Member State until a final decision on the application has been taken. Member States should in all cases grant the right to remain in the asylum country during an appeal procedure.</p>