

## **The Way Forward**

Europe's role in the global refugee protection system



# **Guarding Refugee Protection Standards in Regions of Origin**

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## Contents

Foreword.....	4
Executive Summary .....	5
Introduction.....	9
1. Principles.....	15
2. Protection Standards .....	17
2.1. Elements of Protection.....	17
2.1.1. Rights .....	17
2.1.2. Legal Framework .....	23
2.2. Accessing Protection.....	25
2.2.1. Access to an Asylum Procedure and Status Determination.....	25
2.2.2. Prima facie and Group Recognition.....	25
2.2.3. Temporary Protection .....	26
3. Returns and Transfers to ‘Safe Third Countries’ .....	28
4. International Solidarity and Responsibility-Sharing .....	31
4.1. Building protection capacity in countries of first asylum.....	32
Annex 1 List of Recommendations.....	35
Annex 2 ECRE Reading List .....	39

## Foreword

The European Council on Refugees and Exiles (ECRE) is a pan-European network of refugee-assisting non-governmental organisations, concerned with the needs of all individuals seeking refuge and protection within Europe. It promotes the protection and integration of refugees based on the values of human dignity, human rights and an ethic of solidarity. ECRE draws on the energy, ideas and commitment of an active membership and a strong secretariat. It strives to involve wider civil society, the political community and refugee communities in its work.

ECRE aims to ensure that its ideas, projects, research and policies are of the highest quality, legally accurate and representative of a wide range of knowledge, experience and best practice throughout Europe. ECRE encourages the widest possible active involvement of its member agencies.

## The Way Forward

The development of this paper on the protection standards of refugees in regions of origin is part of the organisation's development of a series of proposals entitled "**The Way Forward - Europe's Role in the Global Refugee Protection System**", designed to provide constructive recommendations on a number of topical refugee policy issues and contribute to positively influencing the European debate. The other proposals address the issues of developing European resettlement activities, creating fairer and more efficient asylum systems in Europe, improving solutions for refugees through integration, and the return of asylum seekers whose applications have been rejected.

## Executive Summary

Most refugees flee to countries close to their countries of origin, namely regions of origin. All regions are, to a greater or lesser extent, regions of origin, as refugees come from all over the world, including Europe. But the majority of refugees are in developing countries that are struggling to provide them with adequate protection. Living in extremely precarious conditions, without access to adequate food, shelter, security or access to the range of social, economic, cultural, civil, political and legal rights they are entitled to, many refugees remain without a solution in sight. Such protracted refugee situations can continue for many years and even run into decades.<sup>1</sup> The scale and impact of this grim reality demands an urgent global response.

While continuing poverty, political instability, conflict and human rights violations in countries of origin are among the root causes of refugee flows and protracted refugee situations, the international community's lack of sufficient positive engagement, in both countries of origin and countries hosting refugees, are also to blame. Development efforts to effectively tackle root causes must be strengthened and coupled with concerted action to improve the protection environment in regions of origin, to develop and implement comprehensive strategies for solutions to refugees' plight and to promote greater responsibility-sharing and international solidarity between states. However, European states appear to be driven more by the desire to better 'manage' migratory flows to their countries and thus decrease the number of people seeking asylum in Europe.

### **Europe must play an active role in improving refugee protection in regions of origin, without undermining the right to seek asylum in Europe.**

One element of the 'migration management' agenda of some European states has been to try to arrive at a minimalist collective understanding of what constitutes 'effective protection' in regions of origin. This could help them more easily designate third countries as 'safe', which can lead to asylum seekers being denied entry into Europe and being returned to such countries. However, states are obliged to ensure that they do not return or transfer any asylum seeker or refugee to a place where their rights may not be fully respected.

### **Europe must act on the basis of a comprehensive understanding of what constitutes protection, drawn from international refugee and human rights law.**

European Union (EU) plans to develop Regional Protection Programmes (RPPs)<sup>2</sup> have the potential to contribute to improvements in refugee protection in regions of origin, if they are protection-oriented and adequately funded. In order to be effective, they must comprise one element of a wider strategy for regions of origin that is principled, holistic and comprehensive and aimed at ensuring that refugee protection standards are upheld and implemented.

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<sup>1</sup> At the end of 2003 there were over six million refugees worldwide involved in 'protracted refugee situations', *Protracted Refugee Situations*, Standing Committee 30<sup>th</sup> meeting, UNHCR, EC/54/SC/CRP.14, 10 June 2004.

<sup>2</sup> *European Commission Communication on regional protection programmes*, COM (2005) 388 final, 1.9.2005. Note that the first pilot is planned in Eastern Europe (Ukraine, Belarus and Moldova) and the second in the Great Lakes region (Tanzania).

## Principles

The following principles underpin the elements necessary to guard refugee protection standards globally:

- An individual must be granted, without delay, the human rights to which he/she is entitled under international refugee and human rights law.
- Regions of origin should not be taken to mean only developing countries.
- Helping to make refugee protection more effective beyond Europe does not substitute European countries' obligation to protect refugees who spontaneously arrive on their territory.
- The responsibility for hosting and protecting the world's refugee population must be shared more equally between states.
- Strengthening protection in regions of origin should not be regarded as a means of returning or transferring asylum seekers and refugees from Europe to other countries.
- No state should assist another state to act in ways that would breach its own obligations under international law.

## Elements of Protection

If refugees are to access protection that is effective they must enjoy the rights flowing from the relevant international and regional refugee and human rights instruments.

- The **guarantee of non-refoulement**, as the essence of refugee protection and part of customary law, is, in this context, the first essential step towards ensuring protection is available.
- Refugees must enjoy all their **civil and political rights** and not only rights such as freedom from torture, cruel, inhuman or degrading treatment or punishment, or the right to life.
- **Economic, social and cultural rights** are essential to the enjoyment of protection and other human rights. States restricting the economic rights of refugees are not providing them with protection that is effective.
- The right to **legal protection** (including access to a legal status and necessary documentation) should last for as long as international protection is required and until a durable solution ensues, to which new legal protection rights would be attached.
- Particular attention should be given to the needs and rights of **vulnerable groups**, including women, children, the disabled and older persons, in accordance with the relevant international human rights instruments.

- Refugees should have timely access to a **durable solution**. States should play a leading role in the development of comprehensive strategies for durable solutions and European states should increase the availability of resettlement in Europe.<sup>3</sup>

For protection to be considered effective, governments in all regions must, without reservations, accede to and comply with the standards set out in the 1951 Refugee Convention and the 1967 Protocol, and other relevant international and regional human rights instruments. For example, it is essential for European states to accede to and comply with the European Convention on Human Rights (ECHR). While accession to such instruments alone does not prove that a country is providing protection that is effective for refugees on its territory, it can be an important indicator of a state's political will to do this and can help UN bodies exercise their supervisory functions.

### Accessing Protection

If an individual undergoes an asylum procedure and/or status determination procedure, this will only provide them with effective access to protection if it is undertaken in the form of an individual assessment. This should include all the necessary safeguards, such as free legal advice, access to UNHCR/NGOs, a qualified and impartial interpreter, a personal interview and a suspensive right of appeal.<sup>4</sup>

*Prima facie* and group recognition are useful to speed up access to protection. However, states should ensure that the full range of human rights to which refugees are entitled and timely access to durable solutions flow from these processes. Any additional procedures for accessing durable solutions should not be lengthy.

Temporary protection programmes should be fully respectful of refugees' rights and be able to lead to durable protection. However, such programmes, as historically implemented in Europe, have been, and will likely continue to be, too limited to do this. Any future temporary protection regimes in Europe must, nevertheless, provide access to refugee status determination at any time, in accordance with EC legislation.<sup>5</sup>

### Returns and transfers to 'safe third countries'

The fact that a third country respects the right to *non-refoulement* is not sufficient to justify the return or transfer of asylum seekers or refugees to that country. The critical determinants of return to a 'safe third country' should be whether they would access a fair asylum procedure and enjoy all their rights, including whether a state complies fully with the 1951 Refugee Convention and the 1967 Protocol. Additionally, ECRE considers that, even where adequate protection might be available in a country of first asylum or in a 'safe third country', asylum seekers or refugees should never be returned or transferred there if:

- It would be inconsistent with international responsibility-sharing principles;

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<sup>3</sup> See ECRE, *The Way Forward. Europe's role in the global refugee system. Towards a European Resettlement Programme*, April 2005.

<sup>4</sup> See ECRE, *The Way Forward. Europe's role in the global refugee system. Towards Fair and Efficient Asylum Systems in Europe*, September 2005.

<sup>5</sup> See the so-called *Temporary Protection Directive 2001/55/EC of 20 July 2001*, Article 17(1).

- Only temporary protection will be provided;
- The country hosts a protracted refugee situation;
- Resettlement is the only available durable solution.
- They have no meaningful links with the country and have not consented.

States should also consider their obligations to respect rights related to asylum seekers' or refugees' circumstances in the sending country, such as family ties or health reasons.

Any readmission agreements in place between countries should be consistent with international refugee and human rights law standards. The process of reaching such agreements should be transparent and monitored, with their full content made publicly available. They should not contain enforcement conditions linked to the provision of assistance by European states to developing countries. The receiving state should additionally have explicitly agreed to readmit an individual as an asylum seeker or refugee.

### **International solidarity and responsibility – sharing**

Developing countries already host the majority of the world's refugees. Actions that would shift more responsibility to those already over-stretched countries only risk further destabilising the international refugee protection system. International and European cooperation should lead to greater responsibility-sharing and go beyond its current overwhelming focus on the strengthening of border controls. Responsibility-sharing should also concretely contribute to the greater provision of durable solutions to refugees. Resettlement, for example, can have a positive impact on the protection environment for those refugees who remain in a host country. Development assistance can contribute to improving the prospects of integration into the host society and to increasing refugees' self-reliance while they await a solution.

Enhancing protection in regions of origin is not a quick fix solution to the asylum challenges faced by industrialised countries. It is a long-term task requiring significant resource investment, including the strengthening of national structures and support services and ongoing technical assistance. European states should undertake concrete measures to help other refugee-hosting countries provide a better quality of protection. There are a number of stakeholders, in addition to governments, such as NGOs and UNHCR, who do important work strengthening protection capacities. Capacity-building programmes in all regions of origin should therefore combine direct assistance to governments with adequate funding of UNHCR, NGO refugee protection programmes and civil society more widely. Programmes should take into account the rights and needs of the local host populations. The fundamental and urgent need to effectively address the root causes of forced migration must also be more of a political priority for Europe.

*The development of this paper on the protection standards of refugees in regions of origin is part of the organisation's development of a series of proposals entitled "The Way Forward -Europe's Role in the Global Refugee Protection System", designed to provide constructive recommendations on a number of topical refugee policy issues and contribute to positively influencing the European debate. The other proposals address the issues of developing European resettlement activities, creating fairer and more efficient asylum systems in Europe, improving solutions for refugees through integration, and the return of asylum seekers whose applications have been rejected.*



## Introduction

Refugees' rights and safety should be protected from day one in the country to which they have fled but in reality frequently they are not. The majority of the world's refugees flee to countries close to their countries of origin and most remain there in inadequate conditions and without a solution in sight. Over 70% of refugees are hosted in poor, developing countries. Many find themselves without adequate food, shelter and with their social needs not met. Often they remain vulnerable to attacks or threats and have their fundamental rights restricted.<sup>6</sup> Many are 'warehoused' for many years in unsuitable camps or struggle to maintain an impossible existence on the margins of society in their host country.<sup>7</sup> More than six million people are involved in 38 protracted refugee situations<sup>8</sup> worldwide, and the average length of stay for refugees caught in protracted refugee situations is estimated at 17 years.<sup>9</sup> Unresolved protracted refugee situations perpetuate poverty and social and political deprivation.<sup>10</sup> They are the result of continuing instability and human rights violations in countries of origin as well as of the lack of engagement on the part of the international community in both countries of origin and the countries hosting refugees.

The scale and impact of such unacceptable situations demands an urgent global response, including a frank analysis of the full set of rights that protection entails and how host states and the international community can ensure they are fulfilled. An understanding of the relationship between the provision of protection, return and responsibility-sharing on the part of all stakeholders, especially states, is crucial, as failure to understand this represents a serious threat to the stability of the global refugee protection system.

At the international and European levels there has been substantial discussion in recent years about what refugee protection should consist of and how it could be improved. But industrialised states have also pushed this debate to address how improving protection could help them manage migratory flows to their countries and, thus, also deal with the issue of their domestic asylum challenges.

The United Nations High Commissioner for Refugees' (UNHCR) *Agenda for Protection* adopted in 2002 recognised the need for "better responsibility-sharing

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<sup>6</sup> For example see ECRE and U.S. Committee for Refugees, *Responding to the Asylum and Access Challenge: An agenda for Comprehensive Engagement in Protracted Refugee Situations*, August 2003, for information on refugee protection realities in East Africa and the Middle East.

<sup>7</sup> See U.S. Committee for Refugees and Immigrants, 'Warehousing Refugees: A Denial of Rights, a Waste of Humanity,' *World Refugee Survey 2004—Warehousing Issue*, pp. 38-56.

<sup>8</sup> UNHCR has defined a protracted refugee situation as when "refugees find themselves in a long-lasting and intractable state of limbo. Their lives may not be at risk, but their basic rights and essential economic, social and psychological needs remain unfulfilled after years in exile", *Protracted Refugee Situations*, Standing Committee 30<sup>th</sup> meeting, UNHCR, EC/54/SC/CRP.14, 10 June 2004, p.2. See also Gil Loescher and James Milner, *Protracted Refugee Situations: domestic and international security implications*, Adelphi Paper 375, International Institute for Strategic Studies, Routledge, 2005, p.14, for a discussion of this definition which stresses that such populations are not static, change in composition, and may include camp-based and urban refugee populations.

<sup>9</sup> Figures at the end of 2003. UNHCR, *Protracted Refugee Situations*, Standing Committee 30<sup>th</sup> meeting, EC/54/SC/CRP.14, 10 June 2004, p.2.

<sup>10</sup> Gil Loescher and James Milner, *Protracted Refugee Situations: domestic and international security implications*, Adelphi Paper 375, International Institute for Strategic Studies, Routledge, 2005, p.70.

arrangements to shoulder the burdens of first asylum countries”.<sup>11</sup> The resulting background paper<sup>12</sup> and roundtable discussion<sup>13</sup> focused on ‘effective protection’ in the context of secondary refugee movements and the return of asylum seekers. The Lisbon expert roundtable did not produce a comprehensive definition of ‘effective protection’ but it did highlight some of its critical elements. Two of the most important conclusions were that: 1) although accession to international refugee instruments and basic human rights instruments is not essential, at least in theory, it is a critical indicator, and, in the absence of accession, the host country must be able to demonstrate that a third state has developed a practice akin to the 1951 Refugee Convention<sup>14</sup> and/or the 1967 Protocol;<sup>15</sup> 2) asylum seekers do not have any obligation to seek international protection at the first effective opportunity.<sup>16</sup>

Amnesty International has called on UNHCR to provide further guidance on the scope and content of the term ‘effective protection’ as a legal standard.<sup>17</sup> This is based on a concern that, in the absence of an authoritative legal definition, states wishing to limit secondary and onward movements and to return asylum seekers will develop their own minimalist benchmarks. However the term ‘effective protection’ has become increasingly politicised and, thus, problematic for those whose central concern is ensuring progress towards the highest standards of protection for refugees. In arguing that ‘effective protection’ is the implementation of rights as set out by international and human rights law, UNHCR has pertinently asked the question: “*Why add ‘effective’ to the notion of protection?*”<sup>18</sup> In recognition of the continued dangers of an unmanaged ‘effective protection’ debate, UNHCR has further stated:

*“Effective protection is not a term of art, although rather unfortunately it is becoming one... It is increasingly being seen,..., as a means to limit a state’s responsibilities towards particular asylum-seekers or refugees because the persons in question have found, or could have been expected to find, protection elsewhere... We fear the result will be consensus around the lowest common denominator definition.”*<sup>19</sup>

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<sup>11</sup> UNHCR, *Agenda for Protection*, Executive Committee of the High Commissioner’s Programme, Fifty-Third Session, A/AC.96/965/Add.1, June 26 2002, Goal 3.1.

<sup>12</sup> Stephen H. Legomsky, ‘Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection’ in *International Journal of Refugee Law*, Vol 15, 2003, pp.567-677.

<sup>13</sup> Lisbon Expert Roundtable, 9 and 10 December 2002, organised by the United Nations High Commissioner for Refugees and the Migration Policy Institute, hosted by the Luso-American Foundation for Development.

<sup>14</sup> Convention Relating to the Status of Refugees of 28 July 1951.

<sup>15</sup> Protocol Relating to the Status of Refugees of 31 January 1967.

<sup>16</sup> Lisbon Expert Roundtable, 9 and 10 December 2002, organised by the United Nations High Commissioner for Refugees and the Migration Policy Institute, hosted by the Luso-American Foundation for Development. *Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers*, paras. 15 and 11.

<sup>17</sup> See Amnesty International, *UK/EU/UNHCR Unlawful and Unworkable – extra-territorial processing of asylum claims*, AI Index: IOR 61/004/2003, June 2003, Recommendation 5.

<sup>18</sup> *Statement by Ms. Erika Feller*, Director, Department of International Protection, UNHCR, at the Fifty-fourth Session of the Executive Committee of the High Commissioner's Programme, Geneva, October 2003.

<sup>19</sup> *Statement by Ms. Erika Feller*, Director, Department of International Protection, UNHCR, at the Fifty-fifth Session of the Executive Committee of the High Commissioner's Programme, Geneva, 7 October 2004.

Secondary<sup>20</sup> and onward<sup>21</sup> movement of refugees from countries in their regions of origin<sup>22</sup> in order to seek asylum has continued to be a major preoccupation of European countries that want to reduce the numbers of asylum seekers arriving in Europe, as has their interest in externalising their refugee protection obligations. Following its Global Consultations, UNHCR initiated the Convention Plus process in 2003 and tried to address these issues. One of the three strands of work within this process focused on 'irregular secondary movements'. Bringing together states from both industrialised and developed countries, the discussions were clearly difficult and finally no agreement was reached between them on how to tackle this phenomenon.<sup>23</sup>

European countries have also discussed ideas amongst themselves at the European Union (EU) level. In 2003, both the UK and Denmark offered their EU partners working definitions of 'effective protection' in order to set benchmarks to identify whether asylum seekers could be returned or transferred to, or their applications processed in, third countries.<sup>24</sup> In the UK's proposals for 'protection zones' and processing centres,<sup>25</sup> the definition of 'effective protection' was quite limited focusing principally on primary humanitarian assistance and protection against *refoulement*, including compliance with Article 3 of the European Convention on Human Rights (ECHR).<sup>26</sup> In a similar vein, the Danish government suggested that 'effective protection' should comprise a guarantee against *refoulement*, physical protection and an appropriate level of social protection, placing emphasis on the importance of being able to agree a level of protection that may be implemented in practice.<sup>27</sup> On the basis of such minimalist definitions states have discussed with interest the processing of

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<sup>20</sup> Here defined as the movement of persons who have already found international protection, as set out in UNHCR Executive Committee Conclusion 58 (XL) – 1989- *Problem of refugees and asylum seekers who move in an irregular manner from a country in which they had already found protection*, (while noting the problems inherent in the definition provided by this Conclusion).

<sup>21</sup> Here defined as the movement of persons asylum seekers who have not already found international protection.

<sup>22</sup> The term 'regions of origin' is here used to refer to all regions including regions in Europe and not only developing countries. See section 1 of this paper for further details.

<sup>23</sup> See UNHCR, *Joint Statement by Co-Chairs, Convention Plus Core Group on Addressing Irregular Secondary Movements of Refugees and Asylum Seeker*, FORUM/2005/7, 8 November 2005 for an outline of the discussions, the points agreed and the issues left unresolved.

<sup>24</sup> The Dutch governments are also actively interest in ideas promoting refugees' access to protection closer to home. For discussion of EU Member State proposals see Alexander Betts, 'International Cooperation between North and South to Enhance Refugee Protection in Regions of Origin', *Refugee Studies Centre Working Paper No.25*, University of Oxford, July 2005, pp.15-17.

<sup>25</sup> See CO/HO Future of Migration Project, *A new vision for refugees*, Final Report, January 2003 and Letter from Tony Blair to Costas Simitis, 'New international approaches to asylum processing and protection', 10 March 2003.

<sup>26</sup> For an analysis of the UK proposals see: British Refugee Council, *Unsafe Havens, Unworkable Solutions*, May 2003; Gil Loescher and James Milner, 'The missing link: the need for comprehensive engagement in regions of refugee origin', *International Affairs*, Vol 79, No3, May 2003 and *Protracted Refugee Situations: domestic and international security implications*, Adelphi Paper 375, International Institute for Strategic Studies, Routledge, 2005, p.30; Amnesty International, *UK/EU/UNHCR Unlawful and Unworkable – extra-territorial processing of asylum claims*, AI Index: IOR 61/004/2003, 18 June 2003; Oxfam GB, *Foreign Territory: The Internationalisation of EU Asylum Policy*, 2005, pp58-67.

<sup>27</sup> See Gregor Noll, 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones', *European Journal of Migration and Law*, Volume 5, Issue 3, 2003 which cites a Danish Memorandum produced in April 2003.

asylum claims within regions of origin (as opposed to on EU territory),<sup>28</sup> transferring funds from domestic asylum systems to do this, and providing resettlement to the EU as a form of orderly, legal entry into Europe.<sup>29</sup> These ideas have been accompanied by widespread rhetoric on the need for refugees to find protection closer to home, to avoid them undertaking dangerous journeys to Europe or using smugglers / traffickers, and so they can more easily return to their country of origin when the time is right.

The European Commission was tasked with further exploring some of these ideas. As a first step it defined 'effective protection' as including physical security, a guarantee against *refoulement*, access to procedures with sufficient safeguards and social-economic well being.<sup>30</sup> It went on to propose what might be considered less comprehensive benchmarks and indicators for 'effective protection', as well as the development of EU Regional Protection Programmes (RPPs), in part aimed at undertaking "*action to enhance the protection capacity*" of third countries in regions of origin to help them become "*robust providers of effective protection*".<sup>31</sup> More recent Commission proposals sketching out the first possible pilot RPPs indicate an intention for these programmes to be protection-oriented.<sup>32</sup> However, the pilots proposed are far from being able to address the scale of the problems in the regions in question and have yet to be implemented and evaluated. In addition, political will and consensus at the European level is greater in relation to supporting transit countries in improving their protection standards, than countries in regions of origin, a sign of the dominance of the migration management agenda.<sup>33</sup>

The European Council on Refugees and Exiles (ECRE) believes there must be a comprehensive understanding of what constitutes protection, drawn from international refugee and human rights law, and that this should, in turn, be integrated into all proposals and programmes for improving protection in regions of origin. The agreement of any minimalist definition of 'effective protection' between states (through European or international fora) would be contrary to this approach and undermine the global refugee protection system.

ECRE is concerned that EU Member States wish to use processes to define 'effective protection' to more easily divest themselves of the responsibility to protect a large proportion of individuals who seek asylum on their territory, by more readily

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<sup>28</sup> Note that under the EU Hague Programme the European Commission has been charged with undertaking a feasibility study of external processing, *Presidency Conclusions-Brussels, 4/5 November 2004: Annex 1: The Hague Programme, Strengthening Freedom, Security and Justice in the European Union* 14292/1/04 REV 1, 8 December 2004, p.18.

<sup>29</sup> ECRE supports the expansion of European resettlement activities on the basis that resettlement remains complementary to existing asylum systems for dealing with protection claims of spontaneously arrived asylum seekers. See ECRE, *The Way Forward. Europe's role in the global refugee system. Towards a European Resettlement Programme*, April 2005, p.26.

<sup>30</sup> European Commission Communication *Towards more accessible, equitable and managed systems*, COM (2003) 315 final, 3.6.2003, p. 6.

<sup>31</sup> European Commission Communication *On the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin – "Improving access to Durable Solutions"*, COM (2004) 410 final, 4.6.2004, p.18, para. 51.

<sup>32</sup> See *European Commission Communication on regional protection programmes*, COM (2005) 388 final, 1.9.2005.

<sup>33</sup> *Ibid.* The proposal to date to set up an RPP in Eastern Europe (Ukraine, Belarus, Moldova) is more detailed and concrete than a second proposal to set up an RPP in Africa (Tanzania).

returning refugees without giving them access to a fair asylum procedure and by encouraging already overburdened countries in regions of origin to provide protection to more people, while continuing to make it harder for asylum seekers to reach the EU. Onward or secondary movements will not be minimised unless their causes are identified and measures are taken to remove or mitigate them. The absence of protection which meets the needs of refugees and grants them their rights is one of the causes of such movements and this should be addressed through the strengthening of protection.<sup>34</sup> In contrast, intensified border controls and interception practices, without the concomitant safeguards, seriously increase the risk of *non-refoulement* and fail to address the causes of such movements. At the same time any measures to improve the protection environment in regions of origin must not undermine states' obligations to ensure that no asylum seeker or refugee is returned or transferred from a European country to a place where they may not be able to access all their rights.

This paper therefore bases itself on the premise that an agenda for responsibility-sharing and international solidarity must be set out and implemented and that Europe should play a leading role in this. In contributing to the debate ECRE aims to encourage European countries to take a more principled, holistic and comprehensive approach to the aim of improving refugee protection. It offers a framework for assessing the availability of international protection in line with international refugee and human rights law and also identifying any failures to respect refugee rights. It aims to influence European policy and practice on return, specifically in relation to the return of asylum seekers and refugees to 'safe third countries', as well as the wider debate around onward movements of asylum seekers and secondary movements of refugees. It also seeks to encourage European states and/or institutions to build the capacities of countries with less developed or more burdened refugee protection systems. While it does not set out modalities for capacity-building/development programmes, the paper outlines objectives and a framework within which these activities should take place.

Section 1 outlines a set of principles at the core of ECRE's examination of the elements required to guard global refugee protection standards.

Section 2 addresses what protection is, by setting out some universally applicable benchmarks that derive from international refugee and human rights law. These include the rights refugees must have access to and enjoy, without discrimination, as well as legal standards that must be complied with. It also briefly considers different ways in which protection can be accessed.

Section 3 addresses the dangers of returning asylum seekers and refugees to countries in regions of origin under the so-called 'safe third country' notion, and points to necessary additional safeguards. The section focuses on barriers to such returns in regions of origin, while recognising there are additional barriers to such returns related to an asylum seeker's circumstances in the sending country (a full discussion of which is beyond the scope of this paper).

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<sup>34</sup> This is the approach recommended in ExCom Conclusion 58 that recognises that refugees move in an irregular manner when they feel compelled to seek protection elsewhere due to the fact that they cannot access their rights and / or a durable solution. See UNHCR Executive Committee Conclusion No. 58 (XL) – 1989 – *Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner From a Country in Which They Had Already Found Protection*.

Section 4 reaffirms the principles of international solidarity and responsibility-sharing and proposes a framework for the capacity-building of countries in regions of origin, including countries of first asylum.



## 1. Principles

ECRE has identified a number of key, cross-cutting principles underpinning the elements necessary to guard refugee protection standards globally.

***An individual must be granted, without delay, the rights to which he/she is entitled under international refugee and human rights law***

The provision of effective refugee protection requires that all the rights to which refugees are entitled, based on international refugee and human rights law and drawing on international customary law and other relevant standards, must be granted, without any being prioritised over others.

***Regions of origin should not be taken to mean only developing countries***

All regions are, to a greater or lesser extent, regions of origin. Refugees come from all over the world, including Europe. Any principles developed to strengthen protection are therefore applicable everywhere. This means there is a need to invest heavily to build protection capacity in countries where the availability of protection is extremely low, and to maintain and enhance protection capacity in other countries.

***Helping to improve refugee protection beyond Europe does not substitute European countries' obligation to protect refugees who spontaneously arrive on their territory***

ECRE is concerned that European states' interest in improving refugee protection outside the EU may result in moves to reduce their responsibilities and shift them elsewhere. While assisting others, European states must under no circumstances diminish their own capacity to protect refugees arriving spontaneously on their own territory and should in fact improve it.<sup>35</sup>

***The responsibility for hosting and protecting the world's refugee population must be shared more equally between states***

ECRE recognises that many countries struggle to provide protection to large numbers of refugees in contexts where their own nationals often do not enjoy basic human rights. European states can and must do more to assist these countries. They should share the responsibility for hosting and protecting the world's refugee population in a principled and rights-based manner and ensure that their asylum and immigration policies lead to the them taking a fairer share of the responsibility rather than exacerbate the problem of unequal burdens.

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<sup>35</sup> See ECRE, *The Way Forward. Europe's role in the global refugee system. Towards Fair and Efficient Asylum Systems in Europe*, September 2005.

***Strengthening protection in regions of origin should not be regarded as a means to returning or transferring asylum seekers and refugees from Europe to other countries***

The global standard of protection must not be narrowly interpreted to incorporate a presumption of return. Return should be seen as an integral part of a comprehensive protection regime. But even where protection is effective in a country of first asylum, return should not take place if, for example, it would be inconsistent with principles of international responsibility-sharing. The large number of refugees already hosted by some countries should not be increased. States' focus should instead be on agreeing benchmarks that will have a positive influence on the quality of protection for refugees in all countries.

***No state should assist another state to act in ways that would breach its own obligations under international law***

The 'complicity principle'<sup>36</sup> draws on European jurisprudence and provides that no country may send any person to another country, knowing the latter will violate rights that the sending country itself is obligated to respect.<sup>37</sup> The European Court of Human Rights, the Committee Against Torture and national courts have, for example, identified the obligation of destination countries to take into account third countries' observance of the rights to life and prohibition of torture prior to effecting returns.

In 2004, the UN Human Rights Committee agreed that a state party to the 1966 International Covenant on Civil and Political Rights (ICCPR)<sup>38</sup> must ensure the protection of an individual on its territory *or under its effective control* (even if not within its territory), and acknowledged that a state's obligations under the ICCPR to respect, protect and fulfill these rights is both direct and indirect and may have extraterritorial application.<sup>39</sup> Similarly the International Court of Justice determined that obligations apply in any territory over which a state party holds "effective jurisdiction".<sup>40</sup> This principle should be observed when considering returns under the 'safe third country' concept.

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<sup>36</sup> See Stephen H. Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection', *International Journal of Refugee Law*, Vol 13, 2003.

<sup>37</sup> See for example, *Soering v. United Kingdom* [1989] ECHR 14038/88, (1989) 11 EHRR 439, *T.I. v. United Kingdom*, Decision as to the Admissibility of Application No. 43844/98 (ECtHR, 2000).

<sup>38</sup> *First Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 *U.N.T.S* 302.

<sup>39</sup> UN Human Rights Committee, *General Comment No. 31 [80] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, adopted on 29 March 2004 (2187th meeting), CCPR/C/21/Rev.1/Add. 13, 26 May 2004, paragraph 10.

<sup>40</sup> See International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (2004), Gen. List No.131, decided 9 July 2004..



## 2. Protection Standards

### 2.1 Elements of Protection

Using international refugee and human rights law as its point of reference, ECRE is putting forward a framework to be used to measure and evaluate the quality of protection. It sets a standard which it recognises many developed countries may not presently meet. But ECRE's firm view is that any state that does not (or cannot) implement these recommendations is not providing protection which is effective and that persons in need of international protection cannot therefore be returned or transferred to that state on the basis of any 'safe third country' notion.

#### 2.1.1 Rights

In June 2004 the European Commission set out the following benchmarks and indicators for effective protection that contain important safeguards, including certain human rights standards:

- (a) *"life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;*
- (b) *the principle of non-refoulement in accordance with the Geneva Convention is respected;*
- (c) *the right to freedom from torture and cruel, inhuman or degrading treatment is respected as well as the prohibition of removal to such treatment;*
- (d) *the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention;*
- (e) *the possibility exists to live a safe and dignified life taking into consideration the relevant socio-economic conditions prevailing in the host country".*<sup>41</sup>

In October 2004 UNHCR set out a number of standards which, it stated, should as a minimum be reliably guaranteed:

- (i) *"There is no likelihood of persecution, of refoulement or of torture or other cruel and degrading treatment;*
- (ii) *There is no other real risk to the life of the person[s] concerned;*
- (iii) *There is a genuine prospect of an accessible durable solution in or from the asylum country, within a reasonable timeframe;*
- (iv) *Pending a durable solution, stay is permitted under conditions which protect against arbitrary expulsion and deprivation of liberty and which provide for adequate and dignified means of subsistence;*
- (v) *The unity and integrity of the family is ensured;*
- (vi) *The specific protection needs of the affected persons, including those deriving from age and gender, are able to be identified and respected".*<sup>42</sup>

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<sup>41</sup> Communication from the Commission *On the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin – "Improving access to Durable Solutions"*, COM (2004) 410 final, 4.6.2004, p.16, para. 45.

<sup>42</sup> *Statement by Ms. Erika Feller, Director, Department of International Protection, UNHCR, at the Fifty-fifth Session of the Executive Committee of the High Commissioner's Programme, Geneva, 7 October 2004.*

While agreeing with some of the elements put forward by the European Commission and UNHCR, ECRE considers that a wider range of rights drawn from international refugee and human rights law must be granted for the protection of refugees to be considered effective. ECRE also recognises the attachment and contingent standards within the 1951 Refugee Convention, meaning that not every right must be immediately granted to all refugees but rather that rights are accrued, based on the individual's attachment to the duty-bearing state, and are also often contingent on the rights granted to another group of persons.<sup>43</sup> As the 1951 Refugee Convention already provides some flexibility to states, it is inappropriate for them to select amongst the rights in any other way, and they must ensure that the full provision of rights contained in the 1951 Refugee Convention are ultimately accessible. ECRE further considers that in the context of the application of 'safe third country' returns, additional safeguards are necessary.

### ***Protection against refoulement***

Protection against *refoulement* is the essence of refugee protection. As a principle of customary international law, all states are bound by the principle of *non-refoulement*. Giving primacy to the principle of *non-refoulement* is essential not only in avoiding direct *refoulement*, but also in avoiding chain *refoulement*. In this context, the guarantee of *non-refoulement* should be seen as the first step towards securing effective protection, which demands a much wider range of human rights.

### **Recommendation 1:**

As the essence of refugee protection and part of customary law, *non-refoulement* must be guaranteed. It is the first essential step towards ensuring protection is available.

### ***Civil and political rights***

For protection to be considered effective, refugees must enjoy all their civil and political rights. The focus should not be only on rights such as freedom from torture, cruel, inhuman or degrading treatment or punishment, or the right to life. Such rights are of course critical and should have prominence, but civil and political rights are minimum standards – they are not aspirational or open to selective application. Other civil and political rights include the right to family unity,<sup>44</sup> rights to liberty and freedom of movement,<sup>45</sup> and rights of conscience and belief.<sup>46</sup>

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<sup>43</sup> See Hathaway's elaboration of these principles which explains the rights a refugee is entitled to, according to the following categories of attachment: under a state's jurisdiction; physical presence; lawful presence; lawful stay; durable residence; and sets out the general and exceptional standards of treatment. James C. Hathaway *The Rights of Refugees under International Law*, Cambridge University Press, 2005, p.154 and pp.192-238.

<sup>44</sup> Article 16; Universal Declaration of Human Rights; Article 23 (1); ICCPR, Articles 10(1) and 22(2), Convention on the Rights of the Child, Lisbon Expert Roundtable, 9 & 10 December 2002, *Summary Conclusion on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum Seekers*, UNHCR and the Migration Policy Institute; see also relevant contributions in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, eds. Erika Feller, Volker Türk and Frances Nicholson, 2003.

<sup>45</sup> Articles 3 and 13, Universal Declaration of Human Rights; Articles 9 and 12, ICCPR; Articles 26 and 31, 1951 Refugee Convention; Articles 10(2) and 37, Convention on the Rights of the Child.

It should be noted that Article 4 of the ICCPR and Article 15 of the ECHR allow for derogations from certain rights in times of public emergency that threaten national security, which can only be invoked in certain carefully prescribed circumstances and in a non-discriminatory way.<sup>47</sup> Such circumstances, however, would automatically exclude the possibility that effective protection might be available.

**Recommendation 2:**

Protection can only be effective when refugees enjoy all their civil and political rights, and not only rights such as freedom from torture, cruel, inhuman or degrading treatment or punishment, or the right to life.

**Recommendation 3:**

No asylum seeker or refugee should be returned to situations of national emergency and therefore to a state needing to invoke Article 4 of the International Covenant on Civil and Political Rights (ICCPR) and/or Article 15 of the European Convention on Human Rights (ECHR).

***Economic, social and cultural rights***

Economic, social and cultural rights have long been recognised as integral to refugees being able to have a dignified life,<sup>48</sup> as have the interdependence and indivisibility of human rights.<sup>49</sup> There are clear standards within economic, social and cultural rights which states are required to respect (not to interfere with the exercise of rights), protect (to ensure others do not interfere primarily through effective regulation and remedies) and fulfil (including to promote rights).<sup>50</sup> The objective of ensuring that refugees and asylum seekers and their families are able to lead a dignified life and enjoy an adequate standard of living, including being self-reliant, is indispensable to ensuring that protection is effective.<sup>51</sup> This includes, in particular, rights to health care, food, clean water, housing, education, and work.<sup>52</sup> While recognising the progressive realisation notion that characterises the economic, social and cultural rights framework internationally (embodied in Art 2(3) of the International Covenant

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<sup>46</sup> These include the rights to freedom of thought, conscience, religion or belief, opinion or expression. See, for example, Articles 18 and 19, ICCPR; Article 4, 1951 Refugee Convention; and Articles 13 and 14, Convention on the Rights of the Child.

<sup>47</sup> For an analysis of the application of the ECHR provision see *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*, [2004] UKHL 56 in which the House of Lords found the UK's derogation from its international human rights obligations permitting indefinite detention of non-national terror suspects to have been implemented in a discriminatory way.

<sup>48</sup> Article 25 of the Universal Declaration of Human Rights provides that: "Everyone has a right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

<sup>49</sup> *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights, A/CONF.157/23, 12 July 1993.

<sup>50</sup> UN Committee on the Elimination of Racial Discrimination, *General Comment 30: Discrimination Against Non Citizens*, 01/10/2004.

<sup>51</sup> An adequate standard of living as per Article 11 (1) of the ICESCR includes adequate food, housing, clothing, and the continuous improvement of living conditions.

<sup>52</sup> In *The Refugee Convention, 1951, The Travaux Préparatoires analysed with a commentary*, at p.147 Dr. Paul Weis states that "Article 17 [right to wage-earning employment] is one of the most important of the Convention."

on Economic, Social, and Cultural Rights (ICESCR),<sup>53</sup> it should be noted that the 1951 Refugee Convention is in many cases more absolute on the question of refugees' access to the economic rights within it.<sup>54</sup> ECRE's view is therefore that when a state restricts the economic rights of non-nationals<sup>55</sup> this indicates that that state cannot afford refugees protection that can be considered effective.

#### **Recommendation 4:**

States must grant refugees access to economic, social and cultural rights as these are essential to the enjoyment of protection and other human rights. Any state restricting the economic rights of refugees is not providing them with protection that is effective.

#### ***Legal protection, including legal status and documentation***

Legal protection is a pre-requisite to ensuring that the obligation to prevent, respond to and remedy protection violations under international human rights law and to ensuring that refugee law is upheld. The right to legal protection should last for as long as international protection is required and until a durable solution ensues, to which new legal protection rights would be attached. In view of the fact that it is the protection of the *state* to which an individual is entitled, documents provided by UNHCR, such as 'protection letters' or 'person of concern' letters may establish that a person is in need of protection, but they will not suffice to establish that an individual can access effective protection.<sup>56</sup>

It is a fundamental principle of international refugee and human rights law that a asylum seeker or refugee is entitled to access to the courts,<sup>57</sup> equality before the courts,<sup>58</sup> equality before the law and equal protection of the law.<sup>59</sup> In order for these rights to be meaningful asylum seekers and refugees should also enjoy the right to independent legal counsel. Likewise, the importance of legal status and documentation is clearly indicated by the rights set out in the 1951 Refugee Convention to identity papers<sup>60</sup> and to travel documents.<sup>61</sup>

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<sup>53</sup> Article 2(3) of the ICESCR provides that "developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals." However, the provision should be interpreted narrowly as the Limburg Principles indicate that the purpose of this provision was to end the domination of certain economic groups of non-nationals during colonial times. *Limburg Principles on the Implementation of the ICESCR*, para. 43.

<sup>54</sup> James C. Hathaway, "The international refugee rights regime", (2000), 8(2) *Collected Courses of the Academy of European Law*, 135 and *The Rights of Refugees under International Law*, Cambridge University Press, 2005, pp.122-123.

<sup>55</sup> This is also done by many states through reservations to Art.17 of the 1951 Refugee Convention.

<sup>56</sup> This reinforces the point made in Section 2.1.2 that the presence of UNHCR in a country is not sufficient to establish the existence of effective protection.

<sup>57</sup> Article 16, 1951 Refugee Convention.

<sup>58</sup> Article 14, ICCPR.

<sup>59</sup> Article 26, ICCPR.

<sup>60</sup> See Article 27, 1951 Refugee Convention: this right accrues to *any refugee* in the territory of the contracting state.

<sup>61</sup> See Article 28, 1951 Refugee Convention: this right is limited to refugees *lawfully staying* in the territory of the contracting state, but the provision invites contracting states to issue a Convention travel document to any other refugee in their territory, particularly those unable to obtain a travel document from their country of lawful residence.

**Recommendation 5:**

The right to legal protection must endure for as long as international protection is required and until a durable solution ensues, to which new legal protection rights would be attached.

**Recommendation 6:**

It is the protection of the *state* to which an individual is entitled. Although documents provided by UNHCR, such as ‘protection letters’ or ‘person of concern’ letters may establish that a person is in need of protection, they will not suffice to establish that an individual has access to protection that is effective.

***Rights of vulnerable groups***

Vulnerable groups, including women, children, the disabled and older people require particular care to ensure that their protection needs are fully met. Protecting vulnerable groups is a duty that derives from international legal obligations, such as the right to non-discrimination. The evolution of the principle of non-discrimination,<sup>62</sup> including protection against racism and xenophobia, together with instruments for the protection of specific groups such as children and women are therefore important.

Particular attention should be given to rights under the 1989 Convention on the Rights of the Child (CRC) and the 1979 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). The CRC provides that the best interests of the child must be of paramount concern,<sup>63</sup> and that child refugees and asylum seekers must receive appropriate protection and humanitarian assistance.<sup>64</sup> The CEDAW provides that steps be taken to ensure that women enjoy protection against sexual and other exploitation,<sup>65</sup> access without discrimination to equal protection of the law,<sup>66</sup> education, employment, health, economic and social benefits.<sup>67</sup>

**Recommendation 7:**

Particular attention should be given to the needs and rights of vulnerable groups, including women, children, the disabled and older persons, under instruments such as the 1989 Convention on the Rights of the Child (CRC) and the 1979 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), in addition to the rights under other generic human rights instruments.

***Durable Solution***

The prospect of timely access to a durable solution must be present for it to be judged that any protection provided is or is likely to be effective. There is a need for more

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<sup>62</sup> Article 7, Universal Declaration of Human Rights; Article 5; Convention on the Elimination of all Forms of Racial Discrimination; Article 3, 1951 Refugee Convention; Article 2, ICCPR; Article 2, ICESCR; Article 2, CEDAW; Article 2, CRC.

<sup>63</sup> Article 3, CRC.

<sup>64</sup> Article 22, CRC.

<sup>65</sup> Article 6, CEDAW.

<sup>66</sup> Article 15, CEDAW.

<sup>67</sup> Articles 10-13, CEDAW.

concerted action to increase the availability of all durable solutions.<sup>68</sup> It is ECRE's view that, within such action, European states have an important role to play, particularly in increasing access to resettlement in Europe. ECRE recognises, however, that resettlement is not a universal panacea and must be approached as part of a comprehensive protection and durable solutions strategy.<sup>69</sup>

The timeliness of the durable solution is highly debated. Experience suggests that refugee situations are far more likely to persist for years than they are to be resolved in a matter of weeks or months and during that time often only emergency relief is available. UNHCR considers refugee situations that have lasted for five or more years to be protracted.<sup>70</sup> However, no refugee should be required to wait five years or more to access all their protection rights and for a durable solution to become available, and no law or policy should create such an expectation.<sup>71</sup> Thus, even if the protection available grants refugees their rights under international law and allows them to become self-reliant, if a durable solution is unlikely to become available within a reasonable period of time, the protection offered will not be effective. This is clearly the case for people in protracted refugee situations. Consequently, return or transfer to such situations is not acceptable. Return should also not be carried out where resettlement is the only available durable solution. It is counter-productive to have a policy that unduly extends the cycle of displacement by sending refugees from one country to another, in addition to the fact that actual resettlement is not always guaranteed.<sup>72</sup>

**Recommendation 8:**

Protection is not effective unless refugees have access to a durable solution within a reasonable period of time.

**Recommendation 9:**

States should play a leading role in the development of comprehensive durable solutions strategies, including for protracted refugee situations. European states should specifically address how to increase the availability of resettlement to Europe. This should eventually lead to the establishment of a European resettlement programme.

**Recommendation 10:**

Asylum seekers and refugees should never be returned to a protracted refugee situation or to a country where resettlement is the only available durable solution.

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<sup>68</sup> See UNHCR, *Agenda for Protection*, Executive Committee of the High Commissioner's Programme, Fifty-Third Session, A/AC.96/965/Add.1, June 26 2002, Goal 5. UNHCR's Preparatory Project for the Comprehensive Plan of Action for Somali Refugees is one example of an initiative aimed at expanding opportunities for durable solutions.

<sup>69</sup> See ECRE, *The Way Forward. Europe's role in the global refugee system. Towards a European Resettlement Programme*, April 2005.

<sup>70</sup> *Protracted Refugee Situations*, Standing Committee 30<sup>th</sup> meeting, UNHCR, EC/54/SC/CRP.14, 10 June 2004, para.5.

<sup>71</sup> For a discussion of situations where UNHCR and its donors are seen as doing this, see Jeff Crisp, 'No solutions in sight: the problem of protracted refugee situations in Africa', *New Issues in Refugee Research, Working Paper No. 75*, UNHCR, Evaluation and Policy Analysis Unit, January 2003.

<sup>72</sup> UNHCR has noted in the case of Indonesia where resettlement is the only available durable solution that "there are considerable numbers of UNHCR recognised refugees who are rejected for resettlement, and who remain without any prospects of a durable solution". *UNHCR's views on the concept of effective protection as it relates to Indonesia*, 2 December 2004.



## 2.1.2 Legal Framework

Protection encompasses all activities – *preventive, responsive, and remedial* – designed to ensure respect for refugees' rights as specified in international refugee and human rights law.

### *Accession to and compliance with international refugee and human rights instruments*

For protection to be considered effective, the host country must, without reservations, have acceded to and be in compliance with the 1951 Refugee Convention and the 1967 Protocol. While it is possible for non-party countries to be in compliance with the 1951 Refugee Convention based on appropriate national legislation or practice, supervision by UNHCR, the mandated international organisation, is essential to ensure ongoing compliance.<sup>73</sup>

The Preamble to the 1951 Refugee Convention acknowledges that the principle that human beings shall enjoy fundamental rights and freedoms without discrimination lies at the foundation of the international refugee protection regime. This shows that refugees have long been recognised as being entitled to the protection of their human rights. Thus, international human rights instruments complement refugee instruments and are integral to making refugee protection effective. Supervision by the relevant mandated UN bodies is also essential to ensure ongoing compliance.

As well as being guided by the overall human rights framework provided in the 1948 Universal Declaration of Human Rights, it is essential that states accede to and comply with the following international human rights treaties:

- 1966 International Covenant on Civil and Political Rights (ICCPR)<sup>74</sup>
- 1966 International Covenant on Economic Social and Cultural Rights (ICESCR)
- 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- 1989 Convention on the Rights of the Child (CRC)

Alongside these international instruments, ECRE believes it is essential that states accede to and comply with the appropriate regional instruments, such as the:

- 1950 European Convention on Human Rights (ECHR)

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<sup>73</sup> Article 35 of the 1951 Convention Relating to the Status of Refugees sets out the obligation of contracting states to co-operate with UNHCR and provide it with requested information and statistics.

<sup>74</sup> The UN Human Rights Committee has stated that the rights within the ICCPR must be extended to persons regardless of their nationality such as asylum seekers and refugees. See *General Comment No. 31 [80] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Human Rights Committee, adopted on 29 March 2004 (2187th meeting), CCPR/C/21/Rev.1/Add. 13, 26 May 2004, paragraph 10.

- 1965 Protocol for the Treatment of Palestinians in Arab States ("Casablanca Protocol") by the League of Arab States
- 1969 Convention governing the Specific Aspects of Refugee Problems in Africa
- 1969 American Convention on Human Rights
- 1981 African Charter on Human and Peoples' Rights
- 1984 Cartagena Declaration on Refugees.

### *Accountability*

Being a state party to an international instrument is not in itself an indicator of compliance with applicable international standards and, at least in theory, it is also not a guarantee of compliance. Accountability at a national level requires legislation to be in place that safeguards standards set out in international instruments. At an international level, accession to relevant international instruments is essential because there is a real need to ensure that compliance with international standards is a matter of legal obligation rather than dependent on the goodwill of the state whose compliance can deteriorate according to changing public attitudes, local legislation, and government leadership. Moreover, good faith willingness to comply with international obligations is more readily established in the case of a state that has elected to submit its performance to international oversight, and thus supervision by a mandated international organisation is an important part of ensuring ongoing compliance.

Although there is currently no reporting system for the 1951 Refugee Convention, under the UNHCR Statute the High Commissioner is empowered to provide for the protection of refugees falling under the competence of the Office, including obtaining information from governments concerning the number and conditions of refugees on their territories and the laws and regulations concerning them.<sup>75</sup> UNHCR has also relied upon Article 35(2) of the Convention and Article II (2) of the Protocol to request specific information and responses to questionnaires from states as part of its protection activities.<sup>76</sup> As part of this process UNHCR compiles Annual Protection reports.<sup>77</sup> However, in the absence of ratification of or accession to the 1951 Refugee Convention, the binding obligation of states to cooperate with UNHCR (under Article 35) is not ensured.

In carrying out its functions, UNHCR may be present in a country. However this should not be viewed as serving in itself as an indicator that protection is effective.<sup>78</sup>

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<sup>75</sup> See Article 8, and in particular paragraph (f) of the UNHCR Statute.

<sup>76</sup> See Walter Kälin, 'Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and beyond' in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, eds. Erika Feller, Volker Türk and Frances Nicholson, 2003, and 'Overseeing the Refugee Convention' Working Paper No. 1: *Reporting*, Archana Pyati and Prof. James C. Hathaway, a collaboration of the International Council of Voluntary Agencies and the Program in Refugee and Asylum Law, University of Michigan, December 2001.

<sup>77</sup> These reports are not publicly available.

<sup>78</sup> UNHCR has itself stated that "[t]he presence of UNHCR in a country cannot be equated with the provision of effective protection. International protection is afforded by States and not by an international organisation". *UNHCR's views on the concept of effective protection as it relates to Indonesia*, UNHCR Canberra, 2 December 2004.



**Recommendation 11:**

Governments in all regions must, without reservations, accede to and comply with the standards set out in the 1951 Refugee Convention and the 1967 Protocol and all the relevant international and regional human rights instruments.

**Recommendation 12:**

No asylum seeker or refugee should be returned to a country purely on the basis that UNHCR is present in that country.

## 2.2 Accessing Protection

An asylum seeker is entitled to his/her human rights and the provisional benefits of relevant rights under the 1951 Refugee Convention, while awaiting a status determination decision, and must, thus, have access to these rights.

### 2.2.1 Access to an Asylum Procedure and Status Determination

If an individual undergoes an asylum procedure and/or status determination procedure, this will only provide them with effective access to protection if it is undertaken in the form of an individual assessment. This may be based, in part, on a more general assessment of the country of origin. The individual assessment must take into account the individual persecution claim irrespective of the designation of the country of origin or the country of first asylum as a ‘safe third country’. Assessment should also be timely, fair and transparent and allow for information to be shared with the applicant in a language he/she fully understands. Access to free legal advice, access to UNHCR / non-governmental organisations (NGOs), a qualified and impartial interpreter, a personal interview and a suspensive right of appeal constitute essential procedural safeguards that must be in place.<sup>79</sup> Moreover effective legal remedies must be available to refugees in the event of specific violations of their rights under both human rights and refugee law.<sup>80</sup>

**Recommendation 13:**

If an individual undergoes an asylum procedure and/or status determination procedure, this will only provide them with effective access to protection if it is undertaken in the form of an individual assessment with all the necessary safeguards. This should include free legal advice, access to UNHCR/NGOs, a qualified and impartial interpreter, a personal interview and a suspensive right of appeal.

### 2.2.2 *Prima facie* and group recognition

*Prima facie* and group recognition of refugees are important tools for expediting access to protection. Where enjoyment of the full range of human rights, of which protection is composed, flows from *prima facie* and group recognition (including

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<sup>79</sup> UNHCR Handbook on Refugee Status Determination 1992, pp. 31 – 32; ECRE Guidelines on Fair and Efficient Procedures for Determining Refugee Status, September 1999, para. 20, and ECRE, *The Way Forward. Europe’s role in the global refugee system. Towards Fair and Efficient Asylum Systems in Europe*, September 2005.

<sup>80</sup> See Article 2(3), ICCPR and Article 13, ECHR.

legal status and other rights set out in the 1951 Refugee Convention<sup>81</sup>) and where timely access to durable solutions ensues, individual status determination procedures are unnecessary. Unfortunately, in practice, more often than not, *prima facie* refugees find themselves in protracted refugee situations, with inadequate protection and no access to a long-term solution to their plight.

#### **Recommendation 14:**

States should ensure that *prima facie* and group recognition of refugees leads to the enjoyment of the full range of rights to which refugees are entitled and timely access to a durable solution. If any additional procedures for accessing durable solutions are required by states, these procedures should not be lengthy.

### **2.2.3 Temporary Protection**

ECRE believes that temporary protection represents a reasonable administrative policy only in emergency situations, for large groups, where individual refugee status determination is not immediately practicable and where temporary protection's application will enhance admission to the territory.<sup>82</sup> It also accepts temporary protection as an exceptional measure providing protection in mass influx situations that would otherwise overwhelm a state's protection system.

However, temporary protection regimes, as implemented historically in Europe, have been too limited to provide protection that could be considered effective. They have often failed to provide for the rights contained in the 1951 Refugee Convention and other human rights instruments, and to offer timely access to durable solutions. Temporary protection in Europe has been offered in anticipation that conditions in the country of origin will quickly improve and that the repatriation option will become viable.<sup>83</sup> Under such circumstances, refugees have generally had a restricted legal status, limited opportunities to work, limited or no access to family reunification and limited possibilities to integrate into the host community. Only once temporary protection status has been lifted and programmes for refugees to return home have been put in place have governments generally granted access to status determination processes.

ECRE believes that any European temporary protection programmes will likely remain inadequate, despite the binding EU framework provided for by the Temporary Protection Directive,<sup>84</sup> which now requires EU Member States to provide asylum seekers and refugees granted temporary protection access to refugee status determination procedures at any time.<sup>85</sup> Temporary protection programmes in Europe could be a first step towards accessing durable protection only if, in future, EU

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<sup>81</sup> See UNHCR, *Protection of Refugees in Mass Influx Situations: Overall Protection Framework*, EC/GC/01/4, 19 February 2001.

<sup>82</sup> ECRE, *Position on Temporary Protection in the Context of the Need for a Supplementary Refugee Definition*, March 1997, paras. 8. and 10.

<sup>83</sup> An example of this was the UK's Humanitarian Evacuation Programme in response to the Kosovo crisis in the late 1990s.

<sup>84</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 measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*. Note that no Member State has yet invoked or made use of this Directive.

<sup>85</sup> Article 17 (1), *ibid.*

Member States were to honour this obligation and other countries followed this practice.

**Recommendation 15:**

Any future temporary protection programmes in Europe should provide access to refugee status determination at any time, in accordance with EC legislation.

**Recommendation 16:**

European states should not return or transfer asylum seekers to third countries that are only able / willing to provide temporary or emergency protection.

### 3. Returns and Transfers to ‘Safe Third Countries’

Some governments continue to be critical of onward or secondary movements. But firstly, it should be noted that there is no obligation under international law for a person to seek international protection at the first opportunity.<sup>86</sup> Secondly, and critically, in a number of countries of first asylum, refugees are unable to access all their rights and as a result they seek protection elsewhere.<sup>87</sup> It is therefore “*unfair to condemn those who try to actively find protection rather than waiting for protection to come to them.*”<sup>88</sup> The European Commission has itself acknowledged that there is “*a long way to go before most of the current refugee hosting countries in the regions of origin could be considered to meet such a standard where they are able and willing to offer effective protection based on an assessment made in line with [the Commission’s] benchmarks.*”<sup>89</sup> This indicates that sustainable ‘safe third country’ returns on the basis of improvements achieved in the quality of protection in regions of origin will not be possible in the short term.

The assertion that the right to *non-refoulement* will be respected is not sufficient to justify return to a third country. On the contrary, the critical determinants of return to a ‘safe third country’ include whether the asylum seeker would access a fair asylum procedure, whether the asylum seeker or refugee would enjoy all the necessary elements of protection, whether the receiving country had acceded to and was complying with the 1951 Refugee Convention and the 1967 Protocol, the prospect of a timely durable solution, as well as whether return would be consistent with principled responsibility-sharing.

The sending state would have to consider whether the asylum seeker or refugee had any meaningful links with the third country, such as a previous legal status or close family and cultural links. Even if the third country would appear to be able to provide effective protection, states should consider their obligations to respect asylum seekers’ and refugees’ rights related to their circumstances in the sending country which might constitute additional barriers to their return, such as family ties and health reasons.<sup>90</sup> Moreover, return is prohibited if, in light of the applicant’s comparative family ties to the country that has received the asylum application, return would violate the applicant’s internationally recognised right to family unity.<sup>91</sup> The return or transfer of

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<sup>87</sup> *Note on International Protection*, Executive Committee of the High Commissioner’s Programme, UNHCR, 53<sup>rd</sup> session, document A7AC.96/965, 11 September 2002.

<sup>88</sup> Amnesty International, *UK/EU/UNHCR Unlawful and Unworkable – extra-territorial processing of asylum claims*, AI Index: IOR 61/004/2003, 18 June 2003.

<sup>89</sup> European Commission Communication, *On the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin – “Improving access to Durable Solutions”*, COM (2004) 410 final, 4.6.2004, para 46. For details of the benchmarks see Section 2.1.1 of this paper.

<sup>90</sup> See ECRE, *Safe Third Countries - Myths and Realities*, February 1995, *Guidelines on Fair and Efficient Procedures for Determining refugee Status*, September 1999, para 19, and *ECRE Comments on the Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, as agreed by the Council on 19 November 2004, March 2005.

<sup>91</sup> Legomsky, Stephen H., ‘Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection’, in *International Journal of Refugee Law*, Volume 13 2003.

asylum seekers or refugees against their will to third countries, with which they have no meaningful links, is unacceptable.<sup>92</sup> Should states choose to return or transfer asylum seekers to third countries against their will, legal responsibility would remain with the sending country to ensure that they would be provided with effective protection.<sup>93</sup>

Host states, rather than the individual asylum seeker, have the burden of proof when deciding, for example, whether a country is safe and appropriate for return. The logic of this lies in the fact that it is the state in which the asylum seeker is present whose obligations are triggered under international law, including with respect to human rights. The burden of proof should not rest with the asylum seeker because he/she cannot, for example, be expected to know how to access the protection system, be familiar with relevant national and international legal standards, or be familiar with the language of the third country. Thus, the state in which the asylum seeker is physically present carries the responsibility to protect, and the burden of proving otherwise rests with the state seeking to rebut that presumption.<sup>94</sup> Furthermore the standard of proof should be high given the serious consequences that may flow from a wrong decision.

Any readmission agreements in place between the sending and receiving countries must be consistent with international refugee and human rights law standards.<sup>95</sup> However, readmission agreements are general instruments and additional safeguards and considerations regarding the individual must be addressed. The third country must first have explicitly agreed to readmit the individual in question in order to ensure no exemptions to any agreement are applied.<sup>96</sup> Otherwise chain *refoulement* to the country of origin becomes a risk. Such agreements, however, must not be the result of coercive tactics towards economically weaker countries and/or the imposition of conditions linking compliance of third countries with the provision of development assistance by European states.

In determining options of return, ECRE also believes that the host country should take into account broader issues impacting the country of return – political stability, economic conditions, and the refugee caseload or share of the global refugee burden.<sup>97</sup> There must be an absence of generalised violence in the country of return and

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<sup>92</sup> See *UNHCR Observations on EC Proposal on Determining Responsible State for Deciding Asylum Application*, Feb. 2002, para. 7; *UNHCR Observations on EC Proposal on Asylum Procedures*, July 2001, paras. 31(ii), 37; *UNHCR Global Consultations in Budapest, Conclusions*, 6 – 7 June 2001, para. 18; *UK/EU/UNHCR Unlawful and Unworkable – extra-territorial processing of asylum claims*, Amnesty International, AI Index: IOR 61/004/2003, 18 June 2003.

<sup>93</sup> This accords with European case law (See *T.I. v. United Kingdom* (judgment of 7 March 2000, req. 43844/98, (unpublished), House of Lords, *R v. SSHD ex parte Adan Aitsegeur*, 19 December 2000, (1999) 1, AC, 293 Austrian Supreme Administrative Court (*VwGH*), 08.03.2001, G 117/00) as well as the Vienna Convention on the Law of Treaties (Article 26).

<sup>94</sup> Article 2, ICCPR and Article 1. ECHR.

<sup>95</sup> UNHCR Executive Committee Conclusion No. 85 (XIX), 1998, para. (aa) and *Position on Return*, ECRE, 2003 paras 51-54.

<sup>96</sup> Legomsky, Stephen H., 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection', *International Journal of Refugee Law*, Volume 13 2003, pp.630-633 and ECRE, *Position on Return*, 2003, para. 53.

<sup>97</sup> ECRE, *Position on Return*, October, 2003, para. 43.

evidence of effective implementation of human rights and refugee protection obligations.<sup>98</sup>

**Recommendation 17:**

If asylum seekers and refugees are returned or transferred to a third country (including a country of first asylum), the host country must first establish that they would access a fair asylum procedure and/or be provided with effective protection and timely access to a durable solution.

**Recommendation 18:**

States should consider their obligations to respect asylum seekers' and refugees' rights related to their circumstances in the sending country, such as family ties or health reasons, which might constitute barriers to their return to 'safe third countries'.

**Recommendation 19:**

Asylum seekers and refugees should not be transferred against their will to third countries with which they have no meaningful links.

**Recommendation 20:**

Host states, rather than the individual asylum seeker, bear the burden of proof when deciding that a third country is safe and will provide effective protection, and the standard of proof should be high.

**Recommendation 21:**

Any readmission agreements in place between countries must be consistent with international refugee and human rights law standards. The process of reaching such agreements should be transparent and monitored, and the full content publicly available. The receiving state should also have explicitly agreed to readmit an individual as an asylum seeker or a refugee.

**Recommendation 22:**

When considering return the host country should take into account broader issues of general safety and security impacting on the country of return, including political stability, and social and economic conditions.

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<sup>98</sup> The UN Human Rights Committee has not agreed with any attempts at applying discretion to remove a person at risk of torture, stating that the prohibition on torture, included as expressed in Article 7 of the ICCPR, is absolute. *Ahani v, Canada*, UNHRC Comm. No.1051/2002, Un Doc. CCPR/C/80/D/1051/2002, decided 29 March 2004, para. 10.10, cited in James C. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, 2005, p.370.



## 4. International Solidarity and Responsibility-Sharing

Developing countries already host the majority of the world's refugees. Actions that would shift more responsibility to those already over-stretched countries only risk further destabilising the international refugee protection system. Particular regions and states continue to host very large numbers of refugees, despite enormous political, economic, environmental and social problems.<sup>99</sup> Exacerbating this problem of undue burden, “*Western States have reversed the direction of the principle of international solidarity by application of safe third country concepts and have increased the burden on already disproportionately affected States*”.<sup>100</sup> At the EU level, for example, much higher levels of funding are consistently allocated to border management / migration control activities than to the improvement of refugee protection in non-EU countries.

The continued functioning of the global refugee regime requires the participation of the international community and the states, and greater responsibility-sharing between them.<sup>101</sup> But while strengthening refugee protection globally and making protection truly effective is necessary and desirable, it must not result in responsibility-shifting or the devolution of developed states' responsibilities: it does not replace their obligations to share the responsibility for hosting and caring for the world's refugees.<sup>102</sup>

Moreover, responsibility-sharing should concretely contribute to the greater provision of durable solutions to the world's refugees. For example, one of resettlement's key functions is to act as a responsibility-sharing mechanism and demonstrate international solidarity<sup>103</sup> and, as such, it can have a positive impact on the protection environment for those refugees who remain in the host country. It is considered that, used strategically, it can also play an important role in the development of

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<sup>99</sup> See UNHCR *2004 Global Refugee Trends*, UNHCR and EXCOM 49<sup>th</sup> Session, Annual Theme: International Solidarity and Burden-Sharing in all its Aspects: National, Regional and International Responsibilities for Refugees, A/AC.96/904, 7 September 1998.

<sup>100</sup> *International protection and reception in the region: The specific European understanding of the principle of international cooperation*, Joint Position of Amnesty International Germany, Arbeiterwohlfahrt, Neue Richtervereinigung and Pro-Asyl Germany, 4 August 2003.

<sup>101</sup> UNHCR calls for “closer dialogue and multilateral ownership of refugee problems and their resolution” and stresses the need for a multilateral approach to enable responsibilities and burdens to be shared more equitably, taking into account the widely differing capacities and resources of states', UNHCR, *Agenda for Protection*, Executive Committee of the High Commissioner's Programme, Fifty-Third Session, A/AC.96/965/Add.1, June 26 2002, Goal 3, introduction & objective 1. See also UNHCR *Note on International Protection*, Executive Committee of the High Commissioner's Programme, 53<sup>rd</sup> session, document A7AC.96/965, 11 September 2002. A number of conclusions from the UNHCR Executive Committees also reaffirm and call upon states to implement their obligations in a spirit of true humanitarianism, international solidarity and burden sharing: UNHCR Executive Committee Conclusions No. 11 (XXIX) 1978, No. 15 (XXX), 1979; No. 19 (XXXI), 1980, No. 22 (XXXII), 1981, No.52 (XXXIX), 1988, No. 61 (XLI), 1990, No. 62 (XLI), 1990, No. 67 (XLII), 1991, No. 68 (XLIII), 1992, No. 71 (XLIV), 1993, No. 74 (XLV), 1994, No. 77 (XLVI), 1995, No. 79 (XLVII), 1996, No. 80 (XLVII), 1996, No. 81 (XLVIII), 1997, No. 85 (XLIX), 1998, No. 87 (L), 1999, No. 89 (LI), 2000.

<sup>102</sup> The European Parliament has called for the consideration of spontaneous asylum applications to be maintained and stressed the importance of the EU sharing responsibility with third countries, *European Parliament resolution on asylum procedures and protection in regions of origin* (2004/2121(INI)), P6\_TA(2004)0100, 15 December 2004, paras 23, 24 & 27.

<sup>103</sup> See UNHCR, *Resettlement Handbook* 2004, Chapter 1, and ECRE, *The Way Forward. Europe's role in the global refugee system. Towards a European Resettlement Programme*, April 2005. pp14-15.

comprehensive solutions to protracted refugee situations.<sup>104</sup> In addition, it is important to ensure that development assistance contributes to improving the prospects of integration into the host society and to increasing refugees' self-reliance while they await a solution to their plight.<sup>105</sup>

**Recommendation 23:**

International and European cooperation should lead to greater responsibility-sharing and go beyond its current overwhelming focus on the strengthening of border controls.

**Recommendation 24:**

European countries should substantially increase their resettlement activities due to the contribution this would make to greater responsibility-sharing and to improving of the protection environment in countries of first asylum.

**Recommendation 25:**

Even where protection might be available in a country of first asylum or in another third country, no return or transfer should take place if it would be inconsistent with international responsibility-sharing principles.

#### **4.1 Building protection capacity in countries of first asylum**

Enhancing protection in regions of origin requires significant resource investment, which would, in part, be used for building the capacity of national structures and support services, for ongoing technical assistance and for the independent monitoring of performance. The international community should not consider working towards this goal as an easy solution to the global refugee problem. The provision of protection for refugees globally is a long-term goal and actions to promote it will not in themselves provide a quick fix solution for the perceived problems of industrialised countries' asylum systems.<sup>106</sup>

Long-term, detailed plans are needed, backed by significant technical and financial assistance, for their implementation in each major refugee hosting country in the developing world. In order to address the issue of lack of political will within host countries, capacity-building actions need to include training in public education and advocacy. Importantly, however, initiatives need to fully involve the host states targeted for support, so as to ensure that their needs and concerns are considered and worked with, in order to create a sense of ownership by all parties and increase the likelihood of success. This is crucial, not least in terms of assisted states' political will and commitment to maintaining their protection obligations. Activities strengthening

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<sup>104</sup> See UNHCR, *Multilateral Framework of Understandings on Resettlement*, FORUM/2004/6, 16 Sept 2004.

<sup>105</sup> See UNHCR, *Conclusion on Local Integration*, Report of the Fifty-Sixth Session of the Executive Committee of the High Commissioner's Programme, General A/AC.96/1021 7 October 2005, pp14-19.

<sup>106</sup> The European Commission has noted that "some countries may take decades before they can reach the institutional and infrastructural standards required", European Commission Communication *On the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin – "Improving access to Durable Solutions"*, COM (2004) 410 final, 4.6.2004, p.14, para.41.



refugee protection should also always take into account the rights and needs of the local host populations.

In addition to governments (including the EU institutions) there are a number of other important stakeholders engaged in capacity-building, including NGOs and UNHCR.<sup>107</sup> Strengthening protection capacities is central to UNHCR's mandate,<sup>108</sup> and an essential element of this is its role in undertaking refugee status determination (RSD) procedures in many states in regions of origin.<sup>109</sup> Nevertheless shortfalls in UNHCR funding have resulted in a dramatic reduction in its ability to exercise its protection and assistance functions in regions of refugee origin<sup>110</sup> and this must be addressed.<sup>111</sup> NGOs also face funding difficulties: some local NGOs for instance cannot have direct access to foreign funds for their assistance and protection programmes for refugees.<sup>112</sup> It is therefore important that capacity-building programmes combine direct assistance to governments (in consultation with UNHCR) with adequate funding of UNHCR, NGO refugee protection programmes and civil society more widely.

Finally it is crucial that the root causes of forced migration be addressed and that European institutions and governments make this more of a political priority. Root causes are often complex, consisting of problems such as human rights abuses, political instability, conflict, poverty and environmental degradation, and require multi-level responses. More analysis is needed to understand the root causes of specific refugee flows, as well as more commitment to the development of concrete plans of action that contain realistic, specific, detailed and measurable operational proposals for their resolution.

### **Recommendation 26:**

Host governments should be supported to accede to and comply with their obligations under the 1951 Refugee Convention and the 1967 Protocol and the relevant human rights instruments. European states should undertake concrete measures to help refugee hosting countries provide a better quality of protection to refugees.

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<sup>107</sup> See for example UNHCR's 'Strengthening Protection Capacity Project' focused on Benin, Burkina Faso, Kenya and Tanzania. Reports identifying gaps in protection capacities in all four countries and a summary of the projects goals and progress (1 October 2005) are available at: <http://www.unhcr.ch/cgi-bin/texis/vtx/doclist?page=protect&id=419b25dc4>. For a list of capacity-building initiatives by a wide range of stakeholders see UNHCR, *Strengthening Protection Capacities in Host Countries*, EC/GC/01/19, 19 April 2002, Annex II.

<sup>108</sup> UNHCR, *Strengthening Protection Capacities in Host Countries*, EC/GC/01/19, 19 April 2002, p.3.

<sup>109</sup> There has long been dissatisfaction on the part of refugees and many local NGOs with UNHCR's RSD procedures lacking basic safeguards. UNHCR has this year published its standards governing RSD procedures and stated its intention to enhance their "quality, fairness and integrity". For discussions of this see ECRE and U.S. Committee for Refugees, *Responding to the Asylum and Access Challenge: An agenda for Comprehensive Engagement in Protracted Refugee Situations*, August 2003 and <http://www.rsdwatch.org/>.

<sup>110</sup> Gil Loescher and James Milner, 'The missing link: the need for comprehensive engagement in regions of refugee origin', *International Affairs*, Vol 79, No3, May 2003, p.608.

<sup>111</sup> A view supported by the European Parliament in *European Parliament resolution on asylum procedures and protection in regions of origin* (2004/2121(INI)), P6\_TA(2004)0100, 15 December 2004, para 17.

<sup>112</sup> ECRE and U.S. Committee for Refugees, *Responding to the Asylum and Access Challenge: An agenda for Comprehensive Engagement in Protracted Refugee Situations*, August 2003, p.11.

**Recommendation 27:**

European states should provide government-to-government technical assistance and financial support to strengthen host country asylum systems and procedures in close consultation with UNHCR, NGOs and the wider civil society.

**Recommendation 28:**

In view of UNHCR's key role in strengthening protection globally, governments should provide sufficient funding to UNHCR to enable it to effectively fulfil this role and to provide legal and technical assistance to host governments on the development of national legislation consistent with international refugee and human rights law standards. The development of effective refugee status determination procedures should be a priority within such capacity-building work, which should also involve lawyers and other legal experts.

**Recommendation 29:**

In view of NGOs' considerable expertise and experience in supporting refugee protection globally, European governments should ensure adequate funding is available to NGOs to enable them to support the strengthening of protection capacity in refugee hosting countries.

**Recommendation 30:**

European states should develop and implement comprehensive training programmes that engage host government counterparts and civil society members on refugee rights, reception conditions, protection, refugee participation and durable solutions.

**Recommendation 31:**

European states should promote and contribute to the enjoyment of an adequate standard of living for refugees and local host populations, in particular the rights to shelter, food and water, health care, education, and employment rights. As part of this, they should ensure increased and better targeted development funding for host countries. This funding should facilitate the integration of refugees into the host societies, when this is a dignified and appropriate solution, and refugees' self-reliance, independently of the availability of any durable solution.

**Recommendation 32:**

European states should ensure that all plans and initiatives to improve refugee protection in regions of origin include the active engagement and participation of all stakeholders, namely UNHCR, the governments of the host countries, a wide range of civil society actors, including NGOs, and the affected refugee population.

**Recommendation 33:**

European institutions and governments should prioritise understanding and effectively tackling the root causes of forced migration.

## ANNEX 1 LIST OF RECOMMENDATIONS

### Elements of Protection

#### **Recommendation 1:**

As the essence of refugee protection and part of customary law, *non-refoulement* must be guaranteed. It is the first essential step towards ensuring protection is available.

#### **Recommendation 2:**

Protection can only be effective when refugees enjoy all their civil and political rights, and not only rights such as freedom from torture, cruel, inhuman or degrading treatment or punishment, or the right to life.

#### **Recommendation 3:**

No asylum seeker or refugee should be returned to situations of national emergency and therefore to a state needing to invoke Article 4 of the 1966 International Covenant on Civil and Political Rights (ICCPR) and/or Article 15 of the European Convention on Human Rights (ECHR).

#### **Recommendation 4:**

States must grant refugees access to economic, social and cultural rights as these are essential to the enjoyment of protection and other human rights. Any state restricting the economic rights of refugees is not providing them with protection that is effective.

#### **Recommendation 5:**

The right to legal protection must endure for as long as international protection is required and until a durable solution ensues, to which new legal protection rights would be attached.

#### **Recommendation 6:**

It is the protection of the *state* to which an individual is entitled. Although documents provided by UNHCR, such as ‘protection letters’ or ‘person of concern’ letters may establish that a person is in need of protection, they will not suffice to establish that an individual has access to protection that is effective.

#### **Recommendation 7:**

Particular attention should be given to the needs and rights of vulnerable groups, including women, children, the disabled and older persons, under instruments such as the 1989 Convention on the Rights of the Child (CRC) and the 1979 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), in addition to the rights under other generic human rights instruments.

#### **Recommendation 8:**

Protection is not effective unless refugees have access to a durable solution within a reasonable period of time.

**Recommendation 9:**

States should play a leading role in the development of comprehensive durable solutions strategies, including for protracted refugee situations. European states should specifically address how to increase the availability of resettlement to Europe. This should eventually lead to the establishment of a European resettlement programme.

**Recommendation 10:**

Asylum seekers and refugees should never be returned to a protracted refugee situation or to a country where resettlement is the only available durable solution.

**Recommendation 11:**

Governments in all regions must, without reservations, accede to and comply with the standards set out in the 1951 Refugee Convention and the 1967 Protocol and all the relevant international and regional human rights instruments.

**Recommendation 12:**

No asylum seeker or refugee should be returned to a country purely on the basis that UNHCR is present in that country.

## Accessing Protection

**Recommendation 13:**

If an individual undergoes an asylum procedure and/or status determination procedure, this will only provide them with effective access to protection if it is undertaken in the form of an individual assessment with all the necessary safeguards. This should include free legal advice, access to UNHCR/NGOs, a qualified and impartial interpreter, a personal interview and a suspensive right of appeal.

**Recommendation 14:**

States should ensure that *prima facie* or group recognition of refugees leads to the enjoyment of the full range of rights to which refugees are entitled and timely access to a durable solution. If any additional procedures for accessing durable solutions are required by states, these procedures should not be lengthy.

**Recommendation 15:**

Any future temporary protection programmes in Europe should provide access to refugee status determination at any time, in accordance with EU legislation.

**Recommendation 16:**

European states should not return or transfer asylum seekers to third countries that are only able / willing to provide temporary or emergency protection.

## Returns and Transfers to 'Safe Third Countries'

**Recommendation 17:**

If asylum seekers and refugees are returned or transferred to a third country (including a country of first asylum), the host country must first establish that they would access a fair asylum procedure and/or be provided with effective protection and timely access to a durable solution.

**Recommendation 18:**

States should also consider their obligations to respect asylum seekers' and refugees' rights related to their circumstances in the sending country that might constitute additional barriers to their return to 'safe third countries', such as family ties or health reasons.

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Asylum seekers and refugees should not be transferred against their will to third countries where they have no meaningful links.

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Host states, rather than the individual asylum seeker, bear the burden of proof when deciding that a third country is safe and will provide effective protection, and the standard of proof should be high.

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Any readmission agreements in place between countries must be consistent with international refugee and human rights law standards. The process of reaching such agreements should be transparent and monitored, and the full content publicly available. The receiving state should also have explicitly agreed to readmit an individual as an asylum seeker or a refugee.

**Recommendation 22:**

When considering return the host country should take into account broader issues of general safety and security impacting on the country of return, including political stability, social and economic conditions.

## **International Solidarity and Responsibility-Sharing**

**Recommendation 23:**

International and European cooperation should lead to greater responsibility-sharing and go beyond its current overwhelming focus on the strengthening of border controls.

**Recommendation 24:**

European countries should substantially increase their resettlement activities due to the contribution this would make to greater responsibility-sharing and to improving of the protection environment in countries of first asylum.

**Recommendation 25:**

Even where protection might be available in a country of first asylum or in a safe third country, no return (or transfer) should take place if it would be inconsistent with international responsibility-sharing principles.

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European states should promote and contribute to the enjoyment of an adequate standard of living for refugees and local host populations, in particular the rights to shelter, food and water, health care, education, and employment rights. As part of this, they should ensure increased and better targeted development funding for host countries. This funding should facilitate the integration of refugees into the host societies, when this is a dignified and appropriate solution, and refugees' self-reliance, independently of the availability of any durable solution.

**Recommendation 32:**

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**Recommendation 33:**

European institutions and governments should prioritise understanding and effectively tackling the root causes of forced migration.

## **ANNEX 2 FURTHER ECRE READING**

Safe Third Countries – Myths and Realities, February 1995

Position on Temporary Protection in the context of the Need for a Supplementary Refugee Definition, March 1997

Guidelines on Fair and Efficient Procedures for Determining Refugee Status, September 1999

Position on The Interpretation Article 1 of the Refugee Convention, September 2000

Position on Complementary Protection, September 2000

Comments from the European Council on Refugees and Exiles on the Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, March 2003

Comments on the Communication from the Commission to the Council and the European Parliament on Towards a more accessible, equitable and managed international protection regime, (COM(2003) 315 final, June 2003

Responding to the Asylum and Access Challenge: An agenda for Comprehensive Engagement in Protracted Refugee Situations, ECRE and U.S. Committee for Refugees, August 2003

Position on Return, October 2003

ECRE's Recommendations to the Justice and Home Affairs Council on the "Safe Third Country" concept at its meeting on 22-23 January 2004

Position on Exclusion from Refugee Status, March 2004

Questionnaire and Guidelines for the treatment of Iraqi asylum seekers and refugees in Europe, April 2004

Guidelines for the treatment of Afghan asylum seekers and refugees in Europe, May 2004

Broken Promises - Forgotten Principles, An ECRE Evaluation of the Development of EU Minimum Standards For Refugee Protection, Tampere 1999 - Brussels June 2004

Comments on Future Orientations for an Area of Freedom, Security and Justice, September 2004

ECRE Information Note on the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, October 2004.



Comments on the Communication from the Commission to the Council and the European Parliament on the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin 'Improving Access to Durable Solutions', COM(2004) 410 final, Sept 2004.

Renewing the Promise of Protection, Recommendations to the Brussels European Council, 5 November 2004, on the Multi-Annual Programme '*Strengthening Freedom, Security and Justice in the European Union*' and recent proposals to establish camps in the Mediterranean region, November 2004

Comments from the European Council on Refugees and Exiles on the Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, as agreed by the Council on 19 November 2004, March 2005

Guidelines on the Treatment of Chechen Internally Displaced Persons (IDPs), Asylum Seekers & Refugees in Europe, June 2005

***Other papers in the Way Forward series:***

The Way Forward. Europe's role in the global refugee system. Towards a European Resettlement Programme, April 2005

The Way Forward Europe's role in the global refugee protection system. The return of asylum seekers whose applications have been rejected in Europe, June 2005

The Way Forward. Europe's role in the global refugee system. Towards the Integration of Refugees in Europe, July 2005

The Way Forward. Europe's role in the global refugee system. Towards Fair and Efficient Asylum Systems in Europe, September 2005