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European Council  
on Refugees and Exiles

# **PROTECTION IN EUROPE: SAFE AND LEGAL ACCESS CHANNELS**

**ECRE'S VISION OF EUROPE'S ROLE IN THE GLOBAL  
REFUGEE PROTECTION REGIME: POLICY PAPER 1**

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The development of this paper on safe and legal channels for refugees to access protection in Europe is part of ECRE's series of proposals designed to provide recommendations on a number of topical refugee policy issues. It aims to constructively contribute to debates on Europe's role in protecting refugees within and outside the continent. Addressing the three distinctive stages in refugees' journeys to Europe, the other papers discuss: the future of the Common European Asylum System, and cooperation with countries in regions of origin and transit in enhancing protection capacity outside of the EU as part of the global protection regime.

- Policy Paper 1: Protection in Europe: Safe and Legal Access Channels
- Policy Paper 2: Principles for Fair and Sustainable Protection in Europe
- Policy Paper 3: EU External Cooperation and Global Responsibility Sharing: Towards an EU Agenda for Refugee Protection

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# INTRODUCTION

ECRE and its member organisations have consistently been promoting the establishment and use of safe and legal channels for refugees as a way to overcome existing legal and practical barriers and reduce the need for refugees to resort to smugglers in order for them to reach the territory and protection in Europe. Several stakeholders have pointed to the gaps in the international protection regime. Whilst an important body of legislation and jurisprudence relevant to the protection of refugees has been developed, it appears to have failed to address the question of how those entitled to international protection are supposed, in practice, to access such protection. In times of increasing security challenges and, in particular, unprecedented numbers of persons applying for asylum in Europe,, governments and European institutions have been reluctant to explore concrete ways to increase the possibilities for refugees to come to Europe in a legal manner in addition to their obligations under European Union (EU) and international law to assess the protection needs of those arriving on their territory outside of any organized programmes or legal pathways. Under pressure of a real, or perceived, lack of or declining support for refugee protection by the general public, in European countries, the trend has been towards restrictive and even discriminatory practices aimed at preventing access to the territory rather than facilitating such access. At the same time, governments and European institutions alike, have time and again been deploring the unacceptable loss of life at sea and have announced ever tougher measures to break the business model of unscrupulous smugglers who have been responsible for unnameable suffering and exploitation of refugees and migrants.<sup>1</sup>

This paper contains the collective reflection of ECRE member organisations on concrete ways for governments and the European Union to implement and develop safe and rights-based legal channels for persons in need of international protection to reach safety in Europe. In doing so, it identifies real or perceived obstacles to make effective use of the various channels that are at the disposal of national and European authorities, and makes concrete suggestions as to how they can be overcome. While promoting an ambitious and creative approach, ECRE acknowledges the inherent limitations to the various channels identified, as well as the fact that some are more suitable to accommodate large numbers than others. However, if states are serious about their commitments to refugee protection and the need to prevent life-threatening journeys, such limitations cannot be an excuse not to use them. Moreover, ECRE's vision on the use of safe and legal channels remains premised on the complementarity of such channels to states' obligations under international human rights law and EU law to process asylum applications lodged on their territory or at the border.

While promoting broader use of safe channels for higher numbers of people, ECRE's vision on safe and legal channels is firmly rooted in respect for human rights, as it is our firm belief that both can and must be reconciled. Therefore, ECRE's vision is centred on a rights-based approach to safe and legal channels that corresponds to relevant developments in international human rights law and EU law, consolidating extra-territorial effect of human rights obligations under certain conditions. Respect for the rule of law needs to be ensured by states when acting outside their territory. Where procedures conducted extra-territorially are concerned, this requires the observance of core human rights safeguards.

Although ECRE's vision speaks to the protection obligations of states in the wider Europe, many of ECRE's recommendations in this paper build on legal and policy developments within the EU framework and in particular the EU asylum, immigration and borders *acquis* and, more specifically, the EU Charter of Fundamental Rights. Consequently, the legal standards upon which ECRE's positions are based, may, in some cases, not be legally binding on European countries that are not Member States of the EU. Moreover, some of the standards relied upon, in particular as part of the second generation EU asylum directives, do not apply to three EU Member States as a result of their opt out from the relevant chapters in the Treaty on the Functioning of the European Union (TFEU). In addition, the decision of the United Kingdom to leave the European Union will, in the longer term, exempt it entirely from its obligations under the EU *acquis* and render the EU Charter of Fundamental Rights inapplicable to its asylum, migration and border policies and to those coming within its jurisdiction or control.

1. See for instance the launch on 7 October 2015 of operation Sophia, an operation carried out within the framework of the EU's Common Foreign and Defence Policy. The operation's core mandate is to undertake systematic efforts to identify, capture and dispose of vessels suspected of being used by migrant traffickers or smugglers in order to contribute to wider "disrupt the business model of human smuggling and trafficking networks in the Southern Central Mediterranean and prevent the further loss of life at sea. See EEAS, EU Naval Force – Mediterranean, Update 1 July 2016, available at [http://www.eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/index\\_en.htm](http://www.eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/index_en.htm).

However, as argued in the paper, in particular for Member States of the Council of Europe, to a certain extent, equivalent legal safeguards relevant to safe and legal channels are implied in standards developed notably by the European Court of Human Rights in its asylum-related case-law. Moreover, even where the legal reasoning underlying ECRE's positions outlined in this paper is not applicable to non-EU countries, nothing prevents countries to commit to an ambitious yet rights-based approach to the use of safe and legal standards as advocated for in this paper. As it is impossible in a vision paper to comprehensively capture the consequences of such complex legal landscapes for the various parts of Europe, this paper does not adapt the specific recommendations to diverging legal contexts within Europe, with the exception of recommendations that are EU-specific.

## CHAPTER 1 - WHY REFUGEES HAVE TO RISK THEIR LIVES: THE INCONVENIENT TRUTH

The orderly arrival of refugees and asylum seekers in what is an inherently disorderly phenomenon is a long-standing objective of industrialised states. Refugee movements are by definition unpredictable, both in terms of scale and duration, and are therefore difficult to anticipate. European asylum policies and responses to refugee crises have, since the 1990s, increasingly focused on stemming flows rather than managing them. Asylum systems in Europe, and in particular in the Member States of the European Union have gradually developed sophisticated protection regimes, establishing increasingly improved levels of protection, (at least on paper). Yet, it became at the same time increasingly difficult for those entitled to such protection to actually reach the region in an orderly and regular fashion. Accessing protection in Europe has become an obstacle course, as multiple legal and practical barriers are in place, forcing those fleeing persecution, serious human rights violations and conflict to embark on perilous journeys to find safety in Europe. Visa restrictions, carrier sanctions and cooperation with third countries in border management through the posting of liaison officers abroad, have resulted in a gradual shifting of border controls beyond the traditional physical State borders. However, at the same time, important jurisprudential developments, giving progressive interpretation to the territorial scope of the principle of *non refoulement*, have expanded Member States' responsibilities vis-à-vis refugees and migrants under international and European human rights law beyond their physical borders.<sup>2</sup>

According to UNHCR, 2015 has broken all records of global forced displacement, reaching 63.5 million by the end of the year.<sup>3</sup> The conflict in Syria continues to produce the largest numbers of refugees and internally displaced but also, the worsening of the human rights situation in other countries such as Afghanistan, Somalia, Eritrea and Iraq is the source of large-scale displacement. While the vast majority of refugees remains in regions close to their country of origin, the number of asylum seekers and refugees arriving in Europe has reached unprecedented levels. In 2015, more than one million persons crossed the Mediterranean with about 900.000 persons arriving in Greece and about 150.000 arriving in Italy.<sup>4</sup> In the first two months of 2016 the number of arrivals in Greece alone reached 122.000, which almost equals the total number of arrivals in the first six months of 2015.<sup>5</sup> Statistical data, disaggregating nationalities, age and gender of those arriving in 2015 and 2016 in the main entry points in the EU, Greece and Italy, show that 85% of those arriving come from the top 10 refugee-producing countries. At the same time, there has been a shift in the gender and age composition of arrivals in Greece and Italy, with 54% of cumulative arrivals in Greece and Italy being women and children in March 2016, compared to only 26% in June 2015.<sup>6</sup> However, the total number of sea arrivals in Europe in 2016 dropped to 396.678,<sup>7</sup> mostly due to the considerable decrease of arrivals in Greece after the adoption of the EU-Turkey Statement on 18 March 2016.<sup>8</sup>

2. For an overview, see section 3.2. below.

3. UNHCR, Global Trends Forced Displacement 2015, p. 5. Available at <http://www.unhcr.org/en-us/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html>.

4. See UNHCR, Refugees/Migrants Emergency Response – Mediterranean, available at <http://data.unhcr.org/mediterranean/country.php?id=105>.

5. UNHCR, UNHCR warns of imminent humanitarian crisis in Greece, 1 March 2016. <http://www.unhcr.org/56d58c146.html>.

6. See UNHCR, Europe Refugees & Migrants Emergency Response, Gender breakdown of arrivals to Greece and Italy June 2015 to March 2016, 27 April 2016, available at <http://data.unhcr.org/>.

7. See UNHCR, Refugees/Migrants Response - Mediterranean, available at <http://data.unhcr.org/mediterranean/regional.php>.

8. European Council, EU-Turkey Statement, 18 March 2016, Press Release 144/16. See also European Commission, Fourth Report on the Progress made in the implementation of the EU-Turkey Statement, COM(2016) 792 final, Brussels, 8 December 2016.

In 2015 and 2016, another tragic record was established. IOM reported a total of 3.770 migrants who had perished in the Mediterranean Sea in their attempts to reach Italy or Greece in 2015, while by 21 December 2016.<sup>9</sup> 4.913 persons had already lost their lives there. This makes the Mediterranean the deadliest sea route worldwide.

Beyond the obvious risks related to the sea crossings, refugees, in particular women and children, are extremely vulnerable to exploitation and human rights abuses at all stages of their perilous journeys. Refugees may be at risk of sexual violence in refugee camps outside Europe as well as, after arriving in Europe, in the makeshift camps or emergency accommodation that have emerged at different points along the so-called Balkan route up to Calais. In this regard unaccompanied children in particular are extremely vulnerable. Europol estimated that, following their arrival in Europe in 2015 and the beginning of 2016, up to 10.000 unaccompanied refugee children disappeared, fearing many might have been the victim of criminal networks.<sup>10</sup>

Finally, despite considerable financial investment by European countries, and the EU in particular, together with the launch of various intergovernmental processes aiming at enhancing protection capacity in the region, conditions for refugees in many of the countries hosting large refugee populations remain extremely harsh. The dire conditions and the lack of long term perspectives remain important drivers for refugees to move on and try to find safety in Europe, although the vast majority of them remain in countries close to their country of origin. A reasoned debate on safe and legal access to protection in the EU must therefore also acknowledge the specific link with the ongoing discussion on the role of the EU in enhancing protection space globally; being the subject of a separate ECRE vision paper.

## 1.1. EUROPE'S RESPONSE TO INCREASED FORCED DISPLACEMENT

Left without any legal alternatives, refugees often have no other choice than to place their faith in the hands of smuggling rings, at the risk of further human rights abuses and exploitation. The absence of legal channels for refugees to come to Europe has thus become the mainstay income of smugglers, while the fight against smuggling and trafficking has become a key priority for all states, and is spearheading, in particular, the EU's asylum and migration policy.<sup>11</sup> This inherent contradiction is increasingly acknowledged by states, European institutions and intergovernmental actors in policy debates. Yet, progress is slow. Within the context of the EU, recent policy documents disclose an ambivalent attitude by EU Member States and institutions towards the issue. Notably, since the adoption of the European agenda on Migration, the Commission has submitted a proposal for an EU framework for resettlement<sup>12</sup> and has taken initiatives on legal migration. However, the latter remains centred around initiatives primarily aimed at attracting highly-qualified third-country nationals, including through the proposed revision of the Blue Card Directive or ways to facilitate mobility for the services sector.<sup>13</sup> Although such proposals include a welcome extension of their scope to beneficiaries of international protection, they are unlikely to present an alternative to current irregular channels, even for those migrants without particular international protection needs. Contrastingly, there is little or no appetite to engage in any other refugee specific channels beyond resettlement, such as humanitarian visa, at the EU level.<sup>14</sup>

At the same time, key emphasis is laid on disincentivising irregular migration through the fight against smuggling and trafficking; equally, in the implementation of the EU Action Plan against migrant smuggling which is exclusively focussed on ways to tackle the supply part of smuggling by increasing efforts to dismantle smuggling rings through law enforcement, and military means, without addressing the demand side of

9. IOM, Missing Migrants Project, <http://missingmigrants.iom.int/mediterranean>.

10. The Guardian, 10.000 children are missing, says Europol, <http://www.theguardian.com/world/2016/jan/30/fears-for-missing-child-refugees>

11. See European Commission, A European Agenda on Migration, COM(2015)0240 final Brussels, 13 May 2015

12. See European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council, COM(2016)468 final, Brussels, 13 July 2016.

13. See, European Commission, Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment, COM(2016)378 final Brussels, 7 June 2016.

14. Beyond the abovementioned structured framework for resettlement, the Commission merely encourages Member States to develop best practices at EU level with respect to private sponsorships, to make regular admission schemes more accessible to refugees and to "make full use of other available legal avenues for persons in need of protection, such as humanitarian permits" while it announced to "assess" ways to promote a coordinated European approach. See European Commission, 'Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe, COM(2016) 197 final', Brussels, 6 April 2016, p.16

smuggling.<sup>15</sup> This chapter will provide the broader legal and political background to the debate on safe and legal channels by focussing in more detail on the adverse effects of current policies that are predominantly occupied with stemming flows towards Europe, at considerable human costs.

## 1.2. LEGAL AND PHYSICAL BARRIERS TO ACCESSING PROTECTION IN EUROPE

Following the refugee trajectory, they face a range of legal and practical barriers at the different stages of their journey, resulting from European border and migration control measures, forcing them to resort to irregular ways of accessing protection in Europe. These include restrictive visa policies, outsourcing of border control functions to the private transport sector or to third countries and the establishment of fences and discriminatory access practices at physical borders.

### Direct and indirect visa restrictions and the impact on refugees' legal access

Undoubtedly, visa requirements constitute the clearest form of pre-frontier control measures that directly restrict the possibility for refugees to leave their country of origin or transit and prevent access to the territory of another state in order to find protection. At the EU level, the Visa List Regulation establishes the countries whose nationals require a visa to cross the external borders of the Member States (black list), and those who are exempted from it (white list).<sup>16</sup> The EU 'black visa list', established on the basis of criteria that include the risk of irregular migration, includes all nationalities of the world's top refugee producing countries. Moreover, the possibility for the EU to temporarily reintroduce visa requirements for nationals of countries on the EU 'white list' in case of an emergency is linked to sudden increases in the number of asylum applications from countries with 'low' recognition rates as well as in the number of rejected readmission applications for such third country's own nationals.<sup>17</sup> The direct link between suspension of visa exemption and an unqualified "sudden increase" of asylum seekers with low chances of being granted protection establishes a further barrier to access to the territory and may trigger either containment in the country of origin or the use of irregular means of crossing the border. It also testifies to a worrying trend of European policies being increasingly based on discriminatory treatment of asylum seekers reliant on nationality rather than an individual assessment of their claims.

The EU policy of imposing visa requirements on nationals of countries constituting an 'irregular migration' risk is also part and parcel of its cooperation with third countries on migration and asylum. In exchange for visa-liberalisation for their own nationals, third countries are required to implement or strengthen visa requirements for nationals of countries that are considered to be main sources of irregular migration to EU Member States. As these include countries with the highest international protection rates in the EU and the wider Europe,<sup>18</sup> refugees and persons in need of international protection are directly affected by such policies. Visa restrictions imposed by the EU therefore not only directly affect nationals of the countries on the 'black visa list' but their adverse effect on refugees' regular mobility is further amplified through visa requirements imposed by third countries that have a strategic importance for the EU's migration management policy.

This is clearly illustrated by the example of Turkey, an Accession country to the EU, host to close to three million refugees from Syria and, since the summer of 2015, the most important transit country to the EU in

15. Although the Action Plan acknowledges that smuggling networks "can be weakened if fewer people seek their services" and it is therefore "important to open more safe and legal ways into the EU", it does not envisage this as an integral part of a coherent strategy to fight migrant smuggling. See European Commission, COM(2015)285 final, EU Action Plan against migrant smuggling (2015-2020), p.2

16. Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (consolidated version), OJ 2001R05369 – EN – 09.06.2014 – 011.001 – 1. Procedures and conditions of issuing short stay visas are laid down in Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), OJ 2009R0810 – EN – 18.10.2013 – 003.001 – 1 (consolidated version).

17. See Article 1a Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ 2001R0539 – EN – 09.06.2014 – 011.001 – 2 (consolidated).

18. Such as Syria (97% recognition rate in the EU in 2015), Eritrea (87% recognition rate in the EU in 2015), Iraq Somalia and Afghanistan (EU wide recognition rates above 60 % in 2015). See EASO, Annual report on the situation of asylum in the European Union 2015, p.22

numerical terms. In 2015, according to the European Commission, 888,457 migrants reached the EU by departing irregularly from Turkish territory, being a 17-fold increase compared to 2014. In its second progress report on the EU - Turkey Visa Liberalisation Dialogue - the Commission highlighted a range of important measures taken by Turkey to strengthen its visa and border management system. In addition to measures to improve the security of visa stickers and to tackle document fraud, Turkey is reported to have introduced visa obligations for Syrians entering the Turkish territory via a seaport or airport from third countries as of 8 January 2016. Apparently, the decision taken on 8 January immediately resulted in a spectacular decrease of transit migration of Syrians from third countries through Turkish sea and airports. Whereas between 1 January and 7 January 2015 about 42.000 Syrians had entered Turkey through these ports, only 1.155 Syrians were recorded between 8 and 18 January 2016. Also, for other nationalities visa requirements were tightened by Turkey in 2015 and 2016. For instance, as of 1 January 2015, nationals of all sub-Saharan Africa countries can no longer obtain a visa at the border in order to enter the Turkish territory but need to obtain a visa at a Turkish embassy abroad, while a similar rule was introduced for Iraqi nationals as of 5 February 2016.<sup>19</sup> Moreover, Turkey is clearly expected to strengthening the visa regime to nationals of other countries with the largest number of irregular entrants into the EU via Turkey, such as Afghanistan, Iran, Morocco, Somalia, Lebanon, Pakistan etc. The Commission furthermore encourages Turkey to undertake a careful assessment “of the potential for irregular migration from any other countries to whose citizens Turkey grants a visa waiver or provides the possibility to obtain e-visas”, emphasising in particular that the EU visa-free and visa-required lists should be the benchmark for such an exercise.

### Outsourcing of border control functions: carrier sanctions and immigration liaison officers

For many years, European states have been outsourcing border management responsibilities to both private actors and in particular to transport companies as well as to third countries. Since the mid-eighties, European States are imposing financial penalties to transport companies who are responsible for entry to the territory of persons who do not comply with entry conditions, including visa requirements.<sup>20</sup> The potential adverse effects of carriers sanctions on refugees' safe and legal access to protection are well known. Threatened with severe financial penalties and potentially very high repatriation costs for letting third country nationals enter the territory in an irregular manner, commercial transport companies will be inclined to avoid such costs by refusing to take on board a potential asylum seeker rather than taking the risk of economic loss.<sup>21</sup>

Carrier sanctions have now been mainstreamed in the strategy of European states and the European Union to tackle irregular migration and have been conceived as a tool to enforce visa requirements and restrictions, as discussed above.<sup>22</sup> Whereas EU legislation on carrier sanctions includes safeguards to preserve the right to asylum, lack of concrete data on its application makes it difficult to measure its real impact. An ad hoc query through the European Migration Network on the application of Directive 2001/51/EC revealed varying practices of EU Member States with regard to exemption from carrier liability for reasons related to international protection obligations. Austrian law, for instance, exempts carriers from paying a fine between 5,000 and 15,000 euros in case the third country national concerned eventually receives refugee or subsidiary protection status or where his or her return to the country of departure would result in *refoulement*. France, on the other hand, exempts carriers from their liability for a financial penalty up to 5,000 euros and costs of return as well as accommodation pending return, in case the third country national concerned submits at the border an asylum application that is not considered as manifestly unfounded. At the same time, however, the French system also provides for a financial incentive to refuse onward travel from a transit airport as the maximum financial penalty for carriers is reduced by half if carriers have detected non-compliance with entry conditions at a later stage in the journey.<sup>23</sup>

19. With the exception of Iraqi citizens holding a Schengen/USA/UK/Ireland visa or residence permit who can enter Turkey with an e-visa. European Commission, Commission Staff Working Document accompanying the document Second Report on progress by Turkey in fulfilling the requirements of its visa liberalisation roadmap, SWD(2016) 97 final, Brussels, 4 March 2016, p.6

20. Ece Basaran, Evaluation of the “Carriers Liability” Regime as Part of the EU Asylum Policy under Public International Law, *Uluslararası Hukuk ve Politika*, vol. 4, no. 15 (2008), pp. 149-163, at p.152

21. See E. Guild, C. Costello, V. Moreno-Lax and M. Garlick, Enhancing the Common European Asylum System and Alternatives to Dublin, Study for the LIBE Committee, 2015, p.22

22. Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, OJ 2001 L 187/45

23. See EMN, Ad Hoc Query on implementing Council Directive 2001/51/EC, Compilation produced on 13 December 2012

However, its effectiveness, in practice, in preventing irregular arrivals on European soil, may be seriously questioned, illustrated by the unprecedented numbers of irregular entrants in 2015 in the EU... Carrier sanctions may certainly have been successful in preventing migrants, asylum seekers and refugees from accessing *regular* means of transport, but, apparently, they have not contributed to a substantial reduction of the total volume of irregular migration to the EU and therefore the use of irregular ways of crossing borders.

Another instrument of European States in the fight against irregular migration is the posting of immigration liaison officers in main countries of origin or transit. States make increasingly use of such liaison officers to implement a variety of tasks that include intelligence gathering on migratory trends in the countries where they are posted, as well as operational activities. The Council Regulation of 2004, establishing an immigration liaison officers network, confirmed the importance of the work of immigration liaison officers in the EU's strategy to address irregular migration flows. The Regulation makes it clear that its main objective is to contribute to prevention and combatting of "illegal" migration, the return of "illegal immigrants" and the management of legal migration.<sup>24</sup> Immigration liaison officers are to be posted to national consular authorities of Member States in third countries, to relevant authorities of other Member States, to competent authorities of the third countries or to international organisations. Responsibility for deploying liaison immigration officers remains with the Member States, but the Regulation includes a description of the mandatory tasks of such officers, which are essentially three-fold: (1) maintaining contacts with competent authorities and relevant organisations in the third country; (2) collection of information for use at the operational or strategic level and (3) rendering assistance in establishing the identity of third country nationals and facilitating their return.

It is interesting to note that the 2004 Regulation does not make reference to compliance with obligations under international refugee and human rights law, despite the fact that immigration liaison officers' competences may include important decisions that may interfere with individuals' human rights, including the right to seek asylum. Since the adoption of the 2004 Regulation, a 2011 amendment updates the Immigration Liaison Officers' Network Regulation, to establish a link following the creation of Frontex and EASO. Interestingly, the 2011 Regulation adds to the list of activities of local and regional cooperation networks of immigration liaison officers in third countries the "exchange of information, where appropriate, on experience regarding asylum seekers' access to protection".<sup>25</sup>

Also, the European Border and Coast Guard Agency, which will continue to carry the name Frontex, has the possibility to deploy its own liaison officers<sup>26</sup> as part of its cooperation with third countries. Whereas the Frontex' liaison officers may only be deployed to third countries in which border management practices comply with minimum human rights standards, priority must be given to the main source countries of origin or transit "regarding illegal migration". In this regard, it is no coincidence that the first Frontex Liaison officer was deployed in Turkey, given the country's strategic and political importance for the EU's migration and asylum policy. The activities of the Liaison Officer in Turkey were initially strictly limited to building working relations with the Turkish counterparts, as well as Member States' liaison officers active in Turkey. However, this does not prevent liaison officers from potentially playing a decisive role in the implementation of policies that may be aimed at preventing refugees and potential asylum seekers from reaching the EU's external borders. One such example is the involvement of the Frontex Liaison officers in the provision of information to Eurosur in the context of establishing the so-called 'common pre-frontier intelligence' picture. The latter is to provide national coordination centres connected to Eurosur with "effective, accurate and timely information and analysis on the pre-frontier area".<sup>27</sup>

Furthermore, the impact of Frontex activities on refugee movements is potentially significantly increased through the deployment of border guard teams for actions on the territory of third countries, as foreseen under the European Border and Coast Guard Regulation. In the absence of a clear definition of such actions, this

24. Council Regulation (EC) No 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network, OJ 2004 L 64/1

25. Regulation (EU) No 493/2011 of the European Parliament and of the Council of 5 April 2011 amending Council Regulation (EC) No 377/2004 on the creation of and immigration liaison officers network, OJ 2011 L 141/13

26. Which shall form part of the regional or local cooperation networks of immigration liaison officers set up in the framework of the abovementioned Council Regulation No 377/2004. See Article 55 Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267, OJ 2016 L 251/1

27. See Article 11 Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur), OJ 2013 L 295/11

leaves scope for a variety of activities to be included in the status agreements to be concluded with the third countries concerned.<sup>28</sup>

Within an EU context, externalization of border controls is also being mainstreamed in the EU's cooperation with third countries, both at the technical and policy level. The EU's drive to enhance such cooperation and actively involve third countries in the extra-territorial implementation of its own border management strategy is certainly not a new phenomenon. It has been part of the EU's strategy since the adoption of its Global Approach on Migration in 2005 - later on transformed into the Global Approach to Migration and Mobility - and figures prominently in the EU's response to the refugee and migration crisis unfolding in 2015 and 2016, such as the Action Plan adopted following the Valetta Summit,<sup>29</sup> and the EU-Turkey Statement.

### Non entrée policies at the physical borders of Europe

As mentioned above, restrictive visa policies, carrier sanctions and direct operational border control activities carried out on the territory of third countries have contributed to an increase of refugees, asylum seekers and migrants who are forced to resort to irregular channels to enter the territory at the expense of human rights abuses. Moreover, those arriving at the border irregularly are increasingly confronted with pushback policies and refusal of entry to the territory and therefore to the asylum procedure. This has most vividly materialized in the resurrection of fences and discriminatory practices at external borders along the so-called Western Balkan route in 2015 and 2016 which have ultimately resulted in the deflection of migratory flows, the containment of thousands of persons in border regions in squalid conditions and unlawful limitations to exercising the right to seek asylum, based on their nationality.<sup>30</sup>

Where they are not accompanied by the establishment of credible and accessible legal channels, these non-entrée policies, that have been part of Europe's response to the refugee crisis, have increased the risks for refugees in accessing protection while undermining the institution of asylum and States' obligations under international refugee and human rights law.

The following chapters in this paper set out ECRE's views and recommendations as regards the use of rights-based safe and legal channels for refugees and asylum seekers as a concrete way to reduce the need for those fleeing persecution and other human rights violations to resort to irregular migration channels and presents concrete recommendations as how to mitigate practical and legal obstacles States may encounter in implementing them in practice.

However, the creation and use of such channels, under no circumstances absolves states from their obligations under international refugee and human rights law and under the EU asylum *acquis* to thoroughly assess the international protection needs of those arriving spontaneously on the territory. Moreover, as explained below, while the use of safe and legal channels is to be promoted as much as possible, it would be illusory to think that such tools will be a realistic option for all protection seekers and will reduce irregular migration to zero. **In this regard, any safe and legal channels that are being created or expanded can never be a substitute for states' obligations to thoroughly assess and examine the international protection needs of those arriving on the territory outside of such channels.**

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28. See Article 54(4) European Border and Coast Guard Regulation

29. Valetta Summit on Migration, 11-12 November 2015, Action Plan

30. See for instance, Amnesty International, Fear and Fences. Europe's approach to keep refugees at bay, 2015

# CHAPTER 2 - A RIGHTS BASED APPROACH TO LEGAL CHANNELS TO ACCESS INTERNATIONAL PROTECTION IN EUROPE

Various lists of possible legal channels to access protection in Europe have been presented by academics, civil society organisations<sup>31</sup> and institutions<sup>32</sup>. In this paper ECRE sets out a vision largely based on the essence of these lists yet also understands that the lists are not necessarily exhaustive. Furthermore, because ECRE's vision going beyond an immediate response to the status quo, it is necessary to establish principles that should apply to all suggested legal channels.

## 2.1. PRELIMINARY OBSERVATIONS

- a. Our Vision is based on and reiterates the rights-based approach to international protection, in accordance with international and regional human rights legal norms (the Refugee Convention, EU Charter of Fundamental Rights, European Convention on Human Rights (ECHR), the Convention against Torture (CAT), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child (CRC), etc.);
- b. From a EU normative perspective, the EU Charter of Fundamental Rights is of key importance as it applies extraterritorially to an individual or situation once EU law governs it.<sup>33</sup> Since the EU Reception Conditions<sup>34</sup> and the Asylum Procedures Directives<sup>35</sup> do not apply extraterritorially<sup>36</sup>, it is primarily thanks to the Qualification Directive<sup>37</sup> and relevant visa-related instruments that the Charter's fundamental rights norms are triggered;
- c. UNHCR's protection mandate should be stressed and strengthened, particularly since the many proposed legal access measures envisage off-shore implementation, therefore requiring monitoring and transparency levels not available to most European NGOs;
- d. Even the most effective safe and legal measures will not reduce to zero the number of asylum seekers resorting to unsafe or illegal routes of access to protection. It is imperative that these asylum-seekers are not singled out and penalised for not having resorted to any safe and legal channel put in place;
- e. Although this Vision paper remains focused on access to protection for refugees, the broader perspective of other migrants resorting to unsafe and illegal routes is also in urgent need of consideration;
- f. In assessing the feasibility of safe and legal channels, their effective access possibilities for refugees within the relevant territory or region must be considered;
- g. The discussion on safe and legal access channels should be aware of where the measures will ultimately 'place' the refugee within the EU;
- h. The creation or strengthening of safe and legal means of access to protection should not prejudice or restrict current procedural and substantive guarantees for persons seeking protection on EU territory or at the EU's borders;
- i. It is useful to talk of a toolbox of safe and legal channels as this approach appreciates that different

31. See for instance, Caritas Europa, CCME and others, Recommendations for the development of safe and legal paths to protection in the European Union, Brussels, 19 November 2014

32. Fundamental Rights Agency, Legal entry channels to the EU for persons in need of international protection: a toolbox, FRA Focus 2/2015

33. See V. Moreno-Lax and C. Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model in S. Peers et al (eds), Commentary on the EU Charter of Fundamental Rights, Oxford: Hart Publishing, 2014, p.1680

34. Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ 2013 L 180/96

35. Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ 2013 L 180/60

36. Although below it is argued that since the Procedures Directive cannot be divorced from the Qualification Directive, its extra-territorial application is indirectly relevant.

37. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2013 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ 2011 L 337/9

refugee scenarios will require different solutions.

To a large extent the above principles, and the next sections, apply to safe and legal channels contextualized within the international protection discourse in relation to measures primarily intended for granting access to Europe to refugees. Channels for safe and legal access primarily intended for other groups of migrants (e.g. students, academics, workers, etc.) are discussed independently, since a different set of principles would need to be applied.

## 2.2. THE LEGAL PARAMETERS

Given the increasing extraterritorial reach of human rights law and standards set in EU asylum law through the EU Charter of Fundamental Rights, the design and implementation of safe and legal channels is necessarily determined by legal standards and obligations that must be observed by States when operating outside of their territory. Therefore, although a full examination of the current international and regional law parameters relevant to the debate on safe and legal channels is beyond the scope of this Vision paper, this section presents a short overview of the current legal regimes that need to be considered when operating specific channels.

Of course, the possibility of these legal regimes changing due to legal amendments or developing jurisprudence cannot be excluded. As mentioned above, this section deals specifically with channels based on international protection considerations, as opposed to those primarily intended for other forms of migration.

### The Refugee Convention

International law provides very little basis for specific requirements with which asylum procedures must comply. The Refugee Convention does not say anything with respect to the assessment of the claim for protection. However, as a general principle of law, states must give 'full effect' to the treaties binding upon them. This means that if a state has the intention to expel an asylum seeker, and this person invokes a breach of the principle of *non-refoulement* under Article 33 of the Refugee Convention, the state will then have to investigate whether that invocation is well-founded. After all, if the state expels the person without such an investigation, it would deprive Article 33 of all meaning. That investigation must be conducted in such a way as to give the asylum seeker a real and sufficient opportunity to substantiate his argument that he is a refugee.<sup>38</sup>

### Other International and Regional Human Rights Conventions (e.g. CRC, CEDAW, CERD, ICCPR, CAT, ECHR, ESC)

Together with the substantive content of these instruments, the main relevant element relates to the application of this substantive content to the situations under scrutiny in this Vision paper. The issue of whether a state's human rights legal obligations are relevant when the state is acting outside its territory<sup>39</sup> is largely settled. The notion of 'effective control', although not accepted by all States, is now a firmly-established legal principle, whereby a state's human rights obligations (e.g. *non-refoulement*, right to life, freedom from torture, effective remedy, etc.) are triggered as soon as, and for as long as, the State enjoys 'effective control' over an individual or group of persons.<sup>40</sup> This principle has been reiterated in the context of both international and regional human

38. See Advisory Committee on Aliens Affairs, External Processing Conditions applying to the processing of asylum applications outside the European Union, The Hague, 2010, p. 29. See further also UNHCR Handbook, although not binding.

39. Defined as situations when a State is acting on the territory of another State (with or without the consent of the host State), or when it is acting in no State's territory, e.g. the high seas.

40. See on this issue, M. Den Heijer, Europe and Extraterritorial Asylum, Institute of Immigration Law, Faculty of Law, Leiden University, 2011; V. Moreno-Lax, Europe in Crisis: Facilitating Access to Protection, (Discarding) Offshore Processing and Mapping Alternatives for the Way Forward, Red Cross EU Office, December 2015, p. 26. See also Articles on State Responsibility, (2001) ILC 53rd Session (A/56/10), UNGA Resolution 56/83;

rightslaw.<sup>41</sup>

Specifically, with regard to the ECHR, the *Hirsi Jamaa vs. Italy* case (2012) set the bar higher in terms of procedural guarantees Member States should be respecting in the way they treat asylum seekers, and also potential asylum seekers outside their territory. The case concerned the interception on the high seas by Italy of a group of Somali and Eritrean nationals, and their prompt return to Libya. The ECtHR held that notwithstanding the fact that the events took place outside Italy's territory, and also outside the territorial scope of the Convention, the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities. It found a violation of Article 3 ECHR prohibiting inhuman and degrading treatment and punishment and Article 4, Protocol 4 to the ECHR prohibiting collective expulsions. In doing so the Court confirmed that all the guarantees found in the ECHR apply extraterritorially as soon as and for as long as the person comes within the effective control of a State.

Furthermore, in finding a violation of Article 3 in conjunction with Article 13 ECHR, the ECtHR attached great importance to the fact that the applicants had no effective access to a number of procedural requirements. Specifically, the Court underlined the importance of individualised identification and assessment procedures, availability of information, legal assistance and interpretation and an effective remedy with automatic suspensive effect.<sup>42</sup> The judgement is particularly relevant in the context of extraterritorial procedures carried out with a view to determining whether a person should be granted protection-related access to the territory of the processing state, as it sets the minimum procedural guarantees that need to be met for such procedures to comply with a state's obligations under the ECHR.

Interestingly, the Court also highlighted the applicants' *prima facie* situation on the basis of their nationality, hinting at an obligation of states to pay increased attention to such *prima facie* protection needs of persons.<sup>43</sup>

Before the *Hirsi Jamaa* judgement, the ECtHR had already clarified that safeguards under Article 5 ECHR to protect individuals from arbitrary detention are also applicable extra-territorially, whenever a person is under the full and exclusive control of a Contracting Party. In the case of *Medvedyev and Others v. France*, the Court held that the applicants, crew-members of a cargo vessel registered in Cambodia who had been confined to their quarters on board under French military guard on the high seas, had been unlawfully deprived of their liberty in violation of Article 5(1) ECHR.<sup>44</sup> It found that France had exercised full and exclusive control of the vessel and its crew and therefore the applicants had been effectively within France's jurisdiction.

## The EU Asylum Acquis

As regards the relevance of the standards laid down in the EU asylum *acquis*, it should be noted that extra-territorial procedures are not directly regulated by the legal framework of the Common European Asylum System. In fact, the recast Reception Conditions and Asylum Procedures Directives explicitly state that they do not apply outside EU territory.<sup>45</sup> Conversely, the recast Qualification Directive does not contain a similar exclusion, rendering it applicable. This has a number of important implications, summarised as follows:

- a. The recast Qualification Directive's first part is strongly procedural in nature insofar as it sets out key definitions, establishes how facts and circumstances are assessed and contains central notions to eligibility for international protection, such as actors of persecution and internal protection. It is clear that for all these 'qualification' elements – and the legal obligations they create – to be conformed with outside the territory, a comprehensive asylum procedure would be necessary in practice.
- b. The Directive's second part, on content of international protection, is of course largely relevant for

41. One example is the judgment of the International Court of Justice in the Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), 19 December 2005 where it held that international human rights instruments are applicable "in respect of acts done by a State in the exercise of its jurisdiction outside its own territory, particularly in occupied territories" (see para. 216). It used this as a basis to find violations of provisions of international human rights treaties which do not include specific provisions on their personal or territorial scope such as the ICCPR and the CRC. See on this issue M. Den Heijer, *Europe and Extraterritorial Asylum*, Oxford and Portland, Oregon: Hart Publishing, 2012, pp. 48-53.

42. See ECtHR, *Hirsi Jamaa and Others v Italy*, Application no. 27765/09, Judgement of 23 February 2012, paras. 202–204.

43. *Idem*, paras. 151-152.

44. ECtHR, *Medvedyev and Others v. Turkey*, Application no 3394/03, Judgment of 29 March 2010

45. According to Article 3(2) of the recast Asylum Procedures Directive, "This Directive shall not apply to requests for diplomatic or territorial asylum submitted to representations of Member States". Article 3(2) of the recast Reception Conditions Directive has the exact same wording.

refugees living on EU territory, but, because of the lack of restrictions on its territorial scope, also has important implications for beneficiaries of international protection recognised outside the territory. Specifically, Article 24 requires international protection beneficiaries to be granted residence permits “as soon as possible after international protection has been granted” meaning any refugee recognised outside the EU should automatically be granted access to and residence in the EU.

- c. As explained below, the applicability of the recast Qualification Directive to extra-territorial interactions between EU Member States and asylum seekers or refugees triggers the application of the EU Charter of Fundamental Rights with important consequences as regards the level of procedural guarantees required.

## The EU Charter of Fundamental Rights

According to Article 52 of the Charter, the rights and principles laid down in the Charter are addressed to EU Member States only when they are implementing EU law. It is the implementation of the Qualification Directive when Member States are dealing with asylum seekers outside their territory that triggers the EU Charter in such situations.<sup>46</sup> Legal literature has deliberated on the extraterritorial application of the EU Charter in particular from the perspective of the applicability of procedural standards derived from the EU Charter to protect individuals from *refoulement* once they come within the jurisdiction of an EU Member State.<sup>47</sup>

The Charter contains several articles that are relevant to the scenarios envisaged in safe and legal channels. With respect to procedural safeguards, Article 18 (right to asylum), Article 19 (*non refoulement*), and Article 47 (right to effective remedy) are relevant (see also paragraph 4.1.). Relevant Charter provisions with respect to reception conditions include Article 1 on human dignity, Article 4 on the prohibition of inhuman or degrading treatment or punishment, Article 3 (right to integrity of the person), Article 6 (right to liberty and security), Article 7 (respect of private and family life) and Article 21 (non-discrimination).

Article 18 takes centre stage insofar as it establishes the right to asylum. Although the actual meaning and content of this right have to date not been interpreted by the CJEU, it follows from the *travaux préparatoires* of the EU Charter that the drafters rejected wording restricting the scope of the article to the ‘right to seek asylum’ as guaranteed under the Universal Declaration of Human Rights, concluding that its scope must go beyond protection from *refoulement*. In this regard, ECRE advocates that guidance should be taken from UNHCR’s submission in the case of *Halaf* before the CJEU.<sup>48</sup> According to UNHCR Article 18 EU Charter contains the following elements: (i) protection from *refoulement*, including non-rejection at the frontier; (ii) access to territories for the purpose of admission to fair and effective processes for determining status and international protection needs; (iii) assessment of an asylum claim in fair and efficient asylum processes (with qualified interpreters and trained responsible authorities and access to legal representation and other organisations providing information and support) and an effective remedy (with appropriate legal aid) in the receiving state; (iv) access to UNHCR (or its partner organisations); (v) treatment in accordance with adequate reception conditions; (vi) the grant of refugee or subsidiary protection status when the criteria are met; (vii) ensuring refugees and asylum seekers exercise of fundamental rights and freedoms; and (viii) the attainment of a secure status. While this statement was made with regard to a case relating to the application of the Dublin Regulation and therefore concerning an asylum seeker present on the territory of the EU Member States, the elements identified by UNHCR are relevant for the meaning of the right to asylum in an extra-territorial context in light of the extraterritorial applicability of the EU Charter.

## Schengen Borders Code and the Visa Code

Applicants from most of the 10 highest nationalities making asylum applications in the EU in 2014<sup>49</sup> require a Schengen Visa to enter EU territory, and it does not seem like future scenarios will bring about any dramatic changes to this context either in terms of legal amendments to relevant legislation or of global events triggering

46. Clearly, this is not exclusive to the Qualification Directive as, for example, implementation of the Visa Code by receiving and assessing visa applications would also trigger the Charter.

47. See for instance V. Moreno-Law and C. Costello, *The Extraterritorial Application of the EU Charter of Fundamental Rights* (cited above).

48. See UNHCR, *UNHCR Statement on the right to asylum, UNHCR’s supervisory responsibility and the duty of States to cooperate with UNHCR in the exercise of its supervisory responsibility*, August 2012, para. 2.2.9.

49. In 2014 the top 10 nationalities were Syria, Eritrea, Afghanistan, Kosovo, Serbia, Pakistan, Iraq, Nigeria, Russia, Somalia. See EASO, *Annual Report on the situation of Asylum in the European Union*, p.125

international protection needs. A Schengen Visa requirement implies fulfilment of a series of conditions and criteria that in the vast majority of cases refugees would be unable to meet, such as access to the application form, passport-size photos, identification documents, sufficient resources and a travel medical insurance policy.

Yet the EU's own rules on borders and visas already offer Member States the possibility to waive these stringent requirements on the basis of humanitarian considerations or because of international obligations. This is explicitly referred to in Article 5(4) of the Schengen Borders Code and Articles 19(4) and 25(1)(a) of the EU Visa Code.<sup>50</sup> Although the terms 'humanitarian grounds' and 'international obligations' are not defined in these EU instruments, it would be extremely difficult for a Member State to argue that its international refugee and human rights obligations are excluded from interpretations of these terms.

Moreover, the Visa Code might go a step further than merely allowing Member States to waive visa requirements. Article 25(1)(a) states that Member States **shall** exceptionally issue a specific kind of visa, a Limited Territorial Validity visa (LTV) "*when the MS concerned considers it necessary on humanitarian grounds...or because of international obligations...*". It would therefore seem that where consulates or embassies are faced with individuals who are clearly refugees, or whose circumstances strongly indicate protection concerns, their discretion whether or not to grant the visa is severely limited.<sup>51</sup> In this regard it should be noted that in a judgment concerning an application for a LTV on the basis of Article 25 EU Visa Code by a Syria family living in Aleppo facing daily threats to their security, to the Belgian embassy in Beirut, a Belgian court suspended the refusal to issue a LTV. It considered that such refusal subjected the applicants to inhuman and degrading treatment prohibited by Article 3 ECHR and that States are under an obligation not only to respect Article 3 ECHR but also to prevent its violation and ordered the Belgian State Secretary to issue a short stay visa or laissez-passer.<sup>52</sup> Moreover, the meaning of 'international obligations' in Article 25 as well as the extent to which this provision imposes an obligation on Member States to issue an LTV in case of a risk of violation of Article 4 and/or 18 EU Charter is the subject of a preliminary reference to Court of Justice of the European Union (CJEU) by the same Belgian Court in a similar case as the aforementioned.<sup>53</sup>

Under the Schengen Borders Code, the possession of a valid visa, including an LTV, does not create an automatic right of entry. In theory such persons would still have to comply with the normal entry conditions under the Schengen Borders Code, but it would be difficult to substantiate that a refugee holding an LTV granted under above-mentioned Article 25(1)(a) EU Visa Code could be denied entry, as Article 5(4)(c) of the Schengen Borders Code also allows entry to third-country nationals on grounds of international obligations.

Nevertheless, the above-mentioned 'necessity' threshold in the Visa Code remains undefined, leaving many questions unanswered. Would a full-scale asylum procedure be needed or would a *prima facie* assessment of protection needs be sufficient? In the latter case, how would this assessment relate to the procedure and decision on the applicant's full asylum procedure conducted on the territory of the Member State concerned, etc.

## Concluding comment

As the legal framework for assessing international protection needs outside the territory is not strictly regulated, it could lend itself to a relatively high degree of flexibility on central issues such as the status determination process, determination criteria, reception conditions pending determination, rights associated with status, treatment of rejected applicants and the relationship between offshore and border or territory procedures. However, as illustrated by the legal parameters briefly set out above, it cannot be said that this flexibility is an absolute and unfettered one as it must already comply with a minimum set of standards.

50. Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), OJ 2009 L 243/1.

51. See the observation made above in relation to *prima facie* considerations, highlighted in the ECtHR *Hirsi Jamaa* judgment.

52. See *Conseil du Contentieux des Etrangers*, Arrêt n° 176 577, 20 octobre 1996. At the time of writing the further appeal by the State Secretary against the Court's judgment before the Council of State was still pending.

53. See CJEU, Case C-638/16 PPU, X and X. See also *Conseil du Contentieux des Etrangers*, Arrêt n° 179 108, 8 décembre 2016.

## 2.3. LEGAL CHANNELS AND MINIMUM HUMAN RIGHTS SAFEGUARDS: ECRE RED LINES

Because of the extra-territorial applicability of Article 3 ECHR and the EU Charter of Fundamental Rights, the legal channels for refugees operated by European States abroad do not operate in a legal vacuum and have to ensure that human rights of the individuals concerned are respected. Chapter four of this paper contains ECRE's specific recommendations on how such a rights-based approach can be implemented in practice for the respective refugee-based legal channels ECRE promotes. Based on the legal parameters set out in section 3.2, this section outlines the key human rights safeguards that, in ECRE's view, have to be respected in order for such procedures to be equitable and fair. In this regard, ECRE has identified 5 **procedural safeguards** that, at a minimum, need to be respected in such procedures:

- Independent information

It should be ensured that applicants are provided with sufficient information to enable them to comply with prescribed procedures as well as fully exercise their rights.<sup>54</sup> Therefore states should guarantee and facilitate contact between applicants and NGOs, as well as UNHCR.<sup>55</sup>

- Qualified and impartial interpretation

Unless the applicant is in fact able to understand what is happening during the assessment of the claim for protection, a fair and rights based procedure is non-existent. Thus, unless he or she fluently speaks a language fully understood by the interviewing officer and the legal representative, a competent, professionally qualified, trained and impartial interpreter should be made available. Applicants should be made aware of this right and enabled to exercise it. This service should be provided out of public funds.<sup>56</sup>

- Personal interview

As the humanitarian visa procedure aims at a preliminary assessment of a person's international protection needs, a personal interview should be conducted. It is the ultimate tool for the applicant to provide a clear account of the personal story and of his or her motives for seeking protection. The interview should only be waived where the competent authority considers it possible to identify a protection need simply on the basis of documentation submitted, including in a context of mass influx or group determination, or where the applicant is unfit or unable to be interviewed.<sup>57</sup>

- Legal assistance

The provision of free legal assistance to the applicant is essential for the fair and efficient conduct of the procedure. Thus, by definition, the disadvantaged position of the applicant in the procedure needs to be properly counterbalanced. Applicants are often in a vulnerable position and unaware of all the procedural aspects of making the application as well as the shared responsibility between the applicant and the authority examining their application in establishing the facts and circumstances of the claim.<sup>58</sup>

- Right to an effective remedy.

Applicants must have a right to appeal the refusal by a State to grant a humanitarian visa, in accordance with national law. The appeal body must be able to conduct a thorough *ex nunc* scrutiny of the refusal decision on

54. Based on the EU general principle of the right to good administration. See ECRE, Information Note on the recast Asylum Procedures Directive, 2014, p.19

55. In accordance with Article 35 Geneva Refugee Convention.

56. ECtHR, I.M. v France, Appl. No. 9152/09, 2 February 2012, para 145; ECRE, Information Note on the recast Asylum Procedures Directive, 2014, p. 21; Recast Asylum Procedures Directive, article 13(3)(c).

57. The right to be heard is a general principle of EU law: CJEU, Case C-277/11, M.M. v. Minister for Justice, Equality and Law Reform, 22 November 2012, paras. 85-89. See also ECRE & Dutch Council for Refugees, The Application of the EU Charter of Fundamental Rights to asylum procedural law, p.72

58. ECtHR, M.S.S. v Belgium and Greece, Appl. No. 30696/09, 21 January 2011, paras 288, 290; ECtHR, I.M. v France, Appl. No. 9152/09, 2 February 2012, paras 128, 130; ECtHR, A.C. v Spain, Appl. No. 6528/11, 24 April 2014, paras 82, 85, 86.

points of both fact and law.<sup>59</sup> In order to be effective, the remedy must have automatic suspensive effect.

With regard to the applicant's access to reception conditions in such procedures, the territorial restriction of the EU Reception Conditions Directive means that the standards contained therein as such do not apply outside the territory. However, as the EU Charter of Fundamental Rights applies extraterritorially, the right to human dignity laid down in its Article 1 is necessarily engaged whenever a person comes within the effective control of an EU Member State. Moreover, although the ECHR does not contain a specific article providing for the right to human dignity, the ECtHR has emphasised that the "very essence [of the ECHR] is respect for human dignity and human freedom".<sup>60</sup>

The exact meaning and implications of the obligation to respect human dignity extra-territorially remains unclear. It is acknowledged that ensuring access to a number of human socio-economic rights that are to be guaranteed in the context of asylum procedures conducted on the territory would be impossible for European States to secure on the territory of a third State as they would necessarily depend on the legal framework of the country concerned, such as for instance access to the labour market or education. Moreover, such persons may not be under the 'effective control' of the European State acting extraterritorially. However, as such procedures may concern individuals who are particularly vulnerable, European States should undertake all reasonable efforts to secure such applicants' access to shelter and medical care pending their actual departure to the European State concerned, including through cooperation with non-governmental organisations or international organisations as discussed below.

## CHAPTER 3 - LEGAL FORMS OF ADMISSION ROOTED IN THE INTERNATIONAL REFUGEE PROTECTION REGIME

There is a range of channels that can be used by states to ensure the safe passage of persons to their territory to access international protection. ECRE uses a wide definition of safe and legal channels for refugees as including resettlement and humanitarian admission programmes, private sponsorship programmes and humanitarian visas. Moreover, ECRE also calls for a more flexible use of family reunification provisions as well as expanding possibilities for legal migration for work or study purposes.<sup>61</sup> This chapter deals with the first-mentioned safe passage channels that are directly rooted in the international protection system. It includes ECRE's views and recommendations on how to make most effective use of legal channels for refugees to access protection in Europe so as to increase their potential as credible alternatives to irregular and dangerous ways of reaching safety in European countries, while respecting the human rights of the individuals concerned. In ECRE's view, this requires a shift of states' and EU institutions approaches to the use of more flexible procedures and ambitious numerical commitments and targets, in particular with regard to resettlement and humanitarian admission programmes at the national and European level as well as the use of humanitarian visas.

Expanding the availability of safe and legal channels for refugees is to the benefit of all; not only do they save lives and offer access to protection, they provide receiving states with the possibility to plan and put structures in place to prepare for the arrival of those in need of international protection. The use of legal channels by refugees avoids additional trauma caused by dangerous journeys that they otherwise have to undertake and therefore is less harmful for their psychosocial well-being. At the same time better anticipation and management of potential integration challenges is also ensured.

Legal channels for refugees to access protection in a safe manner cannot operate in a legal vacuum and must respect the legal parameters set out in Chapter 3. This means that, as such channels are implemented through formal procedures in which decisions are taken which may adversely affect the individual, minimum

59. Article 47 EU Charter on Fundamental Rights; ECtHR, *Gebremedhin v France*, Appl. No. 25389/05, 26 April 2007, para 66

60. ECtHR, *Pretty v United Kingdom*, Application no. 2346/02, 29 July 2002, para 65

61. See ECRE, *Submission to the European Commission Consultation on the Future of Home Affairs Policies. An Open and Safe Europe - What's next*, January 2014

human rights safeguards need to be observed. Some procedural safeguards are already included in UNHCR resettlement programmes and humanitarian admission programmes as well as in visa procedures. However, in ECRE's view, the observance of human rights safeguards should be properly consolidated and enforceable in law and practice. Therefore, this section indicates where the fundamental rights protection of the individuals concerned should be strengthened as well as concrete ways to ensure that those safeguards are available in practice.

It is important to reiterate that the creation and expansion of safe and legal channels for refugees should not be used as a pretext to create legal barriers to accessing the protection system in Europe for persons arriving through irregular channels. As the world is witnessing unprecedented levels of forced displacement, European countries must uphold their obligations under international refugee law, regional human rights instruments and EU law and continue to invest in accessible and resilient asylum systems on their territory.

### 3.1. RESETTLEMENT

#### The multifunctional nature of resettlement

Resettlement is the transfer of refugees from their country of asylum to a third country that has previously agreed to admit them and grant them some formal status, normally as refugees with permanent residence and the possibility of acquiring future citizenship. If a refugee cannot locally integrate in their country of first asylum and there is no prospect of repatriation in the medium to long-term, resettlement becomes the only possible durable solution.<sup>62</sup>

As well as being one of the three possible traditional durable solutions, alongside voluntary return and local integration, resettlement has three other universally accepted functions.

**Firstly**, it is a tangible demonstration of **international solidarity** and responsibility sharing with countries that are hosting the overwhelming majority of the world's refugees and are themselves often poor and unstable. At a time when most countries see Europe attempting to avoid its protection responsibilities by restricting access to Europe, resettlement as an expression of solidarity is extremely important.

**Secondly**, it is a **tool** that provides a **safe and legal access alternative** to refugees already in countries of first asylum to irregular and often life-threatening ways to access protection in other countries.

**Thirdly**, resettlement is, above all, an international protection tool to provide a **durable solution** to refugees whose life, liberty, safety, health and other fundamental human rights are at risk in the country of first asylum, or where they have no prospect of integrating.

Resettlement priorities should be responsive to the most pressing protection needs and not to political pressures or priorities in the resettlement country. Resettlement programmes could also be responsive to unforeseen refugee situations, and include provisions to respond to emergency and urgent resettlement needs.

It is important to underline that resettlement is not and should not be considered a potential substitute for states' obligations under international and European law to consider applications for asylum on their territory. The development of resettlement activities in no way diminishes the continuing need for states to strengthen their national asylum systems.

Neither should resettlement (as well as humanitarian admission programmes and private sponsorship programmes) in principle be used to facilitate family reunification of persons who are legally entitled to join their family members in Europe. While it should be possible in exceptional cases, resettlement quotas should not be used to compensate for the failure of states to reunite family members through the appropriate channels

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62. ECRE, Towards a European Resettlement Programme, 2005, p.13

as this would reduce, rather than enlarge refugees' access to safe and legal channels. Instead, states should simplify and expedite family reunification procedures as suggested in chapter five so as to avoid improper use of resettlement, humanitarian admission and private sponsorship programmes.

## Selection Criteria

The first consideration in determining an **individual's eligibility** for and need of resettlement should be their continued need for international protection, as outlined in the UNHCR *Resettlement Handbook* (2011).<sup>63</sup>

As a minimum, the individual in question should be found to be under the mandate of UNHCR and in need of continued international protection.<sup>64</sup> In some instances, the individual may not meet the refugee definition in the 1951 Refugee Convention, but may still be in need of consideration for resettlement.

Individuals who would, if seeking asylum in Europe, qualify for a subsidiary form of protection as defined in EU law<sup>65</sup> should also be considered for resettlement to Europe. That consideration raises the issue of the importance of flexible determination of refugee status. In some recent cases, refugees have been found ineligible for resettlement because they could not demonstrate an individual fear of persecution.

A consideration of this possible imbalance should be included in the development of a European approach to resettlement. This view is echoed by UNHCR that has argued that a flexible and protection-based approach to resettlement is "*particularly important for refugees who have been in limbo for many years, or for refugees from within prima facie populations who have particularly pressing protection needs in the country of asylum even while they may not, at that point in time, fulfil all the requirements of the 1951 Convention definition.*"<sup>66</sup> Such limited interpretations of the 1951 Refugee Convention can also be problematic in relation to 'group' criteria.

The application of flexible criteria should not, however, preclude a full consideration of the possible application of the relevant exclusion clauses, as contained in Article 1F of the 1951 Refugee Convention, and according to the procedures outlined in the UNHCR Resettlement Handbook.<sup>67</sup>

The resettlement criteria and levels of priority as contained in the UNHCR Resettlement Handbook should serve as the basis for the determination of resettlement needs for European resettlement activities.

European resettlement activities should also be based on the various levels of resettlement priority set by UNHCR which distinguishes emergency (resettlement to take place within seven days of submission), urgent (resettlement to take place within six weeks after submission) and normal (resettlement to take place within twelve months) priority levels. Within the category of normal resettlement priority levels, resettlement activities as part of national or European programmes, in line with UNHCR's Handbook, should be targeting the following priority categories:

- (1) persons with legal and physical protection needs, including those at risk of *refoulement* or arbitrary detention,
- 2) survivors of violence and torture,
- (3) persons with medical needs,
- (4) women and girls at risk
- (5) persons for whom family reunification under resettlement schemes would be the only possibility to be

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63. UNHCR Resettlement Handbook, 2011, available at <http://www.unhcr.org/46f7c0ee2.html>.

64. Idem, p.75

65. See Article 15 EU recast Qualification Directive. At the time of writing the European Commission had presented a proposal for a regulation on standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the protection granted and amending Council Directive 2003/109/EC concerning long-term resident status, COM(2016) 466, Brussels, 13 July 2016. The proposal leaves the grounds for subsidiary protection laid down in Article 15 of the EU recast Qualification Directive unchanged.

66. New Directions for Resettlement Policy and Practice, UNHCR Standing Committee 21st Meeting, EC/51/SC/INF.2, 14 June 2001, para. 10

67. UNHCR Resettlement Handbook, 2011, Chapter 3, <http://www.unhcr.org/3d464c954.html>

reunited with their family members,<sup>68</sup>

(6) children and adolescents at risk.

Any identified need for resettlement, according to UNHCR's criteria, should be the overriding principle rather than considerations of an individual's integration potential. These criteria should be reflected in the resettlement activities of all Member States and in the common EU criteria.

Member States should not use 'integration potential' as a criterion for selection, because this is discriminatory, subjective, and undermines the use of resettlement as a protection tool for the most vulnerable. There is much evidence to show that refugees who may have been the most vulnerable and disadvantaged can integrate when given the right support. It is therefore much more important to focus on the integration capacity of receiving communities.

#### **Recommendations:**

Resettlement eligibility criteria as defined in the UNHCR Resettlement Handbook should be interpreted as including also persons eligible for forms of international protection, including those defined in EU law, other than refugee status under the Refugee Convention and the UNHCR Mandate.

Any identified need for resettlement according to UNHCR's criteria and priority levels and categories, should be the overriding principle rather than considerations of an individual's integration potential. These criteria should be reflected in the resettlement activities of all States and in the common EU criteria.

### **Procedural safeguards**

While there is no 'right' to be resettled under international refugee law and states have discretionary power to accept or reject resettlement cases, procedural safeguards have been developed in the context of resettlement programmes, in particular by UNHCR. With respect to the refugee status determination (RSD) procedures conducted within the overall resettlement process, the same safeguards apply which have to be respected by UNHCR in all operations where it has a responsibility to conduct refugee status determination pursuant to its mandate.<sup>69</sup> These include the five minimum procedural safeguards identified by ECRE above: right to a personal interview, information, qualified interpretation, legal assistance and a right to appeal. However, given the specific context of refugee camps where RSD is conducted by UNHCR, access to legal assistance is rarely available in practice and the appeal is an administrative appeal examined by another person or organ than the one taking the first decision, but still within UNHCR. The latter would not meet requirements of independence and impartiality under the jurisprudence of the ECtHR and the CJEU with respect to the right to an effective remedy. However, RSD procedures conducted by UNHCR as the Supervisory Authority over the Geneva Refugee Convention are essentially of a non-adversarial nature, contrary to State-led asylum procedures and therefore procedural safeguards as set within UNHCR might be sufficient for such purpose. Moreover, UNHCR is in the process of reviewing its procedural standards and has already adopted new guidance for its own RSD procedures, including with regard to interpretation and legal assistance.<sup>70</sup> Furthermore, the UNHCR Handbook on Resettlement emphasises the need for these safeguards to be in place in particular in exclusion cases.<sup>71</sup>

In ECRE's view, these minimum guarantees should be ensured in all resettlement programmes as well as humanitarian admission programmes, whether they are implemented through UNHCR or not.

68. As mentioned, the use of resettlement for family reunification purposes should be exceptional and only where reuniting family members is not possible through the application of flexible and inclusive family reunification policies as sketched out in section 5.1. below.

69. UN High Commissioner for Refugees (UNHCR), Procedural Standards for Refugee Status Determination Under UNHCR's Mandate, 20 November 2003, available at: <http://www.refworld.org/docid/42d66dd84.html> [accessed 16 July 2016].

70. See UNHCR, 2.5. Interpretation in UNHCR RSD Procedures, 2016 and 2.7. Legal representation in UNHCR RSD Procedures, available at <http://www.refworld.org/rsdproceduralstandards.html>.

71. As it refers to the need for a full RSD interview and the right of the individual concerned to respond to information which may form the basis for an exclusion decision. Procedural fairness also requires that the excluded person be given a possibility to submit an appeal, which should be examined by a person or organ different from the one involved in adjudicating and/or reviewing the first-instance decision. UNHCR, Resettlement Handbook, Chapter 3, p. 93, <http://www.unhcr.org/3d464c954.html>.

Moreover, if states reject cases referred to them by UNHCR (or other stakeholders), the reasons for this should be explained. This would improve the overall process, help to set clear criteria, save time and reduce administration costs. At the same time, carefully managing the expectations of the refugees concerned is equally crucial. This implies the provision of specific and accurate information on the possibilities and chances of obtaining a resettlement place in the desired destination state and the services provided in the country of resettlement.

#### **Recommendations:**

Procedural guarantees established in the UNHCR Resettlement Handbook should be, as a minimum, guaranteed under all resettlement programmes as well as humanitarian programmes, whether they are implemented through UNHCR or not.

If States reject cases referred to them by UNHCR (or other stakeholders), the reasons for such refusal should be stated and communicated in writing to the refugee.

### **Increasing the efficiency and volume of referrals**

Engaging in large-scale sustained resettlement activities may be used strategically as part of a comprehensive solution for protracted refugee situations, and may be important in serving to improve the protection environment for those refugees who are not resettled and remain in the country of first asylum - a function that it has served historically - while making the global refugee regime more equitable, and therefore sustainable.

The question is not *how many refugees Europe could resettle*. History does not seem to suggest that there is a 'natural limit' to the number of refugees that a country or region can resettle. Resettlement commitments have, historically, been limited only by the political will to commit the necessary resources. The more important question to ask is, *how many refugees Europe should resettle?* History illustrates that there is no objective answer to this question, and that the determination of resettlement commitments is more of a political question. With strong public support and demonstrable political will, European resettlement activities may be sufficiently generous to respond to the dramatic resettlement need exhibited in regions of refugee origin.

In order to do so, various measures can be taken to enhance both the scale and the efficiency of national referrals and European resettlement programmes, strengthen the capacity and resources of UNHCR, non-governmental organisations and EU institutional actors to take up their role in resettlement activities.

While UNHCR is the main referral organisation to states for refugee resettlement, it is not the only one, and states can also take resettlement referrals from any other organisation. Sometimes NGOs conduct the referrals and submission directly to the resettlement country. There is also the possibility that concerned refugees refer themselves to UNHCR (self-referral). In particular, NGOs can assist with referrals in the following ways:

**Firstly**, having identified the individual, the NGO can complete a resettlement referral, conduct the resettlement-related interview with the refugee(s), and refer the case to UNHCR for review, approval and onward submission to a resettlement country. **Secondly**, following a similar process, NGOs can refer the individual case directly to a resettlement country. For this to happen, the NGO should normally have been trained and approved by the resettlement country and/or UNHCR and have an agreement in place. NGOs can join forces with other NGOs on the ground to identify and refer cases to UNHCR or the resettlement country. **Thirdly**, NGO staff can be recruited by, or seconded to UNHCR.<sup>72</sup>

Identifying **groups of refugees** who share a common vulnerability and fear of persecution could complement the on-going resettlement activities with individual cases. Group determination can support solutions for a specific population in a protracted refugee situation. It can increase efficiency when it concerns large numbers, help expand resettlement opportunities and support the strategic use of resettlement. There are different operational procedures for group resettlement methodology depending on local circumstances, the refugee

72. UNHCR-NGO Toolkit for Practical Cooperation on Resettlement, June 2015

group, the complexity of their cases, and the countries of resettlement.<sup>73</sup>

One area where **dossier consideration**, even on an exceptional basis, may be most useful, is in the treatment of emergency and urgent cases, as defined by the UNHCR Resettlement Handbook. In many cases, such rapid treatment of a resettlement request could be managed only on a dossier basis. ECRE supports the idea to explore further the facilitation of protected entry into the EU as an 'emergency strand' of an EU resettlement scheme, within five days.

## Increasing the number of resettlement countries in Europe and the scale of national programmes

While in recent years an increasing number of European countries have started to engage in resettlement activities, much more can and should be done. European states that currently undertake resettlement should implement their programmes more efficiently and increase their efforts to fill the annual quotas made available. They should also make every effort to consistently expand resettlement programmes. Emerging resettlement countries and those countries that have not yet considered resettlement in Europe should, as a matter of urgency, undertake to establish a national resettlement programme. Multi-year resettlement commitments should be used that can roll over any unfilled places.

Overall, national programmes can be substantially improved with better advance planning and adequate resourcing. Most states could better take advantage of the ability to plan in advance to prepare the receiving communities, the service delivery partners, and the refugees themselves.

Related to advanced planning are the benefits of having a regular resettlement programme in itself. One of the key reasons behind the challenges in service provisions for states running ad hoc programmes is the fact that the programme is not regular. In other words, a stable and regular national programme supports overall national capacities.

The delivery of well-prepared pre-departure orientation can play a decisive role in the success of resettlement programmes. Such an orientation should provide the right information about the resettling country and of managing refugees' expectations.

For a resettlement programme to be effective as a protection tool and a durable solution, resettled refugees should have a long-term legal residence status on arrival.

## A common European resettlement programme

Europe and the EU in particular must substantially increase its resettlement activities and take a fairer share of the large number of refugees worldwide in urgent need of resettlement. The objective of a joint European programme is to increase the scale, and maximise the strategic impact of the EU's resettlement efforts in relation to specific protection needs, by jointly targeting certain groups. This is enabled through common EU priorities for resettlement and additional funding made available for the reception and integration in EU Member States, especially for those states that are developing a programme for the first time.<sup>74</sup> The setting of common priorities and consequent pledging by different Member States are discussed in the framework of the Resettlement and Relocation Forum. The EU should propose a yearly target in tripartite consultations on resettlement while individual EU Member States should increase their resettlement commitments on top of the common EU programme. A Common European resettlement programme should boost resettlement as a durable solution and should not be linked to a third country's cooperation in reducing irregular migration and stepping up readmission and should not result in fragmentation of protection statuses for those resettled.

73. UNHCR Resettlement Handbook, 2011, Chapter Five, <http://www.unhcr.org/46f7c0ee2.pdf>

74. DECISION No 281/2012/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 March 2012 amending Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows' <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:092:0001:0003:EN:PDF>

The Union Resettlement Framework, as proposed by the European Commission in July 2016, raises serious concerns in this respect and should be revisited so as to ensure sufficient added value in terms of numbers and quality of the resettlement process.<sup>75</sup>

While involving the participation of all EU Member States, a European resettlement programme should also encourage non-EU countries to be associated with and/or fully participate in it.

The role of the European Asylum Support Office (EASO)/ EU Agency for Asylum<sup>76</sup> would be pivotal, in ensuring and maintaining the space and coordination for the tripartite character of resettlement (see role of different actors below).

### **Recommendations:**

A European resettlement programme should include provisions for the consideration of resettlement referrals not only from UNHCR, but also from embassies, international organisations, and NGOs working in the country of first asylum.

With greater numbers being resettled to Europe through a joint programme, consideration of a methodology for group identification would become necessary.

Recognizing the value of the involvement of NGOs and other civil society actors in integration programmes, tripartite partnerships should be established at the national level and supported through the funding for national programmes.

In light of the scale of global resettlement needs, the EU resettlement programme should be ambitious and offer at least 25% of global resettlement places. It should establish a large scale European resettlement programme with mandatory participation of all Member States, based on a distribution key. Common priorities should be set that should reflect the priority situations identified by UNHCR, including different nationalities from the Middle East, Africa and Asia. States should also participate through other means than the reception of resettled refugees, such as sharing their expertise to new resettlement countries through the EU Asylum Agency.

The European Commission should provide guidance on the reception and integration of resettled refugees. This should cover aspects of reception post arrival, including in the mid and long term. This guidance could also provide orientation for the evaluation of EU funded activities, to make them more results-driven, for example by developing commonly accepted criteria and evaluation methods for post arrival support services.

## **The role of different actors**

**UNHCR** plays a key role in global resettlement efforts, and it is essential that resettlement programmes are planned on the basis of the centrality of its role. At the same time, European resettlement should be based on the assessment of refugee needs for resettlement, and not on the capacity of UNHCR to process the cases.

The direct consequence of the human and material resource constraints for those required to conduct resettlement processing is a significant backlog of pending cases and long waiting periods for the results of interviews. In many cases, asylum seekers wait far too long (it can be 1-2 years) for the results of their status determination interview with UNHCR. Resettlement procedures still have to take place and this leaves vulnerable refugees stranded in desperate conditions for months on end, often with little or no assistance. Other stakeholders could become more operational in certain aspects of the resettlement process in order to speed up the process and address the capacity challenges, in cooperation with UNHCR.

75. See European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2104 of the European Parliament and the Council, COM(2016) 468 final, Brussels, 13 July 2016

76. At the time of writing, negotiations on a Commission proposal for a Regulation transforming EASO into an EU Agency for Asylum were ongoing. See European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Agency for Asylum and repealing Regulation (EU) No 439/2010, COM(2016) 271 final, Brussels, 4 May 2016. This paper refers in recommendations to the EU Agency for Asylum.

Several **NGOs** are actively involved in national resettlement programmes, undertaking a range of responsibilities, from participating in selection missions and national coordination mechanisms, to providing pre-departure, reception and integration services to resettled refugees. A European resettlement programme should include mechanisms to make full use of the expertise of non-governmental organisations (both in receiving countries and in regions of origin) to help ensure that the resettlement process remains credible, transparent and focused on the protection needs of refugees.

Moreover, NGOs can assume the required administrative responsibilities prior to decision making by the resettlement country, such as preparing refugees for interviews and the dossiers required for State decision making. This would free up UNHCR capacity to concentrate on its key mandate activities, including the coordination of durable solution activities, and again reinforce its capacity at registration and refugees status determination (RSD) level. UNHCR's oversight of the RSD process would need to be maintained, but NGOs could also be usefully involved in core processing activities such as refugee status determination.

Cultural orientation may be conducted by NGOs on behalf of resettlement countries. NGOs can also be involved in providing counselling services, information on integration in the resettlement country and language training. NGOs could also take on monitoring, medical checks, facilitate the delivery of travel documents, etc.

In this regard, the development of a European resettlement programme should include an active role for NGOs in facilitating pre-departure activities.

Providing technical support to Member States resettlement activities is part of **EASO's** current mandate to '*coordinate exchanges of information and other actions on resettlement taken by Member States with a view to meeting the international protection needs of refugees in third countries and showing solidarity with their host countries.*' However, so far, this has not been a priority for the Agency as only one full staff member is dedicated to resettlement.<sup>77</sup> In its 2016 Work programme, EASO states its intention to exercise a coordinating role ("clearing house") in exchanging information and other actions on resettlement taken by EU Member States and countries in cooperation with UNHCR and IOM, and to develop methodologies and tools for strengthening the countries' ability to resettle and promote cooperation.<sup>78</sup>

The future EU Agency on Asylum could facilitate joint selection missions with Member States and in coordination with UNHCR, trainings, sharing of best practices and the development of methodologies to assess resettlement programmes and their sustainability.

Besides, the EU Agency on Asylum could also have a more operational role, for example by placing Agency staff in regions of origin and transit and resettlement hubs to act as the focal point for all Member States at the pre-departure stage of the resettlement process, especially in monitoring the pre-departure screenings and the issue of necessary travel documents, thus ensuring the integrity of the resettlement process. It could also engage in planning allocations, setting levels and resettlement priorities, and in the long term, managing the common European resettlement programme.

#### **Recommendations:**

NGOs should be included in national and European programmes through formal arrangements and partnerships to support identification, referral and submissions in the country of departure, cultural orientation, counselling and support before departure and post arrival.

The EU Asylum Agency should take up a proactive role in enhancing and supporting resettlement activities, both at the EU and national level through (1) fostering cooperation and information exchange between Member States, and NGOs in the areas of resettlement, (2) facilitate joint selection missions in close cooperation with UNHCR and (3) by taking up an operational role by deploying EU Asylum Agency focal points in resettlement hubs.

77. See EASO's revised work programme 2016, p.35 available at <https://easo.europa.eu/asylum-documentation/easo-publication-and-documentation>.

78. EASO work programme 2016, p.30, <https://easo.europa.eu/wp-content/uploads/EASO-WP-2016.pdf>

### 3.2. HUMANITARIAN ADMISSION PROGRAMMES.

In addition to resettlement, humanitarian admission programmes (HAP) constitute another tool that present a legal and safe alternative for large numbers of persons in need of international protection. EU and non-EU countries have made use of such programmes recently in response to the Syria refugee crisis and ECRE encourages *all* states to develop such programmes to complement current resettlement efforts.

According to UNHCR, the main characteristic of HAP is the expedited nature of the process. HAP can be used for specific categories, such as vulnerable groups, extended family members, or individuals with medical needs.<sup>79</sup>

The International Catholic Migration Commission (ICMC) further refines this and distinguishes between 'humanitarian admission programmes', 'extended family reunification programmes' and 'community based sponsorships'. For the purpose of this paper, the first two are discussed under the overall term "humanitarian admission", whereas the third is discussed under 4.3 as private sponsorships.

The German and Austrian programmes have admitted many cases through referrals from family members, churches and civil society partners, and others processed by UNHCR on the basis of resettlement protection and vulnerability criteria.<sup>80</sup> ICMC notes that the capacity of German embassies has, at times, been stretched in processing such large numbers of applications and entry visas, with a lack of dedicated structures and expertise to support applications. Experience so far has also shown that awareness about humanitarian programmes among refugee communities is limited and that information and guidance as regards the applicable procedure to be followed is largely lacking.

Furthermore, according to the ICMC, 'extended family reunification programmes' are a sub-category of humanitarian admission programmes. They offer the possibility to reunite with non-nuclear family members and have been implemented in the framework of the HAPs (Austria, Germany and Ireland), the German Regional Family Member Admission Programme, and the Swiss family admission and humanitarian visa programmes. A significant proportion of those granted residence permits under the regional family reunification programmes have eventually claimed asylum.

At EU level, currently, EU funding under the AMIF is available for resettlement only. Expanding the possibilities for providing AMIF funding for persons under humanitarian admission programmes would provide for additional financial incentives for states to actively engage and create a higher number of places under such programmes.

In terms of status granted, humanitarian admission programmes in Europe have offered different types of statuses, from two-year temporary residency status (Germany and Ireland), to five-year temporary residency (UK), subsidiary protection (France), and full refugee status (Austria and France). In other words, the French and Austrian programmes used the expedited HAP procedure but were essentially resettlement. In ECRE's view, the latter examples constitute best practice and should be mainstreamed throughout Europe. This is necessary in order to avoid discrimination between groups of refugees who have the same protection needs and face the same integration challenges, whether they have been admitted to the territory under resettlement or humanitarian admission programmes. Providing those admitted to the territory with full refugee status, and hence a more long term and stable right of residence on the territory, constitutes an important precondition for increasing their chances for accessing the labour market, housing and education; all key factors of integration.

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79. UNHCR, Legal Avenues to Safety and Protection through other Forms of Admission, 24 June 2015

80. ICMC, 10% of refugees from Syria: Europe's resettlement and other admission responses in a global perspective, June 2015, p.6 <http://www.icmc.net/sites/default/files/documents/10-percent-syrian-refugees-resettlement-2015.pdf>

**Recommendations:**

Prioritization within humanitarian admissions programmes must be determined according to protection needs and specific vulnerabilities and urgency within application procedures, instead of dealing with applications on a first-come, first-served basis.

When implementing humanitarian admission programmes, states must provide for sufficient capacity at embassies.

As protection needs and integration challenges are the same, all persons admitted to the territory through either resettlement or humanitarian admission programmes should be entitled to the status granted to resettled refugees, i.e. refugee status.

In case persons admitted under the humanitarian admission programme have nevertheless been granted a temporary status and permit, they should be informed in due course on the appropriate procedures to renew their residence permit and obtain a status with permanent residency rights. Where this implies submitting an asylum application, such applications should be prioritized and considered for prima facie recognition as it concerns persons whose need for international protection has already been established. They should have access to the same rights as refugees under national or EU law.

EU funding should also provide financial support for developing humanitarian admission programmes that offer a substantial number of places.

Implementation of humanitarian admission programmes need to be supported with awareness raising among the refugees and their family members and guidance through the application procedure.

As it is the case for resettlement, humanitarian admission programmes should be developed in partnership with NGOs at both ends of the process, to support all aspects of the preparation, post arrival phase and integration of the newly arrived refugees.

NGOs and community organisations could raise awareness and support implementation by providing assistance with the preparation of applications and procedures.

### 3.3. PRIVATE SPONSORSHIPS

While recognising that states have primary responsibility for the organisation and financing of refugee resettlement and integration, other models, such as private and community-based sponsorships, can also be used in order to broaden the scope and allow safe and legal access to those who would otherwise not benefit from resettlement or humanitarian admission. In principle, these should be developed in parallel to national resettlement quotas.

#### Key features of private sponsorships

While there is no universally agreed definition, for the purpose of this paper, ECRE uses the term private sponsorship programmes to describe arrangements whereby a sponsor takes responsibility for some of the costs of the refugees (such as care, accommodation, settlement assistance and financial support) for the duration of the sponsorship period; this can be 12 months or more, if needed. Assuming the financial, material and social support does not however substitute for the responsibility to protect and assist these refugees, which lies with the receiving states. Private sponsorships should not be used to shift the cost of existing or planned admission and reception programmes onto civil society. Privately sponsored refugees can be referred by the sponsors, by UNHCR or by the embassies. There is no need for a family link with the sponsor.

While private sponsorship programmes are currently not frequently used in European countries, they constitute another important channel for legal admission for refugees and others in need of international protection with additional positive side-effects beyond providing an alternative for irregular forms of access to the territory.

The experience of such programmes in Australia and Canada shows that they are empowering for the refugee communities, and create bonds between refugees, community-based organisations and receiving communities. They can also enhance cooperation between governments, local authorities, NGOs and community groups and the private sector. While there is little experience with corporate sponsorship, involving the private sector in such programmes would be worthwhile exploring, considering the importance of employment for integration of refugees into the host society. Private sponsorships could also be a way to introduce an admission programme to a country that has not previously engaged in resettlement. The fact that the received refugees are welcomed and supported by an established entity/citizens can help counter public fears and develop a positive attitude. It can also help build certain post arrival assistance capacities that can then be used for integration.

However, in order to ensure that private sponsorship schemes contribute to expand the number of places for legal admission of refugees, while offering a durable solution, ECRE calls for such programmes to be underpinned by the following key considerations, as identified by UNHCR:<sup>81</sup>

- private sponsorship places should always be in addition to resettlement places
- those sponsored should be refugees in need of a solution outside of the country of asylum where they currently are, including for family reunification reasons<sup>82</sup>
- privately sponsored refugees should receive the same legal status and rights as other resettled refugees
- privately sponsored refugees must be provided for their basic needs

## Conditions and legal framework for private sponsorships

In response to the Syria conflict, some civil society actors and community groups in Europe have stepped in to facilitate the admission of extended family members, assuming a part of the costs; this included churches, NGOs, universities, diaspora organisations and migrant associations and other actors. These pilot initiatives have been *ad hoc* and unstructured, but could become the basis for a more structured approach following the examples of Canada and Australia.

In these models, private sponsorships are offered in addition to the national resettlement quotas. They have two key features that distinguish them from resettlement and certain other admission programmes. Firstly, individuals or organisations can assume responsibility (financial and social support) for the admission of refugees for a defined period of time. Secondly, they can identify the person or persons they wish to support for admission.<sup>83</sup> Allowing applications being made from the States where the sponsor resides is a way to overcome practical obstacles.

A legal and operational framework is in place, establishing a set of clearly defined rights and responsibilities for both the sponsor and the receiving state, and the duration of the sponsorship. In order to enter into such an agreement, potential actors interested to become sponsors need to fulfil certain eligibility criteria. The number of refugees to be admitted through these programmes can also be defined in advance. Selection criteria and the identification process needs to be clearly defined, and the application and procedures also agreed through this framework. Refugees and community groups should receive support and guidance throughout the process. The costs that the sponsors are expected to provide should be realistic and not substitute entirely for state support to the programme.

In order to enhance legal certainty for all actors involved, a system of registration of sponsors and standard sponsorship agreements should be in place. While the legal framework for private sponsorship programmes should establish clear eligibility criteria for sponsors, the threshold should not be unrealistically high so as to not to discourage potential sponsors from participating.

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81. UNHCR, Establishing private sponsorship resettlement programmes in Europe and Sample Checklist

82. Some private sponsorship programmes, however, allow also for direct entry from the country of origin (e.g. Argentina, Australia, Germany, Ireland, Switzerland, New Zealand; see Kumin J., (2015), Welcoming engagement; how private sponsorship can strengthen refugee resettlement in the European Union, MPI, December 2015 , p.5, <http://www.migrationpolicy.org/sites/default/files/publications/Asylum-PrivateSponsorship-Kumin-FINAL.pdf>

83. Kumin J., (2015), Welcoming Engagement; how private sponsorships can strengthen refugee resettlement in the European Union, MPI, December 2015

Private sponsorships can complement family reunification opportunities in Europe for non-nuclear family members (grandparents, parents and siblings) of refugees that have been granted refugee status, as well as family reunification opportunities for nuclear family members of refugees under subsidiary protection, temporary or other status. However, as already mentioned, in ECRE's view, private sponsorship programmes should not become a substitute for family reunification procedures and therefore reminds States of the possibility to reunite family members beyond the nuclear family under regular family reunification procedures. States should therefore adopt more flexible family reunification policies in order to address current challenges faced by separated refugee families as advocated for by ECRE in chapter five. This would also help to ensure that private sponsorship programmes can prioritise the regular admission of other vulnerable cases that may not be covered by resettlement or humanitarian admission programmes.

NGOs could facilitate the implementation of such programmes by providing information and trainings to sponsors (community groups)

#### **Recommendations:**

Financial incentives should be made available to support initial private sponsorship programmes. Within the EU this could be achieved through AMIF funding for pilot projects that is additional to funding for resettlement programmes.

States must establish a solid legal framework for the implementation of private sponsorships, which require formal agreements between governments and sponsors, do not require sponsors to bear unrealistic costs and do not substitute for states obligations to provide persons on its territory access to social and economic rights and limit sponsor's responsibilities in time.

### **3.4. HUMANITARIAN VISAS PROCEDURES**

The possibility of European embassies to grant access to territory to persons on the basis of their international protection needs is generally viewed as the more traditional approach to extraterritorial asylum, also at times referred to as 'diplomatic asylum' or 'embassy procedures'. In essence this measure envisages a direct relationship between a refugee and a State establishment or entity situated outside that State's own territory, usually an embassy, consulate, ship or aircraft.<sup>84</sup> Clearly, more appropriate for individual or small group spontaneous arrivals rather than large-scale flows of persons, such measures conducted in embassies may be conceived of in two possible formats: mere preliminary assessment procedures secondary to a fuller and more comprehensive international protection needs assessment on the territory; or full-scale asylum procedures conducted within the Embassy premises. In this Paper ECRE suggests that the latter option is not a feasible one.

#### **Key features of humanitarian visa procedures**

ECRE considers that this form of access to territory granted extraterritorially is distinct from asylum procedures conducted outside a state's territory. Under humanitarian visa procedures ECRE classifies procedures with the following characteristics:

1. Location is not a reception or processing centre, but premises under the state's control and enjoying official status in the host third state;
2. Procedures and decisions are national to the European (EU) State, meaning they are entirely implemented and adopted by the European State, with no involvement of the host third state<sup>85</sup>;
3. Procedures and decisions are complementary and not exclusive to asylum procedures conducted on EU territory or territory of the European State;
4. No comprehensive asylum procedure is actually conducted, but a mere preliminary assessment of the

84. Italian Council for Refugees (CIR), Exploring Avenues for Protected Entry in Europe, March 2012, available at <http://www.ecre.org/component/downloads/downloads/468.html>

85. This does not exclude the possibility of EU Member States cooperating with each other.

individual case with a view to issuing or refusing an entry visa for the European State concerned.

Within an EU context, as a form of extraterritorial asylum, embassy-conducted procedures are not directly regulated by the legal framework of the CEAS. As mentioned above, the recast Asylum Procedures Directive explicitly excludes requests for diplomatic or territorial asylum submitted to representations of Member States from its scope.<sup>86</sup> Yet it must be remembered that the EU *acquis* does in fact envisage a role for EU Member States' representations in securing access to EU territory to refugees and other persons. As outlined above in Chapter 3, under Article 25 of the EU Visa Code, EU Member States may be under an obligation to issue a limited territorial validity visa (LTV) on the basis of their international obligations or of humanitarian grounds.<sup>87</sup> It is within this EU legal regime that the preliminary assessment mentioned in point (4) above ought to be made, and with the sole aim of ascertaining the presence or otherwise of the elements required by the EU Visa Code and the Schengen Borders Code.

At the time of writing, a Commission proposal amending the EU Visa Code presented in 2014 was still under negotiation. Whereas the Commission had not proposed changes to the relevant Articles 25 and 19 of the EU Visa Code, the European Parliament proposes to strengthen Member States' obligation to issue an LTV when necessary to ensure "*the international protection of a person in accordance with the 1951 Refugee Convention*". In addition, a 'European humanitarian visa' procedure is proposed, to be conducted at any consulate or embassy of the Member States allowing persons to enter the territory of that Member State for the sole purpose of lodging an asylum application in that Member State. Whereas the amendment does not define further details as to the procedure to be followed and the legal parameters against which the individual application is to be assessed,<sup>88</sup> the inclusion of a European Humanitarian Visa Procedure would at least establish a legal framework for accessing an asylum procedure in an EU Member State through regular means. Moreover, as a European Humanitarian Visa Procedure would be subject to the general procedural safeguards laid down in the EU Visa Code, the applicant would be guaranteed access to a remedy against the refusal of such visa, according to the national law of the Member State concerned.<sup>89</sup>

Clearly, the use of the two Codes in implementing such measures would trigger the EU Fundamental Rights Charter, whilst the application of the ECHR and other human rights instruments would need to be assessed on a case-by-case basis looking at the degree of 'effective control' being exercised by the Member State over the applicant<sup>90</sup>. This is, of course, without prejudice to the assessment element exploring the extent to which the refugee's location – embassy, consulate, ship, etc. – is actually considered territory of that particular Member State, thereby triggering a more straightforward territorial jurisdiction and therefore the application of the ECHR and other relevant instruments.

### Practical obstacles for making effective use of humanitarian visa procedures.

Research on the use of embassy procedures has provided further insight into the main reasons why a number of EU Member States and other European States have disengaged with procedures conducted at embassies or consulates abroad with a view to ensuring access to the territory of that state for protection reasons. Among the main reasons cited, in a study carried out by ECRE member organisation, the Italian Refugee Council (CIR) lists the following<sup>91</sup>:

- The additional burden on the embassy and the need to have specialised staff to deal with such requests in the embassies, which raises the costs

86. See Article 3(2) recast Asylum Procedures Directive

87. See above section 3.2

88. As this remains for the Commission to determine by way of delegated act. See European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council on the Union Code on Visas (Visa Code) (recast), PE 557. 179v04-00, 25 April 2016

89. See Article 29 EU Visa Code

90. It is not clear whether in a factual context of a refugee physically present within an embassy for the duration of the application, determination and post-determination process, the Member State would be exercising effective control over the individual.

91. See CIR, Exploring avenues for protected entry in Europe, March 2012. It should be noted that the CIR study includes forms of protected entry procedures which allow for a full examination of the persons asylum application abroad, which is not envisaged in ECRE's vision as explained above. Nevertheless, from a State perspective, the same challenges and practical obstacles are raised with respect to any type of procedure carried out abroad.

- Possible pull factor: if this were to become known with refugee populations, embassies could get overwhelmed with applications.
- Costs of interpreters and mediators
- It could discourage third countries to develop and invest in their own asylum systems
- Such procedures also raise questions with regard to the return of those whose applications are not successful and in particular the respective responsibility, if any, of the solicited state and the third country where the unsuccessful applicant is present

In the next section, concrete ways are suggested to *states* as to how these practical obstacles and challenges can be overcome. However, it is important to note that despite the reluctance of states to establish such procedures for protection purposes specifically, a number of EU Member States have (or had until recently) systems in place for the issuing of either national long-stay visas or short stay Schengen visas. A study of the European Parliament concluded that nine EU Member States have or had schemes for issuing national long stay visa for humanitarian reasons (Belgium, Germany, France, Hungary, Italy, Latvia, Luxembourg, Poland and the UK), which may cover both medical and protection reasons.<sup>92</sup> As Member States policies regarding the use of such visas is rapidly changing, and often includes *ad hoc* administrative practices building on the overall discretion of states to grant access to their territory, available data on visa policies of Member States present an incomplete picture. According to the statistical data published by the Commission, a total of 109.505 short stay visas with limited territorial validity were issued in 2015 by 22 Member States plus Norway, Switzerland and Iceland.<sup>93</sup> However, these statistics do not distinguish between the specific reasons for issuing such visas and therefore do not indicate how many have been issued for medical, protection or other reasons. Whereas the number of LTV visas issued in 2015 is substantial, there is a decreasing trend since 2012, when the total number of LTV visas issued reached 298.117. Nevertheless, these figures already illustrate the potential that such visas could have as a safe and legal entry channel for persons in need of international protection, notwithstanding the fact that the same practical challenges as listed above would normally apply from a state perspective.

Also from the *applicant's perspective*, triggering the procedure for issuing a humanitarian visa raises questions of accessibility, information and feasibility. Refugees in need of a humanitarian visa may have difficulties in accessing or reaching the premises of the state abroad for a variety of reasons. Where no EU Member State has an embassy or consulate on the territory of the third country where the refugee is present, he or she may face similar legal and practical barriers of reaching another country with an embassy or consulate that is operational. This is, for instance, currently the case for refugees in Jordan or Lebanon wishing to enter Turkey, as highlighted in Chapter two above. Below, ECRE makes concrete recommendations how this can be partly overcome and how humanitarian visas can be a workable option for States while respecting the minimum guarantees identified by ECRE that are necessary to ensure due process.

## Overcoming obstacles: making humanitarian visas a viable option for States and Refugees

As mentioned above, the trend in European States has been to stop or abolish protection related entry procedures carried out at embassies abroad, rather than increase the opportunities for refugees to use this channel as a safe way of reaching the EU. Resource and capacity reasons, as well as the fear that this would create a pull factor, have been cited as the main reasons for States not to use such channels. Provided there is political will, there are concrete ways to address those concerns.

Firstly, the pooling of resources of Member States to process applications for humanitarian visas for protection reasons can significantly **reduce costs and resources** spent at the national level with regard to such procedures. In the context of the Schengen Consular Cooperation, embassies and consulates are encouraged to cooperate in the issuing of visas. The possibility for embassies to issue visas on behalf of other EU Member

92. See European Parliament, Humanitarian Visas: Option or Obligation? Study, Directorate General for International Policies, September 2014

93. See European Commission, Visa statistics for consulates 2015, available at [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/index_en.htm) (accessed on 9 July 2016). The statistics do not include Bulgaria, Romania and Croatia.

States already exists and should be systematically used.<sup>94</sup> In particular, with regard to the issuance of visas with limited territorial validity, on the basis of Article 19 and 25 of the EU Visa Code, this could contribute significantly to address capacity issues at Member States' embassies. In the EU context, in order to provide further political backing and practical support for the use of such humanitarian visas by Member States, the Commission could issue guidelines on the issuance of visas with limited territorial validity for protection reasons on the basis of the EU Visa Code. In addition, standard operating procedures could be developed by the future EU Asylum Agency, in close cooperation with UNHCR and expert NGOs, as a framework for States to operate such procedures in full respect for the human rights of applicants. These guidelines and standard operating procedures should also include a clear description of the role of EU delegations in receiving and transferring such requests and providing technical and practical support to Member States' embassies or consulates in processing requests for humanitarian visas.

Experience with such procedures conducted in the past have not revealed major issues with embassies being overwhelmed with massive numbers of requests for humanitarian visas. The abovementioned interpretation of Article 25 EU Visa Code as limiting Member States' discretion to issue an LTV in order to ensure compliance with international obligations is also conditional on the existence of a substantiated risk. However, in case of a significant increase of requests going beyond the capacity of the embassy or consulate, a referral system could be established whereby applicants would be referred by NGOs or UNHCR on the basis of a number of criteria relating to vulnerability and urgency. This would contribute to a more manageable and gradual referral of cases. The involvement of NGOs and UNHCR would allow these actors to identify at an early stage cases that may be more suitable for one of the other refugee based legal channels identified in this paper, such as resettlement, humanitarian admission programmes, private sponsorship, or the regular mobility-based channels such as labour migration, education and family reunification. Such a system lies at the heart of a pilot project to establish a humanitarian corridor, launched in Italy in 2016 by a number of Churches in cooperation with the Italian Ministry of Interior and the Ministry of Foreign Affairs. The project, financed by the churches, aims at the issuance of 1,000 humanitarian visas to vulnerable persons in need of international protection from Lebanon, Morocco and Ethiopia on the basis of Article 25 EU Visa Code, thereby providing a concrete alternative to the perilous sea journey for the persons concerned.<sup>95</sup> They are to be selected by the respective organisations in the abovementioned countries in cooperation with local stakeholders and referred to the respective Italian consular authorities, who issue the LTV after a security clearance by the Italian Ministry of Interior. Upon arrival in Italy, they enter the asylum procedure.

As mentioned, under the Schengen Consular Cooperation, EU Member States' diplomatic representations may act on behalf of other Member States, including the issuance of visas. Conversely, were it possible for refugees to apply for a humanitarian visa at the embassy of any EU Member State or at EU delegations, this would provide a concrete solution to the obstacles refugees may face in accessing the embassy or consulate of a particular Member State the individual wishes to apply to.

Beyond the pooling of resources through the Schengen Consular Cooperation, the creation of a European humanitarian visa procedure would also make it possible to centralise the procedure. Rather than applying for a humanitarian visa for a particular Member State, the applicant could make an application to enter the EU. Admissible cases would then be allocated to a particular Member State by the EU Asylum Agency on the basis of a distribution key that would operate along the same lines as proposed by ECRE in its guiding principles for the reform of the Dublin System on EU territory.<sup>96</sup>

It is acknowledged that approaching an embassy or consulate or EU delegation, physically, may not be an option for some refugees, for instance high profile human rights defenders or political leaders who may be at risk of persecution, including in a third country. For such cases, existing emergency evacuation programmes may be more suitable and should be established by States, alongside a humanitarian visa procedure. In addition, the possibility of online applications could be considered as a remedy for these particular predicaments.

The scenario for a humanitarian visa procedure included in Annex I describes how such a procedure might work in practice.

94. See Article 8(1) Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) (consolidated version), OJ 2009R0810 — EN — 18.10.2013 — 003.001 — 1

95. See Federazione delle chiese evangeliche in Italia, Comunità SANT'EGIDIO and Unione delle Chiese Metodiste e Valdese, Partono i corridoi umanitari Dall'Italia un segnale di speranza per l'Europa, available at: <https://goo.gl/bYr1ra>

96. See ECRE, Principles for Fair and Sustainable Protection in Europe, 2017

## A rights-based approach to humanitarian visa procedures

As the five **minimum procedural** safeguards identified in Chapter III - information, qualified interpretation, personal interview, access to legal assistance, right to an effective remedy - are strongly embedded in the international and European legal framework, they must be complied with in the context of humanitarian visa procedures. Some of these guarantees already have to be respected with regard to visas issued under the EU Visa Code<sup>97</sup> and family reunification procedures under current EU and national law, although, in practice, they are not always available for the individuals concerned. Whereas creating the necessary capacity and frameworks for ensuring compliance with these safeguards abroad may pose specific challenges, there are various ways in which these challenges can be addressed. In particular, within an EU context, current practical cooperation tools developed by EASO, to be strengthened by the future EU Asylum Agency, presents huge potential to assist Member States in overcoming practical and resource constraints they may have in ensuring such guarantees abroad:

- EASO training modules on international protection, interview techniques and eligibility criteria under EU law can be used to properly train relevant staff at Member States' representations abroad.
- The interpreter's pool, managed by EASO and its successor, facilitates quality interpretation, including where necessary, 'on the spot' and remote interpretation.

In the EU context, access to an effective remedy for applicants to challenge the refusal of a humanitarian visa must be ensured in accordance with Article 47 EU Charter and Article 32(3) EU Visa Code as part of the remedies foreseen under national legislation of the requested state with regard to visa applications lodged abroad.

Access to legal assistance in the context of humanitarian visas procedures could be facilitated through either local human rights NGOs, presenting the necessary guarantees regarding their expertise and independence or international or European NGOs with an operational presence in the third country concerned. These NGOs could assist applicants in approaching the embassy or consulate concerned, submitting the necessary documentation during a personal interview or adjunct to the written procedure. They could also establish links with legal aid providers in the country requested to issue a humanitarian visa. This would ensure proper legal representation of the applicant during appeals procedures conducted before the national courts of the State requested to issue a humanitarian visa or possible procedures conducted before the European Courts.

Whereas asylum seekers' access to a range of **socio-economic rights and accommodation** during procedures conducted on the territory of EU Member States is ensured under the recast Reception Conditions Directive, the restriction in territorial scope of the Directive means that these standards do not apply in the event of such procedures conducted outside EU territory. However, as the Charter applies extraterritorially, when EU Member States implement EU law, the right to human dignity laid down in its Article 1 is necessarily enacted whenever a person comes within the effective control of an EU Member State. The exact meaning and implications of the obligation to respect human dignity remains unclear in an asylum context; ensuring access to a number of socio-economic rights would be impossible for States to secure on the territory of another State as they would necessarily depend on the legal framework of the country concerned, such as for instance access to the labour market or education.

However, it is clear that in a number of situations the applicant in such a procedure may be at high risk of human rights violations, including detention and refoulement by the authorities of the country where the procedure is lodged. Moreover, the need for support to the applicant with regard to ensuring livelihood, accommodation and access to basic socio-economic rights, pending the outcome of an embassy procedure, is also directly linked to the duration of the entire process. The longer such procedure lasts, the more such support will be needed in order to ensure the effectiveness of the procedure.

In ECRE's view, states should undertake all reasonable efforts to ensure access to shelter to applicants for a humanitarian visa at a high risk of refoulement or detention and to accommodate, as much as possible, reception needs of individuals granted a humanitarian visa pending their actual departure to the European State concerned. Access to accommodation and medical care, pending departure, could be ensured through cooperation arrangements with local NGOs providing such services to the local population and/or asylum seekers, refugees or undocumented migrants present on the territory of the country hosting the diplomatic representation issuing the visa. In an EU-context, specific funding should be foreseen under the EU Asylum, Migration and Integration Fund (AMIF). However, such funding should be benchmarked in order to ensure that

97. See Article 32(3) EU Visa Code. The question as to whether this requires an appeal before a Court or Tribunal is the subject of a preliminary reference referred by the Polish Supreme Court to the CJEU in June 2016. See <http://www.asylumlawdatabase.eu/en/case-law/poland-ruling-supreme-administrative-court-28-june-2016-ii-osk-134616-submitting-request#content>.

financial resources are not taken away from funding needed to maintain and strengthen national reception systems of the EU Member States.

#### **Recommendations:**

States must (re)establish legal procedures for the presentation of requests for a humanitarian visa for protection reasons to their embassies or consulates. Such procedures should be limited to a preliminary assessment of a person's international protection needs with a view to deciding on the issuance of an entry visa to the territory of the solicited State for the purpose of conducting a full examination on the territory of the solicited State, in a regular asylum procedure in accordance with international human rights standards, and where applicable, the EU asylum acquis.

Humanitarian Visa procedures and decisions are strictly complementary and not exclusive to asylum procedures conducted on EU territory or the territory of the European state. They should not impact negatively on the situation of those asylum seekers arriving in Europe in an irregular manner. Making an application for a humanitarian visa should not prevent the person from seeking asylum on the territory of the State concerned nor on the territory of other EU Member States.

Access to minimum procedural safeguards must be guaranteed for all applicants. These include the right to be informed, the right to be heard through a personal interview (or where this is not possible, through a written submission), access to qualified and impartial interpretation, to legal assistance and the right to an effective remedy.

For particularly vulnerable cases or persons at high risk of refoulement or arbitrary detention, States should provide for emergency procedures and the possibility of providing short term accommodation of such persons in safe houses. States should also undertake reasonable efforts to facilitate access of persons granted a humanitarian visa to accommodation and medical care until their departure to the State issuing the visa. This could be provided by local NGOs or international NGOs active in the country concerned on the basis of cooperation agreements financed and earmarked under AMIF.

## **CHAPTER 4 - REGULAR MIGRATION AND MOBILITY SCHEMES**

In addition to the use of refugee resettlement and humanitarian admission programmes, private sponsorship and humanitarian visas that are directly linked to their status as persons in need of international protection, other channels exist that are not strictly refugee-related but could be made available or adapted to the specific situation of refugees to reduce their need to resort to smuggling networks. These channels could be broadly categorised in three groups: family reunification, labour migration and educational mobility.

Research into this area often focuses on the 'mixed migration' concept, and tends to focus on regular migration as a possible integration tool for refugees, particularly where integration prospects for refugees are severely limited or non-existent. Little has been written on the possibility of utilising regular migration as a channel for safe and legal entry for refugees, yet the possibility should not be ignored<sup>98</sup>. Relevant legal regimes are different to those highlighted above, and a number of important elements need to be considered.

The fact that these measures are not protection-oriented does not reduce or remove the importance of a rights-based approach. In this regard, the above-mentioned considerations, regarding the applicability of international and regional human rights instruments, remain valid and, possibly, ought to be given greater attention. In particular, procedural guarantees must be respected in the way applications are received, handled and decided. These would include protection from discrimination, right to an effective remedy and – in the EU context – rights to good governance.

### **4.1. FAMILY REUNIFICATION**

98. K. Long., Extending protection? Labour migration and durable solutions for refugees, UNHCR Policy Development and Evaluation Service, October 2009. See particularly the section 'Potential pitfalls', on page 20.

Family separation is a reality for many refugees fleeing persecution and serious human rights violations. Various reasons, amongst which include the dangers and costs of the journeys, may prevent families travelling together. Family separation can last for years and has a devastating impact on both asylum applicants and beneficiaries of international protection in Europe,<sup>99</sup> as well as on family members abroad. Family members who remain in the country of origin or in another third country are often in great need of protection.<sup>100</sup> A British Red Cross report<sup>101</sup> highlights the humanitarian and protection implications of family reunification. Findings show that, among the people interviewed, the majority of applicants seeking to join their sponsor in the UK - women and children - were exposed to security risks in third countries. This uncertainty is a major concern for asylum applicants and beneficiaries of international protection across Europe. Evidence indicates that family reunification policies in Europe are an important factor for asylum seekers in their choice of destination country.<sup>102</sup>

While the right to family reunification is not explicitly included within the articles of the 1951 Refugee Convention, the unity of the family is considered as an essential right of the refugee in the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, which recommends the Contracting Parties to “take the necessary measures for the protection of the refugee’s family, especially with a view to (...) [e]nsuring that the unity of the refugee’s family is maintained, particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country.”<sup>103</sup>

At the same time, the obligation to respect private and family life, including for refugees and migrants, is ensured in a number of international and regional instruments.<sup>104</sup> However, this is formulated as a qualified right, which means that it may be balanced against certain state objectives that may be in the public interest, as is the case, for instance, in Article 8 ECHR and 14 ECHR. Children enjoy special protection in this regard under the Convention on the Rights of the Child, which specifies that State Parties take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of his or her parent’s or guardian’s legal status and that applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. The ECtHR and CJEU have underlined the primacy of the child’s best interests.<sup>105</sup>

In the EU context, Member States are bound by the Family Reunification Directive,<sup>106</sup> which establishes the conditions according to which third country nationals residing lawfully in one of the Member States can exercise their right to family reunification. Member States may inter alia impose residence, income and housing requirements, determine that applications are to be lodged from abroad and are under no obligation to provide a right to family reunification to beneficiaries of subsidiary protection under the Directive. Member States also retain a certain margin of appreciation with regard to the conditions imposed on applicants within the parameters set by the Family Reunification Directive. However, the CJEU has clarified that the Directive has established a right to family reunification and that its Article 4(1) imposes a positive obligation on Member States, with clearly defined corresponding individual rights, to authorise the reunification of certain family members, “without being left a margin of appreciation”.<sup>107</sup> Furthermore, when using their margin of appreciation, Member States should not undermine the objective of the Directive, which is to promote family reunification.<sup>108</sup>

99. UNHCR, *A New Beginning: Refugee Integration in Europe*, September 2013

100. ECRE and Red Cross EU Office, *Disrupted Flight: The Realities of Separated Refugee Families in the EU*, 2014

101. British Red Cross, *Not So Straightforward: the need for qualified legal support in refugee family reunion*, 2015, p. 29-30

102. 43% of Syrians interviewed mentioned family reunification as one of the main reasons for choosing a destination country. UNHCR, [Profiling of Syrian Arrivals on Greek Islands in March 2016](#)

103. UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 25 July 1951, A/CONF.2/108/Rev.1, available at: <http://www.unhcr.org/refworld/docid/40a8a7394.html>

104. The Universal Declaration of Human Rights, (Article 16(3)); the International Covenant on Civil and Political Rights, (Article 17 and 23); the International Covenant on Economic, Social and Cultural Rights, (Article 10); the Convention on the Rights of the Child, (Article 16); the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 8); the Convention on the Elimination of All Forms of Discrimination against Women (1979) (Article 9, 16); and, the Convention on the Rights of the Child (1989) (article 9, 10, 20, 21, 22); The Charter of Fundamental Rights (Article 9, 33). ExCom Conclusions relating to family unity and reunification are compiled in the UN High Commissioner for Refugees (UNHCR), *A Thematic Compilation of Executive Committee Conclusions*, 7th edition, June 2014, available at: <http://www.refworld.org/docid/5698c1224.html>. Among the most relevant are ExCom Conclusions on Family Reunion, No. 9 (XXVIII), 1997 and No. 24 (XXXII), 1981; ExCom Conclusion on Refugee Children and Adolescents, No. 84 (XLVIII), 1997; and ExCom Conclusion on the Protection of the Refugee’s Family, No. 88 (L), 1999

105. This has been reiterated in the *European Parliament v Council of the European Union* case, where the CJEU stated for the first time that the UN Convention on the Rights of the Child has to be taken into account when applying the general principles of Community law and, therefore, equally when applying the Directive. See CJEU, C-540/03, *European Parliament v Council of the European Union*, Judgment of 27 June 2006, para. 37

106. Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (hereafter ‘Family Reunification Directive’), OJ 2003 L 251/12

107. CJEU, Case C-540/03, *European Parliament v Council of the European Union*, para. 60

108. CJEU, Case C-578/08, *Rhimou Chakroun v Minister van Binnenlandse Zaken*, Judgment of 4 March 2010, para. 43

Nevertheless, despite the international legal framework and more than a decade since the Family Reunification Directive has entered into force, reuniting family members remains extremely difficult in practice. ECRE and the Red Cross<sup>109</sup> have identified numerous obstacles that prevent refugee families from reuniting, which include the obligation to apply from abroad, excessive costs, the length of the procedures, the conditions European States may impose on sponsors (residence, income, housing, health insurance requirements), the documents required, the waiting periods, as well as the differential treatment among beneficiaries of international protection. Rather than focusing on legal alternatives to dangerous irregular movements, some European States are competing to introduce more restrictive eligibility criteria and reducing state-funded legal aid which has been indispensable to navigate complex family reunification procedures.<sup>110</sup> In fact, family reunification procedures have become a tool to reduce the number of new arrivals and control migration flows rather than an instrument to “promote family reunification”.<sup>111</sup>

However, in doing so, states not only expose family members abroad to possible security risks, but due to the numerous restrictions and delays in the procedures often leave families with no other choice but to resort to dangerous and illegal ways to join their relatives in Europe.

These restrictions are also undermining the integration policies that European countries are implementing. The importance of family in the integration process has been widely acknowledged.<sup>112</sup> While support from family and friends plays a crucial role for refugees in a new country, family separation reduces their chances for economic<sup>113</sup> and social integration, as well as their ability to rebuild their lives.

Finally, “family-unfriendly” policies which have an adverse effect on all migrants, and in some cases EU citizens, send a negative signal to refugees and to other countries, which is particularly worrisome in a context of rising fear and xenophobia prevalent in European societies.

## Eligible family members

ECRE advocates an extensive interpretation of ‘family’ that reflects the wide-ranging displacement experiences of refugees, as well as the evolution of the family structure in most parts of the world and the different cultural interpretations of ‘family’. EU Member States have a positive obligation under the Family Reunification Directive to authorise reunification of refugees with the “nuclear” family members - spouse, minor children, and parents of unaccompanied children – whose family relationships predate the refugee’s entry to the territory with no margin of appreciation.<sup>114</sup> Family reunification with other family members, however, remains optional and is often subject to conditions, particularly the requirement of those family members being “dependent” on the sponsor. However, very often, families are split during their flight, find themselves in different refugee camps, or even different countries, and lose contact. Relatives end up taking on guardianship roles of children whose parents die or disappear and new relationships are formed during flight. The strict interpretation of family and dependency applied by most States can have dramatic consequences for beneficiaries of international protection.

Example: <sup>115</sup> A 20-year-old Eritrean woman lives irregularly in Sudan with her father and two underage (i.e. under 18 years old) siblings. In 2014, while she was still a minor, the family applied to be reunited with the mother who was granted a refugee status in Sweden. Despite the documents provided, a DNA test was required. The result showed a 99.999 percent probability that the father and mother were her biological parents. The DNA result came in November 2015, almost a year after the application was submitted, and by that date she had become an adult. As other additional requirements apply to adults aiming to reunite with their family, the Swedish Migration Agency rejected her claim. The Agency considered her level of dependency not sufficient for being reunited with her mother in Sweden. Despite the situation in Eritrea, the Swedish Migration Agency considered that the applicant could join other family members in Eritrea. Her father and her underage siblings were granted a residence permit. The applicant later appealed to the Court of Appeal who rejected her submissions in March 2016 partly on the grounds that the applicant has not clarified her identity and that the

109. ECRE and Red Cross EU Office, *Disrupted Flight: The Realities of Separated Refugee Families in the EU 2014*. See also, Y. Pascouau and H. Labayle, *Conditions For Family Reunification Under Strain*, 2011

110. ECRE-ELENA, [Information Note on Family Reunification for Beneficiaries of International Protection in Europe](#), June 2016

111. CJEU, Case C-578/08, Chakroun, para. 43

112. Family Reunification Directive, Recital 4

113. Andrea Rea & Johan Wets (eds.), *The Long and Winding Road to Employment. An Analysis of the Labour Market Careers of Asylum Seekers and Refugees in Belgium*, 2014

114. Article 4 Family Reunification Directive

115. Example provided by the Swedish Red Cross

applicant is an adult and does not belong to the nuclear family. The Court did not consider that the applicant was dependent on her parents, and ruled that her hearing loss was not a disablement that would substantiate her dependency. She was left alone in Sudan, with limited mobility, where she remains 'irregular'.

In ECRE's view, the definition of family should, at the very least, include

- partners in a durable form of cohabitation who are not legally married or cannot legally marry, who are the biological parents of minor children,
- same-sex partners in a durable form of cohabitation who have children who are de facto members of a household through adoption, fostering or other forms of care arrangements, although not descending from a marriage or a relationship pertaining to that household taking into account the best interests of the child,
- parents of adult siblings,
- young people above 18 who were still living at home at the time of flight.<sup>116</sup>

This broader interpretation of family members is supported in ECtHR case law<sup>117</sup> which defines family based on 'de facto' ties rather than formal relationships, and establishes no distinction according to whether the family relationship arose before or after the sponsor entered the receiving Member State.<sup>118</sup> Moreover, states should not restrict the criteria of dependency solely to the financial aspect, but should also consider the legal, physical, emotional or material dimensions and the situation of the relatives in the third country.<sup>119</sup>

#### **Recommendations:**

European States should systematically consider family reunification of family members beyond the nuclear family, while the best interest of the child should be a primary consideration throughout the procedure.

Procedures started before the age of majority should not be interrupted or modified for the sole reason that the child has turned 18.

Unaccompanied children should have the right to be reunited with both their parents and siblings, or a person holding guardianship for the child.

Dependency should be assessed beyond its financial aspect to include its legal, physical, emotional and material dimensions and states should consider the particular situation of family members concerned.

## **Application from abroad**

The requirement for applicants to introduce the application in embassies and consulates outside of the EU has been identified as a major issue in recent ECRE/Red Cross research on family reunification rules in Europe. This often leads to irregular border crossing, travel through conflict areas in order to reach the consulate or embassy, and the risk of being arrested and detained upon return following the submission of the application.<sup>120</sup> The lack of travel documents, means of travel, accommodation where the application has to be submitted, or simply the fear of persecution by civilian and state actors alike may prevent applicants from submitting their file.<sup>121</sup> This practice increases the vulnerability of family members, particularly women and children, and undermines the fairness of the procedure. Furthermore, it significantly reduces the possibility for refugees to benefit from more favourable treatment when Member States apply the three-month limitation.

116. See ECRE, Submission from the European Council on Refugees and Exiles in response to the Commission's Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC, 2012, p. 5.

117. See ECtHR, L. v. The Netherlands, Application no. 45582/99, Judgment of 1 June 2004, para 36 and Brauer v. Germany, Application no. 3545/O4, Judgement of 28 May 2009, para 30.

118. See CJEU, Case C-578/08, Chakroun, para 63.

119. The European Commission has reminded Member States that when assessing cases with dependent family members, they should take guidance from the CJEU case law on regarding the 'EU Citizens Directive'. See European Commission, Communication on Guidance for Application of Directive 2003/86/EC on the Right to Family Reunification, COM (2014) 210 Final, 3 April 2014.

120. British Red Cross, *ibid*, p32.: "Syrian applicants travelling to Lebanon cited arrest and imprisonment as a major concern. Indeed, one child applicant was imprisoned on his return to Syria following the submission of his application"

121. ECRE/Red Cross, *ibid*, p. 40 and BCR report, *ibid*, p. 57-60.

Example:<sup>122</sup> An Iraqi woman and her children in Baghdad face persecution for the same reasons, while the husband/father was recognised in Belgium as a refugee. Since there is no Belgian diplomatic representation in Iraq, the woman should travel with her children to Teheran (Iran) or Amman (Jordan) in order to lodge their application for family reunification. The cost and danger of the trip, the lack of resources to stay abroad during the processing of the application, as well as the fear of being arrested or attacked upon return prevent this woman from travelling with her children. She has no other way to reunite with her husband and to access protection.<sup>123</sup>

ECRE encourages all European States to make use of the possibility, as also provided in the Family Reunification Directive, for sponsors to lodge their application in the state of residence, as this remains the easiest way to overcome one of the most important obstacles for family members to exercise their right to family life and to avoid those family members having to resort to irregular migration to be reunited with their families.

Where the requirement to appear in person is impossible or very difficult to fulfill due to a particular vulnerability or circumstances beyond the control of the applicant, or where this would impose a disproportionate financial burden on them, applicants should be exempted from this requirement. Alternatives should be developed, such as express mail services, applications by a third person or family members residing in neighboring countries, direct applications at the Immigration Office by the family member residing in the host country, etc.

Increased cooperation between consulates and embassies is also a tool to facilitate family reunification procedures and overcome practical obstacles, in particular where competent diplomatic posts are not accessible for applicants, for instance in the case of conflict or humanitarian crisis. In the EU context, such cooperation is explicitly foreseen under Article 8 of the EU Visa Code.<sup>124</sup> Finally, structural cooperation with professional non-governmental networks such as the Red Cross Societies or Save the Children, which assist applicants at different stages of family reunification procedures in third countries, should be established as a concrete way of facilitating and accelerating family reunification procedures. In countries with high refugee populations, utilising the model of consular cooperation under the EU Visa Code, European consulates could pool resources and send mobile consular teams to receive applications for family reunification.

## Recommendations

States should allow sponsors granted international protection to submit an application for family reunification in the state which granted them status in addition to the possibility for such applications to be made from embassies of the state abroad.

Consular cooperation, such as foreseen under Article 8 of the Visa Code, should be used as a way to facilitate family reunification procedures through the services of embassies of other EU Member States, particularly in cases of humanitarian crises.

Where the requirement to appear in person is impossible or very difficult to fulfill, due to a particular vulnerability or circumstances beyond the control of the applicant, or where this would impose a disproportionate financial burden on them, applicants should be exempted from this requirement. Alternatives could be developed, such as express mail services, applications by a third person or family member residing in neighboring countries, direct applications at the Immigration Office by the family member residing in the host country, etc.

States should set up structural cooperation with professional networks such as the Red Cross societies, the International Committee of the Red Cross or Save the Children, assisting applicants at different stages of the procedure (legal aid, travel to embassies, ensuring security for children, etc.).

## Documentation

Providing documentation required by the authorities to substantiate applications for family reunification is, in many cases, a huge challenge for applicants throughout the procedure. The documents required (passports, birth-marriage-death certificates, custodial and adoption proof, photos, etc.) are often unavailable due to the

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122. Example provided by Hungarian Helsinki Committee.

123. Example provided by Flemish Refugee Action.

124. See also above, section 4.4

circumstances in the country of origin or residence. In addition, there are inconsistencies among different administrations both in the receiving country and in embassies and consulates that may ask for documents that are, in fact, not required for the procedure. Here, the Family Reunification Directive<sup>125</sup> constitutes a commendable standard as it clearly establishes the principle that an application cannot be rejected on the basis of missing documents, and that authorities should take into account other types of evidence (oral testimonies, photos, emails, etc.). However, in reality, applications are often refused on the basis that documents required under the Directive are missing.

Example:<sup>126</sup> In Hungary, as of July 2014 the Syrian Palestinian travel document was again included in the list of accepted travel documents. However, in nearly all family reunification cases witnessed by the Hungarian Helsinki Committee where such document was submitted, applications have been rejected on the basis that is impossible to verify the validity of the travel document. In the absence of alternative travel documents, this practice leads to the de facto exclusion of a particularly vulnerable group of refugees (practically all women, children or elderly and stateless) from family reunification.

In ECRE's view, states must allow for such other types of evidence to be taken into account to compensate for missing documents, such as family books, oral and written testimonies, military cards where parents are mentioned, photos, telephone calls, religious certificates, emails, or sponsor's statements during asylum interviews. Furthermore, national authorities should send clear instructions to their embassies and train their staff on family reunification procedures, the realities of forced flight and how to provide the relevant support to family members seeking reunification. In this regard, flexible interpretation of evidence to establish family links may be required, in particular where the best interest of the child is at stake. Similarly, the UNHCR Guidelines on Determining the Best Interests of the Child<sup>127</sup> should always be considered when establishing a child's family links, taking into consideration that it may not always be possible to obtain the approval of the other parent. Importantly, in order to ensure the implementation of refugee-friendly family reunification policies in practice, States should engage in regular training of embassy and consular staff and in regular monitoring of the way in which family reunification laws and policies are implemented.

#### **Recommendations:**

States must allow for applicants to submit a variety of 'proofs' to substantiate their application for family reunification, including family books, oral and written testimonies, military cards where parents are mentioned, photos, telephone calls, emails, or sponsor's statements during asylum interviews.

National authorities should send clear instructions to their embassies and train their staff on family reunification procedures, the realities of forced flight and how to provide the relevant support to family members seeking to reunite.

Member States must effectively monitor practices in embassies and consulates in order to ensure that staff act consistently to enforce family reunification laws and policies.

### **Conditions and costs**

States have increasingly introduced conditions that restrict the right to family reunification. These include a set of requirements that the sponsor must meet, such as minimum income, housing, health insurance and integration requirements<sup>128</sup>, as well as waiting periods<sup>129</sup> and reasonable prospects of being granted a permanent residence permit for the applicant. In addition, various costs (administrative fees, translation, visas, etc.) may arise at different stages of the procedure. The difficulty for beneficiaries of international protection to fulfill the level of income requirement, to cover the costs, as well as delays resulting from the imposition of waiting periods, combined with the total duration of the process (asylum application + waiting period + family reunification procedure), may result in the impossibility for many persons to effectively exercise their right to family life and cause lengthy periods of separation.

Example:<sup>130</sup> Austria introduced a three-year waiting period for beneficiaries of subsidiary protection. The Austrian Red

125. See Article 11 Family Reunification Directive

126. Example provided by the Hungarian Helsinki Committee.

127. UNHCR, UNHCR Guidelines on Determining the Best Interests of the Child, May 2008

128. Article 7 and Article 12.1 Family Reunification Directive.

129. Article 8 Family Reunification Directive

130. Example provided by the Austrian Red Cross.

Cross estimates that 80% of unaccompanied children granted subsidiary protection will turn 18 before being eligible for family reunification, and will therefore have to comply with income, housing and health insurance requirements.

Applying blanket income or housing requirements constitutes a huge obstacle for beneficiaries of international protection who face specific difficulties in accessing the labour market. In this regard, the CJEU judgment in the Chakroun case sets an important standard. In this case the CJEU interpreted the EU Family Reunification Directive as requiring authorities to undertake a case- by-case analysis when assessing the family capacity to meet the requirements, in order not to undermine the objective and the effectiveness of the Directive.<sup>131</sup> The CJEU has held that the duration of residence in the EU Member States is only one of the factors that must be taken into account when considering an application for family reunification, and that a waiting period cannot be imposed without taking into account, in specific cases, all the relevant factors, while having due regard to the best interests of minor children.<sup>132</sup> Blanket provisions regarding costs and requirements imposed on the applicants are contrary to principles of proportionality and necessity, as emphasized by the Court<sup>133</sup>.

While states can apply income requirements when family life is possible in a third state to which the sponsor or the family member has special ties, the European Commission Guidelines on the Family Reunification Directive<sup>134</sup> clarified that

“This option requires that the third country be a realistic alternative and, thus, a safe country for the sponsor and family members. The burden of proof on the possibility of family reunification in a third country lies with the EU Member State, not the applicant. In particular, the relocation to such a third country should not pose a risk of persecution or of refoulement for the refugee and/or his family members and the refugee should have the possibility to receive protection there in accordance with the 1951 Convention relating to the Status of Refugees.”<sup>135</sup>

Finally, states should not subject sponsors to differential treatment on the basis of the type of their international protection. This is currently still allowed under EU law.<sup>136</sup> However, the protection and basic needs of persons granted complementary or subsidiary protection statuses do not differ from those granted Refugee Convention status. Persons granted other international protection statuses flee similar situations and their need for international protection is in reality not of shorter duration. Differences in entitlements, including the rights to family life and family reunification, are therefore not justified. Moreover, in an EU context, applying different family reunification rules for refugees and beneficiaries of subsidiary protection is inconsistent with the further alignment of refugee status and subsidiary protection status in the EU asylum acquis and the objective of uniform status valid across the EU in Article 78 TFEU. Following this logic, the European Commission encourages Member States to apply similar rules, and the same favourable treatment to refugees and beneficiaries of subsidiary protection.<sup>137</sup>

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131. See CJEU, Case C-578/08, Chakroun, para 43 and Joined Cases C-356/11 and C-357/11, O,S v Maahanmuuttovirasto, and Maahanmuuttovirasto v L, Judgment of 6 December 2012, para. 74

132. European Commission, Communication on guidance for application of Directive 2003/86/EC on the right to family reunification (hereafter ‘EC Guidelines on the Family Reunification Directive’), Brussels, 3 April 2014, p.17

133. Case C-508/10 Commission v. Netherlands (2012) “In accordance with the principle of proportionality, which is one of the general principles of EU law, the measures taken by national legislation transposing Directive 2003/109 must be suitable for achieving the objectives of that legislation and must not go beyond what is necessary to attain them.”

134. European Commission Guidelines on the Family Reunification Directive, p.23

135. Ibid., p.23

136. Beneficiaries of subsidiary protection are not included in the scope of the Family Reunification Directive.

137. European Commission Guidelines on the Family Reunification Directive, p.24-25

**Recommendations:**

Beneficiaries of subsidiary protection should benefit from the same favourable treatment as regards the right to family reunification under EU law as refugees, as in reality they often flee similar situations, their need for international protection is not of a shorter duration and they face similar challenges with regard to family reunification.

European States not bound by the EU Family Reunification Directive should not discriminate between applicants for family reunification on the basis of the type of international protection status granted to the sponsor.

States should proactively facilitate family reunification for all beneficiaries of international protection, including children. “Prohibitive” conditions (residence, time limits, waiting periods, income and housing requirements) should not apply for persons granted international protection as they risk undermining effective access to the right to family life and force family members to use irregular and unsafe channels to reach the territory.

All family members of beneficiaries of international protection should be exempted from procedural costs (visa fee, DNA testing, certified translation, etc.).

## Length of procedures

Delays due to administrative requirements, waiting periods or time to trace family members, impact on the safety and certainty of family left behind, often women and children, as well as the well-being of the sponsor being granted international protection in the receiving State. EU law sets a nine-month time-limit for the administration to decide on family reunification requests relating to refugees, but this may be extended under “exceptional circumstances” (the need to assess family relationships, difficulties in accessing the administration in a conflict zone, difficulties in organising hearings in third countries because of security issues, etc.).<sup>138</sup> This frequently results in excessively long waiting periods with devastating effects for the individuals concerned.

Example:<sup>139</sup> A refugee in France waited four years for a decision relating to reunification with his wife and three children. Two years passed between presenting the application and its registration at the embassy. A year later the family still had no news about the progress of the file and it took another year before the visas were issued.

The ECtHR held that excessive delays in granting a residence permit could constitute unlawful interference with right to private life under Article 8 ECHR, and that national authorities should process the request for family reunification without undue delay, particularly in cases where children are involved.<sup>140</sup> States should undertake all efforts to process requests for family reunification within a reasonable time, prioritizing the most vulnerable cases.

**Recommendations:**

Applications for family reunification should be dealt with in a prompt manner, while ensuring a thorough investigation of the individual circumstances of the applicants.

Applications from people fleeing a humanitarian crisis and where assistance and shelter in neighbouring countries fall short should be dealt with as a priority.

States should facilitate communication flows between asylum and immigration offices and diplomatic services, including through clear administrative instructions and the more efficient use of technology.

States should sufficiently resource embassies and departments processing family reunion applications to ensure decisions are made in a timely manner.

138. Article ((4) EU Family Reunification Directive. See also EC Guidelines, *ibid*, p.10

139. Example provided by France Terre d'Asile.

140. ECtHR, *Tanda-Muzinga v. France*, Application no. 2260/10, Judgment of 10 July 2014. See also, ECtHR, *Aristimuño Mendizabal v. France*, Application no. 51431/99, Judgment of 17 January 2006

## 4.2. LABOUR MIGRATION

The EU acquis on labour migration generally regulates access to the EU's labour markets to third-country nationals fulfilling the specific conditions stipulated in the Directives adopted to regulate the specific sector falling under this thematic heading. Together with admission (eligibility criteria)<sup>141</sup>, the legal instruments also provide a common framework covering procedural requirements, entitlements ensuring fair treatment, intra-EU movement and sanctions. The package of rights varies between the different regulated regimes: highly qualified or highly skilled workers ('blue card'), seasonal workers, intra-corporate transferees, students and researchers, single permit holders.

It is not the aim of this Paper to assess the applicability of each instrument to persons in need of international protection. Yet it is undeniable that, being legal and ensuring safe routes for third-country nationals to enter the EU, labour migration options must necessarily be part of a policy framework wherein refugees can more safely and legally access EU territory.

It is necessary to underline that, since the rationale of these instruments is entirely different to that underlying the CEAS measures, labour migration channels might not be readily or easily adaptable to the contexts in which refugees often find themselves. More importantly, however, are the policy considerations that need to be understood in order to be effectively engaged with at national and EU levels in order to advocate for their applicability to refugee contexts.

Essentially, it ought to be kept in mind that the EU's labour migration regime is intrinsically related to a different set of key policy areas, including: employment and social affairs, international relations, trade and internal market. This interweaving of core policies is evident in the legal instruments' contents (particularly in terms of admission criteria and related entitlements) as well as their implementation at national levels. Advocating for these to be somehow made more accessible to refugees would require a deeper understanding of this move's real and perceived impact across these other policy areas. In this regard, it ought to be stressed that employment remains one of the most sensitive areas of EU and national policy-making, further heightened by the recent financial crisis affecting many EU Member States.

Related to the above considerations is the understanding that the EU's labour migration regime and – importantly – its implementation at national levels – is largely evidence-driven, or at least is intended to be so. Labour market tests, skills gaps and other quantitative data is relied upon at national levels to determine or influence elements such as preferred nationalities, skills, genders, educational backgrounds, etc. Advocating for the addition of refugee data to these parameters would require a technical exercise in clarifying, as quantitatively as possibly, the relationship between refugees and labour markets, if any.<sup>142</sup>

Finally, from a formalistic perspective, the labour migration regime somewhat resembles the current CEAS in terms of its level of applicability to the 28 EU Member States. This internal variance is also coupled with rather wide discretionary powers granted to Member States in the implementation of the relevant Directives, with emphasis on 'may' rather than 'shall' clauses, reflective of national sensitivities in relation to labour market controls and regulations.

In terms of substance, ECRE underlines the understanding that labour migration ought to be perceived only as a manner of safe and legal entry, and not as a long-term option for refugee settlement in the host country. This is primarily due to the fact that refugees who remain in the host country as labour migrants, without their protection needs being assessed, run the risk of being returned once their labour arrangements are terminated or expire. It is important to stress that the right to asylum is not dependent on the manner of entry into the territory of the host state, meaning labour migrants cannot be precluded from submitting an asylum application following their arrival in Europe.

Furthermore, experience tells us, that in many cases, relationships between migrant workers and their employers are often precarious, resulting in situations of dangerous dependence. We therefore caution against refugees being allowed to remain on Member States' territory exclusively on the basis of such arrangements.

Yet it must also be acknowledged that in some Member States labour migrants enjoy far better integration opportunities than international protection beneficiaries. Access to long-term options, including citizenship,

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141. Including cessation and termination criteria.

142. See for example, European Parliament, Directorate-General for Internal Policies, Labour Market Integration of Refugees: Strategies and good practices (2016), available [www.europarl.europa.eu/.../IPOL\\_STU\(2016\)578956\\_EN.pdf](http://www.europarl.europa.eu/.../IPOL_STU(2016)578956_EN.pdf).

family reunification and intra-EU movement are just some examples of situations where international protection beneficiaries might benefit from being treated as labour migrants. In this regard it might be useful to question whether it might be beneficial for refugees to be able to switch their migration status in an EU Member State in order to improve their living conditions and long-term prospects. Clearly, in such situations, protection from non-refoulement and core refugee rights must be guaranteed.<sup>143</sup>

On-going discussions on revisiting the EU's approach to economic migration have in fact touched upon, albeit briefly and at a superficial level, the possibility of including asylum seekers and refugees within such a new approach.<sup>144</sup> Within the context of the review of the Blue Card Directive, acknowledgement was made of the fact that human resources valuable to the EU's economic growth have limited ways of reaching the EU legally and safely, yet limited progress was made in relation to how these persons' access to Blue Card procedures could, in any way, be facilitated<sup>145</sup> other than by considering such access to persons already within the EU through enhanced labour integration strategies.<sup>146</sup>

Ideas flagged in research<sup>147</sup> and in the above-mentioned policy debates, which ECRE is keen to engage in further discussing, include:

- The possibility of waiving visa requirements for refugees seeking EU access through labour migration channels;
- Non-rejection of Blue Card application for being in the country in an irregular situation;
- Provision of EU labour migration information to organisations working with asylum-seekers and refugees in third countries;
- Endorsement from and engagement with employers and related associations;
- Implementation of alternative methods of qualification recognition where formal certification is unavailable or insufficient, such as apprenticeship schemes.

ECRE is aware of the challenges this particular channel presents in terms of its relationship with advocacy efforts aimed at improving access to the EU to migrant workers. Increased advocacy on the use of this channel as a protection measure could result in fewer opportunities for migrant workers, or at least related perceptions. ECRE is keen to avoid these tensions, whilst simultaneously actively exploring how best to view labour migration as a possible safe and legal channel of entry to the EU for refugees.

### 4.3. EDUCATION MOBILITY

Access to education for refugees and others in need of international protection is well established in the legislation of most European states and is firmly consolidated in the EU Qualification Directive. However, student exchange programmes also have the potential to function as regular migration channels for refugees, either as tailored emergency evacuation type of tools or as regular schemes for students to enrol in education abroad. An example of the first category are the specific programmes for scholars and students at risk and initiatives launched by the academic world, such as the Council for at Risk Academics, which dates back to the beginning of World War II and the German Academic Exchange Service, which launched a programme allowing 100 students from Syria to take up residence in Germany and study at German universities.<sup>148</sup>

However, programmes for refugee students to take up education in other countries than their country of refuge outside Europe have greater potential for higher numbers of people. A recent MPI publication identified a number

143. See on this issue, ECRE, Mutual recognition of positive asylum decision and the transfer of international protection status within the EU, Discussion Paper, November 2014.

144. See the discussion papers and participant contributions within the EU Commission Expert Group Economic Migration, available at: <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3253&NewSearch=1&NewSearch=1>

145. See European Commission, Expert Group on Economic Migration, Discussion paper No. 2, Reviewing the Blue Card Directive (2015), available at: <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=19252&no=3>

146. The proposed extension of the scope of the Blue Card Directive presented by the Commission in 2016 to beneficiaries of international protection under the Qualification Directive is particularly relevant from the perspective of enhancing their intra-EU mobility and access to the labour market across the EU after having obtained international protection status, See European Commission, Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment, COM(2016) 378 final, Brussels, 7 June 2016

147. See for example K. Long, From Refugee to Migrant? Labor Mobility's Protection Potential, May 2015, available at <http://www.migrationpolicy.org/research/refugee-migrant-labor-mobilitys-protection-potential> and, by the same author, When refugees stopped being migrants: Movement, labour and humanitarian protection, Migration Studies (2013) 1 (1): p.4-26, 2013

148. See Migration Policy Institute, No way out? Making additional migration channels work for refugees, March 2016

of key obstacles: (1) the lack of information available to refugees about existing scholarship programmes, (2) the inability of refugee students to provide documentary proof of skills, credentials or qualifications already acquired and (3) financial constraints preventing refugees to meet the co-financing requirements or pay registration fees and difficulties in addressing the living costs in the country of destination and (4) difficulties in obtaining a student visa.

Some of the solutions to the obstacles identified are straightforward. Lack of awareness about existing education opportunities is probably the least challenging obstacle to tackle. The creation of specific webpages and web applications and the use of social media is probably the most effective tool to close the awareness gap. Registration fees or co-financing requirements, set by educational institutions, could be waived and financially compensated by States. Proof of qualification requirements could be replaced by testing qualifications through (online) exams or interviews and cooperation could be set up at EU level to centralise such verification.

A fundamental question relates to the legal status of refugees arriving under such educational programmes and the duration of their stay. Even if the practical obstacles for refugee students can be overcome by providing specific exceptions for refugees in order to make it possible for them to make use of such channels, this could only be qualified as a safe and legal channel for refugees if they are entitled to maintain their status as refugees in the host country. Where their right of residence under such programmes is limited to the duration of their studies, they must have an opportunity to access the asylum procedure and have their need for international protection assessed in line with standards laid down in international and EU law. In case of the application of the first country of asylum concept, this requires a thorough examination as to whether the person can still avail him or herself of the range of refugee rights enshrined in the 1951 Geneva Refugee Convention, and other international and European human rights instruments in law and in practice.<sup>149</sup>

## CHAPTER 5 - TEMPORARY SUSPENSION OF VISA-REQUIREMENTS

As mentioned, all main refugee-producing countries are included in the EU list of countries whose nationals require a visa to enter the territory. Lifting visa restrictions for refugees would no doubt remove an important hurdle for many refugees to enter the territory in a regular manner and would, at the same time undermine, to a significant extent, the business model of smugglers.

However, visa requirements are still considered as an indispensable migration management tool by European States and, as vital, from a security perspective, even though they have not prevented irregular entry of nationals subjected to them. At the same time, as technological means to verify document authenticity improve, adverse impact of visa requirements on access to the territory for refugees is likely to increase.

ECRE acknowledges that the permanent blanket lifting of visa requirements, with regard to all countries whose nationals could potentially apply for asylum in Europe, is unrealistic and not feasible in the foreseeable future. However, in ECRE's view, in absence of large scale emergency evacuation or resettlement/humanitarian admission schemes, the possibility of suspension of visa requirements, or the facilitation of issuance of visa for a fixed period of time, to be reviewed at regular intervals, should be considered for nationals of countries experiencing an internal or international armed conflict or a humanitarian crisis.

Current EU law already recognises the possibility of facilitating the issuing of visas in the event of mass influx, triggered by armed conflict, endemic violence or systematic or generalised violations of human rights. The EU Temporary Protection Directive imposes an obligation on Member States to, if necessary, provide persons to be admitted to their territory for the purposes of temporary protection with every facility for obtaining the necessary visas, including transit visas.<sup>150</sup> Referring to the urgency of the situation, the Directive furthermore stipulates that "formalities must be reduced to a minimum and that visas should be "free of charge" or "their cost reduced to a minimum". Whereas the Directive so far has never been applied, it could serve as a point of reference for State practice.

The suspension of visa requirements or facilitation of visas with regard to persons escaping situations of

149. See ECRE, Information Note on the recast Asylum Procedures Directive, 2014, p.41

150. See Article 8(3) 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, OJ 2001 L 2012/12

armed conflict or generalised violence should be used by states in the event that large scale emergency evacuation or resettlement/humanitarian admission agreements have not been put in place for those escaping such situations. Where suspension of visa requirements is not possible, visas should be issued, with formalities reduced to the absolute minimum and visa fees waived, consistent with the model of Article 8(3) of the EU Temporary Protection Directive.

At the EU level, suspension or facilitation of visas should be triggered in situations of mass influx covered under the Temporary Protection Directive or other situations of large scale arrivals of persons from a certain region or country for whom UNHCR has identified the existence of a prima facie need of international protection.

Suspension of visa requirements could be imposed by the Commission for an initial short period of time (for instance three months) which should be renewable as long as it is considered necessary on the basis of a regular evaluation by the Commission of the situation in the area or country concerned based on all available sources, including EU institutions, the EU Asylum Agency, EEAS, UNHCR and expert non-governmental organisations.

Facilitation of visa requirements in the context of an emergency situation or mass displacement as a result of international or internal armed conflict could be initially granted for six months, renewable as long as it is considered necessary on the basis of the same regular evaluation mechanism. In both cases, priority should be given to the most vulnerable cases, in line with the priority categories for resettlement identified by UNHCR.

Whereas visa facilitation would considerably reduce the bureaucratic formalities and therefore the duration of visa procedures, it would not offer a solution in situations where embassies or consulates are closed or impossible to reach, except at great personal risk. In such cases, temporary suspension of visa requirements would offer a more viable solution.

A system of visa facilitation or suspension would not absolve persons from the requirement of a valid travel and identity document to enter the territory regularly and make use of regular means of transport. Hence, while it would remove an important obstacle for a considerable number of refugees, it would certainly not be a solution for all refugees in a certain region or country and therefore visa facilitation or suspension should not be at the expense of the other safe and legal channels promoted by ECRE. Nevertheless, it is undeniable that visa facilitation or suspension for refugees would undermine smuggling networks, save financial resources for refugees that otherwise would have to be paid to smugglers and allow for receiving States to better prepare for a more orderly arrival of refugees.<sup>151</sup>

## CHAPTER 6 - NOT SAFE, NOT LEGAL, NOT WORKABLE: EXTERNAL JOINT PROCESSING CENTRES

In the previous sections ECRE has set out its views and recommendations on the various options that are at States' disposal to provide refugees with legal and safe pathways to access protection in Europe, while respecting their human rights. ECRE promotes the use of these channels as concrete ways to provide alternatives to the perilous journeys refugees currently have to undertake to find protection, as discussed in chapter one of this paper. However, consistently ECRE has emphasised that such safe and legal channels for persons in need of international protection can never absolve States from their protection obligations vis-à-vis those arriving on their territory. Therefore, the legal channels advocated for in this paper must always be without prejudice and complementary to the possibility to apply for asylum on the territory.

In the past decade several proposals have been made to organise the processing of asylum applications in third countries and admit only those who are successful to the territory of EU Member States, thus excluding the possibility to apply for asylum on the territory.

Discussions on external processing regularly feature at the EU level, with an extensive debate having taken

151. See CCME, Providing for safe passage to and through Europe. Background and arguments, available at: [http://www.ccmec.be/fileadmin/filer/ccme/20\\_Areas\\_of\\_Work/Safe\\_Passage/2015-09-10-SP\\_Demands\\_and\\_rationale\\_Sept\\_2015.pdf](http://www.ccmec.be/fileadmin/filer/ccme/20_Areas_of_Work/Safe_Passage/2015-09-10-SP_Demands_and_rationale_Sept_2015.pdf)

place between 2003-2005, following the 'Blair proposals'<sup>152</sup> () and subsequently the German proposal to create 'safe zones' in North-Africa. These proposals were based on the premise that the asylum system was failing in various respects. The financial cost of the asylum system was considerable, while many asylum seekers were not eligible for protection and at the same time did not return following a negative decision. Moreover, while only those with sufficient financial means to pay smugglers were able to reach European territory, the most vulnerable, and refugees without the necessary resources, are de facto compelled to stay in the region. In essence, such proposals postulated that claims for protection should be exclusively processed in centres located outside the European Union, meaning that anyone applying for asylum on the territory of an EU Member State should be returned to one of these centres. A proposal floated by the Austrian Minister of Foreign Affairs in 2016 to establish "protection zones" in or close to regions of origin seems to be based on the same principle of exclusive processing of applications outside EU territory.<sup>153</sup>

For the purpose of this paper, ECRE uses the term 'EU external processing' to describe any arrangement allowing for the exclusive joint assessment of the merits of asylum applications by, or under, the responsibility of the EU or two or more of its Member States in processing centres outside EU territory.<sup>154</sup> ECRE clearly distinguishes this option from embassy procedures, as defined above, since the latter are limited to a preliminary assessment of an individual's protection needs outside the territory and the issuance of an entry and travel document in case of a positive response. This is also to be distinguished from resettlement or humanitarian admission programmes, as discussed above. Although resettled refugees are subject to a selection process outside the territory, this is carried out within the context of pre-determined numerical targets and is without prejudice to the right of those not selected for resettlement to apply for asylum in the destination state, or any other EU Member State.

Proposals on external processing were consistently heavily criticized, contested and rejected by the Commission, several Member States, UNHCR, academics, lawyers and civil society organisations. Objections on the basis of principled, legal and practical grounds can be summarised as follows:<sup>155</sup>

- the flagrant denial of the legal responsibility of EU Member States for persons in need of protection: thus limiting protection space as well as shifting responsibility for refugee protection to third countries or countries in the region;
- absence of serious and substantial dialogue with the third countries concerned;
- lack of legal basis in Union law;
- legal constraints with respect to jurisdiction and transfer of persons intercepted to the territory of the third state where the processing centre is located;
- the lack of political feasibility of arrangements with third countries where such centres should be established;
- questions relating to the possible 'pull-factor' and the risk of such centres becoming attractive hubs for smuggling and trafficking networks to offer their services to those whose application is rejected;
- questions with respect to reception facilities for persons awaiting the outcome of the assessment of screening;
- the costs of setting up a system with adequate legal and procedural safeguards;
- the practical and legal challenges relating to the return in case of rejection of the application

152. New International Approaches to Asylum Processing and Protection and New Vision for Refugees, available at <http://www.statewatch.org/news/2003/apr/10safe.htm>

153. See Financial Times, EU refugee policy helps people's smugglers, says Austria, 4 November 2016, available at <https://www.ft.com/content/ac787848-8242-11e5-a01c-8650859a4767>

154. ACVZ (Dutch Advisory Committee on Aliens Affairs), External Processing: Voorwaarden voor het in behandeling nemen van asielaanvragen buiten de Europese Unie (External Processing: Preconditions for the assessment of asylum claims outside the EU), The Hague, December 2010, p.14

155. UNHCR, Preliminary comments on UK proposals on regional protection and off territory processing zones, February 2003; Amnesty International, Observations on UNHCR consultations on Convention Plus, 2003; Amnesty International, UK/EU/UNHCR Unlawful and Unworkable- Amnesty International's views on proposals for extraterritorial processing of asylum claims, IOR 61/004/2003. ECRE Statement on the Asylum and Access Challenge, 7 April 2003; Comments of the European Council on Refugees and Exiles on the Communication from the Commission to the Council and the European Parliament Towards a more accessible, equitable and managed international protection regime (COM(2003) 315 final); House of Lords European Union Committee, 'Handling EU Asylum Claims: New approaches examined: Report with evidence', Session 2003-2004 Report 11, London 2004; G. Noll, 'Visions of the Exceptional: Legal and theoretical issues raised by Transit Processing Centres and Protection Zones', in European Journal of Migration Law no. 5, 2003, p. 303-341. M. Garlick, 'The EU Discussions on Extraterritorial Processing: Solution or Conundrum?' in: International Journal of Refugee Law 2006, p. 619 ff; ACVZ (Advisory Committee on Aliens Affairs), External Processing. Voorwaarden voor het in behandeling nemen van asielaanvragen buiten de Europese Unie, The Hague, December 2010; V. Moreno-Lax, Europe in Crisis: Facilitating Access to Protection, (Discarding) Offshore Processing and Mapping Alternatives for the Way Forward, Red Cross EU Office, December 2015, p.21-30

Invariably, the outcome of debates on these proposals was that they were unlawful, unfeasible and undesirable. Hence, so far, external processing schemes as defined above were never translated into legislative proposals. In this regard, it should be noted that a feasibility study on joint external processing, which was called for in the 2004 The Hague Programme on the multiannual JHA agenda and in the 2008 EU Policy Plan on Asylum<sup>156</sup>, never saw the light of day. The European Commission's communication on the Taskforce for the Mediterranean, established after the tragic shipwreck near Lampedusa in 2013, refers again to the possibility of exploring external processing of asylum applications but adds explicitly that such options should always be "without prejudice to the existing right of access to asylum procedures in the EU".<sup>157</sup> Once again, no concrete steps have, as yet, been taken.

Against the background of the pressing humanitarian refugee situation in regions of origin, transit countries and within the EU since the summer of 2015, the idea of processing asylum claims outside the EU is again occasionally suggested, and, consequently, some new initiatives may go in that direction.<sup>158</sup>

While, since the 2003-2005 proposals on external joint processing, the legal and policy landscapes changed,<sup>159</sup> and new EU institutional actors such as EASO and EAAS have emerged, ECRE believes that most, if not all, of the objections against external processing put forward during the last decades are still valid today, and that key legal, political practical questions remain unanswered. Therefore, ECRE remains strongly opposed to any form of exclusive 'EU external processing'.

A scenario of 'exclusive' external joint processing, envisaging the establishment of physical processing centres on the territory of a non-EU Member State, would have no legal basis in EU law. As such a scenario is excluded from the scope of both the recast Reception Conditions Directive as well as the recast Asylum Procedures Directive, it would constitute a tool for Member States to contract out from key obligations under the EU asylum acquis.

However, as stated above, as the Qualification Directive would apply in such a scenario, the EU Charter would apply as well. This would, in any case, trigger the obligation to ensure compliance with inter alia, the right to asylum, human dignity, non refoulement, the right to good administration and the right to an effective remedy. Should an external joint processing initiative be considered, in order to be compatible with international and EU law standards, the use of joint processing of asylum applications in processing centres outside the EU, would require:

- an absolute respect for the right to asylum (Article 18 EU Charter), meaning that any initiative will need to be complementary and without any prejudice to the right to access an asylum procedure on EU territory.
- safeguards with regard to the observance of the highest possible level of procedural and reception guarantees derived from EU and international human rights law standards in practice.
- guarantees with regard to independent monitoring and transparency of such processes

Therefore, ECRE is of the opinion that if the EU or EU Member States want to establish external processing centres on the territory of third states, where asylum seekers are processed and accommodated pending the outcome of their application, this requires amending the territorial scope of the relevant EU legal instruments setting the standards in EU law with regard to procedural safeguards and reception conditions.<sup>160</sup> This would be necessary to ensure that the asylum seekers processed in such centres have access to the same standards that are laid down in EU law, as they would come within the jurisdiction of one or more EU Member States.

In any case, in light of the presumption against detention as established in international refugee and human rights law, accommodation in extra-territorial processing centres should be based on the model of open reception centres and under no circumstances should allow for the deprivation of liberty of applicants for the purpose of processing their applications.

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156. European Commission Communication Policy Plan on Asylum. An integrated approach to protection across the EU, COM(2008)360, 17 June 2008, para. 5.2

157. European Commission Communication on the work of the Task Force Mediterranean, COM (2013) 869

158. Although not entirely within the definition of 'external processing', initiatives such as the pilot Multi-Purpose Centre in Niger and Pilot Supported Processing Project in Tunisia, Morocco and Jordan entail elements of joint external processing. See further V. Moreno-Lax, Europe in Crisis: Facilitating Access to Protection, (Discarding) Offshore Processing and Mapping Alternatives for the Way Forward, Red Cross EU Office, December 2015, p.19

159. See M. Garlick, The Potential and Pitfalls of Extraterritorial Processing of Asylum Claims, Commentary March 2015 <http://www.migrationpolicy.org/news/potential-and-pitfalls-extraterritorial-processing-asylum-claims>

160. The EU recast Reception Conditions Directive and recast Asylum Procedures Directive. At the time of writing new proposals for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU and recasting the Directive laying down standards for the reception of applicants for international protection were under negotiation.

, Because of the legal and practical obstacles identified, exclusive external joint processing-scenario, as defined above, may not materialise in practice. However, mixed modes of cooperation with third countries have emerged which include a 'safe channel' component and which do not entail external joint processing as such but in reality aim at the same result of externalising international protection obligations as much as possible. In this regard, the EU-Turkey Statement of 18 March 2016 seems to set the model for the EU's approach. In addition to substantial financial support for Turkey, revamping EU-Turkey accession negotiations and speeding up visa liberalisation, the statement is based on three main principles: (1) the expedited return of all migrants arriving irregularly on the Greek islands from Turkey (2) fast-track processing in an admissibility procedure of all asylum applications on the presumption that Turkey can be considered a safe third country or first country of asylum and (3) the commitment to resettle, for every Syrian being returned to Turkey from the Greek islands, another Syrian from Turkey to the EU.

Whereas ECRE actively promotes resettlement as a safe and legal channel for refugees to reach safety in Europe (as discussed in chapter four), it strongly rejects the one for one approach as the most cynical and opportunist response to the refugee crisis in Europe. Resettlement is a humanitarian act to provide protection, is a durable solution for the world's most vulnerable refugees and should not be driven by a logic of migration control. Trading-off resettlement against the right for those spontaneously arriving on the territory to apply for asylum is self-defeating and unsustainable.

In fact, a few months following the measures implementing the EU-Turkey Statement entered into force, the ad hoc arrangement with Turkey proved to be a failure. The number of migrants returned from the Greek islands soon dropped to zero, while the number of Syrian refugees resettled from Turkey, although double the number of returns, remained at very modest levels. Furthermore, the application of the safe third country and first country of asylum concepts were successfully challenged before the Greek Courts. Moreover, it is unclear to what extent the significant decrease of the number of refugees dying in the Aegean after the entry into force of the EU-Turkey Statement, can in fact also be attributed to the closure of the Balkan route, preventing refugees from reaching other destinations in Europe via Greece. In absence of effective solidarity measures with Greece, the implementation of the EU Turkey Statement also resulted in the further congestion of the Greek asylum system, with asylum seekers and refugees in Greece being exposed to substandard reception conditions and enormous delays in the examination of their claims.

In sum, in ECRE's view, this is not a model to be pursued in search of legal channels for refugees to access protection in Europe.

## CONCLUSION

Fleeing human rights violations, persecution and conflict often entails great personal risk for the individuals concerned at various stages of their journey to safety. This is to a certain extent inherent in the refugee's plight. However, as shown in this paper, a proactive and rights-based use of the various legal channels that are at States' disposal, has enormous potential to allow refugees to avoid resorting to irregular channels to access protection, that often exposes them, once again, to serious human rights violations and abuse.

ECRE acknowledges that safe and legal channels are not a panacea to all refugee situations. Nor can it be denied that implementing legal channels may be challenging from a legal and logistical perspective.

However, this can and should not be used as an excuse not to engage. It is the legal and moral duty of all stakeholders, States, supranational institutions and intergovernmental organisations, NGOs and human rights advocates to work together to address this longstanding gap in the global protection system.

## ANNEX I: SCENARIO HUMANITARIAN VISA PROCEDURE

Following a referral by the Chad Relief Foundation (CRF), Abeo (Nigerian) arrives at the French Embassy in N'Djamena (Chad) to attend the interview set for him by the Embassy, through the NGO. The CRF referral also included a very basic outline of Abeo's story and his reasons for fleeing Nigeria. Furthermore, the visa application and referral indicate that Abeo's brother has been living in Malta for a number of years, a Single Permit holder working as a web-designer with a local company.

Preliminary advice has already been sought from the Office français de protection des réfugiés et apatrides (OFPRA) and Malta's Office of the Refugee Commissioner, and summary country of origin information and guidelines obtained from the EU Asylum Agency and UNHCR. The CRF's legal officer is also present in order to assist Abeo, whilst an interpreter is on speakerphone waiting for the interview to start.

Upon receipt of the referral, the Embassy agreed to include Abeo in CRF's refugee support programme covered by the cooperation agreement it signed with CRF some months earlier. Thanks to this agreement, Abeo is offered shelter in one of CRF's safe houses for a maximum period of seven days, giving the Embassy sufficient time to organise today's interview.

During the interview, Abeo confirms that he entered Chad irregularly and is not in possession of any personal or travel documents. He recounts his experiences in Nigeria, answering questions as best he could. From what can be gathered, his story seems to be consistent with the information received from various sources, and the submissions presented by the CRF also seem to confirm much of what he has recounted.

Aware that Nigeria is not deemed to be a refugee-producing country by his colleagues at other embassies, and also within the EU, the Embassy's case-officer is not convinced that he will be granting Abeo a Temporary Humanitarian Visa<sup>161</sup>. He quickly flips through the EU Asylum Agency's 'Handbook on Humanitarian Visas and International Protection' to refresh his memory on how far he should go during this interview before being able to take a decision. He also makes a note in his file to be sure to attend the next online training session.

On assessment, and having discussed the case with his colleagues in Paris and Valletta, the case-officer reaches the conclusion that Abeo's visa application presents sufficient grounds to trigger the relevant provisions of the EU Visa Code. Having reached this conclusion, he has no option but to grant Abeo a Temporary Humanitarian Visa, which will allow him to travel to Malta.

He explains to Abeo that upon arrival in Malta he will be placed under the care and responsibility of the Agency for the Welfare of Asylum-Seekers, and that he should expect a full and far more detailed interview within fifteen days of his arrival. He emphasises Abeo's obligation to attend this interview, on pain of revocation of his visa.

Until he leaves for Malta, Abeo remains in CRF's refugee support programme. He reaches Malta 13 days after his Embassy interview, and is immediately given documents explaining his legal status and corresponding rights and obligations. After nine days he is interviewed and recognised as a refugee.

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161. Valid for 30 days, renewable for another 30. Also with limited territorial validity.

# ANNEX II: LIST OF RECOMMENDATIONS

## Resettlement

Resettlement eligibility criteria as defined in the UNHCR Resettlement Handbook should be interpreted as also including persons eligible for forms of international protection, including those defined in EU law, other than refugee status under the Refugee Convention and the UNHCR Mandate.

Any identified need for resettlement, according to UNHCR's criteria and priority levels and categories, should be the overriding principle rather than considerations of an individual's integration potential. These criteria should be reflected in the resettlement activities of all States and in the common EU criteria.

Procedural guarantees, established in the UNHCR Resettlement Handbook, should, as a minimum, be guaranteed for all resettlement programmes as well as humanitarian programmes, whether they are implemented through UNHCR or not.

If States reject cases referred to them by UNHCR (or other stakeholders), the reasons for such refusals should be stated and communicated in writing to the refugee/s.

A European resettlement programme should include provisions for the consideration of resettlement referrals not only from UNHCR, but also from embassies, international organisations and NGOs working in the country of first asylum.

With greater numbers being resettled to Europe through a joint programme, consideration of a methodology for group identification would become necessary.

Recognizing the value of the involvement of NGOs and other civil society actors in integration programmes, tripartite partnerships should be established at the national level and supported through the funding for national programmes.

In light of the scale of global resettlement needs, the EU resettlement programme should be ambitious and offer at least 25% of global resettlement places. It should establish a large scale European resettlement programme with mandatory participation of all Member States, based on a distribution key. Common priorities should be set that should reflect the priority situations identified by UNHCR, including different nationalities from the Middle East, Africa and Asia. States should also participate through other means than the reception of resettled refugees, such as sharing their expertise to new resettlement countries through the EU Asylum Agency.

The European Commission should provide guidance on the reception and integration of resettled refugees. This should cover aspects of reception post arrival, including in the mid and long term. This guidance could also provide orientation for the evaluation of EU funded activities, to make them more results-driven, for example by developing commonly accepted criteria and evaluation methods for post arrival support services.

NGOs should be included in national and European programmes through formal arrangements and partnerships to support identification, referral and submissions in the country of departure, cultural orientation, counselling and support before departure and post arrival.

The EU Asylum Agency should take up a proactive role in enhancing and supporting resettlement activities, both at the EU and national level, through (1) fostering cooperation and information exchange between Member States and NGOs in the areas of resettlement, (2) facilitate joint selection missions in close cooperation with UNHCR and (3) by taking up an operational role by deploying EU Asylum Agency focal points in resettlement hubs.

## Humanitarian Admission Programmes

Prioritization within humanitarian admissions programmes must be determined according to protection needs and specific vulnerabilities and urgency within application procedures, instead of dealing with applications on a first-come, first-served basis.

When implementing humanitarian admission programmes, states must provide for sufficient capacity at embassies.

As protection needs and integration challenges are the same, all persons admitted to the territory through either resettlement or humanitarian admission programmes should be entitled to the status granted to resettled refugees, i.e. refugee status.

In case persons admitted under the humanitarian admission programme have nevertheless been granted a temporary status and permit, they should be informed in due course on the appropriate procedures to renew their residence permit and obtain a status with permanent residency rights. Where this implies submitting an asylum application, such applications should be prioritized and considered for prima facie recognition as it concerns persons whose need for international protection has already been established. They should have access to the same rights as refugees under national or EU law.

EU funding should also provide financial support for developing humanitarian admission programmes that offer a substantial number of places.

Implementation of humanitarian admission programmes need to be supported with awareness raising among the refugees and their family members and guidance through the application procedure.

As it is the case for resettlement, humanitarian admission programmes should be developed in partnership with NGOs at both ends of the process, to support all aspects of the preparation, post arrival phase and integration of the newly arrived refugees.

NGOs and community organisations could raise awareness and support implementation by providing assistance with the preparation of applications and procedures.

## Private Sponsorship Programmes

Financial incentives should be made available to support initial private sponsorship programmes. Within the EU this could be achieved through AMIF funding for pilot projects that is additional to funding for resettlement programmes.

States must establish a solid legal framework for the implementation of private sponsorships, which require formal agreements between governments and sponsors, do not require sponsors to bear unrealistic costs and do not substitute for states obligations to provide persons on its territory access to social and economic rights and limit sponsor's responsibilities in time.

## Humanitarian Visas

States must (re)establish legal procedures for the presentation of requests for a humanitarian visa for protection reasons to their embassies or consulates. Such procedures should be limited to a preliminary assessment of a person's international protection needs with a view to deciding on the issuance of an entry visa to the territory of the solicited state for the purpose of conducting a full examination on the territory of the solicited state, in a regular asylum procedure in accordance with international human rights standards, and where applicable, the EU asylum acquis.

Humanitarian Visa procedures and decisions are strictly complementary and not exclusive to asylum procedures conducted on EU territory or the territory of the European state. They should not impact negatively on the

situation of asylum seekers arriving in Europe in an irregular manner. Making an application for a humanitarian visa should not prevent the person from seeking asylum on the territory of the state concerned nor on the territory of other EU Member States.

Access to minimum procedural safeguards must be guaranteed for applicants. These include the right to be informed, the right to be heard through a personal interview, or where this is not possible, through a written submission, access to qualified and impartial interpretation, to legal assistance and the right to an effective remedy.

For particularly vulnerable cases or persons at high risk of refoulement or arbitrary detention, states should provide for emergency procedures and the possibility of providing short term accommodation of such persons in safe houses. States should also undertake reasonable efforts to facilitate access of persons granted a humanitarian visa to accommodation and medical care until their departure to the state issuing the visa. This could be provided by local NGOs or international NGOs active in the country concerned on the basis of cooperation agreements financed and earmarked under AMIF.

## Family Reunification

European States should systematically consider family reunification of family members beyond the nuclear family, while the best interest of the child should be a primary consideration throughout the procedure.

Procedures started before the age of majority should not be interrupted or modified for the sole reason that the child has turned 18.

Unaccompanied children should have the right to be reunited with both their parents and siblings, or a person holding guardianship for the child.

Dependency should be assessed beyond its financial aspect to include its legal, physical, emotional and material dimension and states should consider the particular situation of family members concerned.

States should allow sponsors granted international protection to submit an application for family reunification in the state which granted them status in addition to the possibility for such applications to be made from embassies of the State abroad.

Consular cooperation, such as foreseen under Article 8 of the Visa Code, should be used as a way to facilitate family reunification procedures through the services of embassies of other EU Member States, particularly in cases of humanitarian crisis.

Where the requirement to appear in person is impossible or very difficult to fulfil due to a particular vulnerability or circumstances beyond the control of the applicant, or where this would impose a disproportionate financial burden on them, applicants should be exempted from this requirement. Alternatives could be developed, such as express mail services, applications by a third person or family member residing in neighbouring countries, direct applications at the Immigration Office by the family member residing in the host country, etc.

States should set up structural cooperation with professional networks such as the Red Cross societies, the International Committee of the Red Cross or Save the Children assisting applicants at different stages of the procedure (legal aid, travel to embassies, ensure security for children, etc.).

States must allow for applicants to submit a variety of elements to substantiate their application for family reunification, including family books, oral and written testimonies, military cards where parents are mentioned, photos, telephone calls, emails, or sponsor's statements during asylum interviews.

National authorities should send clear instructions to their embassies and train their staff on family reunification procedures, the realities of forced flight and how to provide the relevant support to family members seeking to reunite.

Member States must effectively monitor practices in embassies and consulates in order to ensure that staff act consistently to enforce family reunification laws and policies.

Beneficiaries of subsidiary protection should benefit from the same favourable treatment as regards the right to family reunification under EU law as refugees, as in reality they often flee similar situations, their need for international protection is not of a shorter duration and they face similar challenges with regard to family reunification.

European States not bound by the EU Family Reunification Directive should not discriminate between applicants for family reunification on the basis of the type of international protection status granted to the sponsor.

States should pro-actively facilitate family reunification for all beneficiaries of international protection, including children. "Prohibitive" conditions (i.e.: residence, time limits, waiting periods, income and housing requirements) should not apply for persons granted international protection as they risk undermining effective access to the right to family life and force family members to use irregular and unsafe channels to reach the territory.

All family members of beneficiaries of international protection should be exempted from procedural costs (visa fee, DNA testing, certified translation, etc.).

Applications for family reunification should be dealt with in a prompt manner, while ensuring a thorough investigation of the individual circumstances of the applicants.

Applications from people fleeing a humanitarian crisis and where assistance and shelter in neighbouring countries fall short should be dealt with as a priority.

States should facilitate communication flows between asylum and immigration offices and diplomatic services, including through clear administrative instructions and the more efficient use of technology.

States should sufficiently resource embassies and departments processing family reunion applications to ensure decisions are made in a timely manner.



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