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European Council
on Refugees and Exiles

PRINCIPLES FOR FAIR AND SUSTAINABLE REFUGEE PROTECTION IN EUROPE

**ECRE'S VISION OF EUROPE'S ROLE IN THE GLOBAL
REFUGEE PROTECTION REGIME: POLICY PAPER 2**

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The development of this paper on the future of the Common European Asylum System 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: safe and legal channels for refugees to access protection in Europe 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

The present paper outlines ECRE's vision for a fair, sustainable and protection-centred Common European Asylum System (CEAS). As Europe continues to attract large numbers of persons seeking international protection, a bolder approach is needed in order to overcome fragmented and uncoordinated responses to forced displacements. The paper deals with specific protection challenges in the CEAS as well as those non-EU countries bound by the Dublin system. For ease of reference these are referred to as "EU+" throughout the paper.

Effective answers to on-going and future emergency situations need to go hand in hand with short, mid and long-term reforms and an increased effort to improve the quality and resilience of the asylum systems across the EU. Despite important institutional, operational and legal developments in the era of the Amsterdam and Lisbon treaties, the emergence of a CEAS has brought only moderate improvements on the ground and the protection landscape remains largely fragmented, with great discrepancies in the quality of the procedural safeguards and in the outcome of the refugee status determination decisions. The challenges faced at national level remain very different from one country to another as refugees are not evenly distributed across the EU territory. Over the past decades, only few EU Member States have significantly contributed to the reception and protection of persons in need of international protection arriving in the EU. While discrepancies in the quality of protection has been primary linked to differences in the level of wealth and economy – as well as historical factors -, the recent emergence of a block of countries branding themselves as a no-refugee zone is of particular concern for the very existence and sustainability of the CEAS.

The situation has severely deteriorated in the face of the acute refugee crisis of 2015-2016. The unprecedented number of refugees and migrants arriving irregularly to the continent through perilous journeys via the Mediterranean Sea, over 1,3 million persons,¹ and the unilateral, piecemeal, and often reactive, response of Member States, led to coining the term "refugee crisis" as currently one of the most critical tests for the credibility and accountability of the European Union (EU). While the EU could have been expected to have the capacity to protect and integrate migrants and refugees accounting for only a tiny fraction (0.2%) of its population, its response to the increased numbers of asylum seekers and refugees arriving in Europe shed a crude light on the political divisions between Member States as well as on the structural weaknesses of its Common European Asylum System. To some extent, the recent crisis has led to an erosion of the protection landscape in the EU as Member States compete with each other in deflecting protection obligations in order to deter asylum flows. Intra-EU solidarity tools remain anecdotal and have not managed to restore mutual trust and address structural shortcomings of the system as a whole.²

The backdrop of a rising number of refugees and migrants with wide-ranging humanitarian and protection needs has prompted Europe to pursue various opportunities for deflection, in the absence of a coordinated approach. The EU and its Member States have, on the one hand, reached an agreement with Turkey for large-scale containment of refugees on Turkish territory, overlooking numerous protection gaps prevailing in the country's asylum and reception system as well as Turkey's political instability. On the other hand, parallel to the externalisation of protection duties to Turkey, efforts were made to contain entrants in EU Member States of first entry. The confinement of thousands of refugees and migrants in Greece illustrates the sharpness of European divisions in the refugee debate. Whilst the implementation of the EU-Turkey Statement³ has led to a considerable decrease of arrivals through the Eastern Mediterranean route, the number of remaining arrivals are putting at great humanitarian risk the persons stranded in the Greek islands, while the situation of those on the mainland also remains of grave concern. Further, the number of arrivals through the Central Mediterranean route is also significant with a risk of creating high congestion in Italy.⁴ As migrants are travelling in extremely dangerous conditions, a very high death toll is anticipated and to be deplored.⁵

As a global reform of the CEAS is now being contemplated,⁶ serious thought should be given to the development

1. UNHCR, Refugees/Migrants Emergency Response – Mediterranean, available [here](#).
2. Out of the target of 106,000 asylum seekers to be relocated from Italy and Greece, 8,162 persons (6,212 from Greece and 1,950 from Italy) had effectively been transferred as of the 8th December 2016. The European Commission has been regularly reporting on the scheme, highlighting a number of challenges resulting in slow and inefficient implementation of Member States' commitment to relocate 66,400 asylum seekers from Greece and 39,600 from Italy. The Commission's progress reports are available [here](#).
3. European Council, EU-Turkey statement, 18 March 2016, available [here](#).
4. Council of the European Union, Note from the Presidency to SCIFA, Central Mediterranean route, doc. 8624/16, 3 May 2016.
5. According to UNHCR, 4,742 persons had died or went missing in 2016, UNHCR Weekly Update, Europe's Refugee Emergency, 14 December 2016.
6. European Commission, Proposal for a Dublin IV Regulation, COM(2016) 270, 4 May 2016; Proposal for a Regulation on the European Union Agency for Asylum, COM(2016) 271, 4 May 2016; Proposal for a recast Reception Conditions Directive, COM(2016) 465, 13 July 2016; Proposal for a Qualification Regulation, COM(2016) 466, 13 July 2016; Proposal for an Asylum Procedures Regulation, COM(2016) 467, 13 July 2016.

of supranational tools in order to promote a better implementation of agreed standards and to homogenize the level of protection available across the EU. ECRE acknowledges that effective management of migration flows and security are key concerns for Member States at a moment where some EU Member States have been confronted with extremely violent attacks. Yet, these objectives should go hand in hand with the promotion and respect of international and EU obligations and are effectively better addressed through proactive policies for the management of migratory flows.

In view of the current challenges, an overall objective is to develop a resilient and sustainable protection system that offers effective protection to persons in need of international protection, regardless and despite the number of arrivals in the EU. The present paper provides recommendations for remedying existing gaps and shortcomings consistently identified in the research. The present paper also explores the opportunities for overcoming ever prevailing disparities and moving ahead through centralized tools and greater convergence of the refugee status determination system.

The present paper discusses a set of four measures that could answer key protection challenges and guide the future steps of the CEAS⁷:

- Dignified reception systems and effective management of crisis situations.
- Fair and equitable responsibility sharing mechanisms.
- Enhanced scope and quality of protection.
- Promote access to integration through robust rights and entitlements.

Expanding regular channels for migration for refugees through increased resettlement schemes and humanitarian evacuation programs is an essential component of the refugee protection regime. Yet, this issue falls outside the scope of the present paper and is covered in ECRE's vision paper relating to safe and legal channels to accessing protection in Europe.⁸

CHAPTER 1 - BUILDING DIGNIFIED RECEPTION SYSTEMS AND EFFECTIVE MANAGEMENT OF CRISIS SITUATIONS

Over the past years, one main issue of concern has been the ability – or lack thereof – of EU+ countries to receive those seeking refuge in appropriate, dignified conditions as mandated by their protection obligations. The very existence of robust and dignified reception conditions is a vital precondition for allowing asylum seekers to recover their dignity and to prepare their applications. Building robust and resilient reception systems remains a key challenge in many EU+ countries. Numerous studies and evaluation reports have pointed to the challenge faced by reception organisations, which must continually adjust their budgets, organise their reception facilities and adapt the volume of their human resources according to the inflow of asylum seekers.⁹ Over the past years, national authorities have also been confronted with austerity measures and constant pressure for implementing cost-effective reception policies. Adjusting the different components of the reception systems has also proved to be challenging under an increasingly hostile political and media climate.¹⁰

While, for many years, reception systems have been perceived as a purely operational matter, things have radically evolved following key judgements of the European Courts, which have put access to reception

7. Information included in the present document is up to date as of 14 December 2015.

8. ECRE, Protection in Europe: Safe and Legal Access Channels, 2016, Forthcoming.

9. Paul Minderhoud and Karin Zwaan (eds), The recast Reception Conditions Directive: Central Themes, Problem Issues, and Implementation in Selected Member States (Oisterwijk; WLP, 2016); EMN, The Organisation of Reception facilities for Asylum Seekers in different Member States, 2014, available [here](#); Odysseus Network, Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in the EU Member States, 2006, available [here](#); Eiko Thielemann, Richard Williams, Christian Boswell, What System of Burden-Sharing between Member States for the Reception of Asylum Seekers? 2010, available [here](#).

10. Madeline Garlick, 'Reception for Asylum-Seekers in a Time of "Crisis"', in Paul Minderhoud and Karin Zwaan (eds), The recast Reception Conditions Directive: Central Themes, Problem Issues, and Implementation in Selected Member States (WLP 2016).

conditions at the centre of the debate on the sustainability and viability of the CEAS.¹¹ Renewed commitments to further harmonize reception systems across the EU have been undertaken with the adoption of the recast reception conditions directive in 2013. On 13 July 2016 the Commission proposed another recast of the Directive as part of the second package of proposals tabled in the context of a new reform of the Common European Asylum System (CEAS)¹². The proposed recast has a number of formal objectives: (1) further harmonisation of reception conditions in the EU; (2) reducing incentives and asserting greater control over secondary movements; and (3) promoting integration and enhancing asylum seekers' self-sufficiency. Another objective of the reform, not explicitly stated in the Explanatory Memorandum, relates to strengthening the resilience and preparedness of national reception systems, a highly pertinent action, against a backdrop of an overall lack of preparedness and planning on the part of European countries to deal with high numbers of arrival.

Paradoxically, whilst the legal framework is increasingly sophisticated, the protection landscape has clearly deteriorated over the past decade, with inadequate levels of investment injected into the regular reception systems. Informal settlements and makeshift camps have mushroomed all over Europe, where asylum seekers and migrants now languish in squalid conditions. Throughout its research and regular monitoring of the situation in key destination countries, ECRE has documented key issues linked to the lack of adequate reception facilities, the complexity of the legal framework but also the poor implementation of legal obligations vis-à-vis the most vulnerable asylum seekers.¹³

As the financing and organisation of national reception systems structures vary greatly from one country to another, there is no "one size fits all" solution to fix existing discrepancies. Yet, there is a consensus amongst experts and stakeholders that three imperatives underlie the successful operation of any reception system: the quality of the reception system and compliance with legal standards defined at EU and national level, the efficient management of resources and the flexibility of the system to ensure that reception authorities are ready to cope with crisis situations.¹⁴ Balancing the three components of the "reception triangle"¹⁵ requires determined actions and synergies to be developed at local, national and regional levels. Reforms should ultimately aim at operationalising high level protection standards and at homogenising the level of reception systems across the EU+ countries. Reforms should be carried out through an incremental process with short, mid and long-term actions to be implemented in order to improve both the quality and the resilience of the reception systems; as well as their capacity to cope, regardless of the numbers of asylum seekers.

1. STRENGTHENING THE QUALITY OF RECEPTION SYSTEMS ACROSS THE EU+

'Marshall Plan' for Reception Systems

As an immediate priority, European countries should massively invest in order to maintain and expand their regular reception facilities. As massive financial investments are key to homogenise the level of reception conditions, we believe that increasing reception standards across the EU is also essential for restoring mutual trust as it would enable Member States which currently have limited reception capacities to contribute to solidarity mechanisms and help to reduce secondary movements, triggered primarily by the lack of reception conditions in the first EU+ country of arrival.¹⁶ As discussed further in the paper, the lack of financial investments

11. CJEU, Joined Cases C-411/10 and C-493/10, N.S. v. Secretary of State for the Home Department and M.E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform, Judgment of 21 December 2011; CJEU, Case C-179/11 Cimade and Groupe d'information et de soutien des immigrés (GISTI) v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration, Judgment of 27 September 2012; Case C-79/13 Saciri and Others, Judgment of 27 February 2014; ECtHR, M.S.S. v. Belgium and Greece, Application no. 30696/09, Judgment of 21 January 2011; Tarakhel v. Switzerland, Application No 29217/12, Judgment of 4 November 2014.

12. See ECRE's Comments on the Commission Proposal to Recast the Reception Conditions Directive, COM (2016) 465 final, available [here](#).

13. See our regular updates and thematic briefings in the Asylum Information Database (AIDA). In particular, see AIDA, Wrong counts and closing doors: The reception of refugees and asylum seekers in Europe, March 2016, available [here](#); AIDA, Common asylum system at a turning point: Refugees caught in Europe's solidarity crisis, Annual Report 2014/2015, available [here](#); ECRE, Reception and Detention Conditions of Applicants for International Protection in Light of the Charter of Fundamental Rights of the EU, January 2015 available [here](#).

14. Michael Kegels, Getting the Balance Right – Strengthening Asylum Reception Capacity at National and EU levels, MPI, February 2016, available [here](#).

15. This terminology is used by the European Platform for European Reception Agencies (EPRA), see EPRA, Briefing Note, December 2015, available [here](#); See also Michael Kegels, Getting the Balance Right – Strengthening Asylum Reception Capacity at National and EU levels, 4. See detailed analysis of these concepts also in EMN, The Organisation of Reception facilities for Asylum Seekers in different Member States, 2014.

16. European Parliament, The Reform of the Dublin III Regulation, PE571.360, June 2016, available [here](#).

is not only limited to reception standards; substantial investments should be injected into all core aspects of protection, from reception systems to asylum procedures and integration policies.

Whilst there should be a significant increase of the resources dedicated to structural development and maintenance of regular reception systems, adequate resources should also be allocated to efficient contingency planning and emergency responses (see below). However, under no circumstances should resources allocated to asylum systems be siphoned off from much needed humanitarian assistance designated to refugee producing countries.

Resources allocated to asylum and migration policies under the EU multi-annual financial framework 2014-2020, only represents 1.6% of the EU budget. The mid-term review of the Asylum, Migration and Integration Fund and negotiations around the next multi-annual framework offer an opportunity to discuss to what extent the resources should be expanded, bearing in mind absorption capacities of Member States. In particular, stakeholders should draw a better balance between the proportion of funding allocated to protection (currently limited to a ceiling of 20% under the AMIF) and the funding allocated to border management. Under any circumstances, Member States should be authorised to build reserves in the cases where funds are allocated on a multi-annual framework.

Develop qualitative benchmarks

Increasing the quality of the reception systems across the EU means that the decision-makers should depart from the primarily quantitative approach taken by European countries and EU institutions, focusing mainly on numbers of places as a benchmark for fulfilling their obligations towards refugees and asylum seekers. This approach runs the risk of sidestepping qualitative aspects at the heart of the concept of reception, in particular with the use of private service providers.

As alluded in the EU Migration Agenda, the sustainability of the CEAS requires the further development of a qualitative approach, both through establishing a “new monitoring and evaluation system for the CEAS and guidance to improve standards on reception conditions and asylum procedures.”¹⁷ The adoption of qualitative indicators - both for open and closed facilities - is crucial to operationalise existing legal standards¹⁸ but also to define a minimum threshold of rights and entitlements which should always be in place to ensure a ‘dignified standard of living’, even in crisis situations, as required by the CJEU.¹⁹ Together with clear qualitative benchmarks, both internal and external monitoring mechanisms are critical to ensuring that reception organisations continue to meet their legal obligations, in particular where services are outsourced to private actors.²⁰

The unstable nature of reception in Europe has borne down heavily on the ability of states to assess special reception and procedural needs, to the point that identification of vulnerability has ultimately been forgone by a significant number of countries. When it is actually carried out, the identification of vulnerability is often done in a very superficial manner and may only lead to identifying self-evident cases. The rights of vulnerable persons – and in particular children - inhering in EU and international law – must be respected by states throughout the asylum procedure. Identification of vulnerability must be conducted at an early stage and, arguably, done so in conditions which would be conducive to such identification. Whilst the legislative proposal put forward by the European Commission in July 2016 to recast the reception conditions directive includes some notable improvements in relation to the obligation for an early and systematic detection of special needs, it is to be deplored that it omits the applicant’s right to be heard. The right for an applicant to submit observations is key in order to have a fair and comprehensive assessment of special reception needs, including in cases where such needs are not self-evident.²¹

17. European Commission, A European Agenda on Migration, COM (2015) 240, 13 May 2015.

18. Article 18(9) of 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) (recast Reception Conditions Directive), OJ 2013 L180/96, allows Member States to temporarily depart from the reception standards laid down in Article 18. As a result, if normally available housing capacities are temporarily exhausted; Member States can also deviate from the requirement to take into consideration gender and age-specific concerns of asylum seekers when housing them; to ensure that transfers of asylum seekers to another reception facility only take place when necessary; and to ensure that reception personnel are adequately trained. On this point, see Lieneke Slingenbergh, ‘Reception Conditions Directive (Recast): Relevance in Times of High Numbers of asylum Applications’, in Paul Minderhoud and Karin Zwaan (eds), *The recast Reception Conditions Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (WLP 2016).

19. See CJEU, *Saciri*, para 40: there is an obligation to house asylum seekers in reasonable conditions which cannot be disregarded.

20. EMN, *The Organisation of Reception facilities for Asylum Seekers in different Member States*, 2014, available [here](#).

21. ECRE, *Comments on the Commission proposal to recast the Reception Conditions Directive*, October 2016.

Special reception needs for vulnerable persons as well as the best interests of the child must be a primary consideration for European countries. States' legal obligations regarding vulnerability require a tangible outcome, namely the actual provision of tailored facilities, material resources and necessary treatment and care for both physical and mental illnesses.²²

Compliance with the principle of non-discrimination

The intensification and politicisation of the refugee debate has increasingly directed European countries to an **oversimplified binary** between those presumed to be in manifest need of protection and those who are not and who ought to be deported; the drive of EU institutions towards rapid screening in “hotspots” and a parallel promotion of relocation and return only echoes this binary.²³ This approach has de facto created categories of protection, with asylum seekers receiving different treatment, given that the dividing lines are drawn on the basis of nationality.²⁴ All Member States must uphold the right to asylum as set down in Article 18 of the EU Charter of Fundamental Rights; they cannot renege on their responsibilities on the basis of discriminatory, linear, distinctions based solely on nationality.

European countries must refrain from discriminating asylum seekers on grounds of nationality without due justification. A faithful reading of the 1951 Refugee Convention and human rights obligations, requires equal treatment in the provision of rights and guarantees to all persons seeking international protection. In the context of reception, this duty primarily enjoins states to accommodate all entrants rather than summarily denying or delaying entry to those not deemed in need of protection.²⁵ It also warrants a prohibition on automatically resorting to detention of specific nationalities on similar grounds.

To some extent, the oversimplified binary between “bad” and “good” refugees is also reflected in the **punitive measures** envisaged in the set of proposals put forwards by the European Commission under which addressing secondary movements may have an impact on the merits of an asylum claim or, in the case of a recognised refugee, may lead to a review of status contrary to Article 1C of the 1951 Convention, or result in the provision of substandard reception conditions limited to emergency healthcare. Both civil society organisations and UNHCR have expressed deep concerns as irregular secondary movements may not be addressed through punitive measures alone and such measures may entail a risk of fuelling vulnerability and destitution. **EU Member States should refrain from using punitive measures and, instead, should use positive incentives during the asylum procedure and post recognition to prevent secondary movements of asylum seekers within the EU.**

Should Member States decide to use sanctions, the use of such measures should be strictly regulated by domestic legislation, and only permissible where proved to be necessary and proportionate to the aim to be achieved. In particular, breach of reception and procedural standards by the Member State holding the responsibility to process the asylum claim should be taken into consideration in the proportionality test.

Further, punitive measures should be combined with a set of incentives: for example early access to the labour market. Irregular secondary movement could be further reduced by allowing persons with protection status to move to another EU Member State from six months after a grant of status subject to certain conditions, including the ability to support themselves.

2. EFFECTIVE MANAGEMENT OF SYSTEMS AND RESOURCES

22. ECRE Oral Submission to the House of Lords EU Home Affairs Sub-Committee's Inquiry on Unaccompanied Minors in the EU, 27 April 2016; UK House of Lords, Children in Time of Crisis, Unaccompanied Migrant Children in the EU, EU Home Affairs Sub-Committee, July 2016, available [here](#).

23. ECRE, The Implementation of the Hotspots in Italy and Greece, December 2016, available [here](#); AIDA, Admissibility, Responsibility and Safety in European Asylum Procedures, September 2016, available [here](#).

24. As of the end of 2015 and early 2016, at least eight countries (Germany, Austria, Belgium, Ireland, Italy, Greece, Bulgaria, Turkey) resort to some form of discrimination in the reception process by privileging certain nationalities over others. Asylum seekers from countries such as Algeria, Morocco, Tunisia, but also Afghanistan, have found themselves faced with undue delays in securing accommodation, or even deprived of their liberty on the sole basis of their origin. See AIDA, Wrong counts and closing doors: The reception of refugees and asylum seekers in Europe, March 2016, 39 et seq.

25. See also Joint Statement by 26 NGOs, 'European leaders should keep the borders open and allow access to asylum', 3 March 2016, available [here](#).

Strengthening bilateral and multilateral cooperation

National reception authorities respond reactively to the pressure on their national system and responses are deployed in isolation, with little cooperation at bilateral or multilateral levels, despite the domino effect that a reception crisis may have at the regional level. As recently illustrated in the 2015/2016 crisis, there are no effective regional coordination mechanisms that would allow to deploy **collective responses and pooling resources**, as has been the case recently at the bilateral level where a Member State with extra capacity agreed to alleviate the pressure from a neighbouring country.²⁶ Thus far, such bilateral cooperation has been very limited in practice and have fuelled the mistrust and hostility of the local population.²⁷ Although pooling reception resources and facilities raises numerous legal and practical questions, this option could be explored in the short-term through targeted pilot projects, provided that the necessary safeguards are in place to ensure that such enhanced cooperation between Member States does not undermine quality of reception standards in the countries concerned and that there is no deflection of responsibilities. Local authorities should, as much as possible, be closely involved in the setting up of bilateral cooperation programs in order to prevent hostile reaction from the population.

In the longer-term, more effective mechanisms for transnational cooperation should be developed. Although consultative platforms - such as the European Platform for European Reception Agencies (EPRA)²⁸ or the European Network of Asylum Reception Organisations (ENARO)²⁹ – have been set up to promote exchanges and to improve the capacities of national organisations, the impact of such transnational dialogue remains limited at the operational level. As the European Migration Agenda refers to the need to set up a “new dedicated network of reception authorities”,³⁰ such a platform should build bridges with non-governmental stakeholders, which are service providers who have built a significant expertise over the years.

A better understanding of the structure and organisation of the different national systems is a key preliminary step in order to be able to strengthen European cooperation in an effective manner. The opacity and complexity of reception systems in many European countries poses a substantial challenge to any meaningful **mapping and analysis at the European level**, as has been confirmed through ECRE’s research and systematic monitoring of the implementation of the EU asylum acquis through AIDA. The scarcity of publicly available and comprehensible official information on states’ reception arrangements and respective capacities is inextricably linked to this challenge. EU Member States are under no duty to report statistics on their systems’ reception capacity and occupancy, as well as the use of detention, either under the recast Reception Conditions Directive³¹ or under the Migration Statistics Regulation.³²

The very notion of “reception” is clouded by conceptual uncertainty, as in the absence of a clear definition. Reception can carry different meanings and legal weight in the asylum and migration context. The EU asylum acquis makes reference to different forms of reception conditions made available to asylum seekers, including material conditions (housing, food, clothing, vouchers, and financial allowances), health care, employment and education.³³ When seen in practice, however, these conditions prove to be implemented in many different ways from one country to another, or even within the same country. At the same time, several European states and EU institutions have too readily presumed deprivation of liberty as an acceptable measure for the accommodation of refugees and migrants. **Detention** upon arrival seems to be structurally embedded in several reception systems, as exemplified in Bulgaria and Malta. In the case of Italy and Greece, the implementation of the EU’s recent “hotspot” approach has reinforced the detainability of asylum seekers and migrants, contrary to states’ human rights duties to only apply detention in exceptional circumstances. The detrimental impact of detention on the health of asylum seekers, and its high financial cost for Member States, has been amply

26. For examples of bilateral cooperation, see Michael Kegels, Getting the Balance Right – Strengthening Asylum Reception Capacity at National and EU levels, 19; Kegels also points at examples of local solidarity where more densely populated Länder occasionally seek support from neighbouring Länder.

27. See AIDA, ‘Austria: Plans to relocate 500 asylum seekers to Slovakia rejected by local population’, 3 August 2015, available [here](#).

28. EPRA is a platform of senior management level of reception organisations. Members meet four times a year to discuss various aspects of asylum reception management, including quality, flexibility and chain management and the reception target groups with special needs.

29. The European Network of Asylum Reception Organisations (ENARO) supports exchanges, job shadowing and information meetings for staff of 20 reception organisations from EU Member States, Norway and Serbia. Twice every year, the workers from each country visit one of the different member countries to attend a practical course. ENARO placed the emphasis at operational level, so as to target people working in the field rather than policy makers.

30. European Commission, European Agenda on Migration, p.12.

31. Reception capacity and detention are not mentioned in the list of information to be reported to the Commission pursuant to Annex I to the recast Reception Conditions Directive.

32. Regulation (EC) No 862/2007 of the European Parliament and of the Council on community statistics on migration, OJ 2007 L199/23.

33. Articles 2(g) and 14-19 recast Reception Conditions Directive.

documented,³⁴ but too often disregarded. In line with global strategies put forward by international actors such as UNHCR, a credible CEAS should mark a **firm shift away from deprivation of liberty of asylum seekers as a migration management tool**.

Crucial conceptual distinctions between first-line reception, second-line reception, emergency accommodation or even detention, are often absent from both policy and practice. These blurred boundaries carry a number of dangers, as they are liable to overestimate the capacity of states to afford proper protection, and to expose asylum seekers to substandard living conditions in countries of refuge. Forthcoming reform of the CEAS should **clarify the concept of reception** to ensure a better understanding of states' obligations and of the ways these are complied with. The distinction between emergency, first- and second-line reception should be formally drawn in the EU legal framework. In order to ease the monitoring process and pooling of resources, Member States should be under a **clear duty to report statistics** on reception capacity and occupancy, as well as the use of detention, in order to enhance transparency of reception conditions across the EU and allow smooth implementation of responsibility allocation tools.

Data management

Transnational data management system and trend analysis are key to inform reception policies and tailor reception systems according to the profile and needs of asylum applicants. In the short term, Member States should use the full potential of current and additional disaggregation of the Migration Statistics Regulation with a focus on age, gender and profiles of both asylum and non-asylum-seeking children.

Due to the dynamic nature of transnational migration flows, experts have pointed at the need to establish a permanent, high-quality information flow in order to replace the static, descriptive statistical analysis now prevalent. In the longer-term, the EU institutions and Member States need to develop **new centralized tools for better informing planning and investments at national level, bilateral and multilateral cooperation and feed into early warning systems**. Depending on the outcome of the negotiations, the proposal to strengthen the role of the European Asylum Agency in data collection and trend analysis may be step in the right direction.³⁵

3. INCREASE THE FLEXIBILITY OF THE RECEPTION SYSTEMS AND DEVELOP EFFECTIVE CRISIS MANAGEMENT

Existing legal standards³⁶ endorse Member States to set exceptionally different modalities for material reception conditions when material reception conditions are not available in certain geographical areas or when housing capacities normally available are temporarily exhausted for a "reasonable period, which should be as short as possible". The approach, of applying different standards and modalities, varies quite significantly across the EU+ according to evaluation studies. Yet, Member States tend to equate crisis management with lowering of standards – including through outsourcing to private actors - without necessarily developing a comprehensive policy allowing national reception authorities both to anticipate and to deliver an effective response to crisis management. Most worryingly, the continued and broad use of temporary forms of reception shows a lack of preparedness and limitations of contingency planning in many EU+ countries, as well as a lack of will to make structural changes so as to develop adaptable and resilient asylum systems in view of future inflows.³⁷

Member States should refrain from the **systematic use of emergency facilities** as long-term accommodation sites for persons in an asylum procedure, as conditions therein do not allow asylum seekers to have a dignified standard of living in line with their fundamental rights.³⁸ If Member States make use of such facilities, it should only be in truly exceptional circumstances, for as short a period of time as possible and only for duly justified reasons relating to the temporary exhaustion of regular reception capacity. European countries, including but not limited to those operating "hotspots" on their territory, must not resort to detention as a strategy of initial accommodation. Building on the presumption against the detention of persons seeking international

34. ECRE, Information Note on the recast Reception Conditions Directive, July 2015 available [here](#); Using the Charter of Fundamental Rights to improve reception and detention standards, March 2015, available [here](#); UNHCR, Beyond Detention – Global Strategy 2014-2019, available [here](#); JRS Europe, Becoming Vulnerable in Detention, 2010, available [here](#).

35. See Article 4 Proposal for a Regulation on the European Union Agency for Asylum.

36. See Articles 14(8) and 18(9) recast Reception Conditions Directive.

37. France an illustrative example of a country that has entrenched "emergency accommodation" in its reception system: AIDA, Country Report France: Fourth Update, December 2015, 74-75.

38. Article 1 EU Charter; Article 17 Recast Reception Conditions Directive.

protection laid down in international human rights law, asylum seekers should not be detained. Detention should remain an exceptional measure and only be applied on narrowly defined grounds, on the basis of necessity, proportionality and observance of relevant procedural safeguards.

Both experts and stakeholders³⁹ have argued that in order for a system to be able to deal with fluctuating numbers, the management of the reception system should not be treated in isolation but as a continuum in the “asylum chain” with a combination of elements depending on the stage of the procedure. Immediately after arrival, applicants should be granted access to emergency or frontline reception facilities, with access to basic services such as information, medical assistance and legal aid. Emergency accommodation should only be used for a short period of time, and soon after registration applicants should be able to access reception facilities suitable for long-term stay. Beneficiaries of international protection should access long-term integration facilities whilst fair, dignified and effective return policies should be available for those with a negative decision⁴⁰. As it is, the case in the proposal recasting the Reception Conditions Directive, the proposed Asylum Procedures Regulation requires the determining authority to regularly assess the needs of the determining authority to ensure it has sufficient capacity to deal with asylum applications in an effective manner.⁴¹ ECRE welcomes this provision as it may contribute to preventing backlogs and considers that this should be duly taken into account in the operation of the Dublin system.

Effective responses to emergency situations should be further reinforced, in particular by strengthening the coordination role of the proposed European Asylum Agency.⁴² ECRE fully shares UNHCR’s proposal in relation to enhancing Europe’s preparedness to respond to possible future mass arrivals. Emergency response requires the development of a system for (1) identification and analysing early warning signs; and (2) assessing the capacity to respond through registration, screening and reception.⁴³ In particular, ECRE supports UNHCR proposals in relation to the development of a standby service assistance package with the necessary technical and human resources committed in advance. Also, a system of standby rosters of experts should be further explored in order to ensure the immediate deployment of equipment for registration, internet connectivity, interpreters and processing teams to affected EU Member States within a short timeframe. Yet, the role of the future Agency should be clearly limited to support and coordination, and should under no circumstances take over the responsibilities of national stakeholders. Lessons drawn from current emergency operations deployed in Greece call for strengthening accountability mechanisms, as well as clarifying the division of tasks and responsibilities between national stakeholders and EU agencies, as discussed further in this paper (see *infra* Chapter 3). The EU and its agencies should also invest into capacity building of national stakeholders in order to increase expertise and build self-sufficient systems in the longer term. Recent experiences in Greece, in particular, have shown the key role of expert non-governmental organisations in addressing humanitarian crisis situations on European soil and ensuring access of newly arriving asylum seekers, migrants and refugees to basic humanitarian needs at the first stage of reception. This requires authorities to create a working environment, enabling NGOs and volunteers to operate in accordance with their mandate and to provide services to asylum seekers, refugees and migrants on the basis of respect for their human rights. Therefore, such responses should always be based on a non-coercive approach to the management of arrivals in dignified reception conditions and referral to competent authorities and service procedures within the shortest time possible after arrival.

Budgetary flexibility is another key element to allow the reception authorities’ to swiftly adapt to changes of circumstances. The financial autonomy of the reception authorities, the legal constraints on public procurement and the degree of autonomy of local entities, all play a role in determining the degree of flexibility of a system. In many Member States, the 2015/2016 crisis has shed a crude light on the lack of flexible procurement policies, rigid human resources policies and obstacles in the creation of new reception places. Forthcoming reforms of both national and European emergency response to the migration crisis should draw the lessons from the recent crisis and explore ways to allow reception agencies to swiftly access the initial resources necessary to respond to situations of mass influx and get buffer mechanisms working.

39. See EMN Belgium, *The Organisation of Reception Facilities in Belgium*, 2013, available [here](#).

40. See AIDA, *Wrong counts and closing doors: The reception of refugees and asylum seekers in Europe*, opus cit.

41. See Article 5(2) of the Proposal for an Asylum Procedures Regulation; Article 28 Proposal for a recast Reception Conditions Directive.

42. Article 22 Proposal for a Regulation on the European Union Agency for Asylum.

43. UNHCR, *Better Protecting Refugees in Europe and Globally*, December 2016, available [here](#).

CHAPTER 2 - DEVELOPING A FAIR AND EQUITABLE RESPONSIBILITY SHARING SYSTEM

Although the need for a substantial reform of the Dublin system⁴⁴ has been discussed for many years, the present crisis has shed a crude light on its dysfunctional architecture as the current system – if strictly applied – would place the responsibility for examining asylum applications mainly on States located at the external land and sea borders of the EU. Long before the 2015/2016 refugee protection crisis, legal practitioners, NGOs and UNHCR warned against the structural weaknesses of the Dublin system, which have now been fully exposed. European and domestic courts have also played a key role in demonstrating the need for structural changes in the Dublin system due to great disparities in the level of protection available across the EU.⁴⁵ ECRE's research in particular the Dublin transnational project entitled "Lives on Hold",⁴⁶ have demonstrated structural gaps, which have been acknowledged in the recent evaluation reports commissioned by the European Commission and by recent communications.⁴⁷ Schematically, the findings of the evaluation studies all identified the same structural flaws: allocation of responsibility rather than responsibility sharing mechanisms; complex administrative procedures relying on intergovernmental cooperation (or lack thereof); no (or limited) consideration for the individual circumstances of the asylum seeker, leading to involuntary transfers and extensive litigation. These findings are well known and will not be discussed in further detail in this paper.

Within the context of the current negotiations, ECRE calls for a **fundamental rethink of the underlying logic of the recast Dublin Regulation** in order to establish a responsibility allocation mechanism that is fair and enhances legal security for both Member States and asylum seekers. ECRE has consistently held that it should be replaced with a system that respects the fundamental rights of asylum seekers, ensures effective access to international protection and is based on the fair sharing of responsibilities between Member States. In essence, the rationale for allocating the responsibility for the examination of a claim to one single Member State is the assumption that all EU Member States offer an **equivalent level of protection. Key measures for approximating protection systems in the EU+ countries are examined in further details under Chapter 3.**

A new system for allocation responsibility should not be designed only as a reaction to the current crisis but as a **sustainable system that is workable regardless of the number of arrivals in the EU.** In light of Article 80 of the Treaty on the Functioning of the European Union (TFEU), the underlying principles of the Dublin Regulation need to be fundamentally redesigned, towards a more **humane system** that duly considers the individual circumstances of asylum seekers and their connections with particular Member States. The system should also be more **equitable**. Combined with the constitutional duty of sincere cooperation under Article 4(3) Treaty on the European Union (TEU), Article 80 TFEU amplifies the duty of all EU Member States to engage in solidarity and fair responsibility-sharing measures. Real and effective solidarity mechanisms are also crucial to avoid unilateral measures and the erection of physical and legal barriers as seen at the peak of the refugee protection crisis in the EU. Furthermore, as an underlying principle of the CEAS, the concept of solidarity must apply beyond crisis situations and cannot be reduced to a matter of mere financial burden sharing.

Putting asylum seekers' circumstances and interests at the centre of the system would favour a better compliance with the system (thus limiting the risk of absconding) and enhance integration prospects for persons eligible to international protection. In order to have a sustainable and functional system, **solidarity should be an intrinsic part of the CEAS, regardless of the number of asylum applications lodged in the EU.**

Finally, in order to be sustainable, the system for allocating responsibility should offer incentives to asylum seekers to comply with the responsibility allocation mechanism, rather than be based on the use of coercion. The perspective of enhanced mobility within the EU post recognition constitutes a key incentive for a sustainable system and may help to overcome resistance of asylum seekers to being allocated to another, than their preferred, Member State. These elements are further discussed in detail in Chapter 4.

44. Regulation No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or stateless person (recast) (Dublin III Regulation), OJ 2013 L180/31.

45. ECtHR, M.S.S. v. Belgium and Greece and CJEU, N.S. v. Secretary of State for the Home Department.

46. See ECRE and others, Dublin II Regulation - Lives on Hold, February 2013, available [here](#); ECRE, Case Law Factsheet: Prevention of Dublin Transfers to Hungary, January 2016; ELENA, Information Note on Dublin transfers Post-Tarakhel: Update on European case law and practice, October 2015, available [here](#); ECRE/ELENA, Research Note: Reception conditions, detention and procedural safeguards for asylum seekers and content of international protection status in Bulgaria, February 2016, available [here](#); ECRE, Comments on the European Commission Recommendation relating to the reinstatement of Dublin transfers to Greece, February 2016, available [here](#).

47. ICF, Evaluation of the Dublin III Regulation, December 2015 and Evaluation of the Implementation of the Dublin Regulation, March 2016, available [here](#).

In order to fully comply with human rights standards, the core elements of a fair and equitable responsibility sharing system should be based on the following **guiding principles**.

1. NO RESPONSIBILITY SHIFTING OUTSIDE THE EU+

The responsibility allocation mechanism shall always take precedence over admissibility procedures. As previously demonstrated, the use of the 'safe third country' and 'first country of asylum' principle with regard to non-EU+ countries raises strong concerns about potential breaches of the principle of non-refoulement. The use of these concepts has prompted heavy criticisms from both inter-governmental and non-governmental organisations⁴⁸ within the context of the implementation of the EU-Turkey Statement. Further, the recent decision of Hungarian authorities to qualify neighbouring countries, such as Serbia, as a safe third country has also raised serious concerns.⁴⁹ Under no circumstances should such concepts be used to bar access to asylum procedures in the EU or to shift responsibility towards countries where the protection regime is far more precarious.

It is essential to reiterate that the concept of 'safe third country' and the 'first country of asylum' have been narrowly defined by the case law of European courts and further codified under Article 38(1) and (2) of the recast Asylum Procedures Directive.⁵⁰ ECRE is concerned that the Commission proposal for an asylum procedure regulation includes important changes to the current provisions in the recast Asylum Procedures with regards to the mandatory use of such concepts and substantial criteria used with respect to the three concepts.⁵¹

According to existing standards and consistent with case law of European and domestic courts, the application of the 'safe third country' concept requires **a careful and individualised case-by-case examination of whether the country can be considered safe for the applicant and whether there exists a meaningful connection between the individual and the third country**.⁵² The record of human rights protection should also be taken into consideration as a benchmark to assess the sustainability and effectiveness of the protection available. In line with UNHCR's view, ECRE's position is that transit alone is not a 'sufficient' connection or meaningful link, unless there is a formal agreement for the allocation of responsibility for determining refugee status between countries with comparable asylum systems and standards. Transit is often the result of fortuitous circumstances and does not necessarily imply the existence of any meaningful link or connection. Neither does a simple entitlement to entry without actual presence constitute a meaningful link.⁵³ As consistently emphasised in the jurisprudence of the ECtHR, the absence of an individualised case-by-case examination or summary examination may lead to a violation of the prohibition of collective expulsions under Article 4 of Protocol No. 4 to the ECHR and under Article 19(1) of the Charter of Fundamental Rights of the European Union.⁵⁴

Furthermore, still in line with UNHCR's position, for the safe third country concept to be applied, it is essential that the person that will be (re) admitted to the third country will be allowed to request refugee status and, if found to be a refugee, will receive protection in accordance with the 1951 Convention, as 'amended' by the 1967 Protocol.⁵⁵ Full ratification and adequate implementation of the Geneva Convention without geographical reservation, guaranteed access to the asylum procedure for all applicants – as well as comparable recognition rates, dignified living conditions and effective access to rights and entitlements – are decisive elements in the assessment of the safety of a third country.

The guarantees with regard to the treatment of the applicant in the safe third country must not only be laid down in national legislation of the country concerned but must also be respected in practice, as highlighted by

48. ECRE, 'The EU-Turkey deal in practice: jeopardising the European asylum system', 8 April 2016, available [here](#); Council of Europe Commissioner for Human Rights, Statement issued on 23 March 2016, available [here](#).

49. Amnesty International, Stranded Hope: Hungary's Sustained Attack on Rights of Refugees and Migrants, September 2016 available [here](#): See also AIDA, Country Report Serbia, March 2016.

50. Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2015 on common procedures for granting and withdrawing international protection (recast) (recast Asylum Procedures Directive), OJ 2013 L180/60.

51. ECRE, Comments on the Commission proposal for an Asylum Procedures Regulation.

52. See Recital 44 recast Asylum Procedures Directive.

53. UNHCR, Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept, 23 March 2016, available [here](#).

54. ECtHR, Conka v. Belgium, Application no. 51564/99, Judgment of 5 February 2002, par. 82; M.A. v. Cyprus, Application no. 41872/10, Judgment of 23 July 2013, par. 137.

55. UNHCR, Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept, 23 March 2016.

the ECtHR.⁵⁶ This includes a positive duty to verify the guarantees in place in the third country, to ensure that the principle of non-refoulement is respected, as well as access to dignified reception conditions and livelihood and a right to family reunification in accordance with international human rights standards in the third country.⁵⁷ The capacity of the third country to provide effective protection in practice, in light of the efforts it is already undertaking in hosting large refugee populations, must also be taken into account.

2. A RIGHTS BASED SYSTEM

The new system of allocation of responsibility must fully comply with obligations under Human Rights law and the EU Charter of Fundamental Rights – in particular the right to asylum guaranteed by Article 18 of the Charter as well as the rights recognised under Articles 1, 4, 7, 19, 21, 24, 41 and 47 thereof.⁵⁸ Henceforth, the procedural guarantees currently included in the recast Dublin Regulation must be properly implemented in order to protect asylum seekers from human rights violations that nevertheless may result from such a system. Better harmonisation of procedural standards is a precondition of a successful reform, as existing disparities in the procedural regimes between Member States have fuelled litigation, which in certain cases prevented Dublin transfers because of the existence of a real risk of serious human rights violations in the responsible MemberState.⁵⁹

The best interests of the child and the primacy of family unity should be at the forefront in the new responsibility sharing system

The poor implementation of the principle of family unity has led to families being torn apart and moved onwards through irregular means, as the regular procedure under the current Dublin Regulation is very lengthy and involves heavy bureaucracy.⁶⁰ The makeshift camps in Calais and Grande Synthe have somehow become the symbol of Europe's failure to unify family members, as children living in deplorable conditions are stuck in a 'migratory dead-end' while attempting to enter the UK by dangerous and irregular means. Respecting the principle of family unity is also an essential prerequisite for the compatibility of the Dublin system, with both the UNCRC and the ECHR as well as the effectiveness of rights contained therein. Indeed, current restrictive practices towards the right to family life within the framework of the ECHR and the Dublin Regulation have triggered a string of litigation which had the dual effect of reinforcing family unity within the Regulation as well as fleshing out the scope of Article 8 ECHR.⁶¹

Given its particular importance for the long-term integration perspective of the refugees, it is essential that the reform of the Dublin system aims at operationalizing the principle of family unity and includes concrete measures to ensure speedy family reunification. In line with UNICEF recommendations, ECRE supports the view that the principle of family unity should be based on a broad definition of the concept of family, in accordance with the jurisprudence of the CJEU and ECtHR.⁶² In this regard, it should be noted that ECtHR jurisprudence

56. See ECtHR, *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Judgment of 23 February 2012, par. 157. See further ECtHR, *F.G. v. Sweden*, Application no. 43611/11 (Grand Chamber), Judgment of 23 March 2016 where, when a State is made aware of facts which would expose the applicant to a real risk of inhumane treatment, State authorities are obliged to carry out an ex nunc assessment of said risk of their own motion using all means at their disposal to produce necessary evidence in support of the application.

57. "It is a matter for the State carrying out the return to ensure that the intermediary country offers sufficient guarantees to prevent the person concerned being removed to his country of origin without an assessment of the risks faced". See ECtHR, *Hirsi Jamaa and Others v. Italy*, par. 147. See also ECtHR, *M.S.S. v. Belgium and Greece*, par. 263.

58. See Recital 39 Dublin III Regulation.

59. See recent case law from France: Administrative Tribunal of Versailles, Judgment N01602127, 24 March 2016 ; Administrative Tribunal of Nantes, Judgment 1600829, 18 February 2016; Netherlands: Hague District Court, Decision VK-16_4943, 18 April 2016, Belgium: Council of Alien Law Litigation, Decision 167 234, 09 May 2016, Germany: Administrative Court of Magdeburg, 8 A 108/16, 26 January 2016; Federal Constitutional Court, 2 BvR 273/16, 21 April 2016.

60. As demonstrated in the facts of ECtHR, *Majad Al-Ahmad v. Sweden and Greece*, Application no. 73398/14, Judgment of 22 September 2015, where the applicant, an unaccompanied child, was forced to use smugglers in order to re-unite with his brother in Sweden on account of the serious shortcomings of family unification under the Dublin Regulation.

61. UK Court of Appeal, *Secretary of State for the Home Department v. ZAT* [2016] EWCA Civ 810. As per par. 84, in an exceptionally compelling case, Article 8 ECHR can prevail over the Dublin process and procedures; UK Upper Tribunal, *AT and another (Article 8 ECHR – Child Refugee – Family Reunification : Eritrea)* [2016] UKUT 227 (IAC), 29 February 2016; UK Court of Appeal, *CK (Afghanistan) v. Secretary of State for the Home Department* [2016] EWCA Civ 166, 22 March 2016; Germany - VG Hannover, 1 B 5946/15, 07 March 2016; Germany Federal Administrative Court, 1 C4.15, 18 November 2015. See a detailed analysis of ZAT by Amanda Taylor and Zarina Rahman [here](#).

62. See e.g. CJEU, *Case C-245/11 K v. Bundesasylamt*, Judgment of 6 November 2012; ECtHR, *Maslov v. Austria*, Application no. 1638/03, Judgment of 23 June 2008. See also UNICEF, *Dublin Reform: Effective Access to an asylum Procedure within Europe*, May 2016, available [here](#).

has moved to an expansive interpretation of family based on actual ties rather than legal relationships.⁶³ As recently stressed under national jurisprudence, personal ties – as identified by the child concerned – should also be taken into consideration.⁶⁴ Adult children should not automatically be excluded from the scope of the principle of family unity, particularly in cases where the child has just turned 18, where there are still strong emotional ties and where the person is unable to support him or herself independently.⁶⁵ The definition of family members in other EU legislative instruments, such as the Free Movement Directive⁶⁶, provides a good illustration of efforts to include adult children in this regard and could inform a more protective definition in the Dublin Regulation with a view to meeting the objective set out in **Recital 19**.

Even where a partnership or a marriage has not been legally registered, the existence of family links should be examined cautiously, as the CJEU jurisprudence indicates that Member States must consider each case on its merits.⁶⁷ Even where national legislation does not offer equal rights to unmarried couples in a stable relationship or to same sex partners, national authorities cannot apply a blanket exclusion and should, by way of an individualised assessment, take into account all relevant factors, in line with the right to dignity and to respect of private and family life guaranteed by Articles 1 and 7 of the Charter.

In order to overcome practical problems, centralised operational tools and standard protocols should be developed on the basis of instruments already developed by EASO for assisting Member States in ensuring consistent and assiduous efforts to trace family members of unaccompanied children living elsewhere in the European Union. The use, of free of charge, DNA testing should only be used in complex cases with the informed consent of the individuals concerned and in the absence of any documentation proving family links.

The new responsibility sharing mechanism should acknowledge the extreme vulnerability of unaccompanied children and the need for their swift access to asylum procedures. In the case where there are no family members, siblings or relatives present in another Member State, these children should have their application processed in the Member State where they are present, provided that this is in their best interests in line with CJEU judgment in *M.A. and others*.⁶⁸ It is essential to establish clear rules and standard protocols for transnational cooperation regarding the best interests of the child determination. The views and opinions of the child should be heard and taken into account when determining the child's best interests.⁶⁹

The system should fully respect the right to dignity, as well as physical and mental integrity of asylum seekers

Article 3(1) of the Charter of Fundamental Rights should also be taken into consideration in the context of the new responsibility allocation system in ensuring the respect for an asylum seekers' physical and mental integrity. Persons falling under a responsibility sharing procedure should have immediate and unlimited access to adequate and dignified reception facilities, in line with the case law of the Court of Justice.⁷⁰

Access to adequate and dignified reception facilities shall never be limited or withdrawn for the purpose of sanctioning secondary irregular movements. Sanctions against refugees and asylum seekers are constrained by international refugee law. Bearing in mind the right for States to enter into responsibility sharing agreements; authoritative commentary explains that Article 31 of the Refugee Convention does not purport to dictate or limit the choice of an asylum seeker as to where to seek protection.⁷¹ It offers refugees a layer of protection against penalisation for irregular entry, subject to certain conditions.

63. ECtHR, *Lebbink v. the Netherlands*, Application no. 45582/99, Judgment of 1 June 2004, par. 36; *Schalk and Kopf v. Austria*, Application no. 75/1995/581/667, Judgment of 22 April 1997.

64. UK Upper Tribunal, *MK v Secretary of State for the Home Department*, JR/2471/2016, 29 April 2016.

65. See ECRE and others, *Lives on Hold*, February 2013; See Sir Stanley Burnton in *Singh & Anor v The Secretary of State for the Home Department* [2015] EWCA Civ 630 (24 June 2015) par. 24, available [here](#).

66. Which includes in the definition of family members the "direct descendants who are under the age of 21 or are dependents and those of the spouse or partner". See Article 2(c) Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Free Movement Directive), OJ 2004 L158/88.

67. CJEU, *Case C-578/08 Rhimou Chakroun v. Minister van Buitenlandse Zaken*, Judgment of 4 March 2010, par. 43.

68. CJEU, *Case C-648/11 MA v Secretary of State for the Home Department*, Judgment of 6 June 2013.

69. See Article 12 UN Convention on the Rights of the Child; Committee on the Rights, General Comment No. 12 (2009), UNICEF, *Dublin Reform: Effective Access to an asylum Procedure within Europe*, May 2016, and further reiterated in UK Upper Tribunal, *AT* and another (Article 8 ECHR – Child Refugee – Family Reunification : Eritrea) [2016] UKUT 227 (IAC), 29 February 2016.

70. CJEU, *Cimade & GISTI*.

71. For an analysis with reference to the Vienna Convention on the Law of Treaties and relevant jurisprudence, see Gregor Noll, 'Article 31' in Andreas Zimmermann (ed), *The 1951 Convention on the Status of Refugees and its 1967 Protocol – A Commentary* (OUP 2011), paras 39-51.

When interpreted in line with the object and purpose of the Treaty and by reference to additional interpretative guidance from the travaux préparatoires of the Convention, the protection of Article 31 must “be accorded to any refugee, with the exception of those who have been accorded refugee status and lawful residence in a transit State to which they can safely return.” Failure to incorporate Article 31 of the Convention into the EU asylum acquis, as indicated by the CJEU in *Qurbani*,⁷² presents a critical gap in the EU’s faithful reliance on the Convention as the “cornerstone” of the CEAS.⁷³ Yet, Member States are bound by this provision both under their international obligations and Article 18 of the Charter.

Detention should not be used in the context of responsibility allocation, except under exceptional circumstances and where alternatives to detention cannot be applied. Alternatives to detention should always be considered and used wherever possible.

Widespread use of detention, including for the purpose of implementing Dublin decisions, is an ongoing concern. The recent evaluation report issued by the European Commission of the recast Dublin Regulation confirms poor implementation of the safeguards included under Article 28 that aims to substantially curtail the possibility to apply detention in Dublin procedures. The future instrument should build on existing European case law and UNHCR guidelines and clearly reflect the presumption against the detention of asylum seekers as laid down in international human rights law by defining strict rules regulating both detention and other regimes leading to deprivation of free movement.⁷⁴

The decision to detain may only be resorted to after an individual assessment when it is deemed to be necessary, reasonable in all circumstances and proportionate to a legitimate purpose. In ECRE’s view, a responsibility allocation mechanism that is rights based and takes into account links of asylum seekers with specific Member States would automatically increase the cooperation of asylum seekers and would considerably reduce the need for using detention for the functioning of the system.⁷⁵ Therefore, the use of detention in a reformed Dublin system should only be allowed as an exceptional measure of last resort and should be strictly limited to the protection of the public order, and in case of a significant risk of non-compliance with the decision allocating responsibility to a particular Member State. Such concepts should be narrowly defined in line with the CJEU’s interpretation of the notion of public order in the free movement of EU citizens in order to avoid arbitrary practices.⁷⁶ The detention of unaccompanied children and people with special protection and reception needs should be prohibited, as detention can never be in their best interest and detention should never be justified by the lack of places in regular reception facilities. In the unlikely event of detention being necessary and proportionate in the context of responsibility allocation, the special circumstances and needs of asylum seekers must be taken into account.

The duration should be strictly limited and its necessity regularly assessed by a judicial authority. ECRE welcomes the provisions of the legislative proposal aiming at reducing substantially the duration of the detention in the context of Dublin transfers.

Detention regimes must be humane and respect human dignity and must fully comply with the guarantees and conditions generally laid down for the detention of asylum seekers under international and EU instruments and particular under the recast Reception Conditions Directive.⁷⁷

No transfer may occur in a case where procedural and reception conditions in the country of destination may breach the provisions of the ECHR

The future instrument should include measures that transfers are only carried out in accordance with the principle of non-refoulement and with the legacy of the *Tarakhel* judgment. Article 3(2) of the recast Regulation has drawn inspiration from the narrow interpretation of the “systemic deficiencies” included under the CJEU’s

72. CJEU, Case C-481/13 *Qurbani*, Judgment of 17 July 2014.

73. CJEU, Case C-604/12 *H.N. v Minister of Justice, Equality and Law Reform*, Judgment of 8 May 2014, par. 27.

74. AIDA, *Wrong counts and closing doors: The reception of refugees and asylum seekers in Europe*, March 2016.

75. The only pertinent ground for detention beyond Article 5(1)(f) ECHR is Article 5(1)(b), allowing detention “in order to secure the fulfilment of any obligation prescribed by law”. This ground is subject to strict conditions: ECRE, *The Legality of Detention of Asylum Seekers under the Dublin III Regulation*, AIDA Legal Briefing No 1, June 2015.

76. CJEU, Case C373/13 *H. T. v Land Baden-Württemberg*, Judgment of 24 June 2015.

77. Article 28(4) Dublin III Regulation, citing Articles 9, 10, 11 recast Reception Conditions Directive. This entails that the detention provisions of the recast Reception Conditions Regulation have to be complied with by the UK, Ireland, Denmark and the Dublin Associated States, who are not otherwise bound by the Regulation.

ruling in *NS v Secretary of State for the Home Department*.⁷⁸ The future instrument should go beyond the existing provisions of the Dublin Regulation and reflect the current state of jurisprudence as the existence of a risk needs to be assessed individually, based on the Court's interpretation of Article 3 ECHR, rather than on a precondition of "systemic deficiencies". Further, any transfer should be in compliance with the right to privacy and family life as stated by domestic courts.⁷⁹

The future instrument should include robust procedural guarantees in line with international instruments, the EU Charter, ECHR and the current *acquis*

In order for Member States to adhere to their obligation to individually and rigorously assess an application, the asylum seeker has to be fully aware of the legal implications of the Dublin system, receive timely information on its application in their individual cases and have an opportunity to present counter arguments. Concretely, this implies the following obligations for the Member States:

First, Member States must provide information to applicants subject to Dublin procedures of their rights and of the relevant criteria and procedure for the determination of the country, which will process their claim.⁸⁰

Second, Member States have a duty to conduct a personal interview with the applicant,⁸¹ to allow him or her to be heard and present his or her views on the allocation of responsibility to another country in line with Article 41 of the EU Charter. The personal interview is an essential step to identify specific connections of the applicant with a particular Member State (see above) as well as the presence of family members. Applicants must have access to legal assistance and to representation free of charge throughout all the stages of the procedure in order to ensure effective legal protection of the applicant.

In line with current provisions of the recast Asylum Procedures Directive, in particular Articles 22 and 23, applicants should be given the opportunity to consult in an effective manner a legal adviser or other counsellor.⁸² Such person must have access to the applicant for the purpose of consultation, including in closed areas such as detention facilities.

The right to an effective remedy is central to the legal architecture of the mechanism and it should provide the possibility to appeal against the determination of the Member State responsible.⁸³ The appeal should include an automatic right to remain on the territory of the Member state pending the outcome of the remedy. At minimum, and in line with ECHR case law, the remedy against an inadmissibility decision must have an automatic suspensive effect in law and in practice, where the applicant has an arguable claim of a risk of ill-treatment, upon return or of arbitrary deportation from country of return in accordance with Articles 3 and 13 ECHR.⁸⁴ According to recent decisions of the CJEU,⁸⁵ the right to an effective remedy also includes the right to appeal against the incorrect application of the hierarchy criteria.

3. A 'MATCHING' SYSTEM

The meaningful links to a particular Member State (or 'connection criteria') and the individual circumstances

78. "Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible. Where the transfer cannot be made pursuant to this paragraph to any Member State designated on the basis of the criteria set out in Chapter III or to the first Member State with which the application was lodged, the determining Member State shall become the Member State responsible."

79. UK Court of Appeal, *CK (Afghanistan) v. Secretary of State for the Home Department* [2016] EWCA Civ 166, 22 March 2016: "The absence of an individual right of the applicant to challenge the determination of the State responsible to examine their asylum claim on Dublin II grounds does not prohibit the autonomous application of ECHR Article 8 to decisions to remove persons from one Member State to another."

80. Article 4 Dublin III Regulation. See Italy, Council of State, Decision N° RG-2655/2015, 17 May 2015, available [here](#).

81. Article 5 Dublin III Regulation.

82. This is confirmed by the CJEU in Cases C-155/15 *Karim* and C-63/15 *Ghezelbash*, Judgments of 7 June 2016.

83. Article 27 Dublin III Regulation See Constantin Hruschka and Seraina Nufer, 'Strengthening effective remedies for asylum seekers in the Dublin procedure: from Abdullahi to Ghezelbash and Karim', 23 June 2016, available [here](#).

84. ECHR, *M.S.S. v. Belgium and Greece*, par. 293.

85. CJEU, Cases C-155/15 *Karim* and C-63/15 *Ghezelbash*, Judgments of 7 June 2016.

of the asylum seeker must be the starting points for allocating responsibility for examining asylum applications lodged in the EU, which should be centrally managed.

The principle of family unity shall always be the first criteria for allocating responsibility. In the absence of family links, the system would take as much as possible into consideration meaningful links to (a) specific Member State(s), such as social and cultural links. The consideration of meaningful links would help to strike a fair balance between the protection and integration perspectives of the applicants on the one hand; and the need to have a pragmatic system that is manageable by national authorities on the other hand. The existence of “meaningful links” could be assessed on the basis of personal links, but also by taking into account the presence of refugee communities in a particular Member State(s). This approach would allow national administrations to make a rational use of expertise and resources (in particular, pools of interpreters, cultural mediators, and COI expertise).

From the perspective of the applicants, the European Court of Human Rights has acknowledged in the case of *M.S.S. v. Belgium and Greece* that asylum seekers are “members of a particularly underprivileged and vulnerable population group in need of special protection”. The individual circumstances and special needs of the individuals should be taken into consideration in the responsibility-allocation criteria and match such cases with Member States with adequate reception services. The system could draw inspiration from existing resettlement selection procedures where emergency cases and most vulnerable persons are prioritised.⁸⁶ In case where there are no meaningful links or special needs, the responsibility should be allocated through a distribution key.

Provided that key procedural safeguards are in place, a distribution key may be a concrete tool to operationalize this system and to assess the relative share and reception capacities of each Member State. However, the distribution system should never equate to a blind mechanical dispersal of asylum seekers across the EU, as ECRE considers this option to be neither realistic nor sustainable. Given current disparities in the quality of the protection systems in the Member States, such a mechanical EU wide dispersal system would not only result in even higher risks of human rights violations, as is currently the case under the Dublin Regulation, it would also fail to resolve the problem of irregular secondary movements. Further, the allocation of responsibility in one MS should not prevent free movement of beneficiaries of international protection once the asylum procedure has been successfully completed (see *infra*).

The responsibility allocation system should match asylum seekers with Member States based on meaningful links and special needs of the applicant with a particular Member State and Member States’ absorption capacity, including with regard to the applicant’s special needs.

The asylum seeker’s meaningful link with a Member State would have to be accommodated insofar as the relative share of that Member State according to a distribution key has not been reached already at the moment of the decision on the responsible Member State. It is acknowledged that the country ultimately responsible for processing the claim may not coincide with the applicant’s preferred destination. Although it is challenging to build trust and convince asylum seekers to change their migration trajectories, the consideration of profile and background of asylum seekers could help to overcome this problem. The information should be provided at an early stage after arrival in the EU by independent organizations, and where possible, with the assistance of cultural mediators. No responsibility for an asylum applicant can be allocated to a Member State where this would result in the asylum seeker’s physical or mental integrity being at risk. Therefore, the assessment of a State’s capacity to adequately address an asylum seeker’s special needs as guaranteed in the EU asylum acquis, should be part of the matching system as further detailed below. Such a system could be operated through a form, allowing for the applicant to indicate existing meaningful links with a specific Member States and special needs.

The matching process should also take into consideration both quantitative (GDP and size of the population) and qualitative factors. In relation to the latter, particular attention should be paid to the presence of refugee communities in a particular Member State, the capacity of a country to provide adequate reception conditions and to deliver quality decision-making. The situation in each Member State must be thoroughly assessed at regular intervals taking into account all available sources, including information from NGOs and UNHCR, along the lines of the permanent performance monitoring system as foreseen in the Commission’s proposal for an EU Asylum Agency, further amended as recommended by ECRE.⁸⁷ While the matching system should take into consideration objective limitations in the absorption capacities, the matching system criteria should always be applied in a manner that is fully compatible with the 1951 Convention, the EU Charter and the ECHR.

86. ICMC, *Welcome to Europe - A comprehensive Guide to Resettlement*, July 2013; UNHCR, *Resettlement Handbook*, 2011.

87. ECRE, *Comments on the Commission Proposal for a Regulation on the European Union Agency for Asylum*, July 2016, available [here](#).

Recent discriminatory practice developed under the relocation schemes by governments such as Slovakia, Poland and the Czech Republic, aiming at selecting refugees on the basis of their religious background, is nothing less than the expression of a prohibitive preference and should be ruled out.⁸⁸

As no matching system could ever be perfect, Member States should still be able to derogate from the responsibility allocation criteria in order to take into consideration humanitarian needs of the applicant or to prevent human rights violations. As suggested by academic experts and practitioners, the system should allow derogation in case of massive influx and be replaced by a consent-based humanitarian evacuation program, similar to the one deployed during the Kosovo crisis in 1999.⁸⁹

In ECRE's view, the establishment of a centralised system at EU level could ensure the effective management of a matching system. In the short term, this task could be assigned to the future European Asylum Agency – provided that all safeguards for its independence are in place.⁹⁰ A precondition for the functioning of a centralised mechanism is effective and swift registration of asylum applications in all EU Member States in a common registration system. Provided it is performed in compliance with fundamental rights and respects the applicant's right to liberty, an orderly and non-discriminatory registration of new entrants in the EU may contribute to creating more legal certainty and swift referral to the appropriate procedures. This should also enable more effective identification of vulnerabilities and special needs. Building on existing EASO tools, vulnerability criteria should be standardized and harmonized to ensure consistency in the registration and identification of applicants and target, in particular assistance to persons with specific needs, both in the country where the application is made and in the final destination country.⁹¹

In this regard, ECRE warns that the current hotspot approach should not be used as a model, as it does not ensure effective access to quality legal assistance and information, fails to ensure effective access to the asylum procedure and has been turned into a regime of systematic detention.⁹² In addition, by implementing the hotspot approach only in countries of first arrival in the EU, without effective intra-EU solidarity mechanism being in place, it has, in particular, contributed to an overburdening of the Greek asylum system.

Finally, bearing in mind existing disparities between national systems, an equitable distribution of asylum seekers should be seen as an incremental process. In the short term, the system would only be enforceable with the adoption of a 'compensation fund' in order to mitigate uneven absorption capacities and ensure that the system complies with high-level reception standards. The compensation fund would aim at further supporting Member States which would host the highest numbers. It should never equate with an opting-out mechanism.

CHAPTER 3 - ENHANCING THE SCOPE AND QUALITY OF PROTECTION

As it has been acknowledged by numerous studies, the quality and capacity of asylum systems, as well as the level of procedural safeguards widely differ across the EU.⁹³

ECRE has long advocated for greater convergence of national practice in order to improve the resilience and quality of national asylum systems.⁹⁴ In the long term, a system of centralised EU decision-making could be envisaged as the ultimate step to ensure a fully harmonised CEAS, provided the necessary safeguards are in place to secure a protection-centred process. While, in the short term, this option remains unrealistic both from a legal and a political point of view, further progress in the harmonisation of the national systems could be achieved in the mid-term through a reinforced EU Asylum Agency and the development of supranational tools.

88. See Financial Times, 'Poland favours Christian Refugees from Syria', August 21 2015; UNHCR, Building on the Lessons Learned to Make the Relocation Schemes Work More Effectively, January 2016.

89. See European Parliament, The Reform of the Dublin III Regulation, June 2016, p.7.

90. See on this issue, ECRE, Comments on the Commission Proposal for a Regulation on the European Union Agency, July 2016.

91. EASO, Tool for Identification of Persons with Special Needs (ISPN Tool), available [here](#).

92. See ECRE, Dutch Council for Refugees, CIR, Greek Council for Refugees, Pro Asyl, The implementation of the Hotspots in Italy and Greece. A Study. Available [here](#)

93. See EASO, Annual Report on the Situation of Asylum in the European Union 2014, July 2015; AIDA, Common European Asylum System at a turning point: refugees in Europe caught in solidarity crisis, Annual Report 2014/2015.

94. ECRE, Enhancing intra-EU solidarity tools to improve quality and fundamental rights protection in the Common European Asylum System, January 2013, available [here](#).

1. STRENGTHENING QUALITY AND RESILIENCE OF ASYLUM SYSTEMS IN THE EU+ COUNTRIES

As already mentioned under Chapter 2, the underlying principle of a sustainable CEAS is the assumption that all EU Member States offer an equivalent level of protection. The principle of mutual trust is the rationale for allocating the responsibility for the examination of a claim to one single Member State. Yet, as acknowledged by all stakeholders, this principle remains a legal fiction within the remit of the EU+ territory. Recognition rates for the same nationalities continue to vary widely between EU Member States, while quality and capacity of reception infrastructure, as well as the level of procedural safeguards, widely differ across the EU.⁹⁵ In this regard, it is noted that the overall protection rate has considerably increased across the EU + recently. According to EASO, as of July 2016, the share of positive decisions was 60 % of all first-instance decisions issued in the EU+. Yet, the recognition rates by nationalities continue to greatly vary across the EU, with the exception of Syrians.⁹⁶ Discrepancies between the recognition rates are particularly acute for Iraqis (between 21% and 98%), Afghans (between 14% and 96%), and the Western Balkans (between 0% and 55%).⁹⁷

Whilst building an equivalent level of protection can only be gradually achieved through short, mid-term and long-term efforts, the immediate priority for remedying the inherent flaws of the EU's common policy on asylum is securing substantial financial investments. Most of the disparities today are primarily linked to a lack of adequate implementation of existing standards but also to a critical lack of financial investment, as already outlined under the Chapter 1.

In the mid-term, better compliance with the *acquis* should be achieved through a major strengthening of existing mechanisms for quality monitoring of national asylum systems and enforcement of implementation of the EU asylum *acquis* in order to ensure a high level of protection throughout the EU. In this regard, the legislative proposal for a European Asylum Agency includes some positive elements. The Agency is entrusted with a bigger role in the monitoring and assessment of the level of implementation of the standards laid down in the CEAS. It envisages a specific monitoring mechanism of the implementation of all aspects of the CEAS, the compliance with operational standards, the capacities of Member States and financial resources, including of the judicial system. Member States should take an ambitious approach and ultimately agree to establish a permanent health and quality check of the CEAS through a well-resourced early warning mechanism that allows for in-depth monitoring of all aspects of the CEAS. This mechanism would be able to trigger remedial actions (including operational assistance and capacity building) where indicators show a lack of capacity or quality in a Member State's asylum practice.⁹⁸

Comprehensive, reliable and up-to-date data collection from all available sources on the practice of Member States is key in order to ensure that the permanent health and quality check presents a complete picture of realities 'on the ground'. While Member States already have a primary responsibility to provide much of the required information that would be necessary, the permanent health and quality check must rely on the full range of sources. The inclusion of information from all stakeholders, including human rights monitoring carried out by the Council of Europe and the UN Human Rights Council, UNHCR and NGOs is key to such monitoring being able to allow for a proper assessment of the capacity and quality of the system. As already mentioned under Chapter 2, the level of implementation of the EU asylum standards and Member States' compliance with such standards must be taken into account in the operation of the new responsibility sharing mechanism and in particular the distribution key.

UNHCR should be part of the quality monitoring, which should not be limited to the quality of protection granted but all aspects of the CEAS. Quality assessment of Member States' asylum systems through Quality Assessment Teams established within the new EU Asylum Agency, involving independent experts and with a key role for UNHCR, must be an integral part of the monitoring mechanism. Such teams should carry out on-the-spot checks in Member States on a regular basis and whenever the indicators establish a need for such checks. With regard to the quality of individual decision-making in Member States, this should include the review of samples of individual asylum decisions taken at the various stages of the asylum procedure on the basis of UNHCR's quality assessment methodology. Relevant indicators must be developed with regard to such information in order to enable EU institutions to swiftly identify where the protection and quality gaps are and to launch the appropriate remedial action.

95. See EASO, Annual Report on the Situation of Asylum in the European Union 2015, July 2016, available [here](#); Common European Asylum System at a turning point: refugees in Europe caught in solidarity crisis, Annual Report 2014/2015.

96. Latest statistics available [here](#). Out of the 624,160 decisions issued in 2015, 327,870 were positive, marking an overall recognition rate at first instance of 53%, which is six percentage points higher than the recognition rate from the previous year (47%), and 18 percentage points higher than in 2013: EASO, Annual Report 2015, July 2016.

97. See EASO, Annual Report 2015, 19. Recognition rates for Iraqi applicants varied significantly (from 21% to 98%) according to EASO.

98. ECRE, Enhancing intra-EU solidarity tools to improve quality and fundamental rights protection in the Common European Asylum System, January 2013.

The proposed extended role for EASO in shaping material EU asylum law, makes the issue of the Agency's independence and governance structure a crucial one for the future of the CEAS. A well-resourced, transparent and independent agency will be able to play a substantial role in the proper functioning of the CEAS, including a fair responsibility-sharing system.⁹⁹ It is of crucial importance to clarify the role and responsibilities of the experts deployed by the Agency and to create adequate accountability mechanisms. The Agency's role should clearly aim at assisting Member States, by building capacities over the longer term, and not taking over responsibilities. The fact that the Agency has no protection mandate as such, is of great concern, given the increasing role it plays in the design and implementation of asylum law and policy.

Another key element for strengthening monitoring mechanisms would be for the Commission to further step up its efforts in launching infringement procedures for incorrect application of EU asylum law, in addition to procedures launched on the basis of non-communication of national transposition measures. Increased solidarity should not create disincentives for individual Member States from complying with their obligations under the asylum *acquis* and international human rights and refugee law. The Commission should therefore reprioritise its monitoring role and allocate sufficient resources to enforcing individual EU Member State's compliance with EU law. This would further minimise the risk of States deliberately underperforming in order to trigger solidarity measures.

In the longer term, further harmonization should address remaining protection gaps as well as the overall complexity of the EU asylum *acquis*, for instance through the adoption of an asylum code, as has been suggested by the Commission.¹⁰⁰ In particular, the reform of the *acquis* should be an opportunity to address structural weaknesses of the system and to homogenize the procedural and reception standards towards a higher level of protection. As mentioned above, better harmonization of procedural and reception standards is a precondition of a successful and inclusive reform of the Dublin system. However, further harmonization should not happen before existing standards have fully embedded in national systems as most EU+ countries have recently been through important reforms of their asylum systems. The need for further legislative reform should be tested against the resilience of the system. Any process of reform should be based on a thorough evaluation of the existing instruments, which is absent with respect to the Commission proposals for reforming the existing *acquis*. The evaluation should be informed by reports published by civil society organisations as well as the outcome of quality initiatives implemented by national authorities, with the support of UNHCR.

2. ENSURING A FAIR AND EFFICIENT ASYLUM PROCEDURE BASED ON FRONTLOADING

ECRE has long advocated for the frontloading of asylum systems, the policy of investing in the quality of decision making at the first instance through the provision of sufficient resources for the competent authorities, training of their staff as well as key procedural guarantees to enable applicants to submit all elements of their claims at the earliest possible stage, and, in particular, access to free legal assistance.¹⁰¹ Such an approach has been partly embraced in the EU harmonization process, but is at the same time fundamentally undermined by its obsession with the speedy examination of asylum applications at the expense of procedural fairness and respect for applicants' fundamental rights.

While a frontloading approach entails efficiency gains at all stages of the procedure, and therefore may eventually result in overall shorter processing times, it is important to emphasize that frontloading is not about acceleration of the asylum procedure for its own sake. A rapid and effective decision making process is in the interest of both the applicants and Member States, provided that applicants for international protection have effective access to procedural guarantees to ensure that their fundamental rights are, in practice, fully respected.

In an EU context, the recast EU Asylum Procedures Directive, complemented by the procedural safeguards derived from the EU Charter of Fundamental Rights and the jurisprudence of the EU Courts, establish an important set of procedural safeguards to be observed by States when examining applications for international protection. ECRE has commented at length on existing and proposed EU standards relating to asylum procedures conducted in EU Member States and in other publications, including on the use of questionable safe country concepts that undermine a thorough and unbiased individual assessment of an individual's need

99. ECRE, ECRE Comments on the Commission Proposal for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 July 2016

100. European Commission, European Agenda on Migration, p.17.

101. ECRE, The Way Forward, Europe's role in the global refugee protection system: Towards Fair and Efficient Asylum Systems in Europe, September 2005, available [here](#), p.38.

for international protection. In this paper, ECRE reiterates what it considers the key procedural safeguards that need to be in place in order to ensure applicants' access to a frontloaded asylum procedure that combines fairness with efficiency and effectively protects them from arbitrary refoulement.

A rest and preparation period before the first personal interview

Asylum seekers arriving in the host country often do so after a long and cumbersome journey. ECRE has long advocated for States to provide applicants with a rest and preparation period in order to allow asylum seekers to come to terms with their new situation first and to enable them to contact a professional legal advisor or NGO to prepare for the personal interview. Such a period could also be used to obtain further documentation and evidence substantiating their claim for international protection and to plan a medical examination in case of torture victims or victims of other serious violence. Currently, such a rest and preparation period is already provided to asylum seekers arriving in the Netherlands. In ECRE's view, a rest and preparation period should ideally last four weeks in order to fully explore its potential. It should be considered as an integral part of a policy of frontloading asylum systems and building trust in the system for applicants. In ECRE's view, while a rest and preparation period may prolong the asylum procedure at the initial stage, if accompanied by quality legal assistance and accurate information, it results in a much smoother process at first instance, as asylum seekers are better prepared and understand what is expected from them and asylum authorities are able to take better informed decisions. Improved quality of the decision-making process at the first instance may reduce the need for lodging appeals, and where such appeals are made, it enables courts and tribunals to process appeals in a much more efficient way.

In case an application is subject to a Dublin procedure, a shorter rest and preparation period could be considered, aimed primarily at informing applicants of the procedure in accordance with Member States' obligations under the Dublin system; amended, as suggested, by ECRE.

Access to independent and accurate information

Access by asylum seekers to independent and accurate information about the asylum procedure and their rights and obligations is a key aspect of a fair asylum process. Various tools have been developed by national administrations, as well as NGOs, to provide asylum seekers with the necessary information. Experience has shown that traditional forms of information provision, such as leaflets or brochures, often have limited impact and that information provided through social media or web-based tools, formulated in non-technical language, may be more effective and reach more people. Moreover, in particular, in situations of large-scale arrivals and where multiple actors, including EU agencies are involved in the management of mixed flows, coordination of information provision is essential in order to avoid potential asylum seekers receiving inaccurate, confusing or even conflicting information from various actors. Such information should be provided in the language of the applicant and preferably by non-governmental actors, including refugee communities present in the host state, in order to increase, as much as possible, trust of the applicant or potential applicant in the system.

A personal interview supported by qualified interpretation

The central role of the personal interview to the examination of an application for international protection is now firmly rooted in EU asylum law and in the practice of many EU Member States. In addition to country of origin information, applicant's oral statements and declarations are, in a significant number of cases, the only elements substantiating the claim. As a result, the quality of the personal interview is crucial to the outcome of the asylum procedure. Therefore, it is essential that personal interviews are conducted by sufficiently qualified and trained staff and that qualified interpretation is made available by the authorities. Upon request, applicants should be interviewed by a case-worker and interpreter of the same sex. Applicants should always have the right to be assisted by their lawyer, legal advisor or a person in which they have confidence.

Given its critical importance in the asylum process, interviews should be audio-recorded, with the consent of the applicant, in addition to a verbatim transcript of the interview. The combination of both tools precludes any discussion or debate about what has been said during the interview and is beneficial for both the applicant and determining authority. This allows the determining authority to make a first instance decision based on a correct and full understanding of the applicant's statement.

An applicant should have an opportunity to provide additional information and clarifications within a reasonable time after the personal interview and before a first instance decision is made. In principle, all efforts should be made to conduct personal interviews in the physical presence of the interviewer, applicant, legal adviser and interpreter. Remote interviewing and interpretation should only be used as a last resort. Visual recording of personal interviews should not be used as it may be intimidating for applicants to speak about their past experiences in front of a camera and has no proven added value for the assessment of the claim.

Access to quality free legal assistance at all stages of the asylum procedure

Quality legal assistance and representation at all stages of the asylum procedure is an essential safeguard to ensure the asylum applicant's access to justice and the overall fairness and efficiency of the asylum process. By definition, asylum applicants find themselves in a disadvantaged position in the asylum process as they are unfamiliar with the legal framework and in most cases do not speak the language in which the procedure is conducted. In particular, where applications are processed in expedited procedures, professional and independent legal assistance and representation is indispensable to navigate applicants for international protection through the process, to assert their rights under the EU asylum acquis and to ensure that all aspects of their case is fully taken into account by asylum authorities.

The importance of applicant's effective access to legal assistance and representation in protecting individual's rights under the ECHR and the EU Charter of Fundamental Rights is also increasingly highlighted in the jurisprudence of the ECtHR and the CJEU. In a number of cases, the ECtHR has held that the lack of legal assistance and representation can undermine the effectiveness of the remedy under Article 13 ECHR to the point that it becomes inaccessible.¹⁰²

From a frontloading perspective, it is essential that quality legal assistance is available early in the process and, if possible, even before people make an application. Providing legal assistance from the start, and during a rest-and preparation period, increases confidence of all parties involved in the asylum process, improves the quality of decision-making and is therefore beneficial to both asylum seekers and asylum authorities.¹⁰³

Free legal assistance should be available to all applicants unless they have the financial means to obtain paid legal advice. Access to free legal assistance should never be made conditional on the likelihood of the applicant being granted international protection. ECRE opposes the use of a merits test in asylum cases as it constitutes an exercise in trying to predict the outcome of an application for international protection based on a preliminary and incomplete pre-assessment of the merits of the case. Consequently, they may result in depriving asylum applicants of an essential procedural guarantee and increases the risk of violations of the principle of non refoulement as a result of the wrongful denial of international protection.

Access to an effective remedy with automatic suspensive effect

The right to an effective remedy is a fundamental safeguard to ensuring protection from refoulement and therefore an inherent part of a fair and efficient asylum procedure. In accordance with a proper reading of ECtHR and CJEU jurisprudence and the EU Charter of Fundamental Rights, applicants for international protection must have access to an appeal before an independent and impartial court or tribunal with automatic suspensive effect and that allows for a rigorous and ex nunc examination of the facts and points of law.

Given the complexity of asylum law, and the specificity of eligibility assessments, which often become difficult exercises involving the application of abstract human rights norms to individual cases, first level appeal courts and tribunals should be specialised asylum courts. Conferring such competence to non-specialised courts or tribunals should only be considered where specialised chambers can be established enabling those courts to develop the necessary expertise in asylum law. In light of the importance of oral statements and declarations in the assessment of a person's international protection needs, asylum seekers should have the opportunity of an oral hearing before the court or tribunal. Applicants should have a reasonable time-limit of at least 30 calendar days after notification of the negative first instance decision to lodge the appeal. Such time-limit should start to run as of the moment a legal advisor or counsellor is appointed to represent the applicant, in case a request

102. In the case of *M.S.S. v. Belgium and Greece*, for instance, the Court found a violation of Article 13 in conjunction with Article 3 ECHR *inter alia* because the applicant had no practical means of paying a lawyer and received no information on organisations offering legal assistance, which was considered essential in securing access to the asylum procedure in Greece: ECtHR, *M.S.S. v. Belgium and Greece*, par. 319.

103. See Bridget Anderson and Sue Conlan, *Providing Protection. Access to early legal advice for asylum seekers*, 2014.

for legal assistance is made only after notification of the negative decision.

A full and *ex nunc* assessment of facts and points of law implies that the material point in time is that of the court's consideration of the case. This means that the scrutiny by the national court or tribunal cannot be limited to an assessment of the evidence that was at the disposal at the time of the decision of the first instance authority but must include new evidence that has been obtained by the court either *proprio motu* or has been submitted by the applicant or the authorities in the course of the proceedings before the court.¹⁰⁴ Therefore, the competence of the court or tribunal to review the first instance decision can under no circumstances be limited to a summary or marginal scrutiny of the facts of the case.

Asylum seekers must be provided with an automatic right to remain on the territory during the time limit within which the right to an effective remedy must be exercised and pending the outcome of the remedy in case the applicant exercises such a right. The suspensive effect of the appeal should not be made conditional on the applicant lodging a separate request to the court on the right to remain pending the appeal, but granted automatically. This reduces the risk of violations of the principle of non-refoulement and avoids additional burdens on already stretched judicial systems as asylum seekers are not required to launch a separate request on their right to remain on the territory and courts are not required to address this issue separately. Moreover, the suspensive effect of the appeal, and therefore the effectiveness of the remedy in practice would depend less on factors that may be beyond the asylum seeker's control, such as access to and availability of adequate information and quality legal assistance.

3. SHARING EXPERTISE TO IMPROVE QUALITY AND FAIRNESS OF THE CEAS

As long as the competence for taking decisions on individual applications for international protection remains with the national authorities of Member States, practical cooperation between asylum authorities across Europe will be key in enhancing harmonisation and convergence of decision-making in the field of asylum. Together with substantial financial investments, enhanced quality of decision-making should be achieved by pooling resources and sharing expertise. Bearing in mind current discussions on better cooperation within the framework of the new EU Asylum Agency, the following paragraph outlines suggestions on how to improve the quality of decision-making in accordance with international refugee and human rights law.

Training

As the level of knowledge of international refugee and human rights law, as well as specific skills needed to conduct interviews with asylum seekers for caseworkers, and considering that judges differ enormously across the EU, training is crucial to increase both convergence and quality of decision-making. The quality of the existing EASO Training Curriculum is generally acknowledged, in particular as the training modules have been developed with the support and involvement of UNHCR, practitioners and non-governmental and academic experts. However, more can be done to further increase the quality and accessibility of this core training tool, throughout the EU.

ECRE notes that the number of stakeholders trained has increased exponentially in the aftermath of the crisis. The increasing deployment of Member States' experts through asylum support teams, and their enhanced role in the individual decision-making process of the host Member States, makes the requirement for training even more important.

ECRE also welcomes the dynamic approach taken by EASO in identifying training needs on a regular basis, in closed consultation with national stakeholders. Yet, so far, little progress has been made for providing adequate training for interpreters. In view of the key role of interpreters in asylum procedures, specific training for both interpreters and caseworkers should be developed, focussing on the role of and interaction with the interpreter in asylum interviews.¹⁰⁵ A training manual containing practical guidelines for interpreters and case-workers on the interpreter's role in asylum interviews and his/her interaction with the interviewer and the asylum seeker could be a useful tool in promoting a common understanding of the interpreter's role across the EU. In addition, guidelines

104. "Even though the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive and it is therefore necessary to take into account information that has come to light after the final decision taken by the domestic authorities": ECtHR, *Salah Sheekh v. the Netherlands*, Application no. 1948/04, Judgment of 11 January 2007, par. 136.

105. On problems relating to existing practice, see UNHCR, *Improving Asylum Procedures: Comparative analysis and recommendations for law and practice*, March 2010, available [here](#).

based on existing best practice, relating to the use and content of a code of conduct for interpreters during asylum interviews could be developed by the Agency in close cooperation with UNHCR and expert NGOs,.

Country of Origin Information

Reliable and up-to-date country of origin information is essential for quality decision-making and the establishment of any robust status determination process and is central to the credibility of asylum procedures. However, it is to be deplored that today - and despite development of common tools by EASO - the quality, availability and accessibility of COI in practice still continues to vary enormously among EU Member States, with some Member States having very limited resources for producing and accessing COI, and other Member States implementing very sophisticated systems. Although the development of centralized tools on COI seems to be a logical step, from a harmonisation view point, entrusting an EU Agency with the power to impose guidance on the way in which country of origin information needs to be interpreted and applied in individual cases, as envisaged for the EU Asylum Agency, requires certain guarantees from an international protection perspective.

Firstly, in order to enhance the objective and independent nature of the Agency's work in the area of country of origin information, its internal procedure for adopting such common analysis should present the necessary guarantees to ensure its objectivity and impartiality. In the interest of ensuring such impartiality and objectivity, a panel of independent experts on COI should be established, consisting of leading academics, representatives of expert NGOs, representatives of the judiciary and UNHCR.. This independent expert panel would have the task of providing advice to the new EU Asylum Agency on matters of methodology, have a formal role in reviewing COI-reports and assessing its sources, prior to publication, so as to ensure that they meet the highest standard of quality and be involved in reviewing and updating the training material relating to COI. It should also be responsible for identifying additional sources on the human rights situation in the country concerned as well as making recommendations for the general improvement of the report as regards structure and general approach. Such a peer review system would also be useful to assist in monitoring the relevance and impact of its COI reports in individual decision-making on asylum applications.

Secondly, the possibility for an EU Agency to develop common analysis, and the obligation on Member States to take such analysis into account in the processing of asylum applications, should never undermine the authority of UNHCR eligibility guidelines on specific countries of origin. These guidelines promote the accurate interpretation and application of criteria for refugee status in line with UNHCR's supervisory responsibility, as contained in paragraph 8 of its Statute in conjunction with Article 35 of the 1951 Convention and Article II of its 1967 Protocol and based on its longstanding expertise in matters of eligibility and refugee status determination. In order to avoid any inconsistent or conflicting guidance being provided to Member States by different actors, the primacy of the UNHCR eligibility guidelines, over the Agency's common analysis on a specific country of origin, should clearly be established by the legal framework governing the new Agency.

Finally, transparency and accessibility is key to ensuring equality of arms in the asylum procedure. In light of Article 41 EUCFR, the accessibility, by asylum seekers and their legal representative, of the COI portal managed by the EU Asylum Agency should be further enhanced. Currently, only COI that is already publicly available from national governmental sources or from EU institutions, is publicly accessible through the COI Portal. Other information that may be highly relevant to individual cases, such as intelligence obtained through specific queries to diplomatic representations or European delegations is only accessible through the portal by accredited COI experts from national asylum authorities. Access to the latter information will depend on national legislative and administrative practice. While reasons of confidentiality and protection of the source of information may require such information to be accessed by password only, such information should be shared with asylum seekers and their legal advisors in an anonymised form, wherever this is used by national asylum authorities in their individual cases. Further guidelines on guaranteeing equality of arms between the asylum authorities and applicants as regards the use of COI collected and stored via the EU Asylum Agency COI Portal should be elaborated in close cooperation with legal practitioners and NGO COI experts.

Joint processing

The joint processing of asylum applications lodged in one of the EU Member States would, without doubt, constitute one of the most advanced ways of sharing expertise in the field of asylum. As it relates to the core function of the asylum procedure, it raises questions as to the respective responsibilities of the Member State hosting joint processing activities, of participating case-workers or other staff from participating Member States and the EU Agency responsible for asylum.

In the absence of a clear definition under EU law, ECRE refers to joint processing as any activity which comprises, as a minimum, the active involvement of experts from other EU Member States in the examination of asylum applications lodged in a Member State. The maximum option of joint processing would consist of individual decisions being taken at EU level by a supranational refugee status determining authority¹⁰⁶. Within the context of the EU, the overall objective of joint processing must be to increase the quality of decision-making and facilitate access to protection in the EU for those fleeing persecution and other serious human rights violations. Although joint processing might be a critical tool in relieving a Member State, whose asylum system is under acute pressure, mere efficiency arguments can never suffice as a basis for launching any model of joint processing.

First and foremost, a joint processing operation requires a clear division of tasks between the various actors in the asylum system of the Member State hosting asylum support teams. Recent experience in Greece shows that the multiplication of national and international actors involved in the asylum system, including with regard to the provision of information or registration, has certainly not contributed to a more transparent process from the perspective of those seeking international protection. On the contrary, NGO reports on the asylum system in Greece have demonstrated that, notwithstanding the development of various information tools, including by EASO, asylum seekers are generally ill-informed about their rights and obligations during the asylum procedure and are often very confused about the respective roles and responsibilities of national administrations and EU agencies such as EASO and Frontex.¹⁰⁷

Secondly, ECRE considers that any joint processing model is only acceptable if it is operated fully in compliance with the Refugee Convention and other international human rights treaties as well as rights under the EU Charter on Fundamental Rights, in particular Article 18. It must guarantee the full set of procedural guarantees as established in international and EU law and jurisprudence, including the right to a personal interview, access to free legal assistance and representation and an effective remedy. It must ensure adequate reception conditions pending the examination of the asylum claim as required under international and EU standards. Any joint processing must always take place physically on EU territory.

Thirdly, ECRE opposes any model of joint processing that would imply detention of asylum seekers. It also rejects in principle forced relocation of asylum seekers or persons granted international protection within the EU.

Fourthly, joint processing should be the subject of thorough and independent public evaluation of its impact on the quality of asylum procedures and outcomes of individual asylum procedures. While pilot projects have been carried out for the purpose of testing various joint processing models within the framework of EASO, the joint processing activities carried out in Greece as part of the implementation of the implementation of the EU-Turkey Statement, constitute the first operational use of joint processing at a significant scale with immediate impact on the outcome of the individual applications for international protection concerned. Before further mainstreaming the model of joint processing used in the Greek context, which included a far-reaching involvement of experts and case-workers from other Member States to issue a recommendation on either admissibility or substance of individual asylum applications to the Greek Asylum Service, this should be the subject of a thorough and independent evaluation.

Centralised EU Decision-making?

The creation of an EU Asylum Authority, exclusively competent to decide on individual applications for international protection made in the EU, has been advanced at various occasions as the ultimate solution to remove disparities in the decision-making practice of Member States across the EU.¹⁰⁸ Whereas this option was not considered as feasible by the European Commission, as part of the third phase of legislative harmonisation launched in May 2016, debates on the long term design and architecture of the CEAS must necessarily engage with the legal and practical feasibility as well as its potential impact on the quality of decision-making and outcomes of asylum processes in the EU. The creation of the EU Asylum Agency, with increased competences to produce a common interpretation of COI relevant to the examination of individual asylum applications and the coordination activities interfering directly with the examination of such applications, may or may not constitute an intermediary step towards a fully fledged EU Asylum Authority with individual decision-making powers.

106. For a detailed analysis of different models of joint processing, see ECRE, *Enhancing intra-EU solidarity tools to improve quality and fundamental rights protection in the Common European Asylum System*, January 2013.

107. For an analysis, see AIRE Centre and ECRE, *With Greece: Recommendations for refugee protection*, July 2016, available [here](#).

108. See the creation of an EU Migration, Asylum and Protection Agency, proposed in the LIBE Committee study: *European Parliament, Enhancing the Common European Asylum System and Alternatives to Dublin*, July 2015, 58-59.

ECRE has consistently denounced the widely diverging recognition rates, across EU Member States with respect to asylum seekers originating from the same countries, as an indication of the lack of a common understanding and interpretation of EU Member States' international protection obligations. As such, this is unsustainable in a common system and incompatible with the objective of ensuring the same outcome of applications for international protection in the common area of solidarity and protection, regardless of the Member State in which such applications are lodged.¹⁰⁹ While practical cooperation tools, including joint processing, may contribute to achieving this objective to a lesser or greater certain extent, it is clear that exclusive centralised EU-decision making on individual asylum applications, in theory, offers a highest chance of establishing the desired level of convergence of decision-making practice across the EU. However, in ECRE's view, harmonisation should always remain a means to an end, being the establishment of a high level of protection in accordance with Member States' obligations under international and refugee law. In this regard, ECRE identifies the following key concerns and preconditions from an international protection perspective in the debate on the creation of an EU Asylum Authority with full-fledged competences to examine and decide on individual asylum applications.

Firstly, for reasons elaborated elsewhere, the question as to whether the current EU Treaty provides for a legal basis for centralised EU decision-making, in the absence of a clear provision allowing for the exclusive conferral of such competence from the national to the EU level, remains unanswered, with arguments being advanced in both directions.¹¹⁰ Whereas political will may overcome many obstacles, continued legal uncertainty over such option is, in a climate of distrust between EU Member States in the area of asylum, obviously a significant impediment to such a scenario being implemented.

Secondly, a key challenge in the institutional framework of the EU is how to ensure the EU Asylum Authority's independence with respect to decision-making on individual asylum applications. In this regard, a key question is whether the governance structure of the EU Asylum Agency presents the necessary guarantees for such independence, as it is composed of representatives of Member States and the Commission. The UNHCR's representative only participates as a non-voting member to the meetings of its Management Board. Nevertheless, both the EASO Regulation and the Commission proposal for an EU Asylum Agency, stipulate that the Executive Director "shall be independent in the performance of his or her duties and shall neither seek nor take instructions from any government, institution person or any other body". Such independence should clearly be stipulated with respect to its competence in taking individual decisions to the model of existing national first instance asylum authorities in Belgium and France.

Thirdly, whereas the key function of both EASO and the EU Asylum Agency is to support EU Member States asylum authorities and reception agencies in the correct implementation and functioning of the CEAS and the EU asylum acquis, it currently lacks a clear mandate to ensure compliance with Member States' international protection obligations. Should decision-making powers be transferred to an Asylum Authority at EU level, the latter should be unambiguously entrusted with a protection mandate. In order to secure the necessary conditions for the impartial and objective implementation of its mandate, this should be clearly dissociated from any decision-making powers over entry and residence on the territory of a Member State or involvement in pursuing return policies. It also raises the fundamental question as to whether such a EU Asylum Authority could still be entrusted with activities relating to the organisation of reception accommodation or monitoring and analysis, as it would be required to assess its own decision-making practice.

Fourthly, as it is the case in the context of an EU Asylum Agency with an expanded mandate to provide guidance on the use and interpretation of COI in individual cases, the prevalence of UNHCR country specific guidance and its guidelines on the application of the Geneva Refugee Convention, must be cemented in the mandate of an EU Asylum Authority. This is necessary to preserve UNHCR's role as the global Supervising Authority on the application of the 1951 Geneva Refugee Convention and to ensure coherence of the global protection regime.

Finally, the EU Asylum Authority should operate through national offices, making use of existing infrastructure of asylum authorities in all EU Member States, in order to ensure accessibility of the EU Asylum Authority and transparency of the individual decision-making process.

109. See European Council, The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens, OJ 2010 C115/1.

110. ECRE, Enhancing intra-EU solidarity tools to improve quality and fundamental rights protection in the Common European Asylum System, January 2013.

CHAPTER 4 - PROMOTING INTEGRATION

The early waves of arrivals in the EU have been warmly welcomed by European citizens and welcome initiatives have, since then, mushroomed in many European cities, thanks to the dedication of volunteers and local authorities. Yet, the atmosphere has gradually changed and the political debate is increasingly poisoned by a toxic narrative, mixing up migration and security issues. ECRE observes with concern the growth of anti-migrant rhetoric and the multiplication of violent incidents, including attacks against refugee shelters. It is all the more worrying that in some cases such xenophobic rhetoric is fuelled by national authorities, which tend to portray refugees and migrants as a threat to national security. The growth of far right political movements in many EU countries requires decisive actions and strong political leadership to depoliticise the subject and to accurately inform public opinion about the challenges of refugee protection.

As UNHCR stressed recently, Member States have a long tradition of providing a safe haven to those fleeing violence, persecution and conflict, which must be preserved.¹¹¹ Access to robust rights and entitlements are key to ensure adequate integration of all beneficiaries of international protection. According to numerous studies, access to family reunification, together with education and employment, are crucial to ensure self-sufficiency and long-term integration perspectives for beneficiaries of international protection.

Proactive integration policies should be inclusive and target all categories of beneficiaries of international protection, as discriminatory practice against persons protected under more precarious statuses (such as holders of subsidiary protection status or other forms of humanitarian protection) can only lead to fuelling discrimination towards “second-class” refugees and hinder access to integration for categories of beneficiaries of international protection who often end up staying in the long term, if not indefinitely. Recent trends towards a systematic review of protection needs, and possible broader use of cessation clause, should be resisted as they have proved to be inefficient in practice and severely undermine integration perspectives.

Finally, beneficiaries of international protection should have better access to intra-EU mobility in order to incentivize acceptance and cooperation within a responsibility allocation mechanism; as well as broaden access to economic opportunities for beneficiaries of international protection.

1. PROMOTE ACCESS TO INTEGRATION THROUGH ROBUST RIGHTS

Promote Access to Family Reunification

Together with economic and educational rights, the right to family reunification should be promoted as a major factor of integration for beneficiaries of international protection and other migrants.¹¹² Numerous studies have documented that protection holders who are separated from family members, have much more difficulty in learning the language or finding a job. Evidence indicates that family reunification policy is becoming an increasingly important factor for asylum seekers in their choice of destination country.¹¹³ In response to this, a number of Member States have introduced restrictive provisions in a ‘race to the bottom’ of standards aiming to reduce access to family reunification for beneficiaries of international protection. The lack of legal assistance available to assist beneficiaries of international protection to navigate the system, as well as increasingly complex procedures, are in practice significantly eroding access to family reunification. This is a significant barrier to integration and closes one of the few legal routes available to reach Europe, essentially forcing migrants and asylum seekers to undertake arduous journeys.

Member States have limited discretion under Article 8 ECHR to refuse family reunification, particularly when there are insurmountable obstacles to developing family life elsewhere, coupled with the obligation to ensure the best interest of the child as a primary consideration of states. This, read in light of the *raison d’être* of the Family Reunification Directive,¹¹⁴ limits a state’s ability to refuse reunification and militates against the use of excessively difficult family reunification procedures.

111. UNHCR, Recommendations to the Slovak Republic for its Presidency of the Council of the EU, July 2016, available [here](#).

112. ELENA, Information Note on Family Reunification for Beneficiaries of International Protection in Europe, June 2016, available [here](#); Red Cross EU and ECRE, Disrupted Flight: The Realities of Separated Refugee Families in the EU, November 2014, available [here](#).

113. UNHCR, ‘UNHCR Survey finds Afghan and Syrian refugees arriving to Greece are fleeing conflict and violence’, 23 February 2016, available [here](#).

114. Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (hereinafter “Family Reunification Directive”), OJ 2003 L 251/12.

Refugees and persons granted other forms of international protection have increasingly been confronted with major obstacles in exercising their right to family life. These include, in particular, exclusion from family reunification rights under the EU Family Reunification Directive of persons granted subsidiary protection, restrictive interpretations of the definition of family members, overly strict application of requirements with regard to documentary evidence of family relationships and excessively short time limitations imposed on refugees to submit applications for family reunification in order to be able to benefit from exemptions from income, health insurance and accommodation requirements.¹¹⁵

Concrete recommendations for the development of refugee friendly family reunification procedures, based on a progressive interpretation of relevant standards in EU and international human rights law, including the EU Charter of Fundamental rights, are contained in ECRE's vision paper on safe and legal channels to accessing protection in Europe. The implementation of flexible family reunification procedures to persons granted international protection, which take into account their precarious individual circumstances and that of their family members, forms an essential part of a coherent protection system at EU level in the interest of reducing the need for refugees to undertake arduous journeys to be reunited with their loved ones and to facilitate their integration into society in EU Member States.

One of the major obstacles that has arisen is that more countries are subjecting subsidiary protection holders to more restrictive conditions, such as waiting periods and income requirements. This ignores their special status and creates an arbitrary distinction between refugees and beneficiaries for subsidiary protection, despite the fact that the humanitarian reasons for providing more favourable conditions to refugees are applicable to both groups. States must not discriminate or create artificial differences between groups that have comparable situations. Different situations must not be treated in the same way unless such treatment is objectively justified (see *infra*).

Family reunification can be limited to 'core' family members, but this doesn't take into account the special circumstances of forced displacement or the wide cultural differences of the concept of a family. There is no static and pre-determined family model for the purpose of family life under Article 8 ECHR or Article 7 and the ECtHR supports an expansive interpretation of family based on actual ties rather than legal relationships.¹¹⁶ Even when it is permissible to exclude certain family members, CJEU jurisprudence indicates that States must consider each case on its merits, cannot apply a blanket exclusion, and should take into account all relevant factors in line with the right to be heard and the right to good administration.

Another major obstacle for beneficiaries of international protection to effectively access family reunification relates to the significant amount of documentation Member States can require when submitting an application. Even though there are valid reasons for requiring such documentation, such as for instance in order to combat smuggling and to uphold the best interests of the child, states nevertheless must take into consideration the special status of beneficiaries of international protection and the difficulties they faced in reaching safety and acknowledge that it is not always possible to obtain the requisite documents required. In accordance with ECtHR case law, any overly rigid documentation requirements will be disproportionate and will undermine the effectiveness of the right to family life. States, in line with ECtHR case law, need to put in place procedures to take into account events that have led the applicant to claim international protection status, which includes having a proportionate approach to what documents will be accepted.¹¹⁷ Finally, as documented, time limits can impede effective access to the family reunification procedure. Having undue delays in the administration of a family reunification application undermines the EU right to good administration and legal certainty. Under the Family Reunification Directive, Member States must decide on a family reunification application within nine months unless there are 'exceptional circumstances' under which this needs to be extended. However, in accordance with CJEU case law, the Directive must be interpreted in a strict manner and Member States discretion must not be used in a manner that would undermine the Directive and its effectiveness. Extending the time period cannot be done as a matter of course but under circumstances that genuinely can be described as exceptional.

Promote Access to Inclusive Integration Schemes

Refugees and other beneficiaries of international protection must be supported in their integration process and provided with the tools they need to fully integrate. As proactive and inclusive integration policies are still

115. ELENA, Information Note on Family Reunification for Beneficiaries of International Protection in Europe, June 2016, available [here](#)

116. ECtHR, *Lebbink v. the Netherlands*, Application no. 45582/99, Judgment of 1 June 2004, par. 36; *Schalk and Kopf v. Austria*, Application no. 75/1995/581/667, Judgment of 22 April 1997.

117. ECtHR, *Mugenzi v. France*, Application no. 52701/09, 22 January 2015, par. 52.

lacking in many countries, ECRE supports UNHCR's position that spending on integration should become mandatory and all EU member states would be required to allocate at least 30% of their annual EU Asylum, Migration and Integration Fund (AMIF) to support integration. Adherence to this spending requirement would be monitored by the European Commission¹¹⁸. As already highlighted under Chapter 1, access to housing and improvement of reception standards should be a key priority of integration programmes.

Together with language training, personalised and individualised social support should be made available to all beneficiaries of international protection at a very early stage. Social support should include cultural orientations courses and a full understanding of respective rights and responsibilities. Education – in particular vocational training - and labour market inclusion are a key part of the integration process. Whilst work supports independence and self-reliance, it is of grave concern that refugees and migrants' employment rates remain below the average of host-country citizens in most EU Member States¹¹⁹. Notwithstanding the efforts made, third-country nationals also continue to fare worse than EU citizens in terms of education and social inclusion outcomes.¹²⁰ As documented by IOM, timely and full labour market integration of migrants and refugees offers an opportunity to meet the growing needs for specific skills in the EU against the background of an ageing population and workforce.¹²¹

Measures promoted by the European Commission under the EU Action Plan on Integration and the EU Skills Agenda for facilitating the validation of skills and recognition of qualifications should be implemented as a matter of priority in order to ensure that asylum seekers, beneficiaries of protection and migrants' skills are used to their full potential. These measures should take into consideration the particular situation of beneficiaries of international protection, who may not have the necessary documentary evidence of their previous learning and qualifications, may have had their education interrupted or may not have participated in formal education. Access to post-recognition integration measures should also include measures for supporting skills development.

2. NO FRAGMENTATION OF PROTECTION STATUS

Member States have not been consistent in the type of protection status granted, even for the same country of origin. The year 2015 saw, for instance, the vast majority of Syrians – a nationality widely acknowledged as in need of international protection – being granted almost exclusively refugee status in Germany, Austria, Greece, Bulgaria or Norway, while Sweden, Spain, Cyprus and Malta overwhelmingly granted subsidiary protection.¹²² More recently, some countries have shown stronger tendencies towards granting subsidiary protection to Syrians. An illustrative example of this can be found in Germany, which remains by far the largest host state for Syrian nationals. The German Federal Office for Migration and Refugees (BAMF) had an overwhelming rate of 95.7% refugee status and a mere 0.06% rate of subsidiary protection for Syrians in 2015.¹²³ In the first seven months of 2016, this has shifted to 77.7% refugee status and 20.1% subsidiary protection,¹²⁴ raising sharp criticism from civil society organisations as regards the quality of asylum decision-making.¹²⁵ This also leads to increasing appeals against erroneous refusals of refugee status, in which German Administrative Courts have accepted that Syrians are entitled to refugee status.¹²⁶

The uneasy divisions between the two statuses appear all the more crucial given the Commission's intention to "better clarify the difference between the refugee and subsidiary protection status and differentiate further the respective rights attached to them."¹²⁷ Although the proposal to reform the Qualification Directive generally maintains the status quo, hostile developments at national levels may negatively influence the debate in the Council and lead to further sharpen the distinction between the two statuses.

118. UNHCR, Better Protecting Refugees in the EU and Globally, opus cit.

119. See Eurostat data [here](#) and OECD/European Union, Indicators of Immigration Integration 2015 – Settling In, available [here](#).

120. European Commission, Action plan on the integration of third-country nationals, p.2.

121. European Commission, An economic take on the refugee crisis, Institutional paper 033, July 2016, available [here](#).

122. Eurostat, First instance decisions Annual aggregated data. Subsidiary protection rates for Syrians in 2015 were 97.8% in Cyprus, 92.7% in Malta, 90.1% in Spain and 87.5% in Sweden.

123. BAMF, Asylum statistics – December 2015, available in German [here](#).

124. BAMF, Asylum statistics – July 2016, available in German [here](#).

125. See e.g. ProAsyl, 'Neue Anerkennungspraxis verwehrt Flüchtlingsschutz und wird Gerichte überlasten', 31 August 2016, available in German [here](#).

126. See e.g. Administrative Court of Regensburg, Decision RN 11 K 16.30889, 6 July 2016; Administrative Court of Schleswig, Decision 12 A 149/16, 15 August 2016. For an overview, see Informationsverbund Asyl und Migration, 'Neue Gerichtsentscheidungen zum Schutzstatus Asylsuchender aus Syrien', 25 August 2016, available in German [here](#).

127. European Commission, Towards a reform of the Common European Asylum System and Enhancing Legal Avenues to Europe, COM(2016) 197, 6 April 2016, p.10.

Another decisive element in the integration process of beneficiaries of international protection is the duration of the right of residence in the country of refuge. ECRE has expressed deep concerns concerning restrictive national policies, as recent reforms in countries such as Austria, Belgium, Denmark, Hungary and Sweden have sought to lower the security of residence afforded to refugees by introducing time limits to residence permits which were previously permanent. Such restrictive approaches are also reflected in the proposal put forwards by the European Commission aiming at introducing a systematic review of status, as the fragmentation of international protection may severely undermine integration prospects¹²⁸. Such restrictive trends should be resisted, as currently the vast majority of Member States (21 out of 28) refrain from revisiting statuses for protection reasons related both to integration and to practical reasons in view of the administrative resources required for such assessments. The value of mechanisms for systematic review of international protection appears to be questionable in practice.¹²⁹

Differentiation of treatment between holders of refugee status and beneficiaries of subsidiary protection is also questionable from a legal perspective. The general principles of equal treatment and non-discrimination require that comparable situations must not be treated differently and that different situations must not be treated in the same way, unless such treatments are objectively justified. This must pursue a legally permitted aim and be proportionate to the aim pursued. In the case of *Alo and Osso*,¹³⁰ that examined restrictions of movement in a Member State. The CJEU interpreted the recast Qualification Directive as affording beneficiaries of international protection the same rights and benefits to those enjoyed by refugees. Its ruling is influenced by the stated intention of the EU legislature to establish a uniform status for beneficiaries of international protection¹³¹ with the Advocate General also highlighting the principle of equal treatment.¹³² The CJEU emphasised that national rules that differentiated between subsidiary protection holders and *inter alia* refugees, would only be legitimate if these groups were not in an objectively comparable situation as regards the objective pursued by those rules. It is unlikely that arguments based on the supposed 'provisional' nature of subsidiary protection will suffice as an objective and reasonable justification. Beneficiaries of subsidiary protection and refugee status have the same protection needs, furthermore, there are divergences between Member States as to which form of protection status is granted to those in similar circumstances from the same nationality,¹³³ which includes countries where there are protracted conflicts, indicating the likelihood of long-term displacement. The EU legislature has recognised this by extending the scope of the Long Term Residence Directive to make this status accessible to all beneficiaries of international protection.

3. ENHANCED INTRA-EU MOBILITY FOR BENEFICIARIES OF INTERNATIONAL PROTECTION

The mutual recognition of positive asylum decisions and the establishment of an EU-wide framework for the transfer of protection status between EU Member States is the next logical step in the harmonisation of asylum policies in the EU. This would be a way to address existing barriers to free movement for persons granted international protection in one Member State and establish a uniform status of asylum, valid throughout the Union, as is required under Article 78(2)(a) TFEU. Currently, the legal avenues for beneficiaries of international protection to move to another Member state remain limited to national immigration schemes, family reunification procedures or under the amended Long Term Residence Directive. In the future, beneficiaries of international protection may also be able to move under the Blue Card Directive that is currently being amended. The numbers that can benefit from these legal options remain very limited and in practice most status holders move irregularly while some even reclaim asylum in another Member State.

A right to free movement and residence anywhere in the EU should be attached to the uniform status of asylum and subsidiary protection required under Article 78 TFEU.¹³⁴ Ultimately, beneficiaries of international protection should be able to move, reside and work within the EU immediately after status has been granted under the

128. *Ibid.*, 5.

129. ECRE, *Asylum on the Clock? Duration and Review of International Protection Status in Europe*, AIDA Legal Briefing No 6, June 2016, available [here](#).

130. CJEU, *Joined Cases C-443/14 and C-444/14 Kreis Warendorf v Ibrahim Alo and Amira Osso v Region Hannover*, Judgment of the Court (Grand Chamber), 1 March 2016.

131. 71 *Ibid.*, paras. 28-36.

132. CJEU, *Joined Cases c-443/14 and c-444/14 Kreis Warendorf v Ibrahim Alo and Amira Osso v Region Hannover*, Opinion of Advocate General Cruz Villalon delivered on 6 October 2015, para. 71.

133. AIDA Annual Report 2014/2015 *Common Asylum System at a Turning Point: Refugees caught in Europe's Solidarity Crisis* at section 3.2: Even where the overall recognition rate for international protection is high across Europe for a particular nationality, such as for Syrians and Eritreans, there are considerable variations in the protection statuses applicants receive in different countries, i.e. refugee status or subsidiary protection.

134. ECRE, *Enhancing Intra EU Solidarity Tools to Improve Quality and Fundamental Rights Protection in the Common European Asylum System*, January 2013, p.48.

same conditions as EU nationals.¹³⁵

It is acknowledged that the amendments introduced to the Long-Term Residence Directive¹³⁶ further align the status of beneficiaries of international protection with EU citizens with regard to a number of socio-economic rights as well as a right to move to another EU Member State and reside there for the purpose of employed or self-employed activity, studies or vocational training or other purposes. However, at the same time, the Long Term Residence Directive maintains important obstacles for beneficiaries of international protection to make effective use of the right to free movement under the directive in practice in the short term. In addition to stable resources and integration requirements, the directive allows Member States not to take into account the entire duration of the asylum procedure, for the calculation of the period of five years' legal residence which is required in order to obtain long term residence status. This causes further delays for persons granted international protection in effectively exercising their right to free movement and fails to take into account, in the case of refugees, the declaratory nature of their status.

In the short-term, Member States must facilitate access to free movement rights as much as possible by refraining from imposing integration requirements to beneficiaries of international protection to obtain long-term residence status or take up residence on that basis in a second Member State. In addition, Member States should always take into account the entire duration of the asylum procedure when calculating the period of five years of legal and continuous residence on the territory as required under Article 4(1) of the Long Term Residence Directive. The duration of the Dublin procedure should also be taken into account, including the period that the person who was granted international protection spent on the territory of another Member State under such a procedure.

In the mid-term, the Long Term Residence Directive should be amended in order to reduce the requirement of legal residence to six months. This would need to be combined with mutual recognition of protection statuses granted by EU Member States and clear rules governing the transfer of protection status to another EU Member State. The prospect of a possibility of free movement would mitigate the fact that not all asylum seekers may have their asylum application examined in the country of their preferred destination. This would constitute a positive incentive for asylum seekers to comply with the responsibility allocation mechanism, avoiding the human and financial cost of enforcing the rules through coercive measures. Pending the establishment of one uniform status of international protection, truly valid throughout the Union, a more secure legal framework for transferring a persons' protection status would further facilitate free movement by providing more legal certainty to the beneficiaries of international protection concerned. In ECRE's view, mobility within the EU, post recognition of international protection, is key to the completion of a CEAS that operates within the framework of the Schengen area, which is based on the abolition of internal border controls. It is also a key element of a sustainable responsibility allocation system that should offer incentives to asylum seekers to comply with such a system, rather than be based on the use of coercion.

Moreover, a right to mobility for refugees, in an EU context, can be also derived from Article 26 of the 1951 Geneva Refugee Convention according to which lawfully residing refugees have a right of free movement in the territory of the Contracting State, subjected to any regulations applicable to aliens generally in the same circumstances,

Future EU rules on the transfer of international protection status must be the same for refugees and beneficiaries of international protection in line with the approximation of both statuses under EU law, ensure transfer of the entire content of the protection status granted in the first Member State and provide maximum guarantees that protection status is transferred in parallel with the exercise of free movement rights.

135. ECRE, Protected Across Borders: Mutual Recognition of Asylum Decisions in the EU, December 2016, available [here](#).

136. Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending the Long-Term Residence Directive to extend its scope to beneficiaries of international protection, OJ 2011 L132/1.

CONCLUSION

The rising number of refugees and asylum seekers arriving in EU+ countries has fundamentally challenged the EU's project of establishing a regional protection framework based on solidarity and fair sharing of responsibility and the full and inclusive application of the 1951 Geneva Refugee Convention and other relevant international treaties as required under Article 78 TFEU.

Fragmented state responses have increasingly aimed at shifting responsibilities to other EU Member States as well as third countries by establishing legal and practical barriers to accessing protection, culminating in the EU-Turkey Statement as the blueprint for "managing" refugee displacement. As the world is witnessing the largest displacement crisis since World War II, the European strategy of containing those fleeing conflict and persecution outside the EU's borders in dereliction of States' obligations under international human rights law is short-sighted and self-defeating in the long term. It risks fundamentally undermining the international protection regime and shrinking protection space globally, in particular where countries hosting the vast majority of refugees start replicating the "European solutions" to refugee flows.

Against the backdrop of growing xenophobia and anti-immigrant rhetoric, the core principles that should underpin the European protection system and are set out in this paper have come under increasing pressure. Once again, European leaders are advancing ill-conceived external processing models as the ultimate solution to address "forced displacement" and avoid "chaos" in Europe. Appealing as they may be for policy-makers, they are unworkable, unfeasible and unlawful and disregard the realities on the ground. While ECRE supports a strong role for the EU in building capacity and robust protection systems outside of Europe, this can never absolve States from their obligations under international law and EU law to respect, protect and fulfil the human rights of those arriving at their borders and requesting protection.

ECRE's vision of a regional protection framework in Europe is based on full respect for the 1951 Geneva Refugee Convention, true solidarity and fair sharing of responsibility and the inclusion and empowerment of refugees into our societies. This requires a fundamental re-think of the system allocating responsibility for examining asylum applications lodged in one of the EU Member States and Schengen Associated States. Rather than building such a system on coercion which has worked against solidarity and has disregarded disparities between Member States as well as the agency of asylum seekers, it should be built on matching applicants with Member States, taking into account connection criteria and Member States' capacity and ability to address special needs. A system which takes the individual circumstances of applicants as the starting point, is more likely to gain the trust of asylum seekers and therefore the likelihood of applicants cooperating with authorities rather than evading the system. Given the disparities between the States involved, fair and equitable sharing of protection responsibilities between them will necessarily be an incremental process.

Building resilient national protection systems at a high level of protection throughout the EU and the Schengen Associated countries, ensuring applicants an effective opportunity to exercise the right to asylum as enshrined in Article 18 EU Charter of Fundamental Rights, is a prerequisite. This will not only require the investment of dedicated financial resources to build dignified reception systems and effective contingency planning. A major and continued investment in the quality of protection and fair and efficient and frontloaded asylum procedures is essential as well as establishing a framework that promotes proactive and inclusive integration policies through enhancing rather than restricting intra-EU mobility for beneficiaries of international protection. At EU level the future EU Agency for Asylum will have a crucial role to play in enhancing quality and resilience of asylum systems in EU Member States and beyond. In-depth monitoring of Member States' capacities and performance in all aspects of asylum policy and far more sophisticated asylum data collection than is currently available will be needed in order to ensure that European asylum policy is truly evidence based. Finally, the long term perspective of an EU authority competent to decide on individual applications for international protection is an option to be explored but requires important safeguards with regards to its independence. Such authority would have to be unambiguously entrusted with a protection mandate, while preserving UNHCR's role as the global supervising authority on the application of the 1951 Geneva Refugee Convention.



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