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## Comments

### **Joint comments on the EC Communication to the Council and the European Parliament towards more accessible, equitable and managed asylum systems (COM(2003) 315 final)**

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The above-named organisations represent Christian churches throughout Europe, Anglican, Orthodox, Protestant and Catholic, as well as church agencies particularly concerned with migrants and refugees.

As Christian organisations, it is part of our tradition to care for the oppressed and to uphold the dignity of the human individual. We take this opportunity to comment on the European Commission's Communication towards more accessible, equitable and managed asylum systems, and to take part in this vital debate on the future of asylum in Europe.

The European Council, after noting the letter from the UK on new approaches to international protection, invited the Commission to explore further the ideas put forward by the UK, in particular with UNHCR. In its Communication the Commission recalls the relevant global and EU legal and policy framework, presents the analysis of the UK paper and UNHCR's and non-governmental organisations' views, establishes basic premises of any new approach to the international protection regime and formulates policy objectives and approaches.

Our organisations share the analysis that there is a crisis in the international protection of refugees, as offered in the recent proposal by the UK and in the UNHCR views. However, we feel that their proposals do not respond adequately to the multi-dimensional crises of the protection system. Particularly the proposals of setting up closed processing centres, be it within or outside the EU borders, pose several ethical and legal questions<sup>1</sup>. In its essence, the UK proposal deploys two concepts, "Regional Protection Zones" and "Transit Processing Centres", and represents a deterrent for unwanted migration, including that of protection seekers. This proposal constitutes an effort to avoid the States responsibilities under the Refugee Convention and human rights treaties, most fundamentally to protect refugees from return to an unsafe place and to uphold the human right to seek and enjoy asylum. The institution of this policy may make UK and any other Governments involved, as well as international organisations contracted to implement the policy, complicit for harms experienced by asylum seekers, refugees and other migrants transferred to and held in processing centres. Finally, the institution of processing centres in countries with serious human rights abuse promise to undermine the norms of "effective protection" under international and domestic law. In the long run, the UK proposal could represent a serious challenge to the institution asylum as we know it. Furthermore, they also seem unworkable.

Our organisations wish to base our comments solely on the Commission Communication.

#### **Executive summary**

While welcoming any initiative to overcome the challenges posed by the crisis in international protection, our organisations supports the ten basic premises, especially the assertions that any new initiative should "fully respect international legal obligation of Member States" and the fact that the new approach should be complementary to the Common European Asylum System. We also support the fair burden-sharing

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<sup>1</sup> Gregor Noll, Visions of the Exceptional: Legal and Theoretical Issue Raised by Transit Processing Centres and Protections Zones, European Journal of Migration and Law, Vol. 5, Issue 3, 2003

system within the EU and with host third countries. Nevertheless our organisations have several serious concerns as regards the proposals set out by the European Commission in its recent Communication. Our main points of concern:

- The proposal of closed processing centres risk to compromise Member States' obligations under refugee and international human rights law
- The Communication does not provide any clear definition what to be understood as fair burden sharing
- The Communication does not put forward any proposal how to improve the quality and speed of asylum procedures in EU Member States
- The proposal of a new separate procedure to examine certain categories of applications lodged at the border of the EU is complicated, putting potential protection needs at risk and deems inefficient.

As to setting up a complementary mechanism for examining certain categories of applications lodged in or at the border of the EU, we share ECRE's view that such a mechanism is unnecessary and a diversion from the Commission's purported aim to improve national asylum procedures and to establish a single asylum system. The proposal for "closed processing centres" at particular locations is legally and practically questionable risking seriously compromising Member States' obligations under refugee and international human rights.

Our experience indicates that the restrictive asylum policies applied in many EU Member States will not reduce irregular migration. On the contrary, we are convinced that these restrictions drive many people, who will nevertheless enter the territories, to live in an irregular situation, a result that surely is neither in the interest of the host societies nor of any actual immigration policies.

### **The underlying analysis**

In our work with persons in need of international protection around the world, our organisations have experienced that the global refugee protection does not work satisfyingly. Although international instruments are in place the implementation does not live up to the standards envisaged by these instruments. Most of the world's refugees are not allowed to live a life of dignity like other persons in the country of residence.

We are concerned that the response by European countries to this protection crises has been mainly focusing on restrictive measures, such as visa requirements, sanctions on carriers, pre-boarding documentation checks at the airports, readmission agreements with the transit countries as well as interdiction and mandatory detention of asylum seekers. We feel a lack of political willingness to establish a fair, efficient and high quality common asylum system.

We welcome the Communication's acknowledgement that the current asylum system requires those fleeing persecution to enter the EU irregularly, using smugglers whereas the majority of refugees, including probably the most vulnerable ones, stay in poorly resourced refugee camps in the region of origin. We must again raise our deep concerns about the way access to the territory and therefore to asylum procedures is becoming increasingly restricted. Persons in need of protection risk serious injury or death owing to the difficulty of obtaining legal entry, in particular to EU territory. Having the best and most generous asylum system is of little use if barriers and obstacles are placed in the path of asylum seekers fleeing persecution. Denial of entry can block any access to a fair refugee status determination procedure.

We are in principle in favour of proposals that alleviate the impact of immigration measures on refugees by enabling them to travel legally to the EU to access protection and durable solutions. In this context, the Commission's proposals on exploring the possibility of an EU legislative framework on resettlement and the setting up of Protected Entry Procedures are to be welcomed.

We further share the view in the Communication that, on a global level, the support for refugees is badly distributed. It seems right to analyse the support provided to an individual refugee against the background of the world's refugee population and the support provided. By now there is a lack of a comprehensive definition of fair global responsibility sharing. Feeling that in asylum procedures in European Union Member States partly money is badly spent in terms of output for input, we would also see need for an analysis of related costs.

We do not share the Commission's notion that the majority of asylum seekers in the EU do not meet the criteria for refugee or subsidiary protection status. Though acknowledging the mixed flows in the asylum system, looking to statistics only does not provide the full picture. According to our experience, some of the persons in need of international protection are not recognised as refugees due to the restrictive interpretation of the definition of refugees and, more particularly, by flaws in the asylum procedures<sup>2</sup>.

We regard the lack of legal opportunities for immigration to the EU Member States and the demand of the grey labour market being some of the main reasons for the mixed flows.

In addition, we wish to recall that no administrative procedure is designed for positive outcome only. When our organisations' services deny legal support to asylum seekers, these decisions are based on judging the claim as not matching with all the criteria set out in the Geneva Convention. They are not to be considered as abusive, but should be seen as a "normal" and necessary phenomenon of any administrative procedure: applicants consider themselves being in a position to enjoy specific rights, but the procedure concludes that they do not. Speaking in a practical example: a person might feel that the discrimination suffered in his/her country of origin is no longer bearable and consequently seek asylum while the asylum authority might conclude that the discrimination does not amount to persecution and therefore fails to fulfil some criteria of the refugee definition.

We are missing in the Communication's analysis any reference to the change in public perception of asylum seekers in Europe due to the use of negative terms regarding refugees and asylum seekers in the media and in public debate. We are concerned about the way in which refugees and asylum seekers are often unjustly labelled, with a consequent negative effect on public opinion. Certain sectors of the media have shown an over-readiness to link refugees and asylum-seekers to criminality, to use headlines that can mislead by exaggerating the number of refugees and asylum seekers, and to present the issue entirely from a negative perspective. We feel that neither the many positive examples of individuals in our societies who on a personal level help those who are in need of protection after their arrival in

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<sup>2</sup> It has to be noted "that Europe's most smuggled and trafficked nationalities, such as Iraqis and Afghans, also happen to have a very high rate of recognition as refugees under Europe's own asylum procedures. It [is estimated that] between one-third and two-thirds of the most trafficked nationalities are eventually recognised"; quotation from the press release on the presentation of the report "The trafficking and smuggling of refugees: the end game in European asylum policy?" by John Morrison with the assistance of Beth Crosland; July 2000.

European countries nor existing positive opinions as regards asylum are adequately reflected in the media.

We support the 10 basic premises of the Commission Communication. Especially we welcome the assertions that any new approach should ‘need to fully respect international legal obligations of Member States’, be complimentary to the Common European Asylum System and be in line with the UNHCR’s Agenda for Protection. We stress even more the importance of establishing protected entry procedures. In this context we would wish for a clarification that these procedures were seen as complementary to processing claims of spontaneously arriving asylum seekers.

### **Regional protection**

Most of the world’s refugees are staying in the region of their origin. Most of them are living in very poor conditions, often deprived of basic human rights. Living in temporary shelters they too often lack adequate sanitation and water. The adults have neither employment nor other occupation and formal education services for children are often missing. All of them find themselves with nowhere to go. This weighs even harder since reality shows that, unfortunately, protection often is not limited to several weeks or months, but lasts for years, sometimes even decades.

We support efforts by EU Member States to develop protection capacities in these regions through a range of actions such as institutional capacity building, infrastructure and policies of reception and integration. This should be done with sensitivity for the needs of the local society and economy. However, we have to note that the present efforts are not sufficient in order to meet the extraordinary needs for protection, e.g. in Africa and the Middle East. We also commit ourselves to work towards these goals. In this context a much stronger commitment by governments will be needed to provide adequate resources to UNHCR for its activities.

We welcome that the Commission in its Communication thinks about what constitutes “effective protection”. We think that this does not only include the protection against non-refoulement and provision of the basic human rights, but to allow the person to live a dignified life as close as possible to the normal life of the citizens in the country of residence. This should at least include freedom of movement, access to the labour market, participation in social and cultural life<sup>3</sup>.

While we agree to the need of strengthening regional protection, we want to contradict the Commission’s assumption that this measure would have significant impact on preventing or managing irregular immigration to Europe. This is a different problem and we think that it would only be solvable by acknowledging and counteracting its main cause, nothing less than the existing and ever growing gap between poor and rich countries. In this light the other reasons, like the lacking legal channels for immigration, seem easily to be dealt with.

In this context we want to warn decision-makers not to see the strengthening of regional protection as a tool to solving other problems such as the impossibility of returning rejected asylum seekers.

### **Resettlement**

We support setting up a EU-wide resettlement scheme and welcome the Commission proposals to study its feasibility and to explore the viability of providing for a EU legislative framework that could establish the goals and the selection criteria.

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<sup>3</sup> 1951 UN Refugee Convention and 1967 Protocol

However, we want to stress that all these efforts only make sense if there is a serious commitment to apply this regime to a considerable number of persons.

We would agree with the concerns by ECRE<sup>4</sup> that “the obvious inherent flow in the Commission’s present proposal is that the annual target might not be met if national contributions are left to the discretion of Member States”.

We would propose to fix the minimum number of refugees to be resettled in reference to the total number of inhabitants of EU Member States. The distribution to the individual Member States must be fixed as well and could be made dependent on criteria such as the population, the GNP or the economy growth rate of each individual Member State.

It is important that UNHCR and non-governmental agencies play a crucial role in developing and implementing the process towards deciding the numbers of person to be resettled.

### **EU Regional Task Force**

While we understand the need for exploring the viability of setting up a EU Regional Task Force that would be in charge of providing and disseminating information, assisting local authorities in processing refugee determination, in resettlement and protected entry procedures, we would urge to include UNHCR and non-governmental organisations in this regional presence. From our experience potential migrants perceive government counselling often as tentatively preventive and even deteriorating while NGO advice is perceived being closer to the interest of the migrant him/herself.

### **Burden and responsibility sharing within the EU as well as with regions of origin**

We agree that there is a need for sharing responsibility for international protection on a global level. Although we see the need for investing in regional protection capacities, we also have the impression that the proposal is driven by the European Union’s own interests, be it in keeping refugees in the region or facilitating easy return etc. In this sense the Commission proposal put forward in its Communication does not go far enough.

We regret very much that by now there was no concrete proposal tabled by any international actor for a fair global responsibility-sharing model, neither in terms of financial contributions nor in terms of capacities. As the Commission acknowledged in a previous Communication the major impact of migratory flows, both voluntary and forced, is found in the countries of the South, many of which are developing countries. The vast majority of refugees, 85 % of the total of 13 million refugees, are hosted outside the EU countries – with 9 million refugees living in developing countries.

We feel that it would be high on time to work towards a definition of fair distribution. This could go alongside some considerations in a previous Communication when the Commission stated that in Africa the ratio “refugee population per 1000 inhabitants divided by GDP per capita” is more than 25 times higher than in Europe.<sup>5</sup> This could indicate some relevant elements in a model of fair global distribution of responsibility. We welcome that the Commission proposal foresees to participate in UNHCR-steered comprehensive plans of action for specific caseload in protracted refugee situation.

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<sup>4</sup> Comments of the European Council on Refugees and Exiles on the Communication from the Commission to the Council and the European Parliament towards a more accessible, equitable and managed international protection regime; CO4/06/2003/ext.AS; 18 June 2003

<sup>5</sup> Communication from the Commission to the Council and the European Parliament integrating migration issues in the European Union’s relations with third countries; COM(2002) 703 final; 3 December 2002.

However, we feel that also this is not enough. UNHCR faces severe under-funding and we are convinced that it would need a strong effort by governments to make the agency's services durable and efficient.

### **Streamlined, efficient and enforceable asylum decision making and return procedures**

While we share the view that an improvement of the quality of decisions is needed – when elaborating this point in its basic premises, the Communication speaks about “frontloading” – we very much regret that in its proposals in chapter 6 this need is not at all reflected.

In most countries the level of competence in the administrative body that makes the first determination is not acceptable. In many countries a significant problem is inadequate understanding of the skills required. We feel that current flaws in the procedures are a significant factor why persons in need of protection fail to get recognition. This is why we would welcome a harmonized high-level profile of decision-makers in asylum cases throughout Europe. In particular: Decision-makers must be fully trained and culturally competent to deal with asylum-seekers of different educational, cultural and social backgrounds, and able to understand the psychological complexities that may be involved, for example in dealing with traumatized persons. Regular training and access to information should be provided. Where additional expertise is necessary, asylum authorities should be able to consult expert opinion.

From our organisations' point of view, the greatest contribution to the achievement of a higher standard of asylum procedures would be a European-wide initiative to increase the number of decision-makers, to improve the qualifications of staff, to reconsider management requirements, to intensify training and to increase substantially the funds for information technology and external expertise, etc. These measures would strengthen existing safeguards and also shorten the procedures.

In addition, there is need for legal counselling free of charge for all asylum seekers. Governments need to show that they have the rights and interests of the asylum seekers at their very heart. This includes as well increasing investment in the best possible training for asylum lawyers.

Additionally, our organisations recommend the European Union should establish an independent quality assessment of asylum procedures and asylum decisions in Member States. This would ask for defining criteria and agree on indicators.

In other words, our organisations argue for a substantial investment in improving the quality of asylum procedures.

Some analysts claim that the costs of care and maintenance of refugees and asylum-seekers in the reception system account for 70-90% of total state asylum costs, while less than 10-30% are spent on processing asylum applications.

In this connection, research is needed to determine whether investing two or three times the amount spent on asylum procedures today to improve their quality would lead to a significant decrease in the costs of social care and maintenance, etc., of asylum seekers. The hypothesis to be examined is: investing in a high quality procedure will shorten its duration, safeguard the rule of law, decrease the costs of reception and deter persons who do not need protection from abusing the asylum process. All this is said even without taking into account the enormous costs of Member States' border management and return policies.

Finally, we would wish to put in question the concept of having two separate procedures, an accelerated one and a “normal” one. At the one hand, as we

experienced in many cases, the development of acceleration was not balanced by an adequate standard of procedural safeguards. This clearly hinders several individual refugees from their case being ever seriously considered in-depth. On the other hand a well-equipped asylum authority, having enough and well-trained decision-makers and access to expert-opinions, should be able to take very quickly the decisions in simply-to-be-decided cases.

We want to stress that any form of collective expulsion is in contradiction to Art 4 of the 4<sup>th</sup> protocol to the European Convention on Human Rights and, therefore, absolutely unacceptable. We want to emphasise that cooperation between EU Member States and countries of first asylum may not lead to collective expulsions. Returning asylum seekers to another country needs always to be in accordance with the human rights guaranteed in international law.

### **Link to development**

We would welcome if the EU supported positive elements on the development-migration nexus particularly for finding durable solutions for refugee protection including local integration and developing comprehensive approaches to addressing protracted refugee situations.

Economic globalisation has led to further marginalisation of those countries that are unable to compete effectively in the global marketplace. In the absence of fair and just rules, globalisation has limited the space for developing countries to control their own development, as the free market-oriented system makes no provision for compensating the weak. The gap between rich and poor is widening and the EU's policies and programmes have so far not changed this trend.

We agree that root causes for forced migration need to be fought, however, we think that the actual concept of fighting the root causes of migration is over-simplistic and does not address the complexities inter alia of protracted refugee situations. There are development potentials in migration, like remittances of migrants or development, trade through engaging migrants or foster the involvement of migrants in bilateral or multilateral trade and development, but only few proposals for action to improve and expand this potential. We underline the necessity of continued research in order to develop concrete actions to promote the positive aspects of migration particularly in the link to development.

The countries generating migration are to a great extent not the world's least developed countries. Whilst many countries in Sub-Saharan Africa are among the most important recipients of development funds, and range among the poorest both in UNDP and World Bank statistics, they are not found among the highest migrant generating countries.

Finally, we are concerned that in the discussion of linking migration, protection and development there is put too much focus on return policies and border control. We fear the extension of the impact of the fight against irregular migration beyond overshadowing the international protection regime to also taking hostage of the development sector.

### **Conclusions**

Our organisations would like to reiterate that since all EU Member States are parties to the 1951 Geneva Convention, the UN Convention against Torture and the European Convention on Human Rights, their respect for human rights obligations is not a matter of choice, but of duty.

Brussels, October 2003