

# A Joint Position on the Current Status of Harmonisation of European Refugee Law

- Arbeiterwohlfahrt Bundesverband e.V. (workers' welfare association)
- Deutscher AnwaltVerein (German association of asylum lawyers)
- Caritas Germany
- German Paritätische Welfare Association
- German Red Cross
- Neue Richtervereinigung (new association of judges)
- Diakonisches Werk (Protestant social service agency)
- PRO ASYL, national working group for refugees

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In 1999 the European Council *Tampere* affirmed the importance that the EU and the Member States attribute to the unconditional respect for the right to asylum. It thus decided “to work towards establishing a Common European Asylum System based on the full and inclusive application of the Geneva Convention”. The Council distinguished between short and long-term measures. The short-term action has already been initiated through a number of legal instruments in the field of asylum and refugee law. In the longer term, community rules were to lead to a “common asylum procedure and a uniform status” for those granted asylum which would apply throughout the European Union.

The EU is now in a transition phase between the first and second phase of harmonising asylum and refugee law. Indeed, the first phase has not yet been concluded in all the Member States and the corresponding instruments have not been fully transposed in accordance with community law. In addition, these legal instruments contain a lot of exemption clauses. They grant the Member States far-reaching powers to fall considerably short of agreed European minimum standards. Whether the transition into the second phase will bring greater harmonisation of asylum and refugee law in the EU will depend on whether these clauses are removed or, at least, reduced to a minimum. While all Member States deplore the unchanged practice of other Member States, they still stick to their exemption clauses and thus prevent the emergence of optimum common standards for all those entitled to international protection in the EU.

The Commission has already presented a number of amendments to improve the instruments. These amendments aim to improve the situation of asylum seekers and refugees in the EU, but contain no solution for those of them seeking access to the EU who are stopped by a rigid European border protection policy. Since 1999 there has been a fundamental shift in the EU’s focus regarding migration policy. The political efforts of the Member States currently focus on keeping refugees out. They are so concerned to combat illegal immigration that they make less of an effort to implement an efficient system of identifying and protecting people in need of protection. Instead, the European border controls have been pushed forward to the countries of origin and there is intensive cooperation with them and the transit countries. The establishment (from October 2004) and expansion of Frontex, the European agency to protect external frontiers, clearly indicates the shift in the EU’s migration policy since Tampere.

This position paper assesses the changes submitted by the Commission. Since the general public is not sufficiently informed about the situation of the refugees on the high seas, we begin by giving a full description of the EU’s exclusion policy at, and away from, the borders of Europe, and then assess the amendments proposed by the Commission. The assumption underlying this position paper is that human rights are the basis of the European project and we call for them to be strengthened, in particular in favour of people needing protection. The civil society movements in the Member States seek to fill this project with life by opposing the exclusion of this group of people from the process begun in Tampere of building an “area of freedom, security and justice”.

# I. Access to the EU: shifting European border protection offshore (Frontex)

## Frontex's structure and mandate

The foundation for Frontex as a European agency was laid in Council Regulation 2007/2004 of 26 October 2004. Regulation 863/2007 of the European Parliament and the Council of 11 July 2007 created the basis for forming rapid border intervention teams to secure the borders. The task of Frontex is "improving the coordination of operational cooperation between Member States in the field of external border management" (Article 3 Council Regulation (EC) 2007/2004) and assisting Member States in situations calling for increased technical and operational support at the external borders (Article 9). Frontex is a community agency and legal entity (Article 15). Frontex has a central function in checking travellers at the EU's external borders as part of the integrated border controls administered under community law.

If people checked by officials from the Member States are to be effectively protected, we must first clarify the accountability question in the event of human rights violations. Either the Member States or Frontex itself could be held accountable. If Member States and third countries conduct joint coastal patrols that penetrate into the coastal waters of the third countries, a community responsibility arises under international law, i.e. the States are liable as a group and must take effective organisational steps to guarantee that the persons affected by the respective operation are effectively protected against violations of the prohibition of refoulement and obtain access to the asylum determination procedure.<sup>1</sup> Violating such responsibilities to protect constitutes a violation of international law that also comprises assisting or supporting the action of a third country in contravention of international law, according to Article 16 of the codification produced by the UN's International Law Commission. Support action may involve making available infrastructure, technical aids and financial resources.

In terms of the relationship of the Member States to the EU, the individual Member States remain responsible for the actions of their agents in the context of Frontex, since the two Council Regulations on Frontex do not provide for a transfer of sovereignty to the border protection agency. Community law and the law of the Member State in which the operation is carried out apply. The officers of the Member State wear their national uniform, but are also identified by "a blue armband with the insignia of the European Union and the Agency" (Article 6 para. 4 Regulation (EC) 863/2007 of the European Parliament and of the Council). However, the responsibility for the action taken by the officials in a team remains with the individual Member State. During the deployment, team members are "treated like officials of the host Member State with regard to any criminal offences that might be committed against them or by them" (Article 11 para. 1 Regulation (EC) 863/2007 of the European Parliament and of the Council). It must thus be assumed that there is a general liability, so that every individual Member State is responsible for the actions of the European border protection team.<sup>2</sup> With respect to each individual Member

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<sup>1</sup> *Ruth Weinzierl/Ursula Lisson*, Border Management and Human Rights, German Institute for Human Rights (eds), 2007, 63 ff.

<sup>2</sup> *Andreas Fischer-Lescano/Timo Tohidipour*, Europäisches Grenzkontrollregime. Rechtsrahmen der europäischen Grenzschutzagentur FRONTEX, 2007, 10, referring to the commentary of the International Law

State participating in Frontex operations, doing nothing to rescue persons in distress is thus tantamount to an active violation of international law.

At first Frontex concentrated on the exchange of information and also involved third countries in North and West Africa, i.e. countries of origin and transit. The essential goal of this cooperation, that also takes the form of agreements, is to combat illegal immigration. Three operations were conducted in the Mediterranean and off the African coast in 2006 and 2007, *Hera I, II and III, Nautilus, Nautilus 2007* and *Jason*. The *Hera* operations were undertaken off the coast of the Canary Islands, Cape Verde and Senegal. At the request of Spain, seven Member States were involved. The *Nautilus* operations were conducted off the coast of Malta. *Jason* entailed the use of border protection teams in the Mediterranean off the coast of Greece.

While these operations were merely support operations, where Frontex officials only assisted on matters of coordination with no executive powers (Article 8 para. 2 lit. a) Council Regulation (EC) 2007/2004), it has been possible since 2007 to deploy rapid border intervention teams (*RABIT*), who are granted “all powers for border checks” (Article 6 para. 1 Regulation (EC) 863/2007 of the European Parliament and the Council). The team members may only “perform tasks and exercise powers under instructions from and (...) in the presence of border guards of the host Member State” (Article 6 para. 3).

In the estimation of Frontex, the greatest challenge to the implementation of the border control regime is the main migration routes into the EU, these being the routes via its southern maritime borders, the eastern land borders, the Balkans and important airports. For example, Frontex reports that between August and October 2006, 3887 people were picked up and diverted near the African coast.<sup>3</sup> An estimated 5000 others had been prevented from setting out to sea while still on African soil.<sup>4</sup> This practice is supported, for example, by the Council document of 2003, which proposed escorting boats back to their ports of departure as a method of border control.<sup>5</sup> Spain works on the basis of bilateral agreements with Senegal and Mauretania and conducts joint patrols in coastal waters of these states.<sup>6</sup> Frontex activity has hitherto focused on operations off Malta, Lampedusa and the Canary Islands.

The German Federal Government stresses that illegal immigration by sea is a great challenge to all Member States. This situation calls for a political response by the EU, with a comprehensive approach to a solution in the areas of immigration, asylum and border protection.<sup>7</sup> However, the EU's focus on combating illegal immigration - which since the 1980s has taken the form of *ad hoc* governmental cooperation – along with

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Commission on the codification of state responsibility (A/RES/56/83, 12 Dec. 2001), Article 47314; *Ruth Weinzierl/Ursula Lisson*, Border Management and Human Rights, German Institute for Human Rights (eds), 2007, 28, 72.

<sup>3</sup> FRONTEX, Annual Report 2006, 12.

<sup>4</sup> *Christoph Mariscka*, FRONTEX – Die Vernetzungsmaschine an den Randzonen des Rechts und der Staaten, in: *Aufgaben und Strukturen der Europäischen Agentur für die operative Zusammenarbeit an den Außengrenzen*, *Tobias Pflüger* (ed.), January 2008, 16 (20).

<sup>5</sup> Council of the European Union, Doc. No 15445/03, para. 30, bullet point 4.31, quoted in *Ruth Weinzierl/Ursula Lisson*, *ibid*, 23.

<sup>6</sup> See Amnesty International Report on Mauritania: “Nobody wants to have anything to do with us” - arrests and collective expulsions of migrants denied entry into Europe”, 1 July 2008, AFR 38/001/2008.

<sup>7</sup> BT-Drs (German Hansard), 16/6254, 8.

Frontex activities and joint border controls extending into the countries of origin can hardly be understood as reinforcing asylum law. Priority is given to warding off refugees and migrants. That is why border controls have been shifted away from the physical borders. Europe's leading role in setting up human rights structures and the promotion of refugee protection after 1945 seems to have gone into reverse, as illustrated by the practice of diverting boats on the high seas.

### **Protection against deportation applies on the high seas according to the Geneva Convention on the Status of Refugees (CSR51)**

The principle of protection against return (refoulement) which has become a mandatory rule of international law (*ius cogens*) under Article 33 CSR51 ("prohibition of expulsion or return (refoulement)") also applies on the high seas, as do the other human rights-based prohibitions of refoulement (Article 7 Covenant on Civil and Political Rights (CCPR); Article 3 Convention against Torture; Article 3 European Convention on Human Rights (ECHR)). The International Court of Justice interprets Article 2 para. 1 CCPR to mean that while state sovereignty is fundamentally territorial it can, under certain conditions, be exercised outside of national territory. The history of the Covenant shows that its authors did not intend to relieve states of their international obligations when exercising jurisdiction outside of their territory.<sup>8</sup> On the basis of Article 2 para. 1 CCPR, the Human Rights Committee states that the States Parties have an "obligation to respect the Covenant rights and ensure them to all individuals within their territory and subject to their jurisdiction". It follows from this that the States Parties must guarantee that all people under their authority can assert the rights laid down in the Covenant or that these rights are effectively monitored, even if the persons concerned are not physically within their territory.<sup>9</sup>

If it is thus not mainly a question of territorial sovereignty, but primarily of jurisdiction, then international obligations also apply on the high seas. Any court decisions to the contrary, e.g. the Haiti decision of the US Supreme Court,<sup>10</sup> which some courts in English-speaking states had endorsed,<sup>11</sup> are incompatible with the very wording of Article 33 para. 1 CSR51 ("prohibition of expulsion or return (refoulement)") and also with the purpose of the CSR51. The Convention stipulates that the protection against forced return is not exclusively related to the territory of the States Parties, but also to the effectiveness of their jurisdiction. Accordingly, the principle of refoulement also applies on the high seas, according to most authors.<sup>12</sup> This principle is also emphasized by the UNHCR Executive Committee.<sup>13</sup> Moreover, the Haiti decision was taken before the International Court of Justice and the Human Rights Committee clarified the scope of international obligations.

### **Obligations under the Law of the Sea towards refugees on the high seas**

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<sup>8</sup> International Court of Justice, Advisory opinion concerning the legal consequences of the construction of a wall in the occupied Palestinian Territory of 9 July 2004, General List No. 131.

<sup>9</sup> Human Rights Committee, General Comment No 31(80) "Nature of the General Obligation imposed on State Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, para. 10.

<sup>10</sup> Supreme Court, No 92–344, The United States Law Week 1993, 4684 – *Sale v. Haitian Ctrs. Council*.

<sup>11</sup> See evidence in *Andreas Fischer-Lescano/Tillmann Löhr*, Rechtsgutachten Menschen- und flüchtlingsrechtliche Anforderungen an Maßnahmen der Grenzkontrolle auf See, 2007, 7 ff.

<sup>12</sup> See evidence in *Andreas Fischer-Lescano/Tillmann Löhr*, *ibid*, 7 ff.

<sup>13</sup> UNHCR ExCom, Recommendation No 53 (XXXIX) (1988).

Additional protective norms are to be observed to the benefit of refugees in distress, e.g. on the Mediterranean. Article 98 of the Convention on the Law of the Sea of 1982 expresses a rule under customary law according to which every State must ensure that the captain of a ship flying its flag has to “proceed with all possible speed to the rescue of persons in distress”, if informed of their need of assistance, as far as this can be reasonably expected of him. These obligations are supplemented by humanitarian law of the sea, e.g. the Safety of Life at Sea Convention (SOLAS) and the International Convention on Maritime Search and Rescue (SAR). Chapter V Regulation 33 SOLAS commits every captain to provide assistance in distress situations “regardless of the nationality and status of such persons”. The SAR Annex also commits States to ensure medical help and other care where needed and “deliver persons rescued at sea to a place of safety”.

### **Protection by the European Convention on Human Rights (ECHR) on the high seas**

Apart from that, the States are not permitted to turn refugees back or around on the high seas. There are tendencies in the European border control regime to *extraterritorialise* control measures and to carry them out either outside the twelve-mile zone allocated to national territory, in the adjoining zone of up to 24 sea miles, in which the exercise of police sovereignty is permitted, on the high seas or in territorial waters, i.e. the coastal sea of third countries, in cooperation with the security authorities. In so doing, however, the Member States cannot escape their international obligations according to the principles outlined above, in particular the prohibition of *refoulement*.<sup>14</sup> A territorial ‘forward-shift’ of border controls does not exempt them from the state obligations following from the prohibition of *refoulement*. The European Court of Human Rights has expressly recognised the extraterritorial effect of the ECHR on board ships flying the flag of their state.<sup>15</sup> The decisive factor cannot be the whereabouts of the person concerned and the state agent exercising authority. Rather, there is no place outside of the state territory of the country of origin at which the prohibition of *refoulement* does not apply, be it within the territory of the state from which protection is sought, at its border or beyond.<sup>16</sup>

The States Parties must not shake off their international responsibilities through moving border controls forward onto the high seas or even into the territorial waters of the countries of origin. The International Court of Justice has ruled that the states must not relieve themselves of their international obligations when exercising jurisdiction outside their own territory.<sup>17</sup> The European Court of Human Rights likewise found that Article 1 ECHR cannot be interpreted to mean that the States Parties are allowed to exercise violations of the convention outside their territory that are not permitted within their territory.<sup>18</sup> As there is serious evidence that the Member States intend to prevent access to community territory through pre-border controls on the high seas, they thereby shift their responsibility under international law to the high

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<sup>14</sup> Guy S. Goodwin-Gill, The Haitian *Refoulement* Case, in: International Journal of Refugee Law 1994, 103; Andreas Fischer-Lescano/Timo Tohidipour, Europäisches Grenzkontrollregime. Rechtsrahmen der europäischen Grenzschutzagentur FRONTEX, 2007, 20; Ruth Weinzierl/Ursula Lisson, Border Management and Human Rights, German Institute for Human Rights (eds), 2007, 13 ff.

<sup>15</sup> ECtHR, ECtHR, EuGRZ 2002, 133 (139), §73 – *Bankovic et. al. v. Belgium et. al.*

<sup>16</sup> Guy S. Goodwin-Gill/Jane McAdam, The Refugee in International Law, 3<sup>rd</sup> ed., 2007, 245.

<sup>17</sup> International Court of Justice, Advisory opinion on legal consequences of the construction of a wall in the occupied Palestinian Territory of 9 July 2004, General List No 131.

<sup>18</sup> ECtHR, Decision of 16 November 2004 – No 31821/96 – *Issa et al. v. Turkey*.

seas. This responsibility does not permit them to divert boats drifting on international waters, forcing them to change direction. Rather, their international obligations require them to enable people in need of protection to gain access to a procedure.

### **Conclusions regarding the EU's dealing with refugees on the high seas**

The prohibition of *refoulement* and the consequent obligation to open a procedure to check whether the person qualifies as a refugee, or is at risk of suffering a human rights violation, entails a temporary, procedure-related right to temporary reception.<sup>19</sup> This right to access to an effective procedure is especially important since those picked up on the high seas have fled their country for different reasons. The international obligations from the prohibition of *refoulement* apply as long as the refugee status has not been determined. The Member States must not close their eyes to the evident fact that among the occupants of boats drifting on the high seas there are persons seeking protection.

Without taking effective precautions to identify those in need of protection, people drifting on the high seas must not be prematurely and generally treated like illegal immigrants. Rather, it follows from the positive guarantee obligations of the Geneva Convention on the Status of Refugees that effective measures must be taken in order to achieve optimum protection from *refoulement*. In order to safeguard the effective protection required, human rights standards impose on Contracting States a number of positive obligations, which aim to prevent violations of the standards of the Convention and to guarantee compensation for any such violations. That is why the States must take certain precautions to effectively protect persons in their sovereign territory against torture and mistreatment.<sup>20</sup>

From the recognition that protection against *refoulement* as stipulated in refugee law and human rights instruments also applies on the high seas, it follows that asylum seekers must be granted effective access to a procedure in the EU. Admittedly, CSR51 does not itself directly provide for such a procedure. From the protection against *refoulement* set out in Article 33 para. 1 CSR51 it follows, however, that the Contracting States have to be ready with a procedure in order to minimise the dangers of *refoulement*. Moreover, Article 13 ECHR commits the States Parties to guarantee effective legal remedies against a negative decision by the authorities when there is threat of torture and inhuman treatment. The European Court of Human Rights has repeatedly decided that Article 13 ECHR guarantees the availability of an appeal at the national level to implement the rights enshrined in the convention. In view of the irrevocability of the suffering ensuing if the danger of torture and maltreatment is realised, and in view of the importance to be attributed to Article 3 ECHR, there must be a guaranteed independent and thorough examination of the statements that there are cogent reasons for fearing an actual risk of treatment contravening Article 3 ECHR.<sup>21</sup> Recommendations No 8 (XXVIII) and No 30 (XXXIV) of the UNHCR Executive Committee also provide for an effective possibility of appeal. With the Asylum Procedures Directive, the EU recognised the scope of such international obligations and stipulated that the Member States provide *access to the asylum procedure* (Articles 6-17 Council Directive No 2005/85/EC) and to an effective

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<sup>19</sup> UNHCR ExCom, Recommendation No. 85 (XLIX) (1998), No. q; *Ruth Weinzierl/Ursula Lisson*, Border Management and Human Rights, German Institute for Human Rights (eds), 2007, 14.

<sup>20</sup> ECtHR, HRLJ 2002, 39 (43) – *Al Adsani v. UK*.

<sup>21</sup> ECtHR, InfAusIR 2001, 57 = NVwZ-Beil. 2001, 97 – *Jabari*.

remedy (appeal) before an independent court (Article 39). Both these provisions are binding on the Member States.

It is obvious that access to a procedure, the examination of the asylum application and the effective remedy cannot happen on the high seas. Nor can it take place in transit processing centres, which are supposed to provide for the administrative outsourcing of refugee protection not open to remedy by a court.<sup>22</sup> Such practice does not just violate Article 13 ECHR, but also community law (Article 6 ff., Article 39 Council Directive 2005/85/EC) and also international standards in refugee law. The UNHCR takes the line that “without prejudice to any responsibilities of the flag State (...) asylum seekers should, whenever possible, be allowed to disembark at the first port of call and given the opportunity of having their refugee status determined by the authorities, provided that this does not necessarily imply durable solution in the country of the port of disembarkation”.<sup>23</sup> The asylum seeker must, however, be safe from refoulement. It is not sufficient to merely terminate the state of distress at sea. Rather, the country in which the port is located must observe the prohibition of refoulement in Article 33 CSR51. Accordingly, both the Maritime Safety Committee and the General Assembly of the United Nations call on the states to engage in international cooperation in order to prevent the individuals concerned being put ashore in countries in which the protection of asylum seekers and refugees cannot be guaranteed.

Commentaries on the subject conclude that not only the asylum seekers rescued at sea but all asylum seekers picked up on the high seas must be taken to a safe place on community territory.<sup>24</sup> The argument in favour of this is that the sovereign State, i.e. the flag State, must provide effective access to the procedure and an effective opportunity for appeal to the asylum seekers picked up in this way. The State cannot guarantee this by merely taking them to the nearest port. That is an insufficient way of discharging its own jurisdiction, first assumed through rescuing the asylum seekers on the high seas, and of taking appropriate responsibility for them.

In respect to a European border control system we therefore call for the following:

- 1. The prohibition of refoulement applicable on the high seas must be strictly observed by the Member States in the event of pre-border controls.**
- 2. The Member States and the EU must take effective measures to guarantee that refugee boats are not diverted on the high seas.**
- 3. The Member States and the EU must take effective measures to guarantee that asylum seekers picked up on the high seas are granted effective access to an asylum procedure in the EU.**

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<sup>22</sup> *Andreas Fischer-Lescano/Tillmann Löhr*, *ibid*, 23.

<sup>23</sup> UNHCR ExCom, Conclusion No. 53 (XXXIX) (1988), para. 2.

<sup>24</sup> See in detail *Andreas Fischer-Lescano/Tillmann Löhr*, *ibid*, 28.



## **II. Treatment of Asylum Seekers and Refugees in the EU**

### **1. Distribution of European responsibility - Council Regulation (EC) 343/2003 (Dublin II)**

Council Regulation (EC) 343/2003 (Dublin II) sets out the responsibility of the Member State responsible for handling the asylum application. Here the principle applies that only one Member State within the EU is responsible for an asylum seeker and the other Member States can therefore refer the asylum seeker to this State. The regulation was designed to be an important module for “the introduction in successive phases of a Common European Asylum Procedure that should lead (...) to a common procedure and a uniform status (...) for those granted asylum” (Recital 5, Dublin II), in order to progressively create “an area without internal frontiers” for the free movement of persons (Recital 8).

The application of the regulation along with practice under the previous systems (the Dublin Convention and the Convention Implementing the Schengen Agreement) have led to vehement criticism of its rigidity and also its political implications. The Dublin system is a burden to the Member States on the external borders of the EU, at present particularly those in southeast Europe, i.e. Greece, Malta, Italy and Spain. The system is structurally designed so that the majority of Member States, using the argument of irregular entry, force refugees from inside the EU back to its external borders for their procedure, while the border states, in their turn, return refugees to their countries of origin with the assistance of Frontex. They take drastic measures to keep their borders closed, or stop people fleeing from their home countries at all.

Through this system of organised irresponsibility Europe runs the risk of sacrificing the tradition of the Enlightenment and human rights to an ethically cleansed policy serving its own interests. Making marginal changes in the Dublin system is not sufficient. After a total of twelve years of disturbing experiences with such a rigid system it is time to check its legitimacy as such and replace it by one directed to the specific needs of those seeking protection. In each case the basic rights of those concerned must be preserved and adequately protected.

The Commission presented a proposal for an amendment to the regulation in 2008.<sup>25</sup> According to the proposal, the Member States “shall give applicants the opportunity of a personal interview” before the decision on competence for the purposes of the regulation (Article 5). This obligation does not exist at present. In addition, it proposes the “right to an effective judicial remedy” (Article 26). The appeal or review is to be through an independent court and covers both questions of fact and law. The appeal court shall decide within seven days whether the asylum seeker may stay in the Member State during the procedure (emergency legal protection), and pending the outcome he or she may not be sent back and must be granted free, independent legal representation.

In view of the preservation of family unity the valid rules were extended to the extent that a person can reunite with a family member on condition that the latter has

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<sup>25</sup> Commission of the European Communities, Proposal for a Regulation of the European Parliament and of the Council 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 a stateless person, COM(2008)820 (recast), 3 December 2008.

already been granted international protection in another Member State (i.e. refugee status or subsidiary protection). The person can reunite with an asylum seeker only as long as no negative decision has been taken on his or her asylum application. In addition, the Commission proposes that in the cases in which one of the family members depends on the assistance of the other – e.g. “on account of pregnancy, a new-born child, serious illness, severe handicap or old age” - the Member State that seems to be the most suitable for reuniting the family shall be responsible on request of the family members. The interests of the family members and their ability to travel must be respected (Article 11). The previous possibility (Article 15 para. 2 Council Regulation (EC) 343/2003 is here turned into a legal right. Likewise, the previous standard of Article 15 para. 3 Council Regulation (EC) 343/2003, where a state may enable relatives to reunite in other Member States, particularly unaccompanied minors, is turned into a legal right in the proposal (Article 8 para. 2).

The right to action beyond defined competence remains a discretionary standard, but it should be expanded to cover compassionate grounds. Compassionate grounds are not defined. However, since the previous compassionate grounds of the humanitarian clause (Article 15 paras 2 and 3 Council Regulation (EC) 343/2003) have been integrated into the “binding responsibility” criteria, it is clear that they go far beyond the previous humanitarian grounds arising particularly from the family or cultural context, and may cover all compassionate grounds independently of such a context.

Asylum seekers must not be held in detention simply because they have made an asylum application (Article 27 para. 1). Detaining someone who is “subject of a decision of transfer to the competent Member State” is only allowed after the delivery of the decision and then only if there is serious risk of the person “absconding” (Article 27 para. 2). Without such a precondition (§15 para. 5 AufenthaltG) detaining someone pending transfer would be incompatible with this article. In addition, the Member States should take consider alternatives to detention (Article 27 para. 3).

The competent Member State must continue the asylum procedure in every case. If it has terminated the procedure owing to the asylum seeker’s having withdrawn his or her application before leaving for another Member State or if it has rejected the application, the competent Member State must cancel this decision and complete the asylum procedure. At the moment, practice in the Member States varies greatly. The proposal is to be understood as meaning that there is always to be a full substantive examination, even if a negative decision has been taken solely due to the departure of the asylum seeker.

Finally, the Commission proposes that if a Member State is confronted with an unexpectedly high number of asylum seekers, or if the Commission or a Member State finds that the prevailing situation is incompatible with the standard as laid down in community law, the Dublin system can be temporarily suspended (Article 31). In these cases the Commission can suspend the process of transferring the applicants for a period of up to six months. An extension of the deadline is possible. All Member States have the right to bring about a final decision by the Council, within one month after the announcement of the decision of the Commission. For the period of suspension it is provided that “the other Member States in which the applicants (...) are present shall be responsible for examining the applications for international protection of those persons” (Article 31 para. 6).

The forthcoming amendment of the regulation is far from adequate when it comes to creating a common area of freedom, security and justice in Europe. Rather, it is still urgently necessary to abolish this rigid system and replace it by one adapted to the interests of the persons in need of protection. Pending that, we call for the following:

1. **The responsibilities of Member States must lead to their recognising a legal right to protection when asylum seekers present humanitarian or other compassionate grounds to justify their claim. Priority must generally be given to language skills, cultural, family and other relationships as grounds for protection.**
2. **There must be a guarantee of effective legal remedy against decisions to pass the asylum seeker on to the competent Member State and it must be possible to stay in the receiving Member State until the decision on this appeal.**
3. **No asylum seeker may be placed in detention pending deportation or expulsion for the purpose of implementing the Dublin procedure.**
4. **Minors must on no account be kept in detention or detained pending removal.**
5. **The opportunity of uniting with their families must be granted not just to recognised refugees but also to others with a right of residence (at least to those entitled to stay on humanitarian grounds or because they enjoy subsidiary protection) and asylum seekers, regardless of the status of the asylum procedure.**
6. **On the asylum seeker's return to the Member State responsible, the latter must take up the asylum procedure from the stage it had reached before the applicant left the country.**
7. **In the event of an unexpectedly high number of asylum seekers in a Member State or the non-fulfilment of the obligations derived from the legislation on refugee protection, the Dublin system must be suspended until the pressure eases and the asylum procedure must be conducted in the Member State in which the person is present.**

## **2. European Asylum Support Office**

In June 2008 the Commission recommended adopting a regulation to set up a **European Asylum Support Office**, for the second phase of the joint European asylum system. Accordingly, the Council adopted the European Pact on Immigration and Asylum on 24 September 2008. It stated that the task of the Office would be to facilitate the exchange of information, analysis and experience between the Member States and to expand the practical cooperation between the national asylum authorities. The Office should not have the power to give instructions or take decisions. Through pooling knowledge about the countries of origin, it would promote the coordination of practices, procedures and thus also of decisions by the individual states.<sup>26</sup>

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<sup>26</sup> *Council of the European Union*, European Pact on Immigration and Asylum of 24 September 2008 (13440/08), IVa, 11.

On 18 February 2009 the Commission presented a proposal to this effect<sup>27</sup>. The need for such an office is due to the considerable differences in asylum practice in the Member States, with regard to both the quality of examination and the scope of assessment. Its terms of reference are to improve knowledge of the different actors in the area of asylum and the collection and quality of information about the countries of origin, to assist the Member States through capacity-building and easing special pressure, to promote resettlement in the EU and to reinforce protection systems in third countries. According to the Commission, this is to be achieved through the exchange of good practices, monitoring and quality control support, training and capacity-building.

From the institutional standpoint, the best solution seems to be setting up a support office in the form of a regulatory agency. As an independent European competence centre for asylum questions, the Office will assist the Member States to become familiar with the asylum systems and practices of the other Member States, create closer working relations between the authorities responsible for asylum questions in the operational field, reinforce mutual trust and achieve greater agreement in practice.

Regarding the interpretation and application of the legal instruments in this area, this institution should be equipped with suitable instruments (recommendations, manuals). Otherwise, in view of the plethora of exemption clauses in these instruments, it will hardly be possible to reduce the deplored differing practice in the Member States. The inward-looking view of the Commission is particularly worthy of criticism. Different organisations should be brought in to improve the information about the countries of origin and set up the coordination centre. These include the United Nations Regional Information Centre for Western Europe (UNRIC) and the UNHCR, not to mention the network of non-governmental organizations. The UNHCR in particular should be guaranteed substantial involvement in the context of the asylum office.

In this context we therefore call for the following:

- 1. The European Asylum Support Office must be given effective powers in order to reduce the marked differences in practice in the Member States.**
- 2. The European Asylum Support Office must involve relevant international, intergovernmental and non-governmental organisations, particularly the UNHCR, in improving the information on countries of origin and the quality of decisions of national asylum authorities.**
- 3. The quality of decisions in the Member States can only be improved if the European Asylum Support Office is equipped with suitable instruments (e.g. recommendations, manuals to interpret the acts in the refugee field).**

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<sup>27</sup> *Commission of the European Communities*, Proposal for a regulation of the European Parliament and the Council establishing a European Asylum Support Office (SEC(2009)154, (COM(2009)66 final, 18 February 2009.

### 3. Reception Directive (2003/9/EC)

The Reception Directive of 27 January 2003 lays down minimum standards for the reception of asylum seekers and seeks to ensure full respect for human dignity. It thus “establishes minimum standards for the reception of asylum seekers”, which shall “ensure them a dignified standard of living and comparable living conditions in all Member States” (Recitals 4 and 7 Council Directive 2003/9/EC). The Reception Directive failed to meet this objective because the discretionary powers granted the Member States proved too great.

The European Parliament criticised numerous failings in the reception of asylum seekers and particularly their increasing detention. It deplored, moreover, that the minimum standards “were being poorly applied, or not applied at all” (para. 1) in some Member States. The Parliament further urged that asylum seekers be granted access to legal aid free of charge (para. 22) and that Member States extend medical cover beyond emergency health care (para 24). Since some Member States, including the Federal Republic of Germany, have not introduced the community law obligation of checking to identify persons with special needs the European Parliament called on the Commission to “lay down mandatory common standards for identifying vulnerable persons” (para. 54).<sup>28</sup>

In its proposal for an amendment to the Reception Directive of 2008, the Commission<sup>29</sup> proposes that asylum seekers not be detained for seeking international protection. Unaccompanied minors must not be detained on any account. In the event of detention, asylum seekers should be given access to free legal advice. While the Member States are able to limit freedom of movement to a certain district, according to the Commission, they should refrain from using the more far-reaching option under applicable law of determining the asylum-seeker’s place of residence for reasons of public order. Six months after making the application for asylum the asylum seeker must be allowed access to the labour market. However, this access should not be inappropriately restricted by reference to the needs of the labour market. In addition, an obligation to immediately identify persons with special needs should be introduced. In this context, Member States “shall ensure (...) essential treatment of illness or mental disorders” (Article 19).

There are doubts about limiting the freedom of movement of asylum seekers. From the history of origin of Article 26 CSR51 we infer that the freedom of movement of asylum seekers and refugees is to be fundamentally guaranteed as for other aliens. Restrictions on the grounds of public order may be arranged for a limited period. However, should the Contracting States want to introduce general restrictions on the freedom of movement of refugees, this was only considered admissible to the extent that such restrictions were also introduced for their own nationals.<sup>30</sup> When it is clear that a person seeks asylum, and the necessary procedural steps have been initiated,

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<sup>28</sup> *European Parliament Resolution of 5 February 2009 on the implementation in the EU of Directive 2003/9/EC.*

<sup>29</sup> *Commission of the European Communities, Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (recast), COM(2008)815, 3 December 2008.*

<sup>30</sup> *Nemiah Robinson, Convention relating to the Status of Refugees, 110.*

it is no longer compatible with Article 26 CSR51 to maintain restrictions on freedom of movement.<sup>31</sup>

Admittedly, the Reception Directive permits sanctions for gross offences against the rules regarding accommodation centres. However, according to the general context of the arrangements in Article 16, only administrative sanctions are considered, e.g. withdrawing previously granted advantages. This is confirmed through Article 7 para. 4, which states that the granting of material reception conditions may be subject to restrictions. The directive does not mention sanctions of a criminal law character (Article 16 para. 4). If Member States were to have been granted such powers as well, explicit provisions should have been included. This is not the case, however. Since the directive lays down minimum standards for practice in the Member States, their sanctions may not fall short of the standard set by replacing administrative sanctions with criminal sanctions, as happens under German law.<sup>32</sup> An amendment to the directive must make this point clear.

For the forthcoming amendment to the Reception Directive we call for the following:

- 1. Asylum seekers must not be kept in detention pending deportation.**
- 2. Minors, in particular, must not be kept in detention pending deportation.**
- 3. Asylum seekers must be guaranteed free and independent legal advice and representation in all procedures related to the asylum application.**
- 4. Asylum seekers must be guaranteed appropriate medical cover, not just emergency health care.**
- 5. The decision-making authority must identify persons with special needs immediately after the asylum application has been lodged and to effectively guarantee the necessary treatment, particularly psychotherapy.**
- 6. Asylum seekers must be guaranteed access to the labour market without undue restrictions or delay after lodging their asylum application, at the latest within six months of doing so.**
- 7. The freedom of movement of asylum seekers must be guaranteed in the whole territory of the Member State.**
- 8. Under no circumstances may the violation of measures restricting residence be the object of penal sanctions.**

#### **4. Long-term Residence Directive (2003/109/EC)**

The Long-term Residence Directive assumes that one of the main goals of the EU is the integration of third-state nationals who are long-term residents in the Member States, because this is a “key element in economic and social cohesion” (Recital 4

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<sup>31</sup> *James C. Hathaway*, The Rights of Refugees under International Law, 704-708; *Alice Edwards*, Human Rights, Refugees, and the Right ‘To Enjoy’ Asylum, *International Journal of Refugee Law* 2005, 304, *Gunnel Stenberg*, Non-Expulsion and Non-Refoulement, 1989, 92; *Tom Clark*, Convention and the Need for Authoritative Interpretation, *International Journal of Refugee Law* 2006, 584 (597), *Lex Takkenberg*, Detention and other restrictions on the freedom of movements of refugees and asylum seekers: The European perspective, in: *J. Bhabha and G. Coll*, *Asylum Law and Practice in Europe and North America: A Comparative Analysis*, 1992, 137, 142 f..

<sup>32</sup> *Reinhard Marx*, *Kommentar zum AsylVfG*, 7th edition, 2008, §85 note 3.

Council Directive 2003/109/EC). The directive thus grants third-country nationals who have lived legally in a Member State for a considerable time a long-term residence permit (Article 8 para. 1) and a limited right of mobility in the whole EU (Article 14). Based on this presupposition, the Commission in 2001 proposed that refugees be drawn into the area of application of the directive (see its proposal for Directive 2003/109/EC). During further deliberations on the directive, however, refugees were excluded. Persons enjoying subsidiary protection were not considered at all.

This shortcoming was generally felt to be unsatisfactory. Since the guarantee of freedom of movement of the Geneva Convention on the Status of Refugees is based on the principle of equal treatment of aliens (Article 26), an act aiming to give third-country nationals a secure legal status in the whole community territory, yet excluding third-country nationals in need of protection, is hardly convincing. In its proposed amendment of 6 June 2007<sup>33</sup> the Commission reacted to this criticism, recommending that all those with international protection status – i.e. not just refugees but also those entitled to subsidiary protection – be included in the area of application of the directive (Article 4). However, it makes no recommendation regarding the simultaneous need for a community rule regarding the transfer of responsibility for protection to another Member State. Thus we remain with the application of §11 CSR51 Annex and the European Agreement on transfer of responsibility for refugees of 1980, which does not take account of those entitled to subsidiary protection.

On the effective guarantee of protection against refoulement, the Commission proposes to add an addendum to the person's ID sticker that the third-country national has been granted the status of beneficiary of international protection (under Article 8 para. 3 Council Directive 2003/109/EC). The duration of the asylum procedure is to be offset against the period of five years (Article 4 para. 1). The deliberations of the Commission proposal are stagnating at present because of the debate on including those entitled to subsidiary protection in the directive's area of application. In this context the UNHCR has gone a step further in calling for the inclusion of all those enjoying subsidiary protection in any form under national law.<sup>34</sup>

For the forthcoming amendment of the Long-term Residence Directive, and taking account of the proposals of the UNHCR, we call for the following:

- 1. The Long-term Residence Directive must cover persons who enjoy international protection or in some form subsidiary protection under national law.**
- 2. The duration of the asylum procedure and all times of legal residence should be counted in the required period of a legal residence of five years, regardless of the grounds for granting the right of residence.**
- 3. The requirement of “stable and regular resources” (Article 5 para. 1 lit. a) Council Directive 2003/109/EC) should be waived for people enjoying international protection, or at least exceptions should be allowed in view of the specific situation of vulnerable persons.**

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<sup>33</sup> Proposal for a Council Directive Amending Directive 2003/109/EC establishing long-term residence status to extend its scope to beneficiaries of international protection (COM(2007)298final).

<sup>34</sup> UNHCR, Comments of UNHCR on the Proposal of the Commission for a Council Directive Amending Directive 2003/109/EC Establishing Long-Term Residence Status to Extend its Scope to Beneficiaries of International Protection, 29 February 2008.

4. **Regarding the requirement to “comply with integration conditions” (Article 5 para. 2 Council Directive 2003/109/EC) exceptions should be allowed for the benefit of people enjoying international protection in keeping with their individual circumstances.**
5. **Rules must be devised to clarify the circumstances under which the responsibility for protecting persons enjoying international protection is transferred to another Member States.**
6. **The recognition of refugee status in one Member State must be binding on all Member States.**
7. **Only the Member State that originally granted protection status is competent to process an application for extradition of a person enjoying international protection. It must be clear that granting international protection runs strictly counter to extradition on the grounds underlying the granting of protection (e.g. the risk of sentences not based on the rule of law).**

## **5. Return Directive (2008/115/EC)**

The directive was adopted by the European Parliament on 18 June 2008 and by the Council on 16 December 2008. The Member States have two years to transpose it into national law. With this directive the EU underlines the legitimate right of the Member States to “return illegally staying third-country nationals, provided that fair and efficient asylum systems are in place which fully respect the principle of non-refoulement” (Recital 8). The directive emphasises the priority of the principle of voluntary return over deportation (Recital 10). Its goal is to establish common rules for “return, removal, detention and entry bans” (Recital 20). “The use of coercive measures should be expressly subject to the principles of proportionality and effectiveness” (Recital 13).

The directive seeks to set common standards for return procedures, but not to replace more favourable provisions in the Member States (Article 4 para. 2). The clause on better conditions is supplemented by a prohibition of worse conditions. According to Annex 1, the Council declares that implementing the directive must not be used to introduce less favourable provision. While this statement is not binding it may be cited in interpreting the clause on better conditions. Decisions to send them back and entry-ban decisions must be issued to the person concerned in writing, giving reasons (Article 12 para. 1). Before being returned, the person must be given the opportunity to lodge an effective appeal with a court, administrative authority or comparable independent body (Article 13 para. 1). An application to temporarily suspend enforcement may be lodged with this body (Article 13 para. 2). The deportation must be suspended when it would violate the prohibition of refoulement or the lodging of an appeal has a suspensory effect (Article 9 para. 1).

A forced removal must only be considered as a last resort, must be proportionate and not exceed reasonable force (Article 8 para. 4). The Member States must set up an effective forced-return monitoring system (Article 8 para. 6). The deportation of unaccompanied minors may only take place after consultation with an independent body, if the authorities of the Member State are satisfied that it is in the best interest of the child or young person, and if he or she is to be returned to a relative or legal representative or to adequate reception facilities (Article 10). The decision to return



shall be accompanied by an entry ban if there was no opportunity for voluntary departure or this was not used (Article 11). In the event of voluntary departure, which is preferred, account must be taken of the principle of family unity, the health of the person and the right of minors to access to basic education during their stay (Article 14). Detention pending deportation may be ordered in the event of a risk of “absconding” or if the third-country national tries to hamper the “preparation of return or the removal process” (Article 15 para. 1). Detention must take place in special facilities (Article 16 para. 1).

The Return Directive was hotly debated. There are fears, in particular, of an expansion of detention pending deportation which is already used inappropriately often. It was criticised that detention be admissible up to 18 months. The directive introduces minimum rights applicable for the return of the persons concerned but they are at a low level. For the transposition in Germany the prohibition of worse conditions must be guaranteed, which has consequences for the ordering of detention pending deportation and entry bans.

In view of the forthcoming transposition of the Return Directive we call for the following:

- 1. The German Federal Government must note the prohibition of worse conditions under Article 4 para. 2 in connection with Annex 1.**
- 2. From the obligation to establish an effective monitoring system for deportations it follows that an independent body must be set up and its members granted access to the persons concerned and the dossiers.**
- 3. According to the prohibition of worse conditions, an entry ban may, apart from removals, only be ordered for deportations after a negative asylum decision and not for those persons who leave the country voluntarily.**
- 4. Access to all detention centres must be permitted at all times to NGOs and also to the Subcommittee on Prevention set up under the Protocol to the Convention against Torture.**

Berlin, 30 June 2009