

Caritas Europa

4, Rue de Pascale, B-1040 Bruxelles

CCME – Churches' Commission for Migrants in Europe

174, Rue Joseph II, B-1000 Bruxelles

***COMECE – Commission of the Bishops' Conferences of the European Community
- Working group on Migration -***

42, Rue Stévin, B-1000 Bruxelles

Conference of European Justice and Peace Commissions

Boltzmanngasse 14, A-1090 Wien

ICMC – International Catholic Migration Commission

4, Rue De Pascale, B-1040 Bruxelles

JRS-Europe – Jesuit Refugee Service Europe

8 Haachtsesteenweg, 1210 Brussel

QCEA – Quaker Council for European Affairs

50, Square Ambiorix, B-1000 Bruxelles

“For I was a stranger and you welcomed me” (Mt 25:35)

Comments on the

Communication by the Commission

***Towards a common asylum procedure and a uniform status, valid
throughout the Union, for persons granted asylum (Com (2000) 755 final)***

The above-named organisations represent Christian churches throughout Europe, Roman Catholic, Orthodox, Protestant and Anglican, 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 therefore welcome this opportunity, at the invitation of the European Commission, to comment on its Communication on asylum, and to take part in this vital debate on the future of asylum in Europe.

General remarks

As regards the general tenor of the Communication, we very much welcome the Commission's analysis of the situation. We believe that this Communication is an important step towards harmonisation of asylum policy. It is vital to have an overarching vision of a European asylum system in order to address all the relevant aspects in a coherent manner, including: the entry of asylum seekers onto the territory, reception conditions, the asylum procedure itself and the interpretation of the refugee definition, the content of refugee status, temporary protection in situations of mass influx, complementary and humanitarian

protection, and solidarity mechanisms. It is crucial that all future measures reflect current best practice. We believe that the Commission is entirely correct to treat asylum and migration as separate although related issues; our comments on the Commission's Communication on a Community Immigration Policy COM (2000) 757 are available separately. This is a valuable opportunity to address some of the main flaws in the current national asylum systems, in particular: the problem of access to the territory, reception conditions that amount to a *de facto* barrier to seeking asylum in some Member States, and national discrepancies in recognition rates and statuses granted, which raise serious concerns about protection gaps.

The European Council has already underlined its commitment to the "full and inclusive" interpretation of the Geneva Convention on the Status of Refugees 1951¹; besides this fundamental obligation to protect refugees, EU states also have relevant commitments under other human rights instruments including the European Convention on Human Rights and Fundamental Freedoms, the EU Charter on Fundamental Rights, the UN Convention against Torture, the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women.

Finally, we are increasingly concerned at some of the terms used about refugees and asylum seekers in the media and in public debate, and 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 believe that it is important to encourage the media to draw up some principles of best practice in this area. We also urge politicians and all involved in public discourse to make a resolute commitment to give leadership in and to promote the use of accurate and sensitive terminology in the debate on asylum. All of us, but especially the Member States of the European Union and their leaders, have a responsibility to increase public awareness on the issue, emphasising that refugees are fleeing human rights abuses and are entitled to protection.

Commentary on the text

(Note: The numbering of each point matches the numbering of the corresponding point in the Commission Communication e.g. Section 1.1 of our paper should be read as a commentary on Section 1.1 of the Communication. As we have not commented on every point, there are occasional "jumps" in our text, as for example where Section 4.1 is followed by 5.3).

- 1.1. We welcome the Commission's recognition that certain national policies have had the serious consequence of "deter[ing] certain refugees from seeking asylum". It is unacceptable that refugees be hindered in seeking protection because they cannot get access to the territory in order to claim asylum, because they are deterred by fear of detention or the denial of basic social benefits, or because their claim is rejected as a result of flawed decision-making procedures². An asylum system should be based not on deterrence, but on prompt and fair decision-making.

We have particular concerns about admissibility procedures at airports and borders. It is our experience that during such procedures individuals have been deprived of their

¹ Presidency Conclusions of the Tampere European Council, October 1999, paragraph 13.

² "A range of factors, including distrust of state asylum determination procedures, reluctance to be detained, and fears about return, lead some refugees to choose life as a migrant with irregular status. The numbers of those in this position are, moreover, probably boosted by the way that restrictive measures force legitimate refugees into illegal activities to enter the state in the first place, dragging them into an underworld that has its own entanglements and fetters". Gibney, *Outside the Protection of the Law: The Situation of Irregular Migrants in Europe*, RSC Working Paper No.6, study commissioned by the Jesuit Refugee Service Europe, December 2000, p.42

liberty without adequate legal basis, and are often held in very unsatisfactory conditions. The circumstances in which these procedures take place, especially the lack of time and of outside scrutiny, and the difficulties in getting access to independent legal advice in a language the individual understands, increase the risk of *refoulement*.³

- 1.2. We are encouraged by the Commission's recognition of the need for "absolute respect for the specificity of humanitarian admission against the legitimate objectives of preventing and combating illegal immigration". An asylum system is only of value if those in need of protection can have access to it. This point is discussed in more detail in 2.3 below.

Much secondary migration by asylum-seekers within the EU is undoubtedly compelled by the need to find an adequate degree of protection, not least because Member States have varying interpretations of the 1951 Convention. Rather than returning asylum-seekers to the country of first entry, a more logical way of tackling the issue is to ensure that an equal and satisfactory degree of protection is available across the EU. While the Commission indicates in section 2.5. that an alternative system of State responsibility for asylum claims based on where the claim was made can be envisaged once the common procedure and uniform status is in place, we believe it is even more imperative to operate such a system now, while the common procedure and uniform status are still lacking. Otherwise, asylum-seekers face a protection lottery.

We support the Communication's call for rapid high-quality decision-making. We feel that current flaws in the procedures are a significant factor why persons in need of protection fail to get recognition. In particular:

- Decision-makers must be fully trained and competent to deal sympathetically 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.
- Decision-makers must have adequate time and resources to make good decisions, in particular access to high quality and up-to-date country of origin information. There is a need for transparency as regards the information on which asylum decisions are made; asylum-seekers and their representatives must have access to this data. UNHCR and non-government organisations have a role to play in gathering and evaluating this information. We recommend the establishment of a centralized EU independent documentation centre for this purpose.
- Asylum-seekers whose claims are rejected must have access to an independent appellate body, with authority to review both factual and legal findings and the authority to hold a full re-hearing.
- Proper interpretation services are vital, as is access to high-quality state-funded legal counselling and representation; in order to safeguard the rule of law, governments are obliged to enable persons under their jurisdiction to enjoy their rights.
- The EU must mainstream gender into asylum policies at all levels and recognise the specific forms of gender persecution as legitimate grounds for granting asylum in all

³ "At all airports visited, access to asylum procedure is guaranteed [...] although in certain cases, the so-called "fast" or "accelerated" procedure makes it *to a large extent illusory*. This is particularly dangerous when appeal has no suspensive effect like at the airport in Stockholm." Gross, *Arrival of Asylum Seekers at European Airports*, Report by the Council of Europe Committee on Migration, Refugees and Demography, Doc 8671, 8th June 2000. Emphasis added.

Member States. Women asylum-seekers should have access to female interviewers, interpreters and counsellors.

- 1.3. We agree that it is not appropriate to “organise the recognition of Geneva-Convention refugee status or subsidiary protection by means of individual positive or negative decisions taken by a Community body”. However, harmonization requires effective judicial control by the European Court of Justice; this seems an appropriate time to review the restrictions in Article 68 (*ex* Article 73p) of the EC Treaty with regard to access to preliminary rulings on the interpretation of EC acts based on Title IV. In our view, the general jurisdiction of the Court of Justice to give preliminary rulings laid down in Article 234 (*ex* Article 177) should apply: lower tribunals should have a discretion to submit an issue to the Court of Justice, whereas courts and tribunals of final appeal should be obliged to bring relevant matters before the Court of Justice. Otherwise, “[t]he fact that judicial control at the EC level is [...] contingent upon discretionary decisions at the level of national courts is likely to weaken the effective implementation of harmonization measures under Title IV”.⁴
- 2.1. We agree that the goal of harmonisation necessitates restricting the flexibility given to Member States. However it is vital that no state will be obliged to lower its current standards in order to align itself with the harmonised standards; for instance, those states that do not impose time limits for lodging an asylum application should not be required to impose such a restriction on the basis that other states follow this practice. Indeed, states should be positively encouraged to operate higher standards than the harmonised minimum; otherwise, common minimum standards quickly become common maximum ones.

We support the option presented by the Commission of abandoning safe country of origin policies. We believe that failing to examine asylum applications on their merits leads to a very real risk that persons in need of protection are not identified. It is unrealistic to expect asylum seekers to rebut the presumption that they are safe in their home countries, particularly where they are expected to do so in a very short time frame, perhaps while being detained (see below 4.1).

Safe third country policies must be exercised with great caution, if at all. No-one must be sent back to a third country without the opportunity to refute the assumption of safety, and without official guarantees that he/she will be admitted to an adequate refugee determination procedure and adequate reception conditions; asylum-seekers must be guaranteed that they do not face the risk of chain deportations ending in *refoulement*.

- 2.2 We support the creation of a single procedure for the determination of protection needs. Such a system is already in place in several member States and, as stated above, harmonisation must be directed at best practice. We strongly agree with the position of UNHCR:

“The circumstances that force people to flee their country are complex and, often, of a composite nature. Many times, those fleeing a country affected by war or conflict can also validly claim to fear persecution on 1951 Convention grounds. The identification of the person's protection needs cannot, therefore, be made in a compartmentalised fashion. **The case must be examined in its totality, and this can be better achieved if the claim is considered in a single procedure.** Furthermore, UNHCR believes that a single asylum procedure will help to

⁴ Alston, “The EU and Human Rights” (1999), OUP p. 373.

increase speed and reduce the costs of decision-making in asylum matters.”⁵

Under such a system the application should first be examined in accordance with the 1951 Convention; should these criteria not be met any other protection grounds fall to be considered, followed by any other humanitarian reasons. We envisage this as a hierarchical system; any applicant refused a particular status is entitled to appeal this refusal without losing any lesser status already granted. We believe that it would be more efficient to consider within this procedure all relevant elements including other obstacles to the removal from the territory.

- 2.3 It is essential that people seeking protection have access to the territory in order to apply for asylum. As noted above in 1.2, we very much welcome the Commission’s recognition that measures to combat irregular migration should take into account protection needs. This is a particular concern in relation to visa policies and anti-trafficking/smuggling measures, which must be framed in such a way as to be sensitive to the question of access. One aspect of this is that all measures taken to prevent irregular migration should contain a “savings clause”, specifying that nothing in the measure shall affect the protection of refugees and asylum-seekers under international law.

Visa requirements should not be introduced for nationalities normally exempt on the basis of a mass influx of asylum-seekers of that origin; on the contrary, such a situation would tend to indicate that there are real protection needs in that country, and if anything access should be facilitated rather than inhibited.

Carrier sanctions, which effectively prevent individuals having access to the territory regardless of the merits of their potential asylum claim, should be abandoned.

We believe that ultimately the most effective way to counteract human trafficking and smuggling is to reduce the demand by creating legal possibilities for access to member States’ territory. We welcome the signal sent by the European Union in signing the protocols to the UN Convention on trans-national organised crime, including the principle of non-penalisation of victims. We particularly urge that those who facilitate unauthorised entry and/or residence out of humanitarian motives should be exempted from punishment.

- 2.3.2 We welcome the Commission’s suggestion of expanding resettlement programmes. As by far the majority of refugees remain outside the EU, in some of the world’s poorest regions, it is an important act of solidarity and responsibility sharing to offer the possibility of resettlement. As the Commission itself underlines, however, this option must not in any way prejudice the proper treatment of individual requests by spontaneously-arriving asylum-seekers.
- 2.4 We support the Commission’s proposal that all applicants for protection would benefit from the same reception standards. Harmonisation of living conditions must reflect current best practice in member States. The rights enjoyed by asylum-seekers should be clearly defined and reception conditions must not be left to the discretion of officials. Asylum-seekers must not be deprived of their original rights as they progress through the different stages of the asylum procedure. We note that the right to work is an important step towards integration.
- 2.5 We believe that an asylum application should be examined in a country where the application is lodged. As the Commission itself has noted, the Dublin Convention is not

⁵ UNHCR preliminary observations, January 2001. Emphasis included.

an efficient mechanism for allocating responsibility⁶. Examining the asylum claim where it is made is the most appropriate solution with regard to the objective of shortening the duration of asylum procedures. We believe that this will reduce administrative procedures and will thus be less expensive. It also provides for the various reasons a refugee is seeking refuge in a specific country. This system should be extended to enable other Member States than the one where the application was lodged to “opt in” for reasons of existing family strings or cultural relations on the basis of the double voluntariness principle.

- 2.6 We note that voluntary return for both refugees and rejected asylum-seekers is more likely to succeed when the individual has had access to training and work experience during the time spent in the host country.

We believe that a useful means of promoting voluntary return for refugees is to encourage “go and see” visits and to offer reintegration assistance above and beyond financial aid.

- 3.1 With regard to the common interpretation of refugee status, we share UNHCR’s position that “persecution” in Article 1 of the 1951 Convention does not exclude persecution by non-state actors, an interpretation also shared by the vast majority of member States. We believe that this is an indispensable part of the “full and inclusive interpretation” of the 1951 Convention to which all member States committed themselves in Tampere.
- 3.2 We believe that a single status for Convention refugees and other persons under protection is both easier to administer and fairer for those concerned. If, however, it is decided to have several statuses with varying rights, it is vital that each status confers sufficient rights to enable a dignified existence.
- 3.3 We welcome the rights set out in this section as basic components of a single protected status or of each status where there is more than one. It should be noted that where a single status is created, the rights granted must not be less than those specified for refugees in the 1951 Convention. In addition, it is important that the anti-discrimination package be implemented in such a way as to avoid any discrimination on the basis of nationality.
- 3.4 We agree with the Commission’s general approach to integration as expressed in this article. We recommend that the EU adhere to the guidelines on integration set down by UNHCR. We would also stress that integration should begin before a final determination is reached. This is particularly important where procedures are of long duration. Once granted protection, individuals should have simplified and accelerated access to citizenship.

Having regard to the necessity of “taking advantage of the talents that refugees have to offer, including their professional skills”, we urge the creation of a coherent system for the swift recognition of refugees’ professional qualifications, accompanied by any assistance necessary to top up an individual’s skills to be ready for the labour market. As noted above in 2.6, this approach is also likely to make a later return to the country of origin more viable, as the individual is able to return with more skills and hence should be better able to provide for himself/herself and in many cases perhaps also provide a valuable contribution to a recovering society.

- 4.1 In relation to the proposed Council decisions identifying the groups or situations where there are or are no special risks, we emphasize that no-one should be rejected without

⁶ Commission Staff Working Paper, “Revisiting the Dublin Convention” SEC (2000) 522

having had a full examination of the individual circumstances of his or her case. In this context, we are extremely concerned about certain proposals to categorize all countries as high, medium and low risk, and make asylum decisions accordingly. We believe that this crude categorisation takes little or no account of very complex national or regional situations, and the speed at which those situations can change. As noted in 2.1 above, we believe that asylum claims should be examined individually and on their merits. We support the proposal for a database and translation facility for exchanging relevant information and we stress the need for the independence and transparency of this resource (see 1.2 above).

- 5.3 We very much welcome the involvement of civil society as “actors and vectors of asylum values in Europe”. We are ready to take part in the preparatory work necessary for the creation of a harmonised European asylum system, such as the various studies set out in this Communication, and to play an active role in the future system itself. We encourage the Commission to establish a formal mechanism for consultation with civil society in the development of future legislation. Many non-government organisations and faith communities have substantial experience on the ground with asylum-seekers and refugees, and can offer a valuable perspective on the debate.

Brussels, May 2001