

**ECRE**



EUROPEAN  
COUNCIL  
ON REFUGEES  
AND EXILES

***Defending Refugees' Access  
to Protection in Europe***

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## Executive Summary

Recent times have seen significant year on year decreases in the number of persons seeking asylum on the territories of European Union (EU) countries. This year the number of refugees worldwide rose for the first time in many years while the number of asylum applications in the European Union reached a 20 year low. There are probably a number of factors influencing these trends. For example, more persons may be choosing to remain irregularly rather than enter an asylum procedure, for reasons including lack of confidence in the asylum systems, a fear of being detained or transferred under the Dublin II Regulation, being under the control of traffickers. However it is also beyond doubt that the constant tightening of EU border controls is having a major impact in preventing refugees from seeking asylum in Europe.

With barely any legal migration routes into the EU from third countries, migrants are forced into resorting to irregular means of travel. This often means people place themselves in the hands of unscrupulous smugglers or traffickers and / or taking life-threatening risks to complete the journey to Europe. Most are suffering horrific violence and human rights abuses along the way and many are dying. It has been estimated that 3,000 persons died between January and July 2006 trying to cross the Mediterranean. Others have said the figure is closer to 25,000.<sup>1</sup> No-one knows the real death toll: journeys can cover vast distances, persons may undertake several attempts – some do not survive desert crossings, while others drown at Europe's door. Every death is one too many, irrespective of a person's reason for trying to enter Europe.

Persons fleeing persecution have no more means to legally travel to the EU than any other category of person, despite the right to seek asylum established under the Universal Declaration of Human Rights. Refugees are therefore also forced into irregular channels thus creating so-called 'mixed flows'. We know that refugees and others in search of international protection are among the migrants. For example since 2002, 48% of asylum applicants in Malta, most of whom arrive by sea in an irregular manner, were eventually recognised as in need of international protection.<sup>2</sup> Meanwhile, to prevent irregular immigration, states are implementing an increasing array of border control measures that lack the necessary mechanisms to identify potential asylum seekers and allow their access to the territory and subsequently to an asylum procedure. This is leading to the violation of the principle of *non-refoulement* as enshrined in the 1951 Refugee Convention at Europe's borders.

**While recognising that states have a right to control their borders, the European Council on Refugees and Exiles (ECRE) urgently calls on EU countries to review and adapt all border management policies and operations in order to ensure the full respect of the principle of *non-refoulement* at its external borders.**

The EU's external borders are generally understood to be the land and sea borders and airports of EU Member States that are part of the Schengen area. While the responsibility for controlling borders lies squarely with the Member States, since the creation of the Schengen zone their capacity for surveillance and control of the EU's external borders has been more systematically supported and developed at the EU level. The EU is making substantial investments in this field, not least through the creation in 2005 of the European Agency for

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<sup>1</sup> Pro-Human Rights Association of Andalusia, cited in CEAR, *Report on certain border externalisation practices pursued by the Spanish government that violate the rights of both now and in the future of immigrants who may seek to reach Spain via the southern border*, May 2007.

<sup>2</sup> Jesuit Refugee Service, *2007 Nansen Award winner addresses government representatives on refugee protection and mixed migration*, 2 October 2007.

the Management of Operational Cooperation at the External Borders (FRONTEX) and a new External Borders Fund of 1.82 billion Euros for 2008-2013.

**FRONTEX** has planned and coordinated a number of operations on the EU's land, air and sea borders. It has stated that its activities to date have led to a considerable decrease in the number of irregular entries into the EU, presenting it as a success and a factor that contributes to saving human lives. For ECRE, these statements fail to portray the entire picture: the number of irregular entrants into the EU space may have decreased overall, but at what price? Does FRONTEX know how many of these people may have been seeking international protection? Were any able to access an asylum procedure, and where? What has happened to them now?

While Member States are signatories to international conventions, have full command during FRONTEX operations and thus have the primary **responsibility towards refugees**, the critical role of FRONTEX – a EU agency - in determining how operations are carried out means it cannot be devoid of all responsibilities for ensuring operations are respectful of human rights. The key question therefore is not *if* it has responsibilities, but *in what respect* and *to what extent*? However, there is a lack of clarity and transparency regarding the exact scope of FRONTEX's coordinating role and the way in which its operations are conducted. Clarification is fundamental in order to cast light on the allocation of responsibilities and obligations towards refugees, between the agency on the one hand and Member States on the other.

ECRE questions **the role of FRONTEX beyond the EU's external borders**, in terms of whether it can legally be involved in these kinds of operations but also whether it can do so with guarantees that its actions remain in full compliance with relevant European Community (EC) law, namely the Schengen Borders Code, the Asylum Procedures Directive and its own founding Regulation. This implies, amongst other things, that FRONTEX should not be involved in operations beyond the EU's external borders. Any FRONTEX cooperation with third countries should be contingent on a demonstrable compliance by such countries with international refugee and human rights standards.

FRONTEX should also vigorously pursue ways to establish a **structured cooperation with asylum experts** such as the United Nations High Commissioner for Refugees (UNHCR) and non-governmental organisations (NGOs) with a protection mandate, in order to facilitate operations that take account of protection issues. The urgent formulation of measures to address the lack of **independent monitoring** of Member States and FRONTEX's border operations is also necessary to safeguard the right to seek asylum. The establishment of an independent monitoring body should be explored, with the involvement of NGOs and UNHCR. Member States and FRONTEX should also ensure that the **training** of border guards and Rapid Borders Intervention Teams (RABITs) includes asylum and human rights law.

ECRE believes that the **EU External Borders Fund** should be used to help incorporate protection-sensitive measures into border management and should therefore support a range of activities that would explicitly aim to ensure that protection aspects of border management are better monitored and that measures to address gaps are developed and implemented over the next few years.

In terms of activities at the EU's external border or within its territory it is important to recall that both FRONTEX and Member States must respect the **Schengen Borders Code**, wherever they perform controls. They should, therefore, be ready to receive all asylum

requests presented to them in the course of the enforcement measures, ensure admission to their territory for the purposes of the asylum procedure, provide reasons for a refusal of entry and ensure that the right to appeal any such decision is available.

As with the activities of FRONTEX, EU governments are not limiting their border management activities to their territories but have in fact developed a range of **externalised migration controls** beyond their borders, sometimes in cooperation with the authorities of other EU states and also those of third countries and private actors, which are aimed at making it as difficult as possible for non-EU citizens to reach Europe. They can prevent the departure of people in need of protection from countries of origin or transit, in contravention of the right to free movement under the Universal Declaration of Human Rights that includes the right to leave one's own country.

The shifting of border controls further and further away from the EU's physical borders makes it extremely difficult to monitor what happens at the crucial moment when refugees and people in need of international protection come into contact with the authorities of the would-be asylum country for the first time, and allows people to be pushed back without anybody in Europe ever knowing about them. ECRE re-affirms the fact that **Member States' obligations under international and European refugee and human rights law do not stop at national borders**: they can be engaged by actions states carry out outside their national and EU borders, directly or through agents. All EU Member States are bound by the principle of *non-refoulement*, as enshrined in the 1951 Refugee Convention. They must therefore ensure that whenever exercising extraterritorial migration controls, those individuals affected who are seeking international protection, are granted access to a fair and efficient asylum procedure. Whenever they exercise **jurisdiction** (defined as effective control over an individual or over another state's territory) this will require allowing asylum seekers access to their territory. EU Member States are equally bound by the relevant provisions in the European Convention on Human Rights and other human rights instruments wherever they exercise migration controls amounting to an exercise of jurisdiction.

Specific **pre-frontier measures** imposed at land borders include requiring visas, imposing sanctions on transport carriers, the posting of Immigration/Airport Liaison Officers (ILOs/ALOs), biometrics and the use of information databases in the migration field. Although **visas** are probably one of the oldest forms of pre-frontier controls it has still not been proven that there is a direct link between the imposition of visas and a slowing down of irregular immigration. Nevertheless, the EU has in place a common list of 128 countries whose nationals are subject to a visa obligation for entry into its territory, including war-torn and refugee-producing countries and entities, such as Afghanistan, Iraq, Somalia, Sudan and the Palestinian Territories. ECRE urges the EU to consider suspending visa restrictions for a determined period of time (that can be reviewed) for nationals and residents whose country is experiencing a recognised significant upheaval or humanitarian crisis. Visa restrictions should also be lifted where there are no facilities for issuing visas within a country of origin and therefore no means to travel legally.

Not being able to acquire a visa does not in itself prevent a person from arriving at an international airport or seaport. States therefore have other complementary mechanisms in place. **Carrier sanctions** are the most important of these, imposing fines on private transport companies that carry persons who do not hold the necessary visas and/or travel documents to enter the EU. ECRE has long called for such measures to be abolished, as such sanctions have overwhelmingly adverse consequences on asylum seekers. Some states provide for exemptions e.g. in cases where a person is subsequently recognised as a refugee (sometimes also when the third country national is granted a subsidiary form of protection). EU legislation on carriers' liability should be revised so as to ensure that sanctions cannot be

enforced by any Member State if a third country national is admitted to the asylum procedure. ECRE emphasises that, even when non-state agents have been engaged, states are responsible under international law.

In recent years EU Member States have also had increasing recourse to the practice of **posting immigration staff abroad** in other Member States and above all in countries of origin or transit from where they wish to maintain better control on migration movements towards their territory. ILOs and / or ALOs are employed by 25 of the 27 EU Member States. At the level of the EU, a network of EU Member States' Immigration Liaison Officers has been set up to prevent and combat irregular immigration, facilitate the return of irregular immigrants and better manage legal migration. It is very difficult to fully understand their functions and powers, as many of the relevant reports on their work are not publicly available. It can be assumed however that their advice is likely to be determinant for carriers seeking to avoid the imposition of fines. **ILOs/ALOs** should strictly comply with their states' obligations in the field of refugee and human rights and play a positive role in facilitating the entry into the EU of people who wish to seek asylum. The EU ILO Regulation should be revised, in order to provide a clearer framework for their activities and establish a code of conduct for incorporating protection concerns in their work.

**Interception at sea** consists of a great variety of measures, including activities to prevent the departure of boats or ships on dry land or in the proximity of the coast; diversion; and visiting/boarding of vessels. Whether these forms of interception are lawful according to international human rights and refugee law depends on the law applicable to the stretch of sea where interception takes place, or on the consent of the third country for interception on its territory or territorial waters. The enforcement of interception often overlaps with the obligation to render assistance to persons and ships in distress at sea wherever they are encountered in the course of navigation. Difficulties can arise because of the unsafe character of the boats and vessels used by migrants, which easily turns a surveillance activity into **rescue**. At the same time the obligation to rescue can be used as a pretext to undertake interception. In the course of rescue and interception operations, priority should be given to ensuring the safety of the people on board. This will imply their transfer to a safe place, which cannot be a ship but must be disembarkation to dry land. Undertaking an effective rescue will also require ensuring the availability of medical and psychosocial care for persons rescued who need it, such as separated children, traumatised persons and victims of violence in transit.

In cases of interception consisting of **diversion to a third country involving a EU state**, the latter should ensure the safety of the people who are intercepted or rescued. Any asylum seekers should be brought to EU territory without delay. In cases of **interception in third country waters involving a EU state** full compliance with the 1951 Refugee Convention and international law should be ensured, including access to asylum procedures, prohibition of inhuman and degrading treatment in all circumstances and the right to an effective remedy. EU Member States should require a number of guarantees from third countries involved, e.g. within any bilateral agreement concluded with third countries, including that refugees will not face a risk of *chain-refoulement*; those who wish to apply for asylum will be given access to an asylum procedure and to UNHCR. EU states should offer to process asylum seekers if an unprecedented burden is placed on the third country's asylum system and where third countries do not agree to such guarantees or cannot provide them, EU states involved should allow anyone wishing to seek asylum to enter their territory without delay.

The issue of how southern European countries can be helped to better receive arrivals by sea is crucial, not least because it is key in the facilitation of people's **disembarkation**. A further key problem is that while international law sets out what state is responsible for rescuing

persons in distress at sea, it does not set out which state is then required to allow the disembarkation of any persons rescued. To date EU states have not shown the necessary political determination to develop ways to share the responsibility for hosting refugees more fairly with their EU partners. At the moment solutions are found on an *ad hoc* basis, but there is a clear need for rules of engagement to be agreed at the EU level that clarify the EU state responsible for receiving persons rescued at sea.

The EU must find a way to **share** not only the burden of patrolling Europe's external borders, but also the duty to save human lives and **the responsibility for refugee protection**. This will require political agreement at the EU level, which should include a mechanism to allow the relocation of refugees – after the asylum procedure is concluded – under agreed criteria, among which family union and consent should be priorities. This mechanism should not in any way be set against quotas for resettlement of refugees from outside the EU.

Even where refugees manage to bypass the numerous hurdles they face on their way to the EU, they may still face difficulties in being admitted to EU territory at the physical borders, such as **readmission agreements**. These should be implemented in full compliance with the principle of *non-refoulement*, meaning governments should ensure that the persons crossing the border irregularly are given the possibility to express their protection needs, in order to avoid being returned – directly or indirectly – to countries where they would be at risk of persecution. They should also have access to a legal remedy to challenge the decision to return them in line with the Schengen Borders Code. Prior to being returned, their identity and nationality should be determined and recorded.

The practice of **re-accompanying to the border irregular migrants** apprehended in the proximity of the border or of refusing to register their presence must be stopped at once. EU Member States should introduce sanctions against officers responsible for this kind of behaviour. In addition, there should be no special procedures at borders. Refugees at the border should be given unimpeded access to independent legal advice, interpretation and UNHCR/NGO assistance.

**Border monitoring** activities should be maintained and expanded in all countries with external EU borders in a sustainable manner. UNHCR and NGOs should be key partners to governments in border monitoring and training activities. EU funding, including the EU Borders Fund, should support such partnerships.

ECRE believes that new ways should be envisaged to allow the legal entry into the EU of people in need of protection. One way could be through setting up specific procedures allowing people in need of protection to present an asylum request to the authorities of Member States posted abroad. **Protected Entry Procedures (PEPs)** are arrangements allowing an individual to approach the authorities of a potential host country outside its territory with a view to claiming recognition of refugee status or another form of international protection; and be granted an entry permit in case of a positive response to that claim, be it preliminary or final. PEPs could be set up at first at national level, to be replaced by a EU PEP procedure alongside the development of a Common European Asylum System.

If the EU does not address the serious and indiscriminate barriers to refugees' access to protection in Europe here highlighted, the number of refugees able to seek asylum in Europe will continue to dramatically decrease. This will render the notion of a Common European Asylum System meaningless. It will also increase the responsibility borne by developing countries, that already host the majority of the world's refugees, rather than promote a global refugee protection system in which Europe takes its fair share of the responsibility.