

ECRE



EUROPEAN
COUNCIL
ON REFUGEES
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*Sharing Responsibility
for Refugee Protection in Europe:
Dublin Reconsidered*

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Table of Contents

| | |
|---------------------------------------------------------------------------------------|-----------|
| Executive Summary | 4 |
| Introduction..... | 7 |
| 1. The Dublin system: failing to meet its objectives..... | 9 |
| 1.1 Objectives of the Dublin system | 9 |
| 1.2 The inefficiency of the Dublin system..... | 10 |
| 1.3 The impact of the Dublin system on states at the EU's external borders | 12 |
| 1.4 The impact of the Dublin system on refugees | 14 |
| 2. Amending the Dublin Regulation..... | 17 |
| 2.1 Safeguarding protection standards and fundamental rights | 17 |
| 2.2 Respecting family unity and the interests of children and other vulnerable groups | 19 |
| 2.3 Ensuring clarity and efficiency | 22 |
| 2.4 Improving solidarity and sharing resources..... | 23 |
| 3. Looking towards a functioning Common European Asylum System..... | 25 |
| 3.1 Allocating responsibility within the future Common European Asylum System... 25 | |
| 3.1.1 The impact of the Dublin system on integration and solidarity..... | 26 |
| 3.1.2 'Joint processing' as an alternative to Dublin..... | 27 |
| 3.1.3 Connecting individuals with Member States | 27 |
| 3.2 Sharing responsibility within the future Common European Asylum System | 30 |
| 3.2.1 Sharing the financial costs | 31 |
| 3.2.2 Sharing other resources and functions | 32 |
| 3.2.3 Beyond Status Determination: Freedom of Movement | 33 |
| 3.2.4 Beyond Status Determination: Sustainable Return..... | 34 |

Executive Summary

The ‘Dublin Regulation’ determines the Member State responsible for processing an asylum claim lodged in the European Union. Usually this will be the Member State through which an asylum seeker first entered the EU. The Regulation replaced the 1990 Dublin Convention, and aims to ensure that each claim is fairly examined by one Member State, to deter repeated applications, and to enhance efficiency. It is linked to EURODAC, a database that stores the fingerprints of asylum seekers entering Europe. The Regulation’s ‘sovereignty clause’ allows a Member State receiving an application to assume responsibility, and its ‘humanitarian clause’ allows Member States to unite families in certain circumstances.

According to the European Commission’s June 2007 evaluation, “*the objectives of the Dublin system . . . have, to a large extent, been achieved.*” This conclusion is questionable. After ten years in operation, responsibility is assigned but not carried out, multiple claims and irregular movement persist, and an expensive layer of bureaucracy sits superimposed on a nascent European asylum system. According to the evaluation, low transfer rates are “*the main problem for the efficient application of the Dublin system,*” as fewer than half of agreed transfers are actually carried out. Most of the time, assessing responsibility for an asylum application yields no tangible result. The Commission’s suggestion that Member States might annul “*the exchange of equal numbers of asylum seekers in well-defined circumstances*” highlights the absurdity of the system: states agreeing not to exercise their acknowledged responsibility could in fact improve efficiency. Similarly, the issue of multiple asylum applications remains unresolved: each year since EURODAC was introduced, the proportion of applicants reported to have previously applied has grown. Finally, although the annex to the Commission’s evaluation contains data that raise the possibility that the Dublin system has a significant financial impact, the evaluation itself omits any meaningful cost-benefit analysis, instead simply asserting that “*Member States consider the fulfilling of the political objectives of the system as very important, regardless of its financial implications.*” In ECRE’s view, knowing the cost of the system is critical to evaluating it.

Far from promoting inter-state solidarity, a long-standing EU goal, the Dublin system shifts responsibility for refugee protection toward the newer Member States in Europe’s southern and eastern regions. In 2005, every border state except Estonia reported more incoming than outgoing transfers, and of the non-border Member States, only Austria reported more incoming than outgoing transfers. The Dublin system has a relatively small net effect on the EU’s wealthier, interior Member States: Germany, for example, saw a net outflow of thirty-two asylum seekers due to Dublin transfers in 2005. By contrast, the effect on the often less wealthy ‘border’ Member States can be significant: in 2005, Dublin transfers increased Hungary’s asylum caseload by nearly 10%, and Poland’s by nearly 20%. Actually carrying out all agreed transfers would have more than doubled this impact.

The inefficiencies and contradictions of the Dublin system do not merely impact governments and public finances, but often harshly disrupt human lives as well. The

Dublin system pledged to “*guarantee*” asylum applicants “*that their applications will be examined by one of the Member States.*” In fact, far too often, a Dublin transfer guarantees that asylum applications will *not* be meaningfully examined. During responsibility determination, the process of deciding which Member State should assess an application, asylum seekers can wait as long as six months before their claims can be heard (even if all deadlines are met), and the Regulation’s interaction with Member State practices can result in claims never being heard. Vastly differing refugee recognition rates create an ‘asylum lottery’: for example, over 80% of Iraqi asylum claims succeed at first instance in some Member States, versus literally none in some others. Reception conditions also vary widely: governments, the European Parliament, and NGOs have raised serious concerns at inadequate or even inhumane treatment of asylum seekers in several Member States. States increasingly detain asylum seekers to try to complete transfers, families are kept apart, and refugees with serious health problems receive insufficient care. The application of the Dublin rules causes additional, unnecessary suffering to already traumatised refugees.

Later in 2008, the European Commission will propose amendments to the Dublin Regulation, creating an opportunity for urgently needed reform. For example, the determination of the country responsible for a claim should not result in transfers to Member States that cannot both guarantee a full and fair hearing of asylum claims, and provide reception conditions that at the very least comply with the EU Reception Directive. The Commission should be empowered to instigate a process to suspend such transfers. Applicants must have a right of judicial appeal against transfer, with suspensive effect. The Dublin Regulation should explicitly require that all transferred cases be examined fully on their merits, that all claimants subject to Dublin procedures receive the same reception conditions as are required for other asylum seekers, and that detention may be used only as an extraordinary measure of last resort, where non-custodial measures demonstrably fail.

Family support can benefit both asylum seekers and their host states, but the Dublin Regulation gives insufficient consideration to the interests of families, and of children and other vulnerable groups. The definition of a family – currently limited to spouses, and minor children and their parents or guardians - should be extended, and refugees should be able to join any family member holding a legal residence status in the EU. The Regulation’s humanitarian clause should not be limited to uniting families. It should also allow Member States to prevent the transfer of vulnerable persons such as torture victims, or those with health problems that may require specialised treatment. Determination of responsibility for the applications of children and other vulnerable people should follow a separate process that focuses on their best interests and particular needs.

Confusion and inconsistency exacerbate the Dublin system’s effects. Transfers increase pressure on national asylum systems, while mechanisms to facilitate cooperation and mutual support are lacking. The Regulation should require that all asylum seekers receive full information about the system and its implications, in a form they can understand. Officials should receive comprehensive training, and oversight and better dispute resolution mechanisms must be established. The proposed European Asylum Support

Office should share best practices, help Member States to support one another, and monitor respect for human rights.

Ultimately, however, the Dublin Regulation must be replaced entirely. The ‘Stockholm Programme,’ a set of forthcoming proposals to advance the Common European Asylum System after the Hague Programme expires at the end of 2009, provides the framework to do this. As it enters its second decade, the Dublin regime faces a greatly changed Europe, in which the integration of long-term residents is a top priority. The Dublin system impedes integration by delaying the substantive examination of asylum claims, by creating incentives for refugees to avoid the asylum system and live ‘underground,’ and by uprooting refugees and forcing them to have their claims determined in Member States with which they may have no particular connection. The Stockholm Programme should therefore include a responsibility allocation system that would operate with, rather than against, a Common European Asylum System.

Responsibility determination should focus on existing connections between asylum seekers and Member States. Extended family ties, the presence of communities of similar origin, language skills, and familiarity with cultures and educational systems can ease integration. Similar factors can also help to predict where refugees will prefer to seek asylum. Member States should accept responsibility for asylum claims based on these or similar criteria, or on asylum seekers’ preferences. Either approach would likely reduce irregular movement prior to refugee status determination, as well as facilitating the integration of recognised refugees.

EU Member States should fairly share costs associated with asylum, and should consider collaborating to carry out responsibilities that can be shared without endangering human rights. Collaboration need not imply a single, centralised procedure. For example, interviews and hearings could take place locally, with officials travelling to centres located throughout the EU, whereas tasks such as scheduling, administration and data storage might be handled centrally. Finally, recognised refugees should be able to move freely within the EU to better integrate and to contribute their skills where they are needed, and reintegration support should be provided to assure the sustainable return of those whose claims fail after full and fair examination.

Developed in 1990, nearly fifteen years before the enactment of the first legislative components of the Common European Asylum System, the Dublin system is now an anachronism. Unsurprisingly, a system designed so long ago fails to fit the needs of an EU of twenty-seven Member States that has prioritised the integration of new residents. The Dublin Regulation does not promote harmonisation of EU asylum systems, seriously impedes integration, and sows dissension among Member States. It simply does not work. Rather than pretending it can be made to work, the Stockholm Programme should repeal the Dublin Regulation. Europe cannot afford to miss this opportunity to devise an efficient responsibility-sharing regime that improves solidarity among Member States, and promotes the integration of people who seek, and deserve, international protection.

Introduction

The Dublin system¹ determines the EU Member State responsible for an asylum application. It aims to guarantee all asylum seekers who enter the EU access to an asylum procedure in one, but only one, Member State, and to contribute to the harmonisation of asylum policies among Member States.²

The system, however, is premised on a level of harmonisation of EU asylum systems that simply does not exist. The interaction of the Dublin system with the significant differences in protection and reception standards among Member States deprives many asylum seekers of the right to have their protection claims fully and fairly assessed, undermines progress toward a Common European Asylum System (CEAS), and might well be contributing to the continuing high rate of multiple asylum claims lodged across the EU.³ By focusing on irregular entry and compelling asylum seekers to apply in a Member State not of their choosing, the Dublin system also challenges free movement, a leading principle of the Area of Freedom, Security and Justice.⁴ Furthermore, the system undermines broader European human rights principles, as for example Member States increasingly detain asylum seekers in the course of transfer procedures.⁵

In order for a responsibility-allocating system to operate well, a more level playing field is required. As the EU continues to progress toward that goal, ECRE believes that Member States must urgently rectify some of the Dublin system's flaws. The first section of this paper details some of the most important failings of the Dublin system. Section two builds on prior ECRE proposals, providing detailed recommendations for the

¹ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50, 25.2.2003 ('Dublin Regulation'), Council Regulation No 2725/2000 of 11 December 2000 concerning the establishment of "EURODAC" for the comparison of fingerprints for the effective application of the Dublin Convention, OJ L 316, 15.12.2000 ('EURODAC'), Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 222, 5.9.2003 ('Dublin Implementing Regulation'), and Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of "EURODAC" for the comparison of fingerprints for the effective application of the Dublin Convention, OJ L 62, 5.3.2002. The system encompasses all Member States, plus Iceland and Norway. In February 2008, Switzerland agreed to join the Dublin system. Research used below does not cover Romania and Bulgaria, due to their recent accession to the EU, or Denmark, which joined the system in April 2006.

² See Dublin Regulation, especially Recitals (1), (8), and (16).

³ About 17% of applications. Commission Staff Working Document, *Annual report to the Council and the European Parliament on the activities of the EURODAC Central Unit in 2006*, Brussels, 11.09.2007 SEC (2007) 1184 ('2006 EURODAC Report'), pp. 9-10.

⁴ See The Treaty of Amsterdam, Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Part I, Article 1(3).

⁵ ECRE/ELENA (European Legal Network on Asylum), *Report on the Application of the Dublin II Regulation in Europe*, March 2006 ('Dublin II Report'), documented significant and increasing use of detention in the course of Dublin transfers. Such detention might violate article 5 of the European Convention on Human Rights.

amendments to the Regulation the European Commission plans to propose during 2008, in the next phase of developing a CEAS.⁶

Looking beyond the envisaged completion of the Hague Programme,⁷ ECRE continues to advocate replacing the Dublin Regulation with a system that ensures respect for refugee rights and true responsibility sharing. The third section of this paper explores the possible outlines of such a system, seeking to inform the discussions under the Stockholm Programme as they consider a CEAS in the context of enhancing solidarity and pursuing the goal of integrating new residents into Europe.⁸ States and asylum seekers must know that reception conditions will be comparable, and each case will follow similar procedures and have the same outcome, no matter which authority evaluates it. The EU asylum *acquis* must comply with the 1951 Refugee Convention⁹ and other relevant law, and adhere to or exceed European standards of human rights.

⁶ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Legislative and Work Programme 2008 COM(640) final, Brussels 23.10.2007, p. 16.* For ECRE's proposals relating to the Dublin Regulation, see ECRE, *The Dublin Regulation: Ten Recommendations for Reform*, March 2007 ('Ten Recommendations'); ECRE, Dublin II Report.

⁷ *The Hague Programme: Strengthening freedom, security and justice in the European Union*, Annex 1 to the Presidency Conclusions, European Council, 4/5 November 2004 ('Hague Programme').

⁸ See Informal JHA Council on 25/26 January 2008, *Report of the High Level advisory Group on the Future of EU Home affairs Policies*. In particular, para. 23 prioritises the creation of a CEAS, para. 28 highlights the importance of integration, and para. 51 notes that the Group will report to Ministers of Home Affairs in July 2008. The proposals of this 'Future Group' are expected to form the basis for the successor to the Hague Programme, currently referred to as the Stockholm Programme.

⁹ Convention Relating to the Status of Refugees, 28 July 1951, and Protocol of 31 January 1967.

1. The Dublin system: failing to meet its objectives

According to the European Commission's June 2007 evaluation, "*the objectives of the Dublin system, notably to establish a clear and workable mechanism for determining responsibility for asylum applications, have, to a large extent, been achieved.*"¹⁰ It is questionable whether this conclusion is justified, as the data provided to support it are inconsistent, incomplete, and sometimes entirely absent.¹¹ Comparing the actual effect of the Dublin system against its stated goals reveals its ineffectiveness and its failure to guarantee respect for the rights of asylum seekers, most prominently the full and fair consideration of their protection claims.

1.1 Objectives of the Dublin system

The primary objective of the Dublin system is to allocate responsibility for processing an asylum application to the Member State that "*played the most important part in the entry or residence of the person concerned.*"¹² The Dublin Regulation and the preceding Convention¹³ also aimed to:

- Contribute to the harmonisation of asylum policies;¹⁴
- Guarantee protection in line with international obligations and humanitarian tradition;¹⁵
- Promote free movement in an EU without internal frontiers;¹⁶
- Ensure efficiency, e.g. through time limits, stipulations on proof required, and rapid processing of asylum applications;¹⁷
- Ensure that one Member State examines each application (avoiding the 'refugees in orbit' phenomenon);¹⁸
- Prevent "*multiple applications for asylum submitted simultaneously or successively by the same person in several Member States*";¹⁹ and
- Preserve family unity to the extent this is compatible with the other objectives.²⁰

¹⁰ European Commission, *Report from the Commission on the evaluation of the Dublin system* COM(2007) 299 final SEC(2007) 742 Brussels 6 June 2007 ('2007 Evaluation').

¹¹ *Ibid.*, pp. 3-4, 12.

¹² European Commission Staff Working Paper, *Evaluation of the Dublin Convention* SEC (2001)756 ('2001 Evaluation'); European Commission, *Green Paper on the future Common European Asylum System*, Brussels, 06.06.2007 COM(2007) 301 final ('Green Paper'), p. 10.

¹³ The Dublin Convention determining the state responsible for examining applications lodged in one of the member states of the European Community CONV/ASILE (1989) ('Dublin Convention').

¹⁴ Preamble to the Dublin Convention.

¹⁵ *Ibid.*; reiterated in European Commission, *Proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, Brussels, 26.07.2001 COM(2001) 447 final 2001/0182(CNS) ('Proposal for Dublin Regulation'); Dublin Regulation, Recital 12.

¹⁶ Preamble to the Dublin Convention.

¹⁷ Dublin Convention; updated in the Dublin Regulation.

¹⁸ Preamble to the Dublin Convention.

¹⁹ European Commission, *Proposal for Dublin Regulation*, p. 3.

²⁰ Dublin Convention, Recital 6.

It is difficult to assert that the Dublin Regulation has achieved any of these goals. The system assigns state responsibility for asylum applications, but execution of this responsibility is inconsistent, and the extra procedures and costs required to comply with the Regulation detract from the efficient processing of applications. Through denial of access to a procedure, inequalities of protection granted in some Member States, erroneous transfers, extensive use of detention, separation of families, and more, the system also fails to achieve its stated objectives regarding international protection.²¹

1.2 The inefficiency of the Dublin system

The lack of complete and reliable statistics makes it difficult to assess the Dublin system thoroughly, but the available evidence indicates its operation remains inefficient and expensive. More than half of agreed Dublin transfers never happen. Multiple applications are still prevalent. Assessment of state responsibility takes time and money even when no transfer request is made or a transfer takes place in error, and the operation of the Dublin system slows asylum processing considerably.

According to the European Commission, low transfer rates are “*the main problem for the efficient application of the Dublin system.*”²² In 2003-2005, Member States agreed to transfer 40,180 out of 599,489 asylum applicants under the Dublin Regulation, i.e. less than 7% of the asylum claims lodged within the EU.²³ Of these, 16,842 were actually transferred. Most people regarding whom Dublin requests are made – and the majority of those for whom another state accepts responsibility – are not transferred.²⁴ Some transfers fall to legal challenges,²⁵ and some would-be transferees ‘disappear.’²⁶ Simply put, public

²¹ See e.g., UNHCR, *The Dublin II Regulation – A UNHCR Discussion Paper*, April 2006 (‘Dublin II Discussion Paper’); ECRE, Dublin II Report; ECRE, *The Dublin Regulation: Twenty Voices – Twenty Reasons for Change*, March 2007 (‘Twenty Voices’).

²² European Commission, *Commission Staff Working Paper Accompanying the Communication on the Evaluation of the Dublin System SEC(2007)742* Brussels 6 June 2007, (‘2007 Evaluation Annex’), p. 17.

²³ European Commission, 2007 Evaluation, p.4. These numbers overstate the effect on asylum systems, as many outgoing transfers are offset by incoming transfers. For example, Germany, involved in far more transfers than any other Member State, reported 2748 outgoing transfers and 2716 incoming. *Ibid.*, p. 12.

²⁴ *Ibid.*, p. 18 (covering Sept. 2003-Dec. 2005). Incoming transfer reports show 40.04% of accepted cases are actually transferred, but outgoing transfer reports show 52.28%. The Annex acknowledges these numbers are based on incomplete reports of actual transfers. *Ibid.*, p. 15.

²⁵ The Netherlands, Sweden, and the UK have seen successful challenges to transfers to Greece on the basis that Greece was not a safe third country. ECRE, Dublin II Report, pp. 94-95, 137; *Nasseri v Secretary of State for the Home Department*, [2007] EWHC 1548 (Admin) (‘Nasseri’). A removal from Austria to Italy was successfully challenged based on a risk of *refoulement*. ECRE, Dublin II Report, p. 14. In 2007, while judicial review was pending, the Hungarian Office of Immigration and Nationality revoked its decision to transfer an Iraqi asylum seeker to Cyprus, citing systemically low recognition rates for Iraqis. Communication received from Hungarian Helsinki Committee, 14 June 2007. Finland, the Netherlands, Norway and Sweden have at various times suspended all transfers to Greece due to protection concerns. ECRE/ELENA, *Summary Report on the Application of the Dublin II Regulation in Europe* (March 2006) (‘Dublin II Summary Report’), p. 9. In February 2008 the Norwegian Immigration Appeals Board again suspended all transfers to Greece, citing concern over possible rights violations. See

resources are being spent to determine and assign responsibilities that are not exercised. To streamline the system, the Commission will consider allowing Member States to conclude bilateral arrangements annulling “*the exchange of equal numbers of asylum seekers in well-defined circumstances.*”²⁷ The perceived need for such a measure highlights the absurdity of the Dublin system: that states agreeing not to exercise their acknowledged responsibility could in fact improve efficiency.

During the Dublin era, the issue of multiple asylum applications has remained unresolved. The reasons behind repeated applications are not well understood, but their incidence continues to increase. Each year since EURODAC was introduced, the proportion of asylum applicants reported to have previously applied has grown.²⁸ Some asylum seekers reapply in the same Member State after being taken back following a Dublin procedure. Others may be legitimately pursuing a claim after transfer to a second state following family reunification, or having successfully challenged transfer back to another Dublin state. Some of those applying in a second state might be doing so following an application made as an emergency measure in a first state, to avoid deportation. Others might be applying following a negative decision in a state where the recognition rate for people from their country of origin is unusually low. Administrative inconsistency also plays a role: for example, Austrian authorities are reported to have allowed a group of Chechen asylum seekers arriving at the border to file asylum claims, but to have then returned them immediately to the Czech Republic without rendering a decision on their claims.²⁹ The fact remains that, in 2006, nearly one in five asylum applicants were known to have previously applied, a higher proportion than ever before. It is arguable that the Dublin system often exacerbates rather than mitigates the phenomenon of multiple claims, and the “*high number of multiple applications indicates that the Dublin system did not have the expected deterrent effect.*”³⁰

At best, the Dublin Regulation adds a lengthy, cumbersome procedure to the beginning of the asylum process. Determining responsibility for an application, and ensuring that exercising that responsibility will not result in *refoulement* or other human rights violations, requires evidentiary hearings and intergovernmental coordination. Many of the steps taken to determine if transfer is appropriate and safe require repetition during the eventual asylum process. Deadlines are frequently missed,³¹ and even if all deadlines are met, a Dublin determination can delay the start of an asylum assessment for many

http://www.une.no/c2002/UNE_no/templates/applications/internet/Dokumenter/Norsk/presse/pressemeldinger/PM070208.htm.

²⁶ European Commission, 2007 Evaluation, p. 8.

²⁷ *Ibid.*

²⁸ 6.89% in 2003, 13.48% in 2004, 16.90% in 2005, and 17.23% in 2006. See European Commission, 2006 EURODAC Report, p. 9; European Commission, 2007 Evaluation Annex, p. 46.

²⁹ Martin Rozumek, *Chechen refugees denied access to Europe*, Forced Migration Review, Vol. 1 No. 23, 2005 (‘Rozumek’), pp. 39-40.

³⁰ European Commission, 2007 Evaluation Annex, p. 47. This statement was made based on 2005 EURODAC data. The proportion of multiple applications increased slightly in 2006.

³¹ European Commission, 2007 Evaluation, pp. 8-9.

months.³² When transfers take place in error, or when courts have to intervene to delay or disallow transfers to protect fundamental rights, this effort is entirely wasted.

Contemplating the inefficiency and ineffectiveness of the Dublin system raises the question of exactly how much public money is spent on it. The Commission's 2007 evaluation asserts that "*Member States consider the fulfilling of the political objectives of the system as very important, regardless of its financial implications,*" but does not attempt to support this position.³³ The accompanying working document contains partial data concerning the number of staff employed by Member States solely to carry out Dublin processing,³⁴ the operational and material cost of handling a transfer request,³⁵ and the cost of carrying out transfers.³⁶ These figures, combined with the reported numbers of requests and transfers, supply a starting point from which to estimate the price of the Dublin system. The cost of accompanying transferees, the burden on court systems of Dublin inquiries and appeals, the additional duties imposed on police and immigration officers in states without dedicated Dublin offices, the reversal of erroneous transfers, and other cost categories merit consideration as well. The available numbers, and the existence of many more types of direct and indirect costs, raise the possibility that the Dublin system imposes a significant, largely unknown, financial burden on Member States. As the chairman of the Select Committee on the European Union of the House of Lords put it, "*[It is] extraordinary that the Commission saw no need to undertake a serious cost/benefit analysis, but were content to act on the assumption that Member States regard fulfilling the political objectives of the system as very important, 'regardless of the financial implications involved'. It cannot be right that we are to accept that taxpayers' money might simply be wasted.*"³⁷ Knowing the true cost of the system is critical to evaluating it.³⁸

1.3 The impact of the Dublin system on states at the EU's external borders

Due to their location, Member States in the EU's southern and eastern regions are the initial destination of most protection seekers who arrive by land or sea. Academic commentators, the UNHCR, and ECRE have all expressed concern that the Dublin system's first country of entry criteria would disproportionately shift responsibility

³² See Madeline Garlick, *The EU Discussions on Extraterritorial Processing: Solution or Conundrum?*, *International Journal of Refugee Law*, Vol.18 No. 3/4, 2006, pp. 605-06 ('Garlick').

³³ European Commission, 2007 Evaluation, p. 13.

³⁴ 190 in Germany, the Netherlands, Austria, Sweden, Belgium and Finland combined. Other member states employ "*usually between three and six persons in their respective Dublin authorities.*" European Commission, 2007 Evaluation Annex, p. 13.

³⁵ For example, € 880 per outgoing or incoming request in Norway, € 15 in Estonia. *Ibid.*, p. 14.

³⁶ More than € 100,000 in Ireland in 2005. *Ibid.* Ireland reported 262 outgoing transfers in 2005. European Commission, 2007 Evaluation, p. 12. This implies a minimum of approximately € 380 per transfer.

³⁷ Letter from the Lord Grenfell, Chairman of the Select Committee on the European Union, to Liam Byrne, MP, Minister of State, responding to the presentation of the Commission's evaluation, July 26, 2007, <http://www.parliament.uk/documents/upload/LetGrenMinDublinsystem260707.pdf>.

³⁸ See e.g., European Commission, 2001 Evaluation, p. 18 ("*[C]ost-effectiveness considerations are an essential part of the assessment of public policies.*").

toward Member States at the EU's external borders.³⁹ By demanding that protection seekers who pass through these countries return there for reception and assessment, the Dublin regulation exacerbates pressures on states that already experience challenges in hosting asylum seekers.

In contrast, the Commission's 2007 evaluation asserts that "*it appears that the overall allocation between border and non-border Member States is actually rather balanced. In 2005, the total number of all transfers to EU external border Member States was 3 055, while there were 5 161 transfers to non-border Member States.*"⁴⁰ This view is questionable, as it is based only on reports of incoming Dublin transfers, and does not reveal how many of the people concerned were transferred from external versus interior Member States. Looking only at outgoing transfers would lead to the opposite conclusion: 7,040 people were transferred from non-border Member states versus 307 from border Member States, a ratio of nearly 23:1.⁴¹ It is more instructive to consider each Member State's ratio of outgoing to incoming transfers. That comparison shows that every border state except Estonia reported more incoming than outgoing transfers, and of the non-border Member States, only Austria reported more incoming than outgoing transfers.⁴² The working document demonstrates the imbalance by ranking Member States according to the ratio of incoming to outgoing transfers reported: the 13 border Member States occupy positions 1-12 and 14 on the list.⁴³

Looking at the relative impact of Dublin transfers on Member States' asylum caseloads reinforces this impression of responsibilities shifted toward border states. When Member States are ranked by order of net Dublin transfers (incoming minus outgoing) compared to the total number of asylum applications received in 2005, the 13 border states occupy the top 11 positions, and 13 of the top 14.⁴⁴ Net Dublin transfers represented a particularly significant proportion of total asylum applications received in Poland (19.28%), Slovakia (12.06%), and Hungary (9.56%).⁴⁵ Carrying out all agreed transfers would exacerbate this effect; for example, Poland, Slovakia and Hungary would each see their asylum caseload increase by more than 40% due to Dublin transfers.⁴⁶

³⁹ See e.g. Garlick, p. 608; Rosemary Byrne, *Harmonization and Burden Redistribution in the Two Europes*, 16 *Journal of Refugee Studies* No. 3 (2003), p. 336, at pp. 350-51; UNHCR, *The Dublin II Regulation: A UNHCR Discussion Paper* (April 2006), p. 1; ECRE, *Comments on the Proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national* (2001).

⁴⁰ European Commission, 2007 Evaluation, p. 12. It appears that the 'border' Member States are Cyprus, Estonia, Greece, Hungary, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Slovakia, Slovenia, and Spain, as these states reported a combined 5,161 incoming transfers. *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.* In aggregate, Member States at the external borders reported 3,055 incoming transfers versus 307 outgoing, and interior Member States reported 7,040 outgoing transfers versus 5161 incoming.

⁴³ European Commission, 2007 Evaluation Annex, p. 50.

⁴⁴ *Ibid.*, p. 52.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, p. 54.

The current European asylum system provides no support to Member States assigned responsibility for cases under the Dublin rules. This would not matter greatly if transfers were distributed more or less evenly across Member States, or even if they tended to place responsibility on the wealthier Member States. As shown above, however, the system disproportionately assigns responsibility to the regions of the EU with the least developed asylum systems, and sometimes also relatively less wealth. At present, the Dublin system does not provide any safeguards against transferees receiving reduced quality of treatment in the states they are transferred to, nor any means to offset the added responsibility assigned to those states. Until the basic problem of assigning responsibility without reference to the needs of either refugees or states is repaired, the Dublin system will continue to operate to the disadvantage of asylum seekers, and of Member States near the EU's external borders.

1.4 The impact of the Dublin system on refugees⁴⁷

Without discounting the inconveniences and costs the Dublin system imposes on Member States, it has its harshest effects on asylum seekers. The system has failed to resolve the 'refugees in orbit' phenomenon, while by disregarding the different levels of treatment afforded asylum seekers by different Member States, it has perpetuated a dangerous 'asylum lottery' in Europe.

During Dublin proceedings, asylum seekers wait with the substance of their claims unheard, and transfers can result in some claims never being heard. For example, for several years the Greek government has 'interrupted' and closed cases if the asylum seeker leaves the place of residence (as is inevitably the case for returned Dublin claimants).⁴⁸ The Commission launched an infringement proceeding against the Greek government at the ECJ in January 2008 for failure to correctly apply the Dublin Regulation.⁴⁹ The details of the action have not been made public, but Amnesty International believes it "*is because of the lack of legal guarantees with regard to a substantive examination of the asylum claim by Greek authorities after transfer to Greece.*"⁵⁰ UNHCR and other NGOs have also recently voiced serious concerns about determination procedures and reception conditions facing Dublin returnees in Greece.⁵¹

⁴⁷ Because the protection requirements of refugees and persons in need of subsidiary protection are similar, and the Commission has proposed extending the Dublin Regulation to encompass subsidiary protection, this paper uses the term 'refugee' as covering both categories, except as otherwise noted.

⁴⁸ See Panayiotis N. Papadimitriou & Ioannis F. Papageorgiou, *The New "Dubliners": Implementation of European Council Regulation 343/2003 (Dublin-II) by the Greek Authorities*, 18 *Journal of Refugee Studies* (2005), pp. 299-318. See also European Commission, 2007 Evaluation, p. 6; ECRE, Dublin II Summary Report, pp. 6-7.

⁴⁹ Case 2006/2217.

⁵⁰ Amnesty International Public Statement, *Greece: No place for an asylum-seeker*, 27 February 2008 (AI Index: EUR 25/002/2008).

⁵¹ See UNHCR, *Asylum in the European Union: A Study of the Implementation of the Qualification Directive*, November 2007, ('Qualification Directive Study'), pp. 31-34; Pro Asyl, "*The truth may be bitter, but it must be told*": *The Situation of Refugees in the Aegean and the Practices of the Greek Coast Guard*, October 2007; Athens News, *Greece blacklisted by Germany*, 29 February 2008 (noting that

ECRE's research revealed that several other Member States close and reject an asylum case *in absentia*, or presume it withdrawn due to the absence of the asylum seeker. These and procedural restrictions, when applied to Dublin transferees, deprive many applicants of the opportunity to have the merits of their claims evaluated or even to lodge an appeal in a number of Dublin states.⁵² The Dublin Convention pledged to “*guarantee*” asylum applicants “*that their applications will be examined by one of the Member States.*”⁵³ In fact, for too many refugees, it is the act of Dublin transfer that guarantees their applications will *not* be examined.⁵⁴

The Dublin system combines with significant differences in the handling of asylum applications by different Member States to produce an ‘asylum lottery’ in the EU. For example, in 2005 recognition rates for Chechens varied from approximately 0% in Slovakia to some 90% in Austria,⁵⁵ and several Member States are reported to *refouler* Chechens to Russia and treat many aspects of their asylum cases differently,⁵⁶ including their status as internally displaced persons prior to seeking asylum and access to reception facilities.⁵⁷ Iraqi asylum seekers also face widely divergent treatment depending upon where their claims are considered.⁵⁸ In 2007, recognition rates at first instance were 87.5% in Cyprus, 85% in Germany, 82% in Sweden, 30% in Denmark, 13% in the UK, and 0% in Slovenia and Greece, for example.⁵⁹ The fates of protection seekers too often depend on which state is allocated responsibility for assessing their claims.

Discrepancies in treatment extend beyond protection rates. Germany, uniquely among Member States, has revoked the refugee status of around 18,000 Iraqis granted protection during Saddam Hussein's reign.⁶⁰ Iraqis whose claims are rejected, but who cannot be returned due to safety concerns, receive a temporary or ‘tolerated’ status in some Member

Germany has suspended transfers of unaccompanied minors to Greece and is considering a suspension of all transfers to Greece after receiving new evidence from ProAsyl).

⁵² Belgium, France, Ireland, Italy, the Netherlands, Slovenia and Spain close cases if they deem the applicant has implicitly withdrawn or abandoned the asylum claim, e.g. by not being present for registration or at the assigned place of residence. Many states do not allow a re-opening of the case, and in Belgium, Hungary, the Netherlands, Slovenia, Sweden and the UK a new application may only be made if the applicant can demonstrate new facts or circumstances. ECRE, Dublin II Report, pp. 150-52.

⁵³ Preamble to the Dublin Convention.

⁵⁴ See e.g., ECRE, *Twenty Voices*, p. 2.

⁵⁵ See e.g., ECRE, *Guidelines on the Treatment of Chechen Internally Displaced Persons (IDPs) Asylum Seekers and Refugees in Europe*, March 2007, (‘Chechen Guidelines’), p. 16. In 2006, recognition rates for Chechen asylum seekers remained above 80% in Austria, and approximately 0% in Slovakia. *Ibid.*, p. 2.

⁵⁶ *Ibid.*, pp. 17-20. See also ECRE, Dublin II Summary Report, pp. 22-23.

⁵⁷ ECRE, Chechen Guidelines, pp. 18-20, 26-28.

⁵⁸ Iraqis represented the largest national group of asylum seekers in industrialised states in 2006-2007. UNHCR, *Asylum Levels and Trends in Industrialized Countries, Second Quarter 2007*, p. 6.

⁵⁹ ECRE, *Five years on Europe is still ignoring its responsibilities towards Iraqi refugees*, March 2008 (‘Iraq five years on’), p. 2 (please note that these figures are rough percentage calculations and are for indicative purposes only as official percentage figures were not available at the time of writing). Sweden, which by 2006 had granted protection to more Iraqis than all other Member States combined, introduced more restrictive policies toward Iraqis in July 2007. This is expected to lead to a steep decline in recognition rates. *Ibid.* See also, UNHCR, Qualification Directive Study, p. 14.

⁶⁰ ECRE, *Iraq five years on*, p. 2.

States, but are left in limbo in others.⁶¹ Social rights pertaining to temporary status vary considerably from one Member State to another.⁶² In some Member States, asylum seekers experience differences in reception conditions depending upon whether they are in a Dublin procedure or in the asylum process itself.⁶³ Even within asylum procedures, those taken back⁶⁴ or taken charge of⁶⁵ following a Dublin transfer sometimes receive different treatment from others.⁶⁶ Recent reports have raised serious concerns about the reception and treatment of asylum seekers in general in several Member States.⁶⁷

Operating the Dublin system in the face of insufficient harmonisation of Member States' asylum systems exacerbates its consequences for protection seekers. Lack of equal protection can create a real risk of *refoulement*, and thus of failing to conform to international legal obligations. By adding to the imbalance of asylum responsibilities toward the Member States at the EU's external borders, the Dublin regime also risks tempting those states to adopt policies seeking to restrict access to their territories or to an asylum procedure.⁶⁸ This can influence asylum seekers to try to avoid transfers or even impel them to go 'underground,' for example to transit irregularly to other Member States, or simply to avoid the asylum process altogether. Some experts have speculated that restrictive asylum practices can convert "a visible flow of asylum seekers into a covert movement of irregular migrants that is even more difficult for states to count and control."⁶⁹ Irregular status harms refugees even more than states, as it can leave them vulnerable to trafficking and other forms of exploitation.⁷⁰ Further harmful effects can accrue if states react by using detention or fast track procedures. In operation, the Dublin system exacerbates many of the very problems it was originally intended to help resolve.

⁶¹ ECRE, *Guidelines on the Treatment of Iraqi Asylum Seekers and Refugees*, April 2007, p. 8.

⁶² *Ibid.*

⁶³ See e.g., ECRE, Dublin II Report, pp. 21, 39, 102.

⁶⁴ The process by which one Member State assumes responsibility for an asylum seeker who has filed a protection claim in another Member State. See Dublin Regulation, Art. 16(1)(a).

⁶⁵ The process by which a Member State resumes responsibility for an asylum seeker who filed a claim there but subsequently relocated to another Member State. See Dublin Regulation, Art. 16(1)(c), (d), (e).

⁶⁶ ECRE, Dublin II Report, pp. 153-54.

⁶⁷ See e.g., European Parliament Committee on Civil Liberties, Justice and Home Affairs, *Report from the LIBE Committee Delegation on the Visit to the Temporary Holding Centre (THC) in Lampedusa (IT)*, Brussels, 19 September 2005; European Parliament press release (Justice and home affairs), *Situation of refugees in Malta – MEPs deplore unacceptable living conditions*, 4 April 2006; Pro Asyl, "The truth may be bitter, but it must be told": *The Situation of Refugees in the Aegean and the Practices of the Greek Coast Guard*, October 2007.

⁶⁸ See ECRE, *The Way Forward: Towards Fair and Efficient Asylum Systems in Europe*, Sept. 2005 ('Way Forward Systems'), p. 13.

⁶⁹ Gil Loescher, *Forced Migration in the Post-Cold War Era*, in Bimal Ghosh, ed., *Managing Migration: Time for a New International Regime?* (Oxford University Press, 2000), p. 200.

⁷⁰ See e.g., Rozumek, p. 41 ("Since 2004 many of those who are genuinely in need of protection and have sought asylum in Poland and the Czech Republic have remained underground and turned to the services of smugglers to reach territories of countries more likely to . . . grant them refugee status").

2. Amending the Dublin Regulation

While continuing to advocate the replacement of the Dublin Regulation with a system that ensures genuine responsibility-sharing and fully respects the protection needs of refugees,⁷¹ ECRE has urged reform of the Regulation as a short term alternative.⁷² ECRE welcomes the European Commission's recognition of some of the significant problems ECRE and others have identified in the Dublin system,⁷³ problems which now require concrete solutions. This section proposes changes for the Commission to consider in the context of the amendments to be proposed in 2008.⁷⁴ These recommendations expand upon earlier suggestions to protect the rights of asylum seekers, and propose policies for the transparent and more efficient functioning of the Dublin system.

2.1 Safeguarding protection standards and fundamental rights

Applicants taken back under the Regulation, who left before receiving final decisions on their claims, should be re-admitted to the asylum procedure. Their cases must be examined substantively, taking into account any new facts or circumstances. If states do not provide each applicant with a full and fair hearing, they may violate their obligations not to return a person to face persecution, torture, or inhuman or degrading treatment or punishment.⁷⁵ The European Court of Human Rights has held that transferring responsibility for an application to another Dublin state does not relieve a state of its obligation to ensure that an asylum seeker is not thereby exposed, even indirectly, to treatment that violates the European Convention on Human Rights (ECHR).⁷⁶

A right of appeal against Dublin transfer, and suspension of transfer pending the outcome of an appeal, is critical to allow Member States to fulfil their duty to verify the absence of a risk of *refoulement* on a case by case basis. The Dublin Regulation does not explicitly guarantee a suspensive right of appeal against transfer, leaving individuals at risk of chain *refoulement* in violation of Article 33 of the Refugee Convention and Article 3 of the ECHR. An appeal that cannot have suspensive effect contravenes Article 3 in conjunction with Article 13 ECHR.⁷⁷

⁷¹ ECRE, Dublin II Report, pp. 4-5.

⁷² ECRE, Ten Recommendations, p. 1.

⁷³ See European Commission, 2007 Evaluation, pp. 6-7. See also ECRE, Ten Recommendations; ECRE, Way Forward Systems; ECRE, Dublin II Report.

⁷⁴ See *The future of European asylum policy*, speech by Franco Frattini (European Commissioner for Justice, Freedom and Security), Brussels, 7 November 2007.

⁷⁵ ECRE, Ten Recommendations, p. 2.

⁷⁶ *TI v UK*, European Court of Human Rights (ECtHR), application no. 43844/98 (7 March 2000). See also *Nasseri* (transferring *Nasseri* to Greece would place the UK in breach of its obligation under Article 3 ECHR to investigate allegations of potential breach of that article). The Canadian Federal Court recently reaffirmed this principle, grounding its decision to invalidate the US-Canada Safe Third Countries Agreement in the Refugee Convention and the Convention Against Torture. *Canadian Council for Refugees et al. v H.M. The Queen*, 2007 FC 1262 (November 29, 2007), para. 136. The Court based its reasoning on a review of the jurisprudence of the House of Lords and the European Court of Human Rights, and expert submissions. *Ibid.*, paras. 110-36.

⁷⁷ ECRE, Ten Recommendations, p.2, citing *Conka v Belgium*, ECtHR, app. no. 51564/99 (5 Feb. 2002).

It is also critical that transferred protection seekers receive adequate reception conditions. Currently, conditions vary widely across Member States in relation to accommodation, material benefits, and access to health care, especially psychiatric assistance and facilities.⁷⁸ ECRE is particularly concerned that a number of Member States have increasingly resorted to custodial measures to facilitate transfers, and also frequently detain those returned via Dublin transfer.⁷⁹ Asylum seekers may already have suffered imprisonment and torture in the countries from which they fled. Detention can seriously exacerbate the emotional and psychological stress of such experiences, and may amount to inhuman and degrading treatment.⁸⁰ The Commission's evaluation correctly reminds Member States to use detention only in exceptional cases, as a measure of last resort.⁸¹ Ireland and Norway achieved higher than average transfer completion rates while making only limited use of detention, indicating that alternative measures can also be effective.⁸²

Recognising the current huge disparities in protection standards between Dublin states, in the immediate term ECRE would advocate suspending Article 10 of the Dublin Regulation (the 'irregular entry criterion') altogether. This could be reviewed following periodic assessments of progress towards achieving greater equality of protection in the Common European Asylum System.⁸³

Recommendations

1. Amend Article 16⁸⁴ of the Dublin Regulation as follows:

- a) To explicitly oblige the responsible Member State not to remove an asylum seeker until after a full and fair examination of the individual claim, if it has not already been evaluated on its merits.⁸⁵*
- b) Subparagraph b) ("complete the examination of the application for asylum") should explicitly refer both to those whom a state is taking charge of, and to those whom the state is taking back.*
- c) To include a non-prejudice clause, setting out clearly that a returned Dublin claimant should not be penalised in any way (either in terms of the completion of a full and fair procedure, or in reception facilities provided).*

Article 2, subparagraph e) should explicitly require that an application be examined

⁷⁸ See ECRE, Ten Recommendations, p. 4.

⁷⁹ See ECRE, Dublin II Report, p. 162.

⁸⁰ *Ibid.*

⁸¹ European Commission, 2007 Evaluation, p. 8.

⁸² European Commission, 2007 Evaluation Annex, p. 30.

⁸³ *Submission from the European Council on Refugees and Exiles in response to the Commission's Green Paper on the Future Common European Asylum System (COM (2007) 301)*, September 2007 ('Green Paper Response'), p. 36.

⁸⁴ Requiring a Member State to 'take charge' of an applicant deemed its responsibility who lodges an application in a different Member State, and to 'take back' an applicant who applies for asylum and is later found in another Member State without permission.

⁸⁵ ECRE, Ten Recommendations, Recommendation 1. The Commission notes that "*an "examination of an asylum application" as defined in the Dublin Regulation should be interpreted, without any exceptions, as implying the assessment whether the applicant in question qualifies as a refugee in accordance with the Qualification directive.*" European Commission, 2007 Evaluation, p. 6.

fully and completely in compliance with the Qualification Directive and international law, rather than simply “in accordance with national law.”

2. Member States should suspend Article 10⁸⁶ in the absence of a fully harmonised or common asylum system. Individuals should not be transferred to Member States that do not offer a comparable prospect of protection or lack adequate reception facilities. This measure should be accompanied by incentives to states to improve the quality of their procedures and increase their capacity to process claims.

3. Amend the Dublin Regulation to empower the European Commission to instigate a process to suspend all transfers to a state in which access to a full and fair determination procedure is not assured (e.g. because of interruptions or other forms of in absentia decision making, or because of significant negative discrepancies compared to average recognition rates across the Member States). This could be linked to the instigation of infringement proceedings by the Commission, and should be accompanied by measures to help raise determination and reception standards, so as not to create an incentive for states to evade transfer requests through lowering those standards.

4. Amend Articles 19⁸⁷ and 20⁸⁸ to provide applicants with access to an effective judicial remedy and automatic suspensive right of appeal against the decision to transfer responsibility to another Dublin state. Applicants should be provided with transfer decisions in writing and entitled to timely legal advice and assistance.

5. Add a provision forbidding the detention of Dublin claimants except as an extraordinary measure of last resort, for cases where non-custodial measures demonstrably fail. Detention must be subject to procedural safeguards and limited to the minimum time necessary to meet its lawful purpose. The provision should explicitly state that detention cannot lawfully be used solely on the grounds that a person is an asylum applicant or in a Dublin procedure.

6. Add a provision explicitly requiring that Dublin claimants receive the same reception conditions as other asylum seekers, to at least the standards of the Reception Directive.⁸⁹

2.2 Respecting family unity and the interests of children and other vulnerable groups

Articles 7 and 8 of the Dublin Regulation oblige Member States to allow the unification of asylum seekers with family members recognised as refugees, or who have applied for asylum but not yet received a first decision, in another Member State, and Article 15(2) provides that Member States “*shall normally*” bring family members together, under

⁸⁶ Article 10 establishes criteria determining state responsibility on the basis of irregular entry.

⁸⁷ Outlining the procedures for taking charge of an application once such a request has been accepted.

⁸⁸ Specifying the rules for handling a request to take back responsibility for an asylum application.

⁸⁹ Council Directive 2003/9/EC of January 2003 laying down minimum standards for the reception of asylum seekers OJ L 31, 6.2.2003.

certain conditions. The definition of ‘family member,’ however, does not consider de facto marriages except insofar as they are recognised under the law of the Member State concerned, nor extended family ties, including siblings or adult children.⁹⁰ Allowing asylum seekers to reunite with relatives residing in the EU would reduce the trauma of their experience, lessen the temptation toward irregular transit, and allow families to provide support, thus aiding states in providing adequate reception conditions. Families should be able to reunify at any stage of the asylum process and with regard to any recognised status in the EU, rather than only when a family member is recognised as a refugee,⁹¹ or before the family member has received a first instance decision.⁹²

ECRE welcomes the Commission’s emphasis of the paramount importance of the best interests of children, and of the need to clarify the applicability of the Dublin rules to unaccompanied minors.⁹³ Similar consideration should be given to other particularly vulnerable groups. Some refugees have fled torture, imprisonment, or other traumas.⁹⁴ Others have serious health problems that have never been treated.⁹⁵ Even when determination processes are carried out carefully and fairly, and reception conditions adhere to European and international standards, the stress, delay and uncertainty experienced during asylum status determination process can have serious long term repercussions for particularly vulnerable refugees.⁹⁶ The Commission should explore the creation of special procedures to prioritise and expedite the cases of vulnerable claimants, while ensuring the quality of claim assessment and reception conditions.⁹⁷

Recommendations

7. The Dublin Regulation should be amended to extend the definition of ‘family member’ in Article 2(i)(i) to mirror Article 4 paragraphs 2 and 3 of the Family Reunification Directive,⁹⁸ i.e. to include unmarried couples in a genuine and stable relationship in accordance with their national law, as well as dependants, including close relatives who have no other family support, and adult children unable to care for themselves. The definition should also include siblings. In cases of unmarried couples, all available documents, witness statements and other sources should be considered as evidence of ‘a duly attested long-term relationship.’

⁹⁰ Dublin Regulation, Article 2(i).

⁹¹ In 2005 a Dutch court ruled that the humanitarian and sovereignty clauses did not require an asylum seeker’s reunification with her husband, because he had been naturalised as a Swedish citizen. AWB 05/13491 District Court Haarlem, 12 April 2005. See ECRE, *Country Report 2004 – Netherlands*, pp. 7-8.

⁹² Article 8 of the Regulation only requires unification before a first instance decision.

⁹³ European Commission, 2007 Evaluation, p. 7.

⁹⁴ See e.g., ECRE, 20 Voices, pp. 2, 6.

⁹⁵ *Ibid.*, pp. 3-4.

⁹⁶ See e.g., UNHCR, *Note on the Integration of Refugees in the European Union*, May 2007, para. 9 (‘Note on Integration’).

⁹⁷ See ECRE, *Way Forward Systems*, p. 42.

⁹⁸ *Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification*, OJ L 251, 3.10.2003.

8. Amend Article 7⁹⁹ to require Member States to allow unification with family members granted subsidiary protection or otherwise legally resident in another Dublin state.¹⁰⁰

9. Amend Article 8¹⁰¹ to require Member States to allow unification with a family member at any stage of the asylum procedure, provided the applicant so consents.

10. The humanitarian clause (Article 15)¹⁰² should be used widely and consistently to ensure its intended impact in avoiding undue hardship to families as a result of separation. States should respond promptly to requests from other states.

11. Extend Article 15 to encompass persons who need medical or trauma treatment facilities unavailable in the responsible Member State. An extended humanitarian clause should apply generally to those in particularly vulnerable situations, not only to cases where relatives are present in a Member State. Transfers should not be enforced where they are likely to have a detrimental effect on the persons transferred.¹⁰³

12. Add a provision to the Dublin Regulation to require a separate responsibility determination procedure (clearing mechanism) in cases concerning unaccompanied minors covered by Article 6,¹⁰⁴ or other particularly vulnerable applicants falling under a broad and inclusive application of the humanitarian clause. This should take into consideration the presence of extended family members or a known caregiver. For all transfers, the best interests of the child or vulnerable applicant must receive primary consideration. The procedure should involve help in identifying family members in other Dublin states (e.g. through the Red Cross) and access to specialist legal advice and other assistance. Within the responsibility determination period, all relevant social rights should be guaranteed, and a legal guardian provided for separated children. In the absence of a family member or caregiver, or other indicia that transfer to a different state would be in the applicant's best interest, the Member State where the application was lodged should examine it.

⁹⁹ Assigning responsibility for an asylum seeker to a Member State hosting a family member as a refugee.

¹⁰⁰ The European Commission will propose extending the Dublin Regulation to encompass subsidiary protection. European Commission, 2007 Evaluation, p.6. Although the family reunification directive does not apply to subsidiary protection, such an extension of the Dublin Regulation should apply to family unity.

¹⁰¹ Assigning responsibility for an asylum seeker to a Member State that has not yet rendered a first instance decision on the asylum application of a family member.

¹⁰² Allowing a Member State, if requested by the Member State that would otherwise be responsible, to assume responsibility for an asylum application in order to bring together family members or other dependent relatives. Section 15(2) obliges Member States to bring family members together, provided the ties existed in the country of origin and the person concerned is dependent on the assistance of the other family member due to pregnancy, a newborn child, serious illness, severe handicap or old age.

¹⁰³ Until 2005, Austrian law required use of the sovereignty clause (Article 3(2)) to ensure that traumatised applicants would have their claims examined in Austria. ECRE, Dublin II Report, p. 17.

¹⁰⁴ Providing that the application of an unaccompanied minor be examined by the Member State where a family member is present, and in the absence of family, in the state where the application was lodged.

2.3 Ensuring clarity and efficiency

Sheer confusion and inconsistency often exacerbate the Dublin system's adverse impacts on refugees, and the available dispute resolution and error correction mechanisms are insufficient to compensate for its shortcomings. The Dublin system should better facilitate the resolution of disputes, whether between states or between claimants and state authorities,¹⁰⁵ over the correct application of the Dublin rules.

Asylum seekers can face serious consequences if they act based on incomplete knowledge of the rules and implications of the Dublin system. Understanding the Regulation and their rights within the process would significantly improve refugees' chances of receiving fair and lawful treatment. Providing asylum seekers with adequate information in a form they can understand would enable them to make informed choices and to obtain legal assistance, improving their prospects while encouraging them to work within the system rather than trying to avoid it.

Similarly, providing state officials with guidance and advanced training would promote correct and fair application of the Dublin rules, helping to build confidence in the system. Increasing consistency in the type and quality of information gathered during Dublin interviews and procedures at the national level, and ensuring that all pertinent facts are securely recorded, would enhance the efficiency of responsibility determination and of the main asylum procedures. For example, medical conditions, family members in other Dublin states, demographic details and other essential information should be entered on standardised forms, and placed clearly on record prior to any transfer.

Recommendations

13. Replace the conciliation procedure specified in the Implementing Regulation with a complaints assessment and dispute resolution body.¹⁰⁶

14. Individuals should have access to a remedial procedure in the form of an ombudsman in each Member State with the power to intervene the Regulation is not being correctly applied (e.g. where an erroneous transfer decision has been made or where a state is not taking charge in accordance with its obligations). Ombudsmen should have the right to seek explanations from Member States, and to monitor or intervene in procedures.

15. The Dublin Regulation should require the provision of clear and comprehensive information on the Dublin system to all asylum seekers, in languages they understand, upon lodging their applications. This information could be made available through a booklet or by other means to those who cannot make appropriate use of a written text, and explained by qualified staff when necessary. To ensure all relevant information is included, the European Commission should provide common standard information, with national context added by Member States. This should include informing asylum seekers

¹⁰⁵ See ECRE, Dublin II Report, p. 165.

¹⁰⁶ The 3-member panel arrangement used for conciliation in WTO disputes can serve as a model.

of the right to legal assistance, with contact details for obtaining such assistance.

16. Add a provision to the Dublin Regulation setting out the steps to be taken when an asylum seeker is transferred in error, and the obligations of the states involved. Costs of reversing the transfer should be reimbursed by the state responsible for the error. The procedure for determining the Member State responsible for erroneous transfer and the reimbursement procedure should be specified in the Dublin Implementing Regulation.¹⁰⁷

17. Immigration officers and other officials involved in applying the Dublin Regulation should receive carefully developed and complete training in the knowledge and skills required to ensure high quality decision and policymaking, thus increasing the likelihood of a fairer and more efficient asylum procedure.¹⁰⁸

18. Amend the Implementing Regulation to require the recording of all information required to determine the humanitarian needs of asylum seekers prior to transfer. This information should include at least the claimant's physical condition and medical needs, family connections, and basic details such as age, native language, and region of origin. This sensitive information must be subject to the strictest data protection standards.

2.4 Improving solidarity and sharing resources

In general, at different times different Member States may experience increased refugee flows. Dublin transfers can exacerbate pressures on national asylum systems because the responsibility allocation rules do not consider the fact that some states may face significantly larger influxes of protection seekers than others. While the Dublin Regulation operates in the context of an incomplete Common European Asylum System, it should be accompanied by mechanisms allowing Member States and EU bodies to mutually support each other by providing expertise and resources when they are lacking.

The Dublin system will work more fairly and efficiently if it facilitates cooperation between states to meet the needs of protection seekers in all aspects of the asylum procedure, not merely in applying responsibility allocation rules. The European Asylum Support Office (EASO) envisaged in the Hague Programme¹⁰⁹ could help to increase interstate cooperation and mutual support.¹¹⁰ In addition to supervisory, monitoring, and training roles, the EASO should provide expert Asylum Support Teams consisting of decision-makers, interpreters and others to assist Member States facing heavy case loads or lacking specialised expertise necessary to serve particular groups of asylum seekers.¹¹¹

¹⁰⁷ Chapter III covers transfers, but not situations of erroneous transfer.

¹⁰⁸ See General Directors' Immigration Services Conference, *European Asylum Curriculum: Objectives and Content*.

¹⁰⁹ Hague Programme, p. 18.

¹¹⁰ ECRE supports such a body only if it operates from its creation onward "in a transparent manner, with public terms of reference and proper reporting functions," with the support of UNHCR and civil society, and subject to democratic oversight by the European Parliament. ECRE, Green Paper Response, p. 34.

¹¹¹ See ECRE, Way Forward Systems, pp. 25-26.

States with greater capacity could provide staff to these teams alongside independent experts and representatives of UNHCR. Such teams could share best practice, advise on international refugee and human rights law, conduct interviews, and make recommendations on status determination.

Finally, to address particular pressures experienced by some states, the intra-relocation or intra-allocation of refugees within the EU could be explored, subject to the principle of mutual consent. Aside from sharing resources, this could be an additional avenue for Member States to show solidarity and better share responsibility with one another.¹¹²

Recommendations

19. A facilitation mechanism should be introduced to trigger financial support where necessary to ensure compliance with the requirements of the Reception Directive and other EU asylum instruments. This could be achieved by creating a financial reserve (financial solidarity fund) for release at the request of overburdened states. So as not to discourage states from maintaining high standards, support should be contingent on the fulfilment of specified criteria concerning the quality of reception conditions, decision making processes, etc. UNHCR and NGOs should be invited to participate in selecting the criteria and monitoring compliance.

20. Intra-allocation of persons granted protection should be explored, based on double voluntariness and taking family links into account.¹¹³

21. Intra-relocation of asylum seekers prior to status determination should also be explored in order to address exceptional strains on reception and determination facilities in particular Member States and prevent asylum seekers from being placed in inadequate conditions or at risk of refoulement. Such a measure should be based on double voluntariness, and should take family links into account.

22. Develop the role of the European Asylum Support Office. The EASO could, for example, monitor decision making and cooperation projects, oversee evaluations and administer solidarity related funds, manage an EU Documentation Centre, coordinate expert Asylum Support Teams, share best practices, and develop training curricula for decision makers.¹¹⁴ The EASO could also promote transparency and accountability through data gathering and statistical analysis, notify the Commission of failures to adhere to required standards, and recommend appropriate remedial action.

¹¹² See European Commission, Green Paper, pp. 10-11; ECRE, Green Paper Response, p. 38.

¹¹³ See European Commission, *Proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*, Brussels, COM(2000) 303 final 2000/0127 (CNS) 24.5.2000, recital 20. Under double voluntariness, a Member State agrees to receive a protection seeker, with that person's informed consent. See *Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof* OJ L 212, 7.8.2001, Article 26.

¹¹⁴ See ECRE, Green Paper Response, p. 31.

3. Looking towards a functioning Common European Asylum System

ECRE has long advocated replacing the Dublin regime with a system that ensures respect for refugee rights and true responsibility sharing.¹¹⁵ The development of the Stockholm Programme provides an opportunity for a forward-thinking discussion aimed at devising a fair and efficient system that does not share the flaws of the Dublin system, and focuses on integration and solidarity.¹¹⁶ Before a detailed alternative can be agreed, however, the Commission needs to coordinate far more extensive research and evaluation concerning the current system. In particular, more information is needed about refugee flows, the financial costs of responsibility allocation, factors affecting integration, and how refugees contribute to host societies.

This section will suggest avenues of debate, focusing on the relationships between asylum, integration, and solidarity. It will suggest alternative ways to determine state responsibility, and explore possible outlines and guiding principles for a common asylum system. It will discuss how Member States could share financial costs, and whether they could collaborate in carrying out certain asylum responsibilities without violating refugees' rights. Free movement within the EU for recognised refugees, and sustainable return for those whose claims are correctly denied, would complete a system that operates from the moment asylum seekers arrive until their situations are resolved. The themes of the previous sections of this paper should continue to guide a harmonised Common European Asylum System: a fair and complete process, protection and reception standards in line with international obligations, respect for families and for the interests of vulnerable claimants, and clarity and efficiency, remain critical priorities.

3.1 Allocating responsibility within the future Common European Asylum System

A core principle of ECRE's proposals is that responsibility should be allocated according to substantive connections between asylum seekers and Member States. Asylum seekers are potential beneficiaries of international protection, many of whom will eventually become EU citizens. By postponing status determination and by placing refugees in Member States regardless of their prior preparation (or lack thereof) developed through familiarity with the local language, culture, or approach to education, or through extended family ties, Dublin procedures hinder integration. Refugees will benefit most from integration support when they can commence the asylum process in a Member State with which they have a natural connection, for example through family, cultural, or educational ties, rather than in one assigned on purely administrative criteria.

¹¹⁵ See e.g., ECRE, *Way Forward Systems*, pp. 29-31; ECRE, *Dublin II Report*, pp. 4-5; ECRE, *Ten Recommendations*, p. 1.

¹¹⁶ 'Stockholm Programme' is the provisional term used to refer to the successor to the Hague Programme, expected to emerge from the discussions of the 'Future Group,' the High Level Advisory Group on the Future of EU Home affairs policies. See footnote 8, above.

3.1.1 *The impact of the Dublin system on integration and solidarity*

Solidarity is a longstanding core principle of the European project, repeatedly emphasised in the context of Member States' responsibilities toward refugees.¹¹⁷ Shared responsibility for asylum is enshrined in the EC treaties,¹¹⁸ and pursued within the framework programme on Solidarity and the Management of Migration flows.¹¹⁹ The 1951 Refugee Convention acknowledges the importance of cooperation to meet international obligations to refugees.¹²⁰ The integration of third-country nationals has become a formal EU priority more recently,¹²¹ but it relates directly to the fundamental humanitarian, economic and security aims of the EU.¹²² The Hague Programme and the discussions leading towards the Stockholm Programme have emphasised the importance of integration in continuing to develop the single market.¹²³

Integration “*is a process of mutual accommodation by both the host societies and the immigrants and an essential factor in realising the full benefits of immigration.*”¹²⁴ Well integrated residents are more likely to be economically productive (i.e. they will pay more taxes and require less social support), they have no reason to go ‘underground,’ and they are less likely to feel isolated or be susceptible to radical influences.¹²⁵ For most refugees, integration means merging into a daily life consisting largely of work, school, and social interactions. Host states can facilitate integration by affording refugees the same economic and social rights as other long-term residents, and by promoting the recognition and use of their educational achievements and professional qualifications. The speed and quality of status determination also inevitably affects integration.¹²⁶

Even before claim assessment begins, the Dublin system reduces refugees' chances to integrate successfully into European society. Dublin claimants face delays, complex and possibly intimidating procedures, and added uncertainty about the future.¹²⁷ Detention,

¹¹⁷ See e.g., Eiko R. Thielemann, *Burden Sharing: The International Politics of Refugee Protection*, The Center for Comparative Immigration Studies, University of California, San Diego, Working paper 134, March 2006 <http://www.ccis-ucsd.org/PUBLICATIONS/wrkg134.pdf> (‘Thielemann 2006’), p. 13.

¹¹⁸ TEC Article 63(2)(b); Reform Treaty Article 63(b).

¹¹⁹ See European Commission, *Communication from the Commission to the Council and the European Parliament*, Brussels, 6.4.2005 COM(2005) 123 final, p. 4.

¹²⁰ Refugee Convention, Preamble (“*a satisfactory solution . . . cannot . . . be achieved without international co-operation*”).

¹²¹ See European Commission, *Handbook on Integration for policy-makers and practitioners*, November 2004, and *Third Annual Report on Immigration and Integration* (‘Third Annual Report’), September 2007. Both the Dutch (2004) and German (2007) EU Presidencies held special ministerial conferences on integration. Integration has also been the subject of Special Commissions in several countries, e.g. the UK - see *The Commission on Integration and Cohesion* established by the Department for Communities and Local Government <http://www.communities.gov.uk/index.asp?id=1501520>.

¹²² See e.g., European Commission, *Third Annual Report*, p. 6; ECRE, *Way Forward Integration*, p. 9.

¹²³ See Hague Programme, pp. 19-20; Future Group report, paras. 25, 28.

¹²⁴ European Commission, *Third Annual Report*, p. 3. ECRE has long emphasised that the integration of refugees is “*a dynamic two-way process which begins from the day a refugee arrives within the new host society.*” ECRE, *Way Forward Integration*, p. 5.

¹²⁵ ECRE, *Way Forward Integration*, p. 11.

¹²⁶ UNHCR, *Note on Integration*, paras. 15-16.

¹²⁷ See e.g., UNHCR, *Dublin II Discussion Paper*, p. 40.

with its adverse impacts on mental health, is particularly damaging to future integration prospects.¹²⁸ The effects of the Dublin system can continue to impede integration if asylum seekers are sent to states that are not well suited to receive them. Lack of family or community support, or unfamiliarity with the local language, can lead to isolation and exacerbate trauma.¹²⁹ Because recognised refugees may not yet move freely throughout the EU, a Dublin determination ‘locks in’ these impediments. Finally, far from promoting solidarity, the Dublin system shifts responsibilities toward Member States at the EU’s external borders.¹³⁰ It is time to view this system as an experiment that has run its course, and consider alternatives that could advance true solidarity and integration.

3.1.2 ‘Joint processing’ as an alternative to Dublin

In 2003, the UK government’s “New Vision for Refugees” discussed the idea of moving asylum applicants to centres outside the EU for claim assessment. The UNHCR’s “EU Prong” proposal placed considerably more emphasis on refugee rights, but suggested similarly centralised processing, albeit within the EU, for asylum seekers with ‘manifestly unfounded’ claims.¹³¹ ECRE does not consider joint processing that involves the transport and concentration of asylum seekers to be a viable or acceptable option.¹³² This form of joint processing disregards asylum seekers’ rights to personal freedom, by presuming that authorities may relocate (and possibly detain) them for administrative convenience. Furthermore, such attempts to advance solidarity come at the cost of impeding integration, thus simultaneously harming both refugees and state interests.

3.1.3 Connecting individuals with Member States

The Dublin system operates against solidarity and integration. ‘Joint processing’ risks sacrificing integration to advance solidarity. ECRE has identified two possible ways to address both goals at once. One approach would determine responsibility based on asylum seekers’ pre-existing ties to particular Member States. The other would consider the subjective preferences of the asylum seeker.

3.1.3.1 The distribution and integration of refugees in Europe

In calling for Integration Fund¹³³ project proposals, the European Commission has prioritised studying and sharing information about immigrant integration, assisting

¹²⁸ See e.g., Mina Fazel & Derrick Silove, *Editorial: Detention of refugees*, *British Medical Journal* 332 (4 February 2006), pp. 251-52, and sources cited therein. The Dublin system has caused an increase in the use of detention, as states increasingly use custodial means to enforce Dublin transfers, or routinely detain transferees after taking them back. See section 2.1, above.

¹²⁹ UNHCR, Note on Integration, para. 25.

¹³⁰ See section 1.3, above.

¹³¹ UNHCR Working Paper, “A Revised “EU Prong” Proposal”, December 2003, pp. 2-4.

¹³² ECRE, *Statement on the European Council Meeting, 21 and 22 March 2003*; ECRE, *Way Forward Systems*, p. 5.

¹³³ The European Fund for the Integration of Third-country nationals.

vulnerable groups, and strengthening links between migration and integration policies.¹³⁴ These are important and helpful priorities, applicable to refugee integration. ECRE reiterates its call on the Commission to extend the Integration Fund to cover projects targeted at refugees as well as other third country nationals; including refugees in the scope of the Integration Fund would serve host states as well as refugees.¹³⁵ Integration projects would yield still greater benefits, at lower cost, if the EU's legal and institutional structures aligned more closely with refugee integration needs.

As discussed above, linguistic, cultural, and community ties, as well as the opportunity to use prior professional and educational qualifications, seem to help predict an individual refugee's prospects for smooth integration into a host society. These factors may also influence asylum seekers' preferences for particular host states, insofar as they are able to flee toward a particular destination rather than simply seeking protection anywhere within the EU. Most research done to date agrees that the relative restrictiveness of asylum regimes is not the predominant factor determining where asylum seekers arrive.¹³⁶ Statistical analysis, literature reviews, and interviews have suggested that factors such as former colonial ties, language, proximity to the country of origin and the availability of community networks influence destination choices.¹³⁷ The presence of communities of similar origin appears to be the most significant factor.¹³⁸

The 2004 Transfer of Protection Study highlighted the difficulties refugees can face in a Member State with which they lack substantial connections, as well as their desire to relocate if given the opportunity.¹³⁹ Taking advantage of circumstances such as linguistic, community, or family ties may thus be expected to enhance the return on investments in

¹³⁴ European Commission, *European Fund for the Integration of Third Country Nationals 2007-2013 Annex I: Community Actions Annual Work Programme 2007 Including Budgetary Implications and Selection Criteria*, pp. 4-5.

¹³⁵ ECRE, *Response to the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on a Common Agenda for Integration*, November 2005, p.5.

¹³⁶ Thielemann 2006, pp. 12-13. Welfare systems, national wealth, politics and recognition rates may also be of minor significance. See Michael Collyer, *The Dublin Regulation, Influences on Asylum Destinations and the Exception of Algerians in the UK*, *Journal of Refugee Studies*, Vol.17 No.4, 2004, and Vaughan Robinson & Jeremy Segrott, *Understanding the decision-making of asylum seekers*, Home Office Research Study 243 (2002) <http://www.homeoffice.gov.uk/rds/pdfs2/hors243.pdf> ('Robinson & Segrott'). But see Aspasia Papadopoulou, *Exploring the asylum-migration nexus: a case study of transit migrants in Europe*, *Global Migration Perspectives* No. 23, January 2005, p. 12 ("the choice of destination is influenced mainly by the type of asylum policies offered and less by social networks").

¹³⁷ Eric Neumayer, *Asylum destination choice. What makes some West European countries more attractive than others?*, LSE Research Online. <http://eprints.lse.ac.uk/archive/00000610/> ('Neumayer'). See also Anita Böcker & Tetty Havinga, *Asylum Applications in the European Union*, *Journal of Refugee Studies*, Vol.11 No.3, 1998; Roger Zetter et al., *An assessment of the impact of asylum policies in Europe 1990-2000*, Home Office Research Study 259, June 2003, <http://www.homeoffice.gov.uk/rds/pdfs2/hors259.pdf>; Khalid Koser & Charles Pinkerton, *The social networks of asylum seekers and the dissemination of information about countries of asylum* (2002) <http://www.homeoffice.gov.uk/rds/pdfs2/socialnetwork.pdf>; Robinson & Segrott.

¹³⁸ Neumayer, pp. 22-23.

¹³⁹ Nina M. Lassen et al., *Study on the transfer of protection status in the EU, against the background of the common European asylum system and the goal of a uniform status, valid throughout the Union, for those granted asylum*, 25 June 2004, p. 131.

integration programmes.¹⁴⁰ Member States must strive to “*achieve a level playing-field that equips both immigrants and nationals with the tools to willingly pursue integration.*”¹⁴¹ Research into the nexus between integration prospects and the factors that guide asylum seekers to particular states is very incomplete, however, and more data and analysis are required before even general policy conclusions can be drawn.

3.1.3.2 Connection criteria as an alternative to Dublin

The Dublin system purports to assign responsibility to the state that “*played the most important part in the entry or residence of the person concerned.*”¹⁴² By failing to consider substantial connections other than some close family links, the Dublin regime wastes resources, impedes integration, and may encourage irregular onward movement.¹⁴³ To remedy these and other deficiencies, responsibility determination should focus on individuals as well as on states. If their needs were taken into consideration, refugees would be more willing to acquiesce in responsibility decisions, reducing expenditures on agreeing transfers that are never carried through. Living from the start of the asylum process where they have better support networks, they would require less support from states, ‘get back on their feet’ faster, and contribute to the tax base sooner.

Focusing on connection criteria would change the basis of responsibility determination, but not the basic process. Asylum seekers would be interviewed on arrival at their first point of contact with a Member State, as now, to discern whether they have family in a Member State. In the absence of family (including parents and other close relatives currently not considered), other criteria would be assessed. These might include language skills, prior residence in the EU, community ties and the relative experience Member States have in integrating particular communities, skills that match the economic needs of particular Member States, or time spent in educational systems resembling those of particular Member States. Only in the absence of significant connection indicators would responsibility fall by default on the Member State where the claim was lodged.

3.1.3.3 Free choice as an alternative to Dublin

A system that assigns asylum seekers to states based on connection factors would, however, function somewhat as a substitute for what asylum seekers are seen as likely to prefer. It might be simpler and less costly to allow the asylum seeker to choose the host state. Choosing where to seek asylum is far easier to understand than a system of rules. This would reduce any incentive for irregular transit pre-recognition, and relieve

¹⁴⁰ See e.g., Alastair Ager & Alison Strang, *The experience of integration: a qualitative study of refugee integration in the local communities of Pollokshaws and Islington*, UK Home Office Online Report 55/04, 2004, pp. 10-13.

¹⁴¹ European Network Against Racism, *ENARgy*, July-August 2007, p. 5.

¹⁴² European Commission, 2001 Evaluation, p. 1.

¹⁴³ For present purposes, this term refers to the unauthorised movement from one Member State to another of would-be asylum seekers who have not yet filed claims, or of asylum seekers who have filed claims but have not yet received a final decision.

authorities of the need to carry out a potentially complex and expensive responsibility assessment.¹⁴⁴

Finally, as the UNHCR's Executive Committee has pointed out, a system that seeks to direct asylum seekers to particular states should take individual preferences into account "as far as possible."¹⁴⁵ The EU is among the largest, wealthiest political units in the world, with one of the most developed legal regimes. In the context of a harmonised asylum system that fairly balances responsibilities, it is difficult to imagine a refugee influx so overwhelming as to render a system based on free choice impracticable.¹⁴⁶ Therefore, respecting individual preferences "as far as possible" arguably equates to simple free choice. It is worth recalling that the European Commission identified and considered free choice as an option when reviewing the Dublin Convention to develop its replacement.¹⁴⁷

3.1.3.4 Facilitating transfer and preventing abuse of the system

The assurance of a full and fair hearing, and the prospect of asylum in a welcoming society that facilitates their integration, will encourage refugees to use the system openly rather than seeking to evade it for fear of its consequences. Informed and willing asylum seekers would have every motive to facilitate their own transfers if they arrived in one state but could apply in a state better suited to host them. At their first point of contact within the EU, asylum seekers should receive a *laissez-passer* (temporary travel document) carrying the right to travel to their selected or allocated Member State. The issuance of this document would provide an ideal opportunity for screening against security risks, and EURODAC would continue to guard against repeated applications or 'asylum shopping.'

3.2 *Sharing responsibility within the future Common European Asylum System*

The Dublin Regulation places added strain on states at the EU's external borders.¹⁴⁸ The types of responsibility determination criteria suggested above might increase caseloads in

¹⁴⁴ For example, Norway spends approximately € 880 to evaluate an incoming Dublin transfer request, and "the handling of outgoing cases tends to be more expensive than incoming cases." European Commission, 2007 Evaluation Annex, p. 14.

¹⁴⁵ UNHCR Executive Committee Conclusion No. 15 (XXX) of 1979, *Refugees Without an Asylum Country*. Through Article 35(1), the states parties acknowledged the UNHCR's "duty of supervising the application of the provisions of" the Refugee Convention. Executive Committee Conclusions therefore carry significant authority, as representing "consensus resolutions of a formal body of government representatives expressly responsible for 'providing guidance and forging consensus on vital protection policies and practices.'" James C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press, 2005), p. 113 (quoting Executive Committee Conclusion No. 81 (1997)).

¹⁴⁶ Such an influx would in any case trigger the facilities of the Temporary Protection Directive.

¹⁴⁷ European Commission, *Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one of the Member States*, Commission staff working paper, SEC(2000) 522, paras. 41-43.

¹⁴⁸ See section 1.3, above.

those Member States with longer immigration and colonial histories.¹⁴⁹ Whatever allocation system is used will probably impact some Member States more than others. Furthermore, only about 9% of asylum claims currently come under Dublin at all,¹⁵⁰ and the system does not insulate Member States from influxes that vary over time.¹⁵¹ Therefore the challenge of achieving greater responsibility-sharing raises wider issues than mere reform or replacement of the Dublin system.

A system that views asylum as a common responsibility should support fairly sharing that responsibility. Responsibility sharing can be viewed in two aspects, financial and administrative. The more administrative responsibility is shared, the simpler it becomes to share financial responsibility. Administrative responsibility sharing can also promote solidarity. This section will review ways to improve financial cooperation, and then suggest options for collaborative administration that advance solidarity without violating refugee rights or impeding integration.

3.2.1 Sharing the financial costs

The European Refugee Fund and other resources provide incomplete support to Member States for the financial costs associated with hosting asylum seekers and processing their claims. ECRE has previously called for financial responsibility sharing,¹⁵² as did the 2006 Finnish Presidency.¹⁵³ The Finnish proposal usefully highlighted the issue of solidarity, but left many details unconsidered. For example, it did not explain how compensation would be allocated or quality ensured. Further research is required to identify and measure all the direct and indirect fiscal costs associated with hosting asylum seekers and evaluating their claims, but a larger solidarity fund will be needed to provide Member

¹⁴⁹ See Neumayer, and sources cited therein.

¹⁵⁰ 55,310 Dublin requests issued out of 589,499 total asylum claims, September 2003-December 2005. European Commission, 2007 Evaluation, p. 4.

¹⁵¹ In 2006, Sweden, home to about 1.85% of the EU's population, received asylum applications from 8,951 Iraqi nationals, far more than any other Member State. UNHCR, *Statistical Yearbook 2006*, Table 9. During and after the Balkans conflicts of the 1990s, Germany saw a disproportionate influx. For example, in 1996 Germany hosted approximately 330,000 refugees from Bosnia and Herzegovina, and Sweden, approximately 50,000; the next highest total among EU Member States was Italy, with 7,950. UNHCR, *Statistical Yearbook 1996*, Table 9.

¹⁵² See e.g., ECRE, *Way Forward Systems*, pp. 31-34.

¹⁵³ Finnish Ministry of Interior, *Migration management; extended European solidarity in immigration, border control and asylum policies*, September 2006 http://www.eu2006.fi/news_and_documents/other_documents/vko36/en_GB/1157615544264/. Under this proposal, EU financing would cover a significant part of the verifiable costs of determining an asylum claim. These would include reception, maintenance, return, and administrative costs.

States with full financial support.¹⁵⁴ As with the bulk of the EU budget, Member States could contribute to such a fund per their gross national income (GNI).¹⁵⁵

A thorough approach to reimbursement would be for Member States to tally and report their expenditures. It might be simpler to provide a set amount per asylum claim. The European Asylum Support Office should calculate this subsidy, carefully considering factors such as population, national wealth, and relative living standards. UNHCR and ECRE have described types of independent quality control mechanisms that could safeguard determination and reception standards against possible encroachment in the name of cost reduction.¹⁵⁶ With a level playing field, full financial reimbursement guaranteed, and support provided for states that lack capacity, states could more effectively handle claims and would face less temptation to try to deter asylum seekers.

3.2.2 Sharing other resources and functions

Reimbursement is easily applied to some costs: housing, for example, or stipends for miscellaneous living expenses. Some other costs are harder to measure. For example, general governmental resources are used to register claims, provide information to asylum seekers and officials, schedule and conduct hearings, and ensure the education of minors during the time between the filing of their claims and the resolution of their cases. Some of these activities might be conducted through common mechanisms or by Member States acting in cooperation. Sharing financial responsibility for shared tasks would be simple, as such tasks could be funded from a common budget. The best combination of reimbursed Member State responsibility on the one hand, and direct collaboration on the other, can be discovered through an incremental process of policy development and implementation. If collaborative processing were to result in any decisions being taken on the substance of a claim, or on any matter requiring the examination of oral or written evidence, by an authority not associated with a particular Member State, then judicial appeals regarding such matters should be heard by an independent, supranational European court of asylum appeals. Such a court could be composed as an independent tribunal, or as a special chamber of the European Court of Justice.

3.2.2.1 Determining and allocating responsibility for claims

¹⁵⁴ ECRE, *Way Forward Systems*, p. 32. The ERF's redistributive element "*currently compensates Member States according to the absolute numbers of protection seekers received rather than according to the relative responsibilities or burdens that Member States are faced with. From a solidarity or burden-sharing perspective this appears sub-optimal.*" Thielemann 2006, p. 19. For example, according to UK Home Office estimates, Britain spent nearly € 30,000 per asylum seeker in 2002, and received just over € 100 from the ERF per asylum application received. *Ibid.*, p. 20.

¹⁵⁵ GNI is GDP plus net income received via e.g. interest or dividend payments. The Directorate-General for Budget estimates 69% of the EU budget comes from Member States contributing 0.73% of their GNI, with most of the remainder obtained from customs revenue and a share of VAT receipts. See http://ec.europa.eu/dgs/budget/budget_glance/where_from_en.htm. Off-budget expenditures except those with military or defence implications are "*charged to the Member States in accordance with the gross national product scale, unless the Council acting unanimously decides otherwise.*" Article 28 TEC.

¹⁵⁶ UNHCR, *Quality Initiative Project: Key Observations and Recommendations*, February-August 2005; ECRE, *Way Forward Systems*, pp. 24-25.

Depending on the system selected, determination of responsibility for asylum claims could be performed by individual Member States (monitored by the European Asylum Support Office), or carried out by a specialised EU authority. A joint responsibility determining authority with branches across the Member States could conduct interviews at the first point of contact with asylum seekers. This would promote consistent application of rules and procedures, and help to ensure confidence in the system.¹⁵⁷

3.2.2.2 Working Together During Claim Determination

ECRE has previously suggested that a single EU authority with offices in each Member State could determine claims, provided it guaranteed full respect for asylum seekers' rights.¹⁵⁸ A single authority could also reduce aggregate costs by leveraging economies of scale that are beyond the reach of individual states.

Collaborative processing need not, however, imply a single centralised procedure, nor a unified decision making authority. It also does not have to involve the forcible transfer of asylum seekers. Scheduling and data storage, for example, could be handled centrally without undue risk of violating human rights. Initial interviews or contested hearings, which require the applicant's presence, could take place locally, conducted by EU or Member State decision makers. Officials could travel to centres located throughout the EU for hearings, in the manner of judges 'on circuit.' Because applicants could report to different centres at different stages, the process would not be disrupted if an applicant relocated. EASO involvement would supply a conduit to direct support to states experiencing capacity challenges. The European Commission should explore possible new and innovative avenues for collaborative processing that strictly observe the rights of refugees and asylum seekers.

3.2.3 Beyond Status Determination: Freedom of Movement

Free movement is a central objective of the EU, and of the Common European Asylum System.¹⁵⁹ In June 2007, the European Commission proposed amending the Long-Term Residence Directive¹⁶⁰ to grant free movement to protection beneficiaries after five years of residence in the EU (including time spent as an asylum seeker).¹⁶¹ This proposal provides a good basis for discussion, but does not go far enough.

¹⁵⁷ For example, EU monitoring at the first point of contact might reduce the confusion that can ensue when a Member State fails to promptly forward data to EURODAC (thus potentially creating the impression that the applicant initially arrived elsewhere, if the applicant applies for asylum in a second Member State before the first Member State transmits the information it received). See 2007 EURODAC Report, p. 11.

¹⁵⁸ See ECRE, *Way Forward Systems*, pp. 36-37.

¹⁵⁹ See The Treaty of Amsterdam, Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Part I, Article 1(3); Preamble to the Dublin Convention.

¹⁶⁰ *Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents* OJ L 16, 23.1.2004.

¹⁶¹ European Commission, *Proposal for a Council Directive amending Directive 2003/109/EC to extend its scope to beneficiaries of international protection*, Brussels, COM(2007) 298 final 2007/0112 (CNS)

ECRE has previously recommended two alternative approaches:¹⁶²

- 1) Attach a right to free movement and residence anywhere in the EU to any protection status recognised in an EU Member State. This is ECRE's preferred model.
- 2) Allow mobility throughout the EU following a grant of protection, subject to criteria that might temporarily exclude individuals from certain welfare provisions in other Member States. A refugee would have full rights in the state that determined status, but rights similar to those of long-term resident third country nationals elsewhere.

Either option would accelerate and deepen integration. The European economy would benefit if refugees could relocate across borders in response to changing demands for their skills as employees or entrepreneurs. Refugees who may live in Europe long term should be treated as European residents, not as residents only of a single Member State. Member States should respect each others' grants of protection as they now recognise each others' rejections. The priorities, such as European integration, that underpin the concept of EU citizenship apply to recognised refugees as well as to EU citizens who reside long term in a Member State other than their state of citizenship.¹⁶³ The core of legal rights pertaining to EU citizenship, including free movement, should be available to refugees for their benefit as well as to advance the interests of European society.

3.2.4 Beyond Status Determination: Sustainable Return

Ensuring that those truly not in need of protection return to their countries of origin in a sustainable manner would reduce the likelihood that they would need to seek asylum again, and reassure Member States of EU support if the claims for which they accept responsibility eventually fail. Sustainable return requires ensuring that claims have been thoroughly examined, appeals have been exhausted, countries of return will cooperate, and that return takes place in safety and dignity with all human rights and international obligations upheld. Sustainable return can also depend on reintegration support.¹⁶⁴ The Return Fund¹⁶⁵ should provide financial support for both voluntary and involuntary returnees and support for governments receiving them in their countries of origin, in addition to reimbursing actual return costs.

6.6.2007, http://ec.europa.eu/justice_home/news/intro/doc/com_2007_298_en.pdf. The individual's protection status would remain with the Member State that granted it.

¹⁶² See ECRE, *Way Forward Systems*, pp. 34-35.

¹⁶³ See European Commission, *Fifth Report on Citizenship of the Union (1 May 2004-30 June 2007)*, COM(2008) 85 final (15.2.2008), p. 3-6.

¹⁶⁴ See ECRE, *Way Forward Return*, and ECRE, *Position on Return*, October 2003. ECRE regrets that the European Commission's *Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals*, COM(2005) 391 final (1.9.2005), does not consider supporting or monitoring the re-integration of returnees. See ECRE, *Comments on the Proposal for a Directive of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third country nationals (COM(2005) 391 final)* (May 2006), p. 4.

¹⁶⁵ See http://ec.europa.eu/justice_home/funding/return/funding_return_en.htm.

Guiding principles for replacing the Dublin system

- 1. The European Commission should instigate extensive research to inform the design of a system to replace the Dublin Regulation. This research should focus on what factors link individuals with states, better promote integration, and enhance the social and economic contributions of refugees to their host societies. In addition to a comprehensive audit of all costs associated with applying the Dublin Regulation, wide-ranging comparative cost analysis should be undertaken on all facets of receiving and determining asylum claims.*
- 2. The future Common European Asylum System should either assign responsibility for asylum seekers according to criteria that reflect connections between individuals and Member States, or allow individuals to choose the Member States where they will seek asylum.*
- 3. All costs associated with asylum processing should be paid out of a joint European fund, contributed to proportionately by Member States.*
- 4. The Commission should explore and propose a system of collaborative processing that allows Member States to share those portions of the asylum process that lend themselves to centralisation without interfering with individual rights. Such a system must not involve the forced relocation of asylum seekers.*
- 5. All refugees recognised by a Member State should immediately be granted free movement and residence throughout the European Union.*
- 6. Member States should better support one another and share costs to ensure safe and sustainable return.*
- 7. Any system replacing the Dublin Regulation must ensure the full and fair examination of every claim lodged in the European Union. It should maximise cost-effectiveness and efficiency while ensuring high quality reception and protection standards fully in line with Member States' obligations under international law.*