

PERCO¹ Position on the Need to Create Legal Avenues to Access International Protection within the European Union

Adopted at the PERCO Annual General Meeting in Cyprus on November 6th 2012

In October 2011, PERCO, the Platform for European Red Cross Cooperation on Refugees, Asylum Seekers and Migrants, adopted a Position Paper on the Right to Access to International Protection, in which 'all EU Member States, the EU and their agencies are encouraged to consider establishing safe and effective ways to enter European territory legally in order to seek asylum within the EU to avoid human suffering and numerous deaths along EU borders'. This position was taken over later on by the Red Cross EU Office on behalf of the National Red Cross Societies of the Member States of the European Union and the International Federation of Red Cross and Red Crescent Societies.²

In December 2011 the 31st International Conference of the Red Cross and Red Crescent³ called upon States, within the framework of applicable international law, to ensure that their national procedures at international borders, especially those that might result in denial of access to international protection, deportation or interdiction of persons, include adequate safeguards to guarantee the dignity and safety of all migrants and to grant migrants appropriate international protection and ensure their access to relevant services.⁴ As this resolution was endorsed by all States which were present at the Conference, they have thus committed to ensure that their national procedures at international borders include adequate safeguards.

As already pointed out in the aforementioned PERCO Position Paper from October 2011⁵, EU Member States⁶ have increasingly been trying to protect their borders against the entry of third country nationals. In addition to national policies and legislation adopted by EU Member States, the EU has made preventing, controlling and combating irregular migration one of its priorities - with disastrous consequences also, but not only, for persons seeking international protection.

In this context, we are alarmed by the EU Council's Note 'EU Action on Migratory Pressures – A Strategic Response'⁷, which merely concentrates on measures for preventing and controlling the so called illegal immigration and abuse of legal migration, while at the same time entirely disregarding the resulting denial of access to international protection which this externalisation of migration management responsibility has on the opportunities of potential asylum seekers to ask

¹ PERCO, the **Platform for European Red Cross Cooperation on Refugees, Asylum Seekers and Migrants** is a network of migration experts from National Red Cross Societies of Austria, Belgium, Bulgaria, Croatia, Denmark, Finland, France, Germany, Greece, Iceland, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Serbia, Spain, Sweden, Switzerland and the United Kingdom. This PERCO position paper was developed by the PERCO Working Group on the Right to Access to International Protection, consisting of representatives of the National RC Societies of Austria, Belgium, Bulgaria, Croatia, Denmark, France, Germany, Luxembourg, Sweden, Switzerland, the UK, the RC EU Office, the IFRC and the ICRC.

² http://redcross-eu.net/en/upload/RCEU%20Office_%20Position%20on%20Access%20to%20International%20Protection-29112011.pdf

³ Composed of 164 National Governments and 186 Red Cross / Red Crescent Societies.

⁴ Resolution 3: 'Migration: Ensuring Access, Dignity, Respect for Diversity and Social Inclusion'.
http://www.rcrcconference.org/docs_upl/en/R3_Migration_EN.pdf

⁵ Access to International Protection: http://redcross-eu.net/en/upload/RCEU%20Office_%20Position%20on%20Access%20to%20International%20Protection-29112011.pdf

⁶ Although this position paper primarily refers to EU Member States, similar problems can also be encountered in other European states.

⁷ <http://register.consilium.europa.eu/pdf/en/12/st08/st08714-re01.en12.pdf>

for international protection within the EU. This document also pursues the already existing practice of the EU and its Member States to label all migrants, including potential asylum seekers, as 'illegal' in official position papers and communications, thereby further stigmatising and criminalising these vulnerable people.

Beyond that, the development of the integrated management system for external borders, including the increasing use of technology via the European Border Surveillance System (EUROSUR)⁸, is moving ahead, neither considering the far-reaching implications for the rights of migrants and asylum seekers on their way to the EU nor establishing clear responsibilities of the EU, its Member States and agencies with regard to the protection of lives at sea. These plans of the EU and its Member States to step up their efforts to prevent irregular entry to the EU territory, could, in the absence of any effective legal avenues for persons in need of international protection to enter EU territory, result in a dramatic increase of the risks which potential asylum seekers are forced to take to reach places of safety and protection.

These efforts take place at a time when work is ongoing to create a Common European Asylum System, which primary aim and purpose must be to ensure the protection of all persons in need of international protection⁹. Even though preventing misuse may be a legitimate concern of governments, measures to combat such possible misuse of the asylum system must never become the priority of the asylum policies of the EU and its Member States as this might render the entire protection framework ineffective. This would have dramatic and irreversible consequences for persons in need of protection and will, contrary to the presuppositions, reinforce smugglers' networks and cause innumerable deaths and untold suffering for migrants who are being forced to take more and more dangerous routes and ever higher risks to reach protection. The setting up of appropriate channels for different kinds of legal migration, such as labour migration, could reduce the so called pressure on the asylum system. Potential peaks of asylum seekers in specific Member States require increased solidarity among EU Member States in order to achieve a real Common European Asylum System and to guarantee access to this system for all people in need of international protection.

In this context, it is important to note that the number of refugees who come to the European Union is only a small fraction of the total number of refugees in the world. According to UNHCR, the developing countries host 4/5 of the world's recognised refugees; Pakistan, Iran and Syria hosted the world's largest number of recognised refugees in 2011.¹⁰ Out of the 876.000 people who submitted asylum applications in 2011, 107.000 asked for asylum in South Africa alone – more than one tenth of all asylum applications worldwide.

Recalling that the European Commission has planned to publish in 2013 a *Communication on New Approaches Concerning Access to Asylum Procedures Targeting Main Transit Countries*¹¹ we point out that the absence of legal avenues to access international protection combined with the increasing externalisation and the rigorous fight against illegal entry will effectively render the asylum system dysfunctional, thereby violating states' obligations under the 1951 Refugee Convention.

⁸ COM (2011) 873 final, 12 Dec. 2011

⁹ „The European Council remains committed to the objective of establishing a common area of protection and solidarity based on a common asylum procedure and a uniform status for those granted international protection“, Stockholm Programme, art.6.2.

¹⁰ UNHCR Global Trends 2011, p. 2: <http://www.unhcr.org/4fd6f87f9.html>

¹¹ See the Action Plan implementing the Stockholm Programme, 20 April 2010, COM(2010)171 final.

PERCO therefore, in line with the Fundamental Principles of the RC/RC Movement, specifically with the Principles of Humanity and Impartiality, and considering the humanitarian mission of the Red Cross and Red Crescent Movement to help vulnerable people, calls on the EU and its Member States to respect their international obligations under the 1951 Refugee Convention and to ensure safe and effective legal avenues for potential asylum seekers to EU territory which enable them to exercise their right to ask for international protection.

Specifically, PERCO calls on the EU and its Member States to consider implementing the following measures:

1. Respect European Refugee and Human Rights Standards at European Borders and Beyond

The European Court of Human Rights clarified that the interception of migrants on the High Seas by Italian authorities and their handover to the Libyan authorities without examination of their protection needs was in breach of the European Convention on Human Rights, in particular the principle of Non-Refoulement.¹² With this decision, the Court confirmed that the case fell into the jurisdiction of Italy, although outside of its territory, because the Italian authorities exercised continuous and exclusive control over the migrants. That decision made it clear that Human Rights are not only applicable on the European territory, but wherever the EU, its agencies or Member States exercise effective control over migrants. Border control measures, even far away from the EU-territory, must therefore always be in line with the European Convention on Human Rights and the principle of Non-Refoulement, and thus not lead to push-backs at external (land, air and sea) borders and other border control mechanisms that cannot guarantee the right to access to a fair asylum procedure and the European territory.

2. Non-Penalisation of Irregular Entry of Asylum Seekers

Asking for international protection is a fundamental right, not a crime. Migrants are often forced to enter a territory illegally in order to exercise their basic right to seek asylum. Illegal entry in search of international protection must not be penalised according to Art. 31 of the 1951 Geneva Refugee Convention. Nevertheless, in the absence of appropriate, effective and safe ways to enter the EU legally to ask for international protection, the unavoidable illegal entry of people seeking protection in EU territory is increasingly criminalised and punished. We do insist that while a migrant might therefore

¹² ECHR: Grand Chamber judgment, 23 February 2012, in the Case of Hirsi Jamaa and Others v. Italy (Application no. 27765/09), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=901565&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

violate a country's laws when entering that country illegally, the migrant himself is never illegal as a person. The expression "illegal migrant" should therefore be avoided at all times, even more so as it further stigmatizes and criminalises what are, often, vulnerable persons.

Detention of migrants and asylum seekers at the European borders is becoming more and more the rule instead of being an exceptional measure. People seeking protection should not be detained.¹³ However, if the detention of asylum seekers is absolutely unavoidable, it must always be a measure of last resort, as required in International and Regional Law instruments. It must only be used if alternatives to detention cannot be applied effectively and if it has been determined to be both necessary and proportionate in each individual case. Detention facilities must offer detained migrants the possibility to lodge asylum applications.¹⁴

3. Effective legal remedy

The European Court of Human Rights (see above) confirmed that the denial of access to EU territory and thus to international protection can be in breach of EU Refugee and Human Rights Law. Despite this fact, protection sensitive border control mechanisms are often not in place and access to an effective legal remedy is not always granted. Part of the reason for this is that accessing the European Court of Human Rights is often too difficult and time consuming for affected migrants. The creation of an effective, uniform, fast and easily accessible legal remedy for migrants who claim to have been denied access to protection by the EU, its Member States or their border agents is therefore necessary. This legal remedy should result in a decision about the right to legal entry to the EU to ask for asylum and also about a financial compensation for unlawfully rejected migrants; the decisions should be taken centrally by an EU authority.

4. Independent Monitoring

EU borders, all places where EU border control measures are implemented and all detention facilities for migrants should be continuously monitored by independent and

¹³ See the Conclusion n°44 (XXXVII) of the 37th session of the Executive Committee on „*Detention of Refugees and Asylum-Seekers*“, 13 October 1986, available at: <http://www.unhcr.org/refworld/docid/3ae68c43c0.html> [accessed 14 August 2012] and the Recommendation REC(2003)5 of the Committee of Ministers to Member States on Measures of Detention of Asylum Seekers, 16 April 2003, (2003) 5, available at: <http://www.unhcr.org/refworld/docid/3f8d65e54.html> [accessed 14 August 2012]] and Council of Europe Parliamentary Assembly Resolution 1707 (2010) on the Detention of Asylum Seekers and Irregular Migrants in Europe, available at: <http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=17813&Language=EN> [accessed 12 October 2012].

¹⁴ In this context, PERCO also supports ECRE's 'Appeal to EU Institutions: Ensure Respect for Asylum-Seekers' Right to Liberty in Recast Reception Conditions Directive and Dublin Regulation' – 'Not Crossing Red Lines – a Negotiator's Checklist on Minimum Detention Safeguards'; <http://www.ecre.org/component/downloads/downloads/558.html>

impartial actors. The findings of this independent monitoring should be reported regularly to the European Parliament and the reports should be made public.

5. FRONTEX Agency

EU states should take all possible measures, including independent monitoring, to ensure the correct implementation of Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union ('FRONTEX') in its recently amended¹⁵ form to ensure that migrants in need of international protection are recognised as such and given due access to EU territory and the asylum system. In addition, since the guarantees offered by the amended Regulation are still weak, a number of measures should be introduced in order to bring the rules governing the functioning of FRONTEX more closely in line with fundamental rights standards. Further recommendations include¹⁶: There is a clear need for a division of responsibilities between EU Member States and FRONTEX in line with the Agency's expanded role, ensuring that FRONTEX is fully responsible for all acts committed during the operations that it coordinates, wherever they take place. In order to enhance transparency, there should be a mandatory consultation of the European Parliament whenever negotiations are conducted between FRONTEX and a third country or the authorities of that country, and any agreement reached by FRONTEX during the negotiations should be submitted to the European Parliament for approval before being concluded. It should be explicitly stated that operations coordinated by and/or involving officers placed under the authority of FRONTEX outside EU territory must be consistent with respect for the right to leave any country, including one's own (Article 12.2 ICCPR).

6. Exemptions from EU Visa Regulations and Carrier Sanctions

Visa obligations are probably the most common form of pre-frontier controls which apply to the vast majority of migrants who are planning to come to Europe. Even migrants from countries in a proven humanitarian crisis, a war situation and those who have already been recognised as refugees by UNHCR need a visa to enter the EU legally. In order to facilitate legal access to the EU for vulnerable people in need of protection, the EU

¹⁵ According to Regulation (EU) No 1168/2011 of 25 October 2011.

¹⁶ For further information please see the EU Red Cross Recommendations to the FRONTEX Ombudsman: <http://www.redcross.eu/en/National-and-EU-activities/Asylum-Migration/European-Ombudsman-inquiry-on-FRONTEX-Red-Cross-comments/>; the migreurop study „FRONTEX agency: which guarantees for human rights?“ - <http://migreurop.wordpress.com/2011/05/25/migreurop-report-%E2%80%9CFRONTEX-which-guarantees-for-human-rights%E2%80%9D/> or the ECRE and Amnesty International Joint Briefing on the Commission Proposal to amend the FRONTEX Regulation, <http://www.ecre.org/topics/areas-of-work/introduction/94-ecre-and-amnesty-international-joint-briefing-on-the-commission-proposal-to-amend-the-frontex-regulation.html>.

should exempt refugees who are formally recognised by UNHCR and whose protection needs cannot be fully covered in their country of residence from EU visa regulations and facilitate their legal entry for the purpose of lodging an asylum application in a Member State. The EU and its Member States should advocate with third countries which lack an appropriate asylum system to entitle UNHCR to perform the Refugee Status determination in their territories. Visa restrictions could also be suspended for nationals and residents of countries in a significant humanitarian crisis and where there are no opportunities for issuing visas within the country of origin, as it is the case at the moment in Syria.

In addition to visa obligations, carrier sanctions¹⁷ that impose fines on private transport companies carrying persons who do not hold the necessary visa have a serious impact on people trying to enter the EU. For that reason, carrier sanctions should be abolished; at least an independent and effective monitoring mechanism should be put into place to avoid negative consequences for people wanting to seek asylum.

7. Humanitarian and Protection Visa

Another option to enable safe and legal access to protection in the EU would be the expanded and protection sensitive issuing of humanitarian visas, already foreseen under EU Law. We therefore ask the EU and its Member States to take all necessary measures to ensure the implementation of Art. 5, Para 4 (c) of the Schengen Borders Code¹⁸ and Art. 25, Para 1 (a) of the Visa Code¹⁹ in order to facilitate the issuing of humanitarian visas for entering the EU.

An EU-wide Protected Entry Procedure could be put in place. This complementary form of access to protection should enable the asylum seeker to apply for asylum at an embassy in the country of origin or a third country. If the national authority reaches the conclusion that the applicant cannot reasonably be expected to stay in her/his country of origin, host country or another country, a protection visa “with regard to the granting of a refugee status” can be issued and the full procedure is carried out after arrival.²⁰ In any case, tight and stringent safety measures have to be taken to ensure that applications

¹⁷ According to Directive 2001/51/CE.

¹⁸ According to Art. 5 of the Regulation (EC) No 562/2006 ‘third-country nationals who do not fulfil one or more of the conditions laid down in paragraph 1 may be authorized by a Member State to enter its territory on humanitarian grounds...’.

¹⁹ According to Art. 25 of Regulation (EC) No 810/2009 ‘A visa with limited territorial validity shall be issued exceptionally, in the following cases: (a) when the Member State concerned considers it necessary on humanitarian grounds,...’

²⁰ Please compare “Exploring Avenues for Protected Entry in Europe”, Final Report, P. 55.

are evaluated objectively, by well trained and competent staff and that any decision to reject visa applications is taken exclusively based on the concrete circumstances of the individual case and not on general political considerations. While such a system can never replace the processing of the claims of spontaneously arriving asylum seekers, it could help some of those who clearly need international protection, and who under the present conditions could never reach EU territory because of the nature of their vulnerability. The procedure should include the possibility to lodge an effective and suspensive appeal if the application is rejected by the first instance. A negative decision must further not preclude an asylum application within an EU country if the asylum seeker manages to reach that country without a protection or humanitarian visa.

8. Resettlement

The number of refugees who can be resettled from third countries to the EU every year should be increased substantially to allow for more legal access to protection within the EU. Even though resettlement clearly cannot replace the processing of asylum applications by spontaneously arriving asylum seekers, it is a recognized durable solution for the most vulnerable refugees who are at risk in the country where they have sought refuge. We welcome the EU Resettlement Programme and encourage the EU and its Member States to think about a more legally binding approach to resettlement. In any case, the EU Resettlement Programme could include more incentives in order to make the resettlement of larger numbers of refugees more attractive for Member States.

9. Closer Cooperation with Civil Society

The EU, its Member States and their agencies should form partnerships and cooperate very closely with NGOs active in the field of international protection, from EU countries as well as from third countries, and should make better and more active use of their practical experience²¹. The quality and intensity of the cooperation between governments and NGOs should be far higher than it is currently the case in fora such as the Consultative Forums of the EASO and the FRA to create more added value for states, their agencies, NGOs and vulnerable migrants.

Finally, we would like to underline that the aim of this Position Paper is to advocate for the implementation of safe and effective legal avenues for persons in need of

²¹ See the Resolution n°3 of the 31st International Conference of the Red Cross and Red Crescent - „Migration: Ensuring Access, Dignity, Respect for Diversity and Social Inclusion“.

international protection in order to avoid the suffering and deaths of numerous migrants along their migration routes. For that reason, we call for the incorporation of a protection-sensitive approach wherever pre-entry checks are performed.²² However, it is imperative that all recommendations pointed out above must be seen as complementary forms of seeking protection, that in no way can constrain the right of asylum seekers to ask for international protection irrespective of the way of their arrival in the European Union. Furthermore, any kind of border or embassy procedure pointed out above must not anticipate the decision on the individual asylum claim. Above all these recommendations do not intend to relieve the European Union and its Member States from the responsibility to create a fair and well functioning Common European Asylum System.

²² Compare: "Protection-Sensitive Entry-Management System in COM(2007)301 and UNHCR, 10 Points Plan of Action.