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RECOMMENDATIONS FOR THE DEVELOPMENT OF SAFE AND LEGAL PATHS TO PROTECTION IN THE EUROPEAN UNION

Our organisations represent Churches throughout Europe – Anglican, Orthodox, Protestant and Roman Catholic – as well as Christian agencies particularly concerned with migrants, refugees, and asylum seekers. As Christian organisations we are deeply committed to the inviolable dignity of the human person created in the image of God, as well as to the concepts of the common good, of global solidarity and of the promotion of a society that welcomes strangers. We also share the conviction that the core values of the European Union as an area of freedom and justice must be reflected by day-to-day politics. It is against this background that we make the following proposals for the development of safe and legal paths to protection in the European Union.

I. THE LACK OF SAFE AND LEGAL WAYS LEADS TO DEATHS AT THE BORDERS

1. After the tragedies of Lampedusa and Malta in October 2013, the discussion on providing more safe and legal paths for persons in need of protection to enter the European Union has gained a new dynamic. Decision-makers from the entire political spectrum quickly joined Pope Francis and other representatives of religious communities in their call for solidarity with migrants and protection seekers. Since then, however, the Commission-led ‘Task Force Mediterranean’ has not come up with proposals in this regard, neither has the European Council in June 2014 adopted any major changes to existing policies, in the context of new ‘guidelines’. It is, again, the role of Church agencies and other civil society actors to advocate for changes in policies and legislation and to make proposals to this effect.
2. The majority of persons who seek protection in the European Union are forced to do so because for people fleeing violence, war and human rights violations in Afghanistan, Eritrea, Iraq, Somalia, or Syria, countries of transit do not offer safety and the possibility to establish a new existence. This is especially true for ‘failed states’ like Libya, but also for other countries that do not yet have established effective and sustainable protection mechanisms.
3. The lack of safe and legal ways to enter Europe in search of protection forces these people to rely on smugglers, being in danger of falling prey to traffickers and other criminals. They risk their lives in unseaworthy boats on the Mediterranean, or by climbing the fences at the external land borders of the European Union. UNHCR estimates that in 2014 more than 3,000 women, children and men have lost their lives in the Mediterranean alone.

II. A PRINCIPLED RESPONSE IS NEEDED

4. The response by EU Institutions and Member States must be governed by the acknowledgement of the inalienable dignity of every human being and by the values that are constitutive for European societies, such as compassion, solidarity, hospitality, the respect for family life and the rule of law. The fundamental rights of all human beings, irrespective of their nationality or citizenship and immigration status, must be respected so as to allow for the full enjoyment of these rights. Border management

measures must not lead to deaths of men, women and children. Policies and mechanisms must be adopted that effectively guarantee that human rights, including the right to seek protection, the “non-refoulement” obligation and the right to family life, are respected under all circumstances.

5. Consequently, a path to protection in Europe can only be considered as “safe” if it is
 - (i) actually accessible for a certain protection seeker who is forced to leave his or her country, and
 - (ii) if the full respect of human rights is guaranteed, including the right to an effective remedy against a negative decision on an application.

III. STATES ARE OBLIGED TO PROVIDE ACCESS TO PROTECTION IN EUROPE

6. EU Member States are bound by a number of international legal instruments which they have agreed to and ratified, and they are under the obligation to respect the right to asylum as laid down in European Union law (Article 18 EU Fundamental Rights Charter).
7. The obligation of States not to expel or return (*refouler*) a person to territories where s/he would face threats for life or freedom “is a cardinal protection principle”¹, most prominently expressed in Article 33(1) of the 1951 Refugee Convention, but also in Article 19(2) of the EU Fundamental Rights Charter. It “applies to all refugees, including those who have not been formally recognised as such, and to asylum seekers whose status has not yet been determined.”² Whereas the territorial scope of Article 33(1) 1951 Refugee Convention and Article 19(2) Fundamental Rights Charter is not explicitly defined, the meaning, purpose and intent of the provisions demonstrate their extraterritorial application, e.g., to situations where a State acts outside its territory or territorial waters.
8. The prohibition of torture and other forms of cruel, inhumane and degrading treatment or punishment, as laid down in Article 3 of the European Convention on Human Rights (ECHR) and Article 4 of the EU Fundamental Rights Charter, is also providing protection against “refoulement”. According to the European Court for Human Rights’ established case-law, State Parties to the ECHR have the right to control the entry, residence and expulsion of migrants. However, expulsion, extradition or any other measure to remove a migrant may amount to a violation of the ECHR, where the person in question would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In such circumstances, Article 3 implies an obligation to provide protection.³ This obligation is also applicable where a migrant is apprehended not on a State Party’s territory but under circumstances where “the State through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction”.⁴ These cases include those involving the activities of a State’s diplomatic or consular agents abroad. A potential asylum seeker/refugee comes into contact with an EU Member State’s official not only when apprehended at the borders, but also when contacting an embassy or a consulate for obtaining a visa or at an airport where immigration officers posted abroad control passports and visa. “In these specific situations, the Court, basing itself on customary international law and treaty provisions, has recognised the extraterritorial exercise of jurisdiction by the relevant State”.⁵ This, in turn, means that this extraterritorial exercise of jurisdiction by an EU Member State must be in full conformity with human rights law. However, the visa regime in combination with the pre-entry clearance and the sanctions against carriers that have transported passengers without the necessary visa can result in a de-facto denial of all legal means of seeking asylum. Thus, in cases of victims of serious human rights violations, these measures can become incompatible with Member States’ obligations to provide protection. Therefore there is an urgent need to install “Doors for Refugees” at the EU borders.⁶

IV. NOT ONE MEASURE FITS ALL, BUT A “TOOLBOX” IS NEEDED

9. The groups of persons who are in need of protection in the European Union have many diverse backgrounds. The situation of someone fleeing war and violence in Syria or Iraq can be completely different from the circumstances that an opponent of the regime in Eritrea is facing. Hence, there is not one measure that can fit all. A person who must flee imminent persecution will not have the time to go to an embassy and request a humanitarian visa. On the other hand, persons who want to join

¹ UNHCR, Submission to the European Court for Human Rights in the Case of *Hirsi and Others v. Italy*, para. 4.1.1.

² *Ibid.*

³ European Court for Human Rights (GC), Judgement of 23 Febr. 2012, *Hirsi Jamaa and Others v. Italy* (application 27765/09), paras 113-114 with further references.

⁴ *Ibid.*, para 74.

⁵ *Ibid.*, para 75.

⁶ The term has been taken from Viola Moreno-Lax (2008): Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers’ Sanctions with EU Member States’ Obligations to Provide International Protection to Refugees. EJML 10, pp. 315-364.

family members who are already living in Europe would benefit from a more liberal visa regime with faster procedures. Many refugees from Syria who live in the camps in Lebanon would like to be resettled to other countries, while the “spontaneous” asylum seekers from Afghanistan may need other forms of access to protection.

Therefore, a “toolbox” of different measures and policies must be developed that meet the wide variety of protection-seekers’ needs. The following are some “tools” that should be included.

RESETTLEMENT AND HUMANITARIAN ADMISSION

10. Refugee resettlement and humanitarian admission continue to be important tools of protection of the most vulnerable refugees and a tool of solidarity with countries hosting large numbers of refugees. More and more member states are engaging in resettlement or humanitarian admission, but overall numbers of places remain limited. EU institutions’ activities could contribute to achieving more ambitious targets: For instance, more places should be offered in response to emergencies (like the 100,000 places for Syrian refugees called for by UNHCR) in addition to a minimum annual resettlement quota for the EU (such as 20,000 places per year by the year 2020, as proposed by the Resettlement Saves Lives Campaign). Even these would be very small numbers for the entire European Union. While resettlement and humanitarian admission will remain voluntary activities for Member States, the EU could - in addition to funding - offer expertise and policy coordination to encourage pledging of higher numbers. Regular exchange between Commission, Member States, NGOs and churches’ entities could contribute to a better coordination of competencies as well as a clearer common priority setting.

A positive example is Germany, which pledged to take in 28,000 refugees from Syria. For a meaningful contribution to the current refugee crisis in the Middle East and to provide perspectives, resettlement figures will however have to be increased considerably.

FAMILY REUNIFICATION

11. As Christian organisations we attach highest importance to everyone’s right to family life. Family life is of utmost importance also for the wellbeing of refugees and crucial for their successful integration. The right to family reunification is laid down in the EU Family Reunification Directive.⁷ The EU Court of Justice has underlined in its jurisprudence that the aim of the directive is to enable family life and promote the right to it, and that the directive must be interpreted and applied in this light. An application of the directive at national level meeting these requirements and refraining from unjustified restrictions would enable a considerable number of persons in need of protection to come to Europe in a safe and organised way and to join their relatives already living here who can provide assistance to set up a new existence. The concept of ‘family’ should be interpreted more broadly to include not only the nuclear family but other relatives as well, especially where relatives find themselves in emergency situations.

HUMANITARIAN VISA

12. For some groups of forced migrants the issuing of humanitarian visa could provide an effective way to protection. Where persons can access an embassy or consulate of a Member State, be it in their countries of origin or in transit countries, they could be provided with a visa authorising them to travel to this Member State. Upon the applicant’s arrival in the country of destination, the usual asylum procedure would follow. The issuing of humanitarian visa under this model should not depend on a definite assessment of the protection request.

Since 2009, Articles 19 (4) and 25 (1) of the Visa Code⁸ provide for the exceptional issuing of a “visa with limited territorial validity”, when a Member State considers it necessary on humanitarian grounds or because of international obligations to issue a visa for reasons of urgency. Such a visa is, as a rule, valid for the territory of the issuing Member State. We strongly support the proposal in a study for the

⁷ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ L 251, 3.10.2003, p. 12).

⁸ Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) (OJ L 243, p. 1).

LIBE committee in the European Parliament⁹ to use the discussion on a Commission's proposal for a new Visa Code¹⁰ in order to make these provisions more effective for protection purposes.

A good example for this model is the policy recently adopted by Brazil for persons fleeing violence in Syria: The Brazilian embassies in countries neighbouring Syria are responsible for issuing special humanitarian visa for Syrians and other nationals affected by the Syrian conflict who want to seek refuge in Brazil. Claims for asylum need to be presented on arrival in Brazil.¹¹

LIFTING VISA REQUIREMENTS

13. An alternative to the issuing of 'humanitarian visa' could be the lifting of visa requirements especially in cases where greater numbers of persons must flee an individual State in search of protection.
14. If lifting of visa requirements were to lead to a considerable increase of persons seeking protection in EU Member States, the Temporary Protection Directive¹² could be invoked and applied. Lifting visa requirements would allow persons seeking protection to travel safely and spend their money on ordinary travel means rather than paying smugglers.

V. IN SPECIAL CASES: PRIVATE SPONSORSHIP

15. Private sponsorship is an option to consider allowing for people to come to the European Union. This model works for example in Canada and is starting to be used by some EU Member States such as Germany and Sweden. Private sponsorship allows for access to EU territory on invitation by a legal resident in an EU state, whether there are family links or in other circumstances (for example an NGO, a Church entity or a group of people living in the member state decides to sponsor one person or one family from Syria). The sponsor is responsible for the asylum seeker, e.g. guaranteeing her/his living costs for a specific period so that there is less impact on the local social welfare system. The model should, however, not be considered as a general solution to the existing problems but rather as a 'tool' to be applied in special cases. It should be avoided, on the other hand, that refugees become dependent on private sponsors for gaining access to protection.

VI. CONCLUSIONS

16. International and European law oblige EU institutions and Member States to develop measures and policies that open safe and legal paths into the European Union for those who must flee war, violence and severe human rights violations. Such a policy would also be in line with core Christian and European values.
17. EU law, such as the Visa Code, already provide for some starting points that can be used for the creation of a 'toolbox' of different schemes that meet the dissimilar needs of diverse groups of forced migrants. There is not one measure that fits all; instead, legal as well as practical solutions must appropriately respond to the various situations that forced migrants are facing.
18. It would be unrealistic, however, to assume that with the development and implementation of such a 'toolbox' it would be possible to suppress all irregular migration and prevent persons from coming to Europe and applying 'spontaneously' for protection. Safe and legal paths to protection in Europe must be complemented by fair asylum procedures, proper and human reception conditions as well as by integration policies that allow forced migrants to establish a new existence in an EU Member State. Persons seeking or granted protection as well as migrants in irregular situations must never be left in destitution and excluded from enjoying their human rights; instead, they must be treated as what they are: Human beings with dignity who are right-holders.

Brussels, 19 November 2014

⁹ Ulla Iben-Jensen (2014): Humanitarian Visas – Option or Obligation? European Parliament, Brussels.

¹⁰ European Commission, 1.4.2014: Proposal for a Regulation of the European Parliament and of the Council on the Union Code on Visas (Visa Code) (recast), COM(2014) 164 final.

¹¹ UNHCR, News Stories, 27 September 2014: UN refugee agency welcomes Brazil announcement of humanitarian visas for Syrians.

¹² 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, p. 12).