Immigration Law Practitioners' Association (ILPA)

Submission in response to the Commission Green Paper on the future Common European Asylum System COM(2007) 301 final

Executive Summary

This response is in two parts. Part 1 contains ILPA's general comments on the current content and future direction for the CEAS. Part 2 contains responses to those questions posed in the Green Paper which fall within ILPA's area of expertise.

The move to discuss a second phase of legislation is premature, in that the first phase instruments are not fully in place. As well as the inopportune timing of the initiative, the combination of the assessment and reform exercises has tended to limit the latter. Reform proposals should not be tied to mere tweaking of the existing instruments. Instead the whole system needs to be revisited to ensure that the promises made in the preambles of consistency with the UN Convention on the status of refugees 1951 and its 1967 protocol are correctly reflected as the minimum standards which apply to the CEAS.

Although ILPA views the move to a second phase of legislation as premature, some legislative changes are warranted. There should be three key objectives:

- to enhance refugee protection, through accessible, fair procedures and appropriate level of rights for asylum seekers and refugees.
- to end the protection lottery across the EU.
- enhanced solidarity, to the extent that it assists in achieving the other two objectives

Three important clarifications to the concept of minimum standards are needed:

- Minimum standards by their very nature should not permit Member States to apply *lower* levels of protection. 'Minimum' implies a common core of non-derogable requirements, not a hodge-podge of optional discretionary standards.
- Minimum standards permit *higher* standards in all areas. The only exception to this proposition is that those higher standards must not undermine the purpose of the EC measure, which cannot be conceived baldly in terms of harmonisation.
- Member States are not only entitled, but indeed may be required to adopt higher standards than those set out in the first phase instruments in certain instances because sources of fundamental rights law are generally binding on the Member States in their application of EC law.

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Introduction

The Immigration Law Practitioners' Association (ILPA) is the UK's professional association of immigration lawyers, advisers and academics practising or engaged in immigration, asylum and nationality law. ILPA has some 1,000 members including lawyers, advice workers, academics and law students. Through its membership ILPA has access to a wide range of experience on asylum.

ILPA welcomes this opportunity to comment on the Green Paper on the future Common European Asylum System ('CEAS'). These comments are divided into two parts. Part 1 contains ILPA's general comments on the current content and future direction for the CEAS. Part 2 contains responses to those questions posed in the Green Paper which fall within ILPA's area of expertise.

Throughout the paper, 'person seeking asylum' refers to seekers of refugee status and subsidiary protection and 'refugees' refers to both those recognised as Convention refugees and those recognised as in need of subsidiary protection.

Background to the Green Paper

In 1999, the European Council at Tampere adopted a five-year programme on justice and home affairs, working towards a CEAS. The Tampere Conclusions identified the following elements of the CEAS:

> 'in the short term, a clear and workable determination of the State responsible for the examination of an asylum application, common standards for fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of refugee status…
>
> In the longer term, Community rules should lead to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union.'[1]

Pursuant to these objectives, the Council adopted the first phase legislative measures: the Procedures Directive[2]; Qualification Directive[3]; Reception Conditions Directive[4] and Temporary Protection Directive[5], as well as the Dublin[6] and EURODAC[7]

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[1] Tampere European Council, 15-16 October 1999, Presidency Conclusions, Annex A, paragraphs 14 and 15.

[2] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13. See ILPA, *Analysis and Critique of Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status* (30 April 2004), August 2004.

[3] Council Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L/304/12. See ILPA, *Response to Home Office Consultation on Qualification Directive*, August 2006.

[4] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJL31/18. See ILPA, *Response to proposed EC Directive on minimum standards on the reception of applicants for asylum* 2001 ILPA, *Submission on the implementation of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers* (December 2004).

[5] 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 [2001]

Regulations. ILPA made recommendations throughout the negotiation of these measures, as well as in the context of the UK implementation consultations. This submission draws on those previous ILPA submissions, as detailed in the references throughout.

In 2004, the European Council adopted the Hague Programme, a further five-year programme of action in the field. Concerning asylum policy, the Hague Programme identified the aims of the CEAS in its second phase as 'the establishment of a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection.'[8] Also in the Hague Programme, the European Council requested that the Commission by 2010 evaluate the first phase legislation, and propose further legislation to give effect to the second phase. It also requested the Commission to 'present a study on the appropriateness as well as the legal and political implications of joint processing of asylum applications within the Union'[9] and requested that 'separate study' to be conducted 'in close consultation with UNHCR' to examine 'the merits, appropriateness, and feasibility of the joint processing of asylum applications outside the EU territory, in complementarity with the Common European Asylum System and in compliance with the relevant international standards.'[10] It also referred to the [possible] establishment of a European Support Office to promote practical cooperation between Member States to implement the Common European Asylum System (hereafter 'European Asylum Support Office' or 'EASO').

The Green Paper: Premature, yet Opportune?

The European Commission adopted its Green Paper on 6 June 2007. In light of the looming 2010 deadline set in the Hague Programme, the Commission's Green Paper responds by launching the evaluation of the first phase legislation in parallel with the discussion of proposals for the second.

ILPA regards the move to discuss a second phase of legislation as premature, in that the first phase instruments are not fully in place, not to mind fully evaluated. The Qualification Directive came into force in October 2006, and the Procedures Directive

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OJ L212/12. See Response to proposed EC Directive on minimum standards of temporary protection, 3 October 2000, ILPA.

[6] 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 [2003] OJ L50 (Dublin II). On Dublin generally, see ILPA, *Representations on the 'Commission Staff Working Paper' Revisiting the Dublin Convention* [SEC 2000 522] 20 June 2000, available at <www.ecre.org/eu_developments/responsibility/ILPAdc.doc>; ILPA, *Scoreboard 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,* January 2002, available at <www.ilpa.org.uk/submissions/dublinIIscoreboard.html>.

[7] Council Regulation (EC) 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 [2000] OJ L316/1.

[8] European Council 4-5 November 2004, Presidency Conclusions, Annex 1, page 17, final paragraph. See ILPA, *Response to the Hague Programme: EU Immigration & Asylum Law and* Policy, January 2005.

[9] *Ibid.*

[10] *Ibid.*

is to be implemented by December 2007. Member States have been tardy in their implementation, as has the Commission in its evaluation. The Commission's report on the Dublin II Regulation[11] was overdue, and its report on the Reception Conditions Directive has not been published, although it was completed in 2006. As well as the inopportune timing of the initiative, the combination of the assessment and reform exercises has tended to limit the latter. ILPA urges that the reform proposals should not be tied to mere tweaking of the existing instruments.

Instead the whole system needs to be revisited to ensure that the promises made in the preambles of consistency with the UN Convention on the status of refugees 1951 and its 1967 protocol are correctly reflected as the minimum standards that apply to the CEAS. The advice of the guardian of the Refugee Convention, the UNHCR, should be applied in the acquis on refugees. A full and expansive interpretation of the Member States' duties under the ECHR and other international standards and as interpreted by the ECtHR must be the bottom line as regards subsidiary protection. In particular, ILPA notes that in more than one decision of the ECtHR regarding persons in need of protection, and in many opinions of the UN Committee against Torture in the individual cases of protection seekers, failures in the administrative culture of Member States have been highlighted. Specifically, the reluctance of some authorities to accept the veracity of a protection seeker, his or her account and documents, has been criticised. In the development of a CEAS, proper safeguards against the culture of disbelief regarding the histories of refugees and protection seekers must be built in.

Political and Institutional Context

The political and institutional context may, however, provide an opportunity for some sober rethinking of the direction of EU asylum policy. This year saw an increased numbers of persons seeking asylum worldwide. However, the trend in Europe until 2006 reflected declining numbers of asylum applications, and similar downward trends are evident in the UK.[12] This pattern is impossible to explain conclusively. It may result from fewer global numbers of refugees, but in all likelihood also reflects the impact of non-arrival and deflection strategies, including the many disincentives to making asylum applications once within the territory of the EU Member States. The UK Home Office has attributed the drop in UK applications to **'**the tough measures introduced by the Government including legislation and border controls in France.'[13] However, these so-called 'tough measures' are blunt and indiscriminate, and so represent a denial of access to protection for refugees in need of protection. From a political point of view, however, it may provide the opportunity for a cooler approach to asylum policy-making. ILPA hopes that the altered context makes it possible to the meet the urgent challenges ahead.

Lawmaking Procedures

The Green Paper is silent on the important changes in EC institutional context, which are a prerequisite for any improvements in the current measures. The changes to the

[11] Commission Report to the European Parliament and the Council on the evaluation of the Dublin system, COM(2007) 299 final, 6 June 2007.
[12] Home Office, *Asylum Statistics United Kingdom 2006*, Home Office Statistical Bulletin 14/07.
[13] Home Office press release: 'Asylum Numbers Down, New Drive On Removals – Home Secretary 24 February 2004'

legislative procedures for asylum law-making, with a move to QMV in the Council and co-decision with the European Parliament,[14] are crucial. In the first phase, legislating by unanimity in the Council led to lowest-common denominator lawmaking at its worst. Together with the dominance of interior ministry officials in the JHA Council, and the passivity of the Commission, it led to measures which, rather than constraining states' discretion, appeared to reinvest in them power that they had in some measure lost due to domestic and ECHR rulings.

In an EU of 27 states, it is inconceivable that more favourable results would emerge by unanimity. The Commission must seize its key role as strategic negotiator in the Council and ally of the Parliament. To date the Parliament's highly critical opinions on the first phase measures[15] have been ignored, as the Council was required to merely consult, rather than actually heed, the Parliament. Now, the Commission with the Parliament can secure real legislative impact. Moreover, the ruling of the ECJ in the EP's challenge to the Procedures Directive will clarify the EC constitutional basis of the Parliament's role in the legislative processes in this area.[16]

The Role of the European Court of Justice

The Green Paper does not mention the role of the European Court of Justice. ILPA welcomes the proposal in the Reform Treaty to confer on the ECJ full jurisdiction over the area of visas, asylum and immigration. At present many interpretative controversies await resolution, as preliminary references are out of reach of most decision-making tribunals and national courts, as only national courts of final instance may make references on Title IV EC matters.[17] In addition, in the UK attempts of questionable legality have been made to deter national immigration tribunals from making references on other issues of EC law, including pertaining to EU Citizenship. The Asylum and Immigration Tribunal (AIT) has issued a practice direction stating that only its President or Deputy President, or a group including one of them, can make a reference to the European Court of Justice under Article 234 of the Treaty[18], notwithstanding that all members constitute 'tribunals' within the meaning of Article 234 EC.[19] For persons seeking asylum, fundamental rights issues remain unresolved, leading to inevitable uncertainty, and accessing decisive rulings is even more costly and protracted than it would otherwise be.

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[14] S Peers 'Transforming Decision Making on EC Immigration and Asylum Law' (2005) 30(2) *ELRev* 285-296.

[15] See, for example, European Parliament, Committee on Civil Liberties, Rapporteur Kreissl-Dörfler, Report on the amended proposal for a Council Directive on minimum standards on procedures in the Member States for granting and withdrawing refugee status (A6-0222/2005, 29 June 2005).

[16] Case C-133/06 *Parliament v Council*, Action brought on 8 March 2006. The Parliament's main argument is that the procedure set out for agreeing common lists of STCs and SCOs should require co-decision with the EP, rather than mere consultation, as Article 67(5) EC provides for the passage to co-decision in the asylum field once legislation defining the basic principles and common rules in respect of the policy on asylum and refugees has been adopted. The Opinion of AG Maduro of 27 September 2007 accepted the Parliament's claims.

[17] Article 68 EC.

[18] Asylum and Immigration Tribunal Practice Directions, consolidated version 30 April 2007 at para 2.2(12), available at <www.ait.gov.uk/practice_directions/documents/2007_practice_dirs_30apr07.pdf>.

[19] Applying the criteria developed by the ECJ in Case 246/80 *Broekmeulen v Huisarts Registratie Commissie* [1981] ECR 2311 and subsequent rulings.

The Human Rights Agency

The EU created a Human Rights Agency in February of this year,[20] which ought to have a role in the asylum field. However, despite the Green Paper's emphasis on operational cooperation, it fails to mention this body and its possible role in monitoring and evaluating the application of EC asylum rules.

Three Key Objectives

Although ILPA views the move to a second phase of legislation as premature, some legislative changes are warranted. As ILPA made clear in its previous submissions, several features of the first phase measures undermine refugee protection in violation of international and indeed EC obligations. The most urgent priority should be to remove those features. Otherwise, the on-going implementation process risks becoming a pretext for the dilution of protection or denial of access thereto. The Procedures Directive in particular appears to confer discretion on the Member States to adopt or amplify procedural practices which would deny access to protection or result in *refoulement*. As such, it is of dubious legality.[21]

In undertaking any further reforms, be they legislative or otherwise, ILPA urges that three key objectives be borne in mind. The Commission identifies as goals for the second stage the achievement of 'a higher common standard of protection and greater equality in protection across the EU and to ensure a higher degree of solidarity between EU Member States'.[22] While in broad terms we share these objectives, as will be made clear in this part of our submission, ILPA does not share the Commission's characterisation in its entirety.

The first objective must be, as always, to enhance refugee protection, through accessible, fair procedures and appropriate level of rights for asylum seekers and refugees. The second, related, objective is to end the protection lottery across the EU. Of course, if all Member States truly met the first objective, the second would less pressing. However, experience shows us that similar standards, practices and conditions across Europe remain elusive, so that specific policy measures are required to ensure comparable levels of protection. Thirdly, ILPA shares the objective of enhanced solidarity, to the extent that it assists in achieving the other two objectives, and enhances protection capacity generally.

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[20] Council Regulation (CE) No 168/2007 establishing a European Union Agency for Fundamental Rights (FRA) 15 February 2007. The launch of the Agency took place 1 March 2007. The FRA replaces and builds on the work of the European Monitoring Centre on Racism and Xenophobia (EUMC).

[21] ILPA, above n 2.
See also UNCHR Press Release *Lubbers calls for EU asylum laws not to contravene international law* (29 March 2004); UNCHR Press Release *UNHCR regrets missed opportunity to adopt high EU asylum standards (*30 April 2004); ECRE, ILGA Europe, Amnesty International, Pax Christi International, Quaker Council for European Affairs, Human Rights Watch, CARITAS-Europe, Médecins Sans Frontières, Churches' Commission for Migrants, Save the Children in Europe *Call for withdrawal of the Asylum Procedures Directive* (22 March 2004). Concerns were reiterated by ECRE, Amnesty International and Human Rights Watch Press Release, *Refugee and Human Rights Organisations across Europe Express their Concern at the Expected Agreement on Asylum Measures on breach of International Law* (28 April 2004).

[22] Green Paper, p 3.

In the next section, ILPA highlights some important aspects of these objectives, which we further concretise in Part 2 of our submission.

- **Refugee Protection: Access to Procedures, Reliable Determinations & Refugee Rights**

ILPA's first priority, as always, is to ensure the protection of refugees and those with other internationally recognised protection needs, through full and effective compliance with the Refugee Convention, ECHR and other international instruments.

Concerning access, ILPA has highlighted the problems with juxtaposed border controls in particular,[23] and with measures which render access illusory, such as fast-tracking of decisions, and practical deprivation of access to legal advice. We have noted that the latter has occurred in particular in the context of dispersal of asylum seekers and detention in remote locations.

Concerning fair procedures, ILPA has already expressed itself unequivocally on the shortcomings of the Procedures Directive.[24] In addition, ILPA has also raised the issue of legal aid repeatedly. On the Hague Programme, ILPA noted the absence of any reference to the importance of legal aid to ensure effective access to administrative and court proceedings for immigration and asylum cases, including relevant data protection disputes.[25] The Green Paper also fails to mention legal aid, despite its integral nature to the reliability of the asylum process. This is particularly worrisome in light of the move to restrict legal aid entitlements. In the UK the legal aid rules[26] are about to change payment in legal aid cases to a fixed fee basis. ILPA has been very critical of the low level of the proposed fees, firstly, because they are insufficient to support best practice and secondly, because they will make practice in immigration and asylum law so difficult that it is likely that many representatives will leave the field, which is already one where demand for quality legal advice outstrips supply.[27]

Concerning refugee rights, ILPA's main submission is that the rights of recipients of subsidiary protection should be aligned with those of Convention refugees. Thus, we support the single uniform status. Failure to treat both categories equally amounts to discrimination, contrary to the general principle of EC law and international human rights law. At present both the Procedures and Reception Conditions Directives allow Member States a choice as to whether to apply their standards to subsidiary protection, amounting to a serious gap in EC law. Moreover, the rights attaching to each status differ considerably under the Qualification Directive. ILPA urges that both categories be encompassed fully within the personal scope of these EC asylum instruments, and relevant immigration rules, including the Family Reunion Directive.

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[23] ILPA, *Response to the Consultation Document: Private freight searching and fingerprinting at Juxtaposed controls*, 28 July 2006.
[24] Above n 2.
[25] ILPA, above n 8.
[26] Community Legal Service (Funding) Order 2007 SI 2007/2441, which will enter into force 1 October 2007.
[27] ILPA, *Response to the Home Office Consultation on Legal Aid Regulations*, July 2007.

ILPA urges that integration be borne in mind from the moment of arrival of asylum seekers. Measures that stigmatise and isolate asylum seekers run counter to the integration objective. Safeguarding asylum seeker and refugee rights assists in integration.

- **Ending the Protection Lottery: The Harmonisation-Plus Approach**

Ending the protection lottery is long overdue. The Dublin Regulation is premised on the false assumption of equal standards of protection across the EU. In reality, stark divergences in recognition rates are evident. For example, UNHCR has urged that all Chechens[28] should be considered in need of international protection, unless there are serious grounds to exclude them from refugee status under the Refugee Convention.[29] However, as ECRE notes:

> 'Throughout Europe the treatment of Chechens seeking protection varies considerably, with refugee recognition rates[30] in 2003 ranging from 0% (Slovakia) to 76.9% (Austria),[31] showing that for many Chechens, the outcome of the 'asylum lottery' will very much depend on the country in which they seek asylum.'[32]

ECRE has reiterated these concerns more recently, highlighting the huge variation in recognition rates and reception conditions for Chechens.[33]

Similar divergences are evident in the treatment of persons seeking asylum from other countries. At various stages, national courts and indeed the European Court of Human Rights have intervened to prevent Dublin removals, when it was evident that the standards of protection applicable in other Member States fell short.[34] Recently, the UK High Court[35] declared that the UK's 'safe third country' ('STC') provision[36]

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[28] i.e. those whose place of permanent residence was the Chechen Republic prior to their seeking asylum abroad.

[29] UNHCR, *Position regarding Asylum Seekers and Refugees from the Chechen Republic Russian Federation*, October 2004.

[30] Refugee recognition rate = Number of recognised refugees divided by the total number of recognised refugees, number of persons granted other forms of protection, and persons rejected protection x 100%.

[31] For more information on refugee recognition rates for Chechens in different European countries see Norwegian Refugee Council, *Whose responsibility? Protection of Chechen internally displaced persons and refugees,* May 2005.

[32] ECRE, *Guidelines on the Treatment of Chechen Internally Displaced Persons (IDPs), Asylum Seekers and Refugees in Europe,* doc PP2/05/2005/Ext/CR (Brussels, June 2005) (footnotes in the original text).

[33] ECRE Press Release 'Russian Roulette? 'Dublin' Regulation Puts Chechen Refugees at Risk' 21 March 2007, available at http://www.ecre.org/files/chechen_refugees.pdf and further ECRE publications cited therein.

[34] See, for example, the ECtHR in Application 43844/98 *TI v. UK* (2000) 12 IJRL 244, and UK courts in *R v. Secretary of State for the Home department* ex parte *Adan; R v. Secretary of State for The Home Department* ex parte *Aitseguer* (Judgments of 19 December 2000) [2001] 2 WLR 143-169; *R (Thangarasa) and (Yogathas) v SSHD* [2003] AC 920. See further, G Noll, 'Formalism vs Empiricism: Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law' (2001) 70 (1-2) *Nordic Journal of International Law* 161.

[35] *Nasseri v Secretary of State for the Home Department* [2007] EWHC 1548 (Admin).

[36] Contained in paragraph 3 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. It requires any person, tribunal or court determining an asylum or human rights claim to treat States identified in a list of "safe countries" as places:

was incompatible with Article 3 ECHR. A 'declaration of incompatibility' is the most extreme remedy under the Human Rights Act 1998, connoting that it is not possible for the court to reinterpret the impugned provision in line with the UK's ECHR obligations.[37] It is now for the Parliament to decide how to respond to the declaration. The case concerned a 17 year old Afghan who had previously claimed asylum in Greece, which appears on the safe countries list. As the provision rendered it impossible for him to challenge the safety of Greece in his case, and there was considerable evidence that Greece would not be 'safe', the High Court held that the provision was contrary to Article 3 ECHR. The case also suggests that UK courts would not accept the supersafe third country rule in the Procedures Directive, as it also seeks to create a watertight presumption of safety.

The harmonisation process remains far from complete, and in particular the Procedures Directive permits serious variation and indeed degradation of procedural standards. It is likely to aggravate the protection lottery, notwithstanding the laudable harmonisation of substantive standards in the Qualification Directive. In addition, the Qualification Directive is far from perfect. Problems remain with the personal scope of the Directive.[38] Its definition of 'serious harm'[39] is difficult to apply in practice, particularly in requiring an individual threat from indiscriminate violence. It should be reworded to make clear that the individual does not need to show specific risk to them individually. The provisions on exclusion from subsidiary protection[40] and the inclusion of non-state actors as 'Actors of Protection' contradict international standards.[41] Thus, that Directive also raises many interpretative conundrums, and does not guarantee equal protection across the EU.

Moreover, the sources of the protection lottery lie not only in the absence of harmonisation. They are political, institutional, geographical and cultural as well as legal and normative. Ending the lottery thus requires a multi-faceted approach, not just more harmonisation. Thus, ILPA advocates a 'harmonisation-plus' approach, focusing on legal harmonisation and creating the conditions for convergence of institutional practices. Courts must play a key role, in particular the ECJ, in bringing interpretative certainty through their rulings. It would also be helpful to develop mechanisms whereby national judges could readily access the rulings of other national courts on the EC measures, in order to gain interpretative guidance and make appropriate assessments as to whether preliminary references are necessary. Any such mechanism would have to include translation services.

(a) where a person's life and liberty are not threatened for a reason contained in the United Nations 1951 Convention Relating to the Status of Refugees (the Refugee Convention). These reasons are race, religion, nationality, political opinion, or membership of a particular social group;
(b) from which the person will not be sent to another State in contravention of his rights under the European Convention on Human Rights;
(c) from which he will not be sent to another State other than in accordance with the Refugee Convention.

[37] See Sections 2 and 3 Human Rights Act 1998.

[38] The personal scope of the Directive is confined to 'third country nationals or stateless persons' (Article 1). However, the UK implementation has correctly included EU Citizens. See Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI 2525/2006).

[39] Article 15 Qualification Directive.

[40] Article 17 Qualification Directive.

[41] Article 7 Qualification Directive.

In addition to highlighting the central judicial role, ILPA welcomes the Commission's endorsement of greater practical cooperation to enhance the quality of asylum determinations,[42] including that in the Green Paper. It is crucial that practical cooperation should achieve the three key objectives, namely to enhance protection, end the protection lottery and institutionalise solidarity. This requires not only a rhetorical commitment, but also a change in the nature and participants in practical cooperation. In the past, particularly in the pre-Amsterdam era, intensive interaction between interior ministry officials in asylum policy served to spread restrictive and deflective practices across Europe, and further afield. The new practical cooperation, if it is not simply to entrench the dominance of interior ministry officials, must broaden participation to include NGOs, civil society and asylum seekers and refugees, and have a clearer *independent* monitoring and evaluative role.

ILPA has always urged an active role for the Commission in this field, using its Article 226 EC powers to bring Member States to account, fulfilling its role as guardian of the treaties. As we have previously stated, 'The European Commission has a legal responsibility to monitor transposition and implementation of Directives into national law. Given the low standards contained in some of the instruments adopted in the first phase, strong monitoring of transposition of Community instruments into national law, taking into account the obligation to apply this legislation in accordance with the Geneva Convention and human rights principles and Treaties, will be crucial in ensuring that member states maintain or adopt legislation and policies that are in line with international law.'[43]

EASO may have a role to play in this monitoring and evaluation process, but we await further proposals to see how the division of functions between EASO and the Commission could be arranged. Our key concern is to have mechanisms which are suitably independent from national executives, and yet suitably participatory. With UNHCR then, we urge the development of a 'systematic and obligatory quality monitoring mechanism.'[44] To be convincing, monitoring must not be carried out by national authorities' peers, but by independent observers. Identification of good and bad practice should be the aim, including the singling out of asylum policies which have failed in some Member States. Examples of such UK bad practice include vouchers, dispersal and the cut-off of benefits for 'late' applications.

UNHCR advocates the development of implementation guidelines to narrow divergences in interpretation.[45] ILPA has concerns that such interpretative guidelines may not fit within the established typology of acts under EC law, and may not address the source of the protection lottery. Non-binding implementation guidelines are likely to create a further source of interpretative controversy. Moreover, where the provisions of the legislative measures themselves are in tension with human rights

[42] Commission Communication of 17 February 2006 to the Council and the European Parliament on strengthened practical cooperation - New structures, new approaches: improving the quality of decision making in the Common European Asylum System COM (2006) 67 final.
[43] ILPA *Memorandum of Written Evidence to the House of Lords European Union Committee on the Commission's Annual Policy Strategy for 2008*, reproduced in House of Lords European Union, *Committee Report on the Commission's Annual Policy Strategy for 2008*, 23rd Report of Session 2006-07, p 56.
[44] UNHCR, *Response to the European Commission's Green Paper on the Future Common European Asylum System,* September 2007, p 33.
[45] *Ibid.* p 7.

norms, no 'guideline' can remedy the situation. Binding court rulings are likely to be much more effective.

The application of EC rules brings with it the general principles of EC law, including procedural fairness and the principle of proportionality. In sum, these require a careful case-by-case analysis, rather than the mechanistic application of guidelines. The UK experience with the use of detailed administrative guidance is instructive. ILPA has demonstrated the attempts to clarify rules in a manner which removes administrative discretion, in particular by fettering decision-makers' fact-finding function, may lead to arbitrariness, discrimination, violations of international and human rights law and the denial of access to justice.[46] UK courts have impugned such guidance on grounds of violation of the principles of administrative fairness.[47]

- **Solidarity in Refugee Protection**

The Green Paper deals with solidarity and burden sharing between EU Member States in Section 4 and relations with non-EU states in Section 5. In contrast, ILPA urges that solidarity become the guiding value in the *global* refugee regime, not only between EU Member States themselves.

The Green Paper identifies responsibility sharing (through the Dublin Regulation) and financial solidarity, mainly through the European Refugee Fund,[48] as the two aspects of burden sharing. However, the process of legal harmonisation and practical convergence should also guarantee (and manifest) solidarity between Member States. Harmonisation ought to prevent States from lowering standards of protection or denying access to protection in order to deflect or deter persons seeking asylum. However, the first phase measures do not meet this aim, as they confer such broad discretion on the Member States to adopt divergent standards and maintain diverse procedures. As such, the characterisation of the first phase as complete is misleading. In most areas, there are no minimum standards below which Member States may not legislate.

Moreover, burden sharing should not degenerate into a burden shifting exercise. ILPA advocates burden, or more properly responsibility, sharing mechanisms only to the extent that they enhance the UK and EU's protection capacity overall, and reduce incentives on governments to deny protection and deflect asylum seekers. Dublin is a burden shifting mechanism in that it allocates responsibility unevenly, and also permits STC removals to countries outside the EU, rather than processing within the EU. We have consistently sought a position where responsibility should be taken by the Member State where the first asylum claim is lodged, rather than where the person seeking asylum first entered the EU. Any such rule for allocation rule would also have to be tempered by very strong humanitarian clauses.[49]

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[46] See ILPA *Response to Borders and Immigration Agency Consultation on Simplifying Immigration Law*, August 2007, in particular pp 8-9.
[47] See, for example, *Ahmed Iram Ishtiaq v SSHD* [2007] EWCA Civ 386, discussed in ILPA *Response to Borders and Immigration Agency Consultation on Simplifying Immigration Law*, August 2007, pp 8-10.
[48] Council Decision 2004/904/EC of 2 December 2004 establishing the European Refugee Fund for the period 2005 to 2010 [2004] OJ L381/52.
[49] Above n 6.

Minimum or Common Standards? Three Important Clarifications

ILPA welcomes the Green Paper's explicit goal of establishing higher standards of protection. However, we regret the unnecessary link drawn between higher standards and 'common standards.' At present, many of the minimum standards enshrined in the first phase measure are too low, in light of fundamental rights law. It should be recalled that fundamental-rights compliant standards are legally required as a bare minimum. The minimum standards must be raised, as a matter of urgent legal necessity.

The term 'common standards' connotes standards *above which* Member States are not permitted to legislate, which would be inappropriate in the asylum context. Minimum standards in contrast are appropriate in that they allow Member States to apply higher standards of protection in light of their diverse legal and constitutional traditions, and allow fundamental rights standards to improve in light of evolving jurisprudence and circumstances. The entire edifice of international human rights law is designed to form a common minimum, a floor of rights, rather than a ceiling. Moreover, the EC's current competence under Title IV EC is confined to establishing minimum standards, such that Member States remain free to adopt higher standards of protection.[50] ILPA thus agrees with UNHCR that the EC should maintain but clarify and redefine the concept of minimum standards.[51]

The concept of minimum standards should be conceived as follows:

❖ Minimum standards by their very nature should not permit Member States to apply *lower* levels of protection.

'Minimum' implies a common core of non-derogable requirements, not a hodge-podge of optional discretionary standards. However, the first phase measures tend to resemble the latter rather than the former. Going forward, the EC must eliminate the apparent discretion in the Directives to restrict core minimal entitlements, such as access to individual assessment, including an interview. Various provisions in the Procedures Directive appear to allow Member State to maintain their own lower standards, including Article 30(3) on national safe country of origin ('SCO') designation; Article 35 on national border procedures and Article 36(7) on national 'supersafe' third country practices. All should be deleted.

❖ **Minimum standards permit *higher* standards in all areas.**

Minimum standards permit higher standards in all areas. The only exception to this proposition is that those higher standards must not undermine the purpose of the EC measure, which cannot be conceived baldly in terms of harmonisation (for then all deviation would undermine the purpose). For example, the purpose of the Qualification Directive is, in accordance with its Preamble, to 'ensure that Member States apply common criteria for the identification of persons genuinely in need of

[50] See eg C-84/94 *UK v Council* [1996] ECR I-5755, para 17 and C-2/97 *Borsana* [1998] ECR I-8597, para 35 concerning another minimum standards competence, namely that for health and safety of workers.
[51] UNHCR, above n 44, p 6.

international protection.'[52] While certain common approaches are necessary, protecting better or more does not in itself undermine that core objective. The Procedures Directive has its 'main objective' the introduction of a 'minimum framework … on procedures.'[53] As such, higher standards would seem to be permissible in all areas, as a 'minimum framework' cannot be undermined by higher standards.

This conception of minimum standards is important not only for future legislative measures, but also for the interpretation and implementation of the first phase measures themselves. ILPA recalls the controversy concerning the term 'minimum standards' in the context of the Qualification Directive.[54] The Council Legal Service advised that in order not to 'annihilate' the objective of harmonisation, the capacity to introduce more favourable standards should have limits.[55] In particular, it suggested that the provisions determining the personal scope of the Qualification Directive should not be deviated from.[56] Accordingly, the definitions laid down in Article 2 of the Directive and related provisions had to be applied *stricto sensu*.[57] ILPA views this interpretation as unfortunate, but it regards the clarification of this point as ultimately for the ECJ. The UK has expanded the personal scope of the Directive, by making its principles applicable to asylum applications from EU citizens,[58] which ILPA views as the correct approach.

❖ Fundamental Rights and Minimum Standards

Member States are not only entitled, but indeed may be required to adopt higher standards than those set out in the first phase instruments in certain instances. This is because three sources of fundamental rights law are generally binding on the Member States in their application of EC law. These are first, national constitutional and administrative law; secondly, the Refugee Convention, ECHR and other applicable norms of international human rights law; and thirdly, the general principles of EC law.[59] In addition, the EU Charter of Fundamental Rights is legally relevant. In June

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[52] Recital 6, Qualification Directive.

[53] Recital 5, Procedures Directive. Again limiting secondary movements is merely something the Directive should help limit (Recital 6).

[54] Article 3 thereof provides that:
Member States may introduce or maintain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, *insofar as those standards are compatible with this Directive* (Emphasis added). Recital 8 provides: 'It is the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions for third country nationals or stateless persons who request international protection from a Member State where such a request is understood to be on the grounds that the person concerned is either a refugee within the meaning of Article 1A of the Geneva Convention, or a person who otherwise needs international protection.'

[55] Doc 14348/02 JUR 449 ASILE 67, 15 November 2002.
Available at <www.statewatch.org/news/2002/dec/14348.02.doc>, para 5.

[56] *Ibid*, para 6.

[57] *Ibid*, para 7.

[58] Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI 2525/2006).

[59] For a detailed account, see for example, C Costello 'The Asylum Procedures Directive in Legal Context: Equivocal Standards Meet General Principles' in A Baldaccini, E Guild, H Toner (eds) *Whose Freedom, Security and Justice? EU immigration and asylum law after 1999* (Hart publishing, 2007), 151-193.

2006 the ECJ cited the Charter for the first time.[60] The citation appears to have been motivated by the Charter's synthetic nature and by the impugned Directive's preambular references thereto.[61] The preambles of the key first phase measures refer to the Charter, so on the same basis, it is legally relevant here.

The first phase measures on their face often appear to permit unlimited downward derogation. However, in order to meet the requisite standards of fundamental rights protection, the texts of the first phase measures require strenuous re-interpretation or, if this is not possible, annulment. The ECJ stated clearly in its ruling in the Family Reunification Directive that:

> 'a provision of a Community act could, in itself, not respect fundamental rights if it required, or expressly or impliedly authorised, the Member States to adopt or retain national legislation not respecting those rights.'[62]

Thus, an EC measure will violate fundamental rights not only when it entails a fundamental rights violation on its face, but also when it 'expressly or impliedly' permits such a violation. The implications of this legal proposition for the controversial provisions of the first phase measures remain to be seen, but at the very least, the provisions must be interpreted and applied with great care, giving the general principles full effect over and above any literal interpretation.

The Procedures Directive in particular reflects a piecemeal and discretionary approach to procedural fairness at odds with that embodied in the binding general principles of EC law. In various areas, the apparent discretion afforded by the Procedures Directive is constrained by the general principles of EC law. Well-established and entrenched principles of EC law guarantee a right to a hearing, a reasoned decision and effective judicial protection. The latter also has implications for legal aid. At present, we face a period of prolonged legal uncertainty as the implications of the general principles are teased out in the judicial arena.

In order to avoid this litigation, the EC legislature would do well to consider replacing the Procedures Directive entirely.

Concluding Comments

ILPA looks forward to participating in the discussions in the course of the Green Paper consultation process.

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[60] Case C-540/03 *European Parliament v Council*, 27 June 2006. Further references are contained in Case C-432/05 *Unibet v Justitiekanslern*, 13 March 2007; Case C-303/05 *Advocaten voor de wereld*, 3 May 2007.

[61] *Ibid,* para 38. The Court referred to the Charter's principal aim as to reaffirm 'rights as they result, in particular, from the common constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court .. and the European Court of Human Rights.'

[62] Case C-540/03 *Parliament v Council*, 27 June 2006, para 23.

PART 2 RESPONSES TO QUESTIONS POSED IN THE GREEN PAPER

Processing of Asylum Applications

1) *How might a common asylum procedure be achieved? Which aspects should be considered for further law approximation?*

ILPA understands a *common procedure* as a procedure that applies across the EU for all asylum applicants. In this sense, a common asylum procedure could be adopted under the existing minimum standards competence, but Member States would retain leeway to adopt higher standards. A common procedure thus encompasses a *single procedure***,** being a unified procedure for recognition of refugee and subsidiary protection needs. ILPA has consistently advocated the move to a single procedure for refugee status and subsidiary protection designation. A single procedure should also entail a single decision-making body. The UK (and most other Member states) currently operates such as system, and so the UK government also supports such a reform at EC level.

The applicability of the general principles of EC law to both refugee status and subsidiary protection applications makes the case for a single procedure more compelling, and should at least prompt convergence of procedures. In a previous Communication, the Commission understated the fact that the general principles require similar approaches to refugee status and subsidiary protection applications. For instance, the Commission outlined as a policy option (rather than legal requirement) the application to negative decisions on subsidiary protection the right to an effective remedy, as enshrined in Chapter V of the Procedures Directive.[63] However, the EC right to effective judicial protection applies in any event to subsidiary protection determinations, even in the absence of an express EC legislative guarantee to this effect.[64]

At the very least, procedures must allow for the proper assessment of evidence. At present, the Procedures Directive appears to permit Member States to deprive asylum seekers of an interview, the principal means of reliable fact-finding, on a range of dubious grounds, for example, where the applicant only raises submissions not relevant or only minimally relevant to a refugee claim;[65] or makes 'inconsistent, contradictory, unlikely or insufficient representations which make his/her claim clearly unconvincing in relation to his/ her having been the object of persecution.'[66] Both features are entirely common in genuine asylum applications, and if the apparent discretion afforded by the Directive were exploited by decision-makers, would lead to *refoulement.* Any minimum EU standard must guarantee a right to a full consideration of an asylum claim to each asylum seeker.

At present, there are a variety of procedures in place within each Member State, a phenomenon likely to increase under the Procedures Directive. Aside from the shortcomings of many of these procedures in and of themselves, the proliferation of

[63] Communication, A more efficient common European asylum system: the single procedure as the next step (*ibid.)*, para 17.
[64] See further Costello, above n 59.
[65] Article 23(4)(a).
[66] Article 23(4)(g).

different procedures within states itself thwarts attainment of the objective of ending the asylum lottery. Different procedures within states mean that similar claims are more likely to be treated differently in differently countries.

However, identical procedures, in the sense of procedural rules, will not in themselves produce similar outcomes in similar cases. At present, for instance, the recognition or otherwise of many asylum claims turns on credibility assessment. Although the Qualification Directive (in particular Article 4 thereof) and Procedures Directive do contain some rules on the assessment of evidence, a range of normative, institutional, cultural and political factors are implicated in the assessment of asylum seeker's testimony and credibility. Hence the importance of the 'harmonisation-plus' approach. Further refinement of interview techniques, training and best practice guidelines are warranted in order to prevent divergent and erroneous assessment of testimony. Thus, while a certain degree of legislative harmonization is warranted, many issues are better suited to convergence through institutional convergence and monitoring and institutional change, than through the development of common rules *per se*.

With this task in mind, the Commission must act as a robust, independent monitoring and quality control body. Together with strategic use of its Treaty powers to enforce EC law, such monitoring can lead to institutional change within the Member States. ILPA emphasizes the important of rulings of the ECJ, ECHR and higher national courts in safeguarding standards and ending the protection lottery. The ECJ has always sought to ensure the uniformity and effectiveness of EC law, and its legal doctrines (including direct effect, supremacy, indirect effect, incidental effect, effective remedies, state liability in damages) have that end in view. As the first phase legislative measures are implemented and applied, litigants, judges and administrators must become accustomed not only to new rules, but to an entirely new legal context. As well as supporting the extension of the jurisdiction of the ECJ, ILPA urges that the contribution of litigation to ensuring the uniformity and effectives of EC law remain central.

2) *How might the effectiveness of access to the asylum procedure be further enhanced? More generally, what aspects of the asylum process as currently regulated should be improved, in terms of both efficiency and protection guarantees?*

ILPA has already commented on various aspects of access to asylum, condemning practices that impede access to asylum. Problems have been noted in relation to the operation of juxtaposed controls, such as those carried out by UK authorities since 2004 in the French ports of Calais and Dunkirk. ILPA notes that such controls raise significant conflict of law difficulties not resolved by EU law. There is an urgent need to examine the complete legal framework for such controls, not only immigration law but also criminal law and related civil law. Establishing clear rights of redress is imperative.[67]

ILPA reiterates that effective access depends on access to legal representation.[68] Without such access, because of a dearth of qualified experienced representatives

[67] ILPA, above n 23.
[68] ILPA, above n 27.

overall or within a particular area, people are not able to exercise their rights. The Qualification and Procedures Directives do not lend themselves to a do-it-yourself approach to asylum claims. Inequality of arms is extreme. The detained, ill-placed to find a representative and often far from places where there are representatives, are particularly disadvantaged. Accelerated procedures are also particularly damaging of equality of arms. In the UK's detained fast track we are seeing claims determined in a matter of days, yet, following an unsuccessful appeal, the person may languish in detention for many months. As mentioned in Part 1, the UK legal aid rules are set to change for the worse,[69] making the case for an EC right to legal aid all the more pressing.

Non-suspensive appeal rights provide only very limited access to procedures – in practice it is very difficult, if not impossible, for people to bring claims from abroad.[70]

3) *Which, if any, existing notions and procedural devices should be reconsidered?*

ILPA welcomes the Commission's acknowledgement that certain procedural devices featuring in the Procedures Directive may warrant reassessment. The Procedures Directive undermines fair procedures. In particular, the extensive derogations permitted, and truncated exceptional procedures on dubious grounds, render access ineffective or illusory. As already mentioned, in its submission on the (then draft) Procedures Directive, ILPA argued that there were compelling legal grounds for the ECJ to annul the Directive in its entirety.[71] Without prejudice to that more general argument, ILPA regards the following provisions of the Procedures Directive are particularly problematic in that they fail to guarantee a full consideration of the asylum claim:

- dubious grounds for dispensing with asylum interview. (Article 12(2)(c) and 23(4)(a), (c), (g), (h), and (j));
- dubious grounds on which applications may be 'deemed' to be withdrawn. (Article 20);
- inadequate rules on legal aid and assistance (Articles 15 & 16);
- inadequate rules on an effective remedy and suspensive effect also must be re-written (Article 39).

ILPA in contrast urges a truly common single procedure. The provisions on special procedures of concern include: the general license to accelerate procedures (Article 23(3));

- the expansive notion of first country of asylum (Article 26(b));
- STC as embodied in the Procedures Directive, as it fails to guarantee adequate access to protection in the third country or assessment of the safety of the country for the particular applicant (Article 27);
- SuperSTC provisions, which completely bar access to protection (Article 36);
- SCO (Articles 29-31);

[69] Above n 26 and 27.
[70] See, for example, the Annual Report of the certification monitor for 2005 (latest available – published April 2006, available at <www.ind.homeoffice.gov.uk/aboutus/reports/certification_monitor_2005>.
[71] ILPA, above n 2.

- border procedures (Article 35);

If these provisions are not redrafted by the EC legislature, protracted litigation is likely to ensue in order to reassert the legally binding standards of fair procedures. For instance, at the time of adoption of the Procedures Directive, it was apparent that the practices of several Member States, in depriving appeals of suspensive effect, was in violation of the ECHR guarantee of an effective remedy (Article 13 ECHR). In the meantime, the ECHR has reiterated this requirement in unequivocal terms.[72] As previously stated, in order to avoid further litigation, and conflict with the European Court of Human Rights and national courts, the EC legislature would do well to consider replacing the Procedures Directive entirely.

4) *How should a mandatory single procedure be designed?*

A single procedure is a unified procedure for recognition of refugee and subsidiary protection needs. It should also entail a single decision-making body to which responsibility is clearly allocated. A single procedure also serves the aim of efficiency, by front-loading resources and ensuring that asylum claims are examined as swiftly as possible. In addition, it avoids the proliferation of procedures and decision-making bodies, which is permissible under the Procedures Directive.

In designing a single procedure, it is important to recall Recital 24 of the Preamble to the Qualification Directive states that SP 'should be complementary and additional to the refugee protection enshrined in the Geneva Convention.' In order to maintain this subsidiary nature of subsidiary protection, decision-makers must consider the Refugee Convention issues first. Otherwise the two issues should be treated similarly. For example, Article 23(4) of the Procedure Directives ought to be amended to ensure that acceleration does not occur on the basis that the refugee convention claim is weak, in circumstances where a subsidiary protection claim may be strong.

5) *What might be possible models for the joint processing of asylum applications? Under what circumstances could a mechanism for joint processing be used by Member States?*

The Hague Programme refers to examination of the 'appropriateness, the possibilities and the difficulties, as well as the legal and practical implications' of joint processing of asylum applications within the EU.[73]

ILPA opposes joint processing, recalling the political context in which these proposals emerged, when external processing was being debated. External processing outside the territory of the EU is completely unacceptable, as it would inevitably fail to guarantee fair and accessible procedures and access to justice. Joint processing, were it to entail any forced movement or detention of asylum seekers, would also be unacceptable. ILPA recalls the importance of access to justice in order to ensure the fairness and reliability of asylum determinations. At present, such access is only possible in challenging decisions of *national* authorities. The EU system is a decentralized one, and assumes for the most part, national application of EC rules.

[72] Application No 25389/05 *Gebremedhin v France*, 26 April 2007.
[73] Above n 8, paragraph 1.3.

This is how it should stay, unless and until proper mechanisms for access to justice are developed in tandem with any move to joint processing. There is an acute danger that joint decision-making structures will escape judicial and political accountability, as EUROPOL and FRONTEX[74] illustrate.

2 Reception Conditions for Asylum Seekers

6) *In what areas should the current wide margin of discretion allowed by the Directive's provisions be limited in order to achieve a meaningful level-playing field, at an appropriate standard of treatment?*

7) *In particular, should the form and the level of the material reception conditions granted to asylum seekers be further harmonised?*

ILPA notes that the Commission had not made public the report on the Reception Conditions Directive, which was due in August 2006. As such, ILPA has not had access to the evidence before the Commission on this measure.

The Reception Condition's Directive contains many 'may' clauses, and permits Member States to derogate from most of the requirements. As such, it does not embody a minimum standard at all. ILPA urges that all the 'may' clauses be reviewed, and where appropriate to ensure a true minimum standard, replaced with 'shall.' Provisions where such a change is apt include Article 3(4), such that Member States would be obliged to apply the reception conditions to all persons seeking asylum; Article 6(5) on travel documents; and Article 12 on vocational training.

Other important changes include redrafting Article 7 on conditions of residence and freedom of movement, to safeguard liberty. Article 13(5) permits support to be in the form of financial assistance or vouchers. ILPA has consistently opposed voucher schemes. Such schemes demean and degrade, as well as imposing a host of petty and not so petty privations. They are expensive to operate. The UK bowed to public pressure and ceased to use these schemes for those seeking asylum but continues to use them for those whose claims for asylum have failed[75].

ILPA advocates that the EU should define further the term 'adequate standard of living' in Article 14 of the Reception Conditions Directive, to avoid further legal controversy. Article 15 on health care also requires clarification, particularly in light of international human rights standards, and Article 35 of the EU Charter of Fundamental Rights on health care. The meaning of the minimum requirement set in Article 15(1) of 'emergency care and essential treatment of illness' remains obscure.

ILPA urges that the provision on withdrawal of support in Article 16 be deleted. The House of Lords condemned the application of the analogous UK provision[76] in *Limuli*,[77] holding that in individual cases, depriving asylum seekers of material

[74] See further ILPA, *Submissions to the Select Committee on the European Union in the context of the Frontex Inquiry*, (September 2007).
[75] Immigration and Asylum Act 1999, section 4 as amended.
[76] Section 55 of the Nationality, Immigration and Asylum Act 2002.
[77] *R (on the applications of Adam, Tesema, and Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66.

support can lead to such severe deprivation as to amount to a violation of Article 3 ECHR. As the UK Parliament's Human Rights Committee recently urged:[78]

> 'The continued use of the … provision to deny support in subsistence-only cases leaves many asylum seekers reliant on ad hoc charitable support and with no regular means of providing for their basic daily necessities. We believe that this treatment does not comply with the House of Lords *Limbuela* judgment, and is in clear breach of Article 3 ECHR. We recommend that section 55 be repealed.'[79]

The EC is on questionable legal ground when it is seen to permit treatment in breach of the ECHR, and so should delete the provisions on withdrawal of support as a matter of urgency.

8) *Should national rules on access to the labour market be further approximated? If yes, in which aspects?*

Yes. ILPA has long held the view that it is desirable that asylum-seekers who wish to do so are granted permission to work. ILPA urges the adoption of a policy of generally granting permission to work to asylum-seekers.

Even if such an approach is not to be taken, ILPA urges the reduction of the waiting period from the current minimum of one year set out in Article 11 of the Reception Conditions Directive to six months.

9) *Should the grounds for detention, in compliance with the jurisprudence of the European Court of Human Rights, be clarified and the related conditions and its lengths be more precisely regulated?*

ILPA considers that use of detention should be restricted to circumstances where it is *strictly necessary.* Such a test is required in order to ensure that the presumption of liberty is safeguarded. ReguILPA urges that any routine detention of a category of persons seeking asylum, as is apparent to effect Dublin transfers, fails the test of strict necessity for legal detention.

Legal Basis for a test of 'strict necessity': ECHR, Refugee Convention, ICCPR and CRC

Article 5 of ECHR provides that the right to liberty may only be removed in certain limited circumstances. In relation to immigration control these circumstances are '*lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition*.' (Article 5(1)(f)). Persons seeking asylum whose claims are yet to be determined can only fall into the former of these categories. We await the crucial ruling of the Grand Chamber of the European Court of Human Rights in

[78] The UK Parliament's Joint Committee on Human Right's Tenth Report of session 2006-07, *The Treatment of Asylum Seekers*, 22 March 2007, para 92. See further, ILPA Memorandum to the Joint Committee on Human Rights following the publication of the Government's response to the Committee's Tenth Report of session 2006-07 *The Treatment of Asylum Seekers,* September 2007.
[79] Para 92.

Saadi v the United Kingdom,[80] following the hearing of 16 May 2007. It is hoped that this ruling will clarify the conditions of strict necessity for detention. In particular, the criterion of 'unauthorised entry' should not be employed to penalize asylum seekers, in light *inter alia* of Article 31 Refugee Convention, of which the ECtHR must take judicial notice.

Article 31 provides as follows:

> '1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
>
> 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.'

Article 31 implies that it is only after an individual's claim to refugee status has been examined that penalties could be imposed. Otherwise a state cannot be sure that it is meeting its obligations under Article 31.[81] As Hathaway explains in light of the drafting history of Articles 26 and 31 Refugee Convention, 'an asylum seeker is "lawfully in" a state … once admitted to an asylum procedure.'[82] As a result, 'once a refugee voluntarily and without delay reports to authorities, and demonstrates that his or her unauthorized entry or presence was on account of a search for protection, Article 31(2) governs. The refugee is now subject only to restrictions "which are necessary".'[83]

As well as the Refugee Convention, the provisions of the ICCPR are legally relevant. In *A v Australia*[84] the Human Rights Committee set out criteria on what was required in order to avoid arbitrary detention. It stressed the importance of periodic review of detention in order to assess the cogency of the grounds for detention. It also stated:

> 'the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.'[85]

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[80] Application No 13229/03.
[81] G Goodwin-Gill 'Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention and protection' in Erika Feller, Volker Türk and Frances Nicholson *Refugee Protection in International Law – UNHCR's Global Consultations on International Protection* (UNHCR / CUP Cambridge 2003), 185, 187.
[82] J Hathaway *The Rights of Refugees under International Law* (Cambridge University Press, 2005), 175-183 and 417, n 630.
[83] *Ibid.,* 418-419, and for a discussion of 'necessity', see -439.
[84] Communication No 560/1993 *A v Australia* (1997).
[85] *Ibid* para 9.4.

The Human Rights Committee also stressed the importance of effective remedies, and that reviewing bodies should be empowered to order release from illegal detention.[86]

As regards children, Article 37(b) of the UN Convention on the Rights of the Child is *lex specialis*, and thus imposes an even stricter test, generally precluding the detention of children.[87]

The test of *strict necessity* means that all the alternatives to detention must be considered. It is only if none of those alternatives would meet the lawful objectives pursued in the individual case, that detention may be contemplated. The principle of necessity also constrains the duration of detention, and means that the legality of detention must be periodically reviewed. In order to ensure that detention of asylum seekers is truly exceptional, detainees must be granted access to a court in order to challenge the legality of their detention speedily. Legal aid is a necessary for access to justice in these circumstances.

The 'strict necessity' test & EC law

At present, a variety of EC measures make reference to detention. The Procedures Directive introduces a general principle that persons seeking asylum not be detained in Article 18, and also refers to the right to speedy access to court.[88] The border procedures provisions in Article 15(4) of the Procedures Directive seem to envisage confinement of asylum seekers at the border for a prolonged period of up to four weeks, detention in all but name. ILPA urges that full effect be given to the ECHR rulings on the meaning of detention,[89] to ensure that the implementation of that Directive is not used as a licence for detention. Article 7 of the Reception Directive also deals with detention, requiring that detention is only permissible when 'necessary'.

ILPA urges that EC law ought to contain a single clear provision embodying the strict necessity test. The EC provision should provide for mandatory bail hearings before a court, and a right to bail without sureties, and legal aid, in order to make the test practical and effective.

Detention Conditions

ILPA is aware of many instances of detention conditions which do not meet minimum acceptable standards. In *Dougoz v Greece*,[90] the European Court of Human Rights found that the conditions of detention fell below the standards of Article 3 and thus constituted inhuman and degrading treatment or punishment.

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[86] *Ibid* para 9.5.

[87] Article 37(b) provides: 'No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.'

[88] Article 18 provides:

'1. Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum.

2. Where an applicant for asylum is held in detention, Member States shall ensure that there is a possibility of speedy judicial review.'

[89] For example, Application No 19776/97 *Amuur v France* (25 June 1996).

[90] Application No 40907/98, 6 March 2001.

Independent monitoring of conditions in places of detention is crucial. In a recent parliamentary debate on the UK Borders Bill, the Lord Bassam of Brighton for the government clarified that in UK detention facilities are subject to oversight by three organisations, namely the independent monitoring boards, the prisons and probation ombudsman and Her Majesty's Chief Inspector of Prisons.[91] Particularly important is the fact that Her Majesty's Inspectorate of Prisons monitors all places of detention and has the power to enter such facilities unannounced at any time. The Inspectorate publishes regular reports on all places of detention, and has brought the conditions in reception centres to public attention.[92] Going forward, the Commission could do well to liaise with such reliable independent sources as Her Majesty's Inspectorate of Prisons, in order to carry out its own monitoring and enforcement role more effectively.

Granting of Protection

10) *In what areas should further law approximation be pursued or standards raised regarding*
- *the criteria for granting protection*
- *the rights and benefits attached to protection status?*

11) *What models could be envisaged for the creation of a "uniform status"? Might one uniform status for refugees and another for beneficiaries of subsidiary protection be envisaged? How might they be designed?*

12) *Might a single uniform status for all persons eligible for international protection be envisaged? How might it be designed?*

Criteria for granting protection

ILPA has already identified the problematic aspects of the Qualification Directive. To recapitulate, ILPA has concerns about the personal scope of the Directive.[93] Concerning its definition of 'serious harm'[94] the reference to a 'serious and individual threat' from 'indiscriminate violence' is contradictory. We urge the deletion of the reference to an 'individual threat' and the redrafting of Recital 26, which is particularly unhelpful in this regard.[95] As outlined further in the response to Question 13 below, there are also compelling reasons to encompass all those who are non-removal on human rights grounds within the definition of subsidiary protection. The provisions

[91] *Hansard* HL, 2 July 2007 Column GC63
[92] See reports available at < inspectorates.justice.gov.uk/hmiprisons/inspect_reports/irc-inspections.html/>.
[93] The personal scope of the Directive is confined to 'third country nationals or stateless persons' (Article 1). However, the UK implementation has correctly included EU Citizens. See Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI 2525/2006).
[94] Article 15 Qualification Directive.
[95] Recital 26 provides: 'Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm.'

on both exclusion from subsidiary protection[96] and non-state actors as 'Actors of Protection' contradict international standards.[97]

Rights and benefits attached to protection status

ILPA supports a single uniform status for beneficiaries of refugee status and subsidiary protection. The Hague Programme refers to a uniform status for those accorded asylum or subsidiary protection. In a worrying contrast, the draft Reform Treaty refers to a distinct uniform status for each category. ILPA's position has long been that both refugees and beneficiaries of subsidiary protection should benefit from equal rights, since their protection needs are equally compelling. Failure to treat both categories equally amounts to discrimination, contrary to the general principle of EC law and international human rights law.

At present both the Procedures and Reception Conditions Directives allow Member States a choice as to whether to apply their standards to subsidiary protection, amounting to a serious gap in EC law. Moreover, the rights attaching to each status differ considerably under the Qualification Directive. ILPA urges that both categories be encompassed fully within the personal scope of these EC asylum instruments, and relevant immigration rules, including the Family Reunion Directive. Long-term residence status should be granted to refugees at the end of three years from arrival in the EU, and not five as applies to settled immigrants under the Long-Term Residents Directive. Thus, although ILPA welcomes the Commission Proposal to extend the latter Directive to refugees,[98] we consider that the proposed conditions are too stringent. However, in order to make the rights to move and reside freely throughout the EU practical and effective, ILPA recommends that the principles developed in the context of Citizenship of the Union be applied by analogy to the case of refugees, whose position such be regarded, at least for labour migration purposes, as akin to nationals.[99]

13) *Should further categories of non-removable persons be brought within the scope of Community legislation? Under what conditions?*

Yes. At present in the UK and throughout the EU, many people whose claims for asylum have failed are non-removable due to protection concerns. This reflects serious shortcomings in the national asylum systems, as most protection concerns should be recognized in the asylum process. However, even if the asylum process

[96] Article 17 Qualification Directive.
[97] Article 7 Qualification Directive.
[98] Commission Proposal of 6 June 2007 for a Council Directive amending Directive 2003/109/EC to extend its scope to beneficiaries of international protection COM (2007) 298 final.
[99] It should be recalled that for some purposes, including wage-earning employment, the Refugee Convention requires refugees to be treated as most-favoured foreigners.
Article 17(1) Refugee Convention provides:
'The Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.'
It remains to be seen how the degrees of equal treatment provided for in the Refugee Convention (national treatment, MFN, treatment akin to other aliens) should be understood in the EU context, this issue is now amenable to ECJ jurisdiction, in order to ensure compliance with Article 63(1) EC.

was more reliable, there are those who are non-removable yet appear to be outside the scope of the Qualification Directive.

Some governments, including that of the UK, maintain that the definition of 'serious harm' is such as to exclude so-called 'medical cases'[100] from the scope of subsidiary protection. It is suggested that the reference to treatment in the country of origin means that those who are non-deportable due to serious illness are not facing ill-treatment in the country of origin and so fall outside the Directive. Some support for this argument may be mustered from Recital 9, which erroneously suggests no obligations to those outside the definition:

> 'Those third country nationals or stateless persons, who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds, fall outside the scope of this Directive.'

However, ILPA does not share this view, as the non-availability of appropriate care and support in the country of origin may amount to 'treatment' for the purposes of the definition of 'serious harm'. Even if the ECJ were to adopt an interpretation of Article 15 which did not encompass all those non-removable under ECHR jurisprudence, all national authorities would nonetheless be legally bound to accord some form of protection, and so it would be desirable to include these persons within an EC definition. It should be recalled that Member States' ECHR obligations remain, in all areas where they exercise discretion.[101] Failure to accord a uniform status is undesirable not only from a human rights perspective, but also is likely to encourage secondary movements. In the Original Commission proposal, serious harm included 'a violation of a human right, sufficiently severe to engage the Member State's international obligations.'[102] ILPA supports reconsideration of this broader definition.

14) *Should an EU mechanism be established for the mutual recognition of national asylum decisions and the possibility of transfer of responsibility for protection? Under what conditions might it be a viable option? How might it operate?*

Mutual Recognition

At present, there is no obligation on EU Member States to recognise one another's positive asylum decisions. However, the Area of Freedom, Security and Justice is based on many instances of mutual recognition of negative asylum and border control decisions. ILPA supports a mandatory system of mutual recognition of positive asylum decisions, including decisions on subsidiary protection (cf. Article 69a(2)(b) of the draft Reform Treaty which refers only to mutual recognition of recognised refugees.)

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[100] Such as Application No 30930/96 *BB v France* 7 September 1998; *D v UK* (1997) 24 EHRR 423; Application No 46553/99 *SCC v Sweden* 15 February 2000.

[101] Application No 45036/98 *Bosphorus Hava Yollari Turizm v Ireland* 30 June 2005. See further C Costello 'Bosphorus: Fundamental Rights and Blurry Boundaries in Europe' (2006) *Human Rights Law Review* pp. 87-130.

[102] Commission Proposal of 12 September 2001 for a Council Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted COM(2001) 510 final, Article 15(b).

In supporting mutual recognition, ILPA's priority is the enhancement rights of refugees, which ought to include the right to move and reside freely throughout the EU. If this right to free movement is not secured from the moment of recognition, then at the very least, refugees should be brought within the scope of the Long-Term Residents Directive. However, refugees should be granted a right to free movement after a period of three years from arrival in the EU, rather than the five years which applied to immigrants without protection needs. The content of this right to free movement should develop in tandem with the EU's understanding of European Citizenship, and not be subject to the more onerous restrictions permissible under the Long-Term Residents Directive. Prior to the elapse of three years from recognition, it is imperative to develop an efficient mechanism to transfer protection responsibility between the Member States, at the request of the refugee.

Transfer of Responsibility

ILPA urges that the transfer of responsibility mechanism be accessible at the request of all refugees. After a period of three year in any event, all should benefit from free movement.

Article 28 Refugee Convention deals with transfer of responsibility,[103] requiring the establishment of lawful residence for a transfer of responsibility. Only 11 EU Member States[104] have ratified the 1980 European Agreement on Transfer of Responsibility for Refugees, which creates a more streamlined transfer of responsibility mechanism. In addition, this Convention applies only refugees, not to beneficiaries of subsidiary protection. Research for the Commission identified the need for further rules on this issue some years ago.[105]

Cross-cutting issues

15) *How could the provisions obliging Member States to identify, take into account and respond to the needs of the most vulnerable asylum seekers be improved and become tailored to their real needs? In what areas should standards be further developed?*

Identification of the vulnerable

While Article 17 of the Reception Conditions Directive requires Member States to take the situation of vulnerable persons seeking asylum into account, ILPA urges that mechanisms be developed to comply with this obligation.

Age identification

[103] Article 28 Refugee Convention and paragraph 11 of the Schedule thereto.
[104] Denmark, Finland, Germany, Italy, Netherlands, Poland, Portugal, Romania, Spain, Sweden and the UK.
[105] N Lassen et al 'The Transfer of Protection status in the EU, against the background of the common European asylum system and the goal of uniform status, valid throughout the Union, for those granted asylum' European Commission, Brussels, 2004, available at: ec.europa.eu/justice_home/doc_centre/asylum/studies/docs/transfer_protection_status_rev-160904.pdf

ILPA recently published an extensive study on age determination,[106] which identified various procedural deficiencies in UK practice and recommended significant reforms. ILPA insists that is unethical to use x-rays for non-therapeutic reasons, and in any event they lack probative value in age determination. As well as documenting such unethical practices, the report recommends the following steps as part of a detailed reform process:

Step 1: Reduce the number of age disputes through a proper application of the principle of 'benefit of the doubt'.
Step 2: Establish independent regional age assessment centres to which all age disputed asylum seekers are automatically referred.
Step 3: Improve the process of age determination through guidance, training and support so that it is genuinely holistic and multi-agency and produces consistent and better informed outcomes.
Step 4: Review the age assessment process to minimize the use of the courts and improve the quality of age assessments over the longer term.

Victims of trafficking

ILPA urges that victims of trafficking also be accorded a legal status to remain.[107]

Family unity to assist the vulnerable

Family reunification often assists vulnerable asylum seekers. However, EC law does not guarantee this right even for recognised refugees. The Qualification Directive makes no provision for a minor child recognised as a refugee to be reunited with family members, whereas an adult can be reunited with minor children.[108] The age of the principal applicant should have no bearing on rights to family reunion. The distinction drawn in the Directive is difficult to square with the general principle of equal treatment in EC law, which prohibits age discrimination.

ILPA urges that the Commission complete its review of the Family Reunification Directive in a timely fashion, before the deadline of October 2007. Careful monitoring of the implementation process is crucial, particularly in light of the ECJ's ruling on the validity of that Directive, which emphasized that its interpretation and application had to be carried out in a manner compliant with fundamental rights, requiring careful application of the ECHR Article 8 principle and the UN Convention on the Rights of the Child 'best interests' standard.[109] Member states which do not comply with these international standards in their implementation of the Directive also breach EC law.

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[106] ILPA / H Crawley *When is a child not a child? Asylum, age disputes and the process of age assessment* (May 2007). The report runs to 225 pages and contains detailed empirical evidence of poor age determination practices.
[107] ILPA Submission to the Joint Committee on Human Rights Inquiry into Human Trafficking (January 2006); ILPA Response to the European Commission Communication: Fighting trafficking in human beings - an integrated approach and proposals for an action place COM(2005) 514 final (January 2006); Tackling Human Trafficking - Consultation on Proposals for a UK Action Plan (April 2006).
[108] Article 2(h) Qualification Directive on the definition of 'family member'.
[109] Above n 60.

16) *What measures should be implemented with a view to increasing national capacities to respond effectively to situations of vulnerability?*

17) *What further legal measures could be taken to further enhance the integration of asylum seekers and beneficiaries of international protection, including their integration into the labour market?*

The Reception Conditions Directive does not draw the link between reception conditions and integration. However, this link is real, and poor reception conditions will impede integration. ILPA urges that integration be borne in mind from the moment of arrival of persons seeking asylum. Measures which stigmatise and isolate asylum seekers run counter to the integration objective. Safeguarding asylum seeker and refugee rights assists integration.

ILPA is concerned at the distortion of the concept of 'integration' evident in various national practices and reflected in the Family Reunion and Long-Term Residents Directive. With the Commission, ILPA insists rather that integration must be understood as a two-way process of adaptation and interaction, wherein refugees are helped to adapt to life in their host societies, and members of host societies are provided with opportunities to interact and engage with refugees. ILPA also recalls the Tampere vision of integration, based on 'fair treatment of third-country nationals who reside legally on the territory of its member states. A more vigorous integration policy should aim at granting these individuals rights and obligations comparable to those of EU citizens. It should also enhance non-discrimination in economic, social and cultural life and develop measures against racism and xenophobia.'[110]

Key integration measures include access to labour market for persons seeking asylum, as per our response to question 8, including provision for mutual recognition of qualifications. In order to facilitate this crucial recognition, ILPA recommends that the principles and instruments governing mutual recognition of EU Citizen's qualifications be applied by analogy in the case of refugees.

ILPA has found that dubious age assessment acts as a bar to access to education in many cases.[111] Education and language training are key aspects of integration. As previously mentioned in our responses to questions 11 and 12, ILPA supports a uniform single status for refugees and those afforded subsidiary protection, and similar rights including under Article 33 Qualification Directive, access to integration programmes. Long-term residence status should be granted to all refugees the end of three years' residence (and not five as applies to settled immigrants under the LTR Directive.)

Ensuring second stage instruments are comprehensive

18) *In what further areas would harmonization be useful or necessary with a view to achieving a truly comprehensive approach towards the asylum process and its outcomes?*

[110] Above n 1, para 18.
[111] ILPA, n 106.

Implementation – Accompanying Measures

19) *In what other areas could practical cooperation activities be usefully expanded and how could their impact be maximised? How could more stakeholders be usefully involved? How could innovation and good practice in the area of practical cooperation be diffused and mainstreamed?*

20) *In particular, how might practical cooperation help to develop common approaches to issues such as the concepts of gender – or child-specific persecution, the application of exclusion clauses or the prevention of fraud?*

21) *What options could be envisaged to structurally support a wide range of practical cooperation activities and ensure sustainability? Would the creation of a European support office be a valid option? If so, what tasks could be assigned to it?*

22) *What would be the most appropriate operational and institutional design for such an office to successfully carry out its tasks?*

If 'a truly comprehensive approach towards the asylum approach and its outcomes' means ending the protection lottery, ILPA emphasises its 'Harmonisation-Plus' approach.

Solidarity and Burden Sharing

23) *Should the Dublin system be complemented by measures enhancing a fair burden-sharing?*

24) *What other mechanisms could be devised to provide for a more equitable distribution of asylum seekers and/or beneficiaries of international protection between Member States?*

25) *How might the ERF's effectiveness, complementarity with national resources and its multiplier effect be enhanced? Would the creation of information-sharing mechanisms such as those mentioned above be an appropriate means? What other means could be envisaged?*

26) *Are there any specific financing needs which are not adequately addressed by the existing funds?*

As previously mentioned, legal aid is a key feature of access to justice.

External Dimension of Asylum

Supporting third countries to strengthen protection

27) *If evaluated necessary, how might the effectiveness and sustainability of Regional Protection Programmes be enhanced? Should the concept of Regional Protection Programmes be further developed and, if so, how?*

28) *How might the EU best support third countries to deal with asylum and refugees more effectively?*

29) *How might the Community's overall strategies vis-à-vis third countries be made more consistent in the fields of refugee assistance and be enhanced?*

Resettlement

30) *How might a substantial and sustained EU commitment to resettlement be attained?*
31) *What avenues could be explored to achieve a coordinated approach resettlement at EU level? What would be required at financial, operational and institutional level?*
32) *In what other situations could a common EU resettlement commitment be envisaged? Under what conditions?*

Addressing mixed flows at the external borders

33) *What further measures could be taken to ensure that protection obligations arising out of the EU acquis and international refugee and human rights law form an integral part of external border management? In particular, what further measures could be taken to ensure that the implementation in practice of measures aimed at combating illegal migration does not affect the access of persons seeking asylum protection?*

34) *How might national capacities to establish effective protection-sensitive entry management systems be increased, in particular in cases of mass arrivals at the borders?*

35) *How could European asylum policy develop into a policy shared by the EU Member States to address refugee issues at the international level? What models could the EU use to develop into a global player in refugee issues?*

The EU damages the international system of when it affirms the Refugee Convention in principle, yet undermines it in practice. Its border control practices mean that asylum seekers are dumped in third countries. The EU must be held accountable for the consequences of its border control practices, which include the detention of asylum seekers in transit countries.

As present, EU practices are exported to third countries without the requisite safeguards. The EU is viewed as a global standard-setter, and unfortunately, it is the letter of its legislative instruments, taken out of legal context, that are mimicked. To date, Europe has exported a range of safe country concepts to areas which receive far fewer claims and have less well-developed protection capacities.[112] In so doing, the EU undermines the global system.

ILPA, 30 September 2007

[112] See further V Türk & F Nicholson 'Refugee Protection in International Law: an overall perspective' in E Feller, V Türk and F Nicholson *Refugee Protection in International Law – UNHCR's Global Consultations on International Protection* (UNHCR / CUP Cambridge 2003) 6.