

Memorandum on the Occasion of the Spanish Presidency (January 2010- June 2010)



1. Introduction

Spain takes over the Presidency of the EU at a time when the EU is entering a decisive stage in the completion of the Common European Asylum System (CEAS). As confirmed again in the Stockholm Programme adopted by the European Council of 10 and 11 December 2009 the “establishment of a Common European Asylum System (CEAS) by 2012 remains a key objective for the EU.”¹

ECRE has always supported the idea of a CEAS that is based on high standards and ensures effective and durable protection. This must be based on a full and inclusive interpretation of the 1951 Refugee Convention and other relevant human rights treaties. At the same time, ECRE has been advocating at EU level for a CEAS that ensures access to the territory to persons in need of international protection. The best protection regime will be of little use if refugees are unable to reach the EU's territory.

On the occasion of the Spanish Presidency ECRE presents its views on what steps need to be taken in order to uphold the EU's commitment to establish a CEAS by 2012 and to ensure that the rights of persons in need of international protection are fully taken into consideration in all relevant EU policies. The main focus of this document is on the EU legislative and policy agenda in the field of asylum. **ECRE intends to evaluate every six months until the end of 2012 the progress made in the Council and the European Parliament on the 4 main legislative files as well as to assess other measures with a potential impact on asylum, such as the EU engagement with third countries and border controls.** As Spain takes over the Presidency from Sweden it also starts to implement the Trio Presidency programme adopted together with Belgium and Hungary. ECRE member organisations in those three countries have published joint recommendations for the Trio Presidency based on good practices in the areas of sustainable return, alternatives to detention, resettlement, integration and statelessness. Those recommendations are complementary to ECRE's Memorandum².

2. Legislative Harmonisation

The EU is in the process of revising the building blocks of the EU asylum *acquis*. The Commission presented in December 2008 proposals recasting the Dublin³ and EURODAC Regulations⁴ and the Reception Conditions Directive.⁵ These proposals were complemented in February 2009 with a proposal for a Regulation establishing a European Asylum Support Office⁶ and in October 2009 with two proposals recasting the Qualification Directive⁷ and the Asylum Procedures Directive⁸.

ECRE has generally welcomed the Commission proposals as a positive development in the construction of a CEAS.⁹ The result of the first phase of harmonisation has been rather disappointing as the level of protection granted to asylum seekers and refugees in the EU asylum *acquis* is generally low. **In addition, certain standards enshrined in EU asylum legislation are at odds with international refugee and human rights law and standards.**¹⁰ Therefore ECRE has consistently advocated

for the adoption of higher standards of protection based on the full respect of the Refugee Convention and other human rights standards. ECRE calls on the Spanish Presidency and the Member States to clearly reaffirm this objective and to make progress in the second phase of harmonisation.

This section states ECRE's main concerns and recommendations with regard to the main legislative instruments under discussion at EU level while providing background information on the state of play.

2.1. Dublin Regulation recast

The Dublin Regulation continues to create hardship and unfair consequences for asylum seekers and persons in need of international protection.¹¹ Based on the myth that protection standards are equivalent throughout the EU and the associated states, the Dublin system results in asylum seekers being transferred to states where their basic human rights are violated, access to protection is *de facto* denied or access to specific treatment for asylum seekers with special needs is non-existent. This is increasingly being recognised in the jurisprudence of the national courts as in several cases transfers of asylum seekers under the Dublin Regulation have been suspended on the basis that they would result in such human rights violations.¹²

While it remains ECRE's position that the Dublin system is an obstacle to an efficient, harmonised and humane CEAS, the organisation acknowledges that the Commission proposal recasting the Dublin Regulation introduces a number of significant improvements to the existing system. These amendments would, if adopted, indeed mitigate some of the negative effects that its operation may have on asylum seekers.

In light of the ongoing negotiations ECRE calls upon the Spanish presidency and the Member States to:

- Maintain the derogation to the hierarchy of criteria for allocating responsibility in Article 7 (3) of the recast proposal in order to better ensure the best interests of unaccompanied children and to prevent separation of family members.
- Ensure that the right to a personal interview (Article 5) is guaranteed in all circumstances before a transfer decision is taken and therefore refrain from introducing exceptions to this right.
- Ensure that the right to an effective remedy against a Dublin transfer is guaranteed in the recast Regulation. Such an appeal must have suspensive effect.
- Seek consensus within the Council on the need for a temporary suspension mechanism to become an integral part of the Dublin system in order to allow the EU institutions to intervene effectively whenever asylum seekers may become the victim of dysfunctional asylum systems in the Member States.
- Ensure that detention of asylum seekers remains a measure of last resort in the context of the Dublin system by upholding the principle in Article 27 (2) that individuals can only be detained for the purpose of carrying out a transfer after the Dublin decision has been taken and only if there is a significant risk of absconding

Background notes

The Commission recast proposal aims at increasing the efficiency of the Dublin system while ensuring higher standards of protection for the asylum seekers falling under the Dublin procedure. In order to increase the efficiency of the Dublin system the Commission proposes to modify some purely technical aspects of the Regulation. These include for instance the introduction of deadlines for submitting take

back requests and provisions on responsibilities of Member States with regards to the costs of the transfers and erroneous transfers.

As far as the legal safeguards for asylum seekers in the context of Dublin procedures are concerned, the Commission proposal contains important improvements, including on:

- (1) The right to information for asylum seekers
- (2) The right to an effective appeal with suspensive effect against Dublin transfers
- (3) The cessation of responsibility of Member States for examining asylum applications guaranteeing effective examination of asylum applications
- (4) The circumstances and procedures for applying the sovereignty and humanitarian clauses increasing legal certainty for asylum seekers subject to Dublin procedures
- (5) Detention of asylum seekers subject to Dublin procedures, introducing the important principle that detention should only be possible after a transfer decision has been made.
- (6) The best interest of the child and the right to family unity: the Commission proposes that the Member State responsible will be determined on the basis of the situation at the time when the asylum seeker lodged the most recent application for international protection. This constitutes an important derogation to the basic principle laid down in the Dublin Regulation, which allocates responsibility to Member States on the basis of the situation when the asylum seekers first lodged a claim, and would introduce an essential safeguard for children or separated family members, given that Member States now hold different views on how to apply the allocation criteria in those situations.

European Parliament amendments

The European Parliament adopted its position in the first reading on the Commission proposal on 7 May 2009.¹³ The EP legislative resolution generally supports the Commission recast proposal but at the same time introduces a number of amendments. The main amendments concern:

- (1) The definition of family members and family unity: the European Parliament proposes to exclude the possibility for spouses of married minors to be considered as part of the family-definition for the purpose of the Dublin Regulation. The European Parliament also deletes the important derogation to the hierarchy of criteria proposed by the Commission in order to better guarantee family unity and the best interests of the child.
- (2) The right to an effective remedy: the European Parliament report amends the new provision on remedies to the effect that Member States shall provide for a reasonable period of time of at least 10 working days within which the asylum seeker concerned may exercise the right to an effective judicial remedy. Furthermore, the relevant Article is amended to shorten the time limit for the appeal authority to decide on whether or not the appeal or review should have suspensive effect (5 working days instead of 7) and to specify that the necessity of suspensive effect can also be examined at the request of the asylum seeker concerned.
- (3) Detention: whereas the Commission proposal makes detention for the purpose of carrying out a transfer to another Member State only possible where a significant risk of absconding exists, the European Parliament deletes the word significant resulting in a lower threshold for Member States to detain in the context of the Dublin Regulation.
- (4) The temporary suspension mechanism: the European Parliament amends the provision introducing a temporary suspension mechanism so as to insert a clearer framework for assessing progress toward resolution of the circumstances that caused the suspension. In addition, the EP adds a mechanism of binding solidarity measures with regards to those Member States that are facing disproportionate and specific pressures on their national systems. Such measures must include the secondment of officials from other Member States under the supervision of the European Asylum Support Office and a scheme to reallocate those granted international protection in a Member States experiencing such pressure to other Member States.

Discussion in the Council

Discussions in the Council have been focusing mostly on those provisions enhancing the efficiency of the Dublin Regulation while little or no progress has been made so far with regard to those elements of the Commission proposal that are aiming at increasing legal safeguards for asylum seekers. In this respect, the provisions on the effective remedy, the definition of family, the detention of persons to be transferred under the Dublin Regulation and the temporary suspension mechanism seem to be particularly problematic. Some Member States argue that a temporary suspension mechanism is unworkable and incompatible with the objectives of the Regulation. Other Member States consider the proposal to restrict the detention of asylum seekers under the Dublin Regulation as an open invitation to

abscond, which will undermine the well-functioning of the system. So far, negotiations in the Council have apparently resulted in further watering down of the recast proposal. For instance, according to compromise proposals presented under the Swedish Presidency the right to a personal interview in a Dublin procedure would no longer be guaranteed in all circumstances but only where it is deemed necessary or at the request of an applicant.¹⁴

2.2. Reception Conditions Directive recast

Current standards for the reception of asylum seekers differ widely across the EU and in-depth research has revealed important shortcomings of reception systems in certain Member States.¹⁵ ECRE has generally welcomed the Commission recast proposal as an important step towards creating higher standards of treatment of asylum seekers in the Member States, which reflects a considerable number of ECRE's key recommendations.¹⁶ However, ECRE also expressed concern as to the broad definition of the grounds for detention as it potentially opens the door for systematic detention of large categories of asylum seekers. In addition the ability of Member States to set exceptional measures for material reception conditions in case of detention or at border posts, laid down in the Commission proposal, is a reason for concern.¹⁷

Nevertheless, ECRE believes that the Commission recast proposal contains a number of important amendments that will, if adopted, raise the standards of reception conditions for asylum seekers. Therefore, the Spanish Presidency should make a serious attempt to unblock the current deadlock and relaunch negotiations in the Council, including with regard to those issues that are currently considered to be 'too controversial'.

In doing so, ECRE calls on the Spanish Presidency and the Member States in particular to:

- Promote access to the labour market for asylum seekers no later than 6 months after lodging the asylum application. This will encourage asylum seekers' self-sufficiency and improve their integration prospects.
- Promote the principle that detention of asylum seekers should always be a measure of last resort through maintaining an obligation to provide for alternatives to detention and establishing limited grounds for detention.
- Maintain the prohibition of detention of unaccompanied children as laid down in Article 11 of the Commission recast proposal.

Background notes

The Commission recast proposal aims at ensuring "higher standards of treatment for asylum seekers with regard to reception conditions that would guarantee a dignified standard of living, in line with international law".¹⁸ In order to do so the Commission proposed to address mainly the following issues in the directive:

- (1) The scope of the directive is extended to include applicants for subsidiary protection while at the same time it is clarified that the standards in the directive apply to all types of asylum procedures and in all areas of the territory, including transit zones and detention centres.
- (2) Access to the labour market is facilitated by allowing asylum seekers to take up employment within 6 months after lodging an asylum application and by clarifying that the imposition of national labour market conditions shall not unduly restrict access to employment.
- (3) In order to ensure an adequate standard of living Member States are required to take into consideration the level of social assistance provided to nationals when granting financial support to asylum seekers. At the same time the circumstances in which reception conditions can be fully withdrawn are limited in order to avoid asylum seekers from becoming destitute.
- (4) The proposal also contains detailed provisions on detention specifying the grounds for detention of asylum seekers, the conditions of detention, guarantees with regard to judicial

review and specific safeguards with regard to the detention of vulnerable groups, including the prohibition of detaining unaccompanied children.

- (5) The need for immediate identification of asylum seekers with special needs is emphasised through an obligation for Member States to establish procedures to conduct such identification in their national systems. In addition safeguards are added in order to ensure that reception conditions are specifically designed to meet asylum seekers' special needs.

European Parliament amendments

The European Parliament's legislative resolution of 7 May 2009 does not fundamentally alter the Commission's recast proposal and includes only a limited number of amendments.¹⁹ However, a number of these do have a significant impact on the content of the recast directive, in particular:

- (1) The European Parliament proposes to include married minor children of the applicant in the definition of family member only insofar as they are not accompanied by their spouses. This is a worrying limitation that may undermine the right to family unity as established under international human rights and refugee law and standards.
- (2) An amendment is introduced to strengthen the obligation for Member States to ensure access to appropriate medical treatment and psychological counselling for asylum seekers in detention
- (3) The European Parliament resolution deletes the reference to the level of social assistance granted to nationals when calculating the amount of assistance to be granted to asylum seekers. However, at present there are wide differences in the level of social support to asylum seekers in the Member States and in some cases the assistance provided does not suffice to have a dignified standard of living, in particular since asylum seekers lack the support of social and family networks.²⁰ ECRE thus believes that, as a minimum, the reference to the amount of assistance granted to nationals should be maintained as a benchmark for evaluating the level of material reception conditions for asylum seekers.
- (4) In a welcome amendment the European Parliament adds safeguards with regards to the tasks and role of a guardian.

Discussion in the Council

Discussions in the Council on the Commission recast proposal have proven to be very difficult and have to date almost come to a halt. The list of reservations to the Commission proposal is apparently very long and the provisions that are considered to be controversial seem to be numerous. The main controversial issues for the Council concern:

- (1) The provisions with regard to detention. Some Member States disagree with the proposed exhaustive list of grounds according to which asylum seekers may be detained as well as with the guarantees regarding the judicial review of detention and the prohibition to detain unaccompanied children seeking asylum. At the same time a number of Member States are of the opinion that the issue of detention of asylum seekers should not be dealt with in the Reception Condition Directive but must be addressed under the recast of the Asylum Procedures Directive.
- (2) Furthermore, the proposal to give access to the labour market to asylum seekers after 6 months is contested, as are the provisions imposing an obligation for Member States to establish procedures to identify asylum seekers with special needs.
- (3) The proposal to take into consideration the level of social assistance granted to nationals when calculating the amount of financial assistance to be granted to asylum seekers is opposed by some Member States.

2.3. Qualification Directive recast

Research conducted by ECRE and UNHCR on the implementation of the Qualification Directive have shown the need for amending this core instrument of the CEAS and bringing it into line with international refugee and human rights law and standards.

As further explained in the background notes, ECRE believes that the Commission recast proposal, notwithstanding the fact that it does not address a number of important protection gaps, generally constitutes an important step forward in harmonising eligibility criteria and the content of protection at EU level and bringing the directive in line with international refugee and human rights law and standards.

- ECRE calls on the Spanish Presidency and the Member States to launch a constructive debate within the Council on the Commission recast proposal on the Qualification Directive and build consensus among Member States to address existing protection gaps on the basis of international refugee and human rights law and standards.

Background notes

According to its explanatory memorandum, the Commission recast proposal has the double aim of ensuring higher protection standards regarding the grounds and the content of the protection in line with international standards and further harmonising protection standards in order to reduce secondary movements. As regards the eligibility criteria for international protection the Commission proposal addresses a number of protection gaps that have been identified in research conducted by UNHCR and NGO's, including ECRE.²¹ In this respect ECRE generally welcomes the amendments with regard to actors of protection (Article 7), the internal protection alternative (Article 8), the causal link requirement (Article 9(3)), cessation of refugee status and subsidiary protection status (Article 11 (3) and 16 (3)). In addition ECRE is supportive of the Commission's proposal to approximate the rights granted to the two categories of beneficiaries of protection almost entirely and to provide for equal treatment with nationals in the context of existing recognition procedures for foreign diplomas, certificates and other evidence of formal qualifications. The latter is particularly important as the lack of recognition of foreign diplomas is for many persons granted international protection a major obstacle to their integration in European societies.²²

However, ECRE also regrets that a number of areas in the Qualification Directive that are considered to be at odds with international refugee law and human rights standards are left untouched in the recast Proposal.²³ In particular the current wording of the exclusions clauses for refugee and subsidiary protection status (Article 12, 14 and 17), the definition of membership of a particular social group (Article 10) and the definition of international protection needs arising sur place (Article 5) are problematic. For instance, research has shown that the implementation of Article 12 and 14 of the Qualification Directive has resulted in certain Member States applying a broad interpretation of exclusion clauses. Some states have established thresholds as low as for example considering any acts punishable with as little as four years of imprisonment under their national law as "serious crimes".²⁴

Discussion in the European Parliament

The European Parliament is currently awaiting the draft report of the *rapporteur* on the recast proposal.

Discussion in the Council

A first general discussion at ministerial level already took place during the Justice and Home Affairs Council of 30 November/1 December. While some Member States made critical remarks on its content, in particular on the proposal to grant the same set of rights and benefits to both categories of international protection, other Member States were supportive of the Commission proposal and welcomed it as a good basis for negotiation.

2.4. Commission recast proposal on the Asylum Procedures Directive

Finally, the Commission has presented, together with the proposal recasting the Qualification Directive, a proposal recasting the Directive on minimum standards on procedures in Member States for granting and withdrawing international protection. At the time of its adoption, the Asylum Procedures Directive was heavily criticised by many experts as it includes a fairly low level of procedural guarantees for asylum seekers and codifies a range of tools that seriously undermines asylum seekers' access to fair and efficient status determination procedures.²⁵ As it also allows Member States a wide margin of discretion, the Directive also fails to set a common standard and contribute to the approximation of procedural standards across the EU.

For reasons explained in the background notes, ECRE believes that despite certain shortcomings, the Commission recast proposal constitutes a good basis for discussion as it contains important improvements of current EU standards with

regard to, among others, access to asylum procedures, the right to an effective legal remedy and the right to a personal interview.

➤ ECRE calls on the Spanish Presidency and the Member States to constructively engage in the discussions with the aim of establishing high procedural standards capable of ensure that those in need are effectively identified and have access to international protection.

Background notes

ECRE generally considers the Commission recast proposal to be a step in the right direction and welcomes in particular the following elements:

- (1) The proposal promotes the principle of frontloading in asylum procedures, which means that asylum systems must be provided with the appropriate resources and expertise to make a qualitative assessment of asylum applications at first instance. This may prevent unnecessary appeals procedures,²⁶ while facilitating the resolution of appeals when necessary as appeal bodies will be able to take decisions on the basis of better prepared case files.
- (2) Better access to asylum procedures for asylum seekers. The proposal includes more specified obligations and training for border guards, police and personnel of detention facilities to deal with asylum applications or forward the application to the competent authority. In addition, it also strengthens the obligations of Member States to make available accessible information on the procedure in particular at border crossing points and in detention facilities.
- (3) Procedural guarantees at first instance are enhanced by guaranteeing that a personal interview takes place in all cases in principle and by making free legal assistance and representation available at first instance procedures.
- (4) The provision with regard to the right to an effective legal remedy is clarified to include an *ex nunc* revision of both facts and points of law by a court or tribunal and an automatic suspensive effect of the appeal in most cases.
- (5) There is a considerable reduction of the circumstances in which the examination of asylum applications may be accelerated and it is provided that border procedures will operate in accordance with the basic principles and guarantees applicable in regular procedures.

Notwithstanding its many positive amendments ECRE regrets the fact the Commission proposal maintains the safe country of origin and European safe third country concepts as they seriously undermine asylum seekers' access to a fair asylum procedure and increase the risk of Member State's breaching the principle of non-*refoulement*.

Discussion in the European Parliament

The European Parliament is currently awaiting the draft report of the *rapporteur* on the recast proposal.

Discussion in the Council

Ministers held a first general discussion on the proposal recasting the Asylum Procedures Directive at the JHA Council meeting of 30 November/1 December, followed by a general discussion in the technical Council working group. While many Member States are critical of the Commission's approach, it is at the same time clear that the current disparities between Member States as regards their asylum procedures are not tenable in the long term and need to be effectively addressed.

3. The European Asylum Support Office (EASO)

As the Council and the European Parliament have reached a political agreement on the Regulation establishing the EASO the formal adoption of the Regulation will take place under the Spanish Presidency.²⁷ ECRE has acknowledged the important role that the EASO can play in helping to construct a CEAS that is founded on high standards of protection, on the condition that its activities aim to enhance the quality of asylum systems and in particular decision-making in the Member States and provide a meaningful role for refugee assisting non-governmental organisations, experts and UNHCR.²⁸

Although the political discussion on the tasks and role of the EASO has been sealed with the first reading agreement on the EASO Regulation, a decision still needs to be taken on the appointment of the Executive Director. The compromise agreement on the EASO Regulation provides for a limited role of the European Parliament, which may only adopt a (non binding) opinion on the candidate selected by the Management Board. The Executive Director shall be appointed on the basis of personal merits, experience in the field of asylum and administrative and management skills.

ECRE believes that the choice of the Executive Director will determine to a large extent the direction the EASO will take. In ECRE's view, in order to be successful the EASO will need to go beyond the immediate logistical needs of Member States in managing their asylum caseloads. **For the future of the CEAS it is of crucial importance that the EASO's activities are also developed with the aim of increasing standards of protection across the EU while ensuring that the CEAS remains accessible in practice for those in need of international protection.** It will be important for the future Executive Director of the EASO to promote such a vision and a protection-oriented approach.

ECRE calls on the Spanish Presidency to:

- Actively support a meaningful role for refugee assisting NGO's and UNHCR in the activities of the EASO, which must as a priority serve the purpose of increasing protection standards and the quality of decision-making in the Member States.

4. Implementing the Stockholm Programme

The Spanish Presidency will have the important task of launching the implementation of the Stockholm Programme in close cooperation with the European Commission and the European Parliament. This will include *inter alia* a discussion on the content of the action plan for the implementation of the Stockholm Programme that will have to be adopted by the Council on the basis of a proposal from the Commission.

ECRE calls upon the Spanish Presidency to ensure the adoption of a clear and ambitious work programme for the EU in the field of asylum in the next five years. Such a programme must include a clear plan for the adoption of high legislative standards as outlined above. Another area that should be addressed in the action plan implementing the Stockholm Programme is the integration of refugees and beneficiaries of subsidiary protection with a view to ensuring that their special needs are met within an overall policy of mainstreaming. In this respect, the upcoming Ministerial Conference on integration organised by the Spanish Presidency will represent a good opportunity to promote their inclusion into EU mainstream integration policies, such as the European Integration Fund, the Family Reunification Directive or the Long Term Residence Directive.

In particular, in close cooperation with the Commission the Spanish Presidency should consider the possibilities for resuming the discussions on the extension of the Long Term Residence directive to beneficiaries of international protection in order to ensure that they are able to acquire the right to move freely in the EU on the same basis as legally residing third country nationals.²⁹ In this respect the entry into force of the Lisbon Treaty offers a new opportunity for re-opening this important debate at EU level. ECRE regrets however that the final version of the Stockholm Programme does not include the principle of mutual recognition of positive decisions on asylum applications but contains only a vague reference to the possibilities for creating a framework for the transfer of protection of beneficiaries of international protection when exercising their acquired residence rights under EU law.

The situation of unaccompanied and separated children will be a priority for the Spanish Presidency. This will include the adoption of an action plan on unaccompanied minors as called for in the Stockholm Programme. ECRE welcomes the focus on one of the most vulnerable categories within our societies and urges the Presidency to pursue a protection-oriented approach based on the principle that the best interest of the child must be a primary consideration. **One way of making such an approach concrete is for the Spanish Presidency to actively promote those amendments in the Commission proposals recasting the Dublin Regulation, the Reception Conditions Directive and the Asylum Procedures Directive that enhance protection standards for unaccompanied and separated children.** In ECRE's view this includes the provisions strengthening the position of qualified guardians and prohibiting the detention of unaccompanied children. In addition, ECRE believes that a EU action plan on unaccompanied children must necessarily be comprehensive and address all stages of the child's stay on EU territory. This means addressing the initial reception of children, taking into account their vulnerable position in asylum procedures and aiming for a sustainable long-term solution in the best interest of the child. While return to the country of origin may constitute such a solution in certain cases, the Spanish Presidency must adopt a rights-based approach which acknowledges that return is only an option where it fully respects the child's rights, can be effected in safety and dignity and is sustainable.

The need for enhanced responsibility-sharing and solidarity between EU Member States is another important feature of the Stockholm Programme, which urges Member States to support each other in building sufficient capacity in their national asylum systems but with an emphasis on preventing abuse. **ECRE believes that the Spanish Presidency must adopt a more balanced approach and promote the principle that responsibility sharing and solidarity mechanisms should aim primarily at improving protection standards throughout the EU.** At the same time such initiatives should never result in Member States shirking their obligations towards refugees. Lack of progress in achieving concrete and meaningful solidarity at EU-level can never justify violations of asylum seekers' and refugees' fundamental rights.

When launching the discussion on the implementation of the Stockholm Programme, ECRE calls on the Spanish Presidency to:

- Promote the adoption of an ambitious action plan for the implementation of the Stockholm Programme in the field of asylum. This will include, among others, a clear work programme for the adoption of high legislative standards as well as resuming the discussions on the extension of the long term residence directive to beneficiaries of international protection.
- Prioritise the integration of refugees and beneficiaries of international protection within the context of the next Ministerial Conference on integration, with a view to promote their inclusion into EU mainstream integration policies.
- Ensure that the action plan on the unaccompanied children arriving in the Member States from third countries adopts a rights-based and balanced approach that recognises the best interests of the child as a primary consideration in line with Member States' obligations under international law.
- Promote responsibility sharing and solidarity between Member States as tools for effective protection instead of mechanisms to shift responsibility for those in need of international protection.

5. Access to protection

Safeguarding access to protection for refugees remains a crucial challenge in the construction of the CEAS. While this was already clearly acknowledged in the European Pact on Immigration and Asylum,³⁰ the Stockholm Programme reiterates that the “strengthening of border controls should not prevent access to protection systems by those persons entitled to benefit from them, and especially people and groups that are in vulnerable situations”.³¹ Measures need to be taken to ensure that these words are put into action. ECRE believes that the Stockholm Programme already contains some building blocks of a comprehensive strategy to ensure access to protection in the EU. These include *inter alia*: (1) the preparation of clear common operational procedures containing clear rules of engagement for joint operations at sea, with due regard to ensuring protection for those in need who travel in mixed flows in accordance with international law; (2) the call on the EASO to develop methods to better identify those who are in need of international protection in mixed flows and (3) the call on the Commission to come forward with proposals for the clarification of the mandate and role of FRONTEX no later than early 2010.

In ECRE’s view the revision of the mandate and role of FRONTEX presents an opportunity to ensure that protection and human rights safeguards are properly integrated into its work and are an integral part of the management of the EU external borders. To ensure greater transparency, this revision should involve discussions with relevant stakeholders such as the UNHCR and expert NGO’s in addition to the role of the European Parliament as a co-legislator.

In this respect **ECRE warns in particular against increasing FRONTEX capacity to cooperate with third countries without giving due consideration to Member States’ human rights obligations.** It has been noted for instance that the revision of FRONTEX mandate may include devising a formal role for the Agency in border control missions conducted in countries of origin and transit.³² There is evidence that FRONTEX is already supporting border management operations in the waters of non-EU countries and that its participation has been instrumental in stemming irregular migration by sea.³³ ECRE questions not only whether FRONTEX can legally be involved in operations beyond the EU’s external borders, but also whether it can do so with guarantees that its actions remain in full compliance with EC law, including legislation on asylum.³⁴ ECRE also reminds Member States that cooperation agreements with third countries in the field of migration control cannot absolve them of their responsibilities under international human rights law.

According to the European Commission’s proposal to amend the Regulation establishing an immigration liaison officers (ILO) network,³⁵ the revision of the FRONTEX mandate may also lead to the creation of EU ILOs who can be posted in third countries representing all EU Member States.³⁶ While there is a fundamental lack of transparency about ILOs’ activities, it appears that their role typically includes the verification of travel and identity documents on behalf of national authorities and the provision of training and advice on relevant legislation to the authorities of the host country and to carriers. Furthermore, at present the founding Regulation of the ILO Network is silent regarding Member States’ international obligations concerning refugees and people in need of protection. Any future reform of the EU framework as regards ILOs should acknowledge the potential impact of liaison officers’ activities on access to protection and address this protection gap through concrete safeguards³⁷.

ECRE urges the Spanish Presidency to:

- On the basis of the Stockholm Programme, develop a comprehensive strategy to ensure that the EU’s external border management does not prevent persons in need of international protection from accessing such protection in the EU.

- Ensure that the revision of the role and mandate of FRONTEX and the possible creation of EU Immigration Liaison Officers incorporate concrete safeguards guaranteeing access to protection to those fleeing persecution and widespread violence.

6. The external dimension of asylum

The Stockholm Programme calls on the EU to act in partnership with third countries hosting large refugee populations, in order to enhance their capacity to provide effective protection, for example through Regional Protection Programmes (RPPs). **ECRE stresses that existing and future RPPs should be designed to create more protection space and not as a tool to prevent onwards migration towards EU Member States.** The EU needs to acknowledge that financial and technical support to a third country does not mean that protection needs can or will be met.

In this regard, it is a cause for concern that the Stockholm Programme urges the Commission to explore “new approaches concerning access to asylum procedures targeting main transit countries, such as protection programmes for particular groups or certain procedures for examining applications for asylum, in which Member States could participate on a voluntary basis”.³⁸ ECRE is concerned about any proposal that could involve setting up EU-sponsored asylum processing centres in transit countries, many of which have very dubious human rights records. It is difficult to see how such initiatives could be compatible with the 1951 Refugee Convention, the European Convention on Human Rights and other international human rights instruments.

A key area in which Member States can and should show concrete solidarity with those countries hosting the majority of the world's refugees and dealing with protracted refugee situations is refugee resettlement. In 2008 UNHCR made submissions of more than 120,000 refugees for resettlement.³⁹ Worldwide 65,596 refugees were effectively resettled, of which 6,7% departed to EU Member States. **The Commission proposal to set up a European Resettlement Programme (ERP)⁴⁰ constitutes a very good first step towards a fully-fledged ERP, which should ultimately lead to an increase of resettlement places in the EU.** In addition to UNHCR, relevant NGOs have a wealth of knowledge and experience in the field of resettlement, and therefore should be involved in all steps of the ERP. Furthermore, in order to set up quality and sustainable resettlement programmes in Member States that currently do not resettle on a permanent basis and maintain those programmes in resettlement States, the model of tripartite meetings between government, UNHCR and civil society should be promoted.

ECRE urges the Spanish Presidency to:

- Seek to reaffirm at EU level that existing and future RPPs are designed to create more protection space and not as a mere tool to prevent refugees from reaching the EU.
- Continue ongoing efforts to increase the engagement of EU Member States in refugee resettlement, including on the basis of the European Resettlement Programme to be adopted during its Presidency.

¹ Council of the EU, *The Stockholm Programme – An open and secure Europe serving and protecting the citizens*, Doc. Nr. 17024/09, Brussels, 2 December 2009.

² Vluchtelingenwerk Vlaanderen, Hungarian Helsinki Committee, CEAR, CIRE, *Good practices for a Europe of protection. A memorandum for the trio of Spain, Belgium and Hungary*, December 2009.

³ European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Recast)*, COM (2008) 0243 final, 3 December 2008 ('Dublin Regulation recast')

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