

ECRE Memorandum to the European Council Meeting 17 – 18 March 2016 Time to Save the Right to Asylum

Ahead of the European Council Summit meeting of 17 and 18 March 2016, ECRE urges Heads of State or Government to assume political leadership and pave the way for a concerted EU response to what primarily continues to be a refugee crisis and not only a migratory phenomenon. Such a response must be based on the principle of solidarity and fair sharing of responsibility and respect for human rights. Current fragmented national approaches have added to the suffering of refugees and migrants arriving in the EU and have resulted in the erosion rather than restitution of the rule of law in the EU.

According to the latest available UNHCR figures over 130.000 persons arrived by sea in the EU in the two first months of 2016 alone, the vast majority (123.000) have arrived in Greece, with 88% coming from the world's top 10 refugee-producing countries, including 45% from Syria, 25% from Afghanistan and 16% from Iraq. Recent arrivals also show a shift in the age and gender composition towards 54% women and children.¹ The increase in the number of arrivals in the EU in 2015 and 2016 is creating huge challenges for the EU and its Member States. However, these numbers must be put into perspective intensifying conflicts in Syria as well as other countries such as Afghanistan and Iraq resulting in an unprecedented 60 million persons being forcibly displaced worldwide today. Moreover, despite the sharp increase of arrivals of asylum seekers and refugees in Europe, the fact remains that the vast majority of refugees continue to be hosted in other regions of the world.² In this regard the EU has a legal and moral obligation to enhance the global protection regime by increasing the protection space within the EU as well as in these regions and uphold the right to asylum as laid down in Article 18 EU Charter of Fundamental Rights.

With this memorandum, ECRE urges the European Council to revisit the principles for collaboration with Turkey to ensure compliance with fundamental rights and presents recommendations for the development of rights-based solutions with regard to the situation of asylum seekers and refugees in Greece and access at the EU's external borders, safe and legal channels to protection in the EU and the broader reform of the CEAS, including the reform of the Dublin system and the role of EU agencies.

1. Revisit the EU-Turkey deal to ensure compliance with fundamental rights

At their extraordinary meeting with Turkey, Heads of State or Government have agreed on a set of principles providing the framework for EU-Turkey cooperation in managing the refugee and migrant flows to Europe and Turkey.³ ECRE strongly opposes the approach taken which, if implemented, risks violating international refugee law, EU asylum law and the EU Charter of Fundamental Rights, and would lead to a policy of containment and chain *refoulement* of persons in need of protection.

First, a **policy of blanket returns of all “irregular migrants arriving in Greece” is incompatible with EU and international law and would be in complete dereliction of the principle of *non refoulement***. Those expressing the wish to apply for international protection have to be given access to the asylum procedure and a full examination of their claim in accordance with Article 6 recast Asylum Procedures Directive. The concerns in relation to a denial of access to the asylum procedure and potential *refoulement* should be read in light of recent information published by ECRE highlighting the limited capacity of the registration system in Greece. As ECRE has argued before, the examination of asylum claims cannot be based on the assumption that Turkey is a safe third country. Turkey does not comply with the criteria listed in Article 38 of the recast Asylum Procedures Directive which requires that applicants must be protected from *refoulement* in the “safe third country” and that the

1 See UNHCR, *Refugees/Migrants Emergency Response – Mediterranean*, accessible at <http://bit.ly/1p80Ye7>.

2 In 2014 developing regions hosted 86% of the world's refugees. See UNHCR, *World at War. Global trends. Forced Displacement in 2014*, p. 2, available at <http://unhcr.org/556725e69.html>.

3 Statement of the EU Heads of State or Government, 07/03/2016, 8 March 2016.

possibility exists to request and receive protection in accordance with the Refugee Convention.⁴ Currently, Turkey still applies a geographical limitation to the 1951 Convention, which means that only persons fleeing events occurring in Europe can obtain refugee status. Though the Law on Foreigners and International Protection provides for a status of “conditional refugee” to those coming from non-European countries, this status only allows a person to temporarily reside in Turkey, while awaiting for resettlement, and does not automatically guarantee access to the labour market.

Moreover, the conditions in Turkey do not guarantee that fundamental rights of refugee and migrants are respected in Turkey. Asylum seekers from nationalities other than Syrian are subject to a largely dysfunctional international protection procedure. Despite recent reforms, the Directorate General for Migration Management lacks capacity to process asylum applications while numerous barriers to state-funded legal aid, coupled with resource constraints on NGOs, leave asylum seekers without legal representation and advice. Moreover, whereas the country received approximately 130.000 asylum applications from non-Syrians in 2015, to date the total reception capacity for these applicants is 850 places.⁵

Moreover, and also applicable to those not applying for international protection, EU Member States have a positive obligation to ensure that return to Turkey complies with the principle of *non refoulement* and the prohibition of collective expulsion, which necessitates a case-by-case assessment of such risk.

Second, **resettling one Syrian to the EU for every Syrian readmitted from the Greek islands to Turkey is as Kafkaesque as it is legally and morally wrong.** A strict reading of the plan outlined on 7 March 2016 would effectively make the number of resettlement places dependent on the number of Syrians who risk their lives in the Aegean and are finally readmitted to Turkey. In practice, this may work as an incentive for Turkey to have as many Syrians crossing irregularly and readmitted in order to have a higher number of refugees resettled out of Turkey. Conversely, keeping readmission numbers low either by preventing as much as possible arrivals of Syrians in Greece or refraining from effecting readmission, would result in a smaller resettlement commitment from the EU side. Moreover, the engagement of Member States to resettle out of Turkey should be guaranteed. Without such commitment, the plan outlined on 7 March may simply become a mechanism for readmission back to Turkey. Combined with a renewed emphasis on restriction of entry to Turkey from other countries by imposing visas to nationalities that previously did not require one, and plans for readmission agreements between Turkey and 14 countries of origin, as envisaged under the Joint EU-Turkey Action Plan, this reveals a policy of containment in Turkey on behalf of the EU, which can trigger the complicity of Member States in chain *refoulement*.

ECRE urges the European Council not to link resettlement to readmission but preserve resettlement as one of the durable solutions to refugee displacement and an unconditional instrument of international solidarity. The European Council should rather establish a comprehensive approach that upholds the right to asylum in the EU, provides substantial support to refugee livelihoods, education and the capacities of local actors and communities in Turkey through the recently agreed Refugee Facility. This should be accompanied by large scale resettlement and/or humanitarian admission programmes from Turkey, Jordan and Lebanon, which currently host the vast majority of the displaced from the Syria conflict. UNHCR has identified that 10% of the over 4 million Syrian refugees displaced by the conflict are currently in need of resettlement.⁶ The European programmes should be structured and financially supported to incrementally cover half of that number by 2020.⁷

2. Assist Greece by responding to the emergency with concrete solidarity

Deterrence measures and discriminatory practices at internal and external Schengen borders along the Balkan route reveal a strategy of containment of asylum seekers and refugees in Greece and

4 ECRE, *ECRE strongly opposes legitimising push-backs by declaring Turkey a “safe third country”*, accessible at: <http://bit.ly/1R7xyK3>.

5 AIDA, *Country Report Turkey: First Update*, December 2015, p. 77.

6 UNHCR High Level meeting on global responsibility sharing through pathways for admission of Syrian refugees, Geneva 30 March 2016, Background Note, accessible at: <http://bit.ly/1R6RNkN>.

7 Similarly, ICMC proposes that European and other resettlement countries resettle 80,000 Syrian refugees every year in order to reach incrementally the 400,000 target by 2020, see ‘10% of refugees from Syria: Europe’s resettlement and other admission responses in a global perspective’, ICMC, June 2015, accessible at: <http://bit.ly/1RzTc3P>.

UNHCR has warned of an imminent humanitarian crisis.⁸ Worryingly, this approach seems to have been endorsed at EU level through the recent Commission initiative providing an incentive to States to reinstate transfers of asylum seekers to Greece under the Dublin Regulation. Firstly, this would be premature and result in serious human rights violations in light of the continuing weaknesses and deficiencies of the Greek asylum system. Secondly, given the potential number of transfers involved, which would then add to those arriving on a daily basis, it would most likely result in the collapse of an already fragile asylum system. Lastly, such an approach would be totally at odds with attempts to alleviate the pressure on Greece through the relocation mechanism.⁹

ECRE strongly opposes resuming Dublin transfers to Greece as they would be premature, result in human rights violations and undermine ongoing solidarity efforts with Greece.

In this regard, recent UNHCR reports and EC Communications on the implementation of the Council relocation Decisions highlight very poor results so far, resulting from considerable delays in submitting pledges, little or no prioritization of vulnerable persons as well as prohibitive preferences by Member States.¹⁰ Relocation can be a helpful tool but in order for such schemes to have any meaningful effect on the situation in Greece as well as Italy, ECRE reiterates its call to extend the number of relocation places and widen its scope, by lowering the eligibility threshold for relocation to include other nationalities, such as Afghans in order to adapt the instruments to the changed composition of the refugee inflow. Moreover, and in accordance with the two Council relocation Decisions priority should be given to the most vulnerable asylum seekers with specific reception needs such as unaccompanied children and mothers with children, survivors of torture and so forth.

Most importantly, relocation should only be carried out with the informed consent of the applicants concerned and in full respect of their fundamental rights, while taking their preferences and links with specific Member States as much as possible into account, as this increases the chances that relocation will be successful and the need for secondary movement reduced.

Efficient relocation schemes should also go hand in hand with comprehensive and effective referral mechanisms ensuring efficient registration and identification and the creation of adequate reception capacity, for those awaiting relocation but also for those entering the asylum procedure in Greece. In this regard, ECRE acknowledges and welcomes the efforts undertaken to create additional reception capacity in Greece but is concerned that current targets put forward may not be sufficient to meet actual reception needs resulting from the closure of the borders with Macedonia and the likely increase in the number of asylum applicants in Greece.

ECRE urges the EU and Member States to step up efforts to provide for adequate reception accommodation capacity in Greece while expediting the roll out of better coordinated contingency plans.

3. Ensure access to international protection and respect for fundamental rights at the EU external borders and in hotspots

Since the adoption of the European Agenda on Migration the hotspot approach has become the centrepiece of the EU's strategy to secure the management of its external borders. As they are designed to facilitate the registration, identification and fingerprinting of those arriving in Italy and Greece they are supposed to play a key role in the orderly management and referral of asylum seekers, refugees and migrants arriving in the EU. Provided it is performed in compliance with fundamental rights, an orderly and non-discriminatory registration of new entrants in the EU may contribute to creating more legal certainty and swift referral to the appropriate procedures. However, ECRE is concerned that the current hotspot approach does not ensure sufficient access to quality legal assistance and information which undermines effective access to the asylum procedure.¹¹ It also

8 UNHCR, *UNHCR warns of imminent humanitarian crisis in Greece*, 1 March 2016, accessible at: <http://bit.ly/1L20rVw>. As recently stressed by UNHCR, the Greek authorities are deploying immense efforts but more support is needed in particular for the development of a better contingency planning system with increased accommodation capacity.

9 ECRE, *Comments on the European Commission Recommendation relating to the reinstatement of Dublin transfers to Greece – C(2016) 871*, February 2016, accessible at: <http://bit.ly/1UEeRNB>.

10 UNHCR, *Building on the Lessons Learned to Make the Relocation Schemes Work More Effectively*, January 2016. As of 4 March 2016, 660 persons had been relocated from Italy and Greece. See European Commission, *Relocation and Resettlement – State of Play*.

11 See AIDA, *Country Report Italy: Fourth Update*, December 2015, 24-25.

entails risks of an increase in the use of detention of newly arriving persons without a proper individualised assessment of its necessity and proportionality.¹²

Over the past year, FRONTEX's budget has been increased considerably to step up its operational presence in the Aegean sea as well as on the Greek islands, while negotiations on a Regulation establishing a European Border and Coast Guard are rapidly progressing with the aim of finalising negotiations under the Dutch Presidency. The proposed Regulation implies important extensions of the current FRONTEX' mandate with regard to equipment, own staff and guest officers to be made available to the Agency as well as far reaching competences in the area of return, cooperation with third countries, vulnerability assessment and the possibility to intervene and take over control over external borders from the Member State hosting the operation under certain circumstances.

In ECRE's view, increased competences of the new Agency with regard to border controls, which have a direct impact on fundamental rights of asylum seekers, refugees and migrants imply increased accountability for fundamental rights violations and responsibility to monitor and remedy such violations. This would require *inter alia* further amendments to the Commission proposal in order to considerably enhance the effectiveness of the individual complaints mechanism, secure the independence of the Fundamental Rights Officer and provide her with the necessary resources to reflect the increased competences and operational range of the Agency and include systematic assessment of fundamental rights compliance in the vulnerability assessment of external borders.

The debate on the creation of 'FRONTEX Plus' renders discussions on the revision of EASO's mandate and budget even more pressing. Increased EU investment in "regaining control" over the external borders must be matched by increased EU investment in guaranteeing access to fair and efficient asylum procedures at the external borders and elsewhere in the EU.

ECRE calls on EU leaders to confirm their commitment to maintain or increase where necessary search and rescue capacity in the Mediterranean in light of continuing deaths at sea and make funds available for that purpose as necessary and unconditionally. At the same time, the necessary measures must be taken to ensure that disembarkation takes place in compliance with obligations under EU and international refugee law, in particular the principle of *non refoulement*.

In this regard, the current deployment of NATO ships in the Aegean leaves many questions unanswered as to how this operation will interact with the ongoing FRONTEX-led joint operations. Further questions are raised as to how the operation will comply with search and rescue obligations of the different actors involved in the Aegean under international maritime law and the guarantees in place to ensure that those intercepted or rescued are not returned to Turkey in violation of the principle of *non refoulement*.

4. Increase significantly the number of resettlement places in the EU and the use of other safe and legal channels for persons in need of international protection

ECRE calls on the European Council to **dramatically increase the number of resettlement places and the use of other safe and legal channels for persons in need of international protection as part of a comprehensive response to the current refugee and migration crisis**. As it stands, persons fleeing their country to seek protection in Europe have no other choice but to use irregular means, thereby risking their lives and becoming prey to exploitation at the hands of smugglers. Introducing and expanding channels to access protection in Europe safely, corresponding to the scale of the current refugee crisis, is a way to reduce present suffering and ongoing fatalities in particular in the Mediterranean. Safe and legal channels are to the benefit of all; not only do they save lives and offer access to protection, they provide receiving states with the possibility to better plan, put structures in place and minimise the risks. Orderly admission through different programmes is less costly and resource intensive than large scale humanitarian assistance that needs to be mobilised in emergencies. Orderly admission supports the psychosocial wellbeing of persons and avoids additional trauma caused by dangerous journeys that refugees currently have to undertake. At the same time better anticipation and management of potential integration challenges is also ensured.

12 The Greek draft law governing the establishment of Reception and Identification Centres set up in hotspots provides for the confinement of migrants, including vulnerable persons within the premises of these centres for an initial period of 3 days, which may be extended with another 25 days. See ECRE, *Comments on the European Commission Recommendation relating to the reinstatement of Dublin transfers to Greece*, p. 12.

In light of the scale of global refugee displacement it is crucial that the array of safe and legal channels are effectively used. First, in line with the principle of solidarity and fair sharing of responsibility, all Member States should commit to refugee resettlement at credible numbers according to a set of established and agreed criteria. In this regard, in light of the scale of global resettlement needs the Commission's proposal for an EU resettlement scheme announced for April 2016 should be ambitious. It should establish **a large scale European resettlement programme with mandatory participation of all Member States**, based on a distribution key. Common priorities should be set that should reflect the priority situations identified by UNHCR, including different nationalities from the Middle East, Africa and Asia. EASO could play an important role in facilitating the common pledging, organisation and carrying out of practical aspects of the resettlement programme by pooling together resources and providing guidance on procedures. Common selection criteria, procedures and conditions post arrival would contribute to the sustainability of the programme.

In addition to resettlement, ECRE urges EU Member States to **use or develop other legal pathways for refugees such as humanitarian admission programmes, private sponsorships, humanitarian visas and flexible and refugee friendly family reunification procedures**. Several EU and non-EU countries have developed such avenues over the last few years in response to the Syria refugee crisis and ECRE encourages *all* EU Member States to make full use these channels. However, where the residence permit granted under such complementary schemes is temporary, beneficiaries of such programmes should have access to the national asylum procedure should the need for international protection continue to exist after the expiry of the permit. Moreover, as it is the case for resettlement, other admission programmes should be developed in partnership with NGOs at both ends of the process, to support all aspects of the preparation, post arrival and integration of the newly arrived refugees. In addition to legal channels for those in need of international protection, regular labour migration schemes also need to be developed in order to reduce the need for those without protection needs to resort to irregular ways to enter the EU.

A large scale European resettlement programme with mandatory participation of all Member States must be established, based on a distribution key. The High Level Meeting on Global Responsibility Sharing through Pathways for Admission of Syrian Refugees on 30 March provides an opportunity for EU Member States to show their engagement by expanding the existing criteria for admission, in order to receive generous numbers of refugees from Syria. This would also allow for resettlement Member States as well as those that have not yet engaged in resettlement to find alternative ways to share the responsibility to protect refugees.

5. Rebuild the CEAS on the basis of true solidarity and responsibility-sharing

Europe's failure to develop a coordinated response to the current refugee crisis as well as the meagre results of fifteen years of harmonisation have demonstrated the inherent limitations of the current architecture of the CEAS. The fundamental flaws in the CEAS are well documented and have been persistent so far. Recognition rates for the same nationalities continue to vary widely between EU Member States while quality and capacity of reception infrastructure as well as the level of procedural safeguards differ enormously across the EU.¹³ The current increase in asylum applications in reality continues to affect only a limited number of Member States, while existing solidarity tools at the disposal of the EU are either not or not sufficiently used or inadequate to address the current challenges. At the same time, the developments of the last year have once more exposed the Dublin system as a totally dysfunctional and unfair system which continues to result in human rights violations.

In ECRE's view remedying the inherent flaws of the EU's common policy on asylum requires much more than a "quick fix" of the Dublin system or effective implementation of the emergency relocation programmes. A fundamental reform of the principles underlying the current system of responsibility allocation is needed coupled with a "Marshall Plan" for the CEAS.

Rethinking the Dublin system

13 For detailed analysis, see AIDA, *Common asylum system at a turning point: Refugees caught in Europe's solidarity crisis*, Annual Report 2014/2015 and EASO, *Annual Report on the Situation of Asylum in the European Union 2014*.

ECRE calls on EU leaders to give impetus to the fundamental rethinking of the legal parameters of the recast Dublin Regulation and the principles underlying the current Dublin system. ECRE has consistently held that it should be replaced with a system that respects the fundamental rights of asylum seekers and is based on the fair sharing of responsibilities between Member States.¹⁴

The revision of the Dublin system must be used as an opportunity to reflect upon existing loopholes in the Regulation, which are incentives for States to avoid their responsibility rather than assuming it and on ways to adopt a clear and workable system, which ensures access to protection and legal security for asylum seekers.

In ECRE's view, a new system of allocating responsibility for examining asylum applications lodged in the EU should be based on the following guiding principles:

- **A Rights Based System** - A system of allocation of responsibility must fully comply with obligations under Human Rights law and the EU Charter of Fundamental Rights and must maintain the procedural guarantees currently included in the recast Dublin Regulation to protect asylum seekers from human rights violations resulting from such a system. The best interest of the child and the primacy of family unity must be guaranteed and put at the forefront in the new responsibility allocating system.
- **A Preference Based System** - The system can no longer be based on the first entry criterion as this works against solidarity and places disproportionate burdens on frontline States. The individual circumstances of the asylum seeker must be the starting point for allocating responsibility for examining the asylum application lodged in the EU, which should be centrally managed. A preference based system would take the applicant's preferences as much as possible into consideration as well as connection criteria to a specific Member State, such as language, educational and professional qualifications and cultural or historical ties. This should be matched with the capacity of the responsible Member State to provide adequate reception conditions, in particular in light of special reception needs or vulnerabilities, and deliver quality decision-making and which must be thoroughly assessed at regular intervals taking into account all available sources, including information from NGOs and UNHCR. The system should never equate to a blind mechanical dispersal of asylum seekers across the EU as this option is neither realistic nor sustainable. Not only would it result in even higher risks of human rights violations as is currently the case under the Dublin Regulation, it would also fail to sort out the problem of irregular secondary movements given current disparities in the quality of the protection systems in the Member States. Provided that key procedural safeguards are in place, a distribution key may be a concrete tool to assess the relative share of asylum seekers between all EU Member States in case of a large scale influx of asylum seekers and where regular asylum systems are congested. Provided that the abovementioned key procedural safeguards are in place, a distribution key may be a concrete tool to assess the relative share of each Member State.
- **A System Based on Incentives** - In order to be sustainable the system for allocating responsibility should offer incentives to asylum seekers to comply with the responsibility allocation mechanism, rather than be based on the use of coercion. The provision of accurate and independent information in the context of a system that proactively takes into account individual characteristics and skills as well as integration perspectives is crucial in order to ensure asylum seeker's trust in and compliance with the system. In addition, the perspective of enhanced mobility within the EU post recognition constitutes a key incentive for a sustainable system and may help to overcome resistance of asylum seekers to being allocated to another than their preferred Member State. A right to free movement and residence anywhere in the EU should be attached to the uniform status of asylum and subsidiary protection required under Article 78 TFEU.¹⁵ Ultimately, beneficiaries of international protection should be able to move, reside and work within the EU immediately

14 See in particular ECRE, *The way Forward; Towards a Fair and Efficient Asylum System in Europe*, accessible at: <http://bit.ly/1R7xPfu> ; ECRE, *Sharing Responsibility for Refugee Protection in Europe : Dublin Reconsidered*, accessible at: <http://bit.ly/1p81wke>.

15 ECRE, *Enhancing Intra EU Solidarity Tools to Improve Quality and Fundamental Rights Protection in the Common European Asylum System*, January 2013, p. 48, accessible at: <http://bit.ly/1OZVlyo>.

after status has been granted under the same conditions as EU nationals. As an intermediate step one option could be for the requirement of five years legal residence before long term residence status can be obtained in the case of beneficiaries of international protection to be reduced to 2 years. While mitigating the fact that not all asylum seekers may have their asylum application country determined in the country of their preferred destination, this option would ensure that all the Member States develop adequate reception conditions and integration schemes. This would need to be combined with mutual recognition of protection statuses granted by EU Member States and clear rules governing the transfer of protection status to another EU Member State would further facilitate free movement by providing more legal certainty to the beneficiaries of international protection concerned.

A Marshall Plan for the CEAS

The operationalisation of the objective of equivalent levels of protection throughout the Union regardless of where an asylum application is lodged as laid down in the Stockholm Programme would require **major strengthening of existing mechanisms for quality monitoring of national asylum systems and enforcement of implementation of the EU asylum *acquis* at a high level of protection**. In this regard, within the current architecture of the CEAS, the resources and role of EASO in assessing preparedness and resilience of Member States' asylum systems and its capacity to deploy tailor made assistance in the Member States that do not comply with the *acquis* should be seriously boosted. At the same time, the Commission should further step up its efforts in launching infringement procedures for incorrect application of EU asylum law beyond non-communication of national transposition measures.

Should a third phase of harmonisation be considered, this should focus in particular on addressing the considerable discretion that is still left with Member States in the implementation EU standards as well as the overall complexity of the EU asylum *acquis*, for instance through the adoption of an asylum code as has been suggested by the Commission in the past.¹⁶ However, a new round of legislative harmonisation should under no circumstances be used to downgrade the current level of protection in the EU asylum *acquis* but on the contrary be used to remedy ever-prevailing protection gaps in the various instruments.

Massive financial investment into national asylum procedures and reception systems is urgently needed. The mid-term review of the AMIF offers an opportunity to give a financial boost to the CEAS by imposing a significant increase of the resources dedicated to structural development and maintenance of asylum systems within the national AMIF programmes. Adequate resources should also be allocated to efficient contingency planning and emergency responses.

In this regard, ECRE welcomes the announced speedy adoption of the recent Commission proposal for an Emergency Assistance instrument which will make €700 million available over the next three years to meet the immediate humanitarian needs of refugees and migrants within the EU.¹⁷

Eventually, a new institutional design for the CEAS may be necessary departing from the current architecture which maintains final responsibility for decision-making on asylum applications and management of reception infrastructure with national authorities. As long as international protection obligations are not assumed collectively at EU level, a common policy on asylum may never materialise in practice. In this regard, the creation of an independent EU Asylum Agency with a clear protection mandate that is in charge of decision-making on individual asylum applications lodged in the EU should be carefully considered.

Brussels, 11 March 2016

¹⁶ European Commission, A European Agenda on Migration, COM(2015) 240 final, 13 May 2015, p. 17.

¹⁷ European Commission, Proposal for a Council Regulation on the provision of emergency support within the Union, COM(2016)115, 2 March 2016.