



EUROPEAN COUNCIL
ON REFUGEES AND EXILES

CONSEIL EUROPEEN
SUR LES REFUGIES
ET LES EXILES

POSITION ON COMPLEMENTARY PROTECTION

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INTRODUCTION

1. ECRE believes that a discussion of complementary protection has to start from an analysis of why such a form of protection is needed at all. The 1951 Convention relating to the Status of Refugees (the Refugee Convention) and its 1967 Protocol are the foundation of the international refugee protection regime. Crucially, they support and complement other human rights treaties agreed by the international community – most of which do not have redress or prevention mechanisms. Drafted in the aftermath of the Second World War, the Convention has been successfully invoked in the protection of millions of refugees and it, and its Protocol, remains the foundation of refugee protection across the globe.¹
2. Despite –or perhaps because of- its continuing worth, the Refugee Convention has been under attack by European states for many years. The attacks have taken various forms but of particular concern to ECRE has been the increasing trend to adopt restrictive interpretations of which persons fall within the definition of Article 1 of the Refugee Convention.² Now, only a small proportion of people seeking asylum in Europe are recognised as Refugee Convention refugees³. In the main, this is due to an increasingly narrow interpretation of the refugee definition in the Refugee Convention⁴.
3. ECRE is deeply concerned that people who should be recognised as refugees under the Refugee Convention are, instead, granted other forms of protection. On the whole, these other forms of protection do not carry the same level of protection or the same level of rights as the Refugee Convention.
4. It is for this reason that ECRE has produced a set of recommendations concerning the application of Article 1 of the Refugee Convention.⁵ This paper is intended to reinforce the message that the Refugee Convention must be interpreted in a full and inclusive way and that a complementary form of protection is a residual status, for categories of people in need of protection who clearly

fall outside the Refugee Convention. ECRE believes that such categories are the exception rather than the rule.

GENERAL PRINCIPLES

5. **ECRE's position is that a complementary protection status is needed in Europe to protect those people whose reasons for flight are beyond a full and inclusive interpretation of the Refugee Convention, but who nevertheless require international protection.**
6. **ECRE's position is that a complementary protection status should harmonise standards of protection across Europe at the highest possible level.**
7. This call for a complementary protection status should emphatically not be seen as support, implicit or otherwise, for the current restrictive interpretation of the Refugee Convention definition common in a number of European states, nor as support for the current European practices favouring non-Refugee Convention protection.
8. **ECRE's position is that a complementary protection status should be used alongside the Refugee Convention and not replace it.**
9. ECRE prefers the term “complementary protection” to “subsidiary protection” in order to emphasise the supporting nature such a status plays to the Refugee Convention and that non-Refugee Convention refugees are not in a lesser need of international protection.
10. **ECRE's position is that complementary protection, which is a response to the causes of a person's flight, is distinct from a regime of temporary protection, which is a reaction to a mass influx of refugees (SEE BELOW).**

SCOPE OF A COMPLEMENTARY PROTECTION MECHANISM

11. **ECRE's position is that any proposal for a complementary protection status**

must begin by considering the following principles:

- The issue has to be addressed on an *international* level and cannot be dealt with individually by states. The notion of complementary protection is familiar across the EU. The EU is bound by new Title IV of the Treaty Establishing the European Community (TEC) to adopt, in accordance with the Refugee Convention and other relevant treaties, minimum standards with respect to the complementary protection of nationals of third countries.⁶
 - ECRE's proposal provides for a positive definition of protected persons, which takes into account the reasons why they left their home countries or why they are unable or unwilling to return there. Any kind of negative definition such as "aliens who temporarily cannot be expelled" does not do justice to the persons concerned and, furthermore, does not lead to a common concept of protection between the states.
 - ECRE's position is that a complementary protection mechanism must include a right to non-refoulement, in the same way as Article 33(2) of the Refugee Convention and Article II (3) of the OAU Convention do. Conversely, the non-refoulement provisions of Article 3 of the European Convention on Human Rights and Article of the Convention Against Torture should be given concrete expression in the form of complementary protection.
 - ECRE's proposal establishes the status and the inherent rights of the person concerned during their stay in the country of asylum. Mere withholding of deportation is insufficient since it does not define the legal conditions under which the person is authorised to remain in the country.
- ECRE's position is that the procedure and procedural safeguards should, at least in general terms, be defined in order to prevent state practice from diverging once again.
12. ECRE's position is that any person who is obliged to flee his or her habitual place of residence and to seek refuge elsewhere should be commonly defined as being in need of international protection, even where they do not meet the definition of a refugee in the Refugee Convention.
 13. ECRE, therefore, proposes that a complementary protection status should include:
 14. persons who have fled their country, and/or who are unable or unwilling to return there, because their lives, safety or freedom are threatened by generalised violence, foreign aggression, internal conflict, massive violation of human rights or other circumstances which have seriously disturbed public order⁷; we emphasise here, however, our position that persecution for a Convention reason can and does occur in the situations described above.
 15. persons who have fled their country, or who are unwilling or unable to return there, owing to well-founded fear of being tortured or of being subjected to inhuman or degrading treatment or punishment or violations of other fundamental human rights or because they have been rendered stateless.
 16. ECRE emphasises here that a person who is outside his or her country of nationality or former habitual residence owing to a well-founded fear of torture or other inhuman or degrading treatment or punishment and who is unable or, owing to such fear, is unwilling to avail himself or herself of its protection or to return to it is only not a refugee within the Article 1A(2) definition if either-
 - (a) it is not possible to demonstrate that the fear of torture or other treatment is for reason of race, nationality,

- religion, membership of a particular social group or political opinion; or
- (b) he or she is excluded from the Refugee Convention under Article 1F, following a fair and efficient determination of exclusion.
17. This proposed definition does not include a number of factors, which some countries regard as being “humanitarian reasons” for not being expelled, such as links to the country of asylum. Those elements may continue to be considered “compassionate reasons” in national aliens legislation. They are not linked to the notion of human rights protection and, therefore, do not form part of this paper.
 18. ECRE notes that age is sometimes considered a “compassionate concern”. In cases concerning separated children who have been found not to be refugees and removal is not possible because it is not in the best interests of the child, ECRE believes that the age and vulnerability of the child can give rise to human rights concerns, specifically under the Convention on the Rights of the Child 1989. In such cases, complementary protection should be granted to the separated child.
 19. ECRE notes that health reasons are also sometimes considered a “compassionate concern”. We observe that in some cases, human rights concerns can arise where there is an issue as to the compatibility of removal with Article 3 of the ECHR. In such cases, complementary protection should be granted.
 20. For the avoidance of doubt, ECRE reiterates from its position on interpretation of Article 1 of the Refugee Convention that those fleeing armed conflict are not automatically excluded from the Convention and that many who flee conflict are, in fact, Convention refugees.
 21. ECRE also re-iterates that those fleeing non-state agents of persecution for a Convention reason should be recognised as refugees under the Refugee Convention. Further, those fleeing gender-related persecution, such as women or homosexuals, should also be recognised as refugees under the Convention.⁸
 22. ECRE believes that a person who is properly excluded from the Refugee Convention under Article 1F is normally a person who deserves to be returned to his or her home country in order to face justice there. However, if instead of facing justice such a person will actually face torture or inhuman or degrading treatment or punishment then he or she cannot be returned because of the absolute nature of the guarantees against such violations of human rights under Article 3 of the European Convention on Human Rights and Fundamental Freedoms and provisions in other instruments.
 23. In such situations, therefore, it is ECRE’s position that such a person should be granted complementary protection because of the risk of a breach of Article 3 ECHR. There may be the possibility of the person facing trial and punishment in the country of asylum for alleged crimes (which formed the basis of exclusion under Article 1F of the Refugee Convention) or at an international level.

DURATION OF PROTECTION

24. Non-Refugee Convention refugees are frequently considered by asylum states to be persons in need of protection of a temporary nature. The laws of all European states grant a form of protection for short periods, sometimes very short periods. This creates a feeling of vulnerability in the minds of such persons. It is also inefficient and can act as a barrier to integration.

KEY ISSUE:

TEMPORARY PROTECTION IS DISTINCT FROM COMPLEMENTARY PROTECTION

Temporary protection, as defined by Conclusions No.19 (XXXI) and No.22 (XXXII) of the Executive Committee of the UNHCR, is a stop-gap measure designed to regulate situations of mass influx, where the refugee status determination system of the receiving state cannot cope with the large numbers of people involved.

Temporary protection is emphatically not a form of protection which should be granted because of the *causes* of the asylum-seeker's flight.

25. The concept of international protection is temporary, as the cessation clauses of Article 1C of the Refugee Convention make plain. Neither the OAU Convention nor the Cartagena Declaration make a distinction in terms of duration of protection between Refugee Convention refugees and those fleeing generalised violence. Where the situation in the country of origin changes ECRE proposes that cessation clauses would be applied to those with complementary protection status, in the same manner as they are under Article 1C of the Refugee Convention or Article 4 of the OAU Convention.

26. It is inefficient for the administration of European states to continue to issue temporary residence permits to refugees at intervals of three or six months when the person is avoiding a situation which may last a decade or longer. Where the permit carries no rights, the situation is intolerable.

27. **ECRE's position is that persons with complementary protection status should be treated, in terms of duration of protection, in the same way as Refugee Convention refugees, bearing in mind that for both categories of protected person, successful integration into the asylum country and eventual re-integration into the home country requires a settled status.**

THE RIGHTS OF REFUGEES UNDER A COMPLEMENTARY FORM OF PROTECTION

28. As with the discussion on the duration of protection, there is no legal or logical reason to grant a refugee under a complementary form of protection fewer or lesser rights than Refugee Convention refugees.

29. Since the time of the League of Nations, the international community has advocated privileged treatment of refugees over aliens in general because of their need to substitute their own state's protection with that of the international community. The rights accorded to refugees under the Refugee Convention stem from this rationale.

30. **ECRE's position is, therefore, that any rights accruing to Convention refugees should be granted to all persons afforded complementary protection.** Due regard should be given to the fact that many European states already accord Convention refugees a more favourable level of rights than those set out in the Refugee Convention. ECRE proposes that national legislation does not make a distinction between Convention refugees and refugees with complementary protection status with regard to their immigration status and their rights in the country of asylum. In particular, the right to family unity and socio-economic rights should be comparable to those accorded to Refugee Convention refugees.

31. ECRE recommends that freedom of movement be granted to refugees under a complementary protection regime. ECRE urges national governments to grant refugees under a complementary protection regime unconditional rights of employment and automatic access to work permits and that access to the labour market should be facilitated.

32. ECRE recommends that refugees under a complementary protection regime are guaranteed the right to shelter and that such people are given a choice about where to settle. ECRE recommends that access to health services should be guaranteed and facilitated.

33. ECRE recommends that family reunion should not be limited only to Convention refugees but is also afforded to refugees under a complementary protection regime. This right should not be restricted on grounds of length of residence or for economic reasons.

34. Where the preferred durable solution to a protection need is local integration, ECRE considers citizenship to be a key policy instrument for facilitating integration and recommends that naturalisation of people afforded complementary protection is facilitated.

PROCEDURES

35. **ECRE's position is that the procedure for recognition of refugee status under the complementary protection mechanism should, in principle, be the same as those for Refugee Convention refugees.** In particular, the same central authority should decide on the application and there should be no need for the applicant himself or herself to state explicitly whether they are applying for Refugee Convention status or complementary protection.⁹

36. ECRE believes that a person should only be expected to make a claim for protection to an appropriate body rather than a particular form of status. That body- after careful, proper and lawful consideration of all relevant matters- should make a decision as to whether to:

- (a) recognise the person as a refugee under the Convention and grant asylum;
- (b) refuse to recognise the person as refugee, with stated reasons as to why, but grant complementary protection status;
- (c) refuse any protection status but allow a person to stay for compassionate or practical reasons;
- (d) refuse any form of protection status and require the person to leave the country.

37. In ECRE's view, a person who comes under (b) or (c) or (d) above should have the right to appeal to a judicial body against the refusal of recognition as a refugee under the Convention. In addition, a person who comes under (c) or (d)

above should have the right to appeal to a judicial body against a refusal to grant complementary protection.

38. The procedure may be expedited in cases of applicants who belong to a specific group to which it has already been decided that the complementary protection applies, e.g. for reasons of internal conflict, foreign aggression etc.. All persons belonging to such a group could then be deemed *prima facie* in need of international protection. ECRE notes, however, that care has to be taken to ensure that members of the group are not, in fact, Convention refugees.

CONCLUSIONS

39. The complementary protection status proposed in this paper reflects not only international refugee law principles, which have their concrete expression on a regional level in Africa and Latin America, but also the legislation and administrative practice, on a national level, of a number of European states. The proposal also attempts to deal with reality, as the persons who would fall under the complementary protection mechanism are currently present in most European countries and, because they are in need of international protection, cannot be forcibly removed to their countries of origin.

40. The advantages of this proposal may be summarised as follows:

- the establishment of an EU instrument, binding upon contracting states, would harmonise current national policies to the highest standard.
- such an instrument would allow for equal treatment of equal refugee groups in the different Member States, with respect to the criteria applied, as well as with respect to the minimum standard of rights and the

principles of a fair and efficient procedure.

- governments would enact a single procedure for all categories of refugees; this is also a precondition for harmonising other aspects of asylum policies in Europe.
- the proposed concept would facilitate and shorten the procedure for determination of refugee status with respect to all those who fall under the *prima facie* group determination; this would lead to savings in administration as well as on a judicial level.

41. The most important advantage of the proposal is, however, that it combines humanitarian and human rights principles with an international binding agreement on the right of asylum for those forced to flee their home countries and to seek protection and refuge in Europe.

¹ ECRE Position on the Harmonisation of the Interpretation of Article 1 of the 1951 Refugee Convention, June 1995

² ECRE Position on the Harmonisation of the Interpretation of Article 1 of the 1951 Refugee Convention, June 1995

³ see ECRE Country Reports 2000

⁴ For a current overview see UNHCR paper on *Complementary Forms of Protection: their nature and relationship to the international refugee protection regime* presented to the 18th meeting of the Standing Committee, July 2000. EC/50/SC/CRP.18

⁵ ECRE Position on the Interpretation of Article 1 of the Refugee Convention, September 2000.

⁶ Inserted by the 1997 Treaty of Amsterdam. The EU is also committed to the development of a Common European Asylum System by the time-table set out in the December 1998 Vienna Action Plan and the European Commission "scoreboard"

⁷ this is an amended version of the Cartagena Declaration, Article 3(3); the amendment is necessary in order to include post-flight reasons and refugees *sur place*

⁸ ECRE Position on Interpretation of Article 1 of the Refugee Convention, July 2000

⁹ ECRE Guidelines on Fair and Efficient Procedures for Determining Refugee Status, September 1999