

ECRE

**EUROPEAN COUNCIL
ON REFUGEES AND EXILES**

**CONSEIL EUROPEEN
SUR LES REFUGIES
ET LES EXILES**

**POSITION ON
THE INTERPETATION OF ARTICLE 1
OF THE REFUGEE CONVENTION**

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SUMMARY OF POSITIONS TAKEN

The references to the Universal Declaration of Human Rights of 1948 in the Preamble to the Refugee Convention serve to highlight the fact that refugee protection must be seen as an integral part of human rights protection, both regarding civil and political rights and economic, social and cultural rights. All international and national efforts for refugees should therefore proceed from the standpoint of obligations to which States have adhered through the adoption of human rights instruments.

State complicity in persecution is not a pre-requisite to a valid refugee claim. This view flows from the language of Article 1A(2) itself and has been confirmed by the overwhelming trend of international case law.

No-one can be returned to an authority which has not been accepted into the international community of states and/or which has no status in international law. Returning refugees to *de facto* authorities undermines the international system and weakens refugee protection.

Persons fleeing from situations of war or internal armed conflict should never be automatically denied refugee status, since generalised violence does not preclude the existence of a well-founded fear of persecution by an individual person or a group of people.

The grounds on which refugee status is recognised may overlap and several will often be applicable to the same person. It is often the case that the grounds are simply attributed to the person by the persecutor.

Where the cessation clauses are applied because of a change of circumstances in the country of origin, the asylum state must ensure that the changes are effective, fundamental and durable before proceeding to withdraw recognition of refugee status. Refugee status should be maintained unless someone falls clearly within one of the cessation clauses as refugees should not be subjected to constant review of their status.

In view of the serious consequences of such a decision for the refugee, Article 1F must be used with care and after thorough consideration, and in accordance with fair and efficient procedures.

INTRODUCTION

1. The 1951 Convention relating to the Status of Refugees¹ (the Refugee Convention) and its 1967 Protocol² (the Protocol) are essential human rights instruments. 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 proved to be the redress mechanism for those fleeing serious human rights violations and has been successfully invoked in the protection of millions of refugees. It, and its Protocol, remains the foundation of refugee protection across the globe.
2. Of particular concern to ECRE has been the increasing trend to adopt restrictive interpretations of which refugees fall within the definition of Article 1 of the Refugee Convention³. Now, only a small proportion of people seeking asylum in Europe are recognised as Refugee Convention refugees.
3. The Refugee Convention has also been subject to sometimes widely differing interpretations.⁴ In Europe, this has resulted in a "protection lottery", with several states interpreting the Refugee Convention in ways which exclude many people from the protection they deserve. This lottery has had a particularly adverse impact on the application of the so-called "safe third country" concept, a concept with which, in principle, ECRE entirely disagrees.⁵
4. During its Presidency of the EU, Austria announced that the Refugee Convention was no longer relevant in dealing with refugees and called for a new asylum system based on political discretion. While at the time many European governments criticised this approach some politicians in several countries have continued to state explicitly that the Refugee Convention is no longer relevant, or have sought new ways to deny access to it, even after making commitments to the Convention at the Tampere European Council.⁶
5. ECRE recalls that in his message on the 50th Anniversary of the Universal Declaration of Human Rights, UN Secretary-General Kofi Annan rebuked those politicians who opposed the idea of the universality of human rights, saying "It was never the people who complained of the universality of human rights, nor did the people consider human rights as a Western or Northern imposition. It was often their leaders who did so". ECRE notes that it is not refugees who complain of the irrelevance of the Refugee Convention, but politicians in asylum states, often playing upon xenophobia.
6. As the 1993 Vienna Declaration on Human Rights makes plain, fifty years after its completion, the Refugee Convention remains a relevant and useful tool to address refugee problems.⁷ This position paper attempts to re-state the relevance of the Refugee Convention by setting out the views of nearly 70 refugee-assisting agencies across Europe about how it should be interpreted. This paper concentrates on those aspects of the Article 1 definition which arouse most contemporary dispute, that is Article 1A(2), Article 1C and Article 1F.
7. This paper has general relevance in the maintenance of international standards. However, it does have a particular focus on the European Union (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 qualification of nationals of third countries as refugees.⁸
8. ECRE fears that, due to the requirement of unanimity between EU Member States on any asylum measures, standards will be adopted at the lowest minimum level, thus excluding refugees from protection. Enlargement of the EU, which has profound implications for refugee protection, makes EU measures important for the whole of Europe⁹. ECRE hopes that the measures to be adopted by the EU under Title IV of the TEC will meet the commitment of the Tampere European Council to "a full and

inclusive interpretation of the Refugee Convention thus ensuring that nobody is sent back to persecution”, so that a correct interpretation of the Convention is assured.¹⁰

9. ECRE believes that in the setting and maintenance of high protection standards the function of the UN High Commissioner for Refugees (UNHCR) to supervise the application of the Refugee Convention needs to be respected and strengthened¹¹. In particular, the importance of the Handbook on Procedures and Criteria for Determining Refugee Status should be emphasised.¹²

GENERAL PRINCIPLES

10. The references to the Universal Declaration of Human Rights of 1948 in the Preamble to the Refugee Convention serve to highlight the fact that refugee protection must be seen as an integral part of human rights protection, both regarding civil and political rights and economic, social and cultural rights. All international and national efforts for refugees should therefore proceed from the standpoint of obligations to which States have adhered through the adoption of human rights instruments.¹³
11. The Convention is a versatile instrument. It can and does address new challenges in refugee protection. This position paper does not, therefore, attempt to be definitive. It should be recognised that some European states do interpret the Convention according to the purpose for which it was drafted.
12. The means by which Convention refugee status is determined are very important because of the risks of making a wrong decision. ECRE believes that the best way to ensure refugee protection is to establish fair and efficient procedures to determine refugee status. We have made a number of recommendations on achieving this aim.¹⁴ ECRE emphasises here the duty of the decision-maker to give the benefit of any doubt to the refugee claimant, especially in view of the difficulties in obtaining corroboration of evidence. We also

emphasise the importance of, in the first place, access to a refugee status determination procedure.

13. ECRE believes that interpretation of the Refugee Convention should respect the principle that in all actions concerning them the best interests of the child and young people shall be a primary consideration¹⁵ and should be gender-sensitive.¹⁶
14. This position paper must be taken in its entirety. The elements of the Refugee Convention definition do not stand alone and false conclusions will only be drawn if the elements of the definition are not read as a whole.

ARTICLE 1A(2) OF THE CONVENTION

15. “The term "refugee" shall apply to any person who.... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable, or owing to such fear, is unwilling to return to it.”
16. ECRE believes that the Refugee Convention definition is made more accessible if the elements of the Article 1A(2) definition are formulated as the following criteria:
 - a “refugee” must be at genuine risk of harm if returned.
 - the harm must be serious.
 - the serious harm against which the state cannot or will not protect must be connected to one of the Convention grounds.
 - a refugee must be unable or unwilling to return to the country of nationality or habitual residence.¹⁷

These elements will be considered in turn below.

Genuine risk of harm

17. Whether a fear of serious harm can be shown to be “well-founded” or not is mostly a question of corroboration of the refugee’s own evidence. **It is ECRE's position that a proper assessment of evidence is an integral element in fair and efficient asylum determination procedures.**¹⁸
18. It is worth emphasising, however, that in practice persecution is rarely, if ever, confined to an individual and it may be that a whole group of people are being persecuted. In such cases, determination of refugee status may be limited to finding whether someone belongs to a persecuted group.¹⁹ It is not necessary for a claimant to show that he or she is more at risk than anyone else in his or her group (SEE ALSO BELOW).
19. ECRE notes that evidence of past persecution is sometimes demanded by asylum states as a prerequisite for the recognition of refugee status. We believe this to be a misinterpretation of the Refugee Convention. Although past persecution is a cogent indication of what may happen in the future, the assessment of risk must always be forward-looking.²⁰
20. As part of the assessment of whether there is a genuine risk of serious harm ECRE notes that it necessary to look at the ability and willingness of the state of origin to protect the refugee claimant.
21. ECRE notes that there are generally four situations in which there is a failure of state protection:
 - a) persecution committed by the state concerned
 - b) persecution encouraged by the state concerned
 - c) persecution tolerated or condoned by the state concerned
 - d) persecution not condoned or not tolerated by the state concerned but nevertheless occurring because the state is unable to protect (SEE BELOW).

22. Persecution by a state organ may take various forms. Force is not the only one. States are often anxious to give the appearance of legality to their actions and persecution may also take the form of administrative and/or judicial measures which either have the appearance of legality and are misused for the purposes of persecution, or are carried out in breach of the law.
23. ECRE believes that, in all cases, the availability of an effective remedy, which would put an end to the persecution, is central. **The fact that no redress exists against serious harm or, if there are means of redress, that access to them is deprived or the decisions of the competent authority are not impartial or have no effect is a cogent indicator of persecution.**

Agents of persecution

24. In contrast to the interpretation adopted by the majority of other state parties to the Refugee Convention (including most European states, the United States, Canada, Australia and New Zealand) some European states have adopted a narrow interpretation of the Refugee Convention. This interpretation restricts refugee status to those who have a well-founded fear of persecution by the state only or where the state condones or tolerates persecution.²¹ They do not accept that action by non-state agents which the state is unable to prevent is also persecution. The UN High Commissioner for Refugees has repeatedly and strongly stated that persecution can emanate from non-state agents.
25. In ECRE's view, a fear of persecution can be well-founded irrespective of whether it is the actions of the state which are feared, or non-state agents. Article 1A (2) of the Refugee Convention does not refer to or require action by the state or a state authority. As paragraph 65 of the Handbook makes plain, persecution is in practice often the result of acts of persons who are not controlled by any state authority and against whom the state is unable to provide protection.²² To deny people the protection

of the Refugee Convention simply because they are being persecuted by the wrong person or organ creates an anomaly in the law.

26. Asylum claims submitted by women are frequently rejected on the grounds that the persecutor is a family member, i.e. that the persecution is “private” and, therefore, does not engage the international community in any protection obligations.²³ ECRE notes that states do have duties in international law to prevent harm by non-state agents and that in situations where there is a violation of human rights then there is persecution. A family member can be considered just as much an agent of persecution as an armed opposition group.²⁴ We re-iterate that whether a fear of persecution is well-founded in these cases depends upon the willingness and ability of the state to protect.

27. **ECRE's position is that state complicity in persecution is not a pre-requisite to a valid refugee claim. This view flows from the language of Article 1A(2) itself and has been confirmed by the overwhelming trend of international case law.**²⁵

Agents of persecution in situations of state breakdown

28. This position is especially relevant to situations where there has been a breakdown of state structures in a country and one group is persecuting another on one of the Refugee Convention grounds. In such cases the members of the persecuted group should be considered refugees. If the state ceases to exist then *ipso facto* it is unable to protect its citizens against persecution.
29. Protection of citizens is quintessentially a state function. However, some European states have taken the view that refugees can be rejected on the grounds that they can be protected by so-called *de facto* authorities, which have either replaced an extinct state or which control parts of state territory previously under the control of a still existing state. The latter notion has become closely linked to the idea of an internal protection alternative (SEE BELOW). **ECRE's position is that no-one can be**

returned to an authority which has not been accepted into the international community of states and/or which has no status in international law. Returning refugees to *de facto* authorities undermines the international system and weakens refugee protection. In the context of protection of human rights, it is crucially important that the authorities in the country of origin have the ability and willingness to fulfil obligations under human rights treaties. Part of their ability to do so depends upon whether they have obligations under human rights treaties to protect human rights and to prevent human rights abuses: this is a question of legal standing as well as practical reality. ECRE notes that human rights obligations relate to state actors and not to non-governmental actors. These obligations mean not only the prevention of rights violations but also the promotion of the enjoyment of rights.²⁶

War or civil war situations

30. ECRE notes that it is hard to conceive of a recent war or civil war situation which has not resulted in or been motivated by persecution for one of the grounds in Article 1A(2) of the Refugee Convention and agrees with the Conclusion of the 49th Session of the UNHCR Executive Committee about “the increasing use of war and violence as a means to carry out persecutory policies against groups targeted on account of their race, religion, nationality, membership of a particular social group, or political opinion.”²⁷
31. The Refugee Convention requires that a well-founded fear of persecution be for reason of one of the five permitted Convention grounds. Unless this link can be established, the claim to refugee status must fail. Persecution can and does occur in situations of war or internal armed conflict. **It is ECRE's position, therefore, that persons fleeing from situations of war or internal armed conflict should never be automatically denied refugee status, since generalised violence does not preclude the existence of a well-founded fear of**

persecution by an individual person or a group of people. (SEE ABOVE)

32. An argument has been advanced by some commentators and courts that unless a person fleeing a civil war situation can show that they are "differentially at risk" i.e. more at risk than other victims or potential victims of generalised violence, for a Convention reason then that person is not a refugee. This argument has been advanced as a way of highlighting the need for a refugee claimant to show a fear of persecution for reason of one of the Convention grounds rather than a fear of violence which affects everyone equally. However, it has been taken to mean that one must show an additional risk of persecution even in situations where there is a conflict which is based on racial or religious differences.
33. ECRE believes that in a situation of generalised violence only those who can show a risk of serious harm for a Convention reason qualify for asylum. However, if everyone within a state in a conflict situation is at risk for a Convention reason then they will all potentially qualify for asylum, irrespective of the size of the group at risk.²⁸

The Internal Protection Alternative

34. Some European states refuse asylum on the grounds that a refugee claimant could relocate to another area in his or her country of nationality or former habitual residence and thus avoid persecution; in other words, it is stated that the threat of persecution does not extend to the entire territory of the country of origin²⁹. There is no requirement in the Refugee Convention that a refugee should first seek safety in another part of his or her country of origin before seeking surrogate protection or that the fear of persecution should extend to the whole territory of the country of origin.
35. The primary use made of the internal protection alternative notion has been to deny protection to those who would otherwise be recognised as refugees. Some states have not focused on the key question

of whether a refugee claimant is genuinely free from a risk of serious harm in the country of origin. States have also used the notion in negative credibility findings, arguing that as the refugee claimant did not "flee" internally first their claim for asylum abroad is not genuine. ECRE notes that there have been cases where European states have denied protection on grounds of internal "flight" to persons from one ethnic group who have been forced out of their home are within the country of origin by another group: in such cases, European states have directly contributed to the worsening of a problem of internal displacement of persons.

36. **ECRE's position is that the focus of enquiry must always be on whether a refugee claimant has a well-founded fear of being persecuted in his or her country of origin.**
37. **As part of the enquiry into well-founded fear in cases where an internal protection alternative may arise ECRE's position is that unless the following criteria can be fulfilled then no internal protection alternative exists:**
- in the proposed site of internal protection, the risk of serious harm for a Convention reason must be less than reasonably likely to occur
 - the claimant must be able to access the area of internal protection in safety and dignity and legally
 - the area of internal protection must be free from conditions which could force the rejected claimant back into the area where there is a risk of serious harm for a Convention reason, i.e. it must offer a durable protection alternative
 - conditions in the area of internal protection must afford at least the same standard of protection of core human rights as the Refugee Convention does (SEE ABOVE)³⁰

- the protection must be afforded by a de jure, not just de facto authority.
38. An internal protection alternative will only exist if each criterion is met. **In addition, it is ECRE's position that an internal protection alternative rarely exists where the state is the persecutor although in each case the notion of an internal protection alternative should be applied very carefully.**

Refugees sur place

39. A well-founded fear of persecution can arise after the time of a refugee claimant's departure from his or her country of origin. A well-founded fear of persecution may be based on the fact that the situation in his or her country of origin has changed since departure, giving rise to a risk of serious harm for him or her, or it may be based on the refugee claimant's own actions after departure. The critical point is that a well-founded fear of persecution must be current.
40. A political conviction may be attributed to the claimant by the persecutor, notwithstanding a lack of real political conviction on the part of the refugee claimant if, for example, the claimant has simply decided to extend a period abroad, or did not return in time at the summons of a new government. A well-founded fear of persecution can also arise where the persecutor in the country of origin knows, or reasonably suspects, that someone has claimed asylum abroad.

Serious harm

41. "Persecution" is not a term defined in the Refugee Convention, nor is there a universally accepted definition. However, ECRE notes that "persecution" should generally be understood as a term connoting a serious violation of human rights or the repetition of violations of rights.

42. ECRE notes that what constitutes serious harm will vary according to the nature of an act or its repetition, and the characteristics of the victim. In children's cases especially, ECRE notes that the impact of a seemingly minor act may be sufficiently grave to amount to serious harm because of the child's comparative vulnerability.³¹
43. ECRE emphasises that several individual acts can amount to persecution if, taken together, they add up to serious harm.
44. **ECRE believes that, taking the Preamble to the Refugee Convention as a guide, it is necessary to look at the list of human rights protected by international treaties and how their violation, or threatened violation, can merit protection.**
45. The international community has recognised that there are certain basic rights, including both freedoms from interference and entitlement to resources, which all states are bound to respect as a minimum condition of legitimacy. The International Bill of Rights, consisting of the Universal Declaration of Human Rights³² and the International Covenants on Civil and Political Rights³³ and on Economic, Social and Cultural Rights³⁴ is central to an understanding of the minimum duty owed by a state to its nationals.
46. **For the purposes of defining "serious harm" ECRE believes that it is not the nature of the right at stake which matters but the gravity of the harm to the person concerned.**

Persecution, not prosecution

47. ECRE notes that whilst appearing to be lawful, prosecution or punishment, or the use of civil actions such as libel laws, may amount to persecution where they are executed primarily for one of the reasons in Article 1A(2) or where they include a discriminatory element. The law itself may be discriminatory, and it is essential to compare the law and its use against international standards. Relevant considerations in assessing a prosecution for, e.g., political, religious or cultural activities would be whether there was a

clear legal basis for the prosecution, a public interest, whether it was proportionate to the ends to be achieved and necessary in a democratic society.

48. Discriminatory prosecution can occur where a criminal law provision is applicable to all but where only certain persons are prosecuted under the provision on one of the grounds protected by Article 1A(2). **ECRE believes that discriminatory prosecution based on a Convention reason may constitute persecution.**
49. Discriminatory punishment can occur where a criminal law punishment is applicable to all but where certain persons are punished more severely on one of the grounds in Article 1A(2). **ECRE believes that discriminatory punishment based on a Convention reason may constitute persecution.**
50. A criminal act committed by someone in their country of origin can give rise to a well-founded fear of persecution as well as prosecution. **ECRE believes that the nature of the crime, the prosecution, and the criminal law provision in the country of origin, should be evaluated by comparison with international standards.** For example, prosecution for putting up posters, or a libel action, may in reality be an attempt to curb free speech and may constitute a violation of international law.

Connexion to a Convention reason

51. **ECRE believes that the following grounds on which refugee status is recognised may overlap and several will often be applicable to the same person. It is often the case that the following grounds are simply attributed to the person by the persecutor.**

Race

52. **There is no universally accepted definition of the term „race“ but, for the purposes of the Refugee Convention, the concept should be understood in the**

broadest sense and include membership of different ethnic groups.³⁵ ECRE emphasises here that the perception of the persecutor is relevant in the definition of race, which is sociological rather than biological.³⁶

Religion

53. The concept of religion is not well defined in international law. **ECRE's position is that the term "religion" should be given a broad meaning and be understood to include theistic, non-theistic and atheistic beliefs.**³⁷ Persecution on religious grounds may take various forms, such as a total ban on worship and religious instruction, or severe discriminatory or persecutory measures against persons belonging to a particular religious group.³⁸ Persecution on religious grounds may also occur where a person does not wish to profess any religion, refuses to take up a particular religion or does not wish to comply with all or part of the rites and customs relating to a religion.

Nationality

54. **Here, the term should not be confined exclusively to the idea of citizenship.** It should also include membership of a group determined by its cultural or linguistic identity, traditions or customs, common roots or its relationship with the population of another State. Stateless persons within a state may also be considered a minority group. A minority group may also be the persecutor of a majority group.³⁹

Membership of a particular social group

55. The definition of a "particular social group" within the Refugee Convention definition has excited much academic comment and litigation in many jurisdictions. Given the lively debate about the meaning of this phrase, ECRE is cautious about advocating one particular view over another. However, ECRE does not believe that the phrase is meaningless- it does extend protection to groups of people not covered by the other four grounds. But nor is the phrase a "catch-all" guaranteeing protection to all those who

would otherwise not come within the Article 1A(2) definition.

56. ECRE believes that some inspiration may be drawn from the meaning attached to the other four grounds: race, religion, nationality and political opinion can all be thought of as denoting characteristics which are either immutable or which are so fundamental to one's personality that a person should not reasonably be expected to change them in order to avoid persecution. However, it should be borne in mind that the categories of "particular social group" can never be closed. More than perhaps any other area of the Convention, the phrase "membership of a particular social group" has to be left to evolve in line with society's understanding of groups within it. The comparison with the other four grounds is useful in one important respect: the grounds of race, religion, nationality and political opinion embrace enormous groups of people. There is no reason, therefore, to assume that the phrase "particular social group" in the Refugee Convention is meant to be confined to narrowly defined, small groups of people.
57. **ECRE believes that there should be no requirement that the members of a particular social group form a cohesive group.** The members of the social group may not know each other, may not even consider themselves part of the social group and the only thing which nominally unites them is the characteristic which gives rise to the persecution. The group should not be defined by its persecution, but the persecution is indicative that society as a whole perceives this group in a certain way and persecutes it because of this perception.
58. **ECRE wishes to emphasise its position that the phrase "membership of a particular social group" can encompass, *inter alia*, classes of people such as women, homosexuals, transsexuals, the family and children.** Saying this does not mean that these classes of people cannot qualify for refugee status on other grounds: for example, women who reject the social mores of their society could be considered members of a particular social group or as

exhibiting a political opinion. Similarly, homosexuals could be persecuted in one country because of the theocratic nature of the government i.e. on political and religious grounds, whereas in other countries it will simply be because they are defined as a particular social group, where there is an unclear or ambiguous genesis of the persecution. ECRE notes that in some jurisdictions, homosexuals have been denied protection on the grounds that they could hide their sexuality. We believe such grounds are inconsistent with international law and the jurisprudence of the European Court of Human Rights; it our belief that no-one should live under a self-denying ordinance in order to avoid being persecuted.

Political opinion

59. To be recognised as a refugee, an applicant will have to show more than mere disagreement with the policies of the authorities or other agent in the country of origin. The applicant will also have to show that the authorities or other agent know about the applicant's political opinions (or could know about them) and do not tolerate them.
60. ECRE believes emphatically that it is not a requirement in the Refugee Convention that a refugee claimant should have been involved in political activity. Indeed, protection on the ground of political opinion is extended not only to those with identifiable political affiliations or roles, but also to other persons at risk from elements within their home community. **It is ECRE's position that the focus of enquiry must always be the existence of a *de facto* political attribution by the persecutor in the state of origin, notwithstanding the objective unimportance of the claimant's political acts, his or her own inability to characterise his or her actions as flowing from any political ideology, or even an explicit disavowal of the views ascribed to him or her by the persecutor.**
61. As with the discussion of non-state agents in relation to women refugees (SEE ABOVE), many are rejected asylum because their

opinions are not seen as “political” either because they involve the rejection of social mores and, hence, are seen as merely personal preferences or are seen as too small-scale. ECRE notes again that the attitude of the persecutor is key, notwithstanding the perceived unimportance of someone’s opinions or acts persecution can arise.

Refusal to perform military service

62. Persons who claim refugee status on the basis of refusal to perform military service are neither refugees *per se* nor excluded from protection. In general terms a person is not a refugee if his or her only reason for desertion or draft evasion is dislike of military service or fear of combat. However, **ECRE believes that there are four major grounds on which refugee status for refusal of military service should be recognised.**

- a) claims based on the fact that conscription for engagement in a legitimate and lawful purpose is conducted in a discriminatory manner, or that prosecution or punishment for evasion or desertion is biased - in relation to one of the five Convention-based grounds of protection.
- b) claims based on an opinion as to the fundamental illegitimacy or unlawfulness in international law of the form of military action avoided. This includes military action intended to violate basic human rights, ventures in breach of the Geneva Conventions, and non-defensive incursions into foreign territory. It would also include claims based on the avoidance of military action which, if undertaken, would have brought the refugee claimant within the terms of the exclusion clauses. It is not necessary, for such claims to succeed, for the refugee claimant to show that the actions avoided have been internationally condemned. It is sufficient that the actions in themselves constitute violations of the laws and customs of war. There is a fundamental interest on the part of the international community in ensuring that those who

avoid joining in oppressive military acts are granted protection.⁴⁰

- c) claims based in a fundamental objection to military service. Such claims are akin to raising political opinion or religion as a ground of persecution and encompass ethical, moral or philosophical objections to military service. Refusal to bear arms for the state, however motivated, reflects an essentially political opinion regarding the permissible limits of state authority and is, inherently, a political act. Where there is no alternative to military service for conscientious objectors then a fundamental right to freedom of belief is violated and refugee status should be recognised.⁴¹
- d) in claims for asylum brought by children who fear conscription as child soldiers refugee status should be granted. In these cases, children may be targeted as children or refusal to serve may be or be perceived as an expression of a political opinion. As such, claims for refugee status would fall either under the limb of “membership of a particular social group” or “political opinion”. Again, there is a fundamental interest on the part of the international community in ensuring that people under 18 are not forcibly conscripted into fighting.⁴²

Outside the country of nationality or former habitual residence.

63. **ECRE believes that, here, "nationality" is meant to be interpreted as "citizenship" of a country, as distinct from the wider sense of "nationality" used as one of the grounds of persecution (SEE ABOVE).** The refugee definition delineates those having a citizenship of a country from stateless persons. In order to be a refugee, a person must show that they can not or will not return to the country or countries in which they have citizenship or, if without citizenship of any country, the country in which they have been considered ordinarily resident. If a person remains within the internationally recognised borders of his or her country of citizenship or residence then they are not refugees within the Convention definition.

Dual or multiple nationality

64. If a person has citizenship of more than one country then they must establish a well-founded fear of persecution for a Convention reason in relation to each country of citizenship. The Refugee Convention interposes international protection only where state protection has failed. However, ECRE believes that in each case, citizenship must be more than merely formal. It must bring with it real rights of residence and protection.
65. For this reason, **it is ECRE's position that before returning a rejected refugee claimant to a country of citizenship the asylum state must ensure that the rejected claimant is already in possession of the citizenship of that country and has meaningful access to the rights which citizenship of that country bestows.**

Statelessness

66. The absence of state protection is an essential element in the status of refugee. This is especially so where the denial of citizenship is based on one of the reasons in the Refugee Convention.
67. For someone who has been stateless prior to the occurrence of persecution, the country to which a stateless person cannot return is usually the country in which they have previously been living. If someone is forced to flee his or her country of former habitual residence then they are usually unable to return and have no right in international law to do so. In cases where a stateless person is found not to be a refugee then the Statelessness Conventions may apply.⁴³ **It is ECRE's view that the Statelessness Conventions should be used more readily in the assistance of stateless persons than they are at present and that an appropriate status should be granted.**⁴⁴
68. Article 1D should not be invoked to exclude a refugee unless it can be shown that the United Nations agency which is mandated to take care of the person has both an assistance and a protection mandate and is able to fulfil these responsibilities in practice. In particular, as a refugee will, by

definition, be outside the area of the agency's mandate the asylum determination authorities must prove that the refugee can return to the agency's area of competence.

**CESSATION OF REFUGEE STATUS
(ARTICLE 1C)**

69. The Refugee Convention conceives of refugee status as a transitory phenomenon, which ends when a refugee secures a durable solution to his or her cause of flight. The three traditional durable solutions are held to be: repatriation to the country of origin; resettlement into a third country; and integration into the asylum state.
70. Where a refugee re-avails him- or herself of the protection of their country of origin then surrogate protection is no longer needed and recognition of refugee status can be withdrawn. **ECRE's position is that before taking such a serious step, the asylum state should ascertain that the refugee has effectively, genuinely and voluntarily re-availed him- or her- self of the protection of the country of origin.** Merely re-newing a passport, without more, does not establish that the refugee intends to re-avail him- or her- self of the protection of their country of origin. Similarly, where a refugee undertakes a short trip to the country of origin, perhaps on a "go and see" basis or to visit a sick relative, without more, this does not constitute an act of re-availing oneself of the protection of the country of origin.
71. While permanent resettlement into a third country is a clear reason not to recognise someone as a refugee, the mere fact that a person has applied for resettlement into a third country is not enough. In cases where a refugee claimant has also applied for resettlement to a third country, some European countries have shown a tendency towards obliging refugees to decide between continuing an asylum application and seeking the protection of a third country, even when the outcome of both sets of procedures is still uncertain. ECRE believes that such a restriction is unnecessary and unacceptable.

72. **Where the cessation clauses are applied because of a change of circumstances in the country of origin, the asylum state must ensure that the changes are effective, fundamental and durable before proceeding to withdraw recognition of refugee status.** Whether the change in the country of origin can be said to meet these tests should be determined in an objective and verifiable manner. Information provided by the UNHCR and NGOs may be of considerable relevance here. Whether or not refugee status is withdrawn should always be investigated on an individual basis. ECRE also believes that someone who has suffered particularly traumatic treatment at the hands of their authorities should not be expected to return to the country of origin, even if the authorities have changed. It may be that where there is no objectively justifiable reason for the continuation of refugee status that such a person is integrated locally or re-settled.
73. **ECRE's position is that refugee status should be maintained unless someone falls clearly within one of the cessation clauses. Refugees should not be subjected to constant review of their status.**

EXCLUSION FROM REFUGEE STATUS (ARTICLE 1F)

74. The clauses in Article 1F of the Refugee Convention are designed to exclude from protection persons who have committed very serious crimes *outside* the asylum state. They may also be applied where the acts become known after the grant of refugee status. **In view of the serious consequences of such a decision for the refugee, Article 1F must be used with care and after thorough consideration, and in accordance with fair and efficient procedures.** We would emphasise, in particular, that the burden of proving exclusion from refugee status is upon the asylum state. Above all, the application of the exclusion clauses should be restrictive.

75. ECRE believes that those who are responsible for human rights violations should be brought to justice. As a matter of law, however, the exclusion clauses can only be applied to those who have first met the criteria of the inclusion clauses. ECRE notes that all individuals, including those excluded from protection as refugees continue to be protected by international and regional human rights law. It may well be that the excluded refugee is protected from removal to the country of origin or a third state, perhaps because of a risk of treatment prohibited by the UN Convention Against Torture or the European Convention on Human Rights.

Article 1F (a)

76. This clause excludes those who have committed three distinct sorts of crimes. A "crime against peace" comprises the planning of or participation in an unlawful war. ECRE notes that mere participation in a "crime against peace" is not sufficient to merit exclusion and that this clause is directed against leaders or organisers of crimes against peace. A "war crime" involves violations of the laws of war, as defined by the Geneva Conventions and Protocols and customary international law. A "crime against humanity" consists of fundamentally inhumane conduct, often grounded in political, racial, religious or other bias. Genocide, slavery, torture and apartheid are examples of crimes within this category, all four of which crimes are specifically outlawed by international treaty.
77. ECRE notes that the crimes mentioned in Article 1F(a) have been the subject of expansion in the light of the drafting process of the Rome Statute of the International Criminal Court and the developing jurisprudence of the two Ad Hoc Tribunals for Rwanda and the former Yugoslavia. As the jurisprudence in this area continues to grow, definition of crimes will necessarily be subject to those future refinements and changes in international law.

Article 1F (b)

78. This exclusion clause, concerning non-political crimes, attempts to bring the

Refugee Convention into line with extradition law and reflects the exception to the right to asylum contained in Article 14(2) of the Universal Declaration of Human Rights. **ECRE notes that this exclusion clause only concerns crimes committed in the country of origin or in transit and is, therefore, distinct from the provision of Article 33(2).** Because of the severity of the consequences for an excluded refugee the nature of the criminal offence must be sufficiently serious to raise the prospect of exclusion. The prospect of such a person being granted a complementary form of protection is a possibility. Where an asylum-seeker has committed a serious crime, such as taking hostages or killing people in pursuit of a political objective, the authorities in the asylum country will need to weigh carefully the ends to be achieved by the act and the means employed. ECRE believes that the more outrageous the act, the less likely is it to be found proportionate to the ends to be achieved. **However, due consideration has to be given to whether the criminal act is unavoidable in the light of the individual circumstances of the person involved and the situation in the country of origin.**

Article 1F (c)

79. This clause refers to the purposes and principles of the United Nations. The purposes and principles referred to in Article 1F (c) are in the first instance those laid down in the Charter of the United Nations, which determines the obligations of the States party to it in their mutual relations, particularly for the purpose of maintaining peace, and with regard to human rights and fundamental freedoms. Article 1F (c) applies to cases in which those principles have been breached and is directed notably at persons in senior positions in the State who, by virtue of their responsibilities, have ordered or lent their authority to action at variance with those purposes and principles as well as at persons who, as members of the security forces, have been prompted to assume personal responsibility for the performance of such action.
80. ECRE would emphasise here that membership *per se* of an organisation which advocates or uses violence is not necessarily

decisive or sufficient to exclude a person from refugee status. Individual liability must be proved, which entails evidence of a positive act and an intention by the claimant. As a corollary of this position, the exclusion of the head of a family or one of its members should not automatically lead to the exclusion of other family members.

81. **In order to determine whether an action may be deemed contrary to the purposes and principles of the United Nations, Member States should look to the Charter of the United Nations, which lists four purposes of the Organisation: 1) to maintain international peace and security; 2) to develop friendly and mutually respectful relations among nations; 3) to achieve international co-operation in solving socio-economic and cultural problems, and 4) in promoting respect for human rights.** In closer defining what the purposes of the United Nations are, the asylum state should take into account the conventions and resolutions adopted in this connexion under the auspices of the United Nations.

¹ Done at Geneva on 28 July 1951. Entered into force 22 April 1954, in accordance with Article 43. UNTS No.2545, Vol.189, p.137

² Done at New York. Entered into force 4 October 1967, in accordance with Article VIII. UNTS No.8791, Vol.606, p.267

³ ECRE Position on the Harmonisation of the Interpretation of Article 1 of the 1951 Refugee Convention, June 1995; 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 Standing Committee, July 2000. EC/50/SC/CRP.18

⁴ Article 38 of the Refugee Convention states that “any dispute between parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice (ICJ) at the request of any one of the parties to the dispute.” The ICJ has yet to receive such a reference.

⁵ See ECRE Position on the Implementation of the Dublin Convention in the Light of the Lessons Learned from the Implementation of the Schengen Convention, December 1997

⁶ For the commitment made to the Convention at the Tampere European Council, 15-16 October 1999 see The ECRE Tampere Dossier, May 2000.

⁷ A/CONF.157/23 (12 July 1993)

⁸ 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”

⁹ see ECRE Position on the Enlargement of the European Union in relation to asylum, September 1998

¹⁰ see Observations by ECRE on the Presidency Conclusions of the Tampere European Council, 15 and 16 October 1999

¹¹ The UN High Commissioner for Refugees is the only person mandated by the international community to provide protection to refugees (Art.1, Ch.1, Statute of the Office of the UNHCR). Her mandate is to assist governments, which carry the first responsibility for refugee protection. In response to challenges to her protection mandate the High Commissioner has taken several initiatives, such as the Partnership in Action process (PARinAC, Oslo 1994) and Reach-Out (New York, 1999).

¹² Published by the Office of the UN High Commissioner for Refugees, Geneva, September 1979. Re-edited 1992.

¹³ Refugee Protection: a European Challenge. Vigdis Vevstad. Tano Aschehoug, 1998

¹⁴ see ECRE Guidelines on Fair and Efficient Procedures for Determining Refugee Status, September 1999.

¹⁵ see Article 3 UN Convention on the Rights of the Child 1989 (CRC89) and the Separated Children in Europe Programme Statement of Good Practice, February 1999; also, SCE Programme of Action 2000.

¹⁶ see ECRE Position on Asylum-Seeking and Refugee Women, December 1997.

¹⁷ These criteria follow the work of Professor James Hathaway in *The Law of Refugee Status*, Butterworths 1992.

¹⁸ ECRE has produced guidance on what fair and efficient procedures should look like in the paper *ECRE guidelines on fair and efficient procedures* on such issues as standard and burden of proof, credibility etc.

¹⁹ See Para.44 UNHCR Handbook

²⁰ Para.45 UNHCR Handbook

²¹ see ELENA Research Paper on non-state agents of persecution. ECRE London, November 1998.

²² As the Supreme Court of Canada stated in the 1993 case of Canada (Attorney-General) v Ward: "persecution under the Convention includes situations where the State is not in strictness an accomplice to the persecution, but is simply unable to protect its citizens".

²³ See doctoral thesis “Gender and Refugee Status”, Thomas Spijkerboer 1999

²⁴ Shah and Islam v SSHD

²⁵ see TI v UK. Eur Ct H R admissibility decision

²⁶ In the 1990s, the international community devised new approaches to refugee protection which involved the creation of “safe havens” for groups of refugees, usually within the territory of a power which was persecuting the group (Northern Iraq 1991; Bosnia; Rwanda 1994). In these cases “protection” was provided by an international armed force, an intervening power, or by a client group of an intervening power. In none of the cases so far seen has the creation of a safe haven explicitly challenged the sovereignty of the persecuting power over the safe haven area. This represents the ultimate contradiction and danger of safe havens. Too often, such places have become death traps, especially as the persecutor usually has time on his

side (Bill Frelick; the World Refugee Survey 2000, US Committee for Refugees)

²⁷ Executive Committee Conclusion No.85 (XLIX) on International Protection.

²⁸ The error is most easily shown by an example: a situation could arise where, in an internal armed conflict between two opposed religions, every citizen of the state has a well-founded fear of persecution - because he or she belongs to one religion or another. On one view, as every citizen faces exactly the same risk of persecution, there is no "differential" risk. But if one were to ask why any specific refugee claimant from that country had a well-founded fear of persecution, the answer would have to be that it was "for reason of" his or her religion. This answer would satisfy the Refugee Convention definition.

²⁹ See ELENA research paper on the application of the concept of the internal flight alternative. ECRE London, November 1998.

³⁰ The Michigan Guidelines on the Internal Protection Alternative. First Colloquium on Challenges in International Refugee Law, April 9-11 1999.

³¹ see Para.52 UNHCR Handbook

³² Adopted and proclaimed by UN General Assembly Resolution 217 A (III) of 10 December 1948.

³³ UNGA Resolution 2200 A (XXI) of 16 December 1966. Entered into force 23 March 1976, in accordance with Article 49.

³⁴ UNGA Resolution 2200 A (XXI) of 16 December 1966. Entered into force 3 January 1976, in accordance with Article 27.

³⁵ Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination 1965 states that “In this Convention, the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

³⁶ On the connexion between “persecution” and the concept of race it may be helpful to consider the opinion of the European Commission of Human Rights in *East African Asians v United Kingdom* (1981) 3 EHRR 76, thus: “[207] that discrimination based on race could, in certain circumstances, of itself amount to degrading treatment within the meaning of Article 3 of the [European] Convention [on Human Rights]. The Commission recalls in this connection that, as generally recognised, a special importance should be attached to discrimination based on race; that publicity to single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity; and that differential treatment of a group of persons on the basis of race might therefore be capable of constituting degrading treatment when differential treatment on some other ground would raise no such question.”

³⁷ For a brief discussion, see Religion and Persecution: should the United States provide refuge to German Scientologists? Arthur C Helton and Jochen Muenker [1999] IJRL 310

³⁸ para.72 UNHCR Handbook

³⁹ Paras.74-76 UNHCR Handbook

⁴⁰ Para.171 UNHCR Handbook

⁴¹ The Refugee in International Law. Guy Goodwin-Gill, 1996

⁴² Draft Optional Protocol to the CRC on the involvement of children in armed conflicts adopted by the Working Group

⁴³ In cases where a stateless person is found not to be a refugee and the receiving state has not acceded to the Statelessness Conventions, complementary protection should be granted.

⁴⁴ see also Conclusion No.78 (XLVI)