

POSITION ON THE FUNCTIONING OF THE TREATY ON EUROPEAN UNION IN RELATION TO ASYLUM POLICY

Introduction

1. In June 1995 ECRE issued a Position Paper on *The Functioning of the Treaty on European Union in relation to Asylum Policy* with reference to the Inter-governmental Conference on the Revision of the Treaty on European Union, (IGC). In this paper ECRE drew attention to the discontent expressed by all the major institutions of the European Union concerning the effectiveness and the adequacy of the Third Pillar of the Maastricht Treaty.
2. ECRE urged the institutions of the Union and the Governments of the Member States to utilise the opportunity of the 1996 IGC and undertake institutional reform to improve co-operation and effectiveness, guarantee transparency and to ensure judicial and democratic control of all Council decisions relating to asylum and refugees.
3. In further contribution to the discussions of the Conference on the revision of the Treaties, ECRE here responds to developments since June 1995.

PART I: General Remarks on the Institutional Framework

Considering:

4. that there is a recognised need for a common approach by the Union and for greater co-operation between Member States on questions related to refugees and the right of asylum;
5. that the 1994 Communication of the Commission on Immigration and Asylum Policies¹ offers a useful framework for a comprehensive approach to refugee situations and indicates a constructive strategy beyond the current approach taken within the inter-governmental framework, which seems to result in the adoption of policies based on the lowest common denominator;
6. that the 1995 Communication of the Commission on Article K.9², was correct in promoting the fundamental revision of the Third Pillar within the framework of the IGC rather than through the eventual application of Article K9;
7. that in Article G of the *General Outline for a Draft Revision of the Treaties*,³ drawn up by

the Irish Presidency for the Conference of the Representatives of the Governments of Member States, the Presidency stated that the role of institutions and decision making procedures under Title VI remain to be considered further by the Conference;

8. that in November 1995 the Council agreed that the adopted acts and other texts in the field of asylum and immigration are to be published in the Official Journal of the European Communities⁴, but that access for all interested parties (i.e the European Parliament, non-governmental organisations and inter-governmental organisations) to information during the development of these acts is still not guaranteed;
9. that it is of the utmost importance that all discussions within the Council framework, especially within the 'Centre for Information, Discussion and Exchange on Asylum' (CIREA) are open to public scrutiny;

ECRE:

10. urges the Conference to continue working towards the transfer of competence for dealing with refugee and asylum matters to the European Community itself, thereby allowing for full democratic and judicial control;
11. or, if the above transfer proves to be politically impossible, at least to adopt qualified majority voting within the Third Pillar for decisions by the Council in all matters relating to asylum and refugees, when further considering the appropriate forms and procedures under Article K.3(2), as a basic prerequisite for strengthening decision making procedures;
12. believes that the Commission should have an exclusive right of initiative and not a shared right with the Member States under either of the options suggested by the Irish Presidency⁵, in order to counter the inevitable tendency of Member States to act primarily in accordance with national interests;
13. believes that the Court of Justice must have full competence in the areas of asylum and immigration through the amendment of Article L of the TEU in order to ensure supranational jurisdiction of the discrepancies which currently exist between the Member States in the interpretation and application of provisions in this area;
14. welcomes the reference in Article 192a of the draft revision to the right of access to European Parliament, Council and Commission documents, but believes that this right of access should include draft documentation and be subject to the minimum number of limiting conditions;
15. recommends as an alternative to CIREA, the establishment of an independent refugee commission⁶ composed of representatives of the Member States, non-governmental organisations, and inter-governmental organisations (amongst which UNHCR) and other experts, to assume the responsibility for research and analysis of the situation in the countries of origin;
16. believes that the substantive issues laid down and the legal instruments adopted hitherto under the Third Pillar should be subject to full renegotiation, under these democratic conditions and in consultation with UNHCR, and not merely transferred to the First Pillar;

17. believes that the highest standards of practice in the asylum field, rooted firmly in values of democracy and human rights, should be taken as a starting point of these negotiations.

PART II: Specific Remarks on Substantive Issues

Considering:

18. that in Article C of the *General Outline for a Draft Revision of the Treaties* immigration and asylum issues, as subjects for further communitarisation, were examined in substance for the first time;
19. that the Council has asked the Conference to develop the proposal⁷ to amend the Treaties in order to establish it as a clear principle that no citizen of a Member State of the Union may apply for asylum in another Member State;

ECRE:

20. welcomes the substantive examination of issues related to refugees and the right of asylum in Section 1, Chapter 2, of *The General Outline for a Draft Revision of the Treaties*,⁸ in particular the fact that Article C.2 deals with persons in need of international protection who fall outside the scope of the Geneva Convention⁹;
21. furthermore welcomes the explicit references to Temporary Protection¹⁰ and “burden sharing”/ sharing the responsibility¹¹ in Article C.2;
22. believes that there is an urgent need for clarification of the meaning of the words “*qualification of third country nationals as refugees*” as described in point 1c in Article C of the draft revision. This point would seem to refer to Article 1 of the 1951 Geneva Convention, an international treaty obligation which as such should not be a subject for consideration within a proposal for the revision of the Treaties on European Union;
23. therefore urges that the 1996 Council Joint Position on the harmonized application of the term “refugee” in Article 1¹² should not be converted into a binding legal instrument;
24. furthermore expresses its concern with regard to the possible reinterpretation of existing treaty obligations, such as those covering the social and economic rights of recognised refugees as laid down in the 1951 Geneva Convention, the interpretation of which are the responsibility of national and international judiciaries, and UNHCR;
25. strongly supports UNHCR’s opposition¹³ regarding **the proposal by the European Council to deny the right of EU citizens to apply for asylum in another Member State** and finds the proposal to be dangerous and unacceptable for the following reasons:
 - i. If adopted, the amendment would result in each Member State being in violation of their obligations under international law. Under the 1951 Geneva Convention, as ratified by every EU Member State, it is incumbent upon those Contracting States to determine who on their territory is a refugee, irrespective of country of origin.
 - ii. In seeking to establish an automatic bar to refugee determination procedures according

to country of origin, the proposed amendment would introduce a geographical limitation to the application of the refugee definition as contained in Article 1 of the 1951 Geneva Convention, and thus violate the 1967 New York Protocol. It is also inconsistent with Article 3 of the 1951 Geneva Convention that requires Contracting States to apply its provisions without discrimination as to country of origin, and is therefore prohibited by Article 42 which does not permit reservations to certain provisions of the Convention, including Articles 1 and 3.

- iii. ECRE believes that the right to free movement enjoyed by citizens of the Member States of the European Union¹⁴ would not, in practice, be sufficient to guarantee protection to a refugee were they to seek it by means of entering and establishing residence in another Member State. They may still be forced to return to their country of origin (*refoulement*), in direct violation of Article 33 of the 1951 Geneva Convention or of Article 3 of the European Convention on Human Rights and Fundamental Freedoms, if they were subject to expulsion under Directive 64/221¹⁵ or extradition under the 1996 Convention on Extradition¹⁶.
- iv. The proposed amendment has been partially motivated by the wish to exclude terrorists from the institution of asylum. ECRE emphasises that the issue of exclusion is already provided for under Article 1F (a) of the 1951 Geneva Convention.
- v. The proposed amendment is falsely based upon the belief that we can predict human rights developments in European States over the longer term. ECRE emphasises that no country is absolutely immune from serious political or social instability resulting in human rights violations. In particular, the proposed amendment fails to take account of situations which could arise under an enlarged European Union.

¹ *Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies*, 23 February 1994. REF.COM (94) 23 final.

² *Communication from the Commission to the Council and The European Parliament on the Eventual Application of Article K.9 of the Treaty on European Union*. REF COM (95) 566 final.

³ *'The European Union Today and Tomorrow - Adapting the European Union for the Benefit of its Peoples and Preparing it for the Future — A General Outline for a Draft Revision of the Treaties'*. Dublin II. 5 December 96, REF CONF 2500/96 COR 1

⁴ OJ C 274 19.9.1996

⁵ Point 1, Article G of *A General Outline for a Draft Revision of the Treaties*

⁶ ECRE believes that bringing information on country of origin into the public domain both facilitates the examination of individual asylum applications and is an important element in guaranteeing fair and efficient procedures for determining refugee status (see *ECRE Proposal for Fair and Efficient Asylum Procedures*, October 1990); and believes that the Canadian Immigration and Refugee Board's "Documentation, Information and Research Branch" may be a useful model.

⁷ Chapter IV, *Conclusions of the Presidency* - Dublin 13/14 December 1996 REF SN 401/96

⁸ See footnote 4

⁹ See *ECRE Working Paper on the Need for a Supplementary Refugee Definition*, April 1993, confirmed as ECRE policy as of May 1996.

¹⁰ See *ECRE Position Paper on Temporary Protection in the Context of the Need for a Supplementary Refugee Definition*, February 1997.

¹¹ See *ECRE Position on Sharing the Responsibility: Protecting Refugees and Displaced Persons in the Context of Large Scale Arrivals*, March 1996.

¹² *Council Joint Position on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term "refugee" in Article 1 of the Geneva Convention of 28 July 1951 relating to the status*

of refugees, 4 March 1996 (Published in OJ L 63, 13/3/96).

¹³ UNHCR *Position on the proposal of the European Council concerning the treatment of asylum applications from citizens of European Union Member States*, January 1997.

¹⁴ As laid down in Article 48 and following of the Treaty on European Community.

¹⁵ This Directive permits expulsion in the interests of public policy, health or security.

¹⁶ *Convention drawn up on the basis of Article K.3 of the Treaty on European Union, relating to Extradition between the member states of The European Union*, September 1996. REF CONV/EXTR. (Published in OJ C 313, 23/10/96).