NOTE FROM
THE EUROPEAN COUNCIL ON REFUGEES AND EXILES
ON THE
HARMONISATION OF THE INTERPRETATION OF
ARTICLE 1 OF THE 1951 GENEVA CONVENTION

Introduction

1. The European Council on Refugees and Exiles (ECRE) welcomes recent efforts by European Union Member States to ensure a coherent interpretation and application of Article 1 of the 1951 Geneva Convention, provided that such efforts are in accordance with the highest standards of international refugee law. Standards of international human rights law - for example, Article 3 of the European Convention on Human Rights - should also be taken into account when determining who should be granted protection in Europe.

2. The process of harmonisation referred to above is being undertaken within the intergovernmental framework of the Council of EU Ministers for Justice and Home Affairs. The Council, apparently, is aiming to adopt a Resolution on this issue. In ECRE's opinion, an EU Resolution with non-binding guidelines is a doubtful instrument by which to achieve the necessary harmonisation, as it does not require any change in the national law or practice of the Member States. In order to reach a harmonised interpretation of the refugee definition, gradual adaptation to a common norm would be required, which could only be achieved through supra-national judicial supervision, as will be further explained below.

3. The divergent interpretation and implementation by Contracting States of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, including Article 1 of the Convention, may be explained by the fact that Article 38 of the 1951 Convention and Article IV of the 1967 Protocol, providing for the reference of disputes of interpretation or application to the International Court of Justice, have never been resorted to by any of the Contracting States. Similar supervisory provisions exist and are invoked when resolving disputes in the implementation and application of other international treaties. ECRE would welcome the establishment of a judicial body at the European level, which could resolve existing differences in interpretation, by EU Member States, of the 1951 Convention and the 1967 Protocol.

4. In terms of 'soft law' guidelines, the UN High Commissioner for Refugees, who as noted in

the Preamble of the 1951 Convention "is charged with the task of supervising international conventions providing for the protection of refugees", has issued at the request of states the Handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees. In addition, UNHCR has promoted the adoption of the Conclusions on the International Protection of Refugees by the Executive Committee of the High Commissioner's Programme at its annual plenary sessions. Among the Member States of the Executive Committee there are twelve of the fifteen Member States of the European Union. The Handbook and the Conclusions are generally accepted as the main international guidelines for the interpretation of the 1951 Convention, particularly of Article 1, Section A.

5. As is clear from UNHCR's Information Note on Article 1 of the 1951 Convention (March 1995), at some points the guidelines now proposed can be read as contrary to the UNHCR Handbook. It is ECRE's firm view that the Handbook is the authoritive guide to the application and hence the harmonisation of the refugee definition, and that this role of the Handbook should be made clear in any proposed EU guidelines. The guidelines should only elaborate the 1979 Handbook; they should not amend it.

Article 1, Section A of the 1951 Convention

6. Given the inter-governmental framework within which the present discussions are taking place, and given the lack of transparency accompanying this framework, the Council text on the harmonisation of Article 1 of the 1951 Convention is not available to outside bodies, such as the European Parliament or ECRE. We do, however, have reason to believe that we should present comments on several points of concern:

- the concept of persecution, particularly the agents of persecution;

- the "internal flight alternative" or "relocation within the country of origin";

- situations of civil war and other internal armed conflicts.

Agents of persecution

7. It is frequently assumed that persecution results from action by the State, including regional and local authorities. Article 1, Section A (2) of the 1951 Convention does not, however, refer specifically to action by the State or a State authority. Persecution is in practice often the result of acts of persons who are not controlled by any State authority. European national case law which recognises this fact includes, inter alia: two decisions by the Austrian Administrative Court (on 17/2/94 and 3/4/86); the Danish Refugee Appeals Board's decisions concerning persecution of Jews by Pamjat; Finnish decisions relating to both Bosnians and Somalis; the Dutch Supreme Court decision in Saydawi v. The Netherlands; and two British decisions, one involving a Tamil (ex parte Jeyakumaran) and the other involving an Egyptian persecuted by the PLO. As the Supreme Court of Canada judged in the case of 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" (c.s. 1993, June 30, Canada (Attorney General) v. Ward).

The draft guidelines should not exclude the possibility that persecution from agents other than the authorities or organs related to them can lead to recognition as a refugee, if the authorities are willing but unable to grant protection. Not only would such exclusion go against administrative practice and/or jurisprudence in the majority of Member States, but it would also fail to take account of para. 65 of the UNHCR Handbook. If the authorities are unable to offer effective protection, irrespective of their willingness, persecution from agents other than State organs or organs linked to the State can lead to recognition as a refugee (unless the temporary absence of protection is merely incidental).

8. ECRE fully supports the position formulated by the UN High Commissioner for Refugees in the Note mentioned above:

"Persecution that does not involve State complicity is still, nonetheless, persecution."

"Clearly, the spirit and purpose of the 1951 Convention would be contravened and the system for the international protection of refugees would be rendered less effective if it were to be held that an asylum seeker should be denied protection unless a State could be held accountable for the violation of his/her fundamental human rights by a non-governmental actor. It is essential that international protection is extended to such refugees and that the principle of non-refoulement is fully respected."

<u>Relocation within the country of origin (internal flight alternative)</u>

9. The position taken by States requested to grant asylum that such protection may be legitimately refused if the asylum seeker fears persecution in a specific, limited area of the country of his/her nationality or habitual residence is not referred to in the 1951 Convention or 1967 Protocol. These international instruments refer systematically to "the *country* of his nationality" or "the *country* of his former habitual residence". It is, rather, a later development in the practice of some of the Contracting States.

10. It is ECRE's firm position that the "internal flight alternative" concept should not be applied, as it can only further restrict the access of refugees to international protection. However, if States insist upon making use of this concept, then in the opinion of ECRE, the following criteria must at least be met in each case.

11. The concept of an internal flight alternative should never be applied in situations where the person is fleeing persecution from State authorities, even if the same authorities may refrain from persecution in other parts of the country.

12. ECRE fully subscribes to the view expressed in the High Commissioner's Note:

"A decision concerning the existence of an internal flight alternative should be based on a profound knowledge and evaluation of the prevailing security, political and social conditions in that part of the country. An effective internal flight alternative can only exist when the conditions correspond to the standards deriving from the 1951 Convention and other major human rights instruments. Above all, an internal flight alternative must be accessible in safety and durable in character. The possibility to find safety in other parts of the country must have existed at the time of flight and continue to be available when the eligibility decision is taken and the return to the country of origin is implemented."

13. The concept of internal flight alternative should only be applied within the general context of fair and efficient determination procedures, as advocated by ECRE, and never within the framework of accelerated or "manifestly unfounded" procedures.

14. Furthermore, it is ECRE's opinion that any internal flight alternative must be proved to be durable in character. This implies that the person fearing persecution in part A of the country should have the *actual possibility of earning a living in acceptable conditions* for him/herself and family in part B of the country. This should be a paramount consideration in evaluating any possibility of "relocation".

Civil war and other internal armed conflicts

15. The question of whether or not persecution occurs in a situation of civil war or other internal armed conflict in the country of origin is irrelevant to the status determination of the individual claimant. The determining factor will always be if the asylum claimant has a well founded fear of persecution based on one of the reasons stated in Article 1(a) of the refugee definition. Persons fleeing from situations of civil war should never be automatically denied refugee status, since generalised violence does not preclude individual persecution.

16. Particularly in situations of civil war or other internal armed conflict, whole groups of people may be exposed to persecution. In such cases, members of that group are individually assessed simply to establish whether each person belongs to the group and thereby is to be granted refugee status.

Beyond Article 1

17. Restrictive interpretation of the Geneva Convention definition can only lead to more persons in need of international protection falling outside its scope and into the non-harmonised area of sub-statuses. This rather contradictory outcome of the process of harmonisation should be avoided by applying a generous approach which takes as its starting point the widespread need for international protection.

18. Finally, ECRE would like to take this opportunity to emphasise that whereas the Organisation for African Unity and the Latin American states have both developed regional refugee definitions that are expansive in character, Europe has so far failed to develop a supplementary definition applicable to *de facto* refugees. All work undertaken on the harmonisation of the 1951 Convention definition must be seen in the context of this continuing and urgent need.

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