

ECRE

EUROPEAN COUNCIL
ON REFUGEES AND EXILES

CONSEIL EUROPEEN
SUR LES REFUGIES
ET LES EXILES

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Comments from the European Council on Refugees and Exiles

on the

Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, as agreed by the Council on 19 November 2004

(2000/0238 (CNS))

Introduction and General Remarks

The European Council on Refugees and Exiles (ECRE), a network of some 76 refugee assisting non-governmental organisations in 30 European countries, welcomes the opportunity to submit its comments on the Amended Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (hereinafter ‘the Proposal’).¹

The European Commission presented its first proposal in September 2000 on which ECRE submitted comments.² Following considerable debate on this draft, the European Council in Laeken, in December 2001, requested the Commission to bring forward an amended proposal. This was presented by the Commission in June 2002.³ On the 28 April 2004, following further protracted negotiations, the Council agreed on a general approach to the Proposal subject to agreement among Member States on a legally binding EU list of safe countries. However, unanimous agreement on this issue could not be reached and therefore an amended approach was agreed by the Council on 19 November 2004⁴ whereby the adoption of a minimum list of safe countries of origin would be postponed until after the adoption of the Proposal (by qualified majority voting in the Council and after consultation of the European Parliament).

¹ Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, 14203/04, Asile 64, of 9 November 2004.

² See Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, Brussels, 20.9.2000, COM (2000) 578 final; and Comments from the European Council on Refugees and Exiles (ECRE) of 18 April 2001.

³ Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, Brussels, 18 June 2002, COM (2002) 326 final.

⁴ 14203/04 ASILE 64, 9 November 2004.

ECRE notes with profound regret that during the course of negotiations the gaps between the Proposal and international law have grown even wider and that the recommendations issued by UNHCR, NGOs and other civil organisations have not been duly taken into account. ECRE is extremely concerned that some provisions will deny asylum seekers access to asylum procedures, and are intended to facilitate their transfer to countries outside the European Union.

ECRE fears that the current text of the Proposal will insufficiently guarantee a proper and fair examination of every asylum application, or an effective remedy in all cases against a refusal of the asylum claim by the determining state. Some of the standards contained in the Proposal fail to meet the commitments of the EU as set out in the Charter of Fundamental Rights and are so low as to permit fundamental breaches of international refugee and human rights law. Those parts of the draft Directive cannot be properly described as the ‘minimum standards’ that the legal basis of the Directive requires⁵. The text of the draft Directive requires crucial revision in order to prevent *refoulement* and violation of Member States’ international obligations, and to avoid costly and time-consuming legal procedures before national and international fora. Some of the provisions of the current draft of the Directive may well be open to objections similar to those raised by the European Parliament in seeking to challenge the validity of the Family Reunification Directive before the European Court of Justice.

Apart from the vital question of standards, the Proposal lacks clarity and coherence in its language and structure. The confusion surrounding admissibility tests and decision-making on the merits of an application, the scope for multiple and different procedures, the large number of exceptions, and exceptions from exceptions, allowing Member States to derogate from the minimum standards which the Proposal is precisely supposed to set, unnecessarily overcomplicate the document and severely undermine its purpose as a harmonising instrument.

ECRE recalls that in view of the concerns outlined above last year it took the unprecedented step, along with nine other organisations, of calling on the Commission to withdraw the Proposal.⁶ The Proposal has not subsequently been significantly modified in order to address these concerns, and therefore ECRE retains its view that a number of provisions would need to be drastically amended or deleted altogether in order for the Proposal to guarantee that Member States fulfil their commitments and comply with their obligations under international refugee and human rights law.

It is not intended to comment on all the provisions contained in this Proposal.⁷ Instead, ECRE wishes to focus critical attention on the deficiencies of key Articles in the Proposal and to seek to spell out the grave consequences which could follow from the adoption of this piece of legislation.

ECRE has identified the following Articles as being those most likely to lead to the *refoulement* of those in need of protection, either directly or indirectly, through exclusionary practices and the absence of adequate safeguards to ensure fair and accurate assessments:

- Application of safe third country concept (Article 27).
- Exceptional application of the safe third country concept (Article 35A)
- Application of the safe country of origin concept (Article 30, 30A, 30B, and Annex II).

⁵ Treaty Establishing the European Community Art 63 (c).

⁶ ECRE, ILGA Europe, Amnesty International, Pax Christi International, Quaker Council for European Affairs, Human Rights Watch, CARITAS-Europe, Medecins Sans Frontieres, Churches’ Commission for Migrants, Save the Children in Europe *Call for withdrawal of the Asylum Procedures Directive* (22 March 2004).

⁷ See Immigration Law Practitioners’ Association (ILPA) *Analysis and Critique of Council Directive on minimum standardson procedures in Member States for granting and withdrawing refugee status* (July 2004) for a comprehensive analysis of the entire Proposal.

- Effective remedy/suspensive appeal (Articles 6 and 38).
- Right to legal assistance (Article 13).
- Right to communication with UNHCR/other refugee-assisting organisations (Article 9 (1) (c)).
- Right to an impartial interpreter (Article 9 (1) (a) & (b)).
- Right to a personal interview (Articles 10 and 11)
- Accelerated and manifestly unfounded procedures (Articles 23, 24, and 29).

It should be emphasised that the absence of specific commentary on other Articles does not denote ECRE's agreement with or endorsement of them.

While it is important to emphasise that the Proposal only provides minimum standards,⁸ and ECRE would reiterate that Member States should not lower existing higher standards, the fact remains that a number of the provisions as currently drafted do not require the implementation of standards at a level sufficient to comply with Member States' obligations under international human rights law or to meet with their commitments under the European Charter of Fundamental Rights.

Article 27 (Application of safe third country concept)

ECRE reiterates its grave concerns regarding the Safe Third Country notion, and in particular the failure of this Article to adequately set the parameters that should properly limit the application of this concept. The article fails to comply with international standards and potentially undermines asylum in the EU.

Under international law the primary responsibility to provide protection remains with the State where the claim is lodged. ECRE underlines the need for very strict criteria for the designation of third countries as safe. In particular, ECRE recalls that for a third country to be considered safe, it must have ratified and implemented the 1951 Geneva Convention and other international human rights treaties, especially the Convention Against Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR), and the respective Optional Protocols and crucially, respect its obligations in practice and have a fair and efficient asylum procedure in place able to provide recognition of refugee status and respect for attendant rights.

It is also indispensable that the third state has given its explicit consent to (re-) admit the asylum seeker and to provide him/her full access to a fair and efficient determination procedure before any transfer may take place. Furthermore, the applicant must have a close link with the third country and that mere transit through a country should not constitute a meaningful link. Finally, ECRE has repeatedly expressed its position that the burden of proof regarding the safety of a third country for a particular asylum seeker lies entirely upon the country of asylum and in any case, the presumption of safety must be rebuttable by the applicant in the particular circumstances of his/her case at a personal interview.

It is therefore extremely regrettable that, in opposition to these norms, the safe third country notion defined in Article 27 rests on a unilateral decision by a Member State to invoke the responsibility of a third State to examine a claim, without adequately guaranteeing the necessary safeguards. This is of all the more concern when considering where the safe third country notion might be applied. It has been superseded by the Dublin II Regulation within the EU, including the 10 new Member States, as well as in neighbouring states such as Norway and Iceland. (It is worth noting that, while

⁸ Article 4 of the Proposal.

new Member States are treated as safe under the Dublin II Regulation, often fair and effective asylum systems are not yet in place, resulting in very low recognition rates). ECRE would be particularly concerned about the application of the concept in relation to many of the States on the periphery of the Union, which lack efficient asylum systems and where serious human rights violations persist.⁹

ECRE would reiterate that in order to comply with the requisite obligations it is necessary to carry out an individual assessment in all cases, and that by not ensuring an asylum seeker's access to a refugee determination procedure that provides for all necessary legal and procedural safeguards in the country where a claim is lodged, sending states risk, directly or indirectly, violating the principle of *non-refoulement* as enshrined in the 1951 Refugee Convention and human rights instruments, in particular Article 3 of the ECHR.¹⁰

In the *TI case*¹¹ the ECtHR clarified that the application of safe third country procedures does not absolve the country of asylum of its duties under Article 3. This clearly illustrates that transfers to third countries, where sufficient safeguards are not in place, are not compatible with the ECHR, and thus, international law places the responsibility for the asylum applicant on the country where the application is lodged. It is therefore instructive to consider the text of Article 27 in the light of these standards, which outline the conditions under which responsibility may be transferred:

- *The criteria for the determination of countries as safe must be adequate*

The criteria set out in Article 27 (1) (a) – (d) are inadequate as they prescribe only minimal requirements, namely 'life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion,' respect of the principle of *non-refoulement* under the Refugee Convention and other international instruments; and the possibility to request refugee status 'and, if found to be a refugee, 'to receive protection in accordance with the [Refugee] Convention.' While Article 27 (1) (d) appears to presume ratification of the 1951 Convention and/or 1967 Protocol, ECRE is concerned by the absence of an explicit requirement that receiving third countries have both ratified and implemented in practice the 1951 Geneva Convention and/or 1967 Protocol. Refugee protection involves more than mere protection from *refoulement*, which is part of customary international law. It also requires the recognition of a set of rights accompanying refugee status under the 1951 Refugee Convention. ECRE regrets that greater emphasis is not given to the need for the careful examination of the receiving State's implementation in practice of the international obligations it has assumed, which necessarily requires thorough consideration of the capacity of third States to readmit applicants, examine their claims and grant effective protection.

- *Third country is safe for individual applicant and the burden of proof on safety of the third country lies with the country of asylum.*

Article 27 (2) (b) simply requires Member States to set out 'rules on methodology' to determine whether the concept is applicable to 'a particular country or to a particular applicant.' 'Such methodology shall include case by case consideration of the safety of the country for a particular

⁹ See for example Amnesty International Annual Report 2004, European Commission against Racism and Intolerance, Third Report on Turkey, 25 June 2004, p. 14 and comments below on Article 35A (Exceptional application of the safe third country concept).

¹⁰ See ECtHR in *T.I. v. U.K.*, Appl. No. 43844/98, Admissibility Decision of 7 March 2000 and ECtHR in *Jabari v. Turkey*, Appl. No. 40035/98, Judgement of 11 July 2000.

¹¹ *T.I. v. U.K.*. Application No. 43844/98, Admissibility Decision of 7 March 2000, highlighting the necessary caution when taking decisions relating to the safety of a third country.

applicant and/or national designation of countries considered to be generally safe.’ This grants Member States an option to ignore the individual circumstances and instead favour a generalised determination of safety. This is tempered by Article 27 (2) (c), which provides that Member States must elaborate rules ‘in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment.’ In addition, in relation to the effective remedy under Article 38 (1), Member States are required to provide for rules ‘in accordance with their international obligations’ on the ‘grounds of challenge for a decision’ under these provisions. However, ECRE is alarmed by the absence of clear wording guaranteeing an individual examination in all cases before an application can be declared inadmissible on the basis of this concept, and similarly the failure to explicitly require a right of appeal with suspensive effect, the absence of either of which could result in the adoption of national legislation permitting unlawful *refoulement* or *chain refoulement* of individuals in need of international protection.

- *Meaningful link between applicant and third country*

Article 27 (2) (a) leaves it to national legislatures to elaborate ‘rules requiring a connection between the person seeking asylum and the third country concerned based on which it would be reasonable for that person to go to that country.’ ECRE considers that this Article thus fails to provide adequate clarity concerning this important principle limiting the proper application of the safe third country concept. In this regard, and in line with EXCOM Conclusion 15 (XXX), asylum should not be refused solely on the grounds that it could be sought from another State. The person must have a connection or close links with the third State, such as family ties and/or substantial cultural ties with the country.

Additionally, the reasons why the asylum applicant lodged the application in the receiving state should be taken into account as far as possible.¹² Thus, Member States should consider assuming responsibility for the asylum application, for instance, where the applicant has close family ties in and/or substantial cultural ties with the country; has been in transit in the third country, with which s/he has no links or contacts, for a limited period of time, and for the sole purpose of reaching his/her destination; is in poor physical or psychological health, or otherwise belongs to a particular vulnerable group.

- *Third country agrees to admit the applicant to a fair and efficient determination procedure.*

ECRE welcomes Article 27 (3) (b), which requires Member States to provide the applicant with ‘a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.’ In addition, under Article 27 (4), where the third country does not admit the asylum applicant ‘to its territory’ Member States must admit him/her to a procedure. However, this fails to explicitly guarantee access to an asylum determination procedure in the third country by only making reference to the third country’s territory. Furthermore, in ECRE’s view the problem of an applicant not being admitted to the territory could not even arise if the transfer was conditional on the prior and explicit consent of the receiving country to accept responsibility for the claim.

¹² See EXCOM Conclusion No. 15 (XXX) – 1979, para. (h) (i), (ii) and (iii).

ECRE Recommendations

ECRE would reiterate its view that application of the safe third country concept should be strictly limited, and furthermore that it is impossible at the current time to envisage its proper application in relation to many of the countries on the periphery of or outside the European Union. However, if the safe third country concept is to remain (to be considered within an individual examination of the claim in a procedure with minimum safeguards), the criteria and requirements in Article 27 must be clearly defined and that at a minimum, they include:

- (a) *Ratification and implementation of the 1951 Geneva Convention and other international human rights treaties;*
- (b) *Existence of an asylum procedure in place leading to the recognition of refugee status;*
- (c) *Explicit consent of the third country to (re-)admit the asylum seeker and to provide her full access to a fair and efficient determination procedure before any transfer may take place;*
- (d) *Close link of the applicant with the third country, such as family ties. Mere transit through a country does not constitute a meaningful link.*
- (e) *Rebuttability of the presumption of safety.*

Article 35A (Exceptional application of the safe third country concept)

ECRE reiterates its comments on Article 27 concerning the necessary limitations and safeguards inherent in a proper application of the safe third country concept, and therefore notes with grave concern that Article 35A allows Member States to deny access to the procedure altogether to any applicant who arrives ‘illegally’ from designated countries.

Although Article 35A (4) does require Member States to lay down ‘modalities’ for implementing [Article 35A] ... in accordance with the principle of *non-refoulement* under the [Refugee] Convention including providing for exceptions from the application of this Article for humanitarian or political reasons or for reasons of public international law’, it is striking that the Proposal itself abdicates any responsibility for setting any explicit standards to ensure respect of Member States’ most fundamental obligations. The long, tough negotiations on this proposal indicate how jealously Member States guard their national asylum procedures; they are unlikely to amend them unless explicitly directed to do so. The Proposal fails to elucidate how Member States can meet their obligations while systematically denying access to a determination procedure on the basis of a designated list determined by generic criteria.

It should also be noted that although Article 38 (1) (a) (iii) does provide for an effective remedy against decisions not to examine a request, it is hard to see how a remedy could be effective when there has been no individual examination of the application or the actual consequences of return to the designated third country.

Article 35A does not require any individual assessment of the safety of the third country for the particular applicant. ECRE strongly reiterates that no category of applicant can lawfully be denied access to an asylum procedure completely. Some form of assessment, at minimum by way of an admissibility determination, must be in place to ensure that refugees can access the rights conferred by the 1951 Geneva Convention. Complete denial of access to the procedure clearly risks being at variance with international refugee law. In this context, it is recalled that in the *TI* case the ECtHR held that indirect removal to an intermediary country, which is also a Contracting State, [did] not

affect the responsibility of the State to ensure that the applicant is not, as a result of the decision to expel, exposed to treatment contrary to Article 3.’

ECRE argues that no country can be labelled as a “safe third country” for all asylum seekers. A decision on the safety of a country for the particular applicant must always be reached within an individual examination on the claim and not on a general presumption of safety based on country-related criteria. There must also be an opportunity for the applicant to rebut the presumption of safety in the particular circumstances of his/her case. The provisions in Article 35A would leave the decision-making authorities in these cases outside any legal framework for the control on their performance and on the lawfulness of their decision. ECRE therefore rejects the exceptional application of the safe third country concept, as outlined in Article 35A.

ECRE reiterates that a Member State’s international obligations are engaged as soon as an asylum applicant arrives at a border, including at any international transit zone¹³, since s/he actually has at that point already reached the territory,¹⁴ this includes that there be no rejection at frontiers without fair and efficient procedures for determining status and protection needs.¹⁵

In particular, UNHCR EXCOM Conclusion No. 87 (L) – 1999 (j) affirms that the notion of “safe third country” should not lead to the improper denial of access to asylum procedures or, indeed, to violations of the principle of *non-refoulement*.

Human rights and refugee protection concerns exist not only in countries bordering the EU, but also in EU Member States themselves, as identified by ECRE and other international organisations, including the EU itself,¹⁶ and international human rights monitoring bodies (such as the European Court of Human Rights). Countries neighbouring the enlarged EU include Albania, Belarus, Bulgaria, Croatia, Macedonia, Romania, the Russian Federation, Serbia & Montenegro, Turkey, and Ukraine. ECRE considers that an un rebuttable presumption of safety for all asylum seekers arriving from any of these countries could result in breaches of international law.

Furthermore, ECRE would wish to emphasise that the mere existence of an asylum procedure in law is insufficient to ensure that a third country will be able to deal fairly and efficiently with asylum applicants. Many countries have neither the structures nor the resources to deal with more than a very small number of asylum seekers. Excluding persons who have traveled through such countries from an individual determination procedure would amount to an effective denial of the right to seek asylum under international law. It is gravely disturbing that the Proposal envisages the Council adopting a common designated list, and thus facilitating this practice across the European Union.

Also of concern is Article 35A (7) which permits Member States who have designated safe third countries in accordance with national legislation in force at the date of the adoption of the Directive to apply the provisions of paragraph 1 (i.e. deny access to the procedure altogether) until such time

¹³ *Amuur vs France*, Application No 19776/97 of 25 June 1996.

¹⁴ Application No. 23366/94 *Nsona v Netherlands* (28 November 1996) which confirmed that Member States’ obligations under the ECHR arise as soon as an individual seeks admission to its territory, provided he/she is within the State’s jurisdiction.

¹⁵ This has been repeatedly reaffirmed by UNHCR’s Executive Committee (Conclusion No. 81 (XLVIII) – 1997 (h), No. 82 (XLVIII) – 1997 (d) (iii), No. 85 (XLIX) – 1998 (q)).

¹⁶ See, for instance, the European Parliament “Annual Report on human rights in the world in 2002 and European Union’s human rights policy” (Doc. A5-0274/2003, of 16 July 2003) and the European Parliament Report ‘Wider Europe - Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours’ (Doc. A5-0378/2003, of 5 November 2003).

as the Council has adopted the common list pursuant to paragraph 3 (an as yet unspecified timeframe), the only requirement being that the third country satisfies the inadequate criteria in paragraph 2 (a) to (c).

ECRE Recommendations

ECRE believes that the exceptional application of the safe third country concept is incompatible with Member States' obligations under international law and therefore calls for the deletion of Article 35A.

Articles 30, 30A and 30B and Annex II (The safe country of origin concept)

ECRE has consistently criticised the safe country of origin concept as being inconsistent with the proper focus of international refugee law on individual circumstances.¹⁷

ECRE believes that assessment of risk in the country of origin should always be conducted on an individual basis rather than on a general presumption on country-related criteria. ECRE is particularly concerned that individuals be required to rebut such presumptions of safety in the context of an accelerated procedure lacking essential safeguards (for example the right to a suspensive appeal), and believes that such circumstances create a very real risk of *refoulement* in breach of international law. The recent practice of certain Member States has borne out these concerns¹⁸ and has illustrated that the safe country of origin principle is often used in a way which amounts to discrimination among refugees in violation of Article 3 of the Refugee Convention, Article 21 of the Charter of Fundamental Rights of the European Union and Article 26 of the International Covenant on Civil and Political Rights.

Article 30 (1) Mandatory list – competence concerns

In addition to fears concerning the potential breaches of international law resulting from potential application of the concept, the Proposal also arguably violates EC law itself. The Proposal requires the Council to adopt (under qualified majority voting (QMV) and following consultation of the Parliament) a minimum common list of countries, which all Member States must treat as 'safe countries of origin'. The Commission originally proposed that Member States should have an option whether to apply the principle in their asylum law, subject to strict safeguards. However, in October 2003 the Council agreed that Member States would be required to apply this principle, at least for a common list of states deemed 'safe'. Many Member States do not currently operate safe country of origin systems. Accordingly, aside from the clear human rights concerns, this is the first time that EU Member States will be required to dilute their standards of protection by a measure of EC law.

This raises serious *competence concerns*, as the EU is only entitled to establish 'minimum standards' in this area. In contrast, Article 30 (1) states that countries on the common list 'shall be

¹⁷ See ECRE, *Guidelines on Fair and Efficient Procedures for Determining Refugee Status*, 1999, paras. 21 (c) and 119 (c).

¹⁸ For example, see case study concerning an applicant from the Roma community in Romania on p 7 of ECRE *Broken Promises – Forgotten Principles. An ECRE Evaluation of the Development of EU Minimum Standards for refugee Protection, Tampere 1999 – Brussels 2004* (Brussels 20 June 2004).

regarded by the Member States' as safe countries of origin. Thus, they are precluded from adopting higher standards in this field. This is the case notwithstanding Article 30B (3), which provides that 'Member States shall lay down in national legislation further rules and modalities for the application of the safe country of origin concept' and the provision of some individual assessment under Article 30 (1). While individual Member States may add to the list, they may not subtract from it, even if the human rights situation in a particular country deteriorates.

Article 30 (1) & (2) Procedural Impropriety

ECRE considers that the *procedure* for agreeing (30 (1)) or amending (30 (2)) this common list is suspect. It is to be determined by the Council by QMV, with mere consultation of the European Parliament. There is a legal impediment to creating such an implementation mechanism, as it is not envisaged in Title IV EC. Rather, what the Treaty envisages in Article 67 (5) EC, is that once the Council has adopted 'common rules and basic principles' in relation to asylum procedures by unanimity, further measures in this field *must* be adopted under co-decision. Thus, agreeing the common list by QMV with mere consultation would infringe the prerogatives of the European Parliament, and disturb the institutional balance of the Treaty.

Article 30 (4) - (7) Removal of countries from the list

ECRE emphasises that even if it were possible to designate countries as generically and absolutely safe it must be borne in mind that human rights situations can change rapidly. The process in Article 30 (4) – (7) is not sufficiently receptive to the possibility of deterioration of human rights standards. Where an individual Member State requests the Commission to propose an amendment to the list, that Member State is then temporarily freed of the requirement to treat applications from that country as unfounded. However, until the Commission proposes the formal amendment to the list (this must be done within three months for the suspension to remain effective), and until/if that amendment is agreed by the Council by QMV, other Member States remain obliged to treat the country as safe, thus putting affected individuals at risk of *refoulement* during this period.

Article 30 (1) & (2) and Annex II Criteria for determining safety

Article 30 (1) provides that Member States may consider a country as a safe country of origin only in accordance with the principles set out in Annex II. ECRE considers that there is a fundamental flaw in the requirements set out in Annex II, which is inherent in the concept of 'safe countries of origin.' Annex II requires that 'there is generally and consistently no persecution ...' and after taking into account 'observance of the rights and freedoms laid down in the European Convention for the Protection of Fundamental Freedoms and/or the International Covenant for Civil and Political Rights and/or the Convention against Torture...'. However, refugee law is not about what happens *generally*, it is about the protection needs of *individuals*. A country may well provide *generally* effective remedies against violations of civil and political rights whilst denying remedy and persecuting a particular individual or group on grounds of their race, religion, political opinion, nationality or social group. ECRE would thus wish to reiterate its reservations concerning the concept of declaring countries as generally safe without a proper examination of the individual circumstances of a claim.

The complexity involved in determining whether a country is safe may itself lead to errors or conflicting assessments. The politicised decision-making process may also lead to foreign policy concerns tainting the objectivity of the assessment. The difficulties and contradictions inherent in this process were aptly illustrated by the fact that protracted negotiations in the Council failed to achieve consensus on a designated common list of safe countries and thus resulted in amendments

to the Proposal providing for the common list to be agreed by QMV following adoption of the Proposal.

Finally, from a practical point of view, if countries are in fact safe, efficient refugee determination processes will quickly weed out erroneous applications by nationals of those countries: there should be no need for a safe country list. Moreover, an efficient procedure will identify individuals whose exceptional and particular circumstances are such that they have a valid claim, despite their country being *generally* safe.

Article 30A National Designations of Safe Countries of Origin

ECRE notes with regret that under Article 30A (1) Member States may treat additional countries as 'safe' countries of origin, using the criteria set out in Annex II. Furthermore, in derogation from Article 30A (1), Article 30A (2) provides that Member States may maintain in force provisions treating countries as safe (or under Article 30A (3) parts of countries) where it is established merely that persons are generally not subjected to persecution, torture, inhuman or degrading treatment. ECRE notes that permitting such national designations can hardly be considered to help achieve the objective of greater harmonisation. It is also unfortunate that Article 30A (2) permitting national derogation introduces the unsatisfactory formulation 'generally neither subject to' persecution, torture or ill-treatment. ECRE also notes that in principle a country cannot be considered 'safe' if it is so for only part of the territory. The designation of a safe part of a country does not necessarily signify the existence of a reasonable internal protection alternative.

Article 30 B Application of the safe country of origin concept

In ECRE's view the Proposal does not provide for an adequate examination of whether the particular country is safe for the individual applicant. Under Article 30B (2) all such applications are to be treated as unfounded, provided that it is safe for the particular applicant. However, this is presumed when the applicant is a national of the country. In the case of stateless persons, it is sufficient if the applicant was formerly habitually resident in the country 'of origin.' The entire burden of rebutting this presumption rests on the applicant, who is required in the context of an accelerated procedure, to submit 'serious grounds for considering the country not to be a safe country of origin in his/her particular circumstances in terms of his/her qualification as a refugee' (Article 30B (1)).

ECRE Recommendations

ECRE strongly opposes the safe country of origin concept and as such urges the deletion of Articles 30, 30A, 30B, and Annex II.

Article 38 (Effective remedy/suspensive appeal)

ECRE welcomes the right, set out in Article 38 (1), to an effective remedy before a court or tribunal. However, ECRE is opposed to the absolute discretion that Article 38 (3) (a) to (c) provides Member States to determine the type of appeal available and whether or not it has suspensive effect (i.e. permitting an applicant to remain on the territory pending the final determination of the claim). Article 38 (3) (b) explicitly envisages that Member States might conceivably deny suspensive

effect, in which eventuality Member States need only consider the ‘possibility’ of other and undefined ‘legal remedy or protective measures.’

The right to an effective remedy before a court or tribunal is embodied in EC Law,¹⁹ Article 47 of the Charter of Fundamental Rights of the European Union, and in Article 13 of the European Convention of Human Rights. As held by the European Court of Human Rights, it implies the right to remain in the territory of a Member State until a final decision on the application has been taken.²⁰ Thus the right of asylum applicants to remain pending a final decision on their cases is essential for Member States to comply with their *non-refoulement* obligations and international law provisions relating to the right to an effective remedy.²¹

It is vital that asylum seekers have a right to remain on the territory until their appeal is decided because a right to appeal becomes meaningless if the asylum seeker has already been sent to the country where they face persecution, torture, inhuman or degrading treatment. Moreover, it becomes impossible to assess at a distance essential elements of a case, such as the credibility of the applicant.

In this regard it should be noted that Article 6 (1) merely provides that the right to remain in the territory lasts only until the first instance decision is taken. As outlined above, the Proposal does not guarantee that appeals need have suspensive effect, and the limited temporal effect of the right to remain reflects this choice. In effect, this means that the right to appeal may be illusory, in that the asylum seeker is liable to deportation before the process is fully concluded. ECRE considers this particularly disturbing as in most EU Member States there is a high rate of overturning refusals of asylum applicants on appeal. As UNHCR has argued, ‘as the text stands, “the vast majority” of rejected asylum seekers who lodge an appeal will not be permitted to remain in the EU until their appeals are decided – despite the fact that in several European countries 30-60 percent of initial negative decisions are subsequently overturned on appeal.’

It is also regrettable that the right to remain is geographically limited. Article 2 (m) of the Proposal defines ‘remain in the Member State’ as remaining in the territory, ‘including at the border or in transit zones of the Member State in which the application for asylum has been made or is being examined.’ In effect, this facilitates the practices of confinement and detention in transit zones, which were condemned as contrary to Article 5 ECHR in *Amuur*.²² This denudes the notion of ‘in’ the Member State of meaning, in that it allows asylum seekers to be confined at the border. In addition, it runs counter to the established view that access to the territory in a real-world sense is necessary in order to allow access to the practical services and facilities necessary for a proper asylum system to be accessible.

¹⁹ According to the case law of the ECJ individuals must be able to invoke before a national court the rights which Community law confers to them (e.g. C-222/84). The requirement of judicial control regarding those rights is a general principle of law, which underlies the constitutional traditions common to the EU Member States (*Johnston*).

²⁰ See *Conka vs. Belgium*, Judgement of 5 February 2002, stating as regards the deportation of asylum seekers: ‘it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention.’

²¹ UNHCR also supports the view that in order to ensure compliance with the principle of *non-refoulement*, appeals should, in principle, have suspensive effect, and the right to stay should be extended until a final decision is reached on the application. Executive Committee Conclusions No. 8 (XXVIII) of 1977 and No. 30 (XXXIV) of 1983 confirm that the automatic application of suspensive effect can be waived only where it has been established that the request is manifestly unfounded or clearly abusive. In such cases, a court of law or other independent authority should review and confirm the denial of suspensive effect, based on a review of the facts and the likelihood of success on appeal.

²² *Amuur vs France*, Application No 19776/97 of 25 June 1996.

In summary, ECRE argues that this principle of suspensive effect should properly apply to all applications regardless of whether considered under accelerated procedures or other designated categories.

ECRE Recommendations

ECRE is extremely concerned that the Proposal does not confirm the explicit right of all asylum seekers to an effective remedy with suspensive effect.

ECRE therefore calls for Article 38 (3) to be deleted and replaced with the following:

3. *Member States shall ensure that the remedy pursuant to paragraph 1 shall have the effect of allowing applicants to remain in the Member State pending its outcome.*

Article 6 (1) should be amended and replaced as follows:

Applicants shall be allowed to remain in the Member State until such time as their application for international protection has been finally determined and all appeal rights have been exhausted.

Article 13 (Right to legal assistance)

ECRE strongly recommends that applicants have the right to legal assistance at all stages of the procedure, and that representation should be free to those who lack resources. ECRE has continually expressed concern that Member States may limit the right to advice/assistance to the appellate process, and even further only to appeals that are deemed likely to succeed. By limiting free legal assistance to the appeals stage, Article 13 renders the legal assistance meaningless in cases where accelerated procedures are used and suspensive effect of appeals denied.

The right to legal assistance and representation is an essential safeguard in the asylum process.²³ Legal aid is also an aspect of EU fundamental rights law, as is evident in the formulation of Article 47 of the Charter of Fundamental Rights (EUCFR)²⁴. In practice, refugee law has become so extremely complex that often it may not be possible for applicants to make their case without legal assistance. This is illustrated by cases like *Shah and Islam* in the UK House of Lords, which could not possibly have been argued by claimants themselves.²⁵

ECRE, therefore deplores the Proposal's inadequate provisions on legal assistance. It contains merely a basic entitlement to consult a lawyer at the applicant's own cost (Article 13 (1)). Member States are only required to provide 'free legal assistance and/or representation' for appeals (many of which will have no suspensive effect) (Article 13 (2)). ECRE considers this approach counterproductive, as many errors made at first instance arise where claimants misunderstand procedures and processes. Such errors are often difficult to correct at the appeal stage. As such,

²³ See Immigration Law Practitioners' Association (ILPA) *Analysis and Critique of Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status* (July 2004) p 59.

²⁴ Article 47 EUCFR provides that 'Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.'

²⁵ *Islam (A.P.) v. Secretary of State for the Home Department, Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.)* (Conjoined Appeals), 25 March 1999.

legal advice/representation at the initial stage are the best way to ensure fair and reliable determinations, avoiding lengthy appeals.

ECRE is further concerned that the right to free legal assistance/representation under Article 13(2) is also heavily qualified in that derogations are permitted in a number of other respects. Paragraph 2 (a) allows Member States to provide assistance only for procedures before a Court or tribunal under Chapter V and ‘not to any onward appeals or reviews provided for under national law’. It is of concern that this could exclude legal aid for judicial review of administrative decisions. Paragraph 3 (d) permits Member States to restrict the provision of assistance to where the appeal or review is likely to succeed. ECRE welcomes the fact that this latter ground is subject to the caveat that legal assistance/representation is not ‘arbitrarily restricted,’ but remains concerned that this provision could be applied unduly restrictively and without being subject to proper scrutiny or review. Greater clarity is required as to the circumstances under which legal assistance can properly and fairly be withheld, including the right to an independent review of any such decision.

Further restrictions are permitted under Articles 13 (5), which allows monetary and temporal restrictions. ECRE again considers that greater clarity is required as to where and how such restrictions are applied in order to ensure that an applicant is able to properly present his/her claim.

ECRE Recommendations

ECRE urges that the right to legal assistance and representation at all stages of the asylum procedure be expressly guaranteed in the Proposal. ECRE would therefore recommend that Article 13 be amended as follows:

1. *Member States shall ensure that all applicants for asylum have the right to qualified independent legal advice and representation at all stages of the procedure. This assistance must be made available free of charge to those who lack sufficient resources.*
2. *Member States may restrict legal assistance given free of charge to legal advisers or other counsellors specifically designated by national law to assist and/or represent applicants for asylum.*

Article 9 (1) (c) (Right to communication with UNHCR/other refugee-assisting organisations)

ECRE regrets that the provisions under Article 9 (1) (c) concerning communication with UNHCR (or organisations working on its behalf) contain a negative formulation, precluding Member States from denying applicants the opportunity to communicate with UNHCR (Article 9 (1) (c)). It would be preferable if Member States should be positively required to provide this opportunity, in light of UNHCR’s privileged supervisory role under Article 35 of the 1951 Geneva Convention. While Article 21 of the Proposal seeks to reflect this cooperative obligation in EC law, the negative formulation of Article 9 (1) (c) fails to reflect the requisite degree of positive co-operation.

ECRE is also concerned that the scope of the right to communication is limited to UNHCR and its delegates, and that there is no provision for other NGOs assisting asylum seekers. Such a formulation risks undermining the fundamental right of asylum seekers to seek independent advice on their claims.

ECRE Recommendations

The text of Article 9 (1) (c) should be amended and replaced as follows:

“they must be provided with the opportunity to communicate with the UNHCR or organisations working on its behalf, as well as with other organisations assisting asylum seekers in the territory of the Member State”.

Article 9 (1) (a) and (b) (Right to interpretation)

ECRE considers that the right to be informed under Article 9 (1) (a) is unjustifiably restricted in that it provides that applicants will be informed only in ‘a language they may reasonably be supposed to understand.’ This risks seriously compromising the right to be informed. Similarly, the right to an interpreter (Article 9 (1) (b)) is also restricted to whenever this is ‘necessary,’ an undefined term, save for the provision that an interpreter is deemed necessary where there will be an interview, and ‘appropriate communication cannot be ensured without such services.’

The qualified nature of this right is further reflected in Article 11 (3) (b), which provides that the interview need not necessarily take place in the applicant’s preferred language, where there is ‘another language which he/she may reasonably be supposed to understand and in which he/she is able to communicate in.’ ECRE believes that such a qualification fails to recognise the difficult and possible traumatic nature of the interview for the applicant, and the paramount importance of facilitating effective and open communication. In ECRE’s view the right to the services of a competent interpreter is an essential procedural requirement.

ECRE Recommendations

In relation to Article 9 (1) (a) ECRE proposes the substitution of “... a language which they may reasonably be supposed to understand” with “...a language they can understand”.

Article 9 (1) (b) should be amended and replaced with the following:

“they must receive the services of an impartial and qualified interpreter for submitting their case to the competent authorities. This right shall be guaranteed during all personal interviews, appeal hearings, and all other material communications with the competent authorities. In all these cases the services shall be paid out of public funds”.

Article 11 (3) (b) should be amended by replacing the second sentence as follows:

“...The communication must take place in the applicant’s mother tongue or preferred language unless the applicant expressly consents to being interviewed in a second language which he/she can understand”.

Articles 10 (Right to a personal interview)

ECRE notes that the centrality of the interview to the asylum determination process is reflected in EXCOM Conclusions No 8 and 30 and in the case law of the ECHR, Human Rights Committee and UNCAT Committee. Indeed this principle was even explicitly reflected in the 1995 Council Resolution on Minimum Guarantees for Asylum Procedures, which provided that ‘before a final decision is taken on the asylum application, the asylum seeker must be given an opportunity of a personal interview with an official qualified under national law.’²⁶

ECRE is therefore particularly concerned that the Proposal adds several new exceptions to this requirement, gravely undermining the reliability and fairness of asylum determinations.

Article 10 (2) sets out a list of sweeping exceptions to the entitlement to an interview. These include where:-

- The competent authority has already had a ‘meeting’ with the applicant under the Qualification Directive (Article 10 (2) (b)). ECRE considers that the term ‘meeting’ is inadequately and imprecisely defined, and thus creates the potential for applicants to be denied the opportunity to fully and fairly present their claims.
- It is not ‘reasonably practicable’ to hold an interview (Article 10 (3)) A specific example of where an interview is deemed not to be ‘reasonable practicable’ is where the authority is of the opinion that the ‘applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his / her control.’ The only limited safeguard is that ‘when in doubt, Member States *may* require a medical or psychological certificate’ (Article 10 (3)). Although ECRE considers that an interview should not be held when the applicant has a mental or emotional disturbance preventing the normal examination of her case, there must be an explicit requirement that the interviewer seeks medical advice and/or a medical report, to include an assessment of whether the condition is temporary or permanent.
- The competent authority considers the application unfounded where the circumstances in Article 23 (4) (a), (c), (g), (h) and (j) apply (Article 10 (2) (c)). ECRE has major concerns about this dramatic change introduced at a very late stage of negotiations. The grounds mentioned are respectively where the applicant raises little relevant evidence (23 (4) (a)); safe country of origin/safe third country cases (23 (4) (c)); the claim is ‘clearly unconvincing’ due to the applicant’s ‘inconsistent, contradictory, unlikely or insufficient representations’ (23 (4) (g)); the applicant has made a subsequent application raising no new issues (23 (4) (h)); the application is made ‘to delay or frustrate the enforcement of an earlier or imminent decision which would result in his/ her removal’ (23 (4) (j)).

ECRE considers that this section potentially renders the guarantee to an interview meaningless. In this context it should be reiterated that the Proposal does not guarantee that an asylum seeker would typically receive any independent advice, legal or otherwise, when filling out the initial application, which generally takes the form of a long and complicated questionnaire. The interview is necessary in order to allow the applicant to provide all relevant information and to clarify any discrepancies, inconsistencies or omissions in his/her account. Instead, the Proposal envisages that such applications are to be regarded as ‘clearly unconvincing’ and thus no interview is to be provided. This could signal the end of reliable asylum determinations. It is equally difficult to see how in the absence of an interview, Member States would be able to fulfil their obligations under

²⁶ Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures, [1996] OJ C274/3, para14.

international law in relation to the requisite examination required in the application of either the safe third country or safe country of origin concepts. ECRE fears that this will inevitably result in the *refoulement* of individuals to face persecution, torture and death.

If the right to an interview is refused on any of these bases, the authority may nonetheless decide on the application. Given the potentially serious consequences of erroneous determinations (particularly given the absence of a guaranteed suspensive right of appeal), ECRE considers that only a decision to recognise a refugee should be able to be taken without a full and personal interview.

ECRE Recommendations

ECRE has previously stated that it believes that a personal interview should be construed as a fundamental right to which the only exception may be in cases where the competent authority believes the written information submitted is sufficient to recognise refugee status. ECRE is extremely concerned about possible limitations on the right to a personal interview. ECRE thus urges that Article 10 be amended in the following way:

- 1. Before a decision is taken by the determining authority, the applicant for asylum has a right to a personal interview on his/her application for asylum with a person competent to conduct such an interview and responsible to take a decision under international law.*
- 2. Member States may refrain from conducting a personal interview in the case of persons who have a mental or emotional disturbance which impedes a normal examination of his/her case or in the case of minors if it is not in their best interest. Where the interviewer believes a person may have a mental or emotional disturbance, the interview should be terminated and medical advice concerning the health of the applicant should be sought from a clinician including whether the condition is temporary or permanent.*
- 3. The fact that no personal interview has taken place shall not negatively impact upon the decision by the determining authority. In these cases, each person must be given the opportunity to be represented by a guardian and legal representative in the case of minors or a counsellor or legal advisor as appropriate.*

Articles 23, 24, and 29 (Accelerated and manifestly unfounded procedures)

ECRE is concerned by the widened scope of accelerated procedures contained in the Proposal, which risks rendering regular procedures a rather exceptional occurrence.

Article 23 (4) sanctions the use of accelerated procedures for any asylum application, while offering a long list of examples, including: applications that raise little relevant evidence (23 (4) (a)), applicants from a safe country of origin or a safe third country (23 (4) (c)), applicants who cannot prove their identity or nationality (23 (4) (f)), applicants who provide inconsistent information (23 (4) (g)), and applicants who do not file their applications as soon as they have the opportunity to do so (23 (4) (i)).

While the guarantees of Chapter II still apply to the non-exclusive list of categories in this article, ECRE believes that the standards contained in Chapter II are insufficient to ensure fair and efficient

access to protection for all applicants for asylum (for the reasons discussed above). Such concerns are exacerbated by the fact that the Proposal does not guarantee a suspensive right of appeal. The channelling of certain groups of applications through specific procedures with reduced safeguards may too often lead to Member States breaching their international obligations.

Furthermore, Article 29 (2) allows Member States to designate any applications under these categories (i.e. any of the circumstances listed in Article 23 (4) (a) and (c) to (o)) as ‘manifestly unfounded’ if it is so defined in national legislation. ECRE is particularly concerned that this list includes circumstances, which do not directly relate to the substance or merits of the claim yet could still be used to designate an application as ‘manifestly unfounded’.

ECRE has major reservations concerning the use of accelerated procedures. However, if Member States insist on using such procedures then they should only be applied to cases that are ‘clearly abusive’, (i.e. clearly fraudulent), or ‘manifestly unfounded’ (i.e. not related to the grounds for granting international protection) which could then be considered for distinct treatment with simplified reviews.²⁷

ECRE also takes the view that acceleration of manifestly unfounded or clearly abusive cases could most effectively occur at the appeal level, through shorter but reasonable time limits for submitting an appeal. This must be without prejudice to their fair examination.

ECRE considers that, in view of the inclusion of so many inappropriate categories of application, and the cumulative absence of adequate safeguards, Articles 23 (4) and 29 (2) should be deleted altogether.

ECRE has similar reservations concerning Article 24 which permits Member States to provide for procedures derogating from the basic principles and guarantees of Chapter II of the Proposal. ECRE repeats its recommendation that there should be a general examination procedure to which all procedural safeguards and guarantees in Chapter II of the Proposal apply. Without the guarantees and safeguards of Chapter II, applicants may not have the opportunity to rebut the presumption of a safe return as applied to their individual applications. ECRE would therefore call for the deletion of Article 24.

ECRE Recommendations

ECRE has serious reservations concerning the use of accelerated procedures. In view of the number of inappropriate categories of application of accelerated procedures and designation of cases as manifestly unfounded, and the cumulative absence of adequate safeguards, Articles 23 (4) and 29 (2) should be deleted.

No derogations from the basic principles and guarantees should be permitted: Article 24 allowing derogation from the basic principles and guarantees should be deleted.

²⁷ UNHCR Executive Committee Conclusion No. 30 (XXXIV) of 1983.

Concluding comments

ECRE has long advocated for the development of fair and efficient asylum procedures across the European Union, both to eradicate the current ‘asylum lottery’,²⁸ and to ensure that international protection is granted to those genuinely fleeing persecution. It is therefore of concern that the protracted negotiations of the Proposal have significantly undermined and frustrated its objective as a harmonising instrument. Rather than reduce the disparities among Member States’ asylum systems and create an equivalent level of protection across the European Union, the current text amounts to little more than a catalogue of national worst practices.

In addition, ECRE has criticised the Proposal for failing to safeguard access to a fair and efficient asylum determination procedure. ECRE reiterates its concern about the many restrictions and exemptions allowed which provide only limited rights to asylum seekers while preserving Member States’ powers to derogate from the exercise of key obligations. The Proposal does not guarantee a fair and efficient asylum procedure for all. ECRE believes there are five minimum guarantees from which there should *never* be derogation (even in so-called accelerated procedures): access to free legal advice, access to UNHCR/NGOs, a qualified and impartial interpreter, a personal interview and a suspensive right of appeal. Four out of the five are not guaranteed by the Procedures Directive.²⁹

ECRE is gravely concerned that the Proposal contains provisions which do not properly reflect or ensure respect for Member States’ obligations under international refugee and human rights law. Although the Proposal only provides for minimum standards, a number of provisions as currently drafted either require or entail fundamental rights violations. While ECRE would reiterate that Member States are legally obliged to respect fundamental human rights in their implementation of the Proposal, this is not sufficient to meet these fundamental rights concerns.

In light of the above, and as an organisation committed to promoting international law and fundamental humanitarian values, ECRE considers the Proposal in its current form to be unacceptable as a legal basis for minimum standards in the European Union. The European Parliament is accordingly requested to take account of these concerns in formulating its report on the Proposal, and to reject those provisions which are not in accordance with international law.

ECRE
March 2005

²⁸ During the period Jan – Sept 2004 Austria recognised 94% of asylum seekers from the Russian Federation (mostly Chechnens) as refugees whereas in the same period the Slovak Republic recognised just two out of 1081 applicants (UNHCR).

²⁹ ECRE *Broken Promises – Forgotten Principles. An ECRE Evaluation of the Development of EU Minimum Standards for Refugee Protection, Tampere 1999 – Brussels 2004*. (Brussels 20 June 2004), 17.

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