

**POSITION OF
THE EUROPEAN COUNCIL ON REFUGEES AND EXILES
ON**

TEMPORARY PROTECTION
in the context of the Need for a Supplementary Refugee Definition

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SUMMARY OF CONCLUSIONS ON TEMPORARY PROTECTION

- 1. ECRE believes that Temporary Protection represents a reasonable administrative policy only in an emergency situation where individual refugee status determination is not immediately practicable and where Temporary Protection's implementation will enhance admission to the territory.**
- 2. ECRE emphasises that Temporary Protection does not reduce the need for a supplementary refugee definition in Europe. Nor should it be applied in any way which erodes existing forms of protection, such as the 1951 Geneva Convention.**
- 3. ECRE proposes that the definition of an emergency requiring the activation of Temporary Protection should relate both to the large scale of the outflow and to the consequences of a sudden large scale arrival in a receiving country.**
- 4. On these conditions, ECRE supports the view that European States should co-operate as widely as possible to develop common standards of Temporary Protection as well as the complementary mechanisms for sharing responsibility among States.**
- 5. Temporary Protection should last for a period between six months and two years, sufficient to deal with the consequences of a sudden large scale arrival. After this fixed period, the legal status of the persons affected by the emergency should be regularised by the granting of a secure status.**
- 6. Persons under Temporary Protection should have access to individual refugee determination procedures as soon as it is practicable and certainly prior to any subsequent return.**
- 7. ECRE proposes the guiding principle that the rights attached to Temporary Protection must be proportionate to its duration. States should declare, at the outset, the time frame which they intend to apply and therefore the rights afforded.**
- 8. The rights afforded should include, as a minimum, the rights to: family unity, education, social assistance sufficient to cover basic needs, health care, engagement in gainful employment, identity documents, as well as an explanation to both refugees and citizens of the host state of how these rights may be exercised.**
- 9. ECRE believes that return following Temporary Protection should only take place multilaterally in conditions of safety and dignity, with assistance and counselling, and on the basis of an independent and impartial human rights assessment.**
- 10. ECRE urges that the principle of democratic transparency be respected throughout, involving consultation with, *inter alia*, non-governmental agencies and the refugees themselves.**

General Remarks

- 1. Unlike Africa and Latin America, European States do not make use of a regional definition of the refugee which extends beyond that contained in Article 1 of the 1951 Geneva Con-**

vention relating to the Status of Refugees. Nor have European States agreed how to handle an emergency situation involving the sudden large scale arrival of displaced persons on European territory¹. The movements arising from the crisis in the former Yugoslavia have highlighted both deficiencies in the current European system.

2. ECRE's central position is this: the two issues of Temporary Protection and the protection of 'de facto refugees' are separate issues². They are in practice closely related, but should not be confused in principle. Temporary Protection does not reduce the need for a supplementary refugee definition in Europe.

Nor should either Temporary Protection or the call for a supplementary refugee definition be interpreted as implicitly condoning European States' current restrictive interpretation of the 1951 Geneva Convention³, though ECRE believes that this evasion of existing obligations aggravates the other problems of protection.

3. ECRE advocates a supplementary refugee definition for Europe, contained in a binding regional instrument and allowing for individual status determination. The supplementary refugee definition would include:

*“a) persons who have fled their country, and/or who are unable or unwilling to return there because their lives, safety or freedom are threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order; and
b) persons who have fled their country, and/or are unwilling to return there, owing to a well-founded fear of being tortured or of being subjected to inhuman and degrading treatment or punishment or violations of other fundamental human rights”*

This position is held for a variety of reasons, both principled and practical, as explained elsewhere⁴. Such a status would allow for cessation, but is not necessarily more temporary in nature than Convention status.

4. In this paper, ECRE addresses the issue of Temporary Protection, as distinct from the issue of refugee definition.
5. ECRE supports the view that European States should co-operate as widely as possible to develop common standards of Temporary Protection, particularly with the States of central Europe. ECRE does not advocate in favour of one particular regional forum, but accepts that the European Union may be well placed to take the lead in this process of co-operation⁵.
6. Any negotiations towards a common approach to Temporary Protection should take place in parallel to the development of truly equitable responsibility sharing systems in the European region, as advocated elsewhere by ECRE⁶. Indeed common standards of treatment under Temporary Protection are a pre-condition of any responsibility sharing which involves the evacuation or further resettlement of displaced persons. ECRE therefore urges the EU Council of Ministers to continue its work in this difficult area.
7. Many of the refugees who have lived under specific forms of Temporary Protection at the national level, have experienced mental health problems as a result of insecurity and social exclusion in the host country. These feelings are particularly acute when the persons con-

cerned are already traumatised by their experiences in the country of origin, such as witnessing the death of relatives or suffering random violence. In the light of this experience, ECRE advises that States should be extremely cautious about the future scope of Temporary Protection, particularly its duration and the rights afforded.

Rationale and Scope of Temporary Protection

8. ECRE believes that Temporary Protection represents a reasonable administrative policy only in an emergency situation where individual refugee status determination is not immediately practicable and where Temporary Protection's application will enhance admission to the territory.
9. As an administrative policy, Temporary Protection responds to the gap which exists between the binding principle of *non-refoulement* and the discretionary character of asylum. It should be primarily a way of suspending refugee status determination, while at the same time guaranteeing that all individuals will have access to such determination prior to return. The fact that an individual receives Temporary Protection should in no way imply a prognosis about which legal status (allowing a legal remedy for the individual) he or she may or may not be granted at a later stage.
10. Temporary Protection should only be activated for a large group of refugees in an emergency situation ("mass exodus/ influx").
11. The causes of flight are irrelevant, and beneficiaries should not be defined solely in terms of "vulnerable groups" as listed in the EU common guidelines of June 1993⁷.

States remain free to grant *prima facie* refugee status under the 1951 Convention to any group of persons where it is generally accepted that the majority of their claims would be recognised under that Convention. States can grant this group recognition based on objective criteria and, in the course of persons registering to benefit from such a provision, can also consider whether Article 1F of the Convention (relating to exclusion) applies to any individuals within the group. ECRE urges States to exercise this positive discretion under the Convention, which can be both fair and efficient, and hopes that the existence of Temporary Protection will in no way discourage such group recognition.

12. ECRE proposes that the definition of an emergency requiring the activation of Temporary Protection should relate both to the large scale of the outflow and to the consequences of a sudden large scale arrival in a receiving region of persons who can not return. The scale of the outflow is important because it would generally indicate that the causes of flight are not only individually targeted but also generalised to whole sections of a population, and that the international community is engaged in trying to resolve the crisis. On the other hand, the effect upon the receiving country is crucial in justifying the suspension of the normal determination procedures, and the possible initiation of a regional responsibility sharing mechanism.
13. A refugee reception emergency can not be defined precisely. It is not only a question of absolute numbers, but is relative to past experience of arrivals and the capacity of a local area to provide assistance and secure protection. States must be trusted to act in good faith and not apply Temporary Protection to groups of refugees which they receive steadily in moderate numbers, even where the cumulative total received might be quite large.

14. ECRE recommends that the activation of Temporary Protection should not depend merely upon the risk of a sudden large scale arrival, but rather the emergency situation should be manifest within the State or group of States applying the regime⁸.
15. Until this risk is manifest, international solidarity can be exercised by States in other ways, such as the offering of permanent resettlement places to UNHCR, or the contribution of humanitarian aid. ECRE recalls, however, that the attempt to establish “protected areas” or “safe havens” inside countries of origin, which was conceived in conjunction with Temporary Protection in the case of the former Yugoslavia, had disastrous consequences. The reasons for this should be fully understood before any such policy is implemented in future.
16. It is apparent that no group of refugees subject to Temporary Protection should be subject to visa restrictions imposed by those same States, as access to the territory is critical to the policy’s success. Evacuation and responsibility sharing may be part of ensuring access, but such orderly movements should never justify the erection of barriers to spontaneous arrivals.

Duration and Relationship to Status Determination

17. Temporary Protection should last for a period between six months and two years, sufficient to deal with the consequences of a sudden large scale arrival. After this fixed period, the legal status of the persons affected by the emergency should be regularised by the granting of a secure status such as that recommended in paragraph 3 above. Applications for refugee status under the 1951 Convention should be considered at the same time.

For the purpose of naturalisation after such a regularisation of status, the period spent under Temporary Protection should be considered as legal residence.

18. Furthermore, persons under Temporary Protection should have access to individual refugee determination procedures as soon as it is practicable and certainly prior to return. Experience has demonstrated that large scale arrivals – of refugees fleeing from civil war, for example – generally include many individuals who should be recognised as refugees under the 1951 Convention and its 1967 Protocol. In the past it has sometimes been wrongly assumed that where a large group has fled a war, their asylum claims would in substance differ from the definition of a refugee under the Convention.
19. ECRE opposes any use of Temporary Protection as a status for those individual asylum seekers whose applications for Convention status are rejected but who cannot be returned for other reasons such as the prohibition contained in Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Such persons should be granted protection under the binding regional instrument indicated in paragraph 3 above.

Rights and Conditions

20. The right of *non-refoulement* applies to all persons under Temporary Protection. The right to admission and the right to stay until any claim for refugee status is determined are inferred from this most fundamental right.
21. In setting standards for the treatment of persons under Temporary Protection, States are

obliged to respect the international human rights instruments to which they are party. For example, States party to the ECHR are obliged to provide all rights guaranteed by Section I of that Convention, and States party to the Convention on the Rights of the Child are obliged to promote the best interests of each child regardless of their status or ‘non-status’⁹. Such legal obligations underlie the minimum standards which ECRE proposes below.

22. ECRE proposes the guiding principle that the rights attached to Temporary Protection must be proportionate to its duration. The sense of social exclusion which Temporary Protection has been known to create is not only a question of which legal rights and conditions are granted to the affected persons, but the problem has certainly been the most serious in those countries where prolonged duration of Temporary Protection has not been matched by appropriate rights.
23. ECRE advocates that States implementing Temporary Protection, unilaterally or as part of a regional approach, should publicly clarify at the outset: the duration of the regime, and the rights afforded to persons under it, including the time limits after which additional rights shall be granted.

The following minimum rights should be afforded:

24. ECRE recommends that the right to family unity¹⁰ should be respected and that persons, regardless of their location, should be assisted to reunite with family members already receiving protection. The terms of Temporary Protection should not prevent the reunion of the family unit in different receiving States and in the country of origin. It should be a particular priority in all cases involving unaccompanied minors¹¹.

Furthermore, ECRE urges European States to view sympathetically all requests for exchanges between States which would assist those refugees who, due to ties beyond the immediate family unit, wish to move their residence from one receiving country to another.

25. ECRE recommends that the right to education should be respected for all children under Temporary Protection without delay¹².
26. ECRE recommends that persons under Temporary Protection should at least receive social assistance sufficient to cover basic needs, and should also be granted the right to engage in gainful employment¹³, so that self-sufficiency is promoted. Any possibility of a sudden large scale arrival of refugees destabilising a local labour market will be remedied by the policy of responsibility sharing among States, rather than by denial of the right to work.
27. Persons under Temporary Protection should be provided with all basic health care, on the same conditions as nationals of the receiving state, and wherever possible be provided with additional specialised treatment for physical and psychological problems related to experiences in country of origin or arising from the hardships of flight and exile.
28. Persons under Temporary Protection should be provided with an identity document, as well as an additional document, in the language of the host country, clearly stating their rights while on the territory of the host State.

In addition, ECRE calls on States to impose as few restrictions as possible upon the freedom of persons under Temporary Protection to travel outside the country of reception.

29. ECRE believes that the above rights should be accompanied by investment in advisory services for refugees, and by public education – particularly that of social service providers, national authorities, trade unions, and employers. Only in this way can the rights be made effective. States have a responsibility to budget for such costs and to support non-governmental activities in this area.

Return

30. The end of Temporary Protection does not necessarily imply return. As stated above, Temporary Protection should be terminated by the authority implementing it, after a fixed period not exceeding two years. At this point, it can be assumed that the need for protection still remains and local settlement or resettlement should be promoted as the logical “durable solution”.
31. However, if the emergency situation in the country of origin which has required the activation of Temporary Protection ceases to exist at any time within the fixed period, return may take place.
32. The guiding principle should be that of voluntary return.
33. “Induced” or involuntary returns should not take place unless the following conditions are met: that each person has had access to a refugee determination procedure, and that the conditions in the country of origin genuinely permit return in safety and dignity, including access to the means of livelihood. The means of livelihood includes basic health care and, for families with children, access to education. Furthermore, States should refrain from returning humanitarian cases (involving, for example, serious trauma) regardless of improved circumstances.

The cessation clauses of the 1951 Convention do not apply to those determined not to be Convention refugees. Nevertheless, involuntary return of persons to a situation where changes are not of a “profound and enduring nature” (UNHCR Excom Conclusion 65 XLII) is highly inadvisable. Such involuntary returns can lead to destabilisation and reversal of fragile improvements in a country of origin’s human rights situation.

34. ECRE believes that UNHCR should play a central role in indicating the viability of safe and dignified return, and in co-ordinating its orderly implementation. ECRE fully supports the definitions of “safety and dignity” that have been recently elaborated by UNHCR in the *Handbook on Voluntary Repatriation* (See Annex)¹⁴, and all efforts to implement such principles more fully.
35. Return should always be by tripartite agreement, with the third party being an independent international body such as UNHCR. Return of persons having fled war situations should always depend on the effective implementation of an international peace agreement, though monitoring after return should refer to a wide range of human rights standards and not only those which may be cited in the peace agreement. Such agreements are not usually sufficient in themselves to guarantee return in safety and dignity.

International human rights bodies, inter-governmental and non-governmental organisations, should together explore how to provide an independent human rights assessment and moni-

toring system both during and after such returns.

36. Access to counselling and re-integration assistance should form part of any organised return, whether voluntary or involuntary.
37. To facilitate voluntary returns and minimise social tensions in the countries of origin, ECRE emphasises the need for consultation with refugee groups, and with non-governmental agencies in both the host country and the countries of origin. Experience shows that the involvement of refugee communities in human rights assessments and in the return process itself will provide one of the best guarantees of accuracy and durability.

Concluding Remarks

38. The form of Temporary Protection advocated here depends, in practice, upon the existence of a more secure status into which persons can be regularised after it is terminated. At present there are high standards of protection for *de facto* refugees at the national level in only a handful of countries, and a binding regional instrument containing a supplementary refugee definition is not yet established, so it remains unclear how refugees in Europe would be handled in situations where Temporary Protection expired but the need for broad international protection continued. Many persons would continue to receive inadequate socio-economic and other rights under various national B-statuses.
39. If a supplementary refugee definition is established, Temporary Protection will then be able to perform the appropriate task of answering States' emergency needs. Emergencies will, unfortunately, always arise and in these situations Temporary Protection is a valuable administrative tool for enforcing the principle of *non-refoulement* and permitting an exception to current "safe third country" practices¹⁵ and visa restrictions. At the same time, it must be carefully preserved from any application that erodes more secure forms of protection. It must be designed, as in this paper, to offer States no incentive for its application in circumstances where it is not truly necessary.
40. Progressive interpretation of the 1951 Convention, with due regard for the established principles of international human rights law, remains the starting point.

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¹ For a detailed response on the "harmonisation" of Temporary Protection in Europe, please see ECRE's forthcoming *Comments on Development of a Common Approach to TP among EU Member States*.

² By "*de facto* refugees", ECRE means all persons who would fall under the definition given in paragraph 3, regardless of their current situation, whether rejected asylum seekers, "B-status" refugees, under national regimes of temporary protection, or living illegally on the territory.

³ See ECRE's *Note on the Harmonisation of the Interpretation of Article 1 of the 1951 Geneva Convention*, June 1995.

⁴ For a full examination of the issue of protection for *de facto* refugees and explanation of ECRE's policy in this regard, see the *Working Paper on the Need for a Supplementary Refugee Definition*, published by ECRE in April 1993 and adopted as official ECRE policy in May 1996.

⁵ See ECRE's forthcoming paper: *Comments on Development of a Common Approach to TP among EU Member*

States.

⁶ See ECRE's *Sharing the Responsibility: Protecting refugees and displaced persons in the context of large scale arrivals* and *Comments on the 1995 "Burden Sharing" Resolution and Decision adopted by the Council of the EU*.

⁷ Copenhagen Resolution, 1 June 1993 related to groups such as: prisoners of war internment camps who were at risk, people in need of critical medical treatment which could not be obtained *in situ*, those who had been subject to severe sexual assault and generally those who were under "direct threat to life and limb".

⁸ For this reason, it is desirable that a "common approach" should, as stated in paragraphs 5-6, be as broad as possible and not limited to only western European states. A decision to activate TP should be based on a joint assessment of the situation, in consultation with major regional and human rights bodies, UNHCR and the ICRC.

⁹ Convention on the Rights of the Child, Article 2 concerning "non-discrimination".

¹⁰ ICCPR Article 17 and ECHR Article 8.

¹¹ See ECRE's *Position on Refugee Children*, paras. 32-35.

¹² See ECRE's *Position on Refugee Children*, paras. 5-7 and paras. 37-39.

¹³ ICESCR Article 6.

¹⁴ Annex: page 12 of UNHCR, *Handbook on Voluntary Repatriation: International Protection*, Geneva, 1996.

¹⁵ See ECRE's 1994 report: '*Safe Third Countries*': *Myths and Realities*.