

# Observations by the United Nations High Commissioner for Refugees Representation for Northern Europe on the proposal to introduce in Sweden a list of safe countries of origin (“Uppenbart ogrundade asylansökningar och fastställande av säkra ursprungsländer, Ds 2020:2”)

## I. Introduction

1. The United Nations High Commissioner for Refugees (hereafter “UNHCR”) Representation for Northern Europe is grateful to the Government of Sweden for the invitation to provide observations to the proposal *Uppenbart ogrundade asylansökningar och fastställande av säkra ursprungsländer, Ds 2020:2*, (hereafter “the Proposal”), transposing Articles 31.8 (b), 36 and 37, including Annex I, of the recast Asylum Procedures Directive (hereafter “recast APD”).<sup>1</sup>
2. UNHCR has a direct interest in law proposals in the field of asylum, as the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, seek permanent solutions to the problems of refugees.<sup>2</sup> Paragraph 8 of UNHCR’s Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees,<sup>3</sup> whereas the 1951 Convention relating to the Status of Refugees<sup>4</sup> and its 1967 Protocol relating to the Status of Refugees (hereafter collectively referred to as “1951 Convention”) oblige States to cooperate with UNHCR in the exercise of its mandate, in particular facilitating UNHCR’s duty of supervising the application of the provisions of the 1951 Convention and 1967 Protocol (Article 35 of the 1951 Convention and Article II of the 1967 Protocol). It has also been reflected in European Union law, including by way of a general reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union.<sup>5</sup>
3. UNHCR’s supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention. Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and

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<sup>1</sup> European Union: Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)* (hereafter “recast APD”), 29 June 2013, L 180/60, available at: <http://www.refworld.org/docid/51d29b224.html>.

<sup>2</sup> UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), available at: <http://www.refworld.org/docid/3ae6b3628.html>.

<sup>3</sup> *Ibid*, para. 8(a). According to para. 8(a) of the Statute, UNHCR is competent to supervise international conventions for the protection of refugees. The wording is open and flexible and does not restrict the scope of applicability of the UNHCR’s supervisory function to one or other specific international refugee convention. The UNHCR is therefore competent qua its Statute to supervise all conventions relevant to refugee protection, UNHCR’s *supervisory responsibility*, October 2002, available at: <http://www.refworld.org/docid/4fe405ef2.html>, pp. 7–8.

<sup>4</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series, No. 2545, vol. 189, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html>. According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of the Convention”.

<sup>5</sup> European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, OJ C 115/47 of 9.05.2008, available at: <http://www.unhcr.org/refworld/docid/4b17a07e2.html>.

subsequent Guidelines on International Protection.<sup>6</sup> UNHCR also fulfils its supervisory responsibility by providing comments on legislative and policy proposals impacting on the protection and durable solutions of its persons of concern.

4. UNHCR welcomes and supports the ongoing efforts made by the Government of Sweden to adapt the relevant Swedish legislation in the transposition of the second generation of the EU asylum *acquis*. This is an opportunity to ensure that the Swedish asylum regulations are fully consistent with the obligations under international law and in particular with the 1951 Convention.
5. UNHCR has in the EU welcomed the adoption of the recast APD, which introduced substantial positive changes with the potential of significantly improving the quality and efficiency of the asylum systems in the EU.<sup>7</sup> UNHCR notes that the recast APD shall be interpreted and applied in accordance with the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter “ECHR”).<sup>8</sup> With respect to the treatment of persons falling within the scope of the recast APD, Member States are also bound by obligations under instruments of international law to which they are a party.<sup>9</sup> In Sweden, this includes, in addition, the 1989 United Nations Convention on the Rights of the Child,<sup>10</sup> the 1966 International Covenant on Economic, Social and Cultural Rights<sup>11</sup> and the 1966 International Covenant on Civil and Political Rights.<sup>12</sup>

## II. General Observations

6. The stated purpose of the Proposal is to make the asylum procedure more efficient by accelerating the procedure for manifestly unfounded claims and thereby avoiding unreasonable costs for society, as well as reducing secondary movements by aligning Swedish rules on safe countries of origin with those of many other EU countries. Harmonization is an important goal if viewed as a means to achieve a fairer and more effective asylum system which reflects international standards and fundamental rights.<sup>13</sup> UNHCR further recognizes that rendering asylum procedures more efficient is a key

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<sup>6</sup> UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, available at: <https://www.refworld.org/docid/5cb474b27.html>.

<sup>7</sup> See e.g. UNHCR, *UNHCR comments on the European Commission’s Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast) COM (2011) 319 final*, January 2012, available at: <http://www.refworld.org/docid/4f3281762.html>.

<sup>8</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html>.

<sup>9</sup> Recital 15 of the APD recast.

<sup>10</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html>.

<sup>11</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, at: <http://www.refworld.org/docid/3ae6b36c0.html>.

<sup>12</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, at: <http://www.refworld.org/docid/3ae6b3aa0.html>.

<sup>13</sup> UNHCR, *UNHCR Comments on the European Commission’s Proposal for an Asylum Procedures Regulation, April 2019, COM (2016) 467*, p.4 (hereafter “UNHCR, Comments on the proposed APR”), available at: <https://www.refworld.org/docid/5cb597a27.html>.

objective, not only for States, but also for individuals concerned. Therefore, UNHCR in general supports the goal of fair and efficient processing and the use of accelerated procedures for manifestly unfounded as well as manifestly well-founded claims.<sup>14</sup> At the same time, efficient asylum procedures must be operationalized in a way that ensures fairness, including access to an effective remedy, and adheres to the principle of *non-refoulement*.

7. According to the Proposal, the Swedish Migration Agency (hereafter “SMA”) should be able to consider an application as manifestly unfounded in a “fast, efficient and legally secure manner”, with immediate enforcement of the rejection decision when the applicant comes from a country that is included in a so-called “safe country of origin list”.<sup>15</sup> UNHCR observes that the rationale behind the current proposal is the judgment of the Court of Justice of the European Union (hereafter “CJEU”) in the case of *A v. Migrationsverket*,<sup>16</sup> which confirmed that a “Member State cannot (...) rely on the rebuttable presumption laid down by the provisions of Directive 2013/32 relating to procedures based on the concept of safe country of origin, without also having fully implemented those rules with regard to the laws, regulations and administrative provisions which it is for the Member State to take.”
8. UNHCR does not object to the introduction of the concept of “safe country of origin” *per se*, nor to the adjudication of claims of applicants originating from such countries in accelerated in-merits procedures which ensures all procedural safeguards, including a personal interview, legal assistance and representation, and the right to an effective remedy.<sup>17</sup> However, despite the designation of a country as safe in general, it may be that the country is not safe in a particular case because of the applicant’s particular profile. In UNHCR’s view, it is therefore important for the concept to be applied on a case-by-case basis, ensuring an individual assessment that takes into account the specific circumstances of the case. The determining authority, in line with Article 36 (1) recast APD, needs to ensure that the applicant has an effective opportunity to rebut any presumption of safety, including providing him or her with all the necessary information to do so.
9. In the following observations, UNHCR will address only those aspects of the Proposal that are found to be of concern to UNHCR. The issues are addressed in the order they appear in the Proposal.

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<sup>14</sup> UNHCR, *Better Protecting Refugees in the EU and Globally: UNHCR's proposals to rebuild trust through better management, partnership and solidarity*, December 2016, available at: <https://www.refworld.org/docid/58385d4e4.html>; UNHCR, UNHCR Discussion Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union, 25 July 2018, available at: <https://www.refworld.org/docid/5b589eef4.html>.

<sup>15</sup> Uppenbart grundade asylansökningar och fastställande av säkra ursprungsländer, Ds 2020:2, p. 41, available in Swedish at: <https://www.regeringen.se/49092f/contentassets/4321a186009a4a54ba75518960e4ca3a/uppenbart-ogrundade-ansokningar-och-faststallande-av-sakra-ursprungslander-ds-2020-2.pdf>.

<sup>16</sup> European Union: Court of Justice of the European Union, *A v. Migrationsverket*, C 404-17, 25 July 2018, para. 31, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62017CJ0404>.

<sup>17</sup> See also, UNHCR, *Observations by the United Nations High Commissioner for Refugees Regional Representation for Northern Europe on the proposal to transpose the recast Asylum Procedures Directive in Sweden (“Genomförande av det omarbetade asylprocedurdirektivet, Ds 2015:37”)* available at: <https://www.refworld.org/pdfid/581221024.pdf>. See also, UNHCR Discussion Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union, 25 July 2018, available at: <https://www.refworld.org/docid/5b589eef4.html>.

### III. Specific Observations

#### Designating safe countries of origin (Chapters 6.2 and 9.1 of the Proposal)

10. UNHCR recognizes the inherent difficulties in making an assessment of whether a country is “safe” for the purpose of such a designation and application in the individual case. In addition, safe country concepts should only be used where precise, impartial, and up-to-date information is available on the safety of a particular country. Displacement situations and general conditions can be volatile and subject to continuous developments. Moreover, any assessment by States is susceptible to political, economic and foreign policy considerations. Therefore, if the safe country of origin concept is to be employed, there must be clear and objective benchmarks for the assessment of safety; and mechanisms for the regular review of assessments. The process must be flexible enough to take account of changes, both gradual and sudden, in any given country.
11. UNHCR welcomes that, according to the Proposal, there must be a thorough evaluation and assessment of a country that will be designated as “safe,” and consequently be included in a list of safe countries of origin. UNHCR considers that in principle a country cannot be considered “safe” if it is only safe in parts of its territory. Therefore, UNHCR also welcomes that the Proposal does not allow the designation of parts of a country as safe in general or for a specified group of persons in that country.
12. UNHCR takes note that the intention of the Proposal is to designate a country as “safe” in a way that in general corresponds with the criteria in Annex I of the recast APD, which largely reflects UNHCR’s policy on this concept. UNHCR is, however, concerned about some divergences in the Proposal with the criteria in Annex I and would encourage consistency.
13. As the Proposal points out, the Swedish version of Annex I of the recast APD does not fully reflect the terminology used in the Swedish Aliens Act, which could potentially make the application of some of the criteria in Annex I difficult.<sup>18</sup> According to the Proposal, the elements for consideration of a safe country does, for example, not contain a requirement of a consistent - in addition to general - absence of persecution. UNHCR understands that the reasoning for this is that the Swedish word for “general” (generellt) in this context also includes continuity over time. Nevertheless, UNHCR would strongly recommend using the same wording as in Annex I, i.e. that there is “generally and *consistently* no persecution” (emphasis added), to ensure a transposition consistent with a positive and generous spirit.<sup>19</sup> It is the country’s record in ensuring *consistent protection* for its citizens against persecution that is relevant for the assessment of whether a country is to be considered safe.<sup>20</sup>

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<sup>18</sup> Uppenbart ogrundade asylansökningar och fastställande av säkra ursprungslander, Ds 2020:2, available in Swedish at:

<https://www.regeringen.se/49092f/contentassets/4321a186009a4a54ba75518960e4ca3a/uppenbart-ogrundade-ansokningar-och-faststallande-av-sakra-ursprungslander-ds-2020-2.pdf>, pp. 43-44.

<sup>19</sup> See the wording in the Swedish translation of Annex I to the recast APD.

<sup>20</sup> The assessment includes a review of factors such as the legal situation, the general political circumstances as well as actual respect for the rule of law and human rights in practice. This refers to the international human rights instruments to which the country is a State Party as well as relevant national legislation enacted, see UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, <http://www.refworld.org/docid/3b36f2fca.html>, para. 39. See also, Annex 1 to the (recast) APD.

14. UNHCR is also concerned about the absence of an explicit reference to “respect for the *non-refoulement* principle in accordance with the 1951 Convention” and the “provision for a system of effective remedies against violations of those rights and freedoms” as required by Annex I (c) and (d) of the recast APD and laid down in the ECHR and international refugee law. UNHCR recommends that these requirements should also be a part of the definition in the Proposal.
15. Lastly, UNHCR recommends that any designation of a country as a “safe country of origin” should allow for the possibility to stipulate that the country in question is not a safe country of origin for persons of certain profiles.<sup>21</sup>

### **Removal decision with immediate enforcement (Chapters 6.3 and 9.1 of the Proposal)**

16. Given the severe consequences of a wrong negative decision on applications examined in an accelerated procedure based on the application of the safe country of origin concept, access to effective remedies is essential. UNHCR takes note that the Proposal affords automatic suspensive effect to applicants from a designated safe country of origin in line with the CJEU’s views expressed in *Gnandi v Belgium*,<sup>22</sup> which states that “it is for Member States to ensure the full effectiveness of an appeal against a decision rejecting an application for international protection, in accordance with the principle of *equality of arms*, which means, inter alia, that all the effects of the return decision must be suspended during the period prescribed for bringing that appeal and, if such an appeal is brought, until resolution of the appeal. In that regard, it is not sufficient (...) to refrain from enforcing the return decision. (...) it is necessary that all the legal effects of that decision be suspended” (emphasis added).
17. Regarding the issue of access to information to the applicant, UNHCR takes note that it follows from Section 6 of the Swedish Administrative Procedure Act that the SMA has a duty to provide information to the applicant in order to enable the applicant to effectively exercise his or her rights. UNHCR would, however, recommend that it should be stated explicitly in the Proposal that the applicant must immediately be informed that his or her country of origin has been designated as “safe” and the potential consequences thereof in the asylum procedures. This information, at the earliest possible stage of the application, is one of several important procedural safeguards that ensure that the applicant has an effective opportunity to rebut any presumption of safety in the individual case, in accordance with the principles of equality of arms and good administration.<sup>23</sup>

### **A list of safe countries of origin (Chapters 6.4 and 9.1 of the Proposal)**

18. With respect to which body or authority should be given the responsibility to draw up a list of safe countries of origin, UNHCR does not find it objectionable to mandate the SMA with that task, as long as the designation of countries as safe follows a clear, transparent and accountable process.

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<sup>21</sup> UNHCR, Comments on the proposed APR, p. 45.

<sup>22</sup> European Union: Court of Justice of the European Union, *Sadikou Gnandi v. État belge*, C-181/16, 19 June 2018, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62016CJ0181>, paras. 61-62. See also, European Union: Court of Justice of the European Union, *Sadikou Gnandi v. État belge*, C-181/16, 19 June 2018, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62016CJ0181>.

<sup>23</sup> UNHCR, Comments on the proposed APR, p. 11.

19. Appropriate review mechanisms need to be put in place that take account of both gradual and sudden changes in a particular country designated as safe country of origin, following clear benchmarks and criteria that trigger and inform such a review.<sup>24</sup> UNHCR thus welcomes that the list of safe countries of origin would be subject to review on a regular basis. In this regard, UNHCR considers that it would be beneficial to create an independent advisory body at the national level to the SMA. This body could have the mandate to review the information that forms the basis for the designation of a particular country a safe country of origin, as well as to assess this information against recognized quality criteria for country information. In view of UNHCR's expertise and its supervisory responsibility under its mandate, UNHCR recommends to be invited as a member of this body. UNHCR also recommends this independent advisory body be given the mandate to recommend a review of countries designated as safe, based on its continuous monitoring of the rule of law, human rights and security situation in designated safe countries.<sup>25</sup>
20. UNHCR welcomes that the Proposal states that it is important to quickly be able to remove a country that has been designated as "safe" but no longer meets the requirement for the designation. However, UNHCR recommends that it should be outlined how such a review should be carried out in practice.

#### **Other considerations (Chapters 6.5 and 9.1 of the Proposal)**

21. Regarding the range of sources of information to be taken into consideration when designating a country as safe, UNHCR takes note that the Proposal reflects the wording of Article 37 (3) in the recast APD, with the only difference that the wording "in particular" has been substituted for "among other". Most importantly, from UNHCR's perspective, the sources used for the assessment of and designation of countries as safe countries of origin need to be based on precise, reliable, objective, and up-to-date information from a range of credible sources, including UNHCR.<sup>26</sup> Further, the lists of countries and sources of country of origin information should be publicly available.<sup>27</sup>

#### *The right to legal assistance*

22. UNHCR takes note that, in situations where the applicant originates from a country that is designated as safe, the right to legal assistance will be limited to unaccompanied minors. Furthermore, legal assistance may also be provided in cases where an applicant as a result of illness - or other similar reasons - not even with the assistance of an interpreter can be expected to effectively exercise his or her rights in a sufficient way.<sup>28</sup>
23. While UNHCR welcomes that the above-mentioned categories of applicants would be entitled to legal assistance, UNHCR recommends that all applicants from a country that has been designated as safe should have the right to legal assistance, which is an essential

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<sup>24</sup> *Ibid.*, p. 44.

<sup>25</sup> *Ibid.*, p. 45.

<sup>26</sup> UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, <http://www.refworld.org/docid/3b36f2fca.html>, para. 39. *Salah Sheekh v. The Netherlands*, Application no. 1948/04, Council of Europe: European Court of Human Rights, 11 January 2007, para. 136, available at: <https://www.refworld.org/cases,ECHR,45cb3dfd2.html>.

<sup>27</sup> UNHCR, Comments on the proposed APR, p. 44.

<sup>28</sup> *Ibid.*, p. 58.

procedural safeguard and necessary to enable applicants to fully exercise their rights.<sup>29</sup> Furthermore, it is the most effective way to ensure that the applicant has an effective opportunity to rebut any presumption of safety.<sup>30</sup>

**UNHCR Representation for Northern Europe  
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<sup>29</sup> *Ibid*, p. 15.

<sup>30</sup> UNHCR Comments on the proposed APR, pp. 11 and 43. *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, available at: <https://www.refworld.org/cases.ECHR.4f4507942.html>, para. 202