UNHCR
The UN Refugee Agency

UNHCR COMMENTS

ON THE EUROPEAN COMMISSION PROPOSAL FOR AN ASYLUM PROCEDURES REGULATION – COM (2016) 467

Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU – COM (2016) 467

These comments complement UNHCR's overarching proposals for the EU as set out in "Better Protecting Refugees in the EU and Globally" (December 2016), aimed at rebuilding trust through better management, partnership and solidarity.[1] Those proposals focus on four elements: engagement beyond EU borders, preparedness, a well-managed asylum system and greater emphasis on integration.

The pressures and shortcomings observed in some Member States following large-scale arrivals in 2015 highlighted the need for a revitalized asylum system in the EU. In its overarching proposals, UNHCR recommends that, in addition to ensuring access to territory is guaranteed and new arrivals are registered and received properly, a new asylum system would allocate responsibility for asylum-seekers fairly among EU Member States, and ensure that EU Member States are equipped to fulfil their EU and international legal obligations.

To complement and elaborate on these overarching proposals, UNHCR is setting out its position on the European Commission's proposals to reform the CEAS in a series of detailed commentaries. This paper contains UNHCR's comments on the specific aspects of the EC's proposal for an Asylum Procedures Regulation. UNHCR calls on States to apply asylum procedures in full compliance with international refugee and human rights law, as well as EU law and EU fundamental rights. Asylum procedures must be fair and efficient, ensure effective access to international protection for those who need it, and be fully in line with the rights to a fair procedure and effective judicial protection – two general principles that the EU rests upon and which must be honoured at all times. This means that procedural guarantees, such as, *inter alia*, the right to information, the right to be heard, the right to remain pending the outcome of a procedure, including at the appeals level, must be observed. Specific provisions for children and persons with vulnerabilities are equally crucial elements in asylum procedures that are fully compliant with international and EU law. Further, while efficient procedures are key, time lines may not be shortened to an extent that undermines the fairness and quality of the procedure. Lastly, admissibility procedures, including those based on safe country concepts, may not be applied in a way that erodes access to these safeguards and the EU's international protection space.

As the proposal would turn the current Asylum Procedures Directive into a Regulation, and thus give it directly binding effect, realizing these elements is even more essential.

[1] 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: http://www.refworld.org/docid/58385d4e4.html.

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EXECUTIVE SUMMARY

UNHCR welcomes the European Commission's (EC) overall goal of **harmonising** protection standards and procedures. Given the current wide divergences in procedures, time frames, and recognition rates throughout the European Union (EU), this is an important and timely objective. UNHCR also shares the EC's view that turning the current recast Asylum Procedures Directive[2] into a Regulation[3] could be an effective way of addressing these challenges. However, UNHCR cautions that harmonization **should not lead to a lowering of rights and standards**. Rather, it should be viewed as a means to achieve a fairer and more effective asylum system which reflects international standards and fundamental rights.

Procedural safeguards

UNHCR welcomes the proposal's emphasis on the applicant's **rights to information** and **legal assistance and representation**. These are key elements in ensuring that an applicant for international protection can effectively exercise his or her rights. UNHCR also shares the EC's view that "provid[ing] the applicant with all the necessary information becomes all the more important because of the consequences that non-compliance may carry for the applicant."[4] Furthermore, UNHCR welcomes the **improved safeguards for persons with specific procedural needs**. For unaccompanied children, UNHCR welcomes the proposed **appointment of a guardian** within five days.

UNHCR is concerned, however, that the proposal does not always strike the right balance between rules that are meant to ensure that applicants are properly informed about their (new) obligations, and rules that sanction non-compliance with the obligations of applicants. For instance, where an applicant refuses to cooperate by not providing the details necessary for the examination of the application and the responsible authorities have properly informed the applicant of her or his obligations, the application shall be rejected as "implicitly withdrawn". It is unclear what details are meant and whether the applicant will be informed of her or his obligations in a language she or he actually understands. An applicant's failure to comply with the obligation to provide the "details necessary for the examination of the application" may be due to reasons unrelated to the validity of his/her claim, but, for example, related to unclear or misinformation. UNHCR therefore **cautions against the use of punitive measures** for non-compliance with obligations of applicants. While asylum-seekers have certain duties throughout the procedure, the use of **implicit withdrawal** should be restricted to certain carefully-circumscribed and well-defined grounds and, in all cases, Member States must ensure that no applicant whose application is considered to be implicitly withdrawn is removed contrary to the principle of *non-refoulement*. As for the use of country of origin information and analysis by the determining authority, where available, UNHCR's country-specific guidance should be considered authoritative in accordance with its supervisory responsibility under its Statute[5] and the 1951 Convention relating to the Status of Refugees,[6] which is binding on all Member States under international law.

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2 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)*, 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU, ("recast APD"), available at: http://www.refworld.org/docid/51d29b224.html.

3 European Union: European Commission: *Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2016) 467 final*, ("APR"), available at: https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-467-EN-F1-1.PDF.

4 APR, note 3 above, Explanatory Memorandum, p. 12.

5 UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), para.8(a), ("UNHCR Statute"), available at: www.refworld.org/docid/3ae6b3628.html.

6 UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, ("1951 Convention"), p. 137, available at: www.refworld.org/docid/3be01b964.html.

Efficiency measures

UNHCR recognizes that **rendering asylum procedures more efficient is a key objective**, both for Member States and individual applicants. **UNHCR therefore supports the EC's goal of fair and efficient processing** and supports the use of accelerated procedures for manifestly unfounded and manifestly well-founded claims, as recommended in its paper *Better Protecting Refugees in Europe and Globally*.[7] Such procedures could help guarantee quick access to international protection for those who need it, and help facilitate return of those who do not.[8] However, UNHCR is concerned about some of the ways the proposal seeks to reach this objective. In particular, **mandatory admissibility procedures, including based on safe country concepts**, as well as **accelerated examination procedures**, without sufficient procedural safeguards, as currently proposed, raise serious concerns. The mandatory application of safe country concepts risks creating both practical and legal challenges, and the proposed grounds for acceleration go beyond what UNHCR considers to be appropriate. In particular, UNHCR has a **different understanding of "manifestly unfounded"** claims,[9] and of procedural consequences which should apply in such cases. In addition, **time limits** for appeals need to be reasonable in the particular circumstances of the individual case, and the applicant must be able to submit all relevant evidence. This is needed to ensure that a remedy is effective. Lastly, the proposal to **remove automatic suspensive effect of appeals**, including in all accelerated examination procedures and some admissibility procedures, increases the risk of persons who are in need of international protection being returned, contrary to the principle of *non-refoulement*. UNHCR shares the EC's opinion that "there is a higher risk of a possible violation of Article 3 of the ECHR when applying the concept of safe third country and therefore the suspensive effect of the appeal remains necessary to ensure an effective remedy".[10] Furthermore, UNHCR considers this risk is high when applying other safe country concepts (i.e. first country of asylum and safe country of origin) and that a deviation from the standard of automatic suspensive effect of appeals is therefore not justified in these cases. In sum, while achieving more efficient procedures is an important goal, it must not be operationalised in a way that endangers the rights to a fair procedure and to an effective remedy, or increases the risk of *refoulement*.

Binding and directly applicable effect of the proposal

As a regulation, the proposal would be binding in its entirety and directly applicable in participating EU Member States. Member States that wish to adopt a more generous approach would find themselves constrained in their ability to do so. Previously optional provisions, for example concerning the application of safe country concepts, would turn into mandatory provisions that leave no discretion to Member States. In situations where the mandatory application of provisions in the Regulation would be in conflict with fundamental rights, **EU primary law and international refugee and human rights law would prevail**, including principles such as *non-refoulement* and the right to family life. For this reason, UNHCR welcomes the multiple references to **fundamental rights** and **international law** throughout the proposal.

Access to international protection

Finally, UNHCR underlines the paramount importance of ensuring **effective access** to asylum procedures and welcomes that the proposal strengthens some procedural safeguards designed to ensure such access (e.g. the right to information, the right to legal representation, or the right to a personal interview). UNHCR is, however, concerned that the mandatory use of admissibility and accelerated examination procedures, which involve insufficient procedural safeguards, may compromise asylum-seekers' effective access to international protection.

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7 UNHCR, *Better Protecting Refugees in the EU and Globally*, note 1 above, p. 12.

8 See also UNHCR, *UNHCR Discussion Paper Fair and Fast – Accelerated and Simplified Procedures in the European Union*, 25 July 2018, available at: http://www.refworld.org/docid/5b589eef4.html.

9 See section 6 below on "Manifestly unfounded claims".

10 APR, note 3 above, Explanatory Memorandum, p. 18.

1 INTRODUCTION

Goals of the proposal

The proposed Asylum Procedures Regulation (APR)[11] would replace the current recast Asylum Procedures Directive (recast APD).[12] As a regulation, it would be directly applicable in EU Member States and, as such, significantly limit their discretion on how to regulate asylum procedures. In this way, the APR aims at harmonizing asylum procedures across Member States, achieving greater uniformity in the outcome of asylum procedures, and removing incentives for onward movement between Member States.

Concretely, the proposal seeks to establish a fair and efficient asylum procedure common in the European Union through:

- simpler, clearer, and shorter procedures;
- procedural guarantees safeguarding the rights of applicants;
- stricter rules to prevent abuse, sanction manifestly abusive claims and remove incentives for onward movement;
- harmonised rules on safe countries.

Main changes

Among the most significant changes proposed by the European Commission (EC) are the **mandatory use** of specific procedures, including **admissibility and accelerated examination procedures**, as well as the mandatory application of **safe country concepts**. Further, the proposal contains **stricter time limits** for lodging applications and appeals and a catalogue of **obligations** with which the applicant has to comply, or otherwise risk procedural **sanctions.** In case of subsequent applications, the proposal allows for **exceptions on the applicant's right to remain**.

To balance these strict provisions, the proposal strengthens applicants' rights, including the **right to information** and the right to free **legal assistance and representation** that is extended to all stages of the asylum procedure. Lastly, the proposal introduces a system of mandatory **guardianship** for unaccompanied children, consistent with the new rules in the recast Reception Conditions Directive (RCD).

UNHCR's mandate

UNHCR provides these comments 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 for refugees.[13] According to its **Statute**, UNHCR fulfils its mandate *inter alia* by "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto […]".[14] This supervisory responsibility is reiterated in the preamble of the 1951 Convention Relating to the Status of Refugees (**1951 Convention**), whereas Article 35(1) of the 1951 Convention and Article II of the 1967 Protocol relating to the Status of Refugees[15] (1967 Protocol) oblige State Parties to cooperate with UNHCR in the exercise of its functions, in particular its supervisory responsibility.

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11 APR, note 3 above. Where not stated otherwise, articles mentioned in this document refer to the APR proposal.

12 Recast APD, note 2 above.

13 UNHCR Statute, note 5 above, para. 1.

14 UNHCR Statute, note 5 above, para. 8(a).

15 UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: www.refworld.org/docid/3ae6b3ae4.html.

UNHCR's supervisory responsibility has also been reflected in **EU 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 (TFEU)[16]; in Article 18 of the Charter of Fundamental Rights of the European Union (EU Charter)[17]; as well as Declaration 17 to the Treaty of Amsterdam, which provides that "consultations shall be established with the United Nations High Commissioner for Refugees […] on matters relating to asylum policy".[18] Lastly, UNHCR's supervisory responsibility is also mentioned in Article 29(1)(c) of the recast APD, which is retained in proposed Article 18(1)(c) of the APR.

Structure

This document sets out UNHCR's key concerns and recommendations on the proposed Asylum Procedures Regulation. The legal analysis and recommendations are based on relevant international law, in particular the 1951 Convention and established UNHCR positions, European human rights law and EU law, as well as case law, in particular from the CJEU and the ECtHR.

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APPLICANTS' OBLIGATIONS

Refusal to cooperate (Articles 7(3), 39)

Article 7 of the proposal contains a catalogue of obligations with which the applicant has to comply when making an application for international protection. It expands the obligations already contained in Article 13 recast APD, and introduces sanctions in case of non-compliance. In general, UNHCR considers that applicants have certain obligations to contribute to an efficient examination of their application. However, as the provision is currently proposed, UNHCR is concerned about the consequences in case an applicant refuses to cooperate by not providing specific information, including his or her fingerprints and facial image (Article 7(3)). UNHCR is also concerned about the absence of safeguards when applicants, or items in their possession, are being searched in the context of the examination of the application (Article 7(7)). Both concerns will be addressed below.

First, according to Article 7(3) of the proposal, the determining authority **shall reject an application as abandoned,** in accordance with the procedure for implicit withdrawal (Article 39),

> *"where an applicant refuses to cooperate by not providing the details necessary for the examination of the application and by not providing fingerprints and facial image, and the responsible authorities have properly informed that person of his or her obligations and has ensured that that person has an effective opportunity to comply with the obligations".*

UNHCR is concerned that the provision may be **open to wide interpretation**. It is unclear whether "the details necessary for the examination of the application" refer to the specific information mentioned in Article 27(1) of the proposal (i.e. biodata and information on identity and travel documents),[19] or whether it refers more broadly to elements relevant to substantiate the application (including reasons for applying for international protection) as mentioned in Article 4(1) of the recast Qualification Directive (QD). In order to clarify the meaning of "details necessary for the examination of the application", UNHCR recommends that Article 7(3) should refer to Article 27(1)(a) and (b) of the proposal and the specific information mentioned therein.

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16 European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, available at: www.unhcr.org/refworld/docid/4b17a07e2.html.

17 European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, available at: www.refworld.org/docid/3ae6b3b70.html.

18 European Union: Council of the European Union, *Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts*, 10 November 1997, available at: www.refworld.org/docid/51c009ec4.html.

19 This narrow reading of Article 7(3) is based on explicit reference in Article 7(2)(a) to data mentioned in Article 27(1)(a) and (b). Article 27(1) refers to the following information: (a) the name, date of birth, gender, nationality and other personal details of the applicant; (b) the type and number of any identity or travel document of the applicant; and (c) the date of the application, place where the application is made and the authority with which the application is made.

This follows logically from the object and purpose of Article 7, which is to ensure that the examination of an application for international protection can commence rather than focus on the substance and credibility of the application.

Further, UNHCR appreciates Article 7(3) requires the responsible authorities to **properly inform the applicant** of her or his obligations. In this regard, UNHCR considers it necessary that applicants be informed in a language they actually understand, rather than a language they are "meant to understand" (see further considerations on this in section 3 below on the right to information under Article 8). UNHCR recommends that explicit reference is made to Article 8 of the proposal, which lists general guarantees for applicants, as well as to proposed Articles 20 to 22 concerning guarantees for "applicants with special needs".

UNHCR therefore recommends to amend **Article 7(3)** as follows:

> "Where an applicant refuses to cooperate, **in accordance with Article 7(2)(a) and (b)**, by not providing **data referred to in points (a) and (b) of the second paragraph of Article 27(1) where the applicant is in a position to readily provide such data, [...]**and by not providing his or her fingerprints and facial image, and the responsible authorities have properly informed that person of his or her obligations and has ensured that that person has had an effective opportunity to comply with those obligations, his or her application **may** be rejected as abandoned in accordance with the procedure referred to in Article 39**. This decision shall take into account special procedural needs referred to in Articles 20, 21 and 22. Proper information shall be provided in line with Article 8 so that the applicant can make an informed choice based on a proper understanding of the processing of personal data, in line with Article 8 of the Charter of Fundamental Rights of the European Union.**"

Searching the applicant and his or her items (Article 7(7))

Second, the proposal allows for the applicant, or his or her items, to be **searched**, with the added qualification that the applicant can be required to be searched only where it is "necessary for the examination of an application". In addition, the search shall be carried out by a person of the same sex, and with full respect for the principles of human dignity and of physical and psychological integrity (Article 7(7)).

UNHCR recognizes the legitimate interests of states in seeking to ensure that asylum decisions are based on the most comprehensive and accurate information available. As such, UNHCR acknowledges that there may be situations in which the search of items as well as of the applicant may be justified. In this regard, UNHCR welcomes that **searches shall be carried out** by a person of the same sex and **with full respect of the applicant's integrity and dignity**. Because of the intrusive character of these searches and despite the requirement that this is only done where necessary for the examination of the application, searches of applicants and their items should not become a routine part of asylum procedures.[20]

In addition, UNHCR welcomes the general obligation for the authorities applying the Regulation to safeguard the confidentiality of any information obtained (Article 6(1)) and reference to the EU General Data Protection Regulation (Recital 68) in accordance with the individual right to protection of personal data.[21] Generally, UNHCR underlines that any **search** must be in accordance with the law, conducted for a **legitimate purpose and be necessary, adequate and proportionate** to achieve this purpose. This approach is required by Article 8 ECHR[22] and by Article 7 in conjunction with Articles 1, 3(1) and 52(1) of the EU Charter.

To ensure searches are lawfully carried out, **applicants should be properly informed**, in a language they understand, regarding the purpose and procedure of the search as well as the relevant data protection rules. In addition, information collected through the search should only be retained, and stored in a safe manner, when it is relevant and material to the examination of the application and for so long as it is necessary for this purpose. Seized items should be returned to the applicant as soon as possible and excess data collected should not be retained, but rather returned in a timely manner to the applicant or destroyed, provided this does not infringe other rights of the person concerned. An audit trail or other record of all processes applied to digital evidence should be created and preserved.

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20 UNHCR, *UNHCR Preliminary Legal Observations on the Seizure and Search of Electronic Devices of Asylum-Seekers*, 4 August 2017, available at: https://www.refworld.org/docid/59a5231b4.html.

21 Article 8 EU Charter.

22 See, for example, ECtHR, *Murray v. The United Kingdom*, Application no. 14310/28, paras. 90-91, available at: http://hudoc.echr.coe.int/eng?i=001-57895.

Further, it is unclear what is meant with the applicant's "items". In this regard, UNHCR has noticed that a number of European States have recently adopted or are currently considering the adoption of legislation allowing authorities to seize and search personal electronic devices, such as **mobile phones and tablets**. UNHCR would like to point out that electronic data saved on mobile devices will frequently include a wide range of information of a personal and sensitive nature (e.g. private communications, financial records, browsing history, GPS location, social media, etc.). While some of this data may bear direct relevance to the consideration of an asylum application, much will not, or will even be subject to specific protection under the law in most jurisdictions, such as information covered by lawyer-client privileges and medical information. Easy access to electronic data does, in UNHCR's view, **not justify an unfocused, indiscriminate or speculative search for information**.

UNHCR also wishes to underline that the evidentiary value of electronic data should be considered with great care. Asylum-seekers might avoid using their correct names on social media platforms, including for legitimate reasons, such as to evade surveillance and possible persecution, or potential harm to their families, in their country of origin. Further, digital and electronic evidence may in certain instances have **limited reliability or accuracy** or may be easily altered. Finally, it is relatively common for mobile devices to have been handed over or used by other individuals, including by smugglers or traffickers.

Due consideration should be given to these factors when considering searching electronic devices deemed necessary for the examination of an application. Moreover, due care should be taken to ensure that the applicant or his/her legal representative has access to any information that is retrieved from the device that will be used to examine the asylum application.

In light of the above considerations, UNHCR recommends referring in Article 7(7) to the applicant's **fundamental rights** broadly as well as the **principle of proportionality**, while retaining the explicit reference to the applicant's dignity and integrity in the final sentence. Further, UNHCR recommends to replace "responsible authorities" with "determining authority" in accordance with Article 5(1) of the proposal.

UNHCR recommends to amend **Article 7(7) first sentence** as follows:

> "**In full respect of the applicant's fundamental rights and the principle of proportionality and [w]**here it is necessary for the examination of an application, the applicant may be required by the **[…]determining authority** to be searched or to have his or her items searched."

3 GENERAL PROCEDURAL SAFEGUARDS

In UNHCR's view, fair and efficient asylum determination procedures need to combine efficiency in decision-making with respect for due process guarantees. The importance of procedural safeguards is highlighted in numerous recitals and the proposal contains important guarantees, such as **information rights (Article 8(2)),** the right to a **personal interview (Articles 10 to 13),** the right to **free legal assistance and representation (Articles 14 to 17)**, and **specific procedural guarantees (Articles 19 and 20)**. In addition, while the provisions on the right to **remain (Articles 9, 29 and 43)**, the right to an **effective remedy (Article 53)**, and **suspensive effect of appeals (Article 54)** have been modified, they remain crucial procedural safeguards. Each of these guarantees will be addressed in this section.

As an overall comment, **UNHCR welcomes the proposed improvements** of procedural safeguards, which represent an important step towards ensuring that applicants can effectively exercise their rights throughout the procedure. UNHCR's concerns relate primarily to the Member States' ability to ensure these procedural safeguards in practice since they often carry major resource implications.[23]

[23] See UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice – Key Findings and Recommendations*, March 2010, ("UNHCR APD Study"), available at: http://www.refworld.org/docid/4bab55752.html; European Council on Refugees and Exiles, *ECRE/ELENA Survey on Legal Aid for Asylum Seekers in Europe*, October 2010, available at: http://www.refworld.org/docid/4d243cb42.html; European Council on Refugees and Exiles, *The length of asylum procedures in Europe*, October 2016, available at: http://www.refworld.org/docid/57f7a0cf4.html.

Right to information (Articles 8(2), 8(5), 8(6) and Recital 25)

Article 8(2), along with Recital 25, of the proposal requires the determining authority to inform the applicant of a number of procedural issues, including his or her rights and obligations during the procedure, as well as consequences in case of non-compliance with these obligations. This information is to be provided in a language which the applicant understands or is "reasonably meant to understand" (Article 8(2)). UNHCR welcomes the list of rights and issues of which the applicant is to be informed as it enhances procedural fairness. However, UNHCR considers it necessary that applicants be informed in a **language which they actually understand** rather than one they are meant to understand, since assumptions that an applicant speaks or understands the official language of his/her country of origin may be incorrect.[24] In addition, the information should be transmitted in a clear, concise form, in line with Article 30 of the EC's Eurodac proposal.[25]

UNHCR also welcomes the obligation to inform applicants in good time of the **consequences of an explicit or implicit withdrawal** of their applications. Timely information is, indeed, essential in this context to ensure that specific provisions on the rejection of explicitly withdrawn claims or on the time limit for reopening an implicitly withdrawn claim are not applied to applicants who in fact do not intend to withdraw their applications.[26]

Further, UNHCR welcomes the determining authority's obligation to ensure that applicants and their representatives have **access to the information** required for the examination of applications (Article 8(5)). This enhances the procedural fairness and is in accordance with the principle of equality of arms[27] and the right to good administration.[28] However, UNHCR is concerned that reference is only made to information on whether the applicant is considered to have engaged in activities for the sole or main purpose of creating the conditions for applying for asylum (Article 33(2)(e)) and to expert advice (Article 33(3)). In UNHCR's view, all information relevant for the examination of applications mentioned in Article 33(2)(b), (c) and (e) as well as in Article 33(3) and (4) should be made available to the applicant prior to the determining authority making a decision on the application. This includes, in particular, relevant, accurate and up-to-date country of origin information (Article 33(2)(b) and Article 33(2)(c)).[29] Such information should be shared *before* the decision is taken, in order to allow the applicant to effectively rebut presumptions that may arise from the use of such information.[30]

Finally, UNHCR notes the possibility for the determining authority to **notify its decision only to the guardian, legal advisor or other counsellor** representing the applicant rather than to the applicant him or herself (Article 8(6)). UNHCR's 2010 APD Study showed that a number of EU states serve the decision both on the applicant and his/her legal representative.[31] UNHCR supports this good practice as it permits the applicant to be informed in a timely way of the decision and promptly take, upon the advice of his or her legal advisor or other legal counsellor, the necessary steps to challenge a negative decision. UNHCR also specifically reiterates that children need to be informed of the decision in person, in the presence of their guardian, with particular care.[32]

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24 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, ("UNHCR 2012 APD (recast) Comments"), available at: http://www.refworld.org/docid/4f3281762.html, p. 13. See in this regard also the requirements for a personal interview, where in Article 12(8) regarding interpretation services it is stipulated that "[t]he communication shall take place in the language preferred by the applicant unless there is another language which he or she understands and in which he or she is able to communicate clearly."

25 European Union: European Commission: *Proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/213 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast) – COM (2016) 272, 4 May 2016*, available at: https://bit.ly/1TMjWSg.

26 UNHCR 2012 APD (recast) Comments, note 24 above, p. 13.

27 See, for example, ECtHR, *Yvon v. France*, Application no. 44962/98, para. 37, available at: http://hudoc.echr.coe.int/eng?i=001-61053, where the ECtHR found a violation of the principle of equality of arms, because one party enjoyed significant advantages as regards access to relevant information and occupied a dominant position in the proceedings.

28 As enshrined in Article 41 of the EU Charter.

29 See Article 12(1)(d) recast APD in conjunction with Article 10(3)(b) recast APD.

30 UNHCR, *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554*, 21 October 2009), August 2010, ("UNHCR 2010 APD Comments"), pp. 15-16, available at: http://www.refworld.org/docid/4c63ebd32.html.

31 UNHCR APD Study, note 23 above, p. 41.

32 UNHCR 2012 APD (recast) Comments, note 24 above, p. 44.

UNHCR recommends to modify **Recital 25** first sentence as follows:

> The applicant should be informed properly of his or her rights and obligations in a timely manner and in a language that he or she understands **[…], in a concise, transparent, intelligible and easily accessible form, using clear and plain language**."

UNHCR also recommends amendment of **Article 8(2)** as follows (retaining the text at letters (a)-(f), amending the text at letter (g), and amending the numbering of current letters (g) and (h) to (h) and (i)):

> The determining authority shall inform applicants, in a language which they understand **[…], in a concise, transparent, intelligible and easily accessible form, using clear and plain language,** of the following: […]
>
> **(g) the country of origin information and all other expert information that the determining authority is taking into consideration for the purpose of taking a decision on the application;**
>
> **(h)** the consequences of an explicit or implicit withdrawal of the application;
>
> **(i)** the outcome of the decision of the determining authority, the reasons for that decision, as well as the consequence of a decision refusing to grant international protection and the manner in which to challenge such a decision.

The information referred to in the first paragraph shall be given in good time to enable the applicants to exercise the rights guaranteed in this Regulation and for them to adequately comply with the obligations set out in Article 7. **The information referred to in paragraph 2 (g) shall be provided to the applicants well in advance of the taking of the decision to allow applicants to effectively rebut presumptions that may arise from the use of such information, in accordance with the principle of equality of arms and the right to good administration.**"

UNHCR also recommends to add a final sentence to **Article 8(2)**:

> **Information, advice and counselling shall also be provided in a gender, age and culturally appropriate way.**"

UNHCR further recommends to modify **Article 8(5)** as follows:

> The determining authority shall ensure that applicants and, where applicable, their guardians, legal advisers or other counsellors have access to the information referred to in Article 33(2)**(b), (c) and** (e) required for the examination of applications and to the information provided by the experts referred to in Article 33(3), where the determining authority has taken that information into consideration for the purpose of taking a decision on their application**, and relevant documents translated in accordance with Article 33(4)**."

UNHCR recommends to modify **Article 8(6)** as follows:

> The determining authority shall give applicants **[…] notification of the decision taken on their application** within a reasonable time **[…]**. Where a **[…]** legal adviser or other counsellor is legally representing the applicant, the determining authority may give notice of the decision to him or her instead of**, or in addition to,** to the applicant. **In the case of unaccompanied children, where a guardian is appointed in accordance with Article 22(1), the determining authority shall give notice of the decision to the child, in the presence of his or her guardian."**

Personal interviews (Articles 10-13), including in the context of subsequent applications (Article 42(3))

UNHCR welcomes the inclusion of a specific section on "Personal Interviews", which distinguishes between "**admissibility interviews**" (Article 10) and "substantive interviews" (Article 11), and sets out general rules applying to both forms of interviews (Articles 12 and 13). Because of its competence under Article 5(2), UNHCR welcomes that the determining authority is responsible for conducting both the admissibility and substantive interview.

To ensure an open and reassuring environment during the interview, taking into account possible difficulties on the part of the applicant to present the grounds of his or her application in a comprehensive manner, as foreseen by Article 12(8) second indent, UNHCR recommends a slight amendment to this Article: instead of referring to the sex of the interviewer and interpreter, reference should be made to their gender.[33]

UNHCR recommends to amend **Article 12(8)** second indent as follows:

> "Where requested by the applicant, the determining authority shall ensure that the interviewers and interpreters are of the same […] **gender** as the applicant […]."

UNHCR is of the opinion that a **personal interview is critical** to guarantee the fairness of procedures and that decisions are based on complete information. In line with UNHCR's Executive Committee Conclusions,[34] UNHCR strongly recommends that all applicants should, in principle, be granted the opportunity for a personal interview, **both at the admissibility and substantive stage**, except in those cases in which the determining authority is able to take a positive decision on the claim to refugee status on the basis of evidence available (as proposed in Article 12(5)(a)), or the applicant is unfit or unable to attend an interview owing to enduring circumstances beyond his or her control (as proposed in Article 12(5)(b)).[35] In the latter case, the examination should be put on hold and a professional opinion obtained as to whether the impediment is temporary or likely to be long-standing. In addition, it should be made explicit that Article 12(9) – allowing the determining authority to take a decision despite the absence of a personal interview – refers only to the cases listed in Article 12(5)(a) and (b).

UNHCR recommends to amend **Article 12(9)** as follows:

> "The absence of a personal interview**, in the cases referred to in paragraph 5 of this Article,** shall not prevent the determining authority from taking a decision on an application for international protection."

As under the recast APD (Article 34(1)), the proposal allows Member States to **dispense with the personal interview** in cases of **subsequent applications**. It limits this option, however, to cases in which no relevant new elements or findings were submitted, or where the subsequent application is clearly without substance and has no tangible prospect of success (Article 42(3)).

Article 42(2) still requires Member States to conduct a **preliminary examination** to determine whether there are new elements or findings. The decision to omit a personal interview cannot be taken unless this preliminary examination has been conducted. However, Article 42(3) permits the preliminary examination of a subsequent application to be conducted on the sole basis of **written submissions** without a personal interview. It must be stressed that this provision is optional, and that holding an interview can facilitate access to important information, including the existence of new elements or prospects of success of a subsequent application.

The APR requires an **adequate and complete examination** of the application.[36] This cannot be achieved without a personal interview, as this is an essential part of the asylum procedure, with the exception of the two narrow cases outlined in Article 12(5)(a) and (b).[37] For this reason, UNHCR considers it good practice for Member States to give applicants the opportunity for an interview during the preliminary examination of subsequent applications.[38] In particular, in cases where an application is rejected on the basis of the concept of **"explicit"** or **"implicit" withdrawal**, and a further submission is therefore considered a "subsequent" application, **a personal interview might have not taken place**. In such cases, Member States should not use the option to omit the personal interview.

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[33] UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, ("UNHCR SOGI Guidelines"), para. 60(vi), available at: http://www.refworld.org/docid/50348afc2.html.

[34] UNHCR, ExCom Conclusion No. 8 (XXVIII) of 1977 and 30 (XXXIV) of 1983.

[35] UNHCR APD Study, note 23 above, p. 81.

[36] Articles 34(2), 41(2), and 55(1), as well as Recitals 33 and 66.

[37] UNHCR APD Study, note 23 above, p. 81, UNHCR, ExCom Conclusion No. 8 (XXVIII) of 1977 and 30 (XXXIV) of 1983. See also UNHCR *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate*, 20 November 2003, available at: http://www.refworld.org/docid/42d66dd84.html, p. 77, which notes that "[u]nder no circumstances should a refugee claim be determined in the first instance on the basis of a paper interview alone."

[38] UNHCR APD Study, note 23 above, p. 91.

UNHCR recommends to add a new **Article 42(4)** (and to re-number the subsequent paragraphs accordingly) as follows:

> "**Paragraph 3 second sentence of this Article applies without prejudice to an adequate and complete examination. It shall not be applied where an application has been rejected as explicitly withdrawn or abandoned in accordance with Article 38 or Article 39, respectively.**"

In general, effective communication with the applicant during the interview is an essential prerequisite for a fair and efficient asylum procedure. For this reason, UNHCR welcomes that interpreters must ensure appropriate communication between the applicant and the **interviewer** (Article 12(8)). However, UNHCR's 2010 APD study has shown shortcomings in the professional qualifications of interpreters as well as on their conduct in practice. It was shown to be essential to ensure specific **professional qualifications** for the selection of interpreters and to establish ethical requirements for their involvement in interviews. UNHCR therefore recommends using only qualified interpreters who have the ability to take into account the personal and general circumstances surrounding the application, including the applicant's cultural origin, age, gender, sexual orientation, gender identity and vulnerability. Finally, UNHCR recommends that interpreters be required, in the same way as authorities applying the Regulation, to safeguard the confidentiality of any information obtained in the course of their work.

UNHCR recommends to add a new second indent after **Article 12(8)**, first indent, as follows:

> "**The interpreter shall have the necessary qualifications and shall have received appropriate training on the circumstances surrounding asylum applications referred to in paragraph 6 of this Article, as well as on the elements referred to in paragraph 7 of this Article.**"

Further, UNHCR recommends to amend the current **Article 12(8)**, second indent, as follows:

> Where requested by the applicant, the determining authority shall ensure that the interviewers and interpreters are of **[…] a gender preferred by** the applicant provided that this is possible and the determining authority does not have reasons to believe that such a request is based on grounds which are not related to difficulties on the part of the applicant to present the grounds of his or her application in a comprehensive manner."

Finally, UNHCR recommends to add a new third indent to **Article 12(8)**, as follows:

> "**The interpreter shall safeguard the confidentiality of any information he or she obtains in the course of his or her work.**"

Recording the personal interview, currently at the discretion of Member States, would become compulsory under the proposal (Article 13(2)). In addition, the proposal provides that the applicant shall be **informed** of the recording in advance (Article 13(2)), and the recording shall be erased ten years from the date of the final decision (Article 13(7)).

While UNHCR considers that recording is an effective means to ensure an accurate record of the personal interview and thereby helps to eliminate any doubts regarding the accuracy of the written report, it should be taken into account that **applicants may be intimidated about speaking freely** when they are recorded, in particular in case of vulnerable applicants and when audio-*visual* recording is used. It might be difficult for survivors of torture, human trafficking or SGBV to speak about their experiences in front of a camera. UNHCR therefore appreciates that the applicant shall be informed and counselled in advance of such recording, in particular regarding its purpose. UNHCR also recommends to ensure that the **specific needs** of vulnerable persons are fully taken into account and supportive measures are taken when recording interviews in these cases.

UNHCR recommends to amend **Article 13(2)** as follows:

> The personal interview shall be recorded using audio or audio-visual means of recording. The applicant shall be informed **and counselled** in advance of such recording. **The specific needs of applicants referred to in Article 20 shall be fully taken into account and supportive measures shall be taken when recording interviews in these cases**."

Lastly, strict adherence to existing rules and regulations on **data protection and confidentiality**, including Article 8 of the EU Charter,[39] the EU General Data Protection Regulation and relevant domestic laws, must be guaranteed. This includes, in

[39] According to Article 8(2) of the EU Charter, personal data "must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law."

particular, the limitations on use, data sharing and data transfers, as well as the safe storage of recordings, with access restricted to authorized staff only. In particular given current aspirations to strengthen cooperation with third states, which is reflected in the current CEAS reform, adequate safeguards should be in place to ensure that neither personal data nor any other information relating to asylum-seekers is shared with the authorities of the country of origin until a final rejection of the asylum claim.[40]

Right to remain (Article 9)

Article 9 of the proposal acknowledges the applicant's right to remain in the territory of the Member State which is examining his or her asylum claim until the determining authority has taken a decision. According to Article 9(3), the right to remain ***may* be revoked in cases of subsequent applications** that have been rejected as inadmissible or manifestly unfounded (Articles 9(3)(a), 43(a)), second or further subsequent applications made after the previous subsequent application was rejected as inadmissible, unfounded, or manifestly unfounded (Articles 9(3)(a), 43(b)), or where the applicant may be surrendered or extradited to another Member State in accordance with a European arrest warrant, to a third country or to international courts or tribunals (Article 9(3)(b)).

From an international refugee law perspective, there are **two main issues** which arise whenever an extradition request (or request for surrender) concerns an asylum-seeker: (i) the host State's **obligation to protect the person against *refoulement*** for the entire duration of the asylum procedure, and (ii) the obligation to provide the person with **access to a procedure** for determining his or her asylum application in line with the standards and criteria set out in the 1951 Convention. Where it is established that delivering the wanted person to the requesting country or an international court or tribunal is consistent with these obligations, the fact that he/she is an asylum-seeker does not as such preclude his or her surrender or extradition.[41]

As explicitly recognized in Article 9(4), Member States are bound by their ***non-refoulement* obligations** under international and EU law to ensure that in the situations envisaged under Article 9(3)(b), the wanted person would not be exposed to a risk of (direct or indirect) *refoulement*.[42] Article 9(4) does not expressly mention the obligation to ensure that the person's application for international protection will be properly examined, either in the country that has requested his or her surrender or extradition, or the country hosting the international criminal court or tribunal (this would require an agreement to assume responsibility for the asylum claim), or by the extraditing country following the person's return upon completion of the proceedings for which he or she was surrendered or extradited. This requirement may nevertheless be considered to be part of the obligation as provided for in Article 9(4), i.e. if surrender or extradition would expose an asylum-seeker to a risk of being returned to the country of origin, or forcibly removed to any other country where he/she would be at risk of persecution or serious harm, without having his or her application properly determined, this would amount to a breach of the host State's *non-refoulement* obligations under international refugee law and may well also constitute a violation of international human rights law. Thus, revoking the person's right to remain pursuant to Article 9(3)(b) of the proposal would be consistent with international refugee law only if respect for both above-mentioned obligations is ensured.

The same is true for the cases covered by Article 9(3)(a) and, by reference, Article 43. Under international law, Member States are under an obligation to ensure that a decision to revoke the right to remain would not lead to direct or indirect *refoulement*. This is acknowledged in Article 43, which notes that such a decision must be without prejudice to the principle of *non-refoulement*. However, in particular in situations where an application is considered to be a "subsequent" application following an implicit withdrawal (Article 39) or an admissibility procedure (Article 36), there might not have been a full examination of the substance of the first application. As such, it might be difficult for the determining authority to satisfy itself that the return would not lead to *refoulement* in practice. UNHCR therefore recommends to **limit potential exceptions to** the right to remain under Article 9(3)(a) to **second or further subsequent applications**. In addition, UNHCR recommends that the **explicit *non-refoulement* obligation** contained in Article 9(4) be extended to both grounds of Article 9(3).

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40 UNHCR, *UNHCR Advisory Opinion on the Rules of Confidentiality Regarding Asylum Information*, 31 March 2005, available at: http://www.refworld.org/docid/42b9190e4.html.

41 See UNHCR, *Guidance Note on Extradition and International Refugee Protection*, April 2008, available at: http://www.refworld.org/docid/481ec7d92.html.

42 The host State's *non-refoulement* obligations are also reflected in Recitals (12) and (13) of European Union: Council of the European Union, *Council Framework Decision 2002/584 on the European Arrest Warrant and the Surrender Procedures between Member States*, 13 June 2002, -002/584/JHA, available at: http://www.refworld.org/docid/3ddcfc495.html.

UNHCR recommends to amend **Article 9(3)(a)** as follows:

> (a) a person makes a **second or further** subsequent application in accordance with Article 42 and in accordance with the conditions laid down in Article 43;"

UNHCR recommends to amend **Article 9(4)** as follows:

> A Member State may **[…]apply** paragraphs 3**(a) and** (b) only where the determining authority is satisfied that an extradition **or return** decision will not result in direct or indirect refoulement in breach of the international and Union obligations of that Member State."

Legal assistance and representation (Articles 14 to 17)

UNHCR welcomes that the proposal extends, at the request of the applicant, access to free legal assistance and representation at **all stages of the asylum procedure** (Article 15(1)). It shares the view that this measure is "necessary to enable applicants to fully exercise their rights given the tighter time-limits for the procedure" and that quality legal assistance is important to ensure quality decisions.[43] Especially in complex European asylum procedures, the right to legal assistance and representation is an essential safeguard. In this regard, UNHCR recommends that in the case of applicants in need of specific procedural guarantees and unaccompanied children, access to free legal assistance and representation is provided systematically, irrespective of the applicant's request.

UNHCR also welcomes the new provision authorizing the **legal adviser** or other counsellor to **intervene during the personal interview** (Article 16(4)). To ensure quality legal assistance and representation, UNHCR recommends including a requirement in Article 17 for legal advisers and other counsellors to have the appropriate knowledge and access to relevant training.

However, UNHCR is concerned that the provision of free legal assistance may be excluded in a number of cases, including where there is no "tangible prospect of success" (Article 15(3)(b)). This suggests a "**merits test**", which risks making an essential procedural safeguard dependent on a "pre-screening" of the case. UNHCR's 2010 APD study highlighted that in some Member States, merits tests were applied in ways that could lead to arbitrary restriction of access to legal assistance on appeal.[44] In UNHCR's view, exceptions to the provision of free legal aid should only be made where the applicant has adequate financial means as stipulated in Article 15(3)(a).[45]

UNHCR therefore **recommends to delete the possibility to make the right to free legal assistance conditional on the merits of the case**, and thus to **delete Articles 15(3)(b) and 15(5)(b)**.

In addition, access to free legal assistance and representation may also be excluded in cases of **subsequent applications** (Article 15(3)(c)) and with regard to the second or higher level of appeal (Article 15(5)(c)). UNHCR recommends that access to free legal aid in the context of subsequent applications should not be excluded in cases of subsequent applications that follow a rejection on the basis of implicit withdrawal. This is important to reduce the risk that the applicant may not effectively enjoy this central procedural right in at least one procedure, since applications following implicit withdrawals are considered to be subsequent applications under the proposal. Given the importance of the legal issues often involved in cases of second or higher level appeals, as well as the complexity of such proceedings, UNHCR also recommends that access to free legal assistance and representation should be maintained in these cases. Where a national legal system allows the applicant to lodge a second or higher appeal, UNHCR considers that the applicant should have an effective opportunity to make use of such a right, including by enjoying free legal assistance and representation.

Finally, UNHCR also recommends including a **time-line** within which free legal assistance and representation has to be made available. As applicants must comply with very tight time lines for lodging applications and appeals, the process of requesting legal assistance must be simple and quick. Otherwise, the right to legal aid risks being illusory.[46]

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43 See APR, note 3 above, Explanatory Memorandum, p. 14.

44 UNHCR APD Study, note 23 above. See also Devon law Centre, *Asylum Appellate Project – Final Report*, March 2010.

45 UNHCR 2012 APD (recast) Comments, note 24 above.

46 UNHCR APD Study, note 23 above, p. 449.

UNHCR recommends to amend **Article 15(1)** as follows:

> Member States shall, at the request of the applicant **and as soon as possible after an application is made**, provide free legal assistance and representation in the administrative procedure provided for in Chapter III and in the appeal procedure provided for in Chapter V. **In the case of an applicant in need of special procedural guarantees or an unaccompanied minor, free legal assistance and representation shall be provided, regardless of whether or not the applicant has requested it.**"

UNHCR recommends to amend **Article 15(2)(b)** as follows:

> assistance in the preparation of the application and personal interview, including participation in the personal interview **[…]**;"

UNHCR recommends to amend **Article 15(3)** as follows:

> The provision of free legal assistance and representation in the administrative procedure may be excluded where:
>
> **(a)** the applicant has sufficient resources; **[…]**
>
> **(b)** the application is a subsequent application**, except when it follows a decision to reject an application as abandoned in accordance with the procedure laid down in Article 39**."

UNHCR recommends to amend **Article 15(5)** as follows:

> The provision of free legal assistance and representation in the appeal procedure may be excluded where **[…]** the applicant has sufficient resources; **[…]**"

UNHCR recommends adding an additional paragraph to **Article 17** (and, accordingly, a re-numbering of the subsequent paragraphs):

> **2. Member States shall ensure that legal advisers and other counsellors referred to in paragraph 1 have the appropriate knowledge and access to the necessary training to adequately provide legal advice and representation relevant for the application of this Regulation.**"

Applicants in need of specific procedural guarantees (Articles 19, 20, Recital 15)

In accordance with Articles 19 and 20, Member States are obliged to engage in a **systematic assessment** of the need for specific procedural guarantees. They are required to identify applicants in need of specific procedural guarantees **as early as possible** and throughout the procedure, and to provide them with **adequate support and guidance** throughout all stages of the procedure. Information on the applicant's specific needs shall be included in the file. UNHCR welcomes these provisions, noting in particular that where it is not possible to provide such adequate support in the framework of an accelerated examination procedure or a border procedure, it is essential that such procedures should not, or should cease to, be applied (Article 19(3)).

To ensure compliance and a harmonized approach throughout the EU, UNHCR recommends that Member States develop **standard operating procedures** for a systematic assessment of specific procedural needs and the reception of appropriate support, care and guidance.

In addition, UNHCR emphasizes that the proposal's **list of grounds** that might indicate specific procedural needs (Recital 15), mentioning age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders, and consequence of torture, rape or other serious forms of psychological, physical, sexual or gender-based violence, is **not exhaustive.**

Right to an effective remedy (Article 53)

Article 53(3) specifies that an effective remedy "shall provide for a full and *ex nunc* examination of both facts and points of law". However, UNHCR is concerned that Article 53(3) further provides that the applicant "may only bring forward new elements which are relevant for the examination of his or her application and which **he or she could not have been aware of at an earlier stage** or which relate to changes to his or her situation."[47] This means that all elements of which a person is aware must be brought forward at first instance; otherwise they would be precluded.

There are many reasons why facts relevant to the application for international protection may not be raised in the course of the first instance administrative procedure.[48] In particular, in cases of **persons with specific needs**, such as children or victims of trafficking or sexual and/or gender-based violence, applicants might not be able or willing to share all relevant information at first instance, in particular information related to traumatic experiences. Further, applicants may be reluctant to talk about intimate matters, such as their sexual orientation and/or gender identity, in particular when their sexual orientation or gender identity is stigmatised in their country of origin.[49] In many cases, applicants will need time, an environment of trust, and concrete psychological support to overcome trauma and talk about their experience. Certain elements of the claim may therefore become evident only at a later stage, something which is explicitly recognized in Article 20(4) when referring to general principles for the assessment of special procedural needs. The opportunity to present elements which are relevant for the applicant's claim should therefore not be cut off after the first instance.

There are also many reasons why documentary evidence may not have been available during the time frame of the first instance procedure, particularly when this is an accelerated procedure, and/or border procedure, and/or the applicant has been held in detention.[50]

It is, therefore, critical that the appeal body is able to establish all the relevant facts and assess all the relevant evidence, at the time it takes its decision, in order to provide an effective remedy. This is required by proposed Article 55 and Recital 66,[51] which require an "**adequate and complete examination**". Not allowing evaluation of information of which the applicant was aware, but failed to mention at first instance is at variance with procedural fairness and may have serious negative consequences, including violating the principle of *non-refoulement*. In addition, it may be in conflict with the right to an effective remedy under Article 47 of the EU Charter, as well as national and ECtHR case law.[52]

UNHCR recommends to amend **Article 53(3) second indent**:[53]

> The applicant may **[…]**bring forward **any** new elements which are relevant for the examination of his or her application**[…]**."

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47 Emphasis added.

48 UNHCR APD Study, note 23 above, p. 466.

49 UNHCR SOGI Guidelines, note 33 above, para. 59, available at: http://www.refworld.org/docid/50348afc2.html.

50 UNHCR APD Study, note 23 above, p. 467.

51 See also Article 4(3)(a) recast Qualification Directive.

52 "In the present case, given that the applicant has not yet been expelled, the material point in time is that of the Court's consideration of the case […]. It is the present conditions which are decisive and it is therefore necessary to take into account information that has come to light after the final decision taken by the domestic authorities." *Salah Sheekh v the Netherlands*, ECHR, 11 January 2007, para. 136. For national case law, see for example the recent decision of the Finnish Supreme Administrative Court, KHO: 2017: 148, 22 September 2017, available at: https://bit.ly/2SCzDUg. The right to an effective remedy has been confirmed as a general principle of EU law. See, *inter alia, Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, Case C-69/10, European Union: European Court of Justice, 28 July 2011, para. 49, available at: http://www.refworld.org/cases,ECJ,4e37bd2b2.html; *Arcor AG & Co. KG*, Case C-55/06, European Union: European Court of Justice, 24 April 2008, para. 174, available at: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-55/06; *Booker Aquaculture Ltd and others v the Scottish Ministers*, Case C-20/00 and C-64/00, European Union: European Court of Justice, 10 July 2003, para. 65, available at: http://curia.europa.eu/juris/liste.jsf?num=C-20/00&language=en.

53 See already UNHCR, 2012 APD (recast) Comments, note 24 above, p. 33, in which UNHCR expressed strong support for Article 46(3) APD, which requires a full and *ex nunc* review of both facts and the law by the appeals body.

In addition, the proposal introduces **time limits for lodging** an appeal (Article 53(6)). According to Article 53(6), an appeal against

- a decision *on the merits* must be lodged within one month;
- a decision rejecting a *subsequent application* must be lodged within one week;
- a decision made through *accelerated examination procedures* or while the applicant is held in *detention*, shall be lodged within two weeks.

These time limits are in contrast to the current provision in the recast APD, which merely foresees that Member States shall provide for "reasonable" time limits to exercise the right to an effective remedy, i.e. time limits that "shall not render such exercise impossible or excessively difficult." (Article 46(4) recast APD).

UNHCR emphasises that the applicant must have sufficient time and facilities to exercise the right of appeal.[54] **Adequate time limits for lodging appeals are required to render a remedy effective**. EU law has established that "the detailed procedural rules governing actions for safeguarding an individual's rights under Community law [...] must not render practically impossible or excessively difficult the exercise of rights conferred by Community law".[55] Further, the **right to an effective remedy and fair trial**[56] must allow the applicant to undertake all the required procedural steps in order to submit the appeal, taking into account the nature of the procedures in each state, the steps required to access legal assistance, and the fact that the applicant is a foreigner who may not understand the language of national judicial proceedings or documents in a Member State. Applicants will need time to understand the decision of the determining authority and any information provided on how to challenge the decision; secure legal assistance; request and/or be given access to his/her case file; consult a legal adviser and discuss the grounds for the appeal; draft the appeal; and, where there is no automatic suspensive effect,[57] to apply for an interim measure to prevent imminent expulsion. For all these reasons, both international and EU law require sufficient time to lodge the appeal.[58]

UNHCR is concerned that some of the **proposed time limits may be too short**, rendering excessively difficult the exercise of the right to an effective remedy, resulting in a failure to lodge an appeal or in an incomplete or hastily-completed appeal, which runs the risk of being dismissed.[59] UNHCR is particularly **concerned with the one week time limit** in the case of a decision rejecting a subsequent application as inadmissible or manifestly unfounded (Article 53(6)(a)). In addition, the two-week time limit foreseen in case of, *inter alia*, accelerated procedures (Article 53(6)(b)) will only be feasible and acceptable if appropriate modalities are in place, and adequate resources allocated for case processing. Further, UNHCR is concerned that the **proposal does not allow any flexibility in case specific procedural needs** are to be addressed. In order to be able to comply with the requirement to take into account the individual circumstances of the particular case,[60] Member States should be given the opportunity to set longer time lines.

The **CJEU** has considered that 15 days for lodging an appeal in an accelerated procedure "does not seem, generally, to be insufficient in practical terms to prepare and bring an effective action".[61] However, the CJEU left it to the national courts to

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54 UNHCR APD Study, note 23 above, p. 322.

55 *Unibet vs Justitiekanslern*, Case C-432/05, European Union: European Court of Justice, 13 March 2007, para. 47, available at: https://bit.ly/2UUb4iT; and *Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer fur das Saarland*, Case C-33/76. European Union: European Court of Justice, 16 December 1976, para. 5, available at: https://bit.ly/2Bw54pD.

56 Article 47 EU Charter, Articles 6 and 13 ECHR. *I.M. c. France*, Requête no 9152/09, Council of Europe: European Court of Human Rights, 2 February 2012, para. 147, available at: http://hudoc.echr.coe.int/fre?i=001-108934.

57 i.e. in cases where applications were rejected as (i) manifestly unfounded, (ii) inadmissible based on application of the first county of origin concept or certain subsequent applications, or (iii) implicitly or explicitly withdrawn (Article 54(2)).

58 HRC, *Concluding Observations on France*, 31 July 2008, UN doc. CCPR/C/FRA/CO/4, para. 20, in which concerns were raised by the Human Rights Committee regarding a 48-hour time limit for lodging an appeal. In *Alzery v. Sweden*, the complainant had no real time to appeal the decision to deport him; he was expelled only hours after the decision to expel him was taken, HRC: *Alzery v. Sweden*, 10 November 2006, No.1416/2005, para. 3.10.

59 UNHCR APD Study, note 23 above, p. 325.

60 *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, C-175/08; C-176/08; C-178/08 & C-179/08, European Union: Court of Justice of the European Union, 2 March 2010, available at: https://www.refworld.org/cases,ECJ,4b8e6ea22.html, para. 90. See also *Bundesrepublik Deutschland v. Y (C-71/11), Z (C-99/11)*, C-71/11 and C-99/11, European Union: Court of Justice of the European Union, 5 September 2012, para. 77, available at: http://www.refworld.org/cases,ECJ,505ace862.html; *X, Y, Z v Minister voor Immigratie en Asiel*, C199/12 – C201/12, European Union: Court of Justice of the European Union, 7 November 2013, para. 73, available at: http://www.refworld.org/cases,ECJ,527b94b14.html.

61 *Samba Diouf*, note 52 above, para. 49; For the principle of effective judicial protection as a general principle of EU law, see also *Arcor AG & Co. KG*, Case C-55/06, European Union: European Court of Justice, 24 April 2008, para. 174, at: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-55/06.

determine whether this time line is sufficient in light of the *individual circumstances*. Thus, if the national court would come to the conclusion that the time line in the accelerated procedure is insufficient, the regular procedure should be applied. "[T]he important point", according to the Court, "is that the period prescribed must be sufficient in practical terms to enable the applicant to prepare and bring an effective action."[62] While recognising the importance of **speedy remedies**, the **ECtHR** equally considered that this **should not be privileged over the effectiveness of procedural guarantees**.[63]

UNHCR recommends to amend **Article 53(6)** as follows:

> 6. Applicants shall lodge appeals against any decision referred to in paragraph 1:
>
> **[…]**
>
> **(a)** within two weeks in the case of a decision rejecting a**[…] subsequent** application as inadmissible **[…]**or while the applicant is held in detention;
>
> **(b)** within **one month** in the case of a decision rejecting an application as **inadmissible, or as explicitly withdrawn or abandoned, or as unfounded in relation to refugee or subsidiary protection status following an accelerated examination procedure or border procedure;**
>
> **(c) within two months in the case of a decision rejecting an application as unfounded in relation to the refugee or subsidiary protection status if the examination is not accelerated or in the case of a decision withdrawing international protection.**
>
> For the purposes of point (b), Member States may provide for an ex officio review of decisions taken pursuant to a border procedure.
>
> **Member States may define longer time-limits than provided for in this paragraph. Member States shall extend these time-limits if required in light of the individual circumstances of the applicant.**
>
> The time-limits provided for in this paragraph shall start to run from the date when the decision of the determining authority is notified to the applicant **[…]. Where the applicant has requested free legal assistance and representation in accordance with Article 15(1), these time-limits shall not expire before the legal adviser or other counsellor has had an effective opportunity to advise the applicant in lodging the appeal and the applicant has had an effective opportunity to act on that advice.**"

Suspensive effect of appeals (Article 54)

The proposal introduces some notable exceptions to the principle of automatic suspensive effect of appeals, in which case a **court or tribunal may allow** the applicant to remain, either upon request or *ex officio* (Article 54(2)). According to Article 54(2), **no automatic suspensive effect of appeal** is provided in cases in which an application was (a) rejected as manifestly unfounded or as unfounded when examined in accelerated or border procedure; (b) rejected as inadmissible on the basis of a first country of asylum or subsequent application; (c) rejected as explicitly or implicitly (i.e. abandoned) withdrawn. Further, an applicant who lodges a further appeal shall **not have a right to remain**, unless a court or tribunal decides otherwise upon the applicant's request or *ex officio* (Article 54(5)).

UNHCR considers that in respect of the principle of *non-refoulement*, the remedy must allow automatic suspensive effect except for very limited cases.[64] Member States should only be able to derogate from the automatic suspensive effect of an appeal on an exceptional basis, when the decision determines that the claim is "clearly abusive" or "manifestly unfounded" as defined in

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62 *Samba Diouf*, note 52 above, paras. 66-68.

63 *I.M. c. France*, note 56 above, para. 147.

64 When there is clearly abusive behavior on the part of the applicant, or where the "unfoundedness" of a claim is manifest, the automatic application of suspensive effect could be lifted. See UNHCR, *UNHCR public statement in relation to Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration pending before the Court of Justice of the European Union*, 21 May 2010, available at: http://www.refworld.org/docid/4bf67fa12.html.

EXCOM Conclusion No. 30(XXXIV) 1983.[65] Additional exceptions could apply with respect to appeals in the case of second or further subsequent applications, and when the application is rejected as explicitly withdrawn. In such situations, in accordance with international law, the appellant nevertheless must have the right and the effective opportunity to request a court or tribunal to grant suspensive effect.[66] In all other cases, automatic suspensive effect of appeals on rejections should be granted.

UNHCR recalls particularly that the remedy against an inadmissibility decision, including based on safe country concepts, must have automatic suspensive effect in law and in practice, where the applicant has an arguable claim of a risk of ill-treatment upon return or of arbitrary deportation from the country of return in accordance with Art. 3 and 13 ECHR.[67]

Under ECtHR case law, a remedy based on an arguable claim of certain ECHR violations has to have automatic suspensive effect in order to be considered effective.[68] The ECtHR has held in several asylum cases that the mere possibility to request suspensive effect is insufficient to ensure the applicant's right to an **effective remedy**. "Rigorous scrutiny" of an arguable claim and effectiveness of the remedy in practice as well as in law is required because of the irreversible nature of the harm that might occur.[69] In essence a claim is arguable if it is supported by demonstrable facts and not manifestly lacking grounds in law.[70] According to the ECtHR, the appeal system as a whole must allow for suspensive effect.[71] If the ordinary appeal procedure does not have automatic suspensive effect it must be possible for the individual to use an urgent procedure to prevent the execution of a deportation order and await the outcome of the ordinary appeal.[72]

UNHCR is concerned that the **scope of potential exclusion of automatic suspensive effect** would become much **broader** under the proposal. This is because accelerated procedures, for which automatic suspensive effect of appeals is excluded, are proposed to become mandatory (Article 40). UNHCR is concerned that automatic suspensive effect does not apply to appeals against negative decisions taken in an accelerated examination or border procedure (Article 54(2)(a)). In UNHCR's view, the modality chosen to examine an application for international protection should generally not negatively affect procedural safeguards, including the suspensive effect of appeal.[73] Given the severe consequences of a wrong negative decision on applications examined through an accelerated or border procedure, these claims, with the possible exceptions outlined above,[74] should be provided with full procedural safeguards to ensure full respect for the principle of *non-refoulement*, including by providing automatic suspensive effect of appeals.

In addition, no automatic suspensive effect is prescribed for appeals in cases that are rejected as inadmissible on the basis of the **first country of asylum** concept (Article 54(2)(b)). By contrast, appeals in cases rejected as inadmissible on the basis of the **safe third country** concept continue to have automatic suspensive effect. According to the EC, "there is a **higher risk of a possible violation of Article 3** of the European Convention on Human Rights (ECHR) when applying the concept of safe third country and therefore the suspensive effect of the appeal remains necessary to ensure an effective remedy in accordance with Article 13 of

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65 "[…] those which are clearly fraudulent or not related to the criteria for the granting of refugee status […] nor to any other criteria justifying the grant of asylum." This does not equate to a finding of "manifestly unfounded" in terms of Article 37(3) in conjunction with Article 40. It equates solely to Article 40(1)(a), and not to other grounds stated under Article 40(1). See also the comment on Article 37(3) and 40(1). See UNHCR APD Study, note 23 above, p. 460.

66 UNHCR APD Study, note 23 above, p. 460.

67 UNHCR, *Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept*, 23 March 2016, available at: http://www.refworld.org/docid/56f3ee3f4.html, see *M.S.S. v. Belgium and Greece*, Application no.30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, para. 293, available at: http://www.refworld.org/docid/4d39bc7f2.html.

68 *Gebremedhin [Gaberamadhien] c. France*, 25389/05, Council of Europe: European Court of Human Rights, 26 April 2007, para. 66, available at: https://www.refworld.org/cases,ECHR,46441fa02.html; *K.R.S. against the United Kingdom*, Application No. 32733/08, 2 December 2008, available at: https://www.refworld.org/cases,ECHR,49476fd72.html; *Čonka v. Belgium*, 51564/99, Council of Europe: European Court of Human Rights, 5 February 2002, available at: http://www.refworld.org/cases,ECHR,3e71fdfb4.html; *Jabari v. Turkey*, Appl. No. 40035/98, Council of Europe: European Court of Human Rights, 11 July 2000, available at: http://www.refworld.org/cases,ECHR,3ae6b6dac.html.

69 *Jabari v. Turkey*, note 68 above, para. 50; UNHCR public statement in *Diouf*, note 64 above, para. 23.

70 *Boyle and Rice v. The United Kingdom*, 19/1986/117/165-166, Council of Europe: European Court of Human Rights, 24 March 1988, para. 52, available at: http://www.refworld.org/cases,ECHR,3ae6b6f74.html.

71 *Gebremedhin c. France*, note 68 above, and *Čonka v. Belgium*, note 68 above, para. 79.

72 *Čonka v. Belgium*, note 68 above, para. 83.

73 UNHCR APD Study, note 23 above; See also Council of Europe: Committee of Ministers, *Guidelines on human rights protection in the context of accelerated asylum procedures*, 1 July 2009, Section IV, available at: http://www.refworld.org/docid/4a857e692.html.

74 See notes 64 and 65 above.

the ECHR".[75] In UNHCR's view, the same rigorous procedural safeguards should apply to both concepts and, as such, automatic suspensive effect should be applied to all cases rejected as inadmissible, either for reasons related to application of the first country of asylum or safe third country concept, or for any other reason. Appeals against rejections based on the application of the safe country of origin concept subject to accelerated procedures should equally enjoy automatic suspensive effect (see preceding paragraph). Therefore, UNHCR considers that **automatic suspensive effect is required for all three safe country concepts** applicable to third countries.

In case of the **safe country of origin** concept, Article 54(2)(a) makes a cross-reference to the "cases subject to an accelerated examination procedure or border procedure", which currently includes cases rejected based on the safe country of origin concept (Article 40(1)(e)). As long as Article 54(2)(a) is deleted (as suggested in this section), there is no need for additional amendments. In case the provision is maintained, however, Article 54(2)(a) should be amended to exclude the safe country of origin concept from possible exceptions of automatic suspensive effect of appeal.

Regarding the **time available to request suspensive effect**, the proposal has not retained the current minimum time period of one week in case of border procedures (Article 46(7)(a) recast APD). Instead, the proposal requires "sufficient" time for the applicant to prepare and submit the request for suspensive effect (Article 54(3)(a)).

In UNHCR's view, the **time limit for requesting suspensive effect must be reasonable** and permit the applicant to effectively exercise this right in practice, including exercising the right to legal assistance.[76] Given the irreversible and potentially life-threatening consequences of an erroneous first instance decision, it is critical that an appeal body has all relevant information to scrutinize rigorously any request for suspensive effect.[77] While the effectiveness of a remedy in practice may depend on many factors, including immediate access to qualified and independent legal advice[78] and rigorous review by the appeal body, it is essential to allow the applicant reasonable time to prepare this request. Providing for a specific time frame, as is the case under the current APD provision, would be helpful for the purpose of harmonisation.

In total, taking into account the above recommendations as well as those made for subsequent applications[79], UNHCR thus recommends to amend **Article 54(2)** as follows:

> A court or tribunal shall have the power to rule whether or not the applicant may remain on the territory of the Member State responsible, either upon the applicant's request or acting *ex officio*, where the applicant's right to remain in the Member State is terminated as a consequence of any of the following categories of decisions:
>
> **[…]**
>
> **(a)** a decision which considers an application to be manifestly unfounded **within the meaning of Article 40(1)(a) in conjunction with Article 37(3)** or rejects a**[…] second or further subsequent** application as inadmissible pursuant to Article 36(1)**[…]**(c);
>
> **(b)** a decision which rejects an application as explicitly withdrawn **[…]**in accordance with Article 38**[…]**."

UNHCR also recommends to amend **Article 54(3)(a)** as follows, retaining the text of Article 46(7)(a) of the recast APD:

> the applicant has the necessary interpretation, legal assistance and **[…]at least one week** to prepare the request and submit to the court or tribunal the arguments in favour of granting him or her the right to remain on the territory pending the outcome of the remedy; and"

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75 APR, note 3 above, Explanatory Memorandum, p. 18, emphasis added.

76 UNHCR APD Study, note 23 above, p. 461. The ECtHR has found that remedies which have virtually no prospect of success in a particular case are ineffective (*I.M. c. France*, note 56 above, and *M.S.S. v. Belgium and Greece*, note 67 above. On the requirement for sufficient time for lodging appeals under international law, see HRC, *Concluding Observations on France* and *Alzery v. Sweden* above note 58.

77 UNHCR APD Study, note 23 above, p. 459.

78 See, for example, Federal Constitutional Court of Germany, BVerfGE 94, 166, concerning the constitutionality of a one week deadline in the accelerated procedure at the airport.

79 See section "Right to remain" above, and concretely the recommendation on Article 9(3)(a), as well as the section on "Subsequent applications" below.

4
UNACCOMPANIED CHILDREN

Guarantees for children, including regarding personal interviews (Article 21)

UNHCR welcomes first and foremost that the **best interest of the child** shall be a primary consideration when applying the Regulation (Article 21(1)). Further, UNHCR welcomes that the child is given the **opportunity for a personal interview**, including where the application is made on the child's behalf, unless this is manifestly not in the best interest of the child (Article 21(2)). In such a case, the authority must give reasons for the decision not to provide the child with the opportunity of a personal interview. UNHCR considers this as a positive step in ensuring the child's right to be heard in any judicial and administrative proceedings affecting the child, in accordance with Article 12 of the Convention on the Rights of the Child. UNHCR would however welcome further clarification of what "manifestly not in the best interest of the child" means, which could include cases where there is a risk of re-traumatization. Given the child's right to be heard, such a provision must be carefully applied.

In addition, UNHCR welcomes that the proposal further specifies the requirement for child-sensitive and -appropriate interviews conducted by a person who has the necessary knowledge of the rights and special needs of children (Article 21(2), second indent).[80] However, UNHCR would welcome reference to interpreters in this regard. Finally, UNHCR further welcomes that Member States shall ensure that the decision on applications by children must be prepared by **personnel with knowledge** of the rights and specific needs of children (Article 21(3)).[81]

UNHCR recommends to amend **Article 21(2), second indent**, as follows:

> "Any such personal interview shall be conducted by a person **and involve an interpreter** who has the necessary knowledge of the rights and special needs of minors and it shall be conducted in a child-sensitive and context-appropriate manner."

Guardianship (Article 22)

Article 22 contains special guarantees for unaccompanied children, regulating the appointment as well as the role and responsibilities of a guardian. UNHCR welcomes the requirement for Member States to appoint a **guardian within five working days** from making an application (Article 22(1)) and inform the guardian of all relevant facts, procedural steps and time limits (Article 22(2)). UNHCR considers the appointment of guardians to be an essential step in **protecting the child's procedural rights** and ensuring respect for the best interests of the child throughout the asylum procedure (Article 21(1)). This is also in line with the views of the UN Committee on the Rights of the Child, which recommends that an unaccompanied child should only be referred to asylum procedures following the appointment of a guardian.[82]

UNHCR also welcomes reference to the guardian having the necessary expertise and the need to ensure that the guardian has no verified record of child-related crimes or offences nor conflict of interest (Article 22(4)). Further, UNHCR welcomes that the guardian's performance is subject to monitoring as well as a complaints mechanism (Article 22(5) second indent). In addition, UNHCR appreciates that a guardian should not be put in charge for a disproportionate number of children at the same time

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[80] Currently, Article 15(3)(e) of the recast APD requires Member States to "ensure that interviews with minors are conducted in a child-appropriate manner".

[81] UNHCR, Conclusion on Children at Risk No. 107 (LVIII) – 2007, 5 October 2007, No. 107 (LVIII) – 2007, available at: http://www.refworld.org/docid/471897232.html; UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, February 1997, para. 5.12, ("UNHCR Guidelines on Unaccompanied Children"), available at: http://www.unhcr.org/refworld/docid/3ae6b3360.html; UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, ("UNHCR Guidelines on Child Asylum Claims"), available at: http://www.refworld.org/docid/4b2f4f6d2.html.

[82] UN Committee on the Rights of the Child (CRC), *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, ("CRC GC No. 6"), para. 21, available at: http://www.refworld.org/docid/42dd174b4.html.

(Article 22(5) 1st indent) and suggests a maximum number of 20 children or less, depending on the individual circumstances. Lastly, UNHCR continues to emphasise the need for provisions on **minimum qualification requirements** of guardians, vetting and monitoring procedures, as well as guarantees of independence and accountability.[83]

UNHCR welcomes the **specific responsibilities a guardian has** vis-a-vis the child, including representing and assisting the child (Article 22(3)) and being present at the interview, including the opportunity to intervene (Article 22(6)). However, UNHCR has concerns about the responsibility for the guardian to inform the child about the meaning and consequences of the personal interview and, where appropriate, how to prepare himself or herself for the personal interview (Article 22(6)). According to UNHCR, this is the responsibility of the child's legal representative, although informing and preparing the child for the interview may require the presence of the child's guardian. Finally, UNHCR questions the relevance of the final sentence of Article 22(6), stipulating that the "determining authority may require the presence of the unaccompanied [child] at the personal interview". This sentence may undermine the obligation for the determining authority under Article 21(2) to provide a child with the opportunity of a personal interview.

UNHCR recommends to amend **Article 22(6)** as follows:

> The **legal representative or legal counsellor [...]**shall inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, **in consultation with the guardian, prepare the minor [...]**for the personal interview.**[...]** The determining authority **shall [...]**require the presence of the unaccompanied minor at the personal interview, even if the guardian is present**, subject to Article 21(1)**.

UNHCR also welcomes the deletion of the possibility for Member States to refrain from appointing a representative where a child will in all likelihood reach the age of 18 before a first instance decision is taken (Article 25(2) recast APD). This is important given this is a very vulnerable group which often needs special care during a transitional period.[84]

Age Assessments (Article 24)

According to the proposal, and subject to the child's or his/her guardian's consent, Member States may conduct a medical examination to determine the age of an unaccompanied child, where there are doubts about the child's age following statements by the applicant or other relevant indicators including a psychosocial assessment (Article 24(1) and (2)). UNHCR reiterates that most experts agree that age assessment is not a determination of chronological age but an estimated guess. Scientific methods currently available, including medical examinations based on dental or wrist bone x-rays or visual inspection of physical development, can only estimate age. Hence there will always be a **margin of error**.[85] This margin inherent to all age assessment methods needs to be applied in such a manner that, in case of **uncertainty**, the individual will be **considered a child**.[86]

Furthermore, medical age assessments methods continue to raise many questions about whether they adequately take into account considerations of safety, child and gender-sensitivity, human dignity and cultural sensitivity. A **holistic assessment** of capacity, vulnerability and needs that reflect the actual situation of the young person is preferred to reliance on age assessment procedures aimed at estimating chronological age.[87]

UNHCR therefore advises against the use of medical age assessment methods in its own operations. If this provision were nevertheless to be retained, a medical examination to determine a child's age must be a **measure of last resort** where reasonable doubts have arisen as to the child's age and a psychosocial assessment has not provided clarity. Age assessments should not be used as a matter of routine. This is particularly the case where the age assessment relies on medical examinations involving

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83 UNHCR Guidelines on Unaccompanied Children, note 81 above, para. 5.7.

84 UNHCR, *Unaccompanied and Separated Asylum-seeking and Refugee Children Turning Eighteen: What to Celebrate?*, March 2014, available at: http://www.refworld.org/docid/53281a864.html; UNHCR 2010 APD Comments, note 30 above, p. 28.

85 Separated Children in Europe Programme, *Position Paper on Age Assessment in the Context of Separated Children in Europe*, 2012, p. 8, available at: http://www.refworld.org/docid/4ff535f52.html. See also *UNHCR paper on age assessment in field operations* (forthcoming).

86 ExCom, Conclusion No. 107, para. (g)(ix); UNHCR Guidelines on Unaccompanied Children, note 81 above, paras. 5.11, 6.

87 UNHCR, *The Heart of the Matter: Assessing Credibility when Children Apply for Asylum in the European Union*, December 2014, p. 102, available at: http://www.refworld.org/docid/55014f434.html. See also UNHCR, *UNHCR observations on the use of age assessments in the identification of separated or unaccompanied children seeking asylum*, 1 June 2015, available at: http://www.refworld.org/docid/55759d2d4.html.

invasive techniques.[88] In any case, it is **essential that the child is fully informed** of the possibility that his or her age may be determined by a medical examination in a language the child understands and not, as currently may be possible under Article 24(4), in a language the child is "reasonably meant to understand".[89]

Article 24 of the proposal introduces three important changes regarding the determination of the age of unaccompanied children through a medical examination.

First, the proposal notes that **refusal** by an unaccompanied child to carry out the medical examination shall be treated as a rebuttable **presumption that the applicant is not a child** and shall not prevent the determining authority from taking a decision on the application (Article 24(5)). UNHCR is concerned that a child's refusal to undergo a medical examination creates the presumption that he or she is not a child, as there may be various legitimate reasons why the child refuses to undergo a medical examination to assess his or her age, including relating to the child's psycho-social wellbeing, particularly in the context of more invasive methods of age assessment.

Second, the proposal drops the recast APD's **safeguard** that an application shall not be rejected solely on the basis of a refusal to undergo a medical examination (Article 25(5)(c) recast APD). UNHCR suggests to **retain this provision** since the refusal to undergo an age assessment is not indicative of whether or not a person is in need of international protection. As age is not universally calculated in the same way and given the same degree of importance, caution needs to be exercised in making adverse inferences of credibility in such situations.[90]

Third, Member States are required to **mutually recognise their age assessment decisions** (Article 24(6)). UNHCR welcomes this obligation in order to avoid multiple age assessments in different Member States, for example in case of transfers under the Dublin Regulation. However, it is important that this only concerns medical examinations carried out in accordance with international human rights standards.[91] In this regard, UNHCR welcomes the initiative by EASO (EUAA) to develop guidance on age assessments which includes such standards and safeguards as well as an overview of new methods building on its current publication on age assessment practices in EU Member States.[92] In addition, the Separated Children in Europe Programme's Statement of Good Practice[93] provides relevant standards and safeguards.

UNHCR recommends to amend **Article 24(1) first sentence** as follows:

> "Medical examinations may be used to determine the age of unaccompanied minors within the framework of the examination of an application, where, following statements by the applicant **and [...]**other relevant indicators**,** including a psychosocial assessment, there are **reasonable** doubts as to whether or not the applicant is under the age of 18."

UNHCR recommends to amend **Article 24(4) first sentence** as follows:

> "Where medical examinations are used to determine the age of unaccompanied minors, the determining authority shall ensure that unaccompanied minors are informed, prior to the examination of their application for international protection, and in a language that they understand**[...]**, of the possibility that their age be determined by medical examination."

UNHCR recommends to amend **Article 24(5)** as follows:

> "**In the absence of legitimate grounds,** the refusal by the unaccompanied minors or their guardians to carry out the medical examination may only be considered as a rebuttable presumption that the applicant is not a minor and it shall not prevent the determining authority from taking a decision on the application for international protection. **This refusal shall not be the sole reason for the decision to reject an application for international protection**."

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88 UNHCR, *UNHCR observations on the use of age assessments in the identification of separated or unaccompanied children seeking asylum*, 1 June 2015, para. II.9. ix, available at: http://www.refworld.org/docid/55759d2d4.html.

89 See also section 3 of this commentary concerning the right to information in general.

90 UNHCR Guidelines on Child Asylum Claims, note 81 above, para. 75.

91 CRC GC No. 6, note 82 above.

92 European Union: European Asylum Support Office (EASO), *EASO Age assessment practice in Europe*, December 2013, available at: http://www.refworld.org/docid/532191894.html.

93 Separated Children in Europe Programme, *SCEP Statement of Good Practice*, March 2010, 4th Revised Edition, available at: http://www.refworld.org/docid/415450694.html.

UNHCR recommends to amend **Article 24(6)** as follows:

> A Member State shall recognise age assessment decisions taken by other Member States on the basis of a medical examination carried out in accordance with this Article and based on **international legal standards and on** methods which are recognised **and approved under EU law [...].**"

UNHCR recommends to add a new **Article 24(7)**:

> **Unaccompanied minors have the right to an effective remedy against a decision determining their age based on a medical examination or other methods.**"

5 ACCESS TO PROCEDURES

Making, registering, and lodging of applications (Articles 25, 27 and 28)

The proposal introduces a new section entitled "Access to the Procedure", with the stated aim of streamlining and simplifying the existing rules.[94] The proposal maintains a tripartite structure. First, an application is considered having been **made** as soon as a person expresses a wish to receive international protection to officials of the determining authority or other authorities referred to in Article 5(3) or (4), such as border guards, police, or authorities responsible for detention facilities (Article 25(1)). Second, when an application has been made, it shall promptly, and no later than three working days from the making of the application, be **registered** by the responsible authorities (Article 27(1)). Third, the applicant shall **lodge** the application, provided he or she is given an effective opportunity to do so (Article 28 (1)).

UNHCR welcomes the distinction between the "***making***" of an application for international protection and the "lodging" of the application. The "making" of an application does not involve any formalities, but simply refers to a wish expressed by a third-country national or stateless person, who can be understood to seek international protection.[95] As soon as an application is made, not only the APR but also the recast Reception Conditions Directive[96] applies. UNHCR further welcomes the obligation for Member States to promptly ***register*** an application for international protection no later than three days from when it is made (Article 27(1)).

Article 27 establishes that the authorities responsible for receiving and registering applications for international protection "shall register also the following information: (a) the name, date of birth, gender, **nationality** and other personal details of the applicant; [...]" (emphasis added). This should be interpreted as including an obligation to record indications of **statelessness** pending a full assessment of statelessness. While recent data shows an increase in the number of asylum-seekers registered as stateless,[97] the actual figure is likely to be higher as evidence suggests that during registration and lodging of applications, stateless **individuals are often wrongly attributed a nationality or recorded as being of "unknown nationality"**. A failure to record indications of statelessness may be problematic for several reasons. The fact that an applicant may be stateless is often critical when assessing his or her claim for international protection. Whether someone is stateless or a national of his or her country of origin not only impacts the initial assessment of their claim, but also their prospects of enjoying protection in their country of origin, and therefore the possibility for them to return to that country.

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94 APR, note 3 above, Explanatory Memorandum, p. 11.

95 Article 2(b).

96 European Union: *Council of the European Union, Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013, OJ L. 180/96 -105/32; 29.6.2013, 2013/33/EU, available at: http://www.refworld.org/docid/51d29db54.html.

97 See Annex 2 of UNHCR, *Identifying stateless persons in the European Union. Intervention by Vincent Cochetel, UNHCR Director of the Bureau for Europe, on the occasion of the meeting of the Strategic Committee on Immigration, Frontiers and Asylum in Brussels*, 25 April 2017, available at: http://www.refworld.org/docid/5911d8c34.html, referring to Eurostat data.

Currently, at the time of registering applications for international protection, EU Member States record someone as stateless based on that person's claim, or based on documentary evidence of their statelessness. However, the latter is virtually impossible to obtain in practice since it would require the applicant to prove a negative fact (e.g. that they are not recognized as a national of any country). Thirteen out of the current 28 EU Member States do not seem to record statelessness.[98] It is therefore recommended that Article 27(1)(a) be amended to specify the need to **record "nationality (including not having any nationality where this is claimed by the applicant)"** in order to enable asylum authorities to record whether an individual is or claims to be stateless. This element of the claim should subsequently be determined as part of the assessment of the asylum claim and/or an application for recognition as a stateless person.[99] In case the individual is later shown to indeed have a nationality, relevant records can be amended accordingly.

UNHCR recommends to amend **Article 27(1)(a)** as follows:

> "the name, date of birth, gender, nationality **(including not having any nationality where this is claimed by the applicant),** and other personal details of the applicant;"

Further, UNHCR recommends to amend **Article 27(1)(b)** as follows:

> "the type and number of any identity or travel document of the applicant, **if available**;"

UNHCR also recommends to include as a separate indent under **Article 27(1)(a)**:

> "**Where an individual claims not to have any nationality this should be clearly registered pending a full determination of whether the individual is stateless in a separate procedure, either in parallel with or following consideration of the claim for international protection.**"

In addition to amending Article 27, it is also suggested that the **definition of a stateless person**, as per Article 1 of the 1954 Convention relating to the Status of Stateless Persons and under customary international law, be included in Article 4(2).

UNHCR recommends to add the following definition to the list provided for in **Article 4(2)**:

> "**'stateless person' is a person who is not considered as a national by any State under the operation of its law.**"

Regarding Article 27(1) final indent, UNHCR recommends to exercise caution when considering applications by persons who claim not to have a nationality. Information previously obtained from another Member State may not reflect the current situation of the application. This could particularly be for the category of nationality status, as the very reason that an applicant has fled his or her country of origin or is now applying for international protection is because in practice the government no longer considers him or her a national, and he or she is therefore stateless. This may not be something that is recorded in the information that the Member State may have obtained earlier from another Member State. It would therefore seem prudent to always check the details required under Article 27(1) with the applicant him or herself.

Time limit for lodging an application (Article 28(1))

In contrast to the recast APD, the applicant now only has **ten days**, from the date of registration, **to *lodge*** his or her application (Article 28(1)), provided he or she has been given an effective opportunity to do so within these ten days. In case of a disproportionate number of applications, which makes it difficult to meet this time limit, he or she shall be given up to one month to lodge the application (Article 27(2)). UNHCR welcomes that the time limit for lodging asylum applications (Article 28(1)) will only be triggered for unaccompanied children once a guardian is appointed and has met with the child (Article 32(2)).

UNHCR notes that the ten-day **time limit is preconditioned on the applicant having had an effective opportunity to lodge** the application within that time frame. Given the long list of elements and documents the applicant has to produce when lodging the

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98 UNHCR, *Intervention by Vincent Cochetel*, note 97 above.

99 See UNHCR, *Handbook on Protection of Stateless Persons*, 30 June 2014, paras. 78-82, available at: http://www.refworld.org/docid/53b676aa4.html.

application (Article 28(4) in conjunction with Article 4(1) and (2) QR[100]), and the negative consequences that a late submission might have for the applicant's credibility, this is an important safeguard. In practice, an "effective opportunity" should not only refer to, for example, Member States' logistical arrangements to allow for applicants to be interviewed, but also take into account "the difficulties such applicants may face because of, inter alia, the difficult human and material situation", for example in bringing by the required documents.[101]

In addition, where the applicant has requested free legal assistance and representation, this time line should not expire before the legal advisor or counsellor has had an effective opportunity to advise the applicant, and she or he has had an opportunity to act upon that advice, similar to that which is proposed for unaccompanied children (Article 32(2)).

UNHCR recommends to amend **Article 28(1)** as follows:

> "The applicant shall lodge the application within ten working days from the date when the application is registered provided that he or she is given an effective opportunity to do so within that time-limit. **Where the applicant has requested free legal assistance and representation in accordance with Article 15(1), this time-limit shall not expire before the legal adviser or counsellor has had an effective opportunity to advise the applicant and the applicant has had an effective opportunity to act on that advice.**"

Late submission of elements (Article 28(4))

According to the proposal, the new time limit for lodging an application does not affect the applicant's **right to submit additional relevant elements** after the ten days have passed. The applicant is able to do so up to the point at which a decision is taken (Article 28(4) first indent). Once a decision is taken, however, the applicant **may only bring forward new relevant elements that he or she "could not have been aware of" earlier** or which concern changes to his or her situation (Article 28(4) second indent). It is unclear how this will affect the decision and whether, for example, the examination of the application at first instance will be reopened, or whether the examination will be continued on appeal in accordance with Article 53(3), second indent. If the latter is the case, UNHCR is concerned that the determining authority may not have all relevant evidence to make an informed decision, in particular where the **applicant may have been well aware of particular evidence, without being in a position to produce it**. For example, it may be impossible for the applicant to submit evidence which s/he would need to obtain from the country from which s/he fled. In this regard, the ECtHR has ruled that "[t]he lack of direct documentary evidence thus cannot be decisive per se".[102]

UNHCR recommends to delete **Article 28(4) second indent**.

Access to the procedure for dependents, including for (un)accompanied children (Articles 31 and 32)

Applications made on behalf of **dependents** have been **specified**, now referring to spouses, partners in a stable and durable relationship, children, or dependent adults without legal capacity (Article 31), as opposed to the previous terminology "dependents or minors" (Article 7 recast APD). The relevant provisions are expanded and now include detailed rules on making, lodging, and admissibility of applications in relation to dependants.

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[100] According to Article 4(1) QR, the applicant shall submit "all the elements available to him or her which substantiate the application for international protection". According to Article 4(2) QR, these elements are: "the applicant's statements and all the documentation at the applicant's disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous applications […], travel routes, travel documents and the reasons for applying for international protection."

[101] See the CJEU's decision in *Danqua*, in which a 15-day time limit for lodging a follow-up application was considered as too short as it "does not ensure, in practice, that all those applicants are afforded a genuine opportunity to submit an application". See *Evelyn Danqua v Minister for Justice and Equality, Ireland, Attorney General*, C429/15, European Union: Court of Justice of the European Union, 20 October 2016, para. 46, available at: http://www.refworld.org/cases,ECJ,580a36e84.html.

[102] *J.K. and Others v. Sweden*, Application no. 59166/12, Council of Europe: European Court of Human Rights, 4 June 2015, para. 92, available at: http://www.refworld.org/docid/55716c884.html. See in this regard also UNHCR's recommendation in section 3, subsection "Right to an effective remedy" above on bringing forward elements on appeal, irrespective of whether or not the applicant could have been or was earlier aware of these elements.

The rules for applications of **unaccompanied children** are dealt with in a separate provision, stating that an application may be lodged by the unaccompanied child him or herself, if he or she has the legal capacity to do so, or otherwise by the guardian (Article 32(1)). In addition, the determining authority shall lodge an application on behalf of the unaccompanied child, if it is of the opinion that the child may need international protection (Article 32(2)).

UNHCR appreciates that the rules on dependents' access to the procedure are generally clarified. However, it is of concern that the determining authority's **obligation to lodge an application on behalf** of persons in need of international protection where a child's mother or father has not lodged an application on the child's behalf, is limited – under certain circumstances – to *unaccompanied* children (Article 32(2)) and dependent adults (Article 31(4)). This obligation **should be extended** to cases in which a child in need of international protection is accompanied, but no application is lodged for him or her. This is especially important given the serious procedural consequences of not lodging an application within the time limit (e.g. an application being rejected as abandoned or inadmissible). In addition, this approach is also warranted by Article 2 of the Convention on the Rights of the Child, which prohibits discrimination of any kind.

UNHCR recommends amending **Article 31(9)** as follows:

> "When the adult responsible for the accompanied minor does not lodge an application on behalf of the minor**[…]**, the minor shall be informed of the possibility to lodge his or her application in his or her own name**[…]** if he or she has the legal capacity to act**[…]**. Where the minor does not lodge his or her application in his or her own name within**[…]** further ten working days, **the determining authority shall lodge an application on behalf of the accompanied minor if, on the basis of an individual assessment of his or her personal situation, it is of the opinion that the minor may need international protection.**"

6 EXAMINATION PROCEDURE AND DECISIONS ON APPLICATIONS

Country of origin information (Article 33(2)(b) and (c))

Contrary to the recast APD, for the purpose of examining an application for international protection the proposal distinguishes between "all relevant, accurate and up-to-date information relating to the situation prevailing in the country of origin of the applicant" (Article 33(2)(b)) and "the common analysis of the country of origin information" (Article 33(2)(c)).[103] With regard to the former, specific reference is made to information from the European Union Agency for Asylum and UNHCR. With regard to the latter, reference is made to Article 10 of the proposal for an EU Asylum Agency Regulation, which in turn only makes reference to a common analysis provided by the Agency and not by UNHCR. In its comments to the proposal for the EU Asylum Agency Regulation, UNHCR reiterated that any common analysis and guidelines should be based on precise, impartial, and up-to-date information, which should include information from UNHCR and other sources. It further recommends to include, in Article 10 of the proposal for the EU Asylum Agency Regulation, a specific reference in the regulation to UNHCR country-specific guidance (eligibility guidelines, international protection considerations, positions on return), where such UNHCR country-specific guidance exists.[104]

In addition to UNHCR's recommendation to amend Article 10 of the proposal for the EU Asylum Agency Regulation, UNHCR recommends amending Recital 30 and Article 33(2)(c) of the APR proposal to ensure the determining authority considers UNHCR country-specific guidance, where available, authoritative when examining applications for international protection.[105]

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[103] See also Recital 30.

[104] UNHCR, *UNHCR comments on the European Commission proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum – COM (2016) 271*, December 2016, pp. 10-12, available at: http://www.refworld.org/docid/585cde7a4.html.

[105] UNHCR Statute, note 5 above, para. 8(a). 1951 Convention, note 6 above, preamble and Article 35.

UNHCR country-specific guidance is issued at the global level pursuant to its supervisory responsibility to assist decision-makers, including governments and members of the judiciary, in assessing the international protection needs of asylum-seekers. These guidelines present detailed analysis of international protection needs and include recommendations as to how asylum applications relate to criteria and principles of international refugee law, including in the 1951 Refugee Convention and the EU Qualification Directive. Including a specific reference to UNHCR country-specific guidance ensures EU Member States' respect for their obligation to facilitate UNHCR's duty of supervising the application of the provisions of the 1951 Convention in accordance with Article 35(1) of this Convention.

UNHCR recommends to amend **Recital 30** as follows:

> (30) **[…]** The determining authority should also take into account any relevant common analysis of country of origin information developed by the European Union Agency for Asylum, as well as relevant country-specific guidance **UNHCR, which should be considered authoritative […].**"

UNHCR recommends to amend **Article 33(2)(c)** as follows:

> (c) the common analysis of the country of origin information referred to in Article 10 of Regulation (EU) No XXX/XXX (EU Asylum Agency Regulation)**, as well as UNHCR country-specific guidance, which, where available, should be considered authoritative**;"

Sur place activities (Article 33(2)(e))

In general, UNHCR welcomes the list of issues to be taken into account by the determining authority when examining an application (Article 33(2)). This includes reference to activities the applicant was engaged in since leaving the country of origin (Article 33(2)(e)). However, UNHCR is concerned with how Article 33(2)(e) is formulated, in particular where it requires the determining authority to take into account whether the applicant carried out post-flight activities for the sole or main purpose of **creating the necessary conditions for applying for international protection**. As the QD (Article 5(1) and (2)), as well as the QR proposal (Article 5(1) and (2)), indicate, the well-founded fear of persecution or risk of serious harm may be based on post-flight activities, irrespective of why the applicant has carried such activities. What is relevant is whether such activities may have come to the notice of the authorities or other agents of persecution in the applicant's country of origin and how they are likely to be viewed by those authorities or agents. The relevant consideration is whether a person would be exposed to a risk of persecution upon return.[106]

UNHCR recommends to amend **Article 33(2)(e)** as follows:

> **[…]** the activities that the applicant was engaged in since leaving the country of origin **[…]** so as to assess whether those activities would expose the applicant to persecution or serious harm if returned to that country;"

Inadmissibility grounds (Article 36(1))

The existing rules of the recast APD contain a list of grounds under which applications can be considered inadmissible. In such cases, Member States are not required to examine whether the applicant qualifies for international protection, i.e. **no in-merit examination** is carried out. The proposal makes the application of this **list mandatory**. Where one of the grounds listed applies, an application *shall* be rejected as inadmissible (Article 36(1)). These grounds apply when the

- applicant comes from a **first country of asylum**,
- applicant comes from a **safe third country**,
- applicant makes a subsequent application without new relevant elements or findings, or
- applicant's dependants make a separate application which is considered unjustified.

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[106] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1979, para. 96.

The proposal requires the Member State in which the application is lodged to consider the first country of asylum and the safe third country concept ***before*** considering which Member State is responsible under the proposed **Dublin IV Regulation** (Article 34(1) second indent). In effect, this means that the determining authority is required to check whether safe country concepts apply *before* considering, e.g. family links under the proposed Dublin IV Regulation.

As noted in the Comments on the proposed Dublin IV Regulation, UNHCR's position is that possibilities for **family reunion should take precedence over admissibility considerations**.[107] To ensure respect for the right to family unity and the best interests of the child, as enshrined in international law and the EU Charter, persons who can be reunited with family members should therefore not be subject to admissibility procedures.

UNHCR recommends to delete **Article 34(1) second indent**.

Manifestly unfounded claims (Articles 36(5) and 37(3))

The proposal requires the determining authority to declare unfounded applications for international protection as manifestly unfounded in specific cases that have been accelerated (Article 37(3) in conjunction with Article 40(1)(a) to (e)). Further, where the determining authority *prima facie* considers that an application may be rejected as manifestly unfounded, it is not obliged to pronounce itself on the admissibility of the application (Article 36(5)).

The proposal does not explicitly define "manifestly unfounded applications", but implies, in Recitals 39 and 44, that this refers, *inter alia*, to abusive claims or applications clearly without substance. UNHCR appreciates that applications that are clearly not related to the criteria for refugee status or which are clearly fraudulent or abusive may be rejected as manifestly unfounded (Article 37(3) in conjunction with 40(1)(a)).[108] UNHCR's prior statements on this subject have indicated that claims by individuals who clearly are not in need of international protection, or who make claims with an intent to deceive or mislead decision makers, may be subject to expedited procedures.[109] However, **false statements do not in themselves make the claim "clearly fraudulent"**.[110] In this regard, the mere fact of an applicant having made inconsistent, contradictory or false representations (Article 40(1)(b)); has misled the authorities by withholding information or documents that could have had a negative impact on the decision (Article 40(1)(c)); has made an application merely to delay or frustrate the enforcement of an earlier imminent decision on removal (Article 40(1)(d)); or comes from a safe country of origin (Article 40(1)(e)), does not mean that the criteria for international protection may not be met, nor would it obviate the need for international protection. While such cases can be examined in an expeditious manner, i.e. an accelerated examination procedure, they need to be approached with care to ensure they are abusive or without substance prior to declaring them manifestly unfounded.

As such, UNHCR is concerned that the proposal – in Article 37(3) in conjunction with Article 40(1)(a) to (e) – mandates the determining authority to declare such applications as manifestly unfounded. UNHCR **recommends Article 37(3) of the proposal is clarified** to distinguish manifestly unfounded applications from those that might be rejected as unfounded after a regular examination procedure.

In addition, in line with UNHCR's position that only claims which are clearly abusive, clearly fraudulent or have no link to the 1951 Convention should be considered as "manifestly unfounded",[111] the definition in Article 37(3) should be amended.

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[107] UNHCR, *UNHCR comments on the European Commission proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) – COM (2016) 270*, ("UNHCR 2016 Dublin Comments"), p. 11, available at: http://www.refworld.org/pdfid/585cdb094.pdf; See also already UNHCR APD Study, note 23 above, p. 283.

[108] UNHCR, *Aide-Memoire & Glossary of case processing modalities, terms and concepts applicable to RSD under UNHCR's Mandate* ("The Glossary"), 2017, p. 19, available at: http://www.refworld.org/docid/5a2657e44.html; UNHCR, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum No. 30 (XXXIV) – 1983*, 20 October 1983, No. 30 (XXXIV) – 1983, ("UNHCR The Problem of Manifestly Unfounded Applications"), available at: http://www.refworld.org/docid/3ae68c6118.html; UNHCR, *UNHCR's Position on Manifestly Unfounded Applications for Asylum*, 1 December 1992, 3 European Series 2, ("UNHCR's Position on Manifestly Unfounded Applications"), p. 397, available at: http://www.refworld.org/docid/3ae6b31d83.html. See also UNHCR, Fair and Fast, note 8 above.

[109] See UNHCR, Fair and Fast, note 8, p. 4-5.

[110] UNHCR's Position on Manifestly Unfounded Applications, note 108 above.

[111] UNHCR's definition does not correspond to the list in Article 40(1)(a)-(e) as referred to in Article 37(3). See already UNHCR APD Study, note 23 above, p. 460, note 239 on the APD's predecessor provision.

UNHCR recommends deletion of **Article 36(5)** as well as the **last sentence of Recital 38**.

Further, UNHCR recommends to amend **Article 37(3)** as follows:

> "The determining authority **[…]may** declare an unfounded application to be manifestly unfounded in the cases referred to in Article 40(1)(a)**[…] when the application is clearly not related to the criteria for international protection or when it is clearly fraudulent or abusive**."

Access to the procedure in detention (Article 30(1))

The rules on access to the procedure in detention facilities and at border crossing points (Article 30 APR) are more detailed compared to existing Article 8 recast APD. They now specify particular circumstances in which authorities shall **inform** the applicant of the possibility to apply for international protection: cases of unaccompanied children; cases where persons suffer from mental or other disorders; and *prima facie* cases. In addition, access of organisations and persons providing **advice and counselling** is now explicitly **extended to detention facilities**, whereas the previous provision only referred to border crossing points.

However, UNHCR is concerned that the obligation to inform only exists "[w]here there are indications" that a person "may need international protection" (Article 30(1)). The **right to information is therefore made conditional** on the perceived need of international protection. UNHCR considers that detention facility staff or border police might not be best placed to make such an assessment. Therefore, information should be provided in a systematic manner to everyone held in detention or at border crossing points, irrespective of perceived "indications" of protection needs.

UNHCR recommends to amend **Article 30(1)** as follows:

> **[…]The responsible authorities shall inform all** third-country nationals or stateless persons held in detention facilities or present at border crossing points, including transit zones, at external borders **[…]**of the possibility to apply for international protection**[…]**."

Duration of the examination procedure (Articles 34 and 40(2) and (4))

Article 34 of the proposal contains a series of maximum **time-limits** for the examination procedure, aiming at providing "short but reasonable time-limits".[112] A maximum of **one month** is set to determine the admissibility of an application (Article 34(1), first indent), and a maximum of **six months** for an examination on the merits (Article 34(2)). Further, a shorter timeframe of **ten working days** is set for applying the concept of a first country of asylum or safe third country in accordance with the proposed Dublin Regulation (Article 34(1), second indent). In addition, accelerated procedures shall be concluded within **two months** (Article 40(2))[113] and border procedures shall be completed within **four weeks** (Article 41(2)).[114]

UNHCR welcomes that these are maximum time limits, as it is in the interest of all parties that quality decisions are taken as soon as possible in an efficient and fair asylum procedure.[115] However, speed should not be a goal in itself and any time limits must be applied without prejudice to an **adequate and complete examination** (Recital 33, 66, Articles 34(2), 41(2), 55(1)). In any case, **states must guard against reducing or undermining procedural safeguards** for applicants, or their ability to benefit from those safeguards in practice, and maintain **sufficient flexibility in time frames** should complicated issues arise. In this regard, UNHCR welcomes that the six-month time frame for a merits examination may be extended for not more than three months where complex issues of fact or law are involved (Article 34(3)(b)) and that, for the same reasons, an application may be moved from an accelerated examination procedure to a 'non-accelerated' procedure (Article 40(4)). However, UNHCR is concerned that no flexibility in time frames is foreseen for determining the admissibility of an application.

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[112] APR, note 3 above, Explanatory Memorandum, p. 11.

[113] Accelerated examination procedures are addressed in section 7 of this commentary.

[114] Border procedures are addressed in section 7 of this commentary.

[115] UNHCR 2012 APD (recast) Comments, note 24 above, p. 23; UNHCR 2010 APD Comments, note 30 above, p. 30; See also UNHCR, *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004)*, 10 February 2005, ("UNHCR 2005 APD Comments"), p. 27, available at: http://www.refworld.org/docid/42492b302.html.

Instead of the proposed **Article 34(1) second indent**,[116] UNHCR recommends to add a new second indent, so that **Article 34(1)** is amended as follows:

> "The examination to determine the admissibility of an application in accordance with Article 36(1) shall not take longer than one month from the lodging of an application.
>
> **[…]Where the determining authority does not determine the admissibility of an application within one month, it shall continue the examination of the application in accordance with paragraph 2 and 3 of this Article as well as Article 37.**"

In addition, the general six month time-limit to examine the merits of an application may be **extended** by maximum of three months (currently nine months), in cases of "a **disproportionate number**" of applications (Article 34(3)(a)). As noted previously,[117] UNHCR considers that it is necessary to define the term "disproportionate number of third-country nationals or stateless persons [that] simultaneously apply for international protection" in order to render this provision clear and implementable. Otherwise, it could lead to unjustified prolongation of procedures, with associated costs and uncertainties for all parties concerned.

Finally, UNHCR is concerned that the determining authority, as is the case under the recast APD, may **postpone** the examination procedure **where** it cannot be reasonably expected to decide within the set time limits because of an **uncertain situation in the country of origin**, which is expected to be temporary (Article 34(5)). The applicant must be **informed** about the postponement, and country situation reviews must take place every two months. New is also the requirement to inform the **EUAA**, and a stricter **maximum time limit of 15 months** (currently 21 months).

UNHCR recalls that while in certain circumstances the examination of applications could validly be suspended or deprioritized for short periods, this should be done in narrowly circumscribed cases and for short periods only, which are subject to regular reassessment.[118] In any case, such postponement must not negatively affect the right to claim and receive international protection, and must honour relevant case law, including by the CJEU.[119]

Implicit withdrawal of applications (Article 39)

Article 39(1) requires the determining authority to **reject an application as abandoned** on the basis of six exhaustively listed grounds. These grounds include **non-compliance with** the newly introduced lodging requirements or **reporting obligations, refusal to provide fingerprints, and situations of onward movement**. In contrast to the recast APD, which leaves this matter to the Member States' discretion, the provision on implicit withdrawal under the APR is **compulsory**.

To balance this strict consequence of considering an application to be "implicitly withdrawn", the proposal requires an important safeguard: the determining authority is required to give the applicant written **notice** that the application will be definitely rejected as abandoned unless the applicant reports within one month. The applicant is then given the **opportunity to report** to the determining authority **within one month** and to **demonstrate** that the reason for which the application was rejected as abandoned was **beyond his or her control**, in which case the examination shall be resumed (Article 39(3)). When the applicant does not report within a month and cannot demonstrate the reason for rejecting the application as abandoned was beyond his or her control, the application shall be considered as implicitly withdrawn (Article 39(4)).

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[116] Which UNHCR proposes to delete: see above subsection on "Inadmissibility grounds".

[117] UNHCR 2012 APD (recast) Comments, note 24 above, p. 24.

[118] UNHCR 2012 APD (recast) Comments, note 24 above, p. 24

[119] Rights guaranteed by EU law require a "procedural system which is […] capable of ensuring that the persons concerned will have their applications dealt with objectively and within a **reasonable time**" (emphasis added), see *Panayotova and others v. Minister voor Vreemdelingenzaken en Integratie*, C-327/02, European Union: European Court of Justice, 16 November 2004, para. 27, available at: https://bit.ly/2BHfXVJ; see also CJEU, *Shamso Abdullahi v. Bundesasylamt, C-394/12, European Union: Court of Justice of the European Union*, 10 December 2013, available at: http://www.refworld.org/cases,ECJ,52d7ba9b4.html, where the Court stated that one of the principal objectives of the Dublin regulation is to rapidly determine the responsibility Member State "as to guarantee effective access to the procedures for determining refugee status and not to compromise the **objective of the rapid processing of asylum applications**" (para. 59, emphasis added); see also *H.I.D. and another v Refugee Applications Commissioner and others*, C-175/11, European Union: Court of Justice of the European Union, 31 January 2013, para. 60, available at: http://www.refworld.org/cases,ECJ,510be4c52.html.

The **listed grounds for rejecting** an application as abandoned are:

- failure to meet the requirements for lodging the application as provided for in Article 28 (i.e. **lodging within 10 days, substantiating the application**, lodging in person at designated place), despite having had an effective opportunity to do so (Article 39(1)(a));
- cases whereby **dependent** spouses, partners or children have not lodged an application on their own after the applicant failed to lodge application on their behalf (Article 39(1)(b));
- refusal to cooperate either by **not providing details, fingerprints** or his or her facial image, in accordance with Article 7(3) (Article 39(1)(c));
- **non-appearance** at a personal interview, despite being required to do so (Article 39(1)(d));
- cases whereby the applicant has abandoned his or her place of residence or has repeatedly not complied with **reporting duties** (Article 39(1)(e) and (f)).

In general, UNHCR considers that an **application can only be rejected where there has been a full examination of all relevant facts and circumstances**, based on which the determining authority has established that the applicant is not a refugee or does not qualify for subsidiary protection. However, UNHCR appreciates that there may be situations where the determining authority is not able to undertake a full examination and that applications for international protection, despite having been made, are to be discontinued. This includes applications that have been made, but where, despite having had an effective opportunity, the applicant has not lodged an application, as foreseen by Article 39(1)(a) and Article 39(1)(b) in conjunction with Article 31(3) and (8) for dependent applicants.

UNHCR is concerned that **all other grounds** listed in Article 39(1) requiring the determining authority to reject an application as abandoned are **punitive in character** and may lead to incorrect decisions, i.e. wrongly rejecting an application of a person in need of international protection. In UNHCR's view, an applicant may fail to cooperate, not appear at a personal interview or not comply with residence or reporting obligations for a variety of reasons, including issues of miscommunication, procedural errors, or service of post, which do not necessarily indicate the absence of international protection needs, or prevent the determining authority from examining the application.

UNHCR had strongly supported the recast APD's predecessor provision – Article 28 (1) recast APD – which notes that the determining authority can reject a claim that is considered implicitly withdrawn or abandoned **only after an adequate examination of its merits**. UNHCR recommends that this requirement be retained in Article 39(1). In addition, UNHCR recommends to **retain the concrete *non-refoulement* obligation** present in the current provision (Article 28(2) third indent recast APD).

UNHCR recommends to amend **Article 39** as follows:

> **1. Taking into account special procedural needs referred to in Articles 20, 21 and 22, [...]**the determining authority **[...]may** reject an application as abandoned **only** where:
>
> **(a)** the applicant has not lodged his or her application in accordance with Article 28, despite having had an effective opportunity to do so;
>
> **(b)** a spouse, partner or minor has not lodged his or her application after the applicant failed to lodge the application on his or her own behalf as referred to in Article 31(3) and (8) **[...]**.

UNHCR recommends to retain current Article 28(2) third indent recast APD as new **Article 39(6)**:

> **Member States shall ensure that an applicant whose application is considered to be implicitly withdrawn is not removed contrary to the principle of *non-refoulement* based on the information that is available to the authorities.**"

UNHCR recommends to **delete** the other grounds for rejecting an application as abandoned currently proposed in **Article 39(1)(c) to (f)**.

7
SPECIAL PROCEDURES

Accelerated examination procedures (Article 40)

The proposal significantly **expands the use of accelerated examination procedures**. Their use is made **mandatory** and a new ground for acceleration, in cases of onward movement contrary to the Dublin Regulation, is introduced (Article 40(1)(g)).[120] Further, the proposal distinguishes between acceleration of procedures and **prioritization** of the examination of an application. The latter may be applied where the application is likely to be well-founded, where the applicant has special reception needs, or where he or she is in need of special procedural guarantees, in particular where he or she is an unaccompanied child (Article 33(5)).[121] UNHCR welcomes that likely well-founded cases and applications from persons with specific needs and unaccompanied children may be prioritized and encourages Member States to systematically apply this provision.[122]

According to UNHCR the acceleration of the examination of an application can contribute to the efficiency of asylum procedures and a better managed asylum system. Acceleration means a shortening of timeframes, whereby such **timeframes should remain reasonable and not affect procedural fairness or the quality** of the examination. UNHCR welcomes that sufficient flexibility is maintained by ensuring the examination of the application is moved to a different modality should complicated issues arise (Article 40(4)). The EC acknowledges it is "necessary for all the procedural guarantees to apply",[123] in particular, the right to be heard in a personal interview, interpretation and free legal assistance and representation. UNHCR is, however, concerned that *all* cases examined through an accelerated examination procedure are excluded from **automatic suspensive effect** of appeals.[124]

In UNHCR's view, **acceleration should not be used as a punitive measure** in cases the applicant does not comply with obligations, but used solely as an efficiency tool ensuring expedient access to international protection for those in need of it, and quick negative decisions for those who are not. In particular, some persons with specific needs may not be well-served by accelerated timelines that do not allow them sufficient time to understand the process and present their claim. Therefore, accelerated procedures should not be mandatory and their use should be restricted to certain, well-defined grounds.[125] Accelerated procedures may be appropriate when the application is clearly fraudulent, or clearly not related to the criteria for the granting of refugee status laid down in the 1951 Convention nor to any other criteria justifying the granting of asylum. Such applications are often labelled as "manifestly unfounded".[126]

UNHCR is concerned that the grounds provided for in the proposal under Article 40(1) are, however, **much broader**, and refer to cases for which acceleration of the examination may not be appropriate, i.e. where other elements are brought forward indicating a need for international protection.[127] This includes cases where the applicant has made clearly inconsistent and contradictory or obviously improbable representations (Article 40(1)(b)); has misled the authorities by withholding or presenting false information or documents that could have had a negative impact on the decision (Article 40(1)(c)); where the applicant may be considered a danger to the national security or public order (Article 40(1)(f));[128] or whereby the applicant does not make the application in the Member State of first entry or of legal presence in accordance with the Dublin Regulation (Article 40(1)(g)). The ground listed in

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[120] See Article 40(1)(g) on the new ground relating to onward movement, which refers to the obligation under Article 4(1) of the proposed Dublin IV Regulation to apply in the first Member State of entry or Member State of regular stay or be channelled into an accelerated procedure as per Article 5(1) of the proposed Dublin IV Regulation ("Consequences of non-compliance").

[121] For the concepts of accelerated Refugee Status Determination (RSD) and prioritisation for RSD under UNHCR's mandate, see UNHCR Glossary, note 108 above, p. 8 and 17.

[122] UNHCR APD Study, note 23 above, p. 265.

[123] APR, note 3 above, Explanatory Memorandum, p. 16.

[124] See section 7 and notes 64 and 65 above.

[125] UNHCR Glossary, note 108 above, p. 8.

[126] See section 6 above. The term "manifestly unfounded" refers to applications for international protection that are "clearly not related to the criteria for refugee status" or which are "clearly fraudulent or abusive", see UNHCR The Problem of Manifestly Unfounded Applications, note 108 above, UNHCR's Position on Manifestly Unfounded Applications, note 108 above, p. 397.

[127] UNHCR, *Note on International Protection*, 7 July 1999, A/AC.96/914, available at: http://www.refworld.org/docid/3ae68d98b.html, para. 22; UNHCR The Problem of Manifestly Unfounded Applications, note 108 above.

[128] UNHCR 2005 APD Comments, note 115 above, p. 32.

Article 40(1)(d) is unclear in that it is not clear how the authority may assess whether an application is made "merely to delay or frustrate the enforcement of" a removal decision. UNHCR recalls that a late application or substantiation does not preclude the credibility of the applicant's statements, and due consideration should be given to any circumstances of the case that may lead to delays in applying for international protection or appropriately substantiating the claim, including trauma due to past experience, feelings of insecurity, or language problems.[129]

UNHCR recommends to amend **Article 40(1)** as follows:

> The determining authority **[…]may**, in accordance with the basic principles and guarantees provided for in Chapter II, accelerate the examination on the merits of an application for international protection, in the cases where:
>
> **(a)** the applicant, in submitting his or her application and presenting the facts, has only raised issues that are not relevant to the examination of whether he or she qualifies as a beneficiary of international protection in accordance with Regulation (EU) No XXX/XXX (Qualification Regulation);
>
> **(b)** the applicant has **only** made **[…]**clearly false **[…]**representations which contradict sufficiently verified country of origin information, thus making his or her claim clearly unconvincing in relation to whether he or she qualifies as a beneficiary of international protection by virtue of Regulation (EU) No XXX/XXX (Qualification Regulation);**[…]**
>
> **(c)** a third country may be considered as a safe country of origin for the applicant within the meaning of this Regulation;**[…]**
>
> **(d)** the application is a subsequent application, where the application is so clearly **not related to the criteria for the granting of refugee status laid down in the 1951 United Nations Convention relating to the Status of Refugees nor to any other criteria justifying the granting of asylum[…]** that it has no tangible prospect of success."

Article 40(2) second sentence should be deleted.

UNHCR considers that **Article 40 should not be applied to Unaccompanied and Separated Children (UASC) nor to vulnerable persons** who are in need of specific procedural guarantees due to factors outlined in Recital 15 of the proposal (*inter alia*, gender, sexual orientation, serious illness, or as a consequence of psychological, physical, sexual or gender-based violence).[130] Rather, these groups should be referred to specialised procedures which fully take into account their specific needs.[131] For children, such a procedure should entail an identification and registration phase, with the immediate appointment of a guardian, referral to age-appropriate first reception, and a preliminary, non-invasive age assessment applying the benefit of the doubt principle. Following registration, a thorough and multidisciplinary Best Interests Assessment should take place, which involves the child's legal advisor, guardian, and social workers, and where a holistic age assessment and proactive family tracing takes place.[132] Further, in UNHCR's view, due to their often complex nature, claims based on sexual orientation are generally unsuited to accelerated processing as they raise particular challenges for adjudicators, as well as for applicants.[133] UNHCR therefore recommends not to apply Article 40 to UASC or other vulnerable groups, but to rather examine their applications in a **prioritized procedure** in line with Article 33(5).

UNHCR recommends to amend **Article 40(5)** as follows:

> The accelerated examination procedure **[…]shall not** be applied to unaccompanied minors **as well as applicants in need of special procedural guarantees as referred to in Article 19 of this Regulation[…]. Due consideration shall be given to possibilities to prioritise applications by unaccompanied minors and applicants in need of special procedural guarantees in line with Article 33(5) of this Regulation.**"

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[129] UNHCR, *UNHCR Comments on the European Commission Proposal for a Qualification Regulation – COM (2016) 466*, February 2018, available at: http://www.refworld.org/docid/5a7835f24.html, p. 10.

[130] UNHCR, *Better Protecting Refugees in the EU and Globally*, note 1 above, p. 12 at note 19, UNHCR APD Study, note 23 above, p. 265; UNHCR SOGI Guidelines, note 33 above, para. 59.

[131] See Flowcharts 2 and 3 of UNHCR, Better Protecting Refugees in the EU and Globally, note 1 above, p. 16.

[132] UNHCR, *Better Protecting Refugees in the EU and Globally*, note 1 above, p. 16.

[133] UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of M.B. v. Spain (Appl. No 15109/15) before the European Court of Human Rights*, 15 January 2016, available at: http://www.refworld.org/docid/56a22d9b4.html, para. 4.6. and UNHCR SOGI Guidelines, note 33 above, para. 59.

Border procedures (Article 41)

While accelerated procedures are proposed to become mandatory, **border procedures remain optional**. They are only permissible to decide on the admissibility of an application pursuant to Article 36(1) or for cases subject to an accelerated examination pursuant to Article 40 (Article 41(1)). In the latter case, border procedures may also be used to take a substantive decision. Importantly, the proposal notes that such a procedure has to be taken "without prejudice to an **adequate and complete examination**" (Article 41(2)) and within maximum four weeks (Article 41(2)), or else the applicant has the right to enter and remain on the territory (Article 41(3)). In case of a "disproportionate number" of applications, these border procedures may also be applied at locations in proximity to the border or transit zone (Article 41(4)).

In case of **unaccompanied children**, the use of border procedures is limited and may only be applied if the unaccompanied child comes from a safe country of origin, is considered a danger to the national security or public order, a safe third country is available, or when the child has misled the authorities in an attempt to conceal information would have likely resulted in a refusal of international protection (Article 41(5)).

In UNHCR's view, border procedures must comply with the same due process requirements and safeguards as procedures that apply to applications submitted at other locations. UNHCR therefore welcomes that border procedures must comply with the **basic principles and guarantees** provided for in Chapter II of the proposal (Article 41(1)). The principle of *non-refoulement* should be scrupulously observed, including in all situations of large-scale influx.[134]

In light of the fact that border procedures "normally imply the use of **detention** throughout the procedure"[135], UNHCR notes that Article 41 requires a decision within four weeks, before entry to the territory shall be granted and "normal" processing continued (Article 41(3)). UNHCR recalls that such prolonged confinement at the border amounts to detention, as acknowledged in the ECtHR's jurisprudence.[136] UNHCR therefore recalls that asylum-seekers should, in principle, not be detained. Detention is an exceptional measure, can only be justified for a legitimate purpose, must be assessed on an individual basis and regularly reviewed.[137] Where detention is used for asylum-seekers, including at a border or in a transit zone, it should meet the requirements under Articles 8 to 11 of the Reception Conditions Directive.

Given the systematic use of detention, and the character of border procedures that may make the provision of full procedural safeguards practically difficult, **border procedures should not be applied to children**. Detention, including at borders, is never in the best interests of the child, and should not even be used as a last resort. This concerns both unaccompanied and separated children, as well as children in families.[138] The proposal, while limiting the use of border procedures in the case of unaccompanied children, would allow their use in practically highly relevant cases, including where a safe third country is available for the unaccompanied child or where the child "misled the authorities by presenting false information" (Article 41(5)(c) and (d)).

UNHCR recommends to delete **Article 41(5)**.

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134 ExCom Conclusion No. 19 (XXXI), 1980, para. (a). As the ECtHR strongly emphasised in its *A.C. and Others v. Spain* judgment, despite the significant numbers of asylum-seekers the States concerned are under the obligation to organise its judicial system to comply with the right to an effective remedy in expulsion and asylum matters (para. 104), *A.C. et autres c. Espagne, Requête no 6528/11*, Council of Europe: European Court of Human Rights, 22 April 2014, available at: http://www.refworld.org/cases,ECHR,5357733b4.html.

135 APR, note 3 above, Explanatory Memorandum, p. 15, emphasis added.

136 See, for example, *Amuur v. France*, 17/1995/523/609, Council of Europe: European Court of Human Rights, 25 June 1996, available at: http://www.refworld.org/docid/3ae6b76710.html.

137 UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: http://www.refworld.org/docid/503489533b8.html.

138 UNHCR, *UNHCR's position regarding the detention of refugee and migrant children in the migration context*, January 2017, available at: http://www.refworld.org/docid/5885c2434.html; Joint General Comment of the Committee on the Rights of the Child and the Committee on the Rights of Migrant Workers (CMW/GC/4-CRC/GC/23), 16 November 2017.

Subsequent applications (Articles 4(2)(i), 42, 43)

Article 4(2)(i) **defines** a subsequent application as a further application made in any Member State after a **final decision** has been taken on a previous application, **including** cases where the application has been **rejected as explicitly withdrawn or as abandoned** following its implicit withdrawal.

UNHCR has noted in the past that confusion could arise from including withdrawn applications in the definition of subsequent applications.[139] It notes with concern that the proposal continues to **include withdrawn applications** in the definition of subsequent applications. While the proposal no longer explicitly mentions withdrawn applications in the provision on subsequent applications itself, it defines "final decisions" as including "explicitly withdrawn or abandoned" (i.e. implicitly withdrawn) applications (Article 4(2)(d)).[140]. The result therefore remains the same as under the recast APD provision.

In UNHCR's view, treating an application as a subsequent application is justified only if the previous claim was considered fully **on the merits**, involving all the appropriate **procedural safeguards**.[141] Under the current proposal, however, there may be cases where such safeguards may not have been applied, including to "implicitly withdrawn" applications.

According to the proposal, a subsequent application shall be subject to a **preliminary examination** (Article 42(2) and (3)), and a new procedure shall be initiated when there are new elements or findings "which significantly increase the likelihood of qualification as a beneficiary of international protection" (Article 42(4)(a) in conjunction with Article 42(2)), and when the applicant was unable, through no fault of his or her own, to present those elements or findings during the earlier application (Article 42(4)(b)). In UNHCR's view, a preliminary examination would not require assessing whether such elements "significantly increase the likelihood of the applicant qualifying as a beneficiary of international protection". Whether an application qualifies for international protection requires an examination of the merits in a new procedure.

UNHCR recommends amending **Article 42(2)** as follows:

> "A subsequent application shall be subject to a preliminary examination in which the determining authority shall establish whether relevant new elements or findings have arisen or have been presented by the applicant, which **[…]**relate to the reasons for which the previous application was rejected as inadmissible;"

While in principle, subsequent applications require both written submissions and a personal interview, the proposal allows Member States to **dispense with the personal interview** where, from the written submissions, it is clear that the application does not give rise to relevant new elements or findings, or where the subsequent application is clearly without substance and has no tangible prospect of success (Article 42(3)). UNHCR considers that this option to omit the personal interview should not be used where the application has been explicitly or implicitly withdrawn, as explained above.[142]

In addition, the applicant has **no right to free legal assistance** during this preliminary examination (Article 15(3)(c)). UNHCR recommends to limit this provision to second or further subsequent applications, as explained above.[143]

Most significantly, the proposal retains the **possibility to remove** applicants before a decision is taken on certain subsequent applications. According to Article 43 ("Exceptions from the right to remain in subsequent applications"), Member States may derogate from the automatic suspensive effect of appeals, and create an **exception to the right to remain** in the case of (i) subsequent applications rejected as inadmissible or manifestly unfounded or (ii) second or further subsequent applications following a final rejection decision. The EC considers this approach to be justified, because the applicant "would have already had his or her application examined under the administrative procedure as well as by a court or tribunal and where the applicant would have enjoyed procedural guarantees".[144]

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[139] UNHCR 2012 APD (recast) Comments, note 24 above, p. 7.

[140] The proposal defines a "final decision" as "a decision on whether or not a third-country national or stateless person is granted refugee status or subsidiary protection status by virtue of Regulation (EU) No XXX/XXX (Qualification Regulation), *including* a decision rejecting the application as inadmissible *or a decision rejecting an application as explicitly withdrawn or abandoned* and which can no longer be subject to an appeal procedure in the Member State concerned" (Article 4(2) (d)." (emphasis added)

[141] UNHCR 2012 APD (recast) Comments, note 24 above, p. 7.

[142] See above Section 3 (General procedural safeguards), subsection "Personal interviews".

[143] See above Section 3 (General procedural safeguards), subsection "Legal assistance and representation".

[144] APR, note 3 above, Explanatory Memorandum, p. 17.

Article 43 must also be read together **with Article 54(2)(b)**. Both provisions concern the right to remain in cases of certain subsequent applications, but contain different aspects of the procedure. While Article 43(a), in general terms, allows Member States to terminate the right to remain for certain subsequent applications, Article 54(2)(b) provides for judicial review of such a termination decision, either upon the applicant's request or *ex officio*. As Article 43 only allows derogation from Article 54(1), the safeguard in Article 54(2)(b) remains untouched. As such, a decision to terminate an applicant's right to remain on the territory of the Member State responsible in a subsequent application procedure is subject to the review of a court or tribunal, which can rule that the applicant may remain on the territory, either upon the applicant's request or acting *ex officio*.

UNHCR recommends to clarify this provision by amending **Article 43** as follows:

> "Without prejudice to the principle of non-refoulement **and Article 54(2)(b)**, Member States may provide an exception from the right to remain on their territory**[…]**, where **[…]**a second or further subsequent application is made in **[…]the** Member State **responsible** following a final decision rejecting a previous subsequent application as inadmissible, unfounded or manifestly unfounded.
>
> Member States may make such an exception only where the determining authority considers that a return decision will not lead to direct or indirect refoulement in violation of that Member State's international and Union obligations."

8 SAFE COUNTRY CONCEPTS

Generally, UNHCR considers that admissibility arrangements and the use of "safe country" concepts would need to be part of efforts to share responsibilities and involve key protection safeguards. While admissibility arrangements could be used, for example, by main countries of arrival, under an EU emergency support plan and with the necessary safeguards in place, they are **currently not amenable to mandatory use** across the EU since these elements are not currently present.[145] Further, they would stand in contrast to solidarity concepts that should apply to ensure that transfers to third countries aim at enhancing the overall protection space, rather than shifting protection responsibilities and externalizing asylum processing to non-EU countries.[146] Therefore, UNHCR proposes that the **use of safe country concepts remains optional**.

UNHCR recommends to replace the word "shall" in the respective first sentence of **Articles 44(1), 44(2), 45(1) and 45(2)**, and in **Article 46(1)**, as well as the word "should" in the first and second sentences of **Recitals 36 and 37**, with "may".

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 and an applicant must have an effective opportunity to rebut the presumption of safety in light of their individual circumstances.[147]

Safe third country concepts (Articles 36(1), 44(3) and 45(4))

The **mandatory use** of safe third country concepts is one of the proposal's **most significant changes**. Applications shall be rejected as inadmissible when a country can be considered either as a "first country of asylum" (Article 36(1)(a)), or a "safe third country" (Article 36(1)(b)), unless it is clear that the applicant will not be (re)admitted to that country.

UNHCR appreciates that where the applicant is not (re)admitted to the third country, the decision to reject the application as inadmissible must be revoked and the application must be examined on its merits (Articles 44(6) and 45(7)) by the Member State.

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145 UNHCR, *Better Protecting Refugees in the EU and Globally*, note 1 above, p. 13.

146 UNHCR, *UNHCR's Recommendations to the Federal Republic of Austria for its Presidency of the Council of the European Union (EU)*, June 2018, available at: http://www.refworld.org/docid/5b35e4367.html, p. 1.

147 UNHCR 2016 Dublin Comments, note 107 above.

Prior to transfer, it is important, keeping with relevant international law standards, individually to assess whether the third state will (re)admit the person.

UNHCR recommends to amend **Article 36(1)(a) and (b)** as follows:

> **(a)** a country which is not a Member State is considered to be a first country of asylum for the applicant pursuant to Article 44, **provided [...]**that the applicant will **[...]**be admitted or readmitted to that country;
>
> **(b)** a country which is not a Member State is considered to be a safe third country for the applicant pursuant to Article 45, **provided [...]**that the applicant will **[...]**be admitted or readmitted to that country;"

Importantly, the application of the safe third country concepts requires an **individual examination** whether the conditions of "safety" are met. According to Article 44(3) and Article 45(4) respectively, "the applicant shall be allowed to challenge the application of the concept" of first country of asylum or safe third country "in light of his or her particular circumstances". In this regard, UNHCR welcomes the applicant's right to information (Article 8(2)) and the applicant's right to an admissibility interview (Article 10). Both are essential preconditions for the applicant's effective opportunity to rebut the presumption of safety.

However, UNHCR notes that the **opportunity to challenge** the application of safe third country concepts is proposed to be **limited in time**. According to Article 44(3) and Article 45(4), respectively, the applicant can challenge the application of these concepts only "when lodging the application and during the admissibility interview." This is contrary to the general rule set out in Article 28(4), according to which applicants are authorised to submit any additional elements relevant for their claims until a decision is taken. UNHCR recommends to align the respective safe third country rules with this general rule.

UNHCR recommends to amend **Article 44(3)** as follows:

> Before his or her application can be rejected as inadmissible pursuant to Article 36(1)(a), the applicant shall be allowed to challenge the application of the first country of asylum concept in light of his or her particular circumstances**[...]**."

UNHCR recommends to amend **Article 45(4)** as follows:

> Before his or her application can be rejected as inadmissible pursuant to Article 36(1)(b), the applicant shall be allowed to challenge the application of the concept of safe third country in light of his or her particular circumstances**[...]**."

Further, in UNHCR's view, it is the responsibility of the determining authority to assess that a third country is safe for the individual, and **examine the application on its merits, where** the applicant has brought forward issues of fact or law that may **indicate the third country is not safe for the applicant**.

First country of asylum (Article 44(1) and (2))

For a third country to be considered a "first country of asylum" for a particular applicant, the applicant must have enjoyed protection in accordance with the 1951 Convention in that country and is able to still avail him- or herself of that protection (Article 44(1)(a)). Alternatively, the applicant must have enjoyed "sufficient protection" in that country (Article 44(1)(b)), which is satisfied when certain criteria are respected in the third country (Articles 44(2)).

UNHCR acknowledges for a country to be considered a "first country of asylum" that a particular applicant has and will continue to enjoy protection in accordance with the 1951 Convention.[148] It is however equally important that refugees are treated in accordance with international human rights law standards.[149] Further, UNHCR regrets that the proposal maintains an alternative in the form of enjoying "sufficient protection". While UNHCR welcomes many of the criteria defining "sufficient protection" listed in Article 44(2), these do not correspond fully with the standards of treatment commensurate with the 1951 Convention and international human rights standards to which refugees and others in need of international protection should have access. In UNHCR's view, both refugees and those eligible for complementary forms of international protection, including subsidiary

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[148] UNHCR, *Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries*, April 2018, paras. 3, 7, 8 and 10, http://www.refworld.org/docid/5acb33ad4.html.

[149] 1951 Convention preambular paragraphs 1 and 2. EXCOM Conclusion No. 81 (XLVII) 1997, para. (e) and EXCOM Conclusion No. 95 (LIV) 2003, para. (l).

protection within the meaning of EU law, need to be accorded the standards of treatment commensurate with the 1951 Convention and international human rights law standards.

Further, UNHCR regrets that the proposal maintains the term **"sufficient protection"**, instead of "effective protection". In line with the ECtHR's case law, UNHCR considers that protection does not only need to be available according to the law, but effective in practice. Whether standards of treatment commensurate with the 1951 Convention, its 1967 Protocol and international human rights standards are available cannot be answered without looking at the state's international legal obligations, its domestic laws and the actual practice of implementation. To ensure access to protection is effective and enduring, being a state party to the 1951 Convention and/or its 1967 Protocol and basic human rights instruments without any limitations is a critical indicator. Access to human rights standards and standards of treatment commensurate with the 1951 Convention and its 1967 Protocol may only be effectively and durably guaranteed when the state is obliged to provide such access under international treaty law, has adopted national laws to implement the relevant treaties and can rely on actual practice indicating consistent compliance by the state with its international legal obligations.[150] A theoretical guarantee of *non-refoulement* and other key human rights safeguards, without being effective in practice, is not adequate.[151] Therefore, UNHCR continues to recommend to replace the word "sufficient protection" with "effective protection".[152] The following elements, whilst not exhaustive, are critical factors in the assessment of whether an applicant enjoys effective protection:[153]

- The person has **no well-founded fear** of persecution in the third state on any of the 1951 Convention grounds, and there is **no risk of serious harm**, as stipulated in Article 15 of the Qualification Directive, in the third state.
- There is and will be **respect for fundamental human rights** in the third state in accordance with applicable international standards, including but not limited to the following:
- There is no real risk to the life of the person in the third state.
- There is no real risk that the person would be deprived of his/her **liberty** in the third state without due process.
- There is **no real risk that the person would be sent** by the third state **to another state** in which s/he would not receive effective protection, or would be at risk of being sent from there on to any other state, where such protection would not be available.
- Where the return of an asylum-seeker to a third state is involved, accession to and compliance with the 1951 Convention and/or 1967 Protocol are essential, unless the destination country can demonstrate that the third state has developed a practice akin to the 1951 Convention and/or its 1967 Protocol.
- The person has access to **means of subsistence** sufficient to maintain an adequate standard of living, and steps are undertaken by the third state to enable the progressive achievement of self-reliance, pending the realization of durable solutions.
- The third state takes account of any **special vulnerabilities** of the person concerned and maintains the privacy interests of the person and his/her family.

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150 UNHCR, *Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries*, April 2018, para. 10, available at: http://www.refworld.org/docid/5acb33ad4.html.

151 UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, ("UNHCR 2001 Global Consultations on Asylum Processes"), paras. 10-11, available at: http://www.refworld.org/docid/3b36f2fca.html; UNHCR APD Study, note 23 above, p. 282-283; *Abdolkhani & Karimnia v. Turkey*, Appl. No.30471/08, CoE, ECtHR, 22 Sep 2009, para. 88, available at: www.refworld.org/docid/4ab8a1a42.html.

152 UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009), August 2010, available at: http://www.refworld.org/docid/4c63ebd32.html, p. 32-33; UNHCR APD Study, note 23 above, p. 282; UNHCR, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees & Asylum-seekers (Lisbon Expert Roundtable*, 9-10 December 2002), February 2003, available at: http://www.refworld.org/docid/3fe9981e4.html.

153 UNHCR APD Study, note 23 above, pp. 279-2080; UNHCR, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003, available at: http://www.refworld.org/docid/3fe9981e4.html.

In line with these considerations, UNHCR recommends:

- to amend **Article 44(1)(a)** as follows:

> the applicant has enjoyed **legal residence and** protection in accordance with the Geneva Convention **and international human rights standards** in that country before travelling to the Union and he or she can still avail himself or herself of that **residence and** protection;"

- to delete **Article 44(1)(b).**
- to amend **Article 44(2)** as follows:

> The determining authority **may[…]** consider that an applicant enjoys **effective** protection **[…]** provided that it is satisfied that:"

- to amend **Article 44(2)** (opening sentence and paragraph (2)(a)) as follows:

> The determining authority shall consider that an applicant enjoys **effective** protection within the meaning of paragraph 1(b) provided that it is**, in particular,** satisfied that:
>
> **(a) The person has no well-founded fear of persecution in the third state[…]** on account of race, religion, nationality, membership of a particular social group or political opinion;"

- to amend Article 44(2)(f) as follows:

> **(f)** there is appropriate access to the labour market, reception facilities, healthcare and education **in accordance with the Geneva Convention and international human rights standards**;"

- to add the following elements to the ones already listed in **Article 44(2)** (and to re-number the existing letters, without replacing them):

as new (b): "**there is no real risk to the life of the person in the third state;"**

as new (c): **"there is no real risk that the person would be deprived of his or her liberty in the third state without due process;"**

as new (e): **"there is no real risk that the person would be sent by the third state to another state in which s/he would not receive effective protection, or would be at risk of being sent from there on to any other state, where such protection would not be available;"**

as new (g): **"the person has access to means of subsistence sufficient to maintain an adequate standard of living, and steps are undertaken by the third state to enable the progressive achievement of self-reliance, pending the realization of durable solutions, which consist of local integration, third country resettlement or voluntary return;"**

as new (h): **"the third state takes account of any special vulnerabilities of the person concerned and maintains the privacy interests of the person and his/her family;"**

as new (i): **"the third state has acceded to international refugee instruments and basic human rights instruments and complies with these instruments in practice."**

Safe third country (Article 45(1) and (3), Recital 37)

For a third country to be considered a "safe third country" for a particular applicant, the determining authority must be satisfied of the safety of the third country for the particular applicant and must have established that there is a connection between the applicant and the third country (Article 45(3).

For a third country to be designated as "safe", certain criteria need to be respected by the third country (Article 45(1)), including the possibility for the applicant to receive protection in accordance with the substantive standards of the 1951 Convention or to receive "sufficient protection" (Article 45(1)(e)). As with the "first country of asylum" concept addressed above, UNHCR regrets that the proposal introduces an alternative in the form of "sufficient protection". In UNHCR's view, a third country can be considered "safe" for a particular applicant, when the applicant can access a fair and efficient procedure for determination of refugee status and other international protection needs; is permitted to remain while a determination is made; and is accorded

standards of treatment commensurate with the 1951 Convention and international human rights law standards.[154] In UNHCR's view, this includes *inter alia* providing the person access to reception facilities, healthcare and education, as well as access to means of subsistence sufficient to maintain an adequate standard of living[155] and to undertake steps to enable the progressive achievement of self-reliance.[156] As such, although the enjoyment of the right to self-employment under Article 18 of the 1951 Convention may be delayed for a limited period of time, it cannot be denied over the long-term because of government delays in the asylum procedures.[157] Further, where the applicant is determined to be a refugee or otherwise in need of international protection, s/he should be recognized as such and be granted lawful stay in the third country.[158]

In line with these considerations, UNHCR recommends to amend **Article 45(1)** as follows:

to delete Article 45(1), paragraphs (a) to (e) and replace these paragraphs with:

> A third country **may** be designated as a safe third country provided that:
>
> **(a) a fair and efficient procedure for determination of refugee status and other international protection needs is regulated and accessible;**
>
> **(b) applicants for international protection are permitted to remain while a determination is made;**
>
> **(c) standards of treatment commensurate with the Geneva Convention and international human rights standards are guaranteed; and**
>
> **(d) when the third country determines an applicant to be a refugee or otherwise in need of international protection, he or she is recognized as such and is granted legal residence.**"

Further, UNHCR notes that the proposal modifies the **connection that is required between the applicant and the third country** in question. Where the recast APD requires a "sufficient connection to a third country as defined by national law" (Recital 44 recast APD), the APR merely requires a "connection to the third country including one through which he or she has transited" (Article 45(3)(a) and, similarly, Recital 37).

The "safe third country" concept has been applied in cases where a person could have or can find international protection in a third state, either in relation to a specific individual case or pursuant to a formal bi- or multilateral agreement between states on the transfer of asylum-seekers.[159] While international law does not require the existence of a **meaningful link or connection**, UNHCR has consistently been advocating for such a meaningful connection to exist that would make it reasonable and sustainable for a person to seek asylum in another country.[160] Taking into account the duration and nature of any sojourn, and connections based on family or other close ties[161] increases the viability of the return or transfer from the viewpoint of both the individual and the third country. As such, it reduces the risk of irregular onward movement, prevents the creation of "orbit" situations[162] and advances international cooperation and responsibility sharing. In this context, transfers to third countries should

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154 UNHCR, *Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries*, April 2018, para. 4, 9 and 10, http://www.refworld.org/docid/5acb33ad4.html.

155 Article 11, International Covenant on Economic, Social and Cultural Rights.

156 UNHCR APD Study, note 23 above, p. 283, available at: http://www.refworld.org/docid/4c63e52d2.html.

157 UNHCR, *Expert opinion of UNHCR on issues of the right to work for refugees and asylum-seekers in the case of [South African Somali Association vs Limpopo Department of Economic Development, Environment and Tourism] in the North Gauteng High Court, Pretoria, South Africa*, 14 March 2013, 12/HCR/RSA/ADM/594, available at: http://www.refworld.org/docid/5215d0734.html.

158 UNHCR, *Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries*, April 2018, para. 4, http://www.refworld.org/docid/5acb33ad4.html.

159 UNHCR, *Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries*, April 2018, para. 4, http://www.refworld.org/docid/5acb33ad4.html.

160 UNHCR, Considerations on the "Safe Third Country" Concept, July 1996, http://www.refworld.org/docid/3ae6b3268.html. UNHCR, Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures), 31 May 2001, EC/GC/01/12, para. 16 (final sentence), http://www.refworld.org/docid/3b36f2fca.html. UNHCR, Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002), February 2003, para. 12, available at: http://www.refworld.org/docid/3fe9981e4.html.

161 UNHCR has identified such ties as including family relations; previously acquired rights in the state such as previous residence or long-term visits, and linguistic, cultural or other similar ties. See, for example: UNHCR, Considerations on the "Safe Third Country" Concept, July 1996, http://www.refworld.org/docid/3ae6b3268.html; UNHCR, Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice – Detailed Research on Key Asylum Procedures Directive Provisions, March 2010, p. 311, available at: http://www.refworld.org/docid/4c63e52d2.html.

162 EXCOM Conclusion No. 71 (XLIV) 1993, para. (k).

be aimed at enhancing burden- and responsibility-sharing and international/regional cooperation, and not be burden shifting. Transfers to third countries need to contribute to the enhancement of the overall protection space in the transferring state, the receiving state and/or the region as a whole.[163]

In line with these considerations, UNHCR recommends to amend **Article 45(3)(a)** as follows:

> there is a **meaningful** connection between the applicant and the third country in question on the basis of which it would be reasonable for that person to go to that country **[…]**;"

Further, UNHCR recommends to add a final indent to **Article 45(3)** as follows:

> **"The determining authority may also consider a third country to be a safe third country for a particular applicant pursuant to a bi- or multilateral agreement between states on the transfer of applicants for international protection, only where it is satisfied of the safety of the third country for a particular applicant in accordance with the criteria established in paragraph 1."**

Finally, UNHCR recommends to amend **Recital 37** as follows:

> The concept of safe third country **may** be applied as a ground for inadmissibility where the applicant, due to a **meaningful** connection to the third country **[…]** can reasonably be expected to seek protection in that country, and there are grounds for considering that the applicant will be admitted or readmitted to that country. **Such connection should not be based on the mere transit of the applicant through a particular country, but should be meaningful to make it reasonable and sustainable for the applicant to seek international protection in another country. The concept of safe third country may also be applied pursuant to a bi- or multilateral agreement between states on the transfer of applicants for international protection, established on the basis of the principle of solidarity and to advance international cooperation and responsibility-sharing for the protection of refugees and others in need of international protection.** Member States should proceed on that basis only where they are satisfied including **[…]** based on assurances obtained from the third country concerned, that the applicant will have **access to a fair and efficient procedure for determination of refugee status and other international protection needs, be accorded standards of treatment commensurate** with **[…]** the Geneva Convention **and international human rights standards, including – but not limited to – protection from** refoulement**, and, where it is determined that the applicant is a refugee or otherwise in need of international protection, is recognized as such, and** will enjoy **effective** protection, particularly as regards the right of legal residence, appropriate access to the labour market, reception facilities, healthcare and education, and the right to family reunification in accordance with international human rights standards."

Safe country of origin (Article 47)

According to the proposal, applications shall be examined in an accelerated examination procedure where a country may be considered as a safe country of origin for the applicant (Article 40(1)(e)).[164] Applying the safe country of origin concept requires an **individual assessment** and may only be considered in cases where applicants are nationals of a designated safe country of origin, or, in the case of stateless persons, had their habitual residence there (Article 47(4)(a) and (b)). Further, the concept may only be applied when the applicant has not submitted any serious grounds for considering the country not to be safe in his or her particular circumstances (Article 47(4)(c)). In this regard, UNHCR welcomes the applicant's right to information (Article 8(2)) and the applicant's right to an interview (Article 11). Both are essential preconditions for the applicant's effective opportunity to rebut the presumption of safety.

In UNHCR's view, despite the designation of a country as a "safe country of origin" in general, it may be that the country is not safe in a particular case because of a certain profile. 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. In this regard, the determining authority must 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. The procedure must therefore be an **in-merits** procedure, which ensures **all procedural safeguards**, including a personal interview, legal assistance and representation, and the right to an effective remedy.

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[163] UNHCR, Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, May 2013, para. 3(iv), available at: http://www.refworld.org/docid/51af82794.html.

[164] See section 7 above on accelerated examination procedures.

Further, in accordance with Article 40(4) of the proposal, the examination of the application should be continued outside the accelerated procedure, where the applicant has brought forward issues of fact or law that may indicate the applicant's country of origin is not safe for him or her.

UNHCR recommends to amend **Article 47(1)** as follows:

> A third country may be designated as a safe country of origin in accordance with this Regulation where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, **the determining authority is satisfied [...]**that there is**[...]** no persecution as defined in Article 9 of Regulation (EU) No XXX/XXX (Qualification Regulation), no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict."

UNHCR recommends to amend **Article 47(2)** as follows:

> The assessment of whether a third country may be designated as a safe country of origin in accordance with this Regulation shall be based on **precise, reliable, impartial, and up-to-date information from** a range of sources**[...]**, including in particular information from Member States, the European Union Agency for Asylum, the European External Action Service, the United Nations High Commissioner for Refugees, the Council of Europe as well as other relevant organisations, and shall take into account the common analysis of the country of origin information referred to in Article 10 of Regulation (EU) No XXX/XXX (EU Asylum Agency)."

UNHCR recommends to amend **Article 47(4)** as follows:

> A third country designated as a safe country of origin in accordance with this Regulation may, after an individual examination of the application **that takes into account the specific circumstances of the case**, be considered as a safe country of origin for a particular applicant only where:
>
> **(a)** he or she has the nationality of that country; or
>
> **(b)** he or she is a stateless person and was formerly habitually resident in that country; and
>
> **(c)** he or she has **been given an effective opportunity to rebut the presumption of safety in a clear and transparent procedure and has** not submitted any **[...]**grounds for considering the country not to be a safe country of origin in his or her particular circumstances. **During this procedure, the applicant enjoys procedural guarantees, including those referred to in Articles 12 (personal interviews), 15 (legal aid and representation), and 53 (right to an effective remedy).**"

UNHCR recommends to add a **new Article 47(6)**:

> **Where the applicant has submitted any grounds for considering the country not to be a safe country of origin in his or her particular circumstances, the determining authority shall continue the examination on the merits in accordance with Articles 34 and 37. In that case, the applicant concerned shall be informed of the change in the procedure.**"

General designation of countries as safe (Articles 45(1), 47, 48)

UNHCR appreciates that the **designation** of countries as safe shall be based on a range of sources (Article 45(1) final indent, for safe third countries, and Article 47(2) for safe countries of origin). UNHCR considers that the assessment of a country as "safe" must be based on **precise, reliable, objective, and up-to-date information** from a range of credible sources, including from UNHCR.[165] Further, UNHCR is of the view that the lists of countries and sources of country of origin information should be **publicly** available.[166]

UNHCR is concerned that the proposal lacks clear **methodology** for designating countries as either "safe third countries" or "safe countries of origin". According to UNHCR, designation of countries as safe should follow a **clear, transparent and accountable process**. Appropriate **review mechanisms** must 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

[165] UNHCR 2001 Global Consultations on Asylum Processes, note 151 above, para. 39.

[166] UNHCR 2001 Global Consultations on Asylum Processes, note 151 above, para. 39; UNHCR APD Study, note 23 above, p. 70.

review. In this regard, it would be beneficial to create an **EU independent advisory body** with a mandate to review the information which forms the basis for a designation of a particular country as a safe third country or safe country of origin at Union level, as well as to assess such information against recognized quality criteria for country information.[167] In view of UNHCR's expertise and its supervisory responsibility under its mandate, UNHCR recommends it is invited to be a member of this body. UNHCR also recommends this independent advisory body be given the mandate to recommend to the EC a **review of countries designated as safe**, based on their continuous monitoring of the rule of law, human rights and security situation in designated safe countries.

With regard to the designation of safe countries of origin, UNHCR welcomes that Article 47(1) and (3) includes **indicators for the "safety" designation**, referring to the legal situation, the general political circumstances as well as actual respect for human rights and the rule of law in practice, but is concerned that no reference is made that there is a consistent practice in this regard, contrary to what is currently included in Annex 1 to the recast APD.

UNHCR recommends to amend **Article 47(1)** as follows:

> "A third country may be designated as a safe country of origin in accordance with this Regulation where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally **and consistently** no persecution […]"

Further, 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.

UNHCR recommends to amend **Article 48** by adding a sub-paragraph as follows:

> "**(5) The Commission may, in accordance with conditions laid down in Article 47, declare a designated safe country of origin as unsafe for persons of a particular profile.**"

EU-level designation of safe countries by Regulation (Articles 46, 48-50)

According to the proposal, the designation of safe countries of origin and safe third countries shall ultimately be done at the EU level (Articles 46 and 48). The existing national lists will be gradually phased out, stipulating that Member States can retain their own national lists for no longer than five years (Article 50(1)).

Establishing a list of safe countries of origin and a list of safe third countries by means of a **regulation** may have grave **consequences for the applicant's ability to challenge such a list**. A regulation, unlike a directive, is directly applicable in Member States. This means, effectively, that the CJEU becomes exclusively competent to examine the legality of these lists and to decide on the inclusion or exclusion of particular countries; national courts may no longer be able to do so themselves. Due to individual's and NGO's restricted access to the CJEU, this could also mean that the very actors that are currently challenging such lists at the national level would be effectively prevented from continuing to do so. While an individual asylum-seeker may still challenge the application of a safe country concept to his or her particular case, he or she is unlikely to be in a position to challenge his or her country of origin being on a common list in the first place, and therefore a presumption of safety being applicable to his or her case. Given how safe country concepts are applied in practice, and the significantly reduced safeguards applicants enjoy once they are considered to come from a safe country of origin, this is an important procedural difference.[168]

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[167] See for example Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), *Researching Country of Origin Information: Training Manual*, October 2013, Chapter 2, available at: http://www.refworld.org/docid/5273a56b4.html.

[168] European Council on Refugees and Exiles, *"Safe countries of origin": A safe concept?*, September 2015, AIDA Legal Briefing No. 3, available at: http://www.refworld.org/docid/5608e3e94.html and European Council on Refugees and Exiles/AIDA: *Mind the Gap, an NGO Perspective on Challenges to Accessing Protection in the Common European Asylum System, Annual Report 2013/2014*, pp. 48-52.

9 CONCLUSION

The Proposal contains **many welcome elements** that have the potential to significantly improve asylum procedures in Europe, in particular regarding procedural guarantees, the identification of persons with specific needs, and unaccompanied children.

However, the impact of these improvements may remain limited if **access to the EU protection space** is not systematically and fully guaranteed. Even if the proposed positive amendments were to be retained during negotiations, some elements of the proposal focus on shifting protection responsibilities *outside* the EU, thereby potentially curtailing the impact of improved procedural rules. The mandatory use of admissibility procedures, including based on safe country concepts, is one of these elements; accelerated examination procedures with insufficient procedural safeguards, as currently proposed, is another. While accelerated procedures are a valid tool if applied with the required procedural safeguards and for the right purposes, they are proposed to apply in a way that gives rise to serious concerns, including due to the broad definition of "manifestly unfounded" claims. As regards legal remedies, the lack of automatic suspensive effect in some instances, coupled with very tight time lines, risks rendering remedies ineffective. For these reasons, UNHCR is concerned that some of the proposed measures may impact on the applicant's ability to fully enjoy the fundamental rights he or she is entitled to under the EU Charter, the ECHR and international refugee law.

Apart from legal concerns, some of the new measures may also have negative **practical consequences** and risk undermining the overall goal of greater efficiency. For example, rendering the "implicit withdrawal" concept mandatory may lead to large-scale rejections of applications in cases in which applicants do not actually intend to withdraw their application. This, in turn, may create a wealth of subsequent applications, thereby prolonging procedures and defying the principle of "frontloading" asylum procedures. In addition, restricting applicants' opportunity to present all relevant elements upon appeal may result in subsequent requests to supplement the appeal, which risks drawing out procedures even further. Similar concerns arise when unduly tight time frames for appeals make remedies ineffective, and therefore give rise to prolonged litigation, including before European courts.

In UNHCR's view, the best way forward is to ensure appropriate resource allocation and management at all stages of the process, including with regard to staffing, training, scheduling, targets, software systems, and infrastructure. **"Frontloading" resources** to registration, triaging and first instance assessment can go a long way in improving the overall efficiency of the process. Adequate resources are key to guaranteeing that the process is not only efficient but that its quality, particularly as regards respect for procedural standards, is not compromised. Such an approach ensures that applicants' rights are fully observed already at the first instance and the need for appeals diminishes. Among other elements, quality legal aid, information in a language that the applicant understands, and correct application of safe country concepts in full compliance with EU and international law is essential in this regard. Such a properly functioning system would also improve applicants' trust in the system, thereby facilitating compliance and rendering sanctions superfluous.

In working towards such a system throughout the ongoing APR negotiations, UNHCR encourages EU institutions, EU Member States and civil society to make use of these comments. More effective responses for persons in need of international protection are needed and UNHCR stands ready to support efforts in this regard.

UNHCR, April 2019