



**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)**

**INTRODUCTION**

On 21 October 2009, the European Commission adopted a proposal to recast the 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).<sup>1</sup>

The Office of the United Nations High Commissioner for Refugees (“UNHCR”) has closely observed the application of the Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection<sup>2</sup> (“the Directive” or “APD”) since its entry into force. UNHCR has also undertaken research supported by the European Refugee Fund on the application of key provisions of the Directive in selected Member States<sup>3</sup> with the aim of i) evaluating the achievement of the APD’s stated objectives, including minimum common rules on asylum procedures, ii) assessing whether the Directive has ensured fair and effective asylum procedures, iii) assessing the respect, in law and in practice of international refugee and human rights law and iv) producing recommendations addressed to EU institutions, Member States and other actors for achieving a Common European Asylum System in line with the 1951 Convention<sup>4</sup> and other relevant treaties. The findings of UNHCR’s research, its general observations of practice since transposition of the Directive and other comparative data available<sup>5</sup> identify significant divergences in asylum practice<sup>6</sup> across the EU and

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<sup>1</sup>European Union: European Commission, *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 (Recast)*, 21 October 2009, COM(2009) 554 final; 2009/0165 (COD), at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0554:FIN:EN:PDF>.

<sup>2</sup>European Union: Council of the European Union, *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, 2 January 2006, 2005/85/EC, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005L0085:en:NOT>.

<sup>3</sup>UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations*, March 2010, at: <http://www.unhcr.org/refworld/docid/4bab55752.html>.

<sup>4</sup>UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, at: <http://www.unhcr.org/refworld/docid/3be01b964.html>.

<sup>5</sup>One of the most effective illustrations of divergences in asylum practice in EU Member States is represented by the percentage of total positive decisions on asylum claims. In 2007 for instance it varied from 52.2% in Luxembourg to 27.5% in Germany, to 0.8% in Greece. See European Union:

gaps in law and practice in the implementation of the Directive. Some APD minimum requirements are not fully met by some Member States, and in some cases, practice falls significantly short. In addition, the numerous exceptions, discretionary and optional provisions in the Directive have allowed Member States to continue some widely diverging and, in some cases, problematic procedures.

UNHCR's research confirms the concerns UNHCR had voiced at the time of the APD's adoption regarding its potential impact on persons seeking international protection in the EU: Namely that the Directive does not fully ensure compliance with international refugee and human rights law, and that problematic provisions in the Directive contribute to weaknesses in the procedures of some Member States. This underscores the fact that further efforts are needed to improve standards and guarantee fair and effective asylum procedures consistently across the EU. It also highlights the need for amendments to the current EU legislation to ensure more harmonized implementation, streamlined procedures and higher protection standards.

UNHCR welcomes many elements of the Commission's proposal which would significantly improve the quality and efficiency of the asylum systems in the EU and further harmonize protection standards in line with the objective of establishing a Common European Asylum System ("CEAS"), as expressed for the first time by the European Council at Tampere in 1999.<sup>7</sup> In addition, the proposed recast represents a positive step forward towards establishing common procedures for the granting or withdrawing of uniform asylum or subsidiary protection status for persons in need of international protection as required by Article 78 (2) (d) of the Treaty of the Functioning of the European ("TFEU").<sup>8</sup>

A number of important proposed amendments have been introduced, such as, for instance, the strengthening of common basic guarantees, better access to procedures and access to effective remedies. It is important to note that these amendments, once adopted, would bring the EU legislation in line with European and international human rights and refugee law standards, including as expressed in recent case law from the Court of Justice of the European Union ("CJEU") and the European Court of Human Rights ("ECtHR") (referred to in detail below).

Improved decisions in the first instance resulting from the introduction of a number of proposed changes -- including the frontloading of services, expertise and examinations -- should, over time, reduce the number and duration of appeals. This is

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European Commission, *Commission Staff Working Document accompanying the 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} {SEC(2009) 1377}, 21 October 2009, at: [http://ec.europa.eu/governance/impact/ia\\_carried\\_out/docs/ia\\_2009/sec\\_2009\\_1377\\_en.pdf](http://ec.europa.eu/governance/impact/ia_carried_out/docs/ia_2009/sec_2009_1377_en.pdf).

<sup>6</sup> The fact "that considerable disparities remain between one Member State and another concerning the grant of protection" has been also noted by the European Council. European Union: Council of the European Union, *European Pact on Immigration and Asylum*, 24 September 2008, 13440/08, at: <http://register.consilium.europa.eu/pdf/en/08/st13/st13440.en08.pdf>.

<sup>7</sup> European Union: Council of the European Union, *Presidency Conclusions, Tampere European Council, 15-16 October 1999*, 16 October 1999, at: [http://www.europarl.europa.eu/summits/tam\\_en.htm](http://www.europarl.europa.eu/summits/tam_en.htm).

<sup>8</sup> European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, at: <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2010:083:SOM:EN:HTML>.

consistent with the interest both of Member States and asylum applicants in ensuring conclusion of asylum proceedings within a short period of time.

However, UNHCR regrets that the proposal does not address some of the problematic provisions that were analysed in UNHCR's provisional comments<sup>9</sup> on the APD such as, for instance, the European safe third country concept.

In the observations below, UNHCR comments on specific proposed amendments and, in some cases, suggests that different wording may be more effective to achieve the aims of the recast Directive and the Common European Asylum System.

Some of UNHCR's recommendations would require the substantive amendment of parts of the APD which remained unchanged in the Commission's proposal. In these cases, aware of the recast rules and considering the importance of the amendments it proposes, UNHCR suggests to make use of the provision sets out by Article 8 of the Interinstitutional Agreement on the more structured use of the recasting techniques for legal acts".<sup>10</sup>

## 1. Legal Basis

When the recast proposal was issued in October 2009, its legal basis was identified as Article 63 (1) (d) of the EC Treaty, which states:

*The Council [...] shall, [...] adopt:*  
*1. measures on asylum [...], within the following areas: [...]*  
*(d) **minimum standards** on procedures in Member States for granting or withdrawing refugee status; [...].*<sup>11</sup>

The amendments dealing with procedural standards relating to subsidiary protection status were based on Article 63 (2) (a) of the EC Treaty.<sup>12</sup> Both provisions made reference to **minimum standards**.

Meanwhile, in December 2009, the Lisbon Treaty modified Article 63 of the EC Treaty which now corresponds to Article 78 of the TFEU. The TFEU refers no longer to **minimum standards** but to "**common procedures**" for the granting and withdrawing of uniform asylum or subsidiary protection status. A change is thus needed to the legal basis cited in the recast Directive, which will reflect the TFEU's

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<sup>9</sup> 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, at: <http://www.unhcr.org/refworld/docid/42492b302.html>.

<sup>10</sup> Article 8: "Where, in the course of the legislative procedure, it appears necessary to introduce substantive amendments in the recasting act to those provisions which remain unchanged in the Commission's proposal, such amendments shall be made to that act in compliance with the procedure laid down by the Treaty according to the applicable legal basis". European Union, *Interinstitutional Agreement on a more structured use of the recasting technique for legal acts*, 2007/C 77/01, 21 November 2001, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:077:0001:0003:EN:PDF>.

<sup>11</sup> European Union, *Consolidated version of the Treaty establishing the European Community*, C 325/33, 24 December 2002, at: [http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E\\_EN.pdf](http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E_EN.pdf).

<sup>12</sup> *Ibid.*

objective of establishing more harmonized standards through “common procedures,” which move beyond minimum standards.

## 2. A single procedure

It is in the interest of Member States that all forms of international protection which are available in a national legal system be decided upon by the same authority in one single procedure with the same minimum guarantees.<sup>13</sup> A single procedure, dealing with applications both for refugee status and for subsidiary protection, carries advantages because, *inter alia*, it is likely to save time and resources.

Each application should be considered in its entirety in light of potential eligibility for both forms of international protection set out in the Qualification Directive,<sup>14</sup> namely refugee status based on 1951 Convention grounds on the one hand, and complementary or subsidiary protection needs on the other. The circumstances that force people to flee their countries are complex and often of a composite nature. Information obtained during an examination of a claim under the 1951 Convention could also be relevant for the examination of complementary or subsidiary protection needs. Basic procedural guarantees should apply equally to any request for international protection. Assessment of international protection needs in separate processes may lead to the application of different standards in practice.<sup>15</sup> This is important, especially in light of the fact that an ever-growing percentage of applicants are granted subsidiary protection, rather than refugee status according to the 1951 Convention.<sup>16</sup> A single procedure would ensure greater coherence among different EU asylum instruments, with a view to facilitating uniform application of the asylum *aquis*.

To avoid the risk that the 1951 Convention is undermined by the grant of subsidiary protection to applicants qualifying for refugee status, the Commission has proposed a predetermined sequence of examinations.<sup>17</sup> In this sequence, the question of whether the person qualifies for refugee status must always be examined first. In addition, the Commission has proposed the deletion of the provision allowing Member States not to state the reasons for not granting refugee status in a decision granting a status which offers the same rights and benefits under national and Community law.<sup>18</sup> This proposal will facilitate the examination of challenges to a decision to reject a claim for refugee status under the 1951 Convention.

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<sup>13</sup> See footnote 9, UNHCR, *Provisional Comments*, page 2.

<sup>14</sup> European Union: Council of the European Union, *Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted*, 19 May 2004, 2004/83/EC, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:EN:HTML>.

<sup>15</sup> See footnote 9, UNHCR, *Provisional Comments*, page 2.

<sup>16</sup> European Union: European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Policy Plan on Asylum. An Integrated Approach to Protection Across the EU*, 17 June 2008, COM(2008) 360, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008DC0360:EN:NOT>.

<sup>17</sup> See footnote 1, Recast Article 9 (2).

<sup>18</sup> *Ibid*, Recast Article 10(2).

### Single procedure

*UNHCR welcomes the proposed introduction of a single procedure with the same minimum guarantees for refugee and subsidiary protection claims (Recast Articles 1, 2 (b), 2 (c), 2 (i) and others). UNHCR also welcomes the rule requiring a mandatory sequence of the examination (recast Article 9 (2)) as well as the deletion of the provision permitting Member States to refrain from stating the reasons for denying refugee status, in a decision where the applicant is granted a status which offers the same rights and benefits under national and Community law.*

### 3. Definitions

In line with the observations above, UNHCR welcomes recast Article 2 (b) expanding the definition of “application for international protection” to include applications both for refugee and subsidiary protection as defined by the Qualification Directive. This will ensure, *inter alia*, consistency with the recast proposals related to the Reception Conditions Directive,<sup>19</sup> the Qualification Directive and the Dublin Regulation.<sup>20</sup> UNHCR also welcomes the use of the expanded definition of “international protection” in recast Article 2 (c).

All Member States of the European Union are States parties to the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and have thus adopted a refugee definition without any limitations as to country of origin. The retention of the restriction of the definition of “applicant for international protection” to third country nationals and stateless persons, is not in line with Article 1 of the 1951 Convention, as revised by the 1967 Protocol, because it introduces *a posteriori* a geographical limitation to the application of the refugee definition, as contained in Article 1 A (2) of the 1951 Convention. This is incompatible with the 1967 Protocol and the fact that any such previously existing limitation has been removed by the Member States of the Union. The retention of the restriction of the definition of “applicant for international protection” to third country nationals and stateless persons is, furthermore, inconsistent with Article 3 of the 1951 Convention that requires States to apply its provisions without discrimination as to country of origin. Therefore, UNHCR would propose that Member States, in incorporating this article in domestic legislation, replace “a third country national or a stateless person” in Article 2 (c) with “person who is not a citizen of the Member State in question”.

UNHCR supports the introduction of recast Article 2 (d) defining applicants who, for objective reasons, i.e. age, gender, disability, mental health problems or consequences of torture, rape or other serious forms of psychological, physical or sexual violence, may face additional difficulties when substantiating their claims for international protection.

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<sup>19</sup> European Union: European Commission, *Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast)*, 3 December 2008, COM(2008) 815 final, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008PC0815:EN:NOT>.

<sup>20</sup> European Union: 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*, 3 December 2008, COM(2008) 820 final, at: [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008PC0820R\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008PC0820R(01):EN:HTML).

This provision is especially important in a context where, for instance, the number of claims introduced by women over the last two years is increasing.<sup>21</sup> Procedural rules must be adapted to allow applicants with special needs to be heard in appropriate conditions, giving them the possibility to express their protection concerns. UNHCR welcomes the proposed introduction of recast Article 2 (d) which, in line with recast Recital 20, recognises that applicants with special needs require special guarantees.

UNHCR acknowledges the difference between recast Article 2 (d) and the terminology used to define applicants with special needs contained in the proposed recast of the Reception Conditions Directive<sup>22</sup> and of the Qualification Directive.<sup>23</sup> While the terminology could be adjusted to ensure consistency, UNHCR recognises that there is a difference between the special procedural needs of and corresponding procedural safeguards required by certain categories of applicants to substantiate their claims and the nature of their material needs and corresponding substantial rights of other persons.

UNHCR considers that persons with special needs should enjoy particular safeguards (e.g. exemption from the application of border procedures) from the beginning of the procedure. This requires that an identification/monitoring process be established. Such a process, as proposed in Article 21 (2) of the Reception Conditions Directive recast, and Article 20 (4) of the Qualification Directive recast, is essential to ensure that the safeguards in recast Article 20 APD will have effect. Adoption of recast Article 21 (2) of the Reception Directive -- or an equivalent mechanism in the APD -- is therefore strongly encouraged by UNHCR.

UNHCR welcomes the modification of the definition of “final decision” to include decisions on subsidiary protection status. This will minimize the risk that a negative decision on refugee status may lead to removal before subsidiary protection needs have been examined.

In line with the observation made previously on the introduction of a single procedure, UNHCR welcomes the proposed introduction of recast Article 2 (h) related to “persons eligible for subsidiary protection”. In addition, UNHCR supports the introduction of recast Article 2 (i) defining international protection status.

With regard to recast Article 2 (j) and the definition of “refugee status” to which no significant changes are proposed by the EC, UNHCR points out that “refugee status” may, depending on the context, cover two different notions. Paragraph 28 of the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* reads:

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<sup>21</sup> According to EUROSTAT, in 2008 there were 72,990 female asylum applicants. In 2009, there were 81,600 female asylum applicants.

<sup>22</sup> See footnote 19.

<sup>23</sup> European Union: European Commission, *Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted*, 21 October 2009, COM(2009) 551 final; 2009/0164 (COD), at: <http://www.unhcr.org/refworld/docid/4ae95f222.html>.

*[a] person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined.*<sup>24</sup>

In this sense, “refugee status” means the condition of being a refugee. In contrast, the proposal uses the term “refugee status” to mean the formal recognition or determination of being a refugee and subsequently be granted specific rights and subject to specific obligations. A distinction should therefore be made between “refugee status” in this sense of “refugeehood” and the formal determination of such status.

UNHCR welcomes the proposed new definition of “minor” in recast Article 2 (l) reflecting the standard of the Convention on the Rights of the Child<sup>25</sup> (“CRC”), meaning persons under age 18. UNHCR supports this definition, as endorsed by the UNHCR Executive Committee in 2007.<sup>26</sup>

UNHCR further supports the amendment introduced by recast Article 2 (m) to ensure consistency with the definition of unaccompanied minor contained in the Qualification Directive recast proposal.

Recast Article 2 (o), defining “withdrawal of international protection” does not address a conceptual and definitional problem with existing Article 2 (j) of the Asylum Procedures Directive and in the Qualification Directive, where both directives seem to confuse the legal concepts of cessation, cancellation and revocation. Under international law, cessation refers to the ending of refugee status, pursuant to Article 1C of the 1951 Convention, for the reason that international refugee protection is no longer necessary. Revocation refers to the withdrawal of refugee status in situations where a person who has been determined to be a refugee engages in conduct subsequent to recognition which comes within the scope of Article 1F(a) or (c) of the 1951 Convention. Cancellation means a decision to invalidate an earlier recognition of refugee status, where it is subsequently established that the individual should never have been recognized, including where he or she should have been excluded from international refugee protection in the initial status determination procedure. UNHCR proposes that EU and national legislation and processes differentiate among these concepts and their legal requirements.<sup>27</sup>

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<sup>24</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, January 1992, at: <http://www.unhcr.org/refworld/docid/3ae6b3314.html>.

<sup>25</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, at: <http://www.unhcr.org/refworld/docid/3ae6b38f0.html>.

<sup>26</sup> UNHCR Executive Committee, *Conclusion on Children at Risk*, Conclusion No. 107 (LVIII), 5 October 2007, at <http://www.unhcr.org/refworld/docid/471897232.html> (“ExCom Conclusion No. 107 (LVIII)”).

<sup>27</sup> See UNHCR, UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (OJ L 304/12 of 30.9.2004), 28 January 2005, at: <http://www.unhcr.org/refworld/docid/4200d8354.html>, comment on Article 14 of the Qualification Directive; UNHCR, *Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)*, 10 February 2003, HCR/GIP/03/03,

Recast Article 2 does not include a definition of “family members” despite the references to the term in recast Articles 6 (5), 10 (4), 14 (1), 26 (b) and 40 (1) (b). UNHCR recommends the inclusion of the definition of “family member” which is contained in the proposals amending the Reception Conditions Directive, the Qualification Directive and the Dublin Regulation.

#### **Definitions**

- *UNHCR welcomes recast Article 2 (b) and (c) expanding the definitions of “application” and “applicant for international protection” to include both applications and applicants for refugee and subsidiary protection. However, to ensure full compatibility with the 1951 Convention, UNHCR proposes that Member States, in incorporating this article in domestic legislation, replace “a third country national or a stateless person” with “person who is not a citizen of the Member State in question”.*
- *UNHCR welcomes the introduction of Article 2 (d) defining applicants with special needs and recognising that they require special procedural safeguards. This provision should be supported by a mechanism to identify, as soon as possible, applicants with such special needs.*
- *UNHCR welcomes the proposed definition of minor in recast Article 2 (l) which reflects the standard of the Convention on the Rights of the Child.*
- *UNHCR recommends that the recast proposal differentiate among the legal concepts of cessation, cancellation and revocation and their legal requirements.*
- *UNHCR recommends the introduction of the standardized definition of “family members” as included in the proposals for amendment of the Reception Conditions Directive, the Qualification Directive and the Dublin Regulation.*

#### **4. Scope of the Directive**

It is essential that asylum-seekers have access to the territory of the State where they are seeking international protection and to a procedure in which the validity of their claims can be assessed. Otherwise, persons in need of international protection will not be able to benefit from the standards of treatment provided for by the 1951 Convention, by other relevant international instruments and/or by EU and national law, potentially creating the risk of breaches of the principle of *non-refoulement*. These essential prerequisites of refugee protection have been repeatedly underlined by the General Assembly of the United Nations<sup>28</sup> and by the Executive Committee of UNHCR.<sup>29</sup>

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at: <http://www.unhcr.org/refworld/docid/3e50de6b4.html>; UNHCR, Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, 4 September 2003, HCR/GIP/03/05,

at: <http://www.unhcr.org/refworld/docid/3f5857684.html>; UNHCR, Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, 4 September 2003, at: <http://www.unhcr.org/refworld/docid/3f5857d24.html>; UNHCR, Note on the Cancellation of Refugee Status, 22 November 2004, at: <http://www.unhcr.org/refworld/docid/41a5dfd94.html>.

<sup>28</sup> See, e.g., UN GA Resolutions: A/RES/52/132 of 12 December 1997 and A/RES/56/137 of 19 December 2001, GA Resolution A/RES/58/151 of 24 February 2004.

<sup>29</sup> See, e.g., Executive Committee Conclusion No. 81 (XLVIII) para. (h) of 17 October 1997; Conclusion No. 82 (XLVIII) para. (d) (iii) of 17 October 1997; Conclusion No.85 (XLIX) para. (q) of 9



The obligation of states not to return (*refouler*) a person to a territory where his/her life or freedom would be threatened is the cardinal protection principle, most prominently expressed in Article 33 of the 1951 Convention. The prohibition of *refoulement* applies to all refugees, including to asylum-seekers whose status has not yet been determined.<sup>30</sup>

The territorial scope of Article 33 (1) is not explicitly defined in the 1951 Convention. However, UNHCR is of the view that the meaning, object and purpose of Article 33 (1) of the 1951 Convention are unambiguous and establish an obligation not to return a refugee or asylum-seeker to a country where he or she would be at risk of persecution or other serious harm, which applies wherever a State exercises jurisdiction, including at the frontier, in the territorial waters, on the high seas or on the territory of another State.<sup>31</sup>

UNHCR therefore supports the formal<sup>32</sup> clarification introduced by Article 3 (1) according to which the APD also applies in the territorial waters of the Member States. As specified by recast Recital 19, asylum seekers present in the territorial waters of a Member State should be disembarked on land to have their application examined in accordance with the Directive. However, UNHCR would like to reiterate that the responsibility of Member States to grant access to asylum procedures extends beyond the territory, the borders and territorial waters to wherever and whenever a Member State exercises its jurisdiction.<sup>33</sup>

#### **Scope of the Directive**

*UNHCR supports the clarification introduced by Article 3 (1) stating that the Asylum Procedure Directive also applies in the territorial waters of the Member States.*

#### **5. The determining authority**

UNHCR welcomes recast Article 4 (1) introducing the principle that a single and competent determining authority should examine all asylum applications, as recalled by UNHCR's Executive Committee Conclusion No. 8 (XXXVIII) of 1977.<sup>34</sup> A single determining authority should be responsible for all stages of the procedure, including,

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October 1998; Conclusion No. 87 (L) para. (j) of 8 October 1999; Conclusion No. 93 (LIII) paras (a), (b) (i) and (ii) of 8 October 2002.

<sup>30</sup> This interpretation is supported by Recital 14 of the Preamble, which refers to the declaratory nature of the decision to recognize refugee status.

<sup>31</sup> UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, paras 24, 26 January 2007, at: <http://www.unhcr.org/refworld/docid/45f17a1a4.html>.

<sup>32</sup> The Commission had already clarified that the APD applies also in the territorial waters in: European Union: European Commission, *Commission Staff Working Document Study on the international law instruments in relation to illegal immigration by sea* 15 May 2007, SEC(2007) 691, at: [http://ec.europa.eu/justice\\_home/doc\\_centre/immigration/illegal/doc/sec\\_2007\\_691\\_en.pdf](http://ec.europa.eu/justice_home/doc_centre/immigration/illegal/doc/sec_2007_691_en.pdf).

<sup>33</sup> See UNHCR, *Hirsi and Others v. Italy - Submission by the Office of the United Nations High Commissioner for Refugees*, March 2010, at: <http://www.unhcr.org/refworld/docid/4b97778d2.html>. See also footnote 31.

<sup>34</sup> UNHCR, *Determination of Refugee Status*, 12 October 1977, No. 8 (XXVIII) - 1977, letter e (iii), at: <http://www.unhcr.org/refworld/docid/3ae68c6e4.html>.

for instance, the admissibility interview.<sup>35</sup> UNHCR notes, however, that in certain recast provisions, the language used still refers to “competent authorities”.<sup>36</sup> This may generate some confusion and needs to be addressed either by replacing this term with references to the “determining authority” or, if appropriate, by defining, as relevant, the notion and the competence of the “competent authority”.

In line with UNHCR’s research project on the application of key provisions of the APD in selected Member States,<sup>37</sup> UNHCR does not consider that the role of single determining authority should be performed by the police, border officials or other law enforcement authorities. Police authorities in general are not trained, equipped or resourced to conduct the personal interview and examine applications for international protection. Placing police in this role may undermine the perception of confidentiality and impartiality which is crucial for creating the conditions conducive to the complete disclosure of facts by applicants during the personal interview. UNHCR recommends that another independent authority is assigned this responsibility and role.

UNHCR also welcomes recast Article 4 (1) requiring Member States to ensure that personnel who examine applications and take decisions on international protection receive initial and follow-up training.<sup>38</sup> This would address some of the problematic issues identified by UNHCR’s research such as, for instance, the fact that three Member States surveyed do not require interviewers to hold specific qualifications in refugee and/or human rights law or to have relevant experience, and do not provide compulsory training for them after recruitment.<sup>39</sup>

The provisions of this Article requiring the determining authorities to be prepared and staffed with sufficient personnel are essential preconditions to ensure quality and efficient first instance decisions. Such steps could, *inter alia*, reduce the number and duration of appeals, thus strengthening the effective use of resources in the asylum procedure. Member States should also be supported by the European Asylum Support Office<sup>40</sup> (“EASO”), which is expected to establish and develop training<sup>41</sup> and provide country of origin information<sup>42</sup> as well as manage and develop the European Asylum Curriculum.<sup>43</sup>

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<sup>35</sup> See footnote 1, Recast Article 30.

<sup>36</sup> See footnote 1, Recast Article 8 (3), Article 13 (2) (b), Article 32 (2) (b), Article 35 (1), Article 36 (3) (b), Article 38 (1) and Article 40.

<sup>37</sup> See footnote 3, UNHCR, *Improving Asylum Procedures*.

<sup>38</sup> UNHCR, *Promotion and Dissemination of Refugee Law*, para. 4, 1988, No. 51 (XXXIX) - 1988, at: <http://www.unhcr.org/refworld/docid/3ae68c4378.html>; UNHCR, *General Conclusion on International Protection*, para. o), 12 October 1987, No. 46 (XXXVIII) - 1987, at: <http://www.unhcr.org/refworld/docid/3ae68c95c.html>.

<sup>39</sup> See footnote 3, UNHCR, *Improving Asylum Procedures*, section 5, page 17.

<sup>40</sup> European Union: European Commission, *Proposal for a Regulation of the European Parliament and of the Council Establishing a European Asylum Support Office*, COM(2009) 66 final, Article 6, 18.02.2009, at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0066:FIN:EN:PDF>. The proposal was adopted in second reading by the European Parliament the 18 May 2010.

<sup>41</sup> Useful guidance on the development of training encompassing the topics mentioned in recast Article 4 (2) could be drawn from the Refugee Status Determination Section of Refworld at: <http://www.unhcr.org/refworld/rsd.html>.

<sup>42</sup> See footnote 1, Recast Article 9 (3) (b).

<sup>43</sup> For more details, please see: <http://www.asylum-curriculum.eu>.

## **The determining authority**

- UNHCR welcomes recast Article 4 (1) introducing the principle that a single and competent determining authority should examine all asylum applications.
- UNHCR supports the recast provision requiring Member States to ensure that personnel examining applications and taking decisions on international protection receive appropriate initial and follow-up training.

## **6. Access to procedure**

UNHCR welcomes the amendments introduced by recast Article 6 to enhance access to procedures for persons seeking international protection in line with the case law of the CJEU.<sup>44</sup>

UNHCR appreciates that the provisions of recast Article 6 (1), allowing Member States to require that application be made “*in person and/or at a designated place,*” applies without prejudice to paragraphs 5, 6, 7 and 8 of Article 6. This permits asylum seekers in detention and at the border to introduce an application in a location other than the designated place. However, UNHCR proposes that recast Article 6 (1) should provide legal representatives with the possibility to introduce an application on behalf of asylum-seekers who do not have the possibility to do so (e.g. because they may be unable for medical reasons).

UNHCR further welcomes recast Article 6 (4) ensuring that appropriate counselling is provided to dependent applicants before they consent to the lodging of the application on their behalf to ensure that they understand the implication of their choice.<sup>45</sup>

UNHCR supports recast Article 6 (5) which brings the APD in line with the requirement of Article 22 (1) CRC<sup>46</sup> by giving children the possibility to apply for international protection on their own, through their parents, or through other family members.

As with dependent adult asylum-seekers, a child asylum-seeker may not be able to substantiate his/her claim initially. He or she may only later develop sufficient maturity and confidence to report on his/her experiences. It is therefore important that appropriate safeguards ensure that the examination of subsequent asylum applications

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<sup>44</sup> Even though it did not involve a person in need of international protection, see for instance *Panayotova and others v. Minister voor Vreemdelingenzaken en Integratie*, C-327/02, European Union: European Court of Justice, 16 November 2004, paragraph 27 (Rights guaranteed by Community Law requires “*a procedural system which is easily accessible*”), at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002J0327:EN:HTML>.

<sup>45</sup> See, Procedural Standards for Refugee Status Determination Under UNHCR's Mandate, Paragraph 3.2.6, 20 November 2003, at: <http://www.unhcr.org/refworld/docid/42d66dd84.html>.

<sup>46</sup> See footnote 25, Article 22 (1): “*States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties*”. UN General Assembly, Convention on the Rights of the Child.

of child dependants, and/or separated child asylum-seekers, take such constraints into account.

UNHCR further appreciates and supports the set of guarantees introduced by recast Article 6 (8) requiring that appropriate training be provided to border guards, police, immigration authorities and personnel of detention facilities. UNHCR also welcomes the requirement that an application for international protection must be registered within 72 hours so as to shorten the period of legal uncertainty and enable asylum-seekers to benefit from the standard of treatment provided for by the Reception Conditions Directive.

#### **Access to procedure**

- *UNHCR welcomes the amendments introduced by recast Article 6 with a view to enhancing access to procedures of persons seeking international protection, including children, in line with the case law of the Court of Justice.*
- *UNHCR recommends that a legal representative should be given the possibility to introduce an application on behalf of asylum-seekers who do not have the possibility to do so.*

### **7. Information and counseling at border crossing points and detention facilities**

Information is an essential condition to ensure effective access to the asylum procedure.<sup>47</sup> UNHCR supports the new provision in recast Article 7, requiring Member States to provide information on procedures to be followed at border crossing points, including transit zones at external borders and detention facilities. In this framework, UNHCR particularly welcomes recast Recital 19 specifying that officials who first come into contact with persons seeking international protection, including those carrying out surveillance of maritime border in the territorial waters, should receive appropriate training and be able to provide information on how to access asylum procedures. In line with its position on extraterritorial responsibility for *non-refoulement*,<sup>48</sup> UNHCR notes that this recital should be extended to acknowledge that the responsibility of Member States to permit access to asylum procedures extends wherever and whenever a Member State exercises its jurisdiction over an asylum-seeker.

UNHCR further welcomes recast Article 7 (2) requiring interpretation arrangements to ensure communication between applicants and border guards or personnel of detention facilities; and recast Article 7 (3) ensuring that organisations providing advice and counselling to applicants **have effective access** to border crossing points including transit zones and detention facilities.

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<sup>47</sup> See UNHCR, *Determination of Refugee Status*, 12 October 1977, No. 8 (XXVIII) - 1977, para e (ii), at: <http://www.unhcr.org/refworld/docid/3ae68c6e4.html>; UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, Conclusions, letter g), 31 May 2001, EC/GC/01/12, at: <http://www.unhcr.org/refworld/pdfid/3b36f2fca.pdf>.

<sup>48</sup> See footnotes 31 and 33.

## Information and counseling

*UNHCR supports the recast Article 7 as an important and necessary tool to ensure an effective opportunity for those in need of international protection to access the examination procedure.*

### 8. The right to remain pending examination of an application

UNHCR is concerned that the right to remain in a Member State during the asylum determination process is currently limited to the duration of the first instance procedure. To ensure compliance with the principle of *non-refoulement*, appeals should, in principle, have suspensive effect, and the right to remain should be extended until a final decision is reached on the application. The threats to which refugees are exposed are serious and often relate to fundamental rights such as life and liberty. In line with Executive Committee Conclusions No. 8 (XXVIII) of 1977 and No. 30 (XXXIV) of 1983, the automatic application of suspensive effect may be waived only where it has been established that the request is manifestly unfounded or clearly abusive. UNHCR has acknowledged additional exceptions could apply with respect to preliminary examinations in the case of subsequent applications, and where there is a formal arrangement between States on responsibility-sharing with respect to the determination of asylum claims.<sup>49</sup> In such cases, a court of law or other independent authority should review and confirm the denial of suspensive effect, based on a review of the facts and the likelihood of success on appeal.

The recast proposal introduces automatic suspensive effect for most appeals.<sup>50</sup> In line with this proposal, the right to remain should be extended for the duration of the first instance procedure and for as long as permitted by a competent court.

UNHCR welcomes recast Article 8, which introduces two clarifications with regard to the possibility for Member States to surrender or extradite applicants for international protection.<sup>51</sup>

The principle of *non-refoulement* as provided for in Article 33 (1) of the 1951 Convention and Article 3 of the European Convention on Human Rights<sup>52</sup> (“ECHR”) also applies to persons who meet the eligibility criteria set out in the Qualification Directive, but who have not had their status formally recognized.<sup>53</sup> This is of particular relevance to claimants for international protection. As people who may be refugees or be eligible for subsidiary protection, applicants for international protection should not be returned or expelled pending a final determination of their status.<sup>54</sup> In

<sup>49</sup> See footnote 9, UNHCR, *UNHCR Provisional Comments*, page 52.

<sup>50</sup> See footnote 1, Recast Article 41 (5).

<sup>51</sup> See, UNHCR, *UNHCR Observations on the European Commission Proposal for a Council Framework Decision on the European Arrest Warrant and the Surrender Procedures Between Member States (COM(2001) 522 final - 2001/0215 (CNS))*, 1 October 2001, at: <http://www.unhcr.org/refworld/docid/3c6a663f2.html>.

<sup>52</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5, at: <http://www.unhcr.org/refworld/docid/3ae6b3b04.html>.

<sup>53</sup> See UNHCR, *Non-Refoulement*, 12 October 1977, No. 6 (XXVIII) - 1977, para. (c) at: <http://www.unhcr.org/refworld/docid/3ae68c43ac.html>.

<sup>54</sup> See UNHCR, *Guidance Note on Extradition and International Refugee Protection*, para. 11, April 2008, at: <http://www.unhcr.org/refworld/docid/481ec7d92.html>; UNHCR, *Problems of Extradition*

line with the above, UNHCR welcomes recast Article 8 (2) requiring Member States not to surrender or extradite a claimant for international protection to his/her country of origin pending determination of the application.

The principle of *non-refoulement* applies not only with regard to a refugee's country of origin, but also any other country where he or she has reason to fear persecution related to one or more of the grounds set out in Article 1A (2) of the 1951 Convention, or from where he or she could be sent to a country where there is a risk of persecution linked to a 1951 Convention ground.<sup>55</sup> In this framework, UNHCR also supports recast Article 8 (3) further clarifying that the competent authorities must be satisfied that an extradition decision will not result in direct or indirect refoulement.

### **The right to remain**

- UNHCR recommends that Article 8 (1) be amended to explicitly affirm the right to remain during proceedings at first instance under Chapter III “and for so long as permitted by a competent court”.
- UNHCR welcomes recast Article 8 (2) prohibiting the extradition of a person claiming international protection to his/her country of origin, pending determination of the claim.
- UNHCR supports recast Article 8 (3) further clarifying that the authorities must be satisfied that an extradition decision will not result in direct or indirect refoulement.

## **9. The requirements for the examination of the application**

Formal time limits for submitting an asylum application may, in their strict application, result in *refoulement* and are therefore inconsistent with international refugee law. Failure to apply promptly for asylum may be an element in the consideration of the credibility of a claim.<sup>56</sup> However, it should never be the sole reason for rejecting an application. In UNHCR's experience, valid reasons may delay the filing of a claim. They include, for instance, illness, trauma, lack of access to information about the means to apply, the need to consult with a legal counsellor, or cultural sensitivities. The possibility of lodging an asylum claim at any time after arrival is also essential to enable individuals to apply as refugees *sur place*. The automatic and mechanical application of time limits for submitting applications is not consistent with “the protection of the fundamental value embodied in Article 3” as interpreted in the case law of the ECtHR<sup>57</sup> and with international protection principles.<sup>58</sup> Therefore, UNHCR welcomes recast Article 9 (1) deleting the reference

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*Affecting Refugees*, 16 October 1980, No. 17 (XXXI) - 1980, at: <http://www.unhcr.org/refworld/docid/3ae68c4423.html>.

<sup>55</sup> UNHCR, *Note on Non-Refoulement*, EC/SCP/2, 1977, para. 4, at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae68ccd10>.

<sup>56</sup> UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, para. 20, at: <http://www.unhcr.org/refworld/docid/3b36f2fca.html>.

<sup>57</sup> *Jabari v. Turkey*, Appl. No. 40035/98, Council of Europe: European Court of Human Rights, 11 July 2000, para. 40, at: <http://www.unhcr.org/refworld/docid/3ae6b6dac.html>.

<sup>58</sup> UNHCR, *Refugees without an Asylum Country*, 16 October 1979, No. 15 (XXX) - 1979, para. (i), at: <http://www.unhcr.org/refworld/docid/3ae68c960.html>; Standing Committee of the UNHCR, *Note on International Protection*, EC/49/SC/CRP.12, 4 June 1999, para. 18, at: <http://www.unhcr.org/excom/EXCOM/3cc413316.pdf>.

to the current Article 23 (4) (i) APD. Article 23 (4) (i) APD at present allows Member States to channel a claim into an accelerated procedure if an applicant for international protection fails without reasonable cause to make an application earlier, having had the opportunity to do so. In conjunction with Article 28 (2) APD, Article 23 (4) (i) APD allows Member States to declare such a claim manifestly unfounded.

Under the Qualification Directive, Member States are obliged first to assess whether an applicant qualifies for refugee status before proceeding to examine eligibility for subsidiary protection status. In UNHCR's view, it is important that any application first be considered under the criteria of the 1951 Convention, and only if these are not met, under the criteria for subsidiary protection.<sup>59</sup> UNHCR therefore supports the formalization of the principle of a single procedure<sup>60</sup> and recast Article 9 (2), providing explicitly that all applications for international protection will first be assessed on the basis of the refugee definition contained in the 1951 Convention and, only if these criteria are not fulfilled, on the basis of the requirements for subsidiary protection.<sup>61</sup>

Accurate, up to date and reliable country of origin information (COI) from objective and reliable sources is paramount for quality decisions.<sup>62</sup> Due to the absolute nature of Article 3 ECHR, the ECtHR has held that it must be satisfied that the assessment by the returning state of an alleged risk of ill treatment is "sufficiently supported by, in addition to the domestic materials, other materials originating from reliable and objective sources".<sup>63</sup> In this context, UNHCR welcomes the introduction of the EASO<sup>64</sup> amongst the sources of country of origin information (recast Article 3 (b)). UNHCR would also like to draw attention to its country of origin information and legal database known as "Refworld".<sup>65</sup>

UNHCR welcomes recast Article 9 (3) (b) which, on the basis of the principle of equality of arms and in accordance with the case law of the CJEU,<sup>66</sup> clarifies that country of origin information must be made accessible to the applicant and his/her legal advisor. An applicant for international protection should receive that information before the decision is taken in order to have the effective possibility to rebut presumptions that may arise from the use of the information. UNHCR also welcomes recast Article 9 (3) (d) requiring that personnel examining the application have the possibility to seek expert advice on particular issues, e.g., medical, cultural, child or

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<sup>59</sup> See footnote 14, Article 2 states that "*Person eligible for subsidiary protection*" means a third country national or a stateless person who does not qualify as a refugee ...."

<sup>60</sup> See section 2 on *A single procedure*.

<sup>61</sup> See footnote 5 "*All 26 Member States have introduced arrangements (a single procedure)*", European Union: European Commission, *Commission Staff Working Document*, page 25.

<sup>62</sup> UNHCR, *Country of Origin Information: Towards Enhanced International Cooperation*, February 2004, at: <http://www.unhcr.org/refworld/docid/403b2522a.html>; European Union, *Common EU Guidelines for Processing Country of Origin Information (COI)*, April 2008, at: <http://www.unhcr.org/refworld/docid/48493f7f2.html>.

<sup>63</sup> *Salah Sheekh v. The Netherlands*, Appl. No. 1948/04, Council of Europe: European Court of Human Rights, para. 136, 11 January 2007, at: <http://www.unhcr.org/refworld/docid/45cb3dfd2.html>.

<sup>64</sup> See footnote 40.

<sup>65</sup> At [www.refworld.org](http://www.refworld.org).

<sup>66</sup> *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, C-402/05 P and C-415/05 P, European Union: European Court of Justice, 3 September 2008, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0402:EN:HTML>.

gender issues. However, in line with the principle of equality of arms and the case law of the CJEU, any expert advice on particular issues, (which could include as a further example language analysis), should be made available to the applicant and his/her legal advisor.

UNHCR also welcomes recast Article 9 (5) obliging Member States to provide for rules concerning the translation of documents relevant for the examination of the application.

#### **The requirements for examination of an application**

- UNHCR welcomes recast Article 9 (1) deleting the reference to Article 23 (4) (i) APD, permitting use of accelerated procedures for claims which could have been made earlier.
- UNHCR supports the formalization of the principle of one single procedure and the specification that the question of whether the applicant qualifies for refugee status must be assessed before other protection needs (recast Article 9(2)).
- UNHCR welcomes the introduction of the European Asylum Support Office amongst specified sources of country of origin information.
- UNHCR welcomes recast Article 9 (3) (b) clarifying that country of origin information must be made accessible to the applicant and his/her legal advisor.
- UNHCR welcomes recast Article 9 (3) (d) requiring Member States to make expert advice available to the personnel examining the application. However, UNHCR recommends that the recast Directive should require such expert advice also to be made available to the applicant and his/her legal advisor
- UNHCR also welcomes recast Article 9 (5) obliging Member States to provide for rules concerning the translation of documents relevant for the examination of an application

#### **10. Requirements for a decision**

Article 41 of the Charter of Fundamental Rights of the European Union (“The Charter”) sets out the “obligation of the administration to give reasons for its decisions”.<sup>67</sup> UNHCR has consistently expressed its view that good quality decisions in the first instance lend greater credibility to the fairness and efficiency of the asylum system overall, including the appeals system. With regard to negative decisions, the applicant needs to know the reasons in fact and law so that s/he can take an informed decision as to whether to exercise any right of appeal; and a well-reasoned decision will inform the specific grounds upon which any eventual appeal should be based. A sound and well-reasoned first instance decision will also help to ensure that any appeal can be decided efficiently without infringing principles of due process or fairness.

UNHCR therefore welcomes recast Article 10 (2), first indent, ensuring that where an application for international protection is rejected with regard both to refugee status

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<sup>67</sup> European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (2000/C 364/01), at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:EN:PDF>.



and subsidiary protection, the reasons in fact and in law for the rejection of each form of status are stated.

UNHCR considers that the grounds for refusal of refugee status should be stated in the decision, even when another form of status is conferred bringing equivalent rights and benefits. According to a UNHCR's recent study on the application of the APD,<sup>68</sup> in one Member State, where subsidiary protection status is granted offering the same rights and benefits as refugee status, the reasons for the refusal of refugee status are made available to the applicant only if and when subsidiary protection status is withdrawn. In UNHCR's view, such reasons should be given at the time of the decision, thus enabling the applicant to respond immediately to a refusal of refugee status or subsidiary protection. In this framework, UNHCR welcomes recast Article 10 (2), deleting the provision allowing Member States to refrain from stating reasons for denying refugee status, where the applicant is granted a status which offers the same right and benefits.

With regard to positive decisions, a reasoned decision could also assist with decision-making at a later stage concerning any application to renew the validity of a residence permit or any potential application of the cessation clauses. In this framework, UNHCR recommends that the recast Article 10(2), first indent, be modified to require also that positive decisions state the reasons in fact and law.

The obligation to provide information on how to challenge a negative decision is an important procedural safeguard. UNHCR regrets that this important guarantee is undermined by recast Article 10 (2) second indent, which provides for a potentially problematic exception in cases where the decision may be "available by electronic means".<sup>69</sup> UNHCR notes that it will be extremely difficult to ascertain whether information made available electronically is accessible to a particular applicant, and it certainly cannot be assumed that information posted on the internet in a limited number of languages will in fact be accessible to all asylum-seekers.

UNHCR supports recast Article 10 (4) which, in accordance with recast Recital 22, ensures that that the examination procedure is gender-sensitive. The provision requires issuance of a separate decision to the person concerned when disclosure of the person's particular circumstances to members of his/her family may jeopardize his/her interests.

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<sup>68</sup> See footnote 3 UNHCR, *Improving Asylum Procedures*, page 16.

<sup>69</sup> Cathryn Costello, *The European Asylum Procedures Directive in Legal Context*, Research paper No. 134, November 2006, page 27, at: <http://www.unhcr.org/4552f1cc2.html>.

## Requirements for a decision

- UNHCR welcomes recast Article 10 (2), first indent, ensuring that where an application for international protection is rejected with regard to both refugee status and subsidiary protection, the reasons in fact and in law for the rejection of each status are stated.
- UNHCR welcomes recast Article 10 (2) deleting the provision that allows Member States not to state the reasons for not granting refugee status where the applicant is granted a status which offers the same right and benefits.
- UNHCR recommends that recast Article 10 (2), first indent, be modified to ensure that positive decisions also state the reasons for granting either refugee status or subsidiary protection.
- UNHCR recommends that recast Article 10 (2), second indent, unnecessarily providing an exception to the obligation to provide information on how to challenge a negative decision, be deleted.<sup>70</sup>
- UNHCR supports recast Article 10 (4) ensuring that a separate decision be issued to a person when disclosure of particular circumstances to members of his/her family may jeopardize his/her interests.

## 11. Guarantees for applicants

UNHCR considers it necessary to provide information to every applicant for international protection in a language that he or she actually understands. The information should be provided at the earliest possible moment in the procedure and include information on the purpose and significance of the personal interview. Assumptions that an asylum-seeker speaks or understands the official language of his or her country of origin may be incorrect. Due to the fundamental character of the *non-refoulement* principle in international law, enshrined *inter alia* in Article 33 of the 1951 Convention and Article 3 ECHR, all the safeguards and guarantees provided for in the ECHR<sup>71</sup> — which form an integral part of the general principles of EU law<sup>72</sup> — should apply to all applicants for international protection.<sup>73</sup> In the criminal law

<sup>70</sup> See footnote 3, UNHCR, *Improving Asylum Procedures*, page 84.

<sup>71</sup> See footnote 52, Council of Europe, *ECHR*.

<sup>72</sup> The CJEU held that: “[...] according to settled case-law, fundamental rights form an integral part of the general principles of law, whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories (see, to that effect, Case 44/79 Hauer [1979] ECR 3727, paragraph 15). The ECHR has special significance in that respect (see, among others, Case C-274/99 P Connolly v Commission [2001] ECR I-1611, paragraph 37, and Case C-94/00 Roquette Frères [2002] ECR I-9011, paragraph 25)”. *Booker Aquaculture Ltd v The Scottish Ministers*, C-20/00 and C-64/00, European Union: European Court of Justice, 10 July 2003, para. 65, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62000J0020:EN:HTML>.

<sup>73</sup> Similarly, some expert commentators consider Article 6 ECHR (Right to a fair trial - concerning only civil and criminal proceedings), as applying to all EU rights, including administrative proceedings such as asylum procedures. See John Barnes, *A Manual for Refugee Law Judges relating to European Council QD 2004/83/EC and European Council Procedures Directive 2005/85/EC*, 2007, page 54 which states that “[i]t is important also to emphasise that the ECJ has not accepted the limitation which the ECtHR placed upon the extent of its jurisdiction by classifying asylum and immigration claims as claims to which Article 6 ECHR did not apply. The effect of bringing the issue of effective protection onto a Community law base is, therefore, to increase the scope of the protection offered to claimants to include Article 6 ECHR rights.”

context, it is noted that guarantees expressed in Article 5 (2) and 6 (3) (a) of the ECHR provide that a person arrested or charged with criminal offences has the right to be “[...] *informed promptly, in a language which he understands* [...]”.<sup>74</sup>

While UNHCR appreciates that two exceptions have been introduced to safeguard children’s rights and the right to be heard,<sup>75</sup> UNHCR recommends modifying recast Article 11 to ensure that information is provided to the applicant in a language s/he demonstrably does understand.

Specific information on any particular procedures for children and applicants with special needs should be also provided.

UNHCR welcomes the strengthening of the right to be heard through the extension of the possibility to resort to the services of an interpreter during the admissibility interview<sup>76</sup> provided for by recast Article 11 (1) (b). However, based on UNHCR’s findings in its research on *Improving Asylum Procedures*,<sup>77</sup> recast Article 11 (1) (b) should be amended to provide that all applicants receive the services of an interpreter as necessary when informed of the decision on the application. In addition, recast Article 11 (1) (b) should specify that applicants should receive the services of an interpreter whenever necessary to submit their appeal.<sup>78</sup>

At all stages of the procedure, including at the admissibility stage, applicants for international protection should receive guidance and advice on the procedure and have access to legal counsel. Where free legal aid is available, applicants for international protection should have practical means of access to it in case of need.<sup>79</sup> UNHCR’s mandate requires prompt and unhindered access to asylum-seekers and refugees wherever they are.<sup>80</sup> Therefore UNHCR welcomes recast Article 11 (1) (c) providing that applicants for international protection should be given the opportunity to communicate with UNHCR or with any other organization providing legal advice or counseling.

UNHCR supports the modification introduced by recast Article 11 (1) (e), removing the possibility for Member States to refrain from informing applicants for international protection of the result of the decision where free legal assistance is available. However, UNHCR reiterates that the information on the result of the decision should be provided in a language that the applicant actually understands. In this context, specific procedural safeguards are also necessary for children. Decisions need to be communicated to children in a language and in a manner they understand. Children need to be informed of the decision in person, in the presence of their guardian, legal representative, and/or other support person, in a supportive and non-threatening environment. If the decision is negative, particular care will need to be

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<sup>74</sup> See footnote 52, Council of Europe, *ECHR*.

<sup>75</sup> See footnote 1, Recast Articles 14 (3) (c) and 21 (5) (a).

<sup>76</sup> See footnote 1, Recast Article 30.

<sup>77</sup> See footnote 3, UNHCR, *Improving Asylum Procedures*, Section 3, page 48-54.

<sup>78</sup> *Ibid.*, page 86.

<sup>79</sup> See footnote 47, UNHCR, *Global Consultations*, para. VII letter g).

<sup>80</sup> See footnote 1, Recast Article 25.

taken in delivering the message to the child and explaining what next steps may be taken in order to minimize psychological stress or harm.<sup>81</sup>

### **Guarantees for applicants**

- UNHCR recommends modifying recast Article 11 to ensure that all information must be provided to the applicant in a language s/he actually understands.
- UNHCR welcomes the extension of the possibility to resort to the services of an interpreter during the admissibility interview. However, recast Article 11 (1) (b) should be amended to specify that an applicant receives the services of an interpreter whenever necessary for submitting an appeal to the appeal authority.<sup>82</sup>

## **12. Obligations of the applicant for asylum**

UNHCR supports the introduction of an additional obligation for applicants to cooperate with the competent authority in establishing the elements of their applications for international protection.<sup>83</sup> In line with its view that the Directive should refer to a single determining authority, UNHCR recommends this wording replace the current reference to “competent authority”.

UNHCR welcomes recast Article 12 (2) (d) providing that any search of the applicant be undertaken in a gender-sensitive manner. In UNHCR’s view, searches should be in accordance with law, conducted for a legitimate objective and be carried out in a way which is necessary and proportionate to its objective, including in cases where persons refuse to cooperate. This approach is, *inter alia*, in line with Article 8 of the European Human Rights Convention.

### **Obligations of the applicant for asylum**

- UNHCR supports the introduction of an additional obligation for the applicant to cooperate with the “determining authority” (in place of “competent authority”).
- UNHCR welcomes recast Article 12 (2) (d) providing that any search be undertaken in a gender-sensitive manner.

## **13. Personal interviews**

The examination of applications for international protection should allow for a personal interview before the determining authority.<sup>84</sup> In this context,<sup>85</sup> UNHCR welcomes recast Article 13 (1), requiring that all the interviews on the substance of an application are conducted by representatives of the determining authority. However,

<sup>81</sup> 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, para. 77, at: <http://www.unhcr.org/refworld/docid/4b2f4f6d2.html>.

<sup>82</sup> UNHCR suggests the following wording: “(b) they shall receive the services of an interpreter for submitting their case, **including their appeal**, to the competent authorities whenever necessary....”

<sup>83</sup> See footnote 24, UNHCR, *Handbook*.

<sup>84</sup> See footnote 47, UNHCR, *Global Consultations*, para. VII letter h). “...[T]he examination of applications for refugee status should in the first instance allow for a personal interview, if possible before the decision-makers of the competent body ....”

<sup>85</sup> See section 5 on *The determining authority*.

considering that the certification of a claim as inadmissible<sup>86</sup> may lead to violation of the *non-refoulement* principle, UNHCR is of the view that the determining authority should also conduct the admissibility interview,<sup>87</sup> in order to ensure that the decision is made on the basis of the best available information and evidence. This should be specified in the recast proposal.

UNHCR supports recast Article 13 (1), second indent, introducing the obligation to give each adult dependant the possibility to provide further submissions beyond the interview with the principal applicant.<sup>88</sup> This provision goes some way towards the objective of recast Recital 22, requiring that examination procedure should be gender-sensitive as well as with the right to be heard. Information may emerge during an interview with dependants indicating that they themselves have a valid fear of persecution or serious harm. In such cases, they should be offered the opportunity to have their claims considered separately. This would increase the efficiency of status determination procedures, as potential claims are identified and examined as early as possible. UNHCR understands that this is the meaning of the last part of recast Article 13 (1), second indent, requiring that adult dependant applicants be given the possibility to be interviewed in private on their applications.

The right of children to express their views and to participate in a meaningful way is also important in the context of asylum procedures.<sup>89</sup> UNHCR considers that recast Article 13 (1), third indent, should be modified to render mandatory the obligation for Member States to establish in national legislation that all children are granted the right to an interview and that the interview should only be conducted when it is in the best interest of the child, and with child-appropriate procedures.

In the context of an asylum procedure, where so much depends on the testimony of an individual, the personal interview often proves critical to the decision. In line with Executive Committee Conclusion No. 8 (XXVIII) of 1977 and 30 (XXXIV) of 1983,<sup>90</sup> all claimants should, in principle be granted the possibility of a personal interview,<sup>91</sup> unless the applicant is unfit or unable to attend an interview owing to enduring circumstances beyond his or her control. The right to be heard and of defence are part of the general principles of EU law.<sup>92</sup> This view is supported by

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<sup>86</sup> See footnote 1, Recast Article 29.

<sup>87</sup> See footnote 1, Recast Article 30.

<sup>88</sup> UNHCR, *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate*, para. 3.2.6, 20 November 2003, at: <http://www.unhcr.org/refworld/docid/42d66dd84.html>.

<sup>89</sup> See footnote 25, Article 12, UN General Assembly, *Convention on the Rights of the Child*.

<sup>90</sup> UNHCR, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, 20 October 1983, No. 30 (XXXIV) - 1983, para e) i), at: <http://www.unhcr.org/refworld/docid/3ae68c6118.html>.

<sup>91</sup> Council of Europe: Parliamentary Assembly, *Resolution 1471 (2005) on Accelerated Asylum Procedures in Council of Europe Member States*, 7 October 2005, 1471 (2005), para 9.10.2, at: <http://www.unhcr.org/refworld/docid/43f349e04.html>.

<sup>92</sup> See for instance *Sopropé*, where the CJEU held that: “36. *Observance of the rights of the defence is a general principle of Community law which applies where the authorities are minded to adopt a measure which will adversely affect an individual.*

37. *In accordance with that principle, the addressees of decisions which significantly affect their interests must be placed in a position in which they can effectively make known their views as regards the information on which the authorities intend to base their decision. They must be given a sufficient period of time in which to do so (see, inter alia, Commission v Lisrestal and Others, paragraph 21, and Mediocurso v Commission, paragraph 36).*

Article 41 of the Charter<sup>93</sup> providing for the “right to good administration” which includes the “right of every person to be heard, before any individual measure which would affect him or her adversely is taken”. Though Article 41 of the Charter is only applicable to measures of the institutions and bodies of the EU, “this does not prevent it being invoked where Member States implement EC law”.<sup>94</sup> Considering the above, UNHCR strongly supports recast Article 13 (2) deleting the possibility to derogate from basic principles and guarantees of Chapter II in the current APD by omitting the personal interview.

UNHCR supports recast Article 13 (2) (b) requesting the “competent authority” to consult a medical expert to establish whether a condition precluding an interview is temporary or permanent. UNHCR notes, in accordance with the objective of designating a single determining authority, that the provision should read “determining” rather than “competent” authority.<sup>95</sup>

### **Personal interviews**

- *UNHCR welcomes recast Article 13 (1) requiring that all the interviews on the substance of an application be conducted by representatives of the determining authority.*
- *UNHCR recommends that the determining authority should also conduct the admissibility interview.*
- *UNHCR supports recast Article 13 (1), second indent, introducing the obligation to give each adult dependant the possibility to provide further submissions beyond the interview with the principal applicant.*
- *UNHCR considers that recast Article 13 (1) third indent should be modified to render mandatory the obligation for Member States to establish in national legislation that all children are granted the right to an interview and that the interview should only be conducted when it is in the best interest of the child, and with child-appropriate procedures.*

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[...]49. The purpose of the rule that the addressee of an adverse decision must be placed in a position to submit his observations before that decision is adopted is to enable the competent authority effectively to take into account all relevant information. In order to ensure that the person or undertaking concerned is in fact protected, the purpose of that rule is, inter alia, to enable them to correct an error or submit such information relating to their personal circumstances as will argue in favour of the adoption or non-adoption of the decision, or in favour of its having a specific content.

50. Accordingly, respect for the rights of the defence implies that, in order that the person entitled to those rights can be regarded as having been placed in a position in which he may effectively make known his views, the authorities must take note, with all requisite attention, of the observations made by the person or undertaking concerned”. “Sopropé – Organizações de Calçado Lda v Fazenda Pública, C-349/07, European Union: European Court of Justice, 17, 18 December 2008, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0349:EN:HTML>.

<sup>93</sup> See footnote 67, *Charter of Fundamental Rights*.

<sup>94</sup> See footnote 69, Costello, *The European Asylum Procedures Directive in Legal Context*, page 26.

<sup>95</sup> In the detailed explanation to the recast proposal, the Commission refer to the “determining authority”. European Union: European Commission, *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 (Recast) ANNEX*, 21 October 2009, COM(2009) 554 final, at: <http://register.consilium.europa.eu/pdf/en/09/st14/st14959-ad01.en09.pdf>; See also section 5 on The determining authority above.

- UNHCR strongly supports recast Article 13 (2) deleting the possibility to derogate from basic principles and guarantees of Chapter II in the current APD by omitting the personal interview.

- UNHCR supports recast Article 13 (2) (b) requesting the “competent authority” to consult a medical expert to establish whether a condition precluding interview is temporary or permanent. UNHCR notes that, to be in accordance with the principle of a single determining authority, the provision should read “determining” rather than “competent” authority.

#### **14. Requirements for a personal interview**

UNHCR supports the amendments introduced by recast Article 14 (3) (a) which, in line with recast Article 4,<sup>96</sup> delete the word “sufficiently” thus requiring that the person conducting a personal interview be competent. UNHCR would suggest that, in order to make the recast proposal more consistent with the principle of a single determining authority, the word “person” be replaced by “officer of the determining authority”. UNHCR also supports the recast proposal which, in line with recast Recital 22, requires the interviewer to be competent to take gender into account amongst the circumstances surrounding the application. Along the same lines, UNHCR also welcomes the introduction of the possibility to have an interviewer who is of the same sex as the applicant.<sup>97</sup>

UNHCR has observed that in a number of Member States no specific professional qualifications are required for interpreters; and in at least one Member State, there is no official procedure to recruit interpreters, nor are there job descriptions setting out minimum qualifications.<sup>98</sup> UNHCR’s research revealed widespread misconduct involving interpreters in personal interviews as well as serious shortcomings in the ability of interviewers to work efficiently with or manage the conduct of interpreters. UNHCR researchers witnessed cases where interpreters omitted to interpret some of the applicants’ statements, as well as where interpreters extensively modified the statements of the applicants by paraphrasing their statements. UNHCR also observed interpreters who added their own comments or personal observations, and who responded to questions on behalf of the applicant. In a number of cases, the interpreter took over the role of the interviewer and asked the applicant questions, or explained aspects of the procedure. On one occasion, UNHCR witnessed an interpreter tell an applicant the reasons to state in the application when filling out the application form. In addition, UNHCR observed several interviews in which the interpreters did not possess an adequate command either of the language of the Member State or that of the applicant. Therefore, UNHCR welcomes recast Article 14 introducing a requirement that the interpreter should be competent.

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<sup>96</sup> Recast Article 4 requires, that the personnel of the determining authority are trained, including in interviewing techniques and cross-culture communication as well as in gender, trauma and age awareness.

<sup>97</sup> UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/01, para. 36 ii), at: <http://www.unhcr.org/refworld/docid/3d36f1c64.html>; UNHCR, *Refugee Women and International Protection*, 5 October 1990, No. 64 (XLI) - 1990, para. a) iii) at: <http://www.unhcr.org/refworld/docid/3ae68c441f.html>.

<sup>98</sup> See footnote 3, UNHCR, *Improving Asylum Procedures*, pages 28-46.

Effective communication with the applicant is an essential prerequisite for a fair and effective asylum procedure. UNHCR considers it necessary to communicate in the asylum procedure with every applicant for international protection in a language which he or she actually understands.<sup>99</sup> UNHCR therefore welcomes recast Article 14 (c) requiring Member States to communicate with the applicant in a language that s/he understands and in which s/he is able to communicate clearly. However, UNHCR would like to reiterate that the same wording should be used also in recast Article 11 (a) and (e).

Claimants should be informed of the possibility to have interpreters of the same sex.<sup>100</sup> Hence, UNHCR welcomes recast Article 14 (3) (c) introducing the obligation for Member States, to provide, whenever possible, an interpreter of the applicant's sex of the applicant if the applicant so requests.

UNHCR also supports the introduction of requirements aimed at ensuring that the special needs of children are addressed.

The fact that interviewers may visibly represent police, border authorities or other enforcement agency, may undermine the perception of confidentiality and impartiality that is essential to creating conditions conducive to the complete disclosure of facts by applicants during the personal interview. Applicants may fear and/or lack trust as a result of their experiences in their country of origin. An interview conducted by uniformed personnel may trigger or exacerbate post-traumatic stress disorder in applicants who have suffered persecution or serious harm at the hands of the police, military or militarized groups in their countries of origin. UNHCR therefore supports the requirement introduced by recast Article 14 (3) (d) requiring that the person who conducts the interview on the substance of the application for international protection does not wear a uniform. However, the same requirement should be applied also to the admissibility interview.

With regard to children, appropriate communication methods need to be selected for the different stages of the procedure, including the asylum interview. These methods need to take into account the age, gender, cultural background and maturity of the child as well as the circumstances of the flight and mode of arrival. Useful, non-verbal communication methods for children might include playing, drawing, writing, role-playing, story-telling and singing. Children with disabilities require "whatever mode of communication they need to facilitate expressing their views".<sup>101</sup> UNHCR welcomes recast Article 14 (3) (e) requiring that interviews with minors are conducted in a child-friendly manner.

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<sup>99</sup> See Section 11 on Guarantees for applicants.

<sup>100</sup> See footnote 97, UNHCR, *Guidelines on International Protection No. 1*, para. 36 iii).

<sup>101</sup> See footnote 81, UNHCR, *Guidelines on International Protection No. 8*, para. 71.



### **Requirements for a personal interview**

- UNHCR supports the amendments introduced by recast Article 14 (3) (a) deleting the word “sufficiently” thus requiring that the person conducting a personal interview is competent.
- UNHCR recommends that in recast Article 14 (3) (a), the word “person” be replaced by “officer of the determining authority”.
- UNHCR welcomes the introduction of the possibility to have an interviewer who is of the same sex as the applicant.
- UNHCR welcomes recast Article 14 introducing a requirement that the interpreter should be competent.
- UNHCR welcomes recast Article 14 (c) requiring Member States to communicate with the applicant in a language that s/he understands and in which s/he is able to communicate clearly. However, the same wording should be used also in recast Article 11 (a) and (e).
- UNHCR supports the requirement introduced by recast Article 14 (3) (d) for the person who conducts the interview on the substance of the application for international protection not to wear a uniform. However, the same requirement should be applied also to the admissibility interview.
- UNHCR welcomes recast Article 14 (3) (e) ensuring that interviews with minors are conducted in a child-friendly manner.

### **15. Content of a personal interview**

UNHCR in its recent research observed interviews where the applicants were not allowed to present the grounds for their application in a comprehensive manner.<sup>102</sup> Against this background, UNHCR supports recast Article 15 specifying, in accordance with Article 4 of the Qualification Directive, the basic content requirements of the personal interview.<sup>103</sup> This safeguard, along with others introduced in the APD recast, would contribute to the effectiveness of a fair and efficient procedure, and potentially reducing the need to challenge a wrongful refusal on appeal.

### **Content of a personal interview**

*UNHCR supports recast Articles 15 specifying the basic content requirements of the personal interview.*

### **16. Transcript and report of personal interviews**

In the examination of a claim for international protection, the oral testimony of the applicant is crucial. The failure to record accurately and fully the applicant’s testimony may result in an erroneous decision. This is not in the interest of Member States, as an inaccurate record of the content of the personal interview is liable to challenge upon appeal. For the applicant, such a procedural failure carries the risk of *refoulement* in breach of international law. The current APD requires that the written report contain “at least the essential information regarding the application”. UNHCR

<sup>102</sup> See footnote 3, UNHCR, *Improving Asylum Procedures*, Section 5, page 69.

<sup>103</sup> See footnote 14, European Union: Council of the European Union, *Qualification Directive*.

is concerned that some Member States have interpreted “essential information” as giving the interviewer discretion to determine which parts of the applicant’s statements are worthy of recording in the written report, with the result that the report is only a summary of the oral evidence.<sup>104</sup> This may result in relevant oral evidence not being recorded, and/or the meaning and accuracy of statements being unwittingly altered.

In this framework, UNHCR supports the replacement of current Article 14 with new provision requiring the transcription of every personal interview.

Verifying the contents of the report of a personal interview is useful, not only to avoid misunderstandings, but also to facilitate the clarification of contradictions. Article 8 of the Charter<sup>105</sup> requires that all persons have the right of access to data which have been collected concerning him or her, and to rectify such data. In line with the above, UNHCR supports recast Article 16 (2) providing the possibility for the applicant to make comments and/or provide clarification with regard to any mistranslations or misconceptions in the transcript. UNHCR understands that, in order to make comments to the transcript, its content needs to be read to him/her, if necessary, with the assistance of an interpreter. UNHCR also welcomes recast Article 16 (5) ensuring the applicant has timely access to his/her data, including the transcript and the report of the interview.

#### **Transcript and report of personal interviews**

- *UNHCR supports the replacement of current Article 14 with a new provision requiring a mandatory transcription of every personal interview.*
- *UNHCR supports recast Article 16 (2) providing the possibility for the applicant to make comments and/or provide clarification with regard to any mistranslations or misunderstandings in the transcript.*
- *UNHCR also welcomes recast Article 16 (5) ensuring the applicant has timely access to his/her data, including the transcript and the report of the interview.*

#### **17. Right to legal assistance and representation**

In UNHCR’s view, the right to legal assistance and representation is an essential safeguard. Asylum-seekers are often unable to articulate cogently the elements relevant to an asylum claim without the assistance of a qualified counselor, as they are not sufficiently familiar with the precise grounds for the recognition of refugee status and the legal system of a foreign country. Quality legal assistance and representation is, moreover, in the interest of States, as it can help to ensure that international protection needs are identified accurately and early. The efficiency of first instance procedures is thereby improved.

UNHCR strongly supports recast Article 18 introducing the obligation for Member States to provide, upon request, free legal assistance at first instance. However UNHCR recommends that consideration be given to modifying recast Article 18 (2) to remove the possibility to limit free legal assistance in first instance to the provision

<sup>104</sup> See footnote 3, UNHCR, *Improving Asylum Procedures*, page 41.

<sup>105</sup> See footnote 67, European Union, *Charter*.

of information on the procedure and to the explanation of reasons in fact and in law in the case of a negative decision. Free legal assistance in first instance should ideally also encompass the preparation of procedural documents and legal representation, including participation in the personal interview.

To clarify the language, UNHCR further recommends correcting the wording of recast Article 18 (3) (b) as follows: “*only ~~to~~ **for the services** of legal advisers and other counselors specifically designated by national law to assist and/or represent applicants for international protection*”.

UNHCR recognizes and supports recast Article 21 (4) providing for free legal assistance to unaccompanied children. However, UNHCR recommends that adequate provision should additionally be made for asylum-seekers with special needs (victims of torture and other traumatic experiences), who generally require additional legal assistance. This would respect the principled objectives behind recast Article 20 on applicants with special needs.

#### **Right to legal assistance and representation**

- *UNHCR recommends that consideration be given to modifying recast Article 18 (2) to remove the possibility to limit free legal assistance at first instance to the provision of information on the procedure and to the explanation of reasons in fact and in law in the case of a negative decision. Free legal assistance in first instance should ideally also encompass the preparation of procedural documents and legal representation, including participation in the personal interview.*

- *UNHCR further recommends correcting the wording of recast Article 18 (3) (b) as follows: “only ~~to~~ **for the services** of legal advisers and other counselors specifically designated by national law to assist and/or represent applicants for international protection.”*

- *UNHCR supports recast Article 21 (4) providing for free legal assistance to unaccompanied children. However, UNHCR recommends that adequate provision should additionally be made for asylum-seekers with special needs.*

#### **18. Guarantees for unaccompanied minors**

UNHCR welcomes recast Article 21 which considerably raises procedural safeguards for unaccompanied children in the asylum procedures.

UNHCR specifically welcomes the deletion of recast Article 21 (2) (b) and (3). However, UNHCR regrets that other exceptions to the obligation to appoint a representative for a separated/unaccompanied child have been maintained. UNHCR recommends a generous approach to separated/unaccompanied children who have become adults during the course of the asylum procedure. States should also seek to eliminate unnecessary delays that would result in a child becoming adult during the procedure. As regards the exception under recast Article 21 (2) (b), the fact that a child applicant is or has been married does not necessarily indicate that he or she is not in need of a representative to assist in submitting an asylum claim. Marriage is lawful at a very young age in some countries, and is not necessarily related to the maturity of the child. Moreover, some child applicants may have complex claims for which the assistance of a legal representative is particularly important, including

claims related to domestic violence or forced marriage, where the marriage may even itself be linked to the fear of persecution. In UNHCR's view, this provision in Article 21 (2) (b) should therefore be deleted.

UNHCR supports the amendments to the current APD introduced by recast Article 21 (5). The amendments considerably increase guarantees related to age assessment. It is widely acknowledged by experts that age assessment is subject to a considerable margin of error. Age assessment needs to be part of a comprehensive evaluation that takes into account both the physical appearance and the psychological maturity of the individual. It is important that such assessments are conducted in a safe, child- and gender-sensitive manner with due respect for human dignity. The margin of appreciation 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. Furthermore, it should be explicitly provided in national legislation that persons claiming to be children should be provisionally treated as such, until an age determination has taken place.

#### **Guarantees for unaccompanied minors**

*UNHCR recommends deleting recast Article 21 (2) (b) providing an exception to the obligation to appoint a representative for a separated/unaccompanied child when s/he is married or has been married.*

#### **19. Detention**

In the framework of the recasting process of the asylum instruments, the Commission has decided to regulate the detention of asylum seekers in the Reception Conditions Directive, as it applies to all asylum applicants in all asylum-related procedures. This choice will ensure, *inter alia*, coherence and consistency.

*UNHCR supports the proposal to provide for further regulation of detention in the recast RCD.<sup>106</sup>*

#### **20. Explicit withdrawal of an application**

UNHCR is concerned that the APD permits Member States to reject an application simply because it has been explicitly withdrawn. A decision to reject an application for international protection should only be issued when there has been a complete examination of an application and it has been determined that the applicant is not in need of international protection. A decision to reject the application should not be issued when there has been no examination of the merits of the application because the applicant has explicitly withdrawn the application. Such withdrawal may occur either before s/he has substantiated the application in accordance with Article 4 of the Qualification Directive, and/or before the determining authority has assessed all the relevant facts and circumstances and completed the examination in accordance with Article 4 of the Qualification Directive.

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<sup>106</sup> See footnote 19.

Consequently, UNHCR recommends modifying recast Article 23 (1) to remove the possibility given to Member States to reject an application in case of withdrawal.

In case of withdrawal, UNHCR recommends that Member States take a decision to discontinue the examination, or discontinue the examination of the application without taking a decision, and enter a corresponding note in the applicant's file. Findings of UNHCR's recent study highlight that the overwhelming majority of the Member States surveyed use one of these two options.<sup>107</sup>

#### **Explicit withdrawal of an application**

- *UNHCR recommends modifying recast Article 23 (1) to delete the possibility given to Member States to reject an application in case of withdrawal.*
- *In case of withdrawal, UNHCR recommends that Member States take a decision to discontinue the examination, or discontinue the examination of the application without taking a decision, and enter a corresponding note in the applicant's file.*

#### **21. Implicit withdrawal of an application**

UNHCR has expressed its concern about the provision in current Article 20 APD permitting Member States to reject an application because of non-compliance with procedural obligations. This is permitted "on the basis that the applicant has not established an entitlement to refugee status". In UNHCR's view, an applicant for international protection may fail to comply with reporting or other requirements for a variety of reasons, which do not necessarily indicate a lack of protection needs. UNHCR considers that a negative decision on an application for international protection should only be issued when there has been an appropriate examination of all the relevant facts, based on which it is determined that the applicant is not a refugee or does not qualify for subsidiary protection. In UNHCR's view, a claim may be implicitly withdrawn for a variety of reasons which are not necessarily related to a lack of protection needs. A time limit on the reopening of a claim creates the risk that existing protection needs are not examined and recognized. Therefore, UNHCR welcomes recast Article 24, removing the possibility to reject a claim because it is deemed implicitly to have been withdrawn; deleting the provision permitting time limits for the reopening of a claim; as well as the elimination of the possibility to treat as a subsequent application the claim of an applicant who reports again after his/her claim has been discontinued.

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<sup>107</sup> See footnote 3, UNHCR, *Improving Asylum Procedures*, page 45.

### **Implicit withdrawal of an application**

*UNHCR welcomes recast Article 24 deleting the possibility to reject a claim because it is deemed to have been withdrawn; deleting the provision permitting time limits for the reopening of a claim; as well as the deletion of the possibility to treat as a subsequent application the claim of an applicant who reports again after the examination of his/her claim has been discontinued.*

## **22. Collection of information**

Member States must observe and comply with general international legal standards on data protection, including EU law on the processing of personal data, in the conduct of their asylum procedures. Confidentiality in asylum procedures is critically important, as the unauthorized disclosure of information regarding an individual application for international protection -- or the fact that an application has been made -- to third parties in the country of origin or elsewhere could endanger: family members or associates of the applicant; the applicant in the event of return to the country of origin; and/or the applicant in the host State. Finally, this may result in the applicant becoming a refugee *sur place*. Article 22 of the current APD provides that Member States shall not “directly” disclose information about the applicant, nor seek information, in a way that could result in the alleged actor of persecution being informed “directly” of the application. The efficacy of this provision as a safeguard appears undermined by the use of the word “directly”.<sup>108</sup> UNHCR’s research has showed that most of the Member States surveyed have transposed Article 22, and have offered a higher standard of protection in most cases, by omitting the word “directly” from their national law.<sup>109</sup> In this framework, UNHCR welcomes the proposal in recast Article 26 to delete the term “directly”.

### **Collection of information**

UNHCR welcomes recast Article 26 deleting the word “directly”.

## **23. Examination procedure**

UNHCR underlines the interest of all parties in ensuring efficient, as well as fair, asylum procedures. In this connection, UNHCR supports the introduction by recast Article 27 (3) of a six-month time limit to conclude the procedure. As remarked by the Commission, this requirement emerges, *inter alia*, from the case law of the Court of Justice of the EU.<sup>110</sup> The right to have “his or her affair handled [...] within a reasonable time” is also set out by Article 41 of the Charter, which according to some

<sup>108</sup> Council of Europe: Committee of Ministers, *Twenty Guidelines on Forced Return*, 4 May 2005, at: <http://www.unhcr.org/refworld/docid/42ef32984.html>; see in particular Guideline 12, para. 4: “In particular, the host state should not share information relating to the asylum application.”

<sup>109</sup> See footnote 3, UNHCR, *Improving Asylum Procedures*, page 50.

<sup>110</sup> See footnote 44, Rights guaranteed by Community 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 ....” *Panayotova*, Case C-327/02.

expert commentators, can be “invoked where Member States implement EC law”,<sup>111</sup> including in asylum procedures.

In order to limit the optional clauses resulting in non-harmonized implementation of the APD, UNHCR recommends modifying recast Article 27 (4), last indent, to stipulate in the Directive the consequence of failure to adopt a decision within the time limit.

UNHCR supports recast Article 27 (6), reducing the categories of cases in which Member States may channel a claim into accelerated procedure.<sup>112</sup> In line with UNHCR Executive Committee Conclusion No. 30 (XXXIV) of 1983, only cases that are “clearly abusive” (i.e. clearly fraudulent), or “manifestly unfounded”, (i.e. not related to the grounds for granting international protection), should be considered for accelerated treatment.<sup>113</sup>

The Commission has stated that the grounds for an accelerated examination listed in recast Article 27 (6) are directly linked to the elements of the application as described in Article 4(2) of the Qualification Directive. According to the Commission, the grounds listed by recast Article 27 (6) are the logical consequence of serious deficiencies in the application for international protection.<sup>114</sup> UNHCR notes that the safe country of origin concept is neither directly linked to the elements of the application as described in Article 4 (2) of the Qualification Directive, nor does it denote a weakness in the merits of in the application for international protection. Furthermore, while the safe country of origin concept<sup>115</sup> may have a value as a case management tool, there must be an opportunity to rebut the presumption of safety.<sup>116</sup> The current formulation of recast Article 34 does not achieve this aim, as demonstrated by the fact that in several Member States, no provision is made for applicants to be informed that their country of origin is considered “safe”, until the point at which they are notified of the decision to refuse their application.<sup>117</sup>

In light of the above, UNHCR would consider the recast Article 27 (6) (b) acceptable if recast Article 34 is modified to include an explicit provision ensuring the possibility to rebut the presumption of safety.<sup>118</sup>

### **Examination procedure**

- *UNHCR supports recast Article 27 (3) introducing a 6-month time limit to conclude the procedure.*

<sup>111</sup> Costello, *The European asylum procedures directive in legal context*, page 26, see footnote 71; see also UNHCR, *UNHCR Statement on the right to an effective remedy in relation to accelerated asylum procedures*, para. 32, 21 May 2010, at: <http://www.unhcr.org/refworld/docid/4bf67fa12.html>.

<sup>112</sup> See footnote 3, UNHCR, *Improving Asylum Procedures*, page 57. See also Council of Europe: Committee of Ministers, *Guidelines on human rights protection in the context of accelerated asylum procedures*, 1 July 2009, at: <http://www.unhcr.org/refworld/docid/4a857e692.html>.

<sup>113</sup> See footnote 90.

<sup>114</sup> See footnote 1, Recast, page 13.

<sup>115</sup> See footnote 1, Recast Article 27 (6) (b).

<sup>116</sup> See footnote 47, UNHCR, *Global Consultations on International Protection*, para. 50 f).

<sup>117</sup> See footnote 3, UNHCR, *Improving Asylum Procedures*, page 27.

<sup>118</sup> See section 28 on *Safe Country of*

- UNHCR recommends modifying recast Article 27 (4) last indent to stipulate in the Directive the consequence of the failure to adopt a decision within the time limits. This could include a shift of the burden of proof to the determining authority to disprove an entitlement to protection.

- Recast Article 27 (6) (b) is acceptable if recast Article 34 is modified to include an explicit provision ensuring the possibility to rebut the presumption of safety.

## 24. Unfounded applications

In line with the recommendation to delete the possibility to reject a claim if explicitly withdrawn,<sup>119</sup> UNHCR recommends to delete the wording “Without prejudice to Article 23” from recast Article 28.

### Unfounded applications

UNHCR recommends to delete the wording “Without prejudice to Article 23” from recast Article 28.

## 25. Admissibility interview

UNHCR welcomes the introduction of the admissibility interview which is in line with the right to be heard described above.<sup>120</sup> However, considering the potential impact of the certification of a claim as inadmissible, UNHCR considers that the interview should be carried out by the determining authority. Based on recast Article 4, such determining authority must also receive the necessary training and be competent to apply difficult provisions such as, for instance, the safe third country and the first country of asylum concepts.

### Admissibility interview

UNHCR suggests the rewording of recast Article 30 (1) as follows: “... *To that end, ~~Member States~~ the determining authority shall conduct a personal interview on the admissibility of the application. ....*”

## 26. First Country of Asylum

The wording “sufficient protection” in recast Article 31 (b) is not defined and does not represent an adequate safeguard when determining whether an asylum seeker may be returned safely to a first country of asylum. Any protection in that country should be effective and available in practice. This is, *inter alia*, demonstrated by the recent case law of the ECtHR according to which, the theoretical right to *non-refoulement* is not sufficient.<sup>121</sup> Consequently, the recast proposal should be amended with the term

<sup>119</sup> See section 20 on *Explicit withdrawal of an application*.

<sup>120</sup> See section 13 on *Personal interview*.

<sup>121</sup> See, *inter alia*, *Abdolkhani and Karimnia v. Turkey*, Appl. No. 30471/08, Council of Europe: European Court of Human Rights, 22 September 2009, para. 88, at: <http://www.unhcr.org/refworld/docid/4ab8a1a42.html>: “The Court reiterates in this connection that the indirect removal of an alien to an intermediary country does not affect the responsibility of the expelling Contracting State to *ensure* that he or she is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention.”



“sufficient protection” replaced by “effective protection”. In addition, it is recommended to draw up an Annex to the recast proposal,<sup>122</sup> setting out the criteria for “effective protection” for the purposes of recast Article 31 (b) in line with the 1951 Convention and the Lisbon Conclusions on “effective protection.”<sup>123</sup>

While at procedural level, recast Article 30 provides the applicant with the opportunity to present his or her view with regard to the applications of the First Country of Asylum concept, recast Article 31 should be amended to state explicitly that applicants for international protection should have – at substantial level -- the possibility to rebut the presumption of safety.<sup>124</sup> The new formulation could take as a sample the wording of recast Article 32 (2) (c).<sup>125</sup>

In order to strengthen the guarantees against the violation of Article 3 ECHR, UNHCR further recommends rendering mandatory the provision of recast Article 31 last indent requiring that Member States take into account the criteria for safety under the “Safe Third Country” provision in recast Article 32 (1) when applying the First Country of Asylum concept.

#### **First Country of Asylum**

- *UNHCR recommends amending recast Article 31 (b) by replacing the term “sufficient protection” with “effective protection”.*
- *UNHCR recommends drawing up an annex to the recast proposal, setting out the criteria for “effective protection” for the purposes of recast Article 31 (b) in line with the 1951 Convention and the Lisbon Conclusions on “effective protection”.*
- *Recast Article 31 should be amended to state explicitly that applicants for international protection should have – at substantial level - the possibility to rebut the presumption of safety.*
- *Article 31, last indent, should also be made mandatory (“shall” rather than “may”), to require Member States to take into account the criteria for safety under the “Safe Third Country” provision in recast Article 32 (1) when applying the First Country of Asylum concept.*

#### **27. Safe Third Country**

As the Preamble to the 1951 Convention and a number of Executive Committee Conclusions highlight, refugee protection issues are international in scope and satisfactory solutions cannot be achieved without international co-operation. The primary responsibility to provide protection remains with the State where the claim is lodged. A transfer of responsibility should be envisaged only between States with comparable protection systems, on the basis of an agreement which clearly outlines their respective responsibilities. By contrast, the “safe third country” notion, as

<sup>122</sup> See footnote 3, UNHCR, *Improving Asylum Procedure*, page 59.

<sup>123</sup> 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, at: <http://www.unhcr.org/refworld/docid/3fe9981e4.html>.

<sup>124</sup> See footnote 3, UNHCR, *Improving Asylum Procedures*, page 58.

<sup>125</sup> Recast Article 32 (2) (c) : “rules [...] which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that the third country is not safe in his/her particular circumstances [...].”

defined in the recast Directive, rests on a unilateral decision by a State to invoke the responsibility of a third State to examine an asylum claim.

Since the accession of twelve new EU Member States since 2004 and the inclusion of three other non-EU states in the Dublin II Regulation regime, the Safe Third Country notion appears far less relevant than in the past for EU Member States. Of the twelve Member States recently surveyed by UNHCR, only two apply the safe third country concept in law and in practice. In one of these Member States, administrative instructions refer to the USA and Canada as examples of countries to which transfer of applicants has taken place under this concept. Outside the scope of the survey, UNHCR ascertained that the concept is rarely applied. This leads UNHCR to conclude that the safe third country concept is largely superfluous, and holds little practical use.<sup>126</sup>

UNHCR welcomes recast Article 32 (b) requiring that, in order to apply the safe third country concept, the authorities must be satisfied that there is no risk of serious harm. However, following the observation with regard to recast Article 4, and in light of the competences required to apply the safe third country concept, UNHCR recommends that the wording “competent authority” in recast Article 32 (1) be replaced by “determining authority”. Furthermore, in addition to the possibility to request refugee status, recast Article 32 (e) should be amended to give the applicant the possibility to request a complementary form of protection against a risk of serious harm.<sup>127</sup>

UNHCR notes recast Recital 31, introducing the requirement of a “sufficient” connection to a third country. In UNHCR’s view, transit alone is not a “sufficient” connection or meaningful link, unless there is a formal agreement for the allocation of responsibility for determining refugee status between countries with comparable asylum systems and standards. Transit is often the result of fortuitous circumstances and does not necessarily imply the existence of any meaningful link or connection. Neither does a simple entitlement to entry without actual presence constitute a meaningful link.

Recast Article 32 (2) (b) APD requires that the application of the third country concept is subject to the establishment of rules — in national legislation -- on the methodology by which competent authorities satisfy themselves that the Safe Third Country concept may be applied to a particular country, or to a particular applicant. It further states that

*[s]uch methodology shall include case-by-case consideration of the safety of the country for a particular applicant **and/or** national designation of countries considered to be generally safe.*

Although Article 27 (2) (b) would appear to permit national designation alone, Article 27 (2) (c) APD nevertheless requires an individual examination of whether the third country concerned is safe for a particular applicant. The two provisions do not seem consistent. The question of whether a particular third country is safe for the purpose of sending an asylum seeker to there cannot, in UNHCR’s view, be answered in a generic fashion, for example by “national designation” by parliament or another body,

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<sup>126</sup> See footnote 3, UNHCR, *Improving Asylum Procedures*, Section 12, page 10.

<sup>127</sup> *Ibid*, page 60.

for all asylum seekers in all circumstances. In UNHCR's view, the question of whether an asylum seeker may be sent to a third country for determination of his/her claim must be answered on an individual basis. If not, the risk of chain *refoulement* arises.

In light of the above, UNHCR recommends modification of the wording of recast Article 32 (2) (b) by deleting the word "or" to ensure that the methodology includes both case-by-case consideration of the safety of the country for a particular applicant and the national designation of countries considered generally safe. It is noted in this connection also that while the application of the "safe third country" rule creates a "presumption" of general safety, the applicant must have an effective opportunity to rebut the presumption in practice.

#### **Safe third country**

- UNHCR recommends that the wording "competent authority" in recast Article 32 (1) be replaced by "determining authority".
- UNHCR welcomes recast Article 32 (b) requiring that, in order to apply the Safe Third Country concept, Member States authorities must be satisfied that there is no risk of serious harm.
- Recast Article 32 (1) (e) should be amended to give the applicant the possibility to request a complementary form of protection against a risk of serious harm.
- UNHCR recommends modification of the wording of recast Article 32 (2) (b) by deleting the wording "or", to ensure that the methodology includes a case-by-case consideration on the safety of the country for a particular applicant **and** the national designation of countries considered to be generally safe.

### **28. Safe Country of Origin**

UNHCR supports the modifications introduced by recast Articles 33 and 34. As previously noted in analysing accelerated procedures,<sup>128</sup> the safe country of origin concept may serve as a case management tool, for instance to assign applications to fast track procedures. However, there must be an opportunity to rebut the presumption of safety both in law and practice. As well as requiring an individual examination, this should also involve a shared duty of investigation, prior notification of the intention to designate a country as safe, and other essential procedural safeguards. UNHCR's recent research revealed divergent practices among Member States with regard to the opportunity given to applicants to rebut a presumption of safety. A common problem identified in several States is that no provision is made for applicants to be informed that their country of origin is considered safe until they are notified of the decision to refuse their application. Thus, in effect, the first and only opportunity to challenge the presumption of safety would be at appeal. Therefore, UNHCR recommends that current formulation of recast Article 34 (1) (c) be modified explicitly to grant the applicant the possibility to rebut the presumption of safety and challenge the application of the safe country of origin concept. The new formulation could draw from the model of the wording in recast in Article 32 (2) (c).<sup>129</sup>

<sup>128</sup> See section 23 on *Examination procedure*.

<sup>129</sup> See footnote 1, Recast Article 32 (2) (c): "rules [...] which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that the third country is not safe in his/her particular circumstances [...]".

## **29. Safe Country of Origin**

UNHCR recommends that current formulation of recast Article 34 (1) (c) be modified to explicitly grant the applicant the possibility to rebut the presumption of safety and challenge the application of the safe country of origin concept. The new formulation could take as a model the wording of recast Article 32 (2) (c).

## **30. Subsequent applications**

UNHCR supports recast Article 35 (1) that, unlike the current APD, explicitly requires Member States to examine further representations or a subsequent application made by the applicant.

UNHCR notes that recast Article 35 (1) refers to the “competent authority”. In line with the objective of designating a single determining authority, UNHCR recommends to refer to “determining authority”.

UNHCR, in principle, agrees that subsequent applications could be subjected to a preliminary examination (at the admissibility stage) to examine whether new elements have arisen which would warrant examination of the substance of the claim. Such an approach would permit the quick identification of subsequent applications which do not meet these requirements. However, in UNHCR’s view, such a preliminary examination is justified only if the previous claim was considered fully on the merits.<sup>130</sup> Consequently, UNHCR considers that it is not appropriate to treat claims as subsequent applications if they are submitted following a “rejection” based on explicit withdrawal of an earlier claim. Recast Article 35 (2) (a) should therefore be deleted. National legislation should rather provide for the resumption or re-opening of the asylum procedure (see comment on recast Article 23 above). Similarly, claimants should be permitted to reopen the first asylum procedure in cases where an initial “rejection” was based on the “safe third country” concept or arrangements such as the Dublin II Regulation, if it subsequently emerges that the host State is nonetheless responsible for determining the claim on the merits, in line with recast Article 32 (4).

Recast Article 35 (6) provides that

*Member States may decide to further examine the application only if the applicant concerned was, through no fault of his/her own, incapable of asserting the situations ... in the previous procedure, in particular by exercising his/her right to an effective remedy.*

UNHCR stresses that the implementation of such a procedural bar may lead to a potential breach of the Member State’s *non-refoulement* and human rights obligations. Member States should not automatically refuse to examine a subsequent application on the ground that the new elements or findings could have been raised in the previous procedure or on appeal. Such a procedural bar may lead to a breach of

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<sup>130</sup> See footnote 3, UNHCR, *Improving Asylum Procedures*, page 72.

Member State's *non-refoulement* and human rights treaty obligations. Consequently, UNHCR recommends deleting of recast Art 35 (6).<sup>131</sup>

While UNHCR acknowledges that preliminary examinations under recast Article 36 shall be subject to the guarantees listed in recast Article 11 (1), it reiterates its view that preliminary examinations should, in principle, be subject to the minimum procedural standards of the Directive, outlined in particular in Chapter II. UNHCR further welcomes the fact that the Directive explicitly requires that the conditions outlined in recast Article 36 (2) should not render access to a new asylum procedure impossible, or severely curtail such access. In this regard, UNHCR notes that the obligation to indicate facts and evidence which would justify a new procedure, as required by recast Article 36 (2) (a), rests not only with the applicant but also on the examiner. UNHCR welcomes the deletion of the provision allowing the establishment of time limits for the applicant to submit new information. Applicants should further be given the opportunity to clarify any apparent inconsistencies or contradictions which could lead to a refusal to examine a claim on its merits, including in cases where recast Article 36 (2) (b) would apply.

#### **Subsequent applications**

- *UNHCR notes that recast Article 35 (1) refers to the “competent authority”. In line with the objective of a single determining authority, UNHCR recommends replacement of this reference with “determining authority”.*
- *In UNHCR’s view, it is not appropriate to treat claims as subsequent applications, if they are submitted following a “rejection” based on explicit withdrawal of an earlier claim. Recast Article 35(2) (a) should therefore be deleted.*
- *UNHCR recommends deleting recast Article 35 (6), which excessively limits the discretion of Member States to further examine subsequent applications.*
- *Applicants should further be given the opportunity to clarify any apparent inconsistencies or contradictions which could lead to a refusal to examine a claim on its merits, including in cases where recast Article 36 (2)(b) would apply to permit denial of an interview.*

### **31. Border Procedures**

In UNHCR’s view, there is no reason for requirements of due process of law in asylum cases submitted at borders to be less than for those submitted within the territory. UNHCR therefore supports recast Article 37 requiring Member States to adhere to the basic principles and guarantees of Chapter II in procedures undertaken at the border or in transit zones. However, UNHCR reiterates that an admissibility interview<sup>132</sup> should be carried out by the determining authority (see comment to recast Article 29), not by another undefined “competent authority” which may not necessarily have the qualifications to assess international protection needs, including the applicability of the safe third country or first country of origin concept.

UNHCR further notes that, according to Article 35 (4) APD, confinement of asylum seekers is possible for up to four weeks. UNHCR considers confinement at the border

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<sup>131</sup> *Ibid.* page 74.

<sup>132</sup> Recast Article 30, see footnote 1.

may be equivalent to detention, as has been acknowledged in certain circumstances in the jurisprudence of the ECtHR.<sup>133</sup> While UNHCR welcomes the introduction of a time limit, UNHCR recalls that asylum seekers should not, in principle, be detained. Where detention is used, it should at least meet the requirements outlined in the proposal of the Commission to recast the Reception Conditions Directive,<sup>134</sup> and in UNHCR's comments to the same.<sup>135</sup>

### **Border Procedures**

- UNHCR reiterates that the admissibility interview should be carried out by the determining authority (see comment to recast Article 29), not by a further, undefined "competent authority".
- Where detention is used, it should meet the requirements outlined in the proposal of the Commission to recast the Reception Conditions Directive and in UNHCR's comments to the same.

## **32. European Safe Third Country**

UNHCR is seriously concerned about the exceptions in recast Article 38 qualifying the safeguards defined in the Directive for application of the "safe third country" concept. No minimum principles and guarantees appear to apply to the procedure under recast Article 38, and access to the asylum procedure (and territory) may be denied altogether. Such a denial could be at variance with international refugee law. No category of applicant should be completely denied access to an examination procedure. Some form of assessment, at a minimum by way of an admissibility determination, must be provided for in order to ensure access for applicants for international protection to the rights conferred by the 1951 Convention and the Qualification Directive. In UNHCR's view, the mere existence of an asylum procedure in law is insufficient to ensure that a country which could be designated as a "European Safe Third Country" is able to deal fairly and efficiently with asylum applicants.

With the deletion of the provisions related to the common list of third countries to be regarded as safe<sup>136</sup> pursuant to the CJEU's 2008 judgment,<sup>137</sup> the application of the European Safe Third Country concept becomes even more problematic. As the recast Article 38 stands, the decision to refuse entry or remove the applicant can be taken by the "competent authority"<sup>138</sup> that may not necessarily have the qualifications to assess international protection needs. Concomitantly with the recent research on the Asylum Procedures Directive, UNHCR has investigated whether Member States make use of this provision and found that this provision is not used in any Member State. This

<sup>133</sup> *Amuur v. France*, 17/1995/523/609, Council of Europe: European Court of Human Rights, 25 June 1996, at: <http://www.unhcr.org/refworld/docid/3ae6b76710.html>.

<sup>134</sup> See footnote 19.

<sup>135</sup> UNHCR, *Comments on the European Commission's Proposal for a recast of the Directive laying down minimum standards for the reception of asylum-seekers (COM (2008)815 final of 3 December 2008)*, 13 March 2009, at: <http://www.unhcr.org/refworld/docid/49ba8a192.html>.

<sup>136</sup> Recast Article 38 (2) (c), 38 (3) and 38 (7), see footnote 1.

<sup>137</sup> *European Parliament v. Council of the European Union*, C-133/06, European Union: European Court of Justice, 6 May 2008, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0133:EN:HTML>.

<sup>138</sup> See section 5 on *The determining authority*.

leads UNHCR to conclude that the European Safe Third Country concept is superfluous and is of no practical use. UNHCR therefore strongly recommends the deletion or non-application of recast Article 38.<sup>139</sup>

### European Safe Third Country

*UNHCR recommends the deletion or non-application of recast Article 38.*

### 33. Withdrawal of international protection

With regard to recast Article 40 (4), UNHCR notes that the question of whether international protection status has ceased should always be determined in a procedure in which the person concerned has an opportunity to bring forward any considerations and reasons to refute the applicability of the cessation clauses. The burden of proof that the criteria of the cessation provisions have been fully met lies with the country of asylum. UNHCR further refers to its comment on Article 11 (1) (a) and (d) of the Qualification Directive.<sup>140</sup>

### 34. Right to an effective remedy

UNHCR strongly supports the modifications introduced by recast Article 41 aimed at bringing the APD in line with international and European human rights law as expressed, *inter alia*, in the case law of the CJEU and of the ECtHR.

EU law provides for the right to an effective remedy when rights guaranteed by EU law are affected. This is stipulated in Article 47 of the Charter.<sup>141</sup> The right to an effective remedy is also recognized in the case law of the CJEU<sup>142</sup> and ECtHR.

According to the ECtHR, the notion of an effective remedy in relation to an application for international protection requires the rigorous scrutiny of an arguable claim because of the irreversible nature of the harm that may occur in case of return to

<sup>139</sup> In the Explanatory Memorandum the Commission wrote “*The proposal further deletes the European safe third country notion*”, page 7, see footnote 1. At page 18 of the detailed explanation of the proposal, the Commission wrote: “*In order to ensure consistency with proposed amendments deleting the European safe third country [...] reference to old Article 36 [...] are deleted*”. European Union: European Commission, *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 (Recast) ANNEX*, 21 October 2009, COM(2009) 554 final, at: <http://register.consilium.europa.eu/pdf/en/09/st14/st14959-ad01.en09.pdf>.

<sup>140</sup> UNHCR, *Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (OJ L 304/12 of 30.9.2004)*, 28 January 2005, at: <http://www.unhcr.org/refworld/docid/4200d8354.html>.

<sup>141</sup> See Charter, footnote 67, Article 47: “*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article....*”

<sup>142</sup> See, *inter alia*, *Arcor AG & Co. KG*, C-55/06, European Union: European Court of Justice, 24 April 2008, para 174, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0055:EN:HTML>; See also footnote 66, *Yassin Abdullah Kadi and Al Barakaat International Foundation*.

torture, inhuman treatment or punishment.<sup>143</sup> The right to an effective remedy exists when the individual has an arguable claim.<sup>144</sup> In essence a claim is arguable if it is supported by demonstrable facts and is not manifestly lacking grounds in law. The remedy must be effective in practice as well as in law. It must take the form of a guarantee and not of a mere statement of intent or practical arrangement,<sup>145</sup> and it must have an automatic suspensive effect, in cases where a suspensive remedy is not otherwise available, for instance in the context of expulsion proceedings.<sup>146</sup>

UNHCR considers that, to be effective, the remedy must be assessed by an authority, court or tribunal, separate from and independent of the authority which made the initial decision, and a full review must be allowed.<sup>147</sup> The necessity of an examination at the time of appeal has also been expressed by the ECtHR.<sup>148</sup> In this framework, UNHCR supports recast Article 41 (3) introducing the requirement of a full examination of both facts and law, including an examination of the international protection needs at the time of the appeal decision.<sup>149</sup>

If the applicant is not recognized, s/he should be given a reasonable time to appeal<sup>150</sup> Short time limits for lodging an appeal may render a remedy ineffective in practice. The CJEU has held that: “*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*

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<sup>143</sup> See footnote 57, *Jabari v. Turkey*, para 50: “*In the Court’s opinion, given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised and the importance which it attaches to Article 3, the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned*”; *Chahal v. The United Kingdom*, Appl. No. 70/1995/576/662, Council of Europe: European Court of Human Rights, 15 November 1996, para 151, at: <http://www.unhcr.org/refworld/docid/3ae6b69920.html>.

<sup>144</sup> Kees Wouters, *International Legal Standards for the Protection from Refoulement, A Legal Analysis of the Prohibitions on Refoulement Contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture*, Intersentia, 2009, page. 331. See also footnote 111, UNHCR, *UNHCR Statement on the right to an effective remedy in relation to accelerated asylum procedures*.

<sup>145</sup> *Conka v. Belgium*, Appl. No. 51564/99, Council of Europe: European Court of Human Rights, 5 February 2002, para. 83, at: <http://www.unhcr.org/refworld/docid/3e71fdfb4.html>.

<sup>146</sup> *Gebremedhin [Gaberamadhien] v. France*, Appl. No. 25389/05, Council of Europe: European Court of Human Rights, 26 April 2007, at: <http://www.unhcr.org/refworld/docid/46441fa02.html>.

<sup>147</sup> UNHCR, *UNHCR Statement on the right to an effective remedy in relation to accelerated asylum procedures*, para. 21. See footnote 111.

<sup>148</sup> In *NA. v the UK*, the Court held that: “*A full and ex nunc assessment is called for as the situation in a country of destination may change in the course of time. Even though the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, 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*”. *NA. v. The United Kingdom*, Appl. No. 25904/07, Council of Europe: European Court of Human Rights, 17 July 2008, at: <http://www.unhcr.org/refworld/docid/487f578b2.html>.

<sup>149</sup> See footnote 1, Recast Article 41 (3).

<sup>150</sup> See footnote 34, UNHCR ExCom, Conclusion No. 8 (XXVIII), 1977, para. (vi) “*If the applicant is not recognized, he should be given a reasonable time to appeal [...]*”; See also footnote 24, UNHCR, *Handbook*, para. 192.



*Community law (principle of effectiveness)*”.<sup>151</sup> The appeals procedure must include sufficient procedural safeguards, including sufficient time to lodge the appeal.<sup>152</sup>

UNHCR’s recent research found that some of the time limits imposed by Member States may impede the right to an effective remedy. These include the 48 hour period for submitting appeals which apply to applicants in at least two Member States under specific procedures, operating at borders and in detention. In one of these states, this is exacerbated by the obligation to submit the appeal in the host state’s national language, with no translation assistance. Another state sets a 72-hour deadline for lodging appeals – which causes particular hardship for applicants who receive decisions on a Friday and must file by Monday, given that the deadline refers to calendar and not working hours.<sup>153</sup> It is against the above background that UNHCR welcomes recast Article 41 (4) requiring Member States to provide for reasonable-time limits for the applicant to introduce an appeal, and requiring that time limits must not render impossible or excessively difficult the access of applicants to an effective remedy.

Many refugees in Europe are recognized only following an appeals process. In some of the Member States surveyed by UNHCR’s recent study, around 20% of the total number of people granted international protection in 2007 initially received a negative decision, which was subsequently overturned at the appeal or review stage.<sup>154</sup> Given the potentially serious and irreversible consequences of an erroneous determination at first instance, the effectiveness of any remedy depends on its ability to prevent the execution of any expulsion order which would violate the principle of *non-refoulement*.

When the right to appeal has been exercised within the time limit, the appeal in general should have automatic suspensive effect and the expulsion order should not be enforceable until and unless a final negative decision has been taken on the asylum application. 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” (i.e., clearly fraudulent) or “manifestly unfounded” (i.e. not related to the criteria for the granting of refugee status) as defined in EXCOM Conclusion No. 30(XXXIV) 1983.<sup>155</sup> Additional exceptions could apply with respect to preliminary examinations in the case of subsequent applications, and where there is a formal arrangement between states on responsibility-sharing.<sup>156</sup> In such situations, in accordance with international law, the appellant nevertheless must have the right

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<sup>151</sup> *Unibet*, C-432-05, European Union: European Court of Justice, 13 March 2007, para. 43, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0432:EN:HTML>.

<sup>152</sup> UN Human Rights Committee (HRC), *Consideration of reports submitted by States parties under article 40 of the Covenant : International Covenant on Civil and Political Rights : concluding observations of the Human Rights Committee : France*, 31 July 2008, CCPR/C/FRA/CO/4, at: <http://www.unhcr.org/refworld/docid/48c50ebe2.html>, 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.

<sup>153</sup> See footnote 3, UNHCR, *Improving Asylum Procedure*, page 86.

<sup>154</sup> *Ibid.* page 88.

<sup>155</sup> See footnote 90, UNHCR, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*.

<sup>156</sup> UNHCR, *Provisional Comments*, page 52, see footnote 9.

and the effective opportunity to request a court or tribunal to grant suspensive effect. The principle of suspensive effect should otherwise be observed in all cases, regardless of whether a negative decision is taken in an admissibility procedure instituted for the application of the “safe third country” concept or in a substantive procedure.<sup>157</sup>

The ECtHR held that the “*notion of an effective remedy under Article 13 [ECHR] requires ... a remedy with automatic suspensive effect*”.<sup>158</sup>

In light of the above, UNHCR welcomes recast Article 41 (5) allowing the applicants to remain in the Member State concerned pending the outcome of the appeal. However, the recast proposal does not foresee automatic suspensive effect in cases of decision taken in accelerated procedure or of decisions to consider an application inadmissible on the basis of the fact that the applicant has lodged an identical application after a final decision.

#### **Right to an effective remedy**

- UNHCR supports recast Article 41 (3) introducing the requirement for a full examination of both facts and law, including an examination as of the time of the appeal of international protection needs.
- UNHCR welcomes recast Article 41 (4) requiring Member States to provide for reasonable time limits for the applicant to introduce an appeal and requiring that time limits must not render impossible or excessively difficult the access to of applicants to an effective remedy.
- UNHCR welcomes recast Article 41 (5) allowing applicants to remain in the Member State concerned pending the outcome of the appeal.
- UNHCR recommends clarification of the wording of recast Article 41 (6) as follows: “ In the case of a decision taken in the accelerated procedure pursuant to Article 27 (6) and of a decision to consider an application inadmissible pursuant to Article 29 (2) (d), **in these cases, if and where** the right to remain in the Member State pending the outcome of the remedy is not foreseen under national legislation, a court or tribunal shall have the power to rule whether or not the applicant may remain on the territory of the Member State, either upon request of the concerned applicant or acting on its own motion.”

UNHCR  
Bureau for Europe  
August 2010

<sup>157</sup> *Ibid.*

<sup>158</sup> See footnote 121, *inter alia*, *Abdolkhani and Karimnia v. Turkey*, para. 108; *Muminov v. Russia*, Appl. no. 42502/06, Council of Europe: European Court of Human Rights, 11 December 2008, para 101, at: <http://www.unhcr.org/refworld/docid/49413f202.html>.