COMPROMISING RIGHTS AND PROCEDURES

ICJ OBSERVATIONS ON THE 2011 RECAST PROPOSAL OF THE ASYLUM PROCEDURE DIRECTIVE

Introduction

1. In this paper, the International Commission of Jurists sets out its observations on the 1 June 2011 recast of the *Directive on common procedures for granting and withdrawing international protection status* (Asylum Procedure Directive - APD) under consideration by the European Parliament and the Council of the European Union[1]. The ICJ wishes to provide its views to the European Parliament and the Council on a number of outstanding issues regarding the conformity of the recast Directive with international refugee and human rights law.

2. The ICJ overall welcomes the proposal of the Commission which considerably improves the previous APD text, in particular, by equating the legal protection regime of beneficiaries of subsidiary protection with that of refugees, thereby putting an end to an unjustified difference of treatment. This paper focuses on issues of concern for compliance with the international law obligations of Member States, and makes recommendations for strengthening the human rights protection afforded by the Directive.

3. Among the many provisions of the new recast the ICJ is concerned at:
   - the weakening of legal aid and representation for asylum seekers as compared with the previous recast, and, in particular, the secondary role given to free legal assistance and representation in first instance procedures;
   - the maintenance of the concept of "safe country";
   - the exceptions to the right to remain in the country pending the asylum procedure;
   - the possibility to use Special Advocates;
   - the wide possibilities given to Member States to resort to accelerated and border procedures;
   - the geographical scope of the directive;
   - the exceptions to the role of primacy of the determining authority in asylum procedures; and
   - the maintenance of possibilities for communication and information to and with the asylum seeker other than in a language than he or she understands.

[1] *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*, European Commission, EU Doc. COM(2009) 551 final, Brussels, 21 October 2009.

4. The need for reform of the Asylum Procedures Directive has been highlighted by the judgment of the Grand Chamber of the European Court of Human Rights in *M.S.S. v. Belgium and Greece* ("the MSS case"). In that ruling, the Court held Belgium in breach of the prohibition of *non-refoulement* under Article 3 of the *European Convention on the Protection of Human Rights and Fundamental Freedoms* (ECHR) because "the Belgian authorities knew or ought to have known that [the asylum seeker] had no guarantee that his asylum application would be seriously examined by the Greek authorities".[2] The Court assessed the shortcomings of the Greek asylum system as follows: "insufficient information for asylum seekers about the procedures to be followed, difficult access to the Attica police headquarters, no reliable system of communication between the authorities and the asylum seekers, shortage of interpreters and lack of training of the staff responsible for conducting the individual interviews, lack of legal aid effectively depriving the asylum seekers of legal counsel, and excessively lengthy delays in receiving a decision. These shortcomings affect asylum seekers arriving in Greece for the first time as well as those sent back there in application of the Dublin Regulation."[3] It has also found violations as a result of the lack of effective automatic suspension of deportations in case of judicial review and lack of access free legal assistance and representation.[4]

5. This case demonstrates that a Common European Asylum System centred on mutual recognition of asylum systems, to be effective, must be based on a real equivalency of rights and guarantees in asylum procedures and reception conditions. In its absence, Member States will have to have recourse to internal procedures under the Dublin sovereignty clause to conduct a strict and thorough assessment of the principle of *non-refoulement* when they transfer an asylum seeker to another Member State.[5] The discretion left to the State on restriction of rights and guarantees in asylum procedures must therefore be sufficiently limited such that it does not risk violations of the principle of *non-refoulement*. Weakening guarantees provided for by the previous recast is likely to be counter-productive, as well as risking breaches of international law obligations. The claimed need to respect national systems cannot justify dilution of protection of fundamental human rights, which are central to the EU legal system under Articles 2 and 6 TEU.

Relevant human rights standards: the right to an effective remedy and the right to a fair trial

6. The right to an effective remedy and to a fair trial is contained in Article 47 of the *Charter of Fundamental Rights of the European Union* (EU Charter), according to which "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. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice". This cluster of rights is not a creation of the Charter but a restatement of the right to effective judicial protection. The Court of Justice of the European Union has repeatedly affirmed in its jurisprudence that the right is "a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms".[6]

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[2] *M.S.S. v. Belgium and Greece*, ECtHR, GC, Application No. 30696/09, Judgment of 21 January 2011, para. 358.
[3] *M.S.S. v. Belgium and Greece*, ECtHR, *op. cit.* fn. 2, para. 301.
[4] *M.S.S. v. Belgium and Greece*, ECtHR, *op. cit.* fn. 2, paras. 317-319.
[5] See, *M.S.S. v. Belgium and Greece*, ECtHR, *op. cit.* fn. 2, para. 359.
[6] See, *inter alia, Kadi and Al Barakaat v Council and Commission*, CJEU, 3 September 2008, joined cases C-402/05 P and C-415/05 P, paras. 335-337; *Violetti and Others and Schmit v Commission*, cases F-5/05 and F-7/05, Civil Service Tribunal, 28 April 2009, para 73; *Atxalandabaso v Parliament*, Court (First Chamber), 19 February 2009, paras 41-42; *max.mobil Tel.v Commission*, Court of First Instance, 30 January 2002, case T-54/99, para. 57; *DEB v Deutschland*, Court (Second Chamber), 22 December 2010, case C-279/09, paras. 29-31; *Unectef v Heylens and others*, Court, 15 October 1987, case 222/86, para 14; *Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, CJEU, 28 July 2011, Case C-69/10, para. 49.

7. In international human rights law, the right to an effective remedy is widely recognised under general principles of law and by major human rights treaties.[7] The remedy's purpose is to "enforce the substance of the [human rights treaty] rights and freedoms in whatever form they might happen to be secured in the domestic legal order".[8] International human rights bodies agree that the remedy must be prompt, effective, accessible, impartial and independent, must be enforceable, and lead to cessation of or reparation for the human rights violation concerned.[9] In certain cases, the remedy must be provided by a judicial body,[10] but, even if it is not, it must fulfil the requirements of effectiveness and independence, set out above. The remedy must be effective in practice as well as in law, and must not be unjustifiably hindered by the acts of State authorities.[11]

8. Article 47 of the EU Charter explicitly provides that the right to an effective remedy must be satisfied by a judicial body (tribunal), and that the guarantees of a fair trial and legal aid apply in all cases in which "rights and freedoms guaranteed by the law of the Union are violated". The provision is wider in scope than its equivalents in Article 6 ECHR, which addresses fair trial rights in relation to "civil rights and obligation or criminal charges". Since most of the competences of the European Union involve administrative law matters rather than civil rights and obligations or criminal law, and in light of Article 52(3) of the Charter, the ICJ understands that fair trial rights under Article 47 apply generally to administrative procedures, such as asylum procedures.

9. The right to due process and sound administration in administrative proceedings is enshrined in Article 41 of the EU Charter. Although this right is deemed to apply only in relation to institutions, bodies, offices and agencies of the Union, the jurisprudence of the now Court of Justice of the European Union (CJEU) has maintained consistently this as "one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States".[12] Article 6.3 of the *Treaty on the European Union* (TEU) provides that "fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".[13]

10. In light of Article 6.3 TEU and of the EU jurisprudence, the ICJ considers that the right to a sound administration based on due process is a right that must be respected in the formulation, drafting and implementation of EU law by Member States.

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[7] Article 8 UDHR, Article 2.3 ICCPR, Article 13 ECHR. See further, *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by the Commission on Human Rights, Resolution E/CN.4/RES/2005/35 of 19 April 2005 and by the General Assembly Resolution A/RES/60/147 of 16 December 2005 by consensus. A thorough analysis of the right to a remedy is to be found in International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations – A Practitioners' Guide*, Geneva, December 2006 (ICJ Practitioners' Guide No. 2).

[8] *Al-Nashif v. Bulgaria*, ECtHR, Application No. 50963/99, Judgment of 20 June 2002, para. 132. See also, *Omkarananada and the Divine Light Zentrum v. Switzerland*, ECommHR, Application No. 8118/77, Admissibility decision, 19 March 1981, p. 118, para. 9.

[9] See, generally, ICJ, *Practitioners' Guide No. 2*, *op. cit.*, fn. 7, pp. 46-54.

[10] ICJ, *Practitioners' Guide No. 2*, *op. cit.*, fn. 7, pp. 49-54.

[11] *Muminov v. Russia*, ECtHR, Application No. 42502/06, Judgment of 11 December 2008, para. 100; *Isakov v. Russia*, ECtHR, Application No. 14049/08, Judgment of 8 July 2010, para. 136; *Yuldashev v. Russia*, ECtHR, Application No. 1248/09, 8 July 2010, para. 110-111; *Garayev v. Azerbaijan*, ECtHR, Application No. 53688/08, Judgment of 10 June 2010, paras. 82 and 84.

[12] *max.mobil Tel.v Commission*, Court of First Instance, 30 January 2002, case T-54/99, para. 48; *Technische Glaswerke Illmenau GmbH v Commission*, Order of the President of the Court of First Instance on application for interim measures, Admissibility, 4 April 2002, Case T-198/01 R, para. 85.

[13] Emphasis added.

Analysis of recast provisions

Scope of the Directive and Jurisdiction under international law (Article 3)

11. Recital 21 and paragraphs 2 and 3 of Article 3 (Scope) limit the scope of the Directive to territory, border, territorial waters and transit zones. This does not cover all situations comprised in the definition of jurisdiction under international human rights law. Consequently, there are situations where the right of asylum (Article 18 EU Charter), the prohibition of *non-refoulement*, and other human rights cannot be guaranteed or risk being undermined, such as in the case of interception or rescue in international waters.

12. Under international human rights law, and particularly the ECHR, "jurisdiction" applies to all persons who fall under the authority or the effective control of the State's authorities or of other people acting on its behalf, and to all extraterritorial zones, whether of a foreign State or not, where the State exercises effective control[14] This has been recently confirmed in the landmark case *Al-Skeini and others v. UK*, where the European Court of Human Rights also provided a restatement of its jurisprudence on jurisdiction.[15] A State may have obligations to respect and protect the rights of persons who have not entered the territory, but who have otherwise entered areas under the authority and control of the State, or who have been subject to extra-territorial action (such as detention) by a State agent who has placed them under the control of that State. Of particular relevance for migrants is the fact that the State's jurisdiction may extend in certain situations to international waters. The European Court of Human Rights has clearly stated that measures of interception of boats, including on the high seas, attract the jurisdiction of the State implementing the interception. From the moment of effective control of the boat, all the persons on it fall within the jurisdiction of the intercepting State, which must secure and protect their human rights.[16] The same principles apply in the context of operations of rescue at sea.

13. **The ICJ recommends extending the scope of the Directive to all situations where the Member State has effective authority or control over the asylum seeker, including in international waters**.

Determining authority (Article 4)

14. Article 4 assigns the competence for the decision on international protection status to a determining authority which has competent personnel trained in relevant procedures, international human rights and the asylum *acquis* of the Union. However, Article 4 leaves to Member States the possibility to assign the decisional power to other authorities in cases of application of the Dublin Regulation and in border procedures, during which the other authority can take decisions as to permission to enter onto the national territory, although the decision must be made on the basis of an opinion by the determining authority. For these other authorities the training obligation is less stringent, as it requires only that they "have the appropriate knowledge or receive the necessary training to fulfil their obligations when implementing this Directive".

15. The ICJ is concerned at the extension of the power to administer asylum procedures to other authorities including at the border in procedures of entry to the territory, and at the possibility that Dublin procedures may be assigned to an authority other then the determining authority. Dublin procedures, if properly applied in light of the Regulation's "sovereignty clause", may require assessment of the merits of the case. It is even more problematic that decisions on entry at the border might be given to another authority, which may lack the necessary expert knowledge, as such decisions also have

[14] See, for extensive reference to this established jurisprudence: International Commission of Jurists, *Migration and International Human Rights Law, Practitioner Guide No. 6*, Geneva, 2011, pp. 43-45 and fn. 46 (ICJ Practitioners Guide No. 6).
[15] *Al-Skeini and others v. United Kingdom*, ECtHR, GC, Application No. 55721/07, 7 July 2011, para. 137.
[16] See, *Medvedyev and Others v. France*, ECtHR, GC, Application No. 3394/03, Judgment of 29 March 2010, paras. 62-67.

important consequences for respect of the principle of *non-refoulement*. Under the draft Directive, decisions on entry at the border must be based on "an opinion of the determining authority" (Article 4.2.b). However, if the determining authority is not in charge of the procedure, including personal interviews, it is difficult to see how it will be in a position to ensure that proper consideration will be given to issues of *non-refoulement*, in light of the fact that the "other" authorities' training may be less extensive or rigorous than that accorded to officials of the determining authority.

16. **The ICJ recommends deleting paragraphs 2 and 3 of Article 4**. However, if the Parliament and the Council decide to retain the present text, **the ICJ strongly recommends the deletion of the term "where relevant" in paragraph 3, which qualifies the obligation to provide follow-up training of the determining authority's personnel**. Since international law is evolving, it is always relevant and necessary for these persons to have follow-up trainings. Finally, **the ICJ urges modification of paragraph 4 to assure that the personnel of the authority other than the determining authority ("other authority") receives the same training as the determining authority**.

Access to the procedure and registration (Article 6)

17. The UNHCR Executive Committee (Excom) has acknowledged "the importance of registration as a tool of protection, including protection against refoulement, protection against forcible recruitment, protection of access to basic rights, family reunification of refugees and identification of those in need of special assistance, and as a means to enable the quantification and assessment of needs and to implement appropriate durable solutions"[17] and has underlined the "importance of early and effective registration systems and censuses as a tool of protection and as a means to enable the quantification and assessment of needs for the provision and distribution of humanitarian assistance and to implement appropriate durable solutions".[18] The conclusions and guidance of the UNHCR Excom are based upon international law and standards, including the *UN Refugee Convention*, to which EU Member States are party. Article 6.3 of the recast Directive considers only EASO guidelines to be a reference for States on registration of asylum seekers. **In light of the importance of the UNHCR Guidelines and of the UNHCR role under Article 35 of the Geneva Convention 1951, the ICJ recommends inserting an obligation to consider these together with EASO guidelines**.

18. The ICJ also opposes the exception of Article 6.4 which extends the time limit for registration of asylum-seekers from 72 hours to 7 days when a "large number of third country nationals or stateless persons simultaneously request international protection".

19. Article 6.4 seems to devise a new regime of exception as between singular requests and massive arrivals, which are not part of massive influx under the Temporary Protection Directive which already regulates situations of emergency. The ICJ finds the provision unclear. It does not give a definition of "large arrivals" which gives space to arbitrary conduct by the authorities, as even 50 people incoming might be considered a "large arrival". The provision therefore effectively leaves a wide discretionary margin to the authorities to define these circumstances. This would not abide to the principle of prescription by law. **The ICJ recommends the deletion of paragraph 4 of Article 6.**

[17] UNHCR ExCom Conclusion No. 91 (LII) – 2001 – Registration of Refugees and Asylum-seekers, para. (a).
[18] UNHCR ExCom Conclusion No. 95 (LIV) – 2003, para. (S); No. 99 (LV) – 2004, para. (F); No. 102 (LVI) – 2005, para. (v).

Information and counselling (Article 8)

20. The ICJ recommends that, for coherence with paragraph 1, which provides for information to be available in detention centres, **paragraph 2 should include the obligation for Member States to ensure that organisations providing advice and counselling to applicants also have access to detention facilities**, as provided for in the 2009 recast.

21. As for agreement with authorities, **paragraph 2 should add that in case of such agreements, refusal of authorisation to access these places is temporary and given only where such restriction is strictly necessary to meet a compelling security purpose. No wide discretion should be allowed which results in hindering a proper assistance to asylum seekers.**

Extradition, surrender and *non-refoulement* (Article 9)

22. The principle of *non-refoulement* in international human rights law and in international refugee law is of paramount importance, and the right to remain on the territory pending a final decision (which includes appeal stages) on an international protection application is fundamental in order to respect the right in relation to *non-refoulement*. Furthermore, the international human rights law principle of *non-refoulement* is of absolute nature and does not tolerate any exceptions. In light of this, Article 9 protects the right to remain pending a first-instance asylum procedure, while Article 46.5-6 contemplates the same right for most of appeals.

23. However, Article 9.2 establishes an exception from the right to remain in the Member State pending application for "subsequent applicants" and in cases of surrender or extradition of the applicant. Article 9.3 subjects this exception to respect for the prohibition of direct or indirect *refoulement*. However, this safety clause is applicable only to extradition, apparently leaving out all other cases of transfer. If interpreted restrictively, the principle of *non-refoulement* may be left unprotected. **The ICJ recommends that Article 9.3 be amended to cover all situations contemplated by Article 9.2.**

Requirements for the examination of applications (Article 10)

24. Article 10 sets out requirements for the examination of applications. The ICJ generally welcomes the provisions of the Article and the inclusion of the possibility to call for expert advice during the examination including on issues of religion. However, the ICJ would recommend some modification to these requirements.

25. Article 10.3.b. provides that up-to-date and precise information must be taken from EASO and UNHCR. **The ICJ supports the amendment by the European Parliament of April 2011 aimed at also including information from "international human rights organisations".** This would mirror the practice of the European Court of Human Rights, which regularly takes such material into consideration when assessing a case of *non-refoulement*, and would enhance the effectiveness of the process, given that such organisations often provide invaluable information.[19]

26. Furthermore, Article 10.3.d provides that "the personnel examining the applications and taking decisions are instructed and have the possibility to seek advice, whenever necessary, from experts on particular issues, such as medical, cultural, religious, child-related or gender issues". **The ICJ recommends that "sexual orientation" be added to this list,** in accordance with the recommendation of the European Parliament of April 2011, and in light of the particularities inherent in asylum

[19] See, ICJ Practitioners Guide no. 6, pp. 103-104.

applications involving persecution on grounds of sexual orientation**. The ICJ also proposes adding "legal issues" to the list,** to allow for expert legal advice whenever the determining authority needs have specific clarifications on developments of international or national law.

Basis for Decisions (Article 11)

27. Article 11 stipulates that decisions on applications for international protection must be in writing and, if negative, must explain the reasons for rejection in fact and in law and include information on how to challenge the decisions. The ICJ welcomes this Article, but regrets that the recast maintained the exception of Article 11.2, second indent, according to which "Member States need not provide information on how to challenge a negative decision in writing in conjunction with a decision where the applicant has been provided with this information at an earlier stage either in writing or by electronic means accessible to the applicant". This exception is unnecessary. There is no significant gain in time or costs of the procedure in its application, as the means of appeal can be included in the decision in standardised form and do not require time for drafting. It also risks undermining the applicant's right to an effective remedy, and effective protection of *non-refoulement*. **The ICJ recommends that this provision be deleted.**

Procedural guarantees (Article 12)

28. Article 12 provides basic guarantees for applicants for international protection. In particular, it gives content to the right to be informed of the procedure, rights and obligations, and the consequences of different actions on the procedure (point (a)); of the right to have an interpreter when necessary (b); of communicating with the UNHCR or other relevant organisations (c); of access to information (d); and of being informed of the determining authority's decision (e and f).

29. The ICJ welcomes these guarantees. However, it notes that the right to be informed of the procedure, rights, obligations and time-frame (point (a)) and the right to be informed of the result of the determining authority's decision and of the available remedies (point (f)) are to be provided in a language the applicants "understand or are reasonably supposed to understand".

30. The ICJ believes that the requirement that information be given in a language that the applicant is "reasonably supposed to understand", as opposed to one that he or she actually understands, runs counter to the principle of international human rights law that rights must be protected in a way that is real and effective. In the recent European Court of Human Rights case of *Rahimi v. Greece*, where an unaccompanied child was given an information sheet in Arabic when all he spoke was Farsi, the Court found a violation of the child's right to *habeas corpus* and an effective remedy (Articles 5.4 and 13 ECHR) because of this lack of information. As the Strasbourg Court has highlighted in *M.S.S. v. Belgium and Greece* "the lack of access to information concerning the procedures to be followed is clearly a major obstacle in accessing those procedures".[20] **Article 12 should be amended to omit references to a language that the applicant may be reasonably supposed to understand, and Recital 20 should be amended accordingly.**

31. Finally, the new recast paragraph (d) locates within Article 12 the right to access the information the determining authorities takes into consideration in relation to country of origin situations, from EASO and UNHCR. In order to guarantee, consistent with the right to an effective remedy and due process, the applicant an opportunity to properly challenge the information upon which the authorities are to take a decision, **applicants should also have access to the expert information on particular situations of Article 10.3.d.**

[20] *M.S.S. v. Belgium and Greece*, ECtHR, *op. cit.* fn. 2, para. 304

Obligations upon the applicant (Article 13)

32. The ICJ generally accepts the obligations that Article 13 imposes upon applicants, if strictly construed. However, in order to guarantee that such obligations be implemented in accordance with such strict reading at national level, the ICJ suggests some modifications.

33. Paragraph 1 inserts an obligation of cooperation upon the applicant. While an applicant certainly should cooperate with the authorities in the determination of his or her asylum application, the lack of such cooperation, in particular when the applicant is not situated to satisfy the requirements imposed by the authorities, should not lead automatically to a rejection of his or her application for international protection. This, in particular, when considered that what is at stake is the respect of the principle of *non-refoulement*. UNHCR guidance further states that cases should be decided on the merits: failure to comply with formal requirements of the procedure should not in itself lead to an asylum request being excluded from consideration.[21] **The ICJ therefore recommends the addition at the end of paragraph 1 of the following sentence: "The lack of respect or non compliance with these obligations should not prejudice the decision on the outcome of the international protection application procedure".**

34. Paragraph 2.b. requires the handing over of documents to the authorities. In order to avoid situations in which the asylum seeker is without documents, which might limit his or her freedom of movement and access to other rights, **the ICJ understands that this requirement should not be asked of the applicant before he or she receives a document confirming his or her registration and status of asylum-seeker. The paragraph should make mention of this and refer to Article 7.**

35. Paragraph 2.c requires asylum seekers to inform authorities of their places of residence or address and to communicate relevant changes. An overly strict interpretation of this requirement might create problems of accessing the procedure for asylum seekers who are homeless. While these situations should be avoided in light of the Reception Directive, the reality and experience of the last year have demonstrated that situations of homelessness do exist.[22] **A specification should be made that "When an applicant does not have a specific place of residence or proper address, he or she can elect as place of residence for the purpose of corresponding with the authorities for the asylum application, either the address of a legal counsel or organisation assisting him or her, or the office a municipality or post office that he or she elects and where he or she will have access to the communication at any time."**

Personal Interview (Articles 14, 15 and 16)

36. Article 14.1 requires that the personal interview be conducted by a "person competent under national law", but also specifies that "interviews <u>on the substance</u> of the application for international protection shall be conducted by the personnel of the determining authority".[23] Article 14.1 suggests that the admissibility interview may not be conducted by the determining authority. Respect for the principle of *non-refoulement* is at stake in admissibility decisions, since they might lead to the applicant's expulsion. It is therefore important that the admissibility personal interview involve the personnel of the determining authority. **The ICJ therefore recommends deleting the reference to "competent authority" and substituting it with "determining authority".**

37. Part two of Article 14.1 provides that, in case of large-scale arrivals, the interview may be conducted by other authorities that have received the same training as the determining authority. The ICJ generally

[21] *Conclusion No. 15 (XXX) Refugees Without an Asylum Country*, ExCom, UNHCR, 30th Session, 1979, para. (i).
[22] See, *M.S.S. v. Belgium and Greece*, ECtHR, *op. cit.* fn. 2, paras. 257 and 260.
[23] Emphasis added.

opposes exceptions for mass arrivals as outlined in paragraph 7. However, if this option is maintained, the ICJ would underscore that, consistent with the principle of *non-refoulement*, **the article should provide that at least one person of the determining authority must be involved, or that the decision of these other authorities be revised by the determining authority with the possibility of recalling the applicant for an interview before it if needed.**

38. At the end of Article 14.1 the Directive provides that "Member States may determine in national legislation the cases in which a minor shall be given the opportunity of a personal interview". While this provision is welcome, the ICJ considers that it leaves too much discretion to States. The ICJ recalls that "the best interest of the child" is a principle of paramount importance in international human rights law as enshrined in Article 3 of the *Convention on the Rights to the Child*, to which all EU States are party. The Committee on the Rights of the Child, the supervisory authority for the Convention, has stressed that "it is urgent to fully implement [the] right [of children] to express their views on all aspects of the immigration and asylum proceedings."[24] The importance of this principle is also recognised in the Directive's preamble. **In light of this, the ICJ believes it is necessary to add at the end of this sentence "in light of the best interest of the child" to limit the discretion of States in determining such rules.**

39. Article 15 provides that "whenever possible" the interview of the applicant be conducted by a person of the same sex and that the interpreter present be of the same sex "if the applicant so requests". The *UNHCR Guidelines on Gender-Related Persecution* establish that "[c]laimants should be informed of the choice to have interviewers and interpreters of the same sex as themselves, and they should be provided **automatically** for women claimants."[25] Without automatic provision of same-sex interviewers and interpreters, and without all claimants being informed of the possibility, effective assessment of such claims may not be possible. **The ICJ recommends that the words "whenever possible" and " if the applicant so requests" be deleted from Article 15.3.b. and Article 15.3.c.**

40. Article 17 provides for the report and recording of the personal interview. This is important as it will often form the main basis for a decision on international protection. Paragraph 3 provides that the applicant has a chance to comment on the report and clarify errors, misconceptions or mistranslations and that he or she has to approve the content of the report. No formal requirement for this is contemplated. **The ICJ recommends that such approval be done in writing or in any other suitable way to ensure that the applicant properly and voluntarily has approved the content of the report.**

41. In light of the importance of the reporting and recording of the personal interview, the ICJ regrets that the new 2011 recast proposal has eliminated the requirement of transcripts. While the possibility to record the interview might in certain cases substitute the requirement for transcripts, this is presented as an option for States and not as an obligation. It is also not clear what a "thorough report" might mean and what should be its content. Such a general concept might give rise to abuses. **The ICJ would recommend returning to the previous obligation of transcripts for personal interview, with the possibility of audio-recording.**

Medical examination (Article 18)

42. Article 18 establishes the right for the applicant to have a medical examination carried out in support of his or her statement of "past persecution or serious harm", and allows the determining authority to order such examination, with the consent of the applicant (paragraphs 1 and 2).

[24] CRC, *General Comment no. 12: The Right of the Child to Be Heard*, UN Doc. CRC/C/GC/12, 20 July 2009, paras. 123-124.
[25] UNHCR Guidelines on Gender-Related Persecution, paragraph 36(iii) (emphasis added).

43. Paragraph 3 rightly points out the obligation for States to "provide for relevant arrangements to ensure that impartial and qualified medical expertise is made available for the purpose of medical examination referred to in paragraph 2", which is that at the initiative of the determining authority. The ICJ holds that the requirement of having access to impartial and qualified medical expertise is crucial to demonstrating a person's situation of past persecution or serious harm. Article 18 does not, however, provide that such assistance (both in the cases of paragraph 1 and 2) shall be free of charge. Asylum seekers will typically be incapable of affording to pay for medical expertise, and organisations assisting them will not have always the financial and material capacity to assist. **The ICJ therefore recommends that Article 18 include a further provision to the effect that: "The costs for medical examinations referred to in paragraphs 1 and 2 shall not be borne by the applicant".**

44. Finally, paragraphs 4 and 5 say that Member States shall provide further rules and arrangements for identification and documentation of symptoms of torture, or of other medical problems. Paragraph 5 obliges States to give training to those in charge of personal interviews on recognition of such symptoms. Reference to the principles of the Istanbul Protocol on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment is inappropriately omitted here, although it is mentioned in Recital 24. **The ICJ recommends inserting direct references to this important instrument in both paragraphs 4 and 5.** Finally, paragraph 4 and 5 do not contemplate the detection of symptoms of "cruel, inhuman or degrading treatment", even though this is part of the "serious harm" under the Qualification Directive and the international law principle of *non-refoulement*. **The ICJ recommends inserting reference to it in both paragraphs.**

Legal information, assistance and representation (Articles 19, 20, 21, 22 and 23)

45. The ICJ is particularly concerned at the weakening of guarantees to free legal assistance and representation in the new recast proposal. The combination of these provisions suggests that, in first instance, free legal information is privileged over free legal aid. The ICJ believes that free legal assistance in an asylum procedure cannot be replaced by the mere provision of legal and procedural information to the applicant, who will not have the necessary expertise in law or in asylum procedures to use the information effectively, also in light of Article 47.3 of the EU Charter.

46. Article 19 requires States to **ensure** "that legal and procedural information is provided free of charge to applicants, on request, in procedures of first instance".[26] There is a minimum of information to be given which "shall include, at least, the provision of information on the procedure in the light of the applicant's particular circumstances and explanations of reasons in fact and in law in the event of a negative decision". The ICJ considers that, at a minimum, Article 19 should not allow legal and procedural information to be provided to the applicant **on request** only, as it is highly likely that the applicant will not understand or make use of such a right. This information should be provided automatically. **The ICJ therefore recommends deleting the expression "on request".** Furthermore, nothing in the draft Directive explains how this information should be conveyed. Given the language difficulties which many applicants are likely to face in understanding such information, **the ICJ recommends that Article 19 should stipulate that such legal and procedural information shall be provided in a language the applicant understands and in a form that is accessible to the layperson.**

47. Under Article 20, free legal assistance and representation must be made available in appeals procedures only, not at the initial decision-making stage. According to this provision, free legal assistance and representation is granted **on request** only during the appeals procedure and it may be limited to "the preparation of the required procedural documents and participation in the hearing before the court or tribunal of first instance on behalf of the applicant" (paragraph 1). Under Article 20

[26] Emphasis added.

paragraph 2, granting legal representation for the first instance procedure is optional for the Member States. Furthermore, if such assistance and/or representation is granted, the right to receive legal and procedural information is denied (paragraph 2).

48. The ICJ finds the content of Article 20 highly problematic. Limiting free legal assistance and representation to the appeal stage is at odds with international human rights law. The Human Rights Committee has recommended that, in accordance with Article 13 of the *International Covenant on Civil and Political Rights* (ICCPR), States should grant "free legal assistance to asylum-seekers during all asylum procedures, whether ordinary or extraordinary".[27] It has also affirmed that States should "ensure that all asylum-seekers have access to counsel, legal aid and an interpreter".[28] **The ICJ therefore strongly recommends extending free legal assistance to the first instance stage.**

49. The ICJ is especially concerned by the specification of the Commission that free legal assistance and representation "is limited to first-tier appeal procedures [and that i]n further instances Member States are not bound by this Directive to provide any free legal assistance and representation".[29] It is even more compelling for asylum seeker to have free legal assistance and representation before the highest judicial authorities of the State. This may also contribute to better legal clarity and reduce the number of appeals. **The ICJ recommends that the directive specify that legal assistance and representation are contemplated for all the appeal procedures.**

50. The ICJ also opposes the limitation of granting free legal assistance and representation only **on request.** It is highly likely that the applicant will not understand or make use of such right, since he or she will not be an expert on asylum procedures. **The ICJ therefore recommends deleting the expression "on request". Furthermore, legal assistance and representation should not be limited to "the preparation of the required procedural documents and participation in the hearing before the court or tribunal of first instance on behalf of the applicant", as it is fundamental that assistance and representation are given at all stages of the procedure**.

51. Article 21 sets out conditions which states may impose on the granting of free legal and procedural information (under Article 19) and legal assistance and representation (Article 20). Under paragraph (b) of Article 21.2, States may limit provision of legal information, assistance and representation to designated legal practitioners or counsellors. The right to effective legal representation and assistance requires that the lawyer representing and assisting the refugee be qualified and independent, requirements which are not contained in point (b). The *UN Basic Principles on the Role of Lawyers* require that "adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent profession".[30] In light of this, **the ICJ recommends adding the requirement of "qualified" and "independent" in point (b).**

Access to information and national security exceptions (Article 23)

52. Paragraph 1 of Article 23 allows for an exception to the right to access the applicant's file "where disclosure of information or sources would jeopardise national security, the security of the organisations or person(s) providing the information or the security of the person(s) to whom the information relates or where the investigative interests relating to the examination of applications of for international

[27] *Concluding Observations on Switzerland*, CCPR, UN Doc. CCPR/C/CHE/CO/3, 29 October 2009, para. 18; *Concluding Observations on Ireland*, CCPR, UN Doc. CCPR/C/IRL/CO/3, 30 July 2008, para. 19.
[28] *Concluding Observations on Japan*, CCPR, UN Doc. CCPR/C/JPN/CO/5, 18 December 2008, para. 25.
[29] *Detailed Explanation of the Amended Proposal*, European Commission, EU Doc. COM(2001) 319 final ANNEX, 1 June 2011, Article 20, p. 8.
[30] Principle 16.

protection by the competent authorities of the Member States or the international relations of the Member States would be compromised." In an attempt to address the infringement of the principle of equality of arms which this entails, Article 23.1 provides for the institution of Special Advocates, who would be allowed to view the file, and ensures that access be available to the courts and tribunal responsible for the appeals stage. The ICJ notes that the institution of Special Advocates has, in other contexts, proved problematic and not always sufficient to remedy deficiencies in fair procedures caused by withholding evidence on security grounds. The Grand Chamber of the European Court of Human Rights has ruled in the case *A. and Others v UK* that the Special Advocates, though useful in certain circumstances involving national security sensitive information, could not perform properly their function unless their clients were provided sufficient information to give them effective instructions.[31] The ICJ Eminent Jurists Panel, after a three year intensive examination of counter-terrorism legislation and its impact on the rule of law and human rights, concluded that this is "a system which has dangers for the rule of law and, in a different setting, may prove to be no more than a façade of justice to what is an inherently unfair procedure".[32]

53. Based on the principles on the right to an effective remedy, the right to a fair trial, and the right to sound administration based on due process outlined in the introduction, the ICJ considers that this part of Article 23, as currently formulated, is not in line with the EU and Member States' human rights obligations. Exceptions to the right of access to the file in an asylum proceeding may be provided for only in situations of genuine and compelling threats national security or public order, consistent with the principles of proportionality and necessity. The list of reasons provided under this Article is too wide and extends unjustifiably the scope of this exception. Secondly, even in these narrow cases, the asylum seeker must be provided with at least a summary of the basic reasons contained in the file in order to be able to instruct his or her legal representative. **The ICJ recommends the deletion of this paragraph.**

Unaccompanied Minors (Article 25)

54. Article 25.1.b regulates the presence of persons other than the unaccompanied minor at the personal interview. Those whose presence must be ensured are "a representative and/or a legal adviser or their counsellor". The directive seems to give States the discretion to decide whether to allow the presence of the minor's representative, or the legal representative. The ICJ believes that the presence of both representatives may be necessary at the personal interview to safeguard the rights of the unaccompanied minor, understanding that an exception might be provided when the two persons are identical, but this is not the reading of the provision. **The ICJ therefore, recommends the deletion of the word "or".**

55. The ICJ regrets that the new recast has eliminated the unaccompanied child's right to legal assistance and limited it to the free legal information of Article 19. The ICJ recalls that the Committee on the Rights of the Child has clearly stated that "[t]he unaccompanied or separated child should also, in all cases, be given access, free of charge, to a qualified legal representative".[33] This encompasses all levels of procedure and is an obligation of States under the *Convention on the Rights of the Child* (CRC). Mere legal information is insufficient to satisfy this requirement. **The Directive should therefore provide that the unaccompanied child must be granted free legal assistance and representation throughout the whole asylum procedure and appeals.**

[31] *A. and Others v UK*, ECtHR, Para 220. This case was already applied by the General Court in Kadi (Sept. 2010) http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62009TJ0085

[32] *Assessing Damage, Urging Action*, Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, Geneva, 2009, p. 99.

[33] CRC, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside of Their Country of Origin*, UN Doc. CRC/GC/2005/6, 1 September 2005, para 69

56. Article 25.2 makes an exception to the appointment of a representative when the "unaccompanied minor will in all likelihood reach the age of 18 years before a decision at first instance is taken". This requirement is contrary to the CRC. Before 18 years, an individual enjoys the protections of rights of the child contained in the CRC without derogation or exception. The Committee on the Right of the Child has also specified that "States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the territory and/or jurisdiction of the State, in compliance with the Convention and other international obligations."[34] **The ICJ therefore recommends the deletion of this provision.**

Withdrawal of an application (Article 27)

57. Article 27 provides that, when a Member State allows for the explicit withdrawal of an application, the determining authority shall take a decision either to discontinue or reject the application. Since there might be many reasons why an asylum seeker may want to withdraw the application which are not related to the substance of the asylum application, and that that asylum seeker may later apply again for international protection, **the ICJ suggests deleting reference to rejection of the application, which should be reserved only for fully-fledged examined application**. This will preserve the right of the applicant to apply for asylum without beginning a new procedure (see, paragraphs 84-88), and, from the point of view of the authorities, will allow for more efficient procedures, requiring them only to restart the previous procedure from the point where it had been discontinued.

First-instance procedure

58. Article 31.3 provides that the regular time limit to process an asylum application at first instance of six months be extended to a maximum of one year under certain circumstances including "large arrivals". For the reasons already set out in paragraph 19, **ICJ recommends the deletion of this provision**.

59. Article 31.3 also provides that "Member States may postpone concluding the procedure where the determining authority cannot reasonably be expected to decide within the time limits laid down in this paragraph due to an uncertain situation in the country of origin which is expected to be temporary". If read together with the large arrivals provision of Article 31.3, this rule implies that "temporary uncertain situations" might last for more than one year. An asylum procedure decided after this time-frame cannot be deemed to have been considered within reasonable time. Furthermore, the very concepts of asylum or subsidiary protection are by their nature temporary. This provision conflates the concept of asylum with that of cessation of refugee status. What national authorities have to do under international refugee law is to determine whether the applicant has a "well-founded fear of persecution" or "risk to be subject to serious harm" while he or she is applying for asylum. The possibility to postpone the procedure only in order to determine whether subsequently the situation no longer qualifies the applicant as a refugee or beneficiary of subsidiary protection would mean invalidating the whole asylum process. **The ICJ therefore urges deletion of this provision**.

Accelerated procedure

60. Article 31.6 provides for situations where an application can be considered through an accelerated procedure or at the border. The ICJ does not necessarily oppose the use of accelerated procedures. Following the *UNHCR Executive Committee Conclusion no. 30*, the ICJ considers acceptable the use of

[34] *Ibid.,* para 33. Emphasis added.

accelerated procedures only in cases of "clearly abusive" or "manifestly unfounded" applications,[35] where such determination is made by the authority normally competent to determine refugee status (the determining authority).[36]

61. Article 31.6 provides for these procedures to be applied when the applicant, "in submitting his/her application and presenting the facts, has only raised issues that are not relevant to the examination of whether he/she qualifies as a refugee or a person eligible for subsidiary protection" (point (a)). This provision does not take into account that, especially at the border, the asylum seeker might be afraid to discuss the persecution, or might be in a state of shock or confusion. Article 31.6 requires that the guarantees of Chapter II must be respected in accelerated or border procedures. However, the grounds on which such procedures can be applied under sub-paragraphs (b) (c), (d), and (e), which base the initiation of accelerated or border procedures on "safe country" of origin designation, on failures of the applicant or false information given, are not in line with the UNHCR Conclusion cited above. The only ground for application of the procedures that seems to be in line with the "clearly abusive" concept is (f), while (a) might apply for "manifestly unfounded" applications, as long as the determining authority has been satisfied that this was not due to the fear of the applicant.

62. Sub-paragraph (b) provides for accelerated or border procedures where the person is from a "safe country" of origin. The procedure on "safe country" of origin allows the applicant to rebut the presumption that he or she cannot risk persecution or serious harm there. It should be underscored that risk must be assessed in light of the particular risk to the concerned individual, rather with regard to the abstract generality entailed in the "safe country" designation. Application of accelerated or border procedures in such cases does not take into account that the rebuttal of such evidence of the safety of the country is highly complex and difficult to prove. It is therefore inappropriate to provide the lesser guarantees of an accelerated or border procedure to such cases, when the result of the "safe country" of origin concept is to make it more difficult for an applicant to prove his or her claims to international protection. This situation, as will also be outlined in paragraphs 74 and following, increases risks of violations of the principle of *non-refoulement*.

63. Point (g) of Article 31 allows for accelerated or border procedures when "the applicant may for serious reasons be considered a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law". The fact that this category of people might be subject to accelerated procedures seems to originate from a confusion between the concepts of the principle of *non-refoulement* under international refugee law and international human rights law.

64. First of all, States must still respect the principle of *non-refoulement* under international refugee law and international human rights law in all circumstances.[37] Even when the individuals concerned represents a danger to national security or public order, they are still refugees, and an assessment based on the principle of *non-refoulement* is necessary.

65. Secondly, according to international human rights law, where national security considerations are the basis for the expulsion, the right to an effective remedy nevertheless requires an independent hearing and access to information, including documents, as well as for the reasons for expulsion so as to have an opportunity to contest them.[38] The European Court of Human Rights has stressed that the individual

[35] UNHCR Executive Committee Conclusion no. 30, para (d).
[36] UNHCR Executive Committee Conclusion no. 30, para. (e)(ii).
[37] See, ICJ Practitioners Guide no. 6, Chapter 2.
[38] *Alzery v. Sweden*, CCPR, Communication No. 1416/2005, Views of 10 November 2006, para. 11.8.

must be able to challenge the executive's assertion that national security is at stake before an independent body competent to review the reasons for the decision and relevant evidence.[39]

66. Thirdly, the provision conflates implicitly grounds of exclusion from refugee status and reasons for expulsion. The two proceedings and considerations are separate. Under international refugee law, exclusion decisions should in principle be considered during the regular refugee status determination procedure and not at the admissibility stage or in accelerated procedures. They should be part of a full factual and legal assessment of the whole individual case. The UNHCR has established the rule that "inclusion should generally be considered before exclusion".[40] UNHCR has recalled that "[e]xclusion should not be based on sensitive evidence that cannot be challenged by the individual concerned".[41] The concept of danger to the public or the community under Article 33.2 describes a more imminent risk.[42] The definition of "public order" in recital 19 as including a conviction for "committing a serious crime" and nothing more seems to contribute to the conflation.

67. In all these cases, States are bound to respect the international human rights law principle of *non-refoulement*, which is absolute, and on which the subsidiary protection regime is based.

68. The inclusion of this provision among accelerated procedures ignores the fact that the authorities will in all cases have the obligations to assess the applicant's situation in light of the principle of *non-refoulement* and evaluate risks of serious harm. This must in any case be done before any expulsion or exclusion. In light of this, the ICJ recommends the deletion of this provision, consistent with the 2009 recast. **The ICJ therefore recommends deleting points (b), (c), (d), (e) and (g) of Article 31.6.**

69. Finally, the ICJ finds it crucial that it be the determining authority which decides on whether to have recourse to the accelerated procedure or not. This is not provided by the Directive. **The ICJ recommends that the beginning of Article 31.6 be amended so as to read: "The determining authority may provide that an examination procedure in accordance with the basic principles and guarantees …"**

Inadmissibility

70. Article 33 sets out the grounds on which applications may be deemed inadmissible. The ICJ regrets that the Directive still presents the possibility of inadmissibility based on the concepts of first country of asylum and "safe" third country and **recommends the deletion of reference to these categories.**

71. Article 34 provides for the right of the applicant to present his or her views in an admissibility interview. Considering the impact that a decision of inadmissibility might have on the principle of *non-refoulement*, **the ICJ recommends that it be the determining authority conducting the admissibility interview or, at least, that the personnel dedicated to these interviews undergo the same training as the determining authority personnel.**

The Concept of first country of asylum

72. Article 35 sets out the concept of first country of asylum on the basis of which an application may be considered inadmissible (Article 34). The requirements for this Article to apply are that the person has

[39] *Nolan and K. v. Russia*, ECtHR, Application No. 2512/04, Judgment of 12 February 2009, para. 71. See also, *Liu v. Russia*, ECtHR, Application No. 42086/05, Judgment of 6 December 2007; *Al-Nashif v. Bulgaria*, ECtHR, Application No. 50963/99, Judgment of 20 June 2002, paras. 123-124 and 137; and *Lupsa v. Romania*, ECtHR, Application No. 10337/04, Judgment of 8 June 2006, paras. 33-34.
[40] *UNHCR Guidelines on Application of the Exclusion Clauses: Article 1F of the 1951 Geneva Convention relating to the Status of Refugees*, UNHCR, UN Doc. HCR/GIP/05, 4 September 2003, para. 31.
[41] *Ibid.*, para. 36.
[42] ICJ Practitoners Guide no. 6, pp. 96-98.

been recognised as a refugee there and he or she can still avail of that protection. This requirement does not specify whether the protection must be effective. **The ICJ recommends that the Directive reflect the principle that in order to ensure that the applicant will not be subject to persecution in the first country, the protection must be "effective"**.

73. Furthermore, a country can be considered the first country of asylum, if the applicant for international protection "otherwise enjoys sufficient protection in that country, including benefitting from the principle of *non-refoulement*". For the reasons stated above, and in light of the absolute nature of the principle of *non-refoulement*, **the ICJ recommends substituting "sufficient protection" with "effective protection".**

The concept of "safe country" of origin

74. The ICJ opposes the use of the "safe country" of origin concept. The UNHCR ExCom considers that the situation must be assessed on an individual level, and that the use of "safe countries" lists must not be blind and automatic.[43] The assessment of the principle of *non-refoulement* risk requires a procedure which assesses the situation in the country in relation to the individual, i.e. an international protection procedure.[44] Accordingly, the ICJ does not support in principle the use of a "safe countries" list, although an analysis of general country situations will no doubt be one of a number of important elements in assessing the overall risk to a particular individual.

75. However, if this concept is to be retained, the ICJ considers that the test for rebuttal of the presumption of safety is too burdensome. Article 36.1 requires that the applicant submit "serious grounds for considering that country not to be a "safe country" of origin in his/her particular circumstances and in terms of his/her qualification as a refugee or a person eligible to subsidiary protection". The ICJ considers that the requirement of "serious grounds" is too generic and a too high threshold to be satisfied. Through its application the risk is too high that the hosting country might breach the principle of *non-refoulement* in dismissing the applicant's request. **The ICJ recommends lowering the standard at least to "reasonable grounds".**

76. **The ICJ recommends that Article 36.1 and recitals 30 and 31 should be amended accordingly.**

National designation (Articles 37 and 38)

77. The ICJ is particularly concerned at the use of national designations of "safe countries" on the basis of EU law. Giving to national States the power to designate countries as safe will generate a disparity in designation which will give rise to indirect violations of the principle of *non-refoulement*, in particular when the Dublin Regulation II is applied. This Regulation, which States want to keep without a suspensive mechanism, presumes a strong harmonisation of the asylum systems and, as seen in the MSS case, risks to give rise to violations of the principle of *non-refoulement*. With the maintenance of national lists and differences between such lists, the risk of having more and more MSS cases is clear. This would be in breach of the asylum seeker's right of asylum (Article 18 Charter) and *non-refoulement* (Charter and ECHR).

78. **The ICJ recommends deleting all provisions related to "safe country" lists.**

[43] *Conclusion No. 87 (L) General*, ExCom, UNHCR, 50th Session, 1999, para. (j).
[44] See, ICJ Practitioners Guide no. 6, Chapter 3.III.

European safe third country concept (article 39)

79. **The concept of European** "safe third country" raises difficulties of principle as regards compliance with international refugee and human rights law, as well as difficulties of practicality, as its implementation is likely to involve highly cumbersome and costly procedures.

80. First, the Article, which effectively allows States to disregard or to consider only partly an application for international protection, applies only when "a competent authority has established, on the basis of the facts, that the applicant for international protection is seeking to enter or has entered illegally into its territory from a safe third country" as defined from the following provisions. On its face, this paragraph 1 is in open conflict with Article 31 of the *UN Refugee Convention*.[45]

81. The requirements for considering a third country safe under Article 39 are that "it has ratified and observes the provisions of the Geneva Convention without any geographical limitation" and "it has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and observes its provisions, including the standards relating to effective remedies". The analysis of the observance by the third country of the *UN Refugee Convention* or of the ECHR requires the same resources necessary for an analysis of the general situation in an ordinary asylum procedure. Furthermore assessment of observance of the ECHR by third countries will apply only to Belarus, Ukraine, the Russian Federation, Georgia, Azerbaijan, Turkey, Armenia, Serbia, Montenegro, Bosnia and Herzegovina, Albania, (Kosovo), and Moldova.[46] For the other EU member states, as well as Iceland, Norway and Switzerland, the Dublin Regulation will apply. Even in the abstract and without evaluation, it is difficult to see which of these countries might be considered as entirely "safe", i.e. where no issues of international protection may possibly arise.

82. Finally, Article 39 includes no provision for the applicant to challenge whether a country is a European safe third country. Without this requirement the provision is not in line with international refugee law and human rights law and it is in open danger to lead to breaches of the principle of *non-refoulement*. **The ICJ recommends the deletion of Article 39.**

83. **In light of the above, the ICJ recommends that recitals 35, 36 and 37 be amended accordingly.**

Subsequent applications procedure

84. The new recast of Article 2(q) introduces the definition of "subsequent application", absent in the previous recast, as a "further application made after a final decision has been taken on a previous application, including cases where the applicant has explicitly withdrawn his/her application and cases where the determining authority has rejected the application following its implicit withdrawal in accordance with Article 28(1)".

85. The ICJ believes that withdrawals (see comments at paragraph 57) should not be equated with subsequent application when a final decision on the merits is not reached. They should be archived and reopened at request. The ICJ notes that the previous recast allowed for the possibility to use a preliminary procedure to evaluate only the presence of new evidence and only for cases of explicit withdrawals. The combined reading of the new definition of "subsequent application" and of the procedures of subsequent application in Article 40 (see, below) mean that such procedure is extended to withdrawn applications. **The ICJ recommends that Article 2 (q) be amended by deleting "including**

[45] Article 31 of the *UN Refugee Convention* prohibits the imposition of penalties on refugees on account of their illegal entry or presence.
[46] Croatia is not included here as, by the time of approval of this Directive, it is highly likely to be an EU member.

cases where the applicant has explicitly withdrawn his/her application and cases where the determining authority has rejected an application following its implicit withdrawal in accordance with Article 28.1".

86. Article 40.1 refers to "competent authorities" as those in charge of assessing the admissibility of a subsequent application. For the reasons set out in paragraph 36 of this submission, the ICJ **recommends that the determining authority be designated with the responsibility for considering such admissibility aspects** which may involve, if not properly examined, risks of breaching the principle of *non-refoulement*.

87. Paragraph 4 of Article 40 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 set forth in paragraphs 2 and 3 of this Article in the previous procedure, in particular by exercising his/her right to an effective remedy pursuant to Article 46". The provision is at risk of giving rise to violations of the principle of *non-refoulement,* the respect for which does not depend on the attitude of the applicant, but on objective situations of risk or fear of serious harm or persecution. To expose an individual to a risk of harm to a procedural error, irrespective of fault, is unacceptable. **The ICJ therefore recommends deleting Article 40.4.**

88. Article 42 provides for procedural rules for the consideration of subsequent applications. The last paragraph (3) provides that Member States shall ensure that "the applicant is informed in an appropriate manner of the outcome of the preliminary examination and, in case the application will not be further examined, of the reasons for this and the possibilities for seeking an appeal or review of the decision". **The ICJ recommends that the words "and in a language that the applicant understands" be introduced after "appropriate manner."**

Border procedures

89. Article 43 provides for the possibility of having asylum procedures at the border or transit zones. According to paragraph 1, these must respect the principles of Chapter II, and may be applied only in cases of examination of admissibility (Article 33) and accelerated procedures (Article 31.6). The ICJ is not opposed *per se* to the use of border procedure, although it considers highly preferable for asylum applications to be conducted on the territory. The fact that such procedures are conducted at the border does not mean that they are not undertaken under the jurisdiction of the Member States, with the consequences that the full guarantees provided for by international human rights and refugee law must apply as applicable. Otherwise, the State might breach the principle of non-discrimination of Article 3 of the *UN Refugee Convention* and Article 26 ICCPR. Furthermore, it is essential that a right to an effective remedy be guaranteed, as provided now by Article 46. The main concerns of the ICJ with these provisions are linked with the concerns with Articles 31.6 and 33 which significantly extend the use of border procedures.

90. Paragraph 2 of Article 43 provides that, if the decision is not taken within four weeks, the applicant must be granted entry to the territory and access to an ordinary asylum procedure. This might mean that the applicant, in light of the Reception Directive, might be detained up to four weeks in the border or transit zones. The ICJ recalls that asylum seekers may be detained in very few situations and as a measure of last resort. In order for this principle not to be lost in the combined reading of the two directives, **the ICJ recommends it be included in this provision.**

Procedures for withdrawal of international protection status

91. Article 45 establishes procedural rules for the withdrawal of international protection status, including the guarantees applicable to the concerned person. The first guarantee entails being "informed in writing that the competent authority is reconsidering his or her qualification for international protection status and the reasons for such a reconsideration" (a). **The ICJ recommends that the concerned person be informed in a language that he or she understands, including for the authorities' decision given in writing with reasons in fact and law and information on remedies, according to Article 45.2.**

92. Secondly, the concerned person has the right to submit reasons as to why the international protection status should not be withdrawn in a personal interview or in a written statement (b). The ICJ believes that, in particular for the refugee status that is centred on the person's **well-founded fear of persecution**, the requirement of a personal interview cannot be excluded. **The ICJ recommends that the word "or" should be changed to "and".**

93. The State must also ensure that the competent authority is able to obtain precise information from EASO and UNCHR. **The ICJ recommends that information from relevant NGOs should be included** (see, reasoning at paragraph 25).

Appeals procedures

94. Article 46 provides for the grounds and procedure for an appeal before court and tribunals against most of the decisions taken according to this Directive at first instance. The new recast maintains almost all grounds for judicial appeal, apart from the possibility to challenge a decision not to examine an application on the basis of the "European safe third country" concept. As explained above, the ICJ finds this ground of exclusion of asylum applications to be incompatible with international human rights law and refugee law. The fact that a possibility to challenge a decision in this sense before an effective remedy, i.e. a court or tribunal, is missing, further increases the risk of breaches of the principle of *non-refoulement*. **The ICJ recommends that, if Article 39 is retained, the appeal ground related to it should be reintroduced.**

95. In relation to the situation of the appellant, paragraph 6 of Article 46 provides that the decision to grant leave to remain onto the territory pending the outcome of the appeal is at the discretion of the court or tribunal in cases which would have or have justified accelerated or border procedures; when the applicant has already been granted refugee status in another Member State; and when the subsequent application had been considered inadmissible for lack of new evidence.

96. International human rights law requires that, to guarantee an effective remedy, the appeal must be suspensive of the expulsion measure from the moment the appeal is filed, since the notion of an effective remedy requires that the national authorities give full consideration to the compatibility of a measure with human rights standards, before the measure is executed.[47] A system where stays of execution of the expulsion order are at the discretion of a court or other body are not sufficient to protect the right to an effective remedy, even where the risk that a stay will be refused is minimal.[48] **The ICJ therefore recommends the deletion of paragraph 6.**

97. Finally, the ICJ notes that cases of asylum in relation to the principle of *non-refoulement* may still find their way to international bodies, such as the European Court of Human Rights, the UN Human Rights Committee and the UN Committee against Torture. These international human rights

[47] See, full jurisprudence in ICJ Practitioners Guide no. 6, Chapter 3.III.2 and fn. 561.
[48] *Conka v. Belgium*, ECtHR, Application No. 51564/99, Judgment of 5 February 2002, paras. 81-85.

mechanisms may issue *interim measures* in the preliminary phase of the international dispute in order to assure that a situation of potential violation does not lead to irreparable harm from before the case can be adjudicated on the merits.

98. Interim measures are a corollary of the right to international petition and have therefore been held to be binding on the States which have accepted the international individual complaints mechanism.[49] They are an essential element of procedure before international tribunals, with particular significance for tribunals that adjudicate on human rights, and are widely recognised as having binding legal effect. As the European Court of Human Rights pointed out in the landmark case *Mamatkulov and Askarov v. Turkey*, the binding nature of interim measures has its roots in both procedure and substance: it is necessary, first, to preserve the rights of the parties from irreparable harm, protecting against any act or omission that would destroy or remove the subject matter of an application, would render it pointless, or would otherwise prevent the Court from considering it under its normal procedure; and second, to permit the Court to give practical and effective protection to the Convention rights by which the Member States have undertaken to abide.[50]

99. Since the European Union will shortly be part of the *European Convention on the Protection of Human Rights and Fundamental Freedoms* and that the obligation to respect *interim* measures already binds all its Member States, **the ICJ recommends adding a sentence at the end of paragraph 5 of Article 46: "The right to remain in the territory as provided by this paragraph shall extend to situations where a competent international adjudicatory body, such as the European Court of Human Rights, the UN Human Rights Committee and the UN Committee against Torture have issued *interim measures* in relation to the applicant".**

[49] See, ICJ Practitioners Guide no. 6, pp. 269-270.
[50] *Mamatkulov and Askarov v. Turkey*, ECtHR, GC, *Applications nos. 46827/99 and 46951/99,* 4 February 2005, para. 102.