Common Asylum Procedure Regulation

ICJ comments on the current proposal of the Regulation

April 2017

Table of Contents

1. Introduction

On 13 July 2016, the European Commission published a proposal (Common Asylum Procedure Regulation)[1] to repealing the current Common Asylum Procedures Directive (2013/32/EU).[2] In this briefing paper, the ICJ presents its comments on several key procedural aspects of the proposed Regulation in view of the possible impact on the rights of asylum seekers in Europe.[3]

The areas most impacted include access to legal information; legal assistance, representation and legal aid; accelerated and border procedures; and access to an effective remedy.

The proposed Regulation is one of the instruments of the Common European Asylum System[4] of the EU. It is intended to replace the current Asylum Procedures Directive with a Regulation and thereby aims to reduce the scope of discretion enjoyed by Member States in the implementation of matters covered under its provisions.[5]

---

[1] COM(2016) 467 final 2016/0224 (COD) Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, see: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160713/proposal_for_a_common_procedure_for_international_protection_in_the_union_en.pdf

[2] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, see: http://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32013L0032

[3] This briefing paper does not present comprehensive comments on all the aspects of the proposal but only covers some key concerns of the ICJ.

[4] http://europa.eu/rapid/press-release_IP-16-2433_en.htm

[5] While an EU Directive needs to be implemented into national law of a Member State, a Regulation is immediately applicable and enforceable by law in all Member States.

The proposal of 13 July 2016 was developed in reaction to the increased arrivals of refugees in 2015 which was identified by the European Commission as a "refugee crisis for the EU."[6] In 2015, over one million people – refugees, displaced persons and other migrants – made their way to EU countries. The International Organization for Migration has estimated that some 3,771 of these persons died on their journey[7] and a high number of people were stranded in the border countries, mainly Italy and Greece. The European Commission reacted with a number of legislative and policy proposals, among them a proposal for intra-EU relocation schemes,[8] and the new Common European Asylum System directives and regulations.

2. Scope of the proposal

(a) Regulation proposal

Recital 7 and Article 2.1 would limit the scope of the Regulation to territory, border, territorial waters and transit zones. Recital 7 states that

> This Regulation should apply to all applications for international protection made in the territory of the Member States, including those made at the external border, on the territorial sea or in the transit zones of Member States, and the withdrawal of international protection. Persons seeking international protection who are present on the territorial sea of a Member State should be disembarked on land and have their applications examined in accordance with this Regulation.

Article 2.1 states that:

> This Regulation applies to all applications for international protection made in the territory of the Member States, including at the external border, in the territorial sea or in the transit zones of the Member States, and to the withdrawal of international protection.

(b) Analysis of International and EU law

The limitation of the scope of the Regulation to territory, border, territorial waters and transit zones does not cover all situations, which fall under the protective jurisdiction of a State 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.

Under international human rights law, jurisdiction is generally broader than that contemplated under Recital 7 and Article 2.1. While the exact scope of a State's protective jurisdiction will be dependent on the primary treaty or other source of law providing the basis for the protection, a common minimum standard under international human rights law is that, "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,

[6] http://ec.europa.eu/echo/refugee-crisis_en
[7] https://www.iom.int/news/iom-counts-3771-migrant-fatalities-mediterranean-2015
[8] http://europa.eu/rapid/press-release_IP-15-5039_en.htm, http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/general/docs/proposal_for_a_council_decision_on_provisional_relocation_measures_for_italy_and_greece_en.pdf

and to all extraterritorial zones, whether of a foreign State or not, where the State exercises effective control of the territory on which the person is situated.[9] Particularly under the European Convention of Human Rights, the leading case *Al-Skeini and others v. UK*, where the European Court of Human Rights (Grand Chamber) also provided a clarification as to the extraterritorial reach of the European Convention and its jurisprudence on jurisdiction.[10] Among the various means in which the jurisdiction of Convention extended extraterritorially, was that of control and authority of individuals, irrespective of territory on which control and authority are exercised: "It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual.[11]" Similarly, under the International Covenant on Civil and Political Rights, to which all EU States are Party, States "must respect and ensure the rights laid down in the Covenant to anyone within the power of effective control of that State Party, even if not situated within the territory of the State Party.[12]" In respect of some of other human rights treaties, obligations extend with no territorial limitations whatsoever. For instance, the International Court of Justice has said that "there is no restriction of a general nature in the Convention on the Elimination of all forms of Racial Discrimination", to which all EU member States are a party, and therefore it applies to all State actions within or outside its territory.[13]

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 affirmed 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.[14] The same principles apply in the context of operations of rescue at sea.

(c) Conclusions and recommendations

The ICJ recommends extending the scope of the Regulation so as to apply to all situations where the Member State has effective authority or control over the asylum seeker, including in international waters.

[9] 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).

[10] *Al-Skeini and others v. United Kingdom*, ECtHR, GC, Application No. 55721/07, 7 July 2011, para. 137.

[11] Ibid.

[12] The nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted 29 March 2004, UN Doc. CCPR/C/21/Rev1/add13 (2004).

[13] Provisional Measure in the case of Georgia v. Russian Federation, 2008. No 35/2008, I.C.J, para 109.

[14] See, *Medvedyev and Others v. France*, ECtHR, GC, Application No. 3394/03, Judgment of 29 March 2010, paras. 62-67.

3. Access to legal information

(a) Regulation proposal

Article 8.2 provides general guarantees for applicants for international protection. It states that:

> 2. The determining authority shall inform applicants, in a language which they understand or are reasonably meant to understand, of the following:
> (a) the right to lodge an individual application;
> (b) the procedure to be followed; (…)

The same wording appears in Article 24.4 on the age assessment of unaccompanied minors, which provides that minors should be informed prior to the examination of their asylum application of the possibility that their age be determined by medical examination in a language that they understand or are reasonably meant to understand, of the possibility that their age be determined by medical examination. The same goes for Article 35.1 on the notification to the applicant on the decision on the application for international protection.

(b) Analysis of International and EU law

The provision that all the safeguards are to be provided in a language the applicants "understand or are reasonably meant to understand" is not compliant with international and EU law. The requirement that information be given in a language that the applicant is "reasonably meant 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 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".[15]

It is not clear what is signified by "reasonably meant to understand", but it appears to attach paramount importance to what authorities consider an applicant to linguistically know, rather than what that applicant in real terms knows. This is to turn the protective function of the regulation on its head. Clearly, such formulation "reasonably meant to understand" risks that a number of asylum seekers will not be able to access the information in a language which they actually understand and so they will be deprived of their rights within the asylum procedure.

(c) Conclusions and recommendations

The ICJ recommends that Articles 8.2, 24.4 and 35.1 be amended to delete references to a "language that the applicant may be reasonably meant to understand", and Recital 25 should also be amended accordingly.

In the current Commission proposal package there is a provision in the EURODAC proposal (Article 30), which requires authorities to provide information "in a concise, transparent intelligible and easily accessible form,

[15] *M.S.S. v. Belgium and Greece*, ECtHR, para. 304

using clear and plain language". The ICJ recommends that this formulation be applied to the provisions on access to legal information in the proposal.

4. Legal assistance, representation, and legal aid

(a) Regulation proposal

The important role of free legal assistance and representation in safeguarding the rights of applicants for international protection throughout the procedure is acknowledged in the Commission's proposal. Compared to the recast Asylum Procedures Directive, the right to legal assistance and representation has been strengthened by making the provision of free legal assistance and representation in principle mandatory for Member States (Article 14) at both stages of the procedure, including the first instance procedure. On the other hand, the free legal assistance and representation will only be granted on request, as was the case in the Asylum Procedures Directive. It is likely that some applicants will not understand or make use of such right.

Article 15 of the proposal of the Regulation makes provision regarding free legal assistance:

> 1. Member States shall, at the request of the applicant, provide free legal assistance and representation in the administrative procedure provided for in Chapter III and in the appeal procedure provided for in Chapter V.
> 2. For the purposes of the administrative procedure, the free legal assistance and representation shall, at least, include:
> (a) the provision of information on the procedure in the light of the applicant's individual circumstances;
> (b) assistance in the preparation of the application and personal interview, including participation in the personal interview as necessary;
> (c) explanation of the reasons for and consequences of a decision refusing to grant international protection as well as information as to how to challenge that decision.
> (…)

The provision of free legal assistance and representation in the administrative procedure may be excluded in a number of situations (Article 15.3), particularly where:

(a) the applicant has sufficient resources;
(b) the application is considered as not having any tangible prospect of success;
(c) the application is a subsequent application.

Under Article 15.5, in the appeal procedure, free legal assistance and representation may similarly be excluded where

(a) the applicant has sufficient resources;
(b) the appeal is considered as not having any tangible prospect of success;
(c) the appeal or review is at a second level of appeal or higher as provided for under national law, including re-hearings or reviews of appeal.

Article 16 governs the scope of legal assistance and representation. It provides that legal advisers must be able to have access to the file unless this would jeopardize national

security or otherwise raise security concerns and that those advisers have access to closed areas.

Under the proposal, the applicant would be allowed to bring to a personal interview a legal adviser or other counsellor. The legal adviser or other counsellor is authorised to intervene during the personal interview. The absence of a legal adviser or other counsellor shall however "not prevent the determining authority from conducting a personal interview with the applicant" (Article 16.6).

Member States may also impose monetary limits or time limits on the provision of free legal assistance and representation, provided that such limits do not arbitrarily restrict access to free legal assistance and representation. Member States may request total or partial reimbursement of any costs made if and when the applicant's financial situation considerably improves or where the decision to make such costs had been taken on the basis of false information supplied by the applicant (Article 17).

(b) Analysis of International and EU law

Effective legal protection principle

The principle of effective legal protection means that national rules must not make it "impossible or excessively difficult", in practice, to exercise EU law rights.[16] In the field of asylum, that entails ensuring that protection is granted to those who are entitled to it (Article 18 EU Charter: the right to asylum).

In order to navigate their way through the procedures and to present their claims effectively (and thus achieve the result sought by the CEAS), asylum seekers generally need access to information, advice and assistance. The provision of such advice and assistance obviously leads to a better quality of initial decision-making, which can prevent subsequent time consuming, and costly appeals. This serves the mutual interests of the asylum seeker and the State authorities in simultaneously seeking effective protection while making efficient use of human and financial resources.

Personal interview in absence of a legal adviser

The provision stating that the absence of a legal adviser shall not prevent the determining authority from conducting a personal interview (Article 16.6) raises serious concern. It is always preferable for the legal adviser to be present for the objective of building a relationship of trust between the applicant and the interviewer and ensuring the effectiveness of the legal assistance provided,

The UN Human Rights Committee has recommended that, in fulfillment of 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".[17] It has also affirmed that States should "ensure that all asylum-seekers have access to counsel, legal aid and an interpreter".[18]

---

[16] CJEU, Case C-62/00, Marks and Spencer plc v Commissioners of Customs and excise, 11 July 2002, para 35

[17] *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.

[18] *Concluding Observations on Japan*, CCPR, UN Doc. CCPR/C/JPN/CO/5, 18 December 2008, para. 25.

Exclusion of free legal assistance and representation

The ICJ is concerned that free legal assistance and representation can be excluded in a number of cases (under Article 15.3 and 15.5), according to criteria the scope of which is unclear and potentially wide.

First, Member States can exclude access to legal aid if the responsible authorities consider that there is no tangible prospect of success (Art 15.3.b and Art 15.5.b).

The very point of the procedures is to determine the tangibility of the prospect of success. Without legal aid, a person who may on the superficial consideration seem unlikely to succeed, may well have a more complex case, but one that can only be expressed with legal assistance.

Given the disadvantaged position of persons claiming asylum, and the irreversible harm that this can cause, this criterion is prima facie a problem, and if applied at all, should be applied only with certain safeguards. If it is applied, there must be effective access to a court to challenge this refusal, which must take into account the relevant jurisprudence from the CJEU and ECtHR on legal aid which is now applicable to asylum cases. *Airey v. Ireland* makes clear when assessing whether legal aid is necessary for a fair trial, that it must be determined on the basis of the particular facts of each case and depends on what is at stake for the applicant, the complexity of the relevant law and procedure and the capacity of the applicant to represent themselves. These factors are often characteristics of an asylum hearing, so it applies *mutatis mutandis* to fair procedures in asylum. Given that the criteria as set out by the CJEU in *DEB* and by the ECtHR in *Airey* and later cases also need to be considered, the reasonable prospect of success test is only one element that needs to be taken into account and cannot be the sole reason for denying a person's access to legal aid.

The refusal of free legal assistance and representation on the basis of a lack of tangible prospects of success in the administrative procedure carries even greater risks of denying applicants access to a full and thorough examination of their application. Denying asylum applicants for international protection the right to free legal assistance and representation at this stage of the procedure, based on the presumption that their application is manifestly unfounded, is likely to affect in particular applicants from countries designated as a safe third country, a safe country of origin or first country of asylum.

Refusing such applicants free legal assistance and representation from the beginning, further adds to their already disadvantaged position and deprives them of an indispensable tool to effectively rebut presumptions of safety at this stage in the procedure, as guaranteed in the respective provisions dealing with safe country concepts. In doing so Article 15(3) may further contribute to a tendency of safe country presumptions to become virtually irrebuttable: presumptions that applications from countries identified as safe are manifestly unfounded are more likely to be confirmed in the absence of legal representation.

Second, free legal assistance can be excluded where the "appeal or review is at a second level of appeal or higher" (Article 15.5.c). It is at least as compelling for asylum seekers to have free legal assistance and representation before the highest judicial authorities of the State as at first instance. This may also contribute to better legal clarity and reduce the number of appeals.

Third, the proposed Article 15.2, stipulates what assistance and representation should *at*

least include. We consider that assistance and representation should be given to the applicants at all stages of the procedure and for all relevant circumstances. Article 15.2.b stipulates the assistance in the preparation of the application and personal interview including participation in the personal interview "as necessary". The ICJ considers the notion "as necessary" redundant as the participation of a legal adviser in the interview would be beneficial in all cases.

Finally, in order to ensure that applicants have timely access to free legal assistance in complying with their procedural obligations, free legal assistance and representation must be provided as soon as possible after an application for international protection is made.

(c) Conclusions and Recommendations

The ICJ recommends that the exceptions in **Article 15.3.b and 15.5.b** and 15.5.c be deleted. The ICJ recommends that the Regulation specifies that legal assistance and representation are contemplated for all the appeal procedures.

The ICJ recommends amending the expression "may request" to **"shall receive"** (**Article 14.2**).

The term "as necessary" **in Article 15.2.b** should be deleted.

The ICJ further recommends that Article 15.1 be amended as follows:

1. Member States shall, at the request of the applicant and **as soon as possible after an application is made**, provide free legal assistance and representation in the administrative procedure provided for in Chapter III and in the appeal procedure provided for in Chapter V.

The ICJ suggests inserting a qualifying clause in **Article 16.6** such as "where strictly necessary, in exceptional circumstances".

5. Accelerated examination procedures and border procedures

(a) Regulation Proposal

The use of accelerated procedures becomes mandatory in a number of specific cases as listed in Article 40.1, while it was optional in the Asylum Procedures Directive. Under the proposal, the accelerated procedure should be finalized within two months and only eight days in cases when "the applicant is making an application merely to delay or frustrate the enforcement of an earlier or imminent decision resulting in his or her removal from the territory of a Member State" (Article 40.1.d).

Article 41 provides for the possibility of having asylum procedures at the border or transit zones. According to paragraph 1, these procedures must respect the principles and guarantees of Chapter II, and may be applied only in cases of examination of admissibility and accelerated procedures.

Article 41.5 further provides that the border procedure may be applied to unaccompanied minors, in accordance with Articles 8 to 11 of the Reception Conditions Directive in

certain circumstances. These include where "(a) the applicant comes from a third country considered to be a safe country of origin (…); (b) the applicant may for serious reasons be considered to be 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; (c) there are reasonable grounds to consider that a third country is a safe third country for the applicant in accordance with the conditions of Article 45; (d) the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his or her identity or nationality that could have had a negative impact on the decision. Point (d) shall only be applied where there are serious grounds for considering that the applicant is attempting to conceal relevant elements which would likely lead to a decision refusing to grant international protection and provided that the applicant has been given an effective opportunity to provide substantiated justifications for his actions."

(b) Analysis of International and EU law

Accelerated procedures

Following the UNHCR Executive Committee Conclusion no. 30 and the Council of Europe Guidelines on human rights protection in the context of accelerated asylum procedures (1 July 2009), the ICJ considers the use of accelerated asylum procedures to be acceptable only in cases of "clearly abusive" or "manifestly unfounded" applications,[19] where such determination is made by the authority normally competent to determine refugee status (the determining authority).[20]

The grounds on which such procedures can be applied under sub-paragraphs (a), (c), (e), (f), (g) and (h), 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 (d), while (b) might apply for "manifestly unfounded" applications, as long as the determining authority has been satisfied that the fact that the applicant has made clearly inconsistent and contradictory, clearly false or obviously improbable representations which contradict sufficiently verified country of origin information was not due to the fear of the applicant.

Article 40.1.a 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". This provision does not take into account that, especially at the border, the asylum seeker might be afraid to discuss the facts underlying the persecution, or might be in a state of shock or confusion.

Article 40.1 subparagraph (e) provides for accelerated or border procedures where the person is from a "safe country" of origin. This ground could even be applied in cases of unaccompanied minors (Art 40.5(a)).

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,

[19] UNHCR Executive Committee Conclusion no. 30, para (d).

[20] UNHCR Executive Committee Conclusion no. 30, para. (e)(ii)

rather than 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 typically highly complex and involving difficult to prove factual information. 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 under the next section, increases risks of violations of the principle of *non-refoulement*.

Point (f) of Article 40 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". This ground could also even be applied in cases of unaccompanied minors (Art 40.5(b)).

The fact that this category of people might be subject to accelerated procedures seems to originate from a conflation of what are in actuality distinctive concepts of the principle of *non-refoulement* under international refugee law and international human rights law.

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

Secondly, under 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 documentary material, as well as for the reasons for expulsion so as to have an opportunity to contest them.[21] The European Court of Human Rights has stressed that the individual 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.[22]

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 ordinary 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".[23] UNHCR has recalled that "[e]xclusion should not be based on sensitive evidence that cannot be challenged by the individual concerned".[24]

In all these cases, States are bound to respect the international human rights law

[21] *Alzery v. Sweden*, CCPR, Communication No. 1416/2005, Views of 10 November 2006, para. 11.8.

[22] *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.

[23] 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.

[24] Ibid., para. 36.

principle of *non-refoulement*, which is absolute, and on which the subsidiary protection regime is based.

The inclusion of this provision among accelerated procedures ignores the fact that the authorities will in all cases have the obligation to assess the applicant's situation in light of the principle of *non-refoulement* and to evaluate risks of serious harm. This must in any case be done before any expulsion or exclusion.

There is also no automatic suspensive effect following a decision in the accelerated procedure, which the ICJ strongly opposes (*See further section 8*).

Border procedures

The ICJ does not consider border procedures *per se* contrary to international human rights law, although it is highly preferable for asylum applications to be conducted on the territory. Whether or not such procedures are conducted at the border, they will still necessarily be undertaken under the jurisdiction of the Member States, with the consequences that the full guarantees provided for by international human rights and refugee law are 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 53.a.iv.

However there is no automatic suspensive effect following a decision in the border procedure, which raises serious human rights concerns (*See further section 8*).

Paragraph 3 of Article 41 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 means that the applicant might be detained up to four weeks in the border or transit zones. The ICJ recalls that asylum seekers are lawfully subject to detention in only a few very limited types of situations and as a measure of last resort. In order for this important principle to be reaffirmed, the ICJ recommends it be included in this provision (new Art 41 para 6).

Unaccompanied minors

Article 40.5 and 41.5 allow for application of accelerated and border procedures on unaccompanied minors.

The particular vulnerability of unaccompanied children in asylum and migration related procedures and their need for special protection and safeguards is well recognized in international human rights standards,[25] and in EU law and jurisprudence.[26] Border and accelerated procedures do not provide the necessary guarantees for compliance with Member States obligations' under international law and standards, including Articles 3 and 22 of the UN Convention on the Rights of the Child (UN CRC), according to which the best interest of the child shall always be a primary consideration and appropriate measures shall be taken to ensure that a child who is seeking refugee status receives appropriate protection and assistance in the enjoyment of applicable rights.

Proposed Article 41(5) on the application of the border procedure to unaccompanied

[25] UN Committee on the rights of the Child, General Comment No 6 (2005), Treatment of unaccompanied and separated children outside their country of origin, para. 1.
[26] ECtHR, Mubulanzila Mayeka and Kaniki Mitunga v. Belgium, Application No 13178/03, Judgment of 12 October 2006, par. 55.

minors includes the possibility of such procedure being carried out while the applicants are detained in accordance with the relevant provisions in the recast Reception Conditions Directive. The harmful effects of immigration detention on children, and in particular unaccompanied children, have been widely documented and acknowledged in the jurisprudence of the European Court and other international authorities.[27] Children, whether accompanied or unaccompanied, should never be detained in the migration process as this is never in their best interests.[28]

(c) Conclusions and Recommendations

The ICJ therefore recommends **deleting points (a), (c), (e), (f), (g) and (h) of Article 40.1 and Article 40.5 and Article 41.5**.

The ICJ recommends including paragraph 6 in Article 41: "***Detention of asylum seekers is only permitted as a measure of last resort, after exhausting the possibility of less intrusive measures. It must be in accordance with the law, necessary and proportionate and not arbitrary***."

There must be an available remedy with an automatic suspensive effect against the decision taken in the border procedure (*See further Section 8*).

6. Access to effective remedy, automatic suspensive effect

(a) Regulation proposal

The Commission proposal includes some improvements to the current standards of the recast Asylum Procedures Directive on appeal procedures, such as the obligation to translate documents relevant for the appeal procedure if such a translation has not already been done. However what raises concern are the new provisions on the submission of new elements at the appeal stage (Article 53.3); the time limits (Article 53.6) for lodging appeals; and the suspensive effect of appeals (Articles 9 and 54).

Article 53.1 provides for the grounds and procedure for an appeal before court or tribunal against most of the decisions taken according to this Regulation at first instance.

Article 53.3 provides that:

> … The applicant may only bring forward new elements which are relevant for the examination of his or her application and which he or she could not have been

[27] In A.B. and others v. France, the European Court for Human Rights reiterated that it had repeatedly found a violation of Article 3 ECHR regarding the administrative detention of foreign national children (Popov v France, Muskhadzhiyeva and Others v. Belgium, Mubilanzila Mayeka and Kaniki Mitunga v Belgium, Rahimi v Greece, Kanagaratnam v Belgium). The Court reiterated that the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of an irregular immigrant. In addition, asylum seeking children have specific needs that are related in particular to their age, lack of independence, and status. See also: *UN Special Rapporteur on the human rights of migrants: Follow up country visit to Greece*, Statement of 16 May 2016: "As determined by the Committee on the Rights of the Child, detention can *never ever* be in the best interest of a child."

[28] See ECRE comments on APR, November 2016, http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR_-November-2016-final.pdf

aware of at an earlier stage or which relate to changes to his or her situation. …

In Article 53.6, the Commission proposal sets strict time limits for the purpose of lodging an appeal decision, namely:

> a) within one week in the case of a decision rejecting a subsequent application as inadmissible or manifestly unfounded;
> b) within two weeks in the case of a decision rejecting an application as inadmissible or in the case of a decision rejecting an application as explicitly withdrawn or as abandoned, or in the case of a decision rejecting an application as unfounded or manifestly unfounded in relation to refugee or subsidiary protection status following an accelerated examination procedure or border procedure or while the applicant is held in detention;
> (…)

The new Regulation maintains almost all grounds for judicial appeal, apart from the possibility to challenge a decision on the basis of Article 40.1.f and g and h. (The Regulations provide for such appeal in circumstances where the applicant may, for serious reasons, be considered a danger to the national security or public order of the Member States; if the applicant does not comply with the obligations set out in the Dublin Regulation; if the applicant did not apply in the first country of entry or if the application is a subsequent application; or where the application is so clearly without substance or abusive that it has no tangible prospect of success).

Under Article 9, there is a right to remain pending the examination of the application, but States may revoke the applicant's right to remain on their territory during the administrative procedure where: (a) a person makes a subsequent application in accordance with Article 42 and in accordance with the conditions laid down in Article 43; (b) a person is surrendered or extradited, as appropriate, to another Member State pursuant to obligations in accordance with a European arrest warrant or to a third country or to international criminal courts or tribunals.

Article 9.4 further specifies that a Member State may extradite an applicant to a third country pursuant to paragraph 3(b) only where the determining authority is satisfied that an extradition decision will not result in direct or indirect *refoulement* in breach of the international and EU obligations of that Member State.

It is only in limited cases that the suspensive effect of an appeal might not be automatic and the individual applicant would need to request the court or tribunal to stay the execution of a return decision or the court would act of its own motion to this effect. Where a negative decision rejects an application because the applicant comes from a first country of asylum or the application is a subsequent application, where an application is rejected as explicitly withdrawn or abandoned, a court or tribunal may allow the applicant to remain subject to a request from the applicant or acting ex officio to stay the execution of a return decision (Article 54(2)). Where an applicant lodges a further appeal against a first or a subsequent appeal decision, he or she shall, in principle, not have a right to remain on the territory of Member States (Article 54(5)).

(b) Analysis of International and EU law

First, the fact that the Commission proposal sets strict time limits for the purpose of lodging an appeal decision (Article 53.6) raises concerns in relation to the principle of *non-refoulement* and the right to an effective remedy.

The right to an effective remedy for violations of human rights is a general principle of law and protected under international human rights law, including under Article 13 ECHR, Article 2.3 ICCPR, Article 32 and 33 Geneva Refugee Convention and Article 3 and 14 CAT. It is also reflected in universal instruments such as the 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.

Where there is an arguable complaint that a transfer will violate or subject the transferee to a real risk of violation of human rights, there must be an effective remedy that is independent, impartial, accessible and effective in practice a well as in law, and must not be hindered by the acts of State authorities. The remedy should be provided by a judicial body, but if it is not, it must be provided by an independent and impartial body, which has the competency to review and, if warranted, overturn the decision to expel.

The European Court of Human Rights has held that, in order to comply with the right to an effective remedy under article 13 of the ECHR, a person threatened with an expulsion which arguably violates another Convention right must have:

- Access to relevant documents and accessible information on the legal procedures to be followed in his or her case;
- Where necessary, access to translated material and interpretation;
- Effective access to legal advice, if necessary by provision of legal aid;[29]
- The right to participate in adversarial proceedings;
- Provision of the reasons for the decision to expel (a stereotyped decision that does not reflect the individual case will be unlikely to be sufficient) and a fair and reasonable opportunity to dispute the factual basis for the expulsion.[30]

The jurisprudence of the European Court of Human Rights is of critical importance since, according to article 52.3 EU Charter, it constitutes one of the main sources of interpretation of the Charter.

Indeed in respect of EU law, in the Case C-457/09 Chartry, the Court of Justice of the EU (CJEU) affirmed that "(…) the right to an effective legal remedy, guaranteed by Article 6(1) of the ECHR, referred to by the national court, constitutes a general principle of Union law (…), and was reaffirmed by Article 47 of the Charter, (…)."[31]

The CJEU ruled specifically on the content of the right to appeal in connection with a time-limit in the *Diouf*[32] case. The CJEU stressed that the "that the period prescribed must be sufficient in practical terms to enable the applicant to prepare and bring an effective action".

Similarly, according to the ECtHR, time-limits must not be applied in a way that prevents litigants from using an available remedy (*Zvolský and Zvolská v. the Czech Republic)*[33]. There must be ensured practical and effective access to the appeal (*Souza Ribiero v. France).*[34]

These principles are also contained in the Council of Europe Committee of Ministers' Twenty Guidelines on Forced Return, which state that the time-limits to exercise the

[29] *M.S.S. v. Belgium and Greece*, ECtHR, para. 301.
[30] *M.S.S. v. Belgium and Greece*, ECtHR, para. 302; *C.G. and Others v. Bulgaria*, ECtHR, paras. 56-65. *Hirsi Jamaa and Others v. Italy*, ECtHR, GC, paras. 202-204.
[31] C-457/09 *Claude Chartry v Etat belge* ([2011] ECR I-0000, para. 25
[32] C-69/10, *Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration*, 28 July 2011, para. 66
[33] *Zvolský and Zvolská v the Czech Republic*, Application no. 46129/99, 12 February 2003, para. 51
[34] *Souza Ribiero v. France*, Application no. 22689/07, 13 December 2012, para. 95

remedy shall not be unreasonably short; the remedy must be accessible, with the possibility of granting legal aid and legal representation.[35]

In the case of *I.M. v France,*[36] the Court found a breach of Article 13 ECHR where the resort to an accelerated asylum procedure to examine the first application of an asylum seeker resulted in excessively short time limits for the asylum seeker to present his arguments; lack of access to legal and linguistic assistance; and a series of material and procedural difficulties, exacerbated by the asylum seeker's detention, which rendered the legal guarantees afforded to him merely theoretical.

Placing a fixed time limit of one or two weeks for all cases would comply with the European Convention. In *Jabari v. Turkey,* the Court held that the automatic application of a five-day time limit for registering a claim for asylum, which denied the applicant any scrutiny of her fear of ill-treatment following expulsion, and the subsequent failure of the appeal court to consider the substance of those fears, meant that her deportation would violate Article 3 ECHR, as well as the right to an effective remedy under Article 13 ECHR.[37]

Second, the fact that there is no possibility to challenge a decision in an appeals procedure before a court or tribunal, risks a breach of the principle of *non-refoulement*.

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 allow for any exceptions.

In light of this, Article 9 protects the right to remain pending a first-instance asylum procedure, while Article 54 contemplates the same right for most of appeals.

However, Article 9.3 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 9.4 subjects this exception to respect for the prohibition of direct or indirect *refoulement*. However, this safety clause is applicable only to extradition, by omission leaving out all other cases of transfer. If interpreted restrictively, the principle of *non-refoulement* may be left unprotected.

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.[38]

A system where stays of execution of the expulsion order are at the discretion of a court or other body (Article 54.2 and 54.3) are not sufficient to protect the right to an effective remedy, even where the risk that a stay will be refused is minimal.[39]

---

[35] *Twenty Guidelines on Forced Return*, Guideline 5.2.
[36] *I.M. v France*, Application No. 9152/09, 2 May 2012, paras. 150-154
[37] *Jabari v. Turkey*, ECtHR, Application No. 40035/98, Judgment of 11 July 2000, paras. 39-42.
[38] See, full jurisprudence in ICJ Practitioners Guide no. 6, Chapter 3.III.2.

[39] *Conka v. Belgium*, ECtHR, Application No. 51564/99, Judgment of 5 February 2002, paras. 81-85.

The ICJ therefore recommends the addition of the suspensive effect in all appeals procedures.

Third, Article 53.3 does not allow for the applicants to raise any new elements of which she or he "could" have been aware earlier. Refugees upon arrival can be traumatized, unable to reveal all the relevant facts at the first interview. There is a necessity for a trust-building exercise between the applicant and the authorities that usually takes time. Especially for LGBTI applicants, torture victims or victims of gender-based violence, it cannot be expected that all relevant information will be shared during the first interview with no exceptions. This would undermine the principle of effectiveness of the right to asylum (Article 18 EU Charter). Moreover, the exclusion is not limited to information that the applicant were not actually aware of, but uses the more elastic and nebulous formulation "could not have been aware of", which is overly broad.

(c) Conclusions and Recommendations

The ICJ recommends inserting Article 40.1(f), (g) and (h) in Article 37.3.

The ICJ recommends that Article 9.4 be amended to cover all situations contemplated by Article 9.3.

The ICJ recommends the deletion of paragraphs 2, 3 and 5 of Article 54 and of Article 53.3 and amendment of Article **53.6 as follows**:

Applicants shall lodge appeals against any decision referred to in paragraph 1:

a) within [deleted text] **at least two weeks** in the case of a decision rejecting a subsequent application as inadmissible or manifestly unfounded;

b) within [deleted text] **at least one month** in the case of a decision rejecting an application as inadmissible or in the case of a decision rejecting an application as explicitly withdrawn or as abandoned, or in the case of a decision rejecting an application as unfounded or manifestly unfounded in relation to refugee or subsidiary protection status following an accelerated examination procedure or border procedure or while the applicant is held in detention;