



EUROPEAN COUNCIL
ON REFUGEES AND EXILES

CONSEIL EUROPEEN
SUR LES REFUGIES
ET LES EXILES

Comments from the European Council on Refugees and Exiles

on the

Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status

(2000/0238 (CNS))

Introduction and General Remarks

The European Council on Refugees and Exiles (ECRE), a network of some 73 refugee assisting non-governmental organisations in 30 European countries, welcomes the opportunity to submit its comments on the Amended Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (hereinafter 'the Proposal').¹

The European Commission presented its first proposal in September 2000 on which ECRE also submitted comments.² Following considerable debate on this draft, the European Council in Laeken, in December 2001, requested the Commission to bring forward an amended proposal.

ECRE recognises that the Proposal has undergone considerable modifications. In this regard, we appreciate that some of ECRE's previous comments are reflected in the amended document and we welcome the incorporation of new positive elements such as the applicability of the investigative standards in Article 16 to all procedures and the principle of a right to appeal before a court of law in Article 38 of the Proposal.³ These improvements can however not hide the fact that the Proposal lowers some general basic standards and safeguards, and allows for a low level of harmonisation through extensive use of Member States' discretion.

In ECRE's view, the current draft of the Proposal reflects a rather alarming tendency in some Member States to reduce, circumvent and even openly question well-established protection

¹ Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, Brussels, 18.6.2002, COM (2002) 326 final.

² See Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, Brussels, 20.9.2000, COM (2000) 578 final; and Comments from the European Council on Refugees and Exiles (ECRE) of 18 April 2001.

³ We also welcome Paragraphs 2, 5, 7 and 8 in the Preamble of the Amended proposal.

principles. In this context, ECRE urges all Member States to refrain from agreeing upon minimal rather than minimum standards. The current political agenda, marked by security concerns and immigration control efforts does not justify the development of EU legislation at the lowest level, which sometimes risks going beyond what is permitted under international refugee and human rights law.

In this respect, the Proposal introduces certain standards that are even lower than those currently applying in national asylum procedures and already sharply criticised. For example, the reduced level of basic principles and guarantees applying throughout the procedure; the widened legal grounds to detain asylum seekers; the increased use of accelerated procedures which do not offer sufficient legal and procedural guarantees to safeguard the most fundamental right of persons in need of international protection, i.e. the principle of *non-refoulement*; insufficient safeguards for border and subsequent procedures; as well as the lack of suspensive effect of appeals particularly in accelerated procedures. We also regret that the Proposal provides Member States on several key issues wide discretionary power to retain or even introduce national legislation at lower levels. ECRE's main concerns regarding the Proposal can be summarised as follows:

- Access for all asylum applicants to the procedure is not sufficiently guaranteed;
- The right of asylum applicants to a personal interview, if need be with the services of a qualified interpreter, is conditional;
- There is no right to free legal assistance during all stages of the procedures, thereby severely compromising the procedural safeguards set in the Proposal;
- Member States are given too much discretion concerning the detention of asylum applicants, risking a breach of Article 5 of the ECHR or other relevant international legal provisions;
- The scope of accelerated procedures is largely expanded, resulting in the majority of asylum applicants being channelled through speedy procedures with only limited safeguards;
- Member States are allowed to further reduce procedural guarantees by introducing special procedures for subsequent and border applications;
- There is no guaranteed right to suspensive appeal.

Apart from the question of standards, the Proposal as a future legal document lacks clarity in terms of its structure, language and coherence. The confusion surrounding admissibility tests and decision-making on the merits of an application, the increased use of different procedures, the large number of exceptions and exceptions from exceptions, allowing Member States to derogate from the minimum standards the Proposal is precisely supposed to set, unnecessarily overcomplicates the document and raises fundamental doubts about a harmonisation that truly merits the term.

Instead of sanctioning lowest standards and sometimes reflecting worst practice of some Member States, harmonised EU asylum procedures should provide a positive example that one would wish to also see adopted in other regions of the world. Thus, ECRE calls upon EU Member States to accept the influence and leverage they have within wider international fora, and to live up to their responsibility by showing global leadership and setting procedural standards that truly reflect not only their European and international law obligations but also their fundamental humanitarian values, traditions and principles.

For more information on ECRE's position on asylum procedures, we refer the reader to ECRE's comprehensive Guidelines on Fair and Efficient Procedures for Determining Refugee Status (1999); on detention of asylum seekers, we refer to our Position on Detention (1996).

CHAPTER I - General provisions

Article 1 (Purpose)

Article 1 in combination with **Article 3 para. 3)** provides that the scope of application of the future Directive is binding only regarding applications for refugee status, leaving it up to Member States to include applications by persons who are ‘otherwise in need of international protection’. ECRE recognises that at present, a variety of different systems exist in EU Member States, involving different procedures and authorities. We would however ask Member States to consider the advantages of a single procedure applicable to all claimants of international protection. First, this solution would bring the current Proposal in line with its ‘qualification counterpart’.⁴ Second, a single procedure would pay tribute to the complexity of many applications, whereby only an examination during a comprehensive procedure is able to reveal the type of status to be granted. Third, a single procedure would respond to the fact that many procedural rights and guarantees have their actual basis in the European Convention on Human Rights (ECHR), which is, among other international legal instruments, at the same time the basis for ‘subsidiary forms of protection’.⁵ It would be illogical to deprive those who are ‘otherwise in need of international protection’ of the procedural framework guaranteed by the ECHR.

Article 2 (Definitions)

With regard to **Paragraph (e)**, ECRE welcomes that a single authority is vested with the responsibility for examining and deciding upon applications for asylum. In ECRE’s view, this authority should in no case rest with border (police) authorities. For this reason, we would recommend clarifying this definition by introducing in **Paragraph (e)** the phrase: “*Any authority responsible for controlling the entry into the territory cannot be considered as a determining authority*”.

Paragraph (k) describes withdrawal of refugee status as ‘the decision by the competent authority to withdraw the refugee status of a person on the basis of Article 1 C or Article 33 para. 2) of the Geneva Convention’. While the application of the cessation clause may indeed result in the withdrawal of refugee status, it would be incorrect to base withdrawal of refugee status on Article 33 para. 2) of the Geneva Convention. This provision deals with the very specific case under which refugees may be deprived of protection from *refoulement*, not of refugee status as such. Furthermore, the reasons for the application of the cessation clause (voluntary re-availing of protection in another country and change of circumstances) fundamentally differ from those of Article 33 para. 2), which are related to a refugee constituting a danger to the security or to the community of the host country. The Proposal should seek to maintain a clear distinction between the concept of cessation and Article 33 para. 2) of the Geneva Convention. We therefore recommend the deletion of any reference to Article 33 para. 2) in **Article 2 para. (k)** of the Proposal.

⁴ Proposal for a Council Directive laying down minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, COM (2001) 510 final (hereinafter: ‘Qualification Directive’)

⁵ See Number 3 of the Explanatory Memorandum to the above quoted Proposal.

CHAPTER II - Basic principles and guarantees

ECRE believes that all asylum procedures, whether first or second instance, regular or accelerated, should be governed by the same set of basic procedural standards and safeguards. In this regard, we would like to stress that the protection of individuals who fear persecution or other harm in their country of origin is an obligation of states under international law. It is a necessary corollary that the procedure, which determines *who* should benefit from international protection has to be fair and efficient and needs to ensure that no one is wrongly rejected. The main purpose of the asylum procedure is to establish whether an applicant is in need of international protection. It is vital at this point to recall that a person is a refugee within the meaning of the 1951 Convention as soon as s/he fulfils the criteria contained in the definition.⁶ An asylum procedure must ensure asylum seekers *access* to protection by enabling them to present the merits of their claim to a clearly identified authority with responsibility and the necessary training to take a substantial decision.

Article 5 (Access to the procedure)

ECRE welcomes the principle set forth in **Article 5**. It is indeed of key importance for an *effective* right to seek asylum to have access to an asylum procedure in the country of asylum. On **Paragraph 1**), we would however express our concern that the current draft permits considering a late application as one, albeit not the only, ground for rejecting its examination. The reasons for a late application may, however, not only be valid (in cases of psychological trauma, consultation with NGOs and legal aid centres) but also, and even more importantly, not related at all to the *merits* of the application. We would therefore recommend expanding **Paragraph 1**) by a general safeguard to the effect that the filing of an application for asylum shall not be subject to *any* prior formality.

With regard to minors, including unaccompanied minors, ECRE would suggest including the principle of the best interest of the child in the sense that minors should in principle be entitled to make a claim for asylum on their own behalf whenever this is considered to be in their best interest.⁷ ECRE proposes the following wording of **Paragraphs 1**) and **3**):

1) Member States shall ensure every asylum seeker's right to have his application for asylum examined.

3) Member States shall ensure that each adult has the right to make a separate application for asylum on his own behalf. Minors should have the right to make an application on their own behalf whenever this is considered to be in their best interest.

Article 6 (Right to stay pending the examination of the application)

ECRE welcomes that applicants for asylum shall be allowed to remain on the territory of the Member State until such time as the determining authority has made a decision. However, in order to effectively ensure the respect of the *non-refoulement* principle, the provision should not be limited to first instance decisions as the reference to the determining authority in the sense of **Article 2 para. e**) suggests. In ECRE's view, the right to stay pending the examination of the application is only meaningful if it also includes the appeal stage until a *final* decision is made. In this regard, ECRE would draw attention to **Article 2 para. (c)**,

⁶ For the declaratory nature of refugee status determination, see UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (Geneva 1992), para. 28.

⁷ See in this respect Article 22 of the Convention on the Rights of the Child.

which defines an applicant for asylum as ‘a person who has made an application for asylum in respect of which a final decision has not yet been taken’.⁸

ECRE is also concerned by the discretion of Member States under **Paragraph 2)** to depart from the safeguards of **Article 6 para. 1)** in cases of subsequent applications. The obligation to respect the *non-refoulement* principle is by no means altered or diminished in cases of subsequent applications. While we acknowledge that an exception pursuant to **Article 6 para. 2)** is only permitted if a subsequent application is *not* further examined, the (preliminary) examination, which determines the further examination of a subsequent application is part of an *accelerated* procedure.⁹ Due to the limited procedural safeguards in accelerated procedures and since the preliminary examination may well touch upon important issues on the merits of the case, ECRE is very concerned that the exception contained in **Paragraph 2)** might lead to deportations, potentially in breach of Member States’ obligations under international refugee and human rights law.¹⁰ **Article 6 para. 2)** should therefore be deleted. For the remaining provision, ECRE proposes the following wording:

Applicants for asylum shall be allowed to remain on the territory of the Member State in which the application for asylum has been made or is being examined until a final decision on their application has been made.

Article 7 (Requirements for the examination of applications)

While ECRE generally welcomes the requirements for the examination of asylum applications as set out in **Article 7**, we would like to add some points of clarification, which would render the application of the stated requirements more effective.

In **Paragraph 1) a)**, the Proposal may clarify that not just the determining authority but the person who conducts the interview should in principle be responsible for the decision, in order to avoid the situation where decisions are taken on the basis of the transcript.¹¹ We would therefore recommend to supplement **Paragraph 1) a)** by “... *and in principle by the interviewing officer*”.

Concerning **Paragraph 1) b)**, it is indeed of the utmost importance that the determining authority (its personnel) is well informed of the situation in the country of origin. In our view, this includes that the authority has both, the *obligation* to make use of but also the *right* to access accurate and up-to-date legal and factual background information against which the decision maker may assess the strength of an asylum claim. The material upon which an assessment of a country situation is based should be subject to public scrutiny. In this respect, ECRE welcomes the reference to ‘various sources’, which includes in our understanding sources from a wide range of actors such as UNHCR, NGOs and academic institutions. We would however emphasise that it should not be limited to the *general* situation prevailing in the countries of origin and transit but also include case *specific* information relevant to the application.

As regards the ‘appropriate knowledge’ of the determining authority’s personnel in **Paragraph 1) c)**, ECRE recommends adding some clarification in the Commentary. The personnel should for instance be trained on a regular basis on interviewing skills and working with interpreters and on all relevant areas of law, i.e. international refugee, human rights and humanitarian law as well as international and national criminal and extradition law.

⁸ See also our comments on Articles 39 and 40, below.

⁹ See Article 23 para. 1) d) in combination with Article 33 of the Proposal.

¹⁰ See also our comments on Articles 33 and 34, below.

¹¹ On the need for a personal impression of the examiner, see also UNHCR Handbook, para. 202.

On **Paragraph 2**), ECRE welcomes that courts of law are given access to the information referred to in **Paragraph 1) b)**. However, in order to avoid any potential limitations in the information to which appeal authorities have access, we would suggest to delete the term *general* in **Paragraph 2)**. ECRE wishes to underline the importance of *all* information used by first instance authorities to be made available to courts of law.¹²

Article 9 (Guarantees for applicants for asylum)

ECRE welcomes a specific article on the necessary guarantees for asylum applicants during the refugee determination procedure. However, ECRE would prefer a provision that applies to the whole procedure, including the appeal stage. When setting basic procedural guarantees for applicants for asylum, there are no reasonable grounds to differentiate between first and second instance. Moreover, this approach would be in line with **Article 2 para. (c)** of the Proposal, according to which a person is an applicant for asylum until a *final* decision has been taken. Arguably, a person should enjoy the same guarantees throughout the whole procedure. As a further general remark, we would suggest to entitle **Article 9** '*Rights and guarantees of the applicant of asylum*', which would clarify that each applicant disposes of individual *rights* as opposed to his/her obligations, for instance, under **Article 16** of the Proposal.

With regard to **Paragraph 1) a)**, ECRE considers an applicant's right to be informed of all aspects of the procedure and of his or her rights and obligations as a cornerstone and a basic requirement of a fair asylum procedure.¹³ For this right to be exercised effectively, the information must be provided in a language that the asylum applicant fully understands. ECRE considers unacceptable the qualification "reasonably supposed to understand" contained in the current Proposal as it seriously risks limiting the applicant's right to be informed.

ECRE is equally concerned by the inclusion of the qualification "whenever reasonable" with respect to the provision of the services of an interpreter in **Paragraph 1) b)**.¹⁴ We consider that unless the applicant speaks fluently a language fully understood by the interviewing officer and the legal representative, the services of a competent, professionally qualified, trained and impartial interpreter should be made available. Without proper interpretation, there is a risk of compromising the fairness of the procedure, as the applicant might not have the necessary language skills to present her/his case.

It follows from the above that it would be inappropriate to limit the use of interpreters paid out of public funds to the cases where the determining authority called upon their services as the current Proposal in **Paragraph 1) b)** suggests. Given the interest of examining States in obtaining relevant information, and the paramount importance of authorities correctly understanding and being understood by asylum applicants, interpreting services should always be paid for out of public funds. ECRE stresses that the services of an interpreter should be available at all phases of the asylum procedure and during all interviews, including those conducted by border officials.

It is also crucial that the interpreter is professionally qualified, trained and impartial, and guided by a professional code of conduct. There are a number of reasons why: poor quality interpretation can lead to a misrepresentation of factual evidence or incorrect decision-making

¹² For the right of the applicant and the applicant's legal counsellor to access such information, see our comments on Article 9 and 14, below.

¹³ See also ExCom Conclusion No. 8 (XXVIII) - 1977, Determination of Refugee Status, para. (e) (ii).

¹⁴ No such qualification is contained in the above quoted ExCom Conclusion, para. (e) (iv).

resulting in *refoulement*, or a considerable waste of human and financial resources where evidence is challenged on appeal. Investment in qualified interpreters is thus not only necessary for guaranteeing fairness in asylum procedures it also ensures the efficient use of resources as it allows a better assessment of the facts at the onset of the procedure.

ECRE regrets the significant change from the original proposal reflected in **Paragraph 1) c)**. Instead of Member States being *requested* to provide the applicant with the opportunity to communicate with UNHCR or any other organisation working on its behalf, they are merely obliged “not to deny the applicant” this opportunity. This amendment risks undermining the fundamental right of asylum seekers to seek independent advice and limiting UNHCR’s supervisory role under Article 35 of the 1951 Refugee Convention. ECRE believes that the right to independent advice should be positively upheld in the Proposal. In addition, we would urge Member States not to restrict access to asylum seekers to organisations working on behalf of UNHCR. In view of the important protection and assistance work by many NGOs who are not an implementing partner of UNHCR, this would unduly restrict access to and discriminate against a number of organisations.

Moreover, ECRE is of the opinion that the applicant should have the right to access any case specific information in the sense of **Article 7** that is subject to public scrutiny.

Paragraph d), second sentence, provides for the possibility to notify the decision to the legal adviser or other counsellor instead of to the applicant for asylum. ECRE would suggest, however, that in case of legal representation, both the legal adviser or other counsellor *and* the applicant are informed of the decision.

In summary, we would urge **Article 9** to be modified and amended as follows:

1) With respect to the procedures provided for in Chapter III and IV of this Directive, Member States shall ensure that all applicants for asylum enjoy the following guarantees:

a) They must be informed of the procedure to be followed and of their rights and obligations during the procedure in a language, which they understand. The information must be given prior to the examination of their application, enabling them to exercise the rights guaranteed in this Directive and to comply with the obligations described in Articles 16 and 20 (1).

b) They must be given the services of a qualified and impartial interpreter when communicating with officials responsible for the examination of their asylum application or with their legal representative. These services must be paid for out of public funds and be made available at all phases of the asylum procedure.

c) They must be given the opportunity to communicate with the United Nations High Commissioner for Refugees (UNHCR) or with other refugee assisting organisations, in particular those working on the behalf of UNHCR, at all stages of the procedure.

d) They shall have the right to access information within the meaning of Article 7.

e) They must be notified in reasonable time and in an appropriate manner of the decision by the determining authority on their application for asylum. If a legal adviser or other counsellor is legally representing the applicant, the decision shall be notified to him and the applicant.

f) (paragraph e) of the Proposal)

2) *Each adult among the dependants referred to in Article 5 (4) shall be informed in private of the possibility to provide information to the competent authorities on the application for asylum before a decision is taken by the determining authority.*

Article 10 (Persons invited to a personal interview)

Article 10 spells out the general principle that the asylum applicant shall be given the opportunity of a personal interview before the determining authority takes a decision. **Paragraph 2)** lists a number of exceptions to this principle allowing Member States to omit a personal interview in certain instances.¹⁵ This runs counter to ECRE's opinion that a personal interview should be construed as a fundamental right to which the only exception may be in cases when the competent authority considers it possible to grant refugee status on the basis of written information submitted. With regard to **Paragraph 2 c)**, the fact that a Member State cannot provide the services of an interpreter, guaranteed under **Article 9** of the Proposal, should not in any way prejudice the rights and interests of the applicant. In cases where the applicant does not comply with invitations to appear, the discontinuation of the procedure pursuant to **Article 20** of the Proposal may offer a more appropriate solution than to continue the procedure without a personal interview. This approach would make **Paragraphs 3) and 4)** redundant and the provision easier and more comprehensible. We thus urge Member States to substantially re-phrase **Article 10** in line with international refugee and human rights standards:

1) *Before a decision is taken by the determining authority, the applicant for asylum has a right to a personal interview on his/her application for asylum with a person competent to conduct such an interview and responsible to take the decision under national law.*

2) *Member States may, however, refrain from conducting a personal interview in the case of persons who have a mental or emotional disturbance which impedes a normal examination of his/her case or in the case of minors if it is not in their best interest. Where the interviewer believes that a person may have a mental or emotional disturbance, the interview should be terminated and medical advice concerning the health of the applicant should be sought from a clinician including whether the condition is temporary or permanent.*

3) *The fact that no personal interview has taken place shall not negatively impact upon the decision by the determining authority. In these cases, each person must be given the opportunity to be represented by a guardian and legal representative in the case of minors or a counsellor or legal adviser as appropriate.*

Article 11 (Requirements for a personal interview)

ECRE welcomes the guarantees contained in **Article 11** of the Proposal, particularly that, when appointing the interviewer and interpreter, attention should be given to the specific personal or general circumstances of the individual interviewees, including particular cultural origin and vulnerability. However, 'gender' and 'age' should also be included in relation to relevant personal or specific circumstances in **Paragraph 2) a)** which would imply, for instance, choosing female interpreters for female applicants.

¹⁵ No exceptions are foreseen in paragraph 14 of the 1995 Council Resolution on Minimum Guarantees for Asylum Procedures, O.J. No. C 274, 19.09.1996, page 13: "Before a final decision is taken on the asylum application, the asylum seeker must be given the opportunity of a personal interview with an official qualified under national law."

With regard to **Paragraph 2) b)**, ECRE is concerned about the meaning and the purpose of Member States' stated obligation to select an interpreter who is able to ensure "appropriate communication" between the applicant and the person who conducts the interview. In view of ECRE's proposal for an amended **Article 9 para. 1) b)** (interpreters should be professionally qualified, trained and impartial), and in order to avoid any lowering of standards through a wide interpretation of the term "appropriate communication", we believe that the first sentence of **Paragraph 2) b)** could be deleted.

The second sentence of **Paragraph 2) b)** provides that an interview does not necessarily need to take place in the language preferred by the applicant. ECRE would urge Member States to delete the qualification "reasonably be supposed to understand". We would like to stress that an asylum interview, which raises often very sensitive and painful issues for the applicant should be conducted in a way most conducive to effective communication with the person being interviewed and therefore sensitive to the specific circumstances of the case.

Article 12 (Status of the transcript of a personal interview in the procedure)

ECRE welcomes that a transcript shall be made of every personal interview, thus covering procedures at all instances. We would, however, recommend introducing an *obligation* on the part of the Member State to offer the applicant the opportunity to comment on the transcript. A record of comments and proposals for corrections should be maintained and made available to the appeal authorities. **Paragraph 3)** of the Article should thus read:

3) Member States shall offer the applicant the opportunity to approve the contents of the transcript of the personal interview and shall ensure that the applicant has the opportunity to request or propose corrections to the text of the transcript. In case the applicant refuses to approve the contents of the transcript, s/he shall have the right to have his comments formally recorded and made available to appeal authorities in subsequent proceedings.

Article 13 (Right to legal assistance and representation)

While ECRE welcomes the right to legal assistance and representation in **Article 13 para. 1)** of the Proposal, we regret the weakening of the language ("allow" instead of "ensure"), which does not provide a positive obligation for Member States to ensure the right to legal assistance of all asylum applicants. We consider that each asylum applicant should immediately be informed of his/her right to legal advice and representation, and be provided with the details of qualified organisations and legal advisors providing such a service.

Regarding **Paragraph 2)**, ECRE notes with great concern that the obligation of Member States to provide *free* legal advice is restricted to the appeal stage. The provision of free, qualified and independent legal advice is essential to the functioning of a fair asylum procedure. We would like to underline that applicants for asylum, being in a foreign and therefore unfamiliar environment, may not be aware of the full range of their rights or obligations upon submission of an asylum claim. Moreover, access to free, qualified and independent legal advice at the onset of the asylum procedure will improve the quality of first instance examination and decision making, thereby enhancing fairness, increasing efficiency in use of resources and creating confidence in the asylum system.

In view of the potentially large number of negative first instance decisions without automatic suspensive effect pursuant to Article 40, the right to free legal advice at first instance is of fundamental relevance in the case of applications being dealt with under an accelerated procedure. While **Article 13** would clearly apply during the separate judicial procedure dealing with whether the applicant may remain on the territory under Article 40, para.2), the

right to free legal assistance becomes entirely meaningless in the exceptional cases referred to in Article 40 para. 3) a) to d).

As a minimum standard, each asylum applicant should therefore be provided with free independent and qualified legal advice and representation throughout all stages of the asylum procedure, including any appeals, where the financial situation of the applicant so requires. Regarding the further qualification derived from Article 47 of the Charter of Fundamental Rights of the European Union that legal assistance shall be provided free of charge “insofar as necessary to ensure ... effective access to justice”, ECRE would argue that for the specific category of asylum seekers who due to their unfamiliarity with the legal systems in the Member States are very rarely aware of their rights and obligations during asylum procedures, effective access to justice is in fact *never* possible without legal assistance. ECRE urges the reference to this qualification be deleted and **Article 13** be phrased in the following way:

1) Member States shall ensure that all applicants for asylum have the right to qualified independent legal advice and representation at all stages of the procedure. This assistance must be made available free of charge to those who lack sufficient resources.

2) Member States may restrict legal assistance given free of charge to legal advisers or other counsellors specifically designated by national law to assist and/or represent applicants for asylum.

Article 14 (Rights of legal adviser or counsellor)

With regard to the right of a legal adviser or counsellor to have access to information in **Paragraph 1**, ECRE is concerned by the limitation to “information ... liable to be examined by the authorities referred to in Chapter IV”. The formulation appears to reflect **Article 7 para. 2)**, which in itself seems to imply a limitation of access by the appeals authorities to *general* information. ECRE believes that a legal adviser or counsellor should have access to *all* information on which the first instance decision may have been based in order to ensure the effective representation of the applicant. This should also include access to information used at different instances of the procedure as contained in the applicant’s file as well as accurate and up-to-date legal and factual background information available to the examining authorities.

With regard to **Paragraph 2)**, ECRE welcomes the guarantee that the legal advisor or counsellor shall be informed in due time of the time and place of the applicant’s personal interview in order to ensure effective legal representation during the interview.

Article 15 (Guarantees for unaccompanied minors)

ECRE welcomes that a specific article is devoted to the guarantees to be provided to the particularly vulnerable group of unaccompanied minors. In relation to **Paragraph 1)**, ECRE would like to recommend that unaccompanied minors should be granted immediately upon arrival a guardian who nominates or assumes parental responsibility for them in the absence of natural parents. In ECRE’s understanding, the term ‘representative’ used in the Proposal should equate with these functions. Guardians should be carefully selected, trained and supported in their work. As far as possible, they should be able to take into account the child’s ethnic, cultural, religious and linguistic background. They should have expertise in child welfare, refugee law and an understanding of the situation in the child’s country of origin. Their task should be to ensure that decisions on status determination are in the child’s best interests.

Given that guardians may often not have the qualification to also act as a legal adviser or counsellor, ECRE recommends that they have the right to consult a legal adviser or other counsellor with whom they would work closely in order to provide unaccompanied minors with prompt legal advice and representation throughout the procedure including any appeals.

With regard to the medical examination to determine the age of unaccompanied minors in **Paragraph 3**, ECRE would prefer to (re-) include that the methods used should respect the child's 'physical and moral integrity' in line with Article 8 of the ECHR and related jurisprudence.¹⁶ Finally, we believe that the minor's refusal should have no bearing on the substantial decision of his or her application. We therefore recommend **Paragraph 3** to read:

3) Member States that use medical examinations to determine the age of unaccompanied minors shall ensure that:

a) Unaccompanied minors are informed prior to the examination of their application for asylum, and in a language, which they understand, about the possibility of age determination by a medical examination. The methods used for the examination should be safe and respect human dignity.

b) The minor's refusal to undergo this medical examination shall have no bearing on the decision regarding the well-foundedness of the asylum claim.

Article 16 (Establishing the facts of the procedure)

ECRE welcomes the provisions of **Article 16** and particularly the fact that it now forms part of Chapter II on basic principles and guarantees and thereby applies to both accelerated and regular procedures. However, while ECRE is not opposed to the principle stated in **Paragraph 1**), we would plead for **Article 16** to also establish the concurring duty of the interviewer to assist the applicant to substantiate the claim to refugee status by drawing his/her attention to the importance of providing all available evidence and by obtaining documentation from a variety of sources in support of the application.¹⁷ This is also a necessary corollary to **Article 7 para. 1 b)**, which provides that decisions shall be based on accurate information, which is obtained from "various independent sources". For these reasons, we would recommend **Article 16 para. 1)** to start:

1) The duty to ascertain and evaluate all the relevant facts shall be shared between the applicant and the examiner. Member States shall take appropriate measures to enable the applicant for asylum to co-operate with the competent authorities and assist them in establishing the facts of his/her case.

ECRE also welcomes the explicit mentioning of the "benefit of the doubt" principle in **Paragraph 3)**. However, the conditions of its application as set out under **Paragraph 3) a) to c)** merely seem to reflect aspects of the applicant's obligation of co-operation already contained in **Paragraphs 1) and 2)**. We would therefore propose amending **Paragraph 3)**:

¹⁶ See, for instance, European Court for Human Rights (ECtHR), *Costello-Roberts v. the United Kingdom*, Appl. No. 13134/87, Judgement of 25 March 1993, para. 34. This also corresponds with Article 10 para. 3. (a) of the first Proposal, COM (2000) 578 final.

¹⁷ See for this principle UNHCR Handbook para. 196: "the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner", and the Commentary of Article 7 a) of the Proposal for the Qualification Directive, COM (2001) 510 final.

3) *The determining authority should give the applicant the benefit of the doubt where a credible account of the fear of persecution is provided and once all available evidence has been obtained and checked.*

Article 17 (Detention pending a decision by the determining authorities)

Detention is the subject of international and European legal standards and provisions as well as a number of important documents that interpret and elaborate on these standards.¹⁸ In the light of internationally established principles on detention, ECRE is concerned about several shortcomings in **Article 17** of the present Proposal. In order to keep future EU law in line with existing international legal standards, an amended **Article 17** should set out the following conditions: first, the basic principle that asylum seekers should normally not be detained; second, the prohibition of any arbitrary detention and that the grounds and the procedure are established by law; third, the grounds of detention should be clearly and exhaustively set out; fourth, the principle of proportionality should be included in **Article 17**.

Relevant international legal standards that Member States are under an obligation to respect set out clearly the limited conditions under which detention is to be used in the asylum context. Besides the pure legal point of view, ECRE would like to remind Member States that asylum seekers may have already suffered imprisonment and torture in the country from which they have fled. Therefore, the consequences of detention may be particularly serious for them, potentially causing severe emotional and psychological stress.

Starting from the principle that nobody shall be subject to arbitrary arrest or detention, it follows logically that the exceptions to the principle should be interpreted narrowly and drafted in a way, which does not allow overturning the principle – exception structure. Formulations such as “objectively necessary for an efficient examination of an application” or “strong likelihood of absconding” in **Paragraph 1**) or “necessary for a quick decision to be made” **Paragraph 2**) are worryingly vague formulations that are inappropriate to guarantee the limited use of detention allowing for unacceptable high levels of discretion to the determining authority. ECRE disagrees entirely with the approach to merely “limit the scope of Community law...to laying down guarantees as regards the exceptions to the principle that an applicant should not be solely detained because he is an applicant for asylum”, as suggested in the Commentary. Instead, the grounds for detention should be set clearly and precisely in an exhaustive and enumerative way.¹⁹ In this respect, Conclusion No. 44 of the Executive Committee, further elaborated and defined by UNHCR’s Guidelines, provides useful guidance.²⁰ ECRE considers detention justified only as a measure of last resort if there

¹⁸ See, in particular, Article 25 and 31 of the 1951 Geneva Convention, Article 9 of the Universal Declaration of Human Rights (UDHR), Article 9 of the International Covenant on Civil and Political Rights (ICCPR) and Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). See also, for instance, UN Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment, UN GA Res. 43/173; Human Rights Committee, General Comment 8/16 of 27 July 1982.

¹⁹ See the Commentary to Article 17 in the present Proposal at page 11. Against this, see, for instance, ECtHR, *Amuur v. France*, Appl. No. 19776/92, Judgement of 25 June 1996. In this case, the Court found: “where a national law authorises deprivation of liberty – especially in respect of a foreign asylum seeker – it must be sufficiently accessible and *precise* in order to avoid all risk of arbitrariness. These characteristics are of fundamental importance with regard to asylum-seekers at airports particularly in view of the need to reconcile the protection of fundamental rights with the requirements of states’ immigration policies” (emphasis added), see para. 50.

²⁰ ExCom Conclusion No. 44 (XXXVII) - 1986, Detention of Refugees and Asylum-Seekers; UNHCR’s Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers (1999). UN Body of Principles for the Protection of All Persons under any form of Detention

is a repeated and unjustified failure to comply with reporting requirements imposed by the authorities.²¹ ECRE's focus lies on non-custodial measures and we would urge Member States to consider the full range of alternative, non-custodial measures available to them, which are both more humane and more effective, before resorting to detention.

While we recognise that detention in the case that there are grounds for believing that it is 'necessary for a quick decision to be made' is limited to two weeks (**Article 17 para. 2**), we are nevertheless concerned about the discretion left to Member States when interpreting the term 'necessary'. ECRE fears that the present Proposal could be used by Member States to justify the detention of large numbers of applicants for asylum at the beginning of the procedure as a general deterrent. The risk of arbitrary application is exacerbated by the fact that **Article 17** does not foresee any judicial review for detentions made to enable "a quick decision", an omission that could lead to a violation of Article 5 para. 4) of the ECHR.²²

In any case, the decision to detain should always be based on the individual circumstances and personal history of the asylum seeker.²³ ECRE strongly recommends that such a provision be inserted in the Proposal in order to prevent detention as a general deterrent. Also, unaccompanied minors should not be held in detention and ECRE recommends that the Proposal should include an exemption to that end.

ECRE welcomes **Article 17 para. 3) and 4)** which provide for initial and subsequent regular judicial reviews of the order for detention pursuant to **Paragraph 1)**. However, we would like to recall that judicial review is required by Article 5 para. 4) of the ECHR for *all* detention decisions, including also **Article 17 2)**. Additionally, the review should consider not only the formal legal basis of the decision but also the substantive grounds for detention.

Article 19 (Procedure in case of withdrawal of the application)

ECRE agrees with the assertion made in the Commentary on the need to lay down clear and precise standards for cases when the applicant withdraws her/his application. We believe that the most appropriate response of determining authorities in these cases is to discontinue the procedure and to place a notice into the file of the applicant that allows appropriate consideration of the facts around the withdrawal during a potential future re-opening. Contrary to the Proposal, ECRE sees no legal basis and from a practical point of view no need to take a decision on the substance of an application once it has been explicitly withdrawn. ECRE would recommend that **Article 19 para. 1)** is amended as follows:

When an applicant for asylum explicitly withdraws his application for asylum, Member States shall ensure that the determining authority takes a decision to discontinue the examination and to document this decision with a notice to be placed into the file of the applicant.

or Imprisonment, UN GA Res. 43/173; Human Rights Committee, General Comment 8/16 of 27 July 1982.

²¹ See ECRE's position on the detention of asylum seekers, April 1996, para. 12 b); para. a) and c) are not relevant in the context of proposed Article 17.

²² The article reads: "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

²³ See also UN Working Group on Arbitrary Detention: Report on the visit to the United Kingdom on the issue of immigrants and asylum seekers, issued on 16 December 1998 (E/CN.4/1999/63/Add.4).

Article 20 (Procedure in case of implicit withdrawal or abandonment of the application)

Article 20 foresees the possibility not only to discontinue but also to reject an application for asylum in case of its implicit withdrawal or abandonment. However, from the point made above on **Article 19**, ECRE would argue *a fortiori* that an application should only be discontinued when the determining authority assumes an application to be implicitly withdrawn. Apart from the absence of a legal basis and any practical need to reject, an applicant may have valid reasons not to comply with one of the duties set out in **Paragraph 1) a)**, for instance in case of health problems, also of close relatives. Also, a rejection entails far more serious consequences for the applicant than discontinuation, in which case **Paragraph 2)** provides that s/he shall be entitled to request that his/her case be re-opened. As to a rejection, **Article 20** provides no answers, leaving the applicant with the possibility of a subsequent application under **Article 33** unlikely to succeed in many cases.²⁴

While ECRE is in principle not opposed to the reasons, under which Member States may assume that the applicant has implicitly withdrawn or abandoned his/her application for asylum in **Paragraph 1) a)**, we would urge that the term ‘within a reasonable time’ not be interpreted and applied in a restrictive way. Finally, ECRE is particularly concerned by the effect of **Article 20 para. 1)** combined with **Article 32 (f)** which permits Member States to channel “abandoned” claims through the accelerated procedure, thereby further limiting essential rights and safeguards of the applicant. In light of the above, the first sentence of **Paragraph 1)** should read as follows.

1) When there is reasonable cause to consider that an applicant for asylum has implicitly withdrawn or abandoned his application for asylum, Member States shall ensure that the determining authority takes a decision to discontinue the examination and to document this decision with a notice to be placed into the file of the applicant.

Article 21 (The role of UNHCR)

ECRE welcomes the fact that **Paragraph 1)** foresees that UNHCR has access to applicants for asylum at all stages as well as to information on individual applications. We believe, however, that its access to individual asylum applications could be unduly limited by the condition “provided that the applicant for asylum agrees thereto.” Given that asylum applicants will usually not be aware of UNHCR’s supervisory responsibilities under Article 35 of the Refugee Convention and the agency’s potential intention to access their files in line with this responsibility, ECRE recommends to rephrase the condition into “unless the asylum applicant explicitly refuses”. Otherwise, it may be difficult for UNHCR to secure the agreement of the asylum applicant beforehand in case, for example, s/he is held at the border and UNHCR needs urgent access to the file in order to intervene on his/her behalf.

ECRE also welcomes **Paragraph 2)**, which extends access to applicants and information on their cases to NGOs working on behalf of UNHCR. However, given the fact that other organisations beyond those working on behalf of UNHCR may also be in a position to valuably contribute to the protection of asylum applicants, ECRE regrets that **Paragraph 2)** applies only to organisations working ‘on behalf on UNHCR’ and ‘pursuant to an agreement with that Member State’. These qualifications are newly introduced to the Proposal and appear to limit the role of NGOs in the field of refugee protection. While the rights set out in **Paragraph 1)** may be limited to organisations working *on behalf of* UNHCR, this should not

²⁴ See our comments on Article 33 and 34, below.

be understood exclusively in the sense that asylum seekers are given no access to the services of other NGOs.²⁵ ECRE strongly recommends that these points be reflected in the Proposal.

Article 22 (Data protection)

ECRE welcomes the provision on data protection but would recommend for reasons of clarity that an explicit reference to the UN guidelines for the regulation of computerised personal data files²⁶ and the EC Directive 95/46, which is also mentioned in the Explanatory Memorandum, are included in the Proposal. Additionally, we would welcome a general reference to the need for confidentiality to be observed in *all* matters related to the asylum applicant's claim, especially given that the individual examination may often entail an account of painful incidents of torture and trauma.

CHAPTER III - Procedures at first instance

Article 23 (Purpose of accelerated procedures)

As a matter of principle, ECRE is opposed to the use of accelerated procedures which compromise necessary legal and procedural safeguards for the protection of refugees resulting all too often in poor quality first instance decisions. Although some cases may well be processed in a relatively short time, there is no need and no justification for applying different standards of procedural guarantees and safeguards. It is in fact inappropriate to operate a procedure whereby the decision whether, for example, an application is 'manifestly unfounded', or a country can be considered as a 'safe third country' for a particular applicant for asylum, etc. is taken at the outset of the process rather than as a result of the procedure. Important aspects of the claim risk not being taken into account, the result being long and costly appeal procedures and an increased risk of rejecting a person who in fact deserves international protection. As Member States maintain the discretion to decide in most cases on the suspensive effect of the appeal procedures, there is further a serious risk of *refoulement* of asylum claimants to their country of origin to face persecution.

In addition, ECRE wishes to express its concern regarding the widened scope of accelerated procedures contained in the Proposal, which risk rendering regular procedures a rather exceptional occurrence. It is indeed a rather sad indication that Chapter III on procedures at first instance starts with a provision on the *purpose of accelerated* procedures (**Article 23 para. 1**) and only contains a mere reference on regular procedures in **Article 23 para. 2**.²⁷ This risks turning the exception of accelerated procedures into the rule.

While it is true that the basic principles and guarantees in Chapter II do now apply to accelerated procedures,²⁸ ECRE believes that the standards contained in Chapter II are insufficient to ensure fair and efficient access to protection for all applicants for asylum. First of all, the guarantees included in Chapter II (personal interview, services of a qualified

²⁵ See also, in the case of detention, ExCom Conclusion No. 44 (XXXVII) - 1986 para. (g), which contains no such limitation.

²⁶ See E/CN.4/1990/72. These guidelines were adopted by the General Assembly in its Resolution 45/95 of 14 December 1990.

²⁷ For a more logical structure, see the first Proposal (Chapter III: Admissibility, Chapter IV: Substantive determination procedures, Section 1: The regular procedure, Section 2: The accelerated Procedure), COM (2000) 578 final.

²⁸ See, however, Commentary on Article 32 of the Proposal.

interpreter, access to UNHCR and NGOs) are not in themselves fully granted. Second and more importantly, the right to free legal advice, reasonable time to prepare an application for asylum, including the production of evidence, and in particular the suspensive right to appeal to a court of law are non-existent or seriously limited. Therefore, the assertion in the Proposal's Preamble to ensure applicants for asylum 'substantial guarantees' and that decisions are of 'optimum quality' is inherently contradictory to the intention to allow for 'sufficient differentiation' between regular and accelerated procedures.²⁹

Instead of focussing on speed, ECRE is of the opinion that asylum procedures will be both fairer and more efficient if protection remains their central focus. ECRE maintains that an effective asylum procedure depends on good quality initial decision-making. With the allocation of sufficient resources, speedier decisions could be achieved without compromising procedural fairness. Better initial decisions would also clarify whether or not there are grounds to appeal and, if so, refine the issues to be dealt with at appeal, reducing the length and expense of the system as a whole.

Article 24 (Time limits for an accelerated procedure)

ECRE welcomes the introduction in **Article 24 para. 1)** of the more reasonable time limit of three months for a decision to be made on an application.

We also agree with the possibility to extend the time limit according to **Paragraph 2)**. Pursuant to **Article 38 para. 3 b)**, the extension of time limits can be subject to examination through appeal proceedings before a court of law. While we agree with the possibility to appeal such cases, this highlights at the same time the fact that accelerated procedures may even take longer than regular procedures where the issue of extending time limits does not arise.

With regard to **Paragraph 3)**, ECRE would suggest to simplify the provision in the sense that non-compliance with the time limits in **Paragraphs 1) and 2)** shall result in the application for asylum being processed under the regular procedure. While we recognise that according to the Commentary the use of this provision should be reserved to cases of abuse, ECRE finds it problematic to concede to Member States the right to hold applicants responsible for non-compliance with time limits (set by Member States in this Directive) with the consequence that the determining authority will need to take a decision in the absence of all necessary facts of the case being established, which in turn risks to result in poor quality first instance decisions. Moreover, this responsibility is questionable as it rests, as far as the duty to submit information under **Article 16** is concerned, on a *shared* duty between applicant and the determining authority. Regarding non-compliance to appear for a personal interview, we are concerned about the relationship between the 'sanctions' set forth in **Article 20 para. 1)** (discontinuation or rejection) and in **Article 24 para. 3)** of the Proposal. As stated above, there might be valid reasons why an asylum applicant might fail to comply with his/her duty to appear for a personal interview. ECRE considers that the only acceptable consequence of non-appearance at an interview is the discontinuation of the procedure pursuant to **Article 20**.³⁰

Paragraph 4) has to be read in conjunction with **Article 40** of the Proposal, which seriously limits the applicant's rights in appeal proceedings or review of decisions taken in the accelerated procedure. In line with our comments on **Article 40**, below, we strongly object to this provision and recommend its deletion.

²⁹ See, in this sense, Paragraph 6 of the Preamble.

³⁰ See our comments on Article 20, above.

Article 25 (Cases of inadmissible applications)

Article 25 lists the cases, in which Member States may declare inadmissible (rather than 'reject...as inadmissible' as the Proposal inappropriately states) a certain number of applications for asylum. ECRE considers that the purpose of admissibility procedures should be solely to determine if the applicant has already found protection in another state (first country of asylum) or if the application should be examined by a third state under the Dublin Convention.³¹

ECRE agrees therefore with **Paragraph a)** and **b)**. Concerning **Paragraph a)**, we would however emphasise that the application can only be declared inadmissible (for reasons of another State being responsible for the substantive examination) if that State has *explicitly* acknowledged its responsibility and has given notice *in writing* that readmission will be granted in the individual case.

Concerning **Paragraph c)**, ECRE disagrees with the inclusion of 'safe third country' cases in the admissibility procedural stage. The question whether a country can be considered as safe for a particular applicant for asylum in his/her particular case needs to be dealt with in the substantive determination procedure. As to the designation and the application of the concept of 'safe third countries', we refer to our comments below under **Articles 27** and **28**.

With regard to **Paragraph d)**, ECRE considers that an extradition request does not justify the inadmissibility of an application for asylum. The extradition procedure should be kept distinct from the asylum procedure. An applicant for asylum may well have a valid claim for asylum while at the same time a third state may have a valid request for extradition. Firstly, safeguards need to be put in place concerning the principle of *non-refoulement*, in the sense that no person is extradited to a third country unless the country where the asylum application was lodged has firstly determined that the asylum seeker will not be exposed to torture, inhuman or degrading treatment by the state requesting the extradition within the meaning of Article 3 of the European Convention on Human Rights, Article 3 of the UN Convention against Torture and Article 7 of the International Covenant on Civil and Political Rights. Further, arrangements need to be made following criminal prosecution in the third country to guarantee the applicant's readmission and access to the asylum procedure in the country where a claim was originally lodged. ECRE recommends that instead of extradition cases being dealt with at the admissibility stage, they should be examined as part of a regular procedure. Suspension of the regular asylum procedure would be the most appropriate way to pay respect to both protection needs and valid extradition requests.

Paragraph e) on the indictment by an International Criminal Court concerns by definition, - due to the jurisdiction of the existing courts - cases that would fall under the exclusion clauses of Article 1 F of the 1951 Convention. As stated before, these cases are by their very nature complex and should under no circumstances be dealt with at the admissibility stage and/or in an accelerated procedure. Instead, their merits need to be considered carefully in substance. As a result, ECRE urges to delete **Paragraphs c) to e)**.

Article 27 (Designation of countries as safe third countries)

With regard to **Article 27 para. 2)** and **3)** ECRE is concerned by the discretion granted to Member States to retain or introduce legislation that allows for the designation by law or regulation of 'safe third countries'. As a matter of principle, ECRE believes that the question

³¹ See now Council Regulation No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for asylum lodged in one of the Member States by a third-country national, OJ L 050, 25.02.2003.

whether a particular country is ‘safe’ for the purpose of returning an asylum applicant can only be answered on a case by case basis, taking into account the facts of each individual case. We therefore oppose the use of lists of ‘safe third countries’ by Member States.

Article 28 (Application of safe third country concept) and **Annex I**

On the application of the safe third country concept, ECRE would like to recall its concern that by not ensuring an asylum seeker’s access to a refugee determination procedure that provides for all necessary legal and procedural safeguards in the country where a claim is lodged, sending states risk, directly or indirectly, violating the principle of *non-refoulement* as enshrined in the 1951 Refugee Convention and human rights instruments, in particular Article 3 of the ECHR.³² In this respect, ECRE notes with concern the conditions and criteria used in **Article 28**. Neither the *opportunity* to avail him/herself of the protection of a safe third country pursuant to **Paragraph a)** nor mere *grounds for considering* that the particular applicant will be admitted pursuant to **Paragraph b)** are sufficient to designate a third country as safe. With regard to the latter provision, in order to avoid the phenomena of refugees in orbit, it is necessary that the third state give its *explicit* consent to (re-) admit the asylum applicant and to consider the substance of the asylum claim.

Additionally, ECRE would like to point out that the reasons why the asylum applicant lodged the application in the receiving state should be taken into account as far as possible.³³ Thus, Member States should consider assuming responsibility for the asylum application, for instance, where the applicant has close family ties in and/or substantial cultural ties with the country; has been in transit in the third country, with which s/he has no links or contacts, for a limited period of time, and for the sole purpose of reaching his/her destination; is in poor physical or psychological health, or otherwise belongs to a particular vulnerable group. We therefore recommend deleting **Paragraph a)**, and urge amending current **Paragraph b)** as follows.

“...the third state has given its explicit consent to (re-)admit the asylum applicant to its territory and provide access to the refugee determination procedure.”

On **Paragraph c)**, ECRE agrees that a country can only be considered as safe for a particular applicant for asylum if there are no grounds for considering that the country is not a safe third country in his/her particular circumstances. However, its *effective* application requires the burden of proof to rest with the receiving country that wishes to establish that a third country can be considered safe. Applicants should not be expected to provide evidence apart from and in addition to information to establish their case as stipulated in **Article 16** of the Proposal. Here ECRE notes that the situation of an applicant risks being aggravated through the combined effect of an accelerated procedure not providing sufficient time to rebut the presumption that s/he could have found protection in a third state and **Article 40** not guaranteeing the right to remain on the territory pending an appeal. The burden of proof should be reflected either in the paragraph or in the Commentary.

With regard to **Annex I, Part I. A. 1)** and within the framework set above, ECRE would argue that a country cannot be considered to be safe for an asylum applicant if s/he will not be given access to the asylum procedure. This may occur, for example, where the country implements formal requirements for access such as time limits or possession of particular

³² See ECtHR in *Jabari v. Turkey*, Appl. No. 40035/98, Judgement of 11 July 2000; ECtHR in *T.I. v. U.K.*, Appl. No. 43844/98, Admissibility Decision of 7 March 2000, highlighting the necessary caution when taking decisions relating to the safety of a third country.

³³ See ExCom Conclusion No. 15 (XXX) – 1979, para. (h) (i), (ii) and (iii).

documentation. This should be clarified in **Annex 1 I. A. 1)** by adding the following principle:

“The filing of an application for asylum is not subject to any prior formality. Applicants shall have effective access to an asylum procedure that includes a substantive examination of their case.”

ECRE is particularly concerned by the consideration in **Annex I, Part I. A. 2)** that countries that have *not* ratified the Refugee Convention may be considered to be safe. Refugee protection involves more than mere protection from *refoulement*, which is part of customary international law. It also requires the recognition of a set of rights accompanying refugee status under the 1951 Refugee Convention. In ECRE's view, no country should be considered to be safe without the international legal commitment of ratification and effective implementation of the 1951 Convention. This also implies due consideration of reservations to refugee rights.

ECRE is similarly concerned by **Annex I, Part I. A. 2)**, following which a country shall be considered safe even if, having ratified the Geneva Convention and consistently observing its standards in practice, it has not (yet) put in place a procedure in accordance with the principles under **Part I. A. 1)**. ECRE does not believe that ratification of the 1951 Convention and its observance, indeed fundamental requirements for assessing whether an applicant could have found protection in a third country, can offset the absence of a procedure. In this regard, ECRE requires that an applicant be provided by the receiving state with full access to a fair and efficient determination procedure with all minimum safeguards. ECRE therefore recommends deleting **Part I. A. 2)**.

Article 29 (Cases of manifestly unfounded applications)

With regard to **Paragraph a)**, and in line with ExCom Conclusion No. 30, ECRE agrees in principle with the provision that asylum procedures may deal in an expeditious manner with applications that are clearly unrelated to the criteria for the granting of refugee status laid down in the 1951 Refugee Convention. While the purview of the Proposal in **Article 1** is limited to applications for refugee status, ECRE nevertheless stresses that other human rights criteria justifying the granting of international protection be included.³⁴ This would not only take into account the possibility to expand the scope of application to such cases as foreseen in **Article 3 para. 3)** of the Proposal but also be in line with the above-mentioned ExCom Conclusion.³⁵ We therefore would recommend rephrasing **Article 29 para. a)** accordingly.

Under **Paragraph b)**, the application of an asylum seeker from a ‘safe country of origin’ may be rejected as manifestly unfounded. ECRE disagrees with the concept of ‘safe country of origin’ as it does not relate to an individual assessment of the asylum applicant’s status. While the analysis that a country is ‘safe’ is important, it is only one element to be taken into account in the asylum determination procedure. Even in countries which generally may be considered to be safe, the risk of persecution for a Convention ground can never be entirely excluded. To resort to a notion of ‘safe country of origin’ that effectively excludes certain nationals from having their claim for asylum comprehensively examined, may amount to a *de facto* geographical reservation to Article 1 A para. 2) of the Refugee Convention which is explicitly prohibited by Article 42 of that Convention.³⁶ **Paragraph b)** should be deleted.

³⁴ See Article 3 ECHR, Article 3 CAT and Article 7 ICCPR. See also Article 28 para. 1. (d) of the earlier Proposal, COM (2000) 578 final.

³⁵ See also ExCom Conclusion No. 30 (XXXIV) - 1983, para. (d) “... nor to any other criteria justifying the granting of asylum”.

³⁶ See also comments below to Articles 30 and 31.

Paragraph c) provides that Member States may consider applications that *prima facie* fall under the exclusion clause of Article 1 F of the 1951 Convention as manifestly unfounded. ECRE is alarmed by the addition of this provision in **Article 29** of the Proposal. Article 1F cases, by their complex nature, require the thorough examination and the full knowledge of all facts and elements of an application for asylum as well as a precise legal analysis involving questions of individual criminal responsibility.³⁷ This is essential in view of the gravity of the issues and the potential consequences of an incorrect decision. Moreover, we are strongly opposed to the concept of '*prima facie*' exclusion as it contains a lower standard than what is required under the 'serious reasons for considering' test in Article 1 F of the 1951 Convention. Thus, a *prima facie* exclusion is not only unfortunate as a concept because it introduces just another hardly definable threshold.³⁸ It is also, due to the consequences (rejection as manifestly unfounded) incompatible with the 1951 Refugee Convention. We strongly urge Member States to delete **Article 29 para. c)**.

Article 30 (Designation of countries as safe countries of origin)

Article 30 para. 1) provides that Member States may consider a country as a safe country of origin only in accordance with the principles set out in **Annex II**. ECRE considers that there is a fundamental flaw in the requirements set out in Annex II, which is inherent in the concept of 'safe countries of origin'. Annex II requires that the country "consistently observes the basic standards laid down in international human rights law from which there may be no derogation ..." and that the country "provides for generally effective remedies against violations of these civil and political rights...". However, refugee law is not about what happens *generally*, it is about the protection needs of *individuals*. A country may well provide *generally* effective remedies against violations of civil and political rights whilst denying remedy and persecuting a particular individual or group on grounds of their race, religion, political opinion, nationality or social group. ECRE is thus strongly opposed to the usage of the concept of 'safe countries of origin'.

Article 31 (Application of the safe country of origin concept) and **Annex II**

ECRE acknowledges that **Article 31** provides, notwithstanding **Annex II**, that a country can only be considered a 'safe country of origin' for a particular applicant for asylum "if there are no grounds for considering the country not to be a safe country of origin in his particular circumstances". However, the construction of this as a rebuttable presumption,³⁹ on the basis of which the applicant has to rebut the presumption that s/he is not in need of international protection, makes this provision highly problematic. In ECRE's opinion, it is for the Member State to establish that the country of origin can be considered safe in the particular circumstances of the applicant. This requires the careful and comprehensive examination of the applicant's *individual* claim, most appropriately dealt with in regular procedures. In summary, ECRE strongly opposes the concept of 'safe country of origin' as such and urges the deletion of **Article 29 para. b)**, **Articles 30** and **31**, and **Annex II**.

³⁷ See also our comment on Article 25 e), above.

³⁸ See in this context ECRE's Comments on the Commission Working Document on the relationship between safeguarding internal security and complying with international protection obligations and instruments, para. 1.4.3.2, London, May 2002.

³⁹ See Commentary of Article 31 referring to the former Proposal COM (2000), 578 final.

Article 32 (Other cases under the accelerated procedure)

As far as other cases under the accelerated procedure are concerned, ECRE would like to raise some concerns regarding **Paragraphs f), g) and h)**.

Pursuant to **Paragraph f)**, cases of non-compliance with obligations referred to in **Article 16** and **20 para. 1)** may be processed in an accelerated procedure. As pointed out previously in our comments on **Article 16** and **20**, ECRE is deeply concerned by the combined effect of channelling these cases in accelerated procedures and recommends deleting **Article 32 f)**.

Paragraph g) concerns applicants who entered the territory of a Member State unlawfully and have not presented themselves to the authorities as soon as possible. However, a late application should by no means be used as an indication of the merits and the potential complexity of an application for asylum. Also, this provision runs counter to the guarantee in **Article 5 para. 1)** that applicants shall not be rejected nor excluded from examination on the ground that they did not make their application as soon as possible. While **Paragraph g)** does not deal with the rejection or exclusion of such cases, it does in fact establish a ban from the regular procedures, which may be inappropriate regarding the substance of the case. ECRE suggests deleting the provision.

According to **Paragraph h)**, an application may be processed under an accelerated procedure if the applicant is a danger to the security of the Member State or constitutes a danger to the community of that Member State, having been convicted by a final judgement of a particularly serious crime. This wording seems to reflect Article 33 para. 2) of the 1951 Refugee Convention, which provides for removal of protection against *refoulement* in very exceptional cases where the security of a country or a community is in danger. Given that Article 33 para.2) neither revokes refugee status nor touches upon the question of determination of international protection needs, it could be argued that the provision contained in **Paragraph h)** is out of context and indeed wrongly placed in the present Proposal on asylum procedures. In any case, even if the intention of the drafters has not been to incorporate the content of Article 33 para. 2) of the Refugee Convention in **Article 32** of the amended proposal, ECRE would argue against channelling national security cases into accelerated procedures. In light of the exceptional nature and complexity of such cases, we recommend deleting **Paragraph h)**.

On a general note, the last paragraph by which an application “can only be rejected if the determining authority has established that the applicant has no well-founded fear of persecution” is a necessary component of all examinations of applications for asylum. While the provision is therefore evident, it reflects at the same time the inherent problematic of accelerated procedures. In order to comply with their international obligations and their humanitarian responsibility, Member States have to examine an application for asylum in a fair and efficient procedure. The length of this procedure should only depend on the contents of an application, not on whether it falls in the scope of some generic categories.

Article 33 (Cases of subsequent applications) and Article 34 (Procedural rules)

ECRE opposes the incorporation of specific procedures entailing a preliminary examination in cases of subsequent applications in the amended Proposal. ECRE is highly concerned by the limited procedural safeguards foreseen for the preliminary examination, which are of central importance to the asylum applicant’s right to have his claim examined in substance. **Article 34 para. 2) a) and b)** seems to imply that the obligation to show that the circumstances in the asylum applicant’s claim have changed rests merely with the applicant. However, we would like to point out that the international obligation to protect those who have a well-founded fear of being persecuted requires *also* the Member State to search for

evidence and indicate the facts which may justify a new decision in a particular claim.⁴⁰ While acknowledging the assurance in the second sub-paragraph of **Article 34 para. 2)** that the conditions of the preliminary examination shall not render access to new procedures impossible, ECRE fears that there is indeed a strong risk that access *is* rendered impossible given the severely restricted guarantees for the applicant during the preliminary examination (time limits to submit information, no personal interview).

With regard to **Article 33 para. 2)**, setting out the conditions under which a subsequent application will be further examined, ECRE is concerned that the burden of proof is on the applicant who needs to show that the new reasons could not be asserted in the previous procedure, particularly by filing an appeal, without a fault of his/her own. In this context, we would like to highlight that the Proposal does not provide for free legal advice for all applicants at all stages. Applicant may not be aware of the opportunity to file an appeal despite being able to provide new legal or personal/factual circumstances which would result in a change of the negative decision at first instance

In this context, we would like to recall that applicants for asylum who had their previous application withdrawn by virtue of **Articles 19 and 20** may find themselves in an accelerated procedure, where their claim is never substantially examined, a speedy decision taken and their removal effected in accordance with **Article 40 para. 3) c)** without any opportunity to appeal with suspensive effect. Equally, we would like to recall our concerns in relation to **Article 6 para. 2)**. In both cases, Member States risk violating the *non-refoulement* prohibition.

Finally, we would like to point out that current **Article 32 para. d)** appears to provide Member States with a sufficient tool to expedite ‘subsequent’ applications, which do not contain any new elements. As a result of all these reasons, ECRE opposes the introduction of procedures for subsequent applications and recommends the deletion of **Articles 33 and 34**.

Article 35 (Cases of border procedures)

ECRE is deeply concerned by this Article, which introduces special border procedures with severely limited safeguards. As a matter of principle, border procedures cannot provide all necessary procedural guarantees and safeguards due to the limited facilities *sur place* (housing, qualified examiners, interpreters, legal counsel, etc.). They run counter to the acknowledged need to admit refugees into the territories of States, which includes no rejection at frontiers without fair and effective procedures for determining status and protection needs.⁴¹ They may also risk implicitly rewarding efforts to circumvent border controls and enter the country illegally in order to submit an application from within the territory. ECRE considers that the purpose of the Proposal to set minimum standards for the operation of asylum procedures in Member States, is compromised by provisions that allow Member States maintaining specific procedures that do not comply with some basic principles and guarantees contained in Chapter II, in particular **Articles 9 to 12**. Apart from failing to promote the wider EU aim of a “common asylum system”, ECRE fears that **Article 35 para. 1)** may lead to a harmonisation of minimal standards with Member States which do not currently operate border procedures rushing to introduce them before the adoption of the Directive.

ECRE is deeply concerned that **Articles 9 to 12** are not forming part of the minimum guarantees listed in **Article 35** for specific procedures conducted at the border. The right to be informed of the procedure to be followed and to benefit of the services of an interpreter is

⁴⁰ See also our comments on Article 16, above.

⁴¹ See ExCom Conclusion No. 82 (XLVIII) - 1997, para. (d) (iii).

therefore left to the discretion of Member States. Furthermore, applicants may not benefit from a personal interview with the determining authority. They may consult a legal advisor but in the case of a negative decision, there is no right to free legal advice. ECRE would like to point out in this context that the provision of limited rights to asylum applicants at a border is contrary to the explicit recommendations made by the Committee of Ministers to the Council of Europe in 1994 which stipulated among others the right of applicants for asylum to be received and accommodated in an appropriate place, to be informed about the procedure to be followed and about his/her rights and obligations, and to be assisted by an impartial interpreter during the interview with an appropriately trained authority.⁴²

While **Article 35 para. 3)** provides that Member States shall lay down in further laws or regulations their specific procedures as regards legal assistance, the examination of the application, etc., the standards of these procedures are left to the discretion of Member States. ECRE strongly urges the EU Member States to delete **Article 35** and refrain from introducing special and expeditious border procedures that may lead to serious violations of their international legal obligations.

Article 36 (Withdrawal or annulment of refugee status)

The Commentary points out that ‘the terminology of withdrawal or annulment of refugee status is meant to cover cases of cessation of refugee status as well’. In this respect, ECRE would like to emphasise that the concept of cessation, which comes into play when the reasons for which the refugee status was recognised have ceased to exist, differs widely from the notion of ‘annulment’ which would, for example, be invoked if post recognition evidence comes to light which shows that the refugee was wrongly recognised and the decision should therefore be annulled. ECRE considers that the concept of cessation is rightfully dealt with in the Proposal for a Qualification Directive,⁴³ especially since cessation as a term and concept is an integral part of the refugee definition in international law.

Article 37 (Procedural rules)

ECRE welcomes **Article 37’s** stipulation that during the process of reconsideration of a refugee’s qualification, the annulment or withdrawal of refugee status shall be examined under the regular procedure. We would, however, request clarification as to what is meant in **Paragraph 2)**, which states that Member States may derogate from **Articles 9 to 12** ‘when it is technically impossible for the competent authority to comply with the provisions’. ECRE can only imagine one reason why it should be ‘technically impossible’ for Member States to comply with the provisions of **Articles 9 to 12**, i.e., if the refugee has permanently established himself in another country (either a third country or the country of origin) and is therefore unavailable in person. We consider that it is not necessary to state this explicitly in the Proposal. **Article 37 para. 2)** should therefore be deleted.

⁴² See Council of Europe Committee of Ministers Recommendation No. R (94) 5 *of the Committee of Ministers to Member States on guidelines to inspire practices of the Member States of the Council of Europe concerning the arrival of Asylum-seekers at European Airports*, adopted by the Committee of Ministers on 21 June 1994 at the 515th meeting of the Minister’s Deputies.

⁴³ See Article 13 of the Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, COM (2001) 510 final.

CHAPTER IV - Appeals procedures

ECRE has observed with alarm the recent tendency of EU Member States to restrict the right of the appellant to remain in the country during the appeal procedure. This has been partly based on allegations of abuse of appeal procedures with suspensive effect by ‘undeserving’ asylum seekers for the purpose of prolonging their stay in the EU. ECRE stresses that the key to fast and efficient asylum procedures lies in the quality of the first instance decision. Well-reasoned initial decision-making establishes whether there are grounds for appeal, and if so, identifies the issues to be dealt with on appeal, reducing the length and expense of the system as a whole. ECRE urges Member States to reconsider the approach taken in this Proposal and provide asylum applicants with an *effective* remedy in all asylum procedures that should entail an automatic right to remain on the territory until a final decision has been taken.

Article 38 (The right to an effective remedy before a court of law)

ECRE welcomes **Article 38** as it provides for the right to appeal before a court of law, on both facts and points of law. We also fully support the point made in the Commentary that where there is only one appeal it must be before a court.

We agree that the refusal to re-open an asylum application (see **Articles 19 and 20**) should be subjected to an appeal pursuant to **Article 38 para. 3 a)** of the Proposal. Notwithstanding our fundamental concerns expressed under Article 23 and 24 above, ECRE also agrees with the proposal for examination of time extensions in accelerated procedures before a court of law.

Article 39 (Review and appeal proceedings against decisions taken under the regular procedure)

ECRE welcomes the principle in **Article 39 para. 1)**, which provides that applicants for asylum who have lodged an appeal against a decision taken in the regular procedure shall be allowed to remain on the territory of the Member States pending its outcome (suspensive effect). In fact, there can be no *effective* remedy unless it is combined with the right of the asylum applicant to remain on the territory until the appeal authority has taken a final decision.⁴⁴ An independent review of both the merits and legality of the decision taken by the competent authority is a necessary safeguard to ensure that no refugee is returned to face persecution and thereby to fully respect the principle of *non-refoulement*.⁴⁵ Where an appeal is lodged, it should have suspensive effect; there should be no derogation from this principle as “irreversible harm may be done to the applicant if he is expelled...”.⁴⁶

It is therefore highly regrettable to see this principle being compromised in **Paragraph 2)**, which permits Member States to derogate from **Paragraph 1)** by virtue of laws or regulations

⁴⁴ See also our comment on Article 6, above.

⁴⁵ See ~~ExCom Conclusion No. 8 (XXVIII) - 1977, -p~~ ~~Paragraph (e)(vii) of ExCom Conclusion No. 8 (XXVIII) - 1977 on the Determination of Refugee Status~~: “The applicant...should also be permitted to remain in the country while an appeal to a higher administrative authority or a court is pending.” In the context of Article 3 of the ECHR, Recommendation No. (98) 13 of the Committee of Ministers stipulates that, in order for the remedy to be effective, execution of the expulsion order is to be suspended.

⁴⁶ See ECtHR, *Cruz Varas and Others v. Sweden*, Appl. No. 15576/89, Judgement of 20 March 1991, stating that requests to refrain from deportation “serve the purpose in expulsion (or extradition) cases putting the Contracting States on notice that, (...), irreversible harm may be done to the applicant if he is expelled and, further, that there is good reason to believe that his expulsion may give rise to a breach of Article 3 of the Convention.”

in force on the date of adoption of the Directive. Besides the fact of limiting the right to an effective remedy as such, we find it particularly unfortunate that this general guarantee is placed under the discretion of Member States. The Proposal is therefore unable to set the necessary minimum standards at EU level that guarantee the full respect of international obligations by Member States. We strongly recommend deleting **Article 39 para. 2)**.

Deleting **Article 39 para. 2)** would render **Paragraphs 3)** and **4)** redundant. Concerning those two paragraphs, we would like to underline, however, that an additional review by a court of law as foreseen under **Paragraph 3)** provides for a complex and somewhat cumbersome procedure, which the introduction of a simplified appeal system is trying to avoid.

Additionally, the exception from the requirement for a court to review the expulsion order in cases of national security or public policy contained in **Paragraph 4)** is inconsistent with international refugee and human rights law requirements. The obligation of states not to expose an individual to a danger to his or her life or degrading treatment is absolute.⁴⁷ The combined application of Article 3 and 13 of the ECHR sets a clear standard in the sense that “given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised (...) the notion of an effective remedy under Article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3. This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to national security of the expelling State.”⁴⁸

With regard to the notion of ‘public policy’ as it is used in the English version, we wonder about the rationale for this newly introduced and very vague concept.⁴⁹ Even if the intention of the drafters was to introduce here the concept of public order, we would like to highlight that international human rights law does not link public order considerations to limitations of the right to effective remedy.⁵⁰ In summary, ECRE strongly urges Member States to delete **Article 39 para. 2) to 4)**.

Article 40 (Review and appeal proceedings against decisions taken in the accelerated procedure)

While **Article 39** on appeal proceedings in the regular procedure still contains a right to appeal with suspensive effect as the rule (with regrettable exceptions), **Article 40**, applicable to accelerated procedures, establishes the discretion of Member States on this matter. Pursuant to **Paragraph 1)**, Member States are required to lay down in national law the cases in which applicants will not benefit from an appeal with suspensive effect. As stated in our comments above, this is contrary to the purpose of setting minimum standards. Also, the right to appeal with suspensive effect gains even more importance in the context of accelerated

⁴⁷ See ECtHR, *Chahal v. U.K.*, Appl. No. 22414/93, Judgement of 15 November 1996: “The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. [...] In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.” (para. 80.).

⁴⁸ *Ibid.* at paragraph 151.

⁴⁹ While Article 33 para. 2 c) of the first Proposal still used the term national ‘public order’, the Commentary to Article 39 gives no explanation for the new concept of public policy. Also, the German version of the amended Proposal still uses the term ‘oeffentliche Ordnung’, which is closer to ‘public order’.

⁵⁰ The concept of public order is used, for instance, in Article 12 para.3), 14 para. 1), 19 para. 3) b) and 21 of the ICCPR and in Article 6 para. 1 and 9 para. 2 of the ECHR. Article 8 para. 2), 10 para. 2) and 11 para. 2) of the ECHR contain a similar concept of ‘prevention of disorder’.

procedures because of their limited general procedural safeguards.⁵¹ ECRE is strongly opposed to such practice and the idea that the major distinction between the accelerated and the regular procedure is on the right to remain at the territory as it is stated by the Commentary to Articles 39 and 40. The requirement for a suspensive effect of *all* appeals, whatever the procedure may be, commands absolute respect as it is directly linked with the unconditional principle of *non-refoulement*.

From ECRE's point of view, of **Article 40 para. 2)**, which provides that a court of law shall decide on the suspensive effect of an appeal, i.e. in cases where suspensive effect of appeal is denied, contradicts the very intention of Member States to simplify and render asylum procedures faster. A separate court procedure on the question whether an applicant may remain on the territory while awaiting the outcome of the asylum procedure is cumbersome and unnecessary. In fact, the court procedure necessarily needs to look into the most important elements of the asylum procedure in order to respect the *non-refoulement* principle. ECRE considers that a truly *effective* remedy is only one, which grants the right to appeal with suspensive effect to all applicants. As with **Article 39 para. 2) to 4)**, we strongly recommend to delete **Article 40** of the Proposal.

Article 41 (Time limits and scope of the examination in review or appeal)

On **Article 41 para. 1)** ECRE would recommend that instead of merely asking Member States to lay down "reasonable time limits" for the appeals procedures, the Proposal itself determines what the minimum period shall be for lodging an appeal, giving notice of appeal, and taking the decision. Given the experiences of Member States with a comparatively high percentage of appeal instances overruling first instance decisions and the corresponding importance of appeals for asylum applicants, "reasonable time limit" is too vague a concept and leaves too much discretion to Member States, thereby risking the promotion of different refugee protection standards between the Member States. These considerations also apply to **Paragraph 2)** concerning the conditions under which it can be assumed that an applicant has implicitly withdrawn or abandoned his review or appeal.

CHAPTER V - General and final provisions

Article 44 (Report)

ECRE welcomes the introduction of a two-year interval for the report of the Commission to the European Parliament and the Council on the application of the Directive. However, we would like to point out that we disagree with the statement in the Commentary that the rules on asylum procedures "precede and condition" the exercise of rights under other asylum community legislation such as the proposal on minimum standards for the qualification and status of third country nationals as refugees. In our opinion, it is rather vice versa: the agreement on a common EU definition of who qualifies as a refugee should be seen as the starting point preceding all other agreements, including the one regarding the procedure to determine the status of asylum applicants.

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⁵¹ See our comments on Article 23, above.

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