AMNESTY INTERNATIONAL

European Institutions Office

31 March 2017

Position Paper

THE PROPOSED ASYLUM PROCEDURES REGULATION

SUMMARY

After publishing a proposal for revising the Dublin Regulation (Dublin IV) on 4 May 2016,[1] the European Commission took a further step on 23 July 2016 when it presented revised proposals on asylum procedures, qualification and reception conditions within the framework of the planned reform of the Common European Asylum System (CEAS).

As part of this review, the Asylum Procedures Directive is to be replaced by a regulation. According to Article 288 of the Treaty on the Functioning of the European Union (TFEU), a directive is binding as to the result to be achieved but leaves to the national authorities the choice of form and methods of implementation. A regulation is binding in its entirety and directly applicable in all Member States. Consequently, no higher standards can be set in national law. The introduction of a regulation aims at establishing uniform rules and procedures, thereby advancing the harmonization of European asylum systems, with the stated objective of approximating recognition rates of asylum-seekers and preventing secondary movements.

Amnesty International welcomes efforts to harmonize the asylum laws and procedures of EU Member States. However, Amnesty International is greatly concerned that Member States with higher procedural and substantive guarantees will be forced to lower their standards to the prescribed level in the proposed regulation and have limited or no discretion to grant more favourable treatment. While the proposed review contains some positive aspects, altogether it would lead to a worrying regression of existing standards - for example, through the mandatory use of admissibility and accelerated procedures, and the compulsory application of "safe countries of origin", "safe third countries" and "first countries of asylum" concepts, including for unaccompanied minors and with reduced procedural safeguards. Amnesty International is also concerned by the obligation on Member States to reject applications as abandoned in certain cases (such as when asylum-seekers have not lodged their claim in a timely manner) as this could exclude a large number of asylum-seekers from the asylum procedure.
Amnesty International's keys concerns with respect to this proposal are discussed below.

"SAFE COUNTRIES OF ORIGIN" (ARTICLES 47 AND 48)

The "safe country of origin" concept refers to the absence of any well-founded fear of persecution or real risk of being subjected to serious harm for the individual applicant in his or her country of origin or habitual residence. Currently, Annex I to the Asylum Procedures Directive lays down the criteria for designating a country as "safe country of origin" if there is generally and consistently no political persecution, torture or threat by reason of indiscriminate violence in situations of international or internal armed conflict. In addition, there must be protection against persecution or mistreatment by laws and their actual application, observance of the European Convention on Human Rights (ECHR), respect for the non-*refoulement* principle of the Geneva Convention on Refugees and the provision of effective remedies. The proposed Article 47 of the Asylum Procedures Regulation broadly reflects all these criteria, save for the fact that it omits the word *consistently* and only refers to the absence of persecution generally.[2] Article 47(2) mentions various sources for country of origin information, including reports by international organizations, such as the UNHCR, but includes a new requirement to take into account the common analysis of country of origin information produced by the planned European Asylum Agency. The "safe country of origin" concept also leads to an accelerated examination of the merits of an asylum application (Article 40(1)(e)).

While Member States remain free, temporarily, to define "safe countries of origin" in national law, the proposed Asylum Procedures Regulation makes also provision for a common European list of "safe countries of origin" (Article 48). This common list is currently

[1] Proposal for a Regulation establishing the criteria and mechanisms for determining the Member state responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM(2016) 270, 4 May 2016.

[2] Also, instead of requiring a general observance of the non-*refoulement* principle, the condition in Article 47(3) now is that the country's own nationals are not deported to States where they risk being subject to death penalty, torture or persecution which is indeed the relevant standard vis-à-vis States' treatment of their own nationals.

negotiated in a separate Regulation, amending the recast Asylum Procedures Directive, and will be subsumed by the new Asylum Procedures Regulation.[3] In line with what has already been proposed, according to Annex I to the draft Regulation, Albania, Bosnia and Herzegovina, Macedonia, Kosovo, Montenegro, Serbia and Turkey will be on the common list of "safe countries of origin". While observance of the prescribed criteria for the Balkan states is already questionable, the designation of Turkey as "safe" is clearly not justified at the present time.[4]

Amnesty International categorically rejects the concept of "safe countries of origin" because it is not compatible with the right to a fair and efficient individualized asylum procedure, leads to discrimination against asylum-seekers on the basis of their nationality, and often results in an excessively high burden of proof being placed on the applicant to overcome an unreasonable presumption against the validity of their claim. The application of a "safe country of origin" concept may a priori preclude whole groups of asylum-seekers from refugee status and ultimately result in direct or indirect refoulement. Consequently, Amnesty International also opposes the introduction of a common list of "safe countries of origin". The drawing up of a list of "safe countries of origin" will generate or perpetuate prejudice against asylum-seekers from countries designated as "safe", when the need for international protection must be determined on the basis of individual circumstances.

Amnesty International recommends deletion of Articles 47, 48 and Annex I, and Article 40(1)(e) as a criteria that allows for an accelerated examination procedure.

"FIRST COUNTRY OF ASYLUM" (ARTICLE 44)

The term "first country of asylum" in the proposed Regulation refers to a country outside the European Union in which an asylum-seeker has already found international protection that is accessible and effective for the individual concerned. While the examination of whether or not there is a "first country of asylum" for a person is currently optional for Member States, the Regulation would make this assessment mandatory. The application of this concept, if not successfully rebutted, leads to an asylum claim being rejected as inadmissible without an examination of the application on its merits (Article 36(1)(a)).

The current standard, set out in Article 35 of the Asylum Procedures Directive, provides that a person must have been recognised as a refugee in the first country of asylum for this concept to apply. The Asylum Procedures Regulation now provides that protection in the first country of asylum has to be "in accordance" with the Geneva Convention on Refugees (Article 44(1)(a)). This would be a lower and rather more ambiguous standard.

The other option for applying the "first country of asylum" concept in the Asylum Procedures Directive is that the person otherwise enjoys "sufficient protection" in that country. This continues to be foreseen in the proposed Asylum Procedures Regulation but Article 44(2) now provides a definition of what is supposed to constitute "sufficient protection": this requires that there is no persecution as detailed in the Geneva Refugee Convention, no risk of serious harm as defined in EU law, and respect for the principle of non-*refoulement*. In addition, the status granted to the person concerned must guarantee the right to legal residence, appropriate access to the labour market, reception facilities, health care and education and the right to family reunion.

The "first country of asylum" concept makes access to an asylum procedure in the EU more difficult. International refugee law does not require that a refugee must seek asylum in the first country whose territory he or she reaches. It is the country where a refugee applies for asylum which is obliged to consider the application substantively and to ensure that the refugee is not directly or indirectly returned to persecution.[5] The only recognized exception to this principle is when the applicant has already found effective protection in another country and is able to fully enjoy his or her rights as an asylum-seeker and refugee. Simply having been present in a country does not make it a first country of asylum. Amnesty International is concerned whether the assessment

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[3] Proposal for a Regulation establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU (COM(2015) 452 final).

[4] See various reports by Amnesty International on the human rights situation in Turkey: *Turkey: Independent monitors must be allowed to access detainees amid torture allegations*, 24 July 2016; Joint Statement: *Turkey: State of emergency provisions violate human rights and should be revoked*, 19 October, 2016; *Turkey: Latest detention of journalists a "blatant misuse of powers"*, 31 October 2016; *Turkey: HDP deputies detained amid growing onslaught on Kurdish opposition voices*, 4 November 2016; *Turkey: Curfews and crackdown force hundreds of thousands of Kurds from their homes*, 6 December 2016, Index number: EUR 44/5213/2016.

[5] See UNHCR Guidance Note on bilateral and/or multilateral transfer arrangements for asylum-seekers, May 2013 and EXCOM Conclusion No.15 (XXX) which calls upon States to take asylum-seekers' intentions as to the country in which they wish to request asylum "as far as possible into account", while "regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State".

of the level of protection in the State considered the "first country of asylum" is actually effective and enables a legally secure stay, access to efficient asylum procedures and long-term solutions and the ability to live in dignity. There is a risk that the existence of the relevant legal framework in the country will be overemphasised and refugees are returned to a country where their rights are not guaranteed in practice.[6]

Amnesty International rejects the application of this concept in relation to asylum applications of unaccompanied minors (Article 44(4)). The best interests of the child principle (as reaffirmed in Article 21) should rule out procedures which are ill-suited to take into account a child's particular vulnerability. Unaccompanied minors must have prompt access to efficient and full status determination procedures in the Member State they are present, unless their best interests dictate otherwise.

Amnesty International recommends amending Article 44(1) to ensure that the concept of the "first country of asylum" *may* be considered only if the person has been recognized in the third country as a refugee in accordance with the Geneva Convention on Refugees and can also exercise the corresponding rights, protection and treatment.

Amnesty International recommends deleting Article 44(4) as regards the application of the "first country of asylum" concept to unaccompanied minors.

"SAFE THIRD COUNTRIES" (ARTICLES 45 AND 46)

The concept of "safe third country" in the Asylum Procedures Directive refers to cases where a person could, in a previous state, have applied for international protection or where protection was sought but status was not determined. The proposed Regulation makes this assessment also mandatory for all Member States. As with the application of the "first country of asylum" concept, applications by asylum-seekers to whom the concept of "safe third countries" applies are rejected as inadmissible (Article 36(1)(b).[7]

The criteria for a country to be designated as a "safe third country" are set out in Article 38 of the current Asylum Procedures Directive. They are as follows: there can be no persecution within the State as defined in the Geneva Convention, there can be no risk of serious harm, the non-*refoulement* principle must be respected and there must be the possibility of obtaining protection under the Geneva Convention on Refugees. This last criterion is weakened by the Commission's proposed Asylum Procedures Regulation. According to Article 45, it is sufficient that "the possibility exists to receive protection in accordance with the *substantive standards* of the Geneva Convention" or "sufficient protection" in accordance with the requirements laid down in the proposed Article 44(2). However, as already stated, the criteria referred to in Article 44(2) do not guarantee that protection is effective and available in practice, and only full and effective protection status in accordance with the Geneva Convention should be considered for both the "first country of asylum" and the "safe third country" concepts to apply.

While the Asylum Procedures Directive leaves it to Member States to determine in national law when there is a sufficient connection between the asylum-seeker and the third country concerned on the basis of which it would be reasonable for the asylum-seeker to go to that country,[8] the Asylum Procedures Regulation (Article 45.3(a)) establishes that the reasonableness of the connection can be assumed on the basis that the "applicant has transited through that third country, which is geographically close to the country of origin of the applicant". However, of itself, transit though a country is not sufficient to establish a sufficient connection with a country, as this is often the result of fortuitous circumstances. Up to now, many Member States, such as Austria, Sweden, Bulgaria, the Netherlands and Greece, do not regard mere transit through a country as sufficient to establish a connection, unless for example there were family members in that country.[9]

The proposed Regulation does not rule out the application of the "safe third country" concept to unaccompanied minors. It only requires that authorities in the third country give a commitment to take in the minor and give them a protected status (Article 45(5)). Concerns are similar to those expressed above in relation to subjecting unaccompanied minors to inadmissibility

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[6] See for instance, Amnesty International's report *Turkey: No safe refuge: Asylum-seekers and refugees denied effective protection in Turkey,* 3 June 2016, Index number: EUR 44/3825/2016, with highlights such risks in respect of Turkey being regarded as a "first country of asylum" or "safe third country".

[7] See also Article 3(3)(a) of the Dublin IV Regulation proposed by the Commission.

[8] APD Article 38.2(a).

[9] See ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation, November 2016, at: http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR_-November-2016-final.pdf, page 57.

procedures in application of the "first country of asylum" concept. Unaccompanied minors should as a general rule be exempted from the special procedures in Chapter IV of the proposed Regulation.

While retaining the possibility that "safe third counties" be designated at national level for a period of five years (Article 50), Article 46 of the proposed Asylum Procedures Regulation provides for the first time a common European list of "safe third countries". The concept, however, can also apply in individual cases in the absence of either national or Union designation (Article 45(2)(c)).

By defining "safe third countries" a legal presumption is established that the asylum-seeker could already have sought and received asylum in the third country. In practice, rebutting such a legal presumption can represent a high barrier for access to a regular and efficient asylum procedure. In particular, there is the danger that the criteria for the determination of a "safe third country" are either implemented wrongly or without sufficient rigour and asylum-seekers are returned to countries outside the EU which do not offer them effective protection. This could be a violation of their human right to seek asylum and could lead to direct and indirect *refoulement*.

Amnesty International recommends to amend

- Article 45(1) to state that a third country *may* be designated as a safe third country, as application of this concept in asylum procedures should not be mandatory;

Article 45(1)(e) to read that protection that can be received in the third country is in accordance with the Geneva Convention, ratified and applied without geographical limitation;

- Article 45(3) to read that determining authorities *may* consider a third country to be a safe third country for a particular applicant where it has established that there is a connection between the applicant and the third country in question. The sentence "including because the applicant has transited through that country which is geographically close to the country of origin of the applicant" should be deleted, as a meaningful connection cannot be assumed by the mere fact of transit through a country.

Amnesty International recommends deletion of Article 45(5) applying the "safe third country" concept to unaccompanied minors.

ACCELERATED PROCEDURES (ART. 40)

Article 40(1) of the proposed Asylum Procedures Regulation sets out a list of grounds where the asylum process must be accelerated and completed within two months at the latest (eight working days for applications believed to be made merely to frustrate removal – Article 40(1)(d)). In complex cases, it will be possible to continue to use the regular procedure of examination on the merits of the case (Article 40(4)). Although in comparison with the existing Asylum Procedures Directive the list of grounds for accelerating the examination procedure is shorter, the *obligation* to accelerate the process is new. Moreover, many of the grounds which require authorities to accelerate the examination of a claim remain problematic.

As mentioned above, the list includes applications from asylum-seekers who come from designated "safe countries of origin" (Article 40(1)(e)). However, such cases cannot be put in the same category as cases where it is clear that false or irrelevant information has been supplied.[10] Instead, these cases should be subject to the same level of careful examination as cases from any other country of origin. It is particularly problematic that according to Article 40(5)(a), the accelerated procedure will also apply to unaccompanied minors coming from "safe countries of origin". This must be rejected in absolute terms as it cannot be reconciled with the special requirements for protection needed by unaccompanied minors within the asylum procedure.

The imposition of an expedited procedure to asylum-seekers originating from countries considered to be "safe", while such a procedure is not imposed on asylum-seekers originating from other countries, amounts to discrimination on the basis of their national origin. The prohibition of discrimination based on nationality is one of the fundamental principles of international law,

[10] According to EXCOM Conclusion No.30, where States want to accelerate the examination procedure, this should be limited to cases which are clearly fraudulent or where the applicant has only submitted issues that are not related to the grounds for granting international protection.

recognized among others by Article 3 of the 1951 Refugee Convention, Article 21 of the Charter of Fundamental Rights of the European Union and Article 26 of the International Covenant on Civil and Political Rights.

While an applicant may rebut the presumption of safety, she or he bears the burden of proof and is required to do so in an accelerated procedure with fewer safeguards. As a result of these restrictions, individuals in need of international protection risk being returned to a "safe country of origin" in violation of the obligation of *non-refoulement*.

In the same way, it is unjustifiable to include as a ground for acceleration applications from people who did not pursue their application in the first EU country they arrived in (Article 40 (1)(g)), thus unfairly presuming their applications are manifestly invalid or worse purposefully abusing the system. This situation can arise, for example, because of obstacles that asylum-seekers face in pursuing the asylum procedure in a specific country, such as is currently the case in Hungary.[11] Therefore, in a case of onward travel such as this, no conclusions about the merit of the application can be drawn. Moreover, there is no basis in international law to force asylum-seekers to apply for asylum in a specific country.[12]

It is also questionable to list the withholding of identity papers as a reason to use the accelerated asylum procedure (Article 40(1)(c)). It is not unusual to lose identity papers when fleeing and there is a danger that the authorities will assume too quickly that this was a deliberate action by the applicant. The assessment whether an asylum application is only being done to delay or frustrate an earlier removal decision can also be highly subjective (Article 40(1)(d)). These latter cases, according to Article 40(2), are subject to super-acceleration as they should be decided within eight working days.

In general the problem with the grounds set out in Article 40(1)(c), (d), (e), (f) and (g) is that they are based on elements or behaviour that have no connection to the validity or merit of the application. The assessment as to whether a person will be persecuted or at risk of serious harm is the only assessment that should count in the asylum process.

Amnesty International recommends that Article 40(1) is amended to state that the determining authority *may* accelerate the examination on the merits of an application for international protection, as Member States should not be forced to apply accelerated asylum procedures. The criteria under Article 40(1) (c), (d), (e) and (g) for accelerated asylum procedures should be deleted.

Amnesty International recommends deletion of Article 40(5) and instead include a provision that unaccompanied minors should in all instances be exempted from accelerated asylum procedures.

UNACCOMPANIED MINORS

There are some positive developments for unaccompanied minors in the propsed Asylum Procedures Regulation. For example, it stipulates that a guardian should be appointed for unaccompanied minors no later than five days after an application has been made (Article 22). A guardian should not represent a disproportionate number of minors at the same time, which would render him or her unable to perform his or her tasks effectively (Article 22(5)). The exact number of minors who can be represented at the same time is not given in the proposal.

As seen above, it is however regrettable that asylum applications of unaccompanied minors can be subject to accelerated procedures if coming from a "safe countries of origin" and inadmissibility procedures in application of "safe third country" and "first country of asylum" concepts. The proposed Asylum Procedures Regulation also continues to subject them to border procedures, including on the basis of "safe country of origin" and "safe third country" concepts (Article 41(5)). According to Article 3 of the UN Convention on the Rights of the Child and Article 24 of the EU Charter of Fundamental Human Rights, the best interests of the child must always be given primary consideration. That the best interests of the child must be a primary consideration for Member States when applying this Regulation is also explicitly stated in Article 21(1). It is doubtful that provisions of the proposed Asylum Procedures Regulation that include them in such procedures are in accordance with this requirement. This becomes particularly obvious by the fact that unaccompanied minors can be removed to a "safe third country"

[11] See Amnesty International, *Stranded Hope: Hungary's sustained attack on the rights of refugees and migrants*, 27 September 2016, Index number: EUR 27/4864/2016.

[12] See note 5 above.

even though no family members live there; or by the fact that border procedures foresee the possibility of such procedures being carried out while they are detained (Article 41(5)).

In general, accelerated and border procedures should not be deemed suitable for asylum applications by unaccompanied minors, as they require special protection and special treatment. Moreover, children should not be detained as it is never in their best interests.

Amnesty International recommends deletion of Article 41(5), and inclusion instead of a provision that border procedures should not be applied to unaccompanied minors.

DURATION OF THE ASYLUM PROCEDURE (ARTICLE 34)

The proposed Asylum Procedures Regulation keeps the current maximum time limit of six months envisaged by the Asylum Procedures Directive for concluding the examination on the merits of an asylum claim in the regular procedure (Article 34(2)). Under the current Directive, however, if a case is complex or there are unusually high numbers of applications this duration can be extended for a further twelve months.[13] The proposed Asylum Procedures Regulation envisages an extension of only three further months (Article 34(3)). Moreover, there is no obligation any longer to inform applicants of the reasons for delays and give them a clear time frame within which a decision can be expected.[14]

The Asylum Procedures Regulation also stipulates that decisions on the admissibility of an application are to be taken within one month from the lodging of the application, reduced to ten working days if Member States apply the concepts of "safe third country" or "first country of asylum" (Article 34(1)). For inadmissible or manifestly unfounded asylum applications the time period envisaged for a decision on the merits is a maximum of two months (Article 40(2)).

Amnesty International is of the opinion that in general six months is a reasonable time period for a decision on an asylum application. A time period of six months enables the authorities to carefully check the individual case and also addresses the need of the asylum-seeker to receive a decision on their case as quickly as possible. It does not seem advisable to set time limits which are too strict, since it is likely that quality will suffer at the expense of speed in such cases. The effectiveness of tight time limits must also be questioned, especially as time limits under the Asylum Procedures Directive are currently not being met and there are no legal consequence for the determining authorities who fail to meet the set time limits.[15] Amnesty International is concerned by the extremely short time limit of just ten working days for determining admissibility of an application when the concepts of "safe third country" and "first country of asylum" are applied as this may not offer applicants an effective opportunity to rebut the presumption of safety in individual circumstances and will deny asylum-seekers access to asylum in Europe.

Amnesty International recommends deletion of Article 34(1) second paragraph relating to the extremely short time limit for examination of the admissibility procedure in "safe third country" or "first country of asylum" cases.

Amnesty International recommends to reinstate the obligation to inform applicants when decisions on their applications are delayed, the reasons thereof, as well as provide a clear time frame within which a decision can be expected.

Amnesty International welcomes the requirement placed on Member States to regularly assess the capacity of their authorities to handle asylum applications in an effective manner (Article 5(2)).

RIGHTS DURING THE ASYLUM PROCESS (ARTICLES 10, 11 AND 15)

Under the proposed Regulation, the asylum-seeker has a right to an interview in both the compulsory admissibility procedure and the substantive hearing about the merits of their application (Articles 10 and 11). Moreover, both interviews must be carried out by personnel of the determining authorities as defined in Article 4(2)(e).[16] Currently, this does not apply to procedures carried out

[13] APD Article 31(3).

[14] APD Article 31(6).

[15] See ECRE, The length of the asylum procedure in Europa, October 2016, available at: http://www.ecre.org/wp-content/uploads/2016/10/AIDA-Brief-DurationProcedures.pdf.

[16] The proposed Asylum Procedures Regulation defines "determining authority" any quasi-judicial or administrative body in a Member State responsible for

at the border, where authorities other than the determining authority can play such a role.[17] It is important that such role is performed by personnel which according to the proposed Regulation must be properly trained and instructed (Article 5(5)), as at the border or in transit zones determining authorities may decide on the admissibility of an application when "first country of asylum" or "safe third country" concepts are applied, or the merits of an application in cases subject to an accelerated procedure (Article 41(1)).

According to the proposed Regulation, a person who conducts the substantive interview shall not wear a military or law enforcement uniform (Article 11(3)). This rule should also be extended to the personal interview in the context of an admissibility procedure. Uniforms can be intimidating and impede the building of a sufficient degree of trust between asylum-seekers and Member States' determining authorities.

Amnesty International welcomes particularly that the proposed Regulation extends the right to free legal assistance and representation to asylum-seekers who are in the administrative procedure, i.e. the first instance procedure (Article 14). At present, asylum-seekers only have a right to free legal assistance and representation at the appeal stage. However, the provision of free legal assistance and representation may be excluded for those asylum-seekers whose case is considered not to have a tangible prospect of success or where theirs is a subsequent application (Article 15(3)(b)). These provisions should be removed, since free legal assistance and representation could be essential to ascertain whether or not an application for asylum has a chance of success. Similarly, legal assistance is often essential to enable applicants to submit new elements for asylum in cases of subsequent applications. There is a risk that excluding legal assistance in these cases could in practice be used widely and indiscriminately in the context of safe country concepts, where asylum applications are deemed not to have a tangible prospect of success.

Amnesty International is also concerned that according to Article 15(2)(b) of the proposed Regulation, free legal assistance and representation is foreseen for participation in the personal interview "as necessary". It is difficult to see in what cases free legal assistance could be considered unnecessary during the interview, since the presence of the legal adviser is beneficial both for building trust between the asylum-seeker and the interviewer and the quality of the legal assistance provided. Moreover, Article 8(3) stipulates that the services of an interpreter must be provided if an appropriate communication cannot be ensured without such services. This provision is welcomed but it must be ensured that such services are provided as soon as an application for asylum is made.

Amnesty International recommends deleting Articles 15(3)(b) and (c) as asylum-seekers should be equally entitled to free legal assistance and representation in the course of the administrative procedure.

Amnesty International recommends the deletion of "as necessary" in Article 15(2)(b) with regard to participation of the legal adviser during the interview.

Amnesty International welcomes the proposed Regulation's strengthened provisions for identifying and assessing special procedural needs and the special guarantees for unaccompanied minors (Articles 19-22).

TIME LIMITS FOR ASYLYM SEEKERS DURING THE AYSLUM PROCEDURE (ARTICLES 28 AND 53)

The proposed Regulation envisages a three-step approach to accessing the asylum procedure, comprising "making", "registration" and "lodging" of the application (Articles 25-28). The "making" of an application equates to expressing a wish for international protection to Member State authorities, who are obliged to register the application within three working days (extendable to 10 working days in case of disproportionate pressure - Article 27). The Regulation then envisages that asylum-seekers lodge their application within ten working days of their registration (Article 28(1))[18] or one month if there are a disproportionate number of people applying simultaneously (Article 28(3)). Each stage has specific legal consequences.[19] It is

examining applications for international protection competent to take decisions at first instance (Article 4(2)(e)).

[17] See APD Article 4(2)(b).

[18] This time limit is extended to one month if the member state is confronted with a disproportionate number of asylum applications (Article 28(3)).

[19] The legal consequence of 'making an application" is a status that entails a right to remain in the member state (Article 9) and access to material reception conditions (Article 16 of proposed recast of Reception Conditions Directive). "Registration" triggers duty on authorities to information. "Lodging" the application triggers the start from which deadlines run for examination procedures, for access to the labour market, and gives applicants entitlement to a status document as

necessary to clarify that all general guarantees for applicants under Article 8 (right to information, to interpretation, to communication with UNHCR or other organisations etc) are to be granted already from registration of an asylum application and not from the moment the application is lodged. This is important in particular in the light of Article 28(3). In Germany, during the recent high influx of applications, it has shown that even meeting a monthly deadline for asylum seekers to formally lodge their application has been problematic leaving them without access to general guarantees for a considerable amount of time.

Upon registration, asylum-seekers must be given an appointment with the authorities competent for the lodging of the application (Article 28(5)). When lodging the application, asylum-seekers must provide all elements needed for substantiating their application, as referred to in Article 4(1) of the proposed Qualification Regulation (Article 28(4)). These elements consist of documents regarding the asylum-seeker's identity and background, including that of relevant relatives, previous places of residence, and travel documents. In many cases it will be difficult if not impossible to gather all the key documents within ten working days. Although, according to Article 28(4), it is possible to submit these at a later date, there is always the danger that a delayed submission undermines the credibility of the asylum-seeker. Also, missing the ten-day deadline for lodging the application can lead to the claim being rejected as abandoned in accordance with provisions establishing implicit withdrawal (Article 39 – see further below).

The time limits are also very short for lodging an appeal in the case of a decision rejecting an application as inadmissible or manifestly unfounded (Article 53(6)). The appeal must be lodged

- within one week after the rejection of a subsequent application as inadmissible or manifestly unfounded;
- within two weeks in the case of a decision rejecting an application as inadmissible, as explicitly withdrawn or abandoned, or following an accelerated procedure, a border procedure or while the applicant is in detention.

These time limits are too short and risk undermining the effectiveness of the appeal process and in doing so infringe Article 47 of the Charter of Fundamental Rights of the European Union. The period prescribed must always be sufficient in practical terms to enable the applicant to prepare and bring an effective action. In the case of *Diouf,* the Court of Justice of the EU ruled that a period of fifteen days to lodge an appeal was acceptable but individual cases must be examined to determine if the period really is appropriate or if a longer period should be given.[20]

Moreover, proposed Article 53(3) unduly restricts the possibility of invoking new facts in the appeals procedures by providing that applicants may only bring forward new elements which are relevant for the examination of their claim and which they could not have been aware of at an earlier stage, or which relate to changes to their situation. This does not take into account that sensitive issues relating to asylum claims, such as in cases of torture victims and gender or LGBTI based violence or persecution, are often disclosed at a later stage of the asylum procedure and should, as such, be comprehensively examined by the appeal body.

Amnesty International recommends amending Article 28 to extend the time limit for lodging applications to one month from registration in order to allow asylum-seekers to access specialist advice on the procedure and support with collecting evidence and documents to substantiate their claim.

Amnesty International recommends deletion of second paragraph of Article 53(3) which restricts the possibility of invoking new facts in appeals procedures.

Amnesty International recommends to amend Article 53(6) to provide for a period of at least 15 days for an appeal and allow Member States to set longer time periods in individual cases.

SUSPENSIVE EFFECT OF APPEAL (ARTICLE 54)

Amnesty International is concerned about the lack of suspensive effect of appeals in some circumstances. In particular, Article 54(2) provides that appeals against decisions that have been made in the accelerated procedure or the admissibility procedure do not have an automatic suspensive effect. In these cases, the suspensive effect of an appeal is decided by the court or tribunal

asylum-seekers.

[20] Case C-69/10, *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, Judgment of 28 July 2011, from para. 67.

upon request by the asylum-seeker or *ex officio*. While this is currently the case also under the Asylum Procedures Directive,[21] the proposed Regulation widens the scope of this provision to also include first instance decisions which have applied the "safe third country" concept. Lack of suspensive effect of appeals is highly problematic. It means that protective measures are only determined after an expulsion and thus risk violating the principle of *non-refoulement*. Moreover, judgments made by the European Court of Human Rights (ECtHR) and the Court of Justice of the EU suggest that this provision is incompatible with the right to an effective remedy.[22]

Amnesty International recommends amending Article 54 in order to ensure that appeals in the asylum procedure always have a suspensive effect and there is no risk of infringing the principle of *non-refoulement* and the right to an effective remedy.

ACCESS TO THE ASYLUM PROCEDURE IN DETENTION AND BORDER CROSSING POINTS (ARTICLE 30)

According to Article 30(1) of the proposed Regulation, the responsible authorities at the borders or in detention facilities are to inform of the possibility to apply for asylum where there are "indications that third country nationals […] held in detention facilities or present at border crossing points […] may need international protection." This provision does not set a clear standard, as it is left to the responsible authorities to assess what these indications may be, and can result in discriminatory treatment of asylum-seekers. Information on the possibility to apply for international protection should as a rule be provided indiscriminately to all third country nationals in detention or at border crossing points.

Amnesty International recommends that Article 30(1) be amended to provide that the responsible authorities shall inform all third country nationals or stateless persons held in detention facilities, or present at a border or close to a border, of the possibility to apply for international protection.

SANCTIONS FOR VIOLATIONS OF OBBLIGATIONS (ARTICLES 7, 39, AND 40)

As with the other proposals reviewing the EU asylum *acquis*, the Commission proposes a variety of punitive measures if asylum-seekers fail to respect the obligations set out in Article 7 of the Regulation. These concern particularly the following:

- implicit withdrawal of asylum application (Article 39)

An application will be deemed to be withdrawn, in accordance with the procedure for implicit withdrawal of applications in Article 39, if asylum-seekers refuse to cooperate by not providing details necessary for the examination of their application or by not giving fingerprints (Article 7(3)), abandon their place of residence without authorisation or notifying the authorities (Article 7(4)), or repeatedly fail to comply with reporting obligations (7(5)). Amnesty International is concerned about these provisions, particularly in relation to obligations under Articles 7(3) and 7(4), as in these cases rejecting the asylum application as abandoned is disproportionate and not related to the substance of the claim. Such behaviour should not have an impact on the asylum procedure as such.

In addition, the asylum application is considered withdrawn if the applicant has not lodged his or her asylum application within ten working days, in accordance with Article 28. The inability to meet this tight deadline may as much depend on the administrative capacity of the State as on the applicant's diligence. It must also be added that in most cases the asylum-seeker neither speaks the language of the country nor is familiar with the legal system. This can easily result in misunderstandings which can lead to delays in lodging the asylum application and may lead to those in need of protection being denied asylum.

The proposed Asylum Procedures Regulation imposes an obligation on Member States to reject applications as abandoned in these cases. Thus to obtain protection, there only remains the possibility to make a subsequent application under Article 42. However, for this purpose, new elements for asylum must be presented to the authorities, which may constitute an insurmountable hurdle for the asylum-seeker.

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[21] APD Article 46(6)(b).

[22] ECtHR, *Conka v. Belgium*, Application No 51564/99, Judgment of 5 February 2002, from para. 82; ECtHR, *S.J. v. Belgium*, Application No 70055/10, Judgment of 19 March 2015; ECtHR, *M.A. v. Cyprus*, Application No. 41872/10, Judgment of 23 July 2013, para. 137; Case C-239/14, *Abdoulaye Amadou Tall v. CPAS de Huy*, Judgment of 17 December 2015.

- accelerated procedure (Article 40)

Asylum-seekers are also sanctioned for irregular onward movement to another Member State in defiance of obligations set out in the proposed Dublin Regulation (Article 40(1)(g)). In these cases, applications will be examined in the accelerated procedure, which means shorter time limits for the examinations.

Amnesty International is extremely concerned by the implications of the punitive measures which seek to ensure asylum-seekers' compliance with their obligations. For instance, typically those involved in an onward journey to another Member State would breach reporting obligations that may have been posed on them, thus triggering the implicit withdrawal of their application. Therefore, many asylum-seekers who have travelled on to a Member State other than the one designated as the competent State, must make a subsequent application. Since, in most cases, there will be no new elements for their asylum claim, there is the danger that their application will not be examined at all. If the applicant is deported, then there is a danger of a violation of the principle of *non-refoulement*.

Amnesty International recommends deletion of Article 39(1)(c) and (d) as implicit withdrawal should not be used as a measure to sanction uncooperative behaviour or circumstances which may be beyond the applicant's control.

Amnesty International also recommends deletion of Article 40(1)(g) as the Regulation should not attach procedural consequences to asylum applicants' behaviours that are not related to the merits of their asylum application.

CONCLUSIONS

The proposed Asylum Procedures Regulation must of course be seen in the context of the wider review of the Common European Asylum System, in particular the proposed Dublin IV Regulation. As a whole, the review aims to prioritise the concept of protection outside Europe over protection within Europe. This is to be achieved by the obligation for Member States, laid out in the Asylum Procedures Regulation and the Dublin IV Regulation, to assess the application on the basis of the "safe third country" and "first country of asylum" notions.

The underlying idea is that most of those seeking protection should stay in neighbouring countries and not arrive to EU Member States. This is alarming for many reasons. On the one hand, many of Europe's neighbouring countries do not meet the high standards needed to be defined as a "safe third country". Amnesty has already documented this for Turkey.[23] The situation is particularly alarming in Libya, where refugees are subjected to imprisonment, ill-treatment and torture.[24] On the other hand, this policy approach undermines the basic principle of shared responsibility included in the preamble to the Refugee Convention. In 2015, 86% of worldwide refugees were hosted by the least developed countries.[25] Therefore, the EU continues to have a clear duty to accept refugees and ought not to outsource this responsibility.

The review of the Common European Asylum System should be an opportunity to create a system where the reception of refugees is shared equally on the basis of solidarity and complies with human rights standards. This requires all EU Member States to participate in this endeavour rather than leaving it to a few countries. Freedom of movement, once protected status has been granted, would be an important step to disjoin responsibility for assessing protection needs from longer term responsibility for integrating people into the social and economic fabric. Safe and legal access routes must also be at the core of an EU refugee policy. In this way, from the very start, the reception of refugees can be better organised and unnecessary suffering along the journey to the EU would be reduced.

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[23] See note 6 above.

[24] Amnesty International, Refugees and migrants fleeing sexual violence, abuse and exploitation in Libya, 1 July 2016.

[25] UNHCR, Global Trends. Forced Displacement in 2015, at: http://www.unhcr.org/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html, p. 2.