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Improving the quality and consistency of asylum decisions in the Council of Europe member states

Report
Committee on Migration, Refugees and Population
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Summary

There are important shortcomings in terms of quality and consistency of the asylum decisions taken in the Council of Europe member states. As evidence of this, in 2007 acceptance rates varied considerably between 1% and 39% in countries receiving significant numbers of asylum seekers. The situation was even more dramatic when looking at certain specific groups of asylum seekers. For example, again in 2007, the acceptance rates for Iraqis seeking protection in Europe varied between 0 and 81%.

The very low recognition rates in certain countries, or for certain groups of asylum seekers, may be due to difficulties in accessing the asylum process, poor procedural safeguards in the asylum proceedings, restrictive and divergent interpretation of eligibility criteria, lack of objective and reliable country of origin information, poor evidential assessment, in particular the culture of disbelief in asylum adjudication, political pressure, lack of training of the relevant authorities and their personnel, or a combination of these factors.

The Committee of Ministers of the Council of Europe should be invited to prepare guidelines to address the difficulties outlined above. These guidelines should encourage Council of Europe member states to develop higher standards of protection, based on their own domestic standards of human rights or humanitarian impulse, reflecting the nature of the European Convention on Human Rights as a pan-European minimum standard. Furthermore the Committee of Ministers should consider a mechanism for monitoring the quality and consistency of asylum decisions, and to facilitate this task, consider guidelines on harmonisation of asylum data across Council of Europe member states, taking into account work already carried out at by the European Union. The Committee of Ministers should also review the asylum curriculum in member states and develop training programmes, tools and data-bases of jurisprudence of asylum decisions across Europe.

Finally, there is a pressing need for the Committee of Ministers to establish a new inter-governmental Committee with a permanent mandate to examine asylum and refugee issues to replace the work formerly carried out by the Ad hoc Committee of experts on the legal aspects of territorial asylum, refugees and stateless persons (CAHAR).

A. Draft resolution

1. Acceptance rates for asylum seekers in Europe vary dramatically from one country to another, highlighting important shortcomings in terms of quality of the asylum decisions taken in the Council of Europe member states. As evidence of this, in 2007 acceptance rates varied considerably between 1% and 39% in countries receiving significant numbers of asylum seekers. The situation was even more dramatic when looking at certain specific groups of asylum seekers. For example, again in 2007, the acceptance rates for Iraqis seeking protection in Europe varied between 0 and 81%.

2. The very low recognition rates in certain countries, or for certain groups of asylum seekers, may be due to difficulties in accessing the asylum process, poor procedural safeguards in the asylum proceedings, restrictive and divergent interpretation of eligibility criteria, lack of objective and reliable country of origin information, poor evidential assessment, in particular the culture of disbelief in asylum adjudication, political pressure, lack of training of the relevant authorities and their personnel, or a combination of these factors.

3. Asylum decisions are sometimes inconsistent within one and the same member state, as well as across the member states of the Council of Europe. Inconsistency in asylum decisions means that similar claims are treated differently. This is an affront to the rule of law and inherently unfair. It is true that different member states receive asylum seekers from different countries, whose need for protection might vary. However, taking this into account, the acceptance rates are often found to diverge even more.

4. There are also significant differences between countries with respect to the number of cases in which refugee status is granted and the number of cases in which applicants are afforded complementary protection (including, inter alia, protection under the European Convention on Human Rights (ECHR), subsidiary protection and other humanitarian protection.

5. Divergences may be even more dramatic when looking at acceptance rates for specific countries of origin or ethnic groups lodging applications at the same time, depending on the countries in which the application for asylum are lodged. This can be seen in relation to asylum seekers from Chechnya, Iraq, Afghanistan and by Roma from Kosovo. For example, the acceptance rate for protection seekers from Russia (primarily Chechens) has been seen to vary from 0 to almost 80% in countries which have received significant numbers of persons belonging to this group.

6. In some Council of Europe member states, up to 50%, or in some cases even more, of first instance decisions on asylum are overturned on appeal, indicating that first instance decisions are unreliable and of poor quality. An appeal against a decision does not only delay final decisions, but it increases the cost of the procedure and increases uncertainty for the asylum seeker and members of his or her family. Furthermore, not all states provide for a remedy with automatic suspensive effect (such as appeal or judicial review proceedings which effectively suspend an enforcement measure whose effect is potentially irreversible), as required by the ECHR.

7. All asylum decisions should be guided by fundamental principles and objectives of human rights and the 1951 Geneva Convention Relating to the Status of Refugees and its 1967 Protocol (the Geneva Convention), rather than by political considerations. Any asylum system needs to deal fairly, humanely and efficiently both with those in need of international protection and also those who are found not to need international protection.

8. It is important to improve the quality and consistency of asylum decisions and tackle the significant discrepancies in acceptance rates whether these occur within or between countries. In order to do this, the Parliamentary Assembly calls upon Council of Europe member states to:

8.1 . ensure access to the asylum process by:

8.1.1. ensuring that enhanced border controls, whether on land or at sea, do not entail asylum seekers being denied access to the asylum system. Where border controls are put in place, it must be ensured that the protection offered is at the same level as that provided within the country and border monitoring should be put in place, involving national border authorities, non-governmental organisations (NGOs) and the Office of the United Nations High Commissioner for Refugees (UNHCR);

8.1.2. providing asylum seekers with full information about procedures affecting them in a language they can understand, and allowing UNCHR and legal and NGO advisors access to

asylum seekers at the earliest opportunity, in particular to those who are held in detention, airport and port transit zones;

8.1.3. removing practical barriers to the asylum process, such as deadlines for filing applications which are unreasonably short or applied automatically, restrictive language requirements for filling in application forms and problems with access to competent interpreters;

8.1.4. providing for a personal interview for the purpose of an examination of an asylum application;

8.1.5. providing for legal assistance and representation, free of charge in accordance with the relevant national rules regarding legal aid, not only at appeal stage but also from the beginning of the asylum process;

8.2. ensure that eligibility criteria both in relation to asylum and complementary protection are fully compliant with fundamental rights by:

8.2.1. ensuring that gender- and child-specific forms of persecution are taken fully into account and that the assessment of evidence is gender- and child-sensitive;

8.2.2. clarifying and harmonising the approach to persecution by state and non-state actors, and the acceptance of internal flight alternatives (safe areas within the country where persons can flee or return);

8.2.3. ensuring that common minimum standards (but not lowest common denominator standards) on the use of various forms of complementary protection are established to reflect clearly those legal obligations under the ECHR and other human rights instruments and obligations applicable when asylum seekers are non-removable;

8.2.4. guaranteeing similar status to recipients of both refugee status and complementary protection;

8.3. improve procedural safeguards, including those at appeal level by:

8.3.1 frontloading resources (concentrating resources as early as possible in the asylum procedure) as a crucial means to achieve greater consistency and quality in asylum decisions and to ensure that decisions are taken promptly without wasting time, energy and money on lengthy appeals;

8.3.2. removing all procedural practices that violate the ECHR and/or lead to erroneous assessments increasing the risk of *refoulement*. These include *inter alia*, unreasonably short, automatic time limits, non-suspensive appeals and weak standards of appellate review;

8.3.3. dealing with asylum applications fairly and efficiently without jeopardising the quality or consistency of the decisions, and using accelerated asylum procedures as an exception and only limited to clearly abusive or manifestly unfounded cases. Accelerated asylum procedures should not be used for persons in a vulnerable situation (including unaccompanied and/or separated minors/children, survivors of torture, victims of sexual violence or human trafficking and persons with mental and/or physical disabilities) or in complex cases;

8.3.4. dealing with asylum applications in a way which guarantees personal dignity, the best interest of the child and the unity of the family;

8.3.5. refraining from the use of lists of safe countries of origin and safe third countries, to ensure that each asylum case is examined individually with rigorous scrutiny of the particular situation of each applicant with respect to the country in question. The asylum seeker must be allowed to rebut any presumption of safety that may be raised. Furthermore, states must be satisfied that receiving states will in fact provide effective protection of the individual asylum seeker, in order to comply fully with obligations under the ECHR;

8.3.6. ensuring that reasoned decisions on facts and law are given on all international protection decisions;

8.4. Improve the quality of information and evidence used, and its assessment, by:

8.4.1. ensuring fair assessment of the individual's testimony and credibility, giving, where necessary, the benefit of the doubt to the applicant;

8.4.2. preparing, as appropriate, regular and updated country of origin information and guidance notes for decision makers at all levels, including judges, and publishing key case law in order to contribute to the consistency and quality of decisions;

8.5. provide adequate training and support for those involved in the asylum process and provide ongoing monitoring of the asylum process by:

8.5.1. ensuring that training is provided to all those involved in the asylum process, including judges, on international refugee law and human rights standards. Training on cross-cultural communication skills and gender and age sensitivity should also be provided, together with training on interviewing children. Support and counselling should also be provided to deal with problems which those working in the field of asylum often face (such as "burn-out" including fatigue, diminished interest, feeling overwhelmed, and the culture of disbelief);

8.5.2. ensuring that asylum claims are thoroughly and individually reviewed by more than one qualified decision maker, with adequate resources, including time, at their disposal;

8.5.3. implementing a regular audit of the asylum process, in consultation and in co-operation with UNHCR where appropriate, taking into account the good practice established, including programmes such as the Quality Initiative in the United Kingdom;

8.5.4. supporting the International Association of Refugee Law Judges in its work on training judges, holding conferences and bringing together case law precedents from across Europe so as to build up an accessible database of case law.

9. The Assembly invites the European Union to:

9.1. take into account the recommendations made in this Resolution in implementing its Common European Asylum System and ensure that consistency is not achieved to the detriment of procedural safeguards and that minimum standards do not also become maximum standards;

9.2. revise, as a matter of urgency, the Dublin II Regulation and the "safe country" mechanism, as they are premised on a false assumption of equal standards of protection across Europe;

9.3. give priority – in the setting up of a European asylum support office – to the issue of raising the quality and consistency of asylum decisions in Europe;

9.4. promote responsibility-sharing amongst European Union member states to relieve the burden on those states that are struggling to handle large scale arrivals of asylum seekers, and to provide those states with capacity building assistance to cope with future asylum challenges;

9.5. prioritise in its revisions of the Procedures and Qualification Directives the removal of provisions which are in tension with the ECHR and other international instruments.

10. The Assembly invites the Council of Europe's Commissioner for Human Rights to continue addressing the issue of the quality and consistency of asylum decisions in his work with individual member states and to use his network of national human rights institutions to develop a thematic report on the issue for the benefit of all member states.

B. Draft recommendation

1. Referring to its Resolution… (2009) "Improving the quality and consistency of asylum decisions in the Council of Europe member states", the Parliamentary Assembly draws attention to significant divergences in the recognition rates of asylum seekers between Council of Europe member states.

2. The Assembly considers that much greater efforts should be made to improve the quality and consistency of asylum decisions in member states in the interest of the member states and the persons concerned. It therefore invites the Committee of Ministers to:

2.1. produce guidelines to improve the quality of asylum decisions in Council of Europe member states. These guidelines should take into account seven particular concerns: difficulties in accessing the asylum process; poor procedural safeguards in the asylum proceedings; restrictive and divergent interpretation of eligibility criteria; lack of objective and reliable country of origin information; poor evidential assessment; political pressure on the asylum process; and lack of training of the relevant authorities and their personnel. Furthermore, these guidelines should take into account the case law of the European Court of Human Rights and texts including the Handbook on Procedures and Criteria for Determining Refugee Status of the Office of the United Nations High Commissioner for Refugees (UNHCR), as well as standards set out in the UNHCR Guidelines on International Protection and the UNHCR Quality Initiative developed, inter alia, in the United Kingdom;

2.2. produce guidelines for the collection and harmonisation of asylum data across Council of Europe member states, indicating clear benchmarks regarding the exchange of data and taking into account the existing Parliament and Council Regulation (EC) No 862/2007 of 11 July 2007 on Community statistics on migration and international protection [2007] OJ L 199/23;

2.3. review the asylum curriculum for all member states, taking into account work already being carried out and best practices of member states, relevant principles of refugee law, case law of the European Court of Human Rights and other relevant Council of Europe standards;

2.4. develop training programmes and tools for those involved in asylum procedures, notably in the specific areas of interview techniques, working with vulnerable applicants and with interpreters, finding and using country of origin information, developments in international human rights and refugee law, and drafting of decisions;

2.5. encourage member states to share country of origin information and important case law decisions, by, inter alia, setting up a common database for Council of Europe member states;

2.6. examine in more detail the extent of the problem of lack of legal representation and lack of legal aid for asylum seekers in member states as a limitation of the right of access to justice;

2.7. consider establishing a monitoring mechanism to assess the quality and consistency of asylum decisions across Europe;

2.8. establish a new permanent committee within the Council of Europe with a mandate to examine asylum issues to replace the Ad hoc Committee of experts on the legal aspects of territorial asylum, refugees and stateless persons (CAHAR);

2.9. ensure that the Guidelines on accelerated asylum procedures, as adopted by the Committee of Ministers, are implemented in a way that is not oriented towards the lowest common denominators among Council of Europe member states;

2.10. identify and promote best training methods throughout the Council of Europe member states.

3. The Assembly also invites the Committee of Ministers to take renewed note of Recommendation 1440 (2000) on restrictions on asylum in member states of the Council of Europe and the European Union, and to:

3.1. draw up a European instrument for the harmonisation of asylum policies, with a view to improving the standard of protection for refugees and asylum seekers in Europe;

3.2. instruct the Steering Committee for Human Rights to further examine the proposal of incorporating the right to asylum into the European Convention on Human Rights, with a view to ensuring the same level of protection as provided by the European Union Charter on Fundamental Rights.

C. Explanatory memorandum by Mr Cilevičs, rapporteur

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I. Introduction

1. During the period 2001-2006, the number of asylum applications across the Council of Europe member states declined significantly, with the exception of some countries in southern Europe and of a slight increase in 2007 as a result of the arrival of a large number of asylum seekers from Iraq. In the 27 European Union member states, the overall number of applications decreased by more than half during this period, This, however, cannot hide the fact that there are important shortcomings in terms of quality and consistency of the asylum decisions taken in the Council of Europe member states. As evidence of this, in 2007 acceptance rates varied considerably between 1% and 39% in countries receiving significant numbers of asylum seekers. The situation was even more dramatic when looking at certain specific groups of asylum seekers. For example, again in 2007, the acceptance rates for Iraqis seeking protection in Europe varied between 0 and 81% in countries that received significant numbers of these asylum seekers.

2. The very low recognition rates in certain countries, or for certain groups of asylum seekers may be due to a number of factors. This may be due to difficulties in accessing the asylum process, procedural rules that undermine assessment of the facts and preclude the applicant's provision of a fulsome account; poor procedural safeguards in the asylum proceedings, restrictive and divergent interpretation of eligibility criteria, lack of training of the relevant authorities and their personnel, lack of objective and reliable country of origin information, poor evidential assessment or political pressure, from politicians or the media, or a combination of these factors. Asylum decisions are also inconsistent within one and the same member state, as well as across the Council of Europe. Inconsistency in asylum decisions means that similar claims are treated differently. This is an affront to the rule of law and inherently unfair.

3. There is also a significant difference in the ratio between the number of cases in which refugee status is granted and the number of cases in which the applicant is afforded complementary protection[1] or some other form of protection. As an example, in 2007, in the Netherlands, of those asylum seekers who were granted protection, 12% were granted refugee status and 88% complementary protection. In France and in Germany, the corresponding figures were on the contrary 91% refugee protection and 9% complementary protection for both countries. The level of protection therefore can vary greatly between the two forms of protection. The choice made by the authority that examines an asylum application, as to the form of protection granted, can have important consequences for the individual asylum seeker. Depending on the legislation of the country in question, complementary protection may entail the right to a residence permit for a shorter or a longer period and might give rise to a more or less favourable situation in terms of access to economic and social rights.

4. In some Council of Europe member states, up to 50% of first instance decisions on asylum are overturned on appeal, indicating that first instance decisions might be unreliable. The "frontloading" of resources – to concentrate resources as early as possible in the asylum procedure – has long been urged in order to improve first instance decision making. An appeal against a decision does not only give rise to insecurity and to a longer period of time during which the asylum seeker is obliged to wait for a final decision, it also raises issues as to the quality of the first instance decision. Furthermore, an appeal obviously implies additional costs for the authorities.

5. It is sometimes argued that asylum seekers engage in so-called "asylum-shopping", implying in a pejorative way that strategic decisions are made about where to apply for asylum according to taste or convenience and based on the real or perceived generosity of the country of destination. There is, however, little meaningful choice for the asylum seeker as regards the country of destination. This is more likely dictated by ease of access or ties with the country concerned (family members present, familiarity with the language, historic (including colonial) ties, etc.).

6. Furthermore, for European Union member states the implementation of the Dublin II Regulation and "safe country"[2] mechanisms shuttle asylum seekers to other states said to have primary responsibility for them. This largely precludes the choice of country in which to lodge an application. The allocation of responsibility to one state over another has grave consequences as regards access to a fair and efficient procedure, captured in the expression "asylum lottery". Ending the asylum lottery is long overdue. The Dublin Regulation and "safe country" mechanisms fail to take into account significant divergences in recognition rates as between member states and are thus premised on the false assumption of equal standards of protection across Europe.

7. In the year 2000, following the report on "Restrictions on asylum in the member states of the Council of Europe and the European Union", prepared by this rapporteur, the Assembly recommended the Committee of Ministers (CM) to envisage drawing up a European Convention for the harmonisation of asylum policies based on the highest common denominator, with a view to improving the standard of protection for refugees and asylum seekers in Europe (Recommendation 1440 (2000)). It was also recommended that the right to asylum be incorporated into the European Convention on Human Rights (ECHR). These recommendations are still to be translated into action and it is therefore relevant to repeat them in the context of the present report. It can also be reiterated that as far back as 1967, the Committee of Ministers recommended to member states that they treat refugees and asylum seekers in a "particularly liberal and humanitarian spirit", with full respect for the principle of *non-refoulement* (CM Resolution (67) 14). This certainly entails ensuring that asylum decisions are consistent and of high quality.

8. It is in the light of the above that this report on the improvement of the quality and consistency of asylum decisions in Council of Europe member states has been prepared. As part of the preparation of the report, on 2 April 2008, the rapporteur made a study visit to London where he met with representatives of the Office of the United Nations High Commissioner for Refugees (UNHCR) and selected NGOs, as well as with the Home Office and the Asylum and Immigration Tribunal, all of whom provided a great deal of valuable information. Furthermore, on 19 May 2008, a hearing was organised in Paris, with a particular focus on asylum procedures in France. The meeting benefited from an exchange of views with the *Office français de protection des réfugies et apatrides* (French Office for the Protection of Refugees and Stateless Persons -

[1] In this report, complementary protection means any protection against removal granted in response to an asylum claim which makes removal inappropriate for human rights or humanitarian reasons. Accordingly, it includes all the grounds for non-removal under the European Convention on Human Rights, subsidiary protection under the EU Qualification Directive, and other humanitarian reasons.

[2] The "safe country" concept arises in a number of different contexts – safe country of origin, and safe third country. The same question arises in each: whether or not "effective protection" is available. See UNHCR, *Asylum Processes (Fair and Efficient Procedures,* UN doc. EC/GC/01/12 (31 May 2001), para. 12.

OFPRA) and with members of civil society. The rapporteur was also greatly assisted by a legal consultant, Ms Cathryn Costello, Fellow and Tutor at Worcester College, Oxford, who prepared a background paper surveying the literature on this topic on which the rapporteur has based his work and the report. The rapporteur would like to warmly thank all those mentioned above for their valuable contributions.

II. Relevant European Union initiatives

9. A great deal of work has been carried out by the European Union and it will be referred to by the rapporteur in the course of the report. In this respect, the rapporteur would like to highlight at this stage some the most important steps taken at Union level, which have an impact on the issues discussed.

10. The Treaty of Amsterdam, which entered into force in May 1999, created competence for the adoption of binding European Union standards in the field of refugee law. At that point, the European Union had already adopted the Schengen and Dublin Conventions and measures dealing with matters such as safe country of origin and safe third countries. In 1999, the European Council adopted a programme setting out the goals of a "Common European Asylum System" (CEAS). In 2004, the European Council adopted a further five-year programme of action in the field. The programme identified as a priority the establishment of a common asylum procedure and a uniform status for those who are granted asylum or complementary protection.

11. It is against this back-drop that further European Union initiatives have been taken. The Dublin II Regulation is designed to ensure that asylum seekers can only claim asylum in one member state. Usually this will be the country through which the asylum seeker first entered European Union territory, whether with a visa or irregularly. The Regulation establishes criteria and mechanisms for determining which member state is responsible for examining an application for asylum lodged by a third country national in the European Union.

12. Furthermore, pursuant to the objectives of CEAS, the European Council has adopted the following directives: the Qualification Directive and the Procedures Directive and, less relevant to this report, the Temporary Protection and Reception Conditions Directives. The aim of the Council's Qualification Directive of April 2004 is to resolve the disparate interpretation of the 1951 Geneva Convention in member states. Article 6 of the directive states that "the main objective of this directive is … to ensure that member states apply common criteria for the identification of persons genuinely in need of international protection". The Asylum Procedures Directive includes provisions on the first asylum country, safe third country and safe country of origin.

13. In 2007 the European Parliament published a report on asylum called "Report on asylum": practical co-operation, quality of decision making in the Common European asylum system" (rapporteur: Hubert Pirker). According to the report, strengthening mutual trust is the cornerstone of the process of establishing a common asylum system. The report also called for a joint database, containing information on countries of origin, joint guidelines for the collection and analysis of information about countries of origin and the adequate training of civil servants.

14. In June 2008, the European Commission observed that there was a critical flaw in the CEAS, namely that different traditions, diverse country of origin information sources and a lack of common practice produces divergent results. It is also noted that an ever-growing number of asylum seekers are granted complementary protection and not refugee status. The Commission believed this was due to the fact that an increasing share of today's conflicts and persecutions are not covered by the 1951 Convention. This is however also likely to be due to the fact that fewer rights usually attach to Complementary Protection.

15. In 2009, the Commission proposed the setting-up of a European asylum support office. The office, when established, will work closely with the UNHCR. It is intended to provide practical assistance to those countries which receive the most asylum applications. The office will also assist member states in comparing good practices and organise training at European Union level. It will also facilitate practical co-operation between member states and non-member states of the European. The office should be founded on principles of democratic accountability and transparency and it should ensure close co-operation with UNHCR and other independent asylum experts in carrying out its work.

16. The project of creating a common asylum system within the European Union should be carefully evaluated. Where necessary it should be changed in order to ensure that it contributes to more consistency and quality and that it does not in fact adversely affect asylum seekers. It is particularly important to make sure that consistency is not achieved to the detriment of procedural safeguards and that minimum standards do not also become maximum standards. If the harmonisation within the European Union proves successful,

in terms of enhancing the quality and consistency of decisions and thus increasing the level of protection, it is crucial that these effects spill over also to all Council of Europe member states that are not members of the European Union. The Council of Europe should take a leading role in ensuring that coherence and a high common quality of asylum decisions encompass also non-Union members.

17. In the rapporteur's opinion, whereas the initiative of the European Union to set up a European asylum support office should be viewed as something positive, it is important to carefully monitor its future work. It is equally important to monitor the implementation of the recently agreed European Pact on Immigration and Asylum.

III. Analysis of statistics on acceptance rates

i. Comparison of acceptance rates

18. There are shortcomings in national asylum statistics. Statistics from some countries relate only to first instance decisions and do not reflect recognition following appeals. Others include decisions taken on appeal or following administrative review, as well as at first instance, in the total number of decisions taken during a given period of time. This means that one and the same individual may be counted more than once. Determination of complementary protection relates to different forms of ad hoc status, not all of which are counted in the official statistics as positive recognition. Some states operate strategies of suspending or delaying the processing of asylum applications until a time when they deem that a negative decision can be taken. Statistics may record decisions to return asylum seekers under the Dublin Regulation or under safe third country policies as rejections. Nationality, rather than ethnic data, is taken into account, something which is particularly relevant in Chechen and Roma cases. Bearing in mind the above, there is a clear need for further harmonisation of the way statistics are assembled and presented.[3] The summary below is based on statistics provided by the UNHCR[4] and by Eurostat.[5]

19. *Overall acceptance rates*.[6] In 2007, France closed 61 945 asylum applications. 23% resulted in protection being granted.[7] In Germany, 28 572 asylum applications were decided upon in 2007, with a 27.5% acceptance rate. The United Kingdom decided 41 184 applications and granted protection in 24.7% of the cases. In some of the other European countries which decided significant number of asylum applications in 2007, the acceptance rates were the following: Netherlands, 37%; Belgium, 27%; Switzerland, 35%; Sweden, 39% and Norway 36%. Greece decided 27 282 cases in 2007 and only 163 individuals or less than 1%, were granted protection. Slovakia decided 2 966 cases and afforded protection to 96 asylum seekers, representing 3% of cases. The conclusion is that acceptance rates vary considerably between the different member states. It is true that member states receive asylum seekers from different countries of origin, whose needs for protection might vary. However, as follows from the statistics on the origin of asylum seekers in relation to their respective countries of destination, which is presented below, the acceptance rates can be seen to vary also with these factors taken into account.

20. *Clearance rates.* As for clearance rates, that is the difference between the number of pending asylum applications in a country at the beginning and at the end of a year, some countries can be found to have more important "backlogs" than others. At the end of the year 2007 in France, 31 051 applications were pending against 39 571 at the beginning of the year, meaning a decrease of 22%. In Germany the pending applications at the end of the year were 34 063 against 43 978 at the beginning of the year which is a decrease of 23%. In the United Kingdom, the pending cases at the end of the year were 10 900 against 12 400 at the beginning, i.e. a decrease of 12%. The figures for some other countries were: Netherlands,

[3] The European Union has recently adopted a regulation to help harmonise asylum data. This might contribute to bringing coherence to European asylum systems. Following evaluation, the harmonising could be extended to Council of Europe member states which are not members of the European Union. In case common databases are set up, it has to be ensured that the information stored in such data bases is processed in accordance with international norms on data protection, in particular with the 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and its 2001 protocol.

[4] UNHCR Statistical Yearbook 2007. Trends in Displacement, Protection and Solutions.

[5] UNHCR, "Asylum Levels and Trends in Industrialised Countries, First Half 2008", October 2008.

[6] The figures provided for acceptance rates, include both the group of asylum seekers who have actually been granted refugee states and those who are afforded complementary protection. In paragraph 32, "Complementary protection", below, however, these statistics are broken up between the two groups. The statistics presented suffer from the problem described earlier in the report, namely that the number of decisions taken may overestimate the number of individuals in relation to whom a file has been closed.

[7] Included are 5 380 applications which were repeated or reopened, all of which resulted in a positive decision (4 820 refugee status and 560 complementary protection).

-23%; Belgium, -12%; Switzerland +12%;[8] Sweden +39%[9] and Norway -18%. While it is difficult to interpret these statistics, it is important to see trends. Increasing backlogs may indicate large numbers of arrivals and may sound warning bells of pressures on the system. Overly swift decreases may however also need clarification as speed of clearance should not be given priority over fairness of procedures.

21. *European Union statistics for 2008.*[10] If looking only at the 27 European Union member states, statistics are available also for 2008 which enables us to compare the levels with 2007. In 2008, there were nearly 240 000 asylum applicants registered in these 27 countries. The highest number of applicants were registered in France in 2008 with 41 800 applicants. 31 000 applications were pending in France at the end of 2007, which means an increase of 35%. The United Kingdom recorded 30 500 applicants (only new applicants) in 2008 compared to 42 000 in 2007, a decrease of 27%. Figures for other countries were: Germany, -12%; Sweden -10%; Greece -30% and Belgium +4%. The main countries of citizenship of these applicants in European Union member states were Iraq (29 000 or 12% of the total number of applicants), Russia (21 100 or 9%), Somalia (14 300 or 6%), Serbia (13 600 or 6%) and Afghanistan (12 600 or 5%).

22. When compared with the population of each European Union member state, in 2008, the highest rates of applicants (per million inhabitants) registered were recorded in Malta (6 350 applicants per million), Cyprus (4 370), Sweden (2 710), Greece (1 775), Austria (1 530) and Belgium (1 495). In some member states, a large proportion of the applicants came from a single country. The member states with the highest concentrations were Poland (91% of the applicants came from Russia), Lithuania (77% from Russia), Hungary (52% from Serbia), Luxembourg (48% from Serbia) and Bulgaria (47% from Iraq).

ii. Examination of acceptance rates for specific groups

23. *Chechen asylum seekers.* The disparate treatment of Chechen asylum seekers across Europe has led to repeated interventions from UNHCR, urging that all Chechens be considered in need of international protection, unless there are serious grounds to exclude them from refugee status. However, as the European Council on Refugees and Exiles (ECRE) notes: "Throughout Europe the treatment of Chechens seeking protection varies considerably, with refugee recognition rates in 2003 ranging from 0 (Slovakia) to 76.9% (Austria), showing that for many Chechens, the outcome of the "asylum lottery" will very much depend on the country in which they seek asylum."[11] ECRE has reiterated these concerns more recently, highlighting the huge variation in recognition rates and reception conditions in the case of Chechens.[12] Equally worrying is that in 2007, the recognition rate in the Slovak Republic (349 decisions) was also 0 for Chechens.

24. *Iraqi asylum seekers*. A study from 2007 examined the recognition rates for Iraqi asylum seekers in four European countries: Germany, Greece, Sweden and the United Kingdom.[13] In Greece, recognition rates were negligible (actually 0 in 2006). In the United Kingdom, the recognition rate for Iraqi asylum claims had declined markedly, from a 44% recognition rate in the period 1997-2001, to 0.4% in 2004 and 2005. The Home Office Operational Guidance Notes on Iraq differed from the view of UNHCR. Whereas UNHCR took the view that, in general, there was no internal flight alternative in Iraq, the Home Office maintained that "there is general freedom of movement within the country and it is unlikely that internal relocation would be unduly harsh for men and women with partners or relatives". It concluded that, unless there is a serious risk of adverse treatment and internal relocation would be unduly harsh, it would not be appropriate to grant refugee status.

25. The recognition rate for Iraqis in Germany has also been low and the German authorities have even revoked the protection status of those granted protection before 2003. Between 2003 and 2006, nearly 19 000 Iraqi refugees had their refugee status revoked, based on the argument that they had fled the Saddam Hussein regime and that the grounds for their protection were no longer present.[14] This policy was however altered in June 2007. Iraqis who have seen their refugee status revoked have, however, been allowed to stay in Germany until further notice.

[8] Switzerland, +53% more asylum applications in 2008.
[9] Sweden was not only one of the main receiving country in Europe of asylum seekers in 2007 (36 400 claims), but also the largest recipient of Iraqi asylum seekers.
[10] Eurostat News release, 8 May 2009 (STAT/09/66).
[11] ECRE, "Guidelines on the Treatment of Chechen Internally Displaced Persons (IDPs), Asylum Seekers and Refugees in Europe", June 2005.
[12] ECRE Press Release, "Russian Roulette? Dublin Regulation Puts Chechen Refugees at Risk", 21 March 2007.
[13] M. Sperl "Fortress Europe and the Iraqi 'intruders': Iraqi asylum-seekers and the European Union, 2003-2007" (2007) New Issues in Refugee Research Research Paper No 144. See also ECRE, "Guidelines on the Treatment of Iraqi Asylum Seekers and Refugees in Europe".
[14] UNHCR, "Refugees", Number 146, Issue 2, 2007, p. 23.

26. The study contrasted the Greek, British and German practices with those in Sweden, where, with generosity, the majority of Europe's Iraqi asylum seekers have been accommodated. Previously, Swedish authorities had granted a significant proportion (24%) of Iraqis complementary protection, although few were granted refugee status. In 2006, Sweden recognised 91% of Iraqis as in need of protection, based on UNHCR's advice. According to the study, the Swedish Migration Board decided early in 2006 that all Iraqi asylum seekers from central and southern Iraq whose claims had been rejected as part of the normal status determination process would nevertheless receive a permanent residence permit in Sweden. This was in accordance with the UNHCR guidelines, which stated that no returns to these dangerous areas would be possible in the foreseeable future. Instead of spending years awaiting deportation as failed asylum seekers with only minimal rights, the majority of Iraqis in Sweden were therefore able to begin the process of fully integrating into Swedish society with a secure legal status. In 2007, 81% of the Iraqi protection seekers were granted protection. Of all those granted protection, only 1% received refugee status, the remaining 99% received complementary protection.

27. However, this decision was followed by a significant increase in applications, leading to Swedish appeals to fellow European Union governments for greater solidarity in protecting refugees from Iraq. In July 2007, following a judgment from the Supreme Migration Court in which the situation in Iraq was found not to amount to an "internal armed conflict", a change in Swedish policy was announced. Thereafter, only those Iraqis personally threatened or harassed were to be granted protection. Since then, Iraqis have been denied asylum in Sweden and the authorities have been criticised by Amnesty International for failing to recognise an ongoing internal armed conflict in Iraq.[15] Sweden recently signed a readmission agreement with Iraq.

28. ECRE undertook a further study, published in March 2008, estimating that recognition rates for Iraqi asylum seekers at first instance varied between 0 and 90% in Europe. It is thus clear that the acceptance rates continue to fluctuate widely for Iraqis.

29. *Afghani asylum seekers.* For Afghani asylum seekers, in Austria in 2007, 84% were granted protection, whether complementary or as refugees. In Russia 100% and in Italy 98% of Afghanis were granted protection. The figures for Turkey and Ukraine were 89% and 50% respectively. For the same year no Afghanis were given protection in Greece. In absolute numbers, there was no significant difference between the said countries in the number of pending applications from this group.

30. *Roma asylum seekers from Kosovo*.[16] In its 2006 Position paper on the situation of Roma in Kosovo, the UNHCR advised against returning Roma, Ashkalia and Egyptians to Kosovo, or to Serbia proper, in view of persisting threats against these groups in Kosovo. Council of Europe member states responded differently to this recommendation. Germany took a harsh stance on Kosovo Roma asylum applications and concluded a readmission agreement with Serbia under which a large number of Roma refugees were returned to that country. A new position paper from the UNHCR is awaited in the near future.

iii. Appeals

31. It is also interesting to look at how many of the asylum seekers were successful in the first instance and how many had their application granted upon appeal.[17] In France in 2007, 14 196 persons were granted protection. Of these 24% had a positive first instance decision with 38% upon administrative review and 38% as a result of a repeated or reopened application. Of the 7 870 cases granted protection in Germany, 39% were the result of new applications, 62% of a repeated or reopened application. In the United Kingdom, of 10 189 granted protection, 67% applications were granted at first instance and 33% as a result of administrative review. Of the 5 717 cases with a positive outcome in the Netherlands, 78% asylum applications were granted at first instance and 22% following administrative review. In Sweden 16 451 people were granted protection in 2007, of whom 95% in first instance and 5% upon administrative review. In Norway, of 4 492 positive decision, 65% had positive decisions at first instance, and 35% succeeded during the administrative review stage. The conclusion appears to be that in most countries asylum seekers have to lodge either an appeal or a claim for administrative review, or try to reopen or renew the application in order to have a positive outcome. The exception appears to be Sweden, where a large majority of persons had a positive result at first instance. As follows from the next paragraph, however, these were mainly cases of complementary protection, not refugee status.

[15] Amnesty International, "Iraq – Rhetoric and Reality: the Iraqi Refugee Crisis", June 2008.
[16] All the reference to Kosovo, whether to the territory, institutions or people, in this text shall be understood in full compliance with United Nation Security Council Resolution 1244 and without prejudice to the status of Kosovo.
[17] Statistics taken from UNHCR Statistical Yearbook 2007. Trends in Displacement, Protection and Solutions.

iv. Complementary protection

32. The ratio between the number of asylum seekers granted protection under the Geneva Convention and those afforded complementary protection, which normally entails fewer rights and less security than refugee protection, is interesting to study. In France in 2007, of all those granted protection, 91% were granted refugee status and 9% complementary protection. In other countries the proportion of applicants afforded refugee status as opposed to complementary protection were: Germany, 91%; United Kingdom, 77%; Switzerland, 36%; Norway, 24%; Sweden, 7%, Malta, 1% and the Netherlands, 12%. The conclusion is quite clearly that there is one set of countries which prioritise protection under the Geneva Convention, inter alia France and Germany, and another set that finds it more justified to grant complementary protection, represented most prominently by Sweden, Malta and the Netherlands.

IV. Reasons for diverging acceptance rates

33. The rapporteur has highlighted seven reasons for diverging acceptance rates which are dealt with in this section of the report. They include:

i. difficulties in accessing the asylum process;
ii. lack of procedural safeguards, including at appeal level;
iii. restrictive and divergent interpretation of eligibility criteria;
iv. quality of evidence, personal testimony and country of origin information;
v. evidential assessment;
vi. training of those involved in taking decisions in asylum cases;
vii. political pressure.

i. Difficulties in accessing the asylum process

34. It is essential for asylum seekers to receive full information about procedures affecting them, in a language they understand. Furthermore they must have adequate time to present their case, they must be able to present their case in person and have legal assistance and legal aid. These are the cornerstones for having access to the asylum process.

35. *Right to receive information and communicate with UNHCR and others*. It is essential that information about the asylum procedure should be provided in a language that the asylum seeker actually understands Furthermore, in order to be able to make the most of his or her application, the asylum seeker should be allowed access to information, such as the reception of letters from the country of origin, which may contain evidence crucial for the positive outcome of the application. Being allowed to communicate with the UNHCR should be an important element in particular, as it allows UNHCR to fulfil its international protection mandate.[18] The Procedures Directive provides for the UNHCR to have the right to communicate with the asylum seeker (Article 21), but regrettably not vice versa. In practice, the right to communication is a problem primarily for those asylum seekers who are detained.

36. *Access to an interpreter.* Asylum seekers often need an interpreter in order to properly and effectively put forward their case. Being denied access to an interpreter may consequently lead to asylum decisions of less good quality. The question of language arises already if the asylum seeker is required to fill in the application form in the language of the country to which the application is submitted. In France, for example, the asylum seeker is obliged to fill in the application form in French and must do so within the fairly strict time-limit of 21 days if allowed to stay, 15 days if not allowed to stay and five days if held in a holding centre. No state-paid interpreter is provided for the filling in of the form. The French authorities, however, claim that the first application form to be filled in is intended only to present the most basic reasons for the application. If the form is not completed in French, it is sent back to the asylum seeker. NGOs have been critical of this practice, claiming that many applications fail due to this requirement.

37. *Personal interview.* Article 12 of the European Union Procedures Directive sets out that before an asylum decision is taken, the applicant shall be given the opportunity of a personal interview on his or her application. However, the provision continues to state a number of exceptions to the rule. For example, an interview may be omitted if the determining authority is able to take a positive decision on the basis of evidence available. Moreover, the absence of a personal interview does not prevent the determining authority from taking a decision on an application for asylum. Member states may determine in national legislation the cases in which a minor shall be given the opportunity of a personal interview. Therefore, the text of the Procedures Directive is troubling, in particular the range of grounds upon which European Union

[18] Statute of the Office of the United Nations High Commissioner for Refugees, para 8(a).

member states are apparently permitted to dispense with the interview, including for instance where the applicant has made "inconsistent, contradictory, unlikely or insufficient representations which make his/her claim clearly unconvincing in relation to his/ her having been the object of persecution."[19] As will be explained below, the case law of the ECHR makes clear that inconsistencies should not lead to too hasty findings of lack of credibility. A personal interview should be the cornerstone of the asylum process. This is the case in France, for example, where all applicants are called to a personal interview.

38. Right to legal assistance and representation. Article 15 of the Procedures Directive provides that member states of the European Union shall allow asylum applicants the opportunity, at their own cost, to consult a legal adviser on matters relating to their asylum applications. In the event of a negative decision by a determining authority, member states shall ensure that free legal assistance and/or representation be granted on request. The right to legal assistance and representation, free of charge, according to the relevant national rules on legal aid is set out in the Council of Europe Twenty Guidelines on Forced Return. This right is applicable in the "process leading to the removal order", i.e. from the beginning of the process, no distinction being made as to first instance or appeal proceedings. The possibility is also preserved, for member states which so choose, to grant legal aid subject to conditions they see fit, provided these are not discriminatory and remain in compliance with their international legal obligations (including inter alia, the European Community notion of fair procedures set out in Article 47 of the European Union Charter of Fundamental Rights, and, through these channels, the case law of the European Court of Human Rights as regards the provision of legal aid to safeguard the individual "in a real and practical way"[20]).

39. In cases where the asylum seeker is not able to avail him or herself of this right, there is an obvious risk that the case will not be examined in the same thorough way as if argued by a legal representative. Asylum decisions which have not taken all the relevant circumstances of the case into account, will obviously be of an inferior quality. In practice many asylum seekers do not have legal assistance and are not represented despite the seriousness of the determination for him or her. The Council of Europe should examine in more detail the extent of the problem of lack of representation in member states as a limitation of the right of access to justice.

ii. Lack of procedural safeguards, including at appeal level

40. Procedural safeguards are necessary preconditions for accurate, reliable and consistent asylum decisions and for protecting the dignity of asylum seekers. The absence of certain safeguards in member states is an important reason for inconsistency.

41. *Procedures Directive*. This Directive should have brought about an improvement in the quality and consistency of asylum decisions, but unfortunately it reflects some less positive features of domestic asylum procedures. It has even been criticised as a means of denying refugees access to asylum procedures and for countries of ridding themselves of asylum seekers by facilitating their transfer to countries outside the European Union. The UNHCR, in particular, has criticised the Directive in relation to the provisions on safe third countries and non-suspensive appeals, for not corresponding to the standards set out in the European Convention of Human Rights and the jurisprudence of the European Court of Human Rights.

42. The UNHCR has made the following comments in its 2007 publication *Response to the European Commission's Green Paper on the Future Common European Asylum System*.

43. "A common system and a certain degree of harmonization of member states' procedures are needed to ensure an appropriate level of consistency. The current system, in which responsibility for assessing applications for protection rests with member states and their national asylum institutions, produces very different results from one country to another. As a result, persons in need of international protection have varying chances of finding protection, depending on where they apply. A centralized institutional structure for adjudication of asylum applications would be one way to remedy this problem. However, in a climate in which member states are cautious about far-reaching changes and transfers of procedural competence, the development of an European Union asylum procedure under a single institution would seem unrealistic, at least in the current phase which aims to complete the Common European Asylum System by 2010. Nor is it necessary. UNHCR believes that the existing system based on national institutions and procedures could be strengthened and could achieve more consistent and more satisfactory outcomes if Community institutions were able to ensure better monitoring and quality control, and providing that Community instruments guarantee appropriate standards across the Union."

[19] Article 23(4)(g).
[20] *Airey v. Ireland* App. No. 6289/73, 9 October 1979.

44. The European Commission, in its 2008 Communication, acknowledged that a fundamentally higher level of alignment between member states' asylum procedures is called for. The Commission proposed the following amendments to the directive, to be put forward in 2009:

- setting up a single, common asylum procedure, leaving no room for disparate procedural arrangements in member states;

- establishing obligatory procedural safeguards as well as common notions and devices in order to consolidate the asylum procedure and ensure equal access to procedures throughout the European Union;

- accommodating the particular situation of mixed arrivals, including where persons seeking international protection are present at the external borders of the Union;

- enhancing gender equality in the asylum process and providing for additional safeguards for vulnerable applicants.

45. *Effective legal remedy*. National courts bear the responsibility to ensure reliability and consistency of asylum decisions. In some member states, up to 50% of first instance decisions are overturned on appeal, indicating that first instance decisions may be unreliable (see section on statistics above). This is undesirable because of the uncertainty it causes for applicants as well as because of the costs and time of asylum processing at both levels. In France, for example, more cases of protection are granted by the appeal court than by the first instance authority. NGOs claim that this state of affairs could be the result of too large a quota of applications (2.2 per day) that staff of the French first instance migration board (OFPRA) are set to decide per day, as well as the maximum processing time, which has been set at 60 days. NGOs propose that quality and not only quantity criteria be taken into consideration in setting the objectives and carrying out the assessment. Such criteria should include, *inter alia*, interview rates, the length of interviews, the qualification of interpreters, the statement of reasons for decisions and the production of interview records and, of course, the number of decisions set aside by the appeals court.

46. It is important to have a second instance that controls decisions of first instance authorities. The first instance should, however, be where final decisions are primarily taken. Second instance tribunals should see more than one judge decide on the appeal. One best practice would be the French system, in which the second instance consists of several members – lawyers and lay-judges – including one member nominated by the UNHCR.

47. *Use of accelerated procedures.*[21] In recent years, member states of the Council of Europe have come under increasing pressure to process asylum claims rapidly. This has led to the introduction of various accelerated asylum procedures. There is no common definition of "accelerated asylum procedures" at international or regional level. The expression simply indicates that some applications are processed faster than others. It thus covers a variety of procedures, for example the use of the notion of the safe country of origin, the application of the principle of a safe third country and procedures adopted at the border for dealing with asylum seekers.

48. The large number of different accelerated procedures applied in member states of the Council of Europe contribute to what has been called the "asylum lottery". The need for states to process asylum applications in a rapid and efficient manner must be weighed against the obligation to provide access to a fair asylum determination procedure for those who might be in need of international protection. This balancing of interests, however, does not imply in any circumstances that states may compromise their international treaty obligations.

49. In its resolution 1471 (2005) "Accelerated asylum procedures in Council of Europe member states", the Parliamentary Assembly recommended that accelerated asylum procedures should only be applied as an exception and highlighted that such procedures, because of the emphasis on speed, risked lowering the quality and coherence of asylum decisions. The Assembly urged the Committee of Ministers to initiate drafting of guidelines at the inter-governmental level. The rapporteur welcomes this work, but regrets that the guidelines that have been prepared under the authority of the Steering Committee for Human Rights (CDDH) are somewhat disappointing. It is clear that the draft document is relatively watered down and that the guidelines are not sufficiently ambitious in terms of protection. The principle that accelerated procedures should be an exception has, for example, not been expressed clearly. The earlier Assembly recommendation for member states to refrain from automatic and mechanical application of short time limits to lodge an

[21] Parliamentary Assembly Resolution 1471 (2005) Accelerated asylum procedures in Council of Europe member states.

application for asylum, in particular in view of the judgment of the European Court of Human Rights in the case of *Jabari v. Turkey,*[22] has not been taken into account in the guidelines. The guidelines should nonetheless contribute to ensuring that accelerated asylum procedures are used more fairly across Europe and that the dangers of quality and inconsistency are at least narrowed through its application.

50. *Use of the notion of "safe country of origin" and "safe third country".* Various procedural mechanisms across Europe permit the transfer of asylum seekers to so-called safe countries of origin or safe third countries. The idea is that an asylum seeker does not have to be afforded a fully-fledged assessment of the claim, provided that he or she originates from or could be returned to a third country which is considered "safe" according to certain parameters. The individual generally has the right to rebut the assumption of safety. In order for any transfer to be lawful, the authorities in the transferring state must also ensure that the third country will be safe for the particular applicant. Based on the case law of the European Court of Human Rights, national courts have sporadically intervened to prevent removals under the Dublin II Regulation and on the basis of safe third country policies, when the standards of protection applicable in other member states have fallen short of the Strasbourg standards. However, there are also instances where national courts seem too lenient and have permitted transfers which should have been blocked.[23] More recently, courts in several member states have deemed Greece to be "unsafe" for return of asylum seekers, as have several governments. These cases indicate that there are serious shortcomings in asylum determinations in the receiving states.

51. The rapporteur is of the view that member states should refrain from the use of lists of safe third countries and safe countries of origin. However, if they are used the practice has to be carefully evaluated. It is of crucial importance that each asylum seeker is afforded an analysis of the circumstances in his or her particular case without prejudice to what is considered the general safety of the country of origin or third country. In any event, the asylum seeker must be allowed to rebut the assumption of safety.

52. *The Dublin II Regulation*. An instrument that aims to ensure genuine responsibility-sharing in the field of asylum decisions might be something desirable. However, it has been argued that the implementation of the European Union Dublin II Regulation compounds the problem of inconsistency and varying quality of asylum decisions in Europe. For example, some states are denying access to an asylum procedure to individuals transferred under the Dublin system, thereby placing them at risk of *refoulement*. Furthermore, applicants are often not informed about the workings of the Dublin system in cases where the identification of a responsible state might actually be of use to the applicant, for example where they have family members in another state. States are failing to share information with each other, which can also frustrate the quick and correct identification of the responsible state. Most states do not guarantee a suspensive appeal right enabling individuals to challenge transfer under the Dublin Regulation in cases where mistakes might have been committed. Also some Council of Europe member states which are not members of the European Union, namely Iceland, Norway and Switzerland, have agreed to implement the Dublin Regulation. Nevertheless it is clear that membership of international treaty regimes and organisations, including the European Union, do not absolve Council of Europe member states from their obligations under the ECHR such that the Court will always apply the most rigorous scrutiny in its review of Article 3 cases.[24]

53. The UNHCR has concluded that the Dublin Regulation may result in an unequal distribution of responsibility for protection seekers, particularly as far as the external borders of the European Union are concerned. The UNHCR put forward the suggestion that states which face disproportionate pressure could under certain circumstances, be released from their responsibility to readmit asylum seekers who have moved on to another European Union member state, and to assign responsibility to that latter state. This would achieve a better responsibility sharing.[25] It could also contribute to the improvement of the quality and consistency of asylum decisions.

54. *Border procedures*. The problem with border procedures is that they might prevent an asylum seeker from submitting his or her application. In the readmission agreements between the European Union and Russia and Ukraine, respectively, certain accelerated procedures are provided for in cases where irregular migrants are apprehended closer than 30 kilometres on either side of the border. In these cases, Russia and Ukraine, whether they are the country of origin or just a country of transit, is obliged to readmit the irregular migrant within two days of his or her apprehension. Although this would theoretically give the person the

[22] *Jabari v. Turkey* (App. No. 40035/98), judgment of 11 July 2000.
[23] *TI v. UK* (App. No. 43844/98), judgment of 7 March 2000; and *KRS v. the United Kingdom,* (App. No. 32733/08), decision 2 December 2008; See also *Irruretagoyena v. France* (App. No. 32829/96), decision 12 January 1998, and *Tomic v. the United Kingdom* (App. No. 17837/03), decision 14 October 2003.
[24] *KRS v. the United Kingdom,* (App. No. 32733/08), decision 2 December 2008.
[25] UNHCR, "Response to the European Commission's Green Paper on the Future Common European Asylum System", September 2007, p. 11.

possibility to submit an application for asylum, in practice there might not be enough time to do so. Even when the person is able to submit a claim for asylum, the dangers of accelerated asylum procedures also need to be taken into account. It is therefore particularly important for states to keep under review the practice and procedures at borders.

55. The rapporteur considers it particularly important to ensure that strengthened border controls do not entail that asylum seekers are denied access to the asylum system. For example, the European Union readmission agreements with Russia and Ukraine should be implemented in a generous manner and their implementation evaluated. It is equally important that access to asylum systems are not impeded by interception and migration control measures taken outside of Europe, especially considering that asylum seekers often move alongside irregular migrants. In this context, the UNHCR 10-point-plan (Refugee Protection and Mixed Migration: A 10-Point Plan of Action) should be taken into account. It offers suggestions to states on how to integrate refugee protection considerations into migration and border control policies.

56. The rapporteur notes a good initiative which has been developed in Hungary to ensure access to asylum procedures at the border.The Hungarian Helsinki Committee, UNHCR and the national border agency/authority have put in place a tripartite border monitoring agreement (memorandum of understanding) which allows UNHCR and the Hungarian Helsinki Committee the right to visit border areas and detention centres to monitor access of asylum seekers to the territory and its asylum procedure. This experiment has also been extended to other Central European countries as well, and the rapporteur considers that it represents good practice which could be replicated further.

iii. Restrictive and divergent interpretation of eligibility criteria

57. There are many areas where states adopt different positions in relation to eligibility criteria and examples where particular problems exist are highlighted below.

58. *Distinction between persecution by state and by non-state actors.* One divergence in asylum practice in Europe concerns whether persecution or human rights violations by non-state actors may form the basis for a claim. The European Court of Human Rights has established that the decisive issue is not who is the perpetrator of the suspected ill-treatment or persecution, but rather the actual availability of protection.[26]

59. The European Union Qualification Directive is supposed to solve the issue of non-state actors in its Article 6. The provision provides that actors of persecution or serious harm include non-state actors, if it can be demonstrated that the state or organisations controlling the State or a substantial part of the territory of the State, including international organisations, are unable or unwilling to provide protection against persecution or serious harm inflicted by the non-state actor. UNHCR has for example found that Article 6 has contributed to a change in the position taken by Germany and led to an increase in recognition of Somali refugees in Germany.

60. The Qualification Directive, however, also introduces some new uncertainty concerning actors of protection. Article 7 of the directive sets out that protection can be provided not only by the state, but also by "parties or organisations, including international organisations, controlling the state or a substantial part of the territory of the State". The inclusion of the reference to non-state actors as providers of protection is troublesome. UNHCR has commented that only in the most exceptional cases should non-state actors be considered providers of protection. Under the application of the Qualification Directive in Austria, the United Nations Mission in Kosovo (UNMIK) was considered to be an actor of protection.[27] In some instances, UNHCR or the Red Cross have been deemed to provide protection. Other countries have not considered these organisations to formally provide protection, which might entail inconsistency in asylum decisions across Europe.

61. *Internal protection alternative.* Article 8 of the Qualification Directive provides that member states may determine that an applicant is not in need of international protection if in a part of his or her country of origin there is no well-founded fear of being persecuted and no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country. This may apply notwithstanding technical obstacles to return to the country of origin. Regrettably, the provision falls short of international standards as

[26] *TI v. the United Kingdom* (App. No. 43844/98), decision 7 March 2000*, Salah Sheekh v. the Netherlands* (App. No. 1948/04), Judgment 13 January 2007.

[27] UNHCR *Asylum in the European Union: A Study on the Implementation of the Qualification Directive* (November 2007) and ECRE *The Impact of the Qualification Directive on International Protection* (October 2008) available at : *www.ecre.org/files/ECRE_QD_study_summary.pdf*

it fails to require that the alternative location be "practically, safely and legally accessible". In Sweden, a committee of experts concluded that Article 8 of the Qualification Directive was not reasonable and not in accordance with Article 1A of the 1951 Geneva Convention, which led to the provision not being implemented in Sweden. The European Court of Human Rights has ruled that as regards some countries and situations, the absence of an internal relocation alternative would result in a violation of the Convention were a person to be returned.[28]

62. A UNHCR study identified a significant inconsistency in the application of the criterion for internal protection alterative in Chechen cases. German and Slovak authorities were found to frequently motivate negative asylum decisions with reference to an internal protection alternative, whereas French authorities did not. In particular, a tendency was identified in the Slovak Republic to apply a generic assessment of internal protection alternative to all Chechen applications, rather than the individual assessment required by Article 4 of the Qualification Directive. Overall, the various interpretations of what is "reasonable"' concerning internal protection alternative are "vastly different", according to UNHCR.[29]

63. *Gender-related persecution*. The rapporteur is concerned that gender specific forms of persecution are not always taken fully into account and handled in a systematic fashion, affecting the quality and the consistency of asylum decisions. It is therefore important that those involved in the asylum process are fully informed and trained on gender issues.

64. UNHCR recommends that states promote an age, gender and diversity sensitive approach in asylum procedures in order to ensure gender equality and equal enjoyment of rights, regardless of age, gender or background.[30] This would improve the restrictive approach taken by states and the significant inconsistencies which exist, within and as between states, not only in the recognition rates for persons claiming gender-related persecution, but also as regards unequal treatment and/or access to benefits. Clearly, gender-related claims may be brought by either women or men on the basis of particular types of persecution (including those based on differing sexual orientation or sexual practices (claims involving homosexuals, transsexuals or transvestites) or more commonly in the case of women, domestic- or dowry-related violence or other abuse. There is also wide divergence between benefits accessible by persons, in non-registered homosexual partnerships or extended families, for example.

65. *Treatment given to family members:* It is clear that in the case of family asylum seekers, the factual basis and mix may necessarily be more complex than in claims submitted by individuals. This is due to the different rights and interests claimed and/or at stake in the case of a family (e.g. as regards the father, mother, children or even adult dependents). As an example, in the case of young Tamils, the ill-treatment meted out to a member of a single family can produce, as a by-product, a real risk of ill-treatment for other members of the family. The lack of consistency in this context signifies a real need for greater clarity both in case law and in state practice.

66. *Use of complementary protection.* As has been pointed out above in the section on statistics, there is a great difference in the extent to which countries have opted for granting protection in the form of refugee status or complementary protection. Furthermore, the UNHCR has found that, for example, Greece has systematically failed to carry out an assessment in respect of complementary protection, and may be in breach of the European Union Qualification Directive as a result.[31] In other countries, notably in Malta, the authorities have to a great extent opted for granting complementary protection rather than refugee status (see the Migration, Refugees and Population Committee's report on "Europe's 'boat-people': mixed migration flows by sea into southern Europe", Doc. 11688, rapporteur Mr Morten Østergaard, Denmark, ALDE). The consequences for the asylum seeker, flowing from the protection granted, can be important. In France, for example, refugee status provides the person concerned with a ten-year residence permit, whereas complementary protection entails only a one-year residence permit, which is, however, renewed more or less automatically. Furthermore, access to social and economic rights often vary considerably between the two forms of protection.

[28] *Salah Sheekh v. the Netherlands* (App. No. 1948/04), Judgment 13 January 2007.
[29] United Nations High Commissioner for Refugees *Asylum in the European Union: A Study on the Implementation of the Qualification Directive* (November 2007); See further: ECRE *The Impact of the Qualification Directive on International Protection* (October 2008) available at : *www.ecre.org/files/ECRE_QD_study_summary.pdf*
[30] UN High Commissioner for Refugees, *General Conclusion on International Protection,* 10 October 2008, No. 108(LIX) – 2008. See also UNHCR Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP02/01, 7 May 2002.
[31] United Nations High Commissioner for Refugees Asylum in the European Union: A Study on the Implementation of the Qualification Directive (November 2007), p. 11.

67. Under Article 2(e) European Union Qualification Directive, a person is eligible for subsidiary protection[32] where s/he does not qualify as a refugee but substantial grounds have been shown that s/he would face a real risk of suffering serious harm as defined under Article 15. "Serious harm" under Article 15 (c) of the Directive consists of a "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict." The meaning of Article 15(c) has been the subject of litigation in domestic courts leading to very different outcomes and a number of references to the European Court of Justice for clarification. The Grand Chamber of the ECJ held that Article 15(c) is substantively different to that of Article 3 ECHR and "the interpretation of which must, therefore, be carried out independently although with due regard for fundamental rights, as they are guaranteed under the ECHR."[33] UNHCR has found the said provision to be undermined by a highly restrictive interpretation of the concept of "individual threat", rendering the possibility of subsidiary protection "illusory" in cases of flight from violent conflict[34].

68. Furthermore, the interpretation of the concept of "internal armed conflict" has been found in general, by the UNHCR to be inconsistent[35]. This concept had been interpreted differently in particular in Iraqi cases. Whereas French asylum authorities considered the situation in Iraq as amounting to an "internal armed conflict", in Sweden it was regarded as a "severe conflict". In contrast, however, the Swedish authorities viewed the situation in Chechnya as an "internal armed conflict" which their Slovak counterparts did not.

69. In the view of the rapporteur, in creating common standards for international refugee protection, complementary protection should be further harmonised and work should not be guided by the "lowest common denominator". Council of Europe member states should be encouraged to develop *higher* standards of protection, based on their own domestic standards of human rights or humanitarian impulse. This reflects the nature of the ECHR as a pan-European minimum standard of human rights protection. Entitlements of protection seekers who benefit from complementary protection should be aligned with the protection standards applicable to those granted refugee status.

iv. Quality of evidence, personal testimony and country of origin information

70. For a quality decision to be taken, it must rely on quality evidence, from the applicant and other sources, the personal testimony of the applicant (referred to above as an essential element of access to the asylum process) and accurate and up-to-date country of origin information.

71. It is in principle for the applicant to adduce evidence capable of proving substantial reasons for believing that he or she would be subjected to a real risk of ill-treatment.[36] However, the European Court of Human Rights considers that there is a positive duty on the national authority, if the need arises, to go beyond the evidence provided in the application and to use a wide range of sources of up-to-date information in order to make a proper assessment of the applicant's case viewed against a understanding of the situation in the receiving country.[37] Complete consistency[38] is not required of an applicant and in the presentation of his or her evidence an applicant should be given the benefit of the doubt and the opportunity to provide satisfactory explanation if an inaccuracy or inconsistency is alleged.[39]

72. Use of country of origin information is compulsory in asylum determinations. This follows clearly from Article 4(3)(a) of the Qualification Directive and from the case law of the European Court of Human Rights.[40]

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[32] (the term used in the Directive to refer to complementary protection),
[33] C-465/07 *Elgafaji v. Saatssecreteris van Justitie* ,para 28. other cases remain pending.
[34] United Nations High Commissioner for Refugees Asylum in the European Union: A Study on the Implementation of the Qualification Directive (November 2007), p. 11.
[35] Ibid.
[36] *Saadi v. Italy,* App. No. 37201/06, Judgment (GC) 28 February 2008
[37] *Katani and Others v. Germany* (App. No. 67679/01), decision 31 May 2001, *NA v. the United Kingdom,* (App. No. 25904/07), Judgment 17 July 2008.
[38] *N v Finland* (App. No. 38885/02), Judgment 26 February 2005, and *Said v. the Netherlands,* (App. No. 2345/02, Judgment 15 June 2005.
[39] This obligation not only flows from the ECtHR case law but that of the UN Convention Against Torture Committee, e.g. *Karoui v. Sweden,* Communication No. 185/200, UN Doc. A/57/44, p. 198 (2002) and *Kisoki v. Sweden,* Communication No. 41/1996, UN Doc. CAT/C/16/D/41/1996 (1996).
[40] In particular *Salah Sheekh v. the Netherlands*, (App. No. 1948/04, Judgment 11 January 2007 and *NA v. the United Kingdom,* (App. No. 25904/07), Judgment 17 July 2008. It should also be noted that the European Union Procedures Directive requires information to be accurate and current. The explicit terms used are "objective", "impartial", "precise" and "up-to-date". The final criteria are transparency and retrievability, which reflect the general legal principle of equality of arms. Article 9(2) of the Procedures Directive requires reasoned decisions, while Article 16 deals with access to the file. The sources of the country of origin information on which the asylum decision is based must be made clear and accessible to the asylum seeker.

The outcome of asylum procedures are bound to be inconsistent and to lack in quality if the fundamental information on which decisions are made differs within or between countries. To improve consistency and quality of asylum decision making, national asylum authorities need to co-operate closely with independent organisations in order to assemble balanced country of origin information and, where appropriate, country guidance notes. There is also a need to share information between countries of asylum, including on case law precedents. The Council of Europe should encourage member states to engage in broadened co-operation on country of origin information, case law precedents and where appropriate country guidance notes. It can be noted that in the context of the second phase of the CEAS, the European Commission is also working on producing common European Union guidelines for the processing of country of origin information.

73. In the United Kingdom, in order to improve the quality of the information considered in a given case, a number of steps are taken. These include the preparation of Country of Origin Services reports which are prepared by the Home Office and overseen by an independent Advisory Panel including independent academics and members of leading NGOs. Furthermore Operational Guidance Notes (OGNs) are prepared. These can be valuable sources of information as long as they are kept up to date and used with a certain amount of flexibility. Furthermore, in the United Kingdom, the judicial decision makers provide country guidance on what is happening in certain asylum producing countries, highlighting certain decisions as authoritative, and also a system for selecting cases which are to be reported to make sure that the body of case law is more coherent, of higher quality and in general more consistent.

74. The International Association of Refugee Law Judges (IARLJ) has taken a number of important steps contributing to the improvement of the quality of decisions and the quality of country of origin information. One step has been the preparation of a checklist of judicial criteria for assessing country of origin information. Another step has been to look into the issue of natural justice and equality of arms between asylum seekers and government agencies, which often have the facilities and resource to access a wide range of sources of country of origin information

75. The rapporteur considers that the Council of Europe should encourage member states to engage in broadened co-operation on country of origin information. An important step towards the use of coherent and reliable country of origin information is the setting up of a common database for Council of Europe member states. The database must be updated regularly by experts. Measures should be taken in order for it to be accessible in a sufficient number of languages.

v. Evidential assessment

76. An assessment of evidence[41] is crucial, in particular as in many cases decisions are made on the basis of credibility of the applicant. It is therefore essential that reasoned decisions on the facts and the law are given.

77. Practice on this differs as between member states of the Council of Europe. Practice also differs between first instance decisions and decisions on appeal. In the United Kingdom, for example, where the procedure is adversarial in nature, there tends to be reasoning based on the parties submissions. In France and other countries where the proceedings are inquisitorial, decisions tend to be shorter and less reasoned. It is essential that reasoned decisions on facts and law are given on all international protection decisions and that further work is carried out on this issue, including at a European level, to harmonise this matter.

78. One issue raised with the rapporteur on a number of occasions was the “culture of disbelief” and the issue of “burn-out”[42] amongst those dealing with asylum claims. In view of the very large number of cases where credibility of the applicants’ claim has a decisive role in the outcome of the claim, it is absolutely essential that any culture of disbelief is tackled and decision makers suffering from “burn-out” are supported in an appropriate manner. In addition, it is important to investigate the institutional incentives at play within asylum adjudication systems, which may encourage or reward decision makers to reach hasty negative decisions.

[41] Article 4 of the EC Qualification Directive contains important rules on evidential assessment. See further G Noll, ‘Evidentiary Assessment in Refugee Status Determination and the European Union Qualification Directive’ (2006) *European Public Law* 295. Also, see further R Thomas, ‘Assessing the Credibility of Asylum Claims: European Union and United Kingdom Approaches Examined’ (2006) *European Journal of Migration and Law* 79.

[42] “Burn out” includes long-term exhaustion or diminished interested in professionals due to the length of time they have been working on such cases. They may face problems in dealing with the issues (psychologically), they may have difficulties taking decisions, or they may face other problems in carrying out their work in an adequate manner because of the stress involved.

vi. Training of those involved in taking decisions in asylum cases

79. It goes without saying that quality and consistency of asylum decisions are closely linked to the competence of the people involved in taking the decisions. The level of competence depends to a large extent on the training offered to them and the support given to them in their work, including in dealing with situations of "burn-out". The UNHCR has put forward its Quality Initiative, piloted in the United Kingdom, containing proposals on what training should be provided to civil servants involved in deciding on asylum applications. The Quality Initiative is described below in Section VII.

80. It should however be emphasised that all decision makers need training, including judges. This should include, *inter alia*, training in international refugee law, human rights principles, as well as training in cross-cultural communication skills and gender and age sensitivity. Furthermore, training should also be provided for those interviewing children.

81. In the United Kingdom judges are subject to periodic appraisal schemes and it is compulsory for judges to attend periodic training conferences and workshops. The question is, however, not only of the qualification level of decision makers, but also of lawyers who represent asylum seekers. They should also receive appropriate training.

82. At an international level the rapporteur notes that the International Association of Refugee Law Judges (IARLJ) is involved in training of judges, and considers it important that this initiative is fully supported.

83. It is, however, not only a question of training, it is also a question of selection, making sure that the right persons are selected at the outset to carry out refugee status determination. In this respect it is important that persons are recruited at an appropriate level to carry out this work.

84. *Peer review and audit.* The rapporteur notes the importance of peer guidance and support. Mechanisms for review, including by peers need to be put in place, both for positive and for negative decisions.

85. There is also a need for ongoing audit of the work of those taking asylum decisions and the rapporteur had the benefit of noting the good practice in the United Kingdomwhere an audit team was established back in 2004. This "good practice" should be adopted in all member states.

vii. Political pressure

86. What is the relation between the work of the judiciary or administrative authorities in terms of deciding on asylum applications, on the one hand, and the agenda of the government and the legislative assemblies on the other? Every country has the prerogative under international law to control its borders and to decide who shall be admitted into the country and who shall be granted residence permit. Political decision makers might want to use this prerogative to control the influx of aliens, with regard to, for example, the economic situation in the country. The ECHR contains restrictions and derogations in order that a fair balance may be struck, in certain cases, between the interest of the state and the individual. However, there can be no such restrictions or balancing as regards certain guarantees, including absolute rights (e.g. Article 3 ECHR)[43] and the principle of *non-refoulement*. It is clear that law and not political dictates, should govern the asylum procedure, and that care should be taken to ensure that the political machine, together with its use of press and publicity, are not used in such a way as to influence decisions on asylum. The spirit of the ECHR is conceived to protect the individual from the unbridled "interest" of the executive branch or sometimes even of the legislative branch of the state.[44]

V. Role of Office of the United Nations High Commissioner for Refugees

87. Article 35 of the 1951 Geneva Convention provides for UNHCR to monitor the implementation of the Convention. The agency is mandated to lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide. Its primary purpose is to safeguard the rights and well-being of asylum seekers, refugees, Internally Displaced Persons and stateless persons. It seeks to ensure that everyone fleeing persecution can exercise the right to seek asylum and find safe refuge in another state, with the option to return home voluntarily, integrate locally or to resettle in a third country

[43] *Saadi v. Italy,* App. No. 37201/06, Judgment (GC) 28 February 2008, paras 139-141.
[44] *Ibid.* See concurring opinion of Judge Zupančič.

88. Article 21 of the above-mentioned European Union Directive on Minimum Standards for Procedures also confers a role on the UNHCR. Member states of the Union are to allow the UNHCR to have access to applicants for asylum, to have access to information on individual applications for asylum and the decisions taken and to present its views to any competent authorities regarding individual applications for asylum at any stage of the procedure.

89. UNHCR has also been working for better quality and consistency of asylum decisions in general. In this quest, the UNHCR obviously covers the whole of Europe, not only those countries that are members of the European Union. The UNHCR has conducted studies in respect of the quality and consistency of asylum decisions. Mentioned earlier in this report is the study on the implementation of the Qualification Directive, and below is an account of the Quality Initiative in the United Kingdom.

90. Other important documents are the UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status and the Guidelines on International Protection.[45] The UNHCR document "Refugee Protection and Mixed Migration: A 10-Point Plan of Action" offers suggestions to states on how to integrate refugee protection considerations into migration and border control policies. UNHCR is present in almost all countries of Europe and has an oversight of the quality and consistency of asylum decisions. It is particularly important that UNHCR ensures that statistics are collected and that concerns are registered affecting the quality and consistency of asylum decisions and, where necessary, that alarm bells are rung. Furthermore, UNHCR has to be able to intervene in order to improve the situation wherever necessary. In this respect the United Kingdom's Quality Initiative is something that could be replicated in more countries and consideration should be given to whether UNHCR should carry out a more formal monitoring and reporting exercise on the quality and consistency of asylum decisions, or whether in Europe such a task could also be carried out by another organisation, such as the Council of Europe.

VI. Role of the European Court of Human Rights

i. Application of the European Convention on Human Rights in asylum cases

91. Many complaints are lodged each year before the European Court of Human Rights by asylum seekers whose applications have been rejected by a member state and who are threatened by removal. Whenever there are substantial grounds to believe that, upon return, an applicant faces a real risk of being subjected to treatment contrary to Article 3, the respondent state is obliged to halt the expulsion. Article 3 of the Convention contains an absolute right not to be exposed to torture or inhuman or degrading treatment or punishment. Persecution by non-state actors can also give rise to an issue under Article 3. If the country to which the applicant is about to be deported is a member state of the Council of Europe, the Court will either declare the case inadmissible or voluntarily extend the application against the receiving member state.[46]

92. A risk of breach of other Convention articles, in particular, Article 2 and Article 6 upon return following expulsion might also exceptionally give rise to an issue under the Convention. A complaint under Article 6 (the right to a fair trial) may be successful in cases where the asylum seeker risks suffering a flagrant denial of a fair trial in the country to which he or she is expelled.[47] Article 2 (the right to life) is not absolute and does not contain a prohibition against the death-penalty (although Protocols Nos 6 and 13 to the Convention do). Expulsion to a country in which the applicants risks the death-penalty is thus not per se at present forbidden under the Convention however the key test is whether or not the individual would face a *real risk* of death or prohibited treatment.[48] Nevertheless, the Court has precluded expulsion in cases where the applicant risks facing the death-penalty following a flagrantly unfair trial in the country of destination, or where he or she could be exposed to the so-called death row phenomenon which is deemed to violate Article 3 of the Convention. Article 4 may be relied on to prevent expulsion where the ill-treatment alleged arises from situations of sexual exploitation.[49] The collective expulsion of aliens is also prohibited.[50]

[45] The Geneva Convention does not contain rules on status determination procedures, hence the existence of and necessity for the Handbook. Nonetheless, ensuring respect for the principle of *non-refoulement* in the Geneva Convention has clear procedural implications.
[46] E.g. *KRS v. the United Kingdom,* (App. No. 32733/08), decision 2 December 2008. Further cases are pending the Court, awaiting communication to the respondent Governments.
[47] *Soering v. the United Kingdom,* App. No 14038/88, Judgment 7 July 1989.
[48] *Ibid* and *Bader v. Sweden,* App. No. 13284/04, Judgment 8 November 2005, and *Őcalan v. Turkey* , 46221/99, Judgment (GC) 12 May 2005.
[49] *Siliadin v. France,* App. No. 73316/01, Judgment 26 October 2001.
[50] *Čonka v. Belgium,* App. No. 51564/99, Judgment 5 February 2002.

93. The right to family and private life under Article 8 should be afforded to asylum seekers and their family members throughout an asylum procedure, as should family unity.[51] Article 8 can be invoked in expulsion cases – in its family life and/or private life aspects. For example, in cases where the expulsion measure would result in an unjustified break up of family life, or in cases, under the private life rubric, where an individual alleges ill-treatment of the kind not meeting the threshold required by Article 3 (where an individual alleges ill-treatment on return, including on the basis of sexual orientation).[52] Article 8 may also be invoked in situations not involving expulsion, e.g. in the context of family reunification, or those concerning children (where their best interests are paramount)[53] and access to social and medical care.[54] It is important to stress that the concept of "family life" must be interpreted broadly to protect relationships beyond mere blood ties to those in a de facto or de jure family relationship where there is mutual enjoyment of each others' company, e.g. those in same-sex partnerships or those with adopted children.[55] Equally, "private life" protects broad aspects of one's personal sphere.[56]

94. Furthermore, Article 1 of Protocol No. 7 to the European Convention is of importance. This provision sets out certain procedural guarantees for aliens lawfully resident in the territory of a state, including asylum seekers, since Article 6 of the Convention (the right to fair trial) is normally not applicable to asylum proceedings.

ii. Interim measures – Rule 39

95. In recent years the Court has been requested with increasing frequency to apply Rule 39 of the Rules of Court in order to halt expulsions of applicants who are about to be deported to a country in which they face a risk of treatment contrary to Article 3. Although Rule 39 is not part of the Convention as such, the Court has decided that member states are obliged to implement Rule 39 decisions. Member states have normally abided by these interim measures. In some cases, however, expulsion have been enforced despite the Court's decision under Rule 39.[57]

iii. Implications as to the quality and consistency of asylum decisions

96. The jurisprudence of the European Court of Human Rights sets standards for member states of the Council of Europe. The Court has provided interpretation of certain concepts in the field of asylum law and it has defined the minimum level of protection that asylum seekers can expect. It has contributed significantly to strengthening the security of the asylum procedure and thus the quality of decisions and the dignity of asylum seekers. For example, it has decided that protection under Article 3 of the Convention shall be "practical and effective". The Court's pan-European influence contributes to harmonising the law and practice on asylum, and therefore to the consistency of asylum decisions in member states. The 1951 Geneva Convention lacks a body that enforces its implementation. In the European context, the European Court has *de facto* provided such enforcement.

97. The case law under Articles 3 and 13 of the Convention, in particular, sets out clear requirements for a full and fair asylum process.[58] From it, one can identify the following practices as incompatible with the "practical and effective" nature of the Convention guarantees:

> 97.1. *Time-limits*: limits that preclude the applicant from making a full claim and procedural rules which prevent a proper assessment of the evidence, including the consideration of evidence submitted after the initial application interview, are problematic.

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[51] See Mole, N., *Asylum and the European Convention on Human Rights,* Council of Europe Publishing, 4th edition. Part 1, Chapter 5; and Part 2, Chapters 2-4.
[52] *F v. the United Kingdom,* (App. No. 36812/02), decision 31 August 2004.
[53] *Mubilanza Mayeka and Kaniki Mitunga v. Belgium*, App. No. 13178/03, Judgment 12 October 2006.
[54] *Pretty v. the United Kingdom,* App. No. 2346/02, Judgment 29 July 2002, para 52.
[55] *Al-Nashif v. Bulgaria,* App. No. 50963/99, Judgment 20 June 2002.
[56] *Dudgeon v. the United Kingdom,* App. No. 7525/76, Judgment 22 October 2001.
[57] Since the Court pronounced that interim measures under Rule 39 are binding on state parties to the Convention. Non-compliance with interim measures results in a violation of Article 34 ECHR (the right to individual petition): *Mamatkulov and Askarov v. Turkey*, (App. No. 46827/99), Judgment [GC] 4 February 2005; and *Paladi v. Moldova* (App. No. 39806/05) Judgment [GC] 10 March 2009. As of March 2009, this has been the case with nine applications concerning expulsion before the Court.
[58] The ECHR entails specific procedural obligations, as elaborated the Court in its case law under Article 13 and the substantive articles of the Convention, including Article 3. E.g. Muminov v. Russia (App. No. 42502/06), Judgment 11 December 2008, *Jabari v. Turkey* (App. No. 40035/98), judgment of 11 July 2000, Gebremedhin v. France, (App. No. 25389/05) Judgment 26 April 2007; *Čonka v. Belgium,* App. No. 51564/99, Judgment 5 February 2002; *Sultani v. France,* App. No. 45223/05, Decision 20 September 2007.

97.2. *Faulty credibility assessments*: while it is for the applicant to provide evidence to support his claim, failure to provide supporting evidence, or inconsistencies between different accounts, should not automatically undermine the credibility of the applicant. Too hasty findings of non-credibility undermine the integrity of the asylum process[59].

97.3. *Non-suspensive appeals*: in *Jabari*, *Conka*, *Gebremedhin* and *Sultani,* the European Court of Human Rights emphasised that Article 13 of the Convention requires a remedy with automatic suspensive effect.[60]

97.4. *Weak standards of appellate review*: Article 13 of the Convention (concerning effective judicial protection) requires an independent and rigorous scrutiny of asylum decisions, in particular to ensure that Article 3 of the ECHR is respected.

98. Furthermore, the rapporteur recalls that the European Court of Human Rights requires, in all cases where there is an arguable case that removal will violate the Convention, a full consideration of the facts at the time removal is contemplated. This requires the admission of new evidence in a full *ex nunc* (current) assessment, including gathering information *ex proprio motu* (of its own accord). [61]

99. Two recent cases, which might serve as examples of how the Court sets standards in the field of asylum law are *Salah Sheekh v. the Netherlands* and *Jabari v. Turkey.*[62] In the first case, the Court considered that, given the absolute nature of the protection afforded by Article 3, the assessment made by the authorities of an expelling State must be adequate and sufficiently supported by materials from reliable and objective sources. The information also has to be up-to-date, as the situation in a country of destination may change in the course of time, requiring a fresh assessment of evidence at the time of expulsion.

100. The second case is of particular relevance to the issue of accelerated procedures. In that case, Turkey had refused to grant a temporary residence permit to the applicant due to her failure to comply with a five-day requirement to submit an asylum claim. The national court had failed to examine the substantive aspect of her claim. The Court held that the "automatic and mechanical application of such a short time-limit for submitting an asylum claim must be considered at variance with the protection of the fundamental value embodied in Article 3". The Court found a breach of Article 3. In the case of *Bahaddar v. the Netherlands*[63], the Court noted that time limits must not be so short, or applied so inflexibly, as to deny an asylum applicant a realistic opportunity to prove his or her claim. The Court also reiterated that scrutiny of the substantive claim be "independent and rigorous".

VII. Good practice in improving the quality and consistency of asylum decisions

i. UNHCR Quality Initiative in the United Kingdom

101. In 2005 UNHCR started its Quality Initiative (QI), entailing a review of the United Kingdom Home Office Refugee Status Determination Procedures. Regular reports have been made public and the review is onward going. The QI Project is based on the supervisory role of UNHCR under the 1951 Refugee Convention. Its aim is to assist the Home Office in the refugee determination process, through monitoring of procedures and the application of the refugee criteria. Ssome of the key findings of the review throw light on some of the priorities that other member states should also follow in reviewing their approach to refugee status determination procedures. In particular, the rapporteur wishes to highlight the following conclusions.

102. One of the main proposals from the UNHCR in the Quality Initiative was to promote the "frontloading of resources". This means concentrating resources as early as possible in the asylum procedure so that first decisions, so far as possible, are reliable. This saves time and money, for the state as well as for the individual asylum seeker who does not have to go through the same extended waiting period and uncertainty.

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[59] See in this respect the ECtHR rulings in *N v Finland* (App. No. 38885/02), Judgment 26 February 2005, *Salah Sheekh v. the Netherlands* (App. No. 1948/04), Judgment 13 January 2007 and *Said v. the Netherlands,* (App. No. 2345/02, Judgment 15 June 2005.

[60] *Jabari v. Turkey* (App. No. 40035/98), judgment of 11 July 2000, *Gebremedhin v. France*, (App. No. 25389/05) Judgment 26 April 2007; *Čonka v. Belgium,* App. No. 51564/99, Judgment 5 February 2002; *Sultani v. France,* App. No. 45223/05, Decision 20 September 2007.

[61] As recently emphasised in *Salah Sheekh v. the Netherlands* (App. No. 1948/04), Judgment 13 January 2007.

[62] *Salah Sheekh v. the Netherlands* (App. No. 1948/04) judgment of 11 January 2007 *Jabari v. Turkey* (App. No. 40035/98) judgment of 11 July 2000).

[63] *Bahaddar v. the Netherlands* (App. No. 25894/94), Judgment of 19 February 1998).

103. In the review, UNHCR took the view that a key to improving quality in refugee status determination procedures was the recruitment and retention of highly-qualified caseworkers. UNHCR recommended that the minimum qualification for an asylum caseworker should be a university degree or equivalent qualification together with specific asylum competencies. Improved training of caseworkers should enhance the quality of decisions and ensure their consistency. Training should help to increase the retention of expert decision makers. Caseworkers should receive in-depth training on the 1951 Convention and the European Convention on Human Rights to improve their ability to identify and focus their interviews on salient aspects.

104. Accreditation was found to be a key to overall improvement in quality. Every person involved in first instance decision making, including internal candidates, should be accredited by a scheme that is designed to test the competencies, knowledge, skills and analytical abilities to an appropriate level. Identification and management of stress was essential for the retention of good quality asylum caseworkers. Ignoring stress was identified as leading to staff burn-out and high staff turnover. Case production targets should be kept at reasonable levels and be flexible to allow for careful scrutiny of each and every case.

105. Good quality country of origin information, together with the knowledge of how to apply such information to the claim, were considered keys to good quality decision making. Respected country research from sources such as UNHCR (position papers), Amnesty International and Human Rights Watch should be made available unedited on the knowledge database of the decision-making authority. The need for detailed and up-to-date country of origin information was emphasised. Caseworkers should be equipped with the necessary skills to conduct their own country research. They should be encouraged to consult a variety of sources and assess their reliability and relevance to the applicant's claim. They should be trained to source all references to country of origin information. It should be ensured that specific country of origin information and guidance are made available on countries with poor human rights records, regardless of the number of asylum applications received from such countries.

106. Caseworkers should be expected to spend a reasonable amount of time preparing for an asylum interview, including conducting appropriate research. As much time as necessary should be spent interviewing asylum seekers. Whenever practicable, the same caseworker who conducted the interview should draft the asylum decision. All substantive asylum interviews should be recorded. Gender-sensitive interviewing and interpreting should be automatic and introduced with immediate effect. Where an interview has been arranged that is not gender appropriate for whatever reason, a mechanism should be in place to allow for the postponement of the interview.

107. Guidance on working with interpreters should be incorporated into existing interviewing training. Caseworkers should be reminded of and should make use of the option of a further interview of either the applicant or his/her family members where this is necessary. Measures should be in place to ensure consistency in interviewing practice and procedures across the Home Office and to share best practice from other parts of the Home Office. Applicants should have access to information about the asylum and interviewing process, their rights and obligations. Such information could take the form of leaflets provided in the appropriate languages being prominently displayed in the waiting area. Information on the asylum process beyond the complaints procedure should be provided to applicants in a number of common languages as early as possible in the process.

108. The rapporteur notes the good practice coming from the Quality Initiative. In the light of the experience in the United Kingdom he considers it worthwhile, highlighting in particular that in a number of countries unrealistic targets and caseloads are given to case-workers. There needs to be flexibility and case-workers should not have to sacrifice quality for statistical targets. The rapporteur is also concerned about the impact of heavy backlogs of cases and lengthy delays in reaching decisions. It is clear that the quality of decisions become even more difficult to guarantee after lengthy delays and the fairness of a decision can be impugned where decisions are taken sometimes as long as five or more years after the application is lodged.

109. One particularly positive practice in the United Kingdom is that steps have been taken to ensure that a single caseworker works on a case from beginning to end. This helps to create a culture of respect and is important for the asylum seeker. This practice should be replicated in other countries.

110. As mentioned earlier in the report, in some Council of Europe member states up to 50% of first instance decisions are overturned on appeal, which indicates that many first instance decisions are unreliable. One of the main proposals from the UNHCR in the Quality Initiative has been to promote the "frontloading of resources". This means that resources are concentrated as early as possible in the asylum procedure so that first decisions, so far as possible, are reliable. The rapporteur considers this to be one of the essential proposals in the Quality Initiative which should be taken into account by other states. A

frontloaded system would save time and money for the state, as well as for the individual asylum seeker, who will not have to go through the same extended waiting period and uncertainty.

ii. The UNHCR Asylum Systems Quality and Assurance and Evaluation Mechanism Project in the Central Europe sub-region (ASQAEM)

111. The aim of the project, which is run by the UNHCR and implemented in the Slovak Republic, is to support in a "harmonised and transnational manner" the continuous development and enhancement of fair and efficient asylum procedures that are based on the full and inclusive application of the 1951 Geneva Convention. This should be accomplished by promoting adherence to established common international protection standards in the European Union, such as the Qualification Directive and the Procedures Directive. These are said to provide some clarity and useful guidance for the interpretation of international protection instruments, in particular the Geneva Convention.

112. The project focuses on how the Slovak Republic is undertaking the assessment of claims for international protection after having transposed community legislation. Following a process of independent and objective evaluation, specific actions will be designed to improve the quality, fairness and efficiency of first and second instance decisions in the Slovak asylum system. The project will also aim at advancing a harmonised common European asylum system by developing partnership exchanges between systems in different countries.

113. In April 2009, UNHCR submitted a new proposal to the European Commission for a project funded by the European Refugee Fund entitled "Further Developing Asylum Quality in the European Union – Establishing New Quality Assurance Mechanisms in Southern Europe and Consolidating National Quality Mechanisms in Central and Eastern Europe". This project will build on the previous ASQAEM project. This second phase will undertake targeted monitoring of adjudicator preparation, interviews and written decisions, consolidate newly-established internal review mechanisms and develop a methodology to guide the future establishment of such mechanisms in other European Union member states.

114. The project aims "to examine, assess and develop quality assurance systems in the asylum procedures of ten member states: Bulgaria, Cyprus, Greece, Hungary, Italy, Poland, Portugal, Romania, Slovakia and Slovenia. It will involve the assistance of the asylum authorities of Austria, Germany and the United Kingdom, who will provide good practice advice. The overarching objective is to improve the quality of asylum procedures by building the capacity and expertise of the asylum authorities responsible for the processing, examination and taking of decisions on asylum applications at the first and second instance, and to ensure the effective and sustainable functioning of Quality Assessment Units (QAUs).

iii. The European Asylum Curriculum (EAC)

115. The EAC is a European Union-funded initiative by the member states aiming to enhance the capacity and quality of the European asylum process as well as to strengthen practical co-operation among the European asylum systems. The aim is to create a European asylum curriculum for common vocational training of employees of the immigration services in the European Union and to creating a complete and harmonised learning tool for case workers. In view of the earlier comments on the importance of training, it is clear that some form of common asylum curriculum is essential if those involved in the asylum process are expected to provide quality and consistent decisions across Europe. This curriculum should take into account best practices of member states, relevant principles of refugee law, case law of the European Court of Human Rights and other relevant Council of Europe standards.

VIII. Conclusions

116. The rapporteur has indicated in his report that there remain many concerns over the quality and consistency of asylum decisions. These have been exposed starkly in some of the statistics given.

117. He has highlighted seven main reasons for problems in the quality and consistency of asylum decisions, namely:

a. difficulties in accessing the asylum process;
b. procedural rules that undermine the assessment of the facts and hinder the applicant presenting his or her case;
c. restrictive and divergent interpretation of eligibility criteria;
d. lack of procedural safeguards in the asylum proceedings, including during the appeal stage;
e. lack of objective and reliable country of origin information;

f. lack of training of those involved in taking decisions in asylum cases;
g. political pressure being brought to bear on the asylum process including by politicians and the media;

118. The draft resolution and draft recommendation include the steps that need to be taken by member states and by the Committee of Ministers of the Council of Europe to improve the quality and consistency of asylum decisions.

119. The rapporteur wishes to highlight that the Council of Europe's primary aim is to create a common democratic and legal area throughout the whole of Europe, ensuring respect for its fundamental values: human rights, democracy and the rule of law. As the Council of Europe has the principal responsibility for ensuring that fundamental rights are respected, protected and promoted across Europe, it is incumbent on it to ensure that Europe's asylum systems fully respect and protect fundamental rights, in keeping with the ECHR, the Refugee Convention and other international instruments. In particular, the Council of Europe must ensure that where the European Union standards are dubious, that they do not provide a pretext for Council of Europe states to violate fundamental rights. As regards eligibility criteria in particular, the case law of the European Court of Human Rights demands that states engage in an appropriate risk assessment, irrespective of whether the risks are posed by state or non-state actors.

120. Finally, he would like to highlight the now pressing need for the Committee of Ministers of the Council of Europe to establish a new inter-governmental Committee with a permanent mandate to replace the work formerly carried out by the Ad hoc Committee of experts on the legal aspects of territorial asylum, refugees and stateless persons (CAHAR). This Committee had previously produced quality work, for example the Twenty Guidelines on Forced Return which have become an important European reference point. It is now essential to have a specialised expert committee to carry on this work and tackle further the asylum issues, including those raised in this report.

Doc. 11990

Reporting committee: Committee on Migration, Refugees and Population

Reference to Committee: Doc. 11103, Reference No. 3305 of 22 January 2007

Draft resolution and draft recommendation unanimously adopted by the Committee on 25 June 2009

Members of the Committee: Mrs Corien W.A. Jonker (Chairperson), Mr Hakki Keskin (1st Vice-Chairperson), Mr Doug Henderson, (2nd Vice-Chairperson) (alternate: Mr Bill **Etherington**), Mr Pedro **Agramunt**, (3rd Vice-Chairperson), Mrs Tina Acketoft, Mr Francis Agius, Mr Ioannis Banias, Mr Alexander **van der Bellen**, Mr Márton Braun, Mr André Bugnon, Mr Sergej Chelemendik, Mr Vannino Chiti, Mr Christopher Chope, Mr Boriss **Cilevičs**, Mr Titus Corlățean, Mr Telmo Correia, Mrs Claire Curtis-Thomas, Mr David Darchiashvili (alternate: Mr Guiorgui **Kandelaki**), Mr Arcadio **Díaz Tejera**, Mr Mitko Dimitrov, Mr Vangjel Dule, Mr Tuur Elzinga, Mr Valeriy **Fedorov**, Mr Oleksandr Feldman, Mr Relu Fenechiu, Mrs Doris Fiala, Mr Bernard Fournier, Mr Aristophanes Georgiou, Mr Paul Giacobbi, Mrs Gunn Karin Gjul, Mrs Angelika Graf, Mr John Greenway (alternate: Mr Michael **Hancock**), Mr Andrzej Grzyb (alternate: Mr Bronisław **Korfanty**), Mr Michael **Hagberg**, Mrs Gultakin **Hajibayli**, Mr Davit Harutyunyan, Mr Jürgen Herrmann, Mr Bernd Heynemann, Mr Jean Huss, Mr Tadeusz Iwiński, Mr Zmago **Jelinčič Plemeniti**, Mr Mustafa Jemiliev, Mr Tomáš **Jirsa**, Mr Reijo **Kallio**, Mr Ruslan Kondratov (alternate: Mr Oleg **Panteleev**), Mr Franz Eduard **Kühnel**, Mr Andros Kyprianou, Mr Geert Lambert, Mr Pavel Lebeda, Mr Younal Loutfi, Mr Arminas Lydeka, Mr Andrija Mandić, Mr Jean-Pierre Masseret (alternate: Mr Jean-Claude **Frécon**), Mr Slavko Matić, Mrs Nursuna **Memecan**, Mrs Ana Catarina Mendonça, Mr Gebhard Negele, Mr Hryhoriy **Omelchenko**, Ms Steinunn Valdís Óskarsdóttir, Mr Alexey Ostrovsky, Mr Grigore Petrenco, Mr Jørgen **Poulsen**, Mr Cezar Florin Preda (alternate: Mr Iosif Veniamin **Blaga**), Mr Milorad Pupovac, Mrs Mailis Reps, Mr Gonzalo Robles, Mr Branko Ružić, Mr Giacomo **Santini**, Mr André **Schneider**, Mr Samad Seyidov, Mrs Miet Smet, Mr Dimitrios Stamatis, Mr Florenzo Stolfi, Mr Giacomo Stucchi, Mr László Szakács, Mr Dragan Todorović, Mr Tuğrul **Türkeş**, Mrs Özlem Türköne, Mr Michał Wojtczak, Mr Marco Zacchera, Mr Yury Zelenskiy, Mr Andrej Zernovski.

N.B.: The names of the members who took part in the meeting are printed in **bold**

Secretariat of the Committee: Mr Neville, Mrs Odrats, Mr Ekström, Ms Meredith