COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 4 November 2008

GT-DH-AS(2008)005

STEERING COMMITTEE FOR HUMAN RIGHTS (CDDH)

_____

WORKING GROUP ON HUMAN RIGHTS PROTECTION IN THE CONTEXT OF ACCELERATED ASYLUM PROCEDURES (GT-DH-AS)

_____

REPORT

5th meeting
2-5 September 2008

Summary

The meeting was devoted to finalisation of the draft Guidelines on Human Rights protection in the context of accelerated asylum procedures and draft Explanatory Memorandum thereto.

Item 1: Opening of the meeting and adoption of the agenda

1. The Working Group on human rights protection in the context of accelerated asylum procedures (GT-DH-AS) held its 5th meeting in Strasbourg from 2 to 5 September 2008, with Mr Michal BALCERZAK (Poland) as Chairperson. The list of participants appears at Appendix I. The agenda, as adopted, appears at Appendix II.

2. This last meeting, which took place under the extended ad hoc terms of reference of the Working Group approved by the Ministers' Deputies at their 1025th meeting (30 April 2008; see Appendix III), was devoted to the finalisation of the draft Guidelines and Explanatory Memorandum thereto.

3. The basis for discussion was provided by the draft Guidelines as resulting from the previous meeting (June 2008, GT-DH-AS (2008)005, Appendix IV) along with the draft Explanatory Memorandum prepared by the Secretariat in consultation with the Chairperson and completed by suggestions put forward by the participants[1] (GT-DH-AS(2008)4 revised). The Group noted that the case-law of the European Court of Human Rights constituted the main source of inspiration for these texts. The Group noted with satisfaction that the Registry of the Court was willing to check the relevance of the various references to the case-law included in these texts before they are submitted to the CDDH.

Items 2 and 3: Finalisation of the draft Guidelines and Explanatory Memorandum

4. The Group took into account, in particular, a number of remarks sent by the United Kingdom expert concerning certain Guidelines. This expert having been unable to participate in the meeting, the Group endeavoured, insofar as possible, to find compromise solutions.

5. ***Guideline I (Definition and scope)*** – the Danish expert expressed serious concerns as regards the second provision ("*procedures whereby a State may declare an application inadmissible without considering the merits of the claim also fall* mutatis mutandis *within the scope of the guidelines"*).

6. ***Guideline II (Principles)*** – with respect to the phrase recalling that "*regular asylum procedures should remain the rule and accelerated asylum procedures the exception*", the Group decided to include a paragraph indicating that "*the fact that an asylum application was submitted at borders, including airports and transit areas, as well as lack of documents or use of forged documents, should not entail* per se *an automatic recourse to accelerated procedures*". The Romanian expert, however, indicated a difficulty raised by such a wording with regard to his national law, which provides for an accelerated asylum procedure applicable in all cases where the asylum

[1] Finland, Romania, the United Kingdom, Amnesty International and the AIRE Center. Further proposals were submitted in a separate document at the beginning of the meeting by the UNCHR.

application is submitted at a border crossing point (the only exception being in the case of unaccompanied minors). This expert suggested the following wording: "*When accelerated procedure is applied, in case of submission of an asylum application at borders, the processing of the asylum application shall be done with full observation of the procedural guarantees provided in these guidelines*."

7. ***Guideline III (Vulnerable persons and complex cases)*** – the remarks submitted by the United Kingdom expert gave rise to a lengthy discussion on the notion of the complexity of a case. As a compromise, the Group agreed to retain the following wording: "*When it becomes apparent that a case is particularly complex and that this complexity falls to be addressed in the State where the application was lodged, it should be excluded from the accelerated procedure"*.

Other issues

8. The Group also carefully considered the relevance of dealing with diplomatic assurances in the Guidelines, in particular in the explanatory text to Guideline VI (the safe third country concept). The representative of the AIRE Centre was concerned that the question of diplomatic assurances was engaged equally in cases where it was alleged that an individual could return to a country considered "safe" (Guideline VI - the safe third country concept) as in those involving return to a country where prohibited treatment was feared (Guideline VII - non-refoulement and return). The experts concluded that it was not appropriate to mention this issue in the context of this instrument.

9. The Danish expert considered that the explanatory memorandum should concentrate more on accelerated asylum procedures, the only point addressed in the guidelines, without addressing asylum procedures in general.

Adoption of the texts

10. At the conclusion of its work, the Group adopted the draft Guidelines and draft Explanatory Memorandum as they appear at Appendices IV and V.

11. The Chairperson praised the constructive atmosphere and spirit of compromise shown by all participants during the discussions on these complex and sensitive issues. Finally, the Group considered that it had fulfilled the mandate received by the CDDH, insofar as transmission of the drafts to the CDDH for possible adoption at its 67th plenary meeting (25-28 November 2008) and subsequent transmission to the Committee of Ministers before 31 December 2008 (deadline of the extended ad hoc terms of reference) were foreseen.

*** * ***

Appendix I

List of participants
MEMBERS / MEMBRES

MEMBERS / MEMBRES

ARMENIA / ARMÉNIE
Mr Gagik YEGANYAN, Head of Migration Agency, Ministry of Territorial Administration of the Republic of Armenia, 4 Hr. Kochar St., Yerevan 375033

DENMARK / DANEMARK
Mr Jacob BECH ANDERSEN
Danish Ministry of Refugee, Immigration and Integration Affairs

FINLAND / FINLANDE
Mr Arto KOSONEN, Government Agent, Director, Legal Department, Ministry for Foreign Affairs, PO Box 176, FIN 00161 Helsinki

Ms Jutta GRAS, Senior Adviser, Ministry of the Interior
FIN 00161 HELSINKI

LATVIA / LETTONIE
Mr Emils PLAKSINS, Lawyer, Office of the Government Agent, Ministry of Foreign Affairs, Kr. Valdemara str. 3, LV-1395 RIGA

POLAND / POLOGNE
Mr Michal BALCERZAK, Chair / Président, Assistant Professor, Nicholas Copernicus University, Faculty of Law and Administration, ul. Gagarina 15, 87100 TORUN
Ministry of Foreign Affairs, Legal and Treaty Department, Aleja Szucha 23, WARSAW 00950

ROMANIA / ROUMANIE
Mr Silviu TURZA, Asylum Legal Expert, Romanian Immigration Office, Lt. Col. C-Tin Marinescu, nr 15A, sector 5, BUCAREST

SWEDEN / SUÈDE
Ms Gunilla ISAKSSON, Ministry of Foreign Affairs, SE-103 39 STOCKHOLM

Ms Helen LINDQUIST, Ministry of Justice, Division for Migration and Asylum Policy,

SWITZERLAND / SUISSE
M. Frank SCHÜRMANN, Agent du Gouvernement devant la CEDH, Office fédéral de justice et police, Chef de l'Unité droit européen et protection internationale des droits de l'homme, Bundesrain 20, CH-3003 BERNE

M. Christian ZUMWALD, Adjoint juridique, Département fédéral de justice et police DFJP, Office fédéral des migrations ODM, Domaine de direction procédure d'asile, Quellenweg 6, 3003 Berne-Wabern

UNITED KINGDOM / ROYAUME-UNI
Apologised / Excusé

* * *

PARTICIPANTS

Parliamentary Assembly / Assemblée parlementaire
Apologised / Excusé

Secretariat of the European Committee for the Prevention of Torture (CPT) / Secrétariat du Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT)
Mr Kristian BARTHOLIN, member of Secretariat of the CPT

Office of the Commissioner for Human Rights / Bureau du Commissaire aux Droits de l'Homme du Conseil de l'Europe
Mr Nikolaos SITAROPOULOS, Advisor / Conseiller

* * *

OTHER PARTICIPANTS / AUTRES PARTICIPANTS

United Nations High Commissioner for Refugees (UNHCR) / Haut Commissariat des Nations Unies pour les Réfugiés

Mr Günther SCHESKE, Representative, UNHCR Representation to the European Institutions in Strasbourg, c/o Council of Europe, Agora Building B6 07V, 1 quai Jacoutot, F-67075 STRASBOURG Cedex (France)

Mr Samuel BOUTRUCHE, Associate European Affairs Officer, UNHCR Bruxelles, Rue Van Eyck 11b, B- 1050 BRUSSELS

Ms Anne WEBER, Legal Assistant, UNHCR Representation to the European Institutions in Strasbourg, c/o Council of Europe, Agora Building B6 05V, F-67075 STRASBOURG Cedex

Ms Marion DESPLATS, Intern, UNHCR Representation to the European Institutions in Strasbourg, c/o Council of Europe, Agora Building B6 05V, F-67075 STRASBOURG Cedex

* * *

OBSERVERS / OBSERVATEURS

Amnesty International
Mr Kris POLLET, Executive Officer, Amnesty International EU Office, rue de Trèves, 35 B-1040 BRUSSELS

AIRE Centre
Ms Catherine MEREDITH, 3rd Floor, 17 Red Lion Square, LONDON WC1R 4QH

European Group of National Human Rights Institutions / Groupe européen des institutions nationales des droits de l'homme
Ms Ruth WEINZIERL, German Institute for Human Rights, Policy and Research, Zimmerstr. 26/27, D-10969 BERLIN

European Council on Refugees and Exiles (ECRE) / Immigration Law Practitioners'Association (ILPA)
Apologised / Excusé

* * *

SECRETARIAT

Directorate General of Human Rights and Legal Affairs / Direction générale des droits de l'Homme et des affaires juridiques, Directorate of Standard-Setting / Direction des Activités normatives, Council of Europe/Conseil de l'Europe, F-67075 Strasbourg Cedex
Fax : 0033 3 88 41 37 39

M. Alfonso DE SALAS, Head of the Human Rights Intergovernmental Cooperation Division / Chef de la Division de la coopération intergouvernementale en matière de droits de l'Homme, Secretary of the CDDH / Secrétaire du CDDH

Mr David MILNER, Administrator / Administrateur, Human Rights Intergovernmental Cooperation Division / Division de la coopération intergouvernementale en matière de droits de l'Homme

Ms Annick PIJNENBURG, Study visitor / visiteuse d'études, Human Rights Intergovernmental Cooperation Division / Division de la coopération intergouvernementale en matière de droits de l'Homme

Mme Michèle COGNARD, Assistant / Assistante, Human Rights Intergovernmental Cooperation Division/Division de la coopération intergouvernementale en matière de droits de l'Homme

* * *

Interpreters / Interprètes
M. Philippe QUAINE
Mme Chloe CHENETIER
M. Robert SZYMANSKI

Appendix II

Agenda

Item 1: Opening of the meeting and adoption of the agenda

Working documents

- Draft agenda	GT-DH-AS(2008)OJ002
- Report of the 66th meeting of the CDDH (25-28 March 2008)	CDDH(2008)008
- Report of the 4th meeting of the GT-DH-AS (18-20 June 2008)	GT-DH-AS(2008)003

Item 2: Finalisation of the draft Guidelines

Working document

- Report of the 4th meeting of the GT-DH-AS (18-20 June 2008)	GT-DH-AS(2008)003 Appendix IV

Information documents

- Compilation of Recommendations of the CM and the PACE	GT-DH-AS(2007)006
- Questionnaire on accelerated asylum procedures	GT-DH-AS(2007)001
- Compilation of replies to the questionnaire	GT-DH-AS(2007)002rev Bil
- Table of replies received by the UNHCR	UNHCR synopsis

Item 3: Finalisation of the draft Explanatory Memorandum

Working document

- Elements for possible inclusion in the draft Explanatory Memorandum (as revised on 29 August 2008)	GT-DH-AS(2008)004 revised

Information documents

- Note on relevant case-law of the European Court of Human Rights in the context of accelerated asylum procedures	UNHCR contribution
- Manual on Refugee Protection and the ECHR http://www.unhcr.org/publ/PUBL/3ead312a4.html	UNHCR publication
- Green Paper on the future Common European Asylum System (presented by the Commission on 6 June 2007) http://ec.europa.eu/justice_home/news/intro/doc/com_2007_301_en.pdf	COM(2007)301 final
- UNHCR Response to the European Commission's Green Paper on the Future Common European Asylum System (September 2007)	UNHCR paper

Other information documents

- Surveys on Detention of Asylum Seekers and Alternatives in the EU (The regional coalition 2006 – projects supported by the European Commission, Directorate-General for Justice, Freedom and Security www.alternatives-to-detention.org	
- Secretariat Memorandum on Parliamentary Assembly Recommendation 1727 (2005) of the Accelerated asylum procedures in Council of Europe member states	CDDH(2006)011
- Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:01:EN:HTML	
- UNHCR, ExCom Conclusions No. 8 (XXVIII) - 1977 on the Determination of Refugee Status (http://www.unhcr.org/excom/EXCOM/3ae68c6e4.html)	
- UNHCR, ExCom Conclusions No. 30 (XXXIV) - 1983 on the Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum (http://www.unhcr.org/excom/EXCOM/3ae68c6118.html)	

Item 3: Other business and adoption of the conclusions of the meeting

* * *

Appendix III

Extended ad hoc terms of reference of the Working Group on human rights protection in the context of accelerated asylum procedures (GT-DH-AS)

(Adopted by the Committee of Ministers at the 984th meeting of the Ministers' Deputies (17-18 January 2007, item 4.1b) and amended at the 1017th meeting of the Ministers' Deputies (6 February 2008, item 4.1h))

1.	**Name of Group:**	WORKING GROUP ON HUMAN RIGHTS PROTECTION IN THE CONTEXT OF ACCELERATED ASYLUM PROCEDURES (GT-DH-AS)
2.	**Type of Group:**	Ad hoc Advisory Group
3.	**Source of terms of reference:**	Committee of Ministers, upon proposals of the Steering Committee for Human Rights (CDDH)
4.	**Terms of reference:**	
	Having regard to:	
-	the Declaration and the Action Plan adopted at the Third Summit of Heads of State and Government of the Council of Europe member states (Warsaw, 16-17 May 2005); CM(2005)80 final, 17 May 2005);	
-	the Road map for the implementation of the Action Plan (974th meeting of the Ministers' Deputies – 27 September 2006, item1.6), Chapter I.2;	
-	Decision No. CM/868/14062006, adopted by the Ministers' Deputies at their 967th meeting (14 June 2006), giving ad hoc terms of reference to the Steering Committee for Human Rights (CDDH) with a view to examine the question of human rights protection in the context of accelerated asylum procedures and, as appropriate, to draft guidelines in this field;	
-	the Convention for the Protection of Human Rights and Fundamental Freedoms (1950, ETS No. 5).	
	Under the authority of the Steering Committee for Human Rights (CDDH) and in relation with the implementation of Project 2008/DGHL/1409 "Substantive legal analysis of human rights issues and input in the development of Council of Europe policies on such issues", the Group is instructed to:	
i.	examine the question of human rights protection in the context of accelerated asylum procedures and, as appropriate, to draft guidelines in this field;	
ii.	in this context, to take into account the information and standards emanating from the Council of Europe and other international mechanisms, such as relevant recommendations of the Committee of Ministers, reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the case law of the European Court of Human Rights, documents developed within the framework of the UNHCR and the International	

	Law Commission.
5.	**Composition of the Group:**
5.A	**Members** The Group shall be composed of 8 specialists with the relevant qualifications in issues concerning the right of asylum, appointed by the governments of the following member states: Armenia, Finland, Latvia, Poland, Romania, Sweden, Switzerland and United Kingdom. The Council of Europe budget will bear their travel and subsistence expenses. The above-mentioned states may send (an) additional representative(s) to meetings of the Group, at their own expense. Other countries may send (a) representative(s) to meetings of the Group, at their own expense. Each member state participating in the meetings of the Group has the right to vote.
5.B	**Participants**
i.	The European Committee on Legal Co-operation (CDCJ) may send (a) representative(s) to meetings of the Group, without the right to vote and at the expense of correspondent budgetary articles of the Council of Europe.
ii.	The European Committee on Migration (CDMG) may send (a) representative(s) to meetings of the Group, without the right to vote and at the expense of correspondent budgetary articles of the Council of Europe.
iii.	The European Commission against Racism and Intolerance (ECRI) may send (a) representative(s) to meetings of the Group, without the right to vote and at the expense of its administrative budget.
iv.	The Parliamentary Assembly may send (a) representative(s) to meetings of the Group, without the right to vote and at the expense of its administrative budget.
v.	The Congress of Local and Regional Authorities of the Council of Europe may send (a) representative(s) to meetings of the Group, without the right to vote and at the expense of its administrative budget.
vi.	The Registry of the European Court of Human Rights may send (a) representative(s) to meetings of the Group, without the right to vote and at the expense of its administrative budget.
vii.	The Council of Europe Commissioner for Human Rights may send (a) representative(s) to meetings of the Group, without the right to vote and at the expense of its administrative budget.
viii.	The Conference of INGOs of the Council of Europe may send (a) representative(s) to meetings of the Group, without the right to vote and at the expense of the body that (s)he (they) represent(s).
5.C	**Other participants**
i.	The European Commission and the Council of the European Union may send (a) representative(s) to meetings of the Group, without the right to vote or defrayal of

	expenses.
ii.	States with observer status of the Council of Europe (Canada, Holy See, Japan, Mexico, United States of America) may send (a) representative(s) to meetings of the Group, without the right to vote or defrayal of expenses.
iii.	The Organisation for Security and Co-operation in Europe (OSCE) / the Office for Democratic Institutions and Human Rights (ODIHR) may send (a) representative(s) to meetings of the Group, without the right to vote or defrayal of expenses.
iv.	The Office of the United Nations High Commissioner for Human Rights may send (a) representative(s) to meetings of the Group, without the right to vote or defrayal of expenses.
v.	The Office of the United Nations High Commissioner for Refugees may send (a) representative(s) to meetings of the Group, without the right to vote or defrayal of expenses.
5.D	**Observers** The following non member state: - Belarus;
	and the following non-governmental organisations: - Amnesty International; - International Commission of Jurists (CIJ); - International Federation of Human Rights (FIDH);
	- European Co-ordinating Group for National Institutions for the Promotion and Protection of Human Rights; - European Roma and Travellers Forum; may send (a) representative(s) to meetings of the Group, without the right to vote or defrayal of expenses.
6.	**Working methods and structures:**
	In order to carry out its tasks, the Group may, where necessary, seek advice of external experts, have recourse to consultants and consult with relevant non-governmental organisations and other members of civil society. The CDDH is entitled to invite other participants and/or observers to the Group, without the right to vote or defrayal of expenses.
7.	**Duration:**
	These terms of reference will expire on 31 December 2008.

Appendix IV

Draft guidelines on human rights protection in the context of accelerated asylum procedures

(as adopted at the 5th meeting of the GT-DH-AS (2-5 September 2008))

PREAMBLE

The Committee of Ministers,

(a) Reaffirming that asylum seekers enjoy the guarantees set out in the Convention for the Protection of Human Rights and Fundamental Freedoms in the same way as any other person within the jurisdiction of States Parties, in accordance with Article 1 of the latter;

(b) Bearing in mind notably Article 14 of the 1948 Universal Declaration on Human Rights and reaffirming the obligation of states, whatever asylum procedure they use, to comply with the international and European standards in this field, such as the right to seek and enjoy asylum as well as those identified by the case-law of the European Court of Human Rights and by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and the UN Committee Against Torture (CAT);

(c) Recalling the importance of full and effective implementation of the 1951 Geneva Convention relating to the Status of Refugees ("Geneva Convention") and the 1967 New York Protocol to this Convention and the obligations of states under these instruments, in particular Article 33 (1) regarding the prohibition of refoulement, according to which *"no Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion*";

(d) Recalling Resolution No. 1 on access to justice for migrants and asylum seekers adopted at the 28th Conference of the European Ministers of Justice (Lanzarote, Spain, 25-26 October 2007);

(e) Recalling Recommendations adopted by the Committee of Ministers and the Parliamentary Assembly of the Council of Europe in the field of asylum procedures, notably:
- Recommendation R (97) 22 of the Committee of Ministers containing guidelines on the application of the safe third country concept,
- Recommendation R (98) 13 of the Committee of Ministers of the right of rejected asylum seekers to an effective remedy against decisions on expulsion in the context of Article 3 of the European Convention on Human Rights, and
- Recommendation R (2003)5 of the Committee of Ministers on measures of detention of asylum seekers;
- Recommendation 1327 (1997) of the Parliamentary Assembly on the protection and reinforcement of the human rights of refugees and asylum seekers in Europe,

(f) Referring specifically to:
- Resolution 1471 (2005) of the Parliamentary Assembly on accelerated asylum procedures in Council of Europe member states,
- Recommendation 1727 (2005) on accelerated asylum procedures, and
- the related report by the Committee on Migration, Refugees and Population of the Parliamentary Assembly of the Council of Europe;

(g) Recalling European Union legislation, particularly:
- Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers,
- Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in member states for granting and withdrawing refugee status,
- Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, and
- Council Regulation No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the member states responsible for examining an asylum application lodged in one of the member states by a third-country national ("Dublin Regulation");

1. Adopts the attached guidelines and invites member states to ensure that they are widely disseminated amongst the national authorities responsible for the return of aliens.

2. Notes that none of the guidelines imply any new obligations for Council of Europe Member States.[2]

I. Definition and scope

1. An accelerated asylum procedure is an asylum procedure derogating from normally applicable procedural time scales and/or procedural guarantees with the view to expedite decision making.

2. Procedures whereby a State may declare an application inadmissible without considering the merits of the claim also fall *mutatis mutandis* within the scope of the guidelines.

II. Principles

1. Regular asylum procedures should remain the rule and accelerated asylum procedures the exception.

[2] When the guidelines make use of the verb "shall" this indicates only that the obligatory character of the norms corresponds to already existing obligations of member states. In certain cases however, the guidelines go beyond the simple reiteration of existing binding norms. This is indicated by the use of the verb "should" to indicate where the guidelines constitute recommendations addressed to the member states.

2. States should only apply accelerated procedures in cases prescribed by law and in compliance with their international obligations.

3. Asylum seekers have the right to an individual and fair examination of their applications by the competent authorities.

4. When procedures as defined in guideline I are applied, the state concerned is required to ensure that the principle of *non-refoulement* is effectively respected.

5. The fact that an asylum application was submitted at borders, including airports and transit areas, as well as lack of documents or use of forged documents, should not *per se* entail an automatic recourse to accelerated procedures.

III. Vulnerable persons and complex cases

1. The vulnerability of certain categories of persons such as unaccompanied and/or separated minors/children, victims of torture, sexual violence or human trafficking and persons with mental and/or physical disabilities, should be duly taken into account when deciding whether to apply accelerated asylum procedures. In the case of children, their best interests are paramount.

2. International human rights obligations as regards the rights of specific vulnerable groups shall be duly taken into account when applying accelerated asylum procedures and in the manner of application.

3. When it becomes apparent that a case is particularly complex and that this complexity falls to be addressed in the State where the application was lodged, it should be excluded from the accelerated procedure.

IV. Procedural guarantees

1. When accelerated asylum procedures are applied, asylum seekers should enjoy the following minimum procedural guarantees:

(i) the right to lodge an asylum application with State authorities, including, but not limited to, at borders or in detention;

(ii) the right to be registered as asylum seekers in any location within the territory of the State designated for this purpose by the competent authorities;

(iii) the right to be informed explicitly and without delay, in a language which he/she understands, of the different stages of the procedure being applied to him/her, of his/her rights and duties as well as remedies available to him/her;

(iv) the right to an individual interview in a language which he/she understands in all cases where the merits of the claim are being considered and, in cases as referred to in guideline I.2, the right to be heard, as a minimum, on the grounds of inadmissibility;

(v) the right to submit documents and other evidence in support of the claim and to provide an explanation for absence of documentation, if applicable;

(vi) the right to access legal advice and to be represented throughout the procedure, whether at first instance or during appeal proceedings, it being understood that legal assistance should be provided free of charge in accordance with domestic law;

(vii) the right to receive a reasoned decision in writing on the outcome of the proceedings.

2. Authorities shall take action to ensure that a representative of the interests of a separated or unaccompanied minor is appointed throughout the whole proceedings.

3. Authorities shall respect the confidentiality of all aspects of an asylum application, including the fact that the asylum seeker has made such an application, in as much as it may jeopardize protection of the asylum seeker or the liberty and security of his/her family members still living in the country of origin. No information on the asylum application should be shared with the country of origin.

V. The safe country of origin concept

1. The examination of the merits of the asylum application shall be based on the asylum seeker's individual situation and not solely on general analysis and evaluation of a given country.

2. The fact of coming from a safe country of origin shall be only one element among others to be taken into account in reaching a decision on the merits of the claim.

3. The safe country of origin concept shall be used with due diligence, in accordance with sufficiently specific criteria for considering a country of origin as safe. Up-to-date information is needed from a variety of reliable and objective sources, which should be analysed.

4. All asylum seekers shall be given an effective opportunity to rebut the presumption of safety of their country of origin.

VI. The safe third country concept

1. The following criteria should be taken into account when applying the safe third country concept:

(i) the third country has ratified and implemented the Geneva Convention and the 1967 Protocol relating to the Status of Refugees or equivalent legal standards and other relevant international treaties in the human rights field;

(ii) the principle of *non-refoulement* is effectively respected;

(iii) the asylum-seeker concerned has access, in law and in practice, to a full and fair asylum procedure in the third country with a view to determining his/her need for international protection;

(iv) it is ascertained that the third country will admit the asylum seeker and will comply with the criteria referred to above.

2. All asylum seekers shall be given an effective opportunity to rebut the presumption of safety of the third country.

3. Application of the safe third country concept, even by virtue of the Dublin Regulation, does not dispense a state from its obligations under Article 3 of the European Convention on Human Rights prohibiting torture and inhuman or degrading treatment or punishment.

VII. *Non-refoulement* and return

1. The state receiving an asylum application is required to ensure that return of the asylum seeker to his/ her country of origin or any other country will not expose him/ her to a real risk of the death penalty, torture or inhuman or degrading treatment or punishment, persecution, or other serious harm.

2. In all cases, the return must be enforced with respect for the integrity and human dignity of the person concerned, excluding any torture or inhuman or degrading treatment or punishment.

3. Collective expulsions are prohibited.

VIII. Quality of the decision-making process

1. Throughout the proceedings, decisions should be taken with due diligence.

2. Officials responsible for examining and taking decisions on asylum applications should receive appropriate training including training on applicable international standards. They should also have access to the requisite information and research sources to carry out their task, taking into account the cultural background, ethnicity, gender and age of the persons concerned and the situation of vulnerable persons.

3. Where the assistance of an interpreter is necessary, States should ensure that interpretation is provided to the standards necessary to guarantee the quality of the decision-making.

IX. Time for submitting and considering asylum applications

1. Asylum seekers shall have a reasonable time to lodge their application. Automatic and mechanical application of short time-limits for submitting an application shall be prohibited.

2. The time taken for considering an application shall be sufficient to allow a fair examination, with due respect to the minimum procedural guarantees to be afforded to the applicant.

3. The time should not however be so lengthy as to undermine the required expediency of the accelerated procedure, in particular when an asylum seeker is detained.

X. Right to an effective remedy with suspensive effect

1. Asylum seekers whose applications were rejected shall have the right to have the decision reviewed by a means which constitutes an effective remedy.

2. This remedy shall have a suspensive effect if asylum seekers submit an arguable claim that the execution of the negative decision could lead to a real risk of the death penalty, torture or inhuman or degrading treatment or punishment.

XI. Detention

1. Detention of asylum seekers should be the exception.

2. Children, including unaccompanied minors, and other vulnerable persons should, as a rule, not be placed in detention. In those exceptional cases where these persons are detained, they should be provided with special supervision and assistance.

3. Asylum seekers may only be deprived of their liberty, if this is in accordance with a procedure prescribed by law and if, after a careful examination of the necessity of deprivation of liberty in each individual case, the authorities of the state in which the asylum application is lodged have concluded that the presence of the asylum seekers for the purpose of carrying out the accelerated procedure cannot be ensured as effectively by another, less coercive measure.

4. Detained asylum seekers shall be informed promptly, in a language which they understand, of the legal and factual reasons for their detention, and the available remedies; they should be given the immediate possibility of contacting a person of their own choice to inform him/her about their situation, as well as availing themselves of the services of a lawyer and a doctor.

5. Detained asylum seekers shall have ready access to an effective remedy against the decision to detain them, including legal assistance.

6. Detained asylum seekers should be accommodated within the shortest possible time in facilities specifically designated for that purpose, offering material conditions and a regime appropriate to their legal and factual situation and staffed by suitably qualified personnel. Detained families should be provided with separate accommodation guaranteeing adequate privacy.

XII. Social and medical assistance

Asylum seekers shall be provided with necessary social and medical assistance, including emergency treatment.

XIII. Protection of private and family life

The right to protection of private and family life shall be respected in the application of accelerated asylum procedures and, where appropriate, detention and returns. Whenever possible, family unity should be guaranteed.

XIV. Role of the UNHCR

Even when accelerated asylum procedures are applied, Member States shall allow the UNHCR:

(i) to have access to asylum seekers, including those in detention and border zones such as airport or port transit zones;

(ii) to have access to information on individual applications for asylum, on the course of the procedure and on the decisions taken, as well as to person-specific information, provided that the asylum seeker agrees thereto;

(iii) to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure.

XV. Increased protection

Nothing in these guidelines should restrain the States from adopting more favourable measures and treatment than described in these guidelines.

* * *

Appendix V

DRAFT EXPLANATORY MEMORANDUM

Foreword

1. These Guidelines originate from Parliamentary Assembly Recommendation 1727(2005) on accelerated asylum procedures in member states of the Council of Europe.

2. In its reply to this recommendation, the Committee of Ministers of the Council of Europe concluded that it was necessary "to establish safeguards for asylum seekers in accelerated procedures". It also decided that "this work could constitute a useful source of inspiration also for those member states which are members of the European Union in the context of the recently adopted European Union Council Directive on minimum standards on procedures in member states for granting and withdrawing refugee status". By Decision No. CM/868/14062006, it gave ad hoc terms of reference to the Steering Committee for Human Rights (CDDH) to "examine the question of human rights protection in the context of accelerated asylum procedures and, as appropriate, to draft guidelines in this field".

3. Further to this mandate, the CDDH set up its Working Group on Human Rights Protection in the context of accelerated Asylum Procedures (GT-DH-AS), with the task of drafting the Guidelines and Explanatory Memorandum.

4. The Group started its work in December 2006. It comprised specialists from nine Governments (Armenia, Denmark, Finland, Latvia, Poland (Chair), Romania, Sweden, Switzerland and the United Kingdom). Representatives of the Secretariat of the Parliamentary Assembly, the Secretariat of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the Office of the Commissioner for Human Rights, and the Office of the United Nations High Commissioner for Refugees (UNHCR) also participated in its work, as did a number of representatives from civil society: Amnesty International, the AIRE Centre (*Advice on Individual Rights in Europe)*, and the European Group of National Human Rights Institutions. During the drafting process, all member states took note of progress and were invited to submit written comments. The Working Group finalised its draft texts at its 5th meeting (September 2008).

5. [The CDDH discussed and adopted the draft Guidelines and Explanatory Memorandum at its 67th meeting (November 2008).]

6. [At their … meeting [January 2009] the Committee of Ministers examined [and adopted] the Guidelines [and authorised the publication of the Explanatory Memorandum as contained in this document.]]

Preamble and operational part

1. The right of states to admit or exclude aliens from their territory is a key attribute of national sovereignty.[3] Only if exclusion from the territory or from protection would involve the breach of a provision of international law are states bound to admit aliens.

2. The concept of asylum is the most important example of the latter principle. Although Article 14 of the Universal Declaration of Human Rights expressly protects the right to "seek and enjoy asylum from persecution", this right is not found in the texts of other general instruments of international human rights law such as the European Convention on Human Rights[4] or the 1966 International Covenant on Civil and Political Rights (ICCPR). When those human rights instruments were drafted it was thought that the Geneva Convention would constitute a *lex specialis* which fully covered the need, and no express provision on asylum was thus included.

3. According to Article 18 of the Charter of Fundamental Rights of the European Union (2000/C 364/01): "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community." The fundamental rights form an integral part of the general principles of EC law[5].

4. Insofar as there is no express provision relating to asylum contained in the ECHR, it might therefore seem to be of only marginal relevance to those seeking asylum in Europe. This is far from being the case. The substantial body of jurisprudence that has emerged from the ECHR organs between 1989 and the present day now sets the standards for the rights of asylum seekers across Europe.[6] In particular, the European Court of Human Rights (the Court) has ruled that it would not be compatible with the "common heritage of political traditions, ideals, freedom and rule of law" to which the Preamble (of the ECHR) refers, were a Contracting State to the ECHR knowingly to surrender a person to another state where there were substantial grounds for believing that he or she would be in danger of being subjected to torture or inhuman or degrading treatment or punishment.[7]

---

[3] See, amongst many others, *Salah Sheekh v. the Netherlands*, application No. 1948/04, judgment of 11 January 2007, para. 135.

[4] Hereinafter referred to as the 'European Convention on Human Rights' or 'ECHR'. Unless otherwise indicated, all references to judgments or decisions concern the case-law of the European Court of Human Rights ("the Court").

[5] The Court of Justice of the European Communities has acknowledged the importance of the EU Charter for example in the case C-540/03, European Parliament v. Council of the European Union, 27 June 2006, para. 38

[6] Cf. Nuala MOLE, *Asylum and the European Convention on Human Rights*, Human Rights Files series, No.9 (revised), Strasbourg 2007, Council of Europe Publishing, ISBN 978-92-871-6217-5, p. 18. The explanatory memorandum owes a number of ideas to this very comprehensive study prepared by Mrs Mole, the Director of the *Advice on Individual Rights in Europe* (the AIRE Centre) an expert consultant of the Council of Europe. This document is referred hereinafter to as *Asylum and the ECHR.*

[7] *Soering v. the United Kingdom*, application No. 14038/88, judgment of 7 July 1989, para. 88; *Saadi v. Italy*, application No. 37201/06, judgment (Grand Chamber)of 28 February 2008.

5. While the Court has most frequently considered asylum issues in the context of Article 3 of the ECHR (prohibition of torture), it is clear that it is not the only ECHR article relevant to accelerated asylum procedure questions. The processing of applications for asylum may also raise issues under other provisions, such as Article 2 (right to life), Article 4 (prohibition of slavery and forced labour), Article 5 (right to liberty and security), Article 6 (right to a fair trial)[8], Article 7 (no punishment without law), Article 8 (right to respect for private and family life), Article 9 (right to freedom of thought, conscience and religion), Article 10 (freedom of expression), Article 11 (freedom of assembly and association), Article 13 (right to an effective remedy), Article 14 (prohibition of discrimination), Article 16 (restrictions on political activity of aliens), Article 1 of Protocol No. 1 (protection of property), Article 3 of Protocol No. 4 (exclusion of own nationals), Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens), Article 1 of Protocol No. 7 (procedural safeguards relating to expulsion of aliens), Article 3 of Protocol No. 7 (compensation for wrongful conviction), Article 4 of Protocol No. 7 (right not to be tried or punished twice) and Article 1 of Protocol No. 12 (general prohibition of discrimination**).**

6. Even though the guidelines are mainly based on the standards of protection offered by the ECHR and its protocols in the light of the evolving case-law of the Court, they also take concrete inspiration, as and when appropriate, from the Geneva Convention and its 1967 New York Protocol, as well as from the other texts mentioned in the Preamble and Explanatory Memorandum, in particular the 1984 United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and some key UN human rights treaties and their Optional Protocols,[9] certain Council of Europe conventions[10] and relevant law of the European Union (EU law)**.**

7. The guidelines also take advantage of the experience gained over the years by the CPT, a body set up by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987) as a system for monitoring all places where people are deprived of their liberty. The specific and general reports issued by the CPT further to its periodic visits to all contracting states are a useful source for identifying practical standards of protection of human rights in the context of the accelerated asylum procedures.

---

[8] It should be noted that, although Article 6 does not apply to expulsion/ asylum procedures (see further below under Guideline X), it may be relevant in determining whether or not the fact of removal engages a state's obligations under the Convention. In *Soering v. the United Kingdom* (application No. 14038/88, judgment of 7 July 1989, para. 113), the Court did "not exclude that an issue might exceptionally be raised under article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country" (see also *Einhorn v. France*, application No. 71555/01, judgment of 16 October 2001, para. 32, concerning an extradition decision, and *Tomic v. the United Kingdom*, application No. 17837/03, judgment of 14 October 2003, para. 3, concerning an expulsion decision). See also *Mamatkulov and Ashkarov v Turkey*, App. Nos. 46827/99 ; 46951/99, Judgment (GC) 4 February 2005, para. 90; *Ismoilov v. Russia*, App. No. *2947/06*, Judgment 24 April 2008 at para. 167: "an extradition decision may raise an issue under Article 6 para. 2 if supporting reasoning which cannot be dissociated from the operative provisions amounts in substance to the determination of the person's guilt".

[9] Including the UN Conventions such as 1966 International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR); the 1989 Convention on the Rights of the Child, (CRC). Some implications may also come from other treaties, such as the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the 1965 Convention on the Elimination of All Forms of Racial Discrimination (CERD); and the 2006 Convention on the Rights of Persons with Disabilities (CRPD).

[10] E.g. Council of Europe Convention on Action Against Trafficking in Human Beings (CETS 197).

8. The Geneva Convention and its 1967 Protocol, the core international legal instruments for refugee protection, do not set out parameters for refugee status determination procedures, leaving these to the discretion of State Parties. States have, however, acknowledged the importance of fair and efficient asylum procedures for the identification of refugees and the need for all asylum-seekers to have access to them.[11] In the context of the UNHCR Executive Committee[12], they have identified basic standards for refugee status determinations.[13] Both the Geneva Convention and the 1967 Protocol provide for co-operation between the Contracting States and the UNHCR, which may extend to the determination of refugee status, according to arrangements made in various Contracting States.

9. Art. 33 (1) of the Geneva Convention, which has become customary international law, explicitly protects refugees and asylum-seekers from return, in any manner whatsoever, to the frontiers of territories where their lives or freedom would be threatened because of their race, religion, nationality, membership of a particular social group, or political opinion. The same Article contains in paragraphe (2) the important exception that the benefit of *non-refoulement* "may not be claimed by a refugee for whom there are reasonable grounds for regarding as a danger to the security of the country in which he/she is living or who, having been convicted of a particularly serious crime, constitutes a danger to the community". The obligation of *non-refoulement* is also enshrined in Article 3 of the ECHR.

I. Definition and scope

1. An accelerated asylum procedure is an asylum procedure derogating from normally applicable procedural time scales and/or procedural guarantees with the view to expedite decision making.

---

[11] UNHCR Executive Committee Conclusion No. 82 (XLVIII), "*Safeguarding Asylum*" (1997), para. (d)(iii); UNHCR Executive Committee Conclusion No. 85 (XLIX), "*International Protection*" (1998), para. (q). UNHCR Executive Committee Conclusions are available at: http://www.unhcr.org/cgi-bin/texis/vtx/doclist?page=excom&id=3bb1cd174

[12] The Executive Committee is an intergovernmental group currently consisting of 76 States that advises the UNHCR in the exercise of its protection mandate. While its Conclusions are not formally binding, they are relevant to the interpretation and application of the international refugee protection regime. Conclusions of the Executive Committee constitute expressions of opinion which are broadly representative of the views of the international community. The specialized knowledge of the Committee and the fact that its conclusions are reached by consensus adds further weight.

[13] See, for example, UNHCR Executive Committee Conclusion No. 8 (XXVIII), "*Determination of Refugee Status*" (1977); UNHCR Executive Committee Conclusion No. 15 (XXX), "*Refugees without an Asylum Country*" (1979); UNHCR Executive Committee Conclusion No. 30 (XXXIV), "*The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*" (1983); UNHCR Executive Committee Conclusion No. 58 (XL), "*Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection*" (1989).

2. Procedures whereby a State may declare an application inadmissible without considering the merits of the claim also fall *mutatis mutandis* within the scope of the guidelines.

10. There is no common definition of the notion of “accelerated asylum procedure” at international or regional level. This expression only indicates that certain claims are treated faster than others. It is also generally understood that the accelerated procedures feature less procedural guarantees. “Accelerated procedures” are used in various circumstances, not only in case of clearly abusive or manifestly unfounded claims. They are also used in cases where concepts like “safe country of origin,” “safe third country,” “particularly safe third country,” “European safe third country,” and “first asylum country” are applied. The expression "accelerated procedures” is used to describe those involved in implementing the Dublin Regulation, which facilitates the return of asylum seekers to the “transit country” (basically within the European Union). This expression also refers to procedures used in respect of asylum applicants at borders and asylum applicants who have no documents or present false documents or have not respected the deadlines for lodging their application or other procedural rules, etc.

11. In some countries, accelerated procedures are used to process manifestly well-founded applications. In other countries, the assessment of these cases is prioritized within a regular asylum procedure. Prioritizing the assessment of some particular cases, such as manifestly well-founded claims, can be a useful case management tool to enhance prompt decision-making and accelerate asylum procedures.

12. The guidelines take for granted that the expression “accelerated asylum procedures” covers all the aforementioned procedures insofar as they abrogate from standard procedural time scales and normally applicable guarantees with a view to accelerating the decision making-process. The guidelines focus on accelerated procedures likely to pose risks for human rights, which includes procedures as referred to in paragraph 2 of the definition. The purpose of the guidelines is to indicate how human rights be protected in the context of such procedures.

II. Principles

1. Regular asylum procedures should remain the rule and accelerated asylum procedures the exception.

2. States should only apply accelerated procedures in cases prescribed by law and in compliance with their international obligations.

3. Asylum seekers have the right to an individual and fair examination of their applications by the competent authorities.

4. When procedures as defined in guideline I are applied, the state concerned is required to ensure that the principle of *non-refoulement* is effectively respected.

5. The fact that an asylum application was submitted at borders, including airports and transit areas, as well as lack of documents or use of forged documents, should not *per se* entail an automatic recourse to accelerated procedures.

13. Insofar as accelerated asylum procedures may pose a greater risk of violations of human rights, they must remain exceptional. Such a principle[14]must be taken into account in all procedures concerning asylum matters[15]. It is presented at the beginning of the guidelines so as to recall that the latter also cover inadmissibility procedures and that the principle of *non-refoulement* is also applicable in such procedures.

14. It is to be recalled that in certain countries a link exists between the use of accelerated procedures and the caseload.

15. If accelerated procedures are applied, they should be carried out only in cases clearly and precisely prescribed by law and in compliance with the State's international legal obligations[16]. The *manner* in which States carry out accelerated procedures should comply with both the State's international legal obligations and the principles of transparency, fairness, proportionality, non-discrimination and non-arbitrariness. These principles underpin both the Convention system and the procedural and other guarantees contained within these guidelines. These principles should be applicable at every stage of the accelerated procedure.

16. Concerning the notion of asylum applications made at borders, including airports and transit areas (cf. paragraph 5), it is to be recalled that individuals arriving at ports and airports whom the authorities wish to be able swiftly to return are often kept in the transit zones of airports. It has sometimes been argued that since these people have not technically entered the country they do not fall under Article 1 of the ECHR as they are still in the "international zone". The Court has made it clear that no such concept exists in respect of the interpretation of the term jurisdiction under Article 1 of the ECHR.[17] Thus an asylum application made at a border should not automatically be subject to an accelerated asylum procedure. This approach should also be followed with regard to applicants without documents or presenting false documents, it being understood that public authorities should endeavour to identify the reasons why the applicant has no papers or has false papers.

[14] Recalled below in guideline VI, para. 3; cf. *T.I. v. the United Kingdom,* App. No. 43844/98**,** admissibility decision of 7 March 2000

[15] Cf. *Saadi v. the United Kingdom,* application No. 13229/03, judgment of 29 January 2008.

[16] *Cf. op.cit,"asylum…",* pp. 87-88. See also *Amuur v. France,* application No. 19776/92, judgment of 25 June 1996.

[17] *Amuur v. France,* application No. 19776/92, judgment of 25 June 1996. See also *Asylum and the ECHR* (2007), p. 65 and *Shamsa v. Poland,* Applications Nos. 45355/99 and 45357/99, judgment of 23 November 2003.

III. Vulnerable persons and complex cases

1. The vulnerability of certain categories of persons, such as unaccompanied and/or separated minors/children, victims of torture, sexual violence or human trafficking and persons with mental and/or physical disabilities, should be duly taken into account when deciding whether to apply accelerated asylum procedures. In the case of children, their best interests are paramount.

2. International human rights obligations as regards the rights of specific vulnerable groups shall be duly taken into account when applying accelerated asylum procedures and in the manner of application.

3. When it becomes apparent that a case is particularly complex and that this complexity falls to be addressed in the State where the application was lodged, it should be excluded from the accelerated procedure.

17. Particular attention should be given to vulnerable groups, such as children and victims of torture, sexual violence or trafficking and persons with mental and/or physical disabilities, which, in principle, should not be subject to accelerated procedures (see below).

18. It should be recalled that Parliamentary Assembly Resolution 1471(2005) on accelerated procedures in Council of Europe Member States explicitly called to "ensure that certain categories of persons be excluded from accelerated procedures due to their vulnerability and the complexity of their cases, namely separated children/unaccompanied minors, victims of torture and sexual violence and trafficking, and also cases raising issues under the exclusion clauses of the 1951 Refugee Convention". Permanent training of staff likely to come into contact with asylum seekers should pay particular attention to detection of vulnerability at the earliest possible stage.

19. With regard to victims of torture and ill-treatment, the "Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (Istanbul Protocol), adopted in 1999, is a particularly useful tool. The Istanbul Protocol provides a basis and framework for rules on medical examinations and medico-legal reports, to be used not only within criminal proceedings but also within asylum procedures.

20. Refugee and migrant children may be classed as being "among the world's most vulnerable populations" and face "particular risk when separated from their parents and carers".[18] In addition to the relevant provisions in the Council of Europe Convention on Action against Trafficking in Human Beings and the 1989 UN Convention on the Rights of the Child, Parliamentary Assembly Recommendation 1596 (2003) on "the situation of young migrants in Europe" envisages particular protection for separated children/unaccompanied minors in ordinary and accelerated asylum procedures and asks member states to "give primacy and binding character to the principle of the best interests of the child, making this explicit in all laws, regulations or administrative guidelines concerning migration and/or asylum" (paragraph 7, sub-

[18] *Human Rights Watch World report 2002: children's rights*. Accessible from www.hrw.org/wr2k2/children.html.

paragraph ii). Subsequently, the Assembly devoted a specific text (Recommendation 1703 (2005)) on protection and assistance for separated children seeking asylum.

21. In deciding whether to apply accelerated procedures to victims of sexual violence or human trafficking, their particular past and prospective physical, emotional and mental suffering must be a relevant consideration. The European Court of Human Rights has held that Article 4 ECHR gives rise to positive obligations on the part of the State to adopt measures to protect victims against the harm and suffering caused by human trafficking[19]. The Court has granted interim relief under Rule 39 of the Rules of the Court to an applicant who prima facie faced a real risk of irreparable harm under Article 4 if returned to a country where she would be at risk of being trafficked for purposes of sexual and/or other exploitation.[20]The importance of this provision should be reflected in the context of asylum procedures applied to persons who claim to be victims of sexual violence or trafficking.

22. In this context, due regard should be had to the specific guarantees of UN CEDAW [21] its Optional Protocol and General Recommendation 19, the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,[22] the UNHCR Guidelines on the Protection Refugee Women and the UNHCR Guidelines on Evaluation and Care of Victims of Trauma and Violence when applying asylum procedures to such people.[23] The safety and protection of victims of sexual violence and trafficking should be considered, both in relation to the provision of medical treatment (with particular regard to the needs of pregnant women) and in relation to the efforts of (criminal) law enforcement agencies to combat sexual slavery and trafficking.[24] Additional steps should be taken to protect against the particular vulnerability of the girl child.[25]

23. Due account should be taken of the UN CRPD which provides that: "[e]very person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis

---

[19] See *Siliadin v. France*, Application No. 73316/01, judgment of 26 October 2005.

[20] *M. v. the United Kingdom* (application No. 16081/08) is pending in the Court at the time of writing.

[21] See in particular Articles 2(f) and 6.

[22] In particular Article 6 "Assistance to and protection of victims of trafficking in persons".

[23] See also The Platform for Action and the Beijing Declaration, Fourth World Conference on Women, Beijing China 4- 15 September 1995, paras. 136 and 148.

[24] Having regard to the domestic provisions and international measures adopted to combat trafficking in human beings and the sexual exploitation of children, including but not limited to Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.
http://ec.europa.eu/justice_home/doc_centre/crime/trafficking/doc_crime_human_trafficking_en.htm
Note also the Rome Statute of the International Criminal Court which recognizes rape and sexual violence by combatants in the conduct of armed conflict as war crimes. Under this statute, sexual violence can be considered a crime against humanity and in some cases constitutes an element of genocide.

[25] "Sexual and Gender-Based violence against refugees, Returnees and Internally Displaced Persons – Guidelines for Prevention and Response", May 2003, UNHCR:
http://www.unhcr.org/refworld/docid/41388ad04.html

with others";[26] and that "States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects."[27] Whilst recognising that lengthy asylum procedures are problematic for persons with mental and/or physical impairments, States should provide appropriate assistance, information and physical and social support (including accommodation and reception conditions) to meet disability-related needs. Such considerations should enter into play once a person displays, complains of or raises the reality of long-term physical mental, intellectual or sensory impairments[28].

24. Special procedural guarantees should be afforded to such persons, such as the right to a medical examination, assistance and/or psychological counselling bearing in mind their specific personal circumstances (see below at IV). States should take appropriate steps to ensure that asylum procedures take account of "personal or general circumstances surrounding the application, including the applicant's cultural origin or vulnerability, insofar as it is possible to do so"[29]. It should be remembered that victims of torture and violence (sexual or otherwise) may fall into one or more overlapping categories of vulnerable person.

25. While there is no universal definition of "complex cases", existing state practice indicates that this category would usually include (but not be limited to) cases concerning the rights of vulnerable persons as well as applications for asylum which are capable of falling under the exclusion clauses of the 1951 Geneva Convention and/or which raise issues of national security or public order. Such cases should be examined by means of a careful and individualized determination within the regular asylum procedure and offering full procedural guarantees.[30]

26. This corresponds with the standards enshrined in Recommendation (2005)6 of the Committee of Ministers; Resolution 1471 (2005) and Recommendation 1727 (2005) of the Parliamentary Assembly (CDH (2006) 011), as well as the emphasis that anti-terrorist measures adopted by States should fully conform with international human rights law, refugee law and humanitarian law (see UN Security Council Resolution 1624, 14 September 2005[31] and the Guidelines on human rights and the fight against Terrorism adopted by the Committee of Ministers of the Council of Europe on 11 July 2002). These standards apply to any decision to resort to accelerated asylum procedures, including complex cases which may be suited to accelerated asylum procedures.

---

[26] Article 17.

[27] Article 16.

[28] Article 1, UN Convention on the Rights of Persons with Disabilities.

[29] See Article 13(3a), Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

[30] *Cf. op.cit,"asylum…"*, p. 26; Goodwin-Gill, Guy S. and McAdam, J. (2007) *The Refugee in International Law*, 3rd ed. Pp. 162-197; See also UNHCR 2003 *Guidelines on international protection, application of the exclusion clauses: Article 1F of the Convention relating to the status of refugees* which state that the application of an exclusion clause should be a proportionate response to the particular objective sought.

[31] In particular, the Security Council recalled Article 14 of the UDHR and the right to seek asylum, as well as States' *non-refoulement* obligations: see Preamble and para. 4.

27. The protection of Article 3 ECHR is nevertheless afforded to those applicants who have been unable to secure/ excluded from international protection. The Court recognised in *Saadi v Italy* that "the conduct of the person concerned, however undesirable or dangerous, cannot be taken into account, with the consequence that the protection afforded by Article 3 is broader than that provided for in Articles 32 and 33 of the 1951 United Nations Convention relating to the Status of Refugees".[32] The Court ruled further that the "concepts of "risk" and "dangerousness" in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other."[33] The UN CAT Committee has similarly ruled that the absolute prohibition on torture would prevent return of an applicant otherwise excluded from recognition as a refugee.[34] Due consideration should be had therefore, to all these standards, on a principled and a pragmatic basis, before recourse is had to accelerated procedures in the context of complex cases.

IV. Procedural guarantees

1. When accelerated asylum procedures are applied, asylum seekers should enjoy the following minimum procedural guarantees:

(i) the right to lodge an asylum application with State authorities, including, but not limited to, at borders or in detention;

(ii) the right to be registered as asylum seekers in any location within the territory of the State designated for this purpose by the competent authorities;

(vi) the right to be informed explicitly and without delay, in a language which he/she understands, of the different stages of the procedure being applied to him/her, of his/her rights and duties as well as remedies available to him/her;

(vii) the right to an individual interview in a language which he/she understands in all cases where the merits of the claim are being considered and, in cases as referred to in guideline I.2, the right to be heard, as a minimum, on the grounds of inadmissibility;

(viii) the right to submit documents and other evidence in support of the claim and to provide an explanation for absence of documentation, if applicable;

---

[32] *Saadi v. Italy*, application No. 37201/06, judgment (Grand Chamber) of 28 February 2008, para. 138. See also *Ismoilov v. Russia***,** application No. 2947/06, judgment of 24 April 2008 (request for referral to Grand Chamber pending at the time of writing) and *Ryabikin v. Russia*, application No. 8320/04, judgment of 19 June 2008.

[33] *Ibid. Saadi v. Italy*, para. 139.

[34] *Paez v. Sweden*, application No. 29482/95, judgment of 30 October 1997.

(ix) the right to access legal advice and to be represented throughout the procedure, whether at first instance or during appeal proceedings, it being understood that legal assistance should be provided free of charge in accordance with domestic law;

(vii) the right to receive a reasoned decision in writing on the outcome of the proceedings;

2. Authorities shall take action to ensure that a representative of the interests of a separated or unaccompanied minor is appointed throughout the whole proceedings.

3. Authorities shall respect the confidentiality of all aspects of an asylum application, including the fact that the asylum seeker has made such an application, in as much as it may jeopardize protection of the asylum seeker or the liberty and security of his/her family members still living in the country of origin. No information on the asylum application should be shared with the country of origin.

28. Concerning the right to be registered and to lodge an asylum application (sub-paragraph i), it is worth recalling that some states have attempted to deflect the arrival of asylum seekers from their shores by intercepting the vessels in which they were travelling on the high seas. The case of *Xhavara*[35] concerned the interception by an Italian warship of an Albanian boat which resulted in the boat capsizing and the deaths of several of those on board. In the *Lampedusa* cases,[36] the applicants were rescued or intercepted at sea by the Italian authorities and taken to the Italian island of Lampedusa, from where they were returned to Libya without having the possibility to make and have considered applications for asylum.

29. The reference to "a language which he/she understands" (sub-paragraphs (iii) and (iv)) reflects the wording used in Article 5 § 2 of the ECHR. This is close to, although not the same as, the wording used by EU law ("in a language which the asylum seekers may reasonably be supposed to understand"). Irrespective of the wording chosen, the aim of this procedural guarantee is to ensure that asylum seekers understand in practice, and not only in theory, the information referred to in this sub-paragraph.

30. Accelerated procedures should not be applied to persons lacking capacity, either by age or by way of physical or mental impairment.

31. Notwithstanding Guideline III, which concerns the State's initial decision on whether or not to apply accelerated procedures to vulnerable groups, in those cases where it has been deemed necessary and proportionate to apply accelerated procedures, procedural guarantees should (as far as possible) be afforded. Firstly, under sub-paragraph (iii), the right to be informed of the remedies available in connection with the applied accelerated procedure would include not only legal remedies but also other forms of assistance, including medical, social, family**,** psychiatric and other. Secondly, States should, as far as possible, endeavour to facilitate same sex interviews,

[35] *Xhavara v. Italy and Albania*, application No. 39473/98, decision of 11 January 2001.

[36] *Hussun and others v. Italy*, application No. 101717/05, decision of 11 May 2006.

particularly where this is requested, and, if appropriate under the circumstances, the assistance of an interpreter of the same sex.

32. As regards the right to be heard, sub-paragraph (iv) distinguishes two possible situations. On the one hand, it aims at guaranteeing that the asylum seeker can present his/her grounds for asylum orally during an interview, in order to ensure that all relevant facts have been established with regard to a decision on the merits. On the other hand, it guarantees the right to be heard, at the minimum in written form, before an inadmissibility decision be taken. In cases where the grounds for asylum are not examined and the asylum seeker does not benefit from an interview, he/she should have the opportunity of expressing himself/herself in written form on the grounds leading to the inadmissibility decision and on the risks faced in case of return. This minimal guarantee aims at covering situations where the asylum seeker presents a written asylum application and where national law allows for a written procedure in cases of criminal or administrative detention for illegal residence or where further representations or a subsequent application are made.

33. Concerning the right to submit documents and other evidence (sub-paragraph v), it is clear that asylum seekers have to provide, as far as possible, sufficient evidence to support their claims. In some cases, the Court considered that the applicants had failed to provide specific information or adduce sufficient proof that would have enabled the Court to find a violation.[37] It should be noted, however, that asylum seekers may not be able to support their statements by documentary or other proof and that application of the burden of proof in asylum procedures should take into account such considerations. The UNHCR Handbook on procedures and criteria for determining refugee status acknowledges this and states that "cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule," while "the duty to ascertain and evaluate all relevant facts is shared between the applicant and the examiner" [38].

34. Procedural flexibility should ensure that victims who fail to mention the fact that they have been torture, or subject to sexual violence or trafficking during their initial interview, but who seek to rely on the fact at a later stage, should not thereafter remain *automatically* subject to accelerated procedures, and/or precluded from the regularly applicable procedures. They should be given the time and opportunity to account for the omission and, if appropriate, to obtain and submit corroborating evidence.

35. With all categories of vulnerable persons, but particularly those who claim to be victims of torture, States should pay due regard to the importance of medical considerations when considering applicable asylum procedures.

36. In principle, victims should be afforded reasonable time to obtain corroborating evidence, by means of examination and treatment by appropriately qualified experts or physicians or through other evidentiary channels. If corroborating evidence is unavailable, victims should be given the time and opportunity to provide an explanation. (See comments on guideline III).

37. A crucial aspect in this context is the availability of effective legal advice (sub-paragraph vi), in particular the issue of free legal advice under the conditions provided for by domestic law.

---

[37] Cf. *Al-Shari and Others v. Italy*, application No. 57/03, decision of 5 June 2005; and *Mogos v. Romania*, application No. 20420/02, judgment of 13 October 2005.

[38] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, para. 196.

Legal representatives should enjoy access to both their client and their client's case file, including in detention facilities and transit zones.

38. It is to be recalled that, under the right of individual petition under Article 34 ECHR, "States should furnish all necessary facilities to make a proper and effective examination of applications".[39]

39. The requirement to give a reasoned decision (sub-paragraph vii) aims at informing the applicant of both the reasons underpinning the application's refusal and the consequences of such a decision, including information on how to challenge a negative decision. This guideline should be understood as including the right to be informed in a language he or she understands about those reasons, as otherwise the right to be informed risks being meaningless in practice.

40. In paragraph 2, the guidelines again stress the importance of taking into account the particularly vulnerable situation of separated or unaccompanied minors (see comments on guideline III).

41. Confidentiality concerning information provided by the applicant (paragraph 3) is necessary not only to protect the integrity of the applicant but also his/her family members in the country of origin. The right to privacy of the individual is guaranteed by Article 8 ECHR, Article 17 ICCPR, and Article 16 UNCRC.[40]

42. Reference could be made in this context to article 20(1) of the CRC according to which "A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State."

V. The safe country of origin concept

1. The examination of the merits of the asylum application shall be based on the asylum seeker's individual situation and not solely on general analysis and evaluation of a given country.

2. The fact of coming from a safe country of origin shall be only one element among others to be taken into account in reaching a decision on the merits of the claim.

3. The safe country of origin concept shall be used with due diligence, in accordance with sufficiently specific criteria for considering a country of origin as safe. Up-to-date information is needed from a variety of reliable and objective sources, which should be analysed.

---

[39] *Shamayev v. Russia*, application No. 36378/02, judgment of 12 April 2005, para. 508. See further below at paras. 87-89 concerning the relationship between Articles 3, 13 and 34.

[40] see *Rotaru v. Romania* (Grand Chamber), application. No. 28341/95, judgment of 4 May 2000 para. 43; *Leander v. Sweden*, application No. 9248/81, judgment of 26 March 1987.

4. All asylum seekers shall be given an effective opportunity to rebut the presumption of safety of their country of origin.

43. The safe country of origin concept is used to accelerate the examination of the case on the substance. Many Council of Europe member states apply accelerated procedures when the applicant comes from a safe country of origin. This is the case, for instance, in domestic law of Austria, Bulgaria, Cyprus, Hungary, Ireland, Poland, "the former Yugoslav Republic of Macedonia", Romania and the United Kingdom, but not in Moldova or Spain.

44. Criteria to consider the country of origin as a safe country vary considerably from one country to another. Some countries like Austria have no specific criteria. Others use criteria implying some of the following elements: number of applicants coming from the country concerned, functioning of democracy, independence of justice, rule of law, respect of the Geneva Convention and of human rights treaties, in particular the ECHR.

45. The development of a common policy within the European Union on asylum and migration matters has had important consequences on the designation of certain countries of origin as safe countries. Since the entry into force of the Treaty of Amsterdam, all EU member states are considered as safe countries of origin by other EU countries.

46. The safe country of origin concept must be employed cautiously on the basis of sufficiently precise criteria. It is necessary to have reliable and updated information gathered from various different sources including notably reports from UNHCR, Council of Europe bodies such as the CPT and non-governmental organisations, which should be analysed and compared.

47. In accordance with established case-law of the European Court of Human Rights, "a rigorous scrutiny must necessarily be conducted of an individual's claim that his or her deportation to a third country will expose that individual to treatment prohibited by Article 3." This implies that the individual situation of the asylum applicant must in all circumstances be taken into account.[41]

VI. The safe third country concept

1. The following criteria should be taken into account when applying the safe third country concept:

(v) the third country has ratified and implemented the Geneva Convention and the 1967 Protocol relating to the Status of Refugees or equivalent legal standards and other relevant international treaties in the human rights field**;**

---

[41] *Jabari v. Turkey*, application No. 40035/98, judgment of 11 July 2000, para. 39 (note that in the judgment, the expression "third country" in fact relates to the applicant's country of origin); see also *Chahal v. the United Kingdom*, application No. 22414/93, judgment of 15 November 1996, para. 96; *Saadi v. Italy*, application. No. 37201/06, judgment of 28 February 2008, para. 128; and *N. A. v. U.K.*, application No. 25904/07, judgment of 17 July 2008, para. 111.

(vi) the principle of *non-refoulement* is effectively respected;

(vii) the asylum-seeker concerned has access, in law and in practice, to a full and fair asylum procedure in the third country with a view to determining his/her need for international protection;

(viii) it is ascertained that the third country will admit the asylum seeker and will comply with the criteria referred to above.

2. All asylum seekers shall be given an effective opportunity to rebut the presumption of safety of the third country.

3. Application of the safe third country concept, even by virtue of the Dublin Regulation, does not dispense a state from its obligations under Article 3 of the European Convention on Human Rights prohibiting torture and inhuman or degrading treatment or punishment.

48. The safe third country concept refers to situations where the decision on the substance of the claim is considered to fall under the responsibility of a third state. Many Council of Europe member States apply accelerated procedures when the applicant comes from a safe third country. This is the case, for instance, in domestic law in Austria, Bulgaria, Cyprus, Hungary, Moldova, the Netherlands, Poland, "the former Yugoslav Republic of Macedonia", Romania, Spain and the United Kingdom.

49. Some Council of Europe member states have set up lists of safe third countries, whereas others take decisions on a case-by-case basis. Most often, the lists are in the public domain. Likewise, designation of a third country as a safe country has been strongly influenced by initiatives taken by the EU. Since the entry into force of the Dublin Convention, all States party to it are considered as safe. The Regulation, called "Dublin II" and replacing the Dublin Convention, retains the same principle for all EU member states, adding Iceland and Norway.

50. Every individual application has to be examined according to the same guarantees on the basis of Recommendation No R (97) 22 of the Committee of Ministers to member states containing guidelines on the application of the safe third country concept.

51. As regards sub-paragraph (i), it is important to note that refugee law is part of international human rights law and that it is not enough for a state to have ratified the Geneva Convention and other relevant international treaties. It must also apply them in practice. The *need to monitor* states' implementation of the resulting obligations is particularly necessary in the context of the asylum procedures.

52. Sub-paragraph (ii) follows from the inadmissibility decision of 7 March 2000 reached by the Court in the case of *T.I. v. the United Kingdom*,[42] where the Court considered that "the indirect removal […] to an intermediate country, which is also a contracting state, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its

[42] Application No. 43844/98, judgment of 7 March 2000.

decision to expel, exposed to treatment contrary to Article 3 of the Convention". The Court also emphasized the obligation of the host state to ensure that "there are effective procedural safeguards of any kind protecting the applicant from being removed" from the country of return to another (fourth) country.[43] In determining whether the applicant runs a real risk of suffering treatment proscribed by Article 3 when returned, the Court demands a rigorous scrutiny and the assessment of the issue in the light of all the material placed before it, or, if necessary, material obtained *proprio motu.* [44]

53. It is at the discretion of the host state to decide on the way it verifies the nature of the safeguards operated in the state of return. This duty of verification is even more important where the state to which a person/asylum seeker is to be returned, and from where he/she fears being expelled to a third state, is not a member state of the Council of Europe bound by the ECHR. It will be noted that the CAT adopts the same interpretation of Article 3 of UNCAT, according to which "no state Party shall expel, return (*refouler*) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture".[45]

54. Sub-paragraph (iii) leaves the choice of whether or not to use the words "international protection" so as to cover all complementary/subsidiary forms of protection in addition to the asylum grounds appearing in the Geneva Convention.

55. Sub-paragraph (iv) aims at avoiding a situation where non-nationals are being put "in orbit", i.e., they are obliged to leave the country where they are found without an assurance that they will be able to enter any other country. In the case of *Harabi v. the Netherlands*, the European Commission on Human Rights recalled that "the repeated expulsion of an individual, whose identity was impossible to establish, to a country where his admission is not guaranteed, may raise an issue under Article 3 of the Convention (…). Such an issue may arise, a fortiori, if an alien is, over a long period of time, deported repeatedly from one country to another without any country taking measures to regularise his situation".[46] The host state, the state of origin and the state of return have a joint responsibility to ensure that such situations do not occur.

56. As regards the asylum seeker's admissibility and safety in the third country, the Parliamentary Assembly, in its Resolution 1471(2005) on accelerated asylum procedures in Council of Europe member States, invited the governments of the member States, as regards the concept of the safe third country, including the concept of the 'super safe third country,' to ensure

---

[43] *Gebremedhin v. France*, application No. 25389/05, judgment of 26 April 2007, para. 66.

[44] See *N. A. v. United Kingdom*, application No. 25904/07, judgment of 17 July 2008, para. 119; *Saadi v. Italy*, application No. 37201/06, judgment of 28 February 2008, para. 128; *Salah Sheekh v. The Netherlands*, application No. 1948/04, judgment of 11 January 2007, para. 136, *Hilal v. United Kingdom*, Application No. 45276/99, Judgement of 6 March 2001, para. 60; *Vilvarajah and Others v. United Kingdom*, 30 October 1991, Series A no. 215, p. 36, para. 107, *H.L.R. v. France*, 29 April 1997, *Reports* 1997-III, p. 758, para. 37; *Jabari v. Turkey*, Application no. 40035/98*; Chahal* judgment paras. 79 and 96.

[45] See decision of 11 November 2003 on communication No. 153/2000, *R.T. v. Australia*, point 6.4.

[46] *Harabi v. the Netherlands*, application No. 10798/84, decision of 5 March 1986, DR 46, p. 112.

that each individual claim is examined with safeguards including *inter alia* "genuine and close links between the applicant and the third country."[47]

57. In the case of *Saadi v. Italy*[48]*and* similarly, in the subsequent case of *Ismoilov & others v. Russia*,[49], the Court stated that "the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where(…)reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention."

58. The Court has stated that the application of the safe third country concept does not exempt a country from its duties under Article 3 prohibiting torture and inhuman or degrading treatment or punishment, even by virtue of the Dublin System concerning the determination of the state responsible for examining applications for asylum lodged in one of the member states of the European Union.[50]

VII. *Non-refoulement* and return

1. The state receiving an asylum application is required to ensure that return of the asylum seeker to his/ her country of origin or any other country will not expose him/ her to a real risk of the death penalty, torture or inhuman or degrading treatment or punishment, persecution, or other serious harm.

2. In all cases, the return must be enforced with respect for the integrity and human dignity of the person concerned, excluding any torture or inhuman or degrading treatment or punishment.

3. Collective expulsions are prohibited.

59. The principle of *non-refoulement* is to be linked with Article 3 (prohibition of torture) of the ECHR: it is a well established principle that the absolute prohibition of torture and inhuman or degrading treatment includes an obligation for the member state not to expel a person to a country where there are substantial grounds to believe that he/she will face a real risk of ill

[47] See Resolution 1471(2005) on Accelerated asylum procedures in Council of Europe member states, para. 8.3.2.iii.

[48] *Saadi v. Italy,* Application No. 37201/06, Judgment (GC) 28 February 2008, paras.138-9, 148.

[49] *Ismoilov v. Russia,* Application No. *2947/06,* Judgment 24 April 2008, para. 127 and *Ryabikin v. Russia,* Application No. 8320/04, Judgment 19 June 2008, paras. 119-120.

[50] Cf. *T.I. v. the United Kingdom,* application. No. 43844/98, admissibility decision of 7 March 2000.

treatment contrary to Art. 3 ECHR.[51] The prohibition of refoulement to a real risk of torture or ill treatment is absolute, i.e. it applies regardless of the behaviour or dangerousness of the victim.[52]

60. The prohibition also covers indirect refoulement, i.e., an indirect removal to an intermediary country, and does not affect the responsibility of the state to ensure that the applicant is not, as a result of the decision to expel, exposed to treatment contrary to Article 3.[53]

61. It should be recalled that the European Court of Human Rights noted that the protection afforded by Article 3 ECHR extends to situations "where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection".[54] The formulation chosen takes into account that, under the definition given in public international law, in Article 1 of UNCAT "torture" is a notion reserved to acts by state agents or private agents acting at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

62. The Court makes the position under the ECHR quite clear in *Salah Sheekh v. the Netherlands*: "The existence of the obligation not to expel is not dependent on whether the source of the risk of the treatment stems from factors which involve the responsibility, direct or indirect, of the authorities of the receiving country, and Article 3 may thus also apply in situations where the danger emanates from persons or groups of persons who are not public officials".[55]

63. As far as the respect for moral and physical integrity is concerned, reference must be made to the Twenty Guidelines on Forced Returns" (CM(2005)40) adopted by the Committee of Ministers of the Council of Europe in 2005 with a view to avoiding possible excesses and to set standards for future forced returns. Recommendation 1547(2002) of the Parliamentary Assembly on expulsion procedures in conformity with human rights and enforced with respect for safety and dignity is also to be recalled.

64. Cases of this kind will depend on whether the treatment has reached the requisite threshold of severity required by Article 3. In determining whether the Article 3 threshold is met, or whether the treatment falls under Article 8 (moral and physical integrity), an important test will be whether the deportation could have been effected in a way which constituted less of an infringement to the dignity of the deportee. In order to determine whether there were "relevant and sufficient reasons" for the interference, the ECHR demands that the state should show that

---

[51] See in particular *Soering v. the United Kingdom*, application No. 14038/88, judgment of 7 July 1989; *Cruz Varas and Others v. Sweden*, application No. 15576/89, judgment of 20 March 1991; *Vilvarajah and Others v. the United Kingdom*, applications No. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, judgment of 30 October 1991; *Chahal v. the United Kingdom*, application No 22414/93, judgment of 15 November 1996; *Salah Sheekh v. the Netherlands*, application No. 1948/04, judgment of 11 January 2007.

[52] *T.I. v. the United Kingdom*, application. No. 43844/98, admissibility decision of 7 March 2000; *Chahal v. the United Kingdom*, application No. 22414/93 judgment of 15 November 1996; *D. v. the United Kingdom*, application No. 30240/96, judgment of 2 May 1997; *Saadi v. Italy*, application No. 37201/06, Grand Chamber judgment of 28 February 2008 para. 131.

[53] *T.I. v. the United Kingdom, ibid.*

[54] *H.L.R. v. France*, Application no. 24573/94, judgment of 29 April 1997, para. 40.

[55] *Salah Sheekh v. the Netherlands*, application No. 1948/04, judgment of 13 January 2007.

other methods were investigated and rejected and that the force that was used was no more than was absolutely necessary.[56]

65. As far as the prohibition of collective expulsions is concerned (paragraph 3), it is recalled that Article 4 of Protocol No. 4 to the ECHR prohibits any measure compelling foreigners, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual foreigner of the group.[57] Even if the latter condition is satisfied, the background to the execution of the expulsion orders still plays a role in determining whether there has been compliance with Article 4 of Protocol No. 4.[58]

66. This guideline restates the significance attached by the Court to Article 4 of Protocol No. 4 to the ECHR. This rule does not prohibit the material organisation of departures of groups of returnees, but the removal order must be based on the circumstances of the individual who is to be removed, even if the administrative situations of the members of that group are similar or if they present certain common characteristics.

67. It may not be sufficient, however, to adopt individual removal orders, if the stereotypical character of the reasons given to justify the notification of a removal order or the arrest to ensure compliance with that order, or other factors, indicate that a decision may have been taken in relation to the removal from the territory of a group of aliens, without regard to the individual circumstances of each member of the group.[59]

68. The use of force shall always be carried out in a form and manner prescribed by law and in accordance with the prohibition on discrimination and the prohibition on arbitrariness. These principles should be equally applicable as between members of the State authorities and private security firms carrying out the work of immigration control on behalf of the State. There should be clear complaint mechanisms and effective remedies to address the acts and omissions of private security firms which give rise to alleged human rights violations (and/or civil or criminal liability as prescribed by law). The extent to which a State may be liable for the conduct of the agents of private security firms will depend on the terms of relevant articles of the ECHR and must be examined separately. As set out below, agents and officials should be given appropriate training in order to raise standards and secure human rights compliance.

69. The excessive use of force by immigration officials may raise issues under Article 3 and 8 of the ECHR[60]. The Court's case law in this area would mirror abuse by other state officials[61]

---

[56] See e.g. *Olsson v. Sweden (No. 1)*, App. No. 10465/83, judgment of 24 march 1988, para. 72; *Scozzari & Giunta v. Italy*, App. Nos 39221/98 & 41963/98, Grand Chamber judgment of 13 July 2000, para. 148.

[57] Cf. inadmissibility decision of 23 February 1999 in the case of *Andric v. Sweden* (application No. 45917/99, unpublished).

[58] *Andric v. Sweden*, application No. 45917/99, inadmissibility decision of 23 February 1999; *Čonka v. Belgium*, application No. 51564/99, judgment of 5 February 2002.

[59] *Čonka v. Belgium*, application No. 51564/99, judgment of 5 February 2002, para. 59; see also the friendly settlements reached in the cases *Sulejmanovic and others* and *Sejdovic and Sulejmanovic v. Italy*, applications No. 57574/00 and No. 57575/00, judgment of 8 November 2002.

[60] *Cf. op.cit,"asylum…"* p. 75 and *Čonka v. Belgium*, application No. 51564/99, decision of 5 February 2002.

VIII. Quality of the decision-making process

1. Throughout the proceedings, decisions should be taken with due diligence.

2. Officials responsible for examining and taking decisions on asylum applications should receive appropriate training including training on applicable international standards. They should also have access to the requisite information and research sources to carry out their task, taking into account the cultural background, ethnicity, gender and age of the persons concerned and the situation of vulnerable persons.

3. Where the assistance of an interpreter is necessary, States should ensure that interpretation is provided to the standards necessary to guarantee the quality of the decision-making.

70. As far as the wording "due diligence" is concerned, the Court stated that "if such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 para. 1 (f).[62]

71. The best way of accelerating the asylum procedure is to improve the decision-making process rather than to try to treat as many applications as possible through accelerated procedures, which imply obstacles to admissibility and scarce remedies**.** Decision-makers should also demonstrate, as a matter of best practice, an understanding of information, knowledge of law and procedure, and awareness of the rules and concepts of both the regularly applicable and accelerated procedures, having particular regard to the fact that accelerated procedures are likely to violate human rights**.** Furthermore, Recommendation 1309 (1996) of the Parliamentary Assembly on the training of officials receiving asylum-seekers at border points underlines that it is essential that those officials be "fully cognizant not only of international and domestic legal instruments and regulations governing the reception of asylum-seekers but also acutely aware of their responsibility for treating asylum-seekers with humanity, sensitivity and discernment, not least at a time when governments of member states have taken steps to reduce the number of asylum-seekers arriving on their territory".

72. The training of officials who come into first contact with asylum seekers, often at border points, are usually not those who are responsible for examining and taking decisions on asylum applications. However, their training is extremely important in order to ensure unimpeded access to the asylum procedure, as well as to prevent any refoulement at the border. Reference should be made in this context to Recommendation No. R (98) 15 of the Committee of Ministers to member

---

[61] See, inter alia, *Ribitsch v. Austria*, application No. 18896/91, judgment of 4 December 1995; *Selmouni v. France*, application No. 25803/94, judgment of 28 July 1999.

[62] *Chahal v. the United Kingdom,* Application n° 22414/93, Judgment 15 November 1996, para. 113.

states on the training of officials who first come into contact with asylum seekers, in particular at border points.

73. The workload of persons dealing with asylum applications varies considerably from one country to another and not all these persons may have received full training, in particular concerning the political and human rights situation in third countries. Some officials have research facilities at their disposal; others do not. Persons dealing with refugee applications consult a number of information sources, among which those coming from the HCR, diplomatic missions, Department of State and Home Office reports, NGOs and Internet.

74. As far as the sources used by authorities to assess the claim in accelerated asylum procedures are concerned, it is recalled that, due to the absolute nature of Article 3 ECHR, the Court held that it must be satisfied that the assessment by the returning state of an alleged risk of ill-treatment is "sufficiently supported by, in addition to the domestic materials, other materials originating from "reliable and objective sources" such as "agencies of the UN and reputable NGOs".[63]

75. In carrying out the required verifications, the authorities of the host state should consult reliable available sources of information. In this respect it should be noted that the Court decided that it "must give due weight to the UNHCR's conclusion on the applicant's claim in making its own assessment of the risk which would face the applicant if her deportation were to be implemented".[64]

IX. Time for submitting and considering asylum applications

1. Asylum seekers shall have a reasonable time to lodge their application. Automatic and mechanical application of short time-limits for submitting an application shall be prohibited.

2. The time taken for considering an application shall be sufficient to allow a fair examination, with due respect to the minimum procedural guarantees to be afforded to the applicant.

3. The time should not however be so lengthy as to undermine the required expediency of the accelerated procedure, in particular when an asylum seeker is detained.

76. As far as time limits are concerned, states must refrain from automatic and mechanical application of short time limits for lodging an application, taking into account the findings of the Court in a case in which it was held that the automatic and mechanical application of a short time

[63] Cf. *Salah Sheekh v. Netherlands*, judgment of 11 January 2007. See also *Saadi v. Italy* [GC], application No. 37201/06, Grand Chamber judgment of 28 February 2008, para. 131; *Ismoilov v. Russia* , application No. 2947/06, judgment of 24 April 2008 on the cautionary note to taking a narrow approach to assessments under Article 3.

[64] *Jabari v. Turkey*, application No. 40035/98, judgment of 11 July 2000, para. 41.

limit of five days for submitting an asylum application was at odds with the fundamental value embodied in Article 3 of the ECHR.[65]

77. The duration of the accelerated asylum procedures varies considerably in Council of Europe member states. The shortest time limits are in the Netherlands (48 working hours, i.e. in practice 5-6 days), Bulgaria (3 days), Spain (4 days at the border; 60 working days inside the country), Romania (decisions must be taken within 3 days), the United Kingdom (the target is less than 14 days), Hungary and "the former Yugoslav Republic of Macedonia" (15 days), and Poland (30 days).

78. It is important to maintain a balance between the need for states to treat asylum applications in a simple and efficient manner, and their obligation to give access to an equitable procedure for determining asylum in favour of persons in need of international protection.

X. Right to an effective remedy with suspensive effect

1. Asylum seekers whose applications were rejected shall have the right to have the decision reviewed by a means which constitutes an effective remedy.

2. This remedy shall have a suspensive effect if asylum seekers submit an arguable claim that the execution of the negative decision could lead to a real risk of the death penalty, torture or inhuman or degrading treatment or punishment.

79. The right to an effective remedy is embodied in Article 13 of the ECHR. It is also proclaimed in Recommendation R (98) 13 of the Committee of Ministers on the right of rejected asylum seekers to an effective remedy against decisions on expulsion in the context of Article 3 of the European Convention on Human Rights, as well as in several Parliamentary Assembly recommendations, among which 1236 (1994) on the right of asylum and 1327 (1997) on the protection and reinforcement of the human rights of refugees and asylum seekers in Europe.

80. The notion of effective remedy concerning asylum applicants has been clarified by the Court in a number of important cases. In the aforementioned *Jabari v. Turkey* judgment the Court stated that "given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised and the importance which it attaches to Article 3, the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned."[66]

81. When it comes to applications lodged at a border, including airports, it is worth recalling that the remedy against a decision of non-admission to the territory for the purpose of seeking

---

[65] *Jabari v. Turkey*, application No. 40035/98, judgment of 11 July 2000.

[66] *Jabari v. Turkey*, application No. 40035/98, decision of 11 July 2000, para. 50; see also *Saadi v. Italy*, application No. 37201/06, Grand Chamber judgment of 28 February 2008 , paras. 139-140.

asylum must have an automatic suspensive effect for it to be effective in the meaning of Article 13 ECHR.[67]

82. This position has been developed in another case where the Court considered that "it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention".[68]

83. Given the absolute character of the principle of *non-refoulement*, the Court considered that "this scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State".[69]

84. The Court has consistently held that Article 6 of the ECHR protecting the right to a fair trial is not applicable to expulsion/asylum procedures, as they do not involve a civil right or a criminal charge.[70]

85. In so far as the negative outcome of an asylum procedure could have consequences engaging the State's obligations under the ECHR, the quality of such a procedure must be assessed against the requirements of Article 13 ECHR. This provision requires that an individual should have a remedy before a national authority in order to have his or her claim decided and, if appropriate, to obtain redress.[71] "In that connection, the importance of Article 13 for preserving the subsidiary nature of the Convention system must be stressed".[72]

86. Article 13 has been consistently interpreted by the Court as requiring a remedy in domestic law only in respect of grievances which can be regarded as "arguable" in terms of the ECHR.[73] While there is no definition of "arguable", the Court held that a grievance could not be unarguable even if it had been eventually adjudged by the Convention organs to be "manifestly ill-founded".[74]

87. Furthermore, the Court has developed a number of procedural guarantees, including most importantly the suspensive effect of the remedy in the asylum procedure, on the basis of Article 13 ECHR. According to it, the right to an effective remedy requires:

---

[67] *Gebremedhin v. France*, application No. 25389/05, judgment of 26 April 2007.

[68] *Čonka v. Belgium*, application No. 51564/99, decision of 5 February 2002, para. 79.

[69] *Chahal v. the United Kingdom*, application No. 22414/93, decision of 15 November 1996, para. 151.

[70] *Maaouia v. France*, application No. 39652/98, judgment of 5 October 2000; *Peñafiel Salgado v. Spain*, decision of 16 April 2002; *Sardinas Albo v. Italy*, application No. 56271/00, decision of 8 January 2004.

[71] *Klass v. Germany*, application No. 5029/71, judgment of 6 September 1978.

[72] Čonka v. Belgium, Application No. 51564/99, Judgement of 5 February 2002 para. 84

[73] *Boyle and Rice v. the United Kingdom*, applications No. 9659/82 and 9658/82, judgment of 27 April 1988.

[74] *Powell and Rayner v. the United Kingdom*, application N° 9310/81, jugdment of 21 February 1990.

(i) an independent and rigorous scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and access to a remedy with automatic suspensive effect in law to challenge the measure at stake; [75]
(ii) a remedy allowing the competent national authority both to deal with the substance of the relevant ECHR complaint and to grant appropriate relief.[76]

88. The remedy required by Article 13 must also be effective in practice as well as in law. The requirements of Article 13 take the form of a guarantee and not of a mere statement of intent or a practical arrangement[77]. As a result, for a domestic remedy to be "effective" according to Article 13 ECHR, those requirements must be guaranteed in national legislation.

89. Article 34 of the ECHR entitles individuals to submit applications and is a fundamental guarantee of the effectiveness of the Convention system[78]. The right to apply to the Court implies freedom to communicate with the organs of the Convention[79] . The right prohibits any direct or indirect pressure placed on applicants to withdraw or modify their complaints[80] and implies effective access and communication with one's legal advisers. These principles should operate in any event and at all stages of the procedure.

XI. Detention

2. Detention of asylum seekers should be the exception.

2. Children, including unaccompanied minors, and other vulnerable persons should not, as a rule, be placed in detention. In those exceptional cases where these persons are detained, they should be provided with special supervision and assistance.

3. Asylum seekers may only be deprived of their liberty, if this is in accordance with a procedure prescribed by law and if, after a careful examination of the necessity of deprivation of liberty in each individual case, the authorities of the state in which the

---

[75] *Jabari v. Turkey*, application No. 40035/98, judgment of 11 July 2000; *Čonka v. Belgium*, application No. 51564/99, judgment of 5 February 2002; *Gebremedhin v. France*, application No. 25389/05, judgment of 26 April 2007.

[76] *Chahal v. the United Kingdom*, application No 22414/93, judgment of 15 November 1996.

[77] See *Čonka v. Belgium*, application No. 51564/99, judgment of 5 February 2002, paras. 75 and 82.

[78] *Loizidou v. Turkey (preliminary objections)*, application No. 1531/89, judgment of 23 March 1995, , para. 70; *Mamatkulov and Askarov v. Turkey*, applications No. 46827/99 and 46951/99, Grand Chamber judgment of 4 February 2005, paras. 100 and 122.

[79] See for example *Peers v. Greece*, application No. 28524/95, judgment of 19 April 2001, para. 84 ; and the 1996 European Agreement relating to persons participating in proceedings of the European Court of Human Rights (CETS 161).

[80] See inter alia, *Akdivar and others v. Turkey*, application No. 21893/93, judgment of 16 September 1996, Reports of Judgments and Decisions 1996-IV, para. 105;

asylum application is lodged have concluded that the presence of the asylum seekers for the purpose of carrying out the accelerated procedure cannot be ensured as effectively by another, less coercive measure.

4. Detained asylum seekers shall be informed promptly, in a language which they understand, of the legal and factual reasons for their detention, and the available remedies; they should be given the immediate possibility of contacting a person of their own choice to inform him/her about their situation, as well as availing themselves of the services of a lawyer and a doctor.

5. Detained asylum seekers shall have ready access to an effective remedy against the decision to detain them, including legal assistance.

6. Detained asylum seekers should be accommodated within the shortest possible time in facilities specifically designated for that purpose, offering material conditions and a regime appropriate to their legal and factual situation and staffed by suitably qualified personnel. Detained families should be provided with separate accommodation guaranteeing adequate privacy.

90. These guidelines take into account the fact that in some countries, whilst alternatives to detention are always considered, domestic policy allows for occasions whereby families with children may exceptionally be detained for a short period.

91. It should be recalled that there is a presumption of liberty under Article 5 of the ECHR, unless one of the exceptions applies. Article 5 states that "everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law", the permitted cases including "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition." Likewise, Article 31(2) of the Geneva Convention provides that "the Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country".

92. The Grand Chamber in *Saadi v. the UK* held that detention of an asylum seeker prior to the State's grant of authorisation to enter under the first limb of Article 5 § 1(f) "must be compatible with the overall purpose of Article 5, which is to safeguard the right to liberty and ensure that no-one should be dispossessed of his or her liberty in an arbitrary fashion." [81] "It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of "arbitrariness" in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention."[82]

---

[81] *Saadi v. the United Kigdom*, application no. 13229/03, judgment 29 January 2008, para. 66.

[82] Ibid. para. 67.

93. The notion of "arbitrariness" (like the rule of law) is not capable of a single universal definition and develops on a case-by-case basis. However the notion encompasses certain core principles which define the obligations of Contracting Parties under Article 5(1)(f), [83] including that:

(a) detention should not involve an element of bad faith or deception on the part of the authorities[84];

(b) both the order to detain and the execution of the detention must genuinely conform with the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5 § 1 [85] ;

(c) there must in addition be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention [86];

(d) the detention of an in individual is such a serious measure that it is justified only as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained; [87]

(e) the principle of proportionality further dictates that where detention is to secure the fulfilment of an obligation provided by law, a balance must be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty;[88]

(f) the duration of the detention is a relevant factor in striking such a balance and the length of the detention should not exceed that reasonably required for the purpose pursued;[89]

---

[83] *Cf. op.cit,*"*asylum…"*, Part 2, Chapter 1 "Detention under Article 5 and restrictions on freedom of movement under Article 2 of Protocol No 4", in particular, pps. 80-88.

[84] Para. 69, and see, for example, *Bozano v. France*, application No. 9120/80, judgment of 18 December 1986; *Čonka v. Belgium*, application No. 51564/99.

[85] *Ibid ;* see *Winterwerp*, cited above, para. 39; *Bouamar v. Belgium*, application No. 9106/80, judgment of 29 February 1988, para. 50; *O'Hara v. the United Kingdom*, application No. 37555/97, para. 34.

[86] Ibid., see *Bouamar* judgment, para. 50; *Aerts v. Belgium*, judgment of 30 July 1998, *Reports* 1998-V, para. 46; *Enhorn v. Sweden*,application No. 56529/00, judgment of 25 January 2005, para. 42.

[87] Ibid. see *Witold Litwa*, cited above, para. 78; *Hilda Hafsteinsdóttir v. Iceland*, application No. 40905/98, judgment of 8 June 2004, para. 51; *Enhorn v. Sweden*, cited above, para. 44.

[88] Ibid. see *Vasileva v. Denmark*, application No. 52792/99, judgment of 25 September 2003, para. 37.

[89] Ibid. para. 74, see also *McVeigh and Others v. the United Kingdom*, applications No. 8022/77, 8025/77, and 8027/77, Commission decision of 18 March 1981, DR 25, pp. 37-38 and 42. Note that the Grand Chamber held in *Chahal* , the principle of proportionality applied to detention under Article 5 para. 1(f) only to the extent that the detention should not continue for an unreasonable length of time; thus, it held (para. 113) that "any deprivation of liberty under Article 5 para. 1(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the

(g) the place and conditions of detention should be appropriate, bearing in mind that "the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country"[90];

94. The CPT has repeatedly indicated in its reports that, as a starting point, asylum seekers should not be detained unless the authorities of the state in which the application for asylum is lodged, on the basis of an individual assessment, deem the asylum seeker in question to pose an imminent danger to public order and security, to be likely to abscond with a view to take up illegal residence on the territory of the state or that of another state, or where he/she is under a criminal investigation.

95. All Member States of the Council of Europe and parties to the ECHR are also parties to the ICCPR.[91] Therefore the relevant case law of the UN Human Rights Committee on arbitrary detention[92] should inform all decision making. These principles flesh out those of Article 5.[93]

96. The best interest of the child shall be a primary consideration in the context of the detention of children. Children, whether in detention facilities or not, have a right to education and a right to leisure, including a right to engage in play and recreational activities appropriate to their age. The provision of education could be subject to the length of their stay.

97. Unaccompanied minors and separated children should be provided with accommodation in institutions provided with the personnel and facilities which take into account the needs of persons of their age.

98. Reference could be made in this context to Article 37 (b) of the CRC stating as follows: "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."

99. Guidelines 6 to 10 of the *Twenty Guidelines on Forced Return*[94] set out useful standards regarding detention pending removal.

---

detention will cease to be permissible ..." . See also *Gebremedhin [Gaberamadine] v. France*, application No. 25389/05, para. 74.

[90] see *Amuur v. France*, application No. 19776/92, judgment of 25 June 1996, para. 43.

[91] Note that San Marino has acceded to but not ratified the ICCPR.

[92] The UN HRC, in its Periodic Reports and Case law, has made clear that under Article 9 ICCPR a deprivation of liberty in an asylum must be necessary and proportionate and a measure of last resort if it is to comply with the prohibition on arbitrariness. See *inter alia* HRC General Comment No 8 on the right to liberty and security of persons; The Fourth Periodic Report of Denmark states that "an alien whose application for asylum is expected to be or is being examined…may be deprived of liberty after a specific, individual assessment…"; See also Communications of the HRC in *Shams v. Australia,* Communication No. 1255 and others (para. 6.5) ; *A v. Australia,* Communication No. 560/1991 , *C v. Australia,* Communication No. 900/1999, *Baban v. Australia,* Communication No. 1014/2001, *Bakhtiyari v. Australia,* Communication No. 1069/2002, *Danyal Shafiq v. Australia,* Communication No. 1324.

[93] With particular regard to the role played by Article 53 ECHR.

100. Detention shall be justified only for as long as the accelerated asylum procedure is in progress, provided the detention is not applied for another lawful reason. If the procedure is not carried out with due diligence, the detention will cease to be permissible.

101. Any detention of asylum seekers shall be for as short a period as possible. The need to detain the asylum seeker should be reviewed at reasonable intervals of time. In the case of prolonged detention periods, such reviews should be subject to the supervision of a judicial authority.

102. Before the decision to detain an asylum seeker is taken, it should be considered whether other, less coercive measures, such as obliging the applicant to report or to hand over his or her travel document, could be used instead of detention.

103. An arrested and/or detained asylum seeker shall be entitled to take proceedings by which the lawfulness of his/her detention shall be decided speedily by a court and, subject to any appeal, he/she shall be released immediately if the detention is not lawful. This remedy shall be readily accessible and effective and legal aid should be provided for in accordance with national legislation.

104. Detained asylum seekers shall have the right to file complaints about instances of ill-treatment or failure to protect them from violence by other detainees. Complainants and witnesses shall be protected against any ill-treatment or intimidation arising as a result of their complaint or of the evidence given to support it.

105. Detained asylum seekers should be systematically provided with information which explains the rules applied in the facility and the procedure applicable to them and sets out their rights and obligations. This information should be available in the languages most commonly used by those concerned and, if necessary, recourse should be made to the services of an interpreter. Detained asylum seekers should be informed of their right to contact a lawyer of their choice, international organisations such as the UNHCR, and relevant non-governmental organisations. Assistance should be provided in this regard.

106. Detention facilities for asylum seekers should provide accommodation which is adequately furnished, clean and in a good state of repair, and which offers sufficient living space for the numbers involved. In addition, care should be taken in the design and layout of the premises to avoid, as far as possible, any impression of a prison environment. Organised activities should include outdoor exercise for at least one hour a day, access to a day room and to radio/television and newspapers/magazines, as well as other appropriate means of recreation. Moreover, detained asylum seekers should have access to activities outside their cells, including association with each other.

107. Detained asylum seekers should be provided with adequate food, sustenance and medical treatment and support. Detention facilities should provide access to appropriate medical professionals and treatment should be administered to meet the specific needs of the detainee patient. Particular regard should be had to children, pregnant women, the elderly, and others with mental and physical impairments.[95]

---

[94] Adopted on 4th May 2005 by the Committee of Ministers of the Council of Europe.
[95] See The EU Social Charter. See Guidelines XII

108. Staff in such facilities should be carefully selected and receive appropriate training (cf. guideline VIII, Quality of the decision-making process [and training]). Member states are encouraged to provide the staff concerned, as far as possible, with training that would not only equip them with interpersonal communication skills but also familiarise them with the different cultures of the detainees. Preferably, some of the staff should have relevant language skills and should be able to recognise possible symptoms of stress reactions displayed by detained persons and take appropriate action. When necessary, staff should also be able to draw on outside support, in particular medical, psychiatric and social support.

109. Detained asylum seekers should, in principle, not be held together with ordinary prisoners, whether convicted or on remand. Similarly, men and women should be accommodated separately; however, the principle of the unity of the family should be respected and families should therefore be accommodated accordingly. In this context, States should guarantee the right to private and family life.[96]

110. National authorities should ensure that the asylum seekers detained in these facilities have access to lawyers, doctors, non-governmental organisations, members of their families, and the UNHCR, and that they are able to communicate with the outside world, in accordance with the relevant national regulations. Moreover, the functioning of these facilities should be regularly monitored, including by recognised independent monitors.

111. Concerning the definition of the deprivation of liberty, Article 5 ECHR comprises an exhaustive list of exceptions to the right to liberty and security as well as procedural guarantees. In particular, it should be recalled that:

(i) the situation of detained asylum seekers has been examined under Article 5 para 1 f): holding a person in the transit zone of an airport may in practice amount to a deprivation of liberty; [97]

(ii) under no circumstances may confinement prevent the asylum seekers from having effective access to the procedure for determining refugee status.[98]

XII. Social and medical assistance

Asylum seekers shall be provided with necessary social and medical assistance, including emergency treatment.

---

[96] See further Guideline XII and Explanatory Text para. 118 as regards the obligations of the state authorities flowing from Article 8 in the context of detention.

[97] *Guzzardi v. Italy*, judgment of 6 November 1980; *Amuur v. France*, application No. 19776/92, judgment of 25 June 1996; *Shamsa v. Poland*, applications No. 45355/99 and 45357/99, judgment of 27 November 2003.

[98] *Amuur v. France*, application No. 19776/92, judgment of 25 June 1996.

112. Social assistance could consist of housing aid, support in cash or in kind for basic material needs, and access to schooling for minors. The assistance provided should involve psychological assistance. The States should also facilitate access to spiritual assistance at the request of the asylum seekers.

113. Article 13, paragraph 4 of the European Social Charter grants foreign nationals entitlement to urgent social and medical assistance. The personal scope of Article 13, paragraph 4 differs from that of other Charter provisions. The beneficiaries of this right to social and medical assistance are foreign nationals who are lawfully present in a particular country but do not have resident status, and those who are unlawfully present. By definition, no time limit can be set on the right to urgent or emergency assistance. States are required to meet immediate needs (accommodation, food, emergency care and clothing). They are not required to apply the guaranteed income arrangements under their social protection systems. While individuals' needs must be sufficiently urgent and serious to entitle them to assistance under Article 13, paragraph 4, this should not be interpreted too narrowly. The provision of urgent medical care must be governed by the individual's particular state of health.

114. In addition, it should be recalled that the Declaration of the Council of Europe Bratislava Conference regarding health issues and people on the move (23 November 2007) encouraged States to provide asylum seekers with "the necessary health care which includes emergency care and essential treatment of illness, and necessary medical or other assistance to those who have special needs".

115. In certain circumstances, the failure to provide social and medical assistance to an asylum seeker, at any stage during the accelerated procedure, or in the context of detention, may engage the responsibility of the State under Article 3. *Pretty v. UK* Application No. 2346/02, Judgment 29 July 2002, at paragraph 52: "The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible (see *D. v. the United Kingdom* and *Keenan*, both cited above, and *Bensaid v. the United Kingdom*, no. 44599/98, ECHR 2000-I)." In *Bensaid v. the United Kingdom*, the Court made clear that treatment not reaching the threshold of Article 3 may nevertheless have sufficiently adverse effects on physical and moral integrity as to amount to a breach of Article 8.

XIII. Protection of private and family life

The right to protection of private and family life shall be respected in the application of accelerated asylum procedures and, where appropriate, detention and returns. Whenever possible, family unity should be guaranteed.

116. Article 8 (right to respect for private and family life) of the ECHR guarantees protection against a risk of ill-treatment in the country of return not meeting the "threshold of severity" of Article 3 ECHR but still contrary to the right to "moral and physical integrity" recognised under Article 8 ECHR. Indeed, the Court, not in an expulsion case, has recognised that ill-treatment can

also raise an issue under Article 8.[99] Under certain conditions, the protection of the right to family life and/or private life in the host country may prevent an expulsion.[100]

117. As regards the protection of family life, the establishment of "family life" is a question of fact depending on the reality of close personal ties[101] and requiring pragmatic and detailed consideration.[102] The notion extends beyond mere blood ties[103]. Thus the State is under an obligation to protect the rights of persons in a *de facto* or *de jure* family relationship to the mutual enjoyment of each other's company. The State shall not interfere with such enjoyment, subject to the conditions of Article 8(2) by reference to the facts of a specific case.

118. The best interests of the child must be paramount in all cases under Article 8 where children are separated from their families or primary carers [104] and measures adopted in asylum procedures must reflect children's particular age and vulnerability. Concerning the minor applicant whose parents or other family members were already given refugee status, the Court has stated the existence of a positive obligation of a State Party under Article 8 ECHR to facilitate the family reunification of an unaccompanied foreign minor with his/her parent(s).[105] The absence of remaining carers or family members in the country of origin[106] as well as conditions in the country of return,[107] are relevant considerations, and may alternatively raise issues under Article 3.[108]

119. As regards the protection of private life, it is important to remember that there is no exhaustive definition of the term "private life" and Article 8 protects broad elements of the personal sphere such as "gender identification, name and sexual orientation and sexual life"[109].

---

[99] *Costello-Roberts v. the United Kingdom*, application No. 13134/87, judgment of 25 March 1993; see also *Bensaïd v. the United Kingdom*, application No. 44599/98, judgment of 6 February 2001.

[100] *Cf. op.cit,"asylum…"* Part 2, Chapters 2 and 3; see also *Boultif v. Switzerland*, application No. 54273/00, judgment of 2 November 2001; *Amrollahi v. Denmark*, application No. 56811/00, judgment of 11 July 2002.

[101] *K. and T. v. Finland*, application No. 25702/94, judgment of 12 July 2001. See *Asylum and the ECHR* pp. 95-99.

[102] *Al-Nashif v. Bulgaria*, application. No. 50963/99, Judgment of 20 June 2002.

[103] Ibid.

[104] *Cf. op.cit,"asylum…"* pp. 101-105; Council Resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries (97/C 221/03); *Nsona v. the Netherlands*, decision of 28 November 1996; *Uner v. the Netherlands*, application No. 46410/99, judgment of 18 October 2006.

[105] *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, application No. 13178/03, judgment of 12 October 2006.

[106] *Taspinar v. the Netherlands*, application No. 11026/84; *Bulus v. Sweden*, application No. 9330/81, decision of 19 January 1984

[107] See *Fadele ., the United Kingdom*, application No. 13078/87, judgment of 4 July 1991.

[108] See *Taspina v. the Netherlands*, and also *Tuquabo-Tekle and Others v. the Netherlands*, application No. 60665/00, judgment of 1 December 2005.

Article 8 in its private life aspect may be engaged both in its territorial and extraterritorial application.

120. Article 8 of the ECHR does not only require a negative undertaking by States to abstain from substantive interferences with the right to private or family life, but also entails the positive obligation to take steps to ensure that personal information not reach the hands of third parties that might use such information for purposes incompatible with international human rights law.[110] Measures should be adopted to secure respect for private life even in the sphere of the relations of individuals between themselves.[111] Guarantees of privacy are of importance when processing highly intimate and sensitive data and health records[112].

121. Personal data of asylum seekers have to be protected in accordance with international standards. Especially, as a principle, personal data should only be used and processed for the purpose of the asylum procedure. The asylum seeker shall have the right to be informed, on request, of any data that is processed concerning him/her.[113]

XIV. Role of the UNHCR

Even when accelerated asylum procedures are applied, Member States shall allow the UNHCR:

(i) To have access to asylum seekers, including those in detention and border zones such as airport or port transit zones;

(ii) To have access to information on individual applications for asylum, on the course of the procedure and on the decisions taken, as well as to person-specific information, provided that the asylum seeker agrees thereto;

---

[109] *Bensaïd v. the United Kingdom*, application No. 44599/98, judgment of 6 February 2001.

[110] See *Airey v. Ireland*, application No. 6289/73, judgment of 9 October 1979, para. 32.

[111] see *X. and Y. v. the Netherlands*, application No. 8978/80, judgment of 26 March 1985, para. 23; *Odièvre v. France*, application No. 42326/98, Grand Chamber judgment of 13 February 2003.

[112] *I. v. Finland*, application No. 20511/03, judgment of 17 July 2008 ; *Z. v. Finland*, judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I, paras. 95-96 .

[113] See Art. 8 ECHR, Art. 17 ICCPR; Human Rights Committee (ICCPR), General Comment No. 16 (1988), para. 10; Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows (CETS 181); Art 8 Charter of fundamental rights of the European Union; UN General Assembly, Guidelines for the regulation of computerized personal data files (A/Res/45/95); OECD Recommendation concerning and guidelines governing the protection of privacy and transborder flows of personal data (C (80) 58 (final)).

(iii) To present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure.

122. UNHCR has been charged by the United Nations General Assembly with the responsibility of providing international protection to refugees within its mandate and of seeking permanent solutions to the problem of refugees by assisting governments and private organizations. As set forth in its Statute, UNHCR fulfils its international protection mandate by, *inter alia*, "promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto."[114] UNHCR's supervisory responsibility under its Statute is mirrored in Article 35 of the 1951 Convention and Article II of its 1967 Protocol.

XV. Increased protection

Nothing in these guidelines should restrain the States from adopting more favourable measures and treatment than described in these guidelines.

* * *

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