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4.5 Steering Committee for Human Rights (CDDH)

e. Draft Guidelines on human rights protection in the context of accelerated asylum procedures – Explanatory memorandum

Item to be prepared by the GR-H at its meeting of 18 June 2009

Foreword

In October 2005, the Parliamentary Assembly adopted its Recommendation 1727(2005) on accelerated asylum procedures in member states of the Council of Europe. In its reply to this text, the Committee of Ministers of the Council of Europe concluded that there was a need to establish "safeguards for asylum seekers in accelerated procedures", bearing in mind also that such work could constitute a useful source of inspiration for those member states that are members of the European Union.[2] In June 2006, it entrusted its Steering Committee for Human Rights (CDDH) to examine the question and, as appropriate, to draft guidelines in this field.[3] In March 2009, the CDDH finalised its draft guidelines on the human rights protection in the context of accelerated asylum procedures and Explanatory Memorandum and transmitted them to the Committee of Ministers. [On 1 July 2009, the Ministers Deputies' adopted the guidelines and authorised the publication of the Explanatory Memorandum.]

Preamble and standards in force

1. Asylum seekers enjoy the guarantees set out in the European Convention on Human Rights as any other person within the jurisdiction of States Parties to this instrument. The specific situation of these persons nevertheless makes them vulnerable, notably when their asylum application is examined through an accelerated procedure; no matter how conscientiously this procedure is applied, Council of Europe member states must ensure that human rights protection is not only guaranteed on paper but implemented in practice.

[1] This document has been classified restricted until examination by the Committee of Ministers.
[2] In the context of the European Union Council Directive on minimum standards on procedures in member states for granting and withdrawing refugee status (Council Directive 2005/85/EC of 1 December 2005).
[3] Decision No. CM/868/14062006. 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. 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. The Group held six meetings from December 2006 to February 2009. During the drafting process, all member states took note of progress and were invited to submit written comments.

2. The substantial body of jurisprudence that has emerged from the organs of the European Convention on Human Rights ("the European Convention") between 1989 and the present day now sets the standards for the rights of asylum seekers across Europe.[4] 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 European Convention) refers, were a Contracting State to the European Convention 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.[5]

3. Article 14 of the Universal Declaration of Human Rights expressly protects the right to "seek and enjoy asylum from persecution". Furthermore, 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.[6] The UNHCR Executive Committee[7] have identified basic standards for refugee status determinations.[8] Both the Geneva Convention and the 1967 Protocol provide for co-operation between the Contracting States and the United Nations High Commissioner for Refugees (UNHCR), which may extend to the determination of refugee status, according to arrangements made in various Contracting States.

4. Article 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 § (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 European Convention.

5. Finally, European Community law provides another important source of rights. 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." EU fundamental rights form an integral part of the general principles of EC law.[9]

6. It goes without saying that, whatever the asylum procedure used, member states are obliged to respect European and international standards such as the right to request and to enjoy asylum. Whilst the present guidelines aim to help those involved in the various stages of asylum procedures, including those responsible for returning non-nationals, the current guidelines nevertheless concentrate on accelerated procedures. They therefore remind national authorities of existing obligations in the area, without adding new ones.

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[4] 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 …"*.

[5] *Soering v. the United Kingdom*, application No. 14038/88, judgment of 7 July 1989, para. 88; *Ismoilov and others v. Russia*, application No. 2947/06, judgment of 24 April 2008, para. 68.

[6] See 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)" 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 specialised knowledge of the Committee and the fact that its conclusions are reached by consensus adds further weight. They have identified basic standards for refugee status determinations.

[7] 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 specialised knowledge of the Committee and the fact that its conclusions are reached by consensus adds further weight.

[8] 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).

[9] 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

7. The purpose of the guidelines is to indicate how human rights should be protected in the context of such procedures. To this end, they bring together the various relevant standards found notably in the European Convention as interpreted by the Court, along with the aforementioned key universal and European instruments in the area. These various sources are cited in the guidelines' Preamble, which also refers to important Resolutions and Recommendations made by Council of Europe bodies as well as the relevant recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) [10] and of the United Nations Committee Against Torture (CAT).

I. Definition and scope

1. An accelerated asylum procedure is one that derogates from normally applicable procedural time scales and/or procedural guarantees with a view to expediting decision making.

8. The guidelines take for granted that the expression "accelerated asylum procedures" abrogate from standard procedural time scales and normally applicable guarantees with a view to accelerating the decision making-process. The general meaning of this expression is to indicate that certain claims are treated faster than others and that, generally, accelerated procedures feature less procedural guarantees.[11] This expression may thus also refer 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.

9. It is necessary to note that, in some countries, accelerated procedures are used to process manifestly well-founded applications. In other countries, the assessment of these cases is prioritised 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. It should be recognised that these states may also avail themselves of alternative case management tools, including the prioritisation of manifestly well-founded claims.[12]

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. For the purposes of these guidelines, the expression "accelerated procedures" does not include procedures whose purpose is to identify the State responsible for determining the asylum application, such as procedures under the Dublin Regulation. In *KRS v. the United* Kingdom,[13] the Court recalled its ruling in *T.I. v. the United Kingdom*: "removal to an intermediary country which is also a Contracting State does not affect the responsibility of [states] to ensure that the applicant is not, as a result of the decision to expel, exposed to treatment contrary to Article 3 of the Convention."

[10] 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.

[11] The expression "accelerated procedures" is 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.

[12] UNHCR, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum,* 20 October 1983, ExCom Conclusion, No. 30 (XXXIV) – 1983, conclusions (d) and (f).

[13] Application No. 32733/08, admissibility decision of 2 December 2008.

II. Principles

1. States should only apply accelerated asylum procedures in clearly defined circumstances and in compliance with national law and their international obligations.

11. 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. They should be applicable at every stage of the accelerated procedure.[14]

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

3. 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.

12. The Court, playing a role subsidiary to that which should be discharged primarily by national authorities, has described the procedural requirements imposed by this principle: "In this type of case the Court is therefore called upon to assess the situation in the receiving country in the light of the requirements of Article 3… In determining whether substantial grounds have been shown for believing that there is a real risk of treatment incompatible with Article 3, the Court will take as its basis all the material placed before it or, if necessary, material obtained *proprio motu*. In cases such as the present the Court's examination of the existence of a real risk must necessarily be a rigorous one… In order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances."[15]

13. Concerning the notion of "asylum applications made at borders, including airports and transit areas", 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 European Convention 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 European Convention.[16]

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.

14. Particular attention should be given to vulnerable groups, such as children, victims of torture, sexual violence or trafficking, persons with mental and/or physical disabilities and persons lacking capacity, either by age or by way of physical or mental impairment. 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.

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[14] *Cf. op.cit, "Asylum …",* pp. 87-88. See also *Amuur v. France*, application No. 19776/92, judgment of 25 June 1996, para. 50.
[15] *Saadi v. Italy*, application No. 37201/06, judgment of 28 February 2008, paras. 126, 128 & 130. See also *T.I. v. the United Kingdom*, application No. 43844/98, admissibility decision of 7 March 2000.
[16] *Amuur v. France*, application No. 19776/92, judgment of 25 June 1996. See also *"Asylum ..."* (2007), p. 65 and *Shamsa v. Poland*, applications Nos. 45355/99 and 45357/99, judgment of 23 November 2003.

15. 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".[17] In addition to the relevant provisions in the Council of Europe Convention on Action against Trafficking in Human Beings and the 1989 United Nations 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-paragraph ii). Subsequently, the Assembly devoted a specific text (Recommendation 1703 (2005)) to the issue of protection and assistance for separated children seeking asylum.

16. 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.

17. 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 of the European Convention 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[18]. 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. 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.

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.

18. In this context, due regard should be had when applying asylum procedures to the specific guarantees of the United Nations Convention on the Elimination of all forms of Discrimination against Women, [19] its Optional Protocol and General Recommendation 19 concerning women in situations of vulnerability; of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children;[20] of the UNHCR Guidelines on the Protection Refugee Women; and of the UNHCR Guidelines on Evaluation and Care of Victims of Trauma and Violence.[21] 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.[22] Additional steps should be taken to protect against the particular vulnerability of the girl child.[23]

[17] *Human Rights Watch World report 2002: children's rights.*
Accessible from www.hrw.org/wr2k2/children.html.
[18] See *Siliadin v. France*, application No. 73316/01, judgment of 26 October 2005.
[19] See in particular Articles 2(f) and 6.
[20] In particular Article 6 "Assistance to and protection of victims of trafficking in persons".
[21] 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.
[22] 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 recognises 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.
[23] "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

19. Due account should be taken of the United Nations Convention on the Rights of Persons with Disabilities which provides that: "every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others";[24] 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."[25] Whilst recognising that lengthy asylum procedures may be 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.[26]

20. 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 further below at Guideline 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".[27] It should be remembered that victims of torture and violence (sexual or otherwise) may fall into one or more overlapping categories of vulnerable person.

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

21. While there is no universal definition of "complex cases", existing state practice indicates that this category can include 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. Complex cases falling within this Guideline should be examined by means of a careful and individualised determination within the regular asylum procedure and offering full procedural guarantees.[28]

22. This corresponds with the standards enshrined in 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, and United Nations Security Council Resolution 1624 of 14 September 2005. These standards apply to any decision to resort to accelerated asylum procedures, including complex cases which may be suited to accelerated asylum procedures.

23. 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".[29] 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."[30] The United Nations Committee Against Torture has similarly ruled that the absolute prohibition on torture would prevent return of an applicant otherwise excluded from recognition as a refugee.[31] Due consideration should therefore be given to all these standards, on a principled and a pragmatic basis, before recourse is had to accelerated procedures in the context of complex cases.

[24] Article 17.
[25] Article 16.
[26] Article 1, UN Convention on the Rights of Persons with Disabilities.
[27] 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.
[28] *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.
[29] *Saadi v. Italy,* application No. 37201/06*,* judgment (Grand Chamber) of 28 February 2008, para. 138. See also *Chahal v. the United Kingdom*, application No. 22414/93, judgment of 15 November 1996, para. 80, Ismoilov *v. Russia*, application No. 2947/06, judgment of 24 April 2008, and *Ryabikin v. Russia*, application No. 8320/04, judgment of 19 June 2008.
[30] *Ibid. Saadi v. Italy*, para. 139.
[31] *Tapia Paez v. Sweden*, Communication No. 39/1996, decision of 28 April 1997, para. 14.5.

IV. Procedural guarantees

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

a. the right to lodge an asylum application with state authorities, including but not limited to, at borders or in detention;

24. It is necessary to recall that Article 5 of the European Convention 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 under no circumstances may confinement prevent the asylum seekers from having effective access to the procedure for determining refugee status.[32]

25. Concerning the right to be registered and to lodge an asylum application, 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*[33] 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,[34] 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.

b. 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;

c. 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;

26. 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. Under this sub-paragraph, 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.

27. The reference to "a language which he/she understands" reflects the wording used in Article 5 § 2 of the European Convention. 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.

d. the right, as a rule, to an individual interview in a language which he/she understands where the merits of the claim are being considered and, in cases referred to in Guideline I.2, the right to be heard on the grounds of admissibility;

[32] *Amuur v. France*, application No. 19776/92, judgment of 25 June 1996.
[33] *Xhavara v. Italy and Albania,* application No. 39473/98, decision of 11 January 2001.
[34] *Hussun and others v. Italy*, application No. 101717/05, decision of 11 May 2006.

28. In the interests of the quality of the interview, States should offer the possibility, insofar as circumstances allow, of an interview or interpretation in circumstances inspiring the greatest possible degree of confidence. For example, when an asylum seeker is a female rape victim, it would be necessary, insofar as possible, for her to be interviewed by a person of the same sex.

29. As regards the right to be heard, this sub-paragraph 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 a minimum in written form, before an inadmissibility decision is 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 minimum 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.

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

30. Concerning the right to submit documents and other evidence, 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.[35] 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"[36].

31. 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 accelerated asylum procedures. In principle, applicants claiming to be victims of torture 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, applicants should be given the time and opportunity to provide an explanation. (See also Guideline III and explanatory text thereto).

32. Procedural flexibility should ensure that applicants who during their initial interview fail to raise a claim that they have been tortured, or subjected to sexual violence or trafficking, 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.

33. 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."

f. the right to access legal advice and assistance, it being understood that legal aid should be provided according to national law;

[35] 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.

[36] 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, adopted by the Executive Committee of the High Commissioner's Programme (UNHCR Executive Committee), an inter-governmental group consisting of 76 states that advises the UNHCR in the exercise of its protection mandate.

34. A crucial aspect in this context is the availability of effective legal advice, in particular the issue of free legal advice under the conditions provided for by domestic law. Legal representatives should enjoy access to both their client and their client's case file at all stages of the asylum procedure that may potentially be determinative, including in detention facilities and transit zones.

35. It is to be recalled that, under the right of individual petition under Article 34 of the European Convention, "States should furnish all necessary facilities to make a proper and effective examination of applications".[37]

g. the right to receive a reasoned decision in writing on the outcome of the proceedings.

36. The requirement to give a reasoned decision 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 have these reasons explained in a language he or she understands, as otherwise the right to be informed risks being meaningless in practice.

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.

37. In paragraph 2, the guidelines again stress the importance of taking into account the particularly vulnerable situation of separated or unaccompanied minors (see explanatory memorandum on Guideline III).

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 jeopardise protection of the asylum seeker or the liberty and security of his/her family members still living in the country of origin. Information on the asylum application as such which may thus jeopardise protection shall not be disclosed to the country of origin.

38. The right to privacy of the individual is guaranteed by Article 8 of the European Convention, Article 17 ICCPR, and Article 16 UNCRC.[38] Confidentiality concerning information provided by the applicant is furthermore necessary not only to protect the integrity of the applicant but also his/her family members in the country of origin. The fact that an asylum application has been made or the elements upon which the asylum claim is based shall not be disclosed to the country of origin. It may be, however, that proper examination of the asylum application requires that certain aspects of it be verified with sources in the country of origin. As a rule, these sources should not include the alleged actor of persecution or serious harm. Where, in exceptional cases, it may be absolutely necessary to obtain information from the alleged actor of persecution or serious harm, this must not result in the actor being informed of the fact of the asylum seeker's application nor jeopardise the physical integrity of the asylum seeker and his or her dependants or the liberty and security of his/her family members. The requirement that "information on the asylum application as such which may thus jeopardise protection shall not be disclosed to the country of origin" does not prevent the member states from sharing with the applicant's country of origin the information on his/ her identity necessary to effect an expulsion order when a return decision has been issued.

39. Article 8 of the European Convention 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 do not reach the hands of third parties that might use such information for purposes incompatible with international human rights law.[39]

[37] *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.
[38] 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, para. 48.
[39] See *Airey v. Ireland*, application No. 6289/73, judgment of 9 October 1979, para. 32.

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.

40. 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 country of origin alleged to be safe". This is the case, for instance, in the domestic law of Austria, Bulgaria, Cyprus, Ireland, Poland, "the former Yugoslav Republic of Macedonia", Romania and the United Kingdom.

41. 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.

2. The fact that the asylum seeker comes 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.

42. 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.

43. Criteria to consider the country of origin as a safe country vary considerably from one country to another. 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 European Convention.

44. 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.[40]

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 must be satisfied when applying the safe third country concept:

45. 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, Moldova, the Netherlands, Poland, "the former Yugoslav Republic of Macedonia", Romania, Spain and the United Kingdom.

[40] *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.

46. 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 Regulation, all States party to it generally consider one another as safe. The Regulation, called "Dublin II" and replacing the Dublin Convention, retains the same principle for all EU member states, adding Iceland, Norway and Switzerland. (It should be recalled that these guidelines do not apply to procedures under the Dublin Regulation: see further under paragraph 10 above.)

47. Every individual application should 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.

a. 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;

48. 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.

b. the principle of *non-refoulement* is effectively respected;

49. In cases where the applicant can adduce evidence capable of proving that there are substantial grounds for believing that he runs a real risk of suffering treatment proscribed by Article 3 when returned, the Court requires a rigorous scrutiny. This involves the assessment of the issue in the light of all the material placed before it, or, if necessary, material obtained *proprio motu*.[41]

50. 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 European Convention. 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".[42]

51. In the case of *Saadi v. Italy, and* similarly, in the subsequent case of *Ismoilov & others v. Russia*,[43], 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."

52. 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.[44] The Court also emphasised 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.[45]

[41] See *Saadi v. Italy*, application No. 37201/06, judgment of 28 February 2008, para.s 128-9; also *N. A. v. United Kingdom*, application No. 25904/07, judgment of 17 July 2008, para. 119; *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, para. 39*; Chahal v. the United Kingdom*, application No. 22414/93, judgment of 15 November 1996, paras. 79 and 96.

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

[43] *Saadi v. Italy,* application No. 37201/06, Judgment (GC) 28 February 2008, para. 147 and *Ismoilov v. Russia,* application No. *2947/06,* Judgment 24 April 2008, para. 127. See also, *Ryabikin v. Russia,* application No. 8320/04, Judgment 19 June 2008, paras. 119-120.

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

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

c. 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; and

53. This sub-paragraph 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.

d. the third country will admit the asylum seeker.

54. This sub-paragraph 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.

55. As regards the asylum seeker's admissibility and safety in the third country, Article 27.2(a) of EU Council Directive 2005/85/EC refers to "rules requiring a connection between the person seeking asylum and the third country concerned on the basis of which it would be reasonable for that person to go to that country."

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 does not relieve a state of 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 serious violation of other fundamental rights which would, under international or national law, justify granting protection.

56. The principle of *non-refoulement* is to be linked with Article 3 (prohibition of torture) of the European Convention: 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 treatment contrary to Art. 3 of the European Convention.[47] 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.[48]

57. 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.[49]

[46] *Harabi v. the Netherlands*, application No. 10798/84, decision of 5 March 1986, DR 46, p. 112.
[47] 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.
[48] *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, paras. 80-82; *Saadi v. Italy*, application No. 37201/06, Grand Chamber judgment of 28 February 2008, paras. 137-139.
[49] *T.I. v. the United Kingdom, ibid*.

58. It should be recalled that the European Court of Human Rights noted that the protection afforded by Article 3 of the European Convention 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".[50] 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.

59. The Court makes the position under the European Convention 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".[51]

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.

60. 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.

61. The excessive use of force by immigration officials may raise issues under Article 3 and 8 of the European Convention.[52] The Court's case law in this area would mirror abuse by other state officials.[53]

62. 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 European Convention demands that the state should show that other methods were investigated and rejected and that the force that was used was no more than was absolutely necessary.[54]

63. 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 to members of both 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 European Convention 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.

3. Collective expulsion of aliens is prohibited.

64. As far as the prohibition of collective expulsions is concerned (paragraph 3), it is recalled that Article 4 of Protocol No. 4 to the European Convention 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.[55] 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.[56]

[50] *H.L.R. v. France*, application no. 24573/94, judgment of 29 April 1997, para. 40.
[51] *Salah Sheekh v. the Netherlands,* application No. 1948/04, judgment of 13 January 2007, para. 147.
[52] *Cf. op. cit, "Asylum …"* p. 75 and *Čonka v. Belgium*, application No. 51564/99, decision of 5 February 2002.
[53] 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.
[54] See e.g. *Olsson v. Sweden (No. 1)*, App. No. 10465/83, judgment of 24 march 1988, para. 72; *Scozzari & Giunta v. Italy*, App. No.s 39221/98 & 41963/98, Grand Chamber judgment of 13 July 2000, para. 148.
[55] Cf. inadmissibility decision of 23 February 1999 in the case of *Andric v. Sweden* (application No. 45917/99, unpublished).
[56] *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.

65. This Guideline restates the significance attached by the Court to Article 4 of Protocol No. 4 to the European Convention. 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.

66. 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.[57]

VIII. Quality of the decision-making process

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

67. 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 § 1 (f).[58]

2. Officials responsible for examining and taking decisions on asylum applications should receive appropriate training, including 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.

68. Improving the quality of the decision-making process will, in all cases, make the overall system more fair, effective and expeditious. It is also of particular importance to ensure protection of human rights in the context of accelerated procedures, which involve abrogation from normally applicable guarantees and/ or timescales. 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. 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".

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

[57] *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.
[58] *Chahal v. the United Kingdom,* application No. 22414/93, Judgment 15 November 1996, para. 113.

70. 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 UNHCR,[59] diplomatic missions, Department of State and Home Office reports, NGOs and Internet.[60]

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.

2. The time taken for considering an application shall be sufficient to allow a full and 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 expediency of the accelerated procedure, in particular when an asylum seeker is detained.

71. 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 limit of five days for submitting an asylum application was at odds with the fundamental value embodied in Article 3 of the ECHR.[61] This principle has since been restated in more general form in the Court's admissibility decision in the case of *K.R.S. v. the United Kingdom*: "While it is in principle acceptable for Contracting States to set procedural requirements for the submission and consideration of asylum claims and to regulate any appeals process from adverse decisions at first instance, the automatic and mechanical application of such procedural requirements will be considered at variance with the protection of the fundamental value embodied in Article 3 of the Convention."[62]

72. 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), "the former Yugoslav Republic of Macedonia" (15 days), and Poland (30 days).

73. 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.

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

[60] 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 of the European Convention, 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". 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.

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

[62] Application No. 32733/08, decision of 2 December 2008.

X. Right to effective and suspensive remedies

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

74. The Council of Europe Commissioner for Human Rights issued on 19 September 2001 a Recommendation (CommDH(2001)19) concerning the rights of aliens wishing to enter a Council of Europe member state and the enforcement of expulsion orders, part of which reads as follows: "It is essential that the right of judicial remedy within the meaning of Article 13 of the European Convention be not only guaranteed in law but also granted in practice when a person alleges that the competent authorities have contravened or are likely to contravene a right guaranteed by the European Convention. The right of effective remedy must be guaranteed to anyone wishing to challenge a refoulement or expulsion order. It must be capable of suspending enforcement of an expulsion order, at least where contravention of Articles 2 or 3 of the European Convention is alleged."

75. The Court has consistently held that Article 6 of the European Convention 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.[63] That said, Article 1 of Protocol No. 7 to the European Convention establishes a minimum right to review of a decision to expel an alien lawfully resident on a State's territory.

76. In so far as the content of an asylum application involves alleged violations of the State's obligations under the European Convention, the quality of such a procedure must be assessed against the requirements of Article 13 of the European Convention. 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.[64]

77. The right to an effective remedy is embodied in Article 13 of the European Convention. 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, 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.

78. 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".

79. 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 European Convention.[65] While there is no definition of "arguable", the Court held that a claim of violation of a substantive right could be arguable for the purposes of Article 13 even if it was eventually declared by the Convention organs to be "manifestly ill-founded".[66]

80. 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 of the European Convention. According to it, the right to an effective remedy requires:

> (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; [67]

[63] *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.
[64] *Klass v. Germany*, application No. 5029/71, judgment of 6 September 1978.
[65] *Boyle and Rice v. the United Kingdom*, applications No. 9659/82 and 9658/82, judgment of 27 April 1988, Series A no. 131, p. 23, para. 52.
[66] *Powell and Rayner v. the United Kingdom*, application No. 9310/81, judgment of 21 February 1990, paras. 25, 31.
[67] *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.

(ii) a remedy allowing the competent national authority both to deal with the substance of the relevant European Convention complaint and to grant appropriate relief.[68]

81. 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[69]. As a result, for a domestic remedy to be "effective" according to Article 13 of the European Convention, those requirements must be guaranteed in national legislation.

82. The right to an effective remedy under Article 13 bears a close relationship with Article 34.[70] In addition to requirements at national level, Article 34 of the European Convention entitles individuals to submit applications to the Court.[71] States must ensure the effective exercise of this right. The right to apply to the Court implies freedom to communicate with the organs of the Convention.[72] The right prohibits any direct or indirect pressure placed on applicants to withdraw or modify their complaints[73] 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.

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".[74]

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

84. The effective remedy described in paragraph 1, whereby the decision to reject an asylum application is subject to review, need not have always suspensive effect. Paragraph 2 sets out the specific circumstances in which the consequences of removal would engage the State's obligations under the Convention and/ or the Geneva Convention in such a way as to require that the remedy against the removal decision have suspensive effect.

85. 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 "the notion of an effective remedy under Article 13 requires … the possibility of suspending the implementation of the measure impugned." [75]

86. The Court has furthermore stated that, in the context of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3, "The remedy required by Article 13 … must have automatic suspensive effect."[76] This builds on an earlier judgment stating that the remedy against a decision of non-admission to the territory for the purpose of seeking asylum must have an automatic suspensive effect for it to be effective in the meaning of Article 13 of the European Convention.[77] Reference should also be had to guideline 5 of the 20 on Forced Return, adopted by the Committee of Ministers in 2005, which states that "The exercise of the remedy should have a suspensive effect when the returnee has an arguable claim that he or she would be subjected to treatment contrary to his or her human rights as set out in guideline 2.1."[78]

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[68] *Chahal v. the United Kingdom*, application No. 22414/93, judgment of 15 November 1996, para. 145.
[69] See *Čonka v. Belgium*, application No. 51564/99, judgment of 5 February 2002, paras. 75 and 82.
[70] *Shamayev v. Russia,* application No. 36378/02, judgment of 12 April 2005, para. 508 and see further below at paras. 87-89 concerning the relationship between Articles 3, 13 and 34.
[71] *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.
[72] 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).
[73] 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;
[74] *Chahal v. the United Kingdom*, application No. 22414/93, decision of 15 November 1996, para. 151.
[75] *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.
[76] *K.R.S. v. the United Kingdom*, application no. 32733/08, decision of 2 December 2008.
[77] *Gebremedhin v. France,* application No. 25389/05, judgment of 26 April 2007, paras. 36-38.
[78] Guideline 2.1 refers to "real risk of being executed, or exposed to torture or inhuman or degrading treatment or punishment; real risk of being killed or subjected to inhuman or degrading treatment by non-state actors, if the authorities of the state of return, parties or organisations controlling the state or a substantial part of the territory of the state, including international organisations, are unable or unwilling to provide appropriate and effective protection; other situations which would, under international law or national legislation, justify the granting of international protection".

87. 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".[79]

88. In addition to remedies at national level, asylum seekers have the right to submit applications to the Court under Article 34 of the European Convention. States must guarantee the effective exercise of this right. The right to apply to the Court implies freedom to communicate with the organs of the Convention.[80] The right prohibits any direct or indirect pressure placed on applicants to withdraw or modify their complaints [81] 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.

89. An applicant may request the Court to grant interim measures staying deportation under Rule 39 of the Rules of the Court. An order by the Court under Rule 39 is legally binding and failure to observe this measure may give rise to a violation of Article 3 or 34 of the Convention.[82]

XI. Detention

1. Detention of asylum seekers should be the exception.

90. Concerning the definition of the deprivation of liberty, Article 5 of the European Convention 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 5.1(f): holding a person in the transit zone of an airport may in practice amount to a deprivation of liberty; [83]

(ii) under no circumstances may confinement prevent the asylum seekers from having effective access to the procedure for determining refugee status.[84]

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

91. 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.

92. 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.

93. 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.

94. 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."

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[79] *Čonka v. Belgium*, application No. 51564/99, decision of 5 February 2002, para. 79.
[80] 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).
[81] 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;
[82] *Mamatkulov and Askarov v. Turkey,* application no. 46827/99, Judgment [GC] 4 February 2005; and *Olaechea Cahuas v. Spain,* application no. 24668/03, Judgment 10 August 2006.
[83] *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.
[84] *Amuur v. France*, application No. 19776/92, judgment of 25 June 1996.

3. In those cases where other vulnerable persons are detained they should be provided with adequate assistance and support.

95. Vulnerable persons, as any other asylum seeker, should only be detained exceptionally, although their situation may generally be distinguished from that of children who are particularly vulnerable and for whom the presumption against detention is therefore generally even stronger. The specific situation of vulnerable individuals should be fully taken into account both when deciding on whether to detain and in assessing what support is adequate for those who may be detained.

4. 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.

96. It should be recalled that there is a presumption of liberty under Article 5 of the European Convention, 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 regularised or they obtain admission into another country".

97. 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.

98. 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." [85] "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."[86]

99. 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), [87] including that:

(a) detention should not involve an element of bad faith or deception on the part of the authorities;[88]

(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;[89]

(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;[90]

[85] *Saadi v. the United Kigdom,* application no. 13229/03, judgment 29 January 2008, para. 66.
[86] *Ibid.* para. 67.
[87] *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.
[88] *Saadi v. the United Kigdom*, cited above, 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.
[89] *Winterwerp v. the Netherlands,* application No. 6301/73, judgment of 24 October 1979, 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.
[90] *Ibid.,* see *Bouamar* judgment, para. 50; *Aerts v. Belgium*, application No. 25357/94, judgment of 30 July 1998, *Reports* 1998-V, para. 46; *Enhorn v. Sweden,* application No. 56529/00, judgment of 25 January 2005, para. 42.

(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;[91]

(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;[92]

(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;[93]

(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";[94]

100. 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. The person concerned has the right to request that such reviews be subject to the supervision of a judicial authority.

101. 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.

102. All member states of the Council of Europe and parties to the European Convention are also parties to the ICCPR.[95] Therefore the relevant case law of the United Nations Human Rights Committee on arbitrary detention[96] should inform all decision making. These principles flesh out those of Article 5.[97]

5. 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.

103. 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. In this context, it should be recalled that access to the services of a doctor or a lawyer will be according to the modalities of national law.[98]

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[91] *Ibid*. see *Witold Litwa v. Poland, application No. 26629/95, judgment of 4 April 2000,* para. 78; *Hilda Hafsteinsdóttir v. Iceland*, application No. 40905/98, judgment of 8 June 2004, para. 51; *Enhorn v. Sweden*, cited above, para. 44.

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

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

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

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

[96] 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.

[97] With particular regard to the role played by Article 53 of the European Convention.

[98] Cf. *Nolan and K. v. Russia,* application No. 2512/04, judgment 12 February 2009*,* para. 93 and 98; *Shtukaturov v. Russia*, application no. 44009/05, judgment 27 March 2008; and *Shamayev v. Russia*, application No. 36378/02, judgment of 12 April 2005.

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

104. 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 according to the modalities of national law.

7. Detained asylum seekers should normally 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.

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

106. It should be understood that the expression “designated for that purpose” has a meaning quite distinct from that of “designed for that purpose.”

107. 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.

108. 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. 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.

109. 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.[100]

110. Staff in such facilities should be carefully selected and receive appropriate training (cf. Guideline VIII on quality of the decision-making process). 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.

111. 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.[101]

[99] Adopted on 4 May 2005 by the Committee of Ministers of the Council of Europe.
[100] See Guideline XII below and, in addition, the EU Social Charter.
[101] See further Guideline XII and Explanatory Text, paras. 117-118, as regards the obligations of the state authorities flowing from Article 8 in the context of detention.

112. 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.

113. 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.

XII. Social and medical assistance

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

114. 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, where reasonably practicable, also allow access to spiritual assistance at the request of the asylum seekers.

115. 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.

116. 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".

117. 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: "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."[102] In *Bensaid v. the United Kingdom* [103], 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

Asylum seekers and their family members within the state's jurisdiction are entitled to respect for their private and family life at all stages of the accelerated asylum procedure in accordance with Article 8 of the European Convention on Human Rights. Whenever possible, family unity should be guaranteed.

118. Under certain conditions, the protection of the right to family life and/or private life in the host country may prevent an expulsion.[104]

[102] *Pretty v. UK, a*pplication No. 2346/02, judgment 29 July 2002, para. 52.
[103] *Bensaïd v. the United Kingdom*, application No. 44599/98, judgment of 6 February 2001.
[104] *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.

119. 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[105] and requiring pragmatic and detailed consideration.[106] The notion extends beyond mere blood ties.[107] 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.

120. 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 [108] 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 of the European Convention to facilitate the family reunification of an unaccompanied foreign minor with his/her parent(s).[109] The absence of remaining carers or family members in the country of origin[110] as well as conditions in the country of return,[111] are relevant considerations, and may alternatively raise issues under Article 3.[112]

121. 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"[113]. Article 8 in its private life aspect may be engaged both in its territorial and extraterritorial application.

122. Measures should be adopted to secure respect for private life even in the sphere of the relations of individuals between themselves.[114] Guarantees of privacy are of importance when processing highly intimate and sensitive data and health records[115].

123. Personal data of asylum seekers must be protected in accordance with international standards. As a principle, personal data should only be used and processed for the purpose of the asylum procedure. This principle does not prevent the exchange of personal data between State agencies. The asylum seeker shall have the right to be informed, on request, of any personal data that is processed concerning him/her.[116]

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[105] *K. and T. v. Finland,* application No. 25702/94, judgment of 12 July 2001. *Cf. op.cit, "Asylum …"* pp. 95-99.
[106] *Al-Nashif v. Bulgaria,* application. No. 50963/99, Judgment of 20 June 2002.
[107] *Ibid.*
[108] *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.
[109] *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, application No. 13178/03, judgment of 12 October 2006.
[110] *Taspinar v. the Netherlands,* application No. 11026/84; *Bulus v. Sweden*, application No. 9330/81, decision of 19 January 1984.
[111] See *Fadele v., the United Kingdom,* application No. 13078/87, report of the Commission of 4 July 1991.
[112] See *Taspina v. the Netherlands,* and also *Tuquabo-Tekle and Others v. the Netherlands,* application No. 60665/00, judgment of 1 December 2005.
[113] *Bensaïd v. the United Kingdom*, application No. 44599/98, judgment of 6 February 2001, para. 47.
[114] 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.
[115] *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.
[116] As a main principle the asylum seeker has access to all information presented in his/her case. If there are extraordinary circumstances the asylum seeker can be denied total access. This exception is used only if it is extremely urgent according to public or individual interests. The possibility to withhold certain information mainly applies in situations concerning personal security, where police methods, analyses and gathered information must be protected or if the information originates from a preliminary police investigation. See Art. 8 European Convention, 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 computerised 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)).

XIV. Role of the United Nations High Commissioner for Refugees (UNHCR)

Even when accelerated asylum procedures are applied, member states shall allow the UNHCR to:

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

124. The United Nations High Commissioner for Refugees (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."[117] UNHCR's supervisory responsibility under its Statute is mirrored in Article 35 of the 1951 Convention and Article II of its 1967 Protocol.

b. 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;

c. 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.

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