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“Safe” countries: A denial of the right of asylum

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INTRODUCTION

On 9 September 2015, the European Commission rekindled debate on the creation of a European common list of “safe countries of origin”.¹

Designating a country of origin as “safe” implies that the human rights situation there is considered satisfactory, governed by the rule of law, and that individuals do not suffer persecution there.

“A country is considered as a safe country of origin where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Article 9 of directive 2011/95/EU, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.”

(Annex I, Directive 2013/32/EU on common procedures for granting and withdrawing international protection).

The legal basis for the notion of “safe countries of origin” under Community law appeared in 2005, in the first Asylum Procedures Directive², and was maintained when the directive was recast in 2013. Under this directive, asylum seekers from “safe” countries may be eligible only for “accelerated” procedures for the examination of their applications (Article 23(4)). The transposition of the directive into national legislations resulted in the adoption by several Member States of lists of countries considered “safe” based on their own criteria. Some Member States adopted such lists recently as part of measures taken in the context of the crisis of EU's migration policies in recent months.

The question of adopting a European common list has been raised regularly in recent years, including during work on the Asylum Procedures Directives (2005 and 2013), but several Member States have opposed the idea of a single, common list and preferred to maintain a system of national lists.

This time, the Commission is to have this list adopted, i.e. currently a “common” list of seven countries which all Member States would be obliged to respect. It aims to contribute to harmonising the implementation of the European asylum system and to improving its “efficiency” by discouraging “unjustified” or “abusive” applications, while facilitating and speeding up returns of asylum seekers refused for “manifestly unfounded” applications (see pg. 8 onwards).

This new regulation is currently being negotiated between the Council of the European Union (made up of representatives of the Member States) and the European Parliament. If adopted, it will take effect after 20 days and will henceforth be applicable to all Member States, without transposition into national law.

The seven countries deemed “safe” in the draft regulation are: **Albania, Bosnia and Herzegovina, Macedonia (FYROM), Kosovo, Montenegro, Serbia and Turkey**. Like national lists, this list can evolve, and **other countries**

¹ European Commission, *Proposal for a regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU* http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/proposal_for_regulation_of_the_ep_and_council_establishing_an_eu_common_list_of_safe_countries_of_origin_en.pdf

² Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status – <http://eur-lex.europa.eu/legal-content/en/TXT/HTML/?uri=CELEX:32005L0085>
The concept actually goes back further. During the adoption of the Treaty of Amsterdam in 1997, Spain, represented by José Manuel Aznar, insisted successfully that “any application for asylum made by a national of a Member State may [not] be taken into consideration or declared admissible for processing by another Member State”. This reservation, implying that all EU Member States should be considered “safe”, was written into Protocol 24 of the Treaty, dubbed the “Aznar Protocol”, which only Belgium refused to ratify.

could be added in the future.³

Ever since the emergence of the notion of “safe countries of origin”, our organisations have opposed its use in implementing the right of asylum. Nobody can guarantee that a country is safe for **all** its citizens. Moreover, as emphasised by the Office of the United Nations High Commissioner for Refugees (UNHCR), “*in so far as application of the concept would a priori preclude a whole group of asylum-seekers from refugee status, in UNHCR’s view this would be inconsistent with the spirit and possibly the letter of the 1951 Convention relating to the Status of Refugees*”,⁴ such as the principle of non-discrimination on grounds of nationality.

This opposition is also linked to the fact that a **specific “accelerated” procedure** and the prevailing presumption in the examination of asylum seekers’ applications breach the principle of equality before the law and make the procedure fundamentally biased.

While the use of a “common” list may put an end to discrimination between asylum seekers on the basis of their country of arrival in the EU, it would not bring to an end the inequality of rights between applicants based on their origin. This is therefore not a sufficient justification for the regulation put forward by the Commission.

³ European Commission, *An EU ‘safe countries of origin’ list*, 2015 – http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/2_eu_safe_countries_of_origin_en.pdf

⁴ Office of the United Nations High Commissioner for Refugees, *Background Note on the Safe Country Concept and Refugee Status*, EC/SCP/68, Sub-Committee on International Protection, 26 July 1991 – <http://www.unhcr.org/3ae68ccec.html>

1 – THE EUROPEAN CONCEPT OF SAFETY

Under Community law, the examination of an asylum application involves the consideration of several criteria defined in the 2011 “Qualification Directive” (2011/95/UE), which include the general circumstances in the country of origin and, potentially, the countries through which the person has travelled.⁵

⇒ Background

The emergence of the concept of safety in the European debate dates back to the early 1990s, arising from increased numbers of asylum applications being filed in Member States.

The list of safe countries of origin is a means of separating applications presumed to be well-founded from “false asylum applications”. **Fear of “bogus asylum-seekers” has been a major political marker of this initiative from the very outset.** This has been quite clear to the UNHCR which, as early as 1991, published a paper warning against the manipulation of the concept of asylum that the notion of “safety” could involve.⁶

In 1992, the EU’s Member States adopted a “Council Resolution on Manifestly Unfounded Applications for Asylum”,⁷ also known as the “London Resolution”. The resolution discusses the risks of the asylum system being overloaded by applications from persons who do not need international protection, to the detriment of those who had a “genuine” application for asylum to make. The resolution’s preparatory work⁸ clearly mentions the need for “concerted resistance to unnecessary applications for asylum in the Member States”.

If it is left up to the Member States to establish lists of “safe” countries. The London Resolution announced that the aim was to eventually adopt a common list.

⇒ Legislative basis of the concept

While the first discussions between EU Member States date back to the early 1990s, several of them were already using the concept of “safe” countries in their asylum legislation.⁹

This notion was incorporated into Community legislation in the 2005 Asylum Procedures Directive (2005/85/EC), which set out the criteria whereby countries can be designated **safe** (Articles 30 and 31 and Annex 1 of the directive). The directive’s recasting in 2013 confirmed the use of this notion and set out various principles, defined in Articles 35 to 37 (directive 2013/32/EU).

⇒ Criteria for the designation of a country as “safe”

The notion of safety is determined on the basis of an assessment of circumstances in a country and how the country ensures, in law and in practice, protection against persecution and mistreatment.

⁵ Applicable standards, respect of the rule of law and individual freedoms, effectiveness of procedural safeguards, and economic, social, cultural, civil and political rights.

⁶ See footnote no. 4.

⁷ Council of the European Union, *Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum* – <http://www.refworld.org/docid/3f86bbcc4.html>

⁸ Council of the European Union – Ad Hoc Group Immigration, *Draft Resolution on manifestly unfounded applications*, 1992 <http://database.statewatch.org/e-library/1992-pre-021.pdf>

⁹ Council of the European Union, *Monitoring the implementation of instruments adopted concerning asylum: Summary report of the Member States’ replies to the questionnaire launched in 1997* (ref. 8886/98), 17 July 1998 – <http://database.statewatch.org/e-library/199808886ihasg1wp1036.pdf>

The notion of persecution is defined in Article 9 of the Qualification Directive (2011/95/EU) and covers acts or accumulations of various measures sufficiently serious by nature or repetition as to constitute a severe violation of basic human rights:¹⁰

- Acts of physical or mental violence, including acts of sexual violence;
- Legal, administrative, police, and/or judicial measures which are, per se, discriminatory or which are implemented in a discriminatory manner;
- Prosecution or punishment which is disproportionate or discriminatory;
- Denial of judicial redress resulting in a disproportionate or discriminatory punishment;
- Prosecution or punishment for refusal to perform military service in a conflict;
- Acts of a gender-specific or child-specific nature.

The situation must be examined regularly and countries must be withdrawn from the list if they no longer fulfil the criteria to qualify as “safe”. The definition contained in the Asylum Procedures Directive imposes particularly demanding standards for respect of rights, because this assessment influences the examination of the application for protection of a person who claims to fear for his/her life, dignity and rights.

EU candidate countries must fulfil the criteria set out by the Asylum Procedures Directive, in addition to the “Copenhagen criteria”.¹¹ Five of the seven countries on the Commission’s list are currently candidates.

⇒ “Safe countries of origin” and “safe third countries”

It is important to distinguish between “safe countries of origin” and “safe third countries”. A “safe third country” is a non-EU country through which the asylum seeker has transited and to which he/she may be returned, as the Member State considers the asylum application should have been lodged there. The application for asylum is therefore examined not by the Member State but by the “safe third country” in question. The Commission is, moreover, considering the adoption of a common list of “safe third countries”, in order to harmonise this notion across the EU.

*“A third country can only be considered as a safe third country (...) where:
(a) it has ratified and observes the provisions of the Geneva Convention without any geographical limitations;
(b) it has in place an asylum procedure prescribed by law; and
(c) it has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and observes its provisions, including the standards relating to effective remedies.
(...) The applicant shall be allowed to challenge the application of the concept of European safe third country on the grounds that the third country concerned is not safe in his or her particular circumstances.”*

(Article 39(2) of directive 2013/32/EU on common procedures for granting and withdrawing international protection).

Pursuant to Article 38 of the Asylum Procedures Directive, a transit country may be designated as safe only if the competent authorities are “satisfied” that the applicant’s life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion, sex or sexual orientation. The authorities must also ensure there is no risk of serious harm to the rights of the applicant or of torture and cruel, inhuman or degrading treatment, or of removal to a country where they could be persecuted or exposed to the risk of violation of their human rights. Lastly, the person must be able to obtain

¹⁰ To assess that, Member States must, under the Asylum Procedures Directive, take into account: the relevant laws and regulations of the country and the manner in which they are applied; observance of the rights and freedoms laid down in the European Convention for the Protection of Human Rights (ECHR) and Fundamental Freedoms and/or the International Covenant for Civil and Political Rights and/or the United Nations Convention against Torture; respect for the non-refoulement principle in accordance with the 1951 Geneva Convention; and provision for a system of effective remedies against violations of those rights and freedoms.

¹¹ The accession criteria, or Copenhagen criteria (after the European Council in Copenhagen in 1993 which defined them), are the essential conditions all candidate countries must satisfy to become an EU Member State. http://ec.europa.eu/enlargement/policy/glossary/terms/accession-criteria_en.htm

refugee status in accordance with the Geneva Convention in the third country concerned.

That means that the national legislation of the “safe third country” must allow individuals’ applications for asylum to be examined in accordance with all the procedural safeguards established under international law, including the right to an effective remedy, to apply for refugee status, and to enjoy the rights enshrined in the Geneva Convention, including economic and social rights.

Moreover, a **sufficient connection** must exist between the person and the transit country to which they are returned. The applicant may challenge before an independent authority the existence of this connection and the application of the safe third country concept on the ground that the third country is not safe in their particular circumstances. Appeals against decisions considering applications for asylum inadmissible have suspensive effect. Pending the decision of the competent authority, the person cannot, therefore, be removed to the transit country considered safe.

⇒ A concept applied inconsistently and based on ambiguous criteria

It is abundantly clear that, between Member States, the process for selecting countries for inclusion on national “safe countries of origin” lists is generally most opaque. **National procedures and the sources used to make the selection are rarely made public, and civil society is hardly ever consulted.**

According to the European Commission, 13 Member States created such lists in 2015: Austria, Belgium, Bulgaria, Czech Republic, Denmark, France, Germany, Hungary, Ireland, Luxembourg, Malta, Slovakia and the United Kingdom.

The proposed European common list is supposed to be based primarily on pre-existing national lists, thus codifying a practice that is already “common”. However, analysis of these 13 national lists brings to light major discrepancies:

- The total number of countries considered “safe” by national lists ranges from one for Ireland to 23 for Malta ;
- No country is acknowledged to be “safe” by all 13 of Member States unanimously ;
- The countries chosen for the EU's common list are not unanimously approved either, as Bosnia and Herzegovina appears on only 9 of the 13 lists, while Macedonia (FYROM), Montenegro, Albania and Serbia are on 8, Kosovo on 6, and Turkey on only one.

Moreover, the **terms of transposition of the very notion of “safety” differ** from country to country. For example, the concept of there being generally and consistently no persecution or serious threat of persecution has been interpreted differently by national lawmakers, particularly as regards the issue of gender. While France clearly sets out a principle of uniformity for all individuals (men and women), the United Kingdom does not mention the issue in its legislation, allowing it to distinguish between men and women for certain countries and consider Gambia and Ghana, for example, “unsafe countries of origin” for women.

Procedures for drawing up these national lists also vary greatly, as the bodies responsible for designating “safe” countries and the possibilities for challenging or verifying these designations are not the same from country to country. Sometimes, moreover, countries have “joined” lists before “leaving” them a few months later and, in some cases, being added once more. For example, France added Kosovo to its list of “safe countries of origin” in December 2013, before removing it in October 2014 after a challenge before the highest administrative jurisdiction, the *Conseil d’État*, by human rights associations. The authorities later decided to override that ruling and add Kosovo to the list once more in October 2015. A new appeal has been lodged with the *Conseil d’État*. While the possibility to re-examine the situation in the various countries can be seen as positive, the criteria used and the sources upon which national authorities base their decisions

remain unclear and untransparent. This lack of transparency can, moreover, lead to a problem of legal uncertainty for asylum seekers, as their treatment can vary depending on the period in which their application is submitted and processed without their knowing why.

The lack of transparency and discrepancies around the procedure for designating a country as “safe” raise questions as to potential **political motivations** underlying the production of these lists. Motivations can also be pragmatic. For example, Bulgaria’s decision to designate Armenia and Turkey “safe” is likely motivated by reasons including a desire to protect themselves against an increased risk of immigration from its two neighbouring countries.

The most telling example of this manipulation of the concept of safety is without a doubt the European Commission’s current efforts to establish Turkey as a “safe” country of origin and “safe” third country at European level, at a time when the human rights situation in Turkey is the worst it has been in several decades.¹² It appears that, in this particular case, the EU is not taking into account Turkey’s fulfilment of the “Copenhagen criteria” or those established by the Asylum Procedures Directive, the Qualification Directive and the Returns Directive. The primary goal of this manoeuvre, in line with current European migration policy and in particular the agreement signed in March 2016 with Turkey, is to make it possible to send back migrants and asylum seekers who arrived in Europe via the country.

Yet the UNHCR had warned in 1991 that “An added concern regarding the concept is that, as it is often explained by States, one purpose of its application is to encourage democratisation processes in countries of origin. **However, promoting ‘normalisation’ in countries through the medium of the asylum procedure is inappropriate, in UNHCR’s view;** it serves to politicise an essentially humanitarian process.”¹³

Considering the general safety of a country does not allow **individual circumstances** to be taken into account adequately, such as those of members of minority groups who can face specific discrimination in countries where the rest of the population is generally “safe”. The situation of Roma minorities and lesbian, gay, bisexual, trans- or intersex (LGBTI) people, or cases of police violence against certain sections of the population for political or socio-cultural reasons, are telling examples, including within the EU, showing why **a country must not be blindly considered “safe” for everyone, as well as the irrelevancy of this notion** (see the country studies attached to this note).

This argument has, moreover, been raised by several institutions in response to the Commission’s proposal. Most recently, the European Union Agency for Fundamental Rights (FRA)¹⁴ responded to the Commission proposal, emphasising the need to ensure particular attention for members of minority groups who are in particular danger of suffering discrimination if they are sent back. On 10 December 2015, the European Economic and Social Committee¹⁵ called for the “safe country of origin” concept not to be applied to countries where freedom of the press or political pluralism have been undermined, or where cases of persecution on the grounds of sex or sexual orientation or against national, ethnic, cultural or religious minorities have been identified. **The accelerated procedures applied to individuals from countries considered “safe” do not provide adequate safeguards to ensure the examination of these individual circumstances.**

¹² EuroMed Rights & FIDH (2016), *Solidarity with Human Rights Defenders From Turkey* – <http://euomedrights.org/publication/solidarity-with-human-rights-defenders-from-turkey/>

¹³ See footnote no. 4.

¹⁴ European Union Agency for Fundamental Rights (FRA), *4 fundamental rights issues to consider in EU safe countries list*, 6 April 2016 – <http://fra.europa.eu/en/press-release/2016/4-fundamental-rights-issues-consider-eu-safe-countries-list>

¹⁵ European Economic and Social Committee, *Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin*, 10 December 2015 – <http://www.eesc.europa.eu/?i=portal.en.rex-opinions&itemCode=37220>

2 – LIMITATIONS ON THE RIGHT OF ASYLUM

⇒ Concerns expressed by the UNHCR

The notion of “safety” impacts on the manner in which applications are examined by **limiting the procedural safeguards to which any person in need of international protection is entitled**. The application of this notion is therefore discriminatory and dangerous for asylum seekers. In 1991, the UNHCR issued a warning on this risk:

“Application of the safe-country concept in relation to countries of origin leads to nationals of countries designated as safe being either automatically precluded from obtaining asylum/refugee status in receiving countries or, at least, having raised against their claim a presumption of non-refugee status which they must, with difficulty, rebut”.¹⁶

The High Commissioner did, however, consider at that time that if the procedural safeguards were maintained throughout every step of the procedure, the systematic use of the notion should not, therefore, prejudice the asylum seeker, but facilitate a more rapid processing of applications. On this point, the UNHCR’s analysis stresses the intrinsic risk that the notion of “safe country” may represent **for the fair treatment of asylum seekers during the procedure**.

Years of analysis of the procedure in various Member States have proven that **the application of the notion of “safety” does a disservice to a large number of asylum seekers during the procedure, sometimes even excluding them from it**.¹⁷

⇒ Presumption of inadmissibility of asylum applications: a heavier burden of proof

The EU established an accelerated system for processing asylum requests from applicants from a “safe country of origin” (article 31 (8) (B) of the Asylum Procedures Directive). This is supposed to enable asylum applications to be examined rapidly via **“accelerated” procedures**.

The stated objective of the list of “safe countries of origin” is to enable faster identification of the applicants whose asylum applications are unfounded. The request may even be deemed “manifestly unfounded”, as stated in Article 32(2) of the Asylum Procedures Directive, which introduces the presumption of an unfounded request¹⁸ thereby adding a further burden of proof to the applicant, who must prove he/she is in need of international protection. In this case, it is presumed that the person is not fleeing a risk of persecution given the situation in their country of origin. This presumption may cause the examining Member State to question the reliability and truth of the facts put forward by the applicant, which may result in an unequitable examination of the application.

Among the 13 Member States that have drawn up their own lists of “safe countries of origin”, 11 of them (Austria, Belgium, Czech Republic, Denmark, France, Germany, Hungary, Ireland, Malta, Slovakia, United Kingdom) consider that an asylum application from a citizen of one of these countries **is presumed manifestly**

¹⁶ See footnote no. 4.

¹⁷ Immigration Law Practitioners’ Association (ILPA), *Analysis and Critique of Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status* (30 April 2004), July 2004 – www.ilpa.org.uk; Coordination Française pour le Droit d’Asile, *Il n’existe pas de pays sûr*, 13 April 2005 – <http://cfda.rezo.net/procedures/com-13-04-05.html>

¹⁸ Opinion of the European Union Agency for Fundamental Rights (FRA) concerning an EU common list of safe countries of origin http://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-opinion-safe-country-of-origin-01-2016_en.pdf

unfounded.¹⁹ In addition to introducing a presumption of unfounded application, the notion of “manifestly unfounded application” has other procedural consequences. If, following examination, the person’s application is rejected and the applicant appeals the decision, **the appeal will not be suspensive** and the person will be sent back to their “safe country of origin” pending the appeal decision (see below), which renders the right to recourse ineffective in practice.

The list of “safe countries of origin” and the accelerated procedures that this list entails means that the **presumption is turned against the applicant**. To presume that requests from citizens of “safe countries of origin” are manifestly unfounded comes down to disqualifying them outright. The concept of “safe country of origin” is therefore a discriminatory one, which lays the burden of proof on the applicant, making it much more difficult for them to exercise their rights in practice.

In this regard, France’s National Consultative Committee on Human Rights has recommended the suppression of the concept of “**safe countries of origin, which institutes unequal treatment among asylum seekers and is therefore incompatible with Article 3 of the Geneva Convention**” which states that ‘the Contracting States shall apply the provisions of this Convention without discrimination founded on race, religion or country of origin’ since 2001.²⁰

Does this list facilitate deportation?

It is important to stress the link, in the approach as well as in its implementation, between the notion of “safe country of origin” and the notion of returning a person to the country of origin. While there is no explicit reference in the Commission’s proposal on the conditions under which rejected asylum seekers should be returned, the EU’s strategy for a returns policy, published the same day as the proposed list of safe countries of origin, specifies that:

“An effective returns policy requires the existence of a functioning asylum system, to ensure that unfounded asylum claims lead to swift removal of the person from the European territory”.

EU Action Plan on Return, 9 September 2015, pg. 5²¹

⇒ **No suspensive appeal: raising concerns over the principle of non-refoulement**

The suspensive effect of recourse (Asylum Procedures Directive, Article 46(5)) against a rejected asylum application is a key guarantee of the efficacy of the right to recourse and respect of the principle of non-refoulement, because unless the applicant accepts, they cannot be deported or forced to leave the territory while the challenge has not been duly examined. The Asylum Procedures Directive does, however, allow States not to grant suspensive recourse to persons whose application was initially considered unfounded or manifestly unfounded.

The United Nations Committee against Torture issued a statement in May 2010 on this topic, in relation to the non-suspensive nature of recourse in accelerated (“priority”) procedures in France. According to the Committee:

¹⁹ AIDA (Asylum Information Database) 2015 reports – <http://www.asylumineurope.org/reports>; Czech Republic, *Act on Asylum*, 11 November 1999 – <http://bit.ly/1YiAqTc> Danish Immigration Service website - https://www.nyidanmark.dk/en-us/coming_to_dk/asylum/asylum_process/more_about_applying_+asylum.htm; Republic of Slovakia, *Act on Asylum*, 20 June 2002 – <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=44a2a04b4&skip=0&query=slovakia%20asylum>

²⁰ French « Commission Nationale Consultative des Droits de l’Homme », *Avis relatif aux travaux de l’Union européenne sur l’asile et au Sommet de Laeken*, 23 November 2001 – http://www.cncdh.fr/sites/default/files/01.11.23_avis_travaux_eu_sur_lasile.pdf

²¹ European Commission, EU Action Plan on Return, 9 September 2015, p.5 – http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/communication_from_the_ec_to_ep_and_council_-_eu_action_plan_on_return_en.pdf

“An applicant may therefore be returned to a country where he is at risk of torture before the National Court on the Right of Asylum can hear his request for protection. (...) the Committee is not convinced that the priority procedure offers adequate safeguards against removal where there is a risk of torture (art. 3).” The Committee recommended that France “introduces an appeal with suspensive effect for asylum applications conducted under the priority procedure.”²²

Similarly, several decisions handed down by the European Court of Human Rights are in favour of examining the legitimacy of the lack of appeal with suspensive effect at each stage of the asylum application process.²³ As a result, the notion of “safety” does not sufficiently safeguard the respect of the fundamental procedural guarantees of the right of asylum, such as the need for an effective remedy and therefore appeal with suspensive effect, or the fundamental principle of non-refoulement.

⇒ Accelerated or hasty procedures

Accelerated procedures are not designed to bear any prejudice to the individual examination of an asylum application, under the principles of the Asylum Procedures Directive (recital 30). However, given the current challenges and the difficulties that national authorities face in examining asylum applications within a timeframe compliant with the directives, the adoption of a list of “safe” countries raises concerns that hasty procedures will be legitimised, within EU territory and borders.

The risk that these “hasty” procedures may weaken procedural safeguards is even greater because practices vary enormously from one country to another, despite efforts towards harmonisation at the European level. A common list of “safe countries of origin” will not resolve the issue posed by the variety of asylum procedures across the EU.

Despite the attempt at harmonisation undertaken through the Common European Asylum System, the period of evaluation of asylum applications (accelerated or not) remain very different depending on the Member State. Certain accelerated procedures may only take a few days (Bulgaria, Malta, Spain, and the United Kingdom), others two weeks (France), a month (Poland), or three months (Greece and Sweden), while other states such as Italy and Hungary have no accelerated procedures. Others practice accelerated procedures at the borders only (eg. Spain).

⇒ Inadmissibility: refusing access to asylum in the EU

Asylum applications deemed inadmissible do not have to be examined fully, and applicants may be returned to their country of origin or a “safe” third country. This means that applications for asylum submitted by persons from a “third safe country” may be considered **inadmissible**, pursuant to Article 33(2)(c) of the Asylum Procedures Directive. Appeals against asylum applications deemed inadmissible are not suspensive.

This is a violation of the principles of asylum application examination, especially since it may potentially be applied to a country such as Turkey, which only grants refugee status to persons from European countries,²⁴

²² Committee against Torture, *Concluding observations by the Committee against Torture - France*, 26 April – 14 May 2010 – <http://www2.ohchr.org/english/bodies/cat/docs/A-65-44.pdf>

²³ For example, European Court of Human Rights, *I. M. vs. France*, Strasbourg, 2 February 2012 – <http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.FRA.CO.4-6.pdf>

²⁴ “The Government of Turkey maintains the provisions of the declaration made under section B of article 1 of the Convention relating to the Status of Refugees, done at Geneva on 28 July 1951, according to which it applies the Convention only to persons who have become refugees as a result of events occurring in Europe, and also the reservation clause made upon ratification of the Convention to the effect that no provision of this Convention may be interpreted as granting to refugees greater rights than those accorded to Turkish citizens in Turkey”, Protocol relating to the status of refugees concluded in New York on 31 January 1967 – <http://www.unhcr.org/3b66c2aa10.html>

and where even persons granted international protection do not enjoy all the rights guaranteed by the Geneva Convention, including certain economic and social rights, and may even see their life threatened (eg. the murder of Syrian refugees in Turkey in 2015 and 2016).²⁵

Furthermore, according to the Asylum Procedures Directive, the applicant must have a connection to the third country in question: the person cannot be deported to a country with which they have no connection. This connection must be “reasonable” – with no further detail provided; this grants Member States significant power of interpretation and enables them to interpret it restrictively.

In addition, the notion of “safe third country” means considering that an asylum seeker should submit an application for asylum in a country through which they have travelled rather than in the EU.

3 – THE EUROPEAN AGENDA ON MIGRATION

The Commission’s proposal for a regulation that establishes a list of “safe countries of origin” was made public on 9 September 2015. This notion was introduced on 13 May 2015 as one of the key measures of the European Agenda on Migration:²⁶ it aims to offer a solution to the increasing numbers of migrants drowning in the Mediterranean and the emergency situation in receiving and handling the arrival of migrants, asylum seekers and refugees in Europe.

The list is presented as an “essential tool supporting the swift processing of applications that are likely to be unfounded” (recital 3).

⇒ Inadequate consultation

In July 2015, the Council of the European Union showed its support for drafting a list of safe countries, requiring the European Asylum Support Office (EASO) to organise a meeting with experts from various Member States on 2 September 2015. A consensus seemed to emerge on a list comprised of the various candidates for EU membership located in the Balkans: Albania, Bosnia and Herzegovina, Kosovo, Macedonia (FYROM), Montenegro and Serbia.

At the initiative of the European Commission, Turkey was added to the proposed list, although it is currently deemed safe only by Bulgaria.

This consultation of Member States was accompanied by information collected on the various countries concerned, namely reports from the European External Action Service (EEAS), EASO, the UNHCR, the Council of Europe “and other relevant international organisations”.²⁷

It would not be excessive to say that civil society was thus excluded from the consultation and that only “official” European or international bodies were taken into consideration.

This haste and lack of transparency were noted by the European Parliament’s rapporteur, Sylvie Guillaume

²⁵ Al Jazeera, *Syrian journalist shot by ISIL in Turkey dies*, 13 April 2016 – <http://www.aljazeera.com/news/2016/04/syrian-journalist-shot-isil-turkey-dies-160413074030033.html>

²⁶ European Commission, *Managing migration better in all aspects: a European Agenda on Migration*, 13 May 2015 – http://europa.eu/rapid/press-release_IP-15-4956_en.htm

²⁷ See footnote no.1.

(S&D),²⁸ who requested that the evaluation of the list of countries proposed in the appendix be pushed back in order to await further evaluations of the situation in those seven countries by EASO. She also proposed more systematic consultation of civil society for the drafting and updating of the common list.

This methodology contradicts the **recommendations of the EASO agency**, which stress that it is important “to search for as wide a range of sources as possible which reflect differing opinions about the issue or event, as this will help to ensure a balanced picture is obtained and presented in the report [information report on the country of origin]”.²⁹

The European Economic and Social Committee, consulted by the Parliament, the Commission and the Council for this proposed regulation, also considered, in its opinion on the proposal for a list of “safe countries of origin”, that it would be “necessary to establish a mechanism whereby recognised organisations defending human rights, together with ombudsmen and economic and social committees, may initiate the procedure to amend the list”.³⁰

⇒ **The Commission’s criteria for identifying “safe” countries**

The preamble of the regulation proposed by the Commission refers explicitly to the common criteria provided by the Asylum Procedures Directive to establish a list of “safe countries of origin” at national level. These same criteria are cited as references to assess whether a country should be removed from the list (Article 3).

Nonetheless, these criteria are cause for concern and do not truly reflect the level to which the rights listed in the definition of the directive must be respected, as if the mere fact that these States are engaged in the EU access process makes them “safe”.

⇒ **Criticism of the restrictive assessment of the human rights situation in the countries listed**

The Commission seems to rely on an **excessively restrictive evaluation of rights violations**. A certain number of elements in the Qualification Directive, despite being a cornerstone of European asylum law, are not taken into consideration.

These failures were not overlooked by the European Economic and Social Committee, which stressed the need to provide access to appeal with suspensive effect in order to fully apply the procedure directive, considering that the indicators highlighted by the Commission “**do not properly assess the criteria set out in Annex I of the Procedures Directive, for example, by not analysing the practical application of the law and respect for human rights, or the absence of persecution or serious harm on the grounds determining eligibility for international protection**”.

Furthermore, while the European Commission mentions a certain number of rights violations occurring in each of the countries proposed in the list, the text presents them as isolated cases in specific individual circumstances.

We should point out that the violations and discrimination mentioned are based on belonging to a certain

²⁸ European Parliament, *Draft Report on the proposal for a regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU*, 13 April 2016 – <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPART&reference=PE-576.958&format=PDF&language=EN&secondRef=01>

²⁹ European Asylum Support Office (EASO), *Country of Origin Information report methodology*, 2012 – http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/european-asylum-support-office/coireportmethodologyfinalayout_en.pdf

³⁰ See footnote no. 15.

group, for example journalists, political opponents, LGBTI persons, ethnic minorities, vulnerable groups and foreigners. **The very fact that the Commission notes such violations raises doubts over the “safe” qualification it intends to apply to these countries.**

The Commission assumes that being party to the European Convention on Human Rights, which ensures the possibility of recourse before the European Court of Human Rights (ECHR), is in itself a sufficient guarantee of the protection of fundamental rights and the effectiveness of a system of recourse and redress in the event of rights being violated.

It is false to consider that a country’s low rate of convictions before the ECHR is proof that there are few rights violations in that country. This is particularly inaccurate as certain countries may attempt to limit access to effective recourse before the Court; this is the opinion of certain victims of attacks in Gezi Park in Istanbul (Turkey) in 2013, who believe that their appeal to the Constitutional Court of Turkey was ineffective³¹ due to the weaknesses of the rule of law and lack of impartial justice in the country.

This statistical argument is also limited in cases that rely on figures of admissible asylum applications to decide whether a country is “safe” or not. Statistical trends cannot replace a comprehensive knowledge of the asylum system and reasons for rejecting asylum applications; this is particularly true for citizens of the Balkan countries, whose asylum applications are very often considered to be unfounded, whereas this is not always true. This prejudice is also present in risk analyses concerning the Western Balkans, conducted by the European agency Frontex, which appeared to have detected a “seasonal pattern to asylum applications from Roma populations as a livelihood strategy”.³²

Finally, we also have significant questions over the notion of “non-refoulement”, which should not be linked to the ratification and effective implementation of the Geneva Convention. However, the fact that a person is not returned from a country does not mean that their right to request asylum, obtain refugee status and enjoy the rights associated with them will be guaranteed. Furthermore, cases of expulsion and refusal to allow migrants enter the territory have been documented in certain countries listed by the Commission.³³

³¹ Hürriyet Daily News ‘*Relatives of Gezi Park victims appeal to ECHR*’, 11 October 2013 – <http://www.hurriyetdailynews.com/relatives-of-gezi-park-victims-appeal-to-echr.aspx?pageID=238&nID=56118&NewsCatID=339>

³² Frontex, *Western Balkan Annual Risk Analysis*, 2012, pg. 29 – http://frontex.europa.eu/assets/Publications/Risk_Analysis/WB_ARA_2012.pdf

³³ Amnesty International, *Turkey: illegal mass returns of Syrian refugees expose fatal flaws in EU-Turkey deal*, 1 Avril 2016 – <https://www.amnesty.org/en/press-releases/2016/04/turkey-illegal-mass-returns-of-syrian-refugees-expose-fatal-flaws-in-eu-turkey-deal/>
Human Rights Watch, *Serbia: Police abusing migrants, asylum-seekers*, 15 April 2015 – <https://www.hrw.org/news/2015/04/15/serbia-police-abusing-migrants-asylum-seekers>

Amnesty International, *Europe’s Borderlands – Violations against refugees and migrants in Macedonia, Serbia and Hungary* (2015) – https://www.amnestyusa.org/sites/default/files/ser-mac_migration_report_final.compressed.pdf

CONCLUSIONS AND RECOMMENDATIONS

No country can be considered to be completely “safe” for everyone. The use of the notion of “safety” implies a lowering of procedural guarantees that undermines the quality of the examination of applications, and consequently the rights and safety of the asylum seekers to whom it applies. It is therefore a notion that contradicts the Geneva Convention and the principle of the right to effective remedy.

Despite the warnings of these risks issued by international organisations, European human rights protection institutions and non-governmental organisations, and despite unequivocal court decisions at national and European level (see above), the European Commission, Member States and the European Parliament are currently reviewing a regulation “on safe countries of origin”. **In an attempt to rationalise and harmonise the European system, the EU is giving institutional legitimacy to the manipulation of asylum applications in order to control migration flows.**

These concerns are particularly worrying in the current context of deportations from Greece to Turkey, following the signing of an agreement between the European Union and Turkey on 18 March 2016,³⁴ and since the closure of the “Balkan route”.

The variety of existing national lists and procedures proves that **an assessment by each State of a country’s level of “safety” entails a risk that geopolitical interests will prevail over the rights of asylum seekers.**

In the current context, there is concern that the notion of “safe countries of origin” will increase the use of expeditious procedures that do not fulfil the procedural guarantees required by the Geneva Convention.

AEDH, EuroMed Rights and the FIDH firmly oppose the use of the notion of “safety” to process certain asylum applications differently. The use of this notion results in Member States violating their international obligations in terms of procedural safeguards and outsourcing their responsibilities in terms of asylum. Our organisations are opposed to the adoption of common lists of “safe countries of origin” and “safe third countries”.

At the very least, it is essential that any decision to establish a common list of “safe countries of origin”:

- Be preceded and accompanied (assessment) by substantial and effective consultation of civil society ;
- Does not bear any prejudice to the procedural guarantees that every person in need of international protection is entitled to, in particular the right to effective, and therefore suspensive, appeal.

³⁴ Council of the European Union, *EU-Turkey statement*, 18 March 2016 – <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>

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