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Joint Submission of the International Commission of Jurists (ICJ) and of the European Council on Refugees and Exiles (ECRE)

to the United Nations Special Rapporteur on the human rights of migrants report on access to justice for migrants

16 April 2018

The International Commission of Jurists (ICJ) and the European Council on Refugees and Exiles (ECRE) welcome the opportunity to present to the United Nations Special Rapporteur on the human rights of migrants their submission in advance of the forthcoming report on access to justice for migrants, to be presented at the United Nations General Assembly's 73rd session in October 2018.

A national legal system that can provide effective access to justice and effective remedies for violations of human rights is essential, given that these are the principal means that human rights beneficiaries have of ensuring that their own rights are protected. In order to ensure this, legal standards and the overall justice system, lawyers, judges, prosecutors, legal practitioners and civil society must operate effectively to provide migrants with access to effective legal remedies for violations of their human rights.[1]

In this regard, the ICJ has developed a set of *Principles on the Role of Judges and Lawyers in relation to Refugees and Migrants*[2] that seek to help judges and lawyers, as well as legislators and other government officials, better secure human rights and the rule of law in the context of large movements of refugees and migrants. They are intended to complement existing relevant legal and other international instruments, including the New York Declaration, as well as the Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations within large and/or mixed movements being developed by the OHCHR. The Principles were developed on the basis of consultations with senior judges, lawyers, and legal scholars working in the field of international refugee and migration law, as well as with States and other stakeholders.

The joint submission provides a brief overview of aspects of access to justice for migrants, with a particular focus on asylum seekers and migrant children, in European countries. The issues dealt with include:

- obstructions to access to justice in relation to access to the territory;
- the undue use of national security exceptions to weaken access to justice in immigration procedures;
- concerns with access to justice in expulsion and detention procedures;

[1] Articles 2 and 3 of the *UN Basic Principles and Guidelines on the right to a remedy and reparation*. See article 2.3 of the International Covenant on Civil and Political Rights (ICCPR) and article 13 of the European Convention on Human Rights (ECHR) among others.
[2] The ICJ Principles are available at https://www.icj.org/rmprinciples/ .

- specific obstacles to access to justice for asylum seekers, including when appealing the rejection of their claims by first instance asylum authorities before a judicial or administrative appeal body;
- specific obstacles to access to justice for undocumented minors.

1. Access to justice and access to the territory: readmission agreements, safe country exceptions and push-backs

In Europe, in recent years, a tendency has developed to avoid or short-circuit effective access to justice for migrants, including refugees, who are attempting to access the territory.

Italy, among other States, has conducted push-back operations in the high seas, sometimes under the guise of rescue operations in what the European Court of Human Rights condemned as a violation of the prohibition of collective expulsions[3] as well as of the principle of *non-refoulement*[4] in both its substantive and procedural limbs.[5] Push-backs also continue to be widely reported at European countries' land borders, with examples from France, Italy, Croatia, Romania and Poland among other countries.[6]

Another example of push-backs is the erection of walls at the border aimed at impeding access to the territory and to legal procedures for admission. These operations also obstruct access to justice in case of human rights violations, as currently occurring in the Spanish enclaves of Ceuta and Melilla,[7] at the Greek-Turkish Evros border and at the Hungarian border with Serbia and Croatia.[8] Sometimes, such as in the case of Hungary, these measures are coupled with the creation within the country of a zone of legal exception within which runs a presumption of non-admission. In these zones that are within Hungarian territory, a person is typically excluded from Hungary merely on the grounds that they have passed through Serbia, considered by Hungary, contrary to UNHCR advice, to be a "safe third country." The exclusions occur without the possibility for affected persons to effectively file an appeal against the rejection for risk of violation of the principle of *non-refoulement*.[9]

As the UN Special Rapporteur on torture has pointed out, "[b]oth "pushbacks" and border closures amount to collective measures that are designed, or of a nature, to deprive migrants of their right to seek international protection and to have their case assessed in an individualized due process proceeding and, therefore, are incompatible with the prohibition of refoulement."[10]

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[3] Article 4 of Protocol 4 to the ECHR, article 12.5 of the African Charter on Human and Peoples' Rights, article 22.9 of the American Convention on Human Rights (ACHR), article 26.2 of the Arab Charter on Human Rights, and article 22.1 of the International Convention on the Rights of Migrant Workers and of the Members of Their Families (ICRMW). Although no express ICCPR provision prohibits collective expulsions, the Human Rights Committee has been clear that "laws or decisions providing for collective or mass expulsions" would entail a violation of Article 13 ICCPR, see CCPR, General Comment No. 15, The position of aliens under the Covenant, 30 September 1986, para. 10.

[4] Articles 6, 7, 9 and 14 ICCPR; article 3 CAT; articles 2,3, 5 and 6 ECHR, for more sources, see ICJ, Practitioners Guide no. 6, Migration and International Human Rights Law, Second Edition, 2014, Chapter 2.

[5] See, *Hirsi Jamaa and Others v. Italy*, ECtHR, GC, Application no. 27765/09, 23 February 2012.

[6] Asylum Information Database, *Asylum systems in 2017 : Overview of developments from selected European countries*, March 2018, available at : https://bit.ly/2GAMsJz.

[7] See, *N.D. and N.T v Spain*, ECtHR, Applications nos. 8675/15 and 8697/15, Judgment of 3 October 2017 (Grand Chamber ruling pending).

[8] ECRE, *What's in a name : The reality of first 'reception' at Evros*, February 2015, available at : https://bit.ly/2jZUe4h; *Crossing boundaries : The new asylum procedure at the border and restrictions to accessing protection in Hungary*, October 2015, available at : https://bit.ly/2CTbUmK.

[9] See description and first ruling of ECtHR in *Ilias and Ahmed,* ECtHR, Application no. 47287, Judgment of 14 March 2017 (Grand Chamber ruling pending). Note that the Hungarian authorities have stopped issuing "safe third country" decisions as of mid-2017: Asylum Information Database, Country Report Hungary, 2017 Update, February 2018, available at: https://bit.ly/2Fnqu8V, 60.

[10] *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. no. A/HRC/37/50, 26 February, para. 54

A related phenomenon, also identified by the UN Special Rapporteur on torture, is that of pull-backs, i.e. "operations [that] are designed to physically prevent migrants from leaving the territory of their State of origin or a transit State (retaining State), or to forcibly return them to that territory, before they can reach the jurisdiction of their destination State."[11] As the Special Rapporteur pointed out, "[b]y their very nature, "pullbacks" prevent migrants from exercising their rights to leave any country or territory; not to be detained arbitrarily; to seek and enjoy asylum; and to have individual rights and duties determined in a due process proceeding."[12] Most recently, cases have been registered of boats rescued by NGOs that were later forced to transfer migrants to Libyan authorities or of assistance by Italian Government programmes to Libyan coastguard with the effect to prevent exit from the Libyan territorial waters.[13] These cases could constitute cases of pull-back that should be assessed from the perspective of their impact on access to justice.

International agreements by the European Union and its Member States have further crystallized this series of attempts to circumvent access to justice regarding admission to the territory. The most significant of these agreements to date is the deal or 'statement' of 18 March 2016 between the European Union and Turkey (which actually according to the General Court of the EU is only between the 28 Member States and Turkey)[14] to establish *inter alia* swift return from Greece to Turkey of any migrant or asylum seeker attempting to reach Greece who does not apply for international protection there or whose application is deemed unfounded or inadmissible. In order to facilitate such returns, Turkey has been declared to be a "safe third country" by Greek authorities as far as Syrian nationals are concerned, which could allow for the dismissal of asylum requests in Greece based on this element alone, and the rapid return of applicants.

These practices have also been recently reported by the UN Special Rapporteur on Torture in his annual report to the UN Human Rights Council: "readmission agreements circumvent migrants' due process rights and fall short of the procedural precautions States must take to ensure returnees will not be exposed to torture or ill-treatment. Moreover, in practice, States often make unrealistic blanket assessments, such as automatically equating democratic countries with "safe" countries, or conclude readmission agreements with States known to practice chain refoulement, or even torture and ill-treatment".[15]

The ICJ and ECRE requests the UN Special Rapporteur on the rights of migrants to take account of all these actions that have been documented as serious and systematic attempts to circumvent the human rights guarantees and access to justice that must be discharged pursuant to State's legal obligation in relation to the entry process.

[11] *Ibid.*, para. 56
[12] *Ibid.*, para. 57
[13] See, Amnesty International, 'Lybia: Dark Web of Collusion', 12 December 2017, https://www.amnesty.org/en/latest/news/2017/12/libya-european-governments-complicit-in-horrific-abuse-of-refugees-and-migrants/ ; Amnesty International, 'Libia: i governi europei complici di torture e violenze', 12 December 2017, available in Italian at: http://bit.ly/2z8EMsA; MSF, 'Libya: Open letter - European governments are feeding the business of suffering', 6 September 2017, available at: http://bit.ly/2xQHDDT..
[14] See, ICJ, 'EU-Turkey deal puts human rights at risk', 21 March 2016, available at https://www.icj.org/eu-turkey-deal-puts-human-rights-at-risk-warns-icj/.
[15] *Report of the Special Rapporteur on torture*, *op. cit.*, para. 46; UN Special Rapporteurs joint statement, 'EU 'trying to move border to Libya' using policy that breaches rights', available at http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21978&LangID=E .

2. Application of a security exception to access to justice in expulsion

In a recent report, *Transnational Injustices,* the ICJ has documented that considerations of national security, whether genuine or contrived, have been and continue to be used to justify, both in rhetoric and in reality, disregard for due process, the principle of *non-refoulement*, the protection of human rights, among other of the most basic tenets of the rule of law.[16]

In the regions analysed - countries in the Commonwealth of Independent States (CIS), the European Union and the United States - there is a general tendency of States, when national security is at stake, to resort to expulsions, whether or not lawful, in place of extradition proceedings that were blocked or otherwise controlled by court orders. The use of varying transfer processes or practices seems to be also dictated by the lack of or weaknesses in effective and independent remedies – before ordinary courts – relating to expulsion. In all these regions, the ICJ documented the extreme vagueness of immigration laws in terms of the definitions of national security, public order and/or public policy or "unreliability" on which expulsions are based.

The typical reasons for resorting to expulsion procedures in national security cases, particularly in the CIS States examined, is that courts are slower to assess the human rights risks inherent in the transfer in such proceedings than criminal courts in extradition cases. European countries have also been shown to periodically resort to these practices.

The ICJ and ECRE call on the UN Special Rapporteur on the rights of migrants to pay attention to take into account the circumvention of fair trial and due process safeguards and of access to justice in international transfers of persons when national security is at stake.

3. Concerns with access to justice in expulsion and detention procedures

A further issue of concern in access to justice for migrants in Europe is access to competent, independent and effective courts to challenge expulsion, in particular in terms of compliance with the principle of *non-refoulement*, and to challenge immigration detention.

In certain countries these procedures are entrusted to courts or single judges that lack the requisite structural independence, such as justices of the peace in **Italy**,[17] or may lack expertise and experience, for example when detention and expulsion appeals are entrusted to administrative courts in **Greece**, and **Bulgaria,** among other countries.[18] Such courts are not used to deal with cases of deprivation of liberty or expulsions, since their daily workload includes predominantly matters such as complaints against public administration for fines, expropriations of land or other property or disputes between neighbours. On several occasions the ICJ has witnessed the discomfort of administrative judges or justices of the peace in dealing with these kinds of cases.

[16] For the sake of space we remand to the sources and documentation included in the ICJ report available at https://www.icj.org/wp-content/uploads/2017/09/Europe-Transnational-Injustices-Publications-Reports-Thematic-reports-2017-ENG.pdf . Executive Summary available at https://www.icj.org/wp-content/uploads/2017/09/Europe-Transnational-Injustices-ExecSummary-Publications-Reports-Thematic-reports-2017-ENG.pdf .

[17] See, ICJ, *Undocumented Justice for Migrants in Italy*, 2014, available at https://www.icj.org/icj-report-highlights-undocumented-justice-for-migrants-in-italy/ .

[18] See Asylum Information Database, Country Report Greece, available at http://www.asylumineurope.org/reports/country/greece/detention-asylum-seekers/procedural-safeguards/judicial-review-detention

The accessibility of judicial review of immigration or asylum detention remains problematic in several countries. States such as **Bulgaria** have recently rolled back on procedural guarantees against detention by abolishing *ex officio* judicial review of detention orders.[19]

Even where an individual is able to gain access to court for the purposes of judicial review of detention, available remedies do not necessarily provide effective protection against arbitrary deprivation of liberty. For example, in **Turkey**, limited available statistics on appeals against detention in the pre-removal detention centres of Izmir (Harmandalı) and Aydın for January to October 2017 indicate very poor prospects of successfully challenging a detention order. Only 17 out of 144 appeals in Izmir and 3 out of 125 in Aydın were allowed by the Magistrates' Court during that period. In the Hatay, Adana and Erzurum pre-removal detention centres, most appeals against detention are also rejected.[20] In **Greece**, the procedure of *ex officio* review of detention seems to be similarly ineffective in practice. Out of a total of 423 asylum detention orders and 121 pre-removal detention orders examined by the Administrative Court of Athens in 2017, there were no decisions taken ordering discontinuation of a detention was zero.[21]

The ICJ and ECRE recommend that the UN Special Rapporteur on the rights of migrants take into account these considerations with a view to providing guidance to States on discharging their legal obligations to ensure that courts in detention and expulsion proceedings are independent, competent and effective not only in law but in practice.

4. Specific obstacles to access to justice for asylum seekers

The inherent vulnerability of asylum seekers lies in their disadvantaged legal position compared to other nationals of a State,[22] insofar as their right to remain on the territory of a country is by definition precarious as long as their refugee status is not formally established, while their likely lack of command of the national language of the host State and the lack of any support network further contribute to their predicament.

Procedural fairness requires national authorities to give due consideration to these circumstances, namely that asylum seekers have inherent legal vulnerability in the host state, "may not, due to language barriers as well as the complexity of the procedure, fully understand domestic asylum processes, and are invoking rights which are non-derogable [i.e. protection from *refoulement*]."[23] Nevertheless, European State practice reveals a range of barriers on access to justice in asylum proceedings, whereby protection seekers encounter expedient procedures, often subject to lower safeguards than those available to other groups of claimants.

[19] Article 46a(3)-(4) Bulgarian Aliens Act, repealed by Law of 5 December 2017, State Gazette No 97. See further Asylum Information Database, Country Report Bulgaria, 2017 Update, February 2018, available at: http://bit.ly/2ErP7Qz, 64.
[20] Asylum Information Database, Country Report Turkey, 2017 Update, March 2018, available at: http://bit.ly/2I1S9fS, 94.
[21] Asylum Information Database, Country Report Greece, 2017 Update, March 2018, available at: http://bit.ly/2G5vKP2, 165.
[22] The European Court of Human Rights has described asylum seekers as members of "a particularly underprivileged and vulnerable population group in need of special protection" and noted the "existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and activities of UNHCR and the standards set out in the European Reception Directive." (European Court of Human Rights, *M.S.S. v. Belgium and Greece*, Application No 30696/09, Judgment of 21 January 2011, para 251. See further Asylum Information Database, *The concept of vulnerability in European asylum procedures*, September 2017, available at: https://bit.ly/2f9gOmN, 10.) C Costello and E Hancox, 'The Recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum-Seeker and the Vulnerable Refugee', in V Chetail, P de Bruycker and F Maiani (eds), *Reforming the Common European Asylum System. The New European Refugee Law* (Brill 2016), 442-443.
[23] ECRE, *The legality of examining asylum claims in detention from the perspective of procedural rights and their effectiveness*, October 2015, available at: https://bit.ly/2rmLwwd, 6.

4.1. Time limits

Time limits for lodging an appeal against a negative decision on an asylum application are an illustrative example of fragmentation and complexity with regard to asylum seekers' access to justice. Legal frameworks from selected European asylum systems show a wide degree of diversity in time limits for challenging a negative decision in the regular asylum procedure:

Appeal authorities and deadlines in the regular procedure			
Country	First appeal authority	Type of appeal body	Time limit for lodging an appeal (days)
Austria	Federal Administrative Court	Judicial	30
Belgium	Council for Alien Law Litigation	Judicial	30
Bulgaria	Administrative Court	Judicial	14
Cyprus	Refugee Reviewing Authority	Administrative	20
Germany	Administrative Court	Judicial	14
Spain	High National Court	Judicial	60
France	National Court of Asylum	Judicial	30
Greece	Appeals Authority	Administrative	30
Croatia	Administrative Court	Judicial	30
Hungary	Administrative and Labour Court	Judicial	8
Ireland	International Protection Appeals Tribunal	Judicial	15 (working)
Italy	Civil Court	Judicial	30
Malta	Refugee Appeals Board	Administrative	14
Netherlands	Regional Court	Judicial	7-30
Poland	Refugee Board	Administrative	14
Portugal	Administrative Court	Judicial	15
Romania	Regional Court	Judicial	10
Sweden	Migration Court	Judicial	21
Slovenia	Administrative Court	Judicial	15
UK	First Tier Tribunal, Immigration and Asylum Chamber	Judicial	14
Switzerland	Federal Administrative Court	Judicial	30
Serbia	Asylum Commission	Administrative	15
Turkey	Administrative Court	Judicial	30

Source: Asylum Information Database, Comparator – Regular procedure: http://bit.ly/2GLIgCD.

As illustrated in the table above, depending on the country where they seek protection, an individual may face appeal deadlines ranging from one week to two months in the regular procedure.

Furthermore, the proliferation of types of asylum procedures in Europe has created further complexity and exacerbated barriers to asylum seekers' effective access to justice. Alongside the regular asylum procedure, the majority of EU Member States, as well as Switzerland, Turkey and more recently Serbia, have established special procedures applicable to specific claimants or to specific locations on their territory. Hence, depending on their profile, travel route and/or point of entry, an asylum seeker may be subject to: (a) the "Dublin procedure" to determine which EU country is responsible for their claim;[24] (b) the "admissibility procedure" to dismiss the claim

[24] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or stateless person (recast) (hereafter "Dublin III Regulation"), *OJ* 2013 L180/31.

without an examination on the merits;[25] (c) the "accelerated procedure" to filter out *inter alia* claims deemed manifestly unfounded;[26] and (d) the "border procedure" applicable at borders and transit zones.[27] These procedures are governed by separate rules, in most cases offering lower standards than those afforded under the regular procedure.

For example, the border procedure entails extremely truncated time limits for appealing a negative decision in some countries. The deadline for lodging an appeal under the border procedure is two days in **Spain**,[28] three days in **Germany**,[29] four days in **Portugal**,[30] five days in **Greece**,[31] and seven days in **Romania**.[32] These time limits, coupled with the fact that all European countries apply the border procedure while holding the asylum seeker in detention,[33] place disproportionate obstacles on asylum seekers' access to an effective remedy. It should also be highlighted that asylum seekers often have no effective access to State-funded legal assistance in order to navigate the procedure at the border.[34]

Time limits for lodging an appeal are not only extremely short in certain asylum procedures, but also exceptional compared to general rules of administrative procedure in European countries. Worryingly, as asylum law is often considered to operate on an exceptional basis, distinct from other areas of law, states tend to carve out derogations from general rules and guarantees of administrative procedure which are liable to place asylum seekers at a disadvantageous position compared to other claimants.

In some instances, derogations from general rules vis-à-vis asylum seekers have been struck down by the courts. The Austrian Constitutional Court (*Bundesverfassungsgericht*) ruled in September 2017 that any derogation from the general four-week time limit for submitting an appeal to the Federal Administrative Court (*Bundesverwaltungsgericht*), competent to hear appeals in asylum cases, is unjustified given the importance of the constitutional guarantees before the court available to individual applicants. Accordingly, it declared the two-week time limit applicable in certain cases of rejection of asylum applications to be unconstitutional, and restored the four-week time limit in all cases.[35]

4.2. Automatic suspensive effect of remedies against negative asylum decisions

The automatic suspension of the execution of negative decisions – and corollary removal proceedings – and thereby the right to remain on the territory of a country during the time necessary to lodge the appeal and pending the outcome of the appeal against a negative first instance decision on an asylum application, is a crucial guarantee and has been affirmed by the European Court as necessary to protect asylum seekers against ill-treatment.[36] Yet, a number of European countries refrain from automatically securing asylum seekers' right to remain on their territory pending the outcome of appeal procedures. This is particularly the case for asylum seekers whose claims are dismissed as inadmissible or rejected under an accelerated procedure.[37] In **Germany** and **Austria,** appeals against inadmissibility decisions have no automatic suspensive effect, nor do

[25] Article 33 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (hereafter "recast Asylum Procedures Directive"), *OJ* 2013 L180/60.
[26] Article 31(8) recast Asylum Procedures Directive.
[27] Article 43 recast Asylum Procedures Directive.
[28] Article 21(4) Spanish Asylum Act.
[29] Section 18a(4) German Asylum Act.
[30] Article 25(1) Portuguese Asylum Act.
[31] Article 60(4)(e) Greek Law 4375/2016.
[32] Article 85(1) Romanian Asylum Act.
[33] Asylum Information Database, *Boundaries of Liberty: Asylum and* de facto *detention in Europe*, March 2018, available at: http://bit.ly/2Epi5Qh, 15 et seq.
[34] See e.g. Asylum Information Database, Country Report Spain, 2017 Update, March 2018, available at: http://bit.ly/2plANDI, 36; Country Report Greece, 2017 Update, March 2018, available at: http://bit.ly/2G5vKP2, 75-76.
[35] Austrian Constitutional Court, Decision G 134/2017, 26 September 2017, available in German at: http://bit.ly/2EmVJ6Y.
[36] See e.g. European Court of Human Rights, *Conka v. Belgium*, Application No 51564/99, Judgment of 5 February 2002, para 83; *M.A. v. Cyprus*, Application No 41872/10, Judgment of 23 July 2013, para 137; *S.J. v. Belgium*, Application No 70055/10, Judgment of 19 March 2015.
[37] Note that this is permitted by EU law: Article 46(6) recast Asylum Procedures Directive.

appeals on certain inadmissibility grounds in **Switzerland**, the **Netherlands**, **Croatia**, **Slovenia** and **Hungary**.[38] Similarly, appeals against negative decisions in the accelerated procedure have no automatic suspensive effect in **Austria**, **Germany**, **Croatia**, **Hungary**, **Italy**, the **Netherlands**.[39]

4.3. The role and function of asylum appeal bodies

A number of European States have enacted reforms in recent years that have had the adverse consequence of undermining the independence and effectiveness of appeals bodies against negative asylum decisions.

The case of **Greece** following the aforementioned EU-Turkey statement of 18 March 2016 is a vivid example.[40] The legal basis for the Appeals Authority was repeatedly amended,[41] most recently following reported pressure on the Greek authorities by the EU with regard to the implementation of the EU-Turkey statement.[42] This last amendment followed or "coincide[d] with the issuance of positive decisions of the – at that time operational – Appeals Committees (with regard to their judgment on the admissibility) which, under individualised appeals examination, decided that Turkey is not a safe third country for the appellants in question."[43]

This amendment modified the composition of the three-member Appeals Committees, previously staffed by one Ministry of Interior official, one member designated by UNHCR and one member designated by the Greek National Commission on Human Rights. Following the reform, the Committees are composed by two administrative judges and one member designated by UNHCR. The reform has had a dramatic effect on the way Appeals Committees have adjudicated appeals against inadmissibility decisions on asylum applications based on the concept of "safe third country", issued following the EU-Turkey statement as discussed above. Whereas the overwhelming majority of decisions prior to the reform had reversed the inadmissibility decisions after finding that the safety presumption for Syrian nationals could not be upheld vis-à-vis Turkey, 394 out of 401 decisions (98.2 %) on appeals against inadmissibility decisions in 2017 dismissed the appeal.[44]

Furthermore, derogations from general rules of administrative procedure to the detriment of asylum seekers can also be found in the instances of appeal available in asylum cases. Several countries have sought to limit the number of appeal instances available to asylum seekers with a view to speeding up asylum procedures. Such instances have been acute in relation to onward appeals at second judicial instance:

- **Italy:** A reform entering into force in August 2017 has abolished the possibility to appeal a negative Civil Court (*Tribunale civile*) decision on an asylum application before the Court of Appeal (*Corte d'appello*). Following the reform, asylum seekers only have access to courts only at the level of Civil Courts and the Court of Cassation (*Corte di cassazione*).[45]

[38] Asylum Information Database, Comparator: Special procedures, available at: http://bit.ly/2GLIgCD.
[39] *Ibid*.
[40] For a detailed analysis, see Asylum Information Database, Country Report Greece, 2017 Update, March 2018, available at: http://bit.ly/2G5vKP2, 43-47.
[41] in April 2016 by Law 4375/2016 and modified again in June 2016 by Law 4399/2016 and in March 2017 by Law 4461/2017
[42] New Europe, 'EU Council: Why Greece should consider Turkey safe for Syrian refugees', 9 June 2016, available at: http://bit.ly/2lWDYOa; Keep Talking Greece, 'EU presses Greece to change asylum appeal committees that consider "Turkey is not a safe country"', 11 June 2016, available at: http://bit.ly/2kNWR5D.
[43] Greek National Commission on Human Rights, 'Public Statement regarding the amendment of the composition of the Independence Appeals Committees', 17 June 2016, available in Greek at: http://bit.ly/2k1Buhz.
[44] Asylum Information Database, Country Report Greece, 2017 Update, March 2018, available at: http://bit.ly/2G5vKP2, 96-97.
[45] Article 35-bis(13) Italian Legislative Decree 25/2008, as amended by Law 46/2017. For further discussion, see Asylum Information Database, Country Report Italy, 2017 Update, March 2018, available at: http://bit.ly/2Ga01zb, 38-39; Association for Legal Studies on Immigration (ASGI) and Magistratura Democratica, 'D.L. 13/2017, sempre più distanza tra giudici e cittadini stranieri', February 2017, available in Italian at: http://bit.ly/2moJoWs; Antigone, 'Il pacchetto Minniti calpesta i diritti', 12 February 2017, available in Italian at: http://bit.ly/2l7pjUo.

- **Slovenia:** The International Protection Act, which entered into force in April 2016, has abolished the possibility for asylum seekers to appeal negative decisions of the Administrative Court (*Upravno sodišče*) before the Supreme Court (*Vrhovno sodišče*).[46]

- **Austria:** Plans for a similar restriction are presently being debated, as the current government has announced the abolition of the review ("extraordinary revision") of Federal Administrative Court decisions by the Administrative High Court (*Verwaltungsgerichthof*), to sharp criticisms from various judicial bodies in the country.[47]

The ICJ and ECRE recommend that the UN Special Rapporteur on the rights of migrants take particular account of the obstacles to access to justice for asylum seekers and, in particular, to the progressive curtailing of procedural guarantees in the asylum procedure.

5. Concerns in relation to access to justice for migrant children

Unaccompanied children face systematic barriers to the right to access justice in many European Union member States. This is often due to lack of access to guardians, lack of best interests of the child determination, lack of access to information, legal assistance and legal aid as well as problems with the age determination procedures.[48]

According to the **Country Report on Bulgaria** conducted by the Asylum Information Database (AIDA), in 100 % of the monitored procedures during 2017 unaccompanied asylum-seeking children were not appointed a legal guardian.[49] Lack of access to guardianship has an impact on other rights of children, such as access to legal assistance and legal aid. According to the report, "the number of legal representatives appointed – one or two per reception facility – is clearly insufficient to meet the need of the population of unaccompanied children who, albeit significantly decreased in 2017, remain considerable in number".[50] During 2016, in 100% of the procedures involving unaccompanied children monitored by the Bulgarian Helsinki Committee, the children did not have a lawyer as their legal representative. There is also an absence of State-funded legal assistance for children in detention to challenge the detention order.[51]

In **Greece**, the public prosecutor for children is appointed as a provisional guardian. The provisional guardian has to undertake all necessary actions to appoint a permanent guardian.[52] Given the lack of an effective legal framework for permanent guardianship, in

[46] Article 72 Slovenian International Protection Act. See also Asylum Information Database, Country Report Slovenia, March 2018, available at: http://bit.ly/2tZwe6P, 20-21.
[47] Asylum Information Database, Country Report Austria, 2017 Update, March 2018, available at: http://bit.ly/2tmJVfW, 25; Austrian Administrative High Court, 'Verwaltungsgerichtshof spricht sich gegen den geplanten Ausschluss der außerordentlichen Revisionen in Asylverfahren aus', 19 December 2017, available in German at: http://bit.ly/2oLnL22.
[48] Guardians play an important role in different life situations of children that are unaccompanied or separated from their families or cannot avail themselves in the protection of their parents/carers. Each unaccompanied or separated child should have a guardian appointed as soon as possible, in order to be able to effectively exercise the right of access to justice. States are required to make sure there is necessary underlying legal framework for that, in accordance with article 12 of the Convention on the Rights of the Child; as well as General Comment No. 12, General Comment No. 6 and General Comment No. 14 of the UN Committee on the Rights of the Child. In particular, the appointed guardian should be consulted and informed regarding all actions taken in relation to the child and should be present during all interviews. See also: Parliamentary Assembly of the Council of Europe, *Unaccompanied children in Europe: issues of arrival, stay and return*, Resolution 1810 (2011), para. 5.7 (Annex 23).
[49] Asylum Information Database, *Country Report on Bulgaria* (31 December 2017), p. 36. Such was also the case in 2016, according to the Bulgarian Helsinki Committee, *Annual Report on Status Determination Procedure in Bulgaria of 2016*, p. 12.
[50] Asylum Information Database, *Country Report on Bulgaria* (31 December 2017), p. 36. While the number of unaccompanied minors lodging applications for international protection to Bulgaria decreased greatly according to the Bulgarian State Agency for Refugees (440) in 2017, figures of unaccompanied children amounted to 2,772 in 2016 and 1,816 in 2015.
[51] This is in breach of article 15.8 of the Bulgarian Child Protection Act, which provides that "the child has a right to legal aid and appeal in all proceedings, affecting his or her rights or interests".
[52] Presidential Decree 220/2007, article 19 para 1.

practice public prosecutors end up being the provisional guardians of a large number of children, with practically no involvement in the decisions that affect the children. Moreover, no best interest of the child determination procedure is in place.[53] NGOs are providing a number of services to unaccompanied children; however these remain limited and are not an adequate substitute for an effective guardianship system.

The first step in ensuring that legislation and policies protecting unaccompanied minors are applied is that the child be **identified as a minor.**

However, despite clear legal standards on fair and appropriate age assessment procedures, the vast majority of European countries continue to over-rely on medical methods for assessing the age of unaccompanied children, the reliability of which remains highly disputed. Therefore, countries such as **Sweden** systematically subject individuals to x-ray examinations of wisdom teeth and knee joints, despite sharp criticism from practitioners, civil society and media.[54] In **Italy**, where the vast majority of unaccompanied children possess no identity documents to prove their age, in some cases, adolescents declaring themselves to be minors are identified as unaccompanied children simply on the basis of their declarations. In other cases, the local authorities require them to undergo age assessment procedures.[55] These procedures are usually carried out with medical examination alone, and generally rely on x-rays of the wrist and hand bones. Moreover, the margin of error inherent in any age assessment methodology is hardly ever indicated in the results, so the benefit of the doubt cannot be applied. Many minors are therefore wrongly identified as adults. They are left without assistance, are not issued a residence permit, and may be expelled and detained pending deportation. Several cases regarding age assessment of unaccompanied minors in Italy have recently been brought to the European Court of Human Rights.[56]

In **Greece**, no age assessment procedure is provided by the national framework to be applied by the Hellenic Police for minors held in detention.[57] In practice, children under the responsibility of police authorities are deprived of any age assessment guarantees set out in the reception and identification procedure, and systematically undergo medical (X-ray) examinations in case their age is disputed. In addition to the limited reliability and highly invasive nature of the method used, it should be noted that no remedy is in place to challenge the outcome of that procedure. These shortcomings with regard to the age assessment procedure result in a number of children being wrongfully identified and registered as adults, and placed in detention together with adults. The Ombudsman stressed the fact that "unfortunately minors continue to be discovered among the population of adult detainees."[58]

In **Spain**, age assessment procedures are regularly applied to children who hold official documentation (passports or other documents) from their countries of origin stating that they are minors. The Spanish Supreme Court has recently affirmed that subjecting

[53] Directive 2013/33/EU (Reception conditions directive, RCD) that regulates issues concerning unaccompanied asylum-seeking minors, such as their representation, has not been transposed into the Greek legal framework yet. A draft of the relevant law has been submitted for consultations since October 2016, and its adoption is pending, despite the transposition deadline being the 20th of July 2015. See Directive 2013/33/EU, Articles 24 and 31, para. 1. A series of reports have demonstrated the inadequacy of this draft law and subsequently the gaps that will be created by it. Greek Council for Refugees, Remarks for the draft law transposing the Reception Directive, available in Greek at: https://tinyurl.com/ybgmejs9; Greek Ombudsman, Tracking Mechanism: The rights of children that move within Greece report, page 83, available in Greek at: https://tinyurl.com/y7ogn8va.

[54] Asylum Information Database, Country Report Sweden, 2017 Update, March 2018, available at: https://bit.ly/2E20Sfw, 36 et seq.

[55] Rozzi, Elena, *Unaccompanied Minors in Italy: Children or Aliens?*, in: Jacqueline Bhabha, Research Handbook on Child Migration", forthcoming

[56] See European Court of Human Rights, Darboe and Camara v. Italy (Application n. 5717/17); Dansu and others v. Italy (Application n. 16030/17); Bacary v. Italy (Application n. 36986/17).

[57] Despite the fact that there are currently two Ministerial Decisions outlining age assessment procedures for unaccompanied children, within the scope of the reception and identification procedures, and that of the asylum procedure, no age assessment procedure is provided by the national framework to be applied by the Hellenic Police for minors held in detention.

[58] Greek Ombudsman, *Migration flows and refugee protection: Administrative challenges and human rights*, April 2017, 75.

unaccompanied children to medical tests is not valid if such decision has been taken without duly justifying the reasons for which the documentation lacks validity.[59] Concerns about access to justice have been expressed by the UN Committee on the Rights of the Child, which prescribed a number of interim measures against Spain with regard to the lack of proper implementation of the age assessment procedure leaving a number of children in legal limbo. Spain has so far disregarded the UN CRC interim measures, contrary to its obligations under the CRC and its third Optional Protocol.

A crucial access to justice gap stems from the fact that most European States do not provide for the possibility of challenging an age assessment decision directly, or the notification of a separate administrative decision on the outcome of the age assessment procedure. **France**, **Italy**, **Sweden**, **Malta** and **Belgium** are exceptions, although in the latter the Council of State is not competent to review elements such as the reliability of the results of the medical examination or the evidentiary value of the person's identity documents.[60]

The ICJ and ECRE encourage the UN Special Rapporteur on the rights of migrants to pay particular attention to the specific obstacles to access to justice that impact migrant children, including access to guardians, lack of best interests of the child determination, lack of access to information, legal assistance and legal aid as well as problems with the age determination procedures and their justiciability.

[59] Judgment of the Spanish Supreme Court of 1 December 2016, Application 2213/2014.
[60] Asylum Information Database, *The concept of vulnerability in European asylum procedures*, September 2017, available at: https://bit.ly/2f9gOmN, 38-39.