



ECRE Comments

on the

**Proposal for a Regulation of the European Parliament and
of the Council establishing an EU common list of safe
countries of origin and amending the recast Asylum
Procedures Directive (COM(2015) 452)**

October 2015

1. Introduction

The concept of “safe country of origin” and its effects in the asylum procedure raise serious concerns in the European Union (EU)’s common policy on asylum.¹ The Asylum Procedures Directive² and its recast³ have allowed EU countries to divide asylum seekers into different categories, with nationals of certain third countries warranting less favourable procedural treatment than others.

The determination of a country of origin as safe carries crucial legal effect on the rights and guarantees available to asylum seekers throughout the refugee status determination procedure. The “safe country of origin” concept, which applies to asylum seekers originating from countries presumed safe who do not provide sufficient evidence to rebut the presumption of safety in their individual circumstances,⁴ can be used by Member States as a ground for expediting the examination of asylum claims as manifestly unfounded.⁵ The procedural consequences and impact of “safe country of origin” designations on applicants’ fundamental rights have been well documented. These entail the use of accelerated procedures with often very short time frames for taking first instance decisions and shorter time-limits for appealing a first instance decision often coupled with lack of automatic suspensive effect for such appeals.⁶ Moreover, whereas the recast Asylum Procedures Directive exempts vulnerable asylum seekers in need of special procedural guarantees from accelerated procedures and border procedures, where adequate support cannot be provided to them in order to allow them to benefit from rights and comply with obligations under the Directive, this is only guaranteed where applicants have been identified as such.⁷ As many Member States lack effective identification mechanisms for the identification of vulnerability, many vulnerable applicants may be subjected to accelerated procedures, including on the basis that they are nationals from a safe country of origin. At the same time, research reveals the persisting discrepancies between Member States’ designations of safe countries in their respective national lists or administrative practice.⁸ Against the backdrop of such divergences, applicants for international protection run the risk of benefitting from widely different procedural rights depending on the Member State where their application is processed, thereby exacerbating risks of a ‘protection lottery’ in the Common European Asylum System.

2. Summary of Views

ECRE seriously questions the compatibility of the safe country of origin concept with international refugee law, as it is at odds with the obligation on states under Article 3 of the 1951 Geneva Refugee Convention to treat refugees without discrimination based on their country of origin.⁹ The use of safe country lists, whether nationally designated or at EU level, further contributes to a practice of stereotyping certain applications on the basis of their nationality and increases the risk of such applications not being subject to a thorough examination of a person’s fear for persecution or risk of serious harm on an individual basis, which is at the core of the refugee definition and crucial to ensuring full respect for the principle of *non-refoulement*. Furthermore, the application of a

¹ For a detailed discussion, see ECRE, “*Safe countries of origin*”: A safe concept? AIDA Legal Briefing No 3, September 2015.

² Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, *OJ* 2005 L326/13, Article 31.

³ 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), *OJ* 2013 L180/60, Article 36.

⁴ Article 36 recast Asylum Procedures Directive.

⁵ Article 31(8)(b) recast Asylum Procedures Directive.

⁶ AIDA, *Common asylum system at a turning point: Refugees caught in Europe’s solidarity crisis*, Annual Report 2014/2015, available at: <http://bit.ly/1ighgPs>, 80.

⁷ Article 24(3) recast Asylum Procedures Directive.

⁸ AIDA, *Common asylum system at a turning point: Refugees caught in Europe’s solidarity crisis*, 78.

⁹ United Nations Convention relating to the Status of Refugees, Geneva, 28 July 1951, UN Treaty Series vol. 189, 137, Article 3.

presumption of safety, while rebuttable under EU law, in practice often places an almost insurmountable burden of proof on the applicant, which is exacerbated by the lack of access to quality legal assistance in many Member States. In this regard, ECRE continues to urge Member States to refrain from using the safe country of origin concept, including through the adoption of national lists, as it distracts authorities from the proper conduct of the asylum procedure which requires the individual examination of the protection needs of the asylum seeker, based on an objective and up-to-date assessment of the human rights situation in the country of origin and his or her individual circumstances,¹⁰ rather than on the basis of general assumptions about the situation in that country.¹¹

Consequently, ECRE is opposed to the adoption of a common EU list of safe countries of origin as proposed by the Commission, as it is part of a worrying development in EU asylum law to increasingly assume a negative outcome of an asylum procedure on the basis of the nationality or profile of the applicant as being manifestly unfounded prior to a proper examination of the application. As explained in the detailed analysis of the Commission proposal below, the proposed Regulation raises important protection concerns and may result in a “race to the bottom” as regards procedural safeguards, while the added value of the proposal from a harmonisation perspective is likely to be very minimal.

However, if the proposal is to be adopted, the comments paper suggests to further amend the Regulation and the recast Asylum Procedures Directive to: (1) ensure that asylum seekers originating from a country presumed safe have access to an appeal with automatic suspensive effect; (2) strengthen the mechanism to suspend countries from the common list by requiring that the Commission’s substantiated assessment is informed by all sources of information, including from NGOs and the expert opinion of UNHCR in particular; and (3) delete references to some of the indicators used by the Commission to argue the inclusion of the seven countries in the common list as they are not conducive to evidence the observance of human rights in those countries.

3. Detailed Analysis of Commission Proposal

On 9 September 2015, the European Commission tabled a proposal for a Regulation amending the recast Asylum Procedures Directive and establishing a common EU list of safe countries of origin including Albania, Bosnia-Herzegovina, the Former Yugoslav Republic of Macedonia (FYROM), Kosovo, Montenegro, Serbia and Turkey.¹² This proposal follows recent calls by the Commission and Council for a harmonised approach to safe countries of origin, with particular focus on countries in the Western Balkan region.¹³

The proposal contains a number of elements meriting detailed analysis and raising important protection concerns. The main issues to be considered relate to (1) the fundamental rights implications of the use of a Regulation as the relevant legislative instrument for a common list; (2) the possibility for Member States to maintain or introduce national lists alongside the common list; (3) the procedure for amending the list or suspending specific countries; and (4) the specific countries presumed as safe and the criteria provided for their safety assessment. The following comments discuss the issues in order and make relevant recommendations throughout.

¹⁰ Article 4(3) recast Qualification Directive.

¹¹ See ECRE, *Information Note on 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)*, December 2014, available at: <http://bit.ly/1MRKWIC>.

¹² European Commission, *Proposal for a Regulation establishing an EU common list of safe countries of origin*, COM(2015) 452, 9 September 2015, Annex.

¹³ Council of the European Union, *Council Conclusions on safe countries of origin*, 11133/15 ASIM 65 COWEB 75, 22 July 2015; European Commission, *Information note on the follow-up to the European Council Conclusions of 26 June 2015 on “safe countries of origin”*, available at: <http://bit.ly/1MCLLb3>.

The implications of the choice of legislative instrument

The proposed list of safe countries of origin is to take the form of a Regulation. This choice is justified by the Commission with reference to the need for a list agreed at EU level and “directly applicable in the legal orders of the Member States”.¹⁴ The advantages of a directly applicable instrument are evident from the viewpoint of harmonisation. A binding EU legislative act on Member States would prevent the risk of divergent interpretations taken by national authorities and guarantee the integrity of the common list.

However, ECRE is concerned that this choice of instrument may create gaps in the justiciability of the common list of safe countries of origin and affect asylum seekers’ access to an effective remedy, laid down in Article 47 of the Charter of Fundamental Rights of the European Union (“Charter”) and Article 46 of the recast Asylum Procedures Directive. Currently, national lists defined through Member States’ legislative processes may be litigated and contested before domestic courts. In fact, judicial authorities have often disagreed with and sanctioned designations of safe countries made by governments,¹⁵ thereby signalling that safe country of origin presumptions remain above all legally questionable and reviewable.

A common list contained in a Regulation would not allow national courts to directly contest the safety presumption for individual countries on that list and the criteria for such a designation, or to annul the inclusion of a country on that list, as doing so would require courts to review the legality of an EU legislative act. Yet the review of legality and potential annulment of EU acts is a competence reserved to the Court of Justice of the European Union (CJEU).¹⁶ In this regard it is important to note that the Treaty on the Functioning of the European Union (TFEU) awards different standing before the CJEU to “privileged” (EU institutions and Member States) and “non-privileged” applicants (individuals). In order to be able to challenge the legality of the common list before the CJEU, “non-privileged” applicants must meet highly demanding rules of *locus standi*. While Member States, the Commission, the Council and the European Parliament may bring actions for (partial) annulment of the Regulation establishing an EU common list of safe countries of origin before the CJEU,¹⁷ an individual affected by the “safe country of origin” concept may only bring an action before the CJEU against an:

“[A]ct addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.”¹⁸

ECRE recalls that the criteria of “direct and individual concern” have been interpreted very narrowly in the jurisprudence of the CJEU. It requires the person concerned to belong to a circumscribed class of individuals due to peculiar attributes which differentiate him or her from all other persons concerned by the act in question.¹⁹ In the case of the common list of safe countries of origin, it is crucial to note that the proposed Regulation is in no way addressed to applicants for international protection, but only details the countries included in the list, the modalities of amendments to it, and its applicability in Member States’ asylum procedures. In that respect, it will be very difficult to envisage a case where

¹⁴ European Commission, *Proposal for a Regulation establishing an EU common list of safe countries of origin*, Explanatory Memorandum, 3.4.

¹⁵ See e.g. Belgian Conseil d’Etat, Decision No 231.157, 7 May 2015, available at: <http://bit.ly/1Fjp3AE>, striking out the inclusion of Albania in Belgium’s list of “safe countries of origin”; French Conseil d’Etat, Decision Nos 375474 and 375920, 10 October 2014, available at: <http://bit.ly/1JCEIS5>, striking out Kosovo from the French list.

¹⁶ Article 263(1) Treaty on the Functioning of the European Union (TFEU), OJ 2012 C326/1.

¹⁷ Article 263(3) TFEU.

¹⁸ Article 263(4) TFEU.

¹⁹ CJEU, Case 25/62 *Plaumann & Co v Commission*, Judgment of 15 July 1963; Case C-263/02 P *Commission v Jégo Quéré*, Judgment of 1 April 2004. For a critique, see P Craig and G de Burca, *EU Law: Text, Cases and Materials*, 6th edition (Oxford University Press, 2015), Chapter 14.

an asylum seeker successfully establishes that the inclusion of a country in the common list *per se* is of “direct and individual concern” to him or her, in line with the test elaborated by the Court’s jurisprudence.

Moreover, as regards the second limb of Article 263(4) TFEU and the notion of “regulatory act which is of direct concern” to an individual, this has been interpreted as not applicable to legislative acts adopted through the ordinary legislative procedure,²⁰ and would thereby not relate to the Regulation in question.²¹

A key responsibility for Member States and EU institutions to challenge the legality of the common list

In light of the highly restrictive test for non-privileged applicants’ *locus standi* before the CJEU, asylum seekers or other interested litigants, who are currently in a position to contest national lists of safe countries of origin before national courts, will in fact be barred from challenging the legality of such a *common list*. It also means that, by adopting a common EU list of safe countries of origin by way of a Regulation, asylum seekers or NGOs will *de facto* no longer be able to challenge before national courts the presence of a country on a *national list*, even where the situation in such country has changed, as long as this country is included in the EU common list. As a result, the level of judicial protection at the national level as regards the use of safe country of origin lists will be significantly reduced, while this is not compensated by increased judicial protection before the CJEU.

Against that backdrop, if adopted, the role of “privileged” applicants before the CJEU will be primordial to ensuring respect of the rule of law and the compatibility of the EU list of safe countries of origin with legal standards, including the safety criteria laid down by the recast Asylum Procedures Directive as discussed below.

As Member States, the Commission, Council and European Parliament have unfettered standing before the Court to request a review of the Regulation and annulment of provisions contravening EU law, ECRE calls on the aforementioned actors to make use of their powers where the common list, if adopted, is liable to infringe EU law.

The need to strengthen the right to an effective remedy in the recast Asylum Procedures Directive

In light of the abovementioned reduced possibilities for applicants to challenge the presence of a country on the list of safe countries of origin as a result of the EU common list being directly applicable, EU institutions should take the opportunity to strengthen the right to an effective remedy under the recast Asylum Procedures Directive and guarantee access to a remedy with automatic suspensive effect in safe country of origin cases, in line with Article 47 of the Charter.

Access to an effective remedy is crucial to ensuring respect of the principle of *non-refoulement*, including where an application is rejected on the basis of the safe country of origin concept. Currently, Article 46 of the recast Asylum Procedures Directive does not guarantee access to an appeal with automatic suspensive effect in such a case. Member States are allowed under Article 46(6) to apply a system where the court or tribunal has the power to rule whether or not the applicant may remain on the territory, either upon the applicant’s request or acting *ex officio*.

²⁰ S Balthasar, ‘*Locus Standi* Rules for Challenges to Regulatory Acts by Private Applicants: The New art 263(4) TFEU’ (2010) 35 *European Law Review* 542. The provision is interpreted as applying to delegated acts adopted by the Commission in accordance with Article 290 TFEU.

²¹ However, delegated acts adopted by the Commission with regard to the suspension of a country from the common list, referred to below, would fall under the scope of such “regulatory acts” in line with Article 290 TFEU and could thereby be amenable to an action for review of legality by individual applicants. However, this would not be a relevant action for asylum applicants as it would not be in their interest to challenge the suspension of the presence of their country of origin on the common list.

ECRE has consistently recommended Member States not to make use of the appeal system provided for under Article 46(6)-(7) of the recast Asylum Procedures Directive but to provide for appeals with automatic suspensive effect in accordance with Article 46(5).²² Providing an asylum seeker with an automatic right to remain on the territory during the time limit within which the right to an effective remedy must be exercised, and pending the outcome of the remedy in case the applicant exercises such a right, constitutes the best guarantee to ensure that his or her right to an effective remedy and the principle of *non-refoulement* are respected in practice. This reduces not only the risk of violations of the principle of *non-refoulement*, but also avoids additional burdens on the already stretched judicial systems, as asylum seekers are not required to launch a separate request on their right to remain on the territory and courts are not required to address this issue separately. Moreover, the suspensive effect of the appeal and therefore the effectiveness of the remedy in practice would depend less on factors that may be beyond the asylum seeker's control, such as access to and availability of adequate information and quality legal assistance.

Recently, in the case of *VM v Belgium*, concerning a vulnerable Roma family whose asylum application was rejected, the European Court of Human Rights (ECtHR) found a violation of Article 13 of the European Convention on Human Rights (ECHR) in conjunction with Article 3, as the application for annulment of the applicants' order to leave the territory did not have suspensive effect.²³ The length of time it took for the Belgian authorities to rule on this, during which the applicants' poor living conditions compelled the family to return to Serbia, deprived them of an effective remedy. It is important to recall that the Strasbourg Court's reading of the right to an effective remedy should inform the interpretation of Article 47 of the Charter.²⁴

Therefore, ECRE recommends further amending Article 46(6) recast Asylum Procedures Directive to exclude decisions taken on the basis of Article 31(8)(b) recast Asylum Procedures Directive from its scope.

The application of the EU common list in national asylum procedures (Article 4)

The proposal explains that a common EU list of safe countries of origin will “facilitate convergence in the application of procedures and thereby also deter secondary movements of applicants for international protection.”²⁵

However, Article 4(2) of the proposal amends Article 37(1) of the recast Asylum Procedures Directive while continuing to enable Member States to retain or introduce legislation for the national designation of safe countries of origin beyond those contained in the common EU list. Through that amendment, the Regulation. This confirms that the common list of safe countries of origin is in fact an instrument of minimum harmonisation, which does not preclude Member States from applying safety presumptions with regard to applicants from other countries. Recital 4 concedes that this effort will only “address some of the existing divergences between Member States' national lists”.

As a result, whereas the EU common list of safe countries of origin raises serious concerns from a human rights perspective, its added value from a harmonisation perspective is highly questionable. In practice, the common list will do little to remedy the prevailing discrepancies in the treatment of several nationalities of applicants in different Member States. While Recital 4 acknowledges the possibility of “future further steps of harmonisation that could lead to the elimination of the need for

²² See ECRE, *Information Note on 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)*, December 2014, available at: <http://bit.ly/1MRKWIC>, 54.

²³ See ECtHR, *VM and others v Belgium*, Application no. 60125/11, Judgment of 7 July 2015.

²⁴ Article 52(3) Charter.

²⁵ Recital 4 Proposal for a Regulation establishing a common EU list of safe countries of origin.

national lists”, no mention is made by the Commission of the tension between promoting some harmonisation of safety determinations, on one hand, and maintaining wide discretion to expand presumptions nationally on the other under the current proposal.

As the application of the safe country of origin concept may trigger the application of an accelerated procedure with reduced procedural safeguards in Member States, ECRE is highly concerned that the proposal will encourage Member States towards a ‘race to the bottom’ in this regard. Moreover, if adopted, the Regulation risks becoming an incentive for Member States to introduce national lists where they did not exist before, including other countries than those on the common EU list. At the same time, this may also, in the long run, result in a self-fulfilling prophecy whereby the inclusion of countries included in national lists legitimises the expansion of the EU common list.²⁶

Modifications to the common list (Articles 2-3)

According to Article 2(2) of the proposal, the EU list of safe countries of origin is to be regularly reviewed by the Commission based on available sources of information on the countries concerned. Modifications to the list may be brought about through either a legislative amendment or the suspension of an individual country for one year by a delegated act.²⁷ This suspension may be extended by a further period of one year if the Commission has proposed a legislative amendment to the list.²⁸ A delegated act for such a suspension will be adopted if no objection has been voiced by the European Parliament or Council within a time-limit of one month.²⁹

For its part, a fully-fledged amendment to the list, with a view to removing or adding safe countries of origin, entails an even more cumbersome bureaucratic process, as it need be adopted through the ordinary legislative procedure of co-decision between Council and European Parliament. Contrary to the more flexible amenability of national lists of safe countries of origin to review and amendment by domestic authorities, including courts, amending an EU list is likely to require considerable effort and time from both Commission and co-legislators.

ECRE is therefore concerned that the lengthy procedure required for modifications to be introduced to the list would jeopardise the swift and flexible process needed for appropriately responding to changes in the human rights situation in the third countries concerned, following a “regular review” thereof. The absence of a mechanism allowing for a speedy withdrawal of a country from the common list in light of a sudden change in the situation in that country further adds to the risk of such common list undermining asylum seekers’ access to a fair and thorough examination of their need for international protection.

Moreover, in the procedure laid down in Article 3, it is up to the Commission to assess whether the criteria of Annex I to the recast Asylum Procedures Directive are met with respect to a specific country in the list and to decide to suspend the presence of the country on the list. Whereas the Commission is under an obligation to adopt a Decision suspending the presence of a third country in case the criteria are fulfilled, this remains based on its own assessment, whereas nothing is foreseen in case the Commission refuses to suspend. Therefore, Article 3(2) should require the Commission to request the expert opinion of the United Nations High Commissioner for Refugees (UNHCR) and take into account the information from the other organisations mentioned in Article 2(2) in case of “sudden changes in the situation of a third country” in order to inform its “substantiated assessment” of the fulfilment by a country included in the list of the conditions in Annex I to the recast Asylum Procedures

²⁶ As presence of a country on national lists is one of the indicators in the preamble to the Commission proposal to assess whether a country can be considered as safe in accordance with Annex I of the recast Asylum Procedures Directive. See below.

²⁷ Article 3(2) Proposal for a Regulation establishing a common EU list of safe countries of origin.

²⁸ Article 3(3) Proposal for a Regulation establishing a common EU list of safe countries of origin.

²⁹ Article 3(7) Proposal for a Regulation establishing a common EU list of safe countries of origin.

Directive. This will at least ensure that, beyond the regular review provided for in Article 2(2), the Commission's decision whether or not to suspend the presence of a country from the EU common list in case of a sudden change is based on an objective and expert analysis of the situation in the country concerned.

ECRE recommends to amend Article 3(2) as follows:

"In case of sudden changes in the situation of a third country that is on the EU common list of safe countries of origin, the Commission shall conduct a substantiated assessment of the fulfilment by that country of the conditions set in Annex I of Directive 2013/32/EU, **based on the sources of information mentioned in Article 2(2) and the expert opinion of UNHCR** and, if those conditions are no longer met, shall adopt, in accordance with Article 290 TFEU, a Decision suspending the presence of that third country from the EU common list for a period of one year."

The listed countries and indicators to assess safety (Annex I, Recitals 10-16)

Currently, Member States may designate third countries as "safe countries of origin" in national lists, while adhering to EU-wide common criteria for such a designation.³⁰ According to Annex I to the recast Asylum Procedures Directive,

"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 [the recast Qualification Directive],³¹ 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."

For the assessment of such a general and consistent absence of persecution or serious harm, Annex I to the Directive lists a non-exhaustive set of criteria determining "the extent to which protection is provided against persecution or mistreatment". These include:

- (a) The relevant laws and regulations of the country and the manner in which they are applied;
- (b) Observance of human rights, notably the rights that are non-derogable under the ECHR;
- (c) Respect for the *non-refoulement* principle in accordance with the 1951 Refugee Convention; and
- (d) Provision for a system of effective remedies against violations of those rights and freedoms.

The assessment of the safety criteria by Member States is to be conducted by reference to a range of sources, including information provided by the European Asylum Support Office (EASO), the United Nations High Commissioner for Refugees (UNHCR), the Council of Europe and other relevant organisations.³² In ECRE's view, the reference to "other relevant organisations" must necessarily be interpreted as referring to information on the human rights situation of the countries concerned provided by expert non-governmental organisations. The necessity of including such sources in assessing the risk of *refoulement* in individual cases has consistently been emphasised in the case law of the ECtHR.³³

³⁰ Article 37(1) recast Asylum Procedures Directive.

³¹ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ 2011 L337/9.

³² Article 37(3) recast Asylum Procedures Directive.

³³ "In respect of materials obtained *proprio motu*, the Court considers that, given the absolute nature of the protection afforded by Article 3, it must be satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources such as, for instance, other Contracting or non-

The proposal follows the same criteria and lists seven countries for inclusion in the common list of safe countries of origin: Albania, Bosnia-Herzegovina, FYROM, Kosovo, Montenegro, Serbia and Turkey. However, ECRE considers that the Commission does not provide appropriate justification for the proposed inclusion of the above countries with reference to the criteria listed in Annex I and Article 37 of the recast Asylum Procedures Directive. Moreover, the Preamble to the Regulation sets out a number of – arguably questionable – factors to substantiate a presumption of safety in respect of these countries, which are further examined here.

a. Condemnations before the European Court of Human Rights

With the exception of Kosovo, due to lack of consensus on its international status of statehood, all countries are members of the Council of Europe and parties to the ECHR, thereby adhering to the jurisdiction of the ECtHR.

On that basis, the proposal for a Regulation mentions the number of violations found by the ECtHR in its 2014 judgments as a relevant criterion for assessing safety: 4 cases out of 150 applications against Albania (2.6%);³⁴ 5 out of 1,196 against Bosnia-Herzegovina (0.4%);³⁵ 6 out of 502 against FYROM (1.2%);³⁶ 1 out of 447 against Montenegro (0.2%);³⁷ 16 out of 11,490 against Serbia (0.1%);³⁸ and 94 out of 2,899 against Turkey (3.2%).³⁹

However, the reference to the number of Strasbourg cases concerning those countries leaves considerable ambiguity. The proposal fails to specify a number of relevant elements, including: what proportion of the applications before the Court actually resulted in decisions on the merits (thereby scrutinising the observance of human rights in the respective countries); at what time the alleged violation took place, as some cases decided by the Court relate to complaints made several years before; how many cases concerned those countries' nationals, so as to be relevant to the "safe country of origin" concept; or even on what grounds the applications were based and violations were found. In that respect, a superficial look at the ECtHR's caseload without due regard to the context and content of those cases could be a misleading criterion of safety.

If the mere number of condemnations against applications before the Strasbourg Court would constitute an accurate criterion of safety, these countries should not be deemed any safer than a number of EU Member States. During the same year, the Court found violations in 50 cases out of 680 applications against Greece (7.3%) and in 49 out of 2,320 against Hungary (2.1%).⁴⁰ In that light, ECRE believes that a general reference to statistics on ECtHR case-law cannot be considered an appropriate factor for determining whether a country satisfies the safety criteria set out in Annex I to the recast Asylum Procedures Directive.

b. EU-wide recognition rates for nationals of the countries concerned

The proposal also refers to the 2014 EU recognition rate regarding applicants originating from the aforementioned seven countries as evidence supporting their compliance with the safety criteria in Annex I to the recast Asylum Procedures Directive. During that year, the EU rates were: 7.8% for

Contracting States, agencies of the United Nations and reputable non-governmental organisations." See ECtHR, *Salah Sheekh v The Netherlands*, Application No 1948/04, Judgment of 11 July 2007, para 136.

³⁴ Recital 10 Proposal for a Regulation establishing a common EU list of safe countries of origin.

³⁵ Recital 11 Proposal for a Regulation establishing a common EU list of safe countries of origin.

³⁶ Recital 12 Proposal for a Regulation establishing a common EU list of safe countries of origin.

³⁷ Recital 14 Proposal for a Regulation establishing a common EU list of safe countries of origin.

³⁸ Recital 15 Proposal for a Regulation establishing a common EU list of safe countries of origin.

³⁹ Recital 16 Proposal for a Regulation establishing a common EU list of safe countries of origin.

⁴⁰ ECtHR, *The ECHR in facts & figures 2014*, February 2015, available at: <http://bit.ly/1Q3Or2Z>, 8, 10.

Albania, 4.6% for Bosnia-Herzegovina, 0.9% for FYROM, 6.3% for Kosovo, 3% for Montenegro, 1.8% for Serbia and 23.1% for Turkey. Evidently, these protection rates reveal that the assessment of international protection needs differs considerably for the above countries within the EU, while recognition rates for some of these countries seriously call into question their presumed safety.

Protection rates recorded during the first and second quarter of 2015 echo these concerns, as applicants from Turkey were granted international protection at a respective rate of 28.1% and 29.3% in the 32 EU and Schengen Associated States.⁴¹ Particularly higher rates were seen in individual countries such as Italy (75% during the first quarter, 72.2% during the second quarter) or Switzerland (72.7% during the first quarter, 68.2% during the second quarter).⁴²

Concerning Albania, the protection rate across EU and Schengen Associated States rose to 10.4% during the first quarter of 2015. During that period, the vast majority of first instance decisions were issued by the UK, France and Germany, subject to varying recognition rates. The UK and France granted protection to 17.4% and 12.9% of cases respectively, while Germany only issued positive decisions for 1.6%. Further contrasts may be made between countries such as the Netherlands or Ireland, which rejected all claims by Albanian nationals during the first quarter of 2015, as opposed to Italy and Switzerland which recorded protection rates of 54% and 33.3% respectively.

Germany's low recognition rate for Albanian nationals dropped significantly to 0.2% during the second quarter of 2015, with only 10 positive decisions out of a total 3,655 first instance decisions.⁴³ Germany's rate accounts for the substantial drop of the EU and Schengen Associated States rate to 4.2% in the second quarter of 2015, while the UK and France maintained relatively high protection rates of 30.7% and 10.6% respectively for Albanian nationals. This shows that, although the overall average rate has decreased according to latest statistics, the assessment of risks of persecution or serious harm in light of the situation in the country is not conducted uniformly across EU Member States but continues to result in high recognition rates in some Member States.

Moreover, the available statistics serve to question the rationale behind the safe country of origin concept and the establishment of a common EU list or national lists, as they seem to dispel the assumption that a number of nationalities do not qualify for international protection in the EU. For example, countries which have inserted Albania in their national lists of safe countries of origin, such as Belgium, France, the UK but also Switzerland, all have far from minimal recognition rates for Albanian applicants,⁴⁴ while the same applies to Turkey as mentioned above.

Such a close examination of the rate of protection grants is all the more important given the Commission's intention to expand the proposed EU list after its adoption, with priority awarded to countries such as Bangladesh, Pakistan and Senegal.⁴⁵ ECRE stresses that recognition rates for these countries would also rather call into question the appropriateness of applying the "safe country of origin" concept, given that the EU average first instance protection rate in 2014 was 10.3% for Bangladesh, 26.8% for Pakistan and 34.3% for Senegal.⁴⁶

⁴¹ Eurostat, *First instance decisions on applications by citizenship, age and sex Quarterly data (rounded)*, migr_asydcfstq. Data for Austria is not available for either quarter.

⁴² *Ibid.*

⁴³ *Ibid.* Note that 63.5% of the total number of decisions on Albanian applicants during the second quarter of 2015 in EU and Schengen Associated States was issued by Germany alone.

⁴⁴ See also AIDA, *Common asylum system at a turning point: Refugees caught in Europe's solidarity crisis*, Annual Report 2014/2015, 79.

⁴⁵ European Commission, *Proposal for a Regulation establishing an EU common list of safe countries of origin*, Explanatory Memorandum, 6.

⁴⁶ Eurostat, *First instance decisions on applications by citizenship, sex and age Annual aggregated data (rounded)*, migr_asydcfsta.

c. Inclusion of the countries concerned in national lists of safe countries of origin

Thirdly, Recitals 10-16 of the proposal mention the number of national “safe country of origin” lists in which the seven suggested countries are included as a relevant factor to determining their safety. However, the inclusion of a country in a national list should not automatically be deemed as evidence that the safety criteria have been met, especially since the interpretation of these criteria is not uniform across Member States.⁴⁷ Moreover, ECRE recalls that Member States’ lists remain highly diverse and adopt widely different interpretations of safety.⁴⁸ More particularly, as far as convergence in relation to the countries proposed for the EU list is concerned, Albania is listed in 7 Member States’ lists, Bosnia-Herzegovina in 8, FYROM in 7, Kosovo in six,⁴⁹ Montenegro in 8, Serbia in 8 and Turkey in none.⁵⁰ In that respect, there is little to suggest that consensus on the safety of these countries is to be found in Member States’ current asylum practice.

d. EU candidate status and state of play of accession

Finally, Recitals 10, 12 and 14-16 to the Regulation proposal refer to the state of play of accession negotiations between the EU and the five candidate countries: Albania, FYROM, Montenegro, Serbia and Turkey. Reference is made to the Copenhagen European Council accession criteria relating to stability of institutions, democracy and rule of law, respect for human rights and protection of minorities. The proposal uses these conditions set out in the accession context as indicators of whether the safety criteria in Annex I to the recast Asylum Procedures Directive are complied with in the countries concerned.

However, for all candidate countries, the Commission proposal mentions that the Copenhagen accession criteria have been met.⁵¹ This finding seems an inaccurate and misleading generalisation of the progress reports issued as part of the EU enlargement process, which consistently highlight critical deficiencies and weaknesses in these areas.⁵² More worryingly, the warning in the same Recitals that these countries “will have to continue to fulfil these criteria for becoming a member” of the Union implies again that the safety determination made by the proposal rests more on political conditionality rather than legal reasoning.

For the case of Turkey, beyond the critiques addressed in the 2014 progress report, further concerns are raised by the recent attacks and restrictive measures taken against Kurdish minorities, which further exacerbate persecution risks for asylum seekers originating from Turkey.⁵³ Accordingly, ECRE reminds the co-legislators that, contrary to what the Preamble to the proposed Regulation suggests, progress reports provide evidence that countries such as Turkey do not fulfil the conditions of democracy, rule of law, respect for human rights and protection of minorities, required by the

⁴⁷ ECRE, “*Safe countries of origin*”: A safe concept? AIDA Legal Briefing No 3, September 2015, 4.

⁴⁸ AIDA, *Common asylum system at a turning point: Refugees caught in Europe’s solidarity crisis*, Annual Report 2014/2015, available at: <http://bit.ly/1ghqPs>, 78.

⁴⁹ Note that Kosovo has since been reinserted in the French list of safe countries of origin. See AIDA, ‘France: Kosovo reintroduced in list of safe countries of origin’, 12 October 2015, available at: <http://bit.ly/1VPi6nE>.

⁵⁰ Recitals 10-16 Proposal for a Regulation establishing a common EU list of safe countries of origin contain different figures as the Commission also includes Bulgaria: European Commission, *Information Note on the follow-up to the European Council Conclusions of 26 June 2015 on “safe countries of origin”*. However, since 2007 Bulgaria no longer has a national list of “safe countries of origin”: AIDA Country Report Bulgaria: Third Update, January 2015, available at: <http://bit.ly/1lmyJil>, 36.

⁵¹ Recitals 10, 12, 14-16 Proposal for a Regulation establishing a common EU list of safe countries of origin.

⁵² See e.g. European Commission, *Turkey Progress Report*, October 2014, available at: <http://bit.ly/1vPqXqg>, where the Commission expresses concerns around the country’s stance *inter alia* on corruption and the rule of law, barriers to freedom of expression, as well as domestic violence.

⁵³ See e.g. Returners, ‘Turkish nationalists attack pro-Kurdish party HQ’, 9 September 2015, available at: <http://bit.ly/1g8y88C>; BBC, ‘Turkey restores curfew in restive Kurdish city of Cizre’, 13 September 2015, available at: <http://bbc.in/1EXI40W>.

Copenhagen accession criteria. In that light, the safety criteria mentioned in Annex I to the recast Asylum Procedures Directive are not straightforwardly met for all candidate countries, contrary to what it implied in the proposal.

For the reasons set out above, ECRE seriously questions the added value and the rationale of the indicators laid down in Recitals 10-16 of the Commission proposal to assess the fulfilment by a country of the criteria laid down in Annex I to the recast Asylum Procedures. The indicators relating to a country's membership of the Council of Europe and status as an accession country to the EU show little relevance to the assessment of the observance of human rights in practice in those countries. For their part, the criteria related to recognition rates as well as the inclusion in national lists of the proposed safe countries of origin rather point to the absence of a common understanding of which countries can be presumed safe for the purpose of examining an asylum application. Moreover, the recognition rates for certain countries in fact seriously call into question their presumed safety and therefore their inclusion in the proposed EU common list, as well as their current inclusion in national lists.

<p>ECRE recommends to delete the references to criteria related to a country's membership of the Council of Europe and status as an accession country to the EU, as they are not conducive to evidence of the observance of human rights in practice in those countries.</p>

4. Conclusion

As discussed above, the use of the safe country of origin concept raises serious questions from a fundamental rights perspective, as it distracts asylum authorities from the core focus of international refugee law on the assessment of persecution risks on an individual basis rather than on general assessments of the situation in the country of origin of the applicant and is at odds with Article 3 1951 Refugee Convention.

The establishment of a common list of safe countries of origin on the basis of the Commission proposal for a Regulation raises further human rights concerns by excluding the possibility for individual applicants or NGOs to challenge the designation of individual countries as safe on human rights grounds. Moreover, as it leaves discretion to Member States to maintain national lists of safe countries of origin other than those included in the common list, it is likely to have only limited effect on the current disparities between EU Member States with regard to legislation and practice on safe countries of origin. Furthermore, the criteria laid down in Recitals 10 to 16 of the Commission proposal, relating to a country's membership of the Council of Europe or its status as a candidate country for accession to the EU, are of little relevance to the assessment of the individual countries' presumed safety. It also remains to be seen whether the proposed mechanism to amend or suspend the common list of safe countries of origin will allow for swift removal of individual countries from list in case of changes in the situation in such countries. The latter is an essential safeguard in order to prevent risks that the establishment of an EU common list of safe countries of origin results in *refoulement* and other serious human rights violations.

In light of these concerns and observations, the Council and the European Parliament should thoroughly consider the fundamental rights implications of the Commission proposal, as well as its necessity and added value in the framework of establishing a Common European Asylum System based on high standards of protection. For the reasons outlined above, ECRE is opposed to the adoption of an EU common list of safe countries of origin as it is an instrument to facilitate the application of a concept which is highly questionable from an international refugee law perspective.

However, if the Regulation is to be adopted, ECRE urges EU institutions to further strengthen the fundamental rights safeguards in the Regulation as well as in Article 46 of the recast Asylum Procedures Directive as recommended in this document.