

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



Constitutional Affairs

Justice, Freedom and Security

Gender Equality

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Petitions

Setting up a Common European Asylum System

STUDY



DIRECTORATE GENERAL FOR INTERNAL POLICIES

**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS**

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

Setting up a Common European Asylum System: Report on the application of existing instruments and proposals for the new system

STUDY

Abstract

The study assesses firstly the evaluation process of the first generation of asylum instruments while underlining the possibilities to improve it. It analyses secondly the asylum "acquis" regarding distribution of refugees between Member States, the eligibility for protection, the status of protected persons regarding detention and vulnerability, asylum procedures and the external dimension by formulating short-term recommendations of each area. Its last part is devoted to the long term evolution of the Common European Asylum System regarding the legal context including the accession of the EU to the Geneva Convention, the institutional perspectives including the new European Support Office, the jurisdictional perspective, the substantive perspective, the distributive perspective and the external perspective.

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LIST OF ABBREVIATIONS

AJIL:	American Journal of International Law
APD:	Asylum Procedures Directive
AQSEM:	Asylum Systems Quality Assurance and Evaluation Mechanism
AsyIGH:	Asylgerichtshof (Austrian asylum tribunal)
ATV:	Airport Transit Visa
BVerfG:	Bundesverfassungsgericht (German Constitutional Court)
BVG:	Bundesverwaltungsgericht (Swiss Federal Administrative Tribunal)
CCC:	Common Core Curriculum
CCI:	Common Consular Instructions
CCV:	Community Code on Visas
CAT:	Convention Against Torture
CE Be:	Conseil d'Etat (Belgian Council of State)
CE Fr:	Conseil d'Etat (French Council of State)
CEAS:	Common European Asylum System
CFR:	Charter of fundamental rights of the EU
CISA:	Convention Implementing the Schengen Agreement
CMLRev:	Common Market Law Review
CRD:	UN Convention on the Rights of the Child
CS:	Consiglio di Stato (Italian Council of State)
DG:	Directorate General
EAC:	European Asylum Curriculum;
EASO:	European Asylum Support Office
EC:	European Community or European Community Treaty
ECHR:	European Convention on Human Rights

ECJ:	European Court of Justice
EComHR:	European Commission of Human Rights
ECR:	European Court Reports
ECRE:	European Council on Refugees and Exiles
ECtHR:	European Court of Human Rights
EDPS:	European Data Protection Supervisor
EEA:	European Economic Area
EHRLR:	European Human Rights Law Review
EJML:	European Journal of Migration and Law
ERF:	European Refugee Fund
(E)STC:	European Safe Third Country
ETS:	European Treaty Series
EUCFR:	European Union Charter of Fundamental Rights
EWCA:	England and Wales Court of Appeal
EXCOM:	Executive Committee
FCA:	First Country of Asylum
FCAFC:	Federal Court of Australia Full Court
FSJ:	Freedom, Security and Justice
GC:	Geneva Convention
HRC:	Human Rights Committee
IA:	Impact assessment
ICCPR:	International Covenant on Civil and Political Rights
ICJ:	International Court of Justice
ICLQ	International and Comparative Law Quarterly
IJRL:	International Journal of Refugee Law
ILC:	International Law Commission
ILO :	Immigration Liaison Officer
IMO :	International Maritime Organisation

Inter-Am.

C.H.R.:	Inter-American Commission of Human Rights
IOM:	International Organisation for Migration
JHA:	Justice and Home Affairs
JLS:	Justice, Liberty and Security
LTV:	Limited Territorial Validity
MSC:	Maritime Security Committee
NEFR:	The EU network of independent Experts on Fundamental Rights
NGOs:	Non-Governmental Organisations
NIS:	Newly Independent States
Nyr:	Not yet reported
OJ:	Official Journal
PEP:	Protected-Entry Procedure
QB:	Queen's Bench
QI:	Quality initiatives
RABIT:	Rapid Border Intervention Team
RPP:	Regional Protection Programme
RSQ:	Refugee Survey Quarterly
SAR:	Search and Rescue or Search and Rescue Convention
SBC:	Schengen Borders Code
SCIFA:	Strategic Committee on Immigration, Frontiers and Asylum
SCO:	Safe Country of Origin
SIS:	Schengen Information System
SOLAS:	Safety of Life at Sea Convention
TAR:	Tribunale amministrativo regionale (Italian Administrative Tribunal)
TEU:	Treaty on European Union
TFEU:	Treaty on the Functioning of the European Union
UDHR:	Universal Declaration of Human Rights

UK CA:	UK Court of Appeal
UK HL:	UK House of Lords
UN:	United Nations
UNHCR:	United Nations High Commissioner for Refugees
VG:	Verwaltungsgericht (German Administrative Tribunal)
VwGH:	Verwaltungsgerichtshof (Austrian Supreme Administrative Court)

EXECUTIVE SUMMARY AND RECOMMENDATIONS

PART 1: ASSESSMENT OF THE EVALUATIONS OF THE ASYLUM POLICY

The issue is a key one since The Hague Programme requested in 2004 the Common European Asylum to be built upon a thorough and complete evaluation of the legal instruments that have been adopted in the first phase. This evaluation should be systematic, efficient, impartial and objective and have not only a legal purpose by dealing with the implementation of the asylum instruments, but also a political one by covering the effectiveness and impact of the asylum policy.

The Commission adopted to follow up this request a Communication on the evaluation of EU policies on Freedom, Security and Justice on 28 June 2006. The mechanism conceived in three steps (information gathering, reporting and evaluating strategically) was based on factsheets containing indicators to be completed by Member States and would have been implemented twice every five years. The Council adopted on 19 June 2007 conclusions restraining the proposal of the Commission. Due to the lack of support of Member States considering it too burdensome, this mechanism has never been implemented. In practice, the evaluation of the asylum policy consequently took place on the basis of the existing methodology and means. They are based on the "Scoreboard +" (see below) and the standard reporting provisions included in the final provisions of the legal instruments adopted by the EU that are insufficient.

The evaluations conducted suffer from several weaknesses - firstly, not on a political, but rather from a more or less purely legal perspective. This has been the case for the evaluation of the directives on reception conditions for asylum seekers and on the definition and status of protected persons and in particular for the Dublin Regulation and the Frontex Agency, with nevertheless some improvement for the directive on asylum procedures. Secondly, no horizontal approach evaluating the instruments in the broader context of the asylum policy and including cross-cutting issues, but a merely vertical approach focusing on each of the instruments separately. The fact that impact assessments that are normally ex-ante evaluating tools about the possible impact of an instrument in the future, have been used to replace (in the case of the qualification and asylum procedures directives) or complete ex-post evaluations reveals the difficulties of the Commission to conduct proper evaluations. The results show that the evaluations have not been systematic, neither efficient but fairly objective, even if the report about the Dublin regulation is not impartial as it has been driven in function to the single minded preference for the status quo.

Several reasons explain this situation. Aside from the fact that evaluations are sometimes requested too early due to the political agenda before there is enough insight concerning the implementation of instruments by Member States, the main reason is a lack of appropriate evaluating tools and data.

The Scoreboard qualified "plus" because it covers not only the European but also national level, is a purely quantitative tool measuring the progress of the policy regarding the adoption of the expected instruments towards the agenda contained in the five years policy programmes and action plans. The standard provision¹ contained in the final provisions of

1 Reading like following: "Not later than/ by (date) the Commission shall report to the European Parliament and the Council on the application of this Directive/ Regulation/ Decision in the Member

legal instruments adopted by the EU and included in the asylum directives or regulations, has no political purpose. It limits the scope of the evaluation to the application and not the impact or effectiveness of the instruments without specifying the information to be provided by the Member States to the Commission. Despite the fact this is not limited to Asylum, it is still a general problem after fifty years of European Law and it is striking that even the legal information that the Member States are requested to transmit to the Commission does not include at least a table of concordance between the provisions of European directives and national provisions of transposition². Only the decisions related to the European Refugee Fund contain more adequate provisions on evaluation due to the fact that they concern a financial instrument whose efficiency is more scrutinised. There is also a problem due to the lack of statistical data in the field of asylum.

The absence of a mechanism for monitoring Human Rights is particularly problematic due to the fact that asylum has been included under article 18 in the EU Charter that is legally binding since the entry into force of the Lisbon Treaty. If the Commission checks the conformity of its legislative proposals with the Charter, the Fundamental Rights Agency does not have a mandate to control the respect of human rights by the EU and its Member States, but only to provide them with assistance and expertise. Finally, the costs of gathering the information necessary to adequately evaluate the effectiveness of European and national instruments might be considered to high by Member States as it was the case during the discussions of the Council conclusions of 19 June 2007 on the Evaluation of EU policies on Freedom, Security and Justice.

There are fortunately several elements that should or could lead to an improvement of the evaluation in the field of asylum.

Firstly, the regulation 862/2007 of 11 July 2007 on community statistics on migration and international protection is applicable in practice since 2008 and will provide lacking data in the field of asylum, even if it does not cover adequately all the fields of asylum where some gaps not filled by specific provisions of the concerned instruments will remain. Secondly, the Quality Initiatives promoted by the UNHCR in the United Kingdom since 2003, in eight Central and Eastern countries since 2008 and envisaged for five more Southern Member States contribute to the evaluation of the quality of the concrete functioning of the national asylum systems and incite the participating States to set up internal quality review mechanisms. Thirdly, the European Asylum Support Office created by Regulation 439/2010 of 19 May 2010, will contribute notably to improve the availability of data and information about the implementation of European and national rules regarding asylum and their comparability. This new office will also have a reporting mission on the situation of asylum in the Union that could nevertheless be limited to its own activities due to the fact the legislator has not tasked it with a function of evaluation that could nevertheless be added to its missions in the future.

Finally, the Treaty of Lisbon paves the way for an improvement of the evaluation of the asylum policy in the European Union. Article 70 TFEU provides a special legal basis for the creation of a new evaluating mechanism. The fact that it is based on peer review of States by States will have the advantage to encourage them to provide the necessary information while the collaboration with the Commission will guarantee the required objectivity and impartiality of the process. On the contrary, the exclusion of the European Parliament of a

States and shall propose any amendments that are necessary. The Member States shall send the Commission all the information that is appropriate for drawing up this report."

² This leads often the Commission to externalise lengthy studies to legal experts obliged to loose time by looking for information that Member States have or should have.

mechanism aiming at evaluating European policies where the Assembly has a co-decision power is incomprehensible. The Stockholm programme devotes a lot of attention to evaluation and even quotes asylum procedures as a priority field to this end. There seems to be the necessary political will to improve evaluation in the field of asylum. The future will tell us if this will translate into reality.

PART 2: ASSESSMENT OF THE ASYLUM ACQUIS AND RECOMMENDATIONS FOR IMPROVEMENT IN THE SHORT TERM

CHAPTER 1: DISTRIBUTION OF APPLICANTS FOR INTERNATIONAL PROTECTION AND PROTECTED PERSONS

1. GENERAL CONSIDERATIONS

This Chapter addresses CEAS instruments on the distribution of applicants for protection and of protected persons. The key instrument in this area, indeed the sole significant “distributive” instrument adopted to date, is the Dublin system. Current proposals for the second phase of the CEAS do not prefigure a profound restructuring of its “distributional” components but essentially focus on the Commission proposal to recast the Dublin Regulation. The Proposal does not purport to alter the general scheme of the Dublin system. Instead, the Commission has taken the approach of “confirm[ing] the principles underlying [the Dublin Regulation], while making the necessary improvements”. The first and welcome such improvement consists in fully extending the scope of the Dublin system to all applicants for international protection and not only to asylum seekers. The other suggestions for improvement put forward by the Commission aim to tackle a number of deficiencies observed in the operation of the Dublin system, in pursuance of two overarching goals: to increase the system’s efficiency and to ensure higher standards of protection for persons falling under the Dublin procedure.

This Chapter examines these proposals in detail, against the background of current Dublin practice, and in light of protection principles relevant to the operation of the Dublin system. The analysis is organised in five thematic sections, each discussing key problem areas in relation to the Dublin system: guarantees against refoulement; protection of family unity and integration-related concerns; protection of vulnerable persons, including children; distributive fairness and the burden-concentrating effects of the system on “border” States; and finally, concerns relating to the effectiveness of the Dublin system and to the adverse impacts it has on the CEAS as a whole. In each area, possible solutions are considered in the context and within the constraints of the current recasting procedure. The Recast Proposal includes a number of welcome suggestions to correct the shortcomings of the Dublin system, but leaves a number of problems standing. Some of these will need to be tackled in the long term, through a reconsideration of the Dublin system as a whole.

2. MAIN PROBLEM AREAS IDENTIFIED IN RELATION TO THE DUBLIN SYSTEM

Our first finding is that the Dublin Regulation falls short of ensuring compliance with the principle of non-refoulement, generating instead risks of refoulement. This is the result of two concomitant problems. The first such problem is that sufficient guarantees against refoulement and ill-treatment are not available always in the responsible State. On the one hand, and specifically, the interplay of the Dublin system with procedural rules (e.g. interruption in case of withdrawal) has demonstrably prevented asylum seekers from accessing a meaningful asylum procedure in the responsible State. On the other hand, in the context of widely diverging protection and reception standards, there are persistent concerns that the practices of some Member States fall short of ensuring fair asylum procedures (due to e.g. insufficient procedural guarantees, the application of unduly restrictive qualification criteria or reliance on flawed risk assessments) and dignified standards of living. The “sending” Member States could of course obviate to this, and prevent any risk of refoulement, through a principled application of the sovereignty clause. However – and this is the second problem – this second line of protection is also performing well below the standard of a full and inclusive application of the non-refoulement principle. Thus, first instance Dublin procedures fall short of basic standards of fairness and effective remedies against transfers are not always available in the “sending” State. Furthermore, in several member States, national administrations and courts are not in the position, or not willing, to meaningfully scrutinise the risks incurred by the asylum seeker in the responsible State, leading to an over-reliance on safety presumptions and an underestimation of the risks incurred by the asylum seeker.

The second problem area is that of protection of family-unity and integration-related concerns. The Dublin criteria on family unity are shown to be restrictively framed and applied, falling well short of ensuring respect for the fundamental right to family life. The sovereignty and humanitarian clauses, which could in principle correct this shortcoming, are not consistently applied to this end. Moreover, the Dublin regulation disregards “close links”, other than family ties, between asylum seekers and a particular Member State, which has a negative impact on the integration and well-being of asylum seekers, as well as on the efficiency of the Dublin system.

In a third section, the Chapter discusses problems concerning the protection of vulnerable persons -including children- in the Dublin system. While the Dublin Regulation explicitly refers to international obligations and humanitarian standards as an integral part of the Dublin scheme, it does not make provision for specific safeguards in regard to applicants with special needs, a lacuna which has given rise to unsatisfactory practice. More specifically, reception conditions of vulnerable persons in the State carrying out the Dublin procedure are of concern, both due to gaps in the legal framework (e.g. absence of firm obligations to institute a “screening procedure” to identify special needs), and to its misapplication (e.g., instances where the Reception Conditions Directive is not applied to persons subject to the Dublin procedure). Furthermore, the Dublin Regulation does not make provision for “fit for transfer” screening, nor does it include sufficient guarantees ensuring the continuity of treatment of vulnerable persons in the “receiving” State, after the transfer. Such shortcomings have not been made good by Member State practice, and have resulted in serious -on occasion even fatal- harm.

In regard to unaccompanied minors, the Dublin Regulation does not adequately reflect the principle that in all actions relating to children, the child's best interest must be a primary consideration. Insufficient consideration for other child-specific guarantees, such as adequate representation, is also highlighted, and it is shown that these lacunae in the legal framework have paved the way for unsatisfactory practice in the Member States. More particularly, Member State practice shows that Dublin transfers are carried out even when in conflict with the best interest of the child, and that Member States rely excessively on uncertain age-assessment techniques or even treat age-disputed applicants as adults.

The fourth problem area taken up is that of distributive fairness and the burden-concentrating effects of the system on "border" States. It is shown that the Dublin system in some cases aggravates the imbalances in the distribution of asylum seekers, with detrimental effects in terms of effectiveness and protection. Though not meant to realise a "fair sharing of responsibilities", the Dublin system is however intended to contribute to a fair sharing, but due to its distributive concept, linking together responsibility and irregular entry into the EU, the system does entail additional burdens on some Member States that are under particular migratory pressure because of their geographical location, and that have limited reception and absorption capacity.

Lastly, this Chapter mentions the problem of the inefficiency of the Dublin system as a whole. Available information indicates that the number of effected transfers is much lower than the number of accepted transfers, and that the overwhelming majority of asylum applications are examined where they are first lodged. These structural problems indicate, first, that many of the resources invested in the operation of the system are ultimately wasted and, second, that the Dublin criteria have a minimal impact in practice – or more pointedly, are unworkable in practice. We also note that the Dublin system considerably delays access to asylum procedures. While these deficits may in part be due to technical problems, such as inappropriate deadlines or un-clarity of rules, it is argued that they are more likely due to key structural features of the system – and more particularly, to the fact that the system insufficiently takes into consideration the interests of asylum seekers, inciting them to evade its application, e.g. by absconding or by disposing of travel documents. The impacts of such uncooperative behaviour go beyond the mere inefficiency of the Dublin system. By inducing asylum seekers to engage in uncooperative behaviour, the Dublin system adversely affects the ability of Member States to carry out efficient asylum and return procedures, and it undermines efforts for an orderly management of migration. Furthermore, to the extent that it induces bona fide refugees to abscond or to engage in behaviour otherwise undermining their protection chances, the system arguably contradicts the Treaty goal of "offering appropriate status to any third-country national requiring international protection" (art. 78 TFEU).

3. RECOMMENDATIONS

With regard to insufficient guarantees against refoulement and ill-treatment in the responsible State, and more specifically the issue of impaired access to the asylum procedure, it is suggested that Dublin returnees be given a clear right to have their case re-opened, or to lodge an appeal, on return to the responsible State. Art. 18(2) of the Recast Proposal lays down an explicit guarantee that the responsible State must examine the application including by re-opening the case, if the examination of the claim has been discontinued due to "withdrawal". This proposal would partially solve the problem. However, in view of providing for more complete protection, it is recommended to take the Presidency Compromise text as a basis and to further amend it in order to eliminate its current ambiguities. In regard to the problem of failing protection and reception standards in the responsible State, the study emphasises that there are no solutions to be expected

from a reform of the Dublin system. Indeed, the goal of ensuring that adequate and equivalent standards of reception and protection are applied throughout the Dublin area is a long-term goal, which can only be achieved through decisive advances in harmonisation and, arguably, strengthened supervision, capacity building, and burden-sharing.

Concerning the problem of insufficient procedural guarantees against refoulement in the sending State, the Commission proposes the introduction of strengthened guarantees in the Dublin procedure: a comprehensive right to information, the right to a hearing and, importantly, a truly effective remedy against Dublin transfer. These proposals are fully supported in their original form, subject to a helpful amendment introduced by the Parliament, regarding a minimum 10 days deadline to file an appeal against Dublin transfers. With regard to the problem of over-reliance on safety presumptions, the Recast Proposal includes an innovative mechanism for the general suspension of transfers to Member States where “systemic” risks of refoulement or ill-treatment exist. This collective suspension mechanism should be maintained, although the substantive and procedural rules relating to its functioning should be improved in order to ensure that it is indeed applied in a protection-minded perspective. Another important measure would be to clarify Member States’ responsibilities in preventing refoulement through suitable amendments (fully set out in the Chapter) to the preamble of the Dublin Regulation. This would prevent the establishment of the collective suspension mechanism from sending wrong and dangerous signals to national administrations, e.g. that the Commission is solely responsible to avoid refoulement in Dublin context.

As regards the problem of the overly restrictive criteria on family-unity and the ensuing human rights concerns, the proposed reforms of the family definition and family criteria go some way towards solving the issues arising under the right to family life. There is nonetheless scope for improvement. Thus, art. 11 of the Recast Proposal should refer to “a family member or relative” and not only “a relative”; the enumeration of dependency situations should be made non-exhaustive and a new procedure should be introduced ensuring the identification of a responsible State in every case. It is also advised that the European Parliament reopen a discussion with the Commission and Council on whether, and how far, some stark “status” limitations, which are left untouched by the Recast Proposal, are indeed justified by public interest considerations. Concerning special provisions on minors, the Recast Proposal includes a number of welcome proposals, such as making it clear that the “best interest” principle applies throughout the procedures; clearly requiring Member States to trace the family of unaccompanied minors; and extending the definition of “family members”. In this last respect, a reformulation of art. 2(i)(v) of the Recast Proposal is suggested so as to ensure that adult siblings of a minor applicant are included in the definition. A possible rewording for the “time rule” in art. 7(3) of the Recast Proposal is also put forward, in recognition of the fact that although the original provision suggested by the Commission is flawed, its underlying concept is worth maintaining.

In this context, we would recommend that the European Parliament reconsider some of the amendments it has adopted at first reading – particularly, that it revert to the original Commission proposals to consider married minors as family members of their parents and siblings, provided that it is in line with the “best interest” principle, and to ensure family reunification for unaccompanied minors to the extent possible in the framework of art. 8 of the Recast Proposal. It is important to stress that even if all our recommendations were followed, gaps in the protection of family unity would remain, and the discretionary clauses would retain their importance. The Proposal introduces welcome amendments to the clauses themselves and to the Preamble of the Regulation. It is further recommended, as a short-term measure, to broaden the scope of the humanitarian clause in order to

encompass "close ties" beyond family ties. This would be a small step towards addressing the broader issue of integration, though real solutions to this problem would require rethinking the whole distributive concept underpinning the Dublin Regulation.

With regard to problems relating to the protection of vulnerable persons, and their reception during Dublin procedures more specifically, recital 9 of the Recast Proposal seeks to ensure the full application of the Reception Conditions Directive. This initiative is welcome, as well as the suggestion to set up an identification procedure (art. 21 of the Reception Conditions Recast Proposal). The strengthened information rights and procedural guarantees, provided in articles 4-5 and 26 of the Recast Proposal, are also supported in the perspective of improving the protection of vulnerable persons. Taken together, these proposals would help ensuring appropriate identification and treatment of vulnerable applicants at all stages of the asylum process. Concerning fitness to travel and continuity of care, the Recast Proposal assists in ensuring that the Dublin system is applied with due regard to the physical and mental integrity of vulnerable applicants, laying down the principle that applicants may be transferred only if "fit for transfer", and that relevant information must be exchanged between the Member States concerned. It is recommended that these useful proposals be strengthened by the inclusion of a mandatory "fit to travel" screening in the Regulation.

Regarding unaccompanied minors, it is suggested that the "horizontal" guarantees for minors (a clear affirmation of the "best interest" principle, the obligation to ensure adequate representation in all Dublin procedures and a requirement of age-sensitive communication) be strengthened in all Dublin procedures, along the lines of the Recast Proposal. In addition, the requirements of independence and qualification for the minor's representative should be better clarified. A properly conducted "best interest" determination, along the lines of art. 6 of the Proposal, would have the potential of solving the problem of transfers that are carried out even when in conflict with the "best interest" principle. However, practice suggests that Member States have not been unaware of relevant principles in the past, but have rather sidelined them in favour of the effective implementation of transfers. Owing to the special vulnerability of unaccompanied minors, the Commission's proposal to introduce a "hard and fast" rule exempting them in part from "take back" transfers merits further consideration. Finally, the Commission Proposal does not address the issue of age assessment. The European Parliament has adopted welcome amendments in this regard, although they would be usefully complemented by a principle whereby applicants must be given the benefit of the doubt in case of uncertainty.

Concerning the lacking distributive fairness of the Dublin system, the Recast Proposal foresees the establishment of a mechanism for the suspension of transfers to overburdened States. This proposal is considered positive, though it is recommended it be further improved by enlarging the conditions for triggering the mechanism. The solution is not considered as complete however, and the distributive imbalances currently observed in the CEAS are seen to require more decisive steps forward in the establishment of permanent burden-sharing mechanisms, as also demanded by the European Parliament at first reading.

Regarding the final problem area, the inefficiency of the Dublin system, it is highlighted that the Recast Proposal includes a number of technical amendments designed to ensure a smoother operation of the Dublin system, such as new or revised deadlines, clarifications on contested points and the generalisation of conciliation procedures. Though it is acknowledged that these amendments may in part mitigate the observed problems, it is argued that they fail to tackle the key factor behind the considerable efficiency deficit of the

Dublin system: the fundamental unfairness of the Dublin system to asylum seekers. In the view of the authors, true solutions to this problem can only come from a reconsideration of the Dublin system as such, i.e. from its replacement with a more integration-friendly system, capable of attracting widespread compliance from asylum seekers.

CHAPTER 2: THE QUALIFICATION DIRECTIVE

1. GENERAL CONSIDERATIONS

This part of the Assessment analyses problematic aspects of the current text of the Qualification Directive (qualification part of this instrument, while status part is only referred to on several connected aspects) and proposes short-term solutions. The problems were identified taking into account first of all the objectives of the Directive, namely:

- To ensure a minimum level of protection in all MSs for those in need of protection;
- To reduce disparities between MS legislation and practice;
- To limit secondary movements.

The need to align Member State obligations with the Geneva Convention and international human rights law was taken into account, as required by Art. 78(1) TEU. Proposals were developed with solution orientation in mind and considering the effectiveness, efficiency and coherence, as well as social impacts and impacts on fundamental rights as suggested in the 2009 Commission Impact Assessment. Since the Commission presented its' Recast Proposal for Qualification Directive on 21 October 2009, some of the problems identified and proposals to deal with them are already included in Commission's suggestions. Also, due to recast legislative technique possibility of amendments to the Directive is limited to what the Commission suggests. However the authors have kept also suggestions that go beyond the Recast Proposal. It is believed that the Commission unnecessarily overlooked some of the key issues, which will not be addressed right now, but will remain relevant in view of implementing the Stockholm Programme. The analysis of problems and proposed solutions is presented in the order of sequence of articles in the directive.

2. MAIN PROBLEMS

Several issues have been identified in the problem analysis part and they relate to the following provisions of the Directive: refugee status inclusion provisions (sur place claims, non-state actors of protection, internal relocation alternative, prosecution for conscientious objection, possible nexus between lack of protection and persecution grounds, cumulative test of social group and gender related aspects), grounds of subsidiary protection and exclusion and cessation provisions for refugee status and subsidiary protection.

In terms of international protection inclusion provisions, the following provisions are of concern:

1. Refusal of protection when a person creates the circumstances leading to protection needs: art. 5(2) comes close to requiring the "continuation of convictions" as a condition for a well-founded fear or real risk, while it is not necessary under the Refugee Convention. Art. 5(3) provision may raise concern with regard to compliance with the Refugee Convention, as the latter does not provide for any limitations of protection in cases when a person himself/herself creates the circumstances leading to protection needs.
2. Non-state protection and the notion of protection without the mandatory requirement of effectiveness: while the Refugee Convention requires state

protection, Art. 7(1)(b) of the Directive allows the possibility of non-state protection. According to Art. 7(2), it is enough that state or non-state actors take "reasonable steps to prevent the persecution", regardless of whether those steps lead to the effective protection of individuals or not.

3. Internal protection alternative test in Art. 8 („the applicant can reasonably be expected to stay there“) is considered to be too general and not ensuring that alternative is accessible: it gives a complete discretion to the MSs and results in divergent interpretations of the concept across national jurisdictions. Article 8(3) allowing refuse protection despite technical obstacles to return might be evaluated as contrary to the Refugee Convention.
4. Prosecution for conscientious objection is not covered by persecution as a basis for refugee status (Art. 9(2)(e)): as the recognition of conscientious objection is not specifically mentioned in the directive, the practice of MSs regarding persecution by prosecution of draft evaders varies a lot. Mentioning only excludable acts, the directive does not seem to cover other situations (i.e. conscientious objection in the absence of alternative to a military service).
5. Possible nexus between lack of protection and persecution grounds is not included (Art. 9(3)): the rules of the Directive on the nexus with the Refugee Convention grounds are overly restrictive, because Art. 9(3) excludes possible link between the Convention grounds and the lack of protection. It often results in state practice that is not in conformity with existing case law on the Refugee Convention.
6. Cumulative test of social group and weak reference to gender related aspects: art.10(1)(d) raises the issues related to cumulative application of "social perception" and "protected characteristics" requirements in social group test and to non-presumption of social group from gender related aspects alone. These provisions are weak, they give a broad discretion to the MSs and involve the risk that persecution on the basis of social group (in particular on the basis of gender) will not be sufficiently considered.

One of the major concerns is that current scope of subsidiary protection in the directive is limited as does not cover all protection needs (Art. 15). As a result, a number of persons in need of international protection remain outside the scope of harmonisation among the MSs under the notion of subsidiary protection. This goes against the objective of the directive, which is to ensure minimum level of protection to all those in need. Secondly, there are significant disparities in MS practices while applying subsidiary protection, thus undermining the harmonisation objective and encouraging onward movements within the Union. Among the persons not currently covered by subsidiary protection in the Directive, but in need of protection are:

- Persons who cannot be expelled because of the absolute obligation of MSs under non-refoulement (e.g. art. 3 ECHR). This may include persons who were denied status under the directive but cannot be returned; as well as persons who should be exceptionally protected as there is no adequate treatment in their home country.
- Persons whose family life cannot be guaranteed in the home country based on Art. 8 ECHR or when interests of the child cannot be guaranteed in the country of origin.

- Victims of generalised violence and human rights violations to whom most MSs grant protection. On EU level, protection to these persons is provided under the Temporary Protection Directive, but only when they arrive in a mass influx situation, albeit not individually. This causes horizontal inconsistency between asylum instruments and disparities in MS practice as concerns the issuance of residence permits.
- Persons left out because MSs interpret various notions in Art. 15(c) differently: for instance "internal armed conflict" is understood unevenly, as a result some MSs do grant protection and some not to individuals coming from the same countries of origin.

The need to expand the scope of subsidiary protection should be clearly distinguished from purely compassionate situations (e.g. old age, integration in a host society or technical obstacles to return) which should continue to be part of MSs discretionary decisions (in the absence of internationally or regionally defined standards how to deal with these individuals).

With regard to denial of protection (exclusion, cessation and revocation clauses), they are beyond permitted limits of MS's obligations (Art. 14 (4-5), 17 (1), 19). Confusion of exclusion/cessation clauses with exceptions to non-refoulement, as well as obligatory exclusion from subsidiary protection disregarding the absolute prohibition of refoulement, poses a risk to compliance of MS practices with the Convention and the TEU, thereby undermining the objective of the Union to provide protection to those in need. There is an apparent confusion in the Directive itself, even more in MS practice, as concerns the correct application of mentioned notions. Two concrete practical and legal problems are identified:

1. Art. 14(4) and 14(5) dealing with exceptions to non-refoulement include what constitutes de facto provisions on exclusion, going beyond what is permissible under the Refugee Convention. National security reasons and convictions for a "particularly serious crime" maintained as quasi-exclusion grounds under the revocation provisions may be potentially in breach of MS obligations under the Refugee Convention. Some MS merge provisions on exclusion with provisions that stem from exceptions to the principle of non-refoulement. However, there is a difference between denial (exclusion) and termination of refugee status. Hence, if using Art. 14(4-5), refugee status is withdrawn, the person will no longer be considered as refugee and thus will not be able to enjoy the benefits mentioned in art. 14(6).
2. Mandatory exclusion from subsidiary protection may run counter with prevailing international obligations of MS and "minimum standards" required by the TEU. In a number of MS exclusion is not required in all cases covered by Art. 17(1), since the MS refer to absolute obligations under non-refoulement (e.g. Art. 2 and 3 ECHR). In practice also, many MS grant to persons excluded from international protection other statuses, and this renders the obligatory exclusion rather symbolical. If the obligations under international human rights law are considered minimum standards as required, then requirement of the directive to mandatory exclude persons from subsidiary protection is below these standards. In MS practice, it has been noted that provisions on revocation, ending of or refusal to renew refugee status (Art. 14) or subsidiary protection status (Art. 19) have led to cases of deterioration due to this obligation to terminate the status.

With regard to cessation provisions for refugee status and subsidiary protection (Art. 11, 14(2), 16 and 19(4)), the practice shows that there is insufficient harmonisation of

requirements for application of cessation of protection across the MS. As a result, some Member States tend to examine the existence of current risk of persecution/harm rather than assessing the durability of eliminated risk along with availability of effective protection. This results in incorrect practical application of cessation thereby prematurely denying protection to persons who continue to be in need of it. Evidence collected by UNHCR, Odysseus network and ECRE suggests that:

- a. in some MS domestic law states additional grounds or overly wide grounds for cessation or exclusion or these grounds were interpreted in a liberal way resulting in revocation of status of many refugees;
- b. many MS have failed the rule on the burden of proof, which requires the authorities to “demonstrate on an individual basis” that the person has ceased to be a refugee or a person eligible for subsidiary protection. Refugee status cessation provisions became an issue before the Court of Justice which delivered a decision on 2 March 2010 concluding that a person loses the status when, following a change of circumstances of a significant and non-temporary nature in the third country concerned, the circumstances which had justified the person’s fear of persecution no longer exist and he has no other reason to fear being persecuted. This Court decision clarified the application of cessation to a certain extent, however it would still be beneficial to clarify the provisions of the Directive in order to ensure better harmonisation of practices. If these issues are not addressed, the impact of the directive on secondary movements within the EU will continue to be insignificant and legal limbo situations for persons to whom protection was legally ended but who cannot de facto as yet enjoy national protection might become more frequent.

3. RECOMMENDATIONS

Solutions for problems identified suggest revision of QD provisions, where it is considered that the issue cannot be sufficiently resolved by the practice, Court jurisprudence or in other ways. With regard to international protection inclusion provisions of the Directive, the authors suggest to:

- Delete the second part of Art. 5(2) (starting from the words “in particular”) and Art. 5(3); Art. 7(1)(b) or limit it only to de facto state authority; the words “generally” and “inter alia” in Art. 7(2); Art. 8(3);
- Specify internal protection criteria in Art. 8(1) by making a reference to Art. 7 criteria and the criteria of Salah Sheekh vs. Netherlands judgment of ECtHR, adding the word “access” and deleting the word “stay”;
- Amend Art. 9(2)(e) to include refusal to perform military service (and not only in a conflict) due to conscientious objection as a possible case of persecution;
- Amend Art. 9(3) by adding a link between lack of protection and persecution grounds as a possible nexus in the refugee definition;
- Amend Art. 10(1)(d) by stating that the requirements of “social perception” and “protected characteristics” are alternative and that gender related aspects are in particular relevant for both social group tests.

Expansion of subsidiary protection to include all those really in need of protection would align the practice with the objective of the directive and ensure consistency with other asylum instruments. Explicit coverage of certain individuals will limit the disparities that exist in MS legislation and practice and reduce the onward movements within the Union. From a practical and financial point of view, expansion of subsidiary protection should not

bear significant implications, as a number of MS already protect those persons under national law and many grant them certain rights. Proposal includes:

- a. Supplement Art. 15 with paragraph 2 requesting MS to grant subsidiary protection also in cases when international obligations prevent expulsion;
- b. Recital 26 should be deleted, as well as the terms "individual threat" and "internal or international armed conflict" in Art. 15(c); amend Art. 17(1) and 19 to state that exclusion from subsidiary protection should only be considered when there is no issue of absolute prohibition of refoulement based on the circumstances of the case.

With regard to denial of protection, the authors suggest that:

1. To prevent misinterpretation by MS of Art. 14(4) and (5) as exclusion or cessation clauses (which already happens in practice), these provisions should be moved to Status Rights' part of the Directive. This would ensure that MS apply this article strictly as termination of "residence status" ("asylum" in the meaning of the EU Charter on Fundamental Rights), rather than refugee status or subsidiary protection as such, which would also ensure the elimination of risks pertaining to compliance with the Refugee Convention.
2. Art. 2 would benefit from defining the concept of exclusion and revocation. Such a clarification would reduce disparities in MS exclusion practices and ensure compliance with the Refugee Convention.
3. Observance of MS obligations under human rights law may only be ensured if a requirement is introduced to apply exclusion/revocation and when there is no issue of absolute prohibition of refoulement based on the circumstances of the case. Alternatively, provisions on exclusion should be stated in non-obligatory terms in these Articles. As a result, only those persons falling under art. 17 and with regard to whom no international obligations apply would be excluded and effectively removed from the territory of the EU.

As the practice of several MS shows that they do not apply the cessation provisions correctly, clarification on what cessation means through defining it among the main notions in art. 2 of the Directive would ensure better harmonisation of MS cessation practices, reduce the number of cases of preliminary rulings to the Court of Justice and secondary movements. This as a result would minimise occurrence of legal limbo situations for persons for whom protection was legally ended in a premature way, but who cannot de facto as yet enjoy national protection. It would also save resources that would be spent as a result of premature cessation and the need to examine the applications once again. The notion of cessation to be inserted in Art. 2 needs to include inter alia the requirement to assess the previous risk, the durability of its elimination, the absence of new risks and the availability of effective protection, as well as reinforce the difference between the right to protection and corresponding residence permit.

The Commission in its Recast Proposal for Qualification Directive addresses a number of issues identified as concerns above. In regard to inclusion clauses, the Recast Proposal solves completely the problem in Art. 9(3), partly solves the problems in Art. 7, 8 and 10(1)(d), but does not respond to problems in Art. 5 and 9(2)(e). The Proposal does not touch upon the scope of subsidiary protection, despite the evidence that not all persons in need of protection are currently eligible for protection under QD. The Recast Proposal does

not also address any of the legal and practical problems related to exclusion and revocation of status, presumably because of the sensitivity that exists around these issues among the MS. It is believed that cessation provisions will be resolved by the jurisprudence of the Court of Justice and practice of MS, but these issues are also not addressed. Given that a number of issues (exclusion, cessation, revocation and scope of subsidiary protection) fall beyond the negotiable limits of the Recast Proposal, these issues remain to be addressed in the future.

CHAPTER 3: STATUS OF PROTECTED PERSONS

1. GENERAL CONSIDERATIONS

Two essential issues are dealt with in Chapter III related to the Status of Protected Persons: the detention of asylum seeker and the taking into account of the situation of vulnerable asylum seekers and vulnerable refugees having special needs. These two issues are analyzed in a horizontal way through the various relevant legal instruments of the EC (the reception conditions directive, the asylum procedure directive, the Dublin regulation and in addition the qualification directive regarding the second issue). The analysis focuses mainly on the content of the second generation of instruments that is the texts proposed by the Commission. The valuation of the Commission proposals can nevertheless imply an examination of the first generation instruments (texts currently into force). In addition, mentioning the texts proposed by the Parliament and/or the Council proves sometimes useful when these authorities have already come to a conclusion about the texts of the Commission.

On the border between the above mentioned issues, a third one is tackled: the detention of vulnerable asylum seekers with special needs. This question is dealt with in the reception conditions directive proposal through the analysis of the texts of the Commission, the Parliament and the Council.

1.1. The detention of asylum seekers: Main problems and Recommendations

If one can underline, the fact that the loss of freedom has become commonplace for foreigners - including many asylum applicants - as an instrument used to control migratory flux, one must agree that from a legal point of view, taking into consideration international standards, asylum seekers can be subjected to detention. The main relevant international standards are found in article 31 of the Geneva Convention, article 9 of the International Covenant on Civil and Political Rights (ICCPR), article 5, § 1 of the European Convention on Human Rights (ECHR) and article 6 of the European Charter of Fundamental Rights. The case of law relating to them and the Court of Justice of the European Union case of law must also be taken into account.

Thus the legal debate relating to the detention of asylum seekers does not question the principle of the detention itself but the basic conditions of the detention (including the reasons for detention), procedural guarantees and the framing of the conditions of detention. The reception conditions directive Commission proposal is overall positive regarding these three elements. In addition, without any doubt, the introduction of the new articles 8 to 11 contributes to a better harmonization in the EC objective sought within the framework of the first phase of the CEAS.

First of all, concerning the reasons for detention, the text restricts the loss of freedom to four cases only exhaustively listed (article 8 § 2, a) with d)). By doing so, from the point of view of the rights of asylum seekers the Commission proposal constitutes a progress in comparison with the reception conditions directive in force. This latter one leaves an important margin of appreciation to the Member States. The reasons for detention suggested by the Commission do not cause any problem taking into consideration the

international law. Nevertheless three of these reasons give way to interpretation and/or miss clearness. Thus details and/or modifications must imperatively be given to the wording.

Beside the four reasons enumerated in the reception conditions directive proposal, the Commission has provided for a very specific reason in the Dublin regulation proposal. Article 27 § 2 of this text makes it possible to hold an asylum seeker subject to a decision of transfer to the State responsible for the determination of his application, if there is a risk of absconding. Detention due to a risk that the asylum seeker may abscond is thus limited to the case of a person under the Dublin procedure and subject to a decision of transfer.

However, in the reception conditions directive proposal, the Council has added a fifth reason for detention being precisely the risk of absconding. Unlike the Dublin regulation Commission proposal, the risk of absconding mentioned by the Council is stated in a general and non-restrictive way: it applies to any asylum seeker regardless of the procedure and at any time.

This raises the issue of a proper balance to be found between the right for the states to fight illegal immigration and the asylum seekers' right to freedom. The Council proposal does not ensure it. At the same time, the four reasons suggested by the Commission in the reception conditions directive proposal and the specific reason provided for in the Dublin regulation proposal do not apply to some situations and this create a legal gap. An arrangement was proposed to meet these problems.

Concerning the asylum seekers' guarantees, they are generally in conformity with the international law with the exception of a few points, (for example the applicant's right to be given information about the reasons for his/her placement in detention in a language he/she understands).

The Council proposal deserves a special attention regarding the detention conditions, since in matter of lodging it sets an exemption likely to enter into conflict with the decisions of the European Court of Human Rights.

Two important questions of principle must finally hold the attention of the Community legislator: the possible fixation of an optimal duration of detention and the application of principle of the reception conditions directive proposal to asylum seekers. This last issue should not be underestimated, considering the current position of a certain number of MS that consider that the reception conditions directive in force does not apply to asylum seekers. Even if the drafting of the reception conditions directive Commission proposal has reduced the risk of divergent interpretations, it has not managed to make it disappear totally. It is essential to add an explicit provision stipulating the application of principle of the directive to applicants held in detention.

1.2. Taking into account of the situation of vulnerable asylum seekers with special needs: main problems and Recommendations

The reception conditions directive in force is the only Community instrument of first generation to give attention in a specific way to the situation of vulnerable asylum seekers with special needs. Indeed the Dublin regulation in force does not mention it and the directive procedure only touches the subject of the possible vulnerability of asylum seekers in an extremely marginal way. The situation of the identified refugees or the beneficiaries

of subsidiary protection is quite different, since provisions partly identical to the reception conditions directive in force can be found in the qualification directive. The asylum procedure directive Commission proposal and the Dublin regulation proposal clear up this problem. In the draft, specific provisions devoted to vulnerable asylum seekers are now envisaged.

The European Council was asking for such a change: the Stockholm Program puts at the centre of the priorities of the Union a better protection of the vulnerable people. It is essential if one keeps in mind, among other cases, the children situation or the people who are victims of torture. The reception conditions directive in force provides itself several provisions relating to the situation of vulnerable asylum seekers - mainly articles 17 to 20-. Several reports however, have outlined the fact that many MS have failed to transpose and/or implement the aforementioned provisions. This is partly explained by the wording of the provision stating the general principle that the situation of vulnerable asylum seekers should be paid specific attention to (article 17). It does not expressly oblige the MS to set up a procedure of identification for these applicants, even if one can consider that this procedure is logically required by article 17 as the European Commission has underlined it in its report on November 26th 2007.

In any event, the reception conditions directive Commission proposal gives an adequate answer to the problems. Indeed, with the new article 21, the MS are very clearly compelled to bring in procedures of identification in order to assess the individual situation of any asylum seeker aiming at identifying whether or not he/she has special needs. However the timing for the different stages must still be better defined in order to allow the identification of the vulnerable people throughout the procedure. Moreover, the reception conditions directive Commission proposal raises a problem of concept that is the determination of the people and the special needs one intends to meet. Written as it is, the interpretation and implementation of article 21 is unclear. These two elements must be thought over again. Insofar, the Council drafting of article 21 cannot in any case be accepted, as it mentions two distinct concepts without establishing any links between them making its interpretation and its implementation more than ambiguous. Under these conditions, a detailed proposal for an amendment of article 21 has been proposed.

New protective provisions in favour of vulnerable asylum seekers with special needs are to be found in the asylum procedure directive Commission proposal (article 2, d and article 20) and in the Dublin regulation Commission proposal (article 30). For this reason they should be fully approved. However two major drawbacks must be underlined in these two texts. First of all, the lack (or the insufficiency) of coordination between the various instruments of second generation regarding the issue of vulnerable applicants. If the set of problems can partly be seen in a different perspective according to the specific framework of instrument you are looking at, some links and/or similarity must be considered. Some clues are given to guide the EC legislator when tackling this first problem. Concerning the second drawback, the new provisions of the asylum procedure directive Commission proposal and the Dublin regulation Commission proposal can be compared with article 17 of the reception conditions directive in force. Indeed, even if these provisions protect asylum seekers having special needs, the States are not however, compelled to bring in specific procedures of identification in order to identify asylum seekers with special needs - as does article 17 of the reception conditions directive in force.

Of course one can always argue, as the Commission pertinently did it for article 17, that it is logically required by these protective provisions, since the procedure of identification is "... a core element without which the provisions of the directive aimed at special treatment

of these persons will lose any meaning". It does not in anyway mean that the lack of specific provision give way, with regard to the application of article 17, to many deficiencies. This absence of explicit provision creates also a legal insecurity. The problem is particularly acute concerning the people with mental health disability or concerning victims of torture or violence. Indeed, these are vulnerabilities uneasy to detect. At the same time, their identification is essential in order to be able to take these vulnerabilities into account within the framework of the asylum procedure itself (by adapting the modalities of the procedure) and also to acknowledge the possible link between these states of vulnerability and evidence, which can become grounds for international protection. It is consequently recommended to expressly set the obligation for the States to bring in a mechanism ensuring the identification of vulnerable asylum seekers with special needs.

Finally concerning the qualification directive Commission proposal, the wording of the protective provision for vulnerable asylum seekers (article 20 §§ 3 and 4) cannot be implemented. Its drafting is identical to article 17 of the reception conditions directive in force. Consequently, the problem of express obligation for the States to bring in a procedure of identification remains. It is recommended to copy the drafting of the amendment related to article 21 of the reception conditions directive proposal even if some changes have to be made, as the people concerned are not asylum seekers but recognized refugees, or beneficiaries of subsidiary protection.

1.3. Taking into account of the situation of vulnerable asylum seekers with special needs placed in detention: main problems and Recommendations

The detention of vulnerable asylum seekers set as a principle is neither at variance with the EC legislation nor with the international law. The absence of banning of the principle itself of detention of vulnerable people does not mean their detention will be considered to be legal and non arbitrary in all circumstances. Probably, more often than for other people, the judge will be attentive to the fact that the detention is neither illegal nor arbitrary and that its conditions do not breach the international standards. With regard to the detention conditions, asylum seekers in detention should in theory profit from the implementation of the minimal standards of the reception conditions directive among which protective standards are in favour of vulnerable applicants. However this is not the case in many MS. There are two reasons for it: on the one hand, as it was underlined (Title 2), some MS consider that the reception conditions directive in force does not apply to asylum seekers in detention, on the other hand many MS have not set up yet the procedure of identification of vulnerable asylum seekers (Title 3).

The reception conditions directive Commission proposal improves very efficiently the taking into account of these problems. Beside the answers that were already explained in titles 2 and 3, a specific provision was added by the Commission in the reception conditions directive (article 11 § 5). The purpose of this provision is to avoid the loss of freedom of people whose physical or mental health condition could significantly deteriorate, as a result of the detention. Article 11 § 5 lays down the setting up of an individual examination, making it possible to assess the health condition of the applicant to appreciate how significantly it could be affected by detention. The Commission proposal should be fully accepted. One aspect of the individual examination must nevertheless be reformulated. The text of the Council is a retrograde step since it removed the reference to the individual examination envisaged by the Commission. This modification is likely to compromise the effective implementation of the stated principle. The text of the Council cannot consequently be accepted.

1.4. Common observation to titles 3 and 4 relating to vulnerable asylum seekers with special needs

The instruments of second generation proposed by the Commission contain new protective provisions in favour of vulnerable asylum seekers. This is with no doubt positive. However, the Commission has not often provided the means to make it possible to ensure the implementation of these protective measures. This definitely implies to bring in procedures. Then another issue appears with respect to a multitude of examinations, procedures and mechanisms of assessment. The various actors on the ground should be solicited in order to think of relevant ways to establish links between these various procedures, or some of them. Such a reflection seems essential to ensure the viability of the CEAS.

CHAPTER 4: THE ASYLUM PROCEDURES DIRECTIVE (APD)

1. GENERAL CONSIDERATIONS

This part of the report analyses, on the basis of a diagram of the procedures (see annex to the chapter), the main weaknesses of the APD (vagueness and insufficiency of the current minimum common standards; wide margin of discretion given to Member States; multiplicity of provisional provisions; numerous possibilities to derogate to the basic principles and guarantees of Chapter II of the Directive) and the variety of the different facultative procedures (with several standstill clauses) actually foreseen by the Directive, to conclude that the APD provides more for a “variety of procedural standards” than for a “standard procedure” and lacks the potential to ensure, regardless the Member State concerned, fair and efficient examination of an application for international protection and, in addition to back up adequately the “Qualification Directive”.

The principal aims pursued by the recast proposal of Directive of the Commission (single procedure for both forms of international protection; reinforcement of the procedural guarantees; simplification of the different procedures; modification of a number of notions and devices; enhancing gender equality and providing for additional safeguards for vulnerable applicants) are afterwards described, and the necessity is underlined to examine the recast programme of the second phase of the EU asylum instruments as a whole.

It is referred to in the international legal framework which has to be taken into consideration, inter alia, to ensure the respect of the principle of non-refoulement (Geneva Convention; European Convention of Human Rights; International Convention on the Rights of the Child; Charter of Fundamental Rights of the EU). Attention is also paid to the necessity to control the compatibility of the recast proposal with fundamental rights and general principles of EU law, even as with the case law of the CJEU and the ECtHR. It is indeed essential to determine, when examining the different provisions of the recast proposal, what is legally required and what is more relied upon in a political debate between the different stakeholders.

2. MAIN PROBLEMS AND RECOMMENDATIONS ON THE BASIC PRINCIPLES AND PROCEDURAL GUARANTEES CONCERNING THE ADMINISTRATIVE PROCEDURES AT FIRST INSTANCE

The recast proposal contains the establishment of a single asylum procedure for both forms of protection. The advantages of this option must be underlined.

The report analyses the APD and the recast proposal to determine if the access to the procedure and the procedural guarantees offered are satisfactory. The general conclusion is that the recast proposal answers to a large part of the critics expressed about the APD, while some concerns remain:

The right to remain during the procedure, even in case of extradition, has to be guaranteed taking into consideration the principle of non-refoulement and the absolute protection

against removal guaranteed by article 3 ECHR. The recast proposal answers this critic of the current text.

Right to be informed and capacities of the determining authorities

In order to avoid refoulement of asylum seekers in situation of mixed arrivals, border guards and immigration officials would benefit from training and clear instructions on how to answer asylum application and how to handle the needs of vulnerable groups. The recast proposal improves the capacities of the authorities, while an unjustified exception remains for the Dublin cases. In the same time, the identification of the authorities has to be clarified since the recast proposal continues to refer as well to "determining" as to "competent" authorities. The recast proposal contains also a new provision dedicated to the right to information of the applicant, namely in critical zones like transit zones. The effective access to the procedure depends indeed on this right to receive available and complete information.

Personal interview

The APD lists many exceptions to the right to the personal interview, while an oral hearing is important for an asylum seeker, even if its application seems inadmissible or grounded on undue reasons, or to rebut a presumption of safety in case of application of the concepts of "first country of asylum" (FCA), "(European) safe third countries" ((E)STC), and "safe countries of origin" (SCO). Even when a personal interview is provided by the APD, its requirements are too vaguely formulated. However, the right to be heard is guaranteed by CJ case law and required by the UNHCR. With this regard, the new procedural safeguards provided by the recast proposal contribute to the effectiveness of a fair and efficient procedure and by this way could reduce the percentage of appeal.

Legal assistance

The right to legal assistance is guaranteed by the APD but is limited. On the one side, its scope is problematic since the legal adviser could not have access to all the information contained in the applicant's file. On the other side, this right is guaranteed at the own expenses of the asylum seeker because the right to free legal assistance is limited to the second (judicial) stage of the procedure. The recast proposal enlarges the access to the information of the applicant's file and the right to free legal assistance. On the one side, this right is not yet limited to the procedures on appeal. On the other side, the proposition removes the possibility to refuse to grant the free legal assistance to other procedures than judicial procedures and to limit it only if the appeal or review is likely to succeed. The right to legal assistance is not subjected to discussion under EU law and in the ECHR that imply that the effectiveness of a judicial remedy is conditioned by the right to legal assistance. Even if this right is as such not absolute, the same principles apply to the right to free legal assistance at the second stage (judicial review) of the procedure. At the first stage of the procedure (administrative procedure), even if the texts and the case law are not so explicit, one can deduce from the CJ case law and from the necessity of the practice that a right to free legal assistance at the first stage has also to be recommended, taking into account the specificity of the asylum matter.

Applicants with special needs

One of the criticisms addressed to the APD is the lack of protection of the applicants with special needs. Only minors did benefit of a specific protection, while considered insufficient. Procedural rules have to be adapted to allow weaker applicants to be heard in right conditions. Moreover, to apply the same rules to situations significantly different, violates the principle of non-discrimination. Even if the recast proposal contains a new provision specifically dedicated to applicants with special needs, to guarantee an effective protection,

the recast proposal should also: 1°) define more precisely the protected groups; 2°) oblige the Member States to make a systematic monitoring to identify those groups, since an application is introduced; 3°) and clarify the guarantees provided to each subgroups of the applicants with special needs.

Standards of examination

In addition to the mere procedural provisions, the APD does also contain some rules on the examination of asylum applications ("standards of examination"). The question is if there is a need to better define those standards and if it would or not be possible to make concrete proposals in the amended Directive. Other ideas could be:

1. to charge EASO to deal with issues of "recommended standards of examination" by issuing guidelines, from which Member States may deviate, but may be obliged in that case to register their differences;
2. to realize, with the cooperation of EASO, experimental procedures concerning, inter alia, "joint processing" of examinations;
3. to incorporate Article 4 of the "Qualification" Directive in the APD.

3. MAIN PROBLEMS AND RECOMMENDATIONS CONCERNING GUARANTEES FOR A FULL EXAMINATION OF THE SUBSTANCE OF THE CLAIM

The concrete application by each Member State of some concepts of the APD, like "FCA", "(E)STC", or "SCO", could lead to deprive an asylum seeker to an access to an effective protection because he will not benefit of a full examination of the substance of his/her application. All the specific uses of the different forms of the "safe countries" concept raise similar concerns: the question of the illegal entry and/or of the individual examination of the claim; the criteria for the determination of countries as "safe"; the determination of the authorities that should be responsible in such cases; the meaning of "effective protection" in the country considered as safe; the question of the "necessary link" between the applicant and the third country concerned; the specific treatment of minors or vulnerable persons when applying those concepts. Even if some improvements are inserted in the recast proposal, they are not sufficient. In each case, the right to rebut the presumption of safety has to be explicitly recognized by the directive, as well on the procedural level as on the substantial level. The concept of CEAS is also not consistent with the option to refer only to "national" lists rather than to adopt "common EU" lists, with the possibility to involve the EASO. Moreover, about:

- the FCA, the terms "sufficient protection" are too weak and could be replaced by "effective [and available] protection".
- the STC: a removal to such a country could only occur on the basis of an agreement which clearly outlines the respective responsibility of the Member State and of this country;
- the SCO: providing that the use of those lists of SCO does not increase the burden of proof for the asylum-seeker, that each individual case will be examined fully on its merits, and that procedural guarantees are offered, the establishment of those lists could be acceptable. However, since the procedural guarantees required are the same than in the regular procedure, one may wonder if the complexity involved by this concept is really necessary for the Member States;
- the ESTC: if we consider that the same procedural guarantees would apply as for the STC, this concept would better be abandoned.

4. MAIN PROBLEMS AND RECOMMENDATIONS ON THE ORGANISATION OF THE DIFFERENT ADMINISTRATIVE PROCEDURES AT FIRST INSTANCE

At the hand of a comparative diagram (see annex to the chapter), the accent has first been put on the complexity of the procedures provided by the APD and on the effort of simplification that has been pursued in the recast proposal. At the end of this examination, we can conclude that the new framework of procedures proposed could be considered as much more accessible and comprehensive than the one actually provided by the APD. It would be theoretically possible, but unreasonable in practice, to plaid for the abolition of any kind of specific or accelerated procedure and for the use of only one procedure. Taking this into account, we can consider that the different procedures provided by the recast proposal are acceptable and in line with the international obligations of the Member States and with the case law of the CJ and of the ECtHR, in so far as:

1. the number of those procedures is reduced (inter alia with the abolition of the stand still clauses);
2. the power to decide on the merits of the claim is, as such as possible, given to the determining authority;
3. and the minimal guarantees lay down in the regular (ordinary) procedure, which are also reinforced by the recast proposal, would also apply to the accelerated or specific procedures, unless it appears absolutely incompatible with the specificity of those procedures, but at the condition that the exceptions provided are conform with the case law of the CJ and of the ECtHR.

Some comments or recommendations can however be made concerning some aspects of the new organization of the asylum procedures at first instance:

- the recast proposal should be completed in order to determine the consequences of failure to adopt a decision a first instance within the determined time-limits;
- concerning the “accelerated” procedures, which are now clearly distinguished from the “prioritized” procedures, the main problems posed by the APD are resolved by the recast proposal (limited list of cases; reinforcement of the procedural guarantees: personal interview; possibility to ask, at least, for a temporary suspensive effect of a judicial appeal), provided that time-limits to conduct such procedures should not be too short and that the applicant has to be given a realistic opportunity to prove his/her claim;
- concerning the “inadmissible applications” procedure, it is suggested, in addition to what has already been said concerning the “FCA” and “(E)STC” concepts, to examine some risks confusions resulting from some provisions of the recast proposal: confusion between some cases of “inadmissible applications” procedure and some cases of “preliminary examination” procedure of subsequent applications; what are the requirements for the “admissibility (personal) interview” provided by Article 30 (1) recast proposal?; who will take the decision: the determining authority or another “competent” authority?);
- the provisions of the recast proposal with regard the “border” procedure may be approved, but one concern remains: the fact that very short time frames that

would be applied by Member States, among other to introduce an appeal, could render very difficult the exercise of rights and obligations by the applicant;

- the "preliminary examination" procedure of subsequent applications is, as a principle, acceptable. Concerning the APD, there are however some critics about the fact that this specific procedure can also be applied in circumstances where the first application has not been examined on its substance. It is indeed proposed in the recast proposal to modify the scope of this procedure that would only be applicable when a person makes a subsequent application after a final decision has been taken on the previous application or where the previous application has been explicitly withdrawn. It is also explicitly provided that, where a person with regard to whom a transfer decision has to be enforced pursuant to the "Dublin" Regulation, makes further representations or a subsequent application in the transferring State, those representations or subsequent application shall be examined by the responsible Member State in accordance with the "Asylum Procedures" Directive. It may be considered as a consequence, that most of the concerns expressed with regard to the scope of this procedure are met by the recast proposal. Concerning the foreseen exception to the right to stay in the territory during the administrative examination of a (second or multiple) subsequent claim after that a first subsequent claim has already been considered as "inadmissible" or as "(manifestly) unfounded", further explanations would however be given on the following points:
 1. which right to an effective remedy against the expulsion or removal order: application of the "Return" Directive or of Article 41 recast proposal?
 2. what about the relations between the "competent" authority and the "determining" authority before such an order should be decided?
- in cases of withdrawing of the recognized international protection status, the right to free legal assistance is only recognized once the "competent authority" has taken this decision; we do however not see how this difference of treatment can reasonably be justified with regard to the recognition of such right at all stages of the procedures in first instance. We also consider that the person concerned would have the right to a personal interview, in the place of a written statement of the reasons why it is not justified to withdraw the status, at least when he/she expressly request for such interview;
- is it intentionally or not that the recast proposal does not more contain any provisions concerning "national security problems"?

To conclude on this point, we recommend the Parliament to support the recast proposal and to examine if any proposed amendment to this proposal is at least in conformity with the case law of the CJ and of the ECtHR; we also suggest taking into consideration the problems mentioned above.

5. MAIN PROBLEMS AND RECOMMENDATIONS ON THE EFFECTIVENESS OF THE JUDICIAL PROTECTION PROVIDED BY THE APPEAL BODIES AT FIRST INSTANCE

The accent has first been put on the fact that the APD, which gives Member States a wide margin of discretion for the organization of the judicial remedy is far from given assurance,

such as demonstrated by the recent case law of the ECtHR (among other the possibility of a suspensive effect of a judicial appeal or the power recognized to the court or tribunal), that the national law or regulation of the Member States will effectively be in accordance with their "international obligations". Therefore, this is not surprising that multiples differences appear between Member States with regard to the level of protection standards and procedural guarantees provided by each national judicial system. This statement does not conform with the aim pursued by the construction of the CEAS, among others, of a common asylum procedure with mutual recognition as the long term goal.

Furthermore, taking into account the consequences of the entry into force of Article 47 CFR (and Article 19 (1) TEU) and the interaction with the recent case law of the CJ and of the ECtHR, we can consider that the aim of the Commission to introduce in the recast proposal the minimal requirements for an effective remedy is a good step forwards and that the minimal requirements provided in the recast proposal (among others: the access to information in the applicant's file by the court or tribunal and/or by the applicant and/or his/her counsellor and/or representative; the right to (free) legal assistance and representation; the automatic suspensive effect of the appeal or, at least, the possibility to ask for this suspensive effect until a first decision of the court or tribunal on the arguability of the claim; the scope of examination by the court or tribunal [full examination of both facts and law/examination "ex nunc"/examination "proprio motu"]) in general, conform with the minimal requirements provided by the case law of the CJ and the ECtHR.

Some specific recommendations have however been made in the report:

- the introduction in the Directive of a common minimum time-limit to introduce an appeal, time-limit which could vary regarding the procedure, which has been applied to the specific case;
- the recast proposal would also be amended to prevent that an expulsion order should be enforced during the time-limit open to lodge an appeal, or at least to ask for an interim measure of suspension which has expired;
- the recast proposal would also be completed to determine the consequences of the overstepping of the time-limits imposed for the court or tribunal to examine an appeal.

CHAPTER 5: THE EXTERNAL DIMENSION OF ASYLUM

1. GENERAL CONSIDERATIONS

The area of freedom, security and justice that the Union shall 'offer to its citizens', pursuant to article 3(2) TEU, is supposed to remain penetrable to 'those whose circumstances lead them justifiably to seek access to our territory'. The Tampere Conclusions indeed established that "the aim is an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments [...]" (§4). The Stockholm Programme has set out precisely that "people in need of protection must be ensured access to legally safe and efficient asylum procedures" (§1.1). At the same time, as the Tampere Conclusions recall (§3), "the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes" is to be taken into account. According to the European Pact on Immigration and Asylum, a proper balance is thus to be struck so that "the necessary strengthening of European border controls [does] not prevent access to protection systems by those people entitled to benefit under them".

In an environment of extraterritorial border surveillance and migration control, several solutions have been posted to offer guarantees to those who seek protection in or access to the European Union with varying degrees of success. Some of these mechanisms focus on the regions of origin and transit of refugee flows, as vectors of the international system of protection, with the objective of enhancing their protection capacity to manage protracted situations. Other initiatives engage directly with the individual refugee and his physical access to the territory of the EU Member States in a safe and orderly way. Still other measures, particularly those concerned with border surveillance and migration control in general, appear to largely neglect their impact on asylum seekers' and refugees' rights.

This chapter constitutes the contribution on the external dimension of asylum to the debate regarding the future development of the Common European Asylum System (CEAS). Our purpose is to identify the main legal questions regarding the administration of access to international protection in the EU Member States and to advance possible solutions. The chapter looks into the state of the art of the EU *acquis* on entry management with an impact on access to international protection, evaluating current shortcomings and putting forward short-term solutions. Future perspectives are assessed in Part III of the study. After a preliminary review of the obligations of the EU Member States with an effect on access to international protection, the measures adopted to administer migration in general are dealt with first. The Schengen Borders Code, visa policy, carrier sanctions, immigration liaison officers, and joint patrolling conducted under the auspices of the FRONTEX agency are all concerned.

Subsequently, the policy instruments implemented to manage refugee inflows in particular, are examined. Both the EU Joint Resettlement Programme and Regional Protection Programmes are assessed in Chapter 5. Offshore processing schemes, protected-entry procedures as well as, our recommendation for a comprehensive approach to access in the form of an overall protection-sensitive entry-management system are evaluated in Part III.

2. MAIN PROBLEM AREAS IDENTIFIED WITH REGARD TO ACCESS TO PROTECTION

EU Member States' approach to the extraterritorial applicability of human rights obligations has been fragmentary thus far. There is no uniform understanding of the territorial scope of application of protection-related obligations, which risks seriously encroaching upon refugees' and asylum seekers' rights to protection against refoulement and to (leave to seek) asylum. There is a pressing need for a consistent approach to the issue of access to international protection in the EU, which requires the prior acknowledgment by the EU Member States of the mixed character of the migratory flows to which they are confronted and the recognition of extraterritorial protection-related obligations that may be engaged by the actions or omissions of their agents when they operate abroad. The rights of refugees and asylum seekers travelling in mixed flows should not be compromised by the extraterritorial intervention of the EU Member States. Those rights should be taken into account at all the stages in which the management of migration and asylum flows is carried out. If a priori there is no obligation to provide for international protection extraterritorially, where the EU and/or its Member States exert 'effective control' over an area in foreign territory or over persons abroad, for instance through the extra-territorialisation of their migration and asylum policies, their human rights obligations, as ensuing from international and EU law, may be engaged. In addition, international cooperation, be it with international organisations or with third countries, does not exonerate the Union or its Member States from their respective obligations. In these situations the persons concerned are brought under the jurisdiction of the Union and/or its Member States in such a way that EU law, including its fundamental rights' *acquis*, becomes applicable and must be duly observed.

In the absence of adequate monitoring and evaluation tools, the real impact of entry and pre-entry control measures on the rights of asylum seekers and refugees remains unknown. No such instruments exist with regard to the Schengen Borders Code, nor regarding visa policy or carrier sanctions. The information available with regard to the activities of Immigration Liaison Officers (ILOs) posted abroad is very limited, as is access to data concerning FRONTEX-led operations. Full disclosure is prevented by existing rules on the classification of risk analysis, evaluations and periodic reports in this domain.

The integration of protection-related considerations in the design and implementation of existing instruments of entry and pre-entry control is presently unsatisfactory. Clear entry requirements for refugees and asylum seekers are lacking. Although article 13(1) SBC indicates that 'special provisions concerning the right of asylum and to international protection' may apply when dealing with entry refusals, it remains silent as for what these 'special provisions' should concretely provide. All refugee-producing countries feature in the black list of Regulation 539/2001, putting a heavy burden to access international protection in the EU through the submission of refugees and asylum seekers to visa requirements. In addition, there are no uniform conditions for recognised refugees to obtain visas and the provisions on limited territorial validity visas (LTVs) seem insufficient to fully accommodate the obligations that might be owed to refugees yet-to-be-recognised in exceptional circumstances. Ultimately, actual access to visas is not guaranteed in practice, as the diplomatic presence of the EU Member States in the third countries concerned is not compulsory. Against this background, the articulation of carrier sanctions with the respect of refugees' and asylum seekers' rights in relation to access to international protection is highly problematic. Considering that visas are not always available, carriers should be enabled to carry out full entry checks on the basis of the SBC provisions and the exceptions thereof. Similarly, ILOs' activities accommodation to the asylum dimension related to their

action is not obvious. Their main task is precisely to prevent irregular immigration, without particular regard being had to the special position of those who need international protection. No specification of the procedures to be used in cases in which ILOs encounter refugees or asylum seekers or of any remedies available against their actions can be found in the ILOs Regulation. FRONTEX operations also pay insufficient attention to the rights of refugees and asylum seekers in transit. The lack of a uniform understanding of search and rescue obligations and of interdiction powers at sea among the Member States renders compliance with protection obligations further intricate. Cooperation with third countries in joint-surveillance missions has fostered further confusion in this regard.

The entire system of entry/pre-entry control has to be subject to the democratic oversight of the European Parliament and the judicial control of both national and European courts. However, entry refusals are not endowed with suspensive effect under article 13 SBC. In light of articles 19 and 25 of the Community Code on Visas, appeal rights against LTV visa denials are unclear. As far as private carriers' decisions are concerned, no remedies presently exist against exclusion from boarding in Directive 2001/51. Finally, remedies are also missing with regard to ILOs' and FRONTEX agents' actions or omissions in the relevant legislation.

In a context of prevailing extraterritorial entry controls, to ensure that the right to (leave to seek) asylum and to non-refoulement remain accessible in law and in practice, common measures should be codified to provide a safe and legal access to international protection in the EU. Article 78(2)(g) TFEU provides the EU legislator with the legal basis to adopt legislation 'for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection'. It would further appear that such measures shall be adopted as an integral part of the CEAS that the Union has to develop. Implemented and proposed initiatives in this realm comprise the EU Resettlement Programme, Regional Protection Programmes, which give rise to common concerns: they pursue high ambitions with limited financial and material means; doubts arise as for the voluntary nature of the participation in these measures, as their proponents maintain; so long as the real needs and capacities of the countries of first asylum these measure target are ignored, their impact will be limited; a requirement of consistency has been introduced with regard to the Global Approach of Migration, which constitutes a cause of concern, whereas coherence with the internal asylum acquis has been obliterated; the complementary nature of these measures with pre-existing legal obligations has not been clearly stated.

3. RECOMMENDATIONS

The content of the main obligations binding upon the EU Member States vis-à-vis refugees and asylum seekers in transit, as enshrined in the international instruments to which the EU Member States have adhered and in EU law itself, is to be properly identified. The principle of non-refoulement, the right to (leave to seek) asylum, in their substantive and procedural components, should be well delineated and incorporated into each of the extraterritorial initiatives undertaken by the EU and its Member States with an impact on access to international protection. On the ascertainment that human rights obligations may be engaged extraterritorially, it should be clearly acknowledged that entry and pre-entry controls shall be designed and implemented in a way that does not deprive refugees and asylum seekers of the protection that the prohibition of refoulement and the right to (leave to seek) asylum afford them in both their facets, substantive and procedural. In order to preserve the effect utile, entry and pre-entry controls, in the form of Schengen visas, carrier sanctions, the intervention of immigration liaison officers (ILOs), and the interdiction carried out in the course of FRONTEX-led operations, must be aligned with the fundamental

rights' *acquis* of the EU. Activities pertaining to the 'external dimension of asylum' *stricto sensu*, such as the EU Resettlement Programme, Regional Protection Programmes, and proposals for Protected-Entry Procedures shall also be made compatible with these entitlements.

The real influence of pre-entry and entry management instruments on asylum seekers' and refugees' rights should be properly identified. Therefore, it is highly advisable that reporting obligations on the actors concerned, independent monitoring, evaluation mechanisms and the duty to collect specific statistical data relevant to the situation of refugees and asylum seekers in transit be introduced for the purpose. The existing information in relation to the activities of ILOs and FRONTEX-led missions should be declassified. Once the real dimensions of the legal concerns posed by general border and migration legislation with regard to refugees' and asylum seekers' rights become known, the streamlining of the existing legislation will be facilitated.

The rights of refugees and asylum seekers shall be duly incorporated in migration control and border surveillance strategies. Specific procedures and adequate legal safeguards must be introduced to ensure compliance with protection-related obligations. Ultimately, the instruments for which the alignment with the fundamental rights' *acquis* of asylum seekers and refugees under EU law reveals impossible will have to be abolished. Accordingly, clear procedures for the identification and referral of asylum seekers at entry and pre-entry shall be introduced in the Schengen Borders Code. In light of the *Munaf* and *WM* jurisprudence, visa lists should be configured and reviewed considering not only security and illegal immigration concerns, but also their possible human rights implications, to facilitate the fulfilment by the EU Member States of their extraterritorial protection obligations as appropriate. In order to achieve the Treaty objective of a 'common policy on visas', the current discretion accorded to the EU Member State in relation to visa requirements for recognised refugees should be eliminated. The conditions and the procedure to issue LTV visas to refugees and asylum seekers shall be clarified, to ensure that the Member States at issue are able to fulfil their extraterritorial international obligations, as appropriate. Yet, if the availability of visas cannot be guaranteed in practice, the institution of carrier sanctions must be entirely re-thought, if not abandoned. With regard to ILOs, better specification of their tasks and powers and the introduction of appropriate legal safeguards is essential. The same applies to FRONTEX missions, *vis-à-vis* both the action of the agency's personnel and that of the agents of the Member States participating in joint operations. Specific procedures and remedies shall be introduced to provide adequate legal safeguards to those seeking international protection recovered at sea.

Effective remedies, which are accessible both in law and in practice, must be introduced for each individual case in which the person concerned presents an "arguable claim" that his rights have been or risk being violated. Therefore, the wording of article 13(3) SBC shall be clarified, so that the position of refugees and asylum seekers with regard to appeals against entry refusals is brought in line with the requirements of an 'effective remedy' *ex* article 13 ECHR and article 47 EUCFR. The linguistic inconsistencies between articles 19 and 25 CCV shall be eliminated, so that refugee visa applicants do not see their applications truncated at the admissibility stage. Effective rights of defence and appeal should be introduced for those affected by carriers' decisions. Yet, in practice, even if carriers would be *de jure* empowered to make full decisions on entry, it remains unclear how the exercise of effective remedies against their decisions and the right to judicial protection could be upheld in a meaningful manner. The impossibility to introduce the necessary legal safeguards in the carrier sanctions' scheme should hence lead to the abandonment of the policy. With regard to ILOs' actions, it is also uncertain that the legal safeguards and remedies that may be

introduced in the ILOs Regulation could be effective in practice. Thus, as with carrier sanctions, the impossibility to introduce the necessary legal safeguards in their scheme should lead to their abolishment. With regard to the actions and omissions that may be undertaken in the course of a FRONTEX-led operation, the inconvenience of implementing offshore procedures is referred to above. It ensues that in the maritime context for remedies to be effective disembarkation in 'a place of safety' located within European jurisdiction may actually be required.

With regard to the limitations identified in relation to the EU Resettlement Programme and RPPs, several suggestions are provided: Given the fact that the financial and material means on which they rely are limited, to realize their humanitarian aspirations their coordination with other external humanitarian activities of the EU should be assured in practice; concerning the nature of the participation in these measures, there is ground to consider that, in view of the wording of article 78(2)(g) TFEU, participation in their implementation should be deemed compulsory; to maximise their humanitarian impact, RPPs and the EU Resettlement Programme shall translate a multilateral partnership with the countries of first asylum; in light of the duty to ensure consistency across the policies of the Union, enshrined in articles 7 TFEU and 21(3) TEU, flagrantly contradictory results between or within the external and the internal asylum acquis shall be considered in breach of this legal obligation. Therefore, the design and implementation of RPPs and the EU Resettlement Programme should take into account the relevant rules of the CEAS already in place; on the other hand, linking protection-related measures to migration management concerns, as those belonging to the Global Approach to Migration, risks detracting those measures from their primary humanitarian objectives; the existence of such measures cannot be used as a pretext not to grant admission, or not to provide protection in accordance with international and EU law as appropriate; the complementary nature of these measures must be made straightforward.

PART 3: LONG-TERM PERSPECTIVES FOR THE COMMON EUROPEAN ASYLUM SYSTEM

It does not seem reasonable to expect changes of the European Treaties and therefore to come up with revolutionary proposals. Moreover, much can be done in the current treaty framework with the renewal of the policy due to the entry into force of the Treaty of Lisbon, as well as the Charter of fundamental rights and the creation of the European Asylum Support Office. Four perspectives should be considered for the development of the Common European Asylum System in the future.

SECTION 1: THE LEGAL PERSPECTIVE

Three parameters must be taken into consideration.

1. THE IMPACT OF ARTICLE 18 OF THE CHARTER OF FUNDAMENTAL RIGHTS

This provision states that “The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967, relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union ».

This provision reflects the complexity of the texts guaranteeing asylum in the European Union. Based on a mixing of the notions of asylum and refugee, the question of its precise meaning from the minimum procedural right to seek asylum to the maximum substantive right to territorial asylum, as well as of its effect (direct or not?), are open to interpretation and will need an interpretative ruling by the Court of Justice. It is nevertheless clear when it is read in conjunction with article 78, §§1 and 2 TFEU, that it creates for the European Union the positive obligations to guarantee the right to asylum by applying the principle of non-refoulement and adopting an appropriate status for protected persons encompassing refugees, subsidiary protection and even temporary protection.

2. THE ACCESSION OF THE EUROPEAN UNION TO THE GENEVA CONVENTION

The idea for the EU to accede to the Geneva Convention is expressed for the very first time in the Stockholm Programme. It is in line with article 78, §1 TFEU, following which the common asylum policy “must be in accordance with the Geneva Convention”.

Firstly, one may wonder if it is legally feasible. This seems to be the case from the point of view of the European Union. Its firmly established internal competence regarding asylum allows the Union to exercise it externally by acceding to the Geneva Convention, even if it must be clear that the Union would in this way not succeed to the Member States, as it does not grant asylum to refugees. However, the Geneva Convention covers several questions concerning refugees’ rights that belong to the Member States and would appear to be a mixed treaty that the EU can only ratify partially because of the sharing of competences with its Member States.

The feasibility from the point of view of the Geneva Convention is more complicated. This Convention is indeed only open to State Parties that is not the case of the European Union. This important obstacle can nevertheless be circumvented in two different ways. The first one is an amendment to the Geneva Convention that is not commendable because there is a risk to reopen a debate about its substance which could at the end be undermined. The second of a protocol to the Geneva Convention similar to the one used to organise the accession of the EU to the Convention of Human Rights seems to be the best option. Another more difficult problem might nevertheless appear. The Protocole n°24 on asylum for nationals of Member States of the European Union (the so called "Aznar" Protocole), excluding them from asylum in the EU, is generally considered as contradictory to the Geneva Convention and could be considered as an obstacle to the accession of the EU.

Before its technical feasibility, the added value of the accession of the EU should be at the core of the discussion. Its main value would be linked to the new status that the Geneva Convention would acquire in EU law. As an international convention ratified by the EU itself, the Court of Justice would become a direct interpreter of it and could give more weight to the interpretations given to its provisions by the UNHCR. However, even if it would obviously give it more weight as a key player at international level in the refugee policy, the accession of the EU to the Geneva Convention would not imply that it becomes automatically part of the Executive Committee of the UNHCR, whose composition is regulated by another procedure implying the quality of Member of the United Nations.

3. THE CHANGE FROM HARMONISATION TO REGULATION

Directives have been used until now to adopt the first building blocks of the Common Asylum policy. These instruments were the only ones that could be used under the Treaty of Amsterdam limiting the competence of the EC to minimum standards. With the removal of this limitation by the Treaty of Lisbon, it is now possible to envisage the adoption of regulations. While directives are flexible instruments of harmonisation of national rules leaving a certain room of implementation to Member States that can and in certain cases have effectively undermined the coherence of the European Asylum Policy, regulations having direct effect are instruments of unification of national law that are much more effective to establish the necessary basis for a Common Asylum System. They should be used at least regarding the definition of persons to protect, their status as well as procedural guarantees for asylum seekers while types of asylum procedures would still be subject to directives. Because they have been proposed by the Commission before the entry into force of the Lisbon Treaty, the recasts are still directives. Due to the fact that it will be adequate to coordinate all the texts once they will be adopted, this moment should be the occasion to adopt a European Asylum Code based on regulations.

SECTION 2: THE INSTITUTIONAL PERSPECTIVE

Despite the fact the Commission underlined from the beginning the need to coordinate national policies and not only to harmonise national legislations in order to build a coherent asylum policy in the EU, the Member States ignored the proposal to act in this way made in 2001. The practical cooperation envisaged in the field of asylum by the Hague Programme in 2004 developed therefore too slowly. A decisive step has however very recently been made with the creation of the European Asylum Support Office by a regulation of 19 May 2010.

Among the very diverse tasks of the new Office, the adoption of technical guidelines is particularly promising if they are, as we propose, properly used under the supervision of the Court of Justice to guide the Member States in the assessment of the situation in countries of origin of asylum seekers, in order to improve the convergence and the quality of the decision making process in the field of asylum by national administrations. The political impetus given by the European Council in the Stockholm programme could allow the European Asylum Support Office to make up for the lost time with the development of the practical cooperation between Member States. It is therefore regrettable that the Council, as well as the Parliament have shown that they are not yet fully aware of the necessary policy changes by imagining that "The Support Office should have no direct or indirect powers in relation to the taking of decisions by Member States' asylum authorities on individual applications for international protection" in the preamble of its organic regulation. The mandate of the European Asylum Support Office should be aligned on the huge ambitions of the European Union in the field of asylum at the occasion of its evaluation in 2014.

SECTION 3: THE JURISDICTIONAL PERSPECTIVE

The recognition of asylum as a fundamental right by the EU Charter requires logically a better protection by a judge. This is even more necessary throughout the European Union where protection is interpreted in various ways in similar cases in breach of equality of treatment between applicants. The current control exercised by the Court of Justice is necessary but remains insufficient as it allows a common interpretation of European rules in law, but not a common assessment of the situation in third countries in fact.

Proposing a new system is nevertheless not easy because the need for more jurisdictional control at European level should avoid creating a bottleneck. More particularly, it should also fit with the current organisation of jurisdictional control at EU level.

To reform the system by creating a European judge specialised in asylum is not feasible: the creation of a brand new European Appeal Court for asylum is not realistic because it does not respect the classical division of powers between the European and the national judges; the existing option to give more competences to the tribunal on the basis of article 256, §3 TFEU has not been welcomed by the Court; finally, the establishment of a specialised court in specific areas like asylum, has been made possible by article 257 TFEU, but cannot be used for all types of action.

To adapt the existing system by extending the competences of the Court of Justice appears to be the best way to regulate the Common European Asylum System. The creation of the European Asylum Support Office is an important step in the good direction. Even if they have currently been foreseen with a too narrow-minded approach, there exists the possibility for the office to adopt guidelines addresses to Member States. Moreover, judges can be associated in the working groups of the Office and therefore could contribute to their elaboration. The existence of guidelines in the field of European competition law and the specific value that has been given to these atypical acts by the jurisprudence of the Court could inspire EU asylum law. The idea consists of obliging the Member States to express special motives in their decisions when they do not follow the guidelines of the EASO.

This activity could develop under the control of the judge. First of all, regarding problems related to the legality of the guidelines that can never be excluded, article 263, §5 TFEU foresees that "Acts setting up agencies of the Union may lay down specific conditions and arrangements brought by legal or natural persons against acts of these agencies".

Individuals could so find a possibility to ask the Court to review the legality of EASO's guidelines. Secondly, regarding the respect of guidelines by the Member States which would be essential for the coherence of the Common European Asylum System, one could imagine to open a special request to the Court to give a ruling on a question of interpretation of the guidelines. Afterwards, the Commission could in case use the classical infringement procedures against member States and asylum seekers ask the national judge to review the legality of national decisions against the guidelines.

SECTION 4: THE SUBSTANTIAL PERSPECTIVE

1. THE PROBLEMATIC OF ENVIRONMENTAL OR CLIMATE "REFUGEES"

There is currently a large normative gap in international refugee law for persons fleeing their country of origin for environmental or climate reasons. At the European level, subsidiary or temporary protection could only be applicable to certain of those cases. At national level, those persons may only find a temporary protection in Finland and Sweden on the basis of provisions of national law or humanitarian resident permits based on practice in the UK or Denmark.

Knowing that the criteria to define subsidiary protection should be drawn from international obligations under human rights instruments and practices existing in member States, there seems to be enough ground for thinking to integrate environmental or climate "refugees" into subsidiary protection, as the European Parliament envisaged in 2002 to do during the second phase of the building of the CEAS. Due to the fact that the Commission has announced for 2011 a communication about the link between climate change, migration and development, as requested by the European Council in the Stockholm programme, the conditions seems to be met to take this problematic issue into consideration in the recast of the qualification directive.

2. FREEDOM OF MOVEMENT FOR PROTECTED PERSONS

The problematic issue of freedom movement of protected persons in the European Union is not only considered as a question of individual rights, but also as a way to contribute to a better burden sharing between Member States in the field of asylum, in particular since internal "relocation" within the EU of protected persons from Member States facing particular pressures to others is used to implement the principle of solidarity within the EU.

The Commission proposed in 2007 to extend the scope of the directive 2003/109 on long term residents to protected persons. This proposal has been blocked because the five years period of residence requested to acquire this status has been considered too long by certain Member States. Another decisive argument against this proposal is that it can also be considered as insufficient because it does not guarantee freedom of movement to long-term residents as the Member States keep too much discretion on this point within the directive.

Starting from the point that it is mandatory for the EU institutions to guarantee a certain freedom of movement to protected persons following one of the two possible options based either on mutual recognition of protection by another Member State firstly, or the acquisition or residence rights in another Member State secondly, it is proposed to extend

to protected persons the freedom to work in the European Union. Conditions regulating this freedom should be similar to the provisions of directive 2004/38 on freedom of movement for European citizens, apart from a waiting period of three years corresponding to the renewal of the residence permit for protected persons in the recast proposal of the qualification directive in order to avoid abuse and build trust between Member States.

The Commission announces in its action plan implementing the Stockholm programme a Communication on a framework for the transfer of protection and mutual recognition of asylum decision for the year 2014. This deadline seems to long for a simple communication with regard to the aim of showing solidarity with Member States facing particular pressures.

SECTION 5: THE DISTRIBUTIVE DIMENSION

As far as the distribution of protection seekers and protected persons is concerned, the Commission has opted for an "improved status quo" in the transition from the first to the second phase of the CEAS. This option is unsustainable in the longer term, and a fundamental reconsideration of existing arrangements will become necessary. In regard of the distribution of protection seekers, experience has shown that the Dublin system is unfair, wasteful, and inefficient – these three shortcomings being closely connected. Two elements of the system – guaranteed access to an asylum procedure, and the "one chance only" principle – are implied in article 78 TFEU and will in all likelihood be retained in their present form. By contrast, the Dublin criteria have proved unworkable in practice, and should in our view be abandoned. For any distribution system to be workable, a higher level of convergence of standards throughout the EU will have to be achieved and, crucially, greater relevance needs to be given to the preferences and interests of asylum seekers. This being the general direction for reform, there are several alternative models to consider.

The UNHCR model, allocating responsibility to the State where the application is first lodged, save where the applicant has close links to another Member State, would enormously simplify the process of responsibility determination, improve cost-effectiveness and be more integration-friendly. More radical, the ECRE model advocates giving protection seekers the choice of the responsible State. While maximising the advantages of the UNHCR model, it would likely be met with stiff resistance from Member States fearing "abuse" and burden-concentration to their detriment. In the alternative, systems based on an agreed "distributive key" could be devised, implying inter alia greater involvement of the EASO. However, in order not to recreate the problems observed under the Dublin system, any such system would still have to ensure that the preferences of asylum seekers are taken into account. It would of course be difficult to secure agreement on any of these models. To avoid political deadlock, they could however be usefully combined.

In particular, the UNHCR or ECRE models could be combined with an indicative distribution key, whereby "above quota" States would automatically receive increased assistance and benefit from relocation programmes. Whatever the system chosen, the "once chance only" principle and the resulting possibility of coercive "take back" transfers will remain. In light of non-refoulement obligations, this will make it necessary to retain also the sovereignty clause and attendant guarantees (e.g. effective remedies against transfers). Concerning the distribution of beneficiaries of international protection, two options are on the agenda: introducing mobility rights (examined in Section 4) and strengthening relocation programmes. Our first observation is that both avenues for reform are promising in their own right. They would usefully complement the reform of the Dublin system – not

constitute an alternative thereto. Our second observation concerns relocation programmes. Currently, such programmes are based on “double voluntarism”, and this might be a reason why they have remained largely symbolic to-date. To increase their impact, it might be necessary to render relocation schemes mandatory for the Member States. However, in view of avoiding high human costs and serious legal complications, we consider it crucial to retain the principle whereby relocation is voluntary for the beneficiaries of protection statuses.

SECTION 6: EXTERNAL DIMENSION OF ASYLUM

1. GENERAL CONSIDERATIONS

Attempting to strike the right balance between border control, migration management and access to protection, several proposals have been formulated in the realm of the external dimension of asylum. Some engage directly with the individual refugee and his physical access to international protection in a safe and orderly way. Both protected-entry procedures (PEPs) and offshore processing schemes (Council doc. 13205/09) have been quite comprehensively formulated and reappear periodically for negotiation at EU level. Building upon them, and on account of the findings of Chapter 5, a medium-term proposal for a ‘comprehensive approach’ to access to international protection is submitted at the end.

2. MAIN CONCERNS REGARDING PEPs AND OFFSHORE PROCESSING PLANS PROPOSED AT EU LEVEL

It is highly uncertain that offshore processing programmes, as the proposed ad hoc protection programme in Libya, can be pursued in practice in accordance with international and EU law standards. The selection of addresses shall neither be discriminatory, nor amount to a penalty, as articles 3 and 31 GC must be observed. Detention must comply with article 5 ECHR levels, both at sea and upon arrival to Libya. Transfers to that country cannot be automatic, since the procedural guarantees attached to protection against refoulement, as established in the ECHR and the EUCFR, must also be fulfilled.

From Article 78(2)(g) TFEU, it appears that some mechanism shall be introduced ‘for the purpose of managing inflows of people applying for asylum’. Since international obligations vis-à-vis refugees and asylum seekers can be engaged extraterritorially, in a context of pervading pre-border controls, the codification of a system of protected-entry procedures to ensure access to protection in a safe and legal way may be considered. Excluding full offshore assessments of asylum claims, several arrangements could be envisaged.

3. RECOMMENDATIONS

Considering the overly complex system that would have to be developed to ensure the compliance of an offshore processing scheme with relevant legal obligations, it is improbable that the initiative can be pursued in practice. Its abandonment is highly advised. EU Member States should not create situations in which the fulfilment of their obligations under international and EU law cannot be fully guaranteed.

With regard to PEPs, we recommend the use of LTVs, on the basis of a differentiated presumption, for the purpose of organising access to protection in a safe and orderly manner. Claims introduced from the country of origin would be presumed arguable, unless the asylum authorities of the Member State concerned disprove it. Conversely, claims submitted from third countries would be presumed unfounded, unless the applicant produces proof of the contrary. In any case, they shall remain complementary to the fulfilment of pre-existing legal obligations.

In the medium term, the preferred option should be to develop a comprehensive approach to access to international protection in the EU, which incorporates protection-sensitive components into the system of border management and entry control at all its stages, recognising the mixed character of migration flows and the extraterritorial applicability of human rights' obligations. Such an approach requires a multilateral management to be effective, conducted in partnership with the regions and countries of first asylum, the UNHCR and other relevant stakeholders. It is proposed that the institutional framework that The Hague Conference of International Private Law provides be used to for that purpose.

GENERAL INTRODUCTION³

1. CONTEXT OF THE STUDY

The construction of a common asylum policy is of great moment nowadays. A first generation of minimum standards has been adopted on the basis of the Treaty of Amsterdam between 2003 and 2005. In 2012 a second generation should be carried to establish a genuine common European asylum system. Thus the European Union puts everything into has in the field of asylum. It is impossible not to contrast its concern in asylum with its relatively timid immigration policy. It has acknowledged the flaws of the first generation standards politically and intends to find a remedy, except for the Dublin Regulation relating to the identification of the State responsible with a view to keep it as a founding element of the common asylum system - when it is obvious that this mechanism does poorly at a high cost that should no longer be ignored. The entry into force of the Treaty of Lisbon on 1 December 2005 has given the EU the means to do so. The Stockholm program has - in strong terms - confirmed the European Council will to see this political momentum happen. A further step has been accomplished with the foundation of the European Asylum Support Office on May 19th 2010.

The European Parliament wanted to have a study at its disposal in order to be in the best possible position to bring this project to a successful conclusion during this extremely complex transition period. The authors of this study hope to meet those expectations and contribute to a better understanding of current issues while opening up new avenues of reflection for the future since the second phase - scheduled for 2012 - should not finalize the common European asylum system.

2. AIMS AND METHODOLOGY OF THE STUDY

The primary objective of this study is as the inviting bids insists on, to assist the European Parliament to position oneself in relation to the proposed revisal of the instruments in force

³ All the legislative references are mentioned at the end of each chapter., e.g., Rsolution of 2 September 2008 on the evaluation of the Dublin system (hereafter - EP 2008b).

that have been put forward by the Commission. The second part of the study systematically analyses the proposals of the Commission to highlight the numerous strong points of it without neglecting the few weaknesses that undermine them.

This second part is structured into five chapters that attempt to give a horizontal view as complete as possible of the various instruments under discussion. Indeed, one of the difficulties is to draw parallels between the provisions of the various proposals related to identical items to ensure consistency between the elements of the common European asylum system. The authors have systematically analyzed the proposals of the Commission and have done their utmost to propose accurate alternatives whenever they considered it necessary⁴.

3. EXTENT AND DIFFICULTY OF THE STUDY

The study is extremely broad as shown by the length of it. In addition to the fact that it starts with a first part analysing how the Commission evaluated the instruments of first generation - as the call for tender of the Parliament had required - its scope encompasses all the elements of the common European asylum policy including its external dimension.

However the major difficulties encountered by the authors in completing the study do not arise from the scope of it, but rather from the constant shifts in the matter while its implementation was carried out resulting in so many contingencies and uncertainties for the research team. First of all the Commission has been several months late to present its amendment proposals related to the qualification and procedure directives, which has delayed the work of the research team members involved in this very important part of the study. In addition the Treaty of Lisbon has entered into force right in the middle of our work. The matter has finally ceased to evolve since the adoption of the Stockholm Program, the European Asylum Support Office legal basis and the constant development of the external dimension of the asylum as far for the main elements only.

The authors have done their utmost to take into account the rampant shifts in this topical question in order to provide the Parliament with a study which shall not be useful only but as updated as possible. Therefore it includes the latest developments made in May 2010.

4. THE RESEARCH TEAM

This study was prepared by a genuinely French research team within the Academic "Odysseus" Network for legal studies on Immigration and asylum in Europe bringing together fourteen experts on asylum law, representing six Member States of the European Union associated with it.

The authors of the different parts of the study are specifically identified at the beginning of each of them. Even if its various elements have been collectively discussed in three successive seminars - seven full days of intense exchanges - allowing the authors to

⁴ It should be noted that the study does not always confined to issues on which the Commission has made amendments using the technique of reviewing legally limit the scope of the debate to the subject of the proposal. If it relates to items that are not covered by the various proposals, he will return to Parliament if it considers necessary for the study's recommendations are followed to consult with the Commission that they be required exercise its right of initiative.

collectively assume its findings in a comprehensive manner, their responsibility is only truly committed as regards to the part they have written.

5. REPORT STRUCTURE

The report is divided into three parts. At first, an analysis of the evaluations of standards of first generation for asylum carried out by the Commission.

In the second place, an evaluation of the asylum acquis, including short-term amendments proposals to the proposals of the Commission, namely the adoption of second generation standards intended to establish the common European asylum system.

This part is divided into five chapters:

1. Distribution of asylum seekers and protected persons in the Member States relating mainly to the issue of the Dublin system for determining the State responsible. However it includes the issue of the relocation as well.
2. Definition of persons eligible for international protection within the European Union, essentially relating to the Qualification Directive.
3. The status of protected persons according to the Reception Conditions directive laying down minimum standards for the reception of asylum seekers.
4. The asylum procedures logically relating to the Asylum Procedure directive covering this issue, although it is closely related to the issue of the suspensive effect of appeals in the Dublin system.
5. The external dimension of asylum policy concerning the various elements of this large issue such as visa policy and external border control including activities of Frontex, interception at sea regarding the fight against illegal immigration, the regional protection programmes, resettlement in the EU and protected entry procedures.

In the third place, the long-term outlook for the common European asylum system covering six issues - legal, institutional, jurisdictional, material, redistribution and external.

PART 1: ASSESSMENT OF THE EVALUATIONS OF THE ASYLUM POLICY

INTRODUCTION

The evaluation must be an integrant part of the creation of a Common European Asylum System (CEAS). Indeed according to the Hague Programme, the CEAS will be built on a "Thorough and complete evaluation of the legal instruments that have been adopted in the first phase⁵". The inherent function of the evaluation is to ensure the effectiveness of the EU action⁶. The EU action is effective if the objectives pursued have been reached, or if the necessary improvements are envisaged to comply with these objectives. The evaluation is communally defined in the doctrine as the appreciation of policy efficiency in comparing its results against the objectives assigned and against the means of its implementation⁷. The evaluation aims at assessing the adequacy between the results and the objectives.

The evaluation, therefore, has to carry out two purposes. A legal purpose dealing with the implementation of the EU measure in the Member States, and a political purpose covering the issue of its impact once implemented. The two levels are important as they are interlinked. Indeed if a measure is not correctly implemented it won't, de facto, meet the objective pursued. The evaluation is essential to measure and secure the added value of the EU as well as to give feed-back and improve the policy making.⁸ We can differentiate two levels of evaluation⁹, which are important to ensure that an EU policy is coherent with its objectives. The first one is the ex-ante evaluation which takes place upon the decision-making. It aims at prospecting the efficiency, the viability, the accuracy and the coherence of the future measures¹⁰. The second level is the ex-post evaluation aiming at assessing the application of the EU measures in the Member States, as well as its results and its consequences. This ex-post evaluation must also encompass at a later stage an assessment on the coherence of all measures composing an EU policy, and to assess how far the measures altogether meet the objectives of the general EU policy considered¹¹.

This part of the study will focus on the issue of ex-post evaluations of the first generation of the asylum legal instruments, as identified as the most problematic due to the lack of a coherent evaluation mechanism. On the 28th of June 2006, the Commission tried to set out an evaluation mechanism applicable to all EU policies on Freedom, Security and Justice (FSJ), through a Communication COM (2006) 332¹², but this Communication has been confronted to the resistance of Member States upon its submission to the Council and has never been implemented. Therefore the evaluation systems existing before the proposition,

⁵ The Hague Programme Council of the European Union on strengthening freedom, security and Justice in the European Union, 13.12.2004, OJ (2005/C 53/ 01) Part III point 1.3 page 3

⁶ Ibid, Part II point 3 « "Evaluation of the implementation as well as of the effects of all measures is, in the European Council's opinion, essential to **the effectiveness of the Union action**. The evaluations undertaken from 1 July 2005 must be systematic, objective, impartial, and efficient, page 2

⁷ Bernard Perret "L'évaluation des Politiques publiques" Ed la Découverte (2008) "L'évaluation d'une politique publique a pour objet d'apprécier l'efficacité de cette politique en comparant ses résultats aux objectifs assignés et aux moyens mis en œuvre", Introduction, page 3
Marie-Aude BEERNAERT "Comment évaluer le droit pénal européen" édité par Gilles de Kerchove, Anne Wyembergh et Serge de Biolley, édition Université Libre de Bruxelles (2006) « *Evaluer l'impact d'une législation c'est apprécier ses effets, ses répercussion dans la réalité* », page 21

⁸ Annex to the Communication from the Commission COM (2006)332 on the evaluation of the EU policies on Freedom, Security and Justice (*Impact Assessment*), SEC (2006) 815, 28.06.2006

⁹ Op cit, « Comment évaluer le droit pénal européen », Introduction page 12

¹⁰ Ibid

¹¹ Op cit « L'évaluation des politiques publiques », page 18

¹² Communication from the Commission on the evaluation of the EU policies on Freedom, Security and Justice, COM (2006)332, 28.06.06

which have been deemed as incomplete by the Commission itself¹³, remained applicable to the first generation of evaluation in the field of asylum. The study of the evaluations made by the Commission reveals that they were not sufficient enough to comply with the Community objectives required for the evaluation.

The first Chapter of this study aims at analysing the evaluations made by the Commission in order to bring into attention the weaknesses of those evaluations and to establish the reasons behind the problems encountered upon the evaluation process. This part of the study will also analyse the issue of a systematic and a regular ex-post monitoring of the compliance with the Fundamental Rights in the Member States when implementing the EU law. This mechanism does not exist as such in the current evaluations undertaken, whereas a scrutiny of compliance with Fundamental Rights is far more important in the context of the creation of a CEAS, which very directly implies Fundamental Rights issues, such as the right to asylum recognised in article 18 of the EU Charter of Fundamental Rights, that will soon become primarily law¹⁴.

The second Chapter deals with the recent improvements and the future prospects for a better evaluation mechanism in the field of asylum. Among the other things, the adoption of the Regulation on Community statistics on migration and international protection¹⁵ and the new Regulation establishing a European Asylum Support Office¹⁶. These two instruments are aiming at responding to the shortage of statistics, that weakened the evaluations made until now, and will constitute important bases to set out a coherent and a comprehensive evaluation mechanism for the CEAS. In this perspective of improvement the article 70 of the Lisbon Treaty constitutes also an important step for the evaluation in the field of FSJ. Indeed, it endows the Community with a legal basis for an evaluation mechanism in this field, and thus constitutes the recognition of a central role of the evaluation in the EU legislative process.

¹³ SEC (2006) 815 Ibid, point 3.2 *"The need to act"* page 6

¹⁴ Article 18 « *The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.* »

¹⁵ Regulation (EC) No 862/2007 of the European Parliament and of the Council on Community statistics on migration and international protection and repealing Council Regulation (EC) No 311/76 on the compilation of statistics on foreign workers, 11.07.2007

¹⁶ Proposal for a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office COM(2009)66, 18.02.2009

CHAPTER 1: THE LIMITS OF THE CURRENT EVALUATIONS

The analysis of the evaluations of the first generation of the CEAS made, by or for the Commission, requires a theological approach. It is indeed important to set first the Community objectives attached to the evaluation of the FSJ policies, in order to show whether the evaluations carried out for the first asylum instruments can be considered sufficient enough to fulfil these objectives. This part proposes, therefore, to start with the objectives defined in the Hague Programme with regard to the evaluation of the FSJ policies, and with the study of the Communication from the Commission to the Council and the European Parliament on evaluation of EU policies on Freedom, Security and Justice¹⁷, establishing an evaluation mechanism in conformity with the requirement of the Action Plan implementing the Hague Programme. It is important to note straight away that this Communication has been quickly aborted, as the Council, in its conclusions of 19 June 2007¹⁸, considered that the evaluation mechanism proposed by the Commission had to be revised before being applied. As no modifications were undertaken by the Commission, the evaluation system has consequently never been implemented.

However we considered that the analysis of this Communication is still relevant, as it remains the only proposition made in the view to establish an evaluation mechanism for the field of FSJ. It draws the expected characteristics of the evaluation with regard to its purpose, method and results, that would comply with the Community ambition set up in the Hague programme. (Section I). In comparison, the study of the evaluations made by the Commission to the first generation of the asylum instruments reveals that they were not sufficient enough to comply with the Community objectives (Section II).

SECTION 1: THE EVALUATION MECHANISM ENVISAGED BY THE COMMISSION

According to the Hague Programme, "Evaluation of the implementation as well as of the effects of all measures is, in the European Council's opinion, essential to the effectiveness of the Union action. The evaluations undertaken from 1 July 2005 must be systematic, objective, impartial, and efficient"¹⁹. As previously stated, the inherent function of the evaluation is to ensure the effectiveness of the EU policies. The evaluation is considered also by the Commission as essential to measure and secure the added value of the EU, and must provide policy makers with results about the impact and the effectiveness of activities planned, in the view of improving the policy making to reach the objectives assigned to an EU policy²⁰.

Another function assigned to the evaluation is to ensure the transparency of the information on the implementation and the results of policies, which is considered by the Commission as an important part of the good governance.²¹ The Commission has been, therefore, mandated by the Council in the Action Plan, to set up a coherent and a comprehensive evaluation mechanism for the EU policies on FSJ, which was proposed in the above cited Communication COM (2006) 332. This evaluation mechanism was aiming at

¹⁷ Op cit, COM (2006)332

¹⁸ Council Conclusions on Evaluation of EU policies on Freedom, Security and Justice, 10893/1/07, 19.06.2007

¹⁹ Op cit, The Hague Programme « General Orientations » point 1.3, page 5

²⁰ Op cit, COM (2006) 332 page 3

²¹ Op cit, SEC (2006) 815 point 3.2 "The need to act" « *There is a need to transmit extensive information to all stakeholders on implementation and the results of policies. Transparency is becoming more and more important part of good governance...* », page 6

completing the existing monitoring and evaluation mechanisms, deemed fragmented, as well as incomplete²², and consequently not sufficient enough to fulfil the objectives of the Hague Programme. In this Communication, the Commission defined the expectations as regard to the purpose, the method and the results of the evaluation in order to comply with the Community ambition.

SUB-SECTION 1: THE COMMUNICATION OF 2006

1. THE PURPOSE

In The Hague programme, the evaluation must encompass both a legal and a political purpose, respectively the evaluation of the implementation of an EU measure and the evaluation of its effects. The Commission in its Communication COM (2006) 332 interpreted the evaluation of the implementation of policies referred to in the Hague Programme as "a mechanism evaluating the concrete results of FSJ policies. Evaluation is wider than monitoring implementation policies and includes studying consequences of the implementation"²³. The Commission makes a distinction between monitoring implementation consisting on reviewing progress towards implementing policies, and the evaluation itself, which is considered as "a judgement of interventions (public) actions according to their results, impacts and the needs they aim to satisfy"²⁴. Consequently the concept of "the evaluation of implementation", as referred into the Hague Programme, must encompass, for the Commission, a monitoring of the implementation of the EU measures itself and the evaluation of the results of the measures once implemented. This should allow a better evaluation and a general understanding of the quantity and the quality of results achieved²⁵.

These two levels are indeed important, as they are interlinked. The objectives of a measure cannot be achieved unless the measure has not been effectively implemented. That leads to the important issue of the scope of these two mechanisms: "monitoring the implementation" and the "evaluation of the results". What must they cover? "Monitoring the implementation" shall deal with the distinction between the legal transposition and the application of the measure in practice. Indeed monitoring the mere transposition is not sufficient by itself, and is not sufficient to evaluate how the objectives of the EU measures have been met, as the application of the national transposition in practice can fail to comply with the provisions of the EU measure. In that sense the Commission in its communication of 2006 states that "the scoreboard plus", which corresponds to the Commission's annual report on the implementation of the Hague Programme, "will aim predominantly at assessing proper and adequate transposition of the legislative acts adopted and effective implementation of the measures agreed"²⁶. The "evaluation of the results" of an EU measure aims at assessing the degree of achievement of the objectives assigned to it. It has been envisaged by the Commission as a progressive mechanism, which includes, first, the analysis of the immediate results and the outcomes of the measure, then at a later stage the analysis of the impact of the measure. The results and the outcomes are defined as initial effects and intermediate effects of the measure, whereas the impact is understood as the long-term effects in the society²⁷.

²² Ibid, point 3.2, page 6

²³ Ibid, point 3.1 "Definition of evaluation" page 5

²⁴ Ibid, point 3.1 page 5

²⁵ Ibid, point 3.1 page 6

²⁶ Op cit, COM(2006)332, point 1.4 "Monitoring implementation of the Hague programme" page 94

²⁷ Ibid, page 98 (glossary)

2. THE METHODOLOGY

The evaluation mechanism proposed by the Commission would not have replaced the existing mechanisms but completed them in order to establish a common set of minimum evaluation requirement across different policies²⁸. In this context, the mechanism was built around two pillars the "scoreboard plus", monitoring the implementation of the Hague multi-annual Programme and the evaluation mechanism proposed by the Commission in the present Communication.

The scoreboard practice exists since Tampere. It consists of an annual report submitted by the Commission and assessing the outcomes of the significant political progress against the objectives of the multi annual Programme. The added value of the "Hague scoreboard plus" lies in the fact that it combines the follow up of the institutional decision making process at the EU level, as well as the follow up of the implementation of FSJ measures at the national level. Indeed the Tampere scoreboard used to focus, merely, on the follow up of the EU institutional decision making process²⁹. With regard to the evaluation mechanism proposed by the Commission, it was conceived in three steps, including first a system of information gathering and sharing, then, a reporting mechanism based on the information gathered, and at last an in-depth strategic evaluation. The system of information gathering and sharing was based on factsheets³⁰ established by the Commission in its Communication COM (2006) 332. Factsheets were set up for each policy area of FSJ and for each instrument adopted within specific areas.

This first step is determinant as the quality of the evaluation reports will depend on the availability of the information, as well as on the quality of the information gathered. Therefore, the Commission provided, in these factsheets, a set of relevant indicators for each policy area and for each measure taken within a specific area of FSJ. As the evaluation must aim at assessing the results of the EU measures taken, as well as, assessing the efficiency of an EU policy area, the Commission defined the indicators against the objectives of the policy considered, as well, as against the objectives of each specific instrument. This is illustrated by two examples of factsheets below, respectively the factsheet established for the CEAS and the factsheet related to the Dublin II Regulation.

²⁸ Op cit, SEC(2006)815 point 3.2 "The need to act", page 6

²⁹ Communication from the Commission to the Council and the European Parliament report on the implementation of the Hague Programme for 2005, COM (2006) 333, 28.06.2006, page 2, "In addition to this monitoring of the adoption process, for the first time as part of such an exercise for Justice, Freedom and Security ("JFS") policies, this communication looks into the national implementation of these policies (Part II and Annex 2) ».

³⁰ Op cit COM (2006) 332 « Factsheets of JLS policies », page 13, and more particularly factsheets for Common immigration and asylum policies are in page 32.

Example 1: Factsheets for the Common European Asylum System³¹

Policy sub-area 1: Common European Asylum System

Objectives:

To establish a common asylum procedure and uniform status, To facilitate practical and collaborative cooperation, To address pressures on asylum systems and reception capacities.

Policy sub-area level indicators:

- Number of asylum seekers applying for asylum in Member States other than the country of first entry (Source: Eurodac)
- Instances of MS breaching minimum defined standards (Source: Commission)
- Differences in standards of reception between Member States (Source: Commission)
- Differences between Member States with regard to the average time taken to determine the outcome of an application for asylum (Source: MS and Commission)
- Comparison of asylum acceptance rates among Member States (Source: Commission - Eurostat)
- Differences in the level of capacity per Member State (asylum systems and reception facilities) relative to needs (Source: Member States)

³¹ Ibid, factsheets page 32

Example 2: Factsheet for the Dublin II Regulation³²

Dublin Regulation (Council Regulation (EC) No 343/2003)

Objectives:

- To reduce 'asylum shopping'
- To increase responsibility sharing among MS.
- To increase efficiency by granting MS a realistic period in which to Implement decisions on transfers

Implementation at national level

- Adoption of measures implementing the Regulation at national level
- Immediate results

Number of take back requests (Source: Commission – Eurostat)

Number of applicants sent to another Member

State (Source: Commission – Eurostat)

Number of multiple claims (Source: Commission – Eurostat)

Number of registered irregular entrants (Source: Commission –Eurostat)

Proportion of cases dealt within country of entry (Source: Commission – Eurostat)

Outcomes

Decreased delay in the examination of claims and attribution of responsibility

Measured by: average delay of examination before and after implementation of the Regulation (Source: MS)

Decreased delay to implement decisions on transfers

Measured by: average delay of transfer before and after (Source: MS)

Impacts

Increased sharing of responsibility

Greater efficiency and effectiveness in implementing decisions on transfers

Reduction of persons making multiple claims

One other added value of the factsheet is to guarantee more visibility and transparency, as the information required, as well as, the sources of information is clearly defined. However, the system of information gathering can work properly if the information required is available. The necessary indicators are generally measured by statistical data provided by the Commission, the Member States and by other relevant stakeholders. Thus the Commission immediately considered the availability of statistics as a key component in the development of an evaluation system, and as one of the principle challenges in the evaluation of EU policies in the field of FSJ. Statistics, accordingly, "will be required as baseline data to assess whether existing needs are attenuated or aggravated by a policy over time and, ultimately, to be able to draw conclusions about the impact of policies"³³. Therefore the Commission pointed out the necessity to improve the quality, the availability and the analysis of the statistical data³⁴.

The reporting mechanism, which was the second step of the evaluation mechanism proposed, corresponded to the elaboration of the evaluation report consolidating and

³² Ibid factsheets page 33 and 34

³³ Op cit COM(2006) 332 Point 3.4 « Availability of statistics » page 6

³⁴ Ibid

analysing the information provided on the basis of the factsheets. The third and the last step consisted on targeting in-depth strategic evaluations on selected areas focusing on policies rather than on individual instruments. These in-depth strategic evaluations, based on the evaluation reports made for each instruments, should aim at evaluating the achievement of objectives in the broader context of a policy, as well as at assessing the coherence of the different instruments within a given policy³⁵. The strategic evaluations were presented by the Commission as an added value to the current evaluation practices as they should:

- Focus on policies rather than individual instruments
- Analyse the coherence of different instruments within a given policy
- Investigate how certain policy contributes to the overall objective of establishing an area of Freedom Security and Justice
- Determine the overall rate of achievement of that general objective
- Assess achievement of an overarching objective in the field of freedom security and justice, for instance safeguarding the Fundamental rights³⁶.

Basically, the Commission envisaged an evaluation mechanism according to a vertical approach; consisting on evaluating the results and the impact of individual instruments against their objectives, and to a horizontal approach, consisting on evaluating how these legal instruments have achieved altogether the broader objectives of a given policy. This latter approach must also include cross-cutting issue as safeguarding of the Fundamental Rights.

3. THE CHARACTERISTICS OF THE EVALUATION

As stated above, The Hague Programme asked for systematic, objective, impartial and efficient" evaluation³⁷, but did not defined what those terms cover.

3.1. Systematic

A systematic evaluation implies that all measures have to be automatically evaluated, but this term also evokes the question of the periodicity of the evaluation. According to the Commission in its Communication COM (2006) 332 the evaluation mechanism "should improve policy-making by promoting a systematic feedback of evaluation results into the decision-making progress"³⁸. Following to this, the Commission states that "the proposal takes into account the fact that this mechanism should be conducted on regular basis" which will "make it possible to monitor progress at regular intervals and draw comparison"³⁹. The Commission, accordingly, proposed to conduct the evaluation exercise, meaning the collection of factsheets and the elaboration of the evaluation report twice every five years, and drew a timetable. This timetable took into account the necessary coordination with the monitoring the implementation and was made in the view to enable the Council and the Commission to use the results of the evaluation reports as inputs for assessing the need to prepare a further strategic Programme in 2009⁴⁰.

³⁵ Ibid COM (2006)332 point 4.1.3 « Strategic policy evaluation » page 9

³⁶ Ibid

³⁷ Op cit Hague Programme, point 3 "Implementation and evaluation" page 2

³⁸ Op cit COM (2006) 332 point 2 « The Concept of evaluation » page 3

³⁹ Ibid, point 4.2 « Frequency and follow-up» page 9

⁴⁰ Ibid. See also the timetable of the evaluation p 11 of the Communication

3.2. Efficient

The evaluation will be efficient if it provides the necessary feed-back to improve the policy making. This implies a proper appreciation of the efficiency of a policy by measuring the adequacy between the objectives of the EU measures and its results. As already mentioned, the evaluation mechanism must encompass a legal purpose and a political purpose. The legal purpose of monitoring the implementation of the EU measure is an important step of the evaluation mechanism. The good integration of the EU measure into the national level is decisive to measure the results and the impact of the EU policy intervention. In this context, the Council in The Hague Programme stated that it was "vital for the Council to develop in 2005 practical method to facilitate timely implementation in all policy areas..." and "Regular progress reports by the Commission to the Council during the implementation period should provide an incentive for action in Member State"⁴¹. This should be the role of the "scoreboard plus".

Concerning the political purpose, implying the judgment of interventions according to their results, impacts and needs they aim to satisfy, the efficiency of such a judgement will depend to several factors, which have been defined in the Commission document on "reinforcing the use of the evaluation"⁴². This document defines the evaluation standards for each step of the evaluation process, guaranteeing the efficiency of the evaluation carried out by the Commission⁴³. First of all the evaluation design must provide clear and specific objectives, and appropriate methods. In this context the evaluation indicators chosen, as well as the availability of the information required are determinant to conduct an efficient evaluation. According to the Commission "The quality of the evaluation must be assessed on the basis of pre-established criteria throughout the evaluation process and the quality criteria must as a minimum relate to relevant scope, appropriate methods, reliable data, credible results, valuable conclusions and clarity of the deliverables"⁴⁴. Secondly, the evaluation should be available in due time for operational and strategic decision making and reporting needs. Finally, the question of resources allocated is also a key issue in the evaluation process as revealed in this Commission's document. The evaluation activities have to be appropriately resourced to meet their purposes.

3.3. Impartial

According to the Commission an evaluation mechanism for the field of FSJ can be only proposed at EU level, as the Commission, being independent and having the capacity for objective analysis, is at a more vantage position than Member States to analyse and consolidate the data gathered at national level⁴⁵. However the independence of the Commission must not be the sole guarantee for an objective and an impartial evaluation. This has to be ensured by other criteria which has not been defined by the Commission in its Communication of 2006⁴⁶. A definition of those terms can be found in the jurisprudence

⁴¹ Op cit, the Hague Programme point 3 « Implementation and evaluation » page 2

⁴² Communication to the Commission from MS GRYBAUSKAITE, in Agreement with the president responding to strategic needs: Reinforcing the use of evaluation, SEC (2007) 213, 21.12. 2007

⁴³ Ibid, SEC(2007) 213, Annex II "Evaluation standards" page 20

⁴⁴ Ibid, SEC (2007) 213 « Evaluation standards –Conducting evaluation », page 23

⁴⁵ Op cit SEC (2006) 815 point 3.3 « *There is also the issue of independence and capacity for objective analysis. The peer review mechanism can be highly politicised exercised and Member States are reluctant to criticise each other. Being in a more objective position and having the expertise, the Commission is at a vantage position to analyse and consolidate the data gathered at national level. »*, page 7

⁴⁶ Nor in the Communication (2006) 332 neither in its impact assessment SEC (2006)815 the Commission has defined the criteria for an objective and impartial evaluation as required by the Hague Programme.

of the ECHR, as well as in other community documents related to the issue of the evaluation within the Commission. According to the jurisprudence of the ECHR, the impartiality is normally denoted when the judge has no prejudice or bias⁴⁷ regarding the case submitted to him. As the evaluation involves a judgment of the EU interventions according to their results, the persons in charge of the evaluation in the same way as a judge must be free of prejudice and bias upon the evaluation conduct. In the same way, the Communication of the Commission of 21 February 2007 on reinforcing the use of the evaluation, reaffirmed as a standard that "All actors involved in evaluation activities must comply with principles and rules regarding conflict of interest » and that « Evaluators must be free to present their results without compromise or interference, although they should take account of the steering group's comments on evaluation quality and accuracy"⁴⁸.

3.4. Objective

The objectiveness will depend on the information used. The objectiveness will not be jeopardised if the evaluation statements are evidenced with identified sources and if the supporting information are taken from different stakeholders. The evaluation report must not be based on an exclusive source such as Member States. The Commission must verify the information provided in comparing the different sources of information. This has been generally respected by the Commission when conducting the first generation of evaluation in the field of asylum.

SUB-SECTION 2: THE ABORTION OF THE EVALUATION MECHANISM ENVISAGED BY THE COMMISSION

The Evaluation mechanism proposed by the Commission as presented above had to be subjected to consultations in order to gather comments, as well as propositions for improvement to perfect the evaluation system⁴⁹. To that end the Communication was discussed at a conference on the evaluation of policies in the field of Justice and Home affairs in Brussels on 19 and 20 October 2006, and Member States were subsequently invited to comment on the mechanism proposed by the Commission. The Justice and Home Affairs Council on 4-5 December 2006 acknowledged the need to improve the current existing evaluation mechanisms and called for further discussion on the future mechanism. On the basis of the answers received from Member States, the Council agreed on 19 June 2007, on proposals to modify the Communication, which were approved by the Commission.

It appears clear that the propositions made by the Council are restrictions rather than improvements. The Council first proposed to limit the scope of the evaluation mechanism to specific areas of the Freedom, Security, and Justice Policy according to four defined criteria: (1) The availability of data for the area concerned, (2) The avoidance of overlap with the existing evaluation mechanisms for individual legal acts, (3) No duplication of other Commission evaluation activities, e.g. in the sectors of justice policy and criminal matters, and (4) The relevance of the area selected for freedom, security and justice policy goals. The practical reason given by the Council to limit the scope of the evaluation mechanism was to reduce the amount of the preparatory work and to enable to take into account the

⁴⁷ Case of Piersack v. Belgium 01.10.1982 req n°8692/79

⁴⁸ Op cit, SEC(2007) 213, Annex II « Conducting evaluations » page 23

⁴⁹ Op cit, COM (2006) 332 point 4.2 p 11, point 40

« The proposed mechanism and the factsheets are presented so that comments on and improvements to them can be made in the follow up to this Communication. To this end, a wide ranging consultation process will be launched, including the organisation of a hearing in the autumn »

differences among the different policy area, but raised the question of the objectivity of the criteria selected by the Council, especially as concern the "availability of the data" and the relevance of the "area selected for freedom, security and Justice Policy goal". It is important to note that the data required in the factsheets proposed by the Commission, in its Communication of 2006, are mostly provided by Member States. Then the issue of their availability may depend on the Member States willingness to provide them. Therefore, in applying such criteria, there is a risk that the application of the evaluation mechanism will remain at the Member States discretion. This can also be illustrated, further, in the conclusions as the Council "considers that the Commission's proposed factsheets, and especially the indicators, need to be substantially revised, and that they should first be filled in by the Commission. In this connection, the first evaluation exercise, at least, should be based exclusively on the information available⁵⁰". Also the issue of the relevance of the Policy goal is subject to critics, as no criteria have been proposed by the Council to define the relevance, which gives room for discretion. This will restrain the purpose of the evaluation mechanism, as an evaluation on the results of a policy will be carried out only if it has been considered relevant. Finally, the frequency of the evaluation was also considered as to be revised by the Council, "The Council considers that the evaluation should initially be conducted every five years⁵¹..." and yet the Commission has proposed a more frequent evaluation to monitor progress at regular intervals guaranteeing the efficiency of the evaluation. The Council proposal on the periodicity will somewhat deprive the evaluation mechanism of its efficiency.

To conclude it appears that the Council restrained rather than improved the application of the evaluation mechanism proposed by the Commission, in limiting the purpose and the method applicable, as well as the results. According to the extended report on evaluation of the Hague Programme since 2005⁵², the evaluation mechanism proposed by the Commission "was not fully implemented" because it did not gain the necessary support within the Council, as Member States, perceived it as too demanding and burdensome⁵³. Actually the mechanism has not been implemented at all, as the analysis of the evaluations made by the Commission in the following part will show. Indeed, as the modifications required by the Council have never been undertaken by the Commission, the evaluation system could not have been practically implemented as such, without resistances from Member States. Therefore, the evaluation systems existing before the proposition, which have been deemed as incomplete by the Commission itself, have been applied to the CEAS. One may argue that the Commission should have proposed a revised mechanism under the Council request, but the modification required by the Council would have been too restrictive to ensure the effectiveness of this mechanism. It is difficult to imagine how the mechanism proposed by the Commission would be operational if the Member States were not really ready to provide "available data."

⁵⁰ Op cit Council Conclusions on the evaluation of EU policies in the field of FSJ, point 4, page 4

⁵¹ Ibid, point 2, page 3

⁵² Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions justice, freedom and security in Europe since 2005: an evaluation of the Hague programme and action plan, an extended report on the evaluation of the Hague Programme SEC (2009) 766, 10.06.2009

⁵³ Ibid, point 2.2 "Evaluation and monitoring- II Main developments " p 13

SECTION 2: THE EVALUATIONS IN PRACTICE

SUB-SECTION 1: IDENTIFICATION OF WEAKNESSES

Evaluations' current state of play is made of the scoreboard and the standard evaluation of EU measures. The monitoring process proposed through the scoreboard is mainly focusing on the quantitative progress of the adoption measures and their implementation according to the schedule of the Hague Programme. In this context the evaluation of the legal instruments will have an added value compare to the scoreboard, if they carried out a qualitative assessment, meaning the evaluation of the results against the objectives of the legal instruments itself, but also against the wider objective of the creation of the CEAS. To be effective, the evaluations undertaken must, accordingly, include a vertical and a horizontal approach as seen previously, which is not the case for the evaluations made by the Commission as this part tends to show. This is partly explained by the legal nature of the information provided, which does not allow a full assessment on the impact of the EU measure. Thus, the weakness of the methodology applied to the first generation of the evaluations made by the Commission led to insufficient evaluating results to measure its real impact, and to establish the second generation of the CEAS.

1. NO REAL POLITICAL PURPOSE

The objectives and the purpose of the evaluation carried out by the Commission are generally limited to the legal evaluation of the implementation of the asylum instruments. When the Commission intended to carry out a "political evaluation", the evaluations reports reveal that the political purpose is not clearly dealt with by the Commission, and seems more to have been merged in the legal purpose. Some of the evaluations analysed are focused on quantitative assessments such as Frontex evaluation, which does not contain balanced qualitative assessments on the impacts of the Agency. However some improvement may be observed with the evaluation of the Asylum Procedures Directive (APD) where the Commission tends to conduct a more political evaluation.

1.1. Illustration of the problem

1.1.1. The evaluation of the Reception Conditions Directive⁵⁴

This evaluation has been carried out by the Commission on the basis of two external studies conducted by the Odysseus Academic Network and EMN. As determined in the call for tender⁵⁵ and in the evaluation report of the Commission itself, the objective of the study is to give an overview of the transposition and application of the Directive in the national system of the 23 Member States, and to identify possible problematic issues and possibility for improvements. One may say that the purpose in the view of the evaluation is political, as identifying areas for improvements implies to assess first the area for which the Directive has achieved its objectives or not. Nevertheless, the study of the evaluation report of the Commission reveals that the political purpose is not clearly dealt with by the Commission, and seems more to have been merged in the legal purpose. The Commission has, indeed mainly evaluated how the Directive has been implemented at national level assessing whether the national measures transposing the Directive and the national

54 Report from the Commission to the Council and to the European Parliament on the application of directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers COM(2007) 745, 26.11.2007

55 Specific call for tender on the study on the transposition and implementation by EU Member States of Council Directive 2003/9/EC laying down minimum standards on the reception of applicants for Asylum in Member States Specification for General invitation to tender JLS/B4/2005/03

practice comply with the specific provisions of the Directive. For areas, where general compliance has been respected by the Member States, nor the results of the application of these provisions, neither their impacts have been clearly evaluated by the Commission.

The only political purpose of the Commission remains in its final conclusion where it broadly shows that the application of the directive has not been effective. "The wide discretion allowed to Member States by the Directive in a number of areas...undermines the objective of creating a level playing field in the area of reception conditions." As for illustration, the restriction of the right to free movement and residence, where the Commission has not found difficulties upon the implementation of this provision due to the broad discretion given to the Member States, the Commission displayed the different States' practices without analyzing if the restriction to the right of free movement applied in a Member States may preclude the asylum seekers to access to the directive benefits in practice. Another example is the access of asylum seekers to the labour market. The Commission concluded that no legal problem arose for its application due to the large discretion of Member States in this field. From this again, the Commission displayed the results of the Member States practices without really assessing how far those practices hinder access to labour, and does not answer to important evaluation questions such as, how many asylum seekers accessed to labour market in practice? What is the social impact of the unemployment? How Member States' practices contribute to lower the standard of reception? Concerning the access to health care, the Commission, while concluding that the large number of Member States have broadened access to health care, has not assessed neither question of this access in practice.

Furthermore, the information or indicators used or required have not been defined against the objectives of the Directive as such proposed by COM (2006) 332, but rather evaluate its transposition and its application at national level. According to the call for tender "The study should provide the Commission with detailed information on the transposition and application of the Directive by the Member States, identify possible shortcomings (in the legislation or administrative practice)..."⁵⁶ The legal nature of the information required can explain the difficulty to carry out a more political evaluation. Nevertheless the Commission made a reference to article 22 of the Directive requiring provision of statistical data upon Member States, but this provision has not been really implemented as stated in the Impact Assessment⁵⁷. Regarding the nature of information provided the purpose of the evaluation carried out by or for the Commission could not have been otherwise than legal.

1.1.2. The evaluation of the Qualification Directive

The evaluation of the Qualification Directive (QD)⁵⁸ has been undertaken by the Commission in the impact assessment accompanying the proposal for a new Directive⁵⁹. The evaluation proposed in the impact assessment looks like more general statements of the problems posed by the Directive than a political evaluation, as such. The Commission

⁵⁶ Ibid, Specific call for tender on the study on the transposition and implementation of the Reception conditions Directive point 2.2 « Results to be achieved by the Contractor » page 3

⁵⁷ Commission staff working document *accompanying the* proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers *impact assessment* SEC (2008) 2944, 3.12.2008 « *Scope of the problem* » page 14

⁵⁸ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

⁵⁹ Commission staff working document accompanying the proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, impact assessment SEC(2009) 1373, 22.10.2009

has concluded that the negative impact of the Directive is far from reaching its objectives, but has not really assessed the scope of the problems stated. In that sense the Commission identified as a main problem the vagueness and the ambiguity of the standards adopted, leading to three main negative impacts. First of all the minimum standards adopted are deemed insufficient to secure full compatibility with the evolving human rights and refugee law standards and to ensure effective access to the rights guaranteed by the relevant international instruments. Secondly, they have not achieved a sufficient level of harmonisation to enable the establishment of a uniform status, nor to offer a high protection. Moreover the current divergences between national asylum laws among the Member States still lead to secondary movement. Finally they have a negative impact on the quality and the efficiency of the decision-making⁶⁰.

Although the Commission has briefly targeted the manifestation of those problems stated above in specific provisions of the Directive⁶¹, it has not measured and evaluated in depth the problematic issues. The lack of necessary data can explain the difficulty to undertake a political evaluation. Indeed, most of information collected by the Commission is information about the transposition and implementation of the Directive. This information was collected by the Commission through its monitoring activities, but also on several studies and notably a report carried out on behalf of the Commission by the Odysseus academic network⁶². It is important to note that the Commission required in its call for tender⁶³ only information about the transposition and the application of the Directive in the Member States⁶⁴. Although further data was collected from academic publications, from commentaries of UNHCR, from civil society stakeholders, and from an external study conducted on behalf of the Commission⁶⁵ analysing evidences and results from consultations, the Commission recognised that some important data are missing to work on improvements in the future proposal. This is the case of the information concerning the access of beneficiaries of international protection to the rights granted by the Directive⁶⁶.

1.1.3. Evaluation of the Frontex Agency⁶⁷

The European Commission has conducted its own evaluation of FRONTEX Regulation, as requested by the 2004 Hague Programme⁶⁸. The Council required the Commission to

⁶⁰ Ibid point 2.2.2 "Problems with the standards set down by the Directive", page 10, 11, and 12.

⁶¹ Ibid point 2.2.2 page 12

⁶² Ibid point 1.1.2 " Organization and timing, consultation and expertise" page 7

⁶³ Tender specifications« Conformity checking of measures of Member States to transpose Directives in the sector of asylum and immigration.

⁶⁴ Ibid "*The objective of the contract is to produce studies, which analyse the conformity of national legislation with ten Directives in the sector of asylum and immigration", which implies "a legal examination of the conformity with each Article of the Directive" page 1 and 2*

⁶⁵ GHK impact assessment studies on the future development of measures on the qualification and status of third country nationals or stateless persons as persons in need of international protection and on the content of the protection granted, based on Council Directive 2004/83/EC, and the future development on procedures in Member States for granting and withdrawing refugee status, based on the Council Directive 2005/85/EC, Multiple framework service contract JLS/2006/A1/004. See SEC (2009) 1373, op cit, point 1.1.2 page 7.

⁶⁶ Impact assessment op cit point 2.2.7 "*Moreover, there is no information available on the overall costs of hosting beneficiaries of protection. Different rights, such as access to education, recognition of qualifications, social welfare or employment support, are granted on the basis of individual needs and MS do not segregate statistics on the basis of such criteria. This problem is recognised by the EU, and it is being addressed by greater cooperation and information sharing among MS, the institutions and NGOs, soon to be assisted by the EASO. It is thus impossible to estimate how many applicants might actually be affected by any amendments to the grounds of protection or to assess the effects of any amendments to the rights granted to beneficiaries of protection. This is unfortunately a constraint which future proposals must work within.*"

⁶⁷ Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 26.10. 2004

undertake before the end of 2007 “a review of the task of the Agency and an assessment of whether the Agency should concern itself with other aspects of border management ...”⁶⁹ The Commission presented the evaluation required as a ‘political evaluation’⁷⁰ which includes a review of the tasks of the Agency, an assessment of the results⁷¹ and short term, as well as long term recommendations for the future developments of the Agency. However, the evaluation report emphasized more on quantitative results and did not contain any real, balanced qualitative assessment of the agency’s activities, nor of the added value of a new system⁷². Thus, the Commission addressed recommendations on future development of the Agency on the basis of quantitative outputs without assessing the impact of the Agency activities. For instance, in respect to the evaluation of the joint operations under the cover of the Agency, the Commission displayed the number of joint operations undertaken, then the quantitative results in term of Members States participation, as well as the cost of those operations⁷³. On this basis, the Commission even considered that the results of joint operations cannot be summarized solely in quantitative terms concluded that “Nevertheless the quantifiable results so far must be considered impressive: more than 53 000 persons, for 2006 and 2007 together, have been apprehended or denied entry at the border during these operations. More than 2 900 false or falsified travel documents have been detected and 58 facilitators of illegal migration arrested⁷⁴”. In this regard, it is important to note that the impact of FRONTEX activities over human rights obligations, such the principle of non- refoulement, that EU institutions, Community bodies and Member States must comply with, have not been assessed. For instance, it is unknown which safeguards of those available have benefited the migrants involved in push-backs. (See the part of this study dealing with external dimension of asylum, “FRONTEX evaluation).

According to article 33 of the FRONTEX Regulation, the Management Board shall commission an independent external evaluation of the implementation of the Regulation within three years from the date of the Agency having taken up its responsibilities and every five years thereafter. COWI⁷⁵ was awarded the contract to undertake the evaluation. The evaluation covers the activities of FRONTEX in the period from 1 January 2006 - June 2008. In its draft report of January 2009, COWI sets in the objectives of the evaluation a political purpose, as it intended to assess « the working practices, the effectiveness and impact of the Agency »⁷⁶, meaning a review on the results of the activities, on achievement of the objectives and on the impact, accompanied with recommendations. Compared to the evaluation of the Commission, the external evaluation has attempted to carry out a more qualitative assessment. In this context for each area of activities of the Agency, COWI presents its general findings with an assessment and conclusions on the effectiveness and on the impact of the Agency’s activities. However, some difficulties remain to fully assess the results and the impact of the activities of the Agency, as the evaluation intervened at

⁶⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions report on the evaluation and future development of the FRONTEX agency COM (2008) 67 13.2.2008

⁶⁹ Op cit, Hague Programme point 1.7.1 « Border checks and the fight against illegal immigration » page 6

⁷⁰ Op cit, COM (2008) 67 “Introduction” point 3, page 2

⁷¹ Ibid, point 4

⁷² Elspeth Guild, Sergio Carrera, and Anaïs Faure Atger, « Challenges and prospects for the EU’s area of Freedom, Security and Justice » CEPS Working document No 313/April 2009, point 2.2 “Shortcomings”, page 8

⁷³ Op cit, COM (2008) 67 “Evaluation achievements” Point, 6, 7 and 8, page 3

⁷⁴ Ibid Point 9

⁷⁵ COWI external evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *Draft report* January 2009. COWI (Consultancy within engineering, environmental science and economics) is a northern European consultancy group.

an early stage of its development. In this regard criticisms can be made with regard to the scope as well as the assessments made in the report, which has been developed further in this Study⁷⁷. One of the most important is the lack of evaluation of FRONTEX's activities with regard to their impact on the right to asylum.

1.2. An improvement with the evaluation of the Asylum procedures directive⁷⁸

The evaluation of the Asylum Procedure Directive, such as the evaluation of the Qualification Directive has been undertaken by the Commission in the impact assessment accompanying the proposal for a new Directive⁷⁹. Compared to the other evaluations studied above, the Commission attempted to carry out a more political evaluation. Indeed, apart from the general conclusion of the insufficient harmonisation due to the vague standards set down by the current Directive, the Commission identified specific deficiencies in the Directive and assessed their own negative impact on the basis of evidences, as well as their negative impact when they are combined altogether⁸⁰. By way of example, the Commission demonstrated how insufficient procedural safeguards, such as the possibility for Member States to omit a personal interview under certain grounds, the limited access to legal advice, the fact that procedures are not responsive to special needs, and inadequate access to effective remedy, can leave room for administrative error and lead to denial of protection⁸¹. Also the Commission tended to show how the vague procedural notions and devices, such as the use of accelerated procedures, and the notion of safe country of origin, among the other things that are affecting the accessibility, fairness and efficiency of the asylum process⁸². The Commission has also shown that these specific issues, when combined altogether, have a negative impact on the asylum process that can lead to denial of protection. For instance, as regards survivors of torture, the Directive's silence on the special needs of this category of applicants in combination with provision allowing Member States to treat cases as manifestly unfounded and omit a personal interview, have the potential to produce errors upon the asylum decision making⁸³. The Asylum Procedures Directive has been the object of a deeper analysis, as the Commission attributed to a large extent the limited effectiveness of the asylum acquis to this directive⁸⁴.

2. NO HORIZONTAL APPROACH

The Horizontal approach, as seen above, consists on evaluating the achievement of objectives in the broader context of a policy, as well as assessing the coherence of different instruments within a given policy. This approach has been confirmed through a Communication of 21 February 2007⁸⁵ on reinforcing the use of the evaluation. This approach is indeed essential to create a coherent and a consistent system, such as the CEAS. According to this Communication, [The strategic aspect of the evaluation is how it assesses the link between individual interventions and horizontal objectives or wider EU

⁷⁶ Ibid COWI §1.1 « Objective of the Evaluation » page 10

⁷⁷ Part on the External dimension of Asylum point 3.4 page 29

⁷⁸ Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, 01.12.2005

⁷⁹ Commission staff working document accompanying the proposal for a Directive of the European Parliament and the Council on minimum standards on procedures in Member States for granting and withdrawing international protection, impact assessment SEC(2009) 1376, 23.10.09

⁸⁰ Ibid point 2.2.6 "specific problems" page 12

⁸¹ Ibid point 2.2.6.1, page 12

⁸² Ibid point 2.2.6.2, page 16

⁸³ Ibid point 2.2.6.1 page 14 and 15

⁸⁴ Ibid point 2.2.6 page 12

⁸⁵ Op cit, SEC (2007)213, Point 2.1 « Relevant focus- making evaluation results more useful » page 8

objectives]. "Individual evaluation should therefore, where appropriate include questions that put them into the broader policy context"⁸⁶. This should imply finding answers to certain questions such as: To what extent have individual interventions contributed to the strategic objectives? And how coherent and complementary have these interventions been? This implies a need of information on cross-cutting issues in order to assess the coherence, complementarily and combined impact of several intervention pursuing same or similar objectives⁸⁷. In the same way CEPS evokes the need to open wider debate "about the need to establish a horizontal evaluation mechanism applying to all relevant policies falling under the rubric of an AFSJ"⁸⁸.

The evaluations studied above only carried out a vertical approach focusing on the legal instruments evaluated, but the Commission has not assessed whether these instruments altogether are achieving the objectives for creating a CEAS. The rationale behind the lack of a horizontal approach lies to the fact that the evaluations made by the Commission on the legal instruments are not sufficient enough to carry out such a horizontal evaluation, as they are essentially limited to the evaluation of the legal implementation.

3. IMPACT ASSESSMENTS USED AS A SUBSTITUTE TO EX-POST EVALUATIONS

The Qualification Directive and the Asylum Procedures Directive have not been subjected to an ex-post evaluation before the issuance of the Impact Assessment (IA), accompanying the proposals for the new directives. Indeed, their evaluation by the Commission has been directly carried out in the IA, which is serving, in that case, as an ex-post evaluation of those two directives. Apart from the Qualification Directive and the Asylum Procedures Directive, the other asylum instruments, when evaluated⁸⁹, have been subjected to an ex-post evaluation made by or for the Commission before the issuance of an IA on the developments of the future asylum instruments. However it appears that IA has been also used by the Commission to further complete the ex-post evaluations that have been already made by or for the Commission. By way of example in the impact assessment accompanying the proposal for a new Reception Conditions Directive⁹⁰, the Commission tended to conduct a more political, evaluation and proposed to define the problems encountered in applying the Reception Conditions Directive, in order to address solutions for improvements⁹¹. This has led the Commission to exploit the results of the application of the directive and analyze their impact in order to have a clear state of play of the problems. The Commission first set the deficiencies of the Directive and then set the results of the application of the directive in some problematic areas. At the end the Commission measured the impacts of the results with regard to the standard of treatment of Asylum seekers intended by the directive, the impact on Fundamental Rights, as well as social impact, and impact on other areas of asylum. However this evaluation remains also limited, as it appears to be more general statements than an in-depth analysis of the impact of the Directive. Consequently, in the field of asylum, IA has been used by the Commission either to replace the ex-post evaluations of the legal instruments or to further complete them, whereas it is not the purpose of these instruments. IAs indeed aim more at

⁸⁶ Ibid

⁸⁷ Ibid

⁸⁸ Op cit CEPS working document N° 313/April 2009, point 3.1 "Recommendations", page 12

⁸⁹ This is the case of the Dublin II Regulation, as well as, the EURODAC Regulation, the Reception Conditions Directive, the European Refugee Fund, the Family Reunification Directive, and FONTEX Regulation.

⁹⁰ Op cit, SEC (2008) 2944

⁹¹ Ibid point 2, page 6

analysing future prospects of the efficiency, the viability, the accuracy and the coherence of the future measure in order to improve the quality of the Commission's proposals, as well as to provide effective aid to decision making⁹². The use of the impact assessment as a substitute of the ex-post evaluation in the field of asylum reveals the difficulty for the Commission to undertake such evaluation within the short timeframe of the political agenda.

4. THE TRANSPARENCY OF THE INFORMATION USED

The Commission in its 2007 Communication⁹³, states that the evaluation results can be reliable if "The final evaluation reports must, as a minimum, set out the purpose, context, objectives, information sources, method used, evidence and conclusions"⁹⁴, and if the evaluation document or mandate at least "specify the following points; Purpose and objectives, Key questions, Scope, Expected outputs, Deadlines, Quality criteria"⁹⁵. Thus, the results will be reliable if there is a minimum of transparency of the evaluation process and of the information used. From the evaluation reports, we can conclude that the transparency of the evaluation process was generally respected by the Commission. Concerning, specifically, the study on the transposition and the implementation of the Reception Conditions Directive, the call for tender clearly stated the purpose and the objectives, as well as the scope, the expected results, the methodology and the compulsory information⁹⁶ required. The same presentation has been regarded in the call for tender related to the study of the "conformity checking of measures of Member States to transpose directives in the sector of asylum and immigration"⁹⁷. The final evaluation report on the implementation of the Reception conditions Directive also set out the purpose and the objectives of the evaluation, as well as the conclusions concerning the state of implementation among the Member States. With regard to the information sources and evidences used, the evaluation report clearly mentioned the two external studies, on which the Commission drafted its report, and thus respects the principle of transparency. In the same way, the Commission in its impact assessments clearly set out the different sources of information on which it carried out the evaluation of the Asylum Procedures Directive, as well as the Qualification Directive⁹⁸. As concerns the evaluation of FRONTEX, both evaluations (the one carried out by the Commission and the one carried out by independent experts), provide the source of information and the statistical data on which the conclusions regarding the Agency activities have been drafted.

5. THE RESULTS OF THE EVALUATIONS

5.1. Not systematic

The only instrument that remains unevaluated is the Temporary Protection Directive⁹⁹, whereas the evaluation deadline foreseen was the 31 December 2004¹⁰⁰. The Commission

⁹² Evaluation of the Commission's Impact Assessment System FINAL REPORT – Executive Summary. Contract number SG-02/2006, April 2007, "Objectives of the Commission's IA's system page 3

⁹³ p cit, SEC (2007) 213

⁹⁴ Ibid, "Conducting Evaluations" page 23 point 4

⁹⁵ Ibid, "Designing evaluation" page 23 point 2

⁹⁶ Op cit, Specification for general invitation to tender, points 2, 2.2, 3, 3.4, 3.5, page 2 and 3

⁹⁷ Points 2, 3, 4, and 4.2, page 1, 2 and 3.

⁹⁸ See SEC(2009)1376 point 1.1.3 page 6 and SEC(2009) 1373 point 1.1.2« Organisation and timing, consultations expertises » page 6

⁹⁹ Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, 20.07. 2001

justified the absence of evaluation of this measure by the fact that the Directive has not been applied due to its specific nature. But this does not preclude the Commission to monitor the transposition and implementation of the Directive, which is important to ensure its effectiveness in case it has to be applied. Apart from the Temporary Protection Directive the other asylum instruments have been evaluated, but most of time with a significant delay. As concerns the evaluation of the Dublin system, the Commission provided with an overall evaluation of the Dublin system comprising an assessment of the Dublin II Regulation, and of the EUODAC Regulation, which has been submitted to the European Parliament and to the Council with one year of delay¹⁰¹. On the other hand, the specific evaluations foreseen for the EUODAC Regulation have been regularly carried out by the Commission without significant delay¹⁰².

Dealing with the Reception Conditions Directive, the Commission has submitted, to the European Parliament and the Council, a report on the application of the Directive on the 6th of November 2007¹⁰³, whereas the deadline enshrined in the final provision of the Directive¹⁰⁴ was the 6th of August 2006. The Commission, through the impact assessment prepared for the recast proposals, has done a kind of evaluation of the Qualification Directive and of the Asylum Procedures Directive. If it has respected the deadline for the evaluation of the Asylum Procedures Directive¹⁰⁵, the evaluation of the Qualification Directive should have been made by 10 April 2008¹⁰⁶, that is to say one year and half earlier.

5.2. Not Efficient

As concerns the question of the efficiency of the evaluations carried out, by or for, the Commission, we can conclude that they have not generally provided inputs as regards the impact and the effectiveness of the legal asylum instruments that are to improve the future policy-making. The analysis made on the evaluations conducted by the Commission shows that these evaluations mainly dealt with the issue of their implementation, rather than their impact and we can question whether they will be sufficient and efficient enough to improve the policy-making. This underlines the need for a more frequent evaluation to monitor progress at regular intervals guaranteeing the efficiency of the evaluation, as the Commission proposed in its communication of 2006. Indeed, the evaluation of the

¹⁰⁰ Article 31 and 32 of Council directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

¹⁰¹ Articles 28 and 29 of the current Regulation and article 24.5 of the current EUODAC Regulation foresaw an overall evaluation respectively for February 2006 and January 2006. The evaluation of the Dublin system COM (2007) 299 has been submitted by the Commission on 6th of June 2007.

¹⁰² According to article 24.1 and 24.2 of the EUODAC Regulation, the Commission was on the duty of evaluating the EUODAC Central unit activities on the basis of annual reports. The Commission was also in charge of dressing a special assessment on the Central unit "focusing on the level of demand compared with expectation and on operational and management issues in the light of experience, with a view to identifying possible short-term improvements to operational practice."

¹⁰³ Op cit, COM (2007) 745

¹⁰⁴ Article 25 of the Council Directive 2003/9/EC of 27 January 2003, laying down minimum standards for the reception of asylum seekers : "By 6 August 2006, the Commission shall report to the European Parliament and the Council on the application of this Directive and shall propose any amendments that are necessary."

¹⁰⁵ Article 42 of the Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status "No later than 1 December 2009, the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States and shall propose any amendments that are necessary."

¹⁰⁶ Article 37 of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

implementation of EU measures shall correspond to the first level of the evaluation, as the impact of a measure cannot be effectively assessed if the legal instruments have not been correctly implemented at national level. Once the compliance with the provisions of the legal instruments has been regarded, the evaluation of their impact can be envisaged. Periodical evaluations are foreseen in most of final provisions of the legal instruments of the CEAS. But they could not be carried out by the Commission due to the short schedule attached to the political agenda for the creation of the CEAS, and the general delay of transposition which has constantly postponed the required evaluations.

In addition, the short schedule attached to the evaluation process does not generally allow provision of relevant information to measure their impact. The evaluations generally intervene at a too early stage when the Member States have just transposed the EU legal instruments. In the Extended report on the implementation of The Hague programme the Commission, even though aware of the need to improve the evaluation system, deemed the evaluations of the specific legislation that has already made, as "providing useful appraisal of how they operate and proposing constructive recommendations for possible improvements"¹⁰⁷ and cited the evaluation of Dublin as evidence. This conclusion lacks of credibility, as the Dublin evaluation has been probably one of the most problematic.

5.3. Objectivity into question

In this regard, it is important to note that the Member States are not the principal source of information on which the Commission has undertaken the evaluation of the asylum instruments. As seen previously, an exclusive source of information would be a constraint, precluding the objectiveness of the evaluator. But the Commission has collected information from a wide range of relevant stakeholders as UNHCR, ECRE and other NGO's. This has been specified in the call for tender on the study of the implementation of the Reception Conditions Directive¹⁰⁸, but also in the two impact assessments accompanying respectively a proposal for a new Asylum Procedures Directive, and a proposal for a new Qualification Directive¹⁰⁹. The objectiveness can be more arguable in the case of FRONTEX evaluation, which is exclusively based on the quantitative information given by the Agency, evading the issue of its impact on the right of asylum.

5.4. Impartiality into question

The question of the impartiality has only been problematic concerning the evaluation of Dublin system. It seems indeed that this evaluation has been driven in function to the "single-minded preference for the status quo"¹¹⁰.

SUB-SECTION 2: THE REASONS BEHIND

The existing evaluation mechanisms are not sufficient enough to enable the Commission to carry out evaluations complying with the community objectives. They are characterised by a general lack of instruments, which do not provide precise and sufficient guidelines for the evaluations, as they set out a limited purpose and do not require defined specific

107 Op cit SEC (2009) 766 , Extended report on the implementation of the Hague programme "Main developments" page 13
108 Op cit, point 3.5 of the call for tender, page 3
109 Op cit See SEC(2009)1376 point 1.1.3 page 6 and SEC(2009) 1373 point 1.1.2« Organisation and timing, consultations expertises » page 6
110 Francesco Maiani and Vigdis Vevstad, "Reflection Note on the Evaluation of the Dublin System and on the Dublin III Proposal, submitted to the European Parliament Committee on Civil Liberties, Justice and Home Affairs" (LIBE Committee) 23 March 2009.

information that would be necessary to carry out the evaluation. The evaluation as applied to the first generation of the CEAS is also characterised by the lack of statistical data available and by the lack of institutional mechanism for monitoring Human rights, which should be a key component in the creation of a CEAS. But establishing an overall comprehensive evaluation mechanism will also raise the sensitive question of its economic impact and feasibility.

1. THE LACK OF INSTRUMENTS

There was no legal basis in the Treaty for the evaluation of the first generation of asylum legal instruments. Consequently, the evaluation mechanisms are spread among the final provisions of the different legal instruments. There are two different types of final provision; the "standard provisions" and the "specific provisions". The standard final provisions are characterised by insufficient guidelines for the evaluation, as they set out a limited purpose and do not require and define specific information. Even if the specific provisions are generally more detailed and set out a more political purpose, some weaknesses have to be highlighted, especially as concerns the information required.

1.1. Standard provision

"Not later than / by... the Commission shall report to the European Parliament and the Council on the application of this Directive/ Regulation/ Decision in the Member States and shall propose any amendments that are necessary.
The Member States shall send the Commission all the information that is appropriate for drawing up this report."

This standard provision is enclosed in the Temporary Protection Directive, the current Reception conditions Directive 2003/9/E, the current Qualification Directive 2004/83/EC, the current Asylum Procedure Directive 2005/85/EC, and the current Dublin II Regulation 1560/ 2003/ EC. Concerning the purpose of the evaluation, the standard provision stated above does not require a political purpose, as it limits the evaluation to the reporting mechanism of the application of the legal instruments in the Member States. There is also no further precision on the scope of the evaluation. What does the evaluation of the application of the legal instruments mean and imply? The legal purpose set out in the standard provision could not preclude the Commission to carry out an evaluation on the results of the application of those legal instruments in the Member States, but the information required seem not to be sufficient enough to do so. Indeed, the Member States' obligation to provide the Commission information cannot be efficient unless the information needed to draw up the evaluation report is clearly defined. What is the "appropriate information"? In most of the directives, the only precise information required in the final provisions is the obligation for Member States to communicate to the Commission the provisions of national law transposing the Directive. Therefore the information required to Member States is essentially related to the transposition. In this context, the evaluation pursued by the Commission could not have been otherwise than legal evaluations.

There is only a little precision in the Reception conditions Directive, in which the appropriate information for the evaluation must include the statistical data provided for by article 22. According to this article Member States are compelled to "regularly inform the Commission on the data concerning the number of persons, broken down by sex and age, covered by reception conditions and provide full information on the type, name and format of the documents provided for by Article 6". Aside from the fact that the statistical data

required seems not sufficient enough to provide an effective evaluation, the Commission has also highlighted in the Impact assessment of the proposal for a new Directive that Member States failed to collect this information at national level¹¹¹. In some instruments there is even no obligation for Member States to send information to the Commission for the evaluation report. This is the case of the Family Reunification Directive¹¹² where the sole obligation the Member States have, is to inform the Commission when they have transposed the Directive. (See article 19 and 20). Sometimes there are provisions specifying a deadline for Member States to comply with their obligation to send to the Commission the relevant information in the view of the EU evaluation report. This is the case of the Reception Conditions Directive¹¹³ and the Qualification Directive¹¹⁴. The added value of such a deadline is to timely provide the Commission with the necessary information in order to submit the evaluation report by the deadline foreseen in the final provision.

1.2. Specific provisions

1.2.1. Council Regulation concerning the establishment of Eurodac¹¹⁵

The monitoring and the evaluation mechanisms of EURODAC are foreseen in Article 24 of the Regulation and based on annual reports and on an overall report, which have been submitted by the Commission. The purpose of the evaluation is clearly stated. The annual reports are aiming at monitoring the functioning of the Central Unit against its objectives in term of outputs, cost-effectiveness and quality of service¹¹⁶, based on information on management and performance against pre defined quantitative indicators¹¹⁷. Thus the annual reports pursue a quantitative purpose rather a qualitative purpose, which is carried out by the overall report, as this latter is aiming at examining the results achieved against the objectives¹¹⁸. Aside to the overall report, the political purpose of evaluating the effectiveness of the Central Unit must be subject to regular evaluation, in order to establish whether its objectives have been attained cost-effectively and with the view to provide guidelines for improving the efficiency of future operations¹¹⁹.

The nature of the information required to draft the annual report is clearly defined¹²⁰, which is not the case for the overall report on the evaluation of the results achieved. Furthermore, article 24.5 does not impose obligation on Member States to deliver information that would be necessary to draft the evaluation report. In this regard, the Commission in its Communication COM (2006) 332, defined the necessary information that had to be provided by Member States to evaluate the impact of the Regulation. For instance, the Member States had to provide the percentage rate of change before and after the introduction of the system to measure the increase number of asylum applications being examined in the first country of asylum/entry, and to measure the reduction of persons

¹¹¹ Op cit, SEC (2008) 2244 "scope of the problem" page 14

¹¹² Council Directive 2003/86/EC on the right to family reunification, 22.09.2003

¹¹³ Directive 2003/9, laying down minimum standards for the reception of asylum seekers 27.01.2003, Article 25 "Member States shall send the Commission all the information that is appropriate for drawing up this report by 6 February 2006."

¹¹⁴ Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted 29.04.2004, Article 37 "Member States shall send the Commission all the information that is appropriate for drawing up this report by 10 October 2007"

¹¹⁵ Council Regulation n°2725/2000, concerning the establishment of EURODAC for the comparison of fingerprints for the effective application of the Dublin Convention, 11. 12. 2000

¹¹⁶ Ibid, Article 24.2

¹¹⁷ Ibid, Article 24.1

¹¹⁸ Ibid, Article 24.5

¹¹⁹ Ibid, Article 24.3

¹²⁰ Ibid, Article 24.1 and 24.2

making multiple claims¹²¹. Therefore, we may conclude that article 24 of the Regulation is more focused on the quantitative information than on the qualitative information, which could create difficulties to carry out an evaluation on the impact of the Regulation.

1.2.2. Frontex Regulation

Article 33 of the Regulation clearly set out a political evaluation purpose, as "the evaluation shall examine how effectively the Agency fulfils its mission. It shall also assess the impact of the Agency and its working practices...", but no qualitative criteria are required to carry out such evaluation.

2. THE LACK OF INSTITUTIONAL MECHANISM FOR MONITORING HUMAN RIGHTS

Since 13 March 2001 the Commission decided that any proposals for legislation and any draft instruments have to be first scrutinized for compatibility with the Charter of Fundamental Rights of the European Union. The 2005 Communication¹²² sets a methodology for systematic and rigorous monitoring of compliance with the Charter of Fundamental Rights, which has been designed to ensure that Commission departments check systematically and thoroughly that all the fundamental rights concerned have been respected in all draft proposals. While an ex-ante monitoring of Fundamental Rights has been developed, despite the practical problems in its application¹²³, no systematic and regular ex-post monitoring of the situation of Fundamental Rights in the Member States, upon the implementation of EU policies, has been effectively set out. And yet such a mechanism must be complementary to the ex- ante monitoring of Fundamental Rights. Indeed, monitoring the situation of Human rights should be ensured upon the adoption, and upon the implementation of the European legislation, especially when the Member States can have a margin of discretion or can use exception provided for in such legislative instruments¹²⁴. Moreover, it is an ever growing importance in the area of FSJ, which very directly raises fundamental rights issues, such as the impact of FRONTEX Regulation, by way of example. And specifically, the Commission recalled in its Green paper on the future Common European Asylum System, that the creation of the CEAS must be based on « the full and inclusive application of the Geneva Convention and on the common humanitarian values shared by all Member States¹²⁵".

The existing monitoring mechanisms are not sufficient enough to allow the necessary systematic monitoring of the situation of Fundamental rights in the Member States. Article 7 TEU¹²⁶ makes available preventive measures and potential sanctions against a Member State upon the determination of the "existence of a serious and persistent breach" of one of

¹²¹ Op cit COM (2006) 332 factsheets page 34

¹²² Communication from the Commission, on the compliance with the Charter of Fundamental Rights in Commission legislative proposals, *Methodology for systematic and rigorous monitoring*, COM (2005) 172, 27.04.2005.

¹²³ Report on the Practical operation of the Methodology for a systematic and rigorous monitoring of compliance with the Charter of Fundamental Rights COM (2009) 205, 29.04.2009 « *Experience since 2005 has shown that the methodology is well conceived as regards the objective sought but that its practical application needs to be reinforced.* », point 4 "Conclusion", page 9

¹²⁴ Op cit "Comment évaluer le droit pénal européen", Olivier de Schutter and Valérie Van Goethem, « *The added value of a systematic and regular monitoring of the situation of fundamental rights in the Member States for the evaluation of the implementation of Union laws and policies* » page 125

¹²⁵ Green paper on the future Common European Asylum system, COM (2007) 301, 6.06.2007, point 1 "Introduction", page 2

¹²⁶ Article 7 of the Consolidated version of the Treaty on the European Union, OJ, C 115/13, 9.5.2008

the principles mentioned in article 2 TEU¹²⁷. But the scope of its application is limited to the qualification of a serious and a persistent breach of Fundamental rights, and makes room to other breaches that won't be subjected to scrutiny. Furthermore, article 7 TEU would be workable if it was accompanied by systematic monitoring mechanism aside, to detect the serious and the persistent breach, which is not the case. Thus the EU's procedure envisaged in article 7 TEU to make sure that systematic and serious violations of Human rights and Fundamental freedoms do not take place in the EU has never been used¹²⁸. The EU Network of independent Experts on Fundamental Rights (NEFR) was the only group performing a monitoring function on the basis of the EU Charter of Fundamental Rights in the EU and in the Member States, through annual reports or in delivering specific information and opinions regarding the situation of Fundamental Rights. But the NEFR has been removed by the creation of the Fundamental Rights Agency (FRA)¹²⁹.

As highlighted by article 2 of the Regulation establishing the FRA, the Agency has a limited mandate and is not in charge to carry out a systematic monitoring of the Member States' compliance with Fundamental rights¹³⁰. According to this article "The objective of the Agency shall be to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights, in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights." To that end, the FRA can «formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission"¹³¹. Therefore, the Agency has more a role of assistance than monitoring.

As stated above, fundamental rights are an integrant part of the objectives of the FSJ policies that have to be evaluated by the Commission. The question of compliance with human rights must be taken into account in the in depth strategy as an overarching issue¹³². In this manner, the FRA would be helpful for the Commission to monitor the situation of Human Rights in Member States when applying the asylum legal instruments, if it establishes an institutionalised cooperation and partnership with the Agency. However, the integration of the Fundamental Charter in the Treaty of Lisbon will urge the necessity of setting out a monitoring mechanism of fundamental rights carried out by the European Commission as the guardian of the Member States' obligations.

¹²⁷ Article 2 TEU OJ, C 115/13, 9.5.2008, Former article 6(1) TEU.

"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

¹²⁸ Op cit, CEPS working document, page 14.

¹²⁹ Council Regulation (CE) No 168/2007 establishing a European Union Agency for Fundamental Rights, 15.02.2007

¹³⁰ Furthermore a Systematic monitoring mandate has been specifically excluded from the tasks of the Agency (cf Explanatory Memorandum to the draft Council Regulation as well as the impact assessment SEC (2005) 849 of 30 June 2005)

¹³¹ Article 4d) of the Regulation (CE) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights

¹³² Op cit, COM (2006) 332 , point 4.1.3 "Strategic policy evaluation" page 9

3. THE LACK OF STATISTICAL DATA

In 2003, the Action plan of the Commission for developing Community statistics on migration¹³³ and the Council conclusions of Thessaloniki¹³⁴ had already pointed out the Community needs on statistics on migration and asylum, and therefore the need to adopt a more effective mechanism for collecting the necessary information specific to migration and asylum. On 14 September 2005, the Commission adopted a proposal for a Regulation on Community statistics on migration and international protection, which has been adopted by the European Parliament and the Council two years later, on 11 July 2007¹³⁵. Therefore, the new Regulation on community statistics on migration and international protection was not applicable upon the majority of the first generation evaluations made by the Commission. The Regulation applicable before the entry into force of the new Regulation on community statistics was the Council Regulation (EEC) No 311/76 of 9 February 1976 on the compilation of statistics on foreign workers, which was obsolete and not able to satisfy the community needs on statistics, related to migration and international protection issues¹³⁶. Besides it transpires from the Council Conclusions on evaluation of EU policies on Freedom Security and Justice¹³⁷, that Member States were merely ready to provide information and statistical data that they considered as available. Consequently, the first generation of evaluations suffered from a general lack of statistical data.

4. THE COST OF EVALUATION

The cost of an evaluation process has also to be taken into account, as it may constitute an impediment in its application. This is one of the reasons why the evaluation mechanism envisaged by the Commission in its communication of 2006 has never been implemented. Indeed, the Commission even if it concluded that "the evaluation mechanism proposed strikes the right balance between administrative costs and the benefits covered"¹³⁸, was aware that the mechanism implied a negative economic impact due the administrative costs to the institutions and Member States. Therefore, the Council in its conclusions revised the evaluation mechanism proposed by the Commission in the way of avoiding any duplication of efforts at EU and national levels and limiting the administrative burden on Member States.

SUB-SECTION 3: THE EVALUATION FORESEEN FOR THE EUROPEAN REFUGEE FUND AS A MODEL?

Since 2002, The European Refugee Fund (ERF), as a community financial tool, is regulated by the Financial Regulation applicable to the general budget of the European Communities of 25 June 2002¹³⁹ as well as, by the Commission Regulation laying down detailed rules for

¹³³ Communication from the Commission to the Council and the European Parliament to present an Action Plan for the collection and analysis of Community Statistics in the field of migration COM(2003) 179, 15.04.2003

¹³⁴ Thessaloniki European Council 19 and 20 June 2003 Presidency Conclusions 11638/03

¹³⁵ Regulation (EC) No 862/2007 of The European Parliament and of The Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (Ec) No 311/76 on the compilation of statistics on foreign workers

¹³⁶ Ibid Recital 11

¹³⁷ Op cit Council Conclusions 10893/1/07

¹³⁸ Op cit SEC (2006) 815 point 6.3 page 15

¹³⁹ Council Regulation (EC, Euratom) N° 1065/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 248, 16.9.2002 p.1)

the implementation of this financial Regulation¹⁴⁰. These instruments set out a general obligation of ex-post evaluations applied to all programmes and activities which entail significant spending. More specifically, all programmes or activities, where the resources mobilised exceed 5 000 000 EUR, shall be subject of an interim or/ and an ex-post evaluation in terms of human and financial resources and the results obtained. This obligation of ex-post evaluations is also laid down in the specific provisions of the three ERF decisions¹⁴¹. The specific provisions establish a detailed monitoring and evaluation mechanism, which has been improved through the different decisions. The ERF monitoring and evaluation mechanism is a shared responsibility mechanism between the Member States and the Commission¹⁴². The implementation of the ERF actions is a decentralised system, where the Member States are responsible for implementing and evaluating actions supported by the Fund. To that end, Member States shall appoint a responsible authority charged with the implementation of the actions and which shall handle all communications with the Commission. This responsible authority may delegate its own implementation responsibility to another organisation by a contract¹⁴³. This part is aiming at determining the positive aspects of this ERF evaluation mechanism that could be transposed into the other asylum instruments, and at determining also aspects that still require improvements. This is based on the analysis of the evaluation mechanism foreseen in the provisions of the ERF decisions and the results of its application in practice.

1. A LEGAL AND A POLITICAL PURPOSE

The ERF evaluation mechanism proposed in all decisions is a regular monitoring mechanism operated at national level. This mechanism does not only involve a reporting assignment on quantitative aspects of the implementation, but also on qualitative aspects. Reports presented at national level have to assess the progress and the results of the actions funded, in order to measure the achievement of the objectives assigned to it¹⁴⁴. Then, the information contained in the national reports will be used by the Commission, which is mostly in charge of carrying out the political evaluation. In the context of the ERF I, the Commission had to submit a mid-term report to the European Parliament by 31 December

¹⁴⁰ Commission Regulation (EC, Euratom) N° 2342/2002 of December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) N° 1065/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 357, 31.12.2002 p.1)

¹⁴¹ (ERF I) Council Decision (2000/596/EC) of 28 September 2000 establishing a European Refugee Fund I (OJL L252/12 of 6.10.2000); (ERF II) Council Decision (2004/904/EC) of 2 December 2004, establishing the European Refugee Fund for the period 2005 to 2010 (OJL L381/52 of 28.12.2004); (ERF III) Decision n° 573/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Fund for the period 2008 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows' and repealing Council Decision 904/EC; (OJL L144/1 of 6.6.2007)

¹⁴² See recital 18 of ERF I, recital 18 of ERF II, and recital 33 of ERF III

¹⁴³ Article 7 of ERF I, Article 13 ERF II, Article 28 ERF III

¹⁴⁴ ERF I (article 20.1) "In each Member States the responsible authority shall take whatever measures are necessary to monitor and evaluate the action. To that end, the arrangements and contracts it enters into with organization charged with implementing the action shall contain clauses requiring them to present at least one report a year detailing progress made with regard the implementation of the action and achievement of the objectives attributed to it"
ERF II (article 28.1) "In each Member States the responsible authority shall take the necessary measures to ensure project monitoring and evaluation. To that end, the arrangements and contracts it concludes with organization responsible for action implementation shall include clauses laying down an obligation to submit detailed progress reports on the implementation of these actions **and a detailed final implementation report on the extent to which stated objectives have been achieved**".
ERF III (article 50.1) "In each Member States the responsible authority shall take the necessary measures to ensure project monitoring and evaluation. To that end, the arrangements and contracts it concludes with organization responsible for the implementation of the actions shall include clauses laying down an obligation **to submit detailed reports on the state of progress of implementation and completion of the assigned objectives.**"

2002 at the latest, and a final report by 1st September 2005¹⁴⁵. Although the purpose of these reports was not defined in the provision of the decision itself, their political purpose has been clarified in the European Commission guidelines for the first ERF¹⁴⁶. According to these Guidelines the reports sent by the responsible authority should allow the Commission to carry out a mid-term review and assessment of the impact of the ERF actions, as well as, an ex-post evaluation aiming at providing an account of the use, effects and final impacts of the interventions, as well as all factors contributing to their success or failure, including their sustainability¹⁴⁷. Thereafter the political purpose of the evaluation carried out by the Commission has been clearly set out in the provisions of the two following decisions establishing, respectively the ERF II and the ERF III, according to which « The Fund shall be evaluated by the Commission in partnership with the Member states to assess the relevance, effectiveness and impact of actions in the light of the general objectives... »¹⁴⁸. In the view of the preparation of the evaluation reports carried out by the Commission, the Member States shall submit to the Commission evaluation reports providing the necessary information on the results and impact of actions co-financed by the Fund¹⁴⁹. Therefore, the required information submitted by the Member States to the Commission has a political nature.

2. A HORIZONTAL APPROACH

From the ERF II decision, the Commission, as well as the Member States, have to carry out a horizontal approach, when evaluating actions supported by the Fund. Indeed, they have to assess whether these actions implemented under the Fund are complementary with the actions pursued under other relevant Community policies, instruments and initiatives¹⁵⁰. This seems to be the result of the ERF I evaluation practice. Indeed, the external final report¹⁵¹ and the external mid-term report¹⁵², dealing with the evaluation of the ERF I, dedicated a chapter to assess the coherence and the complementary of the ERF actions with measures supported through other EU instruments, presenting risks of overlaps and complementary¹⁵³. This approach should be a strategic aspect of the evaluation, in view of creating the CEAS. Indeed, the asylum legal instruments may present overlaps and cross-cutting issues, so that the coherence between those instruments has to be assessed, in order to measure if they meet altogether the broader objectives for creating a coherent and a consistent system such as the CEAS. Also this Horizontal evaluation mechanism should take into account the eventual incidences that other Community policies may have on the creation of the CEAS.

¹⁴⁵ ERF I (article 20.4)

¹⁴⁶ Guidelines for the mechanism of monitoring and evaluating European Refugee Fund co-financed actions in the Period 2000-2004- European Commission Directorate General for Justice and Home Affairs, February 2002

¹⁴⁷ Ibid, Point 4.2 of the Guidelines

¹⁴⁸ ERF II(article 27.2) and ERF III (article 49.2)

¹⁴⁹ ERF I (article 20.3 b) ERF III (article 51.2), ERF II (article 28.3 b)

¹⁵⁰ ERF II (article 27.2) ERF III (article 49.3)

¹⁵¹ European Refugee Fund: Final evaluation of the first phase (2000-2004), and definition of a common assessment framework for the second phase (2005-2010), Final Report, Danish Institute for Human rights, Eurasyllum Ltd, and Migration Policy institute, March 2006

¹⁵² Mid-term evaluation of the European Refugee Fund carried out by PLS RAMBOLL Management on behalf of the Commission (Directorate General Justice and Home affairs, December 2003

¹⁵³ See Chapter 8 of the mid-term external report, page 225, and Chapter 6 of the Final report, page 214

3. A REGULAR MONITORING AND EVALUATION MECHANISM

In all ERF decisions the Member States, through the responsible authority, or through the delegated organisation, have the obligation to report on a regular basis the implementation and progress of the actions supported by the fund, as well as an assessment of their results and impact. This regular monitoring mechanism at the national level has the advantage to provide with necessary feedback to the Commission for its evaluation reports. The evaluation reports carried out by the Commission must be also presented on a regular basis. The Commission is entitled to carry out at least two evaluation reports¹⁵⁴, at different periods of the implementation of the Fund. Therefore, all the information generated through this monitoring mechanism, at the national and at the EU level, would constitute an important feed-back of evaluation results to nourish the decision-making process. In the latest ERF decision establishing the ERF III, the transmission of the necessary information is more rigorous. The responsible authority has to submit to the Commission a final report, which must contain detailed information to measure the progress and the effectiveness of the implementation in the Member States¹⁵⁵. Thereafter, the Commission will judge the report acceptable if it contains all the information required. Thus, the Commission has the possibility to ensure that all the information needed for assessing the implementation and the results of the implementation of the actions are fully provided. This possibility for the Commission to supervise the information required from Member States could be interesting for the other asylum instruments, in order to ensure that all the information that are necessary for the evaluation are at the Commission disposal.

4. THE LACK OF NECESSARY DATA FOR EVALUATING THE ERF

Although the ERF evaluation mechanism enables a regular feedback of information, some necessary data for evaluating the Fund are still missing, especially in the context of the ERF I and ERF II. In the ERF I, and ERF II decision, there is no obligation for Member States to provide in national reports specific and detailed information that is necessary to evaluate the Fund, whereas the ERF III decision does. Consequently, in the context of the ERF I, the two external studies evaluating the ERF I revealed some problems in collecting necessary data. The independent experts in the mid-term report have underlined the lack of data at its disposal to conduct the evaluation¹⁵⁶. One of the reasons stated was the time frame of the evaluation. Data concerning results and impacts are short supply due to the early stage of the implementation of the Fund. But the other reason of the lack of statistical data is the decentralised structure of the Fund, which seems to be characterised by a lack of coordination¹⁵⁷. Finally, even in less extend manner, the independent experts in the Final

¹⁵⁴ ERF I article 20.4 "The Commission shall submit to the European Parliament and the Council a mid-term report and a final report" ERF II article 28.4 "The Commission shall submit to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: An intermediate report on the results achieved and on qualitative and quantitative aspects of implementation of the Fund together with any proposed amendments, An intermediate evaluation report and a proposal on the Fund's future development, An ex post evaluation." ERF III article 50.3 "The Commission shall submit to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions two ex- post evaluations for the different Periods of the Fund."

¹⁵⁵ This information is listed in article 51.1 of the ERF III decision

¹⁵⁶ Op cit Mid-term evaluation of the European Refugee Fund Chapter 3« Methodology and Data generating activities », point 3.1" General remarks", page 31

¹⁵⁷ Ibid

report evaluating the first phase of the Fund (2000-2004), drew some shortcomings for obtaining even basic information¹⁵⁸. Only the ERF III decision set out a duty¹⁵⁹ for the responsible authority to ensure collection of data on implementation necessary for financial management, monitoring, control and evaluation, but the required data have not been defined.

5. NO COMMON DEFINITION OF INDICATORS

As stated previously in the study, the effectiveness of the evaluation also depends on the definition of indicators that could measure how the objectives of an EU intervention have been achieved. And yet the different ERF decisions do not provide indicators neither required statistical data on the basis of which the achievement of the objectives of actions supported by the Fund can be judged. Therefore the indicators will be different from a Member State to another, while a secure minimum set of common indicators will ensure a coherent approach in the evaluation mechanism, and make possible a comparison at the community level. However, the Commission Guidelines proposed common evaluating indicators for Member States, but these guidelines were only applicable for the ERF I and are not legally binding¹⁶⁰. Moreover the Commission in its final evaluation of the ERF I stated that "with the results available it is not possible to establish a harmonised balance-sheet of activities because when preparing their activities or during the implementation, the project leaders did not have a set of common indicators that were comparable between Member States and which could have been measured at the end of the project"¹⁶¹. To that end, the Commission expressed its intention to discuss with the Member States on a common evaluation frame for the second phase of the Fund, focusing particularly on the implementation of common indicators and methods applicable at the level of the projects, of the Member States and of the Union. But a definition of common indicators is still missing in the ERF II and ERF III decisions.

6. THE QUESTION OF THE OBJECTIVITY

As already set out the objectiveness of the evaluation will be ensured, if the supporting information is provided by different and identified sources. And yet it appears that the exclusive source of information of the Commission is the Member States. Indeed, the national stakeholders involved in the evaluation mechanism are not independent from the Member States. The responsibility authority is appointed and financed by the Member State. To secure the objectivity and the independence of the evaluation mechanism, the Commission Guidelines for the ERF I recommended to each administration to appoint an independent evaluator responsible for the evaluation of all programmes, and selected by an open and transparent procedure¹⁶². But this has not been transposed in the provisions of the following ERF decisions. However, the two external studies carried out by independent experts on the behalf of the Commission evaluating the ERF I, are based, in a relative

¹⁵⁸ Op cit Final external evaluation European Refugee, Chapter 2 « Methodology and data collection » p.38 « Sometimes, even the most basic information was difficult to obtain. One example is the list of projects, including information on organisation, project title, total programmed project costs, programmed ERF contribution, total actual project costs and actual ERF contribution, divided into years and strands. Although basic, this information is obviously central to the evaluation and provides the basis for the development of crucial statistics to be included in the report. Lack of this basic information might be indicative of certain administrative deficiencies »

¹⁵⁹ ERF III (Article 27.1 h)

¹⁶⁰ Op cit Commission guidelines Annex 1 and 2 of provide examples of indicators that can be used by the Member States to measure the objectives achievement of an action supported by the Fund.

¹⁶¹ Commission staff working document, Final evaluation of the European Refugee Fund for the period 2000-2004, SEC(2006) 1636, 1.12.2006 "achievement of the objectives" page 13

¹⁶² Op cit the Commission guidelines, point 4 "Reporting requirement"

extend, to other sources than Member States, thus guaranteeing the objectiveness. They have notably involved, among the other, information from ECRE and the UNHCR¹⁶³. As illustration to the risk of precluding the objectiveness and the need to have data from different sources, the independent experts in the mid-term evaluation report of the ERF I revealed that due to the lack of information at their disposal "the evaluation is largely reliant on an analysis of the assessments made by the various respondents, i.e. mostly those of project administrators, project beneficiaries, National Responsible Authorities and DG JHA representatives, which have been collected through questionnaires and interviews. Such an approach carries the risks that are associated with a more subjective and biased evaluation. However, our involvement of multiple sources, combined with our caution in interpreting data that is based on subjective assessments, mitigates the inherent risk"¹⁶⁴. To conclude, a shared responsibility mechanism between Member States and the Commission in evaluating asylum instruments, such as proposed by the ERF decisions presents the advantage to provide relevant and regular feed-back to carry out political evaluation. But, there is a need to set out a clear obligation for Member states to transmit the data collected to the Commission in a coordinate manner¹⁶⁵. In that sense, a supervisory role of the Commission on the data transmitted by Member States will present an added value. Also common indicators required for all Member States have to be defined to ensure a coherent approach in the evaluation mechanism, and make possible a comparison at the community level.

¹⁶³ Ibid External mid-term evaluation of the ERF 1 point 3.6 page 41 « *In addition, a group interview was carried out with the following Community Action representatives: Berend Jonker, Refugee Education and Training Advisory Service (RETAS) Henry Martenson, ECRE Richard Stanton, Greater London Authority* », op cit, Final external evaluation of the ERF I point 2.2.2 page 46 « *Thus, in many cases other agencies such as ECRE, UNHCR and national offices for statistics were used to supplement this statistical information 11 . Finally, the team has made use of a range of background documents.* »

¹⁶⁴ Ibid External mid-term report point 3.1 p.32

¹⁶⁵ In that sense recital 33 of the ERF III decision stated that "*the effectiveness and impact of actions supported by the Fund also depend on their evaluation and the dissemination of the results...*"

CHAPTER 2: PERSPECTIVES FOR IMPROVEMENTS

This Chapter aims at analysing the current developments that have been made to respond to weaknesses attached to the existing evaluation mechanisms, as well as, the perspective for future improvements envisaged for the evaluation in the field of asylum. The new Regulation on Community statistics on migration and international protection¹⁶⁶, along with the future European Asylum Office, which will accomplish a collection and sharing of significant quantities of information, will altogether contribute to address the deficits and shortage of data encountered in the field of asylum. Despite the fact that a monitoring mechanism of the quality of asylum decision has not been taken forward at the EU level, the recent developments in the field of evaluation tend to promote a more qualitative evaluation. Indeed, the EASO will have the task of identifying and exchanging best practices that will contribute to a more uniform interpretation with high standards and implementation of asylum instruments in the Member States.

For this task, the EASO will be helped by the UNHCR that could share its experience of Quality initiatives projects. Indeed, the UNHCR on the basis of national agreements has launched in some Member States projects to set out an evaluation of the quality of national asylum decisions process. This could serve as a model for an evaluation mechanism at the EU level. Although these improvements are significant, some weaknesses remain and have to be taken into account in the current and future legislative process (Section 1). Also one of the most considerable steps is the perspective of the application of article 70 of the Lisbon Treaty, which endows the Community with a legal basis for an evaluation mechanism of the implementation of the Union policies in the field of FSJ, and thus constituting recognition of the central role of the evaluation in the EU legislative process. Although this provision would enable to set up a comprehensive evaluation mechanism in the field of asylum, it also poses problematic issues that have to be clarified. Finally, this Chapter will be closed with the problematic of an ex-post systematic monitoring of Fundamental Rights, which has not been addressed yet in the Stockholm programme. This issue is of primarily importance, especially in the context of the integration of the EU Charter of Fundamental Rights in the Treaty (Section 2).

SECTION 1: ON THE WAY OF IMPROVEMENT?

SUB-SECTION 1: THE RESPONSE TO THE DEFICITS AND SHORTAGE OF STATISTICS

1. THE REGULATION ON COMMUNITY STATISTICS ON MIGRATION AND INTERNATIONAL PROTECTION

1.1. Presentation and added value

The Regulation 862/2007 of 11 July 2007 on Community statistics on migration and international protection repealing the Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers, has entered into force on August 2007¹⁶⁷ and

¹⁶⁶ The Regulation 862/2007 of 11 July 2007 on Community statistics on migration and international protection repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers

¹⁶⁷ See article 14 of the Regulation n°862/2007

was applicable in practice from the year 2008¹⁶⁸. This Regulation is aiming at setting harmonised and comparable Community statistics on migration and asylum, essential for the development and the monitoring of Community legislation and policies relating to immigration and asylum, and to the free movement of persons¹⁶⁹. It inserts an obligation for Member States to communicate to the Commission (EUROSTAT) common data defined in the view of fostering the availability of statistics necessary to conduct a political evaluation of the EU action. Also the definition of common indicators is essential to set up a coherent evaluation mechanism and to address comprehensive solutions for the next legislature. The other benefit of the Regulation on Community statistics is to ensure a regular and timely collection and dissemination of data, as the provisions of the Regulation precise the frequency and the deadline within the statistics have to be transmitted to the Commission¹⁷⁰. However the Regulation presents weaknesses. In the field of international protection the material scope of the Regulation does not cover all the scope and issues of the asylum legislations. Therefore, the lack of statistical data will remain for some issues.

1.2. A limited scope

Dealing with the statistics for international protection, they are limited to the administrative and judicial procedures features (article 1 c))¹⁷¹, which excludes per se information on access to rights granted to asylum seekers and to persons who have been recognised in need of international protection. Consequently the Regulation does cover neither the statistical data related to the application of the Reception Conditions Directive nor those related to the application of the qualification directive as concerns the access of the rights granted to beneficiaries of international protection. The statistics required in the Regulation concerned essentially those related to the Asylum procedures (Article 4.2 and 4.3) the Dublin mechanism (Article 4.4), as well as the Temporary Protection Directive (4.3c). If the Regulation on Community statistics covers almost all the information required for the application of the Asylum Procedures Directive, on the other hand, some necessary data for the evaluation of the Dublin mechanism are missing as described below.

1.2.1. Statistical data for Reception conditions

The exclusion of the reception conditions of asylum seekers from the scope of the Regulation has been compensated in the proposal for a new reception conditions Directive¹⁷². Indeed, according to article 27.2 of the Proposal, the Member States shall submit relevant information to the Commission in the form set out in Annex I on a yearly basis. This annex, attached to the Proposal, defines the statistical data required from the Member States, which are namely; The number of asylum seekers in a Member States, number of asylum seekers identified as having special needs, detailed information on the document provided to asylum seekers according to article 6 of the proposal, data related to the access of asylum seekers to the labour market (number of applicants for asylum in a Member State who have access to the labour market, the total number who are currently employed, restrictions attached to the labour market), Amounts of benefits granted to asylum seekers (material conditions and social assistance). The introduction of an obligation for Member States to provide defined common statistical data on a regular basis

¹⁶⁸ The provisions of the Regulation require statistical data from the year 2008

¹⁶⁹ Recital 6 of the Regulation n°862/2007

¹⁷⁰ See article 4.1, 4.2, 4.3, and 4.4 of the Regulation n°862/2007

¹⁷¹ Article 1 c) of the Regulation *"This Regulation establishes common rules for the collection and compilation of Community statistics on: (c) administrative and judicial procedures and processes in the Member States relating to immigration, granting of permission to reside, citizenship, asylum and other forms of international protection and the prevention of illegal immigration"*

¹⁷² Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (COM(2008)815, 3.12.2008).

in final provisions of the proposal for a new reception conditions Directive, is an important step to improve the evaluation mechanism in the field of the CEAS. However, some necessary data to evaluate in full and comprehensive manner the situation of reception conditions of asylum seekers are still missing. This is the case of the access of health care, the conditions of detention, the number of referrals to appropriate treatment for asylum seekers with special needs, as well as, the training activities carried out which could play a deterrent role in the access of employment. And yet some of these indicators had been required by the impact assessment but have not been taken into account in the proposal¹⁷³. Therefore, there is a need to introduce in the final provisions of the proposal for a new Reception Conditions Directive all the indicators required to enable the Commission to conduct an exhaustive evaluation of the application of the reception conditions of asylum seekers in the Member States.

1.2.2. Statistical data for the Qualification Directive

Unlike the proposal for a new Reception Conditions Directive, the lack of statistical data in the new Regulation on community statistics related to the access of beneficiaries of international protection's rights has not been compensated in the final provision of the proposal for a new Qualification Directive¹⁷⁴. Even more, the new final provision relating to the evaluation reports¹⁷⁵ remains unchanged compare to the current provision. Therefore, the problems set out in the previous part of the study will persist. If the final provision set out an obligation for Member State to provide the Commission with the necessary information to draft the evaluation report, this obligation cannot be efficient unless the information needed to drawing up the evaluation report is not clearly defined. Especially, the final provision must require from Member States information on access of rights for refugees such, has those which had been foresaw in the Communication COM (2006) 332. According to this Communication the impact of the Qualification Directive must be appreciated against the improved access of beneficiaries of international's rights, and this should be measured by numbers refugees accessing education, services, employment, appropriate accommodation, and integration programmes¹⁷⁶. These requirements are more than necessary to enable the Commission to carry out a political evaluation of the Qualification directive and should be introduced in the final provisions of the new Qualification Directive.

1.2.3. Statistical data for the Asylum Procedures Directive and for the Dublin Regulation

Following the example of the proposal for a new Qualification Directive, the proposal for a new Asylum Procedures Directive¹⁷⁷ has not introduced a new final provision¹⁷⁸ related to the evaluation report, but this implies little consequences as the statistical data required for its evaluation are almost covered by the Regulation on Community statistics. The only exception are the data related to third countries designated by Member States as safe countries of origin or safe third countries, but Member States are required to provide this

¹⁷³ Commission staff working document accompanying the Proposal for a Directive of the European Parliament and the Council laying down minimum standards for the reception of asylum seekers Impact assessment SEC (2008) 2944, 3.12.2008. See point 7 "Monitoring and evaluation" the Commission required also as indicators the number of vocational training and number of referrals to appropriate treatment for asylum seekers with special needs, page 50

¹⁷⁴ Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted COM(2009) 251, 21.10.2009

¹⁷⁵ Ibid, article 38.

¹⁷⁶ Op cit COM(2006)332, factsheets, page 35 and 36

¹⁷⁷ Proposal for a directive of the European Parliament and the Council on minimum standards on procedures in Member States for granting and withdrawing international protection COM(2009) 554, 21.10.2009

¹⁷⁸ Ibid , Article 45

information under the articles referring to these concepts¹⁷⁹. With regard the Dublin system, the article 42 of the proposal of a new Dublin Regulation set an obligation for Member States to provide statistics in accordance with article 4.4 of the Regulation on Community statistics¹⁸⁰. But the data required in the Regulation on community statistics are mostly limited to information related to requests of taking back or taking charge of asylum seekers, as well as transfers made¹⁸¹. And yet according to the impact assessment¹⁸² accompanying the proposal for a new Dublin Regulation, some other indicators could be also used to assess the progress and effectiveness of the preferred policy option in achieving the objectives. The impact assessment mentioned among the other things, the numbers of disputes settled under the settlement mechanism, number of sovereignty and humanitarian clause applied, of transfers suspended due to a situation of pressure and of asylum expert teams set up and sent to Member States under particular pressure. Although the Commission defined the data deemed necessary to carry out a political evaluation, those are nowhere clearly required in the provisions of the new Regulation.

SUB-SECTION 2: THE UNHCR'S QUALITY INITIATIVES

As stated in the Commission's Green paper on the future of Common European Asylum system¹⁸³, the creation of a CEAS emerged from the idea of making the European Union a single protection area for refugees, guaranteeing to persons genuinely in need of international protection access to a high level of protection under equivalent conditions in Member States¹⁸⁴. One of the prerequisite to achieve this objective would be setting up a monitoring and an evaluation mechanism on the quality of the asylum decision-making in the Member States. Such an evaluation mechanism would aim at safeguarding the good application of the determination status criteria, as well as procedural criteria, according to international and EU asylum legal instruments, and, at further, raising those standards. And yet the information required cannot be only quantitative as expected in the Regulation on community statistics¹⁸⁵, but should be also qualitative information.

In this context, the UNHCR's Quality initiatives (QI) projects are of a great interest, as they could be served as a model for an EU evaluation mechanism of the asylum decision making process in the Member States. Indeed QI projects are aiming at evaluating the quality of the asylum decisions in some Member States on the basis of their agreement. The first QI has been launched in the United Kingdom in 2003. In 2008 the Asylum Systems Quality Assurance and Evaluation Mechanism (AQSEM), has been set in Central and Eastern

¹⁷⁹ Ibid, Article 32.5 « Safe third countries » « Member States shall inform the Commission periodically of the countries to which this concept is applied in accordance with the provisions of this Article », and Article 33.4 "Safe countries of origin" Member States shall notify to the Commission the countries that are designated as safe countries of origin in accordance with this Article".

¹⁸⁰ Proposal for a Regulation of the European Parliament and of the Council 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 a stateless person COM(2008) 820, 3.12.2008, Article 42: "In accordance with Article 4(4) of Regulation (EC) No 862/2007 of the European Parliament and of the Council³⁶, Member States shall communicate to the Commission (Eurostat), statistics concerning the application this Regulation and of Regulation (EC) No 1560/2003".

¹⁸¹ Op cit article 4.4 of the Regulation on Community statistics

¹⁸² Commission staff working document accompanying the proposal for a Regulation of the European Parliament and of the Council 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 a stateless person, SEC(2008) 2962, 3.12.2008. See point 7 "Monitoring and Evaluation" page 59

¹⁸³ Green Paper on the future Common European Asylum System Brussels, COM(2007) 301 , 6.6.2007

¹⁸⁴ Ibid, "introduction" page 2

¹⁸⁵ Op cit, Article 4 of the Regulation on Community statistics

European countries¹⁸⁶, and in 2009 a new initiative has been proposed for Mediterranean countries¹⁸⁷. The overarching objective of the QI projects is to improve the quality of asylum decision making by supporting the full and inclusive application of the 1951 Convention in the context of the specific policy and legislative framework in the EU in the view of creating a CEAS¹⁸⁸. To that end, the UNHCR, in line with its supervisory role under article 35 of the 1951 Refugee Convention¹⁸⁹, will provide to participating Member States its expertise in order to further raise standards in the asylum decision making process. The QI projects are also aiming at building effective and sustainable internal review mechanisms that will regularly and objectively maintain good quality standards in EU Member States' asylum systems¹⁹⁰, and are aiming at fostering practical co-operation between the participating Member States.

1. EVALUATING AND IMPROVING THE DECISION MAKING PROCESS

Under the QI project launched in the UK, the UNHCR has reported¹⁹¹ its findings highlighting causes of concerns and draws recommendations that would contribute to raising the quality of asylum first instance decision making in the Home Office. These reports have been supplied to the Minister for Borders and Immigration. The UNHCR reports are mostly based on UNHCR audits of first instance decisions, audits of asylum interviews, as well as on several meetings with different relevant stakeholders. These findings have highlighted a number of causes for concern, focusing in particular on the application of the refugee definition, the approach to establishing the facts ('credibility') and the conduct of interviews. The recommendations made in UNHCR's reports have also covered different issues such as child asylum cases, recruitment, training and accreditation, identification and management of stress, interviews, use of interpreters, provision of Country of origin information, and guidance, targets, assessment and monitoring of decisions and interviews¹⁹². As indicated in the sixth UNHCR report of April 2009, the majority of the recommendations were accepted by the Minister by a series of published responses¹⁹³. However The UNHCR is also monitoring its recommendation, as some difficulties in their implementations can persist as it has been shown in the forth and the

¹⁸⁶ Asylum Systems Quality Assurance and Evaluation Mechanism Project in the Central and Eastern Europe sub-region (ASQAEM). It includes Austria, Bulgaria, Germany, Hungary, Poland, Romania, Slovakia and Slovenia. (second Quality initiatives)

¹⁸⁷ Further Developing Asylum Quality in the EU – Establishing New Quality Assurance Mechanisms in Southern Europe and Consolidating National Quality Mechanisms in Central and Eastern Europe Project Proposal submitted for ERF Funding April 2009 (Third Quality initiative). The southern countries included are Cyprus, Greece, Hungary, Italy, and Portugal.

¹⁸⁸ Ibid, page 1

¹⁸⁹ Article 35 of the 1951 Geneva Convention "co-operation of the national authorities with the united nations":

"1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention."

"2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning: (a) The condition of refugees, (b) The implementation of this Convention, and; (c) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees."

¹⁹⁰ Op cit, (Third Quality initiative) page 1

¹⁹¹ The UNHCR has already submitted six reports. Five reports are available on the website of the UK border Agency <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/reports/unhcrreports/>. The sixth report is now available in the UNHCR website <http://www.unhcr.org.uk/what-we-do/Quality-Initiative.html>

¹⁹² For more details see the UNHCR website on QI as referred above, as well as the different reports.

fifth reports. Regarding the AQSEM project in the Central and Eastern sub-region, the evaluation of the decision making process is sketched as follow¹⁹⁴. The ASQAEM project will look at first and second instance decisions of asylum procedures in the participating Member States. In a first phase, then ASQAEM will evaluate how the concerned EU Member States assess claims for international protection after having transposed EU legislation. After the evaluation process ASQAEM will suggest specific actions designed to improve the quality, fairness and efficiency of first and second instance decision making. Consequently, the UNHCR is putting in place, in collaboration with the participating Member States, a progressive internal evaluation to ensure the correct application of the standards upon the asylum decision making process and, at further improve these standards.

2. BUILDING EFFECTIVE AND SUSTAINABLE INTERNAL REVIEW MECHANISMS

Through the assistance of the UNHCR, the QI is aiming at developing, in participating countries, internal quality mechanisms in the asylum decision-making process. For instance, in 2007 a Quality Audit team has been set up in UK to supervise the quality and the consistency of the decisions. The team is responsible for auditing decisions and interviews, providing direct feedback to case owners and producing monthly reports on the outcome of its quality audits¹⁹⁵. Also the UK Border Agency (UKBA) and UNHCR have together a joint commitment to implementing and maintaining a system of quality assurance in UKBA through endorsement of a jointly agreed document on minimum standards on quality assurance¹⁹⁶. As concerns the southern countries and central/ Eastern countries, one of the aims of the project is clearly to establish operational internal review mechanism QAUs (Quality Assurance Units) in the involved States¹⁹⁷. These internal review mechanisms will, therefore, ensure a constant monitoring on the compliance of asylum decisions with the quality standards.

3. COOPERATION BETWEEN THE PARTICIPATING MEMBER STATES

The project establishing new quality assurance mechanisms in Southern Europe and consolidating national quality mechanisms in Central and Eastern Europe is aiming at developing cooperation on asylum between the governments of the 13 participating Member States. Notably, it will involve the assistance of the asylum authorities of Austria, Germany and the UK, who will provide good practice advice, and there will also be regular opportunities throughout the project for all participating Member States to meet and share knowledge and experience. The promotion of the practical cooperation between Members States on the implementation of the qualification and procedures standards upon the asylum decision making process will conduct to raising the standards in the EU by exchange of best practices. According to the UNHCR this engagement in practical cooperation reflects the EU's Hague Programme objectives, as well as helping to foster greater responsibility-sharing between Member States¹⁹⁸. The QI projects will have a clear added value in the context of the new European Asylum Support office (EASO). Indeed, with the EASO, the

¹⁹³ These responses are also available in the UK Border Agency website as mentioned above

¹⁹⁴ Op cit, (Second Quality evaluation mechanism)

¹⁹⁵ Quality Initiative Project, Fifth Report to the Minister, UNHCR Representation to the United Kingdom in London- March 2008, "Quality Audit Team" page 2

¹⁹⁶ Sixth report of the UNHCR Representation to the United Kingdom in London Quality initiative project Key observations and recommendations, April 2009, "Quality Auditing Activities in UKBA" page 2

¹⁹⁷ Op cit, the third Quality initiative.

¹⁹⁸ Ibid.

practical cooperation between Member States to exchange best practices will be taken forward at the EU level. The European support office will have the task of facilitating the exchange of information, among Member States, and developing practical cooperation in such a way as to contribute to harmonisation of practices in Member States, with a view to ensuring a consistently high standard of international protection in the European Union. In this context, the Office should act in close cooperation with the UNHCR and then benefit from QI experiences.

SUB-SECTION 3: THE EUROPEAN ASYLUM SUPPORT OFFICE

In late September 2008, the European Council adopted the European Pact on Immigration and Asylum and expressly agreed to establish in 2009 a European Support office (EASO) with the task of facilitating the exchange of information, analyses and experience among Member States, and developing practical cooperation between the administrations in charge of examining asylum applications. In response to that request, the Commission submitted in February 2009 a proposal for a Regulation establishing a European Asylum Support Office¹⁹⁹, adopted on 19 May 2010. The EASO aims at improving evaluations process at the EU level through different tasks, but will not have a clear function of evaluator, even if it could be envisaged in a long term.

1. A SUPPORT TO THE EVALUATION PROCESS AT THE EU LEVEL

The EASO will be engaged in support activities that act as an incentive to practical cooperation on asylum, such as sharing of good practices and information about the application of rules. Under article 11, §1 of the Regulation, the Support Office shall organise, coordinate and promote the exchange of information between the Member States' asylum authorities and between the Commission and the Member States' asylum authorities concerning the implementation of all relevant instruments of the asylum acquis of the Union. To that end, the Support Office may create factual, legal and case-law databases on national, Union and international asylum instruments making use, inter alia, of existing arrangements.

These tasks will, accordingly, facilitate the dissemination of the necessary information to undertake the evaluation of the application of the EU asylum acquis. Also, exchanging best practices information will have the added value to allow Member States to compare different practices with a view to retaining the best ones, and learning from each other. This should allow a better and a more uniform interpretation and implementation of asylum legislation and fully contribute to the general objective of improving a fair and more harmonised processing of applications for international protection through the EU²⁰⁰. However, the nature of the information required is broadly defined and no common indicators are defined, although they are necessary to help the Commission to conduct a comprehensive and a coherent evaluation. The issue of the availability of information could be partly overcome by cooperation between the EASO with relevant stakeholders (NGO's and the UNHCR), as well as the cooperation with other Agencies (FRA and FRONTEX).

199 Proposal for a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office COM(2009)66, 18.02.2009
200 Ibid 5.1.1, page 29.

2. THE EVALUATION TASK INTO QUESTION

In the Commission's perspective, the EASO would not only institutionalise a comprehensive sharing of specific information on asylum processing through formalised procedures, but would also ensure an in-depth systematic evaluation of the data collected. Its' work in this area should thus result in a qualitative and quantitative leap in the collection and evaluation of information²⁰¹. But the Regulation establishing the EASO has not clearly given to the Office the responsibility of conducting evaluation of the data collected. According to article 12, §1 of the regulation, the EASO will endorse a reporting function, as it has to draw up an annual report on the situation of asylum in the European Union. It does not imply a function of evaluator of the policy, but seems more to be "an auto-evaluation" of the Office activities.

Nevertheless, the EASO could in the future see its tasks extended in order to include systematic evaluations of the data collected. Article 46 of the Regulation provides for an evaluation of the Office to be done in 2014. Consequently, the EASO could in the long term become a key evaluating actor at EU level. This will present an added value as the Office is an independent agency working at EU level and does not take part in the decision making process. This will ensure a great level of objectivity in the evaluation process. Furthermore, it is at the vantage position as it will have at its disposal a wide range collection of information collected from different stakeholders.

To conclude, the availability of the data covered by the Regulation on community statistics on migration and international protection, along with the structured and thorough collection and sharing of significant quantities of information that will be accomplished by the EASO could crucially to contribute to addressing the deficits and shortage of data encountered in the field of asylum. Despite the fact that a monitoring mechanism of the quality of asylum decision, such as the UNHCR Quality Initiative, has not been taken forward at the EU level, the recent developments in the field of evaluation tend to promote a more qualitative evaluation.

SECTION 2: FUTURE PROSPECTS FOR A BETTER EVALUATION MECHANISM

SUB-SECTION 1: THE PERSPECTIVE OF ARTICLE 70 OF THE LISBON TREATY

Article 70 of the Lisbon Treaty constitutes an important step for the evaluation in the field of FSJ, as it endows the European Union with a legal basis for an evaluation mechanism of the implementation of the Union policies in this field. The evaluation mechanism proposed is a peer review mechanism inspired by the Schengen evaluation model, which will be revised and improved, taking into account the changes in the legal situation after the integration of the Schengen rules into the framework of the European Union²⁰². In the proposed new Schengen evaluation mechanism, the Commission will take charge of the

²⁰¹ See impact assessments accompanying the proposal for a new Qualification Directive (SEC(2009)1373) point 7 "Evaluation and monitoring criteria" page 52, and the proposal for a new Asylum procedures directive (SEC(2009)1376) point 7 "Evaluation and monitoring criteria", page 52.

²⁰² Proposal for a Council Regulation on the establishment of an evaluation mechanism to verify the application of the Schengen acquis COM(2009)102, 3.03.2009 and the Proposal for a Council Decision on the establishment of an evaluation mechanism to monitor the application of the Schengen acquis COM(2009)105, 3.03.2009

Schengen evaluation process to assess the correct application of the *acquis*, in collaboration with Member States, which will continue to play a key role²⁰³. Such collaboration between the Member States and the Commission to conduct the implementation of the EU policies in the field of FSJ is expressly foreseen in article 70²⁰⁴. The collaboration of the Commission in the evaluation is an important guarantee of independence, which is precisely another requirement of article 70. Indeed, article 70 specifies that the evaluation must be objective and impartial. The objectiveness and impartiality of evaluations should be also guaranteed *inter alia* by enabling relevant professional organisations and stakeholders to contribute to the evaluation process and the Council will ask the Commission to reflect on the best means of ensuring this. This would be also ensured and facilitated in the framework of the EASO, which will collaborate with relevant organisations and stakeholders and will gather information from different sources that are a guarantee to conduct an objective evaluation.

It is also important to note that this new evaluation mechanism cannot replace the Commission's control on the Member States' compliance with their obligations. Article 70 specifies at the beginning that this evaluation mechanism will be established without prejudice to the infringement procedure foreseen in articles 258, 259 and 260 of TFEU. The European Council considers that, in the long term, such evaluation mechanisms should encompass all policies in the area and not only the judicial cooperation, as the inclusion of the terms "in particular in order to facilitate full application of the principle of mutual recognition"²⁰⁵ in the provision, could let imagine. Thus, the evaluation mechanism foreseen in article 70 will also be applicable to the CEAS, but shall await the Commission proposals to that end.

Nevertheless, one may wonder if the peer review mechanism as proposed in the Schengen model will work in the context of the CEAS. This mechanism is effective for the Schengen *acquis* because its correct implementation leads to the lifting of internal border controls of fundamental importance for the internal security of Member States. Regarding asylum, one possible incentive is the foreseen implementation of the principle of mutual recognition of asylum decisions between Member States, as well as the fear of Member States to be condemned for indirect *refoulement* when transferring an asylum seeker in another Member States under the Dublin Regulation. In this context, the Member States have to be sure that the asylum standards are respected in the responsible Member State for the asylum claim. However, the peer review mechanism appears to be the best way to require information and data from Member States that would be necessary to conduct evaluations and would increase the efficiency of the EASO. Also, it would be an incentive of mutual trust between Member States and would facilitate the application of mutual recognition of positive asylum decisions in the European Union, which is one of the objectives of the CEAS²⁰⁶.

²⁰³ Ibid, COM (2009), Integration of the Schengen *acquis* within the European Union framework "Given the Commission's responsibilities under the EC Treaty, it is essential for the Commission to take charge of the Schengen evaluation process to assess the correct application of the *acquis* after the lifting of internal border controls. Nevertheless, the expertise of the Member States is also important in order to be able to verify implementation on the spot, as well as to maintain mutual trust between the Member States." Page 6

²⁰⁴ According to article 70 "Without prejudice to Articles 258, 259 and 260, the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation."

²⁰⁵ Ibid.

²⁰⁶ Op cit, Commission Green paper on the future of the CEAS, point 2.3 "granting of protection": "Finally the concept of a status valid throughout the Union invites reflection on the establishment at Community level of a mechanism for the mutual recognition of national asylum decisions and the

On the other hand, the new evaluation mechanism foreseen by article 70 is not satisfying with regard the role attributed to the European Parliament, which is only informed by the content and the results of the evaluation. And yet according to article 12, c) of the TEU, only national parliaments take part and are associated to the evaluation mechanism on the implementation of EU policies in the field of FSJ. Therefore, the national parliaments seem to have a more important role in the evaluation mechanism than the European Parliament. The quasi exclusion of the European Parliament from the evaluation mechanism is absurd when it has a key role in the elaboration of EU policies in this area. This provision could be interpreted as a minimum requirement and should not prevent the Commission, in its proposal for an evaluation mechanism, to give a wider role to the European Parliament in the evaluation process. The implementation of the evaluation mechanism to all policies of the area of FSJ is a long-term process and the asylum policy won't be at first the priority for the Commission, which will await the implementation of the second phase before proposing initiatives for an evaluation mechanism for the CEAS.

SUB-SECTION 2: POLITICAL GUIDELINES ABOUT EVALUATION IN THE STOCKHOLM PROGRAMME

The Stockholm Programme envisages a sectoral approach with regard the evaluation of EU policies in the field of FSJ, contrasting with the previous general approach of the Commission in its communication of 2006. As previously explained, this Communication was not applied due to resistance of the Member States and the Commission also deemed that its general approach was not operational. Each area or even sub-area of the FSJ policies has its own objectives and specificities, so that the purpose and the method of the evaluation must take these specificities into consideration.

It is foreseen that "Judicial cooperation in criminal matters should be pursued as the first area for the evaluation", but interestingly added that "other policy areas will have to follow such as respect for asylum procedures in relevant legislation". Concerning more specifically asylum, the Commission is invited "to consider, once the second phase of the CEAS has been fully implemented and on the basis of an evaluation of the effect of that legislation and of the EASO, the possibilities for creating a framework for the transfer of protection of beneficiaries of international protection when exercising their acquired residence rights under EU law".

There seems to be a willingness to improve evaluation in the field of asylum. The perspective to apply the principle of mutual recognition of national decisions could be an incentive to effectively do so.

SUB-SECTION 3: THE ISSUE OF MONITORING FUNDAMENTAL RIGHTS

The European Council invites in the Stockholm programme "the EU Institutions and the Member States to ensure that legal initiatives are and remain consistent with fundamental rights throughout the legislative process by way of strengthening the application of the methodology for a systematic and rigorous monitoring of compliance with the Convention and the rights set out in the Charter of Fundamental Rights".

possibility of transfer of protection responsibilities once a beneficiary of protection takes up residence in another Member State", p.6.

The issue of a systematic ex-post monitoring mechanism on the compliance of Fundamental Rights in the Member States when implementing EU policies is on the contrary not addressed in the Stockholm programme. It is however, an ever growing importance when the Member States have a margin of discretion or can use exceptions provided for in EU legislative instruments that may potentially lead to violations of human rights. By way of example, the Commission explained that the current disparities between Member States create differences of treatment between asylum seekers and may potentially lead in certain cases to violations of Fundamental rights such as the right to asylum (Article 18 of Charter), equality before the law (Article 20 of the Charter) and non-discrimination (Article 21 of the Charter)²⁰⁷.

The FRA Regulation could be amended in order to extend the tasks of the Agency to a systematic monitoring function, as FRA aims at promoting Fundamental rights including the right to asylum enshrined in article 18 of the Charter. Moreover, FRA could be helped in its monitoring task by the EASO through a tight collaboration already foreseen into article 52 of the Regulation establishing the EASO. Such a monitoring mechanism should also be applied to legal instruments that could have an incident on the right to asylum, such as Frontex Regulation, as far as its activities could amount to an infringement to the principle of non-refoulement.

²⁰⁷ Impact assessment accompanying the Regulation establishing the European asylum support office (SEC(2009)153 point 5.3 « respect of Fundamental Rights », p. 52).

RECOMMENDATIONS

1. Evaluation must encompass the legal and concrete implementation of the EU measures, as well as the results (impact and efficiency) of the measures once implemented.
2. A model for a standard final clause to be included in the final provisions of all EU instruments should be drafted and made mandatory through an inter-institutional agreement, in order to ensure that Member States provide to the Commission relevant and regular feed-back in view of evaluation, including a table of concordance between the provisions of directives and all national measures of transposition
3. The new directives on reception conditions and on qualification, as well as the new Dublin regulation must contain specific provisions covering statistical data not covered by the Regulation on Community statistics on migration and international protection
4. The mandate of the Fundamental Rights Agency should be extended to an ex-post monitoring of the implementation of Fundamental Rights by Member States, in order to cover the right to asylum under article 18 of the European Charter of Fundamental rights
5. The mandate of the EASO should be extended in the future to include the evaluation in the sense of proposal n°1 of the asylum acquis by the Member States
6. An Evaluation of the quality of the asylum decision-making process could be promoted by the EU on the model of the UNHCR Quality Initiatives projects

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PART 2: ASSESSMENT OF THE ASYLUM ACQUIS AND SHORT-TERM PROPOSALS FOR THE SECOND PHASE OF THE CEAS

CHAPTER 1: DISTRIBUTION OF APPLICANTS FOR INTERNATIONAL PROTECTION AND PROTECTED PERSONS

INTRODUCTION

1. SCOPE OF THE CHAPTER

The present Chapter addresses Common European Asylum System (CEAS) instruments on the distribution of applicants for protection and of protected persons. The focus of analysis will in fact be the Dublin system, which as we will see immediately, can be considered as the sole significant “distributive” instrument adopted to date.

2. OVERVIEW OF RELEVANT CEAS INSTRUMENTS

The Dublin system, established under the Dublin Regulation, the EURODAC Regulation, and their respective Implementing Regulations, institutes a form of distribution of applicants for protection between 30 “Member States” – the EU-27 plus three “associate” EFTA States: Iceland, Norway and Switzerland.

In principle, the Dublin system only applies to “asylum seekers”, that is third-country nationals applying for the recognition of refugee status, and not to applicants for alternative forms of protection. However, the latter are actually excluded from the scope of system only if their applications can be submitted separately in the State concerned (art. 2(c) DR). Since this possibility is no longer available in most Member States (SEC (2008)21), the Dublin system presently applies to most protection seekers.

While existing EU legislation covers (in part) the distribution of protection seekers, there are presently no EU rules dealing directly with the distribution of beneficiaries of international protection between the Member States. The Temporary Protection Directive purports to regulate the issue in respect of its beneficiaries. However, apart from applying in exceptional circumstances, it only establishes a voluntary pledging mechanism for the allocation of temporarily protected persons, not a binding system of rules (Hailbronner 2004:69; Kerber 2002:212). Recent initiatives on the “reallocation” of beneficiaries of protection, to be supported by the European Refugee Fund (ERF), must also be mentioned (see Pact on Immigration and Asylum, IV (c)). However, such initiatives “have been more symbolic than anything else” so far (Matrix 2010:16), and they have been undertaken on a strictly voluntary and ad hoc basis. As of now, therefore, there is no EU binding legal framework for the distribution of protected persons between the Member States. Nor are there any EU provisions allowing for their inter-state mobility, since beneficiaries of international protection are explicitly excluded from the scope of the Long-Term Residents and Blue Card Directives (see art. 3(2) and 2(2) respectively)²⁰⁸.

²⁰⁸

It should be noted that the European Agreement on Transfer of Responsibility for Refugees of 16 October 1980 does not deal with this issue either, but only with the transfer of (certain) responsibilities from a host State to another once a recognized refugee has lawfully settled in the second State (see Lassen et al. 2004:37 ff).

Arguably, the Dublin system is the key CEAS instrument also in this area, since it influences the distribution of protected persons between the Member States. Absent any EU rules on post-status-determination reallocation or mobility, the CEAS operates on the assumption that the Member State responsible for examining an application for asylum will also be the State of residence for the person concerned, if and once protection is granted.

3. THE ONGOING REFORM PROCESS: DISTRIBUTION IN THE "SECOND PHASE" CEAS

The CEAS as a whole is in the process of being reformed. However, current proposals do not prefigure a profound restructuring of its "distributional" components as described above.

For the sake of completeness, we will mention the Commission's proposal to include beneficiaries of international protection in the scope of the Long Term Residents Directive – which has been pending for years before the Council, as well as the forthcoming establishment of the European Asylum Support Office (EASO), which will be tasked to coordinate voluntary relocation programmes (see EASO Regulation, recital 7 and art. 5). However, current debates essentially focus on the Commission proposal to recast the Dublin Regulation.

The Proposal does not purport to alter the general scheme of the Dublin system (COM (2008b)5). In actual fact, the Commission has not even taken into consideration a complete overhaul of the Dublin system (see SEC (2008), in spite of serious doubts as to whether Dublin is "fit for purpose" (EP 2008a:13; see further Maiani/Vevstad 2009; on desirable amendments to the Dublin system in a long-term perspective, see Part III). Instead, the Commission has taken the approach of "confirm[ing] the principles underlying [the Dublin Regulation], while making the necessary improvements" (recital 7 DPr).

The first such improvement consists in fully extending the scope of the Dublin system to all applicants for international protection, as foreseen by art. 78(2e) TFEU (see (COM (2008b)7). This proposal is uncontroversial (EP 2009a:30; Presidency Compromise Proposal), and there is no need to examine it at length here. Let it only be noted that we support the forthcoming extension of the Dublin system to all applicants for international protection.

The other proposals put forward by the Commission aim to tackle a number of deficiencies observed in the operation of the Dublin system, in pursuance of two overarching goals: to "increase the system's efficiency and to ensure higher standards of protection for persons falling under the 'Dublin procedure'" (COM (2008b)5). These proposals will be examined in detail below, against the background of current Dublin practice, and in light of protection principles relevant to the operation of the Dublin system.

4. OUTLINE OF THE CHAPTER

The chapter is organised in five thematic sections, each discussing key problem areas in relation to the Dublin system (on the detention of persons subject to the Dublin procedure, see however Chapter III): guarantees against refoulement (Section I); the protection of family unity and integration-related concerns (Section II); the protection of vulnerable persons, including children (Section III); distributive fairness and the burden-concentrating

effects of the system on “border” States (Section IV); and finally, concerns relating to the effectiveness of the Dublin system and to the adverse impacts it has on the CEAS as a whole (Section V).

In each Section, we analyse the problems observed in Dublin practice against the background of relevant legal standards, and consider possible solutions in the context (and within the constraints) of the current recasting procedure.

SECTION I: DUBLIN AND THE PRINCIPLE OF NON-REFOULEMENT

1. INTRODUCTORY REMARKS

It is a widely shared and justified conviction that the Dublin system can only work satisfactorily if protection standards are adequate and equivalent throughout the European Union (see e.g. EP 2008b, para. 1; see further below in this Section, para. 2.2)²⁰⁹.

Under slightly less restrictive conditions, the system can work sub-optimally, but without giving rise to objections based on the non-refoulement principle. For this to be the case, all Member States must run fair and efficient asylum procedures, fully in line with international standards, and afford asylum seekers dignified standards of living, meeting or exceeding the minimum threshold defined by the prohibition of inhuman or degrading treatment.

Provided that these preconditions are met, Dublin transfers are as said unobjectionable on non-refoulement grounds. Better still, in this scenario the Dublin system decisively promotes respect for the principle of non-refoulement. This is so because under art. 3(1) DR, every application filed with one of the Member States must be “examined” by one of them – the responsible State. True, the Regulation does not at present guarantee full status determination (i.e. the examination of the claim on its merits) in the responsible State²¹⁰. But this does not detract from the importance of article 3(1) DR. Under the conditions spelled out above, access to the asylum procedure in any Member State would amount to a guarantee that the non-refoulement principle is respected, whether the application is examined on its merits or not²¹¹.

As made clear by recital 2 DR, the Dublin system is meant to run in such a “physiological” situation: “Member States, all respecting the principle of non-refoulement, are considered as safe countries for third-country nationals”. Pathological situations may nonetheless arise, whereby a Member State does not afford sufficient protection and reception standards to all asylum seekers. In such situations, instead of promoting respect for the principle of non-refoulement, the Dublin system generates new risks of refoulement. It does so by creating the standing possibility that asylum seekers are removed to a Member State whose asylum system is in some way dysfunctional, or where asylum seekers are at risk of being ill-treated.

²⁰⁹ And, one should add, in the wider “Dublin area”, including the three “associate” States (see above, Introduction).

²¹⁰ The responsible State must “complete the examination of the application for asylum” (art. 16(1b)DR). This obligation is satisfied once “any examination of, or decision or ruling concerning, an application for asylum” is made “by the competent authorities” (art. 1(e) DR). Decisions taken without a full examination of protection needs are arguably covered by this definition. Moreover, art. 3(3) DR explicitly reserves the adoption of “safe third country” decisions, which are by definition taken without prior determination of refugee status.

²¹¹ See the explicit terms of art. 3(3) DR.

Let us stress that this risk need not materialise: the Dublin Regulation provides Member States with the means to take corrective action – i.e. to refrain from effecting transfers that would amount to refoulement. Under art. 3(2) DR (the “sovereignty clause”), any State receiving an asylum application may decide to take responsibility for it, instead of transferring the applicant to the responsible State. The way in which Member States react to a risk of refoulement or ill-treatment in the responsible State is therefore (another) key variable when determining the overall impact of the Dublin system on the principle of non-refoulement.

Unfortunately, as we will see below, experience shows that both “lines of defence” against refoulement may fail or, to put it otherwise, that the Dublin Regulation falls short of “ensur[ing] compliance with the principle of non refoulement” as requested by art. 78 TFEU:

- In the context of widely diverging protection and reception standards, there are persistent concerns that the practices of some Member States fail to afford sufficient protection against ill-treatment or refoulement. Observed problems include hindrances in access to asylum procedures, unfair asylum procedures (due to e.g. insufficient procedural guarantees, the application of unduly restrictive qualification criteria, or reliance on flawed risk assessments), and sub-standard reception conditions.
- The “second line” of protection, that ought to be provided by the “sending” Member States through a principled application of the sovereignty clause, is also performing well below the standard of a “full and inclusive” application of the non-refoulement principle.

2. INSUFFICIENT GUARANTEES AGAINST REFOULEMENT AND ILL-TREATMENT IN THE RESPONSIBLE STATE

2.1. Impaired access to the asylum procedure in the responsible state

PROBLEM: ACCESS TO A MEANINGFUL ASYLUM PROCEDURE IS NOT ALWAYS GUARANTEED IN THE RESPONSIBLE STATE

A key premise of the Dublin system – that each asylum seeker will have access to an asylum procedure in the responsible State – has on occasion been belied in practice, on account of both lacunae in the Dublin Regulation and Member State practices. Barred access to an asylum procedure in the responsible State has entailed, in documented cases, the exclusion from asylum procedures in all the Member State, exposing asylum seekers to risks of refoulement.

In 2004, Greek authorities started to subject Dublin “returnees”²¹² to a domestic provision, whereby asylum cases were closed if the asylum seeker “arbitrarily” abandoned the stated place of residence. Dublin transferees could not, almost by definition, fulfil the strict requirements to have their case reopened. As a consequence, many were transferred back

²¹² I.e. to asylum seekers who, after claiming asylum in Greece, had moved to another Member State and were subsequently transferred back to Greece.

to Greece, where they faced deportation without having had their claim examined at all in any of the Member States (Papadimitriou/Papageorgiou 2005; ECRE 2006:54-55).

The Commission started infringement proceedings against Greece, contending that this "interruption" practice was contrary to the Dublin Regulation itself (case C-130/08). This, combined with stark criticism from UNCHR (UNHCR 2004; UNHCR 2007a), convinced the Greek authorities to alter national legislation so as to render the "interruption" rule inapplicable to Dublin returnees.

This notwithstanding, the issue of access to procedures persists in the Dublin context:

- Firstly, "interruption" rules of varying severity are in place in other Member States (ECRE 2006:152). In one documented case, the combined application of the Dublin system and of the Dutch "interruption" rule led to the deportation of a man whose asylum claim was nowhere examined in the EU, and who was subsequently killed in unclear circumstances in his country of origin (ECRE 2007:2).
- Secondly, factual obstacles may hinder access to asylum procedures, as much as formal rules. As documented by UNHCR and several NGOs, filing an asylum claim in Greece is a difficult and uncertain business (UNHCR 2009c:6-8 and 18-19; DRC 2009:11-13). Refoulement is a standing possibility during the process. Therefore, the end result of a transfer to Greece or to any other State experiencing similar problems may be again, removal without access to any asylum procedure (see UNHCR 2009c:19).

A less dramatic, but still serious variant of the problem described above concerns access to a remedy (rather than to a first instance asylum procedure). Asylum seekers whose claim has been rejected by the responsible State, while they find themselves in another State, may find, once they are sent back, that they have missed the deadline to lodge an appeal and thus have no remedy against the negative decision (SEC 2008)19-20).

SOLUTION: GIVING DUBLIN RETURNEES A CLEAR RIGHT TO HAVE THEIR CASE REOPENED, OR TO LODGE AN APPEAL, ON RETURN TO THE RESPONSIBLE STATE
Art. 18(2) DPr lays down an explicit guarantee that the responsible State must examine the application including, if the examination of the claim has been discontinued due to "withdrawal", by reopening the case. This proposal would partially solve the problems described above. The version of art. 18(2) DPr currently discussed in Council might, with some adjustments, provide a more complete protection.

Under art. 18(2) DPr, a Member State "taking back" or "taking charge" of an applicant, and having previously discontinued the examination of his or her claim following explicit or implicit withdrawal, would have to resume such examination ex officio. Through this provision, the Commission intends to close the protection gaps described above – even to ensure in all cases the "examination of the merits of the application" in the responsible State (COM 2008b), Annex I, ad art. 18; similarly: UNHCR 2009a:13).

This last expectation is bound to be disappointing since the responsible State would still have the possibility of sending the applicant to a "safe third country" (art. 3(3) DPr). But even allowing for this self-evident "exception", the real effects of art. 18(2) DPr would ultimately depend on the provisions of the Asylum Procedures Directive. In fact, other than specifically requesting the Member State to reopen "withdrawn" applications, art. 18(2) DPr only lays down an obligation to "complete the examination" of the application: not to examine it on its merits, but to take a decision "in accordance with [the Asylum Procedures

and Qualification Directives]” (art. 2(d) DPr; the implications for Denmark and the associate States are not clear: see Maiani 2010). Therefore, art. 18(2) can only solve the problems discussed above to the extent that the APD: (a) provides that the examination of applications can only be discontinued through “withdrawal” (since any other form of “discontinuation” would escape art. 18(2) DPr: see UNHCR 2009a:13), and (b) gives Dublin returnees the right to appeal negative decisions adopted in absentia, even though the deadline has expired. Taken together, art. 18(2) DPr and the Recast APD would guarantee the first result (see in particular art. 28 Recast APD; see also Chapter 4, Section IV, para. 7). They would not, by contrast, provide clear solutions to the “appeals” problem.

During negotiations on art. 18(2) DPr in Council, the Presidency has for its part suggested an interesting solution. The provision in the Presidency Compromise Proposal excludes the obligation to “reopen” the case in two situations: “take charge”, and “take back” when the application is still being examined by the responsible State (art. 18(1)(a) and (b) DPr). This is of no consequence, since in both situations the case would still be pending at first instance in the responsible State. In case of “take back” following withdrawal, i.e. in the situations that arose during the “Greek interruption practice”, the asylum applicant would be entitled to request the case to be reopened. On the one hand, the examination would not be resumed ex officio – an acceptable solution, provided the applicant is sufficiently informed (see *mutatis mutandis* Chapter 4, Section IV, para. 7). On the other hand, it is unclear whether the asylum applicant would be entitled as a matter of right to have the case reopened – and this, for the proposal to achieve its objectives, would need to be put beyond dispute through suitable amendments. Finally, in case of “take back” following the adoption of a first instance negative decision, the responsible State would have to ensure that “the person concerned has, or has had, the opportunity to access an effective remedy pursuant to [the APD]”. Provided that the terms “has had” are deleted or clarified, this would solve the problem of access to an appeal on return.

To conclude on this point: the Commission’s proposal holds merit, and would go some way in solving the problems described above. However, we would recommend taking the Presidency Compromise text, examined above, as a basis. If suitably amended, by clarifying that the applicant has an unconditional right to have the case reopened and to lodge an appeal on return, this text would solve the problems examined above.

2.2. Failing protection and reception standards in the responsible State

PROBLEM: SUB-STANDARD PROTECTION AND RECEPTION CONDITIONS IN SOME MEMBER STATES, IN GENERAL OR IN INDIVIDUAL CASES, GENERATE RISKS THAT DUBLIN TRANSFERS MAY AMOUNT TO “REFOULEMENT”

In the context of widely diverging protection and reception standards in the Dublin area, there are persistent concerns that the practices of some Member States may fall below the requisite standards. When sufficient guarantees against refoulement and ill-treatment are not ensured in the responsible State, the Dublin system – apart from operating as an unfair “asylum lottery” – generates risks of illegal refoulement.

Despite the progress made in the harmonization of national legislations, asylum practices and standards still vary widely between the EU Member States (see COM (2009)4; Stockholm Programme, para. 6.2). In 2007, the recognition rate for Iraqi asylum seekers was as high as 80% or more in some States (e.g. Cyprus and Germany) and as low as 0% in others (e.g. Slovenia and Greece) (ECRE 2008:15). Operating the Dublin system in such

a situation is extremely problematic. The Dublin system allocates responsibility on the basis of criteria that have nothing to do with the protection needs of asylum seekers (e.g. travel routes). In theory, it should be neutral on the outcome of the asylum applications. At present, however, the choice of the Member State responsible has a direct and sometimes critical influence on the outcome of the asylum application. It is therefore no exaggeration to say that the Dublin system currently functions as a "protection lottery" (e.g. ECRE 2008:5). This, of course, revokes into question the fairness of the Dublin system to asylum seekers. It also intuitively explains why so many asylum seekers try to resist or avoid the enforcement of transfers, with serious consequences for the effectiveness of the system (see below, Section V). This general problem acquires a distinct legal quality whenever the practices of a Member State are not only less favourable than those of other Member States but also, arguably, in breach of international standards.

In April 2008, UNCHR has issued a position paper detailing the shortcomings of Greek asylum procedures, and shedding light on the determinant factors behind Europe's lowest recognition rate (0,04% in 2007). A new paper, published in December 2009 and superseding previous positions on Greece (UNHCR 2009c), offers fresh evidence on the flaws of the Greek asylum system. It documents practices such as the informal removal of registered asylum seekers to Turkey, and details the absence of even basic guarantees in status determination procedures (see UNHCR 2009c, particularly at 3-5 and 15-18). According to UNHCR, this situation entails risks of refoulement for potentially any asylum seeker. For Dublin transferees, in particular, access to an asylum procedure in Greece is of small comfort, supposing that they obtain it. They end up having no access to a "fair" asylum procedure, ensuring respect for the principle of non-refoulement – neither in the responsible State, which has none in place, nor in the other Member States, which have declined to examine the claim.

At this juncture, one point needs to be stressed. Greece provides the rather extreme example of an asylum system that, according to UNHCR, fails to afford the requisite guarantees to virtually all asylum seekers. Dublin transfers to Greece therefore inherently imply a risk of refoulement, and UNHCR has advised, in the most general terms, against such transfers "until respect for international and EU refugee law is assured" in that country (UNHCR 2009c:21). However, it does not take the collapse of the asylum system to render a Member State potentially "unsafe". A Member State may be unsafe for a particular class of asylum seekers. Such was the case of France and Germany for persons fearing persecution from non-state actors (see UK HL, Adan). A more recent example could be that of Chechen asylum seekers in Slovakia (recognition rate close to 0% in 2005, compared to approximately 90% in Austria: see ECRE 2008:15), possibly due to an improper application of the "internal protection alternative" concept (UNHCR 2007c:55-61). A State may even be unsafe for an individual asylum seeker – e.g., due to his claim having been already rejected by the responsible State through a decision that is patently flawed, but can no longer be challenged (see e.g. UK CA Dahmas). In such situations, the risk of refoulement may be less manifest than in the Greek case. It is not, however, qualitatively different, because the prohibition of refoulement is predicated on an individual, concrete risk prognosis.

Similar considerations apply in respect of reception conditions. In spite of the Reception Conditions Directive, wide disparities persist among Member States (COM (2007b)10-11). Reception conditions in Greece give, again, cause for particular concerns. Several reports from official bodies and NGOs have documented the practice of systematically detaining asylum seekers, including children, in extremely harsh conditions. Over the last few years, the ECtHR has repeatedly condemned Greece on this account (ECtHR, Dougoz; ECtHR,

S.D.; ECtHR, Tabesh). Apart from detention, reliable sources have reported that asylum seekers, including children, do not benefit from reception conditions in line with EU standards, and are exposed to difficult living conditions: homelessness and destitution; desperate measures such as prostitution – including child prostitution – as a means for self-support (UNHCR 2009c:10, 13; DRC 2009:28-33).

It must be stressed, again, that Greece has no monopoly on these problems. Sub-standard reception and detention conditions have been documented in other Member States, as well (see e.g. ECtHR, Muskhadzhiyeva/Belgium; CommDH 2009, 73 ff; MSF 2009).

SOLUTION: NONE TO BE EXPECTED FROM A REFORM OF THE DUBLIN SYSTEM

The goal of ensuring that adequate and equivalent standards of reception and protection are applied throughout the Dublin area is a long-term goal, which can only be achieved through decisive advances in harmonisation and, arguably, strengthened supervision, capacity building, and burden-sharing. No reform of the Dublin system can tackle this issue.

Even though the problem described above has a direct impact on the Dublin system (see again EP 2008b, para. 1), amendments to the Dublin system itself cannot provide solutions. It is only through decisive advances in the harmonization process, coupled with strengthened supervision, capacity-building, and burden-sharing that a “level field of protection” and reception, fully in line with the relevant international standards, can be achieved throughout the Dublin area. While improvements in these regards can be expected under “second generation” CEAS instruments decisive advances of the kind described above are only likely to be realised in the longer term.

3. INSUFFICIENT GUARANTEES AGAINST REFOULEMENT IN THE SENDING STATE

While “second phase” amendments to the Dublin system cannot ensure that sufficient standards are applied in the responsible State, they can (and should) tackle risks of refoulement upstream, i.e. reinforce the protection against refoulement afforded by the sending States. Before examining the problems that have been reported in this area and possible solutions thereto, it is necessary to recall the basic guarantees that the sending States should extend to Dublin transferees.

3.1. The legal framework: mutual trust and “safety assessments” in Dublin context

3.1.1. Basic principles of international law and “qualified” mutual trust

All Member States are subject to the principle of non-refoulement. They may not remove an asylum seeker to a State where he or she would be at risk of persecution (art. 33 GC). Likewise, they may not remove a person to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment (art. 2 and 3 ECHR; see also art. 19(2) CFR). This includes inhuman or degrading conditions of detention, or conditions of extreme deprivation (homelessness, hunger, degrading hygienic conditions: see UK HL, Limbuela and others). “Indirect” refoulement is also prohibited, i.e. the removal to a State where the person concerned, though not immediately at risk of persecution or ill-treatment, would incur the risk of being illegally refouled.

All these prohibitions are fully applicable in Dublin context. A Dublin “transfer” is the removal of an asylum seeker from a State to another. As such, it falls squarely under the scope of the non-refoulement principle. Furthermore, each Member State, qua party to the relevant Conventions, bears an individual responsibility to respect the principle of non-refoulement at all times, vis-à-vis all the asylum seekers that are under its jurisdiction, regardless of whether it is “responsible” for examining their application (see in particular ECtHR, T.I.).

The immediate implication of all this is that before effecting a removal under the Dublin Regulation, the sending State must properly satisfy itself, through a “rigorous scrutiny”, that the responsible State is “safe” for the applicant – i.e. that the latter will be treated in conformity with the international standards recalled above (see Chapter 4, Section I, para. 5.2 and 5.3; see also Lauterpacht/Betlehem 2003:122).

By essence, the prohibition of refoulement focuses on the risks incurred by the individual person. Therefore, the required “safety assessment” should in principle be conducted on a concrete, case-by-case basis (see e.g. UNHCR 2000, § 14). When the removal occurs between States parties to the Geneva Convention or ECHR, as it is the case for Dublin transfers, the principle of “interstate” (or “mutual”) trust allows for a partial relaxation of this requirement. The sending State is entitled to presume that the responsible State will treat the asylum seeker in accordance with its international obligations under both Conventions (see, mutatis mutandis, ECtHR, K.R.S.). Yet, such safety presumptions are only deemed compatible with non-refoulement if the asylum seeker is allowed an “effective possibility to rebut [them]” (UNHCR 1999:20; UNHCR 2005:37; ECtHR, Saadi/Italy, 147; Battjes 2006, § 506 ff). In other words, mutual trust between the Member States must necessarily be a “qualified” trust, allowing for exceptions, as opposed to “absolute” or “blind” trust.

In this context, it is also worth recalling that before a transfer is carried out, the sending State must afford the asylum seeker an effective remedy, entailing independent and rigorous scrutiny of any alleged risks of refoulement and ill-treatment in the responsible State (for further details, see Chapter 4, Section I, para. 5).

3.1.2. “Strengthened mutual trust” under the ECHR?

Some would argue that, contrary to what we have just said, the decision rendered by the European Court of Human Rights in the case K.R.S./UK does establish a principle of “absolute trust” between the Member States, so far as the compatibility of Dublin transfers with the ECHR are concerned²¹³.

In this case, the applicant challenged a transfer to Greece on the grounds that it would amount to illegal refoulement under article 3 ECHR. First, he contended that Greek authorities would expel him to his country of origin, where he would be tortured (indirect refoulement). Second, he alleged that he would be detained in degrading conditions in Greece (direct refoulement). The Court dismissed both claims as manifestly unfounded. It relied inter alia on the argument that since Greece is subject to the Court’s own jurisdiction, the applicant could seek redress for any violation of the ECHR in Greece – first with the Greek authorities and then, if all else failed, by lodging an application with the Court itself.

²¹³ Let it be noted that ECtHR case law has no incidence on the Member States’ duties under the Geneva Convention.

At first sight, K.R.S. indeed suggests that any issue arising under articles 2 and 3 ECHR would need to be raised only after the transfer, with the responsible State or if need be with the Court. The sending State, for its part, would be entitled to transfer the applicant without having to assess the "safety" of the responsible State. On closer inspection, and in light of subsequent case law, things appear to be more complex.

Let us consider, first, the Court's reasoning in relation to the alleged risk of indirect refoulement. Here, the risk of torture can only materialise after the second removal – from the responsible State to a third State. In theory, the Court is in a position to prevent this: on the application of the person concerned ("Rule 39 application"). It can issue interim measures preventing expulsion from any State of the Council of Europe. This holds true, however, only if the Court is practically accessible from the responsible State (ECtHR, K.R.S., 17-18; see the comments of CommDH 2010, para. 28; Nicol 2004:176). To put it differently: the sending State need not concern itself with risks of onward refoulement from the responsible State, as long as access to the European Court is ensured, in law and in fact, in the responsible State. This, as the Court suggests, is a point on which the sending State must "properly satisfy" itself.

As for risks of direct refoulement, the reasoning of the Court in K.R.S. is ambiguous and, ultimately, unsustainable. Here, the alleged risk of ill-treatment can materialise already in the responsible State, immediately after the Dublin transfer. Redress from the Court can therefore only be obtained *ex-post-facto*. However, according to a well-established principle, treatment contrary to art. 3 ECHR must be prevented: "ex-post-facto remedies are little comfort to a person who has already suffered torture or ill-treatment" (Nicol 2004:179). This means that, contrary to what the Court seems to suggest in K.R.S., the applicant must have a possibility to raise the risk of ill-treatment already with the sending State's authorities, and that the latter must carry out a rigorous scrutiny thereof and afford the applicant an effective remedy.

The Court itself is apparently reconsidering K.R.S., at least on this last point. Between January and May 2009, i.e. after K.R.S. was handed down, the Court has instructed several States to refrain from effecting Dublin transfers in more than 50 cases, mostly on account of detention conditions in the responsible State (ECRE 2009b). Furthermore, in the decision Kaplan/Germany of 15 December 2009, the Court was careful to stress that "the fact that the Destination State is a Party to the Convention does not in itself eliminate the need for judicial protection against expulsion in the sending State. In order to evaluate the risks incurred by the concerned person, account must be taken of the nature and seriousness of the violations alleged by the applicant, as well as whether and to what extent these violation could be corrected in the destination State, in particular through an application to the Court" (free translation, emphasis added). It is worth recalling, in this context, that violations of article 3 ECHR are regarded as particularly serious and irreversible (ECtHR, Gebremedhin, para. 58). It follows, in our view, that risks of ill-treatment in the responsible State must indeed be fully examined by the sending State's authorities prior to transfer.

3.1.3. Mutual trust and EU asylum standards

A last point to consider is whether Dublin transfers can be seen to be special – to the point of justifying "absolute trust" – insofar as they take place between EU Member States subject to a Common European Asylum System²¹⁴. In addressing this issue, we would first clear the ground of three possible misconceptions.

²¹⁴ For the purpose of the following discussion, it will be borne in mind that: (a) not all Dublin transfers take place between EU Member States, since three EFTA States are associated to the Dublin system

EU Member States are not, for that reason alone, “safe” for all applicants. In and of itself, EU membership is immaterial in this regard (see e.g. ECtHR, T.I.).

At present, EU migration law does not establish an overarching “principle of mutual recognition” capable of supporting the proposition that Member States may or must have absolute trust in each other’s asylum systems. Quite the contrary, to the extent that EU migration legislation establishes specific mechanisms of mutual recognition, it systematically couples them with derogations that afford the Member States a sufficient margin of discretion to meet their international obligations (see e.g. art. 5(4c) of the Schengen Borders Code; art. 11 of the Return Directive; art. 16(1e) DR and art. 3(2) DR). No rule of absolute trust between the Member States can be derived through a fortiori argument from the “European safe third countries” clause (art. 36 APD). Under this clause, asylum seekers may be sent to a non-Member State without an “examination of [their] safety [...] in [their] particular circumstances”. According to most commentators, however, this course of action cannot be reconciled with the principle of non-refoulement, precisely because the latter only permits rebuttable presumptions of safety (see Chapter 4, Section III, para. 4; see also Battjes 2006, § 535). Therefore, the (optional) rule in art. 36(1) APD is inapplicable as a matter of international law – and de facto, there is no documented instance of it having been applied. In our view, a fortiori arguments cannot be validly based on such a dubious provision. Not if the standard to be achieved in the implementation of the Dublin system is a “full and inclusive application of the Geneva Convention”.

As a potential basis for absolute or, at least, strengthened mutual trust, one could more plausibly point to the Qualification, Procedures, and Reception Conditions Directives.

Compliance with the standards set by these Directives – e.g. access to health care (art. 15 RCD), recognition of persecution stemming from non-state actors as relevant for refugee status (art. 6 QD), or the provision of the services of a qualified interpreter in asylum procedures (art. 10 and 13 APD) – certainly contributes to the finding that a Member State is “safe”. We also accept the position taken by a number of courts, that a State that is bound by these Directives may be presumed to observe them (see e.g. ECtHR, K.R.S.; AsylGH, S8 226976-2/2008; for further details: Maiani 2010). This, however, is no basis for considering that Dublin transfers to an EU Member State are automatically “safe”.

In the first place, even a Member State complying in full with the Directives may fail to respect the standards set by the Geneva Convention and the ECHR – that is, the central, minimal, and incompressible standards of “safety”. As it is well-known, the minimum standards set by the Directives are at places extremely vague, or far from being unquestionably in line with international law. Secondly, and no less importantly, the presumption that EU Member States will abide by their obligations under the Directives must be a rebuttable presumption – just like the presumption that they will abide by their international obligations. In other words: the sending State may presume that the responsible State will comply with the Directives, but the central question remains whether its actual protection and reception practices are in line with the Directives and, ultimately, with the relevant international standards (see e.g. AsylGH, S13 402093-1/2008).

and (b) four Dublin States (the EFTA associates plus Denmark) are not bound by the EU Asylum Directives.

3.1.4. Mutual trust and safety assessments in Dublin context: summary of findings

When seeking to transfer an asylum seeker to the responsible State, all Member States must satisfy themselves that he or she incurs no risk of refoulement or ill-treatment. They are entitled to presume that this will be the case in any other Member State, as reflected in recital 2 DR. However, such a "safety presumption" must be rebuttable: the asylum seeker must be afforded a real opportunity to show good reasons why, in her particular circumstances, the transfer would expose her to a risk of chain refoulement, or to inhuman or degrading treatment. If that is found to be the case, the sending State may not proceed with the transfer, and must apply the sovereignty clause instead (see Noll 2001:162; Filzwieser 2007:20).

The fact that all Member States are parties to the ECHR, and subject to the jurisdiction of the European Court of Human Rights, justifies a partial relaxation of these rules. In particular, the sending State is in principle entitled to dispense with a concrete examination of risks of indirect refoulement in breach of art. 2 or 3 ECHR. Yet, to avail itself of this possibility, the sending State must first be satisfied that the European Court will be, in law and in fact, in a position to prevent onward refoulement from the responsible State.

By contrast, the fact that most Dublin Member States are bound by the Qualification, Procedures and Reception Directives, does not justify any fundamental alteration to the general principles outlined above. It only strengthens trust to the extent that EU standards are in line with international standards, and are complied with in the responsible State.

3.2. Applying the sovereignty clause to prevent refoulement: Member States' practice

3.2.1. Introductory remarks

As sending States, the Member States have followed widely divergent practices in response to risks of refoulement and ill-treatment in the responsible State.

In several documented cases, the sovereignty clause has been applied in line with the principles set out above, and in line with a firm commitment to maintain the principle of non-refoulement. Available documentation suggests, however, that full respect of the non-refoulement principle has not been consistently ensured in the operation of the Dublin system, and that there has been a tendency to sideline protection imperatives in favour of an effective implementation of transfers.

Even in the most critical situations, only a handful of national administrations have taken decisive action to prevent risks of refoulement. In response to the Greek interruption practice described above in this Section (para. 2.1.), only Finland, Norway and Sweden suspended all transfers. The majority of States apparently carried on with "take back" transfers as usual (see UNHCR 2006:47; ECRE 2006:151, 154-155). The same scenario has materialised after April 2008, when UNHCR invited all Member States to suspend transfers to Greece on account of documented and extremely serious flaws in the asylum procedure. Again, with few exceptions (e.g. Norway in 2008), no general suspension of transfers has been implemented.

Risks of ill-treatment in a Member State have attracted similar responses. Some sending States have adopted the policy of suspending the transfer of "vulnerable persons" to Greece, on account of poor reception and detention conditions (e.g. Germany since 2008 and Switzerland in 2009: see Hruschka 2009:6). However, systematic policies of suspension – including for vulnerable persons – have been rare.

Of course, the lack of general suspensions could have been made good through a consistent case-by-case implementation of the sovereignty clause. Reportedly, however, only a handful of States have applied the sovereignty clause in individual cases for protection-related reasons (e.g. Austria or the Netherlands), while the others have not applied the clause at all, or else very rarely (ECRE 2006:154-156; UNHCR 2006:30-32; SEC (2008)11-12).

Many factors could explain this unfortunate state of affairs. Key among these are the insufficient procedural guarantees available in Dublin procedures, on the one hand, and a strong reluctance to consider the risks incurred by the asylum seekers in other Member States, on the other hand. These two problems are considered in turn below.

3.2.2. Procedural guarantees against refoulement

PROBLEM: DUBLIN PROCEDURES FALL SHORT OF BASIC STANDARDS OF FAIRNESS, AND EFFECTIVE REMEDIES AGAINST TRANSFERS ARE NOT ALWAYS GUARANTEED

The Dublin Regulation does not establish sufficient procedural guarantees. As a result, in several Member States, "first instance" Dublin procedures are not up to basic standards of fairness. Furthermore, effective remedies against Dublin decisions are not always accessible in the Member States.

A rigorous scrutiny of the risks incurred by the asylum seeker in the responsible State presupposes a fair Dublin procedure (on this point, and more specifically on the right to be heard in EU law, see Chapter 4, Section I, para. 5.4). Unfortunately, the Dublin Regulation is lacking in this respect: it merely requires national authorities to inform the applicant "regarding the application" of the Dublin system (art. 3(4) DR), and it does not explicitly afford asylum seekers a right to be heard and raise objections to transfers. Member State practice has been widely divergent in both respect – but the general finding is that scant information is provided, and that asylum seekers are not always afforded the right to be heard during Dublin procedures (see SEC (2008)15; UNHCR 2006:13 ff; ECRE 2006:153).

The lack of these guarantees has a serious adverse impact on asylum seekers' rights in the Dublin context, including on the rights that flow from the principle of non-refoulement. The lack of effective remedies against Dublin decisions constitutes an even more serious shortcoming.

Even though remedies against transfer decisions are available in all Member States, in line with art. 19 and 20 DR, effective access to justice is far from being ensured everywhere. This problem is due, first, to national legislation and practice exploiting the lacunae of the Dublin Regulation, and resulting in:

- Extremely short deadlines to file a complaint, the practice of notifying transfer decisions immediately before their enforcement, or failure to adequately motivate and/or translate transfer decisions (SEC 2008:17; ECRE 2006:167; see also, for Swiss practice, Hermann 2009a, § 4-5 and BVG, E-5841/2009);
- Complex rules for applying to court, coupled with the unavailability of qualified legal assistance (SEC (2008)17);
- The absence of suspensive ("in-country") remedies, or restrictive practice in granting suspension, which deprive remedies of their effect (SEC (2008)17; UNHCR 2006:19-20; ECRE 2006:166-167; paradoxically, this has led some national courts to discontinue proceedings post-transfer owing to "lack of interest": for analysis, BVG, E-5841/2009).

Access to a remedy may also be barred through informal practices that evade even the minimal guarantees enshrined in the Dublin Regulation. For instance, in the Adriatic ports, Italian authorities informally “push back” asylum seekers coming from Greece, who are thus denied any recourse to the law (see UNHCR 2009b).

To sum up, as the Commission itself has acknowledged, the “low rate of appeal[s]” against transfer decisions observed in many Member States does not reflect acquiescence to transfer decisions. Rather, it is mostly due to the absence of accessible or effective remedies (SEC (2008)17-18).

SOLUTION: STRENGTHENED PROCEDURAL GUARANTEES, ESPECIALLY IN RESPECT OF REMEDIES, AS PROVIDED FOR IN THE COMMISSION’S PROPOSAL

The Commission proposes the introduction of strengthened guarantees in the Dublin procedure: a comprehensive right to information, the right to a hearing and, most importantly, a truly effective remedy against Dublin transfer. We fully support the Commission’s proposal in its original form, subject to the helpful amendment introduced by the Parliament regarding the deadline to file an appeal against Dublin transfers.

The Recast Proposal includes many provisions designed to strengthen the guarantees available to asylum seekers in Dublin procedures. All of the proposed amendments to the Dublin Regulation deserve unqualified support. The strengthened right to information (art. 4 DPr) and the new right to an interview (art. 5 DPr), would bring first instance Dublin procedures up to the requisite standard of fairness.

Most importantly, the Proposal foresees the introduction of a fully-fledged right to an effective judicial remedy (art. 26 DPr), in line with international standards and with art. 47 CFR, as well as with EP recommendations (see EP 2009c, para. 22). In light of these standards, and in light of past experience, the following aspects of art. 26 DPr can be considered as essential contributions towards an effective protection against refoulement:

- a. Remedy before a court or tribunal, having full jurisdiction in law and in fact, and competent to adjudicate any claim turning on international law and EU fundamental rights, including the prohibition of refoulement (art. 18 and 19 CFR; see also recitals 16 and 17 DPr, as well as art. 47 CFR);
- b. Reasonable time-limits to lodge an appeal, which the EP has helpfully specified in 10 days minimum (EP 2009b, amendment 26);
- c. Automatic suspension of transfers pending the decision of the court on interim measures. This would place beyond doubt the “effectiveness” of the remedy as understood, in particular, by the ECtHR (see Chapter 4, Section I, para. 5, particularly 5.3; for a more critical appraisal, ECRE 2009a:6). The EP reduced the time-limit within which the court must decide from 7 to 5 days (EP 2009b, amendment 27). We would recommend reconsidering this position. The gains in efficiency are minimal, and 7 days to take a reasoned decision on potentially complex issues is already a very strict deadline;
- d. A fully fledged right to free legal assistance for persons who cannot afford it. The EP has somewhat watered down this right, by anchoring it to the parallel (and conditional) right foreseen in the APD (EP 2009b, amendment 28). This choice is fully justified by reasons of coherence in the *acquis*, but makes it all the more important to ensure that the Asylum Procedures Directive is modified to effectively ensure effective access to justice under this standpoint (on this matter, see further Chapter 4, Section II, para. 11, and Section V, para. 3).

Under all the aspects reviewed above, the Recast Proposal would introduce vast improvements on the present situation. Art. 26 DPr in particular, which is being met with considerable resistance in Council, should be regarded as a core element of the Proposal.

3.2.3. Over-reliance on safety presumptions

PROBLEM: UNDERESTIMATION OF RISKS INCURRED BY THE ASYLUM SEEKERS IN THE RESPONSIBLE STATE

In several Member States, national authorities – including courts – are not in a position, or not willing, to meaningfully scrutinise the risks incurred by the asylum seeker in the responsible State.

Fair Dublin procedures, and access to an effective remedy, are a necessary but not sufficient condition for effective protection against refoulement. Indeed, procedural guarantees are of little use if national authorities may not – or will not – correctly assess and recognise the existence of risks in the responsible State. In this regard, asylum seekers are confronted to obstacles of varying nature and intensity in the different Member States.

Statutory safety presumptions constitute a nearly insurmountable obstacle. German and UK law provide interesting examples thereof. Art. 16a of the German Constitution was traditionally interpreted as an irrefutable presumption of safety applying to all other EU States (see Marx/Lumpp 1996; ECRE 2006:46). Since 2008, however, several administrative tribunals have suspended or annulled transfers to Greece on account, inter alia, of sub-standard asylum procedures (see e.g. VG Frankfurt, case 7 K 4376/07.F.A; for an analysis, see Maiani 2010). The German Constitutional Court itself has suspended a number of transfers to Greece. However, it has carefully reserved its decision on the merits, and pending its final decision no definite conclusion concerning the state of German Law on the issue can be drawn.

The United Kingdom has followed an inverse evolutionary trajectory. British case law on the Dublin Convention constitutes, to this day, an exemplary application of the non-refoulement principle in Dublin context. In a string of remarkably well-reasoned decisions, British courts have for instance ruled out transfers to Member States applying unduly restrictive qualification criteria (UK HL, Adan), or having already rejected the asylum application through what they regarded as an “irrational” decision (UK CA, Dahmas). In 1999 and 2004, however, the UK Parliament introduced statutory provisions to the effect that Dublin transfers can no longer be challenged or quashed on the ground that they would amount to indirect refoulement under the Geneva Convention or the ECHR (see Nicol 2004). The compatibility of such “deeming provisions” with the ECHR has been unsuccessfully challenged before the House of Lords (UK HL, Nasseri; case pending before the European Court of Human Rights). The House of Lords has nonetheless conceded that the deeming provision “renders the United Kingdom’s compliance with [art. 3 ECHR] fragile” (ibidem, para. 21-22). And, we would add, it is hardly in line with a commitment to ensure that the principle of non-refoulement is at all times respected in the operation of the Dublin system.

In other States, where statutory provisions of this sort are not in place, irrefutable presumptions of safety have been established by the case law either de jure (see e.g. Czech Republic, Supreme Administrative Court, Azs 37/2006-64) or de facto (ECRE 2006 on Hungary, p. 61, Italy, p. 75, Luxembourg, p. 88, Slovenia, p. 124, Spain, p. 130). Indeed, as of 2006, evidence that courts meaningfully scrutinised risks of refoulement in

the responsible State existed only for a handful of States such as Austria (ECRE 2006:14), the UK (see above) and the Netherlands (ECRE 2006:94).

In some Member States, the situation has apparently improved to some extent – in particular, owing to increasingly detailed reports on the situation in Greece. We have already mentioned the case of Germany. Transfers to Greece have also been suspended or quashed in Italy (see e.g. CS, 666/09; TAR Lecce 656/2008). Moreover, the Belgian and French Conseils d'Etat have, in recent case-law, abandoned their principled objection to any safety assessment concerning the responsible State (see CE Fr, 313915 and, especially, 339478; CE Be, 12.004).

However, even though Dublin transfers can now be challenged de jure and de facto on "safety" grounds in most Member States, the standards on which risks are assessed remain widely different, and overall unduly strict. Some Courts apparently apply the wrong test, asking themselves whether the applicant has already suffered ill-treatment in the responsible State, rather than whether he risks ill-treatment once transferred (CE Fr, 332917; similarly, although concluding for suspension, CE Fr, 339478). Other Courts base their risk assessments on rather unrealistic evidentiary standards (see e.g. CE Be, 40.964; AsylGH, case S1 402025-1/2008; this may be contrasted with VG Frankfurt, case 7 K 4376/07.F.A). Others still tend to dismiss serious problems existing in the responsible State as not relevant for the sending State – at most, a matter to be tackled by the responsible State, or by EU institutions (see e.g. UK HL, Nasser). More generally, national Courts appear to be unwilling to meaningfully scrutinise the asylum practices of the other Member States (see e.g., explicitly, BVG, E-1269/2009). This may well be based on proper considerations of comity between nations. At the same time, it is the responsibility of each sending State to respect the non-refoulement principle and therefore to scrutinise other States' practices when a Dublin transfer is proposed. As held by the UK House of Lords in the case of *Yogathas*:

The Home Secretary and the courts should not readily infer that a friendly sovereign state which is party to the Geneva Convention will not perform the obligations it has solemnly undertaken. This consideration does not absolve the Home Secretary from his duty to inform himself of the facts and monitor the decisions made by a third country in order to satisfy himself that the third country will not send the applicant to another country otherwise than in accordance with the Convention. [...] But the humane objective of the [Dublin] Convention is to establish an orderly and internationally-agreed regime for handling asylum applications and that objective is liable to be defeated if anything other than significant differences between the law and practice of different countries are allowed to prevent the return of an applicant to the member state in which asylum was, or could have been, first claimed.

In current case law, even "significant differences" or significant problems in the responsible State tend to be ignored. For instance, in a case decided in March 2009 concerning a "take back" transfer to Sweden, the Swiss Federal Administrative Court accepted to give superficial consideration to the propriety of the Swedish decision rejecting the asylum claim. However, it utterly failed to consider the fact that the Swedish decision was based on a risk assessment (Southern Iraq is safe) that would have been impermissible in Switzerland according to its own case law (BVG, E-1269/2009) – hardly an "insignificant" difference. In another judgment, dating from July 2009 and dealing with a transfer to Greece, the same Court duly noted that the presumption of safety concerning that State was rebuttable. However, it went on to consider that "nothing in the file suggests that Greek authorities would fail to observe their international obligation by sending the

claimant to her country of origin in violation thereof" (BVG, D-4675/2009) – as if, quite simply, the shortcomings of Greek protection standards had not been in the spotlight for months.

It would be difficult – and probably unfeasible – to change this state of affairs through detailed common rules on safety assessments. To some extent, however, other solutions could improve the situation: a collective suspension mechanism for transfers to unsafe States, which would make coordinated responses possible, as well as modifications to the preamble of the Regulation, designed to underscore the responsibilities of sending States in Dublin context.

SOLUTION: A COLLECTIVE SUSPENSION MECHANISM ENABLING COHERENT RESPONSES TO SITUATIONS OF SYSTEMIC RISKS IN A MEMBER STATE

The Recast Proposal includes an innovative mechanism for the general suspension of transfers to Member States where "systemic" risks of ill-treatment or refoulement exist. This mechanism should be maintained in the Recast Regulation. The substantive and procedural rules relating to its functioning could be improved, in order to ensure that the mechanism is indeed applied in a protection-minded perspective.

The one true innovation in the Recast Proposal is the establishment of a mechanism for the temporary suspension of transfers to a particular Member State (art. 31 DPr). This mechanism is conceived as a response to both situations of "overburdening" (see below, Section IV) and of "unsafety" in a Member State. As a protection mechanism – our only concern in this Section – temporary suspension would occur when, in the judgment of the Commission, "the circumstances prevailing in a Member States may lead to a level of protection [...] which is not in conformity with Community legislation".

The Council is apparently intentioned to suppress this protection mechanism from the Recast Proposal (see Presidency Compromise Proposal). For our part, we would recommend that it be maintained. Its introduction would have the great merit of enabling EU-wide responses to breakdown situations in a Member State – the kind of response that has been sorely missed in the situation of Greece (see Hruschka 2009:7). Another positive aspect of the proposal is to entrust the responsibility of triggering the mechanism to the one EU institution whose task is to "promote the general interest of the Union" in all independence (art. 17 TEU). Rather than being suppressed, the Commission's Proposal should be refined, as detailed below, and accompanied by amendments to the Regulation's preamble (see further below).

- Art. 31 DPr contains a number of substantive rules that govern the suspension mechanism both in situations of "overburdening" and in situations of "unsafety". Some of these are inappropriate in the latter context.
- Art. 31(4) DPr suggests that "the examination of the potential impact of the suspension of transfers on the other States" would be a relevant consideration for the Commission before it decides to trigger the mechanism. That is no doubt appropriate for suspensions addressing issues of "overburdening". By contrast, it would be improper for the Commission to consider this aspect when acting to prevent large-scale refoulement. The one valid and overriding consideration, in that context, would be whether the State making the object of the decision affords sufficient protection to asylum seekers.
- Art. 31(8) DPr limits the duration of suspension decisions to 12 months maximum (6+6). Yet, it might take longer to bring a collapsed protection system up to the

standards set by the EU legislation. The suspension should last as long as protection concerns persist.

- Under art. 31(9b) and (9c) DPr, introduced by the EP at first reading (EP 2009b, amendments 40 and 41), the suspension mechanism would cease to be applicable as soon as binding burden-sharing mechanisms are set up under EU legislation, unless the EP and Council accept to extend its application on the proposal of the Commission. This is perhaps logical insofar as the suspension mechanism seeks to provide relief to overburdened States (see however below, Section IV). And, granted, there is a relation between overburdening and the breakdown of protection standards (see EP 2009a:25). However, binding burden-sharing arrangements under EU Law would not necessarily prevent the situation described in art. 31(2) and (3) DPr from arising. In other words: even with a system of burden-sharing in place, it would still be useful to retain a tool designed to counter systemic risks of refoulement within the UE/EFTA area.

Our recommendation would be to exclude the applicability of all the above rules when the mechanism is applied as a “protection mechanism”.

The procedural rules relating to the suspension mechanism could also be refined, in our opinion, to make it more responsive to risk situations:

- It would be both helpful and natural to formally associate UNHCR to the procedure. Of course, UNHCR can in any case be expected to play a role in assisting and stimulating the Commission, alongside other relevant organizations, by issuing reports and position papers (for precedents, see e.g. UNHCR 2008a and 2009c). However, formally associating UNHCR would better reflect its mandate of supervising the implementation of the Geneva Convention (art. 35 GC), and the special role it is given by the Treaties in regard to the CEAS (see Declaration 17 annexed to the Treaty of Amsterdam). It would also bring, we think, added value. So far, in asylum matters, the Commission has reacted mainly to formal failures to transpose EU standards. It has been far less forthcoming in reacting to protection crises on the ground. For instance, the (meritorious) infringement procedure against Greece could have been pursued on a broader basis, and was (in our view) prematurely withdrawn. Indeed, it was withdrawn following amendments to Greek law that possibly worsened the situation of protection seekers. Giving a formal input to UNHCR would provide a welcome stimulus to the Commission, without prejudice to the latter’s sole competence to decide on applying art. 31 DPr and, a fortiori, without prejudice to the Commission’s rights under art. 258 TFEU.
- It would also make sense to apply the “referral” procedure in Art. 31(5) to decisions whereby the Commission declines to suspend the transfers to a particular Member State. There is no reason in principle why Member States should have the possibility to contest a suspension decision, but should be denied that possibility in the face of inaction.

SOLUTION: CLARIFYING THE MEMBER STATES’ RESPONSIBILITIES IN PREVENTING REFOULEMENT IN THE PREAMBLE OF THE DUBLIN REGULATION

Current practice discloses excessive reliance on “mutual trust” by Member State authorities. The proposed suspension mechanism might conceivably worsen the situation, by sending the wrong “signals” to national authorities – e.g., that the Commission is solely responsible to avoid refoulement risks in the operation of Dublin. This should be counteracted through limited amendments to the Regulation’s preamble, stressing the international obligations of the sending States in Dublin context.

As formally posited by the European Parliament (EP 2009b, amendment 7), the collective suspension discussed above would be an “exceptional measure”. It would be optimistic indeed to assume that art. 31 DPr will always be applied in response to patent and persistent problems in a Member State. In any event, art. 31 DPr is not meant to – and is not a “sensitive” enough tool to – cater for less clear-cut, or wholly individualised risks of refoulement. Thus, the existence of the “collective” suspension mechanism notwithstanding, the sovereignty clause would still be the ordinary tool to prevent risks of refoulement in Dublin context.

Whatever its inherent merits, the introduction of a “collective” mechanism for suspension might have unintended effects precisely in this area: it might obscure or dilute the Member States’ own responsibilities in preventing refoulement (see also Hermann 2009b, § 2.4).

In a strictly legal perspective, of course, there is no reason to assume that this should happen. Art. 31 DPr would be entirely without prejudice to the duties and responsibilities of each sending Member State under the Geneva Convention and the ECHR. However, art. 31 DPr might make a difference in practice by sending two wrong signals.

- The first signal, which some national administrations would be only too eager to receive, would be that “the Commission is in charge” and that, as long as the Commission does not activate art. 31 DPr, all is well in every potential “destination” Member State. Such an argument was explicitly made by the defendant administration in a German case involving a transfer to Greece: “the Commission, which is competent for supervising the observance of the EU minimum standards relating to asylum procedures, has not so far requested the Member States to renounce transfers to Greece” (VG Frankfurt, 7 K 4376/07.F.A, free translation). Introducing art. 31 DPr would only strengthen the (dangerous and flawed) impression that there are no risks of refoulement until the Commission says so.
- The second signal would be that the “adequate standard of safety” is compliance with EU standards, not international standards (see recital 22 and art. 31(2) DPr). To be sure, in the context of art. 31 it is entirely defensible to use EU standards as a yardstick – not least because the Commission is the guardian of EU Law, not of the Geneva Convention or the ECHR. But for the authorities of the sending Member States, it would be both incorrect in law and dangerous in practice to focus exclusively on compliance with EU law, as opposed to international law, in the responsible State (see above in this Section, para. 3.1.3).

The problem here is not a matter of altering the law, but rather of making the present state of the law clear beyond dispute or misunderstanding. Therefore, we believe that it could be addressed by amending the preamble of the Dublin Regulation. The preamble should make it absolutely clear that, as Party to the relevant treaties, each Member State that receives an asylum application has the primary responsibility to prevent any risk of refoulement, including when such risk would derive from a Dublin transfer.

In this regard, the preamble of the DPr lacks the requisite clarity. On the one hand, recital 17 DPr helpfully refers to the duty of Member States to examine “the legal and factual situation in the [responsible Member State] in order to ensure that international law is respected”. On the other hand, no reference to this point is made in recital 3 DPr, where it would belong, whereas recital 14 DPr only refers to “humanitarian and compassionate reasons” when discussing the application of the discretionary clauses. We would suggest the following amendments to both recitals:

“(3) The European Council [...] agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention [...], thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement. In this respect, without prejudice to the duties arising from the Geneva Convention and other relevant treaties for every Member State receiving an asylum application, Member States, all respecting the principle of non-refoulement, may be presumed to be safe countries for third-country nationals.

(14) Any Member State should be able to derogate from the responsibility criteria, in particular for humanitarian or compassionate reasons, or because of international obligations, and examine an application for international protection [...].”

SECTION II: DUBLIN, FAMILY UNITY, AND INTEGRATION

1. THE PROTECTION OF FAMILY UNITY IN THE DUBLIN REGULATION

PROBLEM: THE DUBLIN CRITERIA ON FAMILY UNITY ARE RESTRICTIVE TO THE POINT OF RAISING HUMAN RIGHTS CONCERNS. THE DISCRETIONARY CLAUSES HAVE PROVED INEFFECTIVE TO CORRECT THIS SHORTCOMING

The Dublin criteria based on the family ties of asylum seekers are restrictively framed and restrictively applied. They fall well short of ensuring respect for the fundamental right to family life. The sovereignty and humanitarian clauses, which could in principle correct this shortcoming, are not consistently applied to this end. As a result, the Dublin system has a negative impact on family unity, causing hardship to the persons concerned and entailing the risk of fundamental rights violations.

1.1. The provisions of the Dublin Regulation and the right to family life

Preserving family unity is one of the stated objectives of the Dublin Regulation (see recital 6 DR). To this end, the Regulation places at the top of the “hierarchy” several criteria under which asylum seekers must be brought or kept together with their “family members” as defined in the Regulation itself (art. 2(i), 6-8, and 14 DR). Member States may, furthermore, protect family unity beyond the stipulations of said criteria by applying the discretionary clauses (art. 3(2) and 15 DR).

Protecting family unity is not, however, an overriding goal of the Dublin Regulation (see, again, recital 6 DR). Indeed, when the Regulation was adopted several considerations militated against a broad recognition of family ties as a criterion to allocate responsibility. First, the responsibility criteria are based on the principle that responsibility should principally lie with the “Member State having played the greatest part” in letting the applicant into the Dublin area. This has downgraded family criteria to the role of “exceptions” (COM (2001)4). Secondly, the institutions were preoccupied that the Dublin system could become a means to “get round” the ordinary conditions for family reunification (COM (2001)5). Thirdly, it was felt necessary to prevent asylum seekers from “misusing” the family criteria, e.g. through a contrived marriage with a person residing in their preferred Member State. Leaving this possibility open to asylum seekers would have

weakened the intended effect of the Dublin system that asylum seekers cannot choose the responsible State.

All these policy considerations have left their mark in the text of the Regulation, taking the form of stark restrictions to the scope of the family criteria.

Firstly, the applicable definition of "family members" (art. 2(i) DR) only includes: (a) the spouse, (b) minor, unmarried, and dependent children, and (c) if the applicant is an unmarried minor, the parents or "guardian" – a term that the Regulation does not define. All other relatives (e.g. siblings, uncles and aunts) are excluded from the definition, regardless of the intensity of family ties and of the existence of a dependency situation. In addition, only family ties that existed in the country of origin are as a rule included in the definition.

Further restrictions flow from the terms of the criteria.

- Only applicants that are unaccompanied minors must always be reunited with "family members" (parents, guardian) that are legally present in a Member State (art. 6(1) DR).
- In all other cases where a family member is already present in a Member State, strict status limitations apply. Reunification only occurs with "family members" that are recognised refugees, regardless of whether the family existed in the country of origin (art. 7), or asylum seekers awaiting a first instance decision (art. 8). The "window of opportunity" for reunification opened by art. 8 may indeed be very short, especially in States that extensively use accelerated procedures (see ECRE 2006:158).
- Families entirely composed of asylum seekers must be kept together, provided that they apply for asylum in the same State, at approximately the same time (art. 14 DR). This rule applies to "accompanying" minors regardless of whether they are themselves asylum seekers, including when they are born to the applicant after the entry in a Member State and would therefore not qualify as "family members" (art. 4(3) DR).

Finally, one has to consider the rule whereby the criteria apply by reference to the situation existing when the asylum seeker first lodges an application (art. 5(2) DR). This also reduces the chances of family reunification. If for instance an unaccompanied minor files an asylum claim some days before a family member receives legal status in one of the Member States, art. 6(1) DR cannot apply (for detailed analysis, see Council doc. 12364/09).

Taken together, all these limitations mean that the criteria protect family unity in strictly defined situations. By way of comparison, the 2002 US-Canada "Safe Third Countries Agreement" includes a very broad family criterion, whereby "family members" are defined as "the spouse, sons, daughters, parents, legal guardians, siblings, grandparents, grandchildren, aunts, uncles, nieces, and nephews" of the applicant (art. 1(b)), and status limitations are minimal ("lawful status [...] other than as visitors": art. 4(2a)).

To put it differently: there are wide gaps in the protection of family unity afforded by the Dublin criteria. In the numberless situations that are not covered by the family criteria, the application of the other criteria may indeed prevent reunification or break up family unity. That is the case, by definition, in all the situations involving extended family ties.

That is also the case in many situations involving close family members. For example:

- Spouses that become separated during flight and apply for asylum in the Dublin area have no assurance of being brought together. Family reunification depends on timing and chance. Whether they claim asylum in different States or in the same State, a few weeks' delay of the husband, and an accelerated procedure for the wife, may well rule out reunification under art. 8 DR or art. 14 DR (see e.g. the facts of BVerfG, 2 BvR 99/97).
- Unaccompanied minors seeking asylum in Europe have the assurance, in principle, of being reunited with their parents if these are legally present in a Member State (art. 6(1) DR). But the reverse is not true. If a parent claims asylum in Europe while his or her minor child stays, unaccompanied, in a Member State, reunification will only occur if the child is still an asylum seeker, or already a recognised refugee – but not if the child enjoys subsidiary protection or any other legal status.

This enumeration could go on almost indefinitely. The important point, to which we must now turn, is that these protection gaps generate tension between the Dublin system and the right to respect of family life under art. 8 ECHR.

According to settled case law, there is an "issue" under article 8 ECHR whenever a person is "exclu[ded] [...] from the territory of a State where a member of her family lives" – a close family member, regardless of when and where the family tie was formed, or another relative, at least in cases of dependency (see ECtHR, *Abdulaziz*). This applies also to asylum seekers who, pursuant to the criteria, may easily be "excluded" from the Member State where members of their family are present (contra *Battjes* 2006, § 574; see however, *mutatis mutandis*, ECtHR, *Rodriguez Da Silva*; for further details: *Maiani* 2006:205 ff).

This is not to say that whenever "family life" within the meaning of article 8 ECHR is disrupted, a violation of article 8 occurs. In all such cases, Member States are required to carefully assess all the relevant circumstances (ECtHR, *W/UK, Ciliz*; see also *CE Fr, 302034*) and to "strike a fair balance" between the interest to family unity and competing public interests. A "positive obligation" to bring or keep family members together may or may not arise depending on the relevant circumstances, such as the circumstances of the separation (e.g. the degree to which it was voluntary), the intensity of family ties, the duration and consequences of separation, and the existence (or otherwise) of obstacles to establishing family life elsewhere.

In view of the States' margin of discretion under art. 8 ECHR, a positive obligation to preserve the family unity of asylum seekers may rarely arise. Yet it may arise, especially when children-parent relationships are involved (see ECtHR, *Sen*) or in cases of severe dependency. And whenever it does, separating members of a family pursuant to the criteria is tantamount to violating art. 8 ECHR (see *Brandl* 2003:46; *SEC* 2008:20).

Of course, as already noted, it is open to Member States to use the Regulation's discretionary clauses in order to meet the requirements of article 8 ECHR, and beyond that for humanitarian reasons. The sovereignty clause can be used whenever a person seeks asylum in a State where family members or relatives are present. The humanitarian clause (art. 15 DR) makes it possible to reunite family members and relatives who are separated and would remain so pursuant to the criteria. In cases of strong dependency, or when unaccompanied minors are involved, article 15 DR even requires that family members or relatives be "normally" or "if possible" be brought together. As we will see immediately, however, the clauses have not played the role they should have in Member State practice.

1.2. Member States practice

As statistical evidence shows, the family criteria only play a marginal role in practice: according to EUROSTAT data, in 2008 only 3,2% of the “take charge” requests sent under the Dublin system were based on the family criteria. This is hardly surprising. As noted above, the family criteria are very narrowly defined. Furthermore, their implementation gives rise to a practical problem: tracing family members present in the Dublin space may be difficult, as asylum seekers themselves are not always in possession of the relevant information²¹⁵. This difficulty is exacerbated by the fact that few Member States reportedly engage in active efforts to trace asylum seekers’ relatives (ECRE 2006:157).

But apart from these aspects, the figures given above reflect the tendency of Member States to apply strictly the family criteria, or even in an unduly restrictive manner.

Firstly, several Member State set high evidentiary requirements when requested to accept responsibility on the basis of family criteria: formal proof of family ties, which may well be difficult or impossible to secure, or DNA testing (COM (2007a)7). The Commission has criticised the Member States on that account, pointing out that they should “use all means of proof foreseen [in the Dublin Regulation and its Implementing Rules] including credible and verifiable statements of the asylum seeker” (ibid.). This is a justified criticism, but the Commission itself is partly responsible for the situation. Under the Dublin Implementing Rules, which it has itself adopted, the “detailed and verifiable statements of the asylum seeker” are usually accepted as indicative evidence – except for proving family ties. To provide indicative evidence of family ties, only “verifiable information” will do and, as far as art. 6(1) DR is concerned, the “statements” of family members. In short, under the Dublin Implementing Rules the “verifiable” statements of the asylum seeker presently have no evidentiary value – still less his or her “credible” statements.

Secondly, some States interpret restrictively the conditions under which personal relationships qualify as family ties under the Regulation. For instance, Germany reportedly does not recognise as “valid” for the purpose of the Regulation cultural or religious marriages (UNHCR 2006:26) – a formalism that does not sit well with ECtHR case-law on the existence of family life and, particularly, of marriage (ECtHR, Abdulaziz). The same rigid formalism has been applied to the interpretation of the criteria themselves. In what was styled as a “strikingly inhumane” decision (ECRE 2006:159), a Dutch court ruled out the applicability of art. 7 DR in the case of an Iraqi woman whose husband, a former refugee, had been naturalised in Sweden (for another case, involving the separation of a mother from her daughters, see ECRE 2007:5).

Finally, instances of outright misapplication of the criteria have been documented. In particular, France reportedly does not apply art. 6 DR to unaccompanied minors at all, applying the ordinary criteria instead (ECRE 2006:43, 157). More or less isolated cases of this sort have also been documented in other Member States (UNHCR 2006:21-23; VG Giessen, 2 E 1131/04.A). In one such case, the German administration repeatedly attempted to transfer a minor asylum seeker whose father, a former refugee, had acquired German citizenship (UNHCR 2006:22).

To sum up, whereas Member States generally “welcome” the family criteria set out in the Regulation (SEC (2007)23), many of them undermine their practical application by adopting a formalistic stance or even by seeking to avoid their application.

²¹⁵ Interviews with members of the British, Dutch, German, and Swedish Dublin units.

In theory, this could still be made good by a generous application of the discretionary clauses. In practice, such a generous approach has not been forthcoming.

The application of the humanitarian clause has been rare, owing in particular to the difficulty of reaching an agreement between different Member States (SEC (2007)22; UNHCR 2006:34-35; ECRE 2006:160-161).

The sovereignty clause has been more frequently used, but with wide variations between Member States. Good practices have been reported. For instance, the Netherlands systematically resorted to the sovereignty clause in order to "expand" the scope of application of art. 7 to family members enjoying subsidiary protection (UNHCR 2006:27). However, instances of this sort are exceptional and practice has overall been restrictive. Until 2006, most national administrations made only exceptional use of the sovereignty clause for family reasons, and some never applied it (see UNHCR 2006:30 ff; ECRE 2006:155). In addition, the sovereignty clause has sometimes been applied against family unity, i.e. in derogation of the family criteria (see e.g. the facts of CE Be, 126.387). In such cases, core family members, entitled under the criteria to reunite in another State, have been kept apart for mere reasons of procedural expediency. Even in the abstract, the conformity of this line of conduct with art. 8 ECHR ("fair balance") is dubious.

In view of the restrictive stance of the administrations, it is not surprising that the matter was frequently brought to court – at least in the States affording a real chance of doing so (see above, Section I, para. 3.2.2).

In some States, this was to no avail. For instance, Dutch courts have taken the position that since the separation would only last for the duration of the asylum procedure, a breach of article 8 could not occur (Marinho 2000:252; see also BVerfG, 2 BvR 99/97, allowing however for exceptions). In our view, this position is untenable. First, asylum procedures may last for months or years. They may also, eventually, create lasting obstacles to reunification (e.g.: if all members of the family are granted subsidiary protection in different States). Secondly, depending on the facts of the case, even separations lasting for a few months may amount to a breach of article 8 ECHR (ECtHR, W/UK; on the 'time' factor: ECtHR, Jakupovic). In other words, the foreseeable duration of the separation is indeed a relevant consideration, but it must be weighted against other relevant considerations – such as the fact that in Dublin situations, no possibility to recreate family unity "elsewhere" may exist²¹⁶.

Other courts did ensure a meaningful control and enforcement of the right to family life (VG Braunschweig, 5 A 52/04; CE Fr, 263501 and 261913; VwGH, 2004/01/0220). Even so, the case law underscores the tension existing between the Dublin system and family unity. First, it documents cases in which national administrations utterly disregarded the asylum seekers' interest to maintain family life – even in situations involving, for instance, newborn babies and advanced pregnancy (see e.g. CE Fr, 261913). Secondly, it documents cases in which even though a violation of the right to family life could not be said to exist – and accordingly, judicial redress could not have been forthcoming – a serious commitment to protecting family unity and the well-being of asylum seekers would have commanded keeping relatives together (see e.g. CE Fr, 281001).

²¹⁶

That is likely, since the country of origin of the asylum seeker is ineligible, so long as the asylum claim is not determined; and reunification in the responsible State may also be ruled out owing to obstacles, legal or factual, to the relocation of the family member.

2. REFORMING THE DUBLIN PROVISIONS ON FAMILY UNITY

2.1. Introductory Remarks

The Recast Proposal takes a holistic approach to family matters, intervening at all levels (preamble, definitions, criteria, discretionary clauses, procedural guarantees). As far as procedural guarantees are concerned, we can only reiterate our support for the Commission Proposal (see above, Section I, para. 3.2.2): the protection of family unity would greatly benefit from strengthened rights to information, to an interview, and to an effective remedy.

The material aspects are addressed below. We will address first the proposals concerning the criteria (general criteria: 2.2.1; specific provisions on minors: 2.2.2; "time rule": 2.2.3), and then the proposals concerning the preamble and discretionary clauses (2.3).

2.2. Responsibility Criteria and Family Definition

SOLUTION: ENLARGING THE FAMILY DEFINITION AND CRITERIA ALONG THE LINES OF THE ORIGINAL COMMISSION PROPOSAL, WITH SOME IMPROVEMENTS

The proposed reforms of the family definition and family criteria go some way towards solving the issues arising under the right to family life. There is nonetheless scope for improvement concerning, in particular, the definition of "family member", the new criterion enshrined in art. 11 DPr, and the "time rule" of art. 7(3) DPr. In this regard, we would also recommend to the European Parliament to reconsider some of the amendments it has adopted at first reading.

2.2.1. General criteria

In regard to the "general" family criteria, the Commission proposes to:

- Extend articles 7 and 8 DR to family members that are beneficiaries of (or applicants for) subsidiary protection in a Member State (art. 9-10 DPr);
- Introduce a new criterion for cases of dependency deriving from pregnancy, a newborn child, serious illness, severe handicap, or old age. Art. 11 DPr foresees the reunification of dependent asylum seekers with relatives that are already present in a Member State and vice-versa, provided that family ties existed in the State of origin.

Both amendments are welcome and significant. By removing an important "status" limitation, art. 9-10 would remedy a serious protection gap (see EP 2009a:30). By turning the "semi-mandatory" second paragraph of art. 15 DR into a binding criterion, art. 11 would ensure reunification in highly human-rights sensitive situations (see ECRE 2009a:8).

The Presidency Compromise Proposal would restrict art. 11 to situations where the asylum seeker is dependent on a relative and not vice-versa. This would be a step back, excluding from the scope of the family criteria a number of deserving situations. Art. 11 DPr should rather be expanded on several points.

- Firstly, art. 11 only refers to "a relative", whereas it should refer to "a family member or relative". Under the present wording, art. 11 ensures the reunification of an asylum seeker with a dependent sister living in a Member State, but not with a dependent spouse living there as an ordinary immigrant, i.e., in a situation that

owing to status limitations would not be covered by art. 9 or 10 DPr. This (rather absurd) result could only be avoided through an extensive interpretation of the term "relative", as including "family members". However: (a) experience shows that Member States are not inclined to interpret the family criteria extensively (see above in this Section, para. 1.2); (b) the Proposal itself distinguishes between "family members" and "relatives" (see art. 8 DPr); (c) the Council is minded to introduce a definition of "relatives" not including family members (see Presidency Compromise Proposal).

- Secondly, art. 11 DPr lays down an exhaustive enumeration of dependency situations. As UNHCR has suggested, the enumeration should be made non-exhaustive (UNHCR 2009a:8) – a modification that would also have a positive impact for minors (see below).
- Thirdly, art. 11 DPr does not say where reunification should occur. Rather, it entrusts the Commission with the task of devising an appropriate procedure for a case-by-case determination. This is a reasonable approach, but we are concerned that the Commission might want to retain the procedure existing under art. 11(5) Dublin Implementing Rules (COM (2008b), Annex, ad art. 11: there "might be a need to modify [the] implementing rules"). This procedure, designed for the humanitarian clause, leaves the matter to the agreement of the States concerned – an agreement that may never come. We recommend that when exercising its powers under the regulatory procedure with scrutiny, the EP see to it that a new procedure is introduced ensuring the identification of a responsible State in every case.

While the proposals commented above are welcome, the Recast Proposal is a missed opportunity to tackle two outstanding problems.

- Firstly, it maintains the limitation that family ties must have "existed in the country of origin" – both in the definition of "family member" and in the definition of "relatives" under art. 11 DPr. As ECRE has rightly observed, such a rigid limitation "fails to accommodate the wide-ranging displacement experiences of asylum seekers" (ECRE 2009a:9). Moreover, it does generate tension with art. 8 ECHR since, as we have seen, "family life" under that provision exists regardless of where and when it began. The best course of action would have been to do away entirely with this limitation.
- Secondly, "status" limitations have only been partially removed. Art. 9-10 DPr still leave out whole categories of persons that are legally present in a Member States. Art. 10 DPr still includes the proviso that family reunification with an asylum seeker present in a Member State can only occur until a "first decision on the substance" is taken on the latter's application – a rather arbitrary restriction, depriving art. 10 DPr of much of its utility (on this point see Maiani 2006:171; see also UNHCR 2009a:8).

Both problems have been left out of the recasting process. If at all possible, it would nonetheless be advisable for the European Parliament to reopen a discussion with the Commission and Council on whether, and how far, these stark limitations are justified by public interest

As a final point, we would note that the Recast Proposal does not tackle the vital problem of proof of family ties. This is only natural, since this is a matter for Implementing Rules. But although in this matter the Parliament will lack the powers of scrutiny foreseen in art. 5bis of the Comitology Decision, we would recommend a close follow-up, since flexible

evidentiary rules are vital for the application of the family criteria (see above in this Section, para. 1.2).

2.2.2. Special provisions on minors

The Recast Proposal includes several provisions aiming to improve the position of minors.

- First, art. 6 DPr makes it clear that the principle of the “best interest of the child” applies throughout Dublin procedures. Closer to our subject, art. 6(4) includes an explicit obligation for Member States to trace the family members and relatives of unaccompanied minors present in other Member States, as soon as the asylum application is lodged. This provision constitutes a notable advance on art. 19(3) of the Reception Conditions Directive and, as experience shows, it might greatly improve the implementation of the family criteria relating to minors (see also UNHCR 2009a:5).
- Secondly, the Proposal expands the definition of “family members” in regard of minors. First, unmarried minors would be considered as “family members” of: (a) their parents regardless of whether they are dependent or not (art. 2(i)(ii) DPr) and (b) of minor unmarried siblings (art. 2(i)(v) DPr). These welcome changes have not given rise to objections so far.

Furthermore, the Commission proposes to consider married minors as family members of their parents and minor siblings (married or unmarried) provided that it is in their best interest (or in the best interest of the minor siblings) to reside with them (art. 2(i)(iii)-(v) DPr)²¹⁷. This (minimal) extension has surprisingly attracted a barrage of criticism in the EP and Council. The EP, in particular, has amended the proposal to the effect that married minors may only be considered as “family members” of parents and siblings when “not accompanied by the spouse” (EP 2009b, amendments 10-12). We would recommend reconsidering these amendments and reverting to the original Commission Proposal. The EP amendments are, in our view, inconsistent with the principle that the best interest of the child must be a primary consideration in all procedures under the Regulation – regardless of whether the child is married or unmarried (see the observations in UNHCR 2009a:7).

Rather than being restricted, the Commission’s proposals should have been further expanded. In particular, the exclusion of adult siblings from the definition of “family members”, at least as far as minors are concerned, is rather arbitrary. One example will hopefully make this clear. Under the Proposal, art. 12 DPr would be applicable to two minor siblings aged 10 and 16 – they would be kept together as of right. But if the elder were a mere two years older, and even if he were the breadwinner for the two, the rule would no longer apply and they would be at risk of separation. True, adult siblings may on occasion be considered as the “guardian” of an (otherwise) unaccompanied minor (see e.g. VG Giessen, 2 E 1131/04.A). But again, they may not – and there seems to be no defensible reason to consider minor siblings but not adult siblings, as such, as family members of minor applicants. We would therefore recommend reformulating art. 2(i)(v) so as to ensure that adult siblings of a minor applicant are included in the definition (see also UNHCR 2009a:7).

²¹⁷ Furthermore, art. 2(h) DPr rightly takes out marital status from the definition of “unaccompanied minor” (see UNHCR 2009c:5).

Finally, art. 8 DPr expands the scope of current art. 6(1) DR: for applicants that are unaccompanied minors, responsibility would be attributed to the State where family members and/or relatives are present.

As framed by the Commission, and as far as minor applicants are concerned, art. 8 DPr leaves no protection gaps: it ensures family reunification for unaccompanied minors to all the extent possible. All the limitations flowing from the definition of "family members" (type of family ties; existence of the family in the country of origin) lose their relevance here: for instance, an adult sibling living as an ordinary immigrant in a Member State would qualify anyway as a "relative". Unfortunately, the amendment adopted by the EP at first reading risks reintroducing gaps and inconsistencies. For situations where both family members and relatives are present in different Member States, the Commission has refrained from establishing an automatic "priority" between the former and the latter. In keeping with art. 6 DPr, it has instead opted for a case-by-case "best interest" determination (see 8(3) DPr). At first reading, the EP has instead established the rule that reunification with a relative will only be considered if no family member is legally present (EP 2009b, amendment 21). This rule is overly rigid. It might well be in the "best interest" of the child to reunite him with a prosperous, caring, and beloved uncle, rather than with an irresponsible, destitute, and estranged father. Moreover, if strictly applied, the rule established by the EP could have the paradoxical consequence that e.g. reunification with the father is discarded on the basis of a "best interest" examination (still required under art. 8(1) DPr), and reunification with the uncle is not taken into consideration because, indeed, a family member is present in a Member State. Accordingly, we would recommend to reconsider amendment 21, and to revert to art. 8(1)-(3) as proposed by the Commission.

The only real gap left by art. 8 DPr concerns "reverse" situations: when an unaccompanied minor is present in one of the Member States, and a family member or relative that could care for him applies for asylum. In such situations, reunification is dependent on the "ordinary" rules, i.e. contingent on "status" limitations and on the strictures of the "family member" definition. However, in such situations, the best interest of the child would require reunification no less compellingly than in the cases covered by art. 8 DPr.

Art. 11 DPr on dependent relatives could and should be of assistance here – after all, recital 13 DPr suggests that it was inserted "to ensure full respect for the principle [...] of the best interest of the child". However, it is inapplicable due to its unfortunate wording, which only refers to "relatives" (not "family members") and does not recognise the "dependency" of unaccompanied minors from relatives. For this reason, we would insist on the amendments to art. 11 DPr proposed above (see above in this Section, para. 2.2.1). In addition, to clarify that the provision also applies in situations involving minors, we suggest replacing the terms "old age" by the word "age".

2.2.3. The "time rule"

As noted above, article 5(2) DR impedes the application of the family criteria whenever the relevant facts (e.g.: recognition of refugee status under art. 9 DPr) arise after the first application is lodged.

In a bid to solve this problem, the Commission has proposed that the family criteria be applied "on the basis of the situation obtaining when the asylum seeker lodged his/her most recent application", until "the previous applications of the asylum seeker have not yet been subject of a first decision regarding the substance" (art. 7(3) DPr). The problems with this rule are readily apparent: it might require Member States to reopen a closed Dublin

procedure (until a first decision on the substance is taken), and it might also encourage asylum seekers to file multiple applications. For these reasons, the EP has deleted it on first reading (see EP 2009a:15; EP 2009b, amendment 20). The Council is, for its part, minded to replace it by a rule whereby new evidence, turning up after the application is lodged but referring to pre-existing situations, would have to be taken into consideration (see Presidency Compromise Proposal). This, however, would actually amount to maintaining the status quo.

While we agree that the rule as proposed by the Commission is flawed, we believe that the idea behind it is valid. Art. 7(3) could be replaced by a provision worded along these lines: "By way of derogation from paragraph 2, in order to ensure respect for the principle of family unity and of the best interests of the child, the Member State responsible in accordance with the criteria laid down in Articles 8 to 12 shall be determined on the basis of the situation obtaining after the asylum seeker lodged his/her first application for international protection, and until the process for determining the Member State responsible is completed".

Such a rule would, of course, slightly complicate the Dublin procedure: the proceeding Member State would have to take into account all circumstances that arise until another State accepts responsibility, or art. 3(2) DPr is applied. If such circumstances were to arise late in the process, the proceeding State might even have to send a "subsequent" take charge request. However, no need to reopen a closed "take charge" procedure, and no incentive to lodge multiple applications, would arise. And of course, the key objective of extending the "window of opportunity" for the application of the family criteria would be met to a significant extent.

2.3. The discretionary clauses

SOLUTION: CLARIFYING THE DISCRETIONARY CLAUSES AND THE RECITALS GUIDING THEIR APPLICATION, ALONG THE LINES OF THE COMMISSION PROPOSAL

Even under the provisions of the Recast Proposal, gaps in the protection of family unity would remain, and the discretionary clauses would retain a central importance. The Recast Proposal introduces welcome amendments to the clauses themselves and to the preamble of the Regulation. We support these changes, and furthermore submit that a reference to the Member States' "international obligations", in connection with the discretionary clauses, could be usefully inserted.

As we have just seen, the Commission Proposal reduces some of the gaps and inconsistencies of the Dublin criteria, but leaves some others standing. This highlights the continuing importance of the discretionary clauses in relation to family issues. In this respect, too, the Commission Proposal brings welcome changes.

The preamble acquires special importance here, as it provides guidance for the use of Member States' discretion. Recitals 11 and 12 DPr bring a positive contribution in this context. They dispel the ambiguities of current recitals 6 and 7 DR, and they place a new emphasis on the fact that "respect for family unity should be a primary consideration of Member States when applying [the] Regulation". Recital 14 is also of importance, insofar as it stresses that the discretionary clauses are to be applied "in particular for humanitarian and compassionate reasons". We would only add that our recommendation to include a mention of "international obligations" in Recital 14 (see above, Section I, para. 3.2.3) is pertinent in the present context, in view of the fact that the application of the (amended)

criteria might still cause violations of art. 8 ECHR and/or of the Convention on the Rights of the Child.

As for the discretionary clauses themselves, we welcome the fact that art. 17(1) DPr makes the use of the sovereignty clause conditional upon the applicant's consent. This innovation, which is being met with resistance in Council, would avoid the current situation whereby the sovereignty clause can be used against the applicant's interest to family unity.

We also welcome the proposed changes to the humanitarian clause: expanding its scope to the reunification of "relatives" regardless of situations of dependency, and introducing a deadline for replying to humanitarian requests. The latter reform is fully justified in light of the current, disgraceful situation whereby humanitarian requests are quite simply disregarded (SEC (2008)7). Of course, since the Proposal does not introduce acceptance by default as a sanction, the effects of this amendment remain to be seen.

3. BEYOND FAMILY UNITY: THE DUBLIN SYSTEM AND INTEGRATION

PROBLEM: THE DUBLIN REGULATION DISREGARDS "CLOSE LINKS", OTHER THAN FAMILY TIES, BETWEEN ASYLUM SEEKERS AND A PARTICULAR MEMBER STATE

Apart from family ties, the Dublin Regulation does not take into account the "close links" that an asylum seeker may have to a particular Member State. This has a cost from the standpoint of the integration and well-being of asylum seekers, from the standpoint of the Dublin system's own efficiency, and arguably also from a financial perspective

As we have seen above (section II, para. 1) the law and practice developed under the Dublin system give such a limited recognition to family unity as to raise concerns under art. 8 ECHR. But human rights law violations are not the only problem here.

Disregarding family ties when allocating responsibility – including extended family ties, and family ties to persons that are ordinary immigrants in the EU – has considerable costs. It has human costs, of course, and costs in terms of integration, since asylum seekers that could benefit from supportive environments are "parachuted" in States where they are isolated (Blake 2001:106-108). Arguably, and for the same reasons, it also entails financial costs. Asylum seekers that could rely on private support in one Member State are forced to rely instead on public funds in another State (see *mutatis mutandis* Toth/Šunjić 2010). Finally, disregard for family ties likely has a significant adverse impact on the effectiveness of the Dublin system. As suggested by academic research (Boswell 2003) and field reports (CIMADE 2008:25-26; JRS 2008:2, 4, 6), the presence of family members in a State other than the responsible State is a "pull factor" inspiring attempts to circumvent the Dublin system through avoidance or secondary movements (see SEC (2008)20).

It is now important to stress that all these considerations apply well beyond the issue of family unity. Social networks in the broadest sense, linguistic affinities, previous abode, are all recognised as "pull factors", explaining the preferences of asylum seekers for a particular Member State (see SEC (2008)10; Bocker 1999:9-10; Collyer 2004:376; Thielemann 2003:32). Allocating responsibility in keeping with such preferences would be conducive to the well-being and integration of asylum seekers – as well as to spontaneous compliance with the Dublin system. Disregard for such preferences, by contrast, has the cost detailed above and incites asylum seekers to circumvent the Dublin system – including

by “going underground” and moving irregularly to the preferred Member State (see references above).

Apart from these considerations, and from a normative standpoint, UNHCR has consistently advocated for allocating responsibility on the basis of such “close links”, and for giving consideration to the “wishes” of the asylum seeker (see ExCom 1979; UNHCR 2001:2 and 4-5; Hurwitz 1999:675). The Dublin Regulation does neither. It simply disregards close links (other than family ties) – ignoring them even as a ground to apply the humanitarian clause.

SOLUTION: IN THE SHORT TERM, THE HUMANITARIAN CLAUSE COULD BE BROADENED TO ENCOMPASS “CLOSE LINKS” BEYOND FAMILY TIES

The Proposal utterly fails to address the broader issue of integration. Enlarging the scope of the humanitarian clause to considerations going beyond family unity would be a positive step, although real solutions to this problem would require rethinking the whole distributive concept underpinning the Dublin Regulation

The Recast Proposal focuses exclusively on family unity and does nothing to alleviate the concerns that we have last mentioned. The EP could correct this, albeit to a limited extent.

As noted above, the Commission proposes expanding the cases in which the humanitarian clause can be applied to bring together “relatives”. This modification could be taken further, by expanding the scope of the humanitarian clause beyond family reunification (cfr. art. 9 of the 1990 Dublin Convention). To this effect, circumstances reflecting other “close links” between an applicant and a Member State (cultural ties, previous abode) could be inserted as grounds for the application of the humanitarian clause.

Granted, such a reform would probably have a limited practical impact. However, serious advances towards a more “integration-friendly” approach would require nothing less than an in-depth reconsideration of the Dublin system, and such a fundamental overhaul is out of reach in the ongoing reform process (for long term perspectives see below, Part III). Here and now, expanding the scope of the humanitarian clause would at least constitute a first step in the right direction. It would cost nothing – including to Member States, who would remain free to use the clause – and it would open up new opportunities for a more sensible and humane application of the Dublin system.

SECTION III: THE PROTECTION OF VULNERABLE PERSONS IN THE DUBLIN SYSTEM

1. INTRODUCTORY REMARKS

The Dublin Regulation explicitly refers to international obligations and humanitarian standards as an integral part of the Dublin scheme (see e.g. recitals 2 and 15 DR, as well as article 9 and chapter IV of the Dublin Implementing Rules). However, it does not make provision for specific safeguards in regard to applicants with special needs, and the lacunae of the legal framework have given rise to unsatisfactory practice. The present Section covers three problem areas: the identification of vulnerable persons and reception conditions in the State conducting the Dublin procedure; health problems and continuity of care for vulnerable persons in the context of Dublin transfers; and the treatment of minors in Dublin context.

2. THE IDENTIFICATION OF VULNERABLE PERSONS AND THEIR RECEPTION DURING DUBLIN PROCEDURES

PROBLEM: RECEPTION CONDITIONS OF VULNERABLE PERSONS IN THE STATE CARRYING OUT THE DUBLIN PROCEDURE ARE OF CONCERN, DUE TO BOTH GAPS IN AND MISAPPLICATIONS OF THE EU LEGAL FRAMEWORK

The general problems observed in the implementation of the Reception Conditions Directive also affect asylum seekers undergoing the Dublin procedure. The observed lack of identification procedures for vulnerable persons, as called for in art 17 of the RCD, are of special relevance here. These problems are compounded by the fact that some States do not apply the RCD during Dublin procedures. As a result, reception conditions and social rights for "Dubliners" fall below the minimum standards contained in the RCD.

In accordance with the Reception Conditions Directive, Member States are obliged to take into account the specific situation of vulnerable persons such as "[...] minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence" (art. 17). Article 21 of the Recast RCD adds further categories of vulnerable persons: victims of trafficking and persons with mental health problems. Quite apart from the obligations flowing from the RCD, several instruments of international law prescribe particular attention and treatment. Art. 3 ECHR prohibits inhuman or degrading treatment, and it is worth recalling that prohibited treatment under this provision is defined in function of vulnerability of the persons concerned (ECtHR, *Muskhadzhieva*, para. 55 ff). Furthermore, special standards of treatment apply to minors under the Convention on the Rights of the Child.

Unfortunately, State practice discloses serious shortcomings in the treatment of vulnerable persons under the Dublin procedure (SEC (2008)23, UNHCR 2006, ECRE 2006:153-154). As recalled above, reception conditions of asylum seekers in general are of concern in a number of Member States (see Section I, para. 2.2). More pointedly, only few States have adopted a proper identification procedure for the special needs of vulnerable applicants in accordance with the Reception Conditions Directive (COM (2007b)9). This implies that in a number of Member States, the potential special needs of asylum applicants are not readily identified. These general problems are compounded by the fact that some Member States – including Austria, France and Spain – do not apply the Reception Conditions Directive to persons who are subject to the Dublin procedure, even though the Directive should apply at all stages of the asylum procedure (COM (2007b)9; SEC (2008)15; *Odysseus Network* 2006:76).

The situation results in reception conditions and social rights that fall below the minimum standards of the RCD. Traumatized asylum seekers and victims of torture, for example, are not necessarily identified nor given appropriate medical counselling and treatment, whereas according to medical experts, early assessment and treatment are important factors for ensuring rehabilitation (AMNESTY 2009:21-22; IRCT 2009). We would note, in addition, that lack of identification at an early stage may have an impact on the outcome of the asylum case. An accurate evaluation of protection needs may indeed depend on gathering documentation and evidence, such as signs confirming that a person has suffered torture, at an initial stage.

SOLUTION: CLARIFYING THAT THE RCD APPLIES DURING DUBLIN PROCEDURES, AND ESTABLISHING A MANDATORY SCREENING PROCEDURE IN NATIONAL LEGISLATION AS PROVIDED FOR IN COMMISSION PROPOSALS

Recital 9 DPr seeks to ensure the full application of the Reception Conditions Directive during the Dublin procedure. We support this initiative as well as the setting up of an identification procedure as proposed in art. 21 Recast RCD. Strengthened information rights and procedural guarantees, as provided for in art. 4 and 5 DPr, would also be of value in this context. Taken together, these proposals would help ensuring appropriate identification and treatment of vulnerable applicants at all stages of the asylum process.

As far as asylum seekers undergoing the Dublin procedure in the “first” Member State are specifically concerned, the Commission has put forward two welcome proposals.

First of all, recital 9 DPr states with the requisite clarity that, in order to ensure equal treatment of all asylum seekers, the Reception Conditions Directive should apply during the Dublin procedure.

Secondly, in order to ensure early and proper identification of vulnerable persons, art. 21(2) Recast RCD would specifically oblige Member States to establish procedures in national legislation with a view to identifying the special needs of vulnerable persons as soon as an application has been lodged (for a detailed analysis of this provision see below, Chapter III). This obligation, if fully implemented, would ensure that applicants with special needs are identified early in the process in the State conducting the Dublin procedure. The possibility of providing adequate treatment in the initial phase of the Dublin/asylum process, as well as in all subsequent phases (see below, para. 3), would thus be strengthened.

We give our full support to both proposals. We would also note that the procedural rights established under art. 4 and 5 DPr would be of considerable value in this context. As noted above, applicants in general must be properly informed and given the opportunity to be heard about the Dublin procedure if they are to defend their rights effectively, and State practice is lacking in this respect (see above, Section I, para. 3.2.2). Vulnerable persons, e.g. persons who need to present facts on their medical condition, would particularly benefit from art. 4 and 5 DPr.

3. DUBLIN TRANSFERS AND VULNERABILITY – FITNESS TO TRAVEL AND CONTINUITY OF CARE

PROBLEM: THE DUBLIN REGULATION DOES NOT PROVIDE SUFFICIENT GUARANTEES AGAINST HARMFUL TRANSFERS OR AGAINST DENIAL OF NECESSARY TREATMENT IN THE DESTINATION STATE

Applicants with special needs are not adequately protected as far as the conditions in which Dublin transfers are carried out are concerned. The Dublin Regulation makes no provision for “fit for transfer” screening. Nor does it include appropriate guarantees to ensure continuity of care for persons that are transferred in spite of known vulnerabilities. Such shortcomings have not been made good by Member State practices, and have resulted in serious harm or even fatal incidents on occasion.

According to the Council of Europe Twenty Guidelines on Forced Return, “persons shall not be removed as long as they are medically unfit to travel” (Guideline 16). To ensure respect for this principle, Member States are “[...] encouraged to perform a medical examination

prior to removal on all returnees, either where they have a known medical disposition or where medical treatment is required, or where the use of restraint techniques is foreseen. States are also encouraged to have 'fit-to-fly' declarations issued in cases of removal by air". The guidelines also point to the need to respect the dignity of the returnee, and to the safety precautions that must be taken for the person concerned as well as for other passengers (Guideline 17).

The elementary principles set out in the guidelines are directly derived from art. 2 and 3 ECHR. Indeed, if an applicant for protection is to be transferred, the question of whether he or she is fit to travel should be an overriding consideration, and medical examinations as appropriate should be carried out in order to ascertain his or her mental and physical state.

Unfortunately, the Regulation includes no provision requiring Member States to refrain from transferring persons that are unfit to travel, or to carry out a "fit to travel" assessment in the first place. Of course, Member States may take the necessary precautions of their own motion and, when necessary, make use of the discretionary clauses to avoid harmful transfers. The Commission reports, however, that applicants for protection with special needs are not adequately protected under the Dublin Regulation, and that persons suffering from traumas, or persons with medical needs, are indeed being transferred (SEC (2008)23).

A closely related matter to fitness to travel is continuity of care. Conditions of vulnerability may be identified that are not so serious as to rule out transfer, but that require uninterrupted treatment (or attention) throughout all the Dublin process – before, during, and after the transfer. Likewise, special needs may arise later in the process.

In theory, this is taken care of by the Reception Conditions Directive – assuming that the responsible State is bound by it (see above Section I, para. 3.1.3, footnote 7). It is the responsibility of the destination State to provide adequate follow-up, since addressing the needs of a vulnerable applicant is always the responsibility of the State where the applicant is present, and the Reception Conditions Directive lays down general guarantees to this effect (see e.g. AsylGH, case S8 226976-2/2008; BVG D-2550/2010, deriving "safety" presumptions from these general guarantees).

However, the absence of specific mechanisms ensuring continuity of care has given rise to serious problems in practice. Indeed, the combination of "risky" transfers and the absence of adequate communication between the States involved has resulted not in one (SEC (2008)23), but in several fatal incidents (see in particular the striking cases documented ECRE 2007; UNHCR 2006:44).

SOLUTION: COMPREHENSIVE GUARANTEES FOR "FIT FOR TRAVEL" ASSESSMENTS AND FOLLOW-UP MUST BE INCLUDED, ON THE BASIS OF COMMISSION PROPOSALS

The Recast Proposal assists in ensuring that the Dublin system is applied with due regard to the physical and mental integrity of vulnerable applicant. It lays down the principle that applicants may be transferred only if "fit for transfer", and that relevant information must be exchanged between the Member States concerned. These useful proposals could be strengthened by the inclusion of a mandatory "fit to travel" screening in the Regulation.

The Recast Proposal includes a number of provisions that, if adopted and fully implemented, would go a long way in solving the problems set out above. There is nonetheless scope for improvement.

Art. 30(1) DPr. stipulates clearly that “only persons who are fit for transfer shall be transferred”. It is a matter of serious concern that this provision has been deleted during Council negotiations and is no more included in the Presidency Compromise Proposal. Indeed, art. 30(1) DPr should not only be retained, but also further developed. If the basic guarantee enshrined therein is to be fully implemented in practice, an appropriate medical assessment before transfer must, if needed, be ensured. Such a “screening” system could be based on offering a pre-transfer medical examination by an independent doctor if the applicant appeals a Dublin transfer decision on grounds relating to his or her physical and/or mental state. Another option would be to give an applicant the right to request a pre-transfer medical examination in connexion with a Dublin procedure as a general rule. Any of these options would require a system whereby the opinion and diagnosis of the medical findings, physical and/or mental, are respected even when they imply that the person is not fit for a transfer and the Dublin procedure cannot be applied.

We therefore urge the EP to retain art. 30(1) DPr in its original form, and suggest that an explicit requirement to establish a pre-transfer medical screening be included. We would further note that to ensure the full protection of persons having valid objections to being transferred on medical grounds, the guarantee of an effective remedy as provided for in art. 26 DPr should be retained in the text of the Regulation (see above, Section I, para. 3.2.2).

As for continuity of care, art. 30 DPr clearly requires an appropriate information exchange between the sending and receiving State, including information on the applicant’s fitness for the transfer and on needs for treatment on arrival. We fully support the inclusion of this provision in the proposal.

4. UNACCOMPANIED MINORS AND THE DUBLIN PROCEDURE

4.1. Introductory remarks

The questions discussed above are, of course, relevant to children as well. Furthermore, due to their special vulnerability, children require particular care and consideration. The CRC guarantees certain standards of international law in this regard, including the fundamental “best interest” principle. State practice reveals, however, that the provisions of the Dublin Regulation are not sufficient to ensure that children are consistently treated in accordance with their best interest (UNHCR 2009a:4). Indeed, State practice has varied considerably, and it has disclosed widespread instances of inadequate treatment of – and support for – children. The detention of children, which is a matter of particular concern, is dealt with elsewhere in this Report (see Chapter III, Section I, paras. 4, 7 and 8). In the following pages, we focus on the application of the “best interest” principle and general guarantees for minors, and then consider two specific issue areas – the transfer of unaccompanied minors, and age-assessment methods.

4.2. The “best interest” principle and general guarantees for minors

PROBLEM: DUBLIN LAW AND PRACTICE DISCLOSE AN INSUFFICIENT CONSIDERATION FOR THE “BEST INTEREST” PRINCIPLE, AND FOR OTHER CHILD-SPECIFIC GUARANTEES SUCH AS ADEQUATE REPRESENTATION

The Dublin Regulation does not adequately reflect the principle that in all actions relating to children, the child’s best interest must be a primary consideration. Furthermore, it is

lacking in regard of child-specific procedural guarantees. These lacunae of the legal framework have paved the way for unsatisfactory practice in the Member States

The Dublin Regulation only mentions the “best interest of the minor” at two very specific places: in article 6(1) DR (the family criterion applicable to unaccompanied minors) and in article 15(3) DR (the humanitarian clause). Legally speaking, this has no incidence on the principle that “in all actions relating to children [...] the child’s best interest must be a primary consideration” (art. 24 CFR, based on art. 3(1) CRC) – i.e., that all actions undertaken in the implementation of the Dublin Regulation should be inspired by the “best interest” principle, and guided by “best interest” determinations (see UNHCR 2008b). This notwithstanding, the practice of several Member States has been found lacking in this respect – as regards the application of the criteria (see below, para. 4.3), but in other respects as well (see UNHCR 2006:25).

Child-specific procedural guarantees – which are vital to a proper application of the best interest principle – are also unsatisfactorily reflected in Dublin law, and unsatisfactorily observed in Dublin practice. The right of minors to express their views freely and to be heard in any proceedings affecting them (art. 12 CRC) has been impaired by insufficient, and insufficiently child-specific, information on Dublin procedures (ECRE 2006:156 and 161), as well as by insufficient due process guarantees (see above, Section I, para. 3.2.2).

Furthermore, two specific guarantees foreseen in the Reception Conditions Directive have reportedly received an unsatisfactory implementation. We have already referred to the fact that systematic efforts for tracing family members have been undertaken only by some States (see above, Section II, para. 1.2). We would now point out that the “necessary representation” of unaccompanied minors under art. 19 RCD is not always ensured in the Member States. Problems have been reported in Greece, for instance, where the Public Prosecutor, a representative of the authorities, acts as the formal guardian to thousands of children whereas appointment of a permanent guardian is rare (UNHCR 2009c:13-14). Other States have also been criticised on that account. In Norway, no guardian is assigned to a minor under Dublin procedures, and more generally the Committee on the Rights of the Child has expressed concern in 2005 “about the insufficient supervision of and care provided to unaccompanied asylum-seeking children” (CRC/C/15Add.263, 44).

SOLUTION: STRENGTHENING THE “HORIZONTAL” GUARANTEES FOR MINORS IN ALL DUBLIN PROCEDURES, ALONG THE LINES OF THE RECAST PROPOSAL

The Recast Proposal aims to introduce, in articles 6 and 4(2), a comprehensive set of guarantees for minors including a clear affirmation of the “best interest” principle, spelling out its operational aspects in line with international standards, the obligation to ensure adequate representation in all Dublin procedures, and a requirement of age-sensitive communication. We fully support these proposals, although we suggest to better clarify the requirements of independence and qualification for the minor’s representative.

Article 6 DPr, if approved, would introduce a comprehensive set of guarantees for children in the Dublin context.

First of all, in line with the request of the European Parliament (EP 2008b, para. 15), art. 6(1) DPr would introduce a general reference to the best interest of the child as a primary consideration for Member States with respect to all procedures under the Regulation. In light of practical experience, this “visualisation” of the “best interest” principle would add strength to an obligation that is already in existence, but which is not necessarily respected at all times.

Art. 6(3) DPr usefully spells out the implications of the principle. Its wording implies, first, that Member States must systematically undertake “best interest” determinations in close cooperation with each other. Furthermore, the aspects that must be taken into consideration when carrying out such determinations are explicitly listed. According to the UN Committee on the Rights of the Child, “best interest” determinations should imply making a clear and comprehensive assessment of the child’s identity, including nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and needs (see General Comment No 6, CRC/GC/2005/6). All these elements, alongside with family reunification possibilities, the safety of the minor, and his or her views, are accurately reflected in the Recast Proposal as mandatory reference points.

The issue of appropriate representation of minors in Dublin procedures is dealt with under art. 6(2) DPr, which lays down an unambiguous requirement to appoint a representative. This proposal holds merit, but it could be further improved. The provision merely notes that the “representative” may be the representative appointed under article 23 RCD. At first reading, the EP has adopted an amendment referring, for the notion of “representative”, to art. 2(i) APD. Neither proposal stresses the need to have an independent and qualified representative – a point that, owing to the specialised nature of Dublin procedures, might be of importance (see UNHCR 2009a:6). In this respect, the text of art. 6 DPr, as amended by the European Parliament, could be further strengthened. The text proposed in the Presidency Compromise Proposal, which points out that the representatives must “have the necessary expertise”, constitutes a step in the right direction although it still fails to emphasise the requirement of independence. Finally, we would also express our support for art. 4(2) DPr, which provides for information to be provided to the applicant “in a manner appropriate to [his or her] age”.

4.3. Unaccompanied minors, responsibility criteria, and “take back” transfers

PROBLEM: IT IS APPARENT FROM MEMBER STATE PRACTICE THAT DUBLIN TRANSFERS ARE CARRIED OUT EVEN WHEN IN CONFLICT WITH THE “BEST INTEREST” OF THE CHILD

The flawed wording of art. 6(1) DR notwithstanding, the best interest of the child should be a primary consideration whenever the transfer of a minor is being considered. Far from reflecting such a principled approach, Member State practices discloses instances where the “best interest” principle has been sidelined – or even cases of outright violation of the guarantees established by the Regulation for minors.

On account of their special vulnerability, unaccompanied minors are subject to special responsibility criteria. According to art. 6(2) DR, the responsible Dublin State is “where the minor has lodged his or her application”, unless the family criterion of art. 6(1), examined above in Section II, applies. In other words: under the Regulation, no “take charge” transfers are possible except for family reasons. “Take back” transfers of unaccompanied minors, which usually occur for reasons other than family reunification, can by contrast be carried out. No explicit rule stipulates that the “best principle” applies in this context, but as said this does not authorise Member States to disregard the best interest of the child as a primary consideration (see above, Section 4.2; COM (2007a)7). In practice, however, the implementation of art. 6 has given rise to difficulties and to concerns that the “best interest” principle is not systematically adhered to.

As for take charge transfers, it is a documented fact that some Member States disregard article 6 DR and send requests that are based e.g. on irregular border crossing (see particularly UNHCR 2006:23; see also above, Section II, para. 1.2).

As for "take back" transfers, practice has varied widely among the Member States. In Norway, the vulnerability of children was acknowledged resulting in all unaccompanied minors being exempted from the Dublin system by use of the sovereignty clause, unless art. 6(1) was applicable. This policy has changed in line with government instructions in 2008, for the purpose of Norway to be in line with its European partners. In this case, partly because of peer pressure, Norway chose to abandon a "best practice", to the detriment of unaccompanied minors. At present, best interest determinations are made on a case-by-case basis only, although Norway has suspended all transfers of unaccompanied minors to Greece (see also SEC (2008)15).

As far as other Member States are concerned, there are numerous documented examples where children (or age-disputed children, see below in this Section, para. 4.4) have been returned to asylum countries where they had no links (UNHCR 2006:23 ff; ECRE 2006:157). In several such cases, unaccompanied children were returned to Greece and kept in detention for an extended period of time (ibidem; on the situation of children in Greece, and of children returned under Dublin particularly, see UNHCR 2009c:11-15, 21).

SOLUTION: THE PROBLEM COULD BE SOLVED THROUGH THE GENERAL GUARANTEES DESCRIBED ABOVE, ALTHOUGH THE COMMISSION PROPOSAL TO EXEMPT MINORS FROM (SOME) TAKE BACKS DESERVES CONSIDERATION

A properly conducted "best interest" determination, along the lines of art. 6 DPr, would have the potential for solving the problem. However, practice suggests that Member States were not unaware of the relevant principles when dealing with minors in Dublin context, but rather sidelined them in favour of an effective implementation of transfers. Owing to the special vulnerability of unaccompanied minors, we would support the Commission proposal to exempt them in part from "take back" transfers.

If introduced in the Regulation, the general guarantees that we have examined above (para. 4.2) would probably have a positive impact in this issue area. Systematic "best interest" determinations, based on the correct substantive considerations and on a proper procedure, would more likely than not lead to a reduction of "take back" transfers of unaccompanied minors under the Dublin system. As noted above, this would mean that children would not suffer from the added insecurity of being returned to a country where they have no links and which, sometimes, cannot guarantee their well being and protection.

Several commentators, including the European Parliament, have nonetheless called for a more radical solution, i.e. a "hard and fast" rule prohibiting all transfers of unaccompanied minors other than for the purpose of family reunification (EP 2008b, para. 15; see also ECRE 2006:156 and 158). This would, of course, go beyond the strict requirements of the best interest principle (case-by-case "best interest" determination) and prevent all risks of a transfer going against the best interest of the child. On the other hand, if fully exempted from take back transfers, unaccompanied minors would be for all practical purposes exempted from the Dublin Regulation as a whole – other than as a "mechanism" for family reunification.

The Commission has tried to strike a balance through art. 8(4) DPr. This provision stipulates that where a child does not have family links, the country responsible should be

that “[...] where the minor has lodged his or her most recent application [...] provided this is in the best interests of the minor”. This proposal, if adopted, would: (a) further restrict the situations in which a child may be transferred, by excluding all the cases where a new application is made (see art. 18 DPr), and (b) explicitly require a best interest determination for the transfers that would remain permissible. The proviso that the best interest of the child must be respected, which merely reiterates a point made clear by art. 6(1) DPr, has been maintained both in the text as amended by the EP at first reading and in the Presidency Compromise Proposal. By contrast, the true innovation introduced by art. 8(4) DPr has been deleted from both texts (see in particular EP 2009b, amendment 22). To reiterate, the introduction of art. 6 DPr should theoretically prevent transfers from taking place when they are contrary to the best interest principle. This notwithstanding, the amendments adopted by the European Parliament, and discussed in Council, weaken the protection of unaccompanied minors under the Regulation.

4.4. Age assessment and age-disputed children

PROBLEM: SOME MEMBER STATES RELY EXCESSIVELY ON UNCERTAIN AGE ASSESSMENT TECHNIQUES OR, WORSE STILL, TREAT AGE-DISPUTED APPLICANTS AS ADULTS

National administrations make widespread use of techniques such as bone testing, which do not always yield clear results. In documented cases, they relied on uncertain results to deny applicants the benefits of child-specific rights, or even denied them before age assessment had been carried out at all.

A special regime for minors under the Dublin Regulation unavoidably raises the question of age assessment. Several Member States are concerned that asylum applicants may misrepresent their age in order to enjoy the benefits of the Regulation. This preoccupation is, indeed, understandable, and asylum applicants have on occasion given reason to think that they were trying to abuse the system, or have induced the authorities in error (see e.g. UNHCR 2006:24).

The problem is, however, that Member States place excessive reliance on techniques such as bone testing, whereas all known methods for age assessment have a considerable margin of error (see SEC (2007)23; UNHCR 2009a:5). This problem is compounded by the fact that national administrations apparently tend to treat applicants as adults in contested cases (see e.g. AsylGH, case S12 408980-1/2009; see further, on a tendency to “over-estimate” the age of applicants, UNHCR 2006:27). Worse still, age-disputed applicants have been on occasion transferred before a proper age assessment had been carried out (see ECRE 2006:157 and 189, case 3).

The issue is of course bound to gain in prominence once a more favourable regime is introduced for minors, along the lines of the Recast Proposal.

SOLUTION: INTRODUCING IN THE REGULATION BASIC PRINCIPLES FOR AGE ASSESSMENT, AND A “BENEFIT OF THE DOUBT” PRINCIPLE IN FAVOUR OF AGE-DISPUTED CHILDREN

The Commission Proposal does not address the issue of age assessment. At first reading, the European Parliament has adopted welcome amendments in this regard, referring both to guarantees and standards for medical assessments. These amendments do not, however, tackle the central problem of uncertainty in age assessment, and would be usefully complemented by a principle whereby applicants must be given the benefit of doubt

The Commission Recast Proposal does not deal with the issue of age assessment at all. The EP, which had called in the past for a “a set of common guidelines on age-assessment [to] be adopted at European Union level” (EP 2008b, para. 14), has by contrast adopted an amendment on this issue at first reading (EP 2009b, amendment 19). The proposed art. 6(5a) DPr would first of all strengthen the procedural safeguards for applicants undergoing age assessment, by reference to art. 17 APD (informed consent for medical examinations). Furthermore, Member States would have to ensure that medical examinations are conducted “in a reasonable and thorough manner, as required by scientific and ethical standards”.

Under both points, the amendment is welcome. However, it fails to address the central problem, i.e. the problem of “thorough and reasonable” medical tests yielding nonetheless uncertain results. In this regard, both the European Parliament and UNHCR have called for the explicit recognition of the principle whereby in such cases, applicants must be given the benefit of doubt (see UNHCR 2009a:5; EP 2008b, para. 14). From a legal perspective, this would be justified by the need to ensure that all minors enjoy the guarantees prescribed by the CRC and by EU Law. We support the text as amended by the European Parliament at first reading, but would suggest expanding it by laying down an explicit “benefit of the doubt” principle.

SECTION IV: DISTRIBUTIVE FAIRNESS

PROBLEM: THE DUBLIN SYSTEM AGGRAVATES IN SOME CASES THE IMBALANCES IN THE DISTRIBUTION OF ASYLUM SEEKERS, WITH DETRIMENTAL EFFECTS IN TERMS OF EFFECTIVENESS AND PROTECTION

The Dublin system is not meant to realise a “fair sharing of responsibilities”. It is, however, meant to contribute to fair sharing. Due to its distributive concept, linking together responsibility and irregular entry into the EU, the system does however entail additional burdens on some Member States that are under particular migratory pressure because of their geographical location, and that have limited reception and absorption capacity.

Under article 80 TFEU, the common policy on asylum should be “governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States” (art. 80 TFEU). The present distribution of asylum seekers among the Member States is far from corresponding to a standard of “fair sharing”. In saying this, we do not refer directly to the wide disparities existing between Member States in terms of absolute numbers (see UNHCR 2010, Table 1). Indeed, it has been convincingly pointed out that “while the public debate tends to focus on absolute numbers of asylum seekers, the pressure on member states and their capacity to handle those numbers can only be meaningfully assessed by looking at relative numbers” (Matrix 2010:18). Even so, it has been shown on the basis of several “responsibility indexes” combining GDP, population, and population density, that asylum pressures relative to capacity vary widely among the Member States (Matrix 2010:67 ff) – with some States taking much more than their “fair share”, and other States taking much less.

The Dublin system is not, and is not intended to be, a burden-sharing instrument in the proper sense (SEC (2000), para 35; Matrix 2010:13). Thus, it is not intended tackle to the problem of unfair distribution as such. This notwithstanding, the Dublin system does have redistributive implications (see Noll 2000:318 ff), and should in principle contribute to a fair sharing of responsibilities. According to the preamble of the Dublin Regulation, in particular, the system should be “based on objective, fair criteria both for the Member States and for

the persons concerned" (recital 4), which should reflect "a balance between responsibility criteria in a spirit of solidarity" (recital 8).

It is debatable whether the criteria laid down in the Dublin Regulation fit this description. As recalled above, the system is based on the principle that responsibility should principally lie with the "Member State having played the greatest part" in letting the applicant into the Dublin area (see Section II, para. 1.1), and links more specifically responsibility to failure in guarding the external borders of the EU against irregular immigration (see art. 10 DR). At the time when the Regulation was adopted, this was widely expected to shift responsibilities on the States located at the Southern and Eastern external border of the EU (see e.g. Byrne 2003:350-351; UNHCR 2001:5). The "losing" States were themselves acutely aware of this, as reflected in a Council declaration referring to "the concerns of certain Member States, whose geographical position exposes them to illegal immigration, that an effective application of the Dublin II Regulation [...] may lead to an overburdening of their asylum systems" (Council doc. 6360/03; see further Aus 2006).

The (incomplete) data on "real Dublin flows", provided by the Commission Evaluation Report (SEC (2007)49 ff; reference year: 2005), show that these concerns were justified to some extent. In the Report, the Commission emphasised that "the overall allocation between border and non-border Member States is actually rather balanced", based on the aggregate number of transfers to border and non-border States respectively (COM 2007a)12). This is, however, an incorrect measure. The data on incoming/outgoing transfers for each Member State (SEC (2007)50) show that the border States are, with few exceptions (Finland²¹⁸, Estonia), "net takers" of asylum seekers under Dublin, whereas non-border States are, again with few exceptions (Austria²¹⁹, Portugal, Sweden²²⁰), "net givers".

This does not justify the contention that the Dublin system puts, by itself, "an intolerable burden on the countries situated in the south and east of the EU" (EP 2006, para. 15). The number of persons transferred under the Dublin system is much too low to produce such an effect, and it does not alter significantly the workload faced by each Member State (SEC (2007)52-53, pointing out the exception of Poland; see also p. 53-54, showing that the implementation of all agreed transfers would instead place a number of border States at a distinct disadvantage).

The problem stands in different terms. Apart from doing nothing to address current imbalances, "[the Dublin system] may de facto result in additional burdens on Member States that have limited reception and absorption capacities and who find themselves under particular migratory pressures because of their geographical location" (COM (2008a)8; see also UNHCR 2007b:39).

This is not only problematic for the Member States concerned or, in more abstract terms, in regard of "fair sharing". The problems experienced by those States may backfire on the efficiency of the Dublin system itself, as reflected in the "surprisingly low" number of "illegal entrants" registered in the EURODAC system (COM (2007a)9-10). Worse still, the existence of "overburden" situations, and their aggravation by means of Dublin transfers, may have detrimental effects on the situation of asylum seekers in those States (see UNHCR 2002:5). Such an adverse impact has been extensively documented in the case of Greece, where

²¹⁸ Finland should not, in fact, be considered as an exception. Geographically, it shares a land border with Russia. However, according to the Commission, this border is not exposed to migration flows, and Finland (a "net giver" in the Dublin system) should accordingly be considered as a non-border State (SEC 2008:14).

²¹⁹ Due to its inability to carry out agreed transfers (compare SEC 2007, Tables 7 and 8).

"the increased return of asylum applicants on the grounds of the Dublin system was the straw that broke the camel's back" (Papadimitriou/Papageorgiou 2005:308; see also UNHCR 2008a:8).

SOLUTION: THE ESTABLISHMENT OF A MECHANISM WHEREBY TRANSFERS TO "OVERBURDENED" STATES MAY BE SUSPENDED WOULD BE A PARTIAL SOLUTION

The Recast Proposal foresees the establishment of a mechanism for the suspension of transfers to "overburdened" States, furthermore triggering enhanced assistance to the concerned States. This is a positive proposal, which could be further improved by enlarging the conditions for triggering the mechanism. It is not, however, a complete solution for the distributive imbalances currently observed in the CEAS, whose correction requires decisive steps forward in the establishment of permanent burden-sharing mechanisms.

As anticipated above (Section I, para. 3.2.3), the Commission proposes the establishment of a collective "suspension mechanism" that would enable it to stop transfers to a particular Member State. We have already examined the provisions relating to protection-related suspensions (*ibidem*). We must now turn to the rules on "overburden-related" suspension.

In general, article 31 DPr organises this form of suspension in a satisfactory manner. The procedural rules, whereby the decision falls to the Commission on the request of the State concerned, subject to "referral" to Council in case of suspension, appear to be entirely logical. We would suggest that the concerned State should also be endowed with a "referral" right if the Commission rejects its request (similarly above, Section I, para. 3.2.3). Likewise, the material rules on the exercise of Commission powers appear to be entirely appropriate – we refer, in particular, to the way in which art. 31 (4a-b) Dpr defines the relevant circumstances to be taken into account, and to the possibility to attach "conditions" to the suspension, including in order to give "due consideration for the need to ensure the protection of minors and families". Finally, it makes perfect sense to link together overburden-related suspensions and enhanced assistance to the State concerned (art. 31(7) DPr).

Under all these respect, we support the Commission Proposal to establish a mechanism allowing for the suspension of Dublin transfers to overburdened States (see also UNHCR 2009a:11). There are nonetheless several concerns with the way in which the recast Proposal defines the scope of application of the suspension mechanism.

On the one hand, overburden-related suspension would only be decreed "[w]hen a Member State is faced with a particularly urgent situation which places an exceptionally heavy burden on its reception capacities, asylum system or infrastructure, and when the transfer of applicants [under the Dublin system] could add to that burden". In our view, to render the mechanism applicable in all relevant situations, it would be appropriate to draft the clause using to a more open-ended wording. For instance, the formulation used in the preamble of the text adopted by the European Parliament at first reading (EP 2009b, amendment 7) could be used: "[w]hen a Member State is faced with [particular pressures] on its reception capabilities ...". To our mind, there is no risk that the clause would be used other than in "exceptional circumstances" (*ibidem*), bearing in mind that the Council could overturn by QMV any suspension decision.

On the other hand, we believe that the "sunset clause" adopted at first reading by the Parliament (EP 2009b, amendments 40 and 41) would entail an unwarranted limitation

ratione temporis of the suspension mechanism. Doing away with overburden-related suspensions once “binding” burden-sharing instruments are in place is, of course, a defensible policy choice (contrary to what we found above, Section I para. 3.2.3, in relation to protection-related suspensions). Still, we fail to see the added value of the amendment. On the one hand, retaining the suspension mechanism in parallel with burden-sharing arrangements would pose no problem at all. On the other hand, it cannot be assumed with reasonable certainty that (as yet undefined) burden-sharing mechanisms would always prevent the situation described in art. 31(1) DPR from arising. Accordingly, we would suggest reconsidering amendments 40 and 41.

Beyond these legal problems, it is quite obvious that the envisaged mechanism would have a limited “reach”: suspending Dublin transfers would do little to improve the present imbalances in the distribution of asylum seekers, which are largely independent from the operation of the Dublin system. In this perspective, we fully support the position taken by the European Parliament through amendments 8 and 39 as adopted at first reading: the central problem to be addressed is the insufficiency of existing burden-sharing schemes – financial, administrative, and distributive – which must be imperatively be enhanced if the Common European Asylum System is to be truly founded on “the principle of solidarity and fair sharing of responsibilities” (art. 80 TFEU; see further COM (2008a)8-9; for extensive analysis and policy recommendations, see Matrix 2010).

SECTION V: THE INEFFICIENCY OF THE DUBLIN SYSTEM

1. INTRODUCTORY REMARKS

On a rather optimistic note, the “technical” evaluation conducted by the Commission on the functioning of the Dublin system concluded that “the objectives of the [...] system [...] have, to a large extent, been achieved” (COM (2007a), para. 4; for criticism, see EP 2008a:12; Maiani/Vevstad 2009). However, the very facts and figures provided by the Report throw into sharp relief the effectiveness deficit of the system in discharging its core functions, namely:

1. Allocating responsibility according to the criteria laid down in the Regulation and “take charge” transfers;
2. Preventing asylum seekers from pursuing multiple claims through the so-called “once chance only” principle and “take back” transfers;
3. Ensuring swift access to status determination in one Member State.

Available documentation also suggests that, in its present form, the Dublin system has an adverse impact on the functioning of the CEAS as a whole.

2. REQUESTS AND TRANSFERS: DUBLIN IN FIGURES

<p>PROBLEM: MOST AGREED TRANSFERS ARE NOT CARRIED OUT, MEANING THAT RESOURCES ARE WASTED, AND THE CRITERIA HAVE A MINIMAL IMPACT IN PRACTICE. FURTHERMORE, THE DUBLIN SYSTEM CONSIDERABLY DELAYS ACCESS TO ASYLUM PROCEDURE, AND ARGUABLY UNDERMINES THE PROTECTION OBJECTIVES OF THE CEAS. APART FROM TECHNICAL IMPERFECTIONS, THESE FAILURES SEEM TO BE LINKED TO THE KEY STRUCTURAL FEATURES OF THE SYSTEM</p>

More than anything else, two figures show the ineffectiveness of the Dublin system: the low number of accepted transfers that are ultimately carried out, and the fact that the overwhelming majority of asylum applications are examined where they are first lodged. Many of the resources invested in the process are thus, ultimately, wasted. These deficits may be due to technical problems, such as inappropriate deadlines, but evidence suggests that the constant struggle of asylum seekers to evade the system plays a greater role. The inefficiencies of the system, and the "bad incentives" it provides to asylum seekers, also have a detrimental impact in terms of protection – delayed access to asylum procedures, and incentives to go "underground".

2.1. The ineffectiveness of the Dublin system as a mechanism of migration management: facts and figures

The figures given in the 2007 Evaluation Report – which, as the Commission warned, are to be taken with a pinch of salt – clearly highlight one point: of all the asylum applications that were filed with the Member States in the relevant period (Sept. 03-Dec. 05), only a relatively small proportion had given rise to transfer requests (indicatively 12%: see SEC 2007:18).

Furthermore, according to Commission estimates, roughly 70% of these requests were "take back" requests (SEC (2007)16) – a prevalence that is easily explained by the fact that such requests are backed by EURODAC "hits", i.e. by a sure and simple means of detecting and proving previous applications in other Member States.

EUROSTAT data for 2008 ("outgoing" dataset, i.e. the data provided by 26 Member States out of 30 as to "sent" requests) by and large confirm these figures, and suggest that they reflect the "structural performance" of the Dublin system. In 2008, about 12.8% of all asylum applications lodged in the Member State have given rise to a Dublin request, and take charge requests were only about 27% of all the requests.

These figures, as said, relate to requests. The figures on actual transfers are much lower. The 2007 report shows that most agreed transfers were ultimately not carried out in 2005 (COM (2007a)4). EUROSTAT data for 2008 ("outgoing" dataset) confirm the point, and add further detail on the different success rate of take backs and take charges. Out of 11'011 accepted "take backs", 5'470 were carried out (roughly 50%); and out of 4'066 accepted "take charges" 1'196 were carried out in 2008 (roughly 30%).

Taken together, these data suggest a number of conclusions as to the effectiveness of the Dublin system in discharging its "migration management" functions (above, para. 1).

- The Dublin system as a whole suffers from a considerable effectiveness deficit, owing to the high percentage of failed transfers.
- Failed transfers mean, moreover, that the Dublin system entails a considerable waste of resources (SEC (2008)9; UNHCR 2007b:38; ECRE 2008:10-11). This concerns, as said, both "take back" transfers and "take charge" transfers. However, the situation is more serious in regard of "take charge" transfers: determining responsibility under the criteria is a lengthier and more resource-intensive process than acting on a EURODAC hit and, as we have just seen, take charge transfers fail more frequently.
- Independently from these aspects, it is apparent that the Dublin criteria have a minimal incidence on the distribution of "new" asylum claims between the Member

States. Only a tiny fraction of all asylum applications give rise to a “take charge” request – somewhere in the region of 4% of all the applications for the 2003-2005 period (calculation based on SEC (2007)18), and about 3.4% of the total applications lodged in 2008. Even considering these figures, rather than the lower figures on actual transfers, it is clear that the overwhelming majority of applications are examined by the State where they are first lodged, the Dublin criteria notwithstanding.

To put it even more succinctly:

- In theory at least, the system is apt to fulfil its goal of neutralising multiple applications through the “one chance only” principle and take back transfers (see SEC 2000, para. 53); however, it still fails to deliver satisfactorily because of the low number of effected transfers.
- By contrast, it should be clear by now that the whole distributive concept embodied in the criteria is unworkable and ineffective. While still “moving” thousands of asylum seekers, and impacting on their lives, the Dublin system fails to make a real difference on the distribution of responsibilities, by comparison with a situation where responsibility would lie with the State where the application is first lodged.

2.2. Possible explanations

In explaining the effectiveness deficits of the Dublin system, the 2007 Evaluation Report and the Impact Assessment accompanying the Recast Proposal place considerable emphasis on the technical imperfections of the Regulation: inadequate time-limits, insufficient operational provisions on the execution of transfers, and the absence of a dispute settlement procedure in case of disagreement are mentioned in particular (COM (2007a)7-8; SEC (2008)7-20).

Without denying the possible relevance of these technical aspects, we would be inclined to think that the key problem lies in the structural features of the system, and more particularly in the “bad” incentives they provide to its main actors, asylum seekers and States.

There is ample anecdotal evidence pointing to the fact that asylum seekers try to evade the Dublin system through various means, including the disposal of travel documents, self-mutilation to avoid fingerprinting, self-harm to make transfers impossible, and absconding (see e.g. SEC (2000), para. 45; Van Selm 2005:14; UNHCR 2006:22; CIMADE 2008:22; JRS 2008:3). The reasons for this are only too apparent. Two decisive factors were pointed out earlier in this Chapter:

- The Dublin system is operated in a situation where the very same asylum application might have radically different outcomes depending on the Member State where it is examined (see above, Section I, para. 2.2);
- The Dublin criteria based on family ties are restrictively framed and restrictively applied. Moreover, the criteria are wholly “blind” to other connections that asylum seekers may have with a particular Member States (see above, Section II).

Both circumstances provide asylum seekers with strong incentives to avoid the application of the Dublin (“push” and “pull” factors: SEC (2008)19), and the Commission itself suggests that this has a major impact on the operation of the Dublin system. In particular,

the failure to carry out agreed transfers is frequently due to absconding (see COM (2007a); SEC (2007)29-30; SEC (2008)10; under the Dublin Convention, COM (2001)18).

A parallel argument can be made, *mutatis mutandis*, in respect of Member States. As noted above, the Evaluation Report suggests that border States fail to systematically fingerprint illegal entrants, thus reducing the effectiveness of EURODAC as a tool for the implementation of the Dublin criteria (COM (2007a)9). Such uncooperative behaviour could be explained as the reaction of States that perceive themselves as being "disadvantaged" by the system (see above, Section IV).

However, one could also consider that it reflects more generally the spirit in which Member States approach the implementation of Dublin. All States reportedly set high evidentiary requirements before accepting transfers. Many States, as noted above, go so far as to require DNA tests before accepting responsibility based on family ties (SEC (2007)24; ECRE 2006:159). In short, Member States seem bent on minimizing their "liabilities" under Dublin, and the evidentiary difficulties posed by the Dublin criteria provide them with good opportunities to do so, to the detriment of the system's effectiveness.

2.3. Delayed access to asylum procedures and adverse impact on CEAS protection goals

Recital 4 of the DR indicates that the Dublin procedure should "guarantee effective access to the procedures for determining refugee status" without "compromis[ing] the objective of the rapid processing of asylum applications". This implies that any undue delay in starting status determination procedures should be avoided.

To an extent, the Dublin system inherently contradicts this objective by adding a procedural layer to the processing of asylum applications. Of course, a modest delay would be more than justified in light of the goal, theoretically secured by the Dublin system itself, of guaranteeing access to an asylum procedure (see above, Section I, para. 2.1).

However, the delays generated by the Dublin procedure can hardly be considered as modest. This point is best understood in light of art. 23(2) APD. Under this provision, asylum procedures should be concluded "as soon as possible". What is meant by the wording "as soon as possible" is, of course, open to interpretation and dependent on the circumstances of each case. However, under the same provision, special obligations arise when the decision is not taken within six months. A six month period could therefore be seen as the "EU norm" in this matter (see also art. 27(3) Recast APD).

There is no data available on the average time of a Dublin procedure, but the deadlines established by the DR allow for a Dublin procedure to ordinarily last for eleven months, and in particular cases for almost two years. Furthermore, as the Commission has noted, the deadlines laid down in the Regulation are not systematically complied with (COM (2007a)8).

Such long deadlines, of course, do "compromise the objective of the rapid processing of the asylum application" (recital 3, DR). One could also say, taking the applicant's perspective, that the Dublin procedure as a whole generates delays and obstacles in access to a status determination procedure (SEC (2008)7-8; UNHCR 2006:40 and 50; ECRE 2006:150-152; ECRE 2008:11-12 and 15).

In an even broader perspective, the Dublin system may be seen as having an adverse impact on the functioning of the CEAS as a whole.

As noted above, the perceived “unfairness” of the system pushes asylum seekers to take evasive action – such as disposing of evidence and going “underground”. We would stress that such conduct is not necessarily an indicator of the fact that the asylum seeker concerned has no valid claim to protection. It may simply indicate that he or she has strong reasons for, or against, staying or being sent to a particular State. “Evasive” action may however come at a heavy price in terms of protection. The disposal of documents may, at a later stage, impair the asylum seeker’s credibility and/or reduce procedural guarantees (see e.g. art. 23(4) APD). The same observation applies to those asylum seekers that abscond after receiving a transfer decision, and report back eighteen months later – when the deadline to carry out the transfer has expired (see art. 19(4) and 20(2) DR). In this way, they are able to have their claim examined by the Member State of their choice (SEC (2008)10), but at the price of undermining their credibility. Finally, some asylum seekers reportedly abscond in order to evade a transfer, and do not claim asylum thereafter. In such cases, the Dublin system pushes asylum seekers to entirely forfeit their protection chances in favour of irregular stay in a particular State.

This is highly detrimental to the central protection goal of the CEAS – “offering appropriate status to any third-country national requiring international protection” (art. 78 TFEU; see also recital 1 DR). Furthermore, this side-effect of the Dublin system is also highly undesirable in terms of an orderly migration management, entailing as it does “the creation of a pool of aliens, most often in an unlawful situation” (SEC (2001)3) and affecting the chances of returning those asylum seekers whose claims have been finally rejected (SEC (2000), para. 44).

SOLUTION: THE TECHNICAL AMENDMENTS PROPOSED BY THE COMMISSION MAY MITIGATE IN PART THE PROBLEMS EXAMINED ABOVE. TRUE SOLUTIONS MAY HOWEVER ONLY COME, IN OUR VIEW, FROM A RECONSIDERATION OF THE DUBLIN SYSTEM

The Recast Proposal includes a number of technical amendments designed to ensure a smoother operation of the Dublin system (e.g. new or revised deadlines, clarifications on contested points, the generalisation of conciliation procedures). These are all welcome proposal. However, they fail in our view to tackle the key efficiency problem, which resides in the fundamental unfairness of the Dublin system to asylum seekers

The Recast Proposal includes a number of amendments to the Regulation in view of ensuring a smoother operation of the Dublin system (see recital 7 DPr). These amendments, largely procedural in nature, include:

- Laying down new deadlines for “take back” requests and for replying to humanitarian requests, as well as shortened deadlines for replying to information requests;
- The clarification of several rules whose implementation has given rise to disagreements in the past (e.g. burden of proof in case of cessation of responsibilities; allocation of costs for transfers);
- The extension to all disputes arising under the Regulation of the (optional) conciliation procedure currently available in the context of the humanitarian clause;
- The obligation to interview asylum seekers, which in the intention of the Commission should provide the Member States with the necessary information, and “improve the prospects of [asylum seekers] respecting the system rather than trying to evade it” (SEC (2008)16).

All of the above proposals are welcome. They may all be expected to increase the efficiency of the Dublin system to an extent, and to bring about limited improvements in the position of asylum seekers (UNHCR 2009a:15-16, 22-23).

For the reasons explained above, however, we are not persuaded that they will significantly alter the situation as it stands today. "Dublin III" will be based on the same principles and, subject to limited improvements in regard of family unity (see above, Section II), on the same criteria as "Dublin II". By and large, it will give its main actors, States and most of all asylum seekers, the same incentives as the present system. Of course, strengthened information rights might improve slightly the "prospects of [asylum seekers] respecting the system rather than trying to evade it". However, securing widespread cooperation will likely require more decisive steps: a reduction of the "push" and "pull" factors (e.g. through harmonisation) and, crucially, a new approach recognising asylum seekers as "actors" of the system – bearers of legitimate interests and preferences – rather than as mere "targets" or "objects" of the system (JRS 2008:3; Noll 2003:252; for long-term proposals, see below, Part III).

KEY FINDINGS

1. Due to both lacunae in the Dublin Regulation and Member States practice, and contrary to the goals of the Dublin system, asylum seekers do not always have access to a meaningful asylum procedure in the responsible State. This exposes asylum seekers to serious risks of refoulement.
2. Despite progress made in the harmonization of national legislation, asylum standards still vary greatly, giving rise to concerns of failing protection and reception standards in some Member States. As a result, the Dublin system—in general or individual cases—not only operates as an “asylum lottery”, but also generates risks of illegal refoulement.
3. Even when faced with critical situations in some States, only a handful of national administrations have taken decisive action to satisfy them that an asylum seeker to be transferred does not incur any risk of ill-treatment or refoulement in the responsible State. More generally, the sovereignty clause is not consistently applied in line with a firm commitment to ensure respect for the principle of non-refoulement. A key factor behind the inconsistent and insufficient application of the sovereignty clause is that Dublin procedures fall short of basic standards of fairness, and effective remedies against transfers are not always guaranteed. The sub-standard application of the sovereignty-clause can also be traced back to the generalised reluctance of sending States to consider the risks incurred by the asylum seekers in the responsible State.
4. Both in their framing and in their application, the Dublin criteria on family unity are restrictive to the point of raising human rights concerns, and the discretionary clauses have proved ineffective to correct this shortcoming.
5. Apart from family ties, the Dublin Regulation disregards the “close links” that may exist between asylum seekers and a particular Member State, negatively impacting on the former’s integration and well-being as well as on the efficiency of the Dublin system.
6. Reception conditions of vulnerable persons in the State carrying out the Dublin procedure are of concern, due both to gaps in and misapplications of the EU legal framework.
7. The Dublin Regulation does not provide sufficient guarantees against harmful transfers or denial of necessary treatment in the Destination State, resulting in serious harm and even fatal incidents.
8. Due to their vulnerability, unaccompanied minors require particular attention, yet Dublin law and practice disclose an insufficient consideration for the “best interest” principle, and for other child-specific guarantees such as adequate representation. It is also apparent from Member State practice that unaccompanied minors happen to be transferred against their “best interest”.
9. Some Member States rely excessively on uncertain age assessment techniques or treat age-disputed applicants as adults.

10. Though intended to contribute to a fair sharing of responsibilities, the Dublin system in some cases aggravates the imbalance in the distribution of asylum seekers, with detrimental effects in terms of effectiveness and protection.
11. Most agreed transfers are ultimately not carried out, meaning that resources are wasted. Furthermore, the Dublin criteria have a minimal impact in practice, as in the overwhelming majority of cases the State responsible is the one where the application is first lodged. Finally, the Dublin system considerably delays access to asylum procedure and arguably undermines the protection objectives of the CEAS, in particular by providing asylum seekers with incentives to go "underground". Aside from technical imperfections, these failures are apparently linked to the structural features of the system, and particularly to the unfairness of the system to asylum seekers.

RECOMMENDATIONS

1. Solution to the lack of access to a meaningful asylum procedure: Article 18(2) of the Recast Proposal would partially solve this problem. The version proposed in the latest Presidency Compromise text (doc. 17167/09) could provide a more comprehensive solution – provided that it is amended so as to grant asylum seekers, without ambiguity, a right to have their case reopened and to lodge an appeal once returned to the responsible State.
2. Solution to concerns of failing protection and reception standards in some Member States: This problem cannot be tackled as such through a reform of the Dublin system. It requires decisive advances in harmonisation as well as strengthened supervision, capacity-building, and burden-sharing.
3. Solution to the sub-standard application of the sovereignty-clause: We unreservedly support the relevant provisions of the Recast Proposal offering a comprehensive right to information (art. 4), the right to a hearing (art. 5), and most importantly a truly effective remedy against Dublin transfers (art. 26). Furthermore, the mechanism to suspend all transfers to a State where protection and reception standards fall below EU standards (art. 31 Recast Proposal) would constitute a partial solution – though only for cases where “systemic” risks appear. It should be maintained and refined so as to ensure that it is applied exclusively with protection concerns in mind. In particular, art. 31 should be amended by making sure that collective suspensions are ordered exclusively in light of protection risks, and last as long as such risks exist. Formally involving UNHCR in the procedure could also bring added value. Finally, the EP amendment whereby the mechanism would cease to be applicable once EU burden-sharing mechanisms are put in place should, in our view, be reconsidered.
4. In any event, the sovereignty clause would remain the ordinary instrument to prevent refoulement in the Dublin context. The preamble of the Dublin Regulation (recitals 3 and 14 of the Recast Proposal) should better highlight Member States’ responsibilities in preventing refoulement, thus counteracting, possibly, excessive reliance on “mutual trust”. This would be even more necessary in case the suspension mechanism was established: for all its merits, art. 31 Recast Proposal risks sending to national administrations wrong and dangerous signals, e.g. that the Commission is solely responsible to avoid refoulement in Dublin context.
5. Solution to the restrictive framing and application of the criteria on family unity: The issues arising under the right to family life should be tackled, primarily, by enlarging the family definition and criteria. The Recast Proposal takes some welcome steps in this direction but needs to be improved. We fully support some provisions, such as art. 8 Recast Proposal – in regard of which, we would urge the European Parliament to reconsider the amendments it has adopted at first reading. Other provisions need refinement: first, the definition of “family member” should be further broadened, so as to include particularly the adult siblings of minors; second, the “time-rule” of art. 7(3) is indeed flawed – but it could be changed (see

rewording proposal in the Chapter text) rather than deleted (as done in the EP first reading). Thirdly, art. 11 should refer to "family members and relatives" to avoid paradoxical results, and it should not include an exhaustive enumeration of dependency situations. Regrettably, the Proposal does not address a number of significant problems resulting from stark "status limitations".

6. Solution to the ineffectiveness of the discretionary clauses in regard to family unity: We support the Recast Proposal provisions amending the discretionary clauses as well as the "family recitals" in the preamble of the Regulation (for a minor suggestion for further improvement, see the Chapter text).
7. Solution to the disregard to other "close links" than family ties: The Recast Proposal does not address the issue. In the short term, the humanitarian clause could be broadened to encompass "close links" beyond family ties, although real solutions to this problem would require rethinking the whole distributive concept underpinning the Dublin Regulation.
8. Solution to the sub-standard reception conditions of vulnerable persons: To ensure appropriate identification and treatment of vulnerable applicants at all stages of the asylum process, the Commission has put forward welcome proposals, namely that it be clarified that the Reception Conditions Directive applies during Dublin procedures, and that mandatory screening procedures be established in national legislation.
9. Solution to insufficient guarantees against harmful transfers or denial of necessary treatment in the Destination State: The Recast Proposal includes welcome amendments, such as the principle that only applicants that are "fit to travel" may be transferred, and provisions on information exchange between the competent administrations. These should however be strengthened through a mandatory "fit to travel" pre-transfer screening.
10. Solution to the insufficient consideration for the "best interest" principle, and for other child-specific guarantees: Articles 4 to 6 Recast Proposal go a long way in tackling these problems, by strengthening the "horizontal" guarantees for minors in all Dublin procedures ("best interest" principle, appropriate representation, age-appropriate communication, right to a hearing). Our only suggestion in this respect is that qualification and independence requirements for minors' representatives should be explicitly set out in article 6 of the Recast Proposal. Furthermore, the Commission proposal to exempt altogether unaccompanied minors from (some) "take back" transfers in our view deserves further consideration.
11. Solution to problems related to age assessment: The Recast Proposal does not address this issue. At first reading, the European Parliament has approved welcome amendments introducing some basic guarantees for age assessment. These do not, however, solve the central problem (uncertainty in age assessment). We would recommend introducing a "benefit of the doubt" principle in favour of age-disputed applicants.
12. Solution to imbalance in the distribution of asylum seekers: Article 31 of the Recast Proposal would introduce a mechanism whereby transfers to

“overburdened” States may be suspended, triggering enhanced assistance to the concerned State. We support this proposal, even though we believe that the situations where the mechanism would be applicable are too narrowly defined (for suggested wording, see Chapter main text). We would also urge the European Parliament to reconsider the “sunset clause” introduced at first reading (amendments 40 and 41). It is important to bear in mind that the suspension mechanism would be a very partial solution: the distributive imbalances currently observed are largely independent from the operation of the Dublin system, and require decisive steps towards the establishment of permanent burden-sharing mechanisms, as required by the EP at first reading.

13. Solution to failures linked to structural features of the Dublin system: While the technical amendments proposed by the Commission are welcome and may mitigate in part the serious inefficiency problems of the system (e.g. new or revised deadlines), true solutions can only come from a reconsideration of the latter’s central principles.

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CHAPTER 2: QUALIFICATION DIRECTIVE

INTRODUCTION

This part of the Assessment analyses problematic aspects of the current text of the Qualification Directive (qualification part of this instrument, while status part is only referred to on several connected aspects) and proposes short-term solutions.

Since the Commission presented its' Recast Proposal for Qualification Directive on 21 October 2009, some of the problems identified and proposals to deal with them are already included in Commission's suggestions. Also, due to recast legislative technique possibility of amendments to the Directive is limited to what the Commission amended in its proposal. However the authors wished to keep here also those suggestions that go even beyond the Commission Recast Proposal. The authors believe that the Commission unnecessary overlooked some of the very important problems, albeit for understandable reasons, thus would like to reflect on them for future perspective. In particular, the proposals may be further relevant in view of implementing the Stockholm Programme and building further stages of the Common European Asylum System that should be based on full and inclusive application of the Refugee Convention and other relevant international treaties. It is fairly obvious that existing divergences have a substantial impact upon the aims of the CEAS. It can be assumed that practices about the chance of being recognised on refugee grounds or subsidiary protection grounds may be a substantial factor in the decision-making process on where to apply for international protection (European Parliament evaluation, p. 4).

The analysis of problems and proposed solutions is presented in the order of sequence of articles in the directive.

1. REFUSAL OF PROTECTION WHEN A PERSON CREATES THE CIRCUMSTANCES LEADING TO PROTECTION NEEDS (ART. 5(2-3))

PROBLEM: Art. 5(2) comes close to requiring the "continuation of convictions" as a condition for a well-founded fear or real risk, while it is not necessary under the Refugee Convention. Art. 5(3) provision may raise concern with regard to compliance with the Refugee Convention as the later does not provide for any limitations of protection in cases when a person himself/herself creates the circumstances leading to protection needs.

Art. 5(2) comes close to requiring the „continuation of convictions“ as a condition for a well-founded fear or real risk, while it is not necessary under the Refugee Convention. Art. 5(3) provision may raise concern with regard to the Refugee Convention as the later does not provide for any limitations of protection in cases when a person himself/herself creates the circumstances leading to protection needs. Protection under the Refugee Convention is not restricted to applicants acting in good faith. It can be inferred from Art. 4(3)(d) and Art. 20(6-7) of QD that engagement in activities for the purpose of acquiring refugee or subsidiary protection should not impede the grant of that status (Battjes, p. 261-262; Klug, p. 611-613; Storey, p. 26-28).

Regarding Art. 5(3), problems exist in the national transposition of QD. E.g., Art. 5(3) is applied not just to subsequent, but also to first applications in Bulgaria, Portugal, Slovenia, omitting the word „normally“ in Greece, Slovenia. It means that further harmonization with international law may be needed in this respect (Odysseus study, p. 42).

SOLUTION: the second part of Art. 5(2) (starting from the words “in particular”) and Art. 5(3) should be deleted.

These provisions have not been proposed to amend in the Recast Proposal for Qualification Directive. Art. 5(2) and Art. 5(3) do not contradict with the Geneva Convention, because of the safeguards (the words “in particular” in Art. 5(2); reference to the Geneva Convention and the word “normally” in Art. 5(3)), but the transposition of these provisions creates problems in Member States’ practice. It is noteworthy, that the MSs could react to such situations while accessing the credibility (Art. 4(3)(d)) or while granting the scope of rights (Art. 20(6-7)), but not by refusal of protection. Furthermore, the only interpretation of Art. 5(2-3), which were compatible with the Geneva Convention, is to understand Art. 5(2-3) not as grounds for refusing international protection, but as diminishing the credibility of an applicant (which is already covered by Art. 4(3)(d)). As international protection under the Refugee Convention is not restricted to applicants acting in good faith, Art. 5 should not have provisions implying the refusal of protection when a person creates the circumstances leading to protection needs.

In spite of the phrase ‘without prejudice to the 1951 Geneva Convention’, the Meijers Committee suggests the possibility to incorporate more explicitly the fundamental consideration that it should always be assessed whether the requirements of the refugee definition are in fact fulfilled taking into account all the relevant facts surrounding the claim. The Meijers Committee furthermore emphasizes that it is very well possible that a person could create in ‘good faith’ circumstances giving rise to a well-founded fear of being persecuted. The Committee recognizes that here may also be instances of persons ‘manufacturing’ asylum motives while being outside their country of origin. However this raises issues of evidence and assessment of facts and credibility, which are covered by Art. 4 (Meijers Committee Comments, p. 4).

Therefore, the second part of Art. 5(2) (starting from the words “in particular”) and Art. 5(3) should be deleted.

2. THE POSSIBILITY OF NON-STATE PROTECTION AND THE NOTION OF PROTECTION WITHOUT THE REQUIREMENT OF EFFECTIVENESS (ART. 7(1-2))

PROBLEM: while the Refugee Convention does not require state persecution, but requires state protection, Art. 7(1)(b) allows the possibility of non-state protection. According to Art. 7(2) of the Directive, it is enough that state or non-state actors take “reasonable steps to prevent the persecution”, regardless of whether those steps lead to effective protection of individuals or not.

While the Refugee Convention does not require state persecution, but requires state protection, Art. 7(1)(b) allows the possibility of non-state protection. Non-state entities and international organizations do not have the attributes of a State, and in practice can provide protection only to a very limited extent. According to Art. 7(2) of the Directive, it is enough that state or non-state actors take “reasonable steps to prevent the persecution”,

regardless of whether those steps lead to effective protection of individuals or not. Such approach might fail to take individual risks sufficiently into account. A number of individuals coming from countries of origin where international organization has a role to play may be deprived of protection contrary to the provisions of the Refugee Convention (Battjes, p. 246-249; Klug, p. 606-607; Teitgen-Colly, p. 1545-1551; Storey, p. 25-26; Gil-Bazo, p. 230; Garlic, p. 64-65).

Regarding Art. 7, there is as yet no guidance on the interpretation of this provision regarding international organizations by the Council as provided for in Art. 7(3). It seems that a substantial number of EU Member States have not transposed this provision. In addition, it is unclear to what extent parties or non-state organizations may be considered as controlling a part of the territory of the state (European Parliament evaluation, p. 5). There is also a problem of non-state protection and UNHCR pays attention to the Swedish practice, where even non-state actors not controlling substantial part of the territory (e.g., tribes or clans) are considered as potential actors of protection, because the word „can“ in Art. 7(1) is interpreted as providing non-exhaustive list of actors of protection. Also in German practice the decisive criterion is not the size of the area under control, but the ability to control the area effectively. The example of recognised non-state actor of protection is also provided in the French practice, where prior to the entry into force of the 2003 Asylum Law, UNMIK/KFOR was, in certain cases, considered as capable of providing protection in Kosovo (UNHCR study, p. 47-52). Most MSs have transposed Art. 7(1-2), and many MSs have not transposed Art. 7(3) (Odysseus study, p. 43-46). However, domestic law diverges as regards the question whether “parties and organisations, including international organisations” can provide protection as stated in Article 7(1)(b). As the reason for this disharmony may be possible tension with international law, amendment of these rules is recommendable (Odysseus study, p. 22). Taking into account international standards and divergent state practice, ECRE recommends MSs not to use the concept of non-state actors of protection to deny refugees asylum in Europe; and MSs should use their right to implement higher standards when applying Art. 7(2), and evaluate the actual availability of protection, rather than merely whether the state of protection “take[s] reasonable steps to” prevent persecution or serious harm (ECRE study, p. 16-17).

As the Commission acknowledges in its Impact Assessment, the definition of the “actors of protection” concept does not contain adequate criteria for assessing the level and effectiveness of protection required, in line with the Geneva Convention and the ECHR, thus allowing MS to reject claims and return applicants to their country of origin despite the lack of effective protection. Moreover, this concept is defined in a broad and vague manner which creates a risk of diverse recognition practices (Commission Impact Assessment, p. 12).

The Commission explains that the lack of clarity of the concept allows for wide divergences and for very broad interpretations which may fall short of the standards set by the Geneva Convention on what constitutes adequate protection. For instance, national authorities interpreting broadly the current definition have considered clans and tribes as potential actors of protection despite the fact that these cannot be equated to States regarding their ability to provide protection. In other instances, authorities have considered non-governmental organisations as actors of protection with regard to women at risk of female genital mutilation and honour killings, despite the fact that such organisations can only provide temporary safety or even only shelter to victims of persecution (Explanatory Memorandum to Recast Proposal, p. 6).

The recent judgment of the Court of Justice of the European Union *Salahadin Abdulla & Others vs. Bundesrepublik Deutschland* states that Article 7(1) "does not preclude the protection from being guaranteed by international organisations, including protection ensured through the presence of a multinational force in that territory". However, ECRE notes that the Court's conclusion that actors of protection may comprise international organisations must be read in the context of the case presented to the Court (ECRE Comments on Recast Proposal, p. 7). Noteworthy that the opinion of the Advocate General Mazák implies that the protection through multinational troops is considered as the tool which the State could employ under Art. 7(1)(a), but not as a non-state protection under Art. 7(1)(b).

2. SOLUTION: in Art. 7(1) protection should be characterized as effective, durable and provided only by the state. Consequently Art. 7(1)(b) should be deleted or limited only to de facto state authority. In Art. 7(2) the words "generally" and "inter alia" should be deleted, making the conditions of Art. 7(2) obligatory, not just exemplary.

Regarding Art. 7(1), in its Impact Assessment the Commission considers 2 main legislative options:

- to specify that the list of actors of protection is an exhaustive one, to clarify that "parties" means political parties or entities and to require that such actors have administrative authority and full control over the territory and population in question;
- to specify that the list of actors of protection is exhaustive, as well as to require that protection must be effective and durable and that the parties and organisations in question are willing and able to enforce the rule of law.

The Commission concludes that Option 1 would stipulate with precision under what conditions parties and organisations may be equated to States regarding their ability to provide protection. However, this may exclude entities which might not have a "political" character or the attributes of a State but which would nevertheless be able to effectively provide protection in the context of a given country/society. To the extent that it imposes rather stringent conditions for the definition of the entities able to provide protection, Option 1 appears disproportionate. To the extent that it strengthens and clarifies the criteria for assessing the nature of the protection instead of overly restricting the definition of actors of protection, the Commission chooses Option 2 (Commission Impact Assessment, p. 21-22).

Accordingly, in its Recast Proposal for Qualification Directive the Commission adds that protection "against persecution or serious harm must be effective and durable", that protection "can only be provided" by the actors listed in Article 7(1), and that non-state actors must be "willing and able to enforce the rule of law" (Recast Proposal for Qualification Directive, Art. 7(1)). ECRE recommends amending recast Art. 7(1) to ensure that only State authorities can be considered actors of protection (ECRE Comments on Recast Proposal, p. 8).

The Recast Proposal for Qualification Directive should solve most of the problems identified regarding Art. 7(1). Firstly, it requires that the list of protection actors must be exhaustive. Secondly, it requires that protection must be effective and durable. Thirdly, it requires that non-state actors must be willing and able to enforce the rule of law.

However, the Recast Proposal for Qualification Directive does not resolve fully the problem of non-state protection. As the Geneva Convention requires protection from the state, recognizing even a very effective protection from some organization would modify the refugee definition of the Geneva Convention. Therefore, the straight way to solve this problem is to delete Art. 7(1)(b) at all. It could also be claimed that the Option 1 from the Commission Impact Assessment (which has not been chosen by the Commission) might be in line with the Geneva Convention as the criteria of administrative authority and full control over the territory and population in question from the perspective of international law are attributes of de facto state authority.

Regarding Art. 7(2), in its Recast Proposal for Qualification Directive the Commission only calls the protection "effective and durable", but its definition remains the same and does not necessary lead to the effective and durable protection as it is still enough that state or non-state actors "take reasonable steps to prevent the persecution", and "operating an effective legal system" is still not necessary (Recast Proposal for Qualification Directive, Art. 7(2)).

The Meijers Committee suggests reconsidering whether a more elaborated description should be laid down with respect to the necessary 'protection' available. The current formulation of this article still allows an effective denial of protection so long as the State takes "reasonable steps" to prevent the infliction of persecution or harm (Meijers Committee Comments, p. 2). In order to put Art. 7(2) in compliance with the Geneva Convention, the phrase "prevent persecution" instead of the phrase "take reasonable steps to prevent the persecution" should be used and "operating an effective legal system" should be an obligatory condition, not just exemplary.

3. INTERNAL PROTECTION ALTERNATIVE TEST: TOO GENERAL AND NOT ENSURING THAT ALTERNATIVE IS ACCESSIBLE (ART. 8)

PROBLEM: the test in Art. 8(1) ("the applicant can reasonably be expected to stay there") is not specific at all. It gives complete discretion to the MSs and results in divergent interpretations of the concept across national jurisdictions. Art. 8(3) allow refusing protection despite technical obstacles to return might be evaluated as contrary to the Refugee Convention.
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The Refugee Convention as well as Art.3 of ECHR allows for application of the IPA, provided that there are three conditions met: (a) the alternative must be accessible; (b) the applicant must be safe there from well-founded fear of persecution and real risk of serious harm from the agent of persecution or serious harm who threatens the applicant elsewhere in the country; (c) there must be no well-founded fear of persecution or real risk of serious harm from another agent. If to ignore Art. 8(3) and read Art. 8(1) in conjunction with Art. 7(2), then all three conditions would be met. The word "stay" in Art. 8(1) should be understood as "return", otherwise a backward view would not be in line with the Refugee Convention. Attention should be paid to Salah Sheekh vs. Netherlands case (ECHR) as influencing future interpretation of the IPA in EU Member States (Battjes, p. 249-254; Klug, p. 607-609; Teitgen-Colly, p. 1551-1553; Storey, p. 45-48; Garlic, p. 65-66).

According to Art. 8, Member States may apply internal protection alternative. This has led to divergent MSs practices. Further legislation may clarify the conditions under which the internal protection alternative is applicable. The provision should state more precisely the

requirements concerning living conditions of an applicant. It is also argued by UNHCR that Art. 8 QD omits what is considered by UNHCR an essential requirement of an internal protection alternative, i.e. that the proposed location is practically, safely and legally accessible to the applicant (European Parliament evaluation, p. 3, 5).

Art. 8 can be described just as initial framework for the assessment of IPA. However, the state practice in its application suggests that there are divergent interpretations of the concept across national jurisdictions concerning applicants from the same countries and similar situations. For example, in France and Sweden the concept of IPA was not applied in the cases of Chechen applicants, and contrary, in Germany most parts of the Russian Federation were accepted as possible internal protection alternatives. Art. 8(3) is evaluated as contrary to the Refugee Convention (UNHCR study, p. 64-66).

Most MSs have transposed Art. 8(1-2), and not transposed Art. 8(3). The Swedish and Romanian laws contain interesting practice that may flesh out the conditions for application of the rule in Art. 8(1) - „the applicant can reasonably be expected to stay there“. The Romanian Law requires that the possibility of IPA is recognized by the UNHCR. Swedish Law requires that an applicant has actual possibility to live a life without unnecessary suffering or hardship in that part of the country (Odysseus study, p. 46-48). With regard to Art. 8(3), because of disharmony on application of this provision and possible tension with international law, the Odysseus study recommends amending these rules (p. 22).

ECRE study recommends: when applying the IPA, states should always ascertain that the country of origin provides sufficient, accountable, and durable protection; Member States should not apply the IPA when the state is the actor of persecution, or the persecution is in any way imputable to the state; Member States should not apply the IPA as a blanket measure, as this contravenes the requirement to consider each asylum application on its merits; Member States should not apply the IPA when return is in fact impossible due to technical obstacles (without access, no IPA exists); MSs that use article 8(3) to refuse protection despite technical obstacles to return should provide an alternative legal status to those who cannot return (p. 17-19).

As the Commission acknowledges in its Impact Assessment, the definition of the “internal protection” concept does not contain adequate criteria for assessing the level and effectiveness of protection required, in line with the Geneva Convention and the ECHR, thus allowing MS to reject claims and return applicants to their country of origin despite the lack of effective protection. Moreover, this concept is defined in a broad and vague manner which creates a risk of diverse recognition practices (Commission Impact Assessment, p. 12). The Commission explains that the purpose and content of international protection are not limited to non-refoulement. It is necessary thus to specify that it may be withheld only where protection is available in at least part of the country of origin. It is also necessary to ensure the compatibility of the concept of internal protection with Article 3 ECHR, as interpreted in a recent judgment of *Salah Sheekh vs. Netherlands* case (Explanatory Memorandum to Recast Proposal, p. 7).

SOLUTION: art. 8(3) should be deleted as contrary to the Geneva Convention. Art. 8(1) should specify IPA criteria making reference to Art. 7 criteria (i.e., providing effective and durable protection; operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection); making reference to the *Salah Sheekh vs. Netherlands* judgment criteria (i.e., he or she can safely and legally travel, gain admittance and settle); adding the word “access” which is important element of the IPA test; and deleting the word „stay“

which could suggest a backward view contrary to the Refugee Convention.

Regarding Art. 8(1), in its Impact Assessment the Commission considers 2 main legislative options:

- to specify the criteria to be used for the "reasonableness" analysis based on the relevant UNHCR Guidelines, i.e. safety and security of the applicant, respect for his/her fundamental rights and the possibility to survive at a basic level of subsistence;
- to introduce an additional requirement, namely that the applicant should be able to travel to, gain admittance and settle in the proposed alternative location (according to the criteria as mentioned in ECHR judgment in Salah Sheekh vs. Netherlands case).

The Commission concludes that by establishing criteria to be used for the reasonableness analysis, Option 1 might result in introducing "new", additional restrictions to the use of the concept. Option 2, on the other hand, would only introduce in the Directive the conditions set out in the Salah Sheekh vs. Netherlands judgment; thus, they would not go beyond the transposition of MS' obligations under the ECHR into the EU acquis. Therefore the Commission chooses Option 2 (Commission Impact Assessment, p. 22-24).

Accordingly, in its Recast Proposal for Qualification Directive the Commission proposes the phrase "he or she has access to protection against persecution or serious harm as defined in Article 7 in a part of the country of origin" instead of the current phrase "in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm" and the phrase „he or she can safely and legally travel, gain admittance and settle" instead of the current phrase „the applicant can reasonably be expected to stay" (Recast Proposal for Qualification Directive, Art. 8(1)).

ECRE also recommends maintaining the requirement in Article 8 to assess whether the applicant "can reasonably be expected to stay", in line with the UNHCR guidelines on "Internal Flight or Relocation Alternative" so as to ensure that the person concerned can relocate to the country of origin and lead a relatively normal life there, without undue hardship. In this respect UNHCR indicates that a "reasonableness analysis" includes the assessment of different factors, including the personal circumstances of the applicant and the possibility for economic survival in the area (ECRE Comments on Recast Proposal, p. 9).

The Recast Proposal for Qualification Directive should solve most of the identified problems regarding Art. 8(1). Firstly, it specifies the IPA test by making a reference to Art. 7 criteria (i.e., providing effective and durable protection; operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection). Secondly, it also specifies the IPA test by making a reference to the Salah Sheekh vs. Netherlands judgment criteria (i.e., he or she can safely and legally travel, gain admittance and settle). Thirdly, it adds the word „access" which is the important element of the IPA test. Fourthly, it deletes the word „stay" which could suggest a backward view contrary to the Refugee Convention.

However, one more important element of the IPA test should be added in order to facilitate less divergent MS' practice based on full and inclusive interpretation and application of the Geneva Convention, i.e. the respect for his/her fundamental rights and the possibility to survive at a basic level of subsistence. According to the Geneva Convention, without respect for fundamental rights and the possibility to survive at a basic level of subsistence

in the absence of effective State protection would amount to persecution, but due to its economical aspect this element frequently is not taken into account in MS' practice. In its Impact Assessment the Commission mentions this element as the Option 1 and explains that this element is not new (as it emanates from the Geneva Convention). However, the Commission does not include this element in its Recast Proposal for Qualification Directive for political reasons (as introducing "new", additional restrictions to the use of the concept might meet resistance from the Member States).

Regarding Art. 8(3), in its Recast Proposal for Qualification Directive the Commission proposes to delete the current Art. 8(3) that IPA may apply notwithstanding technical obstacles to return to the country (Recast Proposal for Qualification Directive, Art. 8). As the current Art. 8(3) is evaluated as contrary to the Geneva Convention the proposal seems to be the best way to solve this problem.

4. PROSECUTION FOR CONSCIENTIOUS OBJECTION NOT COVERED BY PERSECUTION AS A BASIS FOR REFUGEE STATUS (ART. 9(2)(E))

PROBLEM: as conscientious objection is not specifically mentioned in QD, the practice of MSs regarding persecution by prosecution of draft evaders varies a lot. Mentioning only excludable acts, the QD does not seem to cover other situations (i.e. conscientious objection in the absence of alternative to military service).

The practice of MS regarding persecution by prosecution of draft evaders varies a lot. As the limited scope to fall under the refugee definition following the QD includes only person forced to engage in committing excludable acts, other situations (e.g. conscientious objection not related to religion, but e.g. moral convictions, etc.) do not seem to be covered. Given the recognition of an evolving right to conscientious objection in human rights discussions, recognition of conscientious objection would have been logical (Battjes, p. 234; Klug, p. 603-604).

In practice, most MSs have transposed Art. 9(2). In few Member States domestic legislation requires that in order to qualify as an act of persecution, performing military service must include committing acts as mentioned in Article 12(2) (as suggested by Article 9(2)(e)): Bulgaria, Finland, Germany, Hungary, Portugal, Romania (Odysseus study, p. 50-51). As in some states, the danger of committing such crimes in this context is a requirement for recognition of draft evaders as refugees, in order to further harmonise and avoid possible collision with international law, clarification that this danger is not required is recommended (Odysseus study, p. 23). Illustrative of the problems is the example of France, where the authorities seem to have a broader understanding than Art. 9(2)(e) because acts of persecution can take the form of prosecution or punishment for refusal to perform military service in a conflict for political, religious or ethnic reasons. On the other hand, in Poland the Office for Aliens does not consider such refusal to perform military service as grounds for refugee status (ECRE study, p. 20).

SOLUTION: art. 9(2)(e) should be amended to include refusal to perform military service (and not only in a conflict) due to conscientious objection as a possible case of persecution.

This provision has not been proposed to amend in the Recast Proposal for Qualification Directive. Art. 9(2)(e) does not contradict with the Geneva Convention, because of the safeguards (the words "inter alia" in Art. 9(2)), but the transposition of this provision

creates problems in Member States' practice. It might be other circumstances than mentioned in Art. 9(2)(e) in which the prosecution or punishment for refusal to perform military service might also amount to persecution (i.e., the cases of conscientious objection and not only in a conflict). Noteworthy, that decisions in *Streletz and others vs. Germany* case (ECtHR), *Krotov* case (UK court), *BE* case (UK court) show that military forces might commit crimes during peacetime as well, e.g. land-mining the border territory and shooting-to-kill civilians who attempt to cross the border. Therefore, in order to avoid problems in practice with Art. 9(2)(e) being interpreted as the only possible case when the prosecution or punishment for refusal to perform military service might amount to persecution, Art. 9(2) should also include other cases. The United Nations Human Rights Committee in the case of *Yeo-Bum Yoon and Myung-Jin Choi vs. Republic of Korea* and in its General Comment No. 22 (48) on Art. 18 of ICCPR (right to freedom of thought, conscience and religion) specifically interpreted Article 18 of ICCPR (the right to freedom of thought, conscience, and religion) as protecting conscientious objection to military service. The situation became contradictory when on 27 October 2009, in the case of *Bayatyan vs. Armenia*, the European Court of Human Rights held, that freedom of conscience as defined in Art. 9 of ECHR does not protect the rights of conscientious objectors who refuse to serve in the military. However, the ECtHR practice does not change ICCPR standards, protecting the rights of conscientious objectors. ECRE recommends adding a recital relating to Art. (9)(2)(e) to recognise persecution arising from conscientious objection to military service (ECRE Comments on Recast Proposal, p. 10).

5. NEXUS BETWEEN LACK OF PROTECTION AND PERSECUTION GROUNDS NOT INCLUDED (ART. 9(3))

PROBLEM: the QD rules on the nexus with the Refugee Convention grounds are overly restrictive, because Art. 9(3) excludes possible link between the Convention grounds and the lack of protection. It often results in state practice that is not in conformity with existing case law on the Refugee Convention.

The QD rules on the nexus with the Refugee Convention grounds are overly restrictive, because Art. 9(3) excludes the possible link between these grounds and the lack of protection. But the QD is not consistent on this matter, as Art. 6(1)(c) defines actors of "harm" by reference to actors of "protection". This problem might be solved reading this provision purposively so as to ensure conformity with existing case law on the Refugee Convention (Battjes, p. 258-260; Storey, p. 26).

Legal conflicts may arise from the different interpretation of the Convention. Thus, for example, in some Member States a person would not qualify for refugee status if the act of persecution was not committed for reasons of a Convention ground even though protection is withheld on such a ground. This practice is in accordance with the text of Art. 9(3); however, some Member States may argue that recognition in such case is required by the Geneva Convention and therefore the directive would have to be interpreted following Art. 63 of the TEC in accordance with the Refugee Convention (European Parliament evaluation, p. 2-3). In practice, most MSs require nexus between persecution (not lack of protection) and persecution grounds (ECRE study, p. 144-146). Currently, there are a number of states that refuse refugee status in case of lacking nexus to persecution, even if such nexus could be established with lacking protection. Worthwhile mentioning that a number of MSs did not transpose this mandatory requirement, while in a number of states the transposition states more favourable standards (*Odysseus* study, p. 16). The tension concerning this provision would be solved by deleting the provision or by adding the provision that states that a link

between lack of protection and persecution grounds would also suffice (Odysseus study, p. 23).

The Commission explains that in many cases where persecution emanates from non-State actors, such as militia, clans, criminal networks, local communities or families, the act of persecution is not committed for reasons related to a Geneva Convention ground but, for instance, with criminal motivations or for private revenge. However, it often happens in such cases that the State is unable or unwilling to provide protection to the individual concerned because of a reason related to the Geneva Convention (for example religion, gender, ethnicity etc). Therefore, such protection gap should be addressed in Art. 9(3) (Explanatory Memorandum to Recast Proposal, p. 7).

SOLUTION: art. 9(3) should be amended by adding a link between lack of protection and persecution grounds as a possible nexus in refugee definition.

In its Recast Proposal for Qualification Directive the Commission, in order to address potential protection gaps, makes it explicit that the requirement of connection between the acts of persecution and the reasons for persecution is also fulfilled where there is a connection between the acts of persecution and the absence of protection against such acts (Explanatory Memorandum to Recast Proposal, p. 7, Art. 9(3)). And that would completely solve the identified legal problem.

ECRE supports recast Art. 9(3) clarifying that the causal nexus requirement encompasses not only situations when there is an act of persecution but also where there is a failure to provide protection for Convention reasons (ECRE Comments on Recast Proposal, p. 10).

6. CUMULATIVE TEST OF SOCIAL GROUP AND WEAK REFERENCE TO GENDER RELATED ASPECTS (ART. 10(1)(D))

PROBLEM: art. 10(1)(d) raises the issues related to cumulative application of "social perception" and "protected characteristics" requirements in social group test, and to non-presumption of social group from gender related aspects alone. The provisions are weak. They give a broad discretion to the MSs and involve the risk that persecution on the basis of social group (in particular on the basis of gender) will not be sufficiently considered.

It might be claimed that non-presumption of social group from gender related aspects alone does not contradict the Refugee Convention, because it is obvious that social groups should be identified in a social context, not in abstract. On the other hand, given the positive developments in recognition practice and jurisprudence with regard to persecution on the basis of gender, the provision referring to gender related aspects is surprisingly weak and involves the risk that persecution on the basis of gender will not be sufficiently considered. The clause seems to leave the matter to the MSs. It might also be claimed that cumulative application of „social perception“ and „protected characteristics“ requirements in social group test does not contradict with the Refugee Convention, because it is doubtful that it might be a common characteristic of a social group that is not innate or otherwise deserve protection. On the other hand, cumulative social group test might be regarded as restrictive. Art. 10(1)(d) is formulated in a cautious manner, probably because of increase in applications for protection which could result (Battjes, p. 255-258; Klug, p. 610-611; Teigen-Colly, p. 1532-1533).

Although Art. 10(1)(d) contributes now to a common understanding of the concept some controversial questions have not been solved. Thus, for instance, Art. 10 states that "gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article". The existing information on state practices, however indicates that domestic law largely differs as regards the question whether a particular social group can be defined on gender-related aspects alone. It is also by no means clear that Art. 10(1)(d), mentioning two requirements for forming a particular social group, means that these requirements apply cumulatively, since the different language versions of the Directive indicate different interpretations (European Parliament evaluation, p. 3). According to Odysseus study, two requirements for constituting a social group mentioned in Art. 10(1)(d) is applied in some MS alternatively and in some - cumulatively, thus clarification seems desirable. The same applies to the issue whether such a group can be defined on the basis of gender related aspects alone (p. 22). For illustration, German definition of persecution solely for reasons of gender as persecution for membership in a particular social group could be noted. It encompasses such cases as female genital mutilation, forced marriages and honour crimes. Regarding the test of social group, it is recommendable to interpret "particular social group" in a broad and inclusive way; MSs should use the flexibility afforded by the words "in particular" in Art. 10(1)(d) to grant protection based either on innate characteristic or social perception, rather than requiring both, as the remainder of Art. 10(1)(d) appears to indicate. This interpretation is consistent with the Refugee Convention, in that protection is provided solely on the basis of an innate characteristic, but if a persecutor perceives that characteristic, then whether or not an individual actually possesses the characteristic is immaterial to the risk of persecution (ECRE study, p. 20-21).

As the Commission acknowledges in its Impact Assessment, the definition of the concept "membership of a particular social group" regarding the significance to be attached to gender-related aspects allows for interpretations which may result in denial of protection for women, as well as for diverse recognition practices of applicants with similar claims (Commission Impact Assessment, p. 12). The Commission explains that gender as such is normally not sufficient as a criterion for the definition of a particular social group; it is generally used in combination with other factors, such as class, marital status, ethnic or clan affiliation. However, women may form a particular social group in certain societies, as evidenced by discrimination in their fundamental rights. The ambiguous wording of the last phrase of Art. 10(1)(d) allows for protection gaps and for very divergent interpretations (Explanatory Memorandum to Recast Proposal, p. 8).

SOLUTION: art. 10(1)(d) should be amended by stating that „social perception“ and „protected characteristics“ requirements are alternative; and that gender related aspects are in particular relevant for both social group tests.

Regarding Art. 10(1)(d), in its Impact Assessment the Commission considers 3 main legislative options:

- to explicitly allow MS to adopt the alternative application of the two relevant criteria by providing for the possibility to define a particular social group based on either one of the two criteria mentioned including based solely on gender-related aspects;
- to replace the last phrase of Article 10(1)(d) with a provision specifying that gender related aspects should be given due consideration for the purposes of recognising membership of a particular social group or identifying a characteristic of such a group;

- to replace the last phrase of Article 10(1)(d) as under Option 2 and also to specify that, for this ground to apply, it suffices that one of the two requirements is met.

The Commission concludes that all legislative options can be considered proportionate; however it appears that Option 1 would be an inadequate measure in terms of raising protection standards, improving efficiency and ensuring a consistent application. Option 3 would have the most positive effects in terms of ensuring that all MS adopt a progressive and inclusive application of this Geneva Convention ground but it might meet with strong resistance from a significant number of Member States. Therefore, the Commission chooses Option 2 (Commission Impact Assessment, p. 24-26).

Accordingly, in its Recast Proposal for Qualification Directive the Commission does not change cumulative test of social group, but adds the phrase “gender related aspects should be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group” instead of the phrase „gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article” (Recast Proposal for Qualification Directive, Art. 10(1)(d)).

The Commission Recast Proposal for Qualification Directive does not solve the problem of cumulative test of social group, but provides a stronger provision for the consideration of gender related aspects. The Meijers Committee and ECRE are content with the new reference to the role of gender aspects in defining ‘particular social group’ ground for persecution in Art. 10(1)(d) (Meijers Committee Comments, p. 4; ECRE Comments on Recast Proposal, p. 10-11). However, it is noteworthy that the provision has the word “should” instead of “shall”, and thus still leaves a possibility not to consider gender related aspects.

As it was identified, a cumulative test might not be fully compatible with the Geneva Convention, and therefore must be changed to an alternative test of social group. It is also noteworthy that a cumulative test has internal contradiction with Art. 10(2) of QD, which could be understood as stating that “social perception” is sufficient even in the absence of “protected characteristics”.

7. CESSATION OF REFUGEE STATUS AND SUBSIDIARY PROTECTION: DENIAL OF PROTECTION DUE TO INSUFFICIENT HARMONISATION (ART. 11, 14(2), 16 AND 19(4))

PROBLEM: due to insufficient harmonisation of requirements for application of cessation of refugee status and subsidiary protection some Member States tend to examine the existence of current risk of persecution/harm rather than assessing the durability of eliminated risk along with availability of protection. This results in incorrect practical application of cessation thereby prematurely denying protection to persons who continue to be in need of it.

Given that the QD allows issuance of residence permits with limited validity (3 years for refugees and 1 year for persons with subsidiary protection), non-renewal of permits may become an easy way for MSs to de facto deny protection without having to engage in a formal procedure to withdraw status. Also, in some MSs domestic law states additional grounds or overly wide grounds for cessation or exclusion. This possibility to deny status to

people entitled to it under the directive must be considered as a violation. Furthermore, many MSs have failed the rule on the burden of proof, which requires the authorities to “demonstrate on an individual basis” that the person has ceased to be a refugee or a person eligible for subsidiary protection (Art. 14(2) and 19(4) of QD) (Odysseus study, p. 17). This leads to a conclusion that cessation under QD has been only partially harmonised (Odysseus study, p. 55). On 28 April 2008 German Federal Administrative Court made submission to EU Court on application of Art. 11(1)(e) QD. German example may be illustrative of the problem in this respect. According to UNHCR, the authorities in Germany have interpreted the criteria for cessation in a manner which focuses on whether, at the time of the review, the individual faces a risk of persecution in the country of origin, either in the form of continuation of the previous danger or a new risk. In practice, this approach has led to the systematic revocation of the refugee status of Iraqis, who later on were once again recognized as refugees, leaving previous cessation meaningless (UNHCR Statement on Cessation, p. 9-11). The Advocate General Mazák claims that cessation can only occur if lasting solution free from persecution is available for refugee in country of origin. If the situation is unsettled and unpredictable or serious violations of human rights could lead to seeking refugee status again, the change of circumstances cannot be considered significant and non-temporary and thus the level of protection is clearly unavailable and ineffective. On 2 March 2010 the EU Court delivered a decision in *Aydin Salahadin Abdulla and Others*²²¹ stating that “a person loses the status when, following a change of circumstances of a significant and non-temporary nature in the third country concerned, the circumstances which had justified the person’s fear of persecution no longer exist and he has no other reason to fear being persecuted.” This Court decision clarifies the application of cessation to a certain extent, while defining the cessation notion in QD would still be beneficial.

Considering this situation it is important to note that cessation requires a specific assessment of the nature of changes, which goes beyond the recognition. Art. 11(1)(e) QD is based on Art. 1(C)(5) of the Refugee Convention, thus in order to cease refugee status, changes in the country of origin must be fundamental and durable, and effective protection must be available there. As concerns the criteria of cessation, mere absence of risk of persecution is not enough, there should be also effective protection available (UNHCR Statement on Cessation, p. 12). Therefore, the MSs should not apply Art. 11(1)(e) by using the same procedure as for qualification for protection, but rather through cessation procedure, which looks not only at existence of the risk, but also durability of elimination of previous risk and availability of effective protection. The directive provisions do not currently ensure that this is the case (Battjes, p. 268, Gil-Bazo, p. 260).

As concerns cessation of subsidiary protection, the cessation ground in Art. 16(1) combines Art. 1C(5) and (6) of the Refugee Convention. This provision seems to imply that there should be determination taking place on whether the grounds that caused subsidiary protection still exist. Therefore, in order to apply cessation clauses the MSs should ensure that proper status determination takes place again. This understanding is also confirmed by the rule contained in the QD on burden of proof in case of withdrawal of status. According to Art. 19(4), the state has to demonstrate whether any of the termination grounds applies to the subsidiary protection beneficiary. Art. 14(2) QD also shifts the burden of proof on the state, but only as far as cessation of refugee status in accordance with Art. 11 is concerned. The practice of several MSs shows that they did not apply the cessation provision correctly, therefore the provision needs to be clarified. Furthermore, it should be

²²¹ *Salahadin Abdulla and Others vs. Bundesrepublik Deutschland*, C-175/08; C-176/08; C-178/08 & C-179/08, European Court of Justice, 2 March 2010.

clearly distinguished between the right to protection and residence permit should be reinforced. In this context, the imperative nature of the revocation clauses ('Member States shall revoke or end' the status) contrasts with the system of the Refugee Convention, under which cessation de jure ends entitlements under the Convention, but without touching upon the issue of the residence right. The Netherlands, for example, has implemented the obligation of revocation or ending the status by stating in imperative terms that the residence permit must be revoked or ended. Such implementation may come in conflict with the goal of facilitating the integration of third-country nationals who have resided legally for a period of time, irrespective of the initial grounds on which residence was granted. This goal has been repeatedly formulated by the European Council (see amongst others the Tampere Conclusions). UNHCR's Executive Committee, in Conclusion No. 69, has also recommended that States consider a (possibly alternative) residence status for long-settled refugees whose refugee status is being withdrawn and "who cannot be expected to leave the country of asylum, due to a long stay in that country resulting in strong family, social and economic links". Accordingly, the Meijers Committee suggests substituting the term 'shall' for 'may' in Articles 14(1) and 19(1). A paragraph could further be added which would clarify that in decisions concerning the revocation or ending of the residence right of protection beneficiaries, other factors than the eligibility criteria laid down in the Directive should be taken into account, including the family, social and economic ties in the Member State (Meijers Committee Comments).

If these issues are not addressed secondary movements within the EU are bound to increase and legal limbo situations for persons for whom protection was legally ended but who cannot de facto as yet enjoy national protection might become more frequent.

SOLUTION: DENIAL OF PROTECTION DUE TO INSUFFICIENT HARMONISATION (Art. 11, 14(2), 16, 19(4)): clarify the requirements of cessation of refugee status and subsidiary protection notion by adding a definition of cessation in Art. 2, which includes inter alia the requirement to assess the previous risk, the durability of its elimination, any new risks and the availability of effective protection, as well as reinforces the difference between the right to protection and corresponding residence permit.

As the practice of several MSs shows that they do not apply the cessation provision correctly, clarification on what cessation means through defining cessation among the main notions in Art. 2 QD would ensure better harmonisation of MS cessation practices, reduce the number of cases of preliminary rulings to the EU Court and add value of ensuring that persons who are not yet able to enjoy national protection of their countries of origin (e.g. Afghan, Iraqi, Chechen and other beneficiaries of protection) are not denied protection in a premature way. This as a result would prevent secondary movements within the EU and minimize occurrence of legal limbo situations for persons for whom protection was legally ended but who cannot de facto as yet enjoy national protection. In addition, it will also save resources that would be spent as a result of premature cessation and the need to examine the applications once again (e.g. refer to situation of Germany with Iraqis).

8. DENIAL OF PROTECTION: EXCLUSION, CESSATION AND REVOCATION CLAUSES BEYOND PERMITTED LIMITS OF MEMBER STATES' OBLIGATIONS (ART. 14 (4-5), 17 (1), 19)

PROBLEM: confusion of exclusion/cessation clauses with exceptions to non-refoulement, as well as obligatory exclusion from subsidiary protection disregarding the

absolute prohibition of refoulement poses a risk to compliance of MS practices with the Refugee Convention and the Treaty of European Union, thereby undermining the objective of the Union to provide protection to those in need.

There is an apparent confusion in the QD itself, even more in MS practice, as concerns the correct application of the Refugee Convention notions. Therefore various practical and legal problems occur:

1. Firstly, Art. 14(4) and 14(5) QD dealing with exceptions to non-refoulement include what constitutes de facto provisions on exclusion, going beyond what is permissible under the Refugee Convention.
2. Secondly, mandatory exclusion from subsidiary protection may run counter with prevailing international obligations of MSs and "minimum standards" required by the TEU.

Provisions of Art. 14(4) and 14(5) QD have a historical relevance because at the time of adoption of the Commission proposal, the exceptions to non-refoulement (Art. 19(2) of the Proposal) were deleted and security concerns have instead become a ground for exclusion, rather than an exception to non-refoulement (considering that the proposal was adopted on 12 September 2001, just in the aftermath of 11 September 2001 attacks in the US). With regard to revocation, this provision constitutes de facto exclusion clause regardless of whether or not it was called so. It is misleading to call Art. 14 as revocation article (as opposed to Art. 12, the exclusion article), because no meaningful difference is drawn between revocation and exclusion. Furthermore, Art. 21 already provides for revocation of the right to non-refoulement for refugees on the basis of security reasons or that the person constitutes a danger to the community of the state. This already reflects Art. 33(2) of the Refugee Convention albeit with the modification that MS may refoule a refugee "whether formally recognised or not". National security reasons and convictions for a "particularly serious crime" maintained as quasi-exclusion grounds under the revocation provisions may be potentially in breach of MSs obligations under the Refugee Convention (ECRE Comments on Recast Proposal, pp. 17, 5). The problem is not only theoretical, but also part of practice. E.g., Germany merges provisions on exclusion with provisions which stem from exceptions to the principle of non-refoulement. As such, the legislation in Germany has expanded the category of persons who may be excluded from refugee status beyond the exhaustive list contained in the Refugee Convention (UNHCR study, p. 13). Similarly, in the Netherlands and Greece, a person may be excluded for having committed serious non-political crime in the asylum country. Argument for this clause was that the difference of treatment of a person who is excluded and that of a refugee who is not given the benefit of non-refoulement is insignificant (this was concluded by Danish Presidency in note to SCIFA in November 2002). It appears that the Directive may have served as a tool for an increasingly expansive use of exclusion clauses in the MSs (ECRE Comments on Recast Proposal, p. 17). However, there is indeed a difference between denial (exclusion) and termination of refugee status (as a form of asylum in the wording of the EU Charter on Fundamental Rights) as concerns Art. 14(4) (which is based on Art. 33(2) of the Refugee Convention), as the relevant criteria and legal consequences of these two articles differ. The consequence of exclusion under Art. 1F is the denial of a set of rights attached to refugee status, including protection from removal to a country where s/he could face persecution (UNHCR Statement on Exclusion, p. 11, 16). Unlike Art. 1F, Art. 33(2) of the Refugee Convention does not form part of the refugee definition and does not constitute a ground for exclusion from refugee protection. The application of Art. 33(2) affects the treatment afforded to refugees, rather than their recognition. The QD confirms this by allowing MSs to reduce or limit the entitlements accorded to refugees or subsidiary

protection beneficiaries on considerations of “national security and public order” (recital 28 read together with Art. 21 and 24 QD). But this is not sufficient to constitute grounds for exclusion. In addition, exclusion grounds are exhaustive and do not allow the addition of other situations, including those of Art. 33(2) of the Refugee Convention (Art. 42 of the Refugee Convention). Therefore, a decision to exclude an applicant based on findings that he/she constitutes a risk to the security of the host country, would be contrary to the object and purpose of Art. 1F and the conceptual framework of the Refugee Convention (UNHCR Statement on Exclusion, p. 8).

This confusion in the QD raises other negative consequences. The person to whom this clause applies, may be denied the “status” as meant in Art. 13 and 18 (or “asylum” as meant in Art. 18 of the EU Charter on Fundamental Rights), and thus the rights set out in Chapter VII QD. However, s/he continues to be a “refugee” for the purpose of Art. 14(6) QD, and should be able to invoke the rights set out in that provision. Hence, if Art. 14(4) is transposed as a ground for cessation or exclusion from refugee status at large, it would also entail infringement of Art. 14(6) (Odysseus study, p. 54), which provides for certain treatment entitlements. In this scenario, a refugee is excluded and cannot thus benefit from e.g. non-refoulement (though mentioned as mandatory benefit in Art. 14(6)). Therefore, the provision of Art. 14(4) and 14(5) should be clarified in order to avoid the situation that persons who are eligible to enjoy the rights of the Refugee Convention are deprived of them, as well as excluded/ceased contrary to the Refugee Convention. This can be corroborated by MS practice, because in many MSs, after termination of status, usually no alternative status is issued, in others, alternative status such as a sort of (exceptional) leave to remain can be issued (Odysseus study, p. 59). Lastly, in the opinion of UNHCR, the wording of exclusion clauses does not contain any indication that exclusion is linked to continuation of posing danger (UNHCR Statement on Exclusion, p. 32), thereby denying the link between exclusion and exceptions to non-refoulement as somewhat similar concepts. In this respect, German Federal Administrative Court lodged two requests to the EU Court in 2009, where it asked if there is a requirement of continued danger in applying exclusion clauses under the QD? However the requests for preliminary ruling do not deal with the relationship between the concepts of exclusion and application of exceptions under Art. 33(2) of the Refugee Convention.

On the second aspect - exclusion from subsidiary protection, domestic legislation in a number of states differs in the sense that exclusion is not required in all cases covered by Art. 17(1). Thus, e.g. under Austrian law, persons, who have committed one of the crimes mentioned in Art. 1F of the Refugee Convention or another serious crime are not excluded from granting of subsidiary protection (because protection under Art. 2 and 3 of ECHR is absolute) (Odysseus study, p. 65). On the other hand, with regard to Art. 19(2) QD, in many MSs persons excluded from international protection status may qualify for other statuses (which may render the obligatory exclusion rather symbolical). Given that exclusion from subsidiary protection is mandatory in the QD and as noted by UNHCR, leaves no scope for more favourable approach under national law, MSs granting protection in their practice to excludible individuals whom they are not allowed to remove under international human rights law, may be interpreted in breach of Art. 3 QD as this would be incompatible with regard to obligation imposed under Art. 17(1) QD.

This situation also leads to another problem - exclusion from subsidiary protection (Art. 17 and 19 QD) may raise concerns with regard to “minimum standards” as required by Art. 63 TEU. Lack of harmonization with regard to persons who are in need of international protection (based on Art. 3 ECHR) may be considered below the standards established by international refugee and human rights law, leaving it to the MSs to develop them further

to meet their obligations under international law. As the Commission states in its Impact Assessment, the human rights and refugee law standards set solely the lower threshold, not the upper limits of harmonisation, thus the harmonisation cannot take place at a level lower than those standards (p. 10). If granting of subsidiary protection in this case by MSs to excluded individuals who cannot be returned based on international obligations, would be considered a breach of EC law, then this would also constitute a breach of minimum standards requirement in Art. 63 TEU (Battjes, p. 26, 265, Gil-Bazo, p. 246-250, 252). In MS practice, it has been noted that provisions on revocation, ending of or refusal to renew refugee status (Art. 14) or subsidiary protection status (Art. 19) have led to cases of deterioration due to obligation to terminate the status (European Parliament, p. 2).

The Commission in its Recast Proposal for Qualification Directive does not address any of the legal and practical problems related to exclusion and revocation of status, presumably because of the sensitivity that exists around these issues among the MSs.

SOLUTION: in order to eliminate confusion and ensure correct implementation of the Refugee Convention notions in the MSs, define firstly the concept of exclusion and revocation in Art. 2, also define Art. 14(4) and (5) clearly as termination of "residence status" (or "asylum" in terms of Art. 18 of the EU Charter) and move these provisions and Art. 14(6) to Status part of QD. Observance of MSs obligations under human rights law may only be ensured if a requirement is introduced to apply exclusion/revocation only when there is no issue of absolute prohibition of refoulement based on the circumstances of the case.

Firstly, to prevent misinterpretation by MSs of Art. 14(4) and (5) as exclusion or cessation clauses (which already happens in practice, e.g. in Germany), it is suggested to move these provisions to Status Rights' part of the QD. This would ensure that MSs apply this article strictly as termination of "residence status" ("asylum" in the meaning of the EU Charter on Fundamental Rights) rather than refugee status or subsidiary protection as such, which would also ensure the elimination of risks pertaining to compliance with the Refugee Convention. Moving of Art. 14(6) to Status Rights' Part of the QD would also contribute to eliminating confusion with regard to rights enjoyed by persons who are allowed to remain when status is removed after being granted. Secondly, Art. 2 would benefit from defining the concept of exclusion and revocation. Such a clarification would reduce disparities in MS exclusion practices and ensure compliance with the Refugee Convention. Lastly, limiting exclusion under Art. 17(1) and 19 to those cases when there is no issue of absolute prohibition of non-refoulement would ensure the elimination of risks pertaining to compliance with the absolute prohibition of refoulement, thus minimum standards under Art. 63 TEU and harmonisation of practices among MSs thereby reducing disparities that cause secondary movements within the EU. Alternatively, provisions on exclusion should be stated in non-obligatory terms in these Articles. As a result, only those persons who fall under Art. 17 and with regard to whom no international obligations apply would be excluded and effectively removed from the territory of the EU.

9. SUBSIDIARY PROTECTION: SCOPE TO BE ALIGNED WITH INTERNATIONAL OBLIGATIONS AND PRACTICE OF MEMBER STATES (ART. 15)

PROBLEM: not all persons who are non-removable under international obligations or Member State practice are covered by current wording of the subsidiary protection. This undermines the EU's harmonisation objective and encourages onward movement

within the EU.

The QD provisions on qualification for subsidiary protection and the Temporary protection directive are based on Art. 63 (2a) of the TEC, therefore it must comply with general principles of Community law reflecting relevant international law. Following the entry into force of the Lisbon Treaty, accession to ECHR becomes possible and once completed, the ECHR will be fully integrated in the EU legal order. Art. 63(2a) of the TEC requires minimum standards, while several provisions of the Directive raise concern that the level of minimum standards (sufficient harmonisation) was not achieved. In addition, the preamble of the QD (recital 25) states that criteria on the basis of which the applicants for international protection are to be recognised as eligible for subsidiary protection [...] should be drawn from (a) international obligations under human rights instruments and (b) practices existing in Member States. It can be seen therefore that the scope of subsidiary protection is expected to be broader than international protection, as it may encompass practices of MSs. However, current situation under the QD as described below is different.

Firstly, current scope of subsidiary protection (grounds) does not coincide with the scope of all persons who are not removable under human rights instruments on the basis of which subsidiary protection was developed (CAT, ECHR, ICCPR) (Battjes, p. 221). In practice, subsidiary protection is not granted to significant numbers of persons who appear to be in need of international protection. In other words, the definition of subsidiary protection as is presently defined by Art. 15 of the QD [...] does not fully cover the public international law dimension of "international protection" (Hailbronner, p. 5). It goes against the objective of the directive - to ensure minimum level of protection to all those in need. This is due both to the impact of procedural flaws and to a narrow interpretation of the directive itself (UNHCR study, p. 11). Thus it can be asserted that the first phase of building Common European Asylum System addresses MS obligations under non-refoulement only partially.

Secondly, subsidiary protection does not cover all cases when MSs in their practice grant protection, e.g. most MSs do grant some form of protection to victims of generalised violence, while subsidiary protection under the QD clearly does not (Battjes, p. 241). Domestic law in a number of MSs grants (forms of) subsidiary protection to broader categories of persons if compared to those defined in Art. 15 QD, which shows a lack of harmonisation among MSs (Odysseus study, p. 20, 75; European Parliament evaluation). Furthermore, there is a tendency because of widely divergent practices in the application of Art. 15(c) to narrow its scope in relation to other non-refoulement provisions (ECRE study, p. 6).

The problem of scope of subsidiary protection is recognised at EU level, thus in order to ensure a truly common interpretative approach and to achieve the objective of introducing uniform statuses (as required by the Hague Programme and the TEU) the Commission was supposed to propose to amend the criteria for qualifying for international protection under this directive. To this effect, it may be necessary inter alia to clarify further the eligibility conditions for subsidiary protection, since the wording of the current relevant provisions allows for substantial divergences in the interpretation and the application of the concept across Member States (Policy Plan on Asylum). The Commission acknowledges in its' Impact Assessment that the Directive does not guarantee the full compatibility of national implementation measures with these instruments [international law] and allows for wide divergences amongst national decision-making practices (Summary, p. 2). Despite that and notwithstanding the specific policy objective (to ensure full respect of the ECHR and of the EU Charter on Fundamental Rights), the Recast Proposal for Qualification Directive does not touch upon Art. 15 of the QD and thus does not address the problems of limited scope of

subsidiary protection, as well as does not follow the objective of the directive - to address disparities between MS legislation and practice.

Who are those persons who are currently falling out of the scope of subsidiary protection, but are in need of protection under international human rights law or MSs practice? For the purpose of analysis, they could be conditionally grouped into four categories:

(1) Non-returnable individuals²²²

The baseline for the need to harmonise MS practice for these individuals lies in international/regional obligations. Firstly, since all MSs are bound by the results of cases such as *D. vs. UK* based on Art. 3 of ECHR, there should be harmonization of MSs practices in this respect. Worthwhile noting that obligation to refrain from expulsion of a seriously ill alien in very exceptional circumstances has not been repealed by the ECtHR since the judgment in *D. vs. UK*, even if none of the subsequent applicants satisfied the test of exceptional circumstances, thus no violation of Art. 3 was found (e.g. *N. vs. UK*, Judgment of the Grand Chamber of 27 May 2008).

Secondly, there are also other situations (beyond Art. 3 of ECHR), which require prevention of expulsion due to international obligations of states (Art. 8 ECHR cases in order to ensure family life; observance of the best interest of the child principle under Art. 3(1) and 37(a) CRC²²³). This is also acknowledged in the EU Returns Directive which states in Art. 5 the expanded scope of the principle of non-refoulement. The nature of cases that involve these individuals is such that the act of expulsion itself attributes to the liability under international law. Due to the terms "in the country of origin" in Art. 15(b) QD, it is possible to read the provision as not applying to mentioned individuals, thus as a result they are excluded from the scope of subsidiary protection. With regard to suspension of expulsion in case of a need to protect family life expansion of subsidiary protection would help to cover those persons who are not covered by the EU Family Reunification Directive of 2003 (e.g. family members of subsidiary protection beneficiaries) or other EU instruments. Family reunification cases would be strictly covered here only when there is no possibility to exercise the right to family life in the country of origin. Clearly, residence permit on the basis of family reunification might be a more desirable solution, thus this status will only apply when there are no other available statuses for the person (e.g. family members of subsidiary protection beneficiaries or persons who do not meet strict conditions of family reunification or to whom family reunification was withdrawn under Family Reunification Directive). What is also noteworthy, that in some MSs family reunion takes place after the final determination of asylum claims only. Another possibility would be to amend Family Reunification Directive by including a possibility to prevent deportation in case of risk to protection of the family irrespective of any other criteria. The rationale for nevertheless including those persons under subsidiary protection lies in the basis of international obligations that the EU MSs must respect. Furthermore, the concept of Art. 8 of ECHR has been considerably expanded by the ECtHR recently by the concept of protection of private life (regardless of family connections) for persons who have established close links with the country of actual residence and whose return may on balance constitute therefore a

²²² This group does not include purely compassionate cases, which are beyond the international obligations of MSs. It does not also cover grounds like environment disasters or social integration that lack mandatory requirements under the international law, but are rather based on States' discretionary protection policies, as well as situations when aliens cannot be returned for practical/technical reasons.

²²³ According to the recommendations of the Committee on the Rights of the Child, no return or removal decisions should be issued without completion of assessment on the "best interests of the child": General Comment No. 6(2005); Treatment of unaccompanied and separated children outside their country of origin, CRC/GC/2006/6, Chapter VII(c), Return to the country of origin.

violation of Art. 8 of ECHR (Hailbronner, p. 6). For instance, in a case *Maslov vs. Austria*²²⁴, the Grand Chamber of the ECtHR has held that the deportation of a youth who had spent the majority of his childhood in Austria constituted a violation of his right to respect for his family and private life. However, these cases may not be necessarily based on international protection needs because these persons may still enjoy the protection of their country of origin.

In this context, a substantial number of MSs has maintained the existing concepts of humanitarian residence permits which partially may have a larger scope of application, partially may be more restrictive with respect to the requirement to be granted a residence permit (European Parliament evaluation, p. 4). E.g. Austria introduced by the new 2005 Asylum Act complementary protection based on Art. 8(1) of the ECHR, which protects private and family life (ECRE Report on Complementary Protection, p. 5). Also, only in six MSs Art. 15(b) does not apply to mentioned cases within the scope of Art. 3 ECHR, while according to domestic legislation of the vast majority of MSs the provision can apply to such cases (Odysseus study, p. 73). It would be therefore logical and useful to harmonise granting of protection in these cases in the MSs as they are beyond the discretion of states, but are rather based on objective mandatory criteria of international law. More specifically, these persons must be clearly distinguished from purely compassionate situations (e.g. old age, integration into host country society, etc.), which would continue being part of discretionary decisions of MSs due to absence of internationally or regionally defined standards how to deal with these individuals. A good example of such a distinction is a new Immigration Act in Norway that entered into force on 1 January 2010 and which differentiates between protection grounds and the more humanitarian reasons for granting residence.

(2) Persons fleeing systematic or generalized violence

While through the Temporary Protection Directive the MSs acknowledged the need for protection in relation to generalised violence (TPD envisages among its beneficiaries also "persons at serious risk of, or who have been the victims of, systematic or generalized violations of their human rights"), they do not fall under any of the two protection statuses under the QD, Art. 15 in particular. The Commission acknowledged in the Policy Plan on Asylum that there are substantive divergences in the interpretation and application of the concept across MSs. Such divergences, resulting in particular from the application of subsidiary protection against a "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict", have been widely documented. Research has also shown a tendency to narrow the scope of certain notions in this provision, most prominently that of "individual threat" (ECRE Comments on Recast Proposal, p. 15).

The potential of current Art. 15(c) to provide protection to those who fear serious harm to life or person is thus undermined by:

- a. highly restrictive interpretation of the term "individual threat" in line with recital 26 of the Directive;
- b. limitation on the scope to "internal armed conflict" only;
- c. varying definitions of "armed conflict".

The first limitation has resulted in authorities of some MSs requiring that the applicant is personally targeted or, in line with the restrictive approach enshrined in recital 26, that the applicant faces a greater risk of harm than the rest of the population, or sections of it, in

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Maslov vs. Austria, [2008] ECHR [GC] 1638/03 (23 June 2008).

his or her country of origin. This renders the protection offered by the QD illusory for many persons, it appears to be incompatible with case-law of the ECtHR regarding risk assessment and is inherently contradictory to Art. 15(c) which provides for protection from serious harm caused by "indiscriminate violence" (UNHCR study, pp. 11, 15). With regard to this concern prior to 2009, the explanation of "individual threat" requirement was provided in two leading UK cases: HH and KH vs. Secretary of State for the Home Department in spring 2008 where indiscriminate violence was defined as violence that does not distinguish between civilian and military targets. In February 2009, the EU Court in *Elgafaji vs. Netherlands*²²⁵ case reasoned that in contrast to Art. 15(a) and (b) (which refer to types of harm that specifically target the applicant), Art. 15(c) "covers a more general risk of harm." Term "indiscriminate" reinforces that. Thus the term "individual" in Art. 15(c) is to be understood as covering harm to all civilians, where violence reaches such a high level as to show "substantial grounds" to believe that a civilian, if returned, would face a real risk solely on the basis of being present. The more the applicant can show an individual risk due to factors particular to his/her personal circumstances, the lower the level of indiscriminate violence that must be shown. If to consider that this EU Court decision has resolved the main interpretation issue in Art. 15(c), maintaining recital 26 in QD continues to leave a room for divergent interpretations by MSs.

Therefore, there is a need to widen the overall scope of Art. 15(c) as most MSs have developed national subsidiary forms of protection with regard to persons from countries of conflict. In conflict situations chances of violation of fundamental human rights for individual citizens are generally high. Because of the often volatile and dangerous situation, individualized risks are harder to substantiate and to assess. Thus, there is still a need for a wider ground for protection in conflict situations, to reflect the EU and its Member States' humanitarian traditions not to expel persons to a situation of (internal) conflict. A less individualized ground for protection for persons fleeing situations of large scale violations of human rights, could by nature involve larger numbers of persons. However, such situations are exceptional and State practice shows that in these situations Member States often do operate general protection schemes or at least some sort of expulsion stop. Until now, such national schemes have often been under pressure, because responses of other neighbouring Member States may be very different. Hence, there could be a need for further EU legislation both on granting and withdrawal of status(es) in situations where dictatorial regimes or factions randomly commit large scale, gross violations of human rights against the population or parts of the population (Meijers Committee Comments).

Furthermore, the term "internal armed conflict" in Art. 15(c) is another source of divergent interpretations across MSs, since there is no agreed definition of "internal armed conflict" in international law. Decisions in France, Germany and Sweden highlight divergences in interpretation and application. As a result, the situation in parts of Iraq was accessed as "internal armed conflict" in France, but not in Sweden where it was described as a "severe conflict". Whilst the Swedish authorities considered the conflict in Chechnya as an "internal armed conflict", the Slovak authorities did not. The application of this term in the QD in at least some MSs appears to deny subsidiary protection to persons facing a real risk of serious harm in their country of origin (UNHCR study, p. 11-12). Thus it would seem inconsistent to deny subsidiary protection to a person who would qualify for temporary protection if s/he entered in the context of a mass influx, on the grounds that the situation s/he fled is not considered an "internal armed conflict" under Art. 15(c) (UNHCR study, p. 79). Furthermore, the scope of Art 15(c) is also limited by its application only in "situations of international or internal armed conflict". It is not clear what added value this term brings

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Elgafaji vs. Staatssecretaris van Justitie, C-465/07, European Court of Justice, 17 February 2009.

to a legal provision on subsidiary protection, as persons who face a real risk of serious harm due to indiscriminate violence and widespread human rights violations are in need of international protection (based on ECHR, CAT and ICCPR) regardless of whether the context is classified as an internal armed conflict or not (UNHCR study p. 11-12). E.g. in a case *V.L. vs. Switzerland*²²⁶, the Committee against Torture established a violation by Switzerland to deport a person to Belarus even though the violations of human rights were not related to armed conflict situation. The Committee established widespread violations in Belarus and based on individual circumstances declared a violation. Protection should thus also cover situations of generalised violence and systematic violations of human rights violations, which do not equate to armed conflicts under international humanitarian law. This would remove any remaining ambiguities and allow for the realisation of Article 15(c)'s key added value, which lies in the potential "to provide protection from serious risks which are situational, rather than individually targeted" (ECRE Comments on Recast Proposal, p. 16).

Lastly, the definition of "armed conflict" in MSs varies (ECRE study, p. 6). Since the definition is limited to international or internal armed conflict, many MSs grant under national law alternative forms of humanitarian protection to persons facing a comparable danger in situations which may not be qualified as an armed conflict (European Parliament evaluation, p. 5). Therefore, to ensure consistency with TPD it is necessary to include this group of persons under subsidiary protection.

(3) Excludable individuals²²⁷

In certain circumstances these persons cannot be returned due to absolute nature of non-refoulement under Art. 2 and 3 ECHR, Art. 3 CAT, Art. 7 ICCPR. It is of concern that Art. 17 QD does not explicitly confirm the absolute prohibition of returns that would breach international human rights law (ECRE study, p. 29). It is paradoxical that subsidiary protection partially developed on the basis of ECtHR jurisprudence on Art. 3, which in absolute terms prohibits refoulement. Even though the intention is to provide protection only to persons deserving it, the limitations on subsidiary protection placed by exclusion clauses cause the situation that MSs continue maintaining a variety of other forms of residence permits as they cannot expel these individuals due to absolute prohibition of refoulement. The standard of treatment of these persons should also respect fundamental human rights. It is therefore, necessary to address the situation of those persons who are excluded from protection but who cannot be returned. The MS practice shows that at least two states (Finland and UK) have provisions for the protection of people denied status due to the application of exclusion clauses (ECRE Report on Complementary Protection, p. 8).

(4) Persons fleeing other human rights violations

Art. 2(a) QD brings about an important distinction between the Refugee Convention refugees on one and persons eligible for subsidiary protection on the other hand. "Serious harm" in the later definition concerns only the right to life or person. "Persecution" on the other hand can concern also other human rights' violations. Thus it seems that "serious harm" is narrower than "persecution", while it would be logical that it covers those cases that fall out of persecution (if we consider that subsidiary protection covers cases left outside the refugee situations) (Battjes, pp. 221, 236, 241, 269-270, Gil-Bazo, p. 241, Noll, p. 186-191).

SOLUTION:

(a) Supplement Art. 15 with paragraph 2 requesting MSs to grant subsidiary protection also

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CAT/C/37/D/262/2005.

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These are persons who are excluded from refugee status under Art. 1(F) of the Refugee Convention and Art. 12(2) of the QD.

in cases when international obligations of MSs prevent expulsion;
(b) Recital 26 should be deleted, as well as the terms "individual threat" and "internal or international armed conflict" in Art. 15(c);
(c) Amend Art. 17(1) and 19 to state that exclusion from subsidiary protection should only be considered when there is no issue of absolute prohibition of refoulement based on the circumstances of the case.

There is general unwillingness to touch upon Art. 15, in order to expand subsidiary protection to additional individuals, as there is a belief that re-opening of discussions on Art. 15 after rather broad interpretation by the EU Court in *Elgafaji* case may tempt some MSs to seek the inclusion of more restrictive provisions. Notwithstanding, amendment of the QD as proposed above through three sub-proposals would be beneficial because:

Firstly, supplementing Art. 15 by paragraph 2 (that encompasses all international obligations of MSs that prevent expulsion) would contribute to the objective of QD to ensure minimum level of protection to those in need, as currently protection is not harmonised for all individuals who need it and to whom MSs grant protection under their national legislation. The disparity of national asylum legislations was recognised from the beginning as one of the main factors affecting asylum flows across the EU, thus harmonisation of this practice would likely have an impact of reducing the onward movements within the Union. Evidence suggests that the harmonisation achieved by the Directive so far has not had any effect on secondary movements. Multiple applications remained high - at 17% in 2006 and 16% in 2007 (Commission Impact Assessment, p. 14). The European Council even states in the Stockholm Programme that "common rules, as well as better and more coherent application of them, should prevent or reduce secondary movements within the EU, and increase mutual trust between Member States" (Stockholm Programme, p. 69). This would also ensure full compliance with ECHR (Art. 3 and 8), CAT, ICCPR and the observance of the best interests of the child principle. As we are entering a second phase of harmonization, it is important to consider that the whole CEAS is based on the full and inclusive application of the Geneva Convention, the obligations that flow from human rights instruments such as the ECHR, and the full respect of the rights enshrined in the Charter on Fundamental Rights (Summary Impact Assessment, p. 6). Furthermore, once the EU accedes to the ECHR as a party, it will be bound to implement Art. 3 without any limitations on national security or other grounds. There is already the practice among MSs to refer to international obligations: at least three MSs have national clauses that mention either international obligations in general (e.g. Finland "fulfil international obligations"; Germany "international law considerations") or ECHR in particular (e.g. UK "flagrant denial of any right guaranteed by the ECHR") (ECRE Report on Complementary Protection, Summary, p. 6). If general reference to international obligations of MSs may seem too broad and vague, reference to obligations under ECHR would be more concrete. Current provisions do not secure full compatibility with the evolving case law on human rights of the ECtHR and EU Court as well as refugee law standards. From the practical perspective in order to distinguish these individuals for the purpose of standard of treatment (if different from Art. 15(1) beneficiaries as proposed below), a special mark on the residence permit may be introduced (e.g. similarly to remark for planned "Blue Card" holders).

Secondly, by deleting recital 26 and the phrase "internal or international armed conflict" in Art. 15(c) a source of divergence both within the MSs and across the MSs would be eliminated and result in inclusion of persons who are in need of international protection, but who were denied protection because of unclarities/divergences raised by these provisions. In addition, since the current wording of Art. 15(c) is confusing elimination of "individual

threat” requirement would ensure that subsidiary protection covers victims of generalised violence (which would be covered by temporary protection in case of mass influx) and provide coherence with TPD. Lastly, slight amendment to Art. 17(1) and Art. 19 by linking exclusion/revocation of subsidiary protection with legal possibilities of expulsion based on international law would ensure effective implementation of MSs obligations under absolute prohibition of refoulement, since under ECHR these persons are considered in need of protection irrespective of their criminal or undesirable behaviour. This would in fact mean not to eliminate exclusion from subsidiary protection as such, but to apply it only when no concerns under international law are raised. Because there could still be persons who are excluded from refugee status/subsidiary protection and can be returned (mainly this will be possible in Art. 15(c) cases, but not in 15(a) and 15(b) cases, as they cover absolute obligations under human rights law).

In addition, from the financial point of view, expansion of the scope of subsidiary protection would not bear significant consequences, because 9 MSs already protect those persons under national law and many of them grant access to education, health care, employment and social welfare (ECRE Report on Complementary Protection, Summary, p.12).

If, following the adoption of the Recast Proposal status rights of refugees and beneficiaries of subsidiary protection become equal, the issue of standards of treatment to persons e.g. who were excluded for refugee status, but still protected under international human rights law in Art. 15(2) may need to be addressed given the sensitivity of the issue (e.g. there is clearly a preference of MSs (e.g. Germany) to have the possibility to restrict status rights in such cases, thus it might therefore be difficult to mobilise agreement of MSs on this point²²⁸). However, to address this concern, the MSs could react to this additional need of protection while granting the scope of rights (Art. 20(6-7)), e.g. by limiting the rights to basic access to education, health care, employment and social welfare only. Thus establishing a connection with Art. 20(7) may be considered in this context²²⁹. This may be possible since there are no international/regional obligations towards the treatment of these persons (except basic human rights), as it exists for refugees under the Refugee Convention or current beneficiaries of subsidiary protection under the QD. This would thus be in line with obligations under ECHR and the Charter on Fundamental Rights and would be beneficial for MSs that wish to exercise stricter control of these individuals, as well as ensure some minimum level of harmonisation of their treatment. Furthermore, currently QD provides for certain rights to persons whose “status”/residence rights are revoked (under Art. 14(6) - so called “toleration” status), thus this standard of treatment by granting similar rights to persons who are excluded from refugee status but enjoy international protection on the basis of human rights law, should be provided as a minimum. According to current practice, majority of MSs grant lower standards of social rights than beneficiaries of subsidiary protection, but at least Belgium and France places them on equal footing (ECRE Report on Complementary Protection, Summary, p. 9).

²²⁸ E.g. in Germany, if protection from expulsion is granted (in case of dangers threatening the whole population), the rights accorded to persons with subsidiary protection under QD are not (UNHCR study, p. 68).

²²⁹ E.g. stating that: “Within the limits set out by international obligations of Member States, they may reduce the benefits of this Chapter, granted to a person protected under Art. 15(2) of this Directive”.

TABLE 1. SUMMARY OF PROTECTION STATUS UNDER QUALIFICATION DIRECTIVE (as per current version of the Directive)

Persons to be protected under QD	Status Rights granted, relevance to right of asylum in the Charter	Corresponding Articles
1. Refugees under 1951 Convention	Full; right to asylum	Chapter VII
2. Persons facing serious harm due to:		
2.1. death penalty, etc.	Possibilities to limit; outside Art. 18 of the Charter	Chapter VII
2.2. torture, etc.	Possibilities to limit, outside Art. 18	Chapter VII
2.3. serious individual threat to life or person in conflict situation	Possibilities to limit, outside Art. 18	Chapter VII
3. Refugees whose status was revoked	Only rights mentioned in Art. 3, 4, 12, 31-33 of the Refugee Convention ("toleration status"), outside Art. 18	14(6)
4. Persons granted refugee status or subsidiary protection as a result of their own activities in country of asylum	Possibilities to reduce benefits, refugees entitled to right to asylum, subsidiary protection beneficiaries - outside Art. 18	20(6-7)

**TABLE 2. SUMMARY OF PROTECTION STATUS UNDER QUALIFICATION DIRECTIVE
(as per proposals of the authors of the present report)**

Persons to be protected under QD	Status Rights granted, relevance to right of asylum in the Charter	Corresponding Articles
1. Refugees under 1951 Convention	Full, right to asylum	Chapter VII
2. Persons facing serious harm due to:		Chapter VII
2.1. death penalty, etc.	Possibilities to limit/possibly full under Recast proposal, outside Art. 18	Chapter VII
2.2. torture, etc.	Possibilities to limit/possibly full under Recast proposal, outside Art. 18	Chapter VII
2.3. serious individual threat to life or person in conflict situation	Possibilities to limit/possibly full under Recast proposal, outside Art. 18	Chapter VII
2.4. Non-returnable individuals under international law (excluded from refugee status, family and child protection cases) (proposed Art. 15(2))	Possibilities to limit to basic access to education, health care, employment and social security, no right to asylum under Art. 18	20(7)
3. Refugees whose status was revoked (new Art. in Status part of QD or merge with Art. 21)	Only rights mentioned in Art. 3, 4, 12, 31-33 of the Refugee Convention, no right to asylum under Art. 18	New Art. in Q D or merge with Art. 21

KEY FINDINGS

1. Art. 5(2) QD comes close to requiring the „continuation of convictions“ as a condition for a well-founded fear or real risk, while it is not necessary under the Refugee Convention. Art. 5(3) provision may raise concern with regard to compliance with the Refugee Convention as the latter does not provide for any limitations of protection in cases when a person himself/herself creates the circumstances leading to protection needs.
2. While the Refugee Convention does not require state persecution, but requires state protection, Art. 7(1)(b) QD allows the possibility of non-state protection. According to Art. 7(2) of the Directive, it is enough that state or non-state actors take “reasonable steps to prevent the persecution”, regardless of whether those steps lead to effective protection of individuals or not.
3. The test in Art. 8(1) QD („the applicant can reasonably be expected to stay there“) is not specific at all. It gives complete discretion to the MSs and results in divergent interpretations of the concept across national jurisdictions. Art. 8(3) allows refusing protection despite technical obstacles to return might be evaluated as contrary to the Refugee Convention.
4. As the recognition of conscientious objection is not specifically mentioned in QD, the practice of MSs regarding persecution by prosecution of draft evaders varies a lot. Mentioning only excludable acts, the QD does not seem to cover other situations (i.e. conscientious objection in the absence of alternative to military service).
5. The QD rules on the nexus with the Refugee Convention grounds are overly restrictive, because Art. 9(3) excludes possible link between the Convention grounds and the lack of protection. It often results in state practice which is not in conformity with existing case law on the Refugee Convention.
6. Art. 10(1)(d) QD raises the issues related to cumulative application of „social perception“ and „protected characteristics“ requirements in social group test, and to non-presumption of social group from gender related aspects alone. The provisions are weak, they give a broad discretion to the MSs and involve the risk that persecution on the basis of social group (in particular on the basis of gender) will not be sufficiently considered.
7. Due to insufficient harmonisation of requirements for application of cessation of refugee status and subsidiary protection (Art. 11, 14(2), 16 and 19(4) QD) some Member States tend to examine the existence of current risk of persecution/harm rather than assessing the durability of eliminated risk along with availability of protection. This results in incorrect practical application of cessation thereby prematurely denying protection to persons who continue to be in need of it.
8. Confusion of exclusion/cessation clauses with exceptions to non-refoulement (Art. 14 (4-5) QD), as well as obligatory exclusion from subsidiary protection (Art. 17 (1), 19 QD) disregarding the absolute prohibition of refoulement poses a risk to compliance of MS practices with the Refugee Convention and the Treaty of

European Union, thereby undermining the objective of the Union to provide protection to those in need.

9. Not all persons who are non-removable under international obligations or Member State practice are covered by current wording of the subsidiary protection (Art. 15 QD). This undermines the EU's harmonisation objective and encourages onward movement within the EU.

RECOMMENDATIONS

1. Solution for refusal of protection when a person creates the circumstances leading to protection needs (Art. 5(2-3)): The second part of Art. 5(2) (starting from the words "in particular") and Art. 5(3) should be deleted.
2. Solution for the possibility of non-state protection and the notion of protection without the mandatory requirement of effectiveness (Art. 7(1-2)): In Art. 7(1) protection should be characterized as effective, durable and provided only by the state. Consequently, Art. 7(1)(b) should be deleted or limited only to de facto state authority. In Art. 7(2) the words "generally" and „inter alia" should be deleted, making the conditions of Art. 7(2) obligatory, not just exemplary.
3. Solution for internal protection alternative test, which is too general and not ensuring that the alternative is accessible (Art. 8): Art. 8(3) should be deleted as contrary to the Geneva Convention. Art. 8(1) should specify IPA criteria making reference to Art. 7 criteria (i.e., providing effective and durable protection; operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection); making reference to the Salah Sheekh vs. Netherlands judgment criteria (i.e., he or she can safely and legally travel, gain admittance and settle); adding the word „access" which is important element of the IPA test; and deleting the word „stay" which could suggest a backward view contrary to the Refugee Convention.
4. Solution for prosecution for conscientious objection, which is not covered by persecution as a basis for refugee status (Art. 9(2)(e)): Art. 9(2)(e) should be amended to include refusal to perform military service (and not only in a conflict) due to conscientious objection as a possible case of persecution.
5. Solution for possible nexus between lack of protection and persecution grounds not included (Art. 9(3)): Art. 9(3) should be amended by adding a link between lack of protection and persecution grounds as a possible nexus in refugee definition.
6. Solution for cumulative test of social group and weak reference to gender related aspects (Art. 10(1)(d)): Art. 10(1)(d) should be amended by stating that „social perception" and „protected characteristics" requirements are alternative; and that gender related aspects are in particular relevant for both social group tests.
7. Solution for cessation of refugee status and subsidiary protection in relation to denial of protection due to insufficient harmonisation (Art. 11, 14(2), 16, 19(4)): requirements of cessation of refugee status and subsidiary protection notion should be clarified by adding a definition of cessation in Art. 2, which includes inter alia the requirement to assess the previous risk, the durability of its elimination, any new risks and the availability of effective protection, as well as reinforces the difference between the right to protection and corresponding residence permit.
8. Solution for denial of protection because exclusion, cessation and revocation clauses are beyond permitted limits of MSs obligations (Art. 14 (4-5), 17 (1), 19): In order to eliminate confusion and ensure correct implementation of the Refugee

Convention notions in the MSs, firstly the concept of exclusion and revocation should be defined in Art. 2, Art. 14(4) and (5) should be defined clearly as termination of "residence status" (or "asylum" in terms of Art. 18 of the EU Charter) and these provisions plus Art. 14(6) should be moved to Status part of QD. Observance of MSs obligations under human rights law may only be ensured if a requirement is introduced to apply exclusion/revocation only when there is no issue of absolute prohibition of refoulement based on the circumstances of the case.

9. Solution for subsidiary protection in order to align its' scope with international obligations (Art. 15): Proposed solution comprises three sub-proposals: (a) Art. 15 should be supplemented with paragraph 2 requesting MSs to grant subsidiary protection also in cases when international obligations of MSs prevent expulsion; (b) Recital 26 should be deleted, as well as the terms "individual threat" and "internal or international armed conflict" in Art. 15(c). (c) Art. 17(1) and 19 shall be amended to state that exclusion from subsidiary protection should only be considered when there is no issue of absolute prohibition of refoulement based on the circumstances of the case.

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CHAPTER 3: THE STATUS OF PROTECTED PERSONS

INTRODUCTION

Two essential issues are dealt with in Chapter III related to the Status of Protected Persons: the detention of asylum seekers and the taking into account of the situation of vulnerable asylum seekers and vulnerable refugees with special needs. These two issues are analysed in a horizontal way through the various relevant legal instruments of the EU. The reception conditions directive, the asylum procedure directive and the Dublin regulation make rules for asylum seekers' detention. The qualification directive applies to the second issue as well. The analysis focuses mainly on the content of the second generation instruments that is the texts proposed by the Commission. The valuation of the Commission proposals can nevertheless imply an examination of the first generation instruments (texts currently into force). In addition, mentioning the texts proposed by the Parliament and/or the Council proves sometimes useful when these authorities have already come to a conclusion about the texts of the Commission.

As shown in the following considerations, the legal debate relating to the detention of asylum seekers does not question the principle of the detention itself but the substantive conditions of the detention, the procedural guarantees and the framing of the conditions of detention. The substantive conditions raise the question of the reasons for detention. In this respect, the reception directive Commission proposal differs from the directive in force since it restricts the deprivation of freedom to four cases only. On the contrary, the current directive leaves an important margin of appreciation to the Member States. In that, the Commission proposal is likely to contribute to a better Community harmonization, objective sought within the framework of the 1st phase of the CEAS.

The reasons for detention suggested by the Commission do not cause any problem taking into consideration the international law. In other respect the Council has added a fifth reason for detention. This raises the issue of a proper balance to be found between the right for the states to fight illegal immigration and the asylum seekers' right to freedom.

Being of vulnerable asylum seekers and vulnerable refugees with special needs, the second generation instruments also differ from the instruments in force insofar as the texts proposed by the Commission imposes on the States, more explicitly and more generally, to take into account the situation of these people. Nevertheless, the reception conditions directive Commission proposal raises a problem of concept regarding the determination of the people and the special needs one intends to meet. In both the other texts relating to asylum seekers (asylum procedure directive and Dublin regulation) the Commission obliges the Member States to take into account the situation of vulnerable people with special needs. Nevertheless the Commission does not force the States to carry out the identification of these people. However, in the absence of express provisions imposing on the States the installation of mechanisms of identification, the positive measures set in favour of these applicants are likely to remain dead letter. Moreover, the introduction of new provisions relating to vulnerable asylum seekers in the asylum procedure directive and the Dublin regulation raises the question of how these provisions will hang together well and no forgetting the provisions of the reception directive. No link between these texts has been established.

On the border between the above mentioned issues, a third one is tackled: the detention of vulnerable asylum seekers with special needs. A specific provision has been introduced by

the Commission into the reception directive. The purpose of this provision is to avoid the deprivation of freedom of people whose physical or mental health condition could be seriously affected following a placement in detention. If the text of the Council maintains this principle, it has however removed the mechanism of identification of these people initially envisaged by the Commission. This modification is likely to compromise the effective implementation of the stated principle.

SECTION I: DETENTION OF ASYLUM SEEKERS

1. INTRODUCTION

Before carrying out the transversal analysis of the contents of the second generation instruments with regard to the detention of asylum seekers, it is essential to briefly point out the principles which prevail on the matter in pursuance of the Geneva Convention, the international and regional framework of human rights and the jurisprudence of the Court of justice of the European Union mainly.

1.1. The Principle itself of the detention of asylum seekers

If one can underline, as Professor Teitgen-Colly²³⁰ does « la banalisation de la privation de liberté » des étrangers -au nombre desquels figurent de nombreux demandeurs d'asile- en tant qu'« instrument normal de contrôle des flux migratoires » [the fact that loss of freedom has become commonplace for foreigners - including many asylum applicants - as the instrument used to control migratory flux]²³¹ one must agree that from a legal point of view asylum seekers can be subjected to detention. The main relevant international standards are to be found in article 31 of the Geneva Convention (GC), article 9 of the International Covenant on Civil and Political Rights (ICCPR), article 5, § 1 of the European Convention on Human Rights (ECHR) and article 6 of the European Charter of Fundamental Rights. The case of law relating to them and the Court of Justice of the European Union case of law must also be taken into account.

1.1.1. Article 31 of the Geneva Convention

Article 31 § 1 of the Geneva Convention states the principle that "Contracting States shall not impose penalties on refugees on account of their illegal entry or presence [because] they have entered or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence [and in so far as they come] directly from a territory where their life or freedom was threatened in the sense of article 1 "of the Geneva Convention. Although article 31 refers to the "refugees" this provision applies to asylum seekers as well²³².

United Nations High Commissioner for Refugees (here after UNHCR) admits first of all that this provision does not prohibit a provisional detention "when necessary and if it is limited to the purposes of preliminary investigation"²³³.

230 C. Teitgen-Colly, *La détention des Etrangers et les droits de l'homme, Mondialisation, migration et droit de l'homme : le droit international en question*, Bruylant, Bruxelles, 2007, p. 576 et 577. Hereafter : C. Teitgen-Colly.

231 Non official translation.

232 UNHCR, *La protection des réfugiés en droit international*, Sous la direction de Erik Feller, Volker Türk et Frances Nicholson, Larcier, Bruxelles, 2008, p. 232. Hereafter: UNHCR : La protection des réfugiés.

233 UNHCR, *La protection des Réfugiés*, Article 31, § 10, p. 259.

It also recognizes that the States retain « considerable discretion, however, as to the measures to be applied pending determination of status, and in relation to the treatment of those who, for whatever reason, are considered not to fall within the terms of the Article »²³⁴. The assertion “for a reason or another” for instance refers to the situation of asylum seekers who would not meet the conditions given in article 31 § 1 namely: to arrive directly from a territory where their life or their freedom was threatened, to have valid reasons justifying their irregular entry or presence and to have presented themselves without delay to the authorities²³⁵.

Article 31 § 1 applies only to certain cases. Nevertheless § 2 of this provision implies that after any acceptable initial period of detention, the contracting States shall not apply restrictions other than those which are necessary to the movements of refugees who, because of their irregular entry or stay, are on the territory without authorization.

In 1986, the UNHCR Executive Committee, after having pointed out article 31 of the Geneva Convention, “expressed the opinion that in view of the hardship which it involves, detention should normally be avoided. If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order”²³⁶. These principles were reiterated and developed by the UNHCR into 1999²³⁷. The range of these principles will be examined in Title 2 of this SECTION I.

Professor Goodwin-Gill considers for its part that « The 1951 Convention explicitly acknowledges that States retain the power to limit the freedom of movement of refugees, for example, in exceptional circumstances, in the interests of national security, or if necessary after illegal entry. Article 31's non-penalization provision applies in some but not all cases, but Article 31(2) implies that, after any permissible initial period of detention, States may only impose restrictions on movement which are ‘necessary’, for example, on security grounds or in the special circumstances of a mass influx, although restrictions are generally to be applied only until status is regularized or admission obtained into another country»²³⁸.

Consequently, under the terms of article 31 § 2 of the Geneva Convention, limiting the freedom of movement of an asylum seeker after any permissible initial period of detention is not excluded as such in so far as this limitation of freedom is “necessary”²³⁹.

1.1.2. Article 9, § 1 of the International Covenant on Civil and Political Rights

Article 9 § 1 states that « Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law ».

²³⁴ UNHCR, *La protection des Réfugiés*, Article 31, p. 262.

²³⁵ On the interpretation of these conditions see : UNHCR, *La protection des Réfugiés*, Article 31, pages 227 à 233, 242, 243, et 257 à 259.

²³⁶ UNHCR, Executive Committee, Conclusions 44, recital b). Hereafter: UNHCR, Conclusions 44.

²³⁷ UNHCR, *Guidelines on applicable criteria and standards relating to the detention of asylum seekers*, Geneva 1999. Hereafter: UNHCR, Guidelines.

²³⁸ Goodwin-Gill, *Article 31 of the 1951 Convention relating to the status of refugee: non-penalization, detention and protection*, 2001, § 121, p. 37. Hereafter: Goodwin-Gill, Article 31.

²³⁹ This condition of necessity will be addressed in Title 2.

In a case²⁴⁰ where the Human Rights Committee (HRC) was to come to a conclusion about the legality of the detention of an asylum seeker within the framework of article 9 § 1 of the ICCPR, it agreed "that there is no basis for the author's claim that it is per se arbitrary to detain individuals requesting asylum. Nor can it find any support for the contention that there is a rule of customary international law which would render all such detention arbitrary" (§ 9. 3).

Thus, article 9 § 1 of the Pact does not exclude the principle of the detention of an asylum seeker as such.

1.1.3. Article 5 § 1 of the European Convention on Human Rights

Article 5 § 1 of the ECHR establishes the right to liberty and security of any person as well. Nobody can be deprived of the right to liberty and security of person "except in the following cases and in accordance with a procedure prescribed by law".

The restrictive enumeration of the cases follows where a person can be arrested or held. Being the detention of asylum seekers, three of these cases must be mentioned specifically - the indent b), 2nd branch and the indent f), first and second branches of article 5 § 1:

- b) The lawful arrest or detention of a person in order to secure the fulfilment of any obligation prescribed by law;
- f) The lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country (1st branch) or of a person against whom action is being taken with a view to deportation or extradition (2nd branch).

It results from the decisions of the European Court of Human rights²⁴¹ (ECtHR) that the principle itself of the detention of an asylum seeker is not included as such according to the above mentioned provision as well.

1.1.4. Jurisprudence of the Court of Justice of the European Union

In a judgment delivered on November 30, 2009 (Kadzoef)²⁴², the Court of justice of the European Union admits very clearly for its part the principle of the detention²⁴³ of asylum seekers. It is interesting to take a close look at this judgment delivered within the framework of a claim for preliminary ruling, insofar as the Court underlines the fact that detention of an asylum seeker (in particular under the reception directive and the asylum procedure directive) and detention for the purpose of removal fall under different legal rules.

The principal relevant facts of the case that was subjected to the Court are the following: on October 21st 2006 a third-country national, Mr. Kadzoef, was arrested by Bulgarian law enforcement near the border with Turkey. He had no identity documents. By decree of 22nd October 2006 of the competent police department, a coercive administrative measure of deportation was imposed on him. He was placed in the detention centre on 3rd November 2006, to be detained until it was possible to execute the decree, that is, until

²⁴⁰ HRC, *A. v. Australia*, Communication n° 560/1993, 30 April 1997, UN Doc. CCPR/C/59/D/560/1993. Hereafter: HRC, *A.*

²⁴¹ Among other: ECtHR, *Saadi v. United Kingdom*, Application n° 13229/03, Judgment 29 January 2008. Hereafter ECtHR, *Saadi*.

²⁴² CJEU, C-357/09, *Kadzoef v. Bulgaria*, Judgment 30 November 2009. Hereafter: CJEU, *Kadzoef*.

²⁴³ The term detention is defined in the reception directive Commission proposal as in the reception directive in force: « *confinement of an asylum seeker by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement* »: article 2, k) of the reception directive in force and article 2, i) of the Commission proposal.

documents were obtained enabling him to travel abroad. On 31st May 2007, while he was detained in the detention centre, Mr. Kadzoev applied for refugee status. The action he brought against the refusal of the Bulgarian administrative authorities to grant that application was dismissed by judgement on 9th October 2007. On 21st March 2008 he made a second application for asylum, but withdrew it on 2nd April 2008. On 24th March 2009 he made a third application for asylum. By decision of 10th July 2009 his asylum application is rejected. No appeal lies against that decision. During all this time Mr. Kadzoev remains held in the temporary detention.

One of the questions put to the Court is that to know if "when calculating the period of detention for the purpose of removal under Article 15(5) and (6) of Directive 2008/115 [return directive], the period must be included during which the execution of the removal decision was suspended because of the examination of an application for asylum by a third-country national, where, during the procedure relating to that application, he has remained in the detention centre."

In its judgment, the Court recalls first of all the terms of recital (9) of the return directive, those of article 7 § 3 of the reception directive²⁴⁴ and those of article 18 of the asylum procedure directive²⁴⁵. It also mentions judicial appeals - made possible by the reception and asylum procedure directives - against a decision of detention taken under the terms of the above mentioned relevant provisions of these directives. On the basis of these provisions, the Court has concluded that "Detention for the purpose of removal governed by Directive 2008/115 [return directive] and detention of an asylum seeker in particular under Directives 2003/9 [reception directive] and 2005/85 [asylum procedure directive] and the applicable national provisions thus fall under different legal rules » (§ 45).

According to the Court, the claimant stayed in the detention centre during the period in which he was an asylum seeker therefore the decision of detention had to be based on provisions of the Community and national law concerning asylum seekers instead of provisions of the Community and national law related to returning illegally staying third-country nationals. It concludes from it that the preliminary prejudicial question should be given an affirmative answer and that therefore "...a period during which a person has been held in a detention centre on the basis of a decision taken pursuant to the provisions of national and Community law concerning asylum seekers may not be regarded as detention for the purpose of removal within the meaning of Article 15 of Directive 2008/115 [return directive] » (§ 48).

However, the Court specifies that this conclusion is valid only in so far as one decision on the claimant placement in the detention centre was taken in the context of the procedures opened following his applications for asylum. It belongs to the qualified national court to check if such is the case and to determine whether the claimant stay « in the detention centre during the period in which he was an asylum seeker complied with the conditions laid down by the provisions of Community and national law concerning asylum seekers » (§ 46). On the other hand if the detention remained based on the previous national rules on detention for the purpose of removal or on the provisions of return Directive, the period of detention corresponding to the period during which those asylum procedures were under way would have to be taken into account in calculating the period of detention for the purpose of removal mentioned in article 15(5) and (6) of return Directive (§ 47).

²⁴⁴ That Member States may confine asylum seekers "... in accordance with national law ..." "... when it proves necessary for example for legal reasons or reasons of public order".

²⁴⁵ "Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum".

If the Court admits the principle itself of detention of asylum seekers, according to it, this detention must be based on specific provisions of Community and national law concerning asylum seekers and cannot be based on the provisions relating to detention for purposes of removal (return directive).

In accordance with recital (9) of the return directive²⁴⁶, on the contrary, this position does not apply however with regard to asylum seekers whose request was rejected in first instance and with regard to those whose right of stay ended, both of them not being authorized any more to remain on the territory of the Member States. The first assumption also includes applicants who made an appeal against the negative decision when under national law this appeal has no suspensive effect since in this case, in spite of the recourse, the applicant is not authorized any more to remain on the territory of the State²⁴⁷. This applicant can be subjected to the legal mode of detention for the purpose of removal (return directive).

Concerning the right of stay it can be reminded that article 7 § 1 of the asylum procedure directive in force - which has not been amended on that specific point by the directive Commission proposal (article 8 § 1), allows the asylum seekers to remain on the territory of the State of reception until the authority comes to a conclusion about its request in first instance. It should be stressed that this authorization to remain neither is equivalent to a residence permit nor is a way to make a possible illegal entry or a possible illegal stay become a legal entry or stay²⁴⁸.

1.1.5. Conclusion related to the principle itself of the detention

Thus, the legal debate relating to the detention of asylum seekers does not question the principle itself of the detention but the substantive conditions of the detention (1. 2), the procedural guarantees (1. 3) and the framing of the conditions of detention (1. 4). These three aspects are briefly pointed out below.

1.2. The substantive conditions of the detention

1.2.1. The ECHR and the ICCPR

According to article 9 § 1 of the ICCPR detention can not be "arbitrary" and it can be applied only "on such grounds and in accordance with such procedure as are established by law". Meanwhile article 5 § 1 of the ECHR states that « No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law » and that « Everyone has the right to (...) security of person" These two provisions set the substantive conditions of deprivation of liberty: the legality and the lawfulness.

1. Conditions of legality

The notion of legal means « in accordance with a procedure prescribed by law » set in article 5 § 1 requires that the detention is based on a legal basis in domestic law and that this latter conforms to the Convention, including the general principles expressed or implied

246 *"...a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force".*

247 See infra Title 2. 2. 3, 2°.

248 See infra Title 2. 2. 3, 2°.

therein²⁴⁹. Such compliance commands inter alia that the deprivation of freedom corresponds to one of the 6 "cases" specifically enumerated in § 1. This exhaustive list must be given a narrow interpretation²⁵⁰. Compliance with "legal means" also implies with the quality of the law.

According to the Court, quality in this sense implies that where a national law authorises deprivation of liberty -especially in respect of an asylum-seeker - it must be sufficiently accessible and precise, and must prescribe adequate legal protection in domestic law against all risk of arbitrariness²⁵¹.

That implies that the domestic law that authorizes the deprivation of liberty shall contain provisions providing for access to legal, humanitarian and social assistance and must also be amenable to judicial review²⁵². This also implies that the law meets the test of "being provided for". That is not the case if the legislation does not specify whether the detention of a person receiving a temporary suspension of a deportation order may take place or not²⁵³.

Unlike article 5 § 1 of the ECHR, article 9 § 1 of the ICCPR does not enumerate the reasons why a person may be detained. Nevertheless the Covenant does require the motive of detention to be based on a domestic law legal basis²⁵⁴.

2. Conditions of lawfulness

Both the ECtHR and the HRC have made lawfulness a substantive condition for any deprivation of liberty.

According to the ECtHR « Where the "lawfulness" of detention is in issue, (...) compliance with national law is not, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness»²⁵⁵. The condition of absence of arbitrary detention is assessed differently depending on the type of detention at issue.

For the ground mentioned in indent b), second branch of article 5 § 1 - arrest or detention in order to secure the fulfilment of any obligation prescribed by law – as well as for the ground mentioned in indent f), first and second branches of this provision - the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the territory or of a person against whom action is being taken with a view to deportation or extradition – absence of arbitrariness implies:

1. That detention has been implemented honestly and without deception.
2. Detention must be closely related to the purpose of the restrictions exhaustively authorized by article 5 § 1.

249 ECtHR, *Winterwerp v. The Netherlands*, Application n° 6301/73, Judgment 24 October 1979, § 45. Hereafter: ECtHR, *Winterwerp*.

250 ECHR, *Winterwerp*, § 37.

251 ECtHR, *Amuur v. France*, Application n° 19776/92, Judgment 25 June 1996, §§ 50 et 53. Hereafter: ECtHR, *Amuur*.

252 ECtHR, *Amuur*, § 53.

253 ECtHR, *Mohd v. Greece*, Application n°11919/03, Judgment 27 April 2006, § 24. Hereafter: ECtHR, *Mohd*.

254 HRC, *Jalloh v. The Netherlands*, Communication n°794/1998, 15 April 2002, UN Doc. CCPR/C/74/D/794/1998.

255 ECtHR, *Saadi*, § 67.

3. The length of detention should not exceed that reasonably required for the purpose pursued.
4. There is some connection between the reason for the deprivation of liberty and the place and conditions of detention. They must be adequate since, for asylum seekers in particular, the deprivation of liberty "is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country"²⁵⁶.

As regards indent b) above mentioned the Court considers that the notion of arbitrariness « also includes an assessment whether detention was necessary to achieve the stated aim. The detention of an individual is such a serious measure that it is justified only as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained »²⁵⁷.

This necessity test applied under the principle excluding any arbitrariness is not retained by the Court when supervising a detention based on indent f) above mentioned²⁵⁸.

For its part, the Human Rights Committee considers "that the notion of "arbitrariness" must not be equated with "against the law" but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context"²⁵⁹.

The Committee does not explicitly accept the necessity test as described above (the detention may be imposed only as a last resort when other less severe measures have been considered and found inadequate to safeguard individual or public interest requiring detention). It refers to a necessity in all respects by citing examples that do not - as such - seem to require the consideration of less severe measures. In any event, it should be noted that the HRC "communications" are not legally binding²⁶⁰.

1.2.2. The Geneva Convention

As a reminder, Article 31 § 2 of the Geneva Convention authorizes restrictions to the movement of refugees who, on account of their illegal entry or presence, enter or are present in their territory without authorization, only if they are necessary. The provision fails to define the concept of necessity.

For Professor Carlier²⁶¹ who refers to the detailed examination of the preparatory work for the disposition by James Hathaway, the concept must be understood as imposing a test of necessity in the sense of an obligation "to rely on less intrusive restrictions on freedom of movement, unless detention is clearly required"²⁶². A more nuanced view is expressed by Professor Hailbronner who insists on the absence of any necessity criteria and on the non-

256 ECtHR, *Amuur*, § 43. See also for the 4 conditions: ECtHR, *Saadi*, §§ 69, 70 and 74 and the Judgments cited.

257 ECtHR, *Saadi*, § 70 and the Judgments cited.

258 ECtHR, *Saadi*, §§ 72 and 73 and the Judgments cited.

259 HRC, *A.*, § 9.2.

260 Frédéric Sudre, *Droit européen et international des droits de l'homme*, PUF, Paris, 2008, §§ 368 et 369, p. 772 à 776.

261 J-Y Carlier, *L'accès au territoire et à la détention de l'étranger demandeur d'asile*, Revue trimestrielle des droits de l'homme, Juillet 2009, p. 806. Hereafter: J-Y Carlier.

262 JC Hathaway, *The right of refugees under International Law*, Cambridge University Press, p. 429 mentioned by par J-Y Carlier, p. 806.

binding aspect of the interpretative "resolutions and recommendations" of Geneva Convention²⁶³ provisions in international law.

1.2.3. The European Charter of Fundamental Rights

Article 6 of the Charter enshrines the right to liberty and security. The Praesidium²⁶⁴ of the Convention states that the rights provided for in article 6 correspond to those guaranteed by article 5 ECHR. It follows that the meaning and scope of Article 6, including the limitations which may legitimately be imposed are - in accordance with article 52 § 3 of the Charter - the same as those conferred by the ECHR, including the jurisprudence Court - being specified that this provision does not preclude the right of the Union to grant a more extensive protection (article 52 § 3 in fine). This last assertion can guarantee the autonomy of the Court of Justice of the European Union (the Praesidium 's explanations).

1.3. Procedural guarantees

1.3.1. The right to information

Article 5 § 2 of the ECHR states that "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him".

As for article 9 § 2 of the ICCPR it states that "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest (...)".

The ECtHR has clarified the scope of the "elementary safeguard" prescribed by article 5 § 2, which applies both to persons deprived of liberty by arrest or by detention. This elementary safeguard requires authorities to inform any person arrested of the legal and factual grounds for his detention, in simple language accessible to her and promptly. To assess whether the content and the promptness conveyed were sufficient one must pay attention to the special features of each Court case²⁶⁵ and the Court has concluded there is no violation of Article 5 § 2 when at the time of their arrest the applicants have received the services of an interpreter, explaining - in a simple and non-technical language that he can understand - the content of verbal and written communications which they received, in particular the document ordering their arrest (§ 52). The communication of the essential legal and factual grounds for his detention must allow the person, where appropriate, to take proceedings under of article 5 § 4 of the Convention. For this purpose, this communication may, depending on the special features of the case require free legal assistance²⁶⁶. In others respects, in the Saadi case, mentioned above, the Court held that a period of 76 hours did not meet the requirement to provide information "promptly" (§§ 84 and 85).

For its part the Human Rights Committee has concluded that the fact the reasons motivating his arrest²⁶⁷ had not been communicated to the complainant at the time of his arrest violated article 9 § 2 of the ICCPR.

263 K. Hailbronner, *Detention of Asylum seekers*, European Journal of Migration and Law 9, 2007, p. 163. Hereafter : K. Hailbronner.

264 UE, Praesidium EC's explanations, Conv 828/1/03. Hereafter: Praesidium 's explanations.

265 ECtHR, *Conka v. Belgium*, Application n° 51564/99, Judgment 5 February 2002, § 50. Hereafter: ECtHR, *Conka*.

266 For example because the person deprived of his liberty was unfamiliar with the language and the case was complex: European Commission for Human Rights, *Zamir v. United Kingdom*, Report 11 October 1983.

267 HRC, *Wilson c. Philippines*, Communication n°868/1999, 11 November 2003, UN Doc. CCRP/C/79/D/868/1999, § 7.5.

1.3.2. The right to judicial protection

1. The ECHR and the ICCPR

This right is prescribed by article 5 § 4 of the ECHR which provides that "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful" and by article 9 § 4 of the Covenant in terms almost identical: the requirement of a "speediness" in the ECHR is replaced by the requirement of "without delay".

In determining whether the requirement for "speediness" is fulfilled, the European Court of Human Rights states that the deadline cannot be fixed in the abstract, but must be assessed in light of the circumstances of each case²⁶⁸. It requires in any event a guarantee of rapidity from the states: both access to judicial review and the decision of the court must be done quickly. In *Conka v. Belgium supra*, the Court further considers that the court must be independent and impartial, the procedure adversarial and the remedy effective and accessible that is to say that the existence of the remedy must have a sufficient degree of certainty and the applicant must be given a realistic possibility of using the remedy (§ 46). This is not the case when information about the available remedies was in tiny characters on the document presented at the time of arrest at the police station and in a language that the applicants did not understand when only one interpreter (§ 44 and 45) but no other form of legal assistance was available to assist dozens of families. The requirement of an adversarial procedure requires that the person deprived of liberty shall be heard either in person or, where necessary, through some form of representation²⁶⁹.

The review of the legality of detention must be assessed both in terms of compliance with substantive rules of detention (as defined in Title 1. 2) and in terms of procedure rules. The court must also be empowered to order the release of the person when the detention is deemed illegal. In addition, article 5 § 4 also requires that any continued detention is subject to judicial review at regular interval as safeguard against the arbitrary²⁷⁰.

2. The European Charter of Fundamental Rights

Article 47 of the European Charter establishes the right to an effective remedy before a court to any person whose rights and freedoms guaranteed by EU law have been violated. The scope of Article 47 is not limited to controversial points and obligations related to civil rights and the merits of any criminal charge as article 6 of the ECHR is. It applies when rights guaranteed by the law of the union are involved. Everyone is entitled to:

- the right to a fair and public hearing in a reasonable time,
- by an independent and impartial tribunal previously established by law,
- the right of being advised, defended and represented.

According to the last indent of article 47 legal aid should also be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.

268 ECtHR, *Sanchez-Reisse v Switzerland*, Application n° 9862/82, Judgment 21 October 1986, § 52.

269 ECtHR, *Megyeri v. Germany*, Application n° 13770/88, Judgment 12 May 1992, § 22. Hereafter: ECtHR, *Megyeri*.

270 ECtHR, *Shamsa v. Poland*, Application n° 45355/99 and 45357/99, Judgment 27 November 2003, § 59; ECtHR, *Megyeri*, § 22.

The explanations of the Praesidium of the Convention state that - according to the jurisprudence of the European Court of Human Rights - a legal aid should be granted where the lack of it would make it impossible to guarantee an effective remedy²⁷¹.

1.4. The framework of conditions of detention

It has already been stated - in Title 1.2.1, 2^o mentioned before - that the lawfulness of the detention required a certain link between the ground for the deprivation of liberty and the place and conditions of detention. These should be adequate because, regarding in particular asylum seekers, deprivation of liberty "is not applicable to those who have committed crimes but to aliens who, often fearing for their lives, have fled from their own country"²⁷². Article 3 of the ECHR and article 4 of the European Charter enshrine the prohibition of torture and inhuman or degrading treatment or punishment. The same ban is enshrined in article 7 of the ICCPR establishing the prohibition of cruel punishment or treatment. The ECHR considers that it follows from the non-derogatory right prohibition of subjecting prisoners "to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention"²⁷³.

As such, are prohibited absolute isolation, humiliating body searches, unhealthy cells or certain conditions of confinement. These conditions of detention must be respected regardless of the place imprisonment²⁷⁴. One must also mention the right to physical integrity and mental health enshrined in article 3 § 1 of the European Charter. Professor Teitgen-Colly recalls that "pèsent aussi sur les Etats des obligations positives comme celle de protéger la vie des détenus qui se décline en des obligations de soins médicaux, de prévention du suicide, de protection des plus vulnérables (...) [the States have positive obligations towards inmates as obligations of medical care, suicide prevention, protection of the most vulnerable (...)]"²⁷⁵.

It is clear that with regard to the detention of asylum seekers these principles are not respected in practice in a number of Member States. There are many various deficiencies and/or breaches in this field²⁷⁶. In his study²⁷⁷ on the assessment of the implementation of the reception directive in the Member States, the Odysseus Academic Network has also heighten the fact that a number of rights conferred by the directive were not effective for detained asylum seekers. The problem is partly due to the fact that 9 Member States consider that the directive does not apply in centres where asylum seekers are detained (on this issue see below the Title 9).

It is important to check the compatibility of legal community standards with international standards on human rights. At the same time, however, it is necessary to ensure that these EU and international standards are not only enshrined in the national legal frameworks but are also effective in practice.

The legal principles that prevail in matter of detention under the Geneva Convention, the

271 Regarding article 6 ECHR: ECtHR, *Airey c. Ireland*, Application n° 6289/73, Judgment 9 October 1979.

272 ECtHR, *Amuur*, § 43.

273 ECtHR, *Kudla v. Poland*, Application n° 3021/96, Judgment 26 October 2000, § 94.

274 C. Teitgen-Colly, p. 615 et 616.

275 C. Teitgen-Colly, p. 615: non official translation

276 Among other: Report of the European Parliament, IP/C/LIBE/IC/2006-181.

277 Study on the conformity checking of the transposition by member States of 10 EC directives in the sector of asylum and immigration" done for DG JIS of the European Commission End 2007. Q. 33 G, p. 107 et 33 J, p 109 et 110. Hereafter: Odysseus Report.

international and regional framework of human rights and the jurisprudence of the CJEU have been laid. It is now of paramount importance to carry out the analysis relating to the issue of asylum seekers' detention in the light of these principles.

2. ARTICLE 8 OF THE RECEPTION DIRECTIVE PROPOSAL

PROBLEM: the grounds for detention²⁷⁸ of asylum seekers do not generally create a problem in terms of international law but which nevertheless give way to some interpretation and /or are unclear. Article 8 § 2 of the reception directive Commission proposal contains four comprehensive reasons justifying the detention of an asylum seeker. In doing so the Commission proposal contrasts with article 7 § 3 of the reception directive in force which does not lay down in an exhaustive way the grounds justifying the detention of asylum seekers. The Commission proposal is likely to contribute to a better Community harmonization aimed at under the first phase of the Common European Asylum System (CEAS). Article 7 § 3 did not contribute to achieve this purpose. The four motives for detention proposed by the Commission do not generally pose a problem in terms of international law however some give way to interpretation and/or are unclear:

- Title 2. 2. 3 below: About the ground based on article 8 § 2, c): "in the context of a procedure, to decide on his right to enter the Territory ": the wording casts doubt on the situations it refers to border procedures (article 37 of the asylum procedure directive proposal) and/or procedure designed to determine the right to enter the territory while the asylum seeker is already in the territory of the State, outside a border or transit zone, but was not allowed to enter the territory and/or another situation?

- Title 2. 2. 5 below: About the ground based on article 8 § 2, indent b): "in order to determine the elements on which his application for asylum is based which in other circumstances could be lost ": the formulation "to determine the elements on which his application for asylum is based "is vague, the formulation "and in other circumstances could be lost" is unclear.

- Title 2. 2. 6 below: About the ground based on article 8 § 2, indent d) "when protection of national security and public order so requires»: the conjunction "and" is inadequate since the notions of national security and public order are different.

2.1. Specific justification, individual examination and necessity test

Before examining the four grounds for detention proposed by the Commission, one must emphasize first the fact that article 8 of the Commission text:

- Requires specific justification and an individual examination.
- Requires a necessity test.

2.1.1. Specific justification and individual examination

Article 8 § 1 incorporates the principle stated in article 22 § 1 of the asylum procedure directive Commission proposal (principle already enshrined in article 18 § 1 of the asylum

²⁷⁸ The term detention is defined in the reception directive Commission proposal as in the reception directive in force: « *confinement of an asylum seeker by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement* »: article 2, k of the reception directive in force and article 2, i of the Commission proposal.

procedure directive in force): "Member States shall not hold a person in detention for the sole reason that he/she is an applicant for international protection". Recalling this principle is recalling in another way the principle that detention requires a specific justification and an individual examination. Article 8 § 2 also clearly lays down the requirement to conduct "an individual assessment of each case".

2.1.2. Necessity test

Article 8 § 2 provides that Member States can hold an asylum seeker only "when it proves necessary" and provided that "other less coercive measures cannot be applied effectively". This wording states the requirement of a necessity test clearly - as described in the above Title 1. 2. 1. This requirement has a general significance: whatever motive the detention of asylum seekers is based a necessity test should be carried out. In this the text of the Commission contrasts with the jurisprudence of the ECtHR²⁷⁹. Article 8 § 3 of the directive Commission proposal also provides the corollary to the requirement of the necessity test by requiring Member States to enact alternatives to detention.

2.2. Review of the grounds for detention stipulated in Article 8§2

2.2.1. Comprehensive grounds justifying the detention

Article 8 § 2 of the Commission proposal contrasts with article 7 § 3 of the directive into force since it allows detention only in four cases exhaustively listed. As a reminder, article 7 § 3 of the reception directive allows Member States to detain asylum seekers "... in accordance with national law ...", "When it proves necessary, for example for legal reasons or reasons of public order (...)". No further explanation is stipulated. This incomplete provision leaves considerable discretion to Member States and for that reason led to a great disparity in detention practices within the Union.

The Odysseus report has underlined how numerous and divergent the motives for detention of asylum seekers were within members States²⁸⁰. In some States the detention is allowed only in one circumstance while in other States the grounds for detention are multiple. It is obvious that such a diversity of practices do not contribute to harmonize national legal frameworks through minimum standards - a Community harmonization aimed at under the first phase of the Common European Asylum System.

In this sense, article 8 § 2 of the reception directive Commission proposal contributes to a better community harmonization. A debate relating to the choice of grounds is however open. Indeed, as it will be discussed in Title 4 below, the Council proposes to add a fifth reason for detention to which the Commission is opposed²⁸¹.

2.2.2. The four motives exhaustively listed

According to article 8 § 2 an applicant may only be detained to a particular place:

- a. In order to determine, ascertain or verify his identity or nationality;
- b. In order to determine the elements on which his application for asylum is based which in other circumstances could be lost;
- c. In the context of a procedure, to decide on his right to enter the territory;
- d. When protection of national security and public order so requires.

279 See supra Title 1. 2. 1, 2^o regarding article 5, § 1, indent f) ECHR.

280 Odysseus Report, Q. 33 A, p. 101 à 103.

281 Council of the European Union, Note from the Presidency to the Strategic Committee on Immigration, Frontiers and Asylum, 8777/10, 26 April 2010.

These four reasons are exactly the four cases exhaustively listed in a recommendation adopted by the Committee of Ministers of the Council of Europe on 16th April 2003²⁸². This recommendation has no binding legal force whatsoever.

However, the reasons given by the Commission proposal do not correspond with the comprehensive reasons defined by the UNHCR Executive Committee in its Conclusion No. 44, October 13 1986²⁸³. It will be shown how each of the grounds cited by the Commission falls within or outside of the grounds listed in the conclusions of the UNHCR Executive Committee. The legal value of the Conclusions of the UNHCR Executive Committee, however, raises an argument. According to Professor Hailbronner "Even UNHCR-EXCOM conclusions, although adopted by representative of Member States, are not intended as binding instruments of refugee law expressing the will of states to be bound to comply with them in their application of the Geneva Convention. They represent recommendations of preferable practices in specific situations and may therefore have political weight in providing guidelines for the future development of standards"²⁸⁴. This must be taken into account in what follows.

After the comparative examination between the Commission proposal and the Conclusions of the UNHCR Executive Committee, the motives for detention proposed by the Commission will be more specifically assessed in the light of Article 5 § 1 ECHR that defines exhaustively the reasons for deprivation of liberty may be based on and more particularly in the light of the three cases already mentioned in relation to detention of asylum seekers (see Title 1. 1. 3):

- Indent b), second branch, article 5 § 1: the lawful arrest or detention of a person in order to secure the fulfilment of any obligation prescribed by law, and
- Indent f), first and second branches, article 5 § 1: the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

In any event the review of the motives for detention raises the issue of a proper balance to be found between the right for the states to fight illegal immigration and the asylum seekers' right to freedom.

This issue will be raised in particular when considering the 5th ground proposed by the Council (see *infra* Title 4).

The ground of indent c), article 8 § 2 of the text of the Commission will be considered first since its previous analysis allows a better understanding on grounds of indents a) and b) article 8 § 2.

2.2.3. The ground of indent c) article 8 § 2 "in the context of a procedure to decide on his right to enter the territory": conform to international law but the formulation casts doubt on the circumstances it is referring to

- Does it refer to the border procedures mentioned in Article 37 of the asylum procedure directive proposal? (Article 35 of the directive in force)

282 Recommendation (2003) 5 related to detention of asylum seekers, Committee of Ministers, Council of Europe. Hereafter: Recommendation (2003) 5.

283 UNHCR, Conclusions 44.

284 K. Hailbronner, p. 162.

And/or

- Does it refer to the event of a procedure designed to determine the right to enter the territory while the asylum seeker is already in the territory of the State, outside of a border or transit zone, but has not been allowed to enter the territory?

And/or

- Another situation?

1. The border procedures mentioned in the asylum procedure directive (Article 37 of the asylum procedure directive proposal)?

Article 37 of the asylum procedure directive Commission proposal states that:

«1. Member States may provide for procedures, in accordance with the basic principles and guarantees of Chapter II [of the directive], in order to decide at the border or transit zones of the Member State on:

(a) the admissibility of an application made at such locations;

and/or

(b) the substance of an application in an accelerated procedure pursuant to Article 27(6) ».

In this case, in accordance with § 2 of article 37 of the proposal, Member States shall ensure that a decision in the framework of the procedures provided for in article 37 § 1 is taken within a reasonable time. When a decision has not been taken within four weeks, the applicant for asylum shall be granted entry to the territory of the Member State in order for his/her application to be processed in accordance with the other provisions of this directive (article 37, § 2 in fine).

From this wording it can be argued that the reason for detention based on indent c) of article 8 § 2 of the directive Commission proposal refers to the procedures at the border or at transit zones set in article 37 of the asylum procedure directive Commission proposal. The issue is really within the context of these procedures to decide on [the] asylum application, in the context of a procedure aiming to determine [the] right to enter the territory.

2. A procedure designed to determine the right to enter the territory while the asylum seeker is already in the territory of the State, outside of a border zone or transit, but has not been allowed to enter the territory?

In the case *Saadi v. United Kingdom* supra, the Grand Chamber of the ECtHR was asked to rule on the application of article 5 § 1, indent f), first branch of the ECHR: the detention of a person to prevent his effecting an unauthorised entry into the country. In this case, several important findings have been made by the Court. One of them is particularly relevant when considering the ground based on indent c) article 8 § 2 of the Commission text. The Court held that as long as a potential immigrant, even when he/she is an asylum seeker, has not been authorized by a State to enter its territory, this entry is irregular. So « detention of a person who wishes to effect entry and who needs but does not yet have authorisation to do so, can be (...) to "prevent his effecting an unauthorised entry ». The court « does not accept that, as soon as an asylum seeker has surrendered himself to the immigration authorities, he is seeking to effect an "authorised" entry, with the result that detention cannot be justified under the first limb of Article 5 § 1 (f). To interpret the first

limb of Article 5 § 1(f) as permitting detention only of a person who is shown to be trying to evade entry restrictions would be to place too narrow a construction on the terms of the provision and on the power of the State to exercise its undeniable right of control referred to above [undeniable sovereign right of States to control aliens' entry into and residence in their territory]. Such an interpretation would, moreover, be inconsistent with Conclusion No. 44 of the Executive Committee of the United Nations High Commissioner for Refugees' Programme, the UNHCR Guidelines and the Committee of Ministers' Recommendation (...) all of which envisage the detention of asylum seekers in certain circumstances, for example while identity checks are taking place or when elements on which the asylum claim is based have to be determined »²⁸⁵.

It can be argued that the Court assessment stating that detention of an asylum seeker - to prevent his effecting an unauthorised entry into the country - is justified as long as the applicant has not received permission to remain in the country even if he/she is there de facto (in the Saadi case the applicant had been awarded by the British authorities a temporary admission. Temporary admission, however, is not equivalent to permission to enter under the British domestic law). This implies that the detention of an asylum seeker based on article 5 § 1, indent f), first branch ECHR is permitted not only under border procedures but also in situations where the person is already on the territory of the State, outside of a border or transit zone and has not been allowed to enter the territory.

Since article 5 § 1, indent f), first branch ECHR allows to justify the detention of an asylum seeker in this case one shall wonder whether the ground of indent c) article 8 § 2 of the text of the Commission intends to cover, in addition to border procedures specified in the asylum procedure directive, situations where an asylum seeker is already in the territory of a State, outside of a border zone or transit, and has not been allowed to enter as defined by the ECHR in the case Saadi. The ground based on indent c) of article 8 § 2 of the Commission proposal is formulated in general terms without any specific reference to border procedures covered by the asylum procedure directive proposal. Without any further precision the motive for detention refers to a procedure in order to decide on the right to enter the territory. Such a formulation seems to allow including the situations referred to in the preceding indent. The wording of the Commission nevertheless deserves to be clarified (see infra Title 2).

3. Other circumstances?

The case Saadi makes one wonder whether article 5, § 1, indent f), first branch ECHR prevents the unauthorised entry into the country and hence the reason for detention based on article 8 § 2, indent c) of the Commission proposal applies or not to the following circumstances: at the time of asylum application the person's stay is illegal, but he/she has entered legally.

A negative answer could be given to this question on the basis of the following elements:

- The literal analysis of the wording of indent f), first branch which refers to the irregular entry and not to the irregular stay.
- The fact that the exhaustive list of grounds for detention under article 5 § 1 must receive a narrow²⁸⁶ interpretation.

285 ECtHR, *Saadi*, § 65.

286 ECtHR, *Winterwerp*, § 37.

A positive response could be given to this question on the following basis:

- The asylum seeker was allowed to enter but is no longer allowed to stay. Now it can be defended that the purpose of article 5, § 1, indent f), first branch is to fight against illegal immigration. Therefore it would not be excluded that when the ECtHR had to decide on such a case it regards it as falling within its scope.

The question remains open. It must therefore be taken into account in the solutions that are recommended below.

The ground for detention under indent c) of article 8 § 2, is not mentioned by the Executive Committee of the UNHCR. In his comments on the Commission proposal²⁸⁷ the UNHCR estimated that this ground could lead to widespread and systematic detention of asylum seekers in the context of border procedures. UNHCR considers that, depending on its implementation and interpretation, it could result in penalization of asylum seekers who enter the EU in an irregular manner. Without a doubt this ground is relating to illegal asylum seekers applying for asylum at border or transit zones (under article 37 of the asylum procedure directive Commission proposal). However, as just noted, this ground seems to apply to other situations. The fact remains that some States tend to detain the asylum seekers who apply for asylum at the border or in a transit zone systematically. Even if the Commission provisions require the submission of any deprivation of liberty to a speedy judicial review²⁸⁸, the possibility of detaining asylum seekers in the context of border procedures might maintain or generate administrative practices giving way to widespread detention of irregular asylum seekers who are at the border or in transit zones at least for a limited time (because of judicial review). This consideration is however closely linked to the directive since it allows specific procedures at the border.

In addition, in view of the Saadi case mentioned above the motive in itself is neither contrary to article 5 § 1, indent f), first branch of the ECHR nor to article 31 of the Geneva Convention against the opinion of ECRE regarding the latter provision²⁸⁹.

ECRE position is based on the partly dissenting opinion made on the fringe of the Saadi case. The six judges at the origin of the dissent consider among others that "asylum seekers who have presented a claim for international protection are ipso facto lawfully within the territory of a State, in particular for the purposes of Article 12 of the International Covenant on Civil and Political Rights (liberty of movement) and the case-law of the Human Rights Committee, according to which a person who has duly presented an application for asylum is considered to be "lawfully within the territory". ECRE maintains that this approach is also reflected in EU asylum law in article 7 § 1 of the asylum procedure directive in force (now article 8 § 1 in the directive Commission proposal - whose terms are unchanged) and recital (9) of the return directive.

In his comment²⁹⁰ on the Saadi case, Jean-Yves Carlier wisely dismantles the judges' dissenting opinion according to which an applicant for asylum must be considered as lawfully in the territory of a State simply because of his asylum application, Professor Carlier mainly uses articles 31 and 33 of the Geneva Convention as an argument. According to Professeur Carlier if the principle of non refoulement enshrined in article 33

287 UNHCR, *Comments on the European Commission's proposal*, p. 5. Hereafter: UNHCR, Comments RCD proposal.

288 See infra Title 5. 2.

289 ECRE, *Comments on the European Commission proposal to recast the reception conditions directive*, April 2009, article 8 – detention. Hereafter: ECRE, Comments RCD proposal.

« ouvre un droit à l'asile provisoire du candidat réfugié qui ne peut être envoyé vers un pays qui ne serait pas sûr, il ne convertit pas pour autant son accès au territoire en accès régulier. L'Etat demeure maître de la portée qu'il donne à cet accès au territoire. L'importance de l'article 33 est précisément de protéger le candidat réfugié qui accède irrégulièrement au territoire d'un Etat, à la différence de l'article 32 qui ne protège que le réfugié « se trouvant régulièrement » sur le territoire » [gives a right to temporary asylum to the asylum seeker who cannot be sent to a country that is not safe, it does not mean his/her entry on the territory becomes a legal entry. The state retains control of the scope he gives to access to its territory. The importance of article 33 is precisely to protect the asylum seeker who enters illegally into the territory of a State, in contrast to article 32 that protects only the refugee lawfully in the territory]²⁹¹.

As to article 31 invoked by ECRE, Professeur Carlier goes on to say « La Convention de Genève est encore plus explicite en son article 31, dont le titre est « réfugié en situation irrégulière dans le pays d'accueil, en indiquant, par là même, comme le confirment les travaux préparatoires, que tout réfugié ou candidat réfugié n'est ni automatiquement en séjour régulier, ni nécessairement en séjour irrégulier. Il peut, selon les circonstances, être dans l'une ou l'autre hypothèse.» [The Geneva Convention is even more explicit in its Article 31 - headed "refugees unlawfully in the country of refugee", indicating thereby that any refugee or asylum seeker is neither automatically lawfully in the territory nor unlawfully as confirmed by the preparatory work. It may, depending on circumstances, be in either case]²⁹².

It is worth recalling the content and the terms of article 31 § 1, which aim at providing penal immunity to refugees (and asylum seekers) who « (...) on account of their illegal entry or presence (...) enter or are present in their territory without authorization (...) ». In addition to the explicit mention of illegal entry or presence, the lack of mention of authorization leads to make a connection with article 7 § 1 of the asylum procedure directive in force invoked by ECRE as well. This article provides that: "Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. This right to remain shall not constitute an entitlement to a residence permit ". This provision does not prescribe on any account the principle that an asylum seeker would be legally present on the territory - because of his application for asylum only. However article 7 § 1 recognizes the right for the asylum seeker to remain on the territory of the State that is to say precisely the right to a temporary stay. Articles 3 § 1 and 6 § 1 of the reception directive Commission proposal refer to the same temporary stay authorization to remain on the territory of the State²⁹³.

Finally, ECRE invokes recital (9) of the return directive mentioned in Title 1. 1. 4 here before according to which « (...) a third-country national who has applied for asylum in a

290 J-Y Carlier, p. 800 et 801.

291 Non official translation

292 Non official translation.

293 Article 3 § 1 related to the scope of application states: "This Directive shall apply to all third country nationals and stateless persons who make an application for international protection at the border, or in the territory, including at the border or in the transit zones, of a Member State, as long as they are allowed to remain on the territory as asylum seekers, as well as to family members, if they are covered by such application for international protection according to the national law". The content of this provision is identical in the reception directive in force. Article 6 § 1 related to the documents states: "Member States shall ensure that, within three days after an application is lodged with the competent authority, the applicant is provided with a document issued in his or her own name certifying his or her status as an asylum seeker or testifying that he or she is allowed to stay in the territory of the Member State while his or her application is pending or being examined". The content of this provision is identical in the reception directive in force.

Member State should not be regarded as staying illegally on the territory of that Member State (...) ». Does this detail imply that an asylum seeker must generally be considered as legally present on the territory of a state because of his asylum application only? A negative answer must be given taking into account the following consideration among others: the scope of recital (9) must be analyzed in the specific context of the return directive and the objectives of the latter. This directive sets out common standards and procedures to be applied in Member States for returning illegally staying third country nationals. These standards include provisions relating to detention of the third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process. In this context, recital (9) can be interpreted as aiming at avoiding the third-country national staying illegally, but seeking asylum also, to be subjected to the standards and community return procedures - including the detention framework - and this « until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force »: recital (9) in fine.

The Court of Justice of European Union ruled in this sense in the case commented in Title 1.1.4. (Case Kadzoeff).

It follows from all the foregoing that the reason for detention mentioned in indent c) of article 8 § 2 of the reception directive Commission proposal is not an issue under the relevant international standards (article 5 § 1 of the ECHR, article 31 of the Geneva Convention and article 9 of ICCPR). However the wording of recital c) needs to be clarified with regard to situations that this provision refers to: see below Title 2.

2.2.4. The ground of indent a) article 8 § 2: « in order to determine, ascertain or verify his identity or nationality »: a ground consistent with international law and requires no modification

Detention for the purpose of verifying an asylum seeker's identity is one of the four reasons given by the UNHCR Executive Committee²⁹⁴. In its 1999 guidelines, UNHCR stated that « This relates to those cases where identity may be undetermined or in dispute »²⁹⁵. This motive for detention does not violate Article 5 § 1 of the ECHR. When the identity and/or nationality are indeterminate or controversial the detention of the asylum seeker based on this initial motive is in the scope of indent f) second branch of this article at first: detention of a person to prevent his effecting an unauthorized entry into the country. In its judgment in the case Saadi the ECtHR expressly endorsed the reason for verification of identity under the application of indent f, the second branch (§ 65 of the Judgment). This motive may also fall within the scope of the indent b), second branch of article 5 § 1 ECHR, secure the fulfilment of any obligation prescribed by law as long as the national law:

- Imposes anyone the obligation to prove his identity.
- Allows the detention of a person to compel him to fulfil this specific and definite obligation²⁹⁶.

So the ground mentioned in indent a) article 8 § 2 of the Commission proposal can legally justify the detention of asylum seekers both at the border and in transit zone or on the territory of a Member State. This ground is in itself no more incompatible with the contents of Article 31 of the GC or with that of article 9 of the ICCPR as a test of necessity is imposed by the directive Commission proposal.

294 The executive committee does not refer to nationality.

295 UNHCR, Guidelines, Guideline 3 (i).

296 Nuala Mole, *Le droit d'asile et la Convention Européenne des droits de l'homme*, Conseil de l'Europe, Strasbourg, 2008, p. 88.

- 2.2.5. The ground of indent b) article 8 § 2: « in order to determine the elements on which his application for asylum is based which in other circumstances could be lost »: a ground consistent with international law but the wordings "in order to determine the elements on which his application for asylum is based" as well "which in other circumstances could be lost" lack clarity

This ground is recognized by the Executive Committee of UNHCR that does not however prescribe the circumstances related to elements "which in other circumstances could be lost". Under the 1999 guidelines, the UNHCR specifies that on this ground the asylum seeker «may be detained exclusively for the purposes of a preliminary interview to identify the basis of the asylum claim. This would involve obtaining essential facts from the asylum-seeker as to why asylum is being sought and would not extend to a determination of the merits or otherwise of the claim. This exception to the general principle cannot be used to justify detention for the entire status determination procedure or for an unlimited period of time »²⁹⁷.

In its comments on the reception directive Commission proposal²⁹⁸ UNHCR reiterates the limitations of the application of this ground and asks for the mention "within the context of a preliminary interview" to be added²⁹⁹ so that the text of the Commission can not be interpreted as allowing to detain an asylum seeker throughout the whole asylum procedure. UNHCR concern to see the text of the Commission authorize the detention of an asylum seeker throughout the whole procedure does not seem justified. Such detention could be sanctioned through the judicial review. The fact remains that the text of the Commission needs to be further clarified to better define and specify the purpose and scope of the ground.

The reference to the specific context of preliminary interview proposed by the UNHCR is not adequate insofar as such preliminary interview is not referred to in the asylum procedure directive Commission proposal even if it is in some national legal framework: it is only referred to personal interview where the application is examined on the merits: article 13 of the Commission text. The phrase "preliminary interview" could also be confusing given the terms of article 35 of the asylum procedure directive Commission proposal mentioning a "preliminary examination" that Member States may apply in case of "subsequent"³⁰⁰ applications. Another phrase must therefore be sought to circumscribe the ground of indent b), article 8 § 2: see SOLUTIONS below.

The condition relating to "elements which in other circumstances could be lost" is unclear. The above Recommendation of the Committee of Ministers of the Council of Europe puts this ground into words as follows: "(...) when elements on which the asylum claim is based have to be determined which, in the absence of detention, could not be obtained"³⁰¹. Examination of the explanatory memorandum of the Recommendation provides no further explanation. This criterion is not mentioned either in the Conclusions of the UNHCR Executive Committee.

The third reason for detention stated in the Commission proposal does not raise any problem regarding article 5 § 1 of the ECHR. As for the first ground, the detention of asylum seekers on this ground is within the scope of indent f), second branch: detention of a person to prevent his effecting an unauthorized entry into the country. In its ruling of Saadi case, the ECHR Court expressly endorsed the reason for determining the factors

297 UNHCR, Guidelines, Guideline 3 (ii).

298 UNHCR, Comments RCD proposal, p. 5.

299 ECRE shares this opinion: ECRE, Comments RCD proposal.

300 See Chapter IV: Section IV, Title 7.

underlying the request according to the implementation of indent f), second branch (§ 65). This ground can legally justify the detention of an asylum seeker at the border as well as at a transit zone or on the territory of a Member State. This ground is not in itself incompatible with the content of article 31 of the Geneva Convention or with that of article 9 of the ICCPR as a necessity test is imposed by the directive Commission proposal.

2.2.6. The ground of indent b) article 8 § 2: « when protection of national security and public order so requires »: a ground consistent with international law but the conjunction "and" is inadequate, however since the concepts of national security and public order are distinct

This ground also mentioned by the Executive Committee of UNHCR raises no legal problem. It is however necessary to replace the conjunction "and" by the conjunction "or" the concept of national security and public order being distinct.

SOLUTION:

- Title 2. 2. 3. above: The ground of indent c) of article 8 § 2:

Proposal to redraft the ground in these terms: "to prevent unauthorized entry into the territory".

This formulation is identical to that of article 5 § 1, indent f), first branch of the ECHR. Such a formulation allows to understand the ground at the light of the jurisprudence of the ECtHR (present and future) and thus removes any doubt as to the question of what circumstances the reason given by the Commission intends to address.

- Title 2. 2. 4. above: the ground of indent a) of article 8 § 2: It does not require any modification

- Title 2. 2. 5. above: The ground of indent b) of article 8 § 2:

Proposal to redraft the ground in these terms: "clarify the facts and the essential elements underlying the claim'."

This formulation allows in one hand to clarify the purpose and scope of the grounds and on the other hand removes the unclear statement "the elements which in other circumstances could be lost" which is not taken up either by the Committee UNHCR Executive.

- Title 2. 2. 6. above: The ground of indent d) of article 8 § 2:

Proposal to redraft the ground in these terms: "when protection of national security or public order so requires".

This formulation substitutes the conjunction "and" by the conjunction "or".

3. ARTICLE 8 § 2 OF THE RECEPTION DIRECTIVE PROPOSAL (TEXT OF THE PARLIAMENT)

PROBLEM: The grounds for detention of asylum seekers: Coexistence of two different regimes of detention frameworks, inconsistent with each other. While maintaining and not amending article 8 § 2 of the directive Commission Proposal, Parliament has reintroduced § 3 of the reception directive into force to article 7. This § 3 authorizes member states to detain asylum seekers "... in accordance with their national law ...", "When it proves necessary, for example for legal reasons or reasons of public order (...)". This reintroduction leads to the coexistence of two different regimes of detention and mutually exclusive: a

restrictive regime - the new article 8 § 2 - another leaving a wide margin of discretion to the States - that of § 3 of article 7.

The incompatibility of the two regimes of detention required to remove one. The restrictive regime of detention proposed by the Commission allows a better community harmonization than § 3 of article 7 of the reception directive into force. Furthermore, this restrictive regime is likely to contribute more to achieving a proper balance between the right of States to fight against illegal immigration and the right to liberty of asylum seekers. It is therefore recommended to retain only the restrictive regime of the Commission proposal (with the arrangements set out in Title 2, Box: SOLUTIONS and those recommended in Title 4, Box: SOLUTIONS).

SOLUTION:

§ 3 of article 7 shall be removed

Then remains only the new detention regime proposed by the Commission (subject to the amendments proposed in Titles 2 and 4, Box: SOLUTIONS).

4. ARTICLE 8 § 2 OF THE RECEPTION DIRECTIVE PROPOSAL (TEXT OF THE COUNCIL)

PROBLEM: the grounds for detention of asylum seekers: Adding a fifth reason for detention, being the risk absconding. If this reason is in principle in line with international law, it nevertheless raises the question of its relationship with the ground for risk absconding in the proposal for a Dublin regulation and the question of its merits

The Council did not adopt the amendment of the Parliament above mentioned namely the reintroduction of Article 7 § 3 of the reception directive in force. Moreover, while maintaining four grounds for detention enacted in the Commission proposal, the text proposed by the Council included in article 8 § 2 a 5th reason for detention: the risk of absconding. If this ground is consistent with international law principle, the text proposed by the Council nevertheless raises two questions:

- Title 4. 1. below: The question of its relationship with article 27 § 2 of the Dublin regulation Commission proposal (and the text of this proposal as amended by the Parliament and that proposed by the Council) which authorizes the detention of asylum seekers for risk of absconding only from the time an asylum-seeker is subject to a decision of transfer when the text of the reception directive proposed by the Council enacts this ground in a general and not restrictive way making article 27 § 2 unnecessary.

- Title 4. 2. below: The question of its adequacy in terms of a proper balance to be found between the right for the States to fight illegal immigration and the asylum seekers' right to freedom. The expansion of the scope of the ground for detention based on a risk of absconding proposed by the Council modifies the balance in favour of the States. One needs to examine whether this change is excessive or not.

In itself, the reason for detention based on a risk of absconding of the asylum seeker is not an issue under article 5 § 1 of the ECHR. This ground may, depending on circumstances, enter the scope of indent f), first or second branch of this article - detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition - or within the scope of

indent b) - detention of a person in order to secure the fulfilment of any obligation prescribed by law-. It can therefore legally justify the detention of an asylum seeker at the border as well as in transit zone or on the territory of a Member State. This motive in itself is also compatible with the content of article 31 of the GC and with that of article 9 of the ICCPR as well since a necessity test is enshrined in the directive Commission proposal. The addition of this fifth ground in the reception directive proposal nevertheless raises the two following questions:

4.1. The question of the articulation of the fifth ground added by the Council with article 27 § 2 of the Dublin regulation Commission proposal (and the text of this proposal as amended by Parliament and the text proposed by the Council), which authorizes the detention of asylum seeker for risk of absconding only when an asylum-seeker is subject of a decision of transfer while the text of the reception directive proposed by the Council enacts this ground in a general and not restrictive way making Article 27 § 2 unnecessary.

According to article 27 § 2 of the Dublin regulation Commission proposal, all asylum seekers subject to its application may be held for detention under the grounds set in the reception directive Commission proposal. In addition, article 27 provides for a specific autonomous reason for the asylum seekers subject to a decision of transfer: those can also be detained if there is a significant risk of him/her absconding. The § 4 of article 28 stipulates that in this case the detention may only be applied from the moment a decision of transfer to the responsible Member State has been notified to the person concerned and until that person is transferred to the responsible Member State. As for the other 4 reasons, this specific autonomous reason for detention can be ordered only when it proves necessary, on the basis of an individual assessment of each case, and if other less coercive measures cannot be applied effectively.

This proposal was welcomed by the UNHCR³⁰² subject of continuing concern about the concept of absconding risk (see below the Title 4.2).

The Parliament has restricted the possibility of detention for risk of absconding of an asylum seeker subject to the Dublin regulation. The States shall not just do necessity test beforehand but they shall - before issuing any deprivation of liberty for risk of absconding³⁰³ - submit the applicant to other less coercive measures and make the conclusion that these measures "have not been effective". The amendment, which was carried out by the Parliament led to the following scenario: delivery of the transfer decision, possibly accompanied by less coercive measures, statement of failure of these measures and therefore possibility to order the detention of the person for risk of absconding. Such a scenario that goes beyond the requirements of the UNHCR, may actually make the detention of asylum seeker for risk of absconding impossible. If at the time of a notification

302 UNHCR, *Comments on the European Commission's Proposal for a recast of the Regulation of the European Parliament and of the Council 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 a stateless person*, p. 17 et 18. Hereafter: UNHCR, *Comments Dublin proposal*.

303 The notion of significant risk of absconding was abolished by Parliament since the notion defined in Article 2, k of this proposal is risk of absconding and not significant risk of absconding: see infra Title 4. 2.

of the decision of transfer there are objective and pertinent reasons to believe that the person will abscond - what is required by the text of the Dublin regulation Commission proposal - to compel the States to submit the asylum seeker to less coercive measures beforehand and see its failure before deprivation of liberty is likely to enable the person to actually abscond. In this, the parliamentary amendment devoid of meaning the reason justifying the detention (to avoid the risk of absconding) and therefore reduces the efficiency aimed at by the system of transfer. Article 27 of the text of Dublin regulation proposed by the Council is then similar to the text proposed by the Commission.

In any case, the addition - by the Council - of risk of absconding as a fifth reason for detention in article 8 § 2 of the reception directive proposal makes article 27 § 2 of the Dublin regulation proposal - ground for detention based on a risk of absconding - unnecessary. Indeed, the mention of the fifth ground of detention in the reception directive proposal is worded in a general and not limiting way. Therefore the Council addition should be maintained as such in the reception directive (which is not recommended: see below Title 4. 2) but maintaining the specific and autonomous ground for risk of absconding in the Dublin regulation proposal has no reason to be (since the ground, as it is formulated in the text of the reception directive of the Council, is relating to the same circumstances)

4.2. The question of the merits of the fifth ground added by the Council in respect of the concern about a proper balance to be found between the right for the States to fight illegal immigration and the asylum seekers' right to freedom. The extension of the scope of the ground for detention based on a risk of absconding proposed by the Council modifies the balance in favour of the States. The issue is to determine whether this modification is excessive or not

The texts proposed by the Commission (reception directive proposal and Dublin regulation proposal), limit the scope of detention for risk of absconding to the only case of an asylum-seeker subject to Dublin procedure) and to a decision of transfer. It is obvious that the introduction by the Council - in the reception directive proposal - of a reason for detention related to a risk of absconding, worded in a general and not limiting way, modifies the balance to be found between the right for the States to fight illegal immigration and the asylum seekers' right to freedom in favour of the States. The extension of the scope of the ground for detention based on risk of absconding is not the only factor. This balance also depends in part on the content and the definition given to the concept of risk of absconding.

Article 27 was given a good reception by the UNHCR (comments related to the Dublin regulation Commission proposal³⁰⁴). UNHCR is nevertheless concerned³⁰⁴ that the possibility remains that Member States take a wide view of what constitutes such a risk despite the fact that the Commission proposal gives a definition of it. However, UNHCR considers that it should not be possible under such a formulation to determine that the mere fact of being subject to the Dublin regulation creates a risk of absconding that justifies detaining the applicant.

It is Article 2, 1) of the Dublin regulation Commission proposal which defines the risk of absconding: it means the existence of reasons in an individual case, which are based on

objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person who is subject to a transfer decision may abscond. The Parliament has not amended this definition. In the text of the Dublin regulation proposed by the Council, no definition of the concept is given even though, as mentioned before, this ground for detention is maintained. The definition of risk of absconding given by the Commission in its Dublin regulation proposal is identical to that given to this same concept in the return directive, article 3, 7): it means the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond³⁰⁵.

One may wonder about the objective criteria to be defined by national law. A first indication is given in the comments on the Twenty Guidelines of the Committee of Ministers of the Council of Europe on Forced Return on 4th May 2005. These comments were drafted by Ad hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR). The 6th Guideline on the forced return defines the conditions for detention of a person subject to an expulsion (removal order). The comment relating to this principle specifies that the use of detention can take place only when there are objective reasons to believe that the person will not comply with the order, for instance:

- If the time limit for departing from the territory has passed and the person has changed her place of residence without notifying the authorities of a change of address,
- If she has not complied with the measures adopted to ensure that she will not abscond,
- If she has in the past already evaded removal.

Of course these are examples related to the return of illegal third-country nationals and not of asylum seekers subject or not to a transfer decision to the responsible State depending on whether one takes into consideration the ground of risk of absconding under the text of the reception directive proposed by the Council, or under of Dublin regulation Commission proposal.

However, with some adaptations, the examples could be retained as objective criteria in the case of detention of an asylum seeker for risk of absconding. Thus, if we consider the situation of an asylum seeker subject to a decision of transfer, one can argue that there are objective reasons to believe that the person will not comply with the transfer decision:

- If the time limit to submit to authorities for his transfer has passed and the person has changed her place of residence without notifying the authorities of a change of address,
- If she has not complied with the measures adopted to ensure that she will not abscond,
- If she has in the past already absconded to a measure of transfer.

Apart from the comments of the Committee of Ministers of the Council of Europe it is interesting to focus on preliminary arrangements for the return directive. The text adopted

305 In the English version of the two texts (Dublin regulation Commission proposal and return directive) the terms are exactly the same when in the French version of the return directive we note the adjective *particulier* instead of the adjective *individuel* in the Dublin regulation Commission proposal, - in English *individual* -. These differences do not affect the scope of the definition.

by the LIBE³⁰⁶ Committee stated that the risk of absconding can not occur directly from the mere fact that a third country national is staying illegally on the territory of a Member State.

This last point has not been maintained in the return directive finally adopted. The principle is stated in general terms, however, in recital (6) of the Directive preamble: according to general principles of EU law, decisions taken under this Directive should be adopted on a case-by-case basis and based on objective criteria, implying that consideration should go beyond the mere fact of an illegal stay.

As part of the return directive this clause is intended to prevent states to apply the following equation: illegal stay = risk of absconding = detention. Illegal stay is an objective criterion but in this case it is not considered relevant by itself. It is this kind of equation that UNHCR is likely to fear in the context of the Dublin regulation: decision of transfer = risk of absconding = detention.

Even if the elements above provide guidance on what may be an objective relevant objective or what is not, the concept of risk of absconding remains open to interpretation. It allows States discretion in the qualification of risk of absconding. This could maintain or generate widespread practice of administrative detention based on that ground (subject to judicial review a posteriori: see below Title 5.2).

It should also be stressed that the Council while introducing the risk of absconding in the reception directive - under the grounds for the detention of an asylum seeker - has not given any definition of it. Is this intentional or is it an oversight? It would not be surprising that this be desired insofar, as mentioned before; the Council has also deleted the definition of risk of absconding in text of the Dublin regulation Proposal without deleting the provision of article 27 above. This lack of definition gives a little more power to the States.

Therefore as it stands, the texts of the reception directive and of the Dublin regulation as proposed by the Council leave a significant margin of discretion to the States about the possibility of placing an asylum seeker in detention because of risk of absconding. Even if the detention is subject to judicial review on legality and lawfulness and even if a definition of risk of absconding similar to that found in the Dublin regulation original proposal is made in the reception directive proposal, allowing for a widely accepted and non limiting detention of asylum seekers for risk of absconding, as proposed by the Council, can maintain or generate excessive administrative practices which are likely to undermine a proper balance to be found between the right of states to fight against illegal immigration and the asylum seekers' right to freedom.

On the other hand, it appears that there could be a legal gap in some situations if only the four detention grounds of the reception directive Commission proposal are accepted and the ground for risk of absconding, as provided in the Dublin regulation Commission proposal (the detention for risk of absconding can no be applied until the time a decision of transfer to the responsible Member State has been notified to the person concerned). Thus, it is in the following situations among others:

1° An asylum seeker has been notified in first instance a decision considering his/her application inadmissible under article 29 § 2, indent d) of the asylum procedure directive

Commission proposal ("subsequent" application) or a decision taken in the accelerated procedure under article 27 § 6 of the same text. He/she lodges an appeal against the decision under article 41 of the asylum procedure directive Commission proposal. According to domestic law, he/she is allowed to remain on the territory of the State during the appeal procedure (the assumption is rather theoretical, but not legally excluded).

In this case, besides the fact that the aforementioned grounds for detention may be ineffective in this event, it appears that detention for the purpose of removal in accordance with the return directive nor can apply, asylum seekers being still allowed to remain on the territory of the Member States despite the refusal of his application in first instance (see above the Title 2. 2. 3. 2°). Then the Member States could not legally justify the detention of the asylum seeker in such circumstances. However, in view of finding a proper balance to be found between the right for the States to fight illegal immigration and the asylum seekers' right to freedom it seems legitimate in this case to allow States to detain the applicant for asylum if necessary.

In fact, it is reasonable to consider that since it is an inadmissibility decision of a claim after a final decision or a decision of refusal taken in the accelerated procedure the probability that the State is facing an illegal migrant is greater than in other situations. Therefore the risk that the person lodges an appeal in a single purpose of delay with the intent to abscond is greater too.

2 ° An applicant for asylum has been notified in first instance a decision considering his/her application inadmissible under article 29 § 2, d) above of the asylum procedure directive Commission proposal or a decision taken in the accelerated procedure under article 27 § 6 of the same text. He/she lodges an appeal against the decision under article 41 of the asylum procedure directive Commission proposal. According to the domestic law, he/she is not allowed to remain in the territory of the State during the appeal procedure.

However, under §§ 6 and 7 of article 41 above, the applicant has the right to remain in the Member State until a court has ruled (on its own initiative or at the applicant's request) on his right to remain on the territory pending the outcome of the remedy. In this case as well, the grounds for detention may be ineffective in this event and detention for the purpose of removal in accordance with the return directive does not apply either since the asylum seekers is allowed to remain on the territory of the Member States while the court referred to in § 6 of article 41 rules on the case. However, for the same reason as stated for the previous hypothesis, it seems legitimate in this case to allow MS to detain the asylum seeker when needed.

3 ° Concerning the event of judicial review in case of accelerated procedure or "subsequent" application (an assumption which may not be provided for by the legislation as has just been described above) it is worth mentioning that in the Saadi case, the ECtHR upheld the detention of an asylum seeker subject to an accelerated procedure (§ 76 of the decision). The hypothesis of an accelerated procedure (before the introduction of possible judicial review) is in itself, in principle, covered by article 5 § 1, indent f), first branch of the ECHR and therefore the article 8 § 2, indent c) of the reception directive Commission proposal.

But one might wonder what happens if the assumption mentioned in article 5 § 1, indent f), first branch of the ECHR should not be applicable and therefore neither article 8 § 2, c)

above³⁰⁷. Are the three other grounds of the reception directive Commission proposal sufficient enough to rule this hypothesis if necessary? In particular, would the ground - mentioned in indent b) of article 8 § 1 of the Commission proposal that is : clarifying the facts and the essential elements on which the asylum application is based - be sufficient for the detention to be based on considering that, given the circumstances of the case, on one hand the asylum seeker's detention can not be justified for reasons of public order or national security - exclusion of the ground of article 8 § 2, indent d) of the reception directive Commission proposal - and on the other hand the identity and nationality of the applicant do not raise a problem - exclusion of the ground of Article 8 § 2, indent a) of the same text?

It seems that an affirmative answer may be given since the grounds justifying the application of the accelerated procedure - indent a) to f) of article 27 § 6 of the procedure directive Commission proposal- are reasons that inherently may be considered as essential elements and must in principle lead to a expedited decision as well. The answer may however be negative if one takes into account the ground of indent b) of article 8 § 2 of the proposal as formulated by the Commission: to determine the elements on which his application for asylum is based which in other circumstances could be lost. This last assertion is unclear and could be interpreted so as to prevent the application of indent b) in the event described above. In this case, the detention of the person would be legally impossible which seems politically delicate since it concerns situations justifying an accelerated procedure. The same scenario seems possible for subsequent application.

Given these considerations it is necessary to find a compromise between the text of the Council and the Commission proposal:

SOLUTION:

- Title 4. 1. above:

If the ground for risk of absconding added by the Council was to be maintained as such in the text of the reception directive (which is not recommended: see below Title 4. 2) keeping the specific ground of autonomous risk of absconding in the Dublin regulation proposal would be useless (since it is covered by the ground as stated in the text of the reception directive). Therefore it would be necessary to remove this specific autonomous ground from the text of the Dublin regulation.

If the ground for risk of absconding added by the Council in the text of the reception directive is replaced by the recommendations set out below in Title 4. 2 or is not maintained at all, the risk of absconding as formulated in article 27 § 2 of the Dublin regulation proposal can be maintained subject to delete the words "significant" from the concept of risk of absconding and to reintroduce a definition of the risk of absconding.

- Title 4. 2. above:

Finding a proper balance between the right for the states to fight illegal immigration and the asylum seekers' right to freedom do not seem affected by the Council proposal. At the same time the texts of the Commission (article 8 § 2 of the reception directive and article 27 § 2 of the Dublin regulation) are insufficient to cover some situations. Therefore a

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See supra Title 2. 2. 3, 3° which refers to the case of a person who is illegally on the territory when she applies for asylum while she had lawfully entered the territory. It is unclear whether this case falls within the scope of article 5 § 1, indent f), first branch of the ECHR and therefore within the scope of article 8 § 2, indent c) of the reception directive Commission proposal.

compromise solution is recommended. It is to add the following ground for detention to the reception directive :

"When a judicial review is lodged against a decision taken under article 27 § 6 or 7 or article 29 § 2, indent d) of the directive XXX [asylum procedure directive Commission proposal] and there is a risk of absconding ".

The addition of this ground can refer to situations not covered by the texts of the Commission. This ground does not seem excessive, since it merely refers to the assumption of a judicial review lodged against an inadmissibility decision against an identical application after a final decision - article 29 § 2, indent d) - or to a decision taken in the accelerated procedure - article 27 § 6; these applications can be described as manifestly unfounded application under article 27 § 7 -. Therefore this ground does not include cases in which the remedy has legitimately a suspension effect. In addition maintaining the criterion of risk of absconding ensures consistency with the Dublin regulation Commission proposal (article 27 § 2). It also allows both to objectify the deprivation of freedom (even if the concept of risk of absconding is subject to interpretation) and to strengthen the control of the court required to rule on the legality and lawfulness of this measure.

This compromise solution might be insufficient if the reason for detention based on indent b) of article 8 § 2 as enacted in the directive Commission proposal should be maintained in its original wording that is: determine the elements on which his application for asylum is based which in other circumstances could be lost. In this case the compromise should not only refer to the assumption of a judicial review brought against a decision taken in the accelerated procedure and/or a subsequent application but it should directly refer to the accelerated procedure (article 27 §§ 6 and 7) and to the subsequent application (article 35 § 3).

Whatever the compromise solution adopted, since the risk of absconding is maintained it is necessary to define it in both texts: reception directive and Dublin regulation (since the texts of the Council does not include a definition: in the Dublin regulation proposal the Council has deleted the definition in article 2 and in the reception directive proposal it has not provided for a definition).

5. ARTICLE 9 OF THE RECEPTION DIRECTIVE PROPOSAL (TEXTS OF THE COMMISSION, PARLIAMENT AND COUNCIL)

PROBLEM: the guarantees offered to asylum seekers in detention are generally consistent with international law, under the exception – depending on the text taken into account (the text of the Commission, the text of Parliament or the text of the Council) - of one or another aspect that requires adjustments in order to fully satisfy the guarantees of article 5 ECHR and the jurisprudence of the ECtHR.

Article 9 of the reception directive Commission proposal (and of the text of this proposal such as amended by the Parliament and as the one proposed by the Council) recognizes a number of safeguards for asylum seekers who are subject to a deprivation of liberty. These guarantees reflect the provisions of article 5 of the ECHR and the jurisprudence of the ECtHR. These guarantees are generally in accordance with article 5 and the jurisprudence of the Court, subject to:

- Title 5. 1. below: The applicant's right to be informed of the reasons for his detention in a language he understands (article 5 § 2 ECHR). Under the text of article 9 § 4 of the reception directive proposal (texts of the Commission, the Parliament and the Council) the possibility to inform the person in a language that he/she is reasonably expected to be able to understand is always an alternative. This alternative does not meet the requirement of the ECHR.

- Title 5. 2. below: The judicial review of the administrative decision of detention that must take place "speedily" (article 5 § 4 of the ECHR). Under article 9 § 2 of the Commission proposal (not amended on this point by the Parliament) the review must occur "within 72 hours from the beginning of the detention". This wording could be considered inconsistent with the requirement of article 5 § 4, as interpreted by the ECtHR.

- Title 5. 3. below: The right to legal assistance in the absence of adequate resources for ensuring the effectiveness of the remedy (article 9, last §). The texts of the Parliament and the Council could undermine the "effective access to justice" as required by article 47, last indent of the European Charter of Fundamental Rights by allowing states to provide that « as regards fees and other costs, the treatment of detained applicants shall not be more favourable than the treatment generally accorded to nationals in similar circumstances ».

Two other questions must be raised as well even if they do not pose a problem under Article 5 ECHR:

- Title 5. 4. below: Providing for a maximum duration of the detention: neither the reception directive Commission proposal nor the text of the Parliament or the text of the Council (or the texts of Dublin regulation in force) lay down a maximum duration of the detention. The issue of a possible setting of a maximum duration of the detention has legal and political aspects.

- Title 5. 5. below: The authority in charge of ordering the detention: the text of the Commission - not amended on this point by the Parliament - provides that detention shall be ordered by judicial authorities but in urgent cases it may be ordered by administrative

authorities without mentioning which administrative authorities it may be. As for the Council text it enacts that detention shall be ordered by judicial or administrative authorities but does not specify which authorities it may be (article 9 § 2 of the proposal).

5.1. The right to be informed of the reasons for detention

According to article 5 § 2 ECHR this information should be given to the person « promptly, in a language which he understands ». According to article 9 § 4 of the reception directive proposal (texts of the Commission, the Parliament and the Council) the possibility to inform the person in a language that he/she is reasonably expected to be able to understand is always an alternative. This alternative does not meet the requirement of the ECHR.

The right to information has been stated in Title 1.3.1 above. According to article 9 § 4 of the reception directive Commission proposal detained asylum seekers are informed of the reasons for detention immediately and in a language they are reasonably supposed to understand. This wording does not meet the requirement of article 5 § 2 ECHR. The texts of the Parliament and of the Council (identical on this point) provide that detained asylum seekers shall be informed in a language they understand or may reasonably be presumed to understand. If the mention of "the language they understand" meet the requirement of article 5 § 2 ECHR, the alternative given by these texts implies that information can be given as well in a language [the asylum seekers] are reasonably supposed to understand. This possibility does not comply with article 5 § 2 ECHR. The text should provide the first part of the alternative only that is the language the asylum seekers understand. The requirement of article 5 § 2 ECHR is met however when asylum seekers receive a notification in a language they do not understand, but receive the assistance of an interpreter mastering their language, who explains the content of oral and written communications that have been made to them, particularly document informing the aliens of the content of the verbal and written communications which they received, in particular, the document ordering their arrest³⁰⁸.

5.2. The judicial review of the administrative decision of detention

According to article 5 § 4 ECHR this review must take place "speedily". When the text proposed by the Council meets this requirement for speed, the Commission proposal (not amended on this point by the Parliament) could be considered inconsistent with the requirement of article 5 § 4, as interpreted by the ECtHR, since it provides that the judicial review must take place within 72 hours.

The right to judicial protection has been explained above, in Title 1. 3. 2. According to article 9 § 2 of the reception directive Commission proposal, when the detention has been ordered by administrative authorities, the detention order shall be confirmed by judicial authorities within 72 hours from the beginning of the detention.

This period of 72 hours is neither in conformity with article 5 § 4 of the ECHR requiring the court to rule "speedily" nor with the Court view stating that this concept cannot be defined in the abstract and the matter must be determined in the light of the circumstances of each case³⁰⁹. Concerning article 5 § 2 a 76 hours period was not considered satisfactory³¹⁰.

308 ECtHR, *Conka*, § 52.

309 ECtHR *Sanchez-Reisse*, § 55.

310 ECtHR, *Saadi*, §§ 84 et 85.

Therefore the Commission provision (which has not been amended on this point by the Parliament) should be amended. This change can follow the meaning of the text of the Council (article 9 § 2) which requires a speedy judicial review to be decided on as speedily as possible from the beginning of detention or after the launch of the relevant proceedings: see the two hypothesis of the Council text whose wording is similar to that of the judicial review provided in the return directive, article 15 § 2, indent 3, a) and b).

5.3. The right of being advised, defended and represented and the right to legal aid in the absence of adequate resources for ensuring the effectiveness of the remedy

Article 47 of the European Charter of Fundamental Rights states that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal. This right includes the right of being advised, defended and represented and the right to legal aid when the person has no adequate resources at his/her disposal and this aid is needed to ensure effective access to justice (article 47, last indent). The text of the directive Commission proposal satisfies the requirement to provide legal aid in these circumstances but the enactment of the Parliament and the Council could undermine article 47 of the Charter by allowing States to provide that « as regards fees and other costs, the treatment of detained applicants shall not be more favourable than the treatment generally accorded to nationals in similar circumstances » (article 9, last §).

The explanations given by the Praesidium of the Convention³¹¹ refer to the jurisprudence of the ECtHR relating to article 6 according to which a legal aid should be granted where the absence of such aid would make it impossible to ensure an effective remedy.

In the case mentioned³¹² the Court considers that the rights stated in article 6 are not respected if considering the circumstances pertaining to the case, it is "unlikely" that without free legal aid, the person "would be able to present her case properly and satisfactorily" and that given the complexity of the case and the « complicated points of law » it entails. The less advantageous position of a person can also require legal assistance³¹³.

The text of the Commission proposal does not violate this provision. However the text amended by the Parliament and the Council proposal could be problematic. These texts allow the States - either explicitly (the text of the Council) or indirectly (the text of the Parliament that incorporates provisions of the asylum procedure directive relating to legal assistance and representation) - to provide that, as regards fees and other costs, the treatment of detained applicants shall not be more favourable than the treatment generally accorded to nationals in similar circumstances. This assertion is acceptable provided that the treatment accorded to nationals does not violate the principle of "effective access to justice" as described above: jurisprudence of the ECtHR, CJEU and article 47 of the Charter.

311 Praesidium 's explanations, article 47.

312 ECtHR, *Airey*, § 24.

313 CJEU, *Evans*, Case n° 63/01, § 77

5.4. Providing for a maximum duration of the detention

Neither the reception directive Commission proposal nor the text of the Parliament or the text of the Council (or the texts of the Dublin regulation) lay down a maximum period of detention. The issue of a possible setting of a maximum duration of the detention has legal and political aspects.

They specify however that detention shall be ordered for the shortest period possible, that this period shall not exceed the time reasonably needed to fulfil the administrative procedures pursuant to article 8 (2) (a), (b) and (c) and that delays in the administrative procedure that cannot be attributed to the asylum seeker shall not justify a continuation of detention (article 9 § 1). The text of the Dublin regulation of the Commission has the same meaning as the text of the reception directive of the Commission but it does not stipulate that delays in the administrative procedure that cannot be attributed to the asylum seeker shall not justify a continuation of detention (article 27 § 5). Finally the text of the reception directive proposed by the Council also establishes the principle that detention shall be ordered for the shortest period possible and that delays in the administrative procedure that cannot be attributed to the asylum seeker shall not justify a continuation of detention.

All these provisions reflect the jurisprudence of the ECtHR which, relating to lawfulness of the detention, verifies the duration of the detention and appreciates in concreto, according to the circumstances of the case, if it does not exceed that reasonably required for the purpose aimed at³¹⁴.

Furthermore, article 9 § 4 of the text of the reception directive Commission proposal states that the decision to detain shall specify the maximum duration of the detention while the text of the Dublin regulation Commission proposal simply states that the written order of detention shall specify the intended duration of the detention (in this respect the text of the Dublin Regulation has not been amended by the Parliament or the Council).

The reference to the maximum duration of the detention has been maintained in the text of the reception directive of the Parliament when it has been removed in the Council proposal. This provision does not set itself the maximum duration but indirectly requires the States to lay it down in their national legislation. One may question the choice of the Commission to refer to national norms of implementation for an element so essential. On the legal aspect a last statement should be outlined: what about the implementation of some provisions of the reception directive proposal if an asylum seeker is detained for a longer duration than the one according to which in principle he/she must be able to benefit from the rights set in the aforementioned provisions and the detention prevents him from doing so? This issue requires considering as established the fact that the reception directive proposal applies to detained asylum seekers in principle: see *infra* Title 9.

The question can be illustrated by an example: what about the application of article 15 of reception directive Commission proposal relating to "Employment" if the detention last over 6 months? According to article 15 applicants have access to the labour market no later than 6 months following the date when the application for international protection was lodged. While article 15 of the reception directive proposal allows the Member States to decide the conditions for granting access to the labour market for the applicant, no exemption is given

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See *supra* Title 1. 2 and ECtHR *Saadi*, §§ 70 et 74.

for the granting of the right itself. When the detention of an asylum seeker lasts over 6 months, the implementation of this provision may be difficult since access to the labour market cannot be effective unless asylum seekers are granted permission to leave the detention centre in order to work or are given access to work in detention facilities (implying that work and working conditions provided in the detention centre are considered as "access to the labour market" in conformity with article 15).

In its report of 26 November 2007³¹⁵ the Commission considers that: « ...the length of detention, except in duly justified cases (e.g. public order), which prevents detained asylum seekers from enjoying the rights guaranteed under the Directive, is contrary to its provisions ». Shall we conclude that duration of detention lasting over 6 months cannot deprive an asylum seeker of his right to access to the labour market provided for in article 15? The Commission thinks so « except in duly justified cases (e.g. public order)» and this mention is of paramount importance.

Another position (which always implies to take for granted the fact that the reception directive proposal as a principle applies to asylum seekers held in detention: see infra Title 9) may be to argue that a reasonable interpretation of the principle according to which the reception directive apply to asylum seeker in detention must be given : when because of their detention it is reasonably not possible to implement a provision of the directive then the directive gets beyond the scope of application as a principle of the directive to asylum seeker in detention. This issue needs to be clarified explicitly³¹⁶.

Apart from these legal issues, the following elements should be considered on a political point of view: nowadays the detention may last many of months or be of unlimited duration in some Member States. Failing to set a maximum duration of the detention at EU level and subject to legal review of the lawfulness of the detention, the latter could last as long that the asylum procedure.

Moreover it follows from the decision of the CJEU in the case Kadzoeff (see supra Title 1.1.4³¹⁷) that the detention of an asylum seeker as defined in Title 1. 1. 4³¹⁸ shall be based on the specific legal regime for asylum and not on the legal regime for removal.

Consequently, the duration of the detention of asylum seekers in the framework of the special regime for asylum is not taken into account for the determination of the maximum duration of the detention authorized by the return directive.

Therefore the duration of the detention of asylum seekers in the framework of the special regime for asylum comes as an addition to the maximum duration provided for by the return directive. This legal aspect should encourage the EU legislator to consider setting a maximum duration of detention subjected to the special regime for asylum even if, given the diversity of national legal frameworks on the subject, a consensus on this issue will not be easy to find. A maximum duration of detention be fixed or not, other avenues should be explored to prevent asylum seekers from being detained for the duration of the asylum procedure or for many months: see below Title 5. 4 Box SOLUTION.

315 Report from the Commission to the Council and to the European Parliament on the application of Directive 2003/9/Ec of 27 January 2003 laying down minimum standards for the reception of asylum seekers, COM (2007) 745 final. Hereafter: Commission Report, RCD.

316 See infra Title 9 which highlights the current differences of point of view in the MS on the application of principle of the directive in force to asylum seekers in detention. In the absence of explicit clarification, such differences may persist - as for instance on article 15.

317 Odysseus Report, Q. 33 L.

318 Asylum seekers until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force.

5.5. The authority in charge of ordering the detention

The text of the Commission - not amended on this point by the Parliament - provides that detention shall be ordered by judicial authorities but in urgent cases it may be ordered by administrative authorities without mentioning which administrative authorities it may be. As for the Council text it enacts that detention shall be ordered by judicial or administrative authorities but does not specify which authorities it may be (article 9 § 2 the proposal). This lack of clarity shall be overcome to ensure transparency and legal certainty for the decisions of detention.

SOLUTION:

- Title 5. 1. above: article 9 § 4 of the reception directive proposal (texts of the Commission, the Parliament and the Council)

The written indication "in a language they [the asylum seekers] understand" to the exclusion of any other one should be retained.

- Title 5. 2. above: article 9 § 2 of the reception directive proposal (texts of the Commission and of the Parliament)

Keep the wording of the text of the Council (article 9 § 2) requiring a speedy judicial review to be decided on as speedily as possible from the beginning of the detention or after the launch of the relevant proceedings.

- Title 5. 3. above: article 9 last § of the reception directive proposal (texts of the Parliament -§ 6- and of the Council -§ 5-)

The attention of the States should be drawn to the fact that the assertion « as regards fees and other costs, the treatment of detained applicants shall not be more favourable than the treatment generally accorded to national in similar circumstances » is only acceptable if the treatment given to their nationals does not itself violate the principle of the effectiveness of the remedy as it emerges from the jurisprudence of the ECtHR, the CJEU and Article 47, last indent of the Charter

- Title 5. 4. above: the issue of the setting a maximum duration of the detention.

This issue should be discussed within the decision-making institutions. During this discussion the principle of a maximum duration for a "normal" asylum procedure should be considered (article 27 § 3 of the asylum procedure directive Commission proposal³¹⁹).

It is also advocated to:

Strengthen the judicial review of detention so that the length of detention should not exceed that reasonably required for the purpose aimed at³²⁰ by giving this control not to ordinary courts generally not familiar with the characteristics of asylum law but to specialized courts in the asylum field.

Make a provision requiring that detained asylum seekers should - like vulnerable asylum seekers with special needs - qualify for a priority procedure instead of an accelerated procedure. However, contrary to what is provided for in article 27 § 5 of the asylum procedure directive Commission proposal, the application of a priority procedure to asylum seekers in detention should not be left to the discretion of the MS, but should be mandatory.

319 See Chapter IV: Section IV, Title 2.

320 Such an appeal court specialised in asylum provided that the national constitutional framework allows it.

- Title 5. 5. above: article 9 § 2 of the reception directive proposal (texts of the Commission, the Parliament and the Council)

Indicate in the directive which administrative authority is responsible for ordering the detention: determining authority within the meaning of Article 2, indent f) of the asylum procedure directive proposal and/or other authority (in charge of the registration of the application for international protection for example).

6. ARTICLE 10 OF THE RECEPTION DIRECTIVE PROPOSAL (TEXT OF THE COUNCIL)

PROBLEM: conditions of detention of asylum seekers: exception on accommodation conditions that might come into conflict with the jurisprudence of the ECtHR and not recommended exception on information required at the border posts or transit zone. Article 10 of the reception directive proposal sets out the conditions of detention of asylum seekers. As the text of the Council these guarantees are consistent with the jurisprudence of the ECtHR, provided that:

- Title 6. 1.below: an exception which allows Member States to put asylum seekers in prison accommodation. This exception is not consistent with the jurisprudence of the ECtHR relating to the requirement of a relationship between the ground of permitted deprivation of liberty relied on the place and conditions of detention (article 10 § 4, indent a) of the text of the reception directive proposed by the Council).

- Title 6. 2.below: another exemption allows Member States not to immediately inform detained asylum seekers in border posts or transit zones about the rules that apply to the detention centre and that set out their rights and obligations and that in duly justified cases and for a reasonable period which shall be as short as possible. This exemption is not recommended (article 10 § 4, indent b) of the text of the reception directive proposed by the Council).

6.1. Exception on accommodation conditions

The possibility for Member States to put asylum seekers in prison accommodation is not consistent with the jurisprudence of the ECtHR concerning the relationship between the ground of permitted deprivation of liberty relied on the place and conditions of detention (article 10 § 4, indent a) of the text of the reception directive proposed by the Council.

Article 10 § 1 of the text proposed by the Council states that the detention must be carried out in specialised detention facilities. However, § 4, indent a) of the same article allows the Member States - in duly justified cases and for a reasonable period which shall be as short as possible - to make an exception to § 1 if this solution is not possible.

In this case the Member States can put asylum seekers in prison accommodation, provided that asylum seekers in detention are separated from ordinary prisoners.

Minors (including unaccompanied minors whose detention is authorized in terms of article

11 § 1 of the text proposed by the Council³²¹) can also be placed in prison accommodation in the same conditions. Although article 11 § 2 of the Council text provides that detained minors shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age and to have access to open-air activities, it is not clear that the exemption clause of article 10 § 4 meets the requirement of relationship between the ground of permitted deprivation of liberty relied on the place and conditions of detention enunciated by the ECtHR being in particular the detention of asylum seekers and unaccompanied minors or minors accompanied by their parents asylum seekers themselves.

In the case *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*³²², the ECtHR ruled that the detention of a five year old-child, a non accompanied asylum seeker, was contrary to article 5 § 1 ECHR because of the lack of sufficient relationship between the ground of permitted deprivation of liberty relied on the place and conditions of detention. The Court notes that the child was detained in a closed centre intended for illegal immigrants in the same conditions as adults; these conditions were consequently not adapted to the position of extreme vulnerability in which she found herself as a result of her position as an unaccompanied foreign minor (§ 103).

The Court has recently reiterated these conclusions in the case *Muskhadzhiyeva v. Belgium*³²³. In this case it was not the detention of unaccompanied minors, but the deprivation of freedom for a mother with four children aged seven months, three and a half years, five years and seven years at investment. The Court ruled that it sees no reason to depart from the above mentioned findings³²⁴ on the mere fact that the children were with their mother (§ 74). It is interesting to note that the detention centre is considered as an inappropriate place even though it is found that:

- it has a wing specifically for single women and couples with or without children and has its own outdoor space.
- it has two large bedrooms combined and consecrated to children reception with an abundance of educational materials, games and crafts and a classroom as well.
- five educators are dealing exclusively with children.
- a class is organized in the morning for the children while in the afternoon educational and outdoor activities are organized in the outdoor spaces (§§ 25-28).

Therefore the exception in article 10 § 4, paragraph a) of the text proposed by the Council cannot be maintained.

6.2. Derogatory conditions for information in border posts or transit zones

Article 10 § 3 of the text proposed by the Council states that detained asylum seekers are immediately provided with updated information on the rules which apply in the facility and

321 The terms of § 1 of article 11 are similar to those of article 37, indent b) of the Convention on the Rights of the Child which stipulates that the detention of a child must be a measure of last resort and as short as possible.

322 ECtHR, *Mubilanzila Mayeke and Kaniki Mitunga v. Belgium*, Application n° 13178/03, Judgment 12 October 2006. Hereafter: ECtHR, *Mubilanzila Mayeke and Kaniki Mitunga*.

323 ECtHR, *Muskhadzhiyeva v. Belgium*, Application n°41442/07, Judgment 19 January 2010. Hereafter: ECtHR, *Muskhadzhiyeva*

324 The detention took place in the same detention center as in the case *Mubilanzila Mayeke and Kaniki Mitunga*.

set out their rights and obligations in a language they are reasonably supposed to understand.

This provision supplements the general provision relating to information to be provided to asylum seekers (article 5: Information). However, § 4, indent b) of article 10 allows Member States, in duly justified cases and for a reasonable period which shall be as short as possible to derogate to § 3 when the asylum seeker is detained in border posts or transit zones.

It is first necessary to outline the importance to any person detained to be informed promptly of their rights and obligations, including those in force in the place of detention especially if the detention takes place in areas where the possibility of contact with others may be more difficult. The Court decision in the case *Amuur v. France*³²⁵ must be recalled. Furthermore it should be noted that article 16 § 5 of the return directive sets out that third-country nationals kept in detention shall be systematically provided with information which explains the rules applied in the facility and sets out their rights and obligations, without any exception or possible limitation. It is true that article 16 § 5 of the return directive aims at a systematic communication of information without enacting that it should be immediate. It is also true that the exemption of § 4, indent b) has a limited scope (duly justified cases, reasonable period as short as possible) and cannot lead to waive the communication of information but only to create a (short) delay of this communication. However, it is not recommended to keep this exemption.

SOLUTION:

- Title 6. 1. above:

Remove the possibility for Member States to derogate from article 10 § 1 by deleting indent a) in article 10, § 4 of the text of the Council.

- Title 6. 2. above:

Remove the possibility for MS to derogate from article 10 § 3 by deleting indent b) in article 10, § 4 of the text of the Council.

7. ARTICLE 27 OF THE DUBLIN REGULATION PROPOSAL: THE PROVISION RELATED TO DETENTION OF ASYLUM SEEKERS (TEXTS OF THE COMMISSION, THE PARLIAMENT AND THE COUNCIL)

PROBLEM: subject to the inclusion of the considerations of Title 8 below, and provided that the risk of absconding is held in Dublin Regulation, some problems described in Title 5 for the reception directive proposal apply to article 27 of the Dublin regulation proposal (Texts of the Commission, the Parliament and the Council).

- Title 7. 1. below: Identical reservations as the one made for the texts of the reception directive proposal.

325 ECtHR, *Amuur*: asylum seekers have been detained for 20 days in the transit area of Orly international airport in Paris for most of their stay without any legal or social assistance.

- Title 7. 1. 1. below: The asylum seeker's right to be informed of the reasons for detention in a language he/she understands according to article 5 § 2 ECHR (article 27 § 7, indent 2 of the Dublin regulation proposal).
- Title 7. 1. 2. below: The judicial review of the administrative decision of detention shall occur speedily according to article 5 § 4 ECHR (article 27 § 6 of the Dublin regulation proposal).
- Title 7. 1. 3. below: Setting out a maximum duration of the detention.

And also:

- Title 7. 2. below: Article 27 § 12 of the Dublin regulation proposal refers to the reception conditions in a very ambiguous way.

7.1. The reservations are identical to those made for the texts of the reception directive proposal

Some issues outlined in Title 5, relating to the texts of the reception directive proposal, apply to article 27 of the Dublin regulation proposal as well. Thus:

7.1.1. The asylum seeker's right to be informed of the reasons for detention

Article 27 § 7, indent 2 of the Dublin regulation (texts of Council and the Parliament similar on this point to the Dublin regulation Commission proposal) provides that detained asylum seekers shall be informed of the reasons for detention in a language they are reasonably supposed to understand. This provision does not comply with article 5 § 2 ECHR which states that information must be given in a language they understand.

7.1.2. The judicial review of the administrative decision of detention

Article 27 § 6 of the Dublin regulation (texts of Council and the Parliament similar on this point to the Dublin regulation Commission proposal) provides that the detention order shall be confirmed by judicial authorities within 72 hours from the beginning of the detention. This provision could be found in breach of article 5 § 4 of the ECHR, which requires a judicial review made speedily and of the jurisprudence of the ECtHR stating that the time limit cannot be defined in the abstract; the matter must be determined in the light of the circumstances of each case.

7.1.3. Setting out a maximum duration of the detention

This issue must also be considered within the framework of article 27 of the Dublin regulation.

7.2. A reference to the reception conditions formulated in an ambiguous way (article 27, § 12 of the Dublin regulation proposal)

Article 27 § 12 of the Dublin regulation Commission proposal (not amended by the texts proposed by the Parliament and the Council) states that Member States shall ensure that asylum-seekers detained in accordance with article 27³²⁶ enjoy the same level of reception conditions for detained applicants as those laid down in particular in articles 10 and 11 of Directive [reception conditions directive, new text].

Since the reception directive applies to asylum seekers subject to Dublin procedure³²⁷ a reference to the same level of reception conditions do not seem adequate. A reference to the same reception conditions as those provided in the reception directive makes more sense. Moreover, why is there only a specific reference to articles 10 and 11 rather than a general reference to the directive followed by a specific reference to articles 10 and 11? No doubt can be left on the application of the other minimum standards of the reception directive to asylum seekers subject to a Dublin procedure and detained on the basis of a risk of absconding³²⁸.

SOLUTION:

- Title 7. 1. above: Identical reservations as the one made for the texts of the reception directive proposal.

- Title 7. 1. 1. above: Article 27, § 2, indent 2

Only the wording in a language they [the asylum seekers] understand must be accepted to the exclusion of any other.

- Title 7. 1. 2. above: Article 27 § 6

Retain the wording of the text of the reception directive proposed by the Council which requires a speedy judicial review to be decided on as speedily as possible from the beginning of detention or after the launch of the relevant proceedings

- Title 7. 1. 3. above: the setting out of a maximum duration of the detention

This issue must be discussed.

It is also recommended to:

Strengthen the judicial review of the detention (see above Title 5. 4).

Provide for asylum seekers in detention a priority procedure (see above Title 5. 4).

- Title 7. 2. above: Article 27 § 12

Replace the reference to the same level (of reception conditions) with a reference to the same reception conditions.

Replace the reference in particular in articles 10 and 11 of the reception directive with a general reference to the reception directive followed by a specific reference to articles 9, 10 and 11 (adding the specific reference to article 9 to articles 10 and 11)

8. RECEPTION AND PROCEDURE DIRECTIVES PROPOSALS AND DUBLIN REGULATION PROPOSAL

PROBLEM: dispersion of the provisions related to the detention of asylum seekers

The reception directive proposal enacts a new regime of detention of asylum seekers (article 8 to 11). The Dublin regulation and the procedure directive proposals partially re-enact some provisions of the regime. This is inadequate insofar as it might bring doubts as

327 It results from recital (8) of the preamble to the reception directive Commission proposal and recital (9) of the preamble of the Dublin regulation Commission proposal.

328 See also infra Title 9 concerning the issue of the application of principle of the reception directive proposal to asylum seekers in detention.

to the implementation of the provisions of the reception directive not explicitly re-enacted in both other texts. This is particularly true for the Dublin regulation.

8.1. A new regime of detention of asylum seekers set out in the reception directive

The new article 8 to 11 of the reception directive proposal enacts a new regime of detention of asylum seekers (reasons to detain, guarantees for detained asylum seekers, conditions of detention...).

8.2. Repetition in the Dublin regulation

Article 27 of the Dublin regulation proposal states the specific reason for detention for risk of absconding in case of transfer decision. In this, article 27 is not a repetition as the reception directive Commission proposal does not mention the risk of absconding.

Therefore to maintain the ground in the Dublin regulation proposal can be justified if the risk of absconding is not included in a general and not limiting way in the text of the reception directive³²⁹. In this context, the first 4 paragraphs of article 27 can be maintained.

Nevertheless article 27 repeats a number of provisions of the regime of detention set out in the reception directive proposal without referring to all the provisions. These partial references are inadequate insofar as they may bring doubts about the implementation of other provisions of the reception conditions directive that are not specifically listed.

Moreover, if the reason for detention based on a risk of absconding in case of decision of transfer is maintained specifically in the Dublin regulation - § 12 of article 27 (maintained and amended as recommended by the Title 7.2 above) - it is sufficient to ensure that asylum seekers detained for this reason benefit from the detention regime set out in the reception directive proposal. This application follows from the recital (8) of the preamble to the reception directive Commission proposal and recital (9) of the preamble to the Dublin regulation Commission proposal.

8.3. Repetition in the asylum procedure directive

Article 22 of the asylum procedure directive Commission proposal:

§ 1 reiterates the principle that Member States shall not hold a person in detention for the sole reason that he/she is an applicant for international protection and states that grounds and conditions of detention as well as guarantees available to detained applicants for international protection shall be in accordance with the one laid down in the reception directive proposal.

§ 2 repeats that where an applicant for international protection is held in detention, Member States shall ensure that there is a possibility of speedy judicial review in accordance with the reception directive.

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See supra Chapter 4 with the result that the Council proposes to introduce the risk of absconding in article 8 § 2 of the reception directive.

The § 1 can be maintained. The § 2 is unnecessary in light of § 1 which refers, inter alia, to the guarantees of the reception directive.

SOLUTION:

Delete §§ 5 to 11 of article 27 of the Dublin regulation proposal. Amendment of § 12 of the same article according to the recommendations of Title 7, Box SOLUTION, Title 7. 2.
Delete article 22 § 2 of the asylum procedure directive proposal.

9. THE RECEPTION DIRECTIVE PROPOSAL (TEXTS OF THE COMMISSION, THE PARLIAMENT AND THE COUNCIL)

PROBLEM: the issue of the application of principle³³⁰ of the reception directive proposal to asylum seekers in detention.

The Odysseus report³³¹ and the report of the Commission³³² related to the evaluation of the transposition in the MS of the reception directive have noted that many states consider that the reception directive in force does not apply to asylum seekers in detention. If the reception directive Commission proposal is less uncertain regarding its application of principle to asylum seekers in detention, this proposal does not completely dispel the doubt.

The application of principle of the reception condition in force to asylum seekers in detention is not reached by consensus. Some defend the application of principle while others believe that this position is not valid³³³. Whatever the relevance of the legal arguments of the two theses³³⁴, this conclusion must lead the EU Legislator to remove this uncertainty.

If provisions in the reception directive Commission proposal (and the texts proposed by the Parliament and the Council) make the issue less uncertain, these texts do not completely dispel the doubt even if the objective sought by the Commission is the application of principle of the reception directive to applicants in detention³³⁵.

The explanatory Memorandum of the reception directive Commission proposal states that « ...in view of adequately clarifying the rationae materiae of the directive, the proposal stipulates that it is applicable to all types of asylum procedures and to all geographic areas and facilities hosting asylum seekers ». Recital (8) of the preamble states that « ...this Directive should apply during all stages and types of procedures concerning applications for international protection and in all locations and facilities hosting asylum seekers ». According to Article 2, indent i), detention shall mean confinement of an asylum seeker by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement while according to indent j) accommodation centre shall mean any place used for collective housing of asylum seekers.

³³⁰ Unless otherwise specified, such as Article 6 § 2 relating to the documents.

³³¹ Odysseus Report, Q. 33. I, p. 108 et 109.

³³² Commission Report, RCD, p. 3.

³³³ 9 MS do not apply the directive to asylum seekers in detention. In three other MS the situation is unclear: Odysseus Report, Q. 33 I, p. 108 and 109.

³³⁴ It seems useless to enter into the details of legal arguments – those of the proponents of the application and those of his detractors.

³³⁵ Commission Report, RCD, p. 3.

As follows from the development of Titles 2-5 above, the directive proposal contains new articles (articles 8 to 11) that define the conditions of detention of asylum seekers. These articles include a set of rules relating to material reception conditions or other reception conditions of asylum seekers in detention. All reception conditions contained in the directive are not however included in these articles 8 to 11³³⁶. Can we therefore consider that legally the changes made by the Commission (in particular the contents of the Explanatory Memorandum and the preamble above mentioned) are sufficient to ensure legal certainty regarding the application of principle of the directive to asylum seekers in detention as sought by the Commission?

According to the relevant departments of the Commission the wording « all ...facilities hosting » in the Explanatory Memorandum and of « all locations and facilities hosting » in the preamble (recital 8) are general and include not only open reception centres, but also closed reception centres, that is detention centres. The Commission also supports the idea that the term accommodation centres (see above: article 2. j) refers to open centres as well as to detention centres given the broad definition of « centre...used for collective housing of asylum seekers ». The argument of the Commission is legally defensible.

Finally, the Commission recalls the *rationae personae* scope of the directive which «...shall apply to all third country nationals and stateless persons who make an application for international protection » (article 3). On this last point it should be noted that the reception directive in force also provides that it shall apply to all third country nationals and stateless persons who make an application for asylum. This provision does not prevent MS to consider that the directive in force does not apply to asylum seekers in detention.

SOLUTION: given the discussions the reception directive in force raised about the issue on the one hand and on the second hand given the fact that even if the wording of the Commission proposal has reduced the risk of conflicting interpretations it has not completely lifted it. It is recommended to add a provision explicitly stating the application of principle of the directive to asylum seekers in detention³³⁷. Some further clarification should also be made as has been pointed out in Title 5. 4 in connection with article 15 (access to employment) for instance.

SECTION II: TAKING INTO ACCOUNT OF THE SITUATION OF VULNERABLE ASYLUM SEEKERS WITH SPECIAL NEEDS

1. INTRODUCTION

The reception conditions directive in force is the only EU instrument of first generation to give attention in a specific way to the situation of vulnerable asylum seekers with special needs. Indeed the Dublin regulation in force does not mention it and the asylum procedure

336 As an example: article 2, h) : reception material conditions : reception conditions that include housing, food and clothing, provided in kind, or as financial allowances or vouchers, or combination of the three, and a daily allowance. Assuming that in detention centres asylum seekers are housed and fed, what about their clothing and payment of daily allowance?

337 Unless otherwise specified, such as article 6 § 2 relating to the documents.

directive only touches the subject of the possible vulnerability of asylum seekers³³⁸ in an extremely marginal way. The situation of the recognized refugees or the beneficiaries of subsidiary protection is quite different since provisions partly identical to the reception conditions directive in force can be found in the qualification directive.

The asylum procedure directive Commission proposal and the Dublin regulation proposal clear up this problem. In the draft, specific provisions devoted to vulnerable asylum seekers are now envisaged. This change is essential if one keeps in mind the situation of the children or of people having important mental health problems or victims of torture among others. The European Council was asking for such a change: the Stockholm Program puts at the centre of the priorities of the Union a better protection of the vulnerable people.

As regards the taking into account of the situation of vulnerable asylum seekers in the reception directive in force, it aims at providing reception conditions appropriate to their particular needs (especially adapted health care). Specific provisions are given in Chapter IV of the directive (articles 17-20), entitled « Provisions for persons with special needs ». Article 17 is central, as it states the general principle of the consideration of the situation of vulnerable asylum seekers with special needs and that of their identification by the States.

In 2007, The Odysseus Academic Network did a study³³⁹ on the transposition of the reception directive. This study underlined that a great number of Member States have no procedure to identify asylum seekers with special needs despite article 17 of the directive. This will obviously deprive those persons of the special reception conditions that they should normally benefit from and leave their special needs unsatisfied. The identification of asylum seekers with special needs is indeed of paramount importance. In some cases, evidence of the vulnerable situation is more obvious than in others where traumas might be difficult to detect (especially traumas related to acts of torture or other serious forms of physical, psychological or sexual abuse: acts of violence which do not necessarily leave visible traces but which often stops the victim from talking about his experiences).

The lack of identification procedure in many Member States is partly due to the fact that article 17 of the reception directive does not expressly oblige the Member States to set up a procedure of identification for these applicants even if one can consider that this procedure is logically required by article 17 as the European Commission has underlined it with relevance in its November 26th 2007 report³⁴⁰: "Identification of vulnerable asylum seekers is a core element without which the provisions of the Directive aimed at special treatment of these persons will lose any meaning".

In any event, the reception conditions directive Commission proposal gives an adequate answer to the problem. Indeed, with the new article 21 the Member States are very clearly compelled to bring in procedures of identification in order to assess the individual situation of any asylum seeker aiming at identifying whether or not he/she has special needs.

It is worth mentioning that in 2009 the Odysseus Academic Network decided to launch a second study related to the issue of the identification of vulnerable asylum seekers in the

338 See article 13, § 3, paragraph a) according to which the States shall ensure that the person who conducts the interview is sufficiently competent to take account of the personal situation or general circumstances surrounding the application, including cultural origin or vulnerability of the applicant, provided it is practicable and article 17 relating to on guarantees granted to unaccompanied minors - found to be insufficient however: see Chapter IV.

339 Odysseus Report.

340 Commission Report, RCD, point 3.5.1., page 9.

framework of the reception directive. This comparative study analysed the rare more or less formalised procedures of identification in place at national level. The legal rules of the few Member States³⁴¹ concerned have been analysed together with their practices of identification in a comparative way in order to identify the good practices and disseminate them to all Member States. Legal and practical recommendations were also made.

The members of the Parliament are invited to consult this study if they want a detailed overview of the issue in the specific context of the reception directive.

The general context being laid down it is now required to conduct the analysis on the taking into account of the situation of vulnerable asylum seekers with special needs in the different instruments of the second generation proposed by the Commission. This analysis will be conducted in the following order:

1. The reception directive proposal (SUB SECTION I)
2. The Dublin regulation proposal (SUB SECTION II)
3. The asylum procedure directive proposal (SUB SECTION III)
4. The qualification directive proposal (SUB SECTION IV)

Where appropriate the texts proposed by the Parliament and/or the Council will be examined together with the initial Commission proposal.

SUB SECTION I: THE RECEPTION DIRECTIVE PROPOSAL (TEXTS OF THE COMMISSION, THE PARLIAMENT AND THE COUNCIL)

1. THE PROCEDURAL DIMENSION OF ARTICLE 21 § 2 OF THE RECEPTION DIRECTIVE PROPOSAL (TEXTS OF THE COMMISSION AND PARLIAMENT)

PROBLEM: the obligation for the States to establish a procedure of identification of vulnerable asylum seekers with special needs: a clear obligation that is definitely in the right direction. However the temporal dimension must be better defined to allow the identification of vulnerable people throughout the asylum procedure.

Article 21 § 2 of the reception directive Commission proposal (and of the text of the Parliament unamended on this point) explicitly sets out the States obligation to establish procedures in national legislation with a view to identifying (...) whether the applicant has special needs.

§ 2 also imposes on the States the obligation to indicate the nature of the particular needs identified in the context of these procedures. The reception directive Commission proposal met the need to clarify the wordings of article 17 of the reception directive into force.

§ 2 also specifies that these procedures should be imposed as soon as an application for international protection is lodged. This temporal precision is insufficient. It does not guarantee that the procedures set out by the States will allow the identification of

341 Member States covered by the study are Belgium, Spain, Finland, Malta, The Netherlands and Poland. Norway took also part to the study. The study was funded by the ERF. Final reports have been addressed to the Commission in February 2010. This study will be subject to an official publication end 2010.

vulnerable persons throughout the asylum procedure. In the absence of monitored individual assessment the objective assigned to article 21 may not be reached.

The determination of the moment when the assessment of the situation of the asylum seeker must take place is a key issue. If it seems important to conduct an individual assessment of the situation of every asylum seeker soon after the lodging of the application for international protection, at the same time carrying this assessment only seems insufficient.

Indeed, some traumas can be difficult to detect (especially traumas related to acts of torture or other serious forms of physical, psychological or sexual abuse: acts of violence which do not necessarily leave visible traces but which often stops the victim from talking about his experiences). In these cases, to create a trustful atmosphere is essential for the asylum seeker to be able to express his/her painful experiences. Creating a trustful atmosphere takes time. In addition, some asylum seekers may not be vulnerable people with special needs upon arrival in the country of reception, but they may, later on, for one reason or another become vulnerable people with special needs.

It is therefore important not to restrict identification (assessment) at a unique moment but to conceive it as a long term project carried out as long as an applicant is, as such, allowed to remain on the territory of the State.

SOLUTION: stipulate the obligation for the States to conduct an individual assessment of the situation of asylum seekers once an application for international protection has been lodged and that on an ongoing basis (see below Title 4 of this SUB SECTION I, where an amendment proposal is given).

2. THE CONCEPTUAL DIMENSION OF ARTICLE 21 OF THE RECEPTION DIRECTIVE PROPOSAL OR WHO IDENTIFY AND/OR WHAT IDENTIFY (TEXTS OF THE COMMISSION AND THE PARLIAMENT)

PROBLEM: The States are compelled to take into account the situation of persons with special needs without requiring a causal link between the special needs and a state of vulnerability of the person making the conceptual dimension of article 21 uncertain. In other respects, when it comes to vulnerable persons, they are always regarded as persons with special needs in the texts of the Commission and Parliament. This does not necessarily correspond to reality.

The conceptual dimension raises the following fundamental question: Who should be identified and/or what is to be identified under the legal norm at issue (article 21 of the draft text or article 17 of the reception directive in force) in order to ensure the purpose of this standard that is to provide to some asylum seekers adapted reception conditions.

Under article 17 of the reception directive in force aim is to identify vulnerable persons with special needs. Article 17 establishes a causal link between the notion of special needs and a state of vulnerability of the asylum seeker.

This causal link is not necessarily required by article 21 of the text proposed by the Commission and not amended on this point by the Parliament. The core idea of article 21 is

based exclusively on the notion of special needs without any requirement of connection with a state of vulnerability of the asylum seeker. This amendment raises a question about the appropriateness of applying the standard mostly since it makes the conceptual dimension of article 21 uncertain.

To address the question of the conceptual dimension of article 21 proposed by the Commission is crucial. As has been stated, the issue is to determine who should be identified and / or what should be identified under this standard aiming at providing adapted reception conditions. The answer given, following the analysis of article 21 proposed by the Commission revealed a problem regarding the appropriateness of applying this standard. To understand the issue at stake the terms of article 17 of the reception directive in force must be analysed at first to give an answer to the same questions: who should be identified and/or what must be identified under article 17 in order to provide for adapted reception conditions.

2.1. Who should be identified and/or what must be identified according to article 17 of the reception directive in force?

2.1.1. Article 17, § 1

The analysis of the terms of article 17 § 1 reveals that the notion of vulnerable persons is the central and exclusive notion of this §. Indeed no other notion other than that of vulnerable persons is mentioned in this §. It does not give any abstract definition of the notion of vulnerable persons. Nevertheless a non-exhaustive list of people considered as vulnerable is given. This list, as formulated, refers to categories of persons. This list is not limiting considering the terms "such as". Therefore it allows adding other categories of individuals. Moreover, the notion does not require that the person necessarily belongs to a category to be regarded as vulnerable. Any person may, individually, fit in the scope of § 1 and be considered vulnerable regardless of his belonging or not to any category.

In the absence of legal definition of the notion of vulnerable person, it is useful to refer to the common definition of vulnerable or synonyms that are given: : «insecure»³⁴², « defenceless»³⁴³, «exposed»³⁴⁴, « unsafe, threatened»³⁴⁵, «likely to be hurt»³⁴⁶, «unprotected»³⁴⁷, «unsafe»³⁴⁸, « fragile »³⁴⁹, «weak»³⁵⁰, « undefended »³⁵¹.

These common definitions or synonyms shed light on the persons the provision intends to address. The list of categories of persons listed as examples also gives an indication on the notion of vulnerable persons that seem to be in the same direction as the common definitions or synonyms of the word vulnerable. Looking at the list we see through the different categories mentioned, that these persons given their age, their health, their family situation or their experiences have or may have³⁵² a certain fragility, insecurity, weakness, ... requiring assistance, protection, special attention.

342 <http://www.synonym.com/synonyms/vulnerable/>

343 As above

344 As above

345 As above

346 As above

347 As above

348 As above

349 As above

350 As above

351 As above

352 The difference between "present" or "may present" is important - see below in Section 2. 2. 4, 2nd question.

2.1.2. Article 17 § 2

Article 17 § 2 refers to the notion of special needs. This notion is not defined. § 2 establishes also - and this is a fundamental point - a causal link between the two notions: the notion of vulnerable persons and the notion of special needs. § 2 is headed:

"2. Paragraph 1 shall apply only to persons found to have special needs after an individual evaluation of their situation ».

By stating that § 1 shall apply only to persons whose special needs were identified after an individual assessment of their situation, § 2 establishes a causal link between the notion of special needs and the notion of vulnerable persons. Indeed, § 1 relates to the vulnerable persons and only them and requires Member States to take into account their particular situation.

2.1.3. Conclusion regarding the conceptual dimension of article 17: Who is to be identified and/or what has to be identified according to article 17 §§ 1 and 2?

It follows from the previous explanations that vulnerable persons with special needs are to be identified or stated differently that special needs related to and/or caused by a condition of vulnerability of the person and/or a vulnerable situation in which a person is³⁵³ are to be identified.

Article 17 therefore refers to one and only one concept that takes into consideration two notions (the notion of vulnerable persons or vulnerability and the notion of special needs) linked by a causal relationship.

In the absence of definition of the notion of special needs and even if the notion of vulnerable persons is not defined in the abstract, the requirement of a causal link between the two notions give a strong indication of the nature of the situations that article 17 refers given the common definition of the word vulnerable on one hand and the categories of vulnerable persons listed as examples in § 1 on the other hand.

Finally, considering the wording of § 2 ("Paragraph 1 shall apply only to persons ...") all vulnerable persons as defined in § 1 are not always regarded as having special needs. It is the very purpose of the individual assessment mentioned in § 2 to identify whether or not they have special needs.

2.2. Who is to be identified and/or what has to be identified according to article 21 proposed by the Commission and the Parliament?

2.2.1. Article 21, § 1

A first major amendment concerns the choice of the notions themselves regarding article 17 § 1 of the reception directive in force: the notion of vulnerable persons is no longer the central and exclusive notion of § 1: beside the notion of vulnerable persons the notion of persons with special need emerges. The notion of special needs is not defined as in article 17. The notion of vulnerable persons is presented in the same way as in article 17. However, in the non-exhaustive list of persons considered as vulnerable persons two categories were added: victims of trafficking and persons with mental health problems.

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A distinction seems to be made between a state of vulnerability and a situation of vulnerability. The loss of the use of the legs, impaired mental health are states of vulnerability. The fact for a woman to

A second fundamental amendment is provided for by article 21 § 1 is relating to connection between the notion of vulnerable persons and the notion of special needs. On the one hand it follows from § 1, in fine, that the vulnerable persons « ...shall always be considered as persons with special needs ». On the other hand, on the contrary to what has been said about the meaning to be given to the wording persons with special need mentioned in the directive in force³⁵⁴ it appears that these terms must, under the new article 21 be understood independently from the concept of vulnerable persons with special needs. This statement follows from the first sentence of article 21 § 1 which constitutes the general principle of the provision: it is « ...take into account the specific situation of persons with special needs...» without the requirement of a causal link between these special needs and a state and/or a situation of vulnerability. The wording of § 2 confirms this interpretation (see below Title 2. 2. 2).

2.2.2. Article 21 § 2

According to § 2 « Member States shall establish procedures in national legislation with a view to identifying...whether the applicant has special needs and indicating the nature of such needs... ». Here the notion of special needs is not linked to a state of vulnerability of the asylum seeker. The § 2 does not refer to § 1 anyway.

2.2.3. Conclusion regarding the conceptual dimension of article 21

It follows from the previous explanations that the identification of persons with special needs - without those needs to be necessarily linked by a causal relationship to a state of vulnerability - is the concern. However, vulnerable persons as defined in § 1 of article 21 are necessarily included in the "primary target group" and these vulnerable persons are still regarded as having special needs: see above under the § 1 in fine.

Therefore the central notion referred to in article 21 is based only on the notion of special needs without such a notion to be linked to the notion of vulnerability. So, according to article 17 of the Directive into force major modifications on the conceptual dimension originate in article 21 of the directive Commission proposal.

These modifications raise questions about the appropriateness of their application.

2.2.4. Questions regarding the modifications made by article 21 of the texts of the Commission and Parliament to the conceptual dimension under article 17 in force

Two questions can be raised.

- Firstly, which special needs must be considered in the context of article 21 proposed by the Commission and the Parliament since a causal link between these special needs and a state of vulnerability of the person is not established nor required any longer?

This question can be asked in the context of article 17 of the directive in force since the latter, nor the Commission directive proposal, defines the notion of special needs. However if the current directive does not define the notion of special needs this notion is framed by the notion of vulnerability as has been stated in Title 2.1 above. This limit is a strong

354 be alone in a dormitory with men exclusively is a situation that may make her vulnerable. The condition is more intrinsic to the person, the situation more extrinsic to the person.
The fact that the wordings of *persons with special needs* must necessarily be understood as the general principle stated in Article 17 that is: *vulnerable people with special needs*.

indication that allows to better identify the special needs the provision is intended to address.

This first point can be illustrated by an example. This example shows that the answer is more obvious under article 17 than under article 21: how to assess the situation of a person who has lost a tooth and requires the replacement of it (however considering that the lack of replacement of this tooth has no impact on chewing and therefore on the possibility of the person to eat normally)?

One must first recall that in the case of health care, under the minimum standard laid down in article 15 § 1 in force, the Member States is only obliged to provide emergency care and essential treatment of illness. It seems fairly clear that a replacement of a tooth will not be taken care of by the minimum standard. Could it be then based on the notion of special needs? If one refers to article 21, one can support the idea that this request may have to be taken into account insofar as the notion of special needs is neither defined, nor framed by the notion of vulnerability. However under article 17, it is reasonable to consider that this request is not a special need due to a state of vulnerability and is therefore not to be taken into account. The issue of special needs in the field of health care is a particularly important issue given the special provision of article 15 above, which became article 19 in the directive Commission proposal. This article 19 incorporates the principle of article 15 (a minimum standard and a higher standard for persons with special needs) with some modifications. The wording is:

Article 19: Health Care

« § 1 Member States shall ensure that applicants receive the necessary health care which shall include, at least, emergency care and essential treatment of illness or mental disorders.

§ 2. Member States shall provide necessary medical or other assistance to applicants who have special needs, including appropriate mental health care when needed, under the same conditions as nationals ».

Under the changes one must note in particular that the directive Commission Proposal introduces a higher standard referring to health care under the same conditions as national in favour of persons with special needs mentioned in § 2 – higher standard which is not provided for in § 2 of article 15 in force. This amendment was deleted in the text amended by the Parliament. In any event, whether or not one takes into account the reference to nationals, the principle of a higher standard than the minimum standard laid down in § 1 still applies to persons with special needs.

The terms of persons with special needs mentioned in article 19 § 2 of the directive Commission proposal must be understood in the light of article 21 of the proposal which states the general principle of « Chapter IV: Provisions for persons with special needs ». But the general principle enacted in article 21 has been amended regarding the conceptual dimension. Besides the concept of "vulnerable persons with special needs" which can still be applied, the autonomous concept of persons with special needs - without the requirement of a causal link with a state of vulnerability - becomes the essential concept of this general principle. It follows that the terms of persons with special needs of article 19 § 2 must be understood in the same way: they may correspond to the concept of vulnerable persons with special needs but not necessarily. If they correspond to the concept of autonomous persons with special needs the issue about the special needs covered by the

standard of § 2 appears since in this case the undefined notion of special needs is not framed by a causal link with a state of vulnerability. This hypothesis may imply that any health problem can potentially be considered as a special need and that therefore any person expressing a need in the health field may require to benefit from the specific standard of § 2, which would accordingly become the minimum standard applicable .

Relating to this first issue, it is interesting to briefly discuss the legal system and the practice in force in Belgium. In this Member State the law requires an individual evaluation of each applicant to determine whether the reception meets the asylum seeker's special needs. The law called for the identification of each asylum seeker's special needs without requiring a causal link between those needs and a state or situation of vulnerability. In doing so, the Belgium legislation is not in keeping with the general pattern of article 17 of the directive into force but that of article 21 of the directive Commission proposal: the central and autonomous concept of persons with special needs is not framed by the notion of vulnerability.

Two important elements relating to the implementation of the Belgian law must be addressed. The first element is that the Belgian law poses the question of how far to go in the interpretation of the notion of special needs? This matter is the subject of litigation. Thus, a judicial review was brought by an asylum seeker who required under a special need to be able to attend language courses. He asked for this special need to be taken into account regarding the reception centre so that it would not be located too far from the place where he attended his course³⁵⁵. This situation illustrates the problem of the applicability of article 21. The second element is that unless a frame is given to the notion of special needs in the legislation, people in charge of the assessment in practice provide an important "filtering" of the needs: needs are taken into account only to a reasonable extent and provided they are not foolish or unrealistic. This "filtering" operated in the practice makes the legal situation uncertain as the judicial review above mentioned proves it. The risk of litigation is real³⁵⁶. Beyond this legal risk, this example should lead the EU legislator to wonder about the situations to which it intends to give greater protection.

- Secondly, are the vulnerable persons as defined by article 21 § 1 always persons with special needs as this provision enacts?

It seems appropriate to argue that being a vulnerable person as defined in article 21 § 1 does not always mean one has special needs. This reserve relates specifically to the list of the categories of persons considered vulnerable. An example is that of the elderly. A senior in good physical and mental health does not necessarily have special needs. However, all the categories mentioned in article 21 shall not be considered the same way: when the objection about the elderly seems relevant, nevertheless with minors or unaccompanied minors we must instead consider that because of the mere fact of their minority minors have special needs necessarily (compared with adults). Therefore, it appears that the nature of the link between the notion of vulnerable persons and the notion of special needs set forth in article 17 of the current directive appears more judicious with specific regard to the categories listed.

355 The plaintiff had been subject to disciplinary action which had involved a change of centre. The plaintiff does not dispute the merits of the disciplinary action itself, but he argued that his transfer to another centre imposed on him a ride too long to get to its language courses.

356 These elements have been put forward as part of the study conducted by the Odysseus Network for the FER on the issue of the identification of vulnerable asylum seekers with special needs: a study submitted to the Commission in February 2010 and to be published in September 2010.

SOLUTION:

Remove the assertion that vulnerable persons as defined in § 1 of article 21 have always special needs

3. THE CONCEPTUAL DIMENSION AND THE PROCEDURAL DIMENSION OF ARTICLE 21 OF THE RECEPTION DIRECTIVE PROPOSAL (TEXT OF THE COUNCIL)

PROBLEM: article 21 of the text of the Council raises a real problem insofar as regarding the obligation to take into account the specific situation of asylum seekers that is obligation to provide adapted reception conditions it refers only to vulnerable persons and as regarding the obligation to establish a procedure of identification it refers only to persons with special needs without requiring any causal link between the notion of special needs and a state or condition of vulnerability. Moreover, the wording of article 21 § 2 puts in doubt the obligation of the States to set out identification systems that apply to all asylum seekers.

- Title 3. 1.below: The parallel use of two concepts that of vulnerable asylum seekers and asylum seekers with special needs without any established link between the notion of special needs and the notion of vulnerability creates a legal uncertainty as to the interpretation and application of article 21.

The §§ 1 and 2 of the text of the Council uses each a different concept (the first § the concept of vulnerable persons, and § 2 the concept of persons with special needs) and no link is established between these two concepts. This approach can lead to the identification of special needs, under § 2 of article 21, which states should disregard when adapting the reception conditions under § 1 of article 21. Indeed the autonomous concept of persons with special needs - without any reference to a state of vulnerability - is wider than that of vulnerable persons with special needs, or in other words persons with special needs due to a condition or situation of vulnerability. In this the Council text is extremely confusing. It might lead to legal uncertainty as to its interpretation and application.

- Title 3. 2.below: The doubt regarding the States obligation to put in place systems of identification which apply to all asylum seekers.

Under § 2 of the Council text there is no question of whether the applicant has special needs or not (the wording of the Commission leaves no doubt as to the states' obligation to assess the individual situation of each asylum seeker with the view to identify, whether he/she has special needs or not) but to identify applicants with special needs (a more general wording that could give rise to different interpretations and lead to identification systems that would not apply to all asylum seekers).

3.1. The parallel use of two concepts that of vulnerable asylum seekers and asylum seekers with special needs without any established link between the notion of special needs and the vulnerability creates legal uncertainty as to the interpretation and application of article 21

Article 21 § 1 of the text of the Council is keeping with the general pattern of article 17 § 1 of the reception directive in force : the central and exclusive notion is that of vulnerable persons whom States have to take into account the specific situation by providing adapted reception conditions. Unlike § 1, § 2 does not fall in line with article 17 of the reception directive in force. If it is indeed relating to persons with special needs, in the second § no link is established between the § 1 and the § 2 and thus between the notion of special needs and the notion of vulnerability. Therefore § 2 aims at identifying asylum seekers with special needs while § 1 aims at considering the situation of vulnerable asylum seekers.

Beside this point, the title itself of Chapter IV of the text of the Council, article 21 being part of it, seems to give credence to the idea that there are two independent concepts: a concept using only the notion of special needs and another using only the notion of vulnerability without any link between these two concepts. Indeed, the Chapter IV is entitled Provisions for vulnerable persons and persons with special needs. The parallel use of these two concepts creates legal uncertainty as to the interpretation and application to be given to article 21.

3.2. The doubt regarding the States obligation to put in place systems of identification that apply to all asylum seekers

The § 2 of the text of the Council is close to the provision of the Commission directive proposal but is not identical. According to the text of the Council the aim is to identify persons with special needs as provided in the Commission text. The wording is different, however, since it is stipulated in the Council text that Member States shall establish mechanisms with a view to identifying applicants with special needs and not as required by the text of the Commission procedures...with a view to identifying...whether the applicant has special needs.

The wording of the Commission does not allow doubting about the States obligation to submit all asylum seekers to the identification procedure which is obviously fundamental in terms of spirit and purpose of the provision. The wording of the Council is more general. It could give rise to different interpretations and lead to the development of systems of identification that do not apply to all asylum seekers.

Incidentally, it may be noted that the text of the Council replaced the term procedures used by the Commission with the term mechanisms. The term mechanism seems both less formal and wider. If it seems less formal that does not mean that exempts states from the obligation placed upon them to set out "means", " methods " for identification in their national legislation and to take a decision as to whether or not the applicant has special needs or not, after the implementation of these " means ", these "methods". The term appears in the same time broader than the term procedures in that it could cover more informal methods of identification such as observation of asylum seekers in their daily life, activities or during recreational, educational, artistic or other activities ... In some Member

States more informal methods have a central role in the process of identifying vulnerable asylum seekers as well more formal methods as an interview with a social worker and/or examination. In the opinion of professionals in the field these methods are particularly effective and positive to identify vulnerabilities difficult to detect at first sight. This is the case when traumas are caused by torture or other serious forms of physical, psychological or sexual violence: acts or violence that do not necessarily leave visible traces but which often stops the victim from spontaneously talking about his/her experiences³⁵⁷. In this sense the term mechanisms is more suitable than the term procedures.

SOLUTION:

- Titles 3. 1. and 3. 2 above:

The text of the Council shall in no case be accepted.

The substitution of the term mechanisms instead of procedures is relevant, however. (See below Title 4 of this SUB SECTION I where a proposed amendment of article 21 is formulated).

4. PROPOSED AMENDMENTS TO THE RECEPTION DIRECTIVE COMMISSION PROPOSAL AS REGARDS THE STATEMENT OF GENERAL PRINCIPLE THAT THE MEMBER STATES MUST TAKE INTO ACCOUNT THE SPECIFIC SITUATION OF VULNERABLE ASYLUM SEEKERS

On sight of the in depth study conducted by the Odysseus network as part of the study on articles 17 (reception directive in force) and 21 (reception directive proposal) – to the attention of ERF - a proposed amendment to the text of the Commission is made for integrating the solutions to the problems identified above, especially that of the conceptual dimension of article 21 and that of the temporal dimension of the identification process.

It is thus recommended:

- To add in article 2 « Definitions » of the reception directive Commission proposal the definition of a « person with special needs »:
- « Person with special needs means an asylum seeker who due to a state or a situation of vulnerability needs attention, assistance or cares, acute or specific ».

This definition maintains a very clear causal link between the notion of special needs and the notion of vulnerability. It also highlights what - in the context of adapted reception conditions - shall be provided to the persons that article 2 mentions: attention, assistance and/or cares, acute or specific:

To draft the new article 21 as follows:

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These elements have been put forward as part of the study conducted by the Odysseus Network for the FER on the issue of the identification of vulnerable asylum seekers with special needs: a study submitted to the Commission in February 2010 and to be published end 2010.

- “§1. For all of the provisions of this directive, the Members States shall take into account the situation of persons with special needs and ensure proper monitoring of their situation. Persons with special needs shall receive attention, assistance or cares, acute or specific, according to their situation as long as it requires it”.
 - § 2. As soon as an application for international protection is lodged and then on an ongoing basis, Member States shall conduct an individual assessment of the situation of each asylum seeker in order to verify if he/she is a person with special needs and to determine the adapted attention, assistance or cares, acute or specific, he/she needs. For the purposes of conducting an individual assessment followed, States shall establish appropriate mechanisms.
 - § 3. When assessing the individual situation of asylum seekers, special attention is paid in particular to minors, unaccompanied minors, disabled persons, elderly persons, pregnant women, single parents with minor children, victims of trafficking in human beings, people with mental health problems and people who have been subjected to torture, rape or other serious forms of psychological, physical or sexual abuse”.
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- The § 1 stresses the fact that the attention, the assistance and/or the cares, acute or specific, adapted to the situation of the applicant must be provided as long as his/her situation required it.
 - The § 2 states clearly that the individual evaluation of the applicant’s situation must be done on an ongoing basis: in that the reservation relating to the temporal dimension identified in Title 1 is dealt with. Moreover, the term “procedures” is substituted for the broader term mechanisms in the sense explained in Title 3.
 - The § 3 draws attention to the categories of persons who may easily show evidence of vulnerability. This § 3 acts as an alarm. However it clearly does not exclude that each applicant may individually be identified as a person with special needs as defined in Title 2, regardless of his/her belonging to on of these categories of persons. In addition, § 3 does not state that these categories of people have always special needs which is not necessary the case as pointed out in Title 2. 2. 4, 2nd question.

5. CONCLUSIONS

Beyond the legal consideration, it is necessary to ensure in practice compliance with the obligation of Member States to provide appropriate care to vulnerable people particularly victims of torture or violence as well as minors who have been victims of any form of abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment, or who have suffered from armed conflicts (as prescribed articles 18 § 2 and 20 of the reception directive in force and articles 22 § 4 and 24 of the Commission proposal).

The improvement of the legal framework and the clarifications above mentioned are prerequisite for the consideration of the situation of vulnerable persons in the context of the reception conditions. These legal improvement and clarifications are not sufficient however. Beyond the legal dimension of the issue, the problem persists of the effective implementation of the provisions protecting vulnerable persons. In his 2007 study on the assessment of the transposition of the directive in force³⁵⁸, the Odysseus Academic Network has noted that the implementation of these provisions was problematic in practice in many countries (lack of financial resources, lack of medical structures ...). An adequate national and EU legal framework is not sufficient enough to protect vulnerable persons. It is

358 Odysseus Report, Q. 30 D, p.89 et 90 ; Q. 31 F, p. 94 et 95.

therefore essential that, beyond identification, the States comply with the obligations to provide cares and adequate reception conditions in an efficient way.

SUB SECTION II. THE ASYLUM PROCEDURE DIRECTIVE PROPOSAL (TEXT OF THE COMMISSION)

1. INTRODUCTION

One must underline the lack of coordination between the various instruments of second generation proposed by the Commission (reception, asylum procedure and qualification directives and Dublin regulation) regarding the issue of vulnerable asylum seekers.

The asylum procedure directive Commission proposal contrasts with the asylum procedure directive in force since in the draft, specific provisions devoted to vulnerable asylums seekers are now envisaged which is not the case with the current directive³⁵⁹. For a full discussion on these provisions see Chapter IV Part II. 7: Applicants with Special Needs. These new provisions are undeniably common sense even if subject to some uncertainties (see below Title 2).

Nevertheless, it is worth mentioning the lack (or the insufficiency) of coordination between the various instruments of second generation proposed by the Commission (reception, asylum procedure and qualification directives and Dublin regulation) regarding the issue of vulnerable applicants. If the set of problems can partly be seen in a different perspective according to the specific framework of instrument you are looking at, some links and/or similarity must be considered. This is the case particularly between the reception directive and the asylum procedure directive on the one hand and between the reception directive and the qualification directive on the other.

2. THE ASYLUM PROCEDURE DIRECTIVE PROPOSAL (TEXT OF THE COMMISSION)

PROBLEM: the definition of applicants with special needs is not accurate enough. There is a lack of obligation to establish a procedure of identification of applicants with special needs. A cross-reference to article 21 of the reception directive Commission proposal that raises questions.

Articles 2 and 20 of the asylum procedure directive Commission proposal include provisions for protecting vulnerable asylum seekers but these provisions pose the following problems:

- Title 2. 1.below: The definition of applicants with special needs given in article 2, indent d) of the proposition lacks acuteness.
- Title 2. 2.below: The text of the proposal does not oblige States to establish a procedure of identification of applicants with special needs. This lack of obligation could result in the

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Subject to article 13, § 3, paragraph a) according to which States shall ensure that the person who conducts the interview is sufficiently competent to take account of the personal situation or general circumstances surrounding the application including cultural origin or vulnerability of the applicant, provided it is practicable and article 17 on guarantees granted to unaccompanied minors found to be insufficient: see Chapter IV.

failure to apply the protective provisions of article 20 of the proposal. Anyhow this lack of provision creates legal uncertainty.

- Title 2. 3.below: Article 20 § 2 makes reference to Article 21 of the reception directive Commission proposal that raises questions about the links that could or should be drawn between on the one hand the people responsible for reception and/or persons responsible for assessment under article 21 and other determining authorities.

2.1. The definition of applicants with special needs given in article 2, indent d) of the proposition lacks acuteness

The article 20 § 1 of the asylum procedure directive Commission proposal compels the Member States to take appropriate measures in favour of applicants with special needs so that where needed, they shall be granted time extensions to enable them to submit evidence or take other necessary steps in the procedure - among other things -.

According to § 3 of the same article these applicants cannot be subjected to an accelerated procedure (article 27 § 6 of the proposal) and the clause relative to manifestly unfounded applications can not be applied to them (article 27 § 7 of the proposal). In addition, these applicants may be given the benefit of priority procedure (article 27 § 5, indent b): optional provision for the Member States). Article 2, indent d) of the proposal defines the notion of applicant with special needs as "an applicant who due to age, gender, disability, mental health problems or consequences of torture, rape or other serious forms of psychological, physical or sexual violence is in need of special guarantees in order to benefit from the rights and comply with the obligations in accordance with this Directive".

It should be noted that while article 21 of the reception directive Commission proposal mentions applicants with special needs, it gives no definition of this category. But, to recall, article 21 provides categories of persons who are considered vulnerable persons - as examples. This list is a non-exhaustive list unlike the one given in article 2, indent d) of the asylum procedure proposal. The asylum procedure directive proposal mentions an exhaustive list of "states", "causes" that can lead to consider a person as an applicant with special needs: age, gender, disability, a mental health problem or consequences of torture, rape or other serious forms of violence.

The fact that the definitions are not the same in both texts may be justified given the different context and objectives of each one³⁶⁰.

However the definition of article 2, indent d) is unclear, both not restrictive (for age, sex, mental health problems) and restrictive: what about the consideration of a person suffering from a chronic disease like diabetes or a serious illness such as cancer, diseases that medical treatment could justify an extension of time allowed? It seems that these people are not covered by the definition of article 2, indent d) except to interpret the concept of disability broadly.

Even if the definition is imprecise, we must highlight the positive aspects however: the fact that the applicant's mental health is taken into consideration (knowing how this factor may negatively influence the ability of the person to tell his story) and the consequences of acts

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It should be noted that it is recommended not to keep the text of article 21 of the reception directive Commission proposal with regard to its conceptual dimension that is to say the definition of the applicants meant to be provided with adequate reception conditions: see supra Titles 2 and 4 of SUB SECTION I.

of torture or other serious forms of violence as well. It is nevertheless essential to compel the States to set out mechanisms with the view to identify applicants with disabilities, with mental health problems or victims of torture or violence.

2.2. The lack of the States obligation to establish a procedure of identification of applicants with special needs

The article 20 § 1 of the asylum procedure directive Commission proposal does not specify when, how and by whom the identification of applicants with special needs must be carried out. As such, article 20 can be compared with article 17 of the reception directive in force. Indeed, article 17 of the reception directive in force as article 20 of the asylum procedure directive Commission proposal provides protective provisions in favour of asylum seekers with special need (the States should take appropriate measures - the accelerated procedure cannot be applied to them nor the clause relative to manifestly unfounded applications - without however compelling the States to set out the mechanism with the view to identify these applicants in an efficient way.

Of course it can always be argued, as the Commission has done for article 17, that this mechanism is logically required by article 20 in so far as this mechanism is « ... is a core element without which the provisions of the Directive aimed at special treatment of these persons [who are here applicants with special needs in the sense of article 2, indent d)] will lose all meaning³⁶¹.

The fact remains that the absence of express provision leads - regarding the application of article 17 - to numerous drawbacks³⁶². This absence of express provision also creates a legal uncertainty. The problem is particularly acute in relation to persons with mental health problems or persons victim of torture or violence. Indeed, these vulnerabilities are not always easily detectable. At the same time, acknowledgement is essential both to take them into account during the asylum procedure itself (see below Title 2. 3.) but also because of a possible link between these states of vulnerability and evidences on which international protection can be granted.

2.3. A reference to article 21 of the reception directive Commission proposal that raises questions

The § 2 of article 20 states that: « In cases where the determining authority consider that an applicant has been subjected to torture, rape or other serious forms of (...) violence as described in article 21 [of the reception directive proposal], the applicant shall be granted sufficient time and relevant support to prepare for a personal interview on the substance of his/her application ».

The formulation as described in article 21 is unclear. The term considers is not clear either. Is § 2 intended or not to establish an implicit link between the individuals responsible for the reception and/or the individuals responsible for the assessment under article 21 on the one hand and determining authority on the second hand? In other words, are the findings - identified during the individual evaluation of the situation of the applicant which must be

361 Commission Report, RCD, point 3.5.1.related to article 17, page 9.

362 It is also necessary to emphasize that article 17 - in contrast with article 20 of the asylum procedure directive procedure which mentions absolutely nothing - suggests at least an individual assessment of the asylum seeker's situation. This statement has not yet convinced the Member States they should establish a procedure of identification.

conducted in the framework of the reception directive - intended to "help" or to be forwarded to the determining authority? Formally the answer is negative.

On the one hand, article 21 of the reception directive Commission proposal assigns - to the individual evaluation of the situation of the applicant - no other purpose than to adapt the reception conditions to the particular needs identified. It is not stipulated that this assessment must also "help" to determine whether the applicant must benefit from appropriate procedural modalities. On the other hand, article 21 of the reception directive Commission proposal (along with the recommended amendment) does not aim to reach a decision that would "label" the applicant as a person who has suffered of torture for instance. The decision to intervene - after the identification procedure of article 21 of the text of the Commission - shall rule on the question of "whether the applicant has special needs and indicating the nature of those needs" or in the case of the amendment above mentioned shall "determine the attention, assistance or cares, acute or specific, [the applicant] needs". Of course, if the asylum seeker is a victim of torture or violence it is possible that in his file concerning the evaluation mentioned in article 21 explicit information is to be found suggesting these acts of torture or violence. However, this can also not be the case. The person in charge of the assessment may have identified symptoms that require specific psychological assistance (sleep disorders, memory disorders, concentration disorders, anxiety, isolation ...) even if he has not necessarily spotted that the asylum has experienced acts of torture or violence or even if the asylum himself has not referred to such facts. In itself, the idea that the assessment carried out in the context of article 21 "serve" a purpose other than adaptation of reception conditions is, at least formally, not convincing.

As part of the study for ERF the workers on the ground in charge of the identification of vulnerable asylum seekers have strongly emphasized the fact they should not be invested of another charge than identifying special needs in order to adapt reception conditions according to them. In most countries, where the study has been carried out, social assistants and other staff of the reception centres are on the front line and primarily responsible for the individual evaluation of the applicants. It is often their daily and on an ongoing basis contacts with applicants which help identify particular needs and difficult/painful situations. If the special need relates to physical or mental health then they refer the applicant (with his consent) to a qualified professional. They exercise their duties independently without being concerned about the fact that their evaluation will help or not the applicant during the asylum procedure (whether on substantive matter or for the modalities of the procedure itself).

It therefore seems inappropriate to expand the aim assigned to the assessment provided for in article 21 by stating that such assessment should also determine if the applicant is a victim of torture knowing that this finding will serve during the asylum procedure. This does not prevent an asylum seeker (or his counsel) to be able - in the framework of the asylum procedure - to assert his rights to benefit of modifications of the conditions of reception he receives if such adjustments are of a nature to justify such communication (the identification of certain needs in the context of reception conditions may have no impact on the asylum procedure). If adapted reception conditions provided to the applicant as a result of the evaluation of article 21 relate to his/her physical and/or mental health this information may be disclosed to determining authority - with the applicant's consent. The communication would not then be in connection with a decision labelling the individual but on the adapted reception conditions he/she receives and possibly on the symptoms that led to such care. The determining authority would have his attention drawn to a state of vulnerability that could have an impact on the asylum procedure.

SOLUTION:

- Title 2. 1. above: definition of applicants with special needs in article 2, indent d) of the proposal:

The categories of persons protected must be defined more precisely.

- Title 2. 2. above: lack of a procedure of identification of asylum seekers with special needs

The States should be compelled to set out a procedure of identification. The identification must be carried out as soon as the application has been lodged.

A statement - as described in Title 2. 3 in fine above - between those responsible for the reception and/or persons responsible for the evaluation of article 21 on the one hand and other determining authority on the other hand could be formalized.

- Title 2. 3. above: article 20 § 2 of the asylum procedure directive Commission proposal § 2 of Article 20 shall be cleared according to the exact purpose and content that the Commission intended to give and in view of the developments in title 2. 3.

SUB SECTION III: THE DUBLIN REGULATION PROPOSAL (TEXTS OF THE COMMISSION, THE PARLIAMENT AND THE COUNCIL)

1. INTRODUCTION

The Dublin regulation Commission proposal contrasts with the Dublin regulation in force since the proposal includes new provisions for protecting vulnerable asylum seekers, which is not the case in the current regulation. For a full discussion of these provisions refer to Chapter I, Section III: Protection of Vulnerable Persons in the Dublin System. These new provisions are undoubtedly directed at the right object. In addition, it is important to remember that these specific provisions are "completed" by the protective provisions of the reception directive proposal since that directive applies to asylum-seekers submitted to the Dublin procedure³⁶³. It follows that both the transferring and the receiving state are bound by the protective provisions of the reception directive. The Member States that hears a Dublin procedure will then proceed to the individual evaluation of the asylum seeker submitted to this procedure. Depending on the duration of the Dublin procedure, it could also be required to ensure an ongoing assessment of the applicant's situation (if the procedure for determining the State responsible is lengthy).

If the assessment reveals that the applicant is a person with special needs, the State investigating the Dublin procedure shall provide the applicant with adequate reception conditions according to his/her its needs. It shall also pass on information relative to the applicant's special needs to the receiving Member States and this pursuant to article 30 § 3, indent d) of Dublin procedure Commission proposal³⁶⁴. As emphasized in the introduction to the previous SUB SECTION, it would be appropriate to create a link between the needs mentioned in article 30 § 3, paragraph d) of the draft Dublin regulation and article 21 of the reception directive proposal.

³⁶³ This results explicitly from the explanatory memorandum to the reception directive Commission proposal (Part 3.1 devoted to the scope of the Directive), recital (8) of the same proposal and recital (9) of the Dublin Regulation Commission proposal.

The receiving Member States will be required to carry out the assessment of the situation of the asylum seeker who has been transferred when, for one reason or another, the transferring Member States has not carried it out. In any event the State of reception will be required to ensure the ongoing assessment of the applicant. It may also be required to provide adequate reception conditions if the assessment revealed a state vulnerability of the applicant.

2. THE ARTICLE 30, § 1 IN FINE OF THE DUBLIN REGULATION PROPOSAL (TEXTS OF THE COMMISSION, THE PARLIAMENT AND THE COUNCIL)

PROBLEM: lack of medical examination to assess whether the applicant is fit or not for the transfer

Article 30, § 1 in fine of the Dublin regulation proposed by the Commission and the Parliament, provides that only persons fit for the transfer can be transferred. However, there is no provision specifying how this finding of incapacity is established or how and by whom the decision not to transfer the asylum seeker is taken. The text of the Council, meanwhile, removed this provision.

Article 30 § 1 in fine of the Dublin regulation Commission proposal may, in the same way as article 20 of the asylum procedure directive Commission proposal, be compared with article 17 of the reception directive in force. Indeed - as article 17 of the reception directive in force - article 30, § 1 in fine states a protective provision for the benefit of asylum seekers (the fact that States may not transfer them when they are not fit for the transfer) without however compelling the States to establish the mechanism that can allow to identify those unable to transfer efficiently. Of course it can always be argued, as the Commission has done for article 17, that this mechanism is logically required by article 20 in so far as this mechanism is « ... is a core element without which the provisions of the Directive aimed at special treatment of these persons [who are here applicants with special needs in the sense of article 2, indent d)] will lose all meaning³⁶⁵.

The fact remains that the absence of express provision leads - regarding the application of article 17 - to numerous drawbacks³⁶⁶. This absence of express provision also creates a legal uncertainty. It should be noted that the text of the Dublin regulation proposed by the Council deleted the provision of article 30, § 1, in fine of the Commission proposal.

SOLUTION:

The article 30, § 1, in fine of the Dublin regulation as proposed by the Commission and the Parliament shall be maintained.

This provision must also be complemented by the recognition of the applicant's right to request the benefit of a medical examination to assess his/her possible inability to be transferred. This examination should take place following the notification of the decision to

364 This obligation to transmit information poses significant practical problem relating to the language in which the communication should take place.

365 Commission Report, RCD, point 3.5.1.related to article 17, page 9.

366 It is also necessary to emphasize that article 17, in contrast with article 20 of the asylum procedure directive proposal which mentions absolutely nothing, suggests at least an individual assessment of

transfer since it is at the time of transfer that this potential incapacity needs to be assessed.

The Dublin Regulation proposal must also be completed to determine the consequences of a decision of incapacity to be transferred on the decision on the substantive merits of the application for international protection and on the decision to transfer.

SUB SECTION IV. QUALIFICATION DIRECTIVE PROPOSAL (TEXT OF THE COMMISSION)

PROBLEM: the provision stating the general principle of taking into account the specific situation of vulnerable persons is drafted as article 17 of the reception directive in force

It was pointed out in Title 1 of Section II that article 17 of the reception directive does not expressly oblige the Member States to set up a procedure of identification for vulnerable persons with special needs and that this partly explains why there is no procedure in place in many states. The article 20 §§ 3 and 4 of the qualification directive Commission proposal whose wording is identical to article 17 of the reception directive in force reproduces the same problem and has not considered the solution proposed by the Commission under article 21 of the reception directive proposal.

Chapter VII headed «Content of International Protection" of the qualification directive proposal contains a provision (article 20 §§ 3 and 4) "equivalent" to article 21 of the reception directive Commission proposal as for its purpose (but not its wording). Indeed, the purpose of article 20 §§ 3 and 4 of the qualification directive proposal is to oblige the Member States to give special treatment to vulnerable persons with special needs in the field of health care, access to employment, access to education, right to information,... since these persons are recognized refugees or persons granted subsidiary protection, whereas under article 21 of the reception directive proposal they are asylum seekers.

Accordingly, the wording of article 20 § 3 and 4 should have been quite similar to that of article 21 and at least different to that of article 17 of the reception directive in force since the wording of this article is currently posing problems of transposition and implementation.

SOLUTION:

The article 20 §§ 3 and 4 of the qualification directive proposal must be modified.

Since article 21 of the reception directive Commission proposal creates a conceptual problem (SUB SECTION I, Title 2. 2) it is not recommended to follow this article to rewrite article 20 §§ 3 and 4, but to build on the proposed amendments recommended in Box 4 of SUB SECTION I. The new wording of article 20 §§ 3 and 4 shall however be adapted since the persons mentioned are not asylum seekers but recognized refugees and beneficiaries of subsidiary protection.

the asylum seeker's situation. This statement has not yet convinced the Member States they should establish a procedure of identification.

SECTION 3: DETENTION OF VULNERABLE ASYLUM SEEKERS WITH SPECIAL NEEDS

1. INTRODUCTION

None of the first generation instruments preclude to the principle itself of the detention of vulnerable asylum seekers. The aspect of EU law is not contrary to international standards. Moreover, when the reception directive in force applies in principle to asylum seekers in detention, we are forced to conclude that 9 MS have conflicting opinion. Asylum seekers detained in these countries do not benefit from the application of minimum standards of the reception directive including protective provisions in favour of vulnerable persons.

The state of EU law does not oppose the principle itself of detention of vulnerable asylum seekers that is not contrary to international law. Indeed, no international standard prohibits the very principle of detention of vulnerable persons such as children, the disabled, families, ... Concerning children, it should be noted that the International Convention on the Rights of the Child (hereafter CICR) does not prohibit the detention of minors, including unaccompanied minors. Converging on this point with article 5 § 1 of the ECHR and article 9 of the ICCPR it states that no child shall be deprived of liberty unlawfully and arbitrarily and moreover specifies that this measure shall be used only in last resort and for the shortest appropriate period of time (article 37 indent b).

The absence of prohibition of the principle itself of the detention of vulnerable persons does not mean that their detention shall be considered legal and not arbitrary in all circumstances. More likely than for other asylum seekers, the judge will draw his attention to the fact that the detention is not arbitrary and the conditions of detention do not violate international standards. Thus the two judgments of the ECtHR discussed in Title 6.1 of SECTION I³⁶⁷ must be recalled in relation to detention of unaccompanied minors or of accompanied minors. In both cases the detention of children was deemed contrary to article 3 and article 5 § 1 ECHR on the basis of the conditions of detention and a lack of relationship between the ground for deprivation of liberty and the place and conditions of detention.

Regarding the conditions of the detention, detained asylum seekers should in principle benefit from the application of minimum standards of the reception directive including protective standards for vulnerable asylum seekers. This is not the case in many MS. The reason is twofold: on the one hand 9 Member States consider that the reception directive in force does not apply to detained asylum seekers, on the other hand, many MS have not implemented the procedure of identification of vulnerable asylum seekers.

The reception directive Commission proposal substantially improves the consideration of these issues even if it raises a question. However the text of the Council operates a setback in his consideration of these issues.

367 ECtHR, *Mubilanzila Mayeke et Kaniki Mitunga*.

2. THE ARTICLE 11 § 5 OF THE RECEPTION DIRECTIVE PROPOSAL (TEXTS OF THE COMMISSION AND THE PARLIAMENT)

PROBLEM: the putting in place of an individual examination whose modalities for implementation must be defined differently.

Article 11 § 5 of the reception directive Commission proposal states that "Persons with special needs shall not be detained unless an individual examination of their situation by a qualified professional certifies that their health, including their mental health, and well-being will not significantly deteriorate as a result of detention".

The wording of § 5 implies that only will be subject to individual examination asylum seekers who have previously been identified as having special needs pursuant to article 21 of the proposal. To subject the implementation of this individual examination to the implementation of another procedure is not in conformity with the objective pursued by article 11 § 5.

Insofar as the objective of article 11 § 5 is to prevent the detention of people whose health could be seriously affected as a result of this detention it seems important that this individual examination can be carried out quickly following the detention. Therefore, to subject the implementation of this individual examination to the implementation of another procedure does not seem wise. Indeed, although article 21 provides that States should set out procedures of identification to verify whether the asylum seeker has special needs or not soon after the application has been lodged, shorter or longer laps of time can potentially occur between the detention and the assessment referred to in article 21, depending on the circumstances.

SOLUTION:

The article 11 § 5 of the reception directive proposal shall be amended.

It is recommended not to subject the implementation of individual examination provided for in article 21 to the implementation of another procedure and to put any person in detention through this individual examination.

3. THE ARTICLE 11 § 5 OF THE RECEPTION DIRECTIVE PROPOSAL (TEXTS OF THE COUNCIL)

PROBLEM: the principle of the protective provision of the Commission has been maintained but the implementation of the individual examination has been deleted

The text of the Council maintains the principle that applicants with special needs cannot be held if the detention is likely to seriously damage their health including their mental health (the reference to the well being has been suppressed). The text of the Council has deleted the individual examination by a qualified and independent professional to assess the asylum seeker's state of health. Failing to set up an examination to assess the asylum

seeker's health, the protective provision is likely to remain a dead letter, as has been repeatedly stressed about article 17 of the reception directive in force.

SOLUTION:

The principle of the implementation of an individual assessment must be maintained.

As stated in Section 2, Box SOLUTION above, it is recommended not to subject the implementation of individual examination provided for in article 21 to the implementation of another procedure and to put any person in detention through this individual examination.

4. THE RECEPTION DIRECTIVE PROPOSAL (TEXTS OF THE COMMISSION, OF THE PARLIAMENT, OF THE COUNCIL)

PROBLEM: the issue relative to the application of principle of the reception directive proposal to detained asylum seekers.

The problem has been stated in Title 9 of SECTION I. Whenever a doubt may remain regarding the application of principle of the directive to asylum seekers in detention, detained applicants may be deprived of the minimum standards of the directive which include provisions for protecting vulnerable people. In particular, article 21 could not be applied to them and therefore they could be deprived of adequate reception conditions.

SOLUTION:

See Title 9, Box SOLUTION, SECTION I: it is recommended to add a provision explicitly stating the application of principle of the directive to asylum seekers in detention³⁶⁸. Some further clarification should also be made as has been pointed out in Title 5. 4 of SECTION I in connection with article 15 (access to employment) for instance.

5. CONCLUSIONS RELATED TO SECTIONS 2 AND 3

The second generation of instruments proposed by the Commission contain new protecting provisions in favour of vulnerable asylum seekers. This is definitely positive. However, the above developments have highlighted the fact that the Commission did not often accompany these protective provisions by the means ensuring legal certainty. Ensuring legal certainty of these provisions inescapably involves the establishment of procedures. This raises the problem of the proliferation of tests, procedures, mechanisms ... of assessment.

The various actors working on the ground should be approached to consider the relevant ways of establishing links between these different procedures or between some them³⁶⁹. Thus if one consider article 20 of the asylum procedure directive of the Commission proposal on the other hand and article 11 § 5 of the reception directive of the Commission proposal one can wonder if a common medical examination could not be established for the purpose of serving the objectives of each of these two provisions. In both cases it is to rule

368 Unless otherwise specified, such as article 6 § 2 relating to the documents.

369 Considering that it not always pertinent to establish links between certain procedures taking into account their specificities : see Title 2.3 (SECTION II, SUB SECTION II).

on the health of the applicant. In both cases the evaluation must take place soon after the application for international protection has been lodged. The medical examination may consist of two parts, one during which health state is examined for the purposes of article 20 of the asylum procedure directive Commission proposal and another one for the purposes of article 11 § 5 of the reception directive Commission proposal. Such reflection seems essential for the sustainability of the CEAS.

KEY FINDINGS

1. THE DETENTION OF ASYLUM SEEKERS

- The very principle of detention of asylum seekers is not in itself contrary to international law.
- The legal debate relating to the detention of asylum seekers does not question the principle of the detention itself but the substantive conditions of the detention (including the reasons for detention), the procedural guarantees and the framing of the conditions of detention.
- The provisions relating to detention of asylum seekers currently in force are inadequate. They leave considerable discretion to Member States and lead to a large disparity of practices within the Union. Such a diversity of practices does not meet the objective to harmonize national legal frameworks through minimum standards, as part of the first phase of the CEAS.
- The new detention regime proposed by the European Commission in the second-generation instruments, in particular the reception proposal, beyond all doubt contributes to improve EU harmonization.
- The principle of an exhaustive list of grounds for detention proposed by the Commission in the second-generation instruments should be followed. It is likely to ensure a fair balance between the right of states to fight against illegal immigration and the right to freedom of asylum seekers subject to some adjustment.
- The fifth ground of detention proposed by the Council in the reception directive proposal cannot be accepted in that it does not strike a fair balance between the right of states to fight against illegal immigration and the right to freedom of asylum seekers.
- Regarding the choice of grounds for detention a compromise between the text of the Council and the European Commission must be considered and is recommended.
- The procedural safeguards and conditions of detention proposed by the reception directive Commission of the second generation are generally consistent with international law subject to one or another aspect requiring an amendment.
- Detention of asylum seekers is based on the specific legal framework for asylum and not on the legal regime of detention for removal. Consequently, the duration of the detention of asylum seekers under the special scheme for asylum falls outside the calculation of the maximum period of detention permitted by the return directive. The duration of the detention of asylum seekers under the special scheme for asylum is therefore added to the maximum term provided for the return directive. This legal consideration should encourage the EU legislator to consider setting a maximum period of detention subject to special rules for asylum even if, given the diversity of national legal frameworks in the field, a consensus on this question will not be easy to find.

- The application of the principle of the reception directive proposal to asylum seekers in detention remains debatable. Currently a number of States consider the reception directive in force does not apply to detained asylum seekers. Even if the drafting of the reception directive Commission proposal has lowered down the risk of divergent interpretations it has not completely lifted it.

2. TAKING INTO ACCOUNT OF THE VULNERABLE ASYLUM SEEKERS WITH SPECIAL NEEDS

- The reception directive in force is the only EU first generation instrument focusing specifically on taking into account the situation of vulnerable asylum seekers with special needs.
- The Dublin regulation in force is silent on the subject and the procedure directive mentions the taking into account the potential vulnerability of the asylum seeker only very marginally.
- The asylum procedure directive Commission proposal and the Dublin regulation Commission proposal contrast with this inventory. In both drafts, specific provisions devoted to vulnerable asylum seekers are now mentioned.
- When the reception directive in force includes several provisions relating to the taking into account of the situation of vulnerable asylum seekers several reports³⁷⁰ however highlighted the failure of many Member States to transpose and/or implement those provisions. This is explained partly by the fact that the provision that states the general principle of taking into account the situation of vulnerable asylum seekers and identifying them (article 17) is written in such a way that this provision does not expressly comply the Member States to establish a procedure of identification of these applicants.
- The reception directive Commission proposal solves the problem since the new article 21 lays down very clearly the obligation of the States to establish identification procedures to assess the individual situation of every applicant for asylum in order to ascertain whether he has special needs or not.
- The temporal dimension of article 21 of the reception directive Commission proposal, however, must be better defined to allow the identification of vulnerable people throughout the procedure.
- The reception directive Commission proposal also raises a conceptual problem. This conceptual problem is the issue of the identification of persons and special needs that is meant to be aimed at. As formulated, the conceptual dimension of article 21 makes its interpretation and its application uncertain.
- The text of the reception directive Council proposal may in no case be accepted in relation to article 21. This text adopts two distinct concepts without establishing any link between them, which makes the interpretation and application of this provision more than ambiguous.

370 Among other: Commission Report, RCD, Title 3. 5, pages 9 and 10 and Odysseus Report, Q. 30 et Q. 31, pages 84 à 98. Déjà cité dans la Section I relative à la détention.

- The texts of the asylum procedure directive Commission proposal and the Dublin regulation Commission proposal include new protecting provisions for the benefit of vulnerable people with special needs. These proposals should, as such, be fully approved.
- Two major shortcomings must however be noted. First the absence (or inadequacy) of coordination between the different instruments of the second generation when they approach the problem of vulnerable asylum seekers. Regarding the second shortcoming, the new provisions of the asylum procedure directive Commission proposal and the Dublin regulation Commission proposal can be compared with article 17 of the reception directive into force. Indeed, as article 17 of the reception directive into force these provisions provide protective measures for the benefit of asylum seekers with special needs without, however, complying the States to establish the mechanism of identification of these people. This absence of express provision creates a legal uncertainty.
- The qualification directive Commission proposal contains a protecting provision for the benefit of the vulnerable asylum seekers. Its wording is identical to article 17 of the reception directive in force. This formulation raises the problem of the absence of an explicit obligation imposed on States to establish of an identification procedure.

3. TAKING INTO ACCOUNT OF THE VULNERABLE ASYLUM SEEKERS WITH SPECIAL NEEDS IN DETENTION

- The state of EU law does not oppose the principle of detention of vulnerable asylum seekers that is not contrary to international law.
- The absence of prohibition of the principle of the detention of vulnerable persons does not mean that their detention will be deemed legal and not arbitrary in all circumstances. More likely than for other persons, the judge will draw his attention on the fact that the detention is not illegal or arbitrary and that the conditions of detention do not violate international standards.
- Regarding the conditions of detention, the detained asylum seekers should in principle benefit from the application of the minimum standards of the reception directive including protecting standards in favour of vulnerable applicants. This is not the case in many Member States. The reason is twofold: On the one hand, some Member States consider that the reception directive in force does not apply to asylum seekers in detention and on the other hand, many Member States have not implemented the procedure of the identification of vulnerable asylum seekers.
- The reception directive Commission proposal significantly improves the consideration of these issues.
- In addition, a specific provision has been made by the Commission in the reception directive. This provision aims to prevent the deprivation of liberty of persons whose mental or physical health state could be seriously affected as a result of a detention. This provision provides for the establishment of an individual examination to assess

to what extent the applicant's health condition could be seriously affected as a result of detention. In this proposal the Commission must be followed. One of the modalities of the individual examination must be reformulated.

- The text of the Council operates a decline since it has deleted the reference to individual examination provided by the Commission. This change may undermine the effective implementation of the principle. The text of the Council cannot therefore be upheld.

4. ELEMENTS RELATING TO VULNERABLE ASYLUM SEEKERS WITH SPECIAL NEEDS COMMON TO TITLES 2 AND 3

- The instruments of second generation proposed by the Commission contain new protecting provisions for the benefit of vulnerable asylum seekers. This is definitely positive. However, the Commission has not often matched those protective provisions with the means to ensure legal certainty. Ensuring legal certainty of these provisions inescapably involves the establishment of procedures.
- This raises the problem of the proliferation of tests, procedures, mechanisms ... of evaluation. The various actors on the ground must be approached to consider the possibilities of establishing relevant links between these different procedures or between some of them. Such reflection seems essential for the sustainability of the CEAS.

RECOMMENDATIONS

1. THE DETENTION OF ASYLUM SEEKERS

- Article 8 § 2 of the reception directive Commission proposal: three of the four grounds of detention must be reformulated. A fifth reason for detention must be added to ensure a compromise between the text of the Commission and the text of the Council that cannot be accepted. An amendment is recommended to keep a fair balance between the right of states to fight against illegal immigration and the right to freedom of asylum seekers.
- Article 9 of the reception directive proposal, texts of the Commission, of the Parliament and the Council: some safeguards for detained asylum seekers should be amended:
 - Article 9 § 2: The administrative authority responsible for ordering the detention must be clearly defined
 - Article 9 § 2: The judicial review of the administrative decision of detention must take place speedily.
 - Article 9 § 4: The applicant's right to be informed of the reasons for his detention "in a language he understands" must be adopted.
- Article 9 § 4 of the reception directive proposal, texts of the Commission, of the Parliament and the Council: the question of the possible setting of a maximum duration of detention should be discussed. In any event, it is recommended to:
 - Strengthen the judicial review of detention by giving its monitoring not to ordinary courts generally unfamiliar with the specifications of asylum but the specialized courts in the field of asylum³⁷¹.
 - Provide that asylum seekers in detention should always benefit from a priority procedure and not even an accelerated procedure.
- Article 10 § 4 of the reception directive proposal, text of the Council: remove the § 4, indent a) and b) allowing the derogatory accommodation conditions which may come into conflict with the jurisprudence of the ECtHR and the derogatory conditions relating to information at the border or transit zones.
- The reception directive proposal, texts of the Commission, the Parliament and the Council: it is recommended to add a provision explicitly stating the application of principle of the reception directive Commission proposal to asylum seekers in detention³⁷². Some further clarification should also be made in connection with Article 15 (access to employment).
- Article 27 §§ 5 to 12 of the Dublin regulation proposal, texts of the Commission, the Parliament and the Council: to prevent the scattering of provisions relating to detention of asylum seekers in instruments of the second generation it shall be

371 Such an appeal court specialised in asylum provided that the national constitutional framework allows it.

372 Unless otherwise specified, such as Article 6 § 2 relating to the documents.

referred to the safeguards provided in article 9 of the reception directive Commission proposal and §§ 5-11 of article 27 shall be deleted. In addition § 12 of article 27 should be reworded.

- Article 22 § 2 the procedure directive proposal, texts of the Commission and of the Parliament: to prevent the spread of provisions relating to detention of asylum seekers in the various instruments second generation, § 2 of article 22 shall be deleted.

2. TAKING INTO ACCOUNT OF THE SITUATION OF VULNERABLE ASYLUM SEEKERS WITH SPECIAL NEEDS

- Article 21 § 2 of the reception directive proposal, texts of the Commission and the Parliament: the obligation for the States to establish a procedure for identifying vulnerable asylum seekers: the temporal dimension for assessing the situation of the asylum seeker must be better defined to allow the identification of vulnerable people throughout the asylum procedure.
- Article 21 of the reception directive proposal, texts of the Commission and the Parliament: the conceptual dimension - or who is to be defined and/or what is to be defined) as formulated in article 21 creates an uncertainty as to its interpretation and its application. This text should be amended.
- Article 21 of the reception directive proposal, text of the Council: the wording of the conceptual and procedural dimension retains two separate concepts, without establishing any link between them which makes the interpretation and application of this provision more than ambiguous. This section shall in no case be accepted.
- Article 2, indent d) of the asylum procedure directive Commission proposal: the definition of applicants with special needs is unclear. The categories of persons to be protected must be defined more precisely.
- Article 20 of the asylum procedure directive proposal, text of the Commission: the provision does not require States to establish a procedure for identifying applicants with special needs. This lack of obligation could result in the inapplicability of the protective provisions contained therein. The states should be compelled to set out an identification procedure.
- Article 20 § 2 of the asylum procedure directive proposal, text of the Commission makes an unclear reference to the article 21 of the reception directive Commission proposal: this § 2 must be clarified to fit the exact purpose and content that the Commission intends to give.
- Article 30, § 1, in fine of the Dublin regulation proposal, texts of the Commission, of the Parliament and the Council: the lack of implementation of a medical examination to assess whether the applicant is fit or not fit for transfer must be bridged.
- Article 20 §§ 3 and 4 of the qualification directive proposal, text of the Commission: the provision stating the general principle of the taking into account of the specific

situation of vulnerable persons is drafted as article 17 of the reception directive into force. It should be modified.

3. TAKING INTO ACCOUNT OF THE SITUATION OF VULNERABLE ASYLUM SEEKERS WITH SPECIAL NEEDS IN DETENTION

- Article 11 § 5 of the reception directive proposal, texts of the Commission and the Parliament: the modalities of implementation of the new individual examination shall be defined differently.
- Article 11 § 5 of the reception directive proposal, text of the Council: removal of individual examination by the Council cannot be accepted.
- The reception directive proposal, texts of the Commission, the Parliament and of the Council: recall of the issue of the application of principle of the reception directive proposal to asylum seekers in detention: it is recommended to add a provision explicitly stating the application of principle of the reception directive proposal to asylum seekers in detention³⁷³. Some further clarification should also be made in connection with Article 15 (access to employment) as instance.

4. FINAL RECOMMENDATIONS COMMON TO PARTS 2 AND 3 RELATING TO VULNERABLE ASYLUM SEEKERS WITH SPECIAL NEEDS

- Relating to the problem of the proliferation of tests, procedures, mechanisms ... of evaluation, the various actors on the ground must be approached to consider the possibilities of establishing relevant links between these different procedures or between some of them. Such reflection seems essential for the sustainability of the CEAS

LEGAL INSTRUMENTS

- Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (reception directive in force)
- Proposal of 3 December 2008 for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast), COM (2008) 815 final (reception directive Commission proposal or reception directive proposal/Text of the Commission)
- European Parliament legislative resolution of 7 May 2009 on the proposal for a directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (recast), COM (2008) 815 final (reception directive proposal amended by the Parliament or reception directive proposal/Text of the Parliament)
- Text of the Presidency of the Council of the European Union addressed to the Asylum Working Party, 6 November 2009, 1595/0 (reception directive proposed by the Council or reception directive proposal/Text of the Council)
- Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (qualification directive in force)
- Proposal of 21 October 2009 for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, COM (2009) 551 final, (qualification directive Commission proposal or qualification directive proposal/Text of the Commission)
- Council Directive 2005/85/CE of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing international protection (asylum procedure directive in force)
- Proposal of 21 October 2009 for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection, (Recast), COM (2009) 554 final (asylum procedure directive Commission proposal or asylum procedure directive proposal/Text of the Commission)
- Proposal of 1 September 2005 for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals, COM (2005) 391 (return directive Commission proposal)
- Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (return directive)

- Council Dublin Regulation EC/343/2003 18 February 2003 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 a stateless person (Dublin regulation in force)
- Proposal of 3 December 2008 for a Regulation of the European Parliament and of the Council 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 a stateless person, (Recast), COM (2008) 820 final (Dublin regulation Commission proposal or Dublin regulation proposal/Text of the Commission)
- European Parliament legislative resolution of 7 May 2009 on the proposal for a Proposal of 3 December 2008 for a Regulation of the European Parliament and of the Council 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 a stateless person, (Recast) (Dublin regulation proposal amended by the Parliament or Dublin regulation proposal/Text of the Parliament)
- Text of the Presidency of the Council of the European Union addressed to the Asylum Working Party, 16 December 2009, 16929/08 (Dublin regulation proposal/Text of the Council).

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Human Rights Committee

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- HRC, *Jalloh v. The Netherlands*, Communication n° 794/1998, 15 April 2002, UN Doc. CCPR/C/74/D/794/1998.
- HRC, *Wilson v. Philippines*, Communication n° 868/1999, 11 November 2003, UN Doc. CCPR/C/79/D/868/1999.

European Court of Human Rights

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- ECtHR, *Kudla v. Poland*, Application n° 3021/96, Judgment of 26 October 2000
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CHAPTER 4: THE ASYLUM PROCEDURES DIRECTIVE (APD)

SECTION 1: GENERAL REMARKS ON THE CONTEXT OF THE APD AND THE RECAST PROPOSAL

The first part of this study is dedicated to general remarks on the political and the juridical context of the APD. It explains the specificity of the context of the APD (1.) and of the recast proposal (2.), while underlining their potential interaction with other current and recast European instruments (3.). The legal basis of the directive (4.) and the issues relating to its conformity with general international human rights law are also mentioned (5.).

1. SPECIFICITY OF THE CONTEXT OF THE APD

The option retained by the Commission³⁷⁴ and, it seems, also approved by the European Council³⁷⁵ and by the European Parliament³⁷⁶, is the maintenance of “national asylum systems” (at administrative level and at judicial level) that will be obliged to apply “a single asylum procedure comprising common obligatory guarantees”³⁷⁷, under the control of the European Court of Justice. An impact assessment has been done by the Commission³⁷⁸. A general study of the implementation of the Directive has also been carried out by the UNHCR³⁷⁹. The analysis here concerns only 12 Member States³⁸⁰, however, this large panel may be considered as representative of the general trends in all Member States. First of all, this study reveals the great diversity in the national legislation of the Member States which have transposed the directive, as well in the practices of the different competent authorities in the MS. This could be explained by the low level of the minimum common standards provided by the directive and by the weaknesses of these standards. The second part of the study contains numerous recommendations. Some of these relate to opportunity issues; which will not be dealt with here, as we are trying to put the emphasis on legal issues. We also refer to analyses provided by NGOs, experts, groups of administrative judges, and we have listed these documents at the end of this draft.

³⁷⁴ COM(2009) 262/4, par. 5.2., page 27 ; COM(2008) 360 final, par. 2, page 4.

³⁷⁵ Document 13440/08, point IV(b).

³⁷⁶ P6_TA(2009)0087), par. 4.

³⁷⁷ In comparison with the concept of a ‘single procedure’ (which is an examination of both refugee and subsidiary protection status), it was provided in the Tampere conclusions (October 2009) to implement, in the longer term, a “common” asylum procedure in the European Community. It is not sure if these two concepts are equivalent.

³⁷⁸ Such as was recalled by the Commission in the Expl. Memo. of its proposal to recast the “Asylum Procedures” Directive (COM(2009)554, p. 3), this Impact Assessment contains a detailed analysis of the problems identified in relation to this Directive and concerning the preparation carried out for its adoption, the identification and assessment of policy options and the identification and assessment of the preferred policy option. The Commission has also emphasized that it had a large amount of information at its disposal regarding the implementation of the Directive, including extensive information on the deficiencies concerning the terms of the Directive and the manner in which it is applied in practice. With the exception of the Green Paper and of the 89 contributions received during the public consultations, we have had no access to the large amount of information collected by the European Commission regarding the implementation of the current Directive (reports of the several(6) experts’ meetings organized by the Commission; transposition measures notified by States Members; external study conducted on behalf of the Commission; detailed questionnaires addressed by the Commission to all members States and to civil society stakeholders).

³⁷⁹ UNHCR Study 2010.

³⁸⁰ Belgium, Bulgaria, Czech Republic, Finland, France, Germany, Greece, Italy, the Netherlands, Slovenia, Spain and the United Kingdom.

2. GENERAL COMMENTS: APD AND THE RECAST PROPOSAL

In addition to the general authorization for each Member State (hereinafter: "MS") to introduce or maintain "more favourable standards" (Article 5, APD), the number of available opportunities for each State to derogate from the ordinary procedure, the degree of the intensity of permissible derogations, which may be subject to challenge before the courts of law of the other Member States - and the variety of options for the Member States (Member State "may require", "may provide", "may determine") results in a complex framework which allows Member States a wide margin of discretion and which may increase the suitability of the system to prolong the procedures regardless of the merit of a claim for international protection.

As already observed, e.g. by the European Commission itself, the "Procedures Directive" provides for a variety of procedural standards rather than for a "standard procedure." Thus, the regular procedure, which would normally be the common (unaccelerated) procedure, seems to be the exception, rather than the rule.

This is due to the fact that during the torturous negotiations on the directive, Member States successfully managed to include a large number of provisions which took into account their specific national rules and practices, and were also inspired by previous resolutions taken by the Council, such as the resolutions of London(1992) ("manifestly unfounded asylum applications" / "safe third countries" concept / "safe country of origin concept"/...). This has led to a specific technique of the Procedures Directive leaving Member States a large amount of interpretative discretion and options to maintain their current national regulations. Therefore, the existing procedures of the Member States were maintained to a substantial degree³⁸¹.

The Directive provides ONE obligatory procedure (for which the basic principles and guarantees of Chapter II of the Directive are obligatory) and SEVEN discretionary procedures (for which it is possible to derogate from all/some of these principles and guarantees and for which some specific principles or guarantees may be applicable). The complexity of this system is evident.

The Commission came to the conclusion that the Directive, as it is currently stands, lacks the potential to support adequately the Qualification Directive and to ensure a rigorous examination of applications for international protection in line with the international and community obligations of Member States regarding the principle of non-refoulement³⁸².

In recital (11) of the APD, the need for "prioritized" or "accelerated" procedures, in the context of a regular procedure, has been justified as follows:

"It is in the interest of both Member States and applicants for asylum to decide as soon as possible on applications for asylum. The organization of the processing of applications for asylum should be left to the discretion of Member States, so that may, in accordance with their national needs, prioritize or accelerate the processing of any application, taking into account the standards in this Directive."

³⁸¹ SEC(2009) 1377, No. 1 – p. 2.

³⁸² COM (2009) 554 final (Expl. Memo.), p. 2.

Whether “national needs” of Member States justify a proliferation of disparate procedural arrangements at national level is increasingly questioned. The consultation of government experts as well as practitioners providing legal advice to asylum applicants in national procedures organized by the Commission in preparation of its amended proposal indicated “a general consensus to achieving further harmonization of procedural arrangements and providing applicants for international protection with adequate guarantees thus insuring an efficient and fair examination of their claims, in line with the Qualification Directive”³⁸³.

Member States, however, do not agree on the amount of changes necessary to achieve this purpose. While some Member States, in line with the Commission, plead for a substantial reduction of options to derogate from provisions of the Directive and for more consistent and uniform procedural rights of asylum seekers, other Member States emphasize the need to retain a certain degree of flexibility regarding the organization of asylum procedures and to maintain procedural arrangements by different procedures aimed at preventing abuse. Some Member States have also expressed their preference for increased cooperation rather than legislative amendments in order to address deficiencies of the present framework³⁸⁴.

The survey of the existing proposals indicates the following basic options:

- One option adopted by certain NGOs³⁸⁵, is to plead for the adoption of just one common examination procedure for all categories of applicants to which all procedural safeguards and guarantees envisaged in Chapter II of the Directive would apply equally. To achieve consensus on their option would seem to be unrealistic. There may indeed be a public interest which would justify the use of accelerated or specific procedures.
- A second option is to revise the present procedural disparity by establishing a regular procedure which would be applicable to the large majority of all asylum applications. Derogations by way of special procedures would only be possible in particular situations which justify a deviation from the regular procedure due to clearly identifiable public and/or private interests involved. Such a public interest may be identified, for instance, in the case of repeated or multiple asylum applications, in the case of arrival of asylum seekers at airports, as well as in the case of (manifestly) unfounded applications in order to avoid the use of asylum procedures as a backdoor to immigration.

It is assumed that the very fact that a large diversity in procedural rules exists, as well as the non-transparency and complexity of the existing procedural system leads to a delay in the examination of an asylum seeker’s claim for international protection. An improvement of the quality and speed of procedures may be achieved by the reduction of the number of accelerated or special procedures and the expedition of the ordinary asylum procedure, rather than the maintenance of a complex system of prioritized or accelerated procedure, specific procedures, procedures in case of inadmissible applications, etc. although in recent years the average length of asylum procedures has clearly been reduced³⁸⁶. A simplification of procedural rules as well as a reduction of the availability of special procedures may contribute to a more transparent procedural system and thus to an acceleration of the asylum procedure.

³⁸³ COM (2009) 554 final (Expl. Memo.), p. 4.

³⁸⁴ COM (2009) 554 final (Expl. Memo.), p. 4.

³⁸⁵ ECRE, Information note 2006, p. 21.

³⁸⁶ The Commission assumes an average duration of procedures at first instance in Member States of six months (COM (2009) 554 Annex, p. 13).

The UNHCR and various human rights organizations have criticized the APD as an instrument for downgrading protection levels. Although the argument that the APD has in fact resulted in a “race to the bottom” rather than setting standards reflecting best practices could not be confirmed in the evaluation of the Directive’s transposition by Member States³⁸⁷, it is largely acknowledged that the provisions currently in force do not exhaust the potential to ensure fair and efficient examination, instrumental in ensuring reliable determinations in line with the Qualification Directive. Frequently, the vagueness of procedural guarantees for asylum seekers and the many opportunities to deviate from procedural standards in connection with substantial gaps on the precise amount of procedural rights, present barriers to the creation of a Common European Asylum System (CEAS) based upon a uniform refugee status valid throughout the European Union. A larger uniformity in procedural standards, however, is also required to improve the efficiency of the procedural systems and to prevent abuse. In addition, the evaluation process has identified a serious deficiency in the absence of more precise procedural guarantees for vulnerable applicants.

Some of the procedural instruments used by Member States have provoked particular criticism. Frequent criticisms are aimed at the abandonment or, at least, the restriction of concepts like the “internal protection alternative”, “safe country of origin” and “safe third country”³⁸⁸. A “culture of disbelief” in the regular procedure is particularly denounced, as MS should seek to provide fair and efficient determinations which render justice to the protection principles. A more moderate approach by the UNHCR also criticizes the lack of a coherent approach in achieving a common procedure of high quality and guaranteeing proper access to protection systems. Subjects most frequently mentioned in this context are access of decision-makers to objective and reliable countries of origin-information, improvement of the quality of procedural systems by better training, giving particular attention to vulnerable asylum applicants and providing for special rules in case of particular pressures³⁸⁹. NGOs frequently urge for further harmonization by restricting Member States’ discretion at the second stage of EU legislation on procedures. In their view, standards should be raised, including such rights as a right to legal assistance, a suspensive right of appeal, sufficiently staffed and trained decision-making authorities and an emphasis on high quality first-instance decisions with negative decisions being fully reasoned so as to reduce the need for appeals³⁹⁰.

The guiding principles of the recast proposal are:

1. The European Commission, after having emphasized the fact that the current minimum standards are insufficient and vague – thus lacking the potential to ensure fair and efficient examination³⁹¹, has indicated that its amendments to the APD are primarily aimed at:
 - the setting up of a single asylum procedure for both forms of international protection provided by the qualification directive;
 - establishing obligatory procedural safeguards;
 - accommodating the particular system of mixed arrivals;
 - enhancing gender equality in the asylum process;

³⁸⁷ Impact assessment, p. 23. It has recently been referred to as a “downward harmonization” (V. TURK, “The CEAS”, p. 3).

³⁸⁸ ECRE, Information note 2006, p. 5, 22, 24, 27 and 28; ECRE, Green Paper 2007, p. 10; ECRE, Memorandum 2010, No. 2.4. – p.7.

³⁸⁹ See COM (2006) 67 final.

³⁹⁰ See for instance ECRE, June 2001.

³⁹¹ COM (2009) 554 final (Expl. Memo.), p. 4.

- and providing for additional safeguards for vulnerable applicants³⁹².
- 2. In its recast proposal³⁹³, the Commission has made the following suggestions to ensure higher and more coherent standards and to deliver robust determinations at first instance: to facilitate a consistent application of the asylum acquis and to simplify applicable arrangements; to clarify the scope of the Directive the proposal provides for a single procedure, thus making clear that applications should be considered in the light of both forms of international protection (refugee status and subsidiary protection status) set out in the "Qualification Directive"; the Commission also suggests that the procedural principles and guarantees set out in the APD should apply to applicants who are subject to procedures pursuant to the Dublin Regulation in the second Member State³⁹⁴.
- 3. With regard to access to procedures, the proposal should include territorial waters in the scope of the Directive and specify the obligations of border guards, police and personnel of detention facilities. The Commission also suggests a time limit for completing formalities related to the lodging of an application and introducing guarantees enabling de facto asylum seekers to articulate their request.
- 4. Special emphasis is put on an increase of the procedural rights in asylum procedures reducing exceptions to procedural principles and guarantees such as the possibility of omitting a personal interview, the right to free legal assistance and special guarantees for vulnerable asylum applicants. The Commission has observed that this would reduce the risk of the annulment of decisions of first instance by the appeal bodies³⁹⁵.
- 5. In order to achieve higher consistency and simplification, the Commission suggests the deletion or modification of a number of notions and devices hitherto contained in the Directive such as the notion of a minimum common list of safe countries of origin, as well as the consolidation of the common objective criteria for the national designation of third countries as safe countries of origin. The present arrangements for accelerated procedures are to be replaced by a limited and exhaustive list of grounds for an accelerated examination of manifestly unfounded applications. At the same time, the proposal intends to safeguard special rules on the processing of abusive or fraudulent claims by introducing an obligation for applicants to cooperate with the competent authorities. With regard to procedures at first instance, the Commission suggests time limits of six months to improve the efficiency of examinations and the obligatory introduction of a single determining authority.
- 6. With regard to access to an effective remedy, the proposal provides for a full and ex-nunc-review of first instance decisions by a court or tribunal in connection with automatic suspensive effect of appeals against first instance decisions, subject to limited exceptions³⁹⁶.

³⁹² COM (2008) 360/3, at p. 5.

³⁹³ COM (2009) 554 final (Expl. Memo.).

³⁹⁴ This means that the notion of implicit withdrawal of applications should not be an obstacle for applicants to re-access asylum procedures in the responsible Member State.

³⁹⁵ In a recent study, the UNHCR has also observed that the quality of the first instance procedures would contribute to avoiding the current situation where many refugees in Europe are recognized only following an appeal process (UNHCR Study 2010, p. 88).

³⁹⁶ COM (2009) 554 final (Expl. Memo.), p. 6-8.

3. POSSIBLE INTERACTION BETWEEN APD AND OTHER EUROPEAN INSTRUMENTS OF THE FIRST GENERATION OF CEAS

When making proposals of amendments on the APD or making a proposition for a new Directive, it is also necessary:

- to emphasize the possible inconsistencies between the “Dublin Regulation” and APD as well as with the “Reception Conditions Directive” “Qualification Directive” and the “Return Directive”³⁹⁷;
- to take into account what has already been proposed by the Commission, by the Parliament or by the Council regarding some procedural provisions of the above-mentioned Directives or Regulations³⁹⁸.

Some provisions of the recast proposal refer also to provisions of the other redrafted instruments. This reinforces the necessity to examine the recast program as a whole to avoid disparities in standards, notions or devices.

Indeed in this regard, the European Commission has recently observed, in its explanatory memorandum of the recast proposal of the Directive,³⁹⁹ that the APD lacks the potential to support adequately the “Qualification Directive”. It has therefore, decided to propose the procedural guarantees and notions which are instrumental in ensuring reliable determinations in line with the “Qualification Directive”⁴⁰⁰ and with the “Dublin Regulation”⁴⁰¹. Thus, with the aim of facilitating consistent application of the different asylum instruments, the proposal of the Commission:

- provides for a single procedure for both forms of international protection set out in (the recast proposal of) the “Qualification Directive” with a view to ensure consistency with the “Qualification Directive”⁴⁰²;
- adapts some provisions to ensure consistency with the “Qualification Directive”⁴⁰³ and with the “Reception Conditions Directive”⁴⁰⁴;

³⁹⁷ In the same sense: UNHCR, Green Paper, 2007, p. 20. For instance:

- some provisions of the “Qualification Directive” also concern procedural rules and the failure of the applicant to comply with the obligations provided by these provisions without good reasons (articles 4(1) and (2), 11 (2) (a) and 20 (1) of the directive) which can lead to the application of a prioritized or accelerated procedure (article 23 (4) (k) APD);
- another example is provided by article 13 (4) of the “Return Directive” which concerns the right to (free) legal assistance and/or representation to the conditions as set out in article 15 (3) to (6) APD;
- concerning the “STC” concept and the requirement of a connection with the country concerned based on “close family relations”, compare article 27 (2) (a), APD and article 32 (2) (e), recast proposal with article 11, Dublin Regulation II.

³⁹⁸ For a presentation of the different proposals of the Commission to amend the legislative instruments of the first stage of the CEAS, see Commission Press release, October 2009.

³⁹⁹ COM (2009) 554 final – Expl. Memo., No. 1.1. – p. 2.

⁴⁰⁰ COM(2009) 554 final – Expl. Memo., No. 2 – p. 4.

⁴⁰¹ COM(2009) 554 final – Expl. Memo., No. 3.1.1. – p. 5.

⁴⁰² It also expressly referred to the “Qualification Directive” in several recitals of the recast proposal (see, for an example, new recital (11) (current recital (6)).

⁴⁰³ See, for example, the amended definition of an “unaccompanied minor”, envisaged in Article 2 (m), recast proposal, which was expressly modified to ensure consistency with the “Qualification Directive” (COM(2009) 554 Annex (Det. Expl.), Article 2 (m) – p. 2) or the prohibition on extraditing an applicant for asylum to his/her country of origin, to ensure coherence with the provisions of the Qualification Directive concerning the exclusion clauses (*Ibidem*, Article 8 – p. 6).

⁴⁰⁴ For example, the exemption of unaccompanied minors from the border procedure (Article 21 (6), recast proposal) is justified by the Commission’s proposal for the “Reception conditions Directive” which maintains that those minors must not be detained (COM(2009) 554 Annex (Det. Expl.), Article 21 – p. 12).

- and makes it clear that the procedural principles and guarantees set out in the APD also apply to applicants who are subject to procedures pursuant to the “Dublin Regulation” in the second Member State⁴⁰⁵. Furthermore, even if the APD does not deal with procedures between Member States governed by the “Dublin Regulation”, applicants to whom this Regulation applies should enjoy access to the basic principles and guarantees set out in the APD and to the special guarantees pursuant to the Regulation⁴⁰⁶. The application of the suspensive effect of the judicial review, such as was foreseen by Article 41 (5) to (7), recast proposal is also made with Article 26 of the recast “Dublin Regulation”⁴⁰⁷.

The Commission has also stated that higher and more harmonized standards on asylum procedures are necessary in order to ensure that asylum seekers who are subject to the Dublin procedures have their applications examined under equivalent conditions in different Member States⁴⁰⁸. In the view of the Commission, this should limit the phenomenon of secondary movements of asylum seekers amongst Member States, “to the degree that such movements are generated from divergent procedural arrangements”⁴⁰⁹.

4. LEGAL BASIS OF THE PROPOSAL OF THE COMMISSION

The Commission’s proposal relating to asylum status has been based upon Art. 63, par. 1, point (1)(d), of the EC Treaty, while the amendments dealing with procedural standards relating to subsidiary protection status were based on Art. 63, par. 1, point (2)(a) of the EC Treaty. As a consequence, the Commission has not proposed the modification of the title of the APD which deals with “minimum” standards on procedure⁴¹⁰. Since the entry into force of the Lisbon Treaty, the Parliament and the Council are no longer limited to enacting “minimum” standards, but may adopt measures with respect to a CEAS including common procedures for granting and withdrawing refugee status. It is suggested that the notion of “common procedures” in comparison to “minimum” standards implies a higher degree of regulatory power of the Union. Therefore, in principle, no legal objection can be raised against the introduction of uniform rules in certain respects, provided that the principle of subsidiarity is complied with⁴¹¹. Whether the wording of Art. 78, par. 2, lit. e, would also include the transfer of responsibility of the Member States to a European asylum processing agency, is questionable. Considering the political realities, the option of a European processing system seems highly unlikely (see proposals long term).

⁴⁰⁵ It is underlined (COM(2009) 554 final – Expl. Memo., No. 3.1.1. – p. 5) that the notion of implicit withdrawal of applications should not be an obstacle for applicants to re-access asylum procedures in the responsible Member State and that the proposal makes it clear that the procedural principles and guarantees set out in the “Asylum Procedures Directive” also apply to applicants who are the subject to procedures pursuant to the Dublin Regulation in the second Member State.

⁴⁰⁶ Recital (36) (current recital (29), APD adapted) and recital (37) (new), recast proposal.

⁴⁰⁷ Article 41 (8), recast proposal.

⁴⁰⁸ COM(2009) 554 final – Expl. Memo., No. 3.3 – p. 9.

⁴⁰⁹ COM(2009) 554 final – Expl. Memo., No. 3.1. – p. 5. See also: recital (11) and (31), recast proposal ; Impact assessment, p. 8.

⁴¹⁰ See also new recital (10) recast proposal (current recital (5), APD) and article 1, recast proposal.

⁴¹¹ This principle is expressly reaffirmed in recital (39) (new), recast proposal and means that some proposed provisions of the Commission are limited to require Member States to make “relevant” arrangements rather than introduce additional rights for third country nationals or stateless persons who have lodged an application for international protection (COM(2009) 554 annex (Det. Expl.), Article 7.

5. INTERNATIONAL LEGAL FRAMEWORK: COMPATIBILITY WITH CERTAIN INTERNATIONAL INSTRUMENTS AND CJ AND ECHR CASE LAW

5.1. Control of the compatibility of the proposal with fundamental rights and general principles of EU Law.

The explanatory memorandum⁴¹² mentions that the proposal has been subject to in-depth scrutiny with a view to ensuring that its provisions are fully compatible with fundamental rights flowing from general principles of Community law, which, themselves, are the result of constitutional traditions common to the Member States and the ECHR. They are also enshrined, moreover, in the EU Charter⁴¹³, and include obligations stemming from international law, (in particular from the Geneva Convention, the European Convention on Human Rights and from the UN Convention on the Rights of the Child,) such as, among others: better respect for the principle of non-refoulement; better access to protection and justice; enhancing gender equality; promoting the best interest of the child principle in national asylum procedures.

It is also suggested that the proposed amendments of the Commission are, to a large extent, informed by evolving case law of the European Court of Justice (CJ)⁴¹⁴, which has developed principles such as the right to defence and to be heard⁴¹⁵, the principle of equality of arms⁴¹⁶ and the right to effective judicial protection⁴¹⁷, and that the

⁴¹² COM(2009) 554 final - Expl. Memo., p. 9.

⁴¹³ In this sense, recital (13) (recital (8), APD), recast proposal: "In particular this Directive seeks to promote the application of Articles 1[right to human dignity], 18[right to asylum], 19[protection in the event of removal, expulsion or extradition], 21[non-discrimination principle], 24[right of the child] and 47[right to effective remedy and fair trial] of the Charter and has to be implemented accordingly". It has to be noted that it does not refer to Article 41 of the Charter[right to good administration].

⁴¹⁴ COM(2009) 554 final - Expl. Memo., p. 6. In the comments on Article 6 (recast proposal), it is also mentioned that several sets of guarantees are introduced with a view to enhancing access to examination procedures and to take into account the considerations of the CJ (*Panayotova*), which indicate that a procedural system for exercising a right to residence permit provided for in Community Law should be "easily accessible and capable of ensuring that the persons concerned will have their applications dealt with objectively and within a reasonable time"(COM(2009) 554 annex (Det. Expl.), Article 6). The proposal to set out a time limit for taking a decision (Article 27 (3) and (4), recast proposal is justified by the CJ findings (*Panayotova*) that decisions on residence permits taken on the basis of Community Law require a procedural system which makes it possible to take a decision within a reasonable period of time (COM(2009) 554 annex(Det. Expl.), Article 27).

⁴¹⁵ For this reason, the proposal of the Commission reduces the current opportunities for Member States to omit a personal interview by (qualified) personnel of the determining authority, "with the view to align the Directive with evolving case law of the European Court of Justice regarding the right to be heard" (COM(2009) 554 annex (Det. Expl.), Article 13), provides also the right to a personal interview before a decision is taken to consider an application as inadmissible (Article 30, recast proposal - See COM(2009) Annex (Det. Expl.), Article 30 - p. 14) and enables the person concerned, before the withdrawal of international protection status, to put forward his/her view with regard to the applicability of the cessation clauses in his/her particular circumstances (*Ibidem*, Article 39 - p. 18).

⁴¹⁶ The amendment to ensure that country of origin information must be made accessible to the applicant or his/her legal advisor "to the extent it has been used by the determining authority for the purpose of taking a decision on the application" is indeed considered necessary in the light of evolving jurisprudence of the CJ with regard to the right of defence (to be heard) and the principle of equality of arms (COM(2009) annex (Det. Expl.), Article 9).

⁴¹⁷ The amendment expressly specifies that the determining authority must state reasons in fact and in law in a decision rejecting the application's refugee status, even if the subsidiary protection status has been recognized. This has been justified by the necessity to ensure that the applicant has access to an effective remedy in the context of a single examination procedure, in conformity with the principle of effective judicial protection of rights guaranteed by Community Law(COM(2009) 554 annex(Det. Expl.), Article 10). It has also to be recalled that, by virtue of Article 41 of the Charter of Fundamental Rights of the European Union, the administration has the obligation to give reasons for its decisions and that this obligation is considered as a guarantee for a more effective right to appeal. The amendment introducing access, without any limitations, to the information or sources in question available to the appeal authorities, is also justified

jurisprudence of the European Court of Human Rights (hereinafter: "ECtHR") was another key source of inspiration for developing further procedural safeguards for asylum applicants⁴¹⁸.

In this study we will ascertain if the proposed amendments of the Commission are, or are not, in conformity with the minimum standards set out by the case law of these Courts and try to emphasize what is required to be in conformity with those minimum standards. We will then look at what is already proposed or which may be proposed (which would be higher than those minimum standards) and which would, as a consequence, depend on a political decision of the Member States. As has already been observed in the comments on the Geneva Convention, it is fundamental to distinguish clearly between, on the one hand, arguments based on the existing state of public international law and EU Law leaving no discretion in legislative policy, and, on the other hand, between *de lege ferenda* and *de lege lata* suggestions⁴¹⁹.

As part of primary community law, the international legal framework for EU legislation in the area of asylum procedures includes the provisions of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 on the legal status of refugees, as well as the compliance with human rights as guaranteed by the European Convention for the Protection of Human Rights and other human rights treaties to which the EU Member States have adhered to and to the common constitutional traditions of EU Member States⁴²⁰. In addition, following the entry into force of the Lisbon Treaty, the EU will be obliged to comply with the provisions of the Charter of Fundamental Rights.

We will consider the most relevant instruments which are as follows: the Geneva Convention; European Convention on Human Rights; Charter of the Fundamental rights and International Convention on the rights of the Child (CRC)⁴²¹.

5.2. The Geneva Convention (GC)

The Geneva Convention does not contain any provisions on procedures nor does it establish an individual right to be granted asylum. The obligations of the contracting States, however, require under the principle of good faith, that States party to the Convention institute a formal procedure which allows for a fair and effective procedure, in order to determine who is entitled to the guarantees of the Convention⁴²². This conclusion has found general acceptance, in particular with regard to the principle of non-refoulement as laid down in Art. 33 GC. It is undisputed that efficient protection against refoulement to a State persecuting a person for the reasons mentioned in Art. 1 A GC must involve a fair and efficient procedure. Fairness can generally be interpreted as meaning a procedure which provides a reasonable chance to an applicant for international protection to enforce his/her

by the necessity to take account of the evolving jurisprudence of both the CJ and the ECtHR regarding access to an effective remedy (COM(2009) 554 annex (Det. Expl.), Article 19).

⁴¹⁸ For an example, Article 8 recast proposal (current Article 7, APD) was modified to take into account the case law of the ECtHR (COM (2009) 554 annex (Det. Expl.), Article 8 – p. 6) and to expressly provide that an applicant for international protection cannot be surrendered or extradited to his/her country of origin as long as the determining authorities and, where applicable, a court or a tribunal has examined, in the first place, whether this applicant qualifies for international protection pursuant to the "Qualification Directive".

⁴¹⁹ In this regard we referred to a working document we completed to analyze and list –on the basis of the case law of the ECtHR and of the CJ among others - the possible criteria regarding fair procedures and an effective remedy.

⁴²⁰ See Art. 6(3) TEU and article 78 (1) TFEU.

⁴²¹ Not analyzed here; see Section II, point 7.

⁴²² G.-S., GOODWIN-GILL, p. 165.

claim to protection. Fairness also implies that the asylum seeker within the procedure is given sufficient opportunity to present and to pursue a claim in the procedure.

In the past few decades, numerous international and non-governmental agencies have analyzed and formulated general principles on asylum procedures. Prominent among them is the UNHCR with its handbook on procedures and criteria for determining refugee status of 1979 and a series of Executive Committee recommendations on the determination of refugee status (EXCOM Conclusions)⁴²³. These recommendations have set forth a basic agenda, comprising of guidance to applicants, the provision of competent interpreters, a reasonable time to appeal for formal reconsideration of a negative decision either to the same or different authority whether administrative or judicial, according to the prevailing system⁴²⁴. The UNHCR Executive Committee has also considered problems arising from manifestly unfounded or abusive applications and considered that special provision might be made for dealing with them in an expeditious manner. However, it also recognizes the substantive character of such decisions, the serious consequences of error, and the consequential need for appropriate procedural guarantees. It is recommended that the individuals affected receive a complete personal interview, that the decision has to be taken by an authority competent in asylum matters and that there should be always a review of negative decisions (possibly simplified) before rejection at the border or enforceable removal⁴²⁵.

5.3. The European Convention of Human Rights (ECHR)

The ECHR does not contain any provisions on the examination of asylum claims. However, Art. 3 is interpreted by the European Court of Human Rights (hereinafter ECtHR) as a prohibition on removing a person to a country in which he/she is facing a serious risk of torture or inhuman or degrading treatment or punishment. In addition, Art. 13 grants a right to an effective remedy before a national authority to anyone whose rights and freedoms as set forth in this Convention are violated⁴²⁶.

On several occasions, the ECtHR therefore, has had to pronounce on the procedural relevance of these provisions relating to refugee procedures. Although the ECHR does not refer to refugee procedures in the sense of the Geneva Convention, the implications drawn by Art. 3 are relevant in practice to refugee procedures in the light of the aim of a single asylum procedure.

From the ECtHR's jurisprudence the following conclusions can be drawn:

1. The prohibition of refoulement requires procedural precautions to assure a "meaningful assessment of the applicant's claim, including its arguability". In the case of *Jabari*, the Court had to decide on a Turkish regulation whereby applicants had to submit their asylum application to the police within five days of their arrival in Turkey. Persons entering Turkey illegally who did not apply to the Turkish authorities within five days of entry could not be accepted as a refugee. The Court came to the conclusion, that the applicant's failure to comply with the five-day registration requirement denied her any scrutiny of the factual basis of her fears about being removed to Iran. The Court stated: "The automatic and mechanical application of such a short time limit for submitting an asylum

⁴²³ See UNHCR thematic compilation and Manual 2003.

⁴²⁴ See EXCOM No. 8 (1977).

⁴²⁵ See EXCOM No. 30 (1983).

⁴²⁶ No comparable judicial mechanism exists for the application of the 1951 Geneva Convention.

application must be considered at variance with the protection of the fundamental value embodied in Art. 3 of the Convention”.

2. Although all asylum seekers do not plead a risk of torture or bad treatment, the majority invoke such a risk in their applications. Since Article 3 enshrines one of the most fundamental values of a democratic society and prohibits in absolute terms torture or inhuman or degrading treatment or punishment, this necessitates the rigorous scrutiny of an individual’s claim that his or her deportation to a third country will expose that individual to treatment prohibited by Art. 3⁴²⁷. It is to be noted that the reasoning of the Court is based on the absolute nature of Art. 3, ECHR and its character as a fundamental value of a democratic society.

This obligation is also grounded on article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)⁴²⁸, and article 7 of the International Covenant on Civil and Political rights (ICCPR)⁴²⁹.

3. These considerations cannot be referred to as refugee protection in the sense of the Geneva Convention. The details of whether different procedural standards relating to the required amount of scrutiny according to different legal bases for international protection may be legally admissible or feasible, do not need to be discussed in this context. The Court has basically applied similar standards of examination with regard to claims for protection under Art. 3, ECHR as Member States have applied with regard to refugee status. The responsibility of States is engaged if substantial grounds have been shown for believing that a person, if rejected or expelled, would face a real risk of either being persecuted for political reasons or subjected to treatment contrary to Art. 3, ECHR. For that reason, national authorities must make all reasonable efforts to examine a claim, while it is the responsibility of the applicant to show “substantial grounds” indicating a serious risk of persecution.
4. When a violation of a provision of the ECHR is invoked, namely article 3 in the asylum context, and if an applicant can show an arguable claim, Art. 13, ECHR requires that an effective remedy is in place to challenge a decision whereby the application for international protection has been rejected. According to the Court’s jurisprudence, Art. 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant convention complained and to grant appropriate relief, although contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. Moreover, in certain circumstances the aggregate of remedies provided by national law may satisfy the requirements of Art. 13⁴³⁰.

⁴²⁷ See judgment in the case ECtHR, *Chahal*, par. 73-74.

⁴²⁸ CAT is expressly referred to in Annex II of the APD and in the recast proposal concerning the criteria to apply for the designation of “safe countries of origin”.

⁴²⁹ ICCPR is expressly referred to in Annex II of the APD and in the recast proposal concerning the criteria to apply for the designation of “safe countries of origin”.

⁴³⁰ ECtHR, *Jabari*, par. 43; *Chahal*, par. 145.

5. The national authority in charge of deciding the appropriate remedy must be able to deal with the substance of a convention complaint and to grant appropriate relief. In *Jabari* the Court seems to have connected this competence with a right to suspend the implementation of a decision and to have an examination of the merits of a claim⁴³¹. The question of the efficiency of a remedy and suspensive effect was further developed in the Court's judgment, *Gebremedhin*. In this case, the Court had to deal with a French rule whereby an applicant arriving at an airport, whose application had been rejected as manifestly ill-founded, could be removed without having had the opportunity to apply to OFPRA for asylum. An application to the administrative courts had no suspensive effect and was not subject to any time limits. The ECtHR notes that it was a requirement of Art. 13 that where a State party decided to remove a foreign national to a country where there was real reason to believe that he/she ran a risk of this nature, the person concerned must have access to a remedy with automatic suspensive effect (a remedy with such effect "in practice" was not considered as sufficient). However, this decision cannot be interpreted as implying a requirement of suspensive effect until a final determination of the case by an administrative court. It is clearly limited to an automatic suspensive effect for the time of the examination of a request for interim protection. Thus, an applicant cannot be removed until a court has had the opportunity to decide, at least under the form of an interim measure, on an application for protection.

5.4. Charter of Fundamental Rights (CFR) of the European Union

The most relevant articles referring to procedural issues are the following⁴³²:

Article 18 of the Charter states that "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community".

However, the legislative history of the provision as well as its wording indicate that the provision was drafted as a compromise in order to accommodate the concerns of some members of the Union who were afraid that the clause could be interpreted as an individual right to asylum. Therefore, the provision does not impose an obligation to grant asylum or a reciprocal individual right. The provision merely obliges Member States to "guarantee" a right of asylum. One has to distinguish between a refugee's claim to asylum, which is recognized by Art. 18, and the obligation to grant asylum, that the CFR does not impose⁴³³. Therefore, it is at least doubtful whether Art. 18 implies further procedural implications as may be drawn from the Geneva Convention and Art. 13 ECHR.

The clause, nevertheless, has the potential to produce diverse interpretations. In the academic discussion it is generally assumed that Art.18 implies a right of access to asylum,

431 ECtHR, *Jabari*, par. 49.

432 The Charter will, however, not be applicable internally within the United Kingdom or Poland and will not establish individual rights in these countries according to the Protocol of the application of the Charter for Poland and the United Kingdom. It has also to be recalled that the provisions of the Charter also address _ the MS when they are implementing Union law (article 51.1.). In its Action Plan Implementing the Stockholm Program, the Commission has expressly highlighted that the CFR should become the compass for all EU law and policies and that the Commission will apply a "Zero Tolerance Policy" (Action Plan, p. 3).

433 H. BATTJES, n° 150, p. 113.

that is, to a durable solution and appropriate secondary rights⁴³⁴. Other commentators imply from Art. 18 an obligation to grant protection ensuring that asylum may be effectively claimed and used⁴³⁵.

Whether procedural implications regarding the application of the “safe third country” exception exist may be a matter of different interpretation. It is argued that Art. 18, guaranteeing a refugee’s right to asylum, implies the possibility of getting asylum and entitlement to the rights granted under the Geneva Convention. Therefore, since the existing procedural rules would allow for expulsion to a third country that may in turn expel an applicant to a fourth country, this would not be fully compatible with Art. 18⁴³⁶.

It also has to be noted that the Commission has invoked the right to asylum enshrined in Article 18 CFR and the general principles of Community Law⁴³⁷, to justify its proposal to delete the current provisions of the APD allowing Member States to consider an application “inadmissible” where the applicant is allowed to remain in the Member State on some other grounds and consequently is granted a status equivalent to the rights and benefits of the refugee status by virtue of the “Qualification Directive”, or is allowed to remain in the territory pending the outcome of a procedure for the determination of such a status⁴³⁸.

The CFR in Art. 19 (2) also prohibits removal, expulsion or extradition to a State where there is a serious risk that the person concerned would be subject to the death penalty, torture or other inhuman or degrading treatment or punishment. It is suggested that this provision basically incorporates the relevant case law from the ECtHR regarding Art. 3⁴³⁹. Therefore, procedural implications going beyond the existing state of public international law cannot be derived from this provision.

Article 41 CFR, concerning the right to good administration, states that:

- “1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and the bodies of the Union.*
- 2. This right includes:*
- the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;*
 - the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;*
 - the obligation of the administration to give reasons for its decisions”.*

If this right is to be considered, with regard to the case law of the CJ, as a fundamental right enshrined in the general principles of EU Law and protected by the Court, it will imply an obligation to provide for, or to respect, minimal procedural safeguards for the asylum procedures at first instance on the EU and Member States⁴⁴⁰, even if such guarantees are

⁴³⁴ H. BATTJES, n° 152, p. 114.

⁴³⁵ BERNSDORFF, in: MEYER (ed.), p. 253.

⁴³⁶ H., BATTJES, n° 540, p. 435.

⁴³⁷ COM(2009) 554 annex(Det. Expl.), Article 29 – p. 14.

⁴³⁸ Compare Article 25, APD and Article 29, recast proposal. On this occasion, the Commission also recalled that “*refugee status is a right conferred to individuals by the Community acquis*” (COM(2009) 554 annex(Det. Expl.), Article 29 – p. 14).

⁴³⁹ See Explanatory Comments, Official Journal (2004), C 310, p. 437; see ECtHR, *Soering*; *Cruz Varas*, par. 69.

⁴⁴⁰ See Article 51(1) CFR: “The provision of this Charter are addressed [...] to the Member States [...] when they are implementing Union law”. See. for some minimal requirements applicable to administrative procedures in general: CJ, Smits and Peerbooms, par. 90; CJ, Panayatova, par. 26-27 (residence permit).

not, as such, required, *de lege ferenda*, by the GC, the ECHR and the case law of the ECtHR, or by other international Conventions, such as the CRC. In this regard, it can already be observed that the European Commission has expressly justified some of the provisions of its recast proposal on this basis⁴⁴¹.

Article 47 CFR provides also that anyone whose rights and freedoms guaranteed by the law of the Union have been violated, has the right to an effective remedy before a tribunal in compliance with the following conditions:

1. each person is entitled to a fair and public hearing,
2. within a reasonable time,
3. by an independent and impartial tribunal previously established by law,
4. each person shall have the possibility of being advised, defended and represented;
5. and legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Therefore, procedural guarantees providing for appeals procedures going beyond these minimal requirements cannot be adopted⁴⁴². It also has to be noted that these conditions do not provide for an automatic suspensive effect during the examination of the request by the tribunal. This question has however, to be examined taking into account the evolving case law of the CJ and of the ECtHR, already mentioned above.

Regarding the position adopted by the CJ⁴⁴³ and Article 47, CFR, the consequence is that Article 6, §1, ECtHR⁴⁴⁴ also has to be taken into account by the CJ, as a general principle of Community law, within its judicial scrutiny of the decisions of national authorities taken pursuant to the application of provisions of Community law, even in administrative proceedings, among other decisions regarding asylum or immigration claims.

441 For an example, the amendment of the Commission to reduce the current possibilities that exist for Member States to omit an applicant's personal interview by the determining authority during procedures at first instance, has been expressly justified by the necessity to align the Directive with the evolving case law of the European Court of Justice regarding the right to be heard (COM(2009) 554 annex (Det. Expl.), Article 13). In the same sense, the new provision concerning special rules on an admissibility interview has also been justified by the aim to guarantee the right to be heard, "in line with the general principles of Community Law" (COM(2009) 554 annex (Det. Expl.), Article 30).

442 It is, for an example, affirmed in the Det. Expl. of the Articles of the recast proposal that the purpose of enabling Member States to apply a "test" before granting free legal assistance in appeal procedure before a court or a tribunal, is in line with Article 47 of the Charter (COM(2009) annex, Article 18). This has nevertheless, to be verified.

443 H., BATTJES, Nos. 111, 159, 410 and 417-420.

444 This provision has also inspired Article 47 CFR.

SECTION 2: WHAT BASIC PRINCIPLES AND GUARANTEES HAVE TO BE PROVIDED IN TERMS OF ACCESS TO THE PROCEDURES AND DURING THE COURSE OF THE ADMINISTRATIVE PROCEDURES? (ANALYSIS OF THE APD AND OF THE RECAST PROPOSAL)

1. WHY OPT FOR A SINGLE PROCEDURE ENCOMPASSING BOTH REFUGEE STATUS AND SUBSIDIARY PROTECTION?

The recast proposal provides for the establishment of a single asylum procedure for both forms of protection⁴⁴⁵. The most obvious advantages of a single asylum procedure include:

- such a procedure would make it easier for applicants to apply for protection.
- higher efficiency in terms of saving both money and time.
- an important deterrent to the practice of making abusive asylum claims ;
- finally, a major advantage of a single procedure is its ability to promote a common European asylum system (CEAS) and a better application of the Dublin Regulation. An extension of the Dublin system would require not only a harmonization of the material standards on granting subsidiary protection, but also the harmonization of procedure, by way of introducing a single asylum procedure, which would enable every State to recognize (positive) decisions based upon a comprehensive assessment of protection grounds common to all EU Member States.

In spite of the obvious advantages, there may be, on the other hand, some disadvantages such as the potential for a dilution of Convention refugee status⁴⁴⁶. To avoid this, one solution could be:

- a predetermined sequence of examination, either based upon legal prescription or administrative rules, whereby a claim for protection on other humanitarian grounds is only examined in the case of a negative assessment of Geneva Convention grounds; and
- giving precise reasons for rejecting a claim for Geneva Convention protection while granting another reason of protection, thereby enabling an appeal based upon the rejection of Convention status.

These are precisely the proposals made by the Commission in its recast proposal⁴⁴⁷.

445 New Articles 2, (b), and 3, par. 1, recast proposal (with the deletion of current Article 3 (3), APD).

446 The Commission has published statistics in its "Policy Plan on Asylum", which suggest that Member States applying a single procedure have increasingly granted subsidiary protection status since the entry into force of the "Qualification Directive".

447 See: 1°) Article 9 (2), recast proposal in relation to a mandatory sequence for the examination of the claim; 2°) Article 10 (2), recast proposal in relation to the obligation to state the reasons to reject the recognition of refugee status and/or subsidiary protection status.

By virtue of current Article 9 (2), APD, Member States do not have to state the reasons for not granting refugee status where the applicant is granted a status which offers the same rights and benefits under national and Community law as the refugee status, but those reasons have to be stated in the applicant's file and the applicant must have, upon request, access to his/her file. Moreover, by virtue of current Article 39 (5), APD, the applicant may be considered, in such a case, as having an effective remedy where a court or tribunal decides that the judicial remedy introduced by the applicant is inadmissible or unlikely to succeed on the basis of "insufficient interest" on the part of the applicant in maintaining the proceedings. This latest provision is not, as such, modified by the Commission in its recast proposal (Article 41 (10)).

For Member States who have provided other forms of protection, the question raised seems to be whether it is necessary or not to make clear the difference between both forms of international protection in the scope of the "Asylum Procedures Directive" and the other form of humanitarian (temporary or permanent) protection under national law with specific procedural guarantees: should these other "protection statutes" be examined or not in the scope of the Directive and should it be mandatory or, should it be optional for Member States as is the case in the APD⁴⁴⁸ and in the recast proposal⁴⁴⁹ concerning other kinds of international protection,?

2. RIGHT TO STAY DURING THE PROCEDURE AT FIRST INSTANCE (ARTICLE 7 (2) APD – ARTICLE 8 RECAST PROPOSAL)

The exception to the right to remain during the first instance procedure, namely in case of extradition by a Member State, does not contain any safeguards to ensure the respect of principle of non-refoulement and the absolute protection against removal guaranteed by article 3 of the ECHR⁴⁵⁰. The case law of the ECtHR on this issue affirms this absolute character without any exception⁴⁵¹.

The recast proposal answers this criticism by adding a paragraph 3 referring to the international obligations of the Members States⁴⁵². It states "A Member State may extradite an applicant to a third country pursuant to paragraph 2 only where the competent authorities are satisfied that an extradition decision will not result in direct or indirect refoulement in violation of international obligations of the Member State".

3. RIGHT TO BE INFORMED

PROBLEM: in order to avoid refoulement of asylum seekers in situation of mixed arrivals⁴⁵³, border guards and immigration officials would benefit from training and clear instructions on how to respond to asylum application and how to handle the needs of vulnerable groups

To avoid the applications being dealt with by unspecialized or incompetent authorities, the recast proposal aims to redraft article 4 identifying the responsible authorities. While current article 4 refers essentially to procedural safeguards, the new text adds guarantees of qualitative and quantitative capacities to those authorities. Article 4 of the recast proposal indeed obliges MS to provide initial and follow-up training programs for the people in charge of the examination of the applications and taking decisions on international protection.

448 Article 3, (4).

449 Article 3, par. 3.

450 The same obligation is deduced from article 3 CAT.

451 ECtHR: Daoudi, par. 64; Al Saadoon and Mufhdi, par. 123; Saadi, par. 127 ; Ben Khemais, par. 53 ; O., par. 36 ; Sellem, par. 35 ; Soering ; Chahal.

452 One exception remains in the recast proposal: the possibility to deprive the applicant of the right to remain when a new application is lodged after a final decision to reject a (first) subsequent application as "unfounded"; it means in case of third, fourth, ..., application. On the procedural consequences of this exception, see *infra*.

453 The accessibility of the asylum procedures, in particular at the borders or in transit zones, is indeed considered as a key pre-condition for ensuring respect of this principle (ECtHR, Gebrehmedin, par. 59-67).

An exception remains for Dublin cases. This exception should be abolished because the application of the Dublin Regulation leads the determining authority to decide on the efficacy of the protection in another EU country. It is not only a technical and mechanical analysis but also an analysis of the compatibility of the decision of removal with international obligations like the Geneva Convention and the principle of non-refoulement, the compatibility of the reception conditions and human rights provisions...

SOLUTION: Right of information of the applicant

Article 7, recast proposal is a new provision dedicated to the applicant's right of information, namely in critical zones like transit zones. The effective access to the procedure requires available and complete information from this right,. The most important point is the territorial applicability of this obligation of information. It has to be provided at the "(a) border crossing points, including transit zones, at external borders" and in "(b) detention facilities". Article 7 also provides for interpretation arrangements in order to ensure communication between persons who wish to make an application for international protection and border guards or personnel of detention facilities. Organizations providing advice and counselling to applicants for international protection have to have access to the border crossing points, including transit zones.

4. DETERMINING AUTHORITY – COMPETENT AUTHORITY: RISK OF CONFUSION IN THE APPLICATION OF THESE CONCEPTS.

By virtue of the current APD, Member States shall, as a principle, designate a "determining authority"⁴⁵⁴ for all procedures provided for by the Directive. This authority will be responsible for the appropriate examination of all applications for asylum in accordance with the Directive⁴⁵⁵. An authority other than the "determining authority" may however, be designated by Member States in some situations⁴⁵⁶. In these cases, decisions, which may concern the examination of the substance of the application for asylum, will be taken by "competent authorities" (border guards or immigration authorities) which are not the normally "determining authority".

454 In the sense of Article 2 (e), APD.

455 Article 4 (1) APD.

456 These are : 1° cases where the transfer of the applicant to another State is being considered according to the rules establishing criteria and mechanisms for determining which State is responsible for considering an application for asylum, until the transfer takes place or the requested State has refused to take charge or to take back the applicant (the so called "Dublin decisions")(Article 4 (2) (a) APD); 2° decisions taken on the application in the light of national security provisions, provided the determining authority is consulted prior to this decision as to whether the applicant qualifies as a refugee by virtue of the "Qualification Directive"(Article 4 (2) (b), APD); 3° decisions not to further examine a subsequent application for asylum when it has been decided by a Member State to apply the specific procedure of "preliminary examination" for such an application⁴⁵⁶ or for an application filed by an applicant who, either intentionally or owing to gross negligence, fails to go to a reception center or appear before the competent authorities at a specified time(Articles 2 (c), 24 (1) (a), and 32 to 34, APD); 4° decisions taken on applications for asylum by virtue of a specific procedure organised by a Member State at the border or in transit zones, in accordance with the basic principles and guarantees envisaged by the Directive (Articles 4 (2) (d), 24 (1) (b) and 32 (1) and (5), APD); 5° decisions taken on applications for asylum by virtue of a specific procedure organised by a Member State at the border or in transit zones, in accordance with national laws or regulations in force on 1 December 2005, provided those laws or regulations respect certain specific guarantees(Articles 4 (2) (e), 24 (1) (b) and 32 (2) to (5), APD); and, 6° decisions not to examine or not to examine fully an asylum application when it is established, on the basis of the facts, that the applicant for asylum is seeking to enter, or has entered, illegally on the territory of the Member State concerned from a (European) safe third country(ESTC concept)(Articles 4 (2) (f), 24 (2) and 36 APD).

Even if there are no international requirements for the designation of the authority responsible for examining asylum claims in the framework of the Geneva Convention, concerns have already been expressed about the fact that the access to the asylum procedures may be denied by an authority other than the one designated for the "regular" procedure, including border guards or police officers who may not necessarily be qualified to assess international protection needs⁴⁵⁷.

Article 4 (3) of the recast proposal, which permits the designation of an authority other than the determining authority for the sole purpose of processing cases pursuant to the Dublin Regulation, constitutes, in this regard, a good step forwards⁴⁵⁸. This new provision expresses the aim of the European Commission to underline in the recast proposal the principle of a "single determining authority" in order to reinforce the quality decision making at first instance⁴⁵⁹.

Notwithstanding this, Article 8 (1) of the recast proposal expressly confirms the power of the "determining authority" to decide in accordance with (all) the procedures at first instance set out in Chapter III recast proposal. Attention must however, be drawn to the fact that some provisions of the recast proposal⁴⁶⁰, or some explanations accompanying this proposal⁴⁶¹, maintain some confusion between the two notions of "determining authority", which would normally be the rule, and "competent authority", which would normally be the exception⁴⁶².

It is therefore, proposed to re-examine the provisions of the recast proposal and/or the comments on some of those provisions to ensure coherence in the application of these two concepts⁴⁶³ or to define clearly⁴⁶⁴ the situations in which a decision can be taken by a

457 UNHCR, EXCOM Conclusions No. 8(XXVIII) on the Determination of Refugee Status of 12 October 1977, No. e), i); UNHCR APD Comments 2005, Article 3A – p. 7; UNHCR Global Consultations 2001, par. 32; ECRE, Information Note 2006, p. 7.

458 See, in this regard, UNHCR Study 2010, p. 53 and 75.

459 COM(2009) 554 final (Expl. Memo.), p. 7; COM(2009) 554 Annex(Det. Expl.), Article 4 – p. 3.

460 See, for example :

- Article 8 (3), recast proposal which refers to the "competent authority" regarding the possibility of surrendering or extraditing an applicant for asylum to a third country;

- Article 13 (2) (b), recast proposal which refers to the "competent authority" although this provision concerns the possibility to omit a personal interview on the substance of the application, which has to be conducted by personnel of the "determining authority", such as is provided for by Article 13 (1), recast proposal (compare with the Det. Expl.(COM(2009) 554 Annex, Article 13 – p. 7), which refers to the "determining authority");

- Article 32 (2) (b), recast proposal which refers to the "competent authority" for examining if the safe third country concept may or not be applied to a particular country or to a particular applicant, by a case-by-case consideration of the safety of the country(see also: COM(2009) 554 Annex, Article 32 – p. 15);

- Article 35 (1), recast proposal, which refers to "the competent authorities" and Article 36 (3) (b) recast proposal, which refers to "the determining authority", concerning the application of the "subsequent application" procedure(compare also with (new) Article 35 (8) (a), which, concerning the possibility of making an exception to the right to remain in some circumstances, refers to the position adopted by the "determining authority");

- Article 38 (1) which seems to confer the power of decision to a "competent authority" for the application of the European safe third countries (ESTC) concept;

- Article 40, recast proposal which refers to the "competent authority" to take the decision to withdraw the recognized status.

461 See for example :

- COM(2009) 554 final (Expl. Memo.), No. 3.1.2. – p. 6;

- COM(2009) 554 Annex(Det. Expl.), Article 35 – p. 16;

- (new) recital (24) recast proposal.

462 Article 6, recast proposal also refers to the notion of a « competent authority » concerning the receipt and the registration of applications for international protection.

463 For example, what should the requirements for a decision taken by a competent authority be within the meaning of Articles 32 (2) (b), 35 (1) or 38 (1), recast proposal (compare with Article 10 recast proposal)?

464 Including, among others, in Article 4 (3) recast proposal.

“competent authority” other than the “determining authority”. It would also be envisaged to introduce a definition of the notion and the competences of the “competent authority” in Article 2 recast proposal, such as has already been provided for in the notion of “determining authority”⁴⁶⁵.

5. PERSONAL INTERVIEW: THE RIGHT AND THE EXCEPTIONS

PROBLEM: the APD lists many exceptions to the right to a personal interview (in case of accelerated, prioritized... procedures), despite the fact that an oral hearing is important to an asylum seeker even if an application seems inadmissible or grounded on undue reasons; even to rebut a presumption of safety in case of application of FCA, (E)STC, SCO. Moreover, the right to be heard is guaranteed by CJ case law and required by the UNHCR. Finally, even when a personal interview is provided, its requirements are too vaguely formulated.

If the current APD considers that the right to a personal interview has to be granted (Art 12 (1)), there are so many exceptions that it does not remain the main rule.

Some of the grounds are vaguely formulated in the APD, such as “when it is not reasonably practicable”, or “when the competent authority has already had a meeting with the applicant for the purpose of assisting him/her with completing his/her application”. The recast proposal removes these vague grounds. Although some exceptions remain, the proposition tries to objectify them. For instance, the inability of the applicant to be interviewed will lead, in case of doubt, to medical expertise determining whether the condition is temporary or permanent.

An exception to the right of personal⁴⁶⁶ interview is authorized by the APD in “prioritized” or “accelerated” procedures (based on the concepts of “safe third country” or “safe country of origin”, irrelevant facts invoked or inconsistent, contradictory, improbable or insufficient representations)⁴⁶⁷. However, how can this be known or evaluated without a personal interview? Moreover, in such cases, the procedural guarantees at the level of appeal are also limited. Those exceptions could lead to a whole procedure without interview in most of the cases, in contradiction to the Executive Committee Conclusions n° 30 of the UNHCR⁴⁶⁸. The right to a personal interview was also required by article 14 of the Council Resolution on Minimum Guarantees for Asylum procedures.

Under the recast proposal, it is no longer possible to omit the personal interview either because a previous meeting occurred, or in the case of accelerated or prioritized procedures. Even in the case of the application of the inadmissibility procedure, a personal interview has to be conducted (articles 29-30), even if its purpose is limited for instance to rebutting the presumption that the safe third country is in fact safe.

465 See Article 2 (f), recast proposal.

466 « Personal » means that each dependent adult should be given the opportunity to invoke independent grounds to qualify. This guarantee is provided by the recast proposal which deletes the sentence “Member States may also give the opportunity of a personal interview to each dependant adult referred to in Article 6 (3)” APD”

467 Article 12, par. 2, APD refers to article 23, par. 4.

468 THEMATIC COMPILATION OF EXCOMS, p. 401, par. (e) (i). See also the Handbook on procedures, par. 200.

This new solution is compatible with CJ case law which stresses that the right to be heard is a general principle of EU Law (see also Article 41 CFR). The personal interview must be considered as an essential element to assess the credibility of an asylum seeker. Since the assessment of credibility is an indispensable part of asylum procedure, exceptions must be limited to very specific conditions⁴⁶⁹.

Article 14 of the recast proposal concerns the requirements for the personal interview. While some guarantees are vaguely formulated in the current text, the recast proposal tries to clarify them. The Member States shall ensure that the person who conducts the interview is competent (deleting the previous standard of "sufficiently competent") to take account of the personal or general circumstances surrounding the application, including the applicant's cultural origin, gender, or vulnerability. The reference to the gender is new and the recast proposal removes the words "insofar as it is possible to do so", making this guarantee compulsory. The proposal also includes a right, albeit remaining vague, that "whenever possible" the interview will be conducted by a person of the same sex. The proposal further specifies that the person who conducts the interview must not wear a uniform.

The recast proposal also improves the guarantees in terms of translation services provided:

- if possible, the translator must be competent in the same language as the applicant;
- the proposition replaces the words "language which he/she may reasonably be supposed to understand" with the expression "language which he/she understands and in which he/she is able to communicate clearly".

Although the APD ensures that a written report will be made of the interview, it contains no rule authorizing the applicant to correct the written report or to contest it. It is merely discretionary for each Member State (Article 14, par. 3, APD). The recast proposal provides this guarantee, requiring/demanding of the Member States to "request the applicant's approval on the contents of the transcript at the end of the personal interview. To that end, Member States shall ensure that the applicant has the opportunity to make comments and/or provide clarifications with regard to any mistranslations or misconceptions appearing in the transcript". This guarantee can also be put in relation to article 8 (2), CFR which guarantees that personal data "must be processed fairly for specified purposes" and that "everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified."

On this subject, the recast proposal replaces article 14, APD ("Status of the report of a personal interview in the procedure") with three new provisions, articles 15, 16 and 17: "Content of a personal interview"; "Transcript and report of personal interviews" and "Medico-legal reports"

Article 15 aims to guarantee that the applicant will have "an adequate opportunity to present elements needed to substantiate his/her application". The questions have to be relevant and the applicant has to receive "the opportunity to give an explanation regarding elements needed to substantiate the application which may be missing and/or any inconsistencies or contradictions in his/her statements". Article 16 obliges Member States to request the applicant's approval of the content of the transcript and to give him/her the opportunity to make comments and/or provide clarifications. A new article 17, entitled

“Medico-legal reports”, also contributes to a more objective treatment of applications. It ensures:

- that the applicant receives a sufficient period of time to get the report and to submit it;
- that the authorities will ask for a medical examination in case of post-traumatic stress disorder, carried out by an impartial and qualified team of medical experts;
- that the authorities will provide identification and documentation of symptoms of torture and other forms of physical, sexual or psychological violence.

SOLUTION: The right to a personal interview has to be guaranteed to each asylum seeker. This solution is adopted by the recast proposal⁴⁷⁰. The new procedural safeguards provided by the recast proposal contribute to the effectiveness of a fair and efficient procedure and can reduce the possibility of challenging a negative decision on appeal.

6. THE RIGHT TO LEGAL ASSISTANCE (ARTICLES 15-16 APD)

PROBLEM: The right to legal assistance is guaranteed by the APD but is limited in nature. On the one hand, its scope is problematic since the legal adviser could not have access to all the information contained in the applicant’s file. On the other hand, this right is guaranteed at the asylum seeker’s own expense as the right to free legal assistance is limited to the second stage of the procedure, after a negative decision at first instance has been taken.

The recast proposal enlarges this right to free legal assistance. On the one hand, this right is not yet limited to the procedures on appeal. On the other hand, the proposition removes the possibility of refusing to grant free legal assistance to procedures other than judicial procedures or limiting such assistance to the sole circumstance where it is granted only if the appeal or review is likely to succeed. Nevertheless, free legal assistance could be conditioned in situations where it is necessary to ensure effective access to justice, without precise criteria. The recast proposal also allows MS to limit free legal assistance at the administrative stage to the provision of information about the procedure and of a negative decision.

One has to distinguish between two separate issues – the right to legal assistance and the right to free legal assistance. Each of these, in turn, has two separate levels: first instance and the appeal stage.

6.1. The current situation

- The right to legal assistance is guaranteed by the APD as article 15 (1) provides that the asylum seeker is allowed to consult a legal or other adviser in an effective manner. However, the scope of the legal assistance seems problematic since the legal adviser or counsellor will not have access to all the information contained in the applicant’s file.
- On the one hand, Member States can make an exception for national security reasons.

470 And is in line with the case law of the ECtHR which required an effective investigation of the case (Aydin, par. 107), even regarding the situation of aliens (Chamaiev, par. 407; Muminov, par. 99).

- On the other hand, the same reasons could lead to a prohibition on access to closed areas, such as detention facilities and transit zones.
- Article 16 (2), APD adds that this refusal could be justified in order to “ensure an efficient examination of the application, provided that access by the legal adviser or other counsellor is not thereby severely limited or rendered impossible”. The first part of this sentence deprives its second part of any sense.
- Finally, article 16 (3), APD does not guarantee the presence of the legal advisers or other counsellors at all interviews in the procedure.

- Free legal assistance: The right to legal assistance is guaranteed at the own expense of the asylum seeker. The right to free legal assistance is limited to the second stage of the procedure, after a negative decision at first instance has been taken. Even in this case, others limits appear (Article 15 (2) and (3), APD), the right applies:
 - only in the context of the procedure at first (judicial) instance,
 - only to those who lack sufficient resources;
 - and/or only if the appeal or review is likely to succeed...
 - Moreover, the Member States are authorized to add additional limits: including monetary and/or time-restrictions or to provide that the treatment of applicants shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance.

6.2. The recast proposal

It improves the system and extends the right to free legal assistance.

6.2.1. Right to legal assistance

The new article 19 would also guarantee the right of the legal adviser to be present during the personal interview and ensure access to the file even where issues of national security arise, although this may include the requirement of imposing a security check on the legal adviser.

6.2.2. Right to free legal assistance

The recast proposal expands the right to free legal assistance, as it is proposed in the recast proposal on “Reception conditions Directive^{471 472 473}”. The same proposals are present in the recast Dublin regulation. Article 26 guarantees the right to an effective

471 Concerning the legal assistance, article 25 should provide that “Member States shall ensure access to legal assistance and/or representation in the cases referred to in paragraph 1. Such legal assistance and/or representation shall be free of charge where the asylum seeker cannot afford the costs involved”.

On this issue, the EP proposes this amendment: “the necessary legal assistance and/or representation is granted on request free of charge in accordance with Article 15(3) to (6) of Directive 2005/85/EC” (now Article 18 recast proposal).

472 EP justifies this guarantee stating that “From the first moment, the asylum-seeker has to have the right to enjoy maximum legal guarantees; they need to be able to count on high-quality legal assistance which will help them to understand their rights. Legal assistance needs to be guaranteed in less than the 72 hours envisaged, as the European Council of Human Rights notes in its much-quoted ruling on *Saadi v UK*, deeming any period longer than 48 hours a violation of Article 5(2) of the ECHR. The UNHCR and other specialist NGOs should have the right to visit the facilities where persons in provisional detention are being held, and the latter should never be mixed in with ordinary prisoners”.

473 See also the “Return Directive”, article 13 (4) (which also refers to current article 15 (3) to (6) APD) and article 18, recast proposal.

judicial remedy, specifying that it includes access to legal assistance and/or representation free of charge where the person concerned cannot afford the costs involved⁴⁷⁴.

On the one hand, this right is not yet limited to the procedures on appeal. The new Article 18 should guarantee that Member States provide for free legal assistance in procedures in accordance with Chapter III (administrative procedures at first instance) and with Chapter V (appeals). Moreover, free legal assistance is automatically granted to unaccompanied minors⁴⁷⁵.

On the other hand, the proposition removes the possibility of refusing to grant free legal assistance to procedures other than procedures before a court or tribunal in accordance with Chapter V and the possibility of limiting this to the sole circumstance where the appeal or review is likely to succeed. At the same time, the recast proposal specifies that "Member States may choose to only make free legal assistance and/or representation available to applicants insofar as such assistance is necessary to ensure their effective access to justice"⁴⁷⁶, without specifying criteria which could be used to answer this question. It is also specified that "Member States may allow non-governmental organizations to provide free legal assistance and/or representation to applicants for international protection in procedures provided for in Chapter III and/or Chapter V". The recast proposal also allows the MS to limit this free legal assistance at the administrative stage to the provision of information about the procedure (article 18 (2) (a) and (b)) and to explanations about the factual and legal reasons of a negative decision.

6.3. Analysis

A distinction must be made between what is merely 'desirable' and what is legally binding.

The right to legal assistance is no longer open to discussion. It is protected both in EU law (article 47, CFR) and in the ECHR. For instance, in the recent decision *Abdolkhani* (par. 57), the ECtHR ruled that "A remedy must be effective in practice as well as in law in order to fulfil the requirements of Article 13 of the Convention. In the present case, by failing to consider the applicants' requests for temporary asylum, to notify them of the reasons for not taking their asylum requests into consideration and to authorize them to have access to legal assistance while in Hasköy police headquarters, the national authorities prevented the applicants from raising their allegations under Article 3 within the framework of the temporary asylum procedure provided for by the 1994 Regulation and Circular no. 57". The effectiveness of a judicial remedy is conditioned by the right to legal assistance.

It is also clear that the right to free legal assistance at the second stage (judicial review) of the procedure is compulsory. Article 47, CFR states that "Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice". Neither in article 47 nor in the case-law of the ECtHR is this right absolute. It depends on the complexity of the procedure and on the rights which are at stake. One can consider that in asylum cases, most of the time, the rights at stake are sufficiently important to justify free legal aid (the risk of violating Articles 2 or 3, ECHR is

474 LIBE Committee: "6. Member States shall ensure that the necessary legal assistance and/or representation is granted on request free of charge in accordance with Article 15(3) to (6) of Directive 2005/85/EC" (even if the texts here studied do not guarantee the right to free legal assistance because of the several exceptions and limitations provided).

This amendment is also present in the European Parliament legislative resolution of 7 May 2009.

475 Article 21 (4), recast proposal. This has been justified by some conclusions of the UN Child Rights Committee (COM(2009) Annex (Det. Expl.), Article 21 – p. 11).

476 Compare with Article 47 CFR.

usually invoked); the great majority of the applicants belong to a lower-income group and are particularly vulnerable vis-à-vis the complexity of the procedures.

At the first stage of the procedure (administrative procedure), although the texts and the case law are not overly explicit, one can deduce from the CJ case law and from the necessity of the practice that a right to free legal assistance at the first stage is to be recommended.

The CJ case law highlights that the grant of free legal assistance may be necessary to a person in a less advantageous position in a pre-judicial procedure to safeguard rights guaranteed by Community Law⁴⁷⁷.

Recent case-law of the ECtHR regarding positive obligations of Member States of the Council of Europe under article 3 could also ground a right to free legal assistance at the first stage of the procedure. Even if no decisions of the ECtHR are clearly dedicated to this specific issue, one could discern from decisions on article 3⁴⁷⁸ and from a recent decision concerning articles 8 and 14, that the lack of free legal aid could potentially violate the Convention⁴⁷⁹.

The UNHCR highlights the limitations to legal aid noting that unlike citizens, "asylum seekers are largely unfamiliar with procedures in countries, and are therefore generally unable to have effective access to justice without legal assistance"⁴⁸⁰. Similar reservations were expressed by ECRE⁴⁸¹. At the very least, the principles of equality and non-discrimination request that free legal assistance has to be provided to asylum seekers under the same conditions that it is provided to citizens. However, those principles have to be understood to be taking into account:

- the particular weakness of asylum seekers facing difficult procedures to which they are not accustomed⁴⁸² and
- the crucial character of the rights at stake (possible violations of articles 2 and or 3 of the ECHR⁴⁸³), whose violation can be irreversible. The ECtHR takes into consideration this kind of specific context when it has to analyze the effectiveness of a remedy;
- the absolute character of article 18 CFR.

Even if one cannot conclude from the case law that free legal aid is clearly compulsory at all stages of the procedures, one must however, consider that the lack of free legal assistance at the first administrative stage and the possibility of limiting this right at the jurisdictional

477 CJ, Evans, par. 77 and 78 (cited in Impact assessment); Unibet, par. 44.

478 ECtHR, Secic, par. 53; Assenov and Others v. Bulgaria, par. 102; Such a positive obligation cannot, in principle, be considered to be limited solely to cases of ill-treatment by State agents (M.C., par. 151).

479 ECtHR, Anakomba Yula. In this case, the Court concludes that Belgium has violated articles 8 and 14 because the domestic law does not provide free legal aid to an applicant staying in Belgium illegally. The applicant wanted to introduce a procedure which would establish a Belgian man's paternity of his young child. This procedure was intended to enable him to obtain a residence permit on the basis of this family tie. The Court estimates that the issues the domestic courts faced were serious questions related to family law. The decisions which the courts were going to pronounce would mark the private life and family life, not only of applicant itself but of several other people, in a final way. There should thus be particularly pressing reasons to justify a difference in treatment between people having a residence permit and people not having such a permit,

480 UNCHR Comments June 2002, p. 12.

481 ECRE, Information Note, 2006, p. 15-16. See also S., PEERS, p. 103.

482 This particular weakness was underlined by the ECtHR Bahaddar, par. 46; the necessity to provide social and legal assistance was also underlined in the case Amuur, par 45.

483 Concerning the obligation to take into consideration the risk at stake while analyzing the effectiveness of a remedy, see the leading case Chahal, par. 150.

stage leads to the fact that, in practice, there is no effective right to free legal assistance for most of the applicants:

- the first stage of the procedure is clearly the most important as this is the stage where the applicant will convey the reasons for his application; he needs to be assisted in order to highlight the important points of his application; moreover, principles, like the benefit of the doubt and the duty to cooperate, reinforce the importance of a high quality administrative procedure; this is the stage where grounds of inadmissibility could appear; some of them are complex and the assistance of a lawyer at this stage could help avoid a decision of inadmissibility caused by an insufficient explanation of the situation; the working document of the Commission adopts the position that in the long term, providing free legal assistance from the beginning of the process is economically and administratively advantageous and contributes to the effectiveness of the asylum procedure⁴⁸⁴;
- the possibility of limiting free legal assistance during the administrative procedure to information should be abolished since it is precisely the assistance of a lawyer during the interview which guarantees due respect of the procedure and effective protection for the asylum seeker. The specificity of the procedure, the rights at stake, the importance of the oral hearing make this stage of the procedure one of the most crucial.
- even if the right to free legal assistance is recognized at this stage of the procedure, the fact that the appeal will not automatically have a suspensive effect could still deprive this second stage of the procedure of its effectiveness;
- the Commission has also previously considered the availability of free legal assistance in the first instance procedure as a possible way of improving access to an effective remedy⁴⁸⁵.

SOLUTION: The right to legal assistance is not subject to discussion under EU law and the ECHR. This position implies that the effectiveness of a judicial remedy is conditioned by the right to legal assistance. Even if this right is not absolute as such (see Article 47, CFR), the same principles apply to the right to free legal assistance at the second stage (judicial review) of the procedure.

At the first stage of the procedure (administrative procedure), although the texts and case law are not quite as explicit, one can deduce from the CJ case law and from the necessity of the practice that a right to free legal assistance at the first stage is also to be recommended.

7. APPLICANTS WITH SPECIAL NEEDS

PROBLEM: One of the criticisms of the APD is the lack of protection for an applicant with special needs. Only minors benefited from a specific protection, which in itself was considered insufficient. Procedural rules have to be adapted to allow vulnerable applicants to be heard in the right conditions. Otherwise, the possibility of allowing the qualification of a (manifestly) unfounded application in cases where inconsistent, contradictory, representations exist, may lead to irrevocable errors in practice. Moreover, the application

⁴⁸⁴ Impact assessment, p. 32.

⁴⁸⁵ Impact assessment, p. 43. At least, 11 MS provide free legal assistance in the initial stage of the asylum process (p. 47).

of the same rules to significantly different situations violates the principle of non-discrimination⁴⁸⁶.

Two different categories of applicants with special needs may be distinguished: minors and other vulnerable applicants.

7.1. Minors

The necessity to take into account the “best interests of the child” has also been reaffirmed in the recast proposal⁴⁸⁷ and the definitions of a “minor” and of a “representative” have been introduced or clarified in Article 2 (l) and (n) of the recast proposal, with a view to align the Directive with the 1989 UN Convention on the Rights of the Child (CRC)⁴⁸⁸ or with a specific interpretation of the UN Child Rights Committee⁴⁸⁹. The Spanish presidency has announced that this will be a priority⁴⁹⁰, in accordance with the Stockholm program (No. 6.1.7.). With the aim of aligning the Directive with Article 22 (1) CRD, Article 6 (5) of the recast proposal explicitly stipulates the right of a minor to make an application for international protection, either on his/her own behalf, or through his/her parents or other adult family members. The requirements of the CRC and some conclusions of the UN Child Rights Committee are also invoked to justify several additional safeguards for unaccompanied minors⁴⁹¹. Moreover, minors should not be subjected to accelerated procedures, unfounded applications’ procedures, safe third country procedures or border procedures (article 21 (6)).

7.2. Other applicants with special needs

The recast proposal introduces a new article 20 dedicated to applicants with special needs (who are defined in article 2, d as any “applicant who due to age, gender, disability, mental health problems or consequences of torture, rape or other serious forms of psychological, physical or sexual violence is in need of special guarantees in order to benefit from the rights and comply with the obligations in accordance with this directive”). This new article provides that the accelerated procedure and the manifestly unfounded clause cannot be used (Article 20 (3), recast proposal) when dealing with such applicants (Article 20 (3), recast proposal) as well as making other changes.

One also has to consider Article 10 (4) of the recast proposal as it guarantees an autonomous examination for any person alleging gender and/or age-based persecution⁴⁹². It is however, regretted that the diffuse character of provided protection considerably decreases its effectiveness. The new text should:

1. Define the protected groups more precisely;

⁴⁸⁶ ECtHR, *Thlimmenos*, par. 44 (“Persons whose situations are significantly different should be treated significantly differently”).

⁴⁸⁷ Recital (23) recast proposal (compare with ~~current~~ recital (15), APD) and Article 2 (n), recast proposal).

⁴⁸⁸ COM(2009) 554 Annex(Det. Expl.), Article 2 (l) and (n).

⁴⁸⁹ COM(2009) 554 Annex (Det. Expl.), Article 2 (n)).

⁴⁹⁰ <http://www.tt.mtin.es/eu2010/fr/noticias/empleo/201003/EMP20100309-001.html>. It has to be recalled that the primary consideration to take into account the child’s best interests in all actions relating to children is also now recognized as a fundamental right of the European Union (Article 24 (2) CFR).

⁴⁹¹ Article 21 (Article 17, APD), recast proposal and comments on this Article(COM(2009) annex(Det. Expl.), Article 21).

⁴⁹² See also article 9 (3) (d) and 4 (2) (b), recast proposal.

2. Oblige MS to identify those protected groups from the time the application is introduced; oblige MS to introduce a systematic monitoring mechanism from the time an application is made to identify those protected applicants; one should avoid establishing “procedures in existing procedures” and overcomplicate the existing procedure. Therefore, a solution could be to insert a first stage before the examination on grounds which are composed of two successive questions: the Geneva Convention and the subsidiary protection. The determining authority would then have to answer three questions:

3. Is this person an applicant with special needs? A positive answer to this question should lead to the adapting of the pending procedure to the specificity of the situation. For instance, the designation, as soon as possible, of a legal guardian for a minor⁴⁹³; or the fact that some specific procedures such as accelerated/inadmissibility/border procedures⁴⁹⁴ cannot be applied to vulnerable groups. The identification of an applicant with special needs may also have an influence on the manner in which the personal interview may be pursued (by personnel of the determining authority with specialist knowledge and training)⁴⁹⁵. A link could be established with the “Reception Conditions Directive” which obliges an identification of persons with special needs. For instance, an identification of such a characteristic by the reception social services could serve as a presumption that special needs are to be taken into consideration for the asylum procedure.
 - a. Do we have to grant refugee status under the GC?
 - b. If not, do we have to grant subsidiary protection under the same convention?

4. Clarify the guarantees provided to each sub-group of applicants with special needs:
 - minors;
 - gender based persecution;
 - victims of torture etc
 - and determine for each of these categories what exact complementary guarantees are provided for.

SOLUTION: Even if the recast proposal contains a new provision specifically dedicated to applicants with special needs, in order to guarantee effective protection, the new text should:

- define the protected groups more precisely;
- oblige MS to introduce a systematic monitoring mechanism to identify those protected groups from the time the application is submitted; a link with the initial monitoring organized by the reception directive could be established;
- clarify the guarantees provided to each sub-group of applicants with special needs.

493 Article 21 (1) (a), recast proposal.

494 See articles 20 (3), 21 (6) and 27 (6) and (7), recast proposal.

495 See, for instance, Article 21 (3) (concerning minors) or Article 17 (2) (concerning medico-legal reports), recast proposal.

8. STANDARDS OF EXAMINATION

PROBLEM: In addition to mere procedural provisions, the APD also contains some rules on the examination of asylum applications ("standards of examination"). The question arises whether there is any need to define those standards better and if, in fact, it would or would not be possible to make concrete proposals in an amended Directive.

The APD nevertheless, does not specify rules on matters of evidence and proof. It has however, to be remembered that under the "Qualification Directive", Member States have the duty to assess, in cooperation with the applicant, all relevant elements of the application (Article 4 (1)), to take into account all relevant country of origin information, statements and documentation presented by the applicant and the individual position and circumstances of the applicant (Article 4 (3)), as well as ascertaining whether the applicant has already been subject to persecution or serious harm (Article 4 (4)).

However, such provisions do not seem not to be enough to avoid diverse interpretations of the "Qualification Directive" in the differing Member States, nor to guarantee a full and fair examination by the Member States of an asylum claim⁴⁹⁶. The question is therefore, if it will be possible to achieve a greater uniformity in Member States' handling of asylum applications and if it would not be more useful to concentrate upon issues of fact-finding and cooperation between Member States and on issues of assessing the situation of certain groups? In any case, it seems difficult to propose a (common) set of rules of evidence.

In this context, a second possibility could be to give an important role to the future EASO (European asylum support office)⁴⁹⁷, whose creation has been presented as a solution to the problem of diverse interpretations of the Asylum Directive⁴⁹⁸.

496 In September 2005, the European Parliament had already emphasized the necessity of a full and fair individual processing of the applications for asylum (TA(2005)0349).

In its recent communication (COM(2009) 262/4), the European Commission has also emphasized (page 3) this weakness of a reinforced CEAS: "Despite the existence of a common system of asylum, there is need for greater uniformity in Member State's handling of asylum applications: the rates of acceptance of applications are currently very variable from Member State to Member State. In 2007, 25% of first decisions granted protection in the form of either refugee status or subsidiary protection. Behind this average figure there are wide variations: some Member States allow protection in only very few cases, while others have a recognition rate close to 50%".

497 For instance:

- to establish agreements between the determining authorities of the different Member States whereby interpreters in other EU Member States can be used via video link, to develop EU guidelines on the attention of the interviewers and the interpreters, or to establish EU criteria and mechanisms for quality control and improvement among Member States (UNHCR Study 2010; p. 33, 37, 39 and 40);
- to support the identification and collation of common information sources to be used by Member States for the purpose of designating safe countries of origin (Article 33 (3), recast proposal);
- or to play a role in the determination of the minimum requirements for the content of the training programs for the personnel of the determining authorities, programs which could be largely based on the EAC (COM(2009) 554 Annex (Det. Expl.), Article 4 - p. 3).

498 European Parliament resolution of 10 March 2009 on the future of the Common European Asylum System(2008/2305(INI) (P6_TA(2009)0087), par. 23 to 29; European Parliament legislative resolution of 7 May 2009 on the proposal for a regulation of the European Parliament and of the Council 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 a stateless person (recast) - P6_TA(2009)0377 - Amendment 2; Report of LIBE Committee on this proposal (A6-0284/2009 - p. 7/40: justification of this amendment); "The EU and Human Rights - Making the impact on people count", Amnesty International, 2009, p. 16.

In the explanatory memorandum of its recast proposal, the Commission has expressly emphasized that this proposal is indeed linked to the Commission's proposal for a regulation establishing a European Asylum Support Office⁴⁹⁹, "which inter alia aims to provide practical assistance to Member States with the view to enhancing the quality of asylum decision making". We can also highlight that this Office is expressly referred to in Article 9 (3) (b) of the recast proposal, in relation to the obligation of Member States to ensure that precise and up-to-date information is obtained from various sources as to the general situation prevailing in the countries of origin of applicants and, where necessary, in countries through which they have transited⁵⁰⁰.

If some concrete provisions are required to be proposed on this subject, in the future it would be useful to look at what has already occurred in the framework of some EU-projects - such as the EAC (European Asylum Curriculum) project⁵⁰¹, or what has recently been proposed by the UNHCR⁵⁰².

With the aim of laying down necessary conditions for ensuring quality and efficient decision making at first instance, the Commission has also proposed an amendment requiring that Member States shall provide adequate training for the specialized personnel at the disposal of the "determining authority." This training shall, in particular, include, inter alia, "use of country of origin information", "evidence assessment, including the principle of the benefit of the doubt" and "case law issues relevant to the examination of applications for international protection"⁵⁰³. Such an obligation is a good step forward as long as these programs have a very concrete and developed content⁵⁰⁴.

SOLUTION:

Another idea could be to authorize EASO to deal with issues of "recommended standards of examination" by issuing guidelines from which Member States may deviate. However, if they choose to deviate from these standards, the MS would be obliged to register the differences they adopted. Furthermore, the proposal could be amended to admit experimental procedures which, for instance, make it possible to use external processing or joint processing as an option for Member States to participate in projects (See proposal long term).

Another question is whether it would be useful to incorporate Article 4 of the "Qualification Directive" in the APD, in order to ensure a better clarity of the rules on evidence and standards for the examination of the applications.

SECTION 3: GUARANTEES CONCERNING A FULL EXAMINATION OF THE SUBSTANCE

The concrete application by each Member State of concepts like "first country of asylum", "safe third country", "(European) safe third country", "safe country of origin," could lead to depriving an asylum seeker access to effective protection because he/she will not benefit

499 Proposal for a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office(COM(2009) 66).

500 See also (new) recital (8), recast proposal.

501 The EAC project has the task to produce an EU-common training program aimed at officials within the migration services in Europe. Some of the modules that have already been produced in 2009 were "Evidence Assessment", "Interviewing Children", "Interviewing Traumatized Persons", "Drafting and Decision-making" and "Asylum Procedures".

502 UNHCR Study 2010, p. 39.

503 Article 4, par. 2, recast proposal.

504 In the Det. Expl. (COM(2009) 554 Annex – Article 4), the Commission has expressly made the link with the European Asylum Curriculum (EAC) and the European Asylum Support Office (EASO).

from a full examination of the substance of his application. One has to analyze how this access is secured, what criteria could be used in this perspective and what are the procedural consequences of the recourse to these specific concepts (Articles 26, 27, 29 and 31, and 36, APD).

PROBLEM:

The APD and the recast proposal make use of some concepts allowing the MS to decide not to proceed with the application at all or not to proceed to a full examination of the substance of a claim. Those concepts are based on the "safe countries" concept. The APD indeed enshrines:

- three forms of the "safe third countries" concept ("first country of asylum"[FCA]; "safe third country"[STC] (national lists or case by case application of the concept); "European safe third country"[ESTC](common EU list or national lists)), which do not address the "qualification" (the substance) of the claim;

- and one specific concept of "safe country of origin" (SCO) (common EU list or national lists), which addresses the "qualification" of the claim, which supposes an individual examination of the substance of the claim and which is based on the (rebuttable) presumption that a country is a "SCO" for a particular applicant.

All of the specific uses of the different forms of the "safe countries" concept raise similar concerns: the question of the illegal entry and/or of the individual examination of the claim; the criteria for the determination of countries as "safe"; the determination of the authorities that should be responsible in "(E)STC" cases; the meaning of "effective protection" in the country considered as safe; the question of the "necessary link" between the applicant and the third country concerned; the specific treatment of minors or vulnerable persons when applying those concepts.

The substantial and the procedural obligations of the Member States in such situations have to be analysed mainly with regards to the case law of the ECtHR. Some common principles have to be underlined. Their application to each of those concepts depends on the risk in the country of destination:

- risk of ineffective protection in case of removal to a first country of asylum;
- risk of ineffective access to a protection in case of removal to a safe third country; the level of protection has to be, at a minimum, higher than in Dublin cases because the country of destination is normally not bound by European common texts (procedures ; qualification, ...);
- risk of persecution or of violation of human rights in case of removal to a safe country of origin; the risk is higher here since no State will examine the application for protection as in the first two cases it usually has to be conducted elsewhere.

1. INTERNATIONAL GUARANTEES

Art. 3, ECHR, as interpreted by the ECtHR, and article 3 of the CAT contain a prohibition on the refoulement of a person to a country in which he/she is facing a serious risk of torture or inhuman or degrading treatment or punishment. In addition, Art. 13, ECHR grants a right to an effective remedy before a national authority to anyone whose rights and freedoms as set forth in this Convention are violated. This case-law applies in the case of removal of an applicant to his/her country of origin [even where that country is classified as 'safe'].

The possibility of receiving effective protection in the third country was underlined by the ECtHR, namely in the Amuur case:

“The mere fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty, the right to leave any country, including one's own, being guaranteed, moreover, by Protocol No. 4 to the Convention (P4). Furthermore, this possibility becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in. Sending the applicants back to Syria only became possible, apart from the practical problems of the journey, following negotiations between the French and Syrian authorities. The assurances of the latter were dependent on the vagaries of diplomatic relations, in view of the fact that Syria was not bound by the Geneva Convention relating to the Status of Refugees”.

Namely⁵⁰⁵ within the scope of application of the Dublin Regulation the ECtHR has, in principle, relied upon the general principles on contracting States' obligations under Art. 3 and 13 of the Convention. In its ruling in T.I., the Court held that removal to a competent EU country does not affect the responsibility of the country of residence of an asylum seeker to ensure that the applicant is not, as a result of the decision to expel, exposed to treatment contrary to Art. 3 of the Convention:

“The indirect removal of an alien to an intermediary country does not affect the responsibility of the expelling Contracting State to ensure that he or she is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention⁵⁰⁶”.

This case law is interesting in the case of removal of an applicant to a third country on the basis of the concepts of FCA, STC and ESTC.

Recently, in the KRS case, although the Court finally judged the application inadmissible, the Court did consider that the claim in itself was arguable. The Court recalled the principles of the TI case and after a concrete analysis⁵⁰⁷ of the situation in Greece considered that there were no reasons to judge that Greece would remove the applicant to a third country without a due analysis of the situation. In many cases other than KRS, the Court had decided to make use of Rule 39 of the Rules of the Court in case of removal to Greece on the basis of the Dublin Regulation⁵⁰⁸. This case illustrates the growing role

505 But not only - See for instance in case of extradition, Muhammet Metin Kaplan.

506 ECtHR, Salah Sheekh, par. 141; Abdolhani and Karimnia par. 88.

507 « On the evidence before it, Greece does not currently remove people to Iran...”; “In concrete terms, Greece is required to make the right of any returnee to lodge an application with this Court under Article 34 of the Convention (and request interim measures under Rule 39 of the Rules of Court) both practical and effective. In the absence of any proof to the contrary, it must be presumed that Greece will comply with that obligation in respect of returnees including the applicant.”

508 For instance, on 24 March 2009 the President of the Chamber to which the case had been allocated decided, “in the interests of the parties and the proper conduct of the proceedings before the Court, to indicate to the Government of Belgium, under Rule 39 of the Rules of Court, that the applicants should not be expelled to Greece until further notice. (...)In regard to article 3 of the Convention and in the light of the recent reports of the Council of Europe Commissioner for Human Rights, Mr Hammarberg, of 4 February 2009 and the Report of November 2008 of Human Rights Watch, the question rises which guarantees your Government has that the applicants will have access to a procedure in Greece and will not have to fear for being kept under circumstances that can be described as inhuman or degrading.” (Appl. 15605/09 (24/03/2009)).

On the 22 of January 2009, the Court suspended a transfer to Greece. The Somalian asylum seeker was removed to Turkey after an initial short stay in Greece. The French government was invited to provide the Court « des informations portant sur l'accès à la procédure d'asile et sur les recours disponibles pour les personnes renvoyées vers la Grèce. En particulier, eu égard à l'affaire KRS c. Royaume-Uni (n° 32733/08), votre Gouvernement est invité à faire savoir à la Cour si le requérant, en cas de renvoi vers la Grèce, aurait la possibilité en Grèce, s'il le souhaite, de soumettre à la Cour

played by the ECtHR in urgent cases, since the Court judged that provisional measures are compulsory on the basis of Rule 39 of the Rules of the Court⁵⁰⁹.

It must also be noted that removals to a third country risk violating, not just article 3, but also articles 5 and/or 8 of the ECHR.⁵¹⁰ The ECtHR has already condemned Greece because the conditions of detention of the asylum seekers violated article 5. In the S.D. case⁵¹¹, the Court judged that the conditions of detention in Greece were such that they violated articles 3 and 5 of the Convention.

Due to the large number of applications submitted to the ECtHR on this issue, the Commissioner for Human Rights was invited by the Court on 9 November 2009 to intervene as a third-party in the Court's proceedings, and to submit written observations. He did so on the 10 March 2010⁵¹². The analysis of the Commissioner highlights several issues with regards to the ECHR⁵¹³.

2. FIRST COUNTRY OF ASYLUM (ARTICLE 26, APD AND 31, RECAST PROPOSAL)

Following the APD and the recast proposal, a country can be considered to be a first country of asylum if:

- (a) the applicant was recognized there as a refugee and still benefits from this protection;
OR
- (b) he enjoys "sufficient"⁵¹⁴ protection in that country, including benefiting from the principle of non-refoulement, and the right to be re-admitted to that country.

Recommendation: The terms "sufficient protection" are too weak and could be replaced by "effective protection"⁵¹⁵. The availability of the protection should also be mentioned.

une demande d'application de l'article 39 dans l'hypothèse où les autorités grecques décideraient de l'expulser vers la Somalie. A cette fin, votre Gouvernement peut notamment se prévaloir de tout accord bilatéral conclu en vertu de la Convention de Dublin. » (Ali Mohamed – France n°44989/08).
509 Numerous similar applications were brought to the ECtHR during those last two years.
510 ECtHR, Mamatkulov and Askarov; Aoulimi; Ben Khemais; Muminov. On this subject, see for instance M. BOSSUYT, p. 86-96.
511 Article 8 could also be at stake because decisions of removal under the Dublin Regulation could lead to the separation of family members. One has to consider that an argument based on a violation of the right to family life is arguable. In that kind of situation, one cannot object that a remedy could be available in a Member State of the Council of Europe since the violation of the Convention results not from the final removal from this country but from the decision of the country who decides to separate the family members.
512 See also: ECtHR, Tabesh.
513 <https://wcd.coe.int/ViewDoc.jsp?id=1595689&Site=CommDH>
- access to refugee protection remains highly problematic, notably due to the non-functioning of the first instance Advisory Refugee Committees, lack of proper information on asylum procedures and legal aid that should be available to potential or actual asylum seekers, widely reported instances of refoulement or non-registration of asylum claims;
- the quality of asylum decisions at first instance is inadequate, notably because of structural deficiencies and lack of procedural safeguards, in particular concerning the provision of legal aid and interpretation;
- existing domestic remedy against negative asylum applications is not effective;
- asylum seekers, including persons transferred under the Dublin Regulation, face extremely harsh living conditions in Greece.
514 Article 31 (b) recast proposal.
515 This was proposed by the UNHCR in its first critical comments of the APD and this suggestion is maintained in the UNHCR Study 2010 (p. 58 – 60: the protection in the third country should be effective and available in practice; UNHCR proposes also to draw up an annex to the APD setting out the criteria for "effective" protection). See also Recommendation R (97) 22, of the Committee of Ministers containing guidelines on the application of the Safe third country concept, par. 1.c. ("the third country will provide "effective" protection against refoulement") and 1.d (" the asylum-seeker

The second alternative (point (b)) does not give any guarantee concerning the protection in the third country. The mere fact of being re-admitted is not sufficient if the readmission does not give effective protection to the applicant. The legal status of the person, even if protected, is important to evaluate the level of protection: legal administrative status, duration of the protection, procedures available to challenge a decision of removal, social status, right to family unity.

Those issues remain even if the FCA is a Member State of the European Union or of the Council of Europe (cfr T.I. case law). The recent K.R.S. case by the ECtHR regarding a Dublin transfer to Greece also illustrates that a theoretical right to non-refoulement is not sufficient. One has to take into consideration the effectiveness of the protection, the access to the protection and also the situation of the asylum seekers in the "first country of asylum" at the level of the reception conditions and social rights.

SOLUTION: The right to rebut the presumption of safety has to be explicitly recognized by the directive, at both a procedural level and on a substantial level. This is not the case in the APD. At a procedural level, article 30, recast proposal guarantees the right to a personal interview. But on the substantial level, article 31 should also include the right to rebut the presumption as it is recognized in article 32, recast proposal concerning the "safe third country" concept (right to challenge the connection between the applicant and the STC).

3. "SAFE THIRD COUNTRY" CONCEPT (ARTICLE 27, APD AND 32, RECAST PROPOSAL)

The APD and the recast proposal authorize the Member States to use the notion of "Safe third country"⁵¹⁶, but under the following conditions: ensuring the protection of human rights, respect of the principle of non-refoulement and the possibility of applying for international protection. Moreover, the domestic law has to provide rules:

- requiring a connection⁵¹⁷ between the person seeking asylum and the third country concerned;
- on the methodology : case-by-case analysis and/or national designation of countries considered to be generally safe;
- allowing an individual examination: this means the applicant at least has the possibility of challenging the safety of the third country and, moreover in the recast proposal, the connection between him and this country.

The guarantees provided by the application of this concept by Member States could only be considered as consistent with the principle of non-refoulement, including chain refoulement, if the following cumulative conditions are fulfilled:

has already been granted effective protection in the third country or there is a clear evidence of the admissibility to the third country concerned").

Concerning the minimum requirements for an "effective" protection, see inter alia: European Commission Communication, "Towards a more accessible, equitable, and managed international protection regime", COM(2003) 315 final, 23 June 2003; UNHCR, Summary Conclusions on the Concept "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002), February 2003.

516 ECtHR, T.I (the use of the safe third country concept is admitted by the Court as a principle, p. 20).

517 See Article 32 (2) (a), recast proposal. Recital (31), recast proposal refers however to « sufficient connection ».

- domestic laws have to provide an effective⁵¹⁸ opportunity for the asylum seeker to rebut the presumption of safety in his/her particular case; that means: correct and complete information is given to the applicant; a personal interview; an effective opportunity to lodge an appeal in a reasonable time limit and suspensive effect of the appeal, or, at least, the possibility of asking for an interim measure;
- the right to rebut the presumption of safety of the third country concerned, in the particular case of the applicant, has also to be explicitly recognized, at both the procedural and the substantial level. Although this is not the case in the APD, which does not expressly provide for a personal interview of the applicant, it is well provided for by the recast proposal: at a procedural level, article 30, recast proposal indeed guarantees the right to a personal interview of the applicant. On the substantial level, article 32 (2) (c), recast proposal provides also for an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant, firstly, to challenge the application of the safe third country concept on the grounds that the third country is not safe in his/her particular circumstances, and, secondly, to challenge the existence of a (sufficient) connection between him/her and this third country;
- a removal to such a safe third country could only occur on the basis of an agreement which clearly outlines the respective responsibility of the Member State and of the STC; this agreement should guarantee that the STC admits the applicant to its territory and will consider the asylum claim substantively in a fair procedure. This guarantee is required neither by the APD nor by the recast proposal. However, the TI case obliges the Member State concerned to guarantee it. It could also be deduced from the ruling of the ECtHR in the *Amuur* case, which underlines that the third country must at least have ratified and implemented in practice the Geneva Convention⁵¹⁹;
- the “sufficient” connection between the applicant and the STC also has to be analyzed on the basis of familial criteria and/or humanitarian criteria (as it is done in the Dublin system⁵²⁰); a presumption of prohibition of removal to a STC should be included in the Directive in case of family ties, unaccompanied minors or applicant with special needs. A separation between members of a family could potentially be a long term separation, since no guarantee exists of family reunification of foreigners living in a EU Member State and/or in a third country.

In comparison with the possibility now provided for by the APD⁵²¹, the use of the “Safe third country” concept in accelerated procedures should be excluded. The reason for this is that the application of an accelerated procedure relies on the supposition that there has been a full individual examination of the merits of an application for international protection, while the “Safe third country” concept implies that there has not been such an examination, because it can reasonably be assumed that another country would do this examination or provide protection. Indeed this is not envisaged in the recast proposal having regard to the accelerated procedures⁵²², with the consequence that the STC-concept

518 See also Recommendation (97) 22 of the Committee of Ministers, 1, c. and d.

519 UNHCR, Considerations on the “Safe Third Country” Concept, July 1996, p. 5.

520 Article 15, Dublin II Regulation and Articles 11 and 17, recast proposal Dublin. See also UNHCR EXCOM conclusion No. 15 (“country where an asylum-seeker has a significant connection especially close family relations”).

521 Articles 23 (4) (c) (ii), 28 (2) and 27, APD.

522 Compare Article 27 (6), recast proposal with former Article 23 (4) (c) (ii), APD.

would only be applied in “inadmissible applications”⁵²³(but by which “authorities”? – See supra Section II.4.).

More fundamentally, the key issue to determine is whether it is admissible to maintain national lists of “Safe countries”, in the context of the realization of the second phase of a CEAS, even where more effective common standards and conditions exist for the establishment of those lists⁵²⁴. The position adopted in the recast proposal to refer only to national lists rather than the adoption of common lists⁵²⁵ at European level and the involvement of the EASO in the process of determining the assumption of safe third countries, seems to be inconsistent with the existence of a common policy based on a uniform procedure and common standards⁵²⁶. The reasons provided for this seem to be based on the difficulty of achieving consensus at European level. However, these reasons are only partly convincing. The practical difficulties of reaching agreement among the EU Member States lie frequently in the context of harmonization of asylum and immigration law. The deletion of the concept of European lists draws the wrong conclusions from the practical difficulties. Difficult processes of reaching agreement may also be overcome by introducing different legal techniques which would provide for a gradual harmonization rather than an immediate harmonization. Thus, in public international law, procedures are used providing for techniques of standard setting which are not necessarily obligatory but require Member States to explicitly file their deviation from standards and recommended practices if they are not able or willing to comply presently with such standards and practices. The establishment of the EASO should be used as an opportunity to introduce new instruments for gradual alignment of national practices and laws with regard to matters for which it may be practicable or suitable to adopt a binding decision by majority voting.

The same analysis applies to the “European safe third country” concept, examined in the following section. The argument that it is difficult to reach this consensus is not a convincing one. It could be argued that everything is difficult in the area we are dealing with and it is not an adequate argument to abandon a concept simply because there are very different political, historical and geographical considerations. If one was to adopt that argument, one might as well give up on the whole idea of the CEAS on the same basis.

SOLUTION:

The principle of non-refoulement implies the respect of the following conditions:

- domestic laws have to provide an effective opportunity for the asylum seeker to rebut the presumption of safety and the existence of a connection in his particular case, at both the procedural and the substantial level;
- a removal to such a safe third country could only occur on the basis of an agreement which clearly outlines the respective responsibility of the Member State and of the STC;

The concept of CEAS is not consistent with the option of referring merely to national lists rather than the adoption of common lists at European level involving the EASO.

523 Articles 29 and 32, recast proposal.

524 COM (2009) 554 final (Expl. Memo.), p. 7.

525 Of “safe third countries”, of “European safe third countries” or of “safe countries of origin”.

526 See the proposition of the LIBE Committee in his Report on the initial proposal of the Directive to abolish the possibility of Member States establishing “national” lists of “Safe third countries” (page 34).

4. "EUROPEAN SAFE THIRD COUNTRY" CONCEPT (ARTICLE 36, APD AND ARTICLE 38, RECAST PROPOSAL)

To this date, no common list has been adopted at European level, because Article 36 (3), APD was annulled by the CJ for procedural reasons⁵²⁷. As a consequence, this concept can only be used by Member States which had introduced this concept in their national legislation on or before 1 December 2005⁵²⁸.

This specific procedure, which is not envisaged in Article 24, APD, is particularly criticized, because it allows Member States to designate authorities, other than the determining authority (Article 4 (4) (f), APD), to deny access to the procedure and to the territory altogether to any applicant who arrives "illegally" from "European designated countries", unless the State concerned does not re-admit the applicant for asylum. The LIBE Committee, among others, has considered that this concept of the so-called "(European) super-safe country" is "far more unacceptable compared to the "safe country principle" because no minimum principles and guarantees apply to this procedure and access to the asylum procedure and territory may be denied altogether. Such denial risks being a violation of international refugee law. No category of applicant should be denied access to an asylum procedure completely. UNHCR also strongly recommends the deletion of this article, which was not foreseen in the Commission proposal"⁵²⁹. Moreover, in its recent report "on the practical operation of the methodology for a systematic and rigorous monitoring of compliance with the Charter of fundamental rights"⁵³⁰, the Commission has emphasized that it considers it inappropriate to table a proposal for the establishment of a list of third countries considered as safe for the purposes of the examination of an asylum application. Following an application of the above-mentioned methodology, it was considered that such a list would raise serious concerns infringing upon the "non-refoulement" principle under both the Geneva Convention and Article 3 ECHR.

Notwithstanding the strong criticisms by the LIBE Committee, the UNHCR⁵³¹ and by several NGOs, and despite the initial intention to delete it⁵³², this concept of "European safe third country" was maintained in the final recast proposal, but only at national level (national lists and no European "common" list)⁵³³.

Moreover, the possibility of "national lists, which was only conceived as a temporary measure in the framework of the APD⁵³⁴ until the "European" list would have been adopted, would be the rule in the framework of the recast proposal. By the suppression of the stand-still clause, this notion which was only used by Germany and which had fallen into disuse since the neighbouring States became Member States of the EU, will be available to all Member States in the future⁵³⁵.

527 CJ, Parliament v. Council.

528 Stand-still clause provided by Article 36 (7), APD.

529 Report LIBE Committee(FINAL A6_0222/2005), amendment No. 157 – p. 70.

530 COM(2009) 205 final (29.4.2009), p. 6.

531 The UNHCR has recently expressly pleaded for the abolition of this concept (Green Paper, 2007, p. 17).

532 Impact assessment (SEC(2009) 1377, p. 4.

533 Article 38, recast proposal.

534 Article 36 (7), APD. For the adoption of a common list, we have to take into account the fact that Article 36, (3), APD has been challenged by CJ (Parliament v. Council).

535 Such as underlined, Article 38, recast proposal in reality revives the "European safe third countries" concept: "Member States on the eastern border of the EU may apply this concept to applicants for international protection from Ukraine, Moldova, Belarus and the Russian Federation with as a consequence "no, or no full examination of the asylum application"(Meijers Committee, p. 7).

If it had have been decided to maintain this concept, the recast proposal of the Commission at least should have been completed to foresee minimum principles and guarantees, such as those that exist for the similar concept of “inadmissible” applications: a right to a personal interview would have been recognized⁵³⁶ and the applicant would have had the possibility, during the interview, of challenging, on the one hand, the application of this concept on the grounds that the third country is not safe in his/her particular circumstances, and, on the other hand, the existence of a connection between him/her and the third country concerned⁵³⁷.

It seems also that the decision does not necessarily have to be taken by the “determining authority”, but can be taken by another “competent authority”⁵³⁸ designated as such in conformity with the national law. This should be clarified and, if another authority may indeed take the decision in this procedure, it should be necessary to introduce in the recast proposal a provision to oblige Member States to ensure that the members of the personnel of this authority have the appropriate knowledge or receive the necessary training to fulfil their obligations when implementing the Directive⁵³⁹. We can also ask the question: what are the requirements for a decision taken by the “competent authority”⁵⁴⁰?

If these conditions are indeed applied, there would no longer be any difference with the common concept of “safe third country” (STC), such as is defined in Articles 29 (1) (c) and 32, recast proposal, with the consequence that the “European safe third country” (ESTC) concept might as well be abandoned⁵⁴¹.

5. “SAFE COUNTRY OF ORIGIN” CONCEPT (ARTICLE 30, APD– NEW ARTICLE 33, RECAST PROPOSAL)

Two categories of SCO exist: those listed by each Member State (national lists) and those included in a European common list. This second category never came into effect since the 2008 CJ judgment annulling the procedure for composing the list at European level⁵⁴². The procedural consequences of the use of this concept lead to severe criticisms given that for instance Article 12 (2) (c), APD permits Member States to omit a personal interview.

The SCO must satisfy the following criteria⁵⁴³: the applicant must:

- a. have the nationality of that country; or
- b. be a stateless person and be formerly habitually resident in that country;
- c. have failed to submit any serious grounds for considering the country as an unsafe country of origin in his/her particular circumstances and in accordance with the “Qualification Directive”.

536 Compare with Article 30, recast proposal.

537 Compare with Article 32 (2) (c), recast proposal.

538 See Article 38 (1), recast proposal.

539 Compare with Article 4 (4), recast proposal, concerning personnel of the competent authority for the “Dublin” cases.

540 Compare with Article 10, recast proposal.

541 The UNHCR has recently expressly pleaded for the abolition of this concept (Green Paper, 2007, p. 17). The Meijers Committee has also recommended that Article 38, recast proposal be brought in line with Article 32 or to delete this concept as was originally envisaged (Meijers Committee, p. 2).

542 CJ, Parliament v. Council.

543 Article 31, APD.

The recast proposal⁵⁴⁴ allows the Member States to retain or to introduce legislation determining lists of third safe countries of origin, by national lists established in conformity with the criteria enumerated in Annex II of the Directive⁵⁴⁵. However, the Commission opted to reinforce the guarantees and the conditions imposed on the Member States:

- MS have to ensure a regular review of the situation in those countries;
- MS are no longer authorized to designate a country safe where only a part of it is considered so, or if it is only safe for a certain group of persons (the proposition deletes current article 30 (3) APD);
- the assessment of whether a country is a SCO has to be grounded on a range of sources of information, including from the EASO;
- Member States shall notify the Commission the countries that are designated as SCO;
- the applicant must be a national of that country or, if he is a stateless person, he has to be habitually resident in that country.

Insofar as the “safe country of origin” concept is maintained for the establishment of “national” lists and for the application of a (regular) “accelerated” procedure⁵⁴⁶, it can be admitted that the procedural guarantees envisaged by the modified provisions of the recast proposal are acceptable:

- the decision has to be taken by the determining authority⁵⁴⁷;
- a personal interview of the applicant has to take place, unless he/she is unfit or unable to be interviewed⁵⁴⁸; during the personal interview, the applicant may challenge, on the basis of his/her individual circumstances⁵⁴⁹, the presumption of safety of a country of origin in relation to both the refugee definition and the grounds of subsidiary protection⁵⁵⁰;
- the application may only be considered as “unfounded” or “manifestly unfounded”, even in an accelerated procedure, when an adequate and complete examination of the claim has been conducted by the determining authority which has established that the applicant does not qualify for international protection pursuant to the “Qualification Directive”⁵⁵¹;
- even if the right to remain in the Member State, pending the outcome of the remedy against a negative decision taken in the accelerated procedure, is not foreseen under national legislation, it is expressly required that a court or a tribunal shall have the power to rule whether or not the applicant may remain on the territory of the Member State. This may occur either upon request by the concerned applicant or by the court/tribunal acting on its own motion, and the applicant is allowed to remain in the territory pending the outcome of this request⁵⁵².

544 Article 33, recast proposal.

545 The UNHCR has recently declared that the criteria laid down in this Annex are broadly adequate (UNHCR Study 2010, p. 67).

546 Articles 27 (6) (b), 33 and 34, recast proposal.

547 Article 4 (1), recast proposal.

548 Article 13 (2) (b), recast proposal.

549 This implies that the intention of the determining authority to apply the SCO-concept must be communicated during the first instance procedure and before the personal interview, and not at the same time as the notification of the negative decision in the first instance. The opportunity to challenge the application of the SCO-concept only during appeal procedure would not conform with the principle of fair and efficient procedure such as is provided for by case law of the CJ.

550 COM(2009) 554 annex (Det. Expl.), Article 34.

551 Articles 27 (7) and 28, recast proposal.

552 Article 41 (6) and (7), recast proposal.

The UNHCR has declared that it is not opposed to this notion where it is used as a procedural tool for “accelerated” and “simplified” treatment of the claim and in carefully restricted situations. Thus, the use of this procedural tool may not increase the burden of proof for the asylum-seeker and it remains essential to assess each individual case fully on its merits⁵⁵³. The UNHCR also generally agrees with the criteria laid out in Annex II of the Directive^{554 555}.

The recast proposal deletes the notion of a “minimum common list of safe countries of origin” while consolidating the common objective criteria for the national designation of third countries as SCO. While one might argue that the “European safe third country” notion is – at least in the current situation – hardly of substantial practical importance, this cannot be argued generally with respect to a common list of safe countries of origin. Firstly, it is hardly convincing that a national concept of safe countries of origin should be upheld while the idea of establishing a European list of safe countries of origin is to be deleted. This clearly contradicts the very idea of a CEAS based on the possibilities of receiving international protection. Divergence in the application of the “safe country of origin” concept also contradicts the intention to reduce incentives, provided that such national concepts are applied in a consistent and transparent manner. A common European list may also be adopted by way of standards and recommended practices and would enhance the credibility of such a concept and increase the transparency of the system, thus reducing potential abuse of asylum procedures.

SOLUTION: Providing that the use of national lists of SCO does not increase the burden of proof for the asylum-seeker, that each individual case will be examined fully on its merits, and that procedural guarantees are offered, the establishment of these lists could be acceptable. However, since the procedural guarantees required are the same as in the regular procedure, one may wonder, due to the complexity involved, if this concept is really necessary for the Member States. Moreover, the same criticism applies with respect to the deletion of the common list of “European safe third country” and, as we have already discussed, with respect to the use of national lists of “safe third countries”. It seems also not to conform with the aim of the CEAS to delete the notion of “common EU” lists and to refer only to “national” lists.

553 UNHCR Study 2010, p. 65, 66 and 71.

554 UNHCR annotated comments June 2002, p. 22; UNHCR Study 2010, p. 67.

555 K. Hailbronner, Reflexion Note, 2008, par. II.1., page 4.

SECTION 4: ORGANIZATION OF THE DIFFERENT PROCEDURES AT FIRST INSTANCE (ARTICLES 23 TO 34, APD - ARTICLES 27 TO 38, RECAST PROPOSAL)

1. COMPLEXITY OF THE PROCEDURES AT FIRST INSTANCE UNDER THE FRAMEWORK OF APD AND THEIR SIMPLIFICATION BY THE RECAST PROPOSAL (SEE COMPARATIVE DIAGRAM IN ANNEX)

The various possibilities provided by the APD to derogate from the “regular” procedure, the extent of the derogations allowed by several of its provisions, the wide margin of discretion given to Member States to organize the different procedures at national level, and the different ‘stand-still’ clauses allowing Member States to maintain national procedures organized by national law before 1 December 2005, result in a complex framework of procedures organized by the APD. The least that can be said is that this complex framework does not reflect the aim of harmonization pursued by the purpose of creating a CEAS.

The complexity of the different procedures provided by the APD is clearly demonstrated in the left-hand column of the diagram of procedures reproduced in the Annex:

- the concepts of “prioritized” and “accelerated” procedures are mixed together⁵⁵⁶, although they do not necessarily cover the same situations⁵⁵⁷;
- the concept of “specific” procedures, such as those provided by Article 24, APD, concerns different types of procedures which rely on totally different grounds;
- some concepts are used in different procedures, although those procedures do not stem from the same background⁵⁵⁸;
- the same procedure, such as the “border” procedure, simultaneously authorizes the application of a common procedure, such as is foreseen by the Directive, and the application of national procedures, with different guarantees, under the cover of stand-still clauses;
- to apply the same concept, such as the “safe country of origin” concept, some stand-still clauses allow also the application of criteria other than those normally provided for by the Directive,
- on the issue of the acceleration of proceedings and “manifestly” unfounded applications, the APD attempts to solve problems by a multitude of different methods to ensure a quick and fair procedure and to cope with “manifestly” unfounded or “abusive” claims, but the applications of all these methods has so far not produced significant results;
- the complexity of the different procedures is moreover reinforced by the fact that the APD permits in several cases the designation of an authority other than the

556 Article 23 (3) and (4), APD.

557 Where it is decided to examine an application for asylum as a priority because the claim is considered as well-founded or concerns an applicant with special needs, this does not imply that this claim will be examined under an “accelerated” procedure with, for example, the possibility of omitting the personal interview of the applicant concerned.

558 For instance, the « Safe third country » concept is used, on the one hand, to permit an “accelerated” procedure (Article 23 (4) (c) (ii), APD), and, on the other hand, to apply the “inadmissible applications” procedure (Article 25 (2) (c), APD). These procedures are however, totally different: the first one supposes that there has been an examination of the substance of the asylum claim; the second implies on the contrary that such examination has not been done.

determining authority to take the decision⁵⁵⁹ and by the fact that, although the APD recognizes, as a principle, the application of “minimum basic principles and guarantees” during the administrative phase of the examination of an asylum claim, it contains numerous exceptions and possible ways to derogate from those minimum standards, according to the type of procedure that it has been decided to apply.

SOLUTION: simplification of the procedures

The Commission proposes to simplify, streamline and consolidate procedural arrangements across the Union, to put an end to the proliferation of disparate procedural arrangements at national level by the deletion of the current stand-still clauses, to lead to more robust determinations at first instance, with the aim of reducing potential annulments by the appeal bodies, and to simplify the organization of the different procedures at first instance. The Commission also envisages a review of the present arrangements for accelerated procedures, providing for a limited and exhaustive list of grounds for an accelerated examination of (manifestly) unfounded applications and for a rigorous examination of an application in such cases, with a personal interview of the applicant⁵⁶⁰. At the same time, the Commission has emphasized the need to safeguard the integrity of procedures, in particular regarding the processing of abusive or fraudulent claims. In that respect, it is suggested that an obligation for applicants to cooperate with the competent authorities in establishing their identity and other elements of the application in relation to Article 4 (2) of the “Qualification Directive”⁵⁶¹ could be introduced. This proposal would operate in conjunction with the current standards which allow Member States to consider applications, based on false information or documents with respect to applicants’ identity or nationality, as manifestly unfounded and to accelerate their examination. According to the Commission, the envisaged measures on quality decision-making are also intended to enhance the preparedness of asylum personnel to identify fraudulent or abusive cases in a timely fashion. These measures are to be further strengthened by underlining the principle of a single determining authority. In sum, the recast proposal of the Commission aims to lay down the necessary conditions for making asylum procedures in the Union more accessible, efficient, fair and context-sensitive and to ensure higher and more coherent standards on asylum procedures that would guarantee an adequate examination of the protection needs of third country nationals or stateless persons in line with, in particular, the case law of the CJ and of the ECtHR, but, at the same time, with the will to maintain procedural arrangements aimed at preventing abuse.

In the following comments, we will examine, taking into account some aspects of the organization of the asylum procedures, whether the recast proposal correctly reflects, on the one hand, the aims pursued by the Commission and, on the other hand, the international and EU obligations of Member States regarding asylum seekers, among the other minimal requirements resulting from the case law of the CJ and of the ECtHR. However, if we look at the second column of the procedures’ diagram, we can already see that the new framework proposed by the recast proposal is, in fact, much more accessible and comprehensive than the one currently provided by the APD.

559 See the different possibilities provided for by Article 4 (2), APD.
560 COM (2009) 554 final (Expl. Memo.), p. 7.
561 Article 12 (1), recast proposal.

2. TIME LIMIT FOR CONDUCTING A NORMAL PROCEDURE AT FIRST INSTANCE (ARTICLE 27 (3) AND (4), RECAST PROPOSAL)

In contrast to Article 23 (2), APD, which does not expressly stipulate a maximal time limit to take a decision, by virtue of Article 27 (3) and (4) of the recast proposal, Member States would have, 6 months to conclude the examination of an application for international protection from the time the application was lodged. The new provision contains only one possibility of extending that time limit, for a period not exceeding a further 6 months, in individual cases involving complex issues of fact and law⁵⁶². The consequences of a failure to adopt a decision within those time limits shall be determined in accordance with national law. The question raised however is whether a better way of conforming with the aim of harmonization of the CEAS would be to provide the consequences of such a failure in the Directive itself.

SOLUTION: Article 27 (4), recast proposal should be completed in order to determine the consequences of the failure to adopt a decision within the determined time limits: one possibility that could be introduced would be to permit the asylum seeker to request a decision of the first instance authority at the end of the period of 12 months but before the end of a determined time limit. This would open a right to an effective remedy within the meaning of Article 41, recast proposal in the absence of a decision at the end of this time limit.

3. "PRIORITIZED" REGULAR PROCEDURE (ARTICLE 23 (3) AND (4), APD – ARTICLE 27 (5), RECAST PROPOSAL)

It is proposed in the recast proposal to clearly distinguish the "prioritized" procedures and the "accelerated" procedures. "Prioritized" procedures should be applied by Member States in order to process certain categories of cases more quickly, such as well founded cases or cases of applicants with special needs in line with Article 20, recast proposal. But this possibility is expressly subject to two limitations: 1^o) such a prioritized examination must not be based on considerations that the case in question may be "unfounded" by virtue of Article 27 (6), recast proposal (which means cases in which "accelerated" procedures can be applied)⁵⁶³; 2^o) the basic principles and guarantees as well as the requirement of an adequate and complete examination must be fully respected⁵⁶⁴. It is also expressly recalled that the characterization of applications made by applicants with special needs as 'priority applications' does not necessarily imply that such examinations will be proceeded with more quickly. The option to extend the initial 6 month period of examination in cases involving complex issues of fact and law may indeed also be required in cases of applicants with special needs⁵⁶⁵.

562 Such as was emphasized in the Det. Expl. (COM (2009) 554 Annex, Article 27 – p. 13), this provision is influenced by the case law of the CJ concerning decisions on residence permits (CJ, Panayatova, par. 26 and 27).

563 Article 27 (5) (c), recast proposal.

564 Article 27 (5) (c), recast proposal.

565 COM (2009) 554 Annex (Det. Expl.), Article 27 – p. 13.

In this context, it can be considered that the proposal of the Commission to clearly distinguish between the two types of procedures is a step forwards.

4. “ACCELERATED” REGULAR PROCEDURE (INTER ALIA “(MANIFESTLY) UNFOUNDED APPLICATIONS”) (ARTICLE 23 (4), APD – ARTICLE 27 (6) AND (7), RECAST PROPOSAL)

Having regard to the fact that it is in the interest both of the Member States and the applicant to know as soon as possible the decision that has been taken on an asylum application, without prejudice to an adequate and complete examination of the request⁵⁶⁶ and in accordance with the basic principles and guarantees of Chapter II of the Directive, it is, as a principle, admissible that Member States organize “accelerated procedures” in respect of the provisions of the Directive. Even the UNHCR accepts the use of accelerated procedures, but only insofar as these procedures should only be applied in a very limited number of cases: only cases that are “clearly abusive” (i.e. clearly fraudulent) or “manifestly unfounded” (i.e. not related to the grounds for granting international protection)⁵⁶⁷.

The main problems of the APD are threefold:

- i. the over-reliance on the significant scope of accelerated procedures for asylum applications⁵⁶⁸; (ii) the procedural consequences foreseen by Member States when using accelerated procedures (inter alia, the possibility of omitting in some circumstances a personal interview or the possibility of denying a suspensive effect of an appeal);
- ii. the existence of “national” lists of “safe countries of origin” and of “safe third countries”.

Article 23 (4), APD expressly enumerates 22 scenarios of potentially (manifestly) unfounded applications and this enumeration is not exhaustive: the question that arises therefore is whether this can be considered reasonable⁵⁶⁹? Doubt is permitted for some of the enumerated possibilities⁵⁷⁰, even if Article 28 (1), APD reaffirms the obligation for the

566 Article 23 (2), APD.

567 UNHCR EXCOM Conclusion No 30(XXXIV) on the Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum, 20 October 1983; UNHCR’s Position on Manifestly Unfounded Applications for Asylum, 1 December 1992, 3 European Series 2, p. 397. See also the Resolution 1471(2005) of the Parliamentary Assembly of the Council of Europe (Accelerated asylum procedures in Council of Europe Member States): the Parliamentary Assembly has invited the governments of the Member States to ensure, inter alia, that minimum procedural safeguards were met in accelerated asylum procedures including the right to an individual determination of one’s claim and the right to an effective remedy under Article 13 ECHR.

568 All these cases are derived from the Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum. The notion of “(manifestly) unfounded claims” was introduced in asylum policies in Europe in the 1980s for two reasons: 1°) the perception that the asylum systems of western European States was overburdened by claims from people fleeing economic hardship and seeking a better life; 2°) the will to reduce the burden on full determination procedures (R. BYRNE, G. NOLL and J. VESTED-HANSEN, p. 403; S. OAKLEY, p. 9).

569 Compare the initial proposal of Directive (September 2000) (6 possibilities) with the amended proposal of Directive (June 2002) (12 possibilities).

570 LIBE Committee had suggested in its Report on the amended proposal of Directive (A6 - 0222/2005 FINAL) (Amendment 114) to delete Article 23(4)(g) of the Directive(Justification: article 23 permits prioritization or acceleration in a wide range of cases, the consequences of which are left largely to the Member States, and may lead to considerably reduced safeguards. Amongst others, the Directive permits States to dispense with personal interviews and other significant procedural requirements. Many such claims will not fall within the definition of “clearly abusive” or “manifestly unfounded”

determining authority to assess each individual case fully on its merits. At this point, it must also be remembered that a personal interview for an applicant is not required in some cases of “unfounded applications” (Article 12 (2) (c), APD). So, even if the proposal to re-examine the list of Article 23 (4), APD is a sensible one⁵⁷¹, the concept of “manifestly unfounded” applications would obviously have to be examined very closely for each individual application and one will have to examine critically whether in such cases a personal interview is or is not necessary.

The first amendment provided by the Commission suggests the replacement of the current illustrative list of the APD with an exhaustive list of circumstances (6 instead of 22 where a Member State could apply an “accelerated” procedure⁵⁷². The aim of the Commission is to limit the grounds of an accelerated examination of an application to grounds which are directly linked with the elements of the application as described in Article 4 (2) of the “Qualification Directive”. An accelerated examination of the application should only be possible where serious deficiencies appear in the application for international protection, which may relate to both the statements of the applicant and/or the documents he/she submits or is expected to submit in order to substantiate the claim⁵⁷³. The Commission considers that this approach is “in line with UNCHR EXCOM Conclusion No 30”⁵⁷⁴. Regarding the content of this conclusion, we can indeed consider⁵⁷⁵ that, with the exception of the use of the “safe country of origin” concept⁵⁷⁶ – already examined in this draft, the limited cases provided for by the recast proposal to authorize an “accelerated” examination of an application are broadly in line with the notions of “clearly abusive” or “manifestly unfounded” applications in the meaning of this Conclusion⁵⁷⁷.

It can furthermore, be considered that the procedural guarantees provided by the recast proposal for applying an “accelerated procedure”, are in line with those recommended by the UNHCR in the same Conclusion No. 30⁵⁷⁸: 1°) Member States have to lay down

claims, which could be dealt with through an accelerated procedure, according to the conclusions of states and international bodies” (See also the European Parliament legislative resolution on the amended proposal for a Council directive on minimum standards for procedure in Member States for granting and withdrawing refugee status (P6_TA(2005)0349 - Amendment 115).

571 It would, in this regard, have been argued that the enumeration of a large number of reasons for accelerated proceedings is not the problem as such and that the essential point is, in reality, whether the reasons mentioned justify the dispensing, in those circumstances, with certain procedural requirements, such as the omitting of a personal interview or the right to remain during an appeal procedure. It is however, the case that there are no reasons to accelerate the examination of, and to exclude from, a regular procedure, applications which are not “clearly abusive” or “manifestly unfounded”. As recently observed, consideration must be given on the fact that very short time-frames render very difficult the exercise of rights and obligations by the applicant and the complete examination of the claim by the determining authority (UNHCR Study 2010, p. 53).

572 Article 27 (6), recast proposal.

573 COM (2009) 554 annex (Det. Expl.), Article 27 – p. 13.

574 Ibid. In this conclusion, the “clearly abusive” or “manifestly unfounded” applications are defined as “those which are clearly fraudulent or not related to the criteria for the granting of refugee status (...) nor to any other criteria justifying the granting of asylum”.

575 The same conclusion can also be made regarding the Resolution 1471(2005) of the Parliamentary Assembly of the Council of Europe (Accelerated asylum procedures in Council of Europe Member States).

576 Article 27 (6) (b) recast proposal.

577 Even if the UNHCR considers that grounds for examining claims in accelerated procedure should be interpreted strictly and cautiously, and that, in particular, grounds which are unrelated to the merits of the application should not be included in the list of criteria for examining a claim in an accelerated procedure (UNHCR Study 2010, p. 57), we didn’t find any legal argument to condemn the new list provided by the recast proposal.

578 The UNCHR considers in this Conclusion that the use of a special procedure for dealing in an expeditious manner with applications considered as “clearly abusive” or “manifestly unfounded” is admissible provided that such procedure is accompanied by the following appropriate procedural guarantees: 1°) a complete personal interview by an official of the determining authority; 2°) the establishment of the “manifestly unfounded” or “abusive” character of an application by the

reasonable time limits for the adoption of a decision⁵⁷⁹; 2°) the decision has to be taken by the determining authority⁵⁸⁰; 3°) a personal interview of the applicant has to take place, unless he/she is unfit or unable to be interviewed⁵⁸¹; 4°) the application may only be considered as “unfounded” or “manifestly unfounded”, even in an accelerated procedure, where an adequate and complete examination of the claim has been conducted by the determining authority, which has established that the applicant does not qualify for international protection pursuant to the “Qualification Directive”⁵⁸²; 5°) even if the right to remain in the Member State pending the outcome of the remedy against a negative decision taken in the accelerated procedure is not provided under national legislation, it is expressly required that a court or a tribunal shall have the power to rule whether or not the applicant may remain on the territory of the Member State, either upon request of the applicant or by the court or tribunal acting on its own motion, and the applicant is allowed to remain in the territory pending the outcome of this request⁵⁸³.

The emphasis can also be put on the fact that the “safe third country” concept is no longer envisaged in the proposed Article 27 (6), recast proposal⁵⁸⁴, but only in the provisions of the recast proposal concerning the “inadmissible applications”⁵⁸⁵. The confusion between “accelerated” procedure and “inadmissible applications” procedure is in this way avoided⁵⁸⁶.

Taking into account the exhaustive list of possibilities allowing the acceleration of the examination of an application for international protection, the procedural guarantees accompanying the application of this procedure, such as the aim to preserve the integrity of the asylum system and to conserve the efforts and resources for dealing with cases which raise more complex issues of facts and law, the proposal of the Commission concerning the “accelerated” procedures appears to be an acceptable one. It has however, to be noted that time limits to conduct such procedures should not be too short and that the applicant has to be given a realistic opportunity to prove his/her claim⁵⁸⁷.

5. “INADMISSIBLE APPLICATIONS” PROCEDURE (ARTICLES 25, 27, AND 23, (4), (C), (II) AND 28, (2), APD – ARTICLES 29 – 32, RECAST PROPOSAL)

The discussion so far has already included an examination of the “inadmissible applications” procedure in the context of the concepts of “first country of asylum” and “safe third country”⁵⁸⁸, as well as the proposals of the Commission relating to the new procedural guarantees justified by the case law of the ECtHR and the CJ.

579 determining authority; and 3°) a possibility for the unsuccessful applicant to ask for the review of a negative decision before rejection at the frontier or forcible removal from the territory.
Article 27 (8), recast proposal.
580 Article 4 (1), recast proposal.
581 Article 13 (2) (b), recast proposal.
582 Articles 27 (7) and 28, recast proposal.
583 Article 41 (6) and (7), recast proposal.
584 Compare with Article 23 (4) (c) (ii), APD.
585 Article 29 (2) (c) and 32, recast proposal.
586 ECRE disagrees however, with the inclusion of “safe third country cases” in the “admissibility” procedural stage, considering that the question whether a country can be considered safe for a particular applicant needs to be dealt with in the substantive determination procedure (ECRE Information Note 2006, p. 26).
587 ECtHR, Bahaddar, par. 45.
588 Supra sections III.2. and III.3.

Risks of confusion in the recast proposal: "inadmissible applications" procedure or "preliminary examination" procedure(1.); rules applicable to an "admissibility interview"(2.); "competent" or "determining" authority(3.); "inadmissible applications" concept and "subsequent" applications or "(manifestly) unfounded" applications(4.); right to a judicial remedy in the "preliminary examination" procedure (5.).

The possibility of declaring an application as "inadmissible" is also envisaged where "the applicant has lodged an identical application after a final decision"⁵⁸⁹ or where "a dependant of the applicant lodges an application, after he/she has, in accordance with Article 6 (4), recast proposal, consented to have his/her case be part of an application made on his/her behalf, and there are no facts relating to the dependant's situation, which justify a separate application"⁵⁹⁰. However, we do not clearly see the difference between the two possibilities, provided by Article 29, recast proposal, of declaring a "new" application "inadmissible", and the possibility provided by Article 35 (2)(b)⁵⁹¹ and (7),⁵⁹² recast proposal, of applying to the same applications the specific procedure of "preliminary examination" of a subsequent application. Where is the coherence between the two procedures? Or does it mean that Member States may examine subsequent applications in an "inadmissible" procedure where they have not organized the specific procedure of the "preliminary examination" of a subsequent application, by virtue of Article 35 (2) to (7), recast proposal?

Having regard to the fact that Article 30 (2), recast proposal expressly refers to Article 5 of the "Dublin Regulation" (with its specific requirement of a personal interview), the question also raised is whether the requirements for a personal interview, such as provided by the basic principles and guarantees of Chapter II (Articles 13 to 16), recast proposal, apply or not to the "admissibility (personal) interview" provided by Article 30 (1), recast proposal. Taking into account the minimal requirements resulting from the case law of the ECtHR and of the CJ, we would give a positive answer, but this is not certain if we compare Article 29 (1)⁵⁹³ with Article 27 (1)⁵⁹⁴ of the recast proposal.

The use of the concept of "competent authorities"⁵⁹⁵ for taking an inadmissibility decision, has already been discussed⁵⁹⁶. If an authority other than the determining authority would indeed be able to take the decision regarding the admissibility of an application, the question raised is whether Article 4 (3), recast proposal could be modified to clarify this question. It should also be necessary to introduce in the recast proposal a provision to oblige Member States to ensure that the personnel of such an authority have the appropriate knowledge, or receive the necessary training, to fulfil their obligations when implementing the Directive⁵⁹⁷.

The question arises also whether it would be possible to abandon the concept of "inadmissible applications" and to attribute such cases either to "subsequent applications" procedures or to "manifestly unfounded application" procedures. The former has been

589 Article 29 (2) (d), recast proposal.

590 Article 29 (2) (e), recast proposal.

591 The applicant has not presented "new elements or findings" relating to his/her new (identical) claim.

592 The applicant has not presented "facts relating to the dependant's situation which justify a separate application".

593 "Inadmissible" application means no examination of the substance of the claim.

594 Basic principles and guarantees of Chapter II apply where there is an examination of the claim.

595 Article 30 (2) (b), recast proposal (See also: COM (2009) 554 Annex (Det. Expl.), Article 32 – p. 15). It has to be recalled that the only possibility for Member States to designate an authority other than the "determining authority" is expressly limited to the "Dublin" cases by virtue of Article 4 (3), recast proposal.

596 Supra, Section II.4.

discussed above. Regarding the latter aspect of the question, we think that it is necessary to keep "(manifestly) unfounded applications" distinct, which means that there has been an examination by the determining authority on the substance of the application, and the "inadmissible applications", which have not been examined on their substance (by the determining authority?).

Attention can also be focused on the fact that the possibility of challenging a negative decision taken in a "preliminary examination" procedure of a subsequent application (Article 35 (2), recast proposal) does not appear to be mentioned more expressly in Article 41 (1), recast proposal⁵⁹⁸. Although the list mentioned in this Article is not exhaustive, it would be better to expressly refer to this type of decision.

SOLUTION: further explanations would be given regarding the different risks of confusion and the recast proposal could be completed if needed.

6. BORDER PROCEDURES (ARTICLES 4 (2) (D) AND (E), 24 AND 35, APD – ARTICLE 37, RECAST PROPOSAL)

There is a consensus on the fact that if a Member State decides to organize a "Border procedure"⁵⁹⁹, there is no reason for the requirements and guarantees for the examination of applications for international protection submitted at the border to be considerably different from those submitted within the territory, with certain exceptions strictly justified by the limited facilities "sur place"⁶⁰⁰.

In accordance with this consensus and taking into account the case law of the ECtHR and of the CJ, the following questions have to be examined:

- would the examination of the asylum claim, to decide that this claim is "unfounded" or "inadmissible", be done by border guards or other control authorities or, on the other hand, by the determining authority?;
- whether the procedural guarantees provided for in the procedure organized by Member States by virtue of Article 35 (1), APD are sufficient: is there a time-limit to decide on an application examined at the border? Is there a right for the applicant to enter the territory if the competent/determining authority considers that a further examination of the claim is necessary? Will there be a personal interview by the competent or determining authority?
- in the framework of the second phase of the establishment of CEAS, are there specific reasons to maintain the specific "border procedure" foreseen by Article 35 (2), APD?
- is it justified to provide different procedural guarantees for the two procedures (Article 35 (1), APD: basic principles and guarantees of Chapter II of the Directive, with several derogations, including, among others, the right to a personal interview / Article 35 (2) and (3), APD: respect of the procedural guarantees envisaged by these specific provisions)?

597 Compare with Article 4 (3) and (4), recast proposal, concerning the personnel of the "competent authority" for the "Dublin" cases.

598 Compare with Article 39 (1) (c), APD.

599 It has also to be recalled that the possibility of examining an application for international protection at the border or in transit zone has expressly been admitted by the ECtHR (Gebremedhin – concerning the legal status of the transit zones: ECtHR, Amuur).

600 Report LIBE Committee, p. 10 and 65; ECRE Information Note, 2006, p. 7 and 31; UNHCR annotated comments, 2002, p. 6.

- how is it possible to simultaneously take into account the problem of “mixed arrivals” and the necessity for the Member States to organize an efficient border control in order to avoid “uncontrolled” immigration?
- Which directive is the most appropriate to determine the status of the asylum seekers expecting entry into the territory who are waiting at the border or in transit zones: the “Procedures Directive” or the “Reception Conditions’ Directive”?

If we look at the recast proposal of the Commission, we can consider that most of these questions are correctly resolved:

- the decision on the application for international protection has to be taken by the determining authority;
- the basic principles and guarantees of Chapter II of the Directive apply to the examination of those applications⁶⁰¹;
- an application for international protection may only be rejected at the border or in transit zones where this application is considered as “inadmissible” or constitutes one of the six cases in which an “accelerated” procedure can be applied⁶⁰²;
- the stand-still clause provided for by the former Article 35 (2) and (3), APD is deleted;
- the “border” procedure is not applicable to unaccompanied minors⁶⁰³;
- the appeal against a negative decision has an automatic suspensive effect⁶⁰⁴;
- and the maintenance of a “border” procedure offers the Member States concerned the possibility of organising an efficient border control to avoid “uncontrolled” immigration.

The remaining main problems that have to be discussed are:

- the very short time-frames which may be applied by Member States, to introduce an appeal, could render the exercise of rights and obligations by the applicant very difficult⁶⁰⁵;
- the determination of the status of the applicants who are waiting at the border or in transit zones during the examination of their claim.

601 Article 37 (1), recast proposal. As was recalled by the Commission, the amendment aims at ensuring the availability of basic principles and guarantees for all applicants for international protection irrespective of where the application is lodged (COM (2009) 554 annex (Det. Expl.), Article 37 – p. 17).

602 Article 37 (1) (a) and (b), recast proposal. This implies that “admissible” cases which do not fall under the notion of “manifestly unfounded” applications are to be processed in “in-land procedures” (COM(2009) 554 annex(Det. Expl.), Article 37 – p. 17).

603 Article 21 (6), recast proposal.

604 Article 41 (5) and (6), recast proposal

605 It has also to be taken into consideration that the stay of an applicant at the border should be, as a principle, as short as possible.

7. SUBSEQUENT APPLICATIONS PROCEDURE (ARTICLES 4 (2)(C), 32, 33 AND 34, APD – ARTICLES 35 AND 36, RECAST PROPOSAL) – RELATION WITH PROVISIONS ON IMPLICIT/EXPLICIT WITHDRAWAL OF A PREVIOUS APPLICATION (ARTICLES 19 AND 20, APD – ARTICLES 23 AND 24, RECAST PROPOSAL)

Although the minimum procedural guarantees which are applicable in the framework of this “specific inadmissibility procedure”⁶⁰⁶ are more limited than the basic guarantees set out in Chapter II of the Directive, it is, in principle, acceptable for Member States to conduct a “preliminary examination” of a subsequent application for international protection introduced in the same Member State, in order to determine whether new “relevant” facts and evidence have arisen or have been presented by the applicant in comparison with his/her previous application⁶⁰⁷. There are however, certain reservations about the fact that this specific procedure can also be applied in circumstances where the first application for international protection has not been examined on its substance. For instance, ECRE considers that this procedure should not be applied: 1°) in the case of explicit or implicit withdrawal of a previous application; 2°) in cases where a Member State takes back an applicant under the “Dublin Regulation”; 3°) and to applicants who fail to go to a reception centre or to appear before the competent authorities at a specified time, with the consequence that they have not had the opportunity to expose the reasons of their claim⁶⁰⁸. The UNHCR considers also that it is not appropriate to equate explicit or implicit withdrawal of an asylum application with the rejection of a claim⁶⁰⁹ and suggests therefore, that the requirements for the resumption or re-opening of an asylum procedure should not be as stringent as they are for cases which are rejected in a final decision⁶¹⁰. In the UNHCR’s view, Member States should not automatically refuse to examine a subsequent application on the grounds that the new elements or findings could have been raised in the previous procedure or on appeal⁶¹¹; such a procedural bar may indeed lead to a breach of Member State’s non-refoulement and human rights treaty obligations⁶¹².

The Commission proposes in the recast the modification of the scope of the ‘preliminary examination’ procedure in order to achieve a number of aims most notably: the reduction of the root causes of subsequent applications – with the consequent risk of violation of the principle of non refoulement; the limitation of the number of successful appeals in such situations and; in order to ensure that all necessary efforts will be taken, to guarantee at least one rigorous examination of the protection needs where a person lodges an

606 Recital (25), recast proposal.

607 The UNHCR, in principle, agrees with such specific procedure (UNHCR Study 2010, p. 72).

608 ECRE Information Note 2006, p. 29.

609 UNHCR annotated comments 2002, p. 24.

610 UNHCR Study 2010, p. 44 and 46. Articles 19 and 20, APD allow the competent authority to take a decision to either discontinue the examination or to reject the application. In the first case, the applicant who reappears is considered as requesting the re-opening of his initial claim; in the second case, he is considered as introducing a subsequent application, with the possibility for the Member State concerned to apply the specific “preliminary examination” procedure.

611 Compare with the examination “ex nunc” expressly provided by Article 41, recast proposal.

612 UNHCR Study 2010, p. 74. The UNHCR observes moreover, that there is no specific procedure as such in six of the twelve Member States surveyed and that, in those States, the so called “preliminary examination” of a subsequent application is conducted by the determining authority as an initial phase of the examination of the claim in a (new) regular procedure (ibidem).

application for the first time⁶¹³. This modified procedure would only be applicable where a person makes a subsequent application after a final decision has been taken on the previous application or where his/her previous application has been explicitly withdrawn by virtue of Article 23, recast proposal. Furthermore, Article 35 (9), recast proposal expressly provides that, where a person, with regard to whom a transfer decision is to be enforced pursuant to the "Dublin Regulation", makes further representations or a subsequent application in the transferring Member State, those representations or subsequent application shall be examined by the responsible Member State, as defined in the "Dublin Regulation" in accordance with the "Asylum Procedures Directive". It means in concrete terms that a "preliminary examination procedure" will only be possible where there has been an explicit withdrawal of the previous application or a final decision taken on the substance of this application by the Member State concerned⁶¹⁴.

In order to avoid a possible violation of the principle of non-refoulement and to be in line with the case law of the ECtHR, this proposal is a good step forward. On the contrary, the proposal of the UNHCR to extend this solution in cases of explicit withdrawal is not convincing, provided that the applicant has been fully informed in advance of the consequences of his/her decision to explicitly withdraw his/her claim.

In cases where applicants abuse the asylum procedure with a view to inter alia delaying or frustrating the enforcement of a return decision, the Commission proposes, to introduce procedural devices⁶¹⁵ aimed at dealing with multiple applications for international protection lodged in the same Member States. The aim of this proposal is to prevent abuse of asylum procedures and enable the "competent" authorities to deal effectively with repeated applications whilst ensuring necessary safeguards against refoulement⁶¹⁶. If, following a final decision to consider a (first) subsequent application "inadmissible" or a final decision to reject a (first) subsequent application as "unfounded", the person concerned lodges a new (second) (subsequent) application in the same Member State before a return decision has been enforced, this Member State can make an exception to the right to remain in the territory during the examination of his/her claim⁶¹⁷, "provided the determining authority is satisfied that a return decision will not lead to direct or indirect refoulement in violation of international and Community obligations of that Member State"⁶¹⁸. The Member State may also provide that this subsequent application will be subject to an 'admissibility' procedure or to an "accelerated" procedure, by which it will be possible to derogate from the time limits normally applicable in those procedures⁶¹⁹. By virtue of Article 8 (2), recast proposal, it is however, expressly provided that refoulement to the country of origin of the applicant concerned cannot take place when the decision to apply Article 35 (8), recast proposal has been made.

613 COM (2009) 554 Annex (Det. Expl.), Article 35 – p. 16.

614 See also Article 24 (3), recast proposal, which provides that the application of the procedure in the case of implicit withdrawal or abandonment of the application will be without prejudice to the "Dublin Regulation". This amendment is proposed by the Commission to make it clear "that the notion of implicit withdrawal or abandonment of the application is not applicable where the person concerned is transferred to the responsible Member State in accordance with the Dublin Regulation" (COM (2009) 554 annex (Det. Expl.), Article 24 – p. 12). These comments seem to be a reaction to some problems caused when applicants were taken back by some Member States by virtue of the Dublin Regulation (see, for instance, ECtHR, T.I. and K.R.S.).

615 Article 35 (8), recast proposal.

616 COM (2009) 554 annex (Det. Expl.), Article 35 – p. 17.

617 Article 8, recast proposal.

618 Article 35 (8) (a), recast proposal.

619 Article 35 (8) (b) and (c), recast proposal.

The question raised however,⁶²⁰ is whether it should be possible for the applicant to introduce a remedy before a court or a tribunal against an expulsion order taken in such circumstances, and whether this remedy should have suspensive effect, such as provided by Article 41 (5), recast proposal, or, at least, to ask for such a suspensive effect, by virtue of Article 41 (6) and (7), recast proposal⁶²¹. Or will a remedy only be initiated against such a decision, by virtue of Article 13 (1) of the "Return Directive"⁶²²?

It seems that the decision in such a preliminary examination of the subsequent application does not necessarily have to be taken by the determining authority, it can also be taken by another "competent authority" designated as such under national law⁶²³, provided that the determining authority has been consulted previously. This should be clarified and, if another authority may indeed take the decision in a preliminary examination procedure, it should be necessary to include in the recast proposal a provision obliging Member States to ensure that the personnel of this authority have the appropriate knowledge or receive the necessary training to fulfil their obligations when implementing the Directive⁶²⁴. A further question is also raised: what are the requirements for a decision taken by the "competent" authority in such circumstances⁶²⁵?

SOLUTION: under the above-mentioned conditions, it has to be considered that this limited exception to the right to remain on the territory during the administrative examination of a (second or multiple) subsequent claim is admissible, considering the international obligations of the Member States and the case law of ECtHR and CJ. Further explanations have however, to be given concerning: 1°) the right to an effective remedy (should the "Return Directive" be applied or Article 41, recast proposal which would be completed in this sense?) and 2°) the relations between the "competent authority" and the "determining authority" before such an expulsion order should be decided.

8. "NATIONAL SECURITY PROVISIONS" PROCEDURE (ARTICLE 4, (2) (B), APD)

The only current provision of the APD that deals with this special procedure⁶²⁶ is Article 4 (2) (b), which obliges the national authority to consult the determining authority prior to

620 It is indeed not expressly mentioned either in Article 41 (1), recast proposal (this provision does not expressly refer to such decision) nor in the "Det. Expl." of the recast proposal (COM (2009)554 annex). Compare this however, with Article 36 (3) (a), recast proposal, by virtue of which the applicant has to be informed of the possibilities of seeking an appeal or review of the decision.

621 However, it is once again not expressly mentioned in Article 41 (6), recast proposal, which only refers to decisions taken in the accelerated procedure pursuant to Article 27 (6), recast proposal or to a decision to consider an application inadmissible pursuant to Article 29 (2) (d), recast proposal.

622 The possibility of introducing an effective remedy to appeal against or to seek review of decisions related to return, before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards and independence, and who have the ability to temporarily suspend the enforcement, unless a temporary suspension is already applicable under national legislation.

623 Regarding the risk of confusion between "competent" or "determining" authority, see Section II.4.

624 Compare this with Article 4 (4), recast proposal, concerning the personnel of the competent authority for the "Dublin" cases.

625 Article 36 (3) (a), recast proposal only provides that the applicant has to be informed "in a appropriate" manner (UNHCR suggests that the decision would be given "in writing" - UNHCR Study 2010, p. 78). Compare with Article 10, recast proposal.

626 See however Article 23 (4) (m), APD (where it is possible for the determining authority to accelerate the examination of the application if the applicant constitutes a danger to the national security or public order of the Member State concerned or has been forcibly expelled for serious reasons of public security and public order under national law) Such provision is not included in Article 27 (6), recast proposal.

taking a decision⁶²⁷. It has however, to be underlined that this provision no longer exists in the recast proposal.

SOLUTION: it seems necessary to complete the recast proposal by including more "National security provision(s)", for example to require a prioritized examination of the claim by the determining authority in such circumstances, or at least to ensure the respect of the principle of non refoulement, in line with the case law of the ECtHR⁶²⁸.

9. WITHDRAWAL INTERNATIONAL PROTECTION STATUS PROCEDURE (ARTICLE 37 DIRECTIVE – ARTICLE 39, RECAST PROPOSAL)

In comparison with Article 37, APD, Article 39 (4) of the recast proposal no longer permits a Member State to decide, without respecting the procedural guarantees envisaged in this Article, to withdraw the recognized status by virtue of the "cessation clauses" provided for by the "Qualification Directive"⁶²⁹. This modification is a step forward.

SOLUTION:

1. In contrast to the provisions of the recast proposal which introduce the right to (free) legal assistance at all stages of the procedures at first instance (Article 18 (1) and (2) (a)), this right is only recognized once the "competent authority"⁶³⁰ has taken the decision to withdraw the international protection status (Article 40 (3), recast proposal). We do not see how this difference in treatment can reasonably be justified.

2. Concerning the right to be heard, Article 40 (1) (b), recast proposal allows Member States to replace the personal interview with a written statement of the reasons why it is justified to withdraw the status⁶³¹; taking into account the proposals of the Commission with regard to the right to a personal interview for the examination of an application for international protection, we do not see why the person concerned would not have the right to a personal interview before the withdrawing of the status, at least when he/she expressly requests such an interview.

10. FINAL REFLECTIONS ON THE COMPLEXITY OF THE PROCEDURES AT FIRST INSTANCE

In its current version, the language of the APD is incoherent and sometime ambiguous; the Directive is unnecessarily overcomplicated and the aim of harmonization is severely undermined by the scope for multiple and different optional procedures and the large number of permissible derogations from the "minimum" standards the Directive is supposed to set. If a decision was taken to prohibit all the discretionary procedures currently envisaged by the Directive, it would eliminate many of the differences in the national procedures of the Member States.

627 It has to be recalled that the authority has to take into account the principle of non refoulement before taking the decision. What is, in this context, the value of the opinion given by the determining authority without any respect for a minimum of procedural safeguards?

628 See, for instance: ECtHR, *Chahal and Ahmed*.

629 This amendment is justified by the aim of enabling the person concerned to bring forward his/her views with regard to the applicability of the cessation clauses in his/her particular circumstances in line with the case law of the CJ regarding the right to be heard (COM (2009) 554 annex (Det. Expl.), Article 39).

630 We suppose that this has to be understood as the "determining authority".

631 This possibility is already provided for by Article 38 (1) (b), APD.

It seems however, on the other hand, also unreasonable to abolish every kind of specific or accelerated procedure. Thus, the most realistic way to adopt such a procedure is to examine if it is possible to simplify the variety of procedural exceptions and derogations, to reduce the number of special accelerated or specific procedures as much as possible, and to give the power to decide on the merits of the claim as much as possible to the determining authority (and not to other national authorities such as border guards). It has also to be provided that the minimal guarantees laid down for the ordinary (regular) procedure would also apply to the accelerated or specific procedures, unless this appears completely incompatible with the specificity of those procedures and with the minimal condition that the derogations provided for by those procedures can be considered as conforming with the case law of both the ECtHR and the CJ.

Most of the amendments of the Commission represent real progress in comparison to the level of "minimum" guarantees actually foreseen by the APD. We refer inter alia:

- to the limitation of the "Dublin" cases, of the cases in which an authority other than the "determining authority" can be responsible for the examination of an asylum claim⁶³², with the reservations that a risk of confusion exists, and that there is a need for clarification of some provisions of the recast proposal which expressly refer to "competent authorities"⁶³³;
- to the distinction that is clearly made between the "determining authority", responsible for the examination of the asylum claim, and the "competent authorities", such as the border guards, police, immigration authorities and personnel of detention facilities, responsible for the receipt and registration of applications for international protection and the delivering of the required information at the de facto asylum seekers⁶³⁴;
- to the additional guarantees introduced in order to ensure information and advice at border crossing points and detention facilities⁶³⁵;
- to the additional provisions provided to ensure a better protection of vulnerable groups (such as medical, cultural, child, or gender issues)⁶³⁶;
- to several obligations ("shall") imposed on the Member States in some proposed amendments in the place of a mere option ("may")⁶³⁷;
- to the limitation of the possibilities of omitting a personal interview⁶³⁸ and to the additional requirements provided for the conducting of the interview⁶³⁹, the right for the legal adviser or other counsellor of the applicant to be present during the interview⁶⁴⁰;
- to the abolition of the several stand-still clauses currently provided by the APD.

This can be explained by the philosophy which underlies the recast proposal: that all necessary efforts are made to ensure a rigorous examination of the protection needs where a person lodges an application for the first time⁶⁴¹. This means, in other words, ensuring

632 Article 4, (3), recast proposal.

633 See Section II.4.

634 Articles 4, (1) and 6, (1) and (8), recast proposal.

635 Article 7, recast proposal.

636 See, inter alia: Articles 9 (2) and 17, recast proposal. See Article 20 (3), recast proposal that provides that the specific "accelerated procedure"(Article 27 (6), recast proposal) and the specific "unfounded procedure"(Article 27 (7), recast proposal) cannot be applied to applicants with special needs.

637 See, inter alia, Article 9 (5) recast proposal: obligation on the Member States to provide rules concerning the translation of documents relevant for the examination of applications for international protection.

638 Article 13 (2), recast proposal.

639 Articles 15 and 16, recast proposal.

640 Article 19 (3) and (4), recast proposal.

641 COM (2009) 554 annex (Det. Expl.), Article 35.

robust determinations at first instance and the reduction of the risk of annulment by appeal bodies of the decision taken at first instance⁶⁴².

SOLUTION: the recast proposal represents a good step forward in the harmonization of the procedures at first instance and is in line with the case law of the ECtHR and of the CJ that we have analyzed. We recommend that the Parliament should support this proposal and examine if each proposed amendment is at least in conformity with the above-mentioned case law. We also suggest the examination of the recommendations made in this draft.

SECTION 5: JUDICIAL PROTECTION AND APPEAL PROCEEDINGS: EFFECTIVENESS OF JUDICIAL PROTECTION (ARTICLE 39, APD – ARTICLE 41, RECAST PROPOSAL)

1. GENERAL COMMENTS ON THE ORGANIZATION OF THE JUDICIAL PROTECTION AND THE INTEGRATION OF THE CASE LAW OF ECTHR AND CJ

1.1. General comments on Article 39 APD: wide margin of discretion given to Member States

The judicial protection of asylum seekers was one of the most discussed topics of the APD during the different stages of its drafting. Comparing the different drafts of the Directive (nine articles in the initial proposal; four articles in the amended proposal; one article in the APD) demonstrates clearly the restrictive position adopted in the final version concerning this matter and the wide margin of appreciation given to Member States, but “in accordance with their international obligations”⁶⁴³. This evolution, in the sense of a restrictive interpretation of the “minimum” common standards applicable to the judicial review, which is the result of the specificity of the judicial system of each Member State and of a sensitive political compromise⁶⁴⁴, is also apparent in each explanatory memorandum of the initial and amended proposals of the Directive, as well as in some recitals accompanying these proposals.

At the end of this evolution and taking into account the different provisions of the APD, it is possible to conclude the following:

- in the matter of international protection applications Article 39 (1), APD, constitutes the mere reaffirmation⁶⁴⁵ of the basic EU law principle of the right to an effective remedy before a court or a tribunal within the meaning of Article 267, EUT (former Article 234, ECT)⁶⁴⁶, insofar as it obliges Member States to provide an effective remedy before a court or a tribunal against a (negative) decision on an application for international protection and gives an (illustrative)⁶⁴⁷ list of such decisions. In

642 COM (2009) 554 final, Expl. Memo., No 3.1. – p. 5.

643 Article 39 (3), APD.

644 See, inter alia: D. ACKERS; J. JAUMOTTE, Nos. 48 and 49.

645 See recital (27), APD (“It reflects a basic principle of Community law that [...]).

646 A right which is now expressly recognized as a fundamental right of the European Union (Article 47 (right to an effective remedy and to a fair trial) CFR.

647 The attention can indeed be put on the fact that this provision does not mention all the possible decisions that can be taken by virtue of the APD(it is, for instance, the case for decisions taken in the

other words, a right to an effective remedy would already be available against each negative decision taken on an application for international protection, even if it was not expressly envisaged by the national legislation of a Member State. Any national provision which prohibited such an effective remedy would certainly be condemned by the CJ, either on request of the Commission or in the framework of a preliminary ruling⁶⁴⁸;

- some provisions of the APD, which are normally applicable to the administrative procedures at first instance, also contain some procedural guarantees regarding the judicial procedures:
 1. right to information in writing⁶⁴⁹ and in reasonable time⁶⁵⁰, of the result of the decision taken by the “competent authority”, with the indication of the reasons in fact and in law that are stated in a negative decision⁶⁵¹;
 2. right to information on how to challenge a negative decision in writing at the same time as the notification of that decision, unless such information has already been provided at an earlier stage of the procedure⁶⁵²;
 3. right of applicants to the services of an interpreter with equivalent guarantees as those provided for the procedures at first instance⁶⁵³;
 4. the opportunity to communicate with the UNHCR or with any other competent organization⁶⁵⁴;
 5. right to legal assistance and/or representation, and right to free legal assistance and/or representation under some conditions⁶⁵⁵; right for the court or the tribunal, if it is necessary for the fulfilment of their task, to have access to precise and up-to-date information obtained and used for the examination of the application⁶⁵⁶; right for the legal adviser or other counsellor who assists or represents an applicant under the terms of national law, to enjoy access to such information in the applicant’s file as this information is liable to be examined by the court or the tribunal during the appeal procedure, but only insofar as the information is relevant to the examination of the application - this right does not apply under

framework of the “National security provisions”). It does not however, imply that there will be no judicial review against the decisions which are not expressly cited.

648 The fact can also be emphasized that many Directives in immigration matters or in other matters of Community law contain, most of the time, only one provision simply referring to “the right for a remedy”, “the right to mount a legal challenge”, “the possibility of an appeal or a review before a judicial body”, the right to “a judicial redress procedure”, the right to an “application for appeal against or judicial review of the expulsion decision”, the right to “a judicial control”, or the right to “an effective remedy to appeal against or seek review of decisions related to return, [...], before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence”, and that some Directives, notwithstanding the matter concerned, do not even contain any provision referring to the right to an effective remedy. This does not hinder the right for each person concerned to challenge, before a court or a tribunal within the meaning of Article 267, EUT, any negative decision regarding each right and/or freedom guaranteed by the law of the Union.

649 Article 9 (1), APD (Article 10 (1), recast proposal).

650 Article 10 (1) (d), APD (Article 11 (1) (d), recast proposal).

651 Article 9 (2), APD (Article 10 (2), recast proposal). For a decision to withdraw the status: Article 38 (2), APD (Article 40 (2), recast proposal).

652 Article 9 (2), APD (Article 10 (2), recast proposal). For a decision to withdraw the status: Article 38 (2), APD (Article 40 (2), recast proposal).

653 Article 10 (1) (b) and (2), APD (Article 11 (1) (b) and (2), recast proposal (this means that the applicant shall receive those services for submitting his/her request “whenever necessary” and, at least, when he/she has to be interviewed by the judicial body and that appropriate communication cannot be ensured without such services; in such case, those services shall be paid for out of public funds).

654 Article 10 (1) (c) and (2), APD (Article 11 (1) (c) and (2), recast proposal).

655 Article 15, APD (Article 18, recast proposal).

656 Article 8 (3), APD (Article 9 (4), recast proposal).

some exceptions provided by Member States⁶⁵⁷; right for the legal adviser or an other counsellor who assists or represents an applicant under the term of national law, to have access to closed areas (such as detention facilities and transit zones for the purpose of consulting the applicant⁶⁵⁸), unless some restrictions expressly provided for by Member States exist;

- that Article 39 (3) APD, concerning the possibility of a suspensive effect of a judicial appeal, goes far in terms of giving an assurance, such as demonstrated by the recent case law of the ECtHR⁶⁵⁹, that the national law or regulation of the Member States will effectively be in accordance with their “international obligations”, including among others: 1°) respect of the principle of non refoulement, of Articles 2 and 3, ECHR, and/or of Articles 2, 3, 18 or 19, CFR; 2°) and that each national judicial system will conform with the minimum required criteria for an “effective” remedy, within the meaning – dependent from the violation that is invoked in the request of appeal-, of Article 13 or of Article 6, ECHR, such as is recognized by virtue of the general principle of Community (now EU) law and, since the entry into force of the Treaty of Lisbon, of Article 47 CFR⁶⁶⁰.

As has already been emphasized and such as has recently been exposed by the UNHCR⁶⁶¹, regarding the practice of each Member State in the organization of the judicial review provided by Article 39, APD, there are multiple differences between Member States with regard to the level of protection standards and procedural guarantees provided by each national judicial system. This statement can be made notwithstanding the guarantees expressly foreseen by the APD, which give a wide margin of appreciation to the Member States.

Even if it can be considered that the basis of the substantial differences lies in deeply rooted differing concepts of judicial protection, it must however be admitted that some of these divergences are not in line with the aim of a harmonized approach at EU level of the examination of applications for international protection which is being pursued with the construction of the CEAS⁶⁶².

The first question to resolve is whether or not it is acceptable to maintain the minimalist position adopted at the time of the adoption of the APD, bearing in mind the wide margin of discretion given to Member States to organize the “right to an effective remedy” within the framework of a reinforced CEAS? In this regard, it is explained in recital (27), APD that “The effectiveness of the remedy, also with regard to the examination of the relevant facts,

657 Article 16 (1), APD (Article 19 (1), recast proposal).

658 Article 16 (2), APD (Article 19 (2), recast proposal).

659 See, for instance: Conka, par. 79; Jabari, par. 50; Gebremedhin, par. 67; Abdolkhani and Karimnia, par. 116.

660 In the explanations of the Presidium regarding Article 47 of the Charter, it has expressly been noted that the second paragraph of this Article corresponds to Article 6 (1), ECHR, but that, in Community law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations (Explanations CFR, p. 41).

661 UNHCR Study 2010, p. 83 (Article 39 – Effective remedies) and CR-Rom attached to the study (Section 16 – The right to an effective remedy).

662 As observed in the recent (29.4.2009) Report of the LIBE Committee on the proposal of the Commission for recasting the “Dublin” Regulation, “From a political point of view, it is apparent that Member States find it difficult to effectively harmonize quality standards as well as to share responsibility. Standards agreed upon so far are in great contrast with the high ambitious as first expressed in 1999. In fact, the highest common denominator is the very minimum. As a consequence huge differences and divergences continue to exist in practice. The Asylum Procedures Directive, for example, is actually an enumerative description of all existing asylum policies in the EU Member States. So it provides for a number of procedural standards rather than for a standard procedure. In this respect, the desired harmonization clearly failed.” (A6-0284/2009, p. 34/40).

depends on the administrative and judicial system of each Member State seen as a whole". It has also been asserted in the explanatory memorandum of the amended proposal (2002)⁶⁶³ that Member States, when they are implementing Community law, have to take into account the case law of the CJ, which establishes the requirements for a remedy to be effective. The ECtHR has also recently considered⁶⁶⁴ that the presumption must be that each Member State will abide by its obligations under the Council Directives 2005/85/EC (APD) and 2003/9/EC (Reception conditions) to adhere to minimum standards in asylum procedures and to provide for minimum standards for the reception of asylum seekers and that each Member State, as a contracting state to the ECHR, has undertaken to abide by its Convention obligations and to secure for everyone within their jurisdiction the rights and freedoms defined therein, including those guaranteed by Article 3. However, this presumption, just like the presumption that remedies organized at EU level respect the requirements of ECHR⁶⁶⁵, is rebuttable, in the framework of a "case by case" examination by the ECtHR⁶⁶⁶.

Taking the above-mentioned into account, it would be possible to consider that it is sufficient to assert in the Directive, without any further explanation, the right to an effective remedy before a court or a tribunal. It would even be possible to say nothing in the Directive, taking into account that the right to an effective remedy is already recognized by the CJ as a general principle of Community Law and is, now, expressly provided by Article 47, CFR. Within this approach, it would nevertheless, be useful to examine the case law of both CJ and ECtHR and to try to establish a list of the minimum criteria which consider whether a remedy is "effective" or not. We have attempted to establish such a list in a working document, but with the difficulty of determining if some of the criteria pointed in the case law of these courts have to be considered as "transversal" criteria or as criteria specific to the matter submitted to the Court. In other words, is the intensity of the effectiveness of a judicial review the same whatever (a) the matter concerned (for instance, a removal outside the EU (to another country of the Council of Europe or to a third country) or a "Dublin" decision (between Member States), (b) the right in question (right to stay; right to ask for international protection; violation of Articles 2 and 3 ECHR; violation of the principle of non-refoulement;...) or (c) the potentially irreversible character of the damage that may occur if the challenged decision, or the expulsion order taken on basis of this decision, was executed before the decision of the court or tribunal on the judicial review? At this stage, the difficulty in establishing such a list becomes apparent as neither the CJ nor the ECtHR really provides a general structure by which effectiveness of judicial protection must be determined, with the consequence that the statements of these two courts always have to be considered on the basis of the specific facts of the case and may not be, as a rule, easily generalized. But this does not constitute a reason to abandon the establishment of such minimal requirements for an effective remedy.

It must however, be emphasized that such a minimal approach appears to conflict with the aim of realizing the second stage of implementation of the CEAS:

- firstly, it has already been observed that the discussions concerning EU asylum legislation and the first stage of implementation of a CEAS have clearly shown that "setting standards in the area of asylum is very different from setting standards in

663 COM (2002) 326 final (commentary on Article 38).
664 ECtHR, K.R.S., p. 18.
665 ECtHR, Bosphorus, par. 156.
666 ECtHR, K.R.S., p. 16.

traditional areas of EU competence⁶⁶⁷. If it seems, on the one hand, to be sufficient to provide for the principle of an effective remedy in those traditional areas, the experience and the case law of the CJ and of the ECtHR demonstrate, on the other hand, the necessity to be more explicit in asylum legislation;

- secondly, if the eventual aim of the EU is to formally enshrine the principle of the mutual recognition of all⁶⁶⁸ individual decisions, both negative and positive, taken by all the competent or determining authorities of Member States ruling on applications for international protection, (which would imply that protection can be transferred between Member States without the adoption of specific mechanisms of recognition at European level), then there is no other solution than to determine the minimal criteria that are to be taken into account to ensure that each applicant has had the opportunity to exercise an effective remedy, at least at the first level of judicial review, whatever the Member State concerned⁶⁶⁹;
- Thirdly, taking into account the proposals of the Commission to recast the "Dublin Regulation"⁶⁷⁰ and the "Reception Conditions Directive"⁶⁷¹ on this matter, we do not see why it would not be possible to do the same for the APD.

To conclude, it appears that Article 39, APD should be amended or, at least, reviewed, to specify, in addition to the guarantees already provided by some provisions of the Directive, the minimal criteria (such as: minimum (suspensive) time limit to introduce a review; examination by the court of both facts and points of law; rules on the suspensive effect of the appeal or the review; scope of examination by the court; etc) which ensure the effectiveness of the first level of judicial review in each Member State⁶⁷².

667 Amnesty international, "The EU and Human Rights - Making the impact on people count", 2009, p. 15.
 668 ECRE has however, recently stated its regret that the final version of the Stockholm Program does not include the principle of mutual recognition of positive decisions on asylum applications (Memorandum for Spanish Presidency, No. 4 – p. 8). The Commission has however, recalled that the establishment of the CEAS and the EASO should ensure [...] high common standards of protection in the EU and a common asylum procedure with mutual recognition as the long term goal (Action Plan Stockholm Program, p. 7).

669 In comparison, the European Council has recently recalled, in civil and criminal matters, that, in order for the principle of mutual recognition to become effective, mutual trust needs to be strengthened by progressively developing a European judicial culture based on the diversity of legal systems and unity through European law (Stockholm Program, p. 21). The Commission has also recently emphasized that the European judicial area and the proper functioning of the single market are built on the cornerstone principle of mutual recognition, which requires e.g. "minimum standards, among other on procedural rights" (Action Plan Stockholm Program, p. 8).

⁶⁷⁰ See Article 26, recast "Dublin Regulation".

⁶⁷¹ See Article 25, recast "Reception Conditions Directive".

672 This necessity to provide for clear and common criteria to ensure the effectiveness of the judicial remedy, at least at first level of instance, whatever the Member State concerned, has recently been emphasized by the recent announcement of Greece to modify, in a restrictive sense, the Presidential Decree 90/2008, which incorporates into Greek law the provisions of the APD. Regarding this modification, Amnesty International, among others, has expressed its concerns by the fact that asylum seekers, whose applications have been rejected at the first stage of the examination of their claim, would only have access to a review by the Council of State, which does not cover the substance of the request, but merely examines procedural aspects (Amnesty International Public Statement, 15 May 2009 (EUR 25/005/2009):Greece: Proposed changes to asylum procedures flagrantly violate international law). See also: UNHCR Study 2010, p. 83-92 and CR-Rom attached at the study (Section 16 – The right to an effective remedy).

1.2. Consequences of the entry into force of Article 47, CFR (and Article 19 (1) TEU) and interaction with the recent case law of the CJ and of the ECtHR

The general principle of EU law of the right to an effective remedy, such as is recognized in the case law of the CJ⁶⁷³, is now expressly provided for by Article 47, CFR: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article"⁶⁷⁴. These conditions, which were mostly already recognized by the case law of the CJ and/or of the ECtHR as minimal requirements for an effective remedy, are⁶⁷⁵: 1°) a fair and public hearing; 2°) held within a reasonable time; 3°) by an independent and impartial tribunal previously established by law; 4°) with the possibility for everyone of being advised, defended and (/or) represented (= right to legal assistance and/or representation); 5°) and with possible access to legal aid (= right to free legal assistance and/or representation) for those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice⁶⁷⁶.

Even if Article 18, CFR, concerning the right "to asylum", only expressly refers to the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967, Article 78, paragraph 1, TFEU requires the Union to develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This paragraph provides furthermore, that this common policy must be in accordance not only with the Geneva Convention and the Protocol of 31 January 1967, but also with "other relevant treaties". By virtue of paragraph 2 of this Article, measures shall be adopted for a common European asylum system (CEAS) comprising, among others, "(d) common procedures for the granting and withdrawing of uniform or subsidiary protection status".

By virtue of Article 15 of the "Qualification Directive"⁶⁷⁷, concerning the qualification for subsidiary protection, "serious harm" can consist of: "(a) death penalty or execution⁶⁷⁸; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin⁶⁷⁹; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflicts". With the introduction, in the recast proposal of the APD, of a single procedure encompassing both

673 CJ, Johnston, par. 18 and 19; Panayatova, par. 27; CJ, Arcor AG & Co, par. 174. The Court has recently emphasized that this principle of effective judicial protection has also been "reaffirmed by Article 47 of the Charter of fundamental rights of the European Union" (CJ, Unibet Ltd, par. 37, and Yassin Abdullah & Al Barakaat, par. 335).

674 In the explanations of the Presidium relating to the text of the Charter, it has been expressly affirmed that the first paragraph of Article 47 is based on Article 13, ECHR, with the particularity that the protection is more extensive in Community law since it guarantees the right to an effective remedy before a court (and not only before "an independent body" within the meaning of Article 13 ECHR) (Explanations CFR, p. 41).

675 We refer to the working document already mentioned.

676 It is also affirmed in the explanations of the Presidium relating to the text of the Charter that these conditions are derived from the requirements of Article 6, par.1, ECHR, taking into account that, in Community law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations and that, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union (Explanations CFR, p. 41).

677 Article 15, recast proposal.

678 Compare with Article 2 (2), CFR.

679 Compare with Article 4, CFR.

forms of international protection⁶⁸⁰, the right for each applicant to make an application for international protection, with the correlative obligation for the “determining/competent” authority to examine such an application, has to be considered as a right guaranteed by the law of the Union and, as a right to which Article 47 of the Charter applies⁶⁸¹, as well as Article 19 EUT⁶⁸².

The consequences⁶⁸³ are:

- that the requirements to provide an effective remedy have to apply at the level of any appeal against a negative decision taken on an application for international protection by virtue of the (recast) APD, and not just when it is decided to execute a removal order or an expulsion measure taken in execution of the negative decision on the application for international protection. For such measures of execution, it can be considered that it is the “Return Directive” which would apply⁶⁸⁴;
- that conditions expressly laid down in Article 47, CFR will have to be taken into account the, as well as the minimum requirements of the case law of the ECtHR regarding Article 13, ECHR⁶⁸⁵, and/or the minimum requirements of the case law of the CJ regarding the effectiveness of a remedy, under both Articles 6⁶⁸⁶ and 13, ECHR;
- that the case law of the ECtHR regarding Article 13, ECHR will also be applicable to decisions adopted in the field of international protection;
- that EU law may guarantee more extensive protection for applicants for international protection, with the consequence that the scope of the guaranteed rights are determined not only by the ECHR and the Protocols to it, but also by the case law of the ECtHR and by the case law of the CJ⁶⁸⁷;
- that, where there is a divergence in the case law of these two courts (for instance, regarding the minimal requirements for the (automatic) suspensive effect of an appeal), the case-law that gives the most guarantees for the effectiveness of the judicial remedy will have to be applied^{688/689}

680 See, inter alia, Articles 2 (a), (b), (c), (g), (h), (i), (j) and (k), and Article 3 (1), recast proposal.
681 H. BATTJES, Nos. 419 and 420 – p. 326. It has also to be recalled that the provisions of the Charter also apply to the Member States when they are implementing Union law (Article 51, par. 1, CFR).
682 By virtue of which “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”.
683 Which have been rightly applied by the Commission in the recast proposal APD.
684 Inter alia, Articles 12 (procedural guarantees for the notification of the expulsion or removal orders) and 13(remedies against such decisions) “Return Directive”.
685 The ECtHR has considered that Article 6 ECHR does not apply to asylum and immigration claims and that those claims, such as with any kind of decision adopted in the field of migration or asylum, are covered by Articles 2, 3 and 8 ECHR, in combination with Article 13 ECHR, and Protocol No. 7 to the Convention, concerning the right to an “effective remedy” before an independent and impartial body(Maaouia, par. 36; Mamatkulov and Abdurasulovic, par. 80; Olaechea Cahuas, par. 59; Muminov, par. 126).
686 Such as was recalled by H. BATTJES(Nos. 410 and 417), “The standards of Article 6 (1) ECHR however do apply as general principles of Community law”
687 Article 52, paragraph 3, CFR and comments of the Presidium relating to the text of the Charter (Explanation CFR, p. 48).
688 As a consequence, we should have to take into account, in addition to the case law of the ECtHR, the case law of the CJ, not only in migration and asylum matters, but also in other matters insofar it concerns the criteria to ensure effective judicial protection. It is not surprising that the European Commission has justified several amendments to the current Directive, inter alia those regarding the appeal procedure, by the necessity to take into account the recent and evolving case law of the CJ (COM (2009) 554 Annex (Det. Expl.), Articles 6, 9, 13, 19, 27, and 41 – See also: SEC (2009)

To conclude, it is in light of these principles that we will now examine some of the procedural guarantees of the judicial remedy such as are provided in the recast proposal.

2. TIME-LIMITS FOR THE EXERCISE OF THE RIGHT TO AN EFFECTIVE REMEDY (ARTICLE 39 (2), APD – ARTICLE 41 (4), RECAST PROPOSAL)

It is foreseen merely that Member States shall provide for “reasonable” time-limits for the applicant to exercise the right to an effective remedy. This formulation is maintained in the recast proposal.

SOLUTION: taking into account the great variety of time-limits that have been determined by Member States⁶⁹⁰, it would be useful to introduce in the directive a minimum common time limit for all Member States to introduce an appeal. This time-limit could vary depending upon the procedure which has been applied in the specific case.

3. RIGHT TO LEGAL ASSISTANCE AND REPRESENTATION (ARTICLE 15 (3) TO (6), APD – ARTICLE 18 (1) (B), AND (2) TO (7), RECAST PROPOSAL)

This topic has already been examined in this report⁶⁹¹. As we have seen, the right to legal assistance and/or representation in judicial procedures was already provided by Article 15, APD (now Article 18 (1), recast proposal) and is now expressly confirmed by Article 47, CFR.

In terms of the right to free legal assistance and/or representation, the possible limitations to this right are enumerated in Article 18, recast proposal. It is available only to those who lack sufficient resources, and/or only to legal advisers or other counsellors specifically designated by national law to assist and/or represent applicants for international protection, and/or insofar as such assistance is necessary to ensure an effective access to justice.

As is explained by the Commission⁶⁹², this latest limitation, which enables Member States to apply a “test” before granting free legal assistance in appeal procedures, is indeed in line with Article 47 CFR, which does not expressly recognize an absolute right to free legal assistance⁶⁹³. But it has however, to be recalled⁶⁹⁴ that the ECtHR has considered that the absence of free legal aid cannot have the result that access to the court or tribunal may be jeopardized and that, to assess whether legal aid is or not necessary, the particular facts

1376(part II) - Impact Assessment, annex 21(Overview of international and community standards on access to effective remedy).

689 As we have already seen, the same reasoning has to be applied regarding the case law of the ECtHR and, particularly, of the CJ, concerning the minimal requirements for a “fair and efficient” administrative procedure at the first instance.

690 The Commission has mentioned variations from 3 to 75 days (SEC (2009) 1376(part II) – Impact Assessment, annex 21(Overview of international and community standards on access to effective remedy).

691 Section II.6.

692 COM (2009) 554 Annex (Det. Expl.), Article 18 – p. 10.

693 We can come to the same conclusion after the examination of the case law of the CJ and of the ECtHR (including among others: ECtHR, Airey, par. 24-26).

694 ECtHR, Kreuz, par. 59.

and circumstances of each case must be taken into account and, in particular, the importance of what is at stake for the applicant in the proceedings⁶⁹⁵. This latest criteria is of importance in application for international protection.

4. ACCESS TO INFORMATION BY THE COURT OR TRIBUNAL AND/OR BY THE APPLICANT AND/OR HIS/HER COUNSELOR AND/OR REPRESENTATIVE (ARTICLE 16 (1), APD – ARTICLE 19 (1), RECAST PROPOSAL)

By virtue of Article 16 (1), APD, the court or tribunal has access to the information contained in the applicant's file except where such access is precluded in cases of national security. By virtue of the same provision, the legal adviser or other counsellor who assists or represents an applicant shall also have access to such information, insofar as the information is relevant to the examination of the application. It is furthermore foreseen that Member States may make an exception to this access where disclosure of information or sources would jeopardize national security, the security of the person(s) to whom the information relates or where the investigative interests relating to the examination of applications for asylum by the competent authorities of the Member States or the international relations of the Member States would be compromised.

It has however, been recognized by the CJ that the right to be heard by a court or a tribunal occupies an eminent position in the organization and conduct of a fair legal process⁶⁹⁶ and that, as a consequence, judicial authorities must be able to receive and examine the evidence alleged to be confidential or secret⁶⁹⁷. On the contrary, the adversarial principle does not mean that the parties are entitled to unlimited and absolute access to all of the information relating to the procedure concerned⁶⁹⁸. In terms of Article 3, ECHR, the ECtHR has also repeatedly insisted on the fact that legitimate national security concerns in expulsion cases must be balanced by arrangements which accord an individual a substantial measure of procedural justice: the judicial authority must, for instance, be competent to reject the executive's assertion that there is a threat to national security where it finds it arbitrary or unreasonable, and there must be, in this case, some form of adversarial proceedings, if need be through a special representative after a security clearance⁶⁹⁹.

Taking into account the case law of both the CJ and the ECtHR, we can agree with the considerations of the Commission that Article 19 (1) of the recast proposal is indeed in the line of the "evolving jurisprudence of respectively the European Court of Justice and the European Court of Human Rights regarding access to effective remedy"⁷⁰⁰.

By virtue of this provision, the following guarantees are recognized: 1°) the legal adviser or other counsellor of the applicant will normally have access to the information in the applicant's file unless some exceptions exist, but with the obligation for the Member States in such cases to grant access to the information to a legal advisor or counsellor who has

695 ECtHR, *Steel and Morris*, par. 61.

696 CJ, *Eurofood IFSC Ltd*, par. 66.

697 CJ, *Varec SA*, par. 53.

698 *Ibidem*, par. 51.

699 See, for instance: ECtHR, *Al-Nashif*, par. 44.

700 COM (2009) 554 Annex (Det. Expl.), Article 19 – p. 10.

undergone a security check, insofar as the information is relevant to the examination of the application; 2°) the court or tribunal will in all cases have access to this information.

5. (AUTOMATIC) SUSPENSIVE EFFECT OF THE JUDICIAL REVIEW (ARTICLE 39 (3), DIRECTIVE – ARTICLE 41 (5) TO (8), RECAST PROPOSAL)

If we examine the different drafts of the APD and the comments on those drafts, we can conclude that Article 39 (3), APD is the result of a sensitive political compromise, which means that the final text contains a lot of ambiguities and legislative gaps. The APD does not guarantee as such a (automatic) suspensive effect of an appeal and, by the use of terms such as “where appropriate” and “in accordance with their national obligations”, this provision refers indeed in a rather vague manner to the competence of each Member State to enact rules concerning the (automatic or not) suspensive effect of an appeal or a review to challenge a negative decision on an application for international protection⁷⁰¹.

In several judgments⁷⁰², the ECtHR has however, considered that different national provisions were not in accordance with the Member State’s obligations under Article 13, ECHR; the Court, referring to its previous judgment in the case *Conka*⁷⁰³, has indeed considered that an effective remedy under Article 13, ECHR requires, at least, the possibility of stopping the execution of measures which may be contrary to the Convention⁷⁰⁴. In a recent decision of 2 December 2008⁷⁰⁵, declaring an application as inadmissible, the Court summarized the contracting States’ obligations under Articles 3 and 13 of the Convention as the following: from the Court’s reasoning, when an applicant, invoking a violation of Article 3 of the Convention, asks for the suspension of a negative decision on its asylum claim or of the subsequent measure of expulsion, such a decision or measure may not be executed until a court has passed a first decision on the arguability of this claim. In a judgment of 11 December 2008⁷⁰⁶, the Court insisted on “the provision of an effective possibility of suspending the enforcement of measures whose effect are potentially irreversible” and in a judgment of 22 September 2009⁷⁰⁷, the Court reiterated that “where an applicant seeks to prevent his or her removal from a Contracting State, a remedy will only be effective if it has automatic suspensive effect”.

The key elements to justify, at least, giving the applicant the opportunity to ask for the suspension of the decision, with a suspensive effect of this request, are the invoked violation of Article 3, ECHR and the potentially irreversible damage that could occur if the expulsion takes place before a decision taken by the court or tribunal.

701 As has recently been observed by the UNHCR, this has led to great divergences between the national law and practices of Member States (UNHCR Study, 2010, p. 88 [“the research has found that a significant number of the [twelve] Member States surveyed do not afford automatic suspensive effect to appeals against certain decisions, or decisions taken in certain procedures, or to applicants in certain circumstances. In two Member States, automatic suspensive effect is not afforded in any appeals”]).

702 See, for instance: *Jabari*, par. 50 and *Gebremedhin*, par. 66.

703 ECtHR, *Conka*, par. 75.

704 As already observed, “The Court does not prescribe a right to remain until [a court or a tribunal] has decided in substance on an appeal against a negative asylum decision, [but she] requires, however, a suspensive effect until a judge has passed a decision on the lawfulness of the authorities’ decision to execute a decision due to its manifest unfoundedness in a preliminary protection procedure” (*Kay Hailbronner*, Minimum Standards, par. 8).

705 ECtHR, *K.R.S.*, p. 15.

706 ECtHR, *Muminov*, par. 102.

707 ECtHR, *Abdolkhani and Karimnia*, par. 108 and 116.

The CJ has not yet had the opportunity to examine the question of the suspensive effect of a judicial review against a decision to reject an application for international protection or against a removal order or a decision of expulsion taken in execution of such a decision. From the case law of the CJ in other matters, it does not appear that Member States would be required to provide, in all circumstances, for a (automatic) suspensive effect of a judicial appeal⁷⁰⁸. However, in a case where an expulsion order was challenged, the Court has considered that the alien should at least be able, before the execution of this order, to lodge an appeal and potentially to obtain the suspension of this expulsion order⁷⁰⁹, which means that the alien must at least have the possibility of requiring, with automatic suspensive effect of this request during the examination by the court or tribunal, the national court to grant interim relief in order to ensure the full effectiveness of the rights claimed under Community law⁷¹⁰. This can be explained by the fact that even if a Member State has no obligation to authorize an alien to remain within its territory for the duration of the proceedings, the alien must nevertheless be able to obtain a fair hearing and to present his defence in full⁷¹¹. With regard to interim relief, the Court has also held that the effectiveness of Community law may require the national court to grant interim relief in order to ensure the full effectiveness of the rights claimed under Community law⁷¹².

The combination of the case law of ECtHR and of the CJ, and the fact that, as we have already explained, the right to ask for an international protection has to be recognized as a (fundamental) right guaranteed by the law of the Union, implies that article 39 (3), APD must be reviewed and that, within the framework of the second stage of implementation of the CEAS, the following minimal guarantees must be provided:

- 1°) the time limit given to introduce a judicial review must have a suspensive effect;
- 2°) if the appeal has no suspensive effect as such, a minimum time limit would be given to permit the applicant to request an interim measure before the court or the tribunal;
- 3°) and the introduction of such a request would automatically have a suspensive effect until a court or a tribunal has examined whether substantial grounds for fearing a real risk of treatment contrary to Articles 2 or 3 ECHR exist: if yes, the suspension of the negative decision and/or of the expulsion measure would be ordered and the applicant would be authorized to remain on the territory, as a rule, until the decision of the court or of the tribunal on the substance of the claim is given; if not, it will be considered that there is no longer "an arguable claim" and the expulsion of the applicant will be possible before the final decision on the substance of the claim.

Such a system, which is also laid down in Article 26, recast proposal of the "Dublin Regulation" and which implies that two assessments have to be carried out by the competent court or tribunal, has however, been criticized and qualified as the minimum required to ensure an effective protection of the fundamental rights of asylum-seekers⁷¹³:

708 CJ, Commission, par. 52-56 ("the suspensory effect of actions brought before national courts cannot be considered essential for ensuring effective protection in the light of Community law"). The CJ has a well-developed and specific case law regarding the interpretation of the former Directive 64/221 on the free movement of EU citizens. However, this can be explained by the specific provisions (Articles 8 and 9) of this Directive, so that it is not possible to consider that the case law of the CJ on this matter (CJ, Dorr, par. 51) would be the affirmation of a general principle of Community law.

709 CJ, Royer, par. 57 and 62.

710 CJ, The Queen, par. 21; CJ, Sipples Srl, par. 19.

711 CJ, Pecastaing, par. 3 ("That requirement implies inter alia that the decision ordering expulsion may not be executed – save in cases of urgency – before the party concerned is able to complete the formalities necessary to avail himself of his remedy").

712 CJ, Siples Srl, par. 19.

713 Amnesty International, April 2009, par. 4 - p. 26. See also ECRE Information Note 2006, p. 9.

situations can arise whereby the court does not object to an expulsion pending the appeal or review but nevertheless finally annuls the negative decision taken on the asylum claim.

To avoid such situations, another solution would be to recognize in all cases the right to appeal to a court or a review body, with suspensive effect at first level. This was one of the basic procedural requirements putting forward by the European Parliament in June 2000⁷¹⁴.

A compromise could also include mixing the two solutions: automatic suspensive effect of the appeal until the final decision of the court or the tribunal at first level has been taken, unless some exceptions exist, such as, for example, applications declared “manifestly unfounded” on strictly delimited grounds, with in this cases the possibility of asking for a suspensive effect and the right to remain on the territory until the decision of the court on this request.

The Commission has proposed the following system in the recast proposal: 1°) as a principle, the introduction of a remedy against a negative decision shall have the effect of allowing the applicant to remain in the Member State pending its outcome⁷¹⁵; 2°) where the right to remain in the Member State pending the outcome of the remedy against a decision taken in an “accelerated” procedure or against a decision of “inadmissibility” of a “subsequent application” is not foreseen under national legislation, a court or a tribunal shall have the power to rule whether or not the applicant may remain on the territory of the Member State, either upon request of the concerned applicant or acting on its own motion⁷¹⁶; 3°) and the State shall allow the applicant to remain in the territory pending the outcome of this procedure⁷¹⁷.

It is furthermore expressly provided that when the negative decision has been taken at the border or in a transit zone, no expulsion may take place pending the outcome of the appeal procedure and that the court or the tribunal shall have the power to rule whether or not the applicant may remain on the territory of the Member State⁷¹⁸.

Although it can be criticized for not providing for a suspensive effect in all situations until the final decision taken by the court or the tribunal, such a proposal is acceptable in terms of the case law of the ECtHR and of the CJ mentioned above⁷¹⁹, but with one exception:

SOLUTION: the recast proposal should be amended in order to prevent enforcement of an expulsion order during the time-limit within which to lodge an appeal, (or at least the time-limit to request an interim measure of suspension) has expired and the right to appeal or to the request for interim measure has not been exercised.

714 European Parliament resolution, June 2000.

715 Article 41 (5), recast proposal.

716 Article 41 (6), recast proposal.

717 Article 41 (7), recast proposal.

718 Article 41 (6), last subparagraph, recast proposal and COM (2009) 554 Annex (Det. Expl.), Article 41 – p. 18.

719 See, within this meaning: UNHCR Study 2010, p. 88.

6. THE AVAILABILITY OF THE OPTION FOR EACH MEMBER STATE TO PROVIDE TIME-LIMITS FOR THE COURT OR TRIBUNAL TO EXAMINE THE DECISION OF THE DETERMINING/COMPETENT AUTHORITY

(Article 39 (4), APD – Article 41 (9), recast proposal)

Article 39 (4), APD and Article 41 (9), recast proposal provide that Member States “may” lay down time limits for the court or tribunal to examine the decision of the determining authority. The question is: what are the consequences of contravening such time limits?

7. SCOPE OF THE EXAMINATION BY THE COURT OR TRIBUNAL: FULL EXAMINATION/BOTH FACTS AND LAW/EXAMINATION “EX NUNC”/EXAMINATION “PROPRIO MOTU”

The recast proposal contains some new provisions in this regard which are justified by the Commission⁷²⁰ by the respective case law of the CJ and of the ECtHR concerning this topic: examination of both facts and points of law; full examination and examination “ex nunc”.

Taking into account that the right to ask for international protection is expressly recognized as a (fundamental) right of the Union and that this right also covers the protection under the “subsidiary protection status”, we can consider that the judicial appeal against a negative decision on such a request must comply with the same requirements as those provided, among others, by the case law of the ECtHR regarding the possible risk of violation of Articles 2 and 3, ECHR if an expulsion order or a removal decision is executed. In such cases, the ECtHR has indeed affirmed: 1°) the necessity of a full examination of the case⁷²¹; 2°) the necessity of a “ex nunc” examination⁷²²; 3°) and the necessity to examine both the facts and the points of law of the case⁷²³.

SECTION 6: CONCLUSIONS

Taking into account the fact that the option retained by the Commission in the final analysis⁷²⁴ and, it seems, also approved by the European Council⁷²⁵ and by the European Parliament⁷²⁶, is to maintain “national asylum systems” (on administrative level and on judicial level) that will have to apply “a single asylum procedure, with common obligatory guarantees”⁷²⁷, further legislative reform of the APD is a crucial need and the recast proposal constitutes a good step forwards provided it is completed or amended on some

720 COM (2009) 554 Annex (Det. Expl.), Article 41 – p. 18, and SEC (2009) 1376 (Annexes to the Impact Assessment), Annex 21.

721 NA, par. 112.

722 NA., par. 112. This examination concerns as well material placed before the court or tribunal by the parties, as, if necessary, material obtained proprio motu (ibidem, par. 119; Abdolkhani and Karima, par. 90).

723 CJ, Wilson, par. 62.

724 Communication from the Commission (COM(2009) 262/4), par. 5.2., page 27.

725 Pact on immigration and asylum, (point IV(b)).

726 EP resolution of 10 March 2009 on the future of the CEAS, par. 4.

727 It is, in reality, better described as a single asylum procedure (for both forms of international protection) comprising reinforced common procedural guarantees, than a common asylum procedure (SEC(2010) 535 final, p. 33).

points in order to reinforce the compliance with compulsory international rights and/or case law of CJ and ECtHR.

The EASO will have a crucial role to play in the future implementation of the recast proposal. As is provided in the Stockholm Program, this agency will be an important tool in the development and implementation of the CEAS and should further develop a common educational platform for national asylum officials, building in particular on the European Asylum Curriculum (EAC)⁷²⁸. It is thus not a surprise that the implementation of the EASO has been highlighted as one of the priorities of the European Commission⁷²⁹.

The future role of the ECtHR and CJ will be essential in order to ensure a common interpretation and or application of some procedural rules. It will be important to follow the case law of these two courts in the future⁷³⁰. The procedure before the CJ will be a very interesting source of law through the mechanism of preliminary rulings, with the possibility in urgent cases to ask the Court to act with minimum delay. The Treaty of Lisbon extends the competence of the CJ in the fields of asylum and immigration, giving any court or tribunal of a Member State the opportunity to request the Court to give a ruling, if it considers that a decision on this question is necessary to enable it to give judgment. Several preliminary rulings were already brought to the Court on important issues, such as the interpretation of the concept of serious and individual threat to the life or person of an applicant for subsidiary protection⁷³¹, or the detention of the asylum seekers^{732 733}.

728 Stockholm Program, p. 70.

729 Action Plan of the Stockholm Program, p. 45 (among others to develop a common methodology with a view to reduce the disparities of asylum decisions (ibidem, p. 55).

730 It has, in this regard, been expressly recalled in the Stockholm Program that the case law of the two Courts will be able to continue to develop in tandem, reinforcing the creation of a uniform European Fundamental and Human Rights System based on the ECHR and those set out in the CFR (Stockholm program, p. 11).

731 CJ, Elgafaji.

732 CJ, Said Shamilovich Kadzoev (Huchbarov).

733 CJ, Gataev, Khadizhat Gataeva; Brahim Samba Diouf.

ANNEX 1: "ASYLUM PROCEDURES": COMPARISON BETWEEN APD AND RECAST PROPOSAL

<p>Diagram of the procedures in the current Directive (APD) (without taking into account the "Dublin procedure" which is not covered by the current APD - Articles 4 (2) (a) and 25 (1) and recital (29)).</p> <p>(1) The regular procedure (Article 23 APD) (involves the adequate and complete examination of the asylum application by the determining authority and in accordance with the basic principles and procedural guarantees of Chapter II of the Directive, but with the exception of the right to a personal interview in several cases of "prioritized/accelerated" procedure[Articles 12 (2) (c) and 23, (4) (a), (c), (g), (h) and (i), Directive])</p> <p>(1)(a):"normal" regular procedure (obligatory procedure) (Article 23 (1) and (2) APD) : ordinary examination;</p> <p>(1)(b):Accelerated (or "prioritized") regular procedure (discretionary procedure) (Article 23 (3),APD: well-founded applications / special needs of the applicant / no relevance or not enough relevance to qualify as a refugee / clearly not a refugee / unfounded applications(Articles 23, (3), 28, (1), 29, 30 and 31) / manifestly unfounded applications (article 28, (1) and Article 23 (4)) (among others: the "safe country of origin" concept⁷³⁴ when it is defined as such in national legislation of the Member State - if not: examined as" unfounded applications").</p> <p>(2) "Inadmissible applications" procedure (discretionary procedure) (Articles 25 and 27 APD) (NO examination of the substance of the asylum application⁷³⁵) (among others: the "first country of asylum"(FCA) and the " safe third country"(STC) concepts)</p>	<p>Diagram of the procedures in the recast proposal of the Commission (without taking into account the "Dublin procedure" which is not covered by the recast proposal - Articles 4, (3), 24 (3) and 29 (1) and recitals (36) and (37)).</p> <p>(1) The regular procedure (Articles 27 and 28, recast proposal) (involves the adequate and complete examination of the asylum application by the determining authority and in accordance with the basic principles and procedural guarantees of Chapter II of the Directive, with a personal interview of the applicant unless the two exceptions provided by Article 13 (2), recast proposal exist)</p> <p>(1)(a):"normal" regular procedure (obligatory procedure) (Article 27, (1) recast proposal) : ordinary examination;</p> <p>(1)(b):"prioritized" regular procedure (discretionary procedure) (Article 27 (5) recast proposal): same requirements as for the "normal" regular procedure, but priority is given in some situations (application considered to be well-founded) or for some specific groups (applicants with special needs)</p> <p>(1)(c):"Accelerated" regular procedure (discretionary procedure) (Article 27 (6) recast proposal): no relevance to qualifying as a refugee / "safe country of origin" concept / presenting false information/documents-withholding relevant information/documents / destruction, false identity given in bad faith/travel documents / application made merely in order to delay or frustrate the enforcement of an earlier or imminent decision).</p> <p>(2) "Inadmissible applications" procedure</p>
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⁷³⁴ With the rebuttable presumption: the applicant can show that there are "serious reasons" to consider the country of origin as being unsafe in his/her particular circumstances (recital (21), APD).

⁷³⁵ Because it can be reasonably assumed that another country would do the examination or provide sufficient protection (recital (22), APD).

⁷³⁶ It means some European third countries which are considered to observe particularly high human rights and refugee protection standards (recital (24), APD).

<p>(3) "Specific" procedures (three procedures – containing the possibility of derogating, under certain conditions, from the basic principles and procedural guarantees of Chapter II of the Directive) (Article 24, APD)</p> <p>(3)(a): "Border (specific accelerated)" procedures (Article 35, APD) (procedure at the border, in transit zones or, in some circumstances, at locations in proximity to the border or transit zone- Article 35 (5) APD)</p> <p>(3)(a)(1): "Border regular (specific accelerated)" procedure (facultative procedure) (Article 35 (1) APD) (examination of the asylum application - which may be made by an authority other than the determining authority (Article 4 (4) (d)) -, in accordance with the basic principles and guarantees of Chapter II of the Directive, unless another procedure is used [including "Inadmissible application", "subsequent application", "European safe third country application"]);</p> <p>(3)(a)(2): Procedure of "preliminary examination" at the border (discretionary procedure) (Article 35 (2) to (4)) (by an authority other than the determining authority (Article 4, (4) (e)), which decides whether the applicant may or may not enter the territory - examination of the asylum application by the competent authority at the border, which can decide to consider the application for asylum "unfounded" or "inadmissible" and refuse entry on the territory).</p> <p>(3)(b) "European safe third country"⁷³⁶ procedure (discretionary procedure) (Article 36, APD - recital (24)) (no, or no full, examination of the asylum application if the competent authority (Article 4, APD) can establish that the applicant for asylum is seeking to enter or has entered illegally into its territory from such a country)</p> <p>(3)(c) "Subsequent application" procedure</p>	<p>(discretionary procedure) (Articles 29 to 32, recast proposal) (NO examination of the substance of the asylum application⁷³⁷) (among other: the "First country of asylum"(FCA)(Article 31, recast proposal) and the "Safe third country"(STC)(Article 32, recast proposal) concepts) (with the obligation of a personal interview – Article 30, recast proposal)</p> <p>(3) "Border ("inadmissible" or "accelerated)" procedures (Article 37 recast proposal) (procedure at the border, in transit zones or, in some circumstances, at locations in proximity to the border of transit zone) (discretionary procedure: possible for the determining authority to apply, in accordance with the basic principles and guarantees of Chapter II, the "inadmissibility" procedure" or an "accelerated" procedure, in the same cases as foreseen by the Directive for the procedures "in-land") (with a time-limit to take the decision, unless arrivals involving a large number of applicants – Article 37 (3), recast proposal)</p> <p>(4) "European safe third country"⁷³⁸ procedure (discretionary procedure) (Article 38, recast proposal) (no, or no full examination, of the asylum application if the competent authority can establish that the applicant for asylum is seeking to enter or has entered illegally into its territory from such a country)</p> <p>(5) "Subsequent application" procedure (discretionary procedure) (Articles 35 and 36, recast proposal) (applicable in case of "further</p>
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737 Because it can be reasonably assumed that another country would do the examination or provide sufficient protection (recital (30), recast proposal).

738 It means some European third countries which are considered to observe particularly high human rights and refugee protection standards (recital (24), of the Directive).

<p>(discretionary procedure) (Articles 32 to 34, APD) (applicable in case of "further representation" or "subsequent application" in the same Member State) (possibility of establishment of a "preliminary examination" of the asylum application - which can be conducted by an authority other than the determining authority - Article 4, (4) (c), APD - to see if "new elements of finding" have arisen or have been presented by the applicant which significantly add to the likelihood of the applicant qualifying).</p> <p>(4) "Special procedure": "national security provisions" procedure (discretionary procedure) (Article 4 (4) (b), APD) (decision taken by the competent authority in the light of national security provisions and after consultation with the determining authority).</p>	<p>representation" or "subsequent application" in the same Member State) (possibility of establishment of a "preliminary examination" of the asylum application [which can be conducted by an authority other than the determining authority?] to control if "new elements of finding" have arisen or have been presented by the applicant which significantly add to the likelihood of the applicant qualifying. - If not, the identical application will be declared inadmissible in accordance with Article 29 (2) (d), recast proposal).</p>
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KEY FINDINGS

1. When making proposals of amendments on the APD or making a proposition for a new Directive, it is necessary:
 - a. to emphasize the possible inconsistencies between the "Dublin Regulation" and APD with the "Reception Directive", the "Qualification Directive", and the "Return Directive";
 - b. and to take into account what has already been proposed by the Commission or by the EP regarding some of the procedural provisions of other Directives or Regulations mentioned above.
2. In order to avoid refoulement of asylum seekers in situation of mixed arrivals, border guards and immigration officials would benefit from training and clear instructions on how to respond to asylum applications and how to handle the needs of vulnerable groups
3. The APD lists many exceptions to the right to a personal interview (in case of accelerated, prioritized... procedures), however, an oral hearing is of particular importance to an asylum seeker, even if his/her application seems inadmissible or grounded on undue reasons; even to rebut a presumption of safety in case of application of FCA, (E)STC, SCO. Moreover, the right to be heard is guaranteed by CJ case law and is required by the UNHCR. In this regard, the new procedural safeguards provided by the recast proposal contribute to the effectiveness of a fair and efficient procedure and can reduce the possibility of challenging a negative decision on appeal.
4. The right to legal assistance is not subject to discussion under EU law and in the ECHR, which implies that the effectiveness of a judicial remedy is conditioned by the right to legal assistance. Even if this right is, as such, not absolute, the same principles apply to the right to free legal assistance at to the second stage (judicial review) of the procedure. At the first stage of the procedure (administrative procedure), even if the texts and the case law are not quite as explicit, one can deduce from the CJ case law and from the necessity of the practice that a right to free legal assistance at the first stage has to be recommended.
5. One of the principal criticisms of the APD is the lack of protection of applicants with special needs. Only minors benefited from a specific protection, which in itself was considered insufficient. Procedural rules have to be adapted to allow weaker applicants to be heard in the right conditions. Applying the same rules to significantly different situations violates the principle of non-discrimination.
6. The concrete application by each Member State of some concepts like "first country of asylum", "safe third country", "(European) safe third country", "safe country of origin" could lead to depriving an asylum seeker access to an effective protection because he will not benefit from a full examination of the substance of his application. One has to analyze how this access is secured, what criteria could be used in this perspective and what are the procedural consequences of recourse to these specific concepts.

7. The new framework of asylum procedures proposed by the Commission in the recast proposal can be considered as much more accessible and comprehensible than the complex system of procedures currently provided by the APD. Although some recommendations are made in the report to ensure a higher level of uniformity and to eliminate some risks of confusion, the general conclusion is that the different procedures provided by the recast proposal are acceptable and in line with the international obligations of Member States and with the case law of the EC Court and of the ECtHR.
8. In contrast to the wide margin of discretion given to Member States by the APD in order to organize the effectiveness of the domestic judicial remedies, with the consequence that some Member States have been condemned by the ECtHR and the differences in the national systems which does not conform with the aim pursued by the construction of the CEAS, the proposal of the Commission to introduce, in the recast proposal, the common minimal requirements for an effective remedy is a good step forwards. We also consider that these minimal requirements, in general (see some recommendations hereafter), conform with the minimal requirements provided by the case law of the EU Court and the ECtHR.

RECOMMENDATIONS

1. There is a necessity to examine the recast program of the EU instruments of the first generation of the CEAS as a whole to avoid divergence in standards, notions and devices.
2. When examining the proposals of the Commission and the amendments that could be suggested, there is a necessity to take into account the minimum standards set out by the case law of the EU Court or of the ECtHR concerning the minimal procedural guarantees during the administrative phase of the procedure and the phase of the judicial review, in order to clearly distinguish what is obligatory to conform with those minimal requirements and what would require more and would, as a consequence, depend on a political decision of the stakeholders.
3. It is proposed to re-examine the provisions of the recast proposal and/or the comments on some of those provisions to ensure coherence in the application of the concepts of "determining authority" and "competent authority" or to clearly define the situations in which a decision can be taken by a "competent authority" other than the "determining authority". It would also be envisaged to introduce a definition of the notion and of the competences of the "competent authority" in Article 2 recast proposal, such as has already been provided for the notion of a "determining authority".
4. Although the recast proposal contains a new provision (Article 20) specifically dedicated to applicants with special needs, in order to guarantee an effective protection, the new text should:
 - a. define more precisely the protected groups ;
 - b. oblige the MS to introduce systematic monitoring to identify those groups from the time that the application is made; in this regard a link with the first monitoring organized by the "Reception Directive" could be made;
 - c. clarify the guarantees provided to each sub-group of applicants with special needs.
5. EASO could be empowered to deal with issues of "recommended standards of examination" by issuing guidelines for which Member States may deviate from but may be obliged in that case to register their differences. Also, it could be permitted to admit experimental procedures which, for instance, make it possible to make use of external processing or joint processing by way of an option of Member States to participate in projects.
6. Another question is whether it would be useful to incorporate Article 4 of the "Qualification Directive" in the APD, in order to ensure better clarity of the rules on evidence and standards for the examination of the applications.
7. "First country of asylum (FCA)" concept (Article 31, recast proposal) :

The terms "sufficient protection" are too weak and could be replaced by "effective protection". The availability of the protection should also be mentioned.

8. The right to rebut the presumption of safety has to be explicitly recognized by the Directive, at both the procedural level and the substantial level. This is not the case in the APD. At a procedural level, article 30, recast proposal guarantees the right to a personal interview. But on the substantial level, article 26 should also include the right to rebut the presumption as it is recognized in article 32, recast proposal ("safe third country (STC)" concept and the right to challenge the connection between the applicant and the STC).
9. If we consider that the same procedural requirements have to apply to the "European safe third country (ESTC)" concept (Article 38, recast proposal) as to the application of the "STC" concept, the question raised is whether it would not be better to abandon this concept.
10. Providing that the use of lists of "safe countries of origin" (SCO) (Articles 33 and 34, recast proposal) does not increase the burden of proof on the asylum-seeker, that each individual case will be examined fully on its merits, and that procedural guarantees are offered, the establishment of such lists could be acceptable. However, since the procedural guarantees required are the same as in the regular procedure, one may wonder if the complexity introduced by this concept is really necessary for the Member States. Moreover it seems also not to conform with the aim of the CEAS to delete the notion of "common EU" lists and to only refer to "national" lists.
11. Article 27 (4), recast proposal should be completed in order to determine the consequences of the failure to adopt a decision within determined time limits: one possibility could be, at the end of the period of 12 months, to permit the asylum seeker to request the decision of the first instance authority before the end of a determined time limit and to initiate a right to an effective remedy within the meaning of Article 41, recast proposal in the absence of a decision at the end of this time limit.
12. The limited exception to the right to remain on the territory during the administrative examination of a (second or multiple) subsequent claim (Article 35 (8) (a), recast proposal) is admissible taking into account the international obligations of the Member States and the case law of ECtHR and EU Court.
13. Further explanations have however, to be given concerning: 1°) the right to an effective remedy (whether to apply the "Return Directive" or a completed Article 41, recast proposal) and 2°) the relations between the "competent" authority and the "determining" authority before such an expulsion order should be decided.
14. Further explanations should be given regarding the risks of confusion in provisions of the recast proposal concerning the "inadmissible applications" procedure (Articles 29 to 32, recast proposal): the differences between "inadmissible applications" and some cases of "preliminary examination" procedure of subsequent asylum claims; which rules are applicable to an "admissibility interview"?; decision has to be taken by the "determining" or by another "competent" authority?; is there a right to judicial remedy in the "preliminary examination" procedure? This is not expressly provided for in Article 41 (1), recast proposal.
15. It seems necessary to complete the recast proposal's "National security provision(s)", for example, to organize a prioritized examination of the claim by

the determining authority in such circumstances or, at a minimum, to ensure the respect of the principle of non-refoulement, in line with the case law of the ECtHR.

16. In contrast to the provisions of the recast proposal which provide the right to (free) legal assistance at all stages of the procedures in first instance (Article 18 (1) and (2) (a)), this right is only recognized once the "competent authority" has taken the decision to withdraw the international protection status (Article 40 (3), recast proposal). We do not see how this difference in treatment can reasonably be justified.
17. Concerning the right to be heard during the procedure to withdraw refugee status, Article 40 (1) (b), recast proposal allows Member States to replace the personal interview by a written statement of the reasons why it is not justified to withdraw this status; taking into account the proposals of the Commission with regard to the right to a personal interview for the examination of an application for international protection, we do not see why the person concerned would not have the right to a personal interview before the withdrawing of the status, at least when he/she expressly requests such an interview.
18. Taking into account the great variety of time-limits that have been determined by the Member States, it would be useful to introduce in the Directive a minimum common time-limit for all Member States to introduce an appeal. This time-limit could vary in accordance with the procedure which has been applied to the specific case.
19. The recast proposal should be amended in order to prevent the enforcement of an expulsion order during the time-limit within which to lodge an appeal, (or at least the time-limit for asking for an interim measure of suspension before a court or a tribunal has expired) and the right to appeal or to the request for interim measure has not been exercised.
20. The question arises as to what the consequences are of contravening time-limits imposed by Member States on the court or tribunal when examining the request against the decision of the determining or competent authority (Article 41 (9), recast proposal)?
21. As a final recommendation, we can consider that the recast proposal represents a good step forward in the harmonization of the procedures at first instance and that the procedural guarantees provided during the administrative phase of the procedure and during the appeal procedure are in line with the case law of the ECtHR and of the EU Court that we have analyzed. We recommend that the Parliament should support this proposal and examine if any amendment which would be proposed is at least in conformity with the above-mentioned case law. We also suggest the examination of the recommendations made in this draft.

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CHAPTER 5: THE EXTERNAL DIMENSION OF THE ASYLUM POLICY

1. INTRODUCTION

The area of freedom, security and justice that the Union shall 'offer to its citizens'⁷³⁹ is supposed to remain penetrable to 'those whose circumstances lead them justifiably to seek access to our territory'⁷⁴⁰. The Tampere Conclusions established that '[t]he aim is an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments [...]' (§4). The Stockholm Programme has set out precisely that '[p]eople in need of protection must be ensured access to legally safe and efficient asylum procedures' (§1.1). At the same time, as recalled in the Tampere Conclusions (§3), 'the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes' is to be taken into account. A proper balance is thus to be struck so that 'the necessary strengthening of European border controls [does] not prevent access to protection systems by those people entitled to benefit under them'⁷⁴¹.

In an environment of extraterritorial border surveillance and migration control, several solutions have been posited to offer guarantees to those who seek protection in or access to the European Union with varying degrees of success, ranging from a predominantly collective perception of refugee flows to a more individualized approach. Some of these mechanisms focus on the regions of origin and transit of refugee flows, as vectors of the international system of protection, with the objective of enhancing their protection capacity to manage protracted situations. Other initiatives engage directly with the individual refugee and his physical access to the territory of the EU Member States in a safe and orderly way. Still other measures, particularly those concerned with border surveillance and migration control at large, appear to neglect their impact on asylum seekers' and refugees' rights altogether.

This chapter constitutes the contribution on the external dimension of asylum to the debate regarding the future development of the Common European Asylum System (CEAS). Our purpose is to identify the main legal questions regarding the administration of access to international protection in the EU Member States and to advance possible solutions. The chapter has been divided into ten sections relating to the state of the art of the EU *acquis* on entry management with an impact on access to international protection, evaluating current shortcomings and putting forward short-term solutions. Future perspectives are assessed in Part III of the study, where medium- and long-term proposals are formulated concerning the 'external dimension of asylum'⁷⁴² *stricto sensu*. The rights that refugees and asylum seekers derive from the EU fundamental rights *acquis* are taken into account throughout the analysis, as are protection-related obligations of the EU Member States.

After a preliminary review of the obligations of the EU Member States with an effect on access to international protection, Chapter 5 has been organised in six main divisions,

739 Article 3(2) TEU.

740 Presidency Conclusions, European Council 15-16 October 1999 [Tampere Conclusions hereinafter], § 3.

741 European Pact on Immigration and Asylum, Council doc. 13440/08, 24.09.2008, p. 11.

742 The Hague Programme, Council doc. 16054/04, 13.12.2004, § 1.6.

equivalent to the different measures introduced to control the movement of persons across the external borders of the EU Member States with an impact on refugees' and asylum seekers' rights. On the one hand, the measures adopted to administer migration in general are dealt with first. On the other hand, the policy instruments implemented to manage refugee inflows in particular are subsequently assessed. Accordingly, the Schengen Borders Code is examined in section three.⁷⁴³ The fourth division deals with Schengen Visas. The fifth part scrutinizes the institution of carrier sanctions alongside that of immigration liaison officers posted abroad. Joint-patrolling operations conducted by the EU Member States at sea under the auspices of the FRONTEX agency are evaluated in section five. Finally, the measures aimed specifically at facilitating the orderly management of asylum arrivals are examined in turns: The EU Joint Resettlement Programme is appraised in section six, whereas Regional Protection Programmes are considered in section seven. The insufficiencies detected for each of the measures have been highlighted in boxes together with a brief explanation and corresponding short-term solutions. Key findings and recommendations are synthesised at the end.

2. PROTECTION-RELATED OBLIGATIONS OF THE EU MEMBER STATES ACTING ABROAD

Before embarking in the detailed analysis of each of the measures investigated, a general account of the main obligations binding upon the EU Member States vis-à-vis refugees and asylum seekers in transit, as enshrined in international instruments to which the EU Member States are parties and in EU law itself, is necessary. The principle of non-refoulement, the right to leave any country including one's own in order to seek asylum, in both their substantive and procedural components, deserve discussion at some length. For our purposes, special emphasis is placed on the extraterritorial dimension thereof.

2.1. Non-Refoulement

Maiani and Vevstad deal with the content of the principle of non-refoulement. Thus, this Chapter refers to Chapter 2 on this point. We will briefly elaborate on the extraterritorial applicability thereof under the main legal instruments binding upon the Member States in relation to international protection, i.e. the Geneva Convention (GC),⁷⁴⁴ the European Convention on Human Rights (ECHR)⁷⁴⁵ and EU law itself.

2.1.1. International law

In the framework of the Geneva Convention, the Sale decision of the US Supreme Court, refusing the extraterritorial applicability of article 33(1),⁷⁴⁶ has subsequently been rejected by the majority of the doctrine, by the Inter-American Commission on Human Rights⁷⁴⁷ and, partly, also by the English House of Lords in the Prague Airport case⁷⁴⁸.

743 Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105/1 of 13.04.2006 [Schengen Borders Code or SBC hereinafter].

744 Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150 [Geneva Convention or GC hereinafter].

745 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 221 [European Convention on Human Rights or ECHR hereinafter].

746 Chris Sale, Acting Commissioner, I.N.S. et al. v Haitian Centers Council Inc. et al. [1993] 509 US 155.

747 Inter-Am.C.H.R., The Haitian Centre for Human Rights et al. v United States, Case 10.675, Report No. 51/96.

748 Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and Others (Appellants), [2004] UKHL 55.

2.1.2. The European Convention on Human Rights

Nevertheless, the applicability of the Geneva Convention is blocked if refugee qualification criteria are not met, which includes being outside the country of own nationality. In such cases, article 3 ECHR becomes relevant, as its personal and material scope of application is larger and may cover the situation of individuals in need of protection who are still within their countries of origin.

Although on exceptional bases, the extraterritorial applicability of the ECHR has been recognized by the Strasbourg Court. *Bankovic* established that 'from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial', stipulating that 'only in exceptional cases [...] acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of article 1 [ECHR]⁷⁴⁹. When States exert 'effective control' over an area outside national territory⁷⁵⁰ or over persons abroad⁷⁵¹ their human rights obligations may be engaged. *Issa* has explained that 'a State may be held accountable for a violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating –whether lawfully or unlawfully– in the latter State [...]'. In such situations, accountability stems from the fact that 'article 1 [ECHR] cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory'⁷⁵².

Al-Saadoon, concerning the detention of two Iraqi nationals by the UK military forces in Iraq and their subsequent referral to the Iraqi authorities to face a trial upon which they risk the death penalty, has confirmed the applicability of the Convention to the actions and omissions of State agents exercising de jure or de facto control over individuals abroad⁷⁵³. Applying the *Soering* approach,⁷⁵⁴ the Court has established that 'the respondent State was

749 ECtHR, *Bankovic a. o. v Belgium a. o.* (Dec.), Appl. No. 52207/99, 12.12.2000, § 59 and 67.

750 ECtHR, *Loizidou v Turkey*, Appl. No. 15318/89, (Preliminary Objections) 23.03.1995 and (Merits) 18.12.1996, § 52: 'As regards the question of imputability, the Court recalls in the first place that in its above-mentioned *Loizidou* judgment (preliminary objections) (pp. 23-24, § 62) it stressed that under its established case-law the concept of "jurisdiction" under Article 1 of the Convention is not restricted to the national territory of the Contracting States. Accordingly, the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory. Of particular significance to the present case the Court held, in conformity with the relevant principles of international law governing State responsibility, that the responsibility of a Contracting Party could also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration [...]'. See also *Cyprus v Turkey*, Appl. No. 25781/94, 10.05.2001.

751 ECtHR, *Ocalan v Turkey*, Appl. No. 46221/99, 12.05.2005, § 91: 'The Court notes that the applicant was arrested by members of the Turkish security forces inside an aircraft registered in Turkey, in the international zone of Nairobi Airport. It is common ground that, directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the "jurisdiction" of that State for the purposes of art. 1 ECHR, even though in this instance Turkey exercised its authority outside its territory. It is true that the applicant was physically forced to return to Turkey by Turkish officials and was under their authority and control following his arrest and return to Turkey'.

752 ECtHR, *Issa and Others v Turkey*, Appl. No. 31821/96, 16.11.2004, § 71.

753 ECtHR, *Al-Saadoon and Mufdhi v UK* (Dec.), Appl. No. 61498/08, 30.06.2009, § 88: 'The Court considers that, given the total and exclusive de facto, and subsequently also de jure, control exercised by the UK authorities over the premises in question, the individuals detained there, including the applicants, were within the UK's jurisdiction [...]'.
754 ECtHR, *Soering v United Kingdom*, Appl. No. 14038/88, 07.07.1989, § 88: 'It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of

under the paramount obligation to ensure that the arrest and detention did not end in a manner which would breach the applicants' rights under articles 2 and 3 of the Convention and article 1 of Protocol 13'. By failing to secure a 'binding assurance' from the Iraqi authorities that the capital punishment will not be imposed, 'the referral of the applicants' cases to the Iraqi courts and their physical transfer to the custody of the Iraqi authorities failed to take proper account of the United Kingdom obligations'. The Court has thus determined that 'through the actions and inaction of the United Kingdom authorities the applicants have been subjected [...] to fear of execution by the Iraqi authorities [...] causing the applicants psychological suffering [that] constituted inhuman treatment', in breach of article 3 of the Convention⁷⁵⁵.

According to § 73 of *Bankovic*, exceptional 'recognised instances of the extra-territorial exercise of jurisdiction by a State' include also 'cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State'.

With regard to the 'flag State' exception, *Medvedyev*, concerning a case of interception of a Cambodian boat sailing 'through the waters off Cape Verde' by the French military forces, constitutes a case in point. The Court determined that since the date the ship was intercepted and until it arrived to port in Brest 'the Winner and its crew were under the control of French military forces, so that even though they were outside French territory, they were within the jurisdiction of France for the purposes of article 1 [ECHR]⁷⁵⁶. *Xhavara* provides a further example of the extraterritorial applicability of the ECHR in the high seas. The case concerned the death of 58 Albanians aboard the *Kater I Rades*, which sunk 35 miles off the Italian coast upon collision with the Italian warship *Sibilla*. The background to the claim is a naval blockade of the Italian navy conducted in the high seas and the territorial waters of Albania for migration control purposes, as authorized by Albania in a bilateral agreement concluded with Italy in 1997. Although the claim was dismissed for non-exhaustion of domestic remedies, the Court made important observations. Because the shipwreck had been directly provoked by the Italian navy, the Court explicitly established that any complaint in this regard should be considered to be addressed exclusively against Italy. By virtue of the collision of the *Sibilla* with the *Kater I Rades* in open seas, *Xhavara* was considered to come within the jurisdiction of Italy in the sense of article 1 ECHR. On that account, the Court reminded Italy that article 2(1) ECHR enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction⁷⁵⁷. Thereafter, the UN Committee against Torture has developed a similar reasoning in a case concerning a search and rescue operation undertaken by Spain in the SAR Region of Senegal, off the Mauritanian coast. Although the complaint was declared inadmissible due to the lack of *locus standi* of the representative of the victims, the Committee considered that in any event the alleged victims were subject to Spanish jurisdiction on account of the control exerted by the Spanish authorities 'over the persons on board the *Marine I* from the time the vessel was

Article 3 (art. 3), would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article (art. 3)'.

755 ECtHR, *Al-Saadoon and Mufdhi v UK*, Appl. No. 61498/08, 02.03.2010, § 140, 143 and 144.

756 ECtHR, *Medvedyev and Others v France*, Appl. No. 3394/03, 10.07.2008, § 50.

757 ECtHR, *Xhavara v Italy* (Dec.), Appl. No. 39473/98, 11.01.2001, § 1 'En droit'.

rescued and throughout the identification and repatriation process' that took place afterwards⁷⁵⁸.

With regard to the 'diplomatic exception' and cases of demands of protection directed to consulates and embassies abroad, international jurisprudence is scarce. The only decision by the Strasbourg organs on the matter dates back to 1992. WM concerned the case of 18 citizens from the DDR willing to travel to the West. As permission to emigrate was refused, the 18 entered the Danish Embassy to request its mediation with the German authorities. The ambassador, however, asked them to leave and, as they did not obey, he requested the DDR police to enter the embassy to remove them. At their hands they allegedly suffered arbitrary detention. In that connection, the European Commission noted that the complaints were 'directed mainly against Danish diplomatic authorities in the former DDR'. It was clear 'that authorized agents of the State, including diplomatic or consular agents, bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property. In so far as they affect such persons or property by their acts or omissions, the responsibility of the State is engaged [...]'. The Commission was, indeed, 'satisfied that the acts of the Danish ambassador complained of affected persons within the jurisdiction of the Danish authorities within the meaning of art. 1 ECHR'. Using the language of *Soering*, it recalled that 'an act or omission of a Party to the Convention may exceptionally engage the responsibility of that State for acts of a State not party to the Convention where the person in question had suffered or risks suffering a flagrant denial of the guarantees and rights secured to him under the Convention'. Yet, as no 'substantial grounds' were shown to believe that the applicant had run a 'real risk' of ill treatment in the DDR upon referral to the German authorities, the claim was eventually dismissed⁷⁵⁹.

More recently, the decision by the HRC decision on *Munaf* has also adopted a *Soering*-like approach in an embassy case. The case concerns an Iraqi-American dual national who travelled from Romania to Iraq accompanying a group of Romanian citizens. The group was kidnapped and freed after a few days through the intervention of the Multi-National Forces operating in Iraq, subsequent to which they were taken to the Romanian embassy. On account of his dual citizenship, *Munaf* requested permission to go instead to the US embassy. There, he was charged with criminal offences and taken to a detention camp where he is presently detained and allegedly subject to mistreatment by the US forces. The applicant has complained to the HRC that the Romanian embassy should have protected him from these alleged violations of his rights under the Covenant by not letting him leave its diplomatic premises. On that account, the Committee has determined that '[t]he main issue to be considered [...] is whether, by allowing the author to leave the premises of the Romanian Embassy in Baghdad, it exercised jurisdiction over him in a way that exposed him to a real risk of becoming a victim of violations of his rights under [the Covenant] which it could reasonably have anticipated'. Accepting that States have full legal jurisdiction over their diplomatic premises and over the persons found therein as a matter of international law, the Committee considered the engagement of Romania's responsibility to be contingent on 'a link in the causal chain that would make possible violations in another jurisdiction. Thus, the risk of an extra-territorial violation must be a necessary and foreseeable consequence and must be judged on the knowledge the State party had at the [relevant] time [...]'. In view of the circumstances of the case, the Committee concluded that the violations of the Covenant complained of 'were [not] a necessary and foreseeable consequence of his departure from the Embassy'⁷⁶⁰.

758 CAT, *J.H.A. v Spain*, Comm. No. 323/2007, 10.11.2008, § 8.2.

759 ECommHR, *WM v Denmark*, Appl. No. 17392/90, 14.10.1992, § 1 'The law'.

760 HRC, *Munaf v Romania*, Comm. No. 1539/2006, 30.07. 2009, § 14.2-14.4.

In light of this jurisprudence we infer that responsibility for human rights violations may be engaged extraterritorially under certain circumstances. Acts of refoulement by the agents of the State abroad may bring potential victims within the remit of the States' obligations under the ECHR. In principle, the exercise of a certain degree of control over the persons concerned appears to be required, be it through acts of abduction, detention, referral to foreign authorities, shipping interdiction, collision or search and rescue at sea. If by their actions Contracting States expose persons to a 'real risk' of ill treatment, extraterritorial responsibility for non-refoulement may be engaged. The case-law is less developed with regard to the omission of State protection in embassy-like cases and instances of 'diplomatic asylum' that may equally entail the exposure to a risk of refoulement. Nevertheless, the jurisprudence available appears to indicate that 'the Soering principle [...] would [also] apply where an individual sought and was refused refuge in a Contracting State's embassy'⁷⁶¹.

2.1.3. EU Law

In the EU legal framework, article 3 SBC holds that the Schengen Borders Code – and hence entry control activities in application thereof – is to be applied without prejudice to the rights of refugees, paying particular attention to non-refoulement. The scope of application *ratione loci* of the Code – and thus of its article 3 – does not coincide with the geographical confines of the EU Member States. Indeed, included as methods of surveillance explicitly provided for by the Code in its Annex VI are the checks performed 'in stations in a third country where persons board the train' (§ 1.2.2), 'on the aircraft or at the gate', even in 'airports which do not hold the status of international airport' (§ 2.1.3. and 2.2.1), and 'in the [territorial sea] of a third country' (§ 3.1.1). Therefore, any debate as for the extraterritorial applicability of the EU *acquis* on entry, in general, and of the Schengen Borders Code, in particular, is rendered unnecessary. It is the legal instrument itself which defines its territorial scope of application as exceeding the territories of the EU Member States⁷⁶².

Content-wise, what the reference to non-refoulement in article 3 SBC entails, in the absence of authoritative jurisprudence from the ECJ, is further clarified by article 19(2) EUCFR⁷⁶³. The provision 'incorporates the relevant case-law from the European Court of Human Rights regarding article 3 ECHR'⁷⁶⁴ and, according to article 52(3) EUCFR, it should be given the same meaning.

With the Lisbon Treaty in force, the EU Charter of fundamental rights produces the same effect as the texts of primary law. Article 19 EUCFR has become a separate source of individual rights, concurrent with article 3 SBC. It is hence pertinent to elucidate its scope of application *ratione loci*. Contrary to the Schengen Borders Code, article 19 EUCFR does not expressly define it. It may hence follow that it is governed by article 52 TEU⁷⁶⁵ and article 355 TFEU⁷⁶⁶ (ex article 299 EC), providing generally for the applicability of the EU Treaties to the territories of their Signatory Parties. However, this should not be read as to exclude the extraterritorial applicability of article 19 EUCFR. According to the ECJ in *Boukhalfa* '[t]he geographical application of the Treaty [as] defined in Article [52 TEU] [...]

761 ECtHR, *Al-Saadoon and Mufdhi v UK*, Appl. No. 61498/08, 02.03.2010, § 139.

762 The European Commission has developed a similar reasoning based on the scope *ratione materiae* of the SBC, considering that where the actions of a Member State match the definition of 'border surveillance' in article 12 SBC the Code becomes applicable. See the letter to the LIBE Committee of 15.07.2009 in connection with the Italian push-backs to Libya.

763 Charter of Fundamental Rights of the European Union, OJ C 83/389, 30.03.2010 [EUCFR hereinafter].

764 Explanations Relating to the Charter of Fundamental Rights, OJ C 303/17, 14.12.2007, p. 24.

765 Consolidated Version of the Treaty on European Union, OJ C 83/13, 30.03.2010 [TEU hereinafter].

766 Consolidated Version of the Treaty on the Functioning of the European Union, OJ C 83/47, 30.03.2010 [TFEU hereinafter].

does not [...] preclude Community rules from having effects outside the territory of the Community', provided that a sufficient link to EU law can be established⁷⁶⁷.

2.2. The right to (leave to seek) asylum:

Beside the principle of non-refoulement, the right to (leave to seek) asylum is also essential for our purposes, for the existence of statutory refugees fulfilling the Geneva Convention definition depends upon it. At the core of our reasoning rests the assumption that this right is legally opposable not only to countries of origin but also to destination States. This implies that the motives bringing a person to leave her country of origin in search of international protection ought to be taken into account not only by the former, but also by the latter, when designing and applying measures of migration control.

2.2.1. International Law

The right to leave has been codified in article 12(2) of the 1966 International Covenant on Civil and Political Rights (ICCPR)⁷⁶⁸. Without being conceived of as an absolute entitlement, the right admits a series of limitations according to article 12(3) ICCPR, which 'must not impair the essence of the right'⁷⁶⁹. The interpretation of these provisions has undergone a certain evolution. It has only been in recent times that emigration measures such as exit visas have been deemed disproportionate and the refusal to issue a passport considered inadmissible⁷⁷⁰. With regard to immigration control mechanisms introduced by countries of destination, the Human Rights Committee, while expressing concern about their potential to foreclose the right to leave in practice, has never openly condemned them. In *Dixit v Australia*, although the question of the proportionality of an entry visa denial was formulated, the communication was rejected for non-exhaustion of domestic remedies⁷⁷¹. This has allowed some doctrine to infer that 'the Committee implicitly accepted that the grant of visas to aliens abroad comes under the ambit of the Covenant. Had it thought otherwise, the case [would have] been declared inadmissible *ratione loci*, and any reasoning on the exhaustion of domestic remedies would have been superfluous'⁷⁷². Along these lines, if we can accept that 'the right to leave is not a right which other States need to "complete" through a duty to admit; rather, it is simply a right each State must guarantee'⁷⁷³, it should be treated as any other right in the Covenant, opposable to each Contracting Party independently⁷⁷⁴. From this perspective, the absence of a right of entry in international law would not *per se* suffice to justify the elimination by destination States of the explicitly recognized right to leave in their regard. The right would produce autonomous effects *vis-à-vis* them. As a result, while restrictions would remain permitted, the essential content of the right would have to remain intact. The interference would need to be

767 ECJ, *Ingrid Boukhalfa v Federal Republic of Germany*, C-214/94, [1996] ECR I-2253, § 14-15.

768 International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 [ICCPR hereinafter].

769 HRC, General Comment No. 27 (1999), § 13.

770 HRC, *Loubna El Ghar v Socialist People's Libyan Arab Jamahiriya*, Communication No. 1107/2002, § 7.2.

771 HRC, *Dixit v. Australia*, Communication No. 978/2001, 28.03.2003.

772 G. Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?', *IJRL* (2005), p. 561.

773 G. S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, OUP (2007), p. 382. The original argument has been extended. The authors appear to restrict its applicability to the country of departure that would police the requirements imposed by a third country of destination. Here we understand that the opposability of the right is not *vis-à-vis* the country of departure, but *vis-à-vis* the country of destination exercising extraterritorial jurisdiction.

774 Article 26 of the 1969 Vienna Convention on the Law of Treaties comes in support of this argument as it rules that: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'. The French version is more telling: 'Tout traité en vigueur lie les parties et doit être exécuté par elles de bonne foi'. When it comes to consider the interplay between international obligations and domestic law, article 27 establishes that: 'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.

provided by law, it would have to be necessary for the realization of the objective invoked, which, in turn, would have to serve one of the limitative motives that allows for the restriction of the right to leave in article 12(3) ICCPR.

For those fleeing persecution, including refugees to-be, still inside their country of origin, to the right to leave any country there joins a right to seek asylum from persecution as a modulating factor⁷⁷⁵. While international law does not expressly recognize a right to seek asylum in any legally binding form and no literal allusion can be traced to article 14 UDHR in the letter of the Geneva Convention, its drafters seem to have considered it inherent. 'The right of asylum was implicit in the Convention, even if it was not explicitly proclaimed therein, for the very existence of refugees depended on it'. The French delegation suggested that 'the right of asylum should be mentioned explicitly together with the reference to the Universal Declaration of Human Rights' made in the Preamble and the Ad Hoc Committee accepted the proposition. Delegates from other countries felt that, then, the same should be done for other articles of the UDHR, since the object and purpose of the Convention was 'to ensure the widest possible exercise of all fundamental rights and freedoms'. Plausibly, it was ultimately decided that any singling out of particular rights would have been done at the detriment of other rights not expressly referred to. Accordingly, a generally encompassing reference to the UDHR was preferred⁷⁷⁶.

Article 14 UDHR does not establish any other limitation to the right to flee than those arising from legitimate prosecution in the country of origin. Consequently, the aggregate right to leave to seek asylum may impose a stricter principle of proportionality than the right to leave operating alone. Public order considerations ought to play a lesser role when constraining the right to leave, as the underlying motives of the person leaving to seek international protection need to be taken into account.

2.2.2. The European Convention on Human Rights

The Strasbourg Court appears to so understand. Although the right to leave (alone), as enshrined in article 2(2) of Protocol 4 ECHR, has been construed as implying 'a right to leave for such a country of the person's choice to which he may be admitted'⁷⁷⁷, when it concerns asylum seekers the Court seems to accept its opposability not only to the country of origin, but also vis-à-vis the country of destination. This appears to be because the person seeks asylum. Precisely, although the main focus in *Amuur* was on detention, the Court also asserted in obiter dicta that 'the mere fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on [...] the right to leave any country, including one's own [...]'. In close connection, the Court declared the existence of a 'right to gain effective access to the procedure for determining refugee status' that immigration controls could not disregard. The Court determined that 'States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum seekers of the protection afforded by these [entitlements]⁷⁷⁸. This implicit recognition of a right to leave to seek asylum, in both its substantive and procedural facets, makes it possible to assume that

775 Note that article 14(1) UDHR does not limit its scope of application *ratione personae* to Geneva Convention refugees: 'everyone has the right to seek and to enjoy in other countries asylum from persecution'. Universal Declaration of Human Rights, UNGA Res. 217 (III), UN GAOR, 3rd Session, Supp. No. 13, [1948] UN Doc. A/810, [UDHR hereinafter].

776 P. Weis, *The Refugee Convention 1951- The Travaux Préparatoires*, CUP, Cambridge, 1995, pp. 6 and 296.

777 ECtHR, *Peltonen v Finland* (Dec.), Appl. No. 19583/92, 20.02.1995; *K.S. v Finland* (Dec.), Appl. No. 21228/93, 24.05.1995; *Napijalo v Croatia*, Appl. No. 66485/01, 13.11.2003.

778 ECtHR, *Amuur v France*, Appl. No. 19776/92, 25.06.1996, § 43 and 48.

departure to seek international protection constitutes a legitimate ground for one to leave his own country that destination States must take into account⁷⁷⁹.

2.2.3. EU Law

In the EU legal order, the precise confines of article 18 EUCFR have elicited profound debate. Some authors go so far as to proclaim the existence of a right to be granted asylum⁷⁸⁰. Others consider the right to seek asylum to be implicit therein⁷⁸¹. Others opine that the right to asylum encloses a general principle of EU law⁷⁸². Still others maintain that article 18 EUCFR does not seem to add anything to the Geneva Convention⁷⁸³. Ultimately, it will be for the ECJ to determine its precise meaning. Meanwhile, if any content is to be attached thereto, article 18 EUCFR shall reflect the right to seek asylum under discussion here, including a preliminary entitlement to leave the country of own nationality for that purpose. This is plausible if read together with the commentary of the Presidium holding that 'the text of the article has been based on TEC article 63 [today's article 78 TFEU], [...] which requires the Union to respect the Geneva Convention on refugees'. If, as developed above, it is possible to ascertain the existence of a right to seek international protection as inhering in the Geneva Convention, EU law must be interpreted in consonance with that standard. This reading is reinforced by the fact that, pursuant to the Charter's distinction between 'rights' and 'principles', article 18 EUCFR, according to the very wording of its title, is to be classified amid the 'rights'. Therefore, as the Presidium has explained, it may 'give rise to direct claims for positive action by the Union's institutions or Member States authorities' and possibly produce direct effect⁷⁸⁴. In regard of its extraterritorial applicability, it is worth noting, that the wording of article 18 EUCFR – as happened to that of article 19 EUCFR – does not enclose any territorial limitation. Hence, in light of Boukhalfa, its eventual applicability beyond the borders of the EU Member States cannot be excluded, provided that a sufficient link to EU law can be established.

2.3. Access to procedures, effective remedies and judicial protection

The procedural side of the rights to be protected from refoulement and to seek asylum has also to be succinctly reviewed. A general reference to Chapter 4 of the study is appropriate in this context.

It is usually submitted that in order to fully comply with the obligation of non-refoulement in article 33(1) GC, it is necessary to determine whether the person's life or freedom would be threatened upon removal on account of his race, religion, nationality, membership of a particular social group or political opinion. In reality, 'to enable States parties to the

779 ECtHR, *Ahmed Hussun a. o. v Italy*, Appl. No. 10171/05, 11.05.2006. The case concerned a possible collective expulsion after maritime rescue of some 100 irregular immigrants to Libya from Lampedusa. The applicants claimed to have been summarily returned prior to having been able to access asylum procedures. The Court declared the claim admissible. However, subsequent to the irretraceability of the victims, he case has been struck out of the list of cases on 19.01.2010. A new case is pending in front of the Court on very similar grounds: *Hirsi a. o. v Italy*, Appl. No. 27765/09.

780 M.-T. Gil-Bazo, 'Refugee Status and Subsidiary Protection under EC Law: the Qualification Directive and the Right to be Granted Asylum', A. Baldaccini, E. Guild and H. Toner (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Hart Publishing (2007), pp. 236-239 and 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law', *RSQ* (2008), pp. 33-52.

781 C. Harvey, 'The Right to Seek Asylum in the European Union', *EHRLR* (2004), p. 17.

782 S. Peers, *EU Justice and Home Affairs*, 2nd Ed., OUP (2006), p. 315.

783 G. Braibant, *La Charte de droits fondamentaux de l'Union Européenne*, Le Seuil (2001).

784 F. Picod, 'Champ d'application', *Commentaire article par article, Traité établissant une Constitution pour l'Europe*, L. Burgorgue-Larsen, A. Levade, F. Picod (eds.), Bruylant, Bruxelles, 2005, p. 653.

Convention [...] to implement their provisions, refugees have to be identified⁷⁸⁵. Indirect references to status determination procedures can be traced in articles 9 and 31(2) GC, but the Convention does not indicate which procedures are to be adopted. It is left to each Contracting State to establish the procedure that it considers most appropriate. In principle, domestic procedures ought to be such as to enable the Convention to deploy its 'appropriate effects'⁷⁸⁶.

In the framework of the ECHR, 'arguable claims'⁷⁸⁷ based on articles 2 and/or 3 ECHR read together with article 13 ECHR have to be dealt with in a procedure that allows for independent and rigorous scrutiny⁷⁸⁸. With regard to the right to leave to seek asylum, as described above, the Strasbourg Court has acknowledged the existence of a 'right to gain effective access to the procedure for determining refugee status' that destination countries should take into account⁷⁸⁹.

In the context of the EU legal order, the procedures to safeguard the rights individuals derive from EU law, in the absence of specific EU rules on the matter, are left to the domestic legal system of each Member State⁷⁹⁰. In such cases, EU law requires domestic norms not to 'render practically impossible or excessively difficult the exercise of rights conferred by Community law'⁷⁹¹. National legislation shall not affect the concomitant 'right to effective judicial protection' developed hereunder⁷⁹².

If initial procedures lead to unsatisfactory results, the claimant must be provided with a means to appeal. The rights to an effective remedy and to judicial protection are tackled in detail in Chapter 4. For our purposes, suffice it to say that article 16(1) GC endows refugees with 'free access to the courts of law on the territory of all Contracting Parties' to enforce their rights as they ensue from the Geneva Convention. Doctrine and State jurisprudence have understood that article 16(1) GC includes an entitlement to judicial review of the initial determination procedure in order to avoid refoulement⁷⁹³.

In the context of the European Convention on Human Rights, articles 2 and/or 3 read together with 13 ECHR grant access to an 'effective remedy' to challenge decisions on refoulement, allowing the competent national authority 'to deal with the substance of the claim and to grant appropriate relief'⁷⁹⁴.

Article 47(1) EUCFR reinstates the rights in the Geneva Convention and the ECHR within the EU legal framework, for access to effective judicial protection must be secured with regard to the rights individuals derive from EU law⁷⁹⁵. Article 47 EUCFR contemplates

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- 785 UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, 1979 (reedited in 1992), § 189.
- 786 Yearbook of the International Law Commission, Vol. II, (1966), p. 219 on the principle of effectiveness of treaties.
- 787 The term 'arguable' is not readily identifiable with the claim not being 'manifestly ill-founded,' since at times the Court has sustained the arguability of a claim rejecting its foundedness only afterwards. In *T.I. v UK* (Dec.), Appl. No. 43844/98, 07.03.2000, the Court considered the claim arguable because it raised concerns about the risks faced after expulsion, although it was declared inadmissible in the end.
- 788 *Inter alia*, ECtHR, *Jabari v Turkey*, Appl. No. 40035/98, 11.07.2000, § 39 ff.
- 789 ECtHR, *Amuur v France*, Appl. No. 19776/92, 25.06.1996, § 43.
- 790 ECJ, *Courage and Crehan*, C-453/99 [2001] ECR I-6297, § 29; *Safalero*, C-13/01 [2003] ECR I-8679, § 49.
- 791 ECJ, *Rewe*, 158/80, [1981] ECR 1805, § 5; *Peterbroeck*, C-312/93, [1995] ECR I-4599, § 12.
- 792 ECJ, *Verholen and Others*, C-87/90 and C-89/90, [1991] ECR I-3757, § 24.
- 793 *R v Secretary of State for the Home Department, ex parte Jahangeer et al.*, [1993] Imm. AR 564 (Eng. QBD), 11.06.1993.
- 794 *Inter alia*, ECtHR, *Jabari v Turkey*, Appl. No. 40035/98, 11.07.2000, § 48.
- 795 ECJ, *Unibet Ltd*, C-432/05, [2007] ECR I-02271, § 67, 77; *Factortame*, C-213/89, [1990] ECR I-2433.

supplementary procedural guarantees. In fact, according to the Charter explanations, 'in Union law the protection is more extensive since it guarantees the right to an effective remedy before a court'. Thus, the 'national authority' to which article 13 ECHR refers has to be understood as a court of law within the EU legal framework. Moreover, according to article 47(2) EUCFR '[e]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law [and] shall have the possibility of being advised, defended and represented'. According to the Presidium, the guarantees which in article 6 ECHR are reserved to civil and penal law proceedings are to be given a wider scope, since '[i]n Union law the right to a fair hearing is not confined to [this kind of] disputes'. As a result, the procedural rights enshrined in article 6 ECHR, which effects had been precluded in cases concerning immigration proceedings by the Strasbourg Court⁷⁹⁶, become generally applicable as a matter of EU law. Finally, the Charter grants also a right to legal aid in article 47(3) that must 'be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice'.

It follows from the foregoing that, to preserve their effet utile, entry and pre-entry controls shall be designed and applied in a way that does not deprive refugees and asylum seekers of the protection that the rights to non-refoulement and to (leave to seek) asylum afford them in both its facets, substantial and procedural.

3. THE SCHENGEN BORDERS CODE

The SBC constitutes the 'common corpus of legislation' governing the movement of persons across borders⁷⁹⁷. This includes entry into the EU Member States as well as pre-entry. In reality pre-entry checks, including visas, pre-boarding documentary control by private carriers and/or Immigration Liaison Officers (ILOs) as well as interception at sea, anticipate the entry check border controls are to ensure. They share a common rationale and are governed by the same prerequisites in the SBC. With regard to the free movement of persons, their equivalence has been acknowledged by the ECJ⁷⁹⁸.

The Code unified previously scattered norms on the crossing of the Union borders. In article 2 a harmonized definition of key concepts in relation to entry controls is provided. The conditions for entry are specified in articles 4 and 5. Articles 6 to 13 detail how external border checks are to be conducted. At the behest of the European Parliament, a right to appeal entry refusals has been introduced in article 13⁷⁹⁹. Rules relating to the staff, resources and cooperation between Member States carrying out controls are established in articles 14 to 17. Specific norms on checks at the various types of borders and on certain categories of persons are stipulated in articles 18 and 19 and Annexes VI and VII. Title III is entirely devoted to internal borders.

As specified below, the Code introduces a clear subordination of entry controls to international obligations of the EU Member States vis-à-vis refugees and others in search of international protection.

796 ECtHR, *Maaouia v France*, Appl. No. 39652/98, 05.10.2000, § 40.

797 Towards integrated management of the external borders of the Member States of the European Union, COM(2002) 233 final of 07.05.2002; Plan for the Management of the External Borders of the Member States of the European Union, Council doc. 10019/02 of 14.06.2002; EU Finnish Presidency, Council Conclusions of 04-05.12.2006, Press Release 15801/06.

798 *Mutatis mutandis*, Pieck, 157/79, [1980] ECR-2171.

799 Report on the proposal for a regulation of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders, A6-0188/2005 of 15.06.2005 and Legislative resolution on the proposal for a regulation of the European Parliament and

3.1. No evaluation mechanism exists to check compliance with refugee rights

PROBLEM: No evaluation mechanism exists to check compliance with refugee rights. Neither possible flaws of the legal system established by the Code, nor non-compliance with its rules by the EU Member States and FRONTEX can be promptly detected in the absence of a monitoring mechanism.

With regard to refugees and asylum seekers, the Code introduces norms with which compliance should be checked periodically. In Recital 20 of the preamble the Code establishes that its provisions 'should be applied in accordance with the Member States' obligations as regards international protection and non-refoulement'. Article 3(b) SBC puts the rights of refugees and asylum seekers beyond the scope of application of the Code, making clear that rules on entry shall apply without prejudice to the 'rights of refugees and persons requesting international protection, in particular as regards non-refoulement'. As a result, when examining entry requests, border guards have to consider international protection obligations binding upon EU Member States, pursuant to article 5(4)(c) SBC. Refusals of admission shall, in turn, be 'without prejudice to the application of special provisions concerning the right of asylum and to international protection,' according to article 13(1) SBC.

SOLUTION: The introduction of a monitoring system to check compliance with refugees' and asylum seekers' rights when implementing entry (and pre-entry) controls is highly recommended.

The observance of the standards established by articles 3(b), 5(4)(c) and 13(1) SBC would be better controlled, if a reporting obligation on the procedures used to accommodate the position of refugees and asylum seekers when carrying out entry controls is established.

To date, however, there is only an obligation for the Member States to notify the Commission certain factual information to enable the harmonious functioning of the regime as established, according to articles 34 and 37 SBC, without questioning its validity or completeness. This is coupled with a duty of the Commission to report on the application of the internal borders Title, pursuant to article 38 SBC, which leaves the external borders Title unaffected.

3.2. Clear entry requirements for refugees and asylum seekers are lacking

PROBLEM: Clear entry requirements for refugees and asylum seekers are lacking. Although the Schengen Borders Code indicates in article 13(1) SBC that 'special provisions concerning the right of asylum and to international protection' may apply when dealing with entry refusals, it remains silent as for what these 'special provisions' should concretely provide. The Handbook for Border Guards gives a sample of 'special provisions', but does not sufficiently clarify the procedures to be followed by the competent authorities for the identification and referral of asylum seekers. The Handbook, in addition, has no legally

binding effect⁸⁰⁰.

This may lead to legal uncertainty and harm the uniformity of the EU acquis on entry.

Prior to the incorporation of the Schengen acquis into EU law, the Common Manual, provided detailed instructions to border guards on border controls, including 'special arrangements' for border checks on certain categories of persons⁸⁰¹. In regard of asylum seekers, § 6. 10 prescribed that 'if an alien requests asylum at the border, the national laws of the Contracting Party concerned shall apply until it is determined who has responsibility for dealing with the application for asylum'. After communautarisation, whereas the 'special arrangements' relating to other particular categories of persons, such as pilots, seamen, minors, etc, have been incorporated in article 19 SBC and Annex VII into the body of the SBC itself, the rules on 'asylum seekers and applicants for international protection' have not. These have been listed in the Handbook for Border Guards compiled by the Commission.

The Schengen Handbook establishes that applications for international protection lodged at the border must be examined on the basis of the criteria laid down in the Qualification Directive⁸⁰², in accordance with the 1951 Geneva Convention. For the purpose, '[a] third-country national must be considered as an applicant for asylum/international protection if he/she expresses – in any way – fear of suffering serious harm if he/she is returned [...]. The wish to apply for protection does not need to be expressed in any particular form [...]; the defining element is the expression of fear of what might happen upon return' (§10). In that case, the application shall be transmitted to the competent authorities in the Member State and no decision to return the person shall be taken beforehand. Yet, these are only guidelines with which compliance when instructing border guards and implementing the rules of the Schengen Code is desirable, but they do not produce legally binding effects. However, in order to fulfil international protection obligations in practice 'special provisions' on the admission of refugees and asylum seekers should, indeed, be established. It is, thus, questionable whether the EU legislator has fulfilled its obligation to provide for all the necessary 'measures on the crossing of the external borders of the Member States', when the arrangements applicable to a whole category of addressees have been left unpronounced⁸⁰³.

SOLUTION: For the sake of legal certainty and the uniformity of EU law, the 'special provisions' compiled in the Schengen Handbook concerning asylum seekers should be upgraded to the SBC itself.

3.3. Entry refusals are not endowed with suspensive effect

PROBLEM: Entry refusals are not endowed with suspensive effect.

Generally, article 13 SBC contemplates appeals against entry refusals with no suspensive effect.

At the same time, in cases in which refugees' and asylum seekers' rights are at stake,

800 Commission Recommendation establishing a common 'Practical Handbook for Border Guards (Schengen Handbook)' to be used by the Member States' competent authorities when carrying out the border control of persons, C(2006) 5186 final of 06.11.2006, updated by C(2008) 2976 final of 25.06.2008 [Schengen Handbook hereinafter].

801 Common Manual, OJ C 313/97 of 16.12.2002.

802 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304/12 of 30.09.2004 [Qualification Directive or QD hereinafter].

803 Former article 62(2) EC, today replaced by article 78(2)(b) and (c) TFEU.

'special provisions' ought to be introduced to ensure compliance with Member States' international obligations and with EU law itself.

In particular, appeals 'with automatic suspensive effect' have to be introduced for those who claim a well-founded fear of persecution or a real risk of ill-treatment in the event of return⁸⁰⁴.

Article 13(3) SBC allows challenges to entry refusals, which 'shall not have suspensive effect'. On the other hand, 'special provisions' have to be foreseen with regard to refugees and others in search of international protection, so that the international obligations owed to them can be appropriately fulfilled. This may lead to confusion. An 'arguable claim' that a 'real risk' of refoulement exists will render 'inconsistent [with the notion of effective remedy] such measures [which are] executed before the national authorities have examined whether they are compatible with [human rights obligations]⁸⁰⁵. In these cases, appeals 'with automatic suspensive effect' become inexcusable. An exercise of consistent interpretation becomes, hence, essential to assure that '[this] wording of secondary Community law, [...] [is] render[ed] [...] consistent with the EC Treaty'⁸⁰⁶.

SOLUTION: The wording of article 13(3) SBC must be clarified, so that the position of refugees and asylum seekers with regard to appeals against entry refusals is brought in line with the requirements of an 'effective remedy' ex article 13 ECHR and article 47 EU Charter of Fundamental Rights (EUCFR).

While, in general, appeals against entry refusals may not require to entail automatic suspensive effect, in the particular case of asylum seekers and refugees this cannot be excluded. Concomitant to the notion of an effective remedy ex article 13 ECHR and 47 EUCFR, as detailed in Chapter 4 of this study, is the suspensive effect it produces in the case irreversible damage would otherwise be caused. Therefore, in the case of asylum seekers and refugees, fearing for their life or freedom if returned, a remedy can only be characterised as being effective if it produces suspensive effect. This clarification should be introduced in the wording of article 13 SBC itself.

4. SCHENGEN VISAS

Schengen visas anticipate entry controls at the stage of departure. Therefore, the conditions for their obtainment reproduce those required for entry at the external borders, as we shall see.

The acquis on visas is abundant, fragmented and dispersed. Current measures on visas can be grouped around four major areas, roughly corresponding to the four legal bases the former EC Treaty provided: visa lists⁸⁰⁷, visa format⁸⁰⁸, procedures and conditions for issuing visas⁸⁰⁹ and the Visa Information System (VIS)⁸¹⁰. Although attempts are directed

804 ECtHR, *Gebremedhin v France*, Appl. No. 25389/05, 26.04.2007, § 66.

805 ECtHR, *Conka v Belgium*, Appl. No. 51564/99, 05.02.2002, § 79.

806 ECJ, *Ordre des barreaux v Conseil de Ministres*, C-305/05, [2007] ECR I-05305, § 28.

807 Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ L 81/1 of 21.03.2001 (as subsequently amended).

808 Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas, OJ L 164/1 of 14.07.1995 (as subsequently amended).

809 Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), OJ L 243/1 of 15.09.2009 [Community Code on Visa, Visa Code or CCV hereinafter].

810 Council Decision 2004/512/EC of 8 June 2004 establishing the Visa Information System (VIS), OJ L 213/5 of 15.06.2004 and Regulation (EC) No 767/2008 of the European Parliament and the Council of

towards the clarification of the visa acquis, with a single Community Code on visa procedures and proposals for a codified version of the rules concerning visa requirements⁸¹¹ and the uniform format for visas⁸¹², it has been recognized that, during the Amsterdam period, 'due to the difference in legal bases, [...] the maintenance of [...] separate instruments [was] necessary'⁸¹³. Under the Lisbon Treaty all aspects of the common policy share the same legal basis in Article 77(2)(a) TFEU, allowing for complete consolidation in a single instrument if so desired.

Special attention will be drawn to the lists and the conditions to issue visas, as these are the rules with a particular effect on the situation of refugees and asylum seekers.

4.1. No evaluations of the necessity and proportionality of the policy exist

PROBLEM: No evaluations of the necessity and proportionality of the policy exist. No evaluation of the proportionality and necessity of the policy has ever been undertaken.

Some impact assessments have been carried out and the majority of visa policy instruments integrates some form of review for each of the technicalities they contemplate. This, however, is no substitute for an overall assessment of the policy as a whole.

SOLUTION: Only an open and thorough analysis of the visa policy as a whole will clarify its impact on refugees and asylum seekers, revealing the pros and cons of its furtherance as it stands today.

Considering the financial implications of the VIS, the impact the visa policy has in a large proportion of third-country nationals and its uncertain efficacy to prevent illegal immigration⁸¹⁴, an open debate on the substance of the policy is indispensable, if a right balance with human rights and other principles the Union aspires to protect is to be struck.

As encouraged by the article 29 Working Party and the European Data Protection Supervisor (EDPS), a public debate on the widespread use of biometrics in relation, in particular, to the data protection principles of limited purpose and proportionality should be promoted. Particular disquiet produces the possibility that law enforcement authorities, including Europol, have been granted access to the database, as this is possibly in breach of the data protection principle of limited purpose⁸¹⁵.

The relationship between asylum and visas should be given a central space in both debates.

9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas, OJ L 218/60 of 13.08.2008.

811 Proposal for a Council Regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (codified version), COM(2008) 761 final of 28.11.2008.

812 Proposal for a Council Regulation laying down a uniform format for visas (codified version), COM(2008) 891 final of 19.12.2008.

813 Draft proposal for a Regulation of the European Parliament and of the Council establishing a Community Code on Visas, COM(2006) 403 final of 19.07.2006, p. 3 [CCV Proposal hereinafter].

814 Study on the links between legal and illegal migration, COM(2004) 412 final of 04.06.2004.

815 Article 29 WP, Opinion 2/2005, WP 110 of 23.06.2005 and Opinion of EDPS, 2005/C 181/06, OJ C 181/13 of 23.07.2005.

4.2. All refugee-producing countries feature in the black list

PROBLEM: All refugee-producing countries feature in the black list.

All refugee-producing countries figured on the black list already before communautarisation. Such classification has remained unchanged ever since. The specific motives behind have not been spelled out beyond the generic criteria enshrined in Recital 5 of Regulation 539/2001. The duty to obtain visas puts a heavy burden on refugees.

Airport Transit Visas (ATVs), as established in the CCV, entail a additional hurdle to access protection in the EU.

'Risks relating to security and illegal immigration' appear to attract prominent consideration for inclusion in the black list⁸¹⁶. Ecuador and Bolivia have been transferred to it on those grounds⁸¹⁷. Kosovo too has been inserted therein '[...]' in view of security concerns regarding in particular the potential for illegal migration⁸¹⁸. ATVs follow the same line, pursuing the harmonisation of airport transit arrangements 'in order to combat illegal immigration'⁸¹⁹. Identical rationale seems to underpin the rules contained in articles 22, 31 and 47(1)(g) CCV on prior consultation or information in relation to specific nationalities or specific categories of persons before they are issued a visa. The 'case-by-case assessment' per country for the distribution in the visa lists, which the Preamble of Regulation 539/2001 states that has been undertaken on the basis of a plurality of criteria, does not subsequently transpire in the text of the Regulation. Instead, the lists drafted during the Schengen period seem to have been inherited 'en bloc', without an assessment of the criteria used for inclusion in the black list in light of the relevant EU law rules and principles governing the policy after communautarisation.

SOLUTION: Visa lists should be configured and periodically reviewed bearing in mind not only security and illegal immigration concerns, but also their possible human rights implications so as to enable the EU Member States to fulfil their obligations in light of the Munaf and WM jurisprudence.

Despite the fact that international protection obligations are common to all the EU Member States, no attention seems to have been paid to the particular position of refugees and asylum seekers when dressing the visa lists. Although room is left to accord recognized refugees some special treatment, as expounded below, the position of refugees yet-to-be-recognized has largely been neglected. As they can be considered to be encompassed in the wider notion of 'third-country nationals', they appear to be generally required to submit to visa requirements if they are the nationals of a blacklisted State. Airport Transit Visas further compound their situation, as all States on the ATV common list in Annex IV to the CCV are main source and transit countries of refugees⁸²⁰.

The periodic revision of the lists in function of the specific circumstances of each of the countries concerned should be given priority, 'in accordance with appropriate criteria', considering not only security concerns but refugee-producing situations as well⁸²¹.

816 Recital 5, Council Regulation (EC) No 539/2001.

817 Recital 1, Council Regulation (EC) No 453/2003 and Recital 1, Council Regulation (EC) No 1932/2006.

818 Recital 4, Council Regulation (EC) No 1244/2009.

819 Recital 5 CCV.

820 UNHCR, Asylum Levels and Trends in Industrialized countries 2009 - Statistical Overview of Asylum Applications Lodged in Europe and selected Non-European Countries, 23 March 2010, retrievable from: <http://www.unhcr.org/statistics.html>.

821 The Stockholm Programme, Council Doc. 17024/09, 02.12.2009, § 5.2, p. 58 [The Stockholm Programme hereinafter].

4.3. No uniform visa requirements for recognised refugees

PROBLEM: No uniform visa requirements for recognised refugees. Visa requirements for recognised refugees originating from white-listed countries can be freely decided by each Member State⁸²². 'In urgent cases of mass influx of illegal immigrants', national ATV lists may be maintained⁸²³. This may harm the uniformity of EU law as well as legal certainty.

The residence criterion initially proposed by the Commission to determine the visa arrangements applicable to recognized refugees⁸²⁴, was unacceptable to the Council. Instead, a complex system has been put in place. Article 1(2) of Regulation 539/2001 establishes an exemption from visa requirements for refugees living in a Member State holding travel papers issued by it. However, according to article 4(2)(b), if refugees reside and have documents from a country on the white list, no automatic exemption applies and the Member States are free to require visas from them if they see fit. Pursuant to article 1(1), for those settled in a country on the black list, the visa requirement can generally not be excused.

Regarding ATVs, article 3 CCV establishes that, in principle, only the '[n]ationals of the third countries listed in Annex IV shall be required to hold an airport transit visa when passing through the international transit areas of airports situated on the territory of the Member States'. But, 'in urgent cases of massive inflow of illegal immigrants', individual Member States may require nationals of third countries other than those listed in Annex IV to procure an ATV, the possibility to entertain national ATV 'grey lists' being thereby maintained.

SOLUTION: In order to achieve the Treaty objective of a 'common policy on visas', the current discretion accorded to the EU Member State concerning the visa requirements of recognized refugees shall be eliminated.

The freedom allowed to the Member States to determine the visa arrangements applicable to recognized refugees coming from white-listed countries and to dress national ATV lists hinders the objective of harmonization of the visa policy that article 77(2)(a) TFEU pursues, thereby potentially harming the uniformity of EU law. The objective of legal certainty and the avoidance of 'visa shopping' that the Community Code on Visas aspires to attain cannot be fully realised under these conditions.

4.4. The provisions on limited territorial validity visas (LTVs) seem insufficient to fully accommodate the obligations that might be owed to refugees in exceptional circumstances

PROBLEM: The provisions on limited territorial validity visas (LTVs) seem insufficient to fully accommodate the obligations that might be owed to refugees in exceptional circumstances. Asylum seekers and refugees cannot fulfil the criteria to be granted ordinary short-term visas. Although their rights to non-refoulement and to seek international protection, both in their substantial and procedural facets, may be secured in certain cases through the

822 Article 4(2)(b) Regulation 539/2001 as amended by Regulation 1932/2006.

823 Recital 5 and article 3(2) CCV.

824 COM(2000) 27 final, p. 7 and 13, and COM(2000) 577 final, p. 9.

delivery of LTVs, it is questionable whether the discretionary language in which the LTV provisions have been formulated affords sufficient guarantees. Stronger language and clearer rules are necessary to ensure legal certainty and consistency with the Schengen Borders Code and to facilitate compliance with international protection obligations of the EU Member States, as appropriate.

Because those in search of international protection cannot show readiness to return, they are unable to fulfil the visa issuing requirements.

The Community Code on Visas, in articles 21 and 24, refers to article 5(1) SBC as the standard to consider when delivering visas. But that article should not be read in isolation, without taking into consideration the system within which that provision is located. Articles 3(b), 5(4)(c) and 13(1) SBC, all crucial to the accommodation of the particular position of refugees and asylum seekers, have to be taken into account, since they constitute the legal context of article 5(1) SBC. Better articulation with the Schengen Borders Code should be introduced in the Community Code on Visas, so that the proper observance of asylum seekers' and refugees' entitlements can be guaranteed.

In light of the existent case-law, as analysed above, where the action taken by a Member State, in the form of a visa refusal, would lead to the refoulement of a refugee, such course of action is banned by article 33 GC. Equally, if the denial of a visa entails the exposure to a 'real risk' of ill treatment, should it occur while the person concerned is still inside his country of origin, both the ECHR and EU law impose an obligation to avoid it. The form such prevention should take depends on the facts of each case. Where protection cannot be effectively provided in situ, the possibility to allow the person to travel to the EU, possibly by means of a LTV visa, cannot be excluded. In addition, the right to leave to seek asylum, as expounded earlier, may require that entry and pre-entry controls, including visas, be arranged in a way that asylum seekers are not deprived of the protection that right affords. If there are no other realistic prospects for a refugee to-be to leave his country of origin in search of asylum than by means of a visa, the country confronted with such a situation may be required to issue him a LTV.

SOLUTION: The conditions and the procedure to issue LTV visas to refugees and asylum seekers shall be clarified, to enable the Member States to fulfil their international obligations, as appropriate.

We do not contest the institution of visas generally. What we note, however, is that under certain exceptional circumstances, as in the cases of WM and Munaf above, EU Member States may be compelled to take positive action to fulfil their international obligations vis-à-vis refugees and asylum seekers. If there is a choice with regard to the means the State concerned can use, the fulfilment of those obligations entail a duty of result. The issuance of an LTV is one possible means EU law puts at the disposal of the Member States to attain such a result, e. g. the avoidance of refoulement in the particular case. In this light, it would be desirable that both the conditions and the procedure to be followed to deliver LTV visas be spelled out clearly in the CCV.

It is uncertain that the may terms and the language of exception in which the LTV visa provision in article 25 CCV has been drafted can warrant compliance with international human rights obligations. In our opinion, the CCV leaves excessive discretion to the Member States, determining that LTVs 'shall be issued exceptionally', provided that the Member State concerned 'considers it necessary' on humanitarian reasons, on grounds of national interest or 'because of international obligations'. By contrast, article 5(4)(c) SBC,

on the basis of which article 25 CCV has been worded, allows for a lesser degree of discretion. Furthermore, there may be situations, especially when international obligations are involved, in which no margin of appreciation at all will be left to the Member State concerned to 'consider' whether or not to comply with these obligations⁸²⁵. Therefore, the wording of article 25 CCV should be clarified to state that where international obligations are engaged, if no other appropriate means are available to comply therewith, an LTV visa shall be delivered.

4.5. Uncertain appeal rights against LTV visa denials

PROBLEM: Uncertain appeal rights against LTV visa denials.

- Linguistic inconsistencies between articles 19 and 25 CCV may lead to the inadmissibility of LTV applications, leaving refugee visa applicants without the rights of appeal that article 32 CCV reserves to those whose applications have been formally rejected.
- Such deprivation of remedies may clash with refugees'/asylum-seekers' rights to effective remedies and to judicial protection under the relevant international and EU law instruments.

The CCV has introduced a right of appeal in article 32 against visa applications that have been formally refused. However, when visa applications do not fulfil the admissibility criteria established in article 19 CCV, the visa procedure may be discontinued without issuing a formal refusal. According to the Commission Proposal, the point is to introduce a 'clear distinction between those visa applications that have been formally refused after full examination of the file and cases where such in-depth examination was not carried out because the applicant failed to provide additional information'. The problem is that non-admissibility entails a material refusal, which leaves the person without any judicial recourse.

With regard to LTV visas, it is not clear whether LTV applications grounded in international protection obligations can be submitted and whether they will fail directly at the admissibility stage. Article 19(4) CCV stipulates that '[b]y way of derogation, an application that does not meet the requirements [...] may be considered admissible on humanitarian grounds or for reasons of national interest', omitting any reference to the international obligations that would require a Member State to issue a LTV visa according to article 25 CCV, in light of article 5(4)(c) SBC. This inconsistency may lead to wrong inadmissibility decisions, depriving refugee visa applicants of their rights to appeal.

Unclear appeal rights may, in turn, collide with the requirements of the rights to effective remedies and to judicial protection, as referred to in section 2.3 above. Indeed, if the denial of a LTV visa puts the person concerned at risk of refoulement or virtually prevents him from exiting his country of origin in view of seeking international protection, an effective remedy, in the form of effective judicial protection, has to be accorded, both on account of the international obligations of the EU Member States and as a matter of EU law itself.

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Standing Committee of experts on international immigration, refugee and criminal law, Note on the draft proposal for a Regulation of the European Parliament and of the Council establishing a Community Code on Visas, COM(2006) 403 final, Utrecht, 08.02.2007, § c.

SOLUTION: The linguistic inconsistencies between articles 19 and 25 CCV shall be eliminated, so that refugee visa applicants do not see their applications truncated at the admissibility stage. This way, the appeal rights associated with formal visa refusals will be made available to them too.

It is essential to recall that 'Community law requires effective judicial scrutiny of the decisions of national authorities taken pursuant to the applicable provisions of Community law [...]'⁸²⁶. Hence, it would be appropriate to adapt the wording of articles 19 and 25 CCV. The right of refugees and asylum seekers to an effective remedy should not be thwarted by defective visa issuing proceedings.

4.6. Cooperation with private entities in the visa issuing procedure entails serious risks for refugees and asylum seekers

PROBLEM: Cooperation with private entities in the visa issuing procedure entails serious risks for refugees and asylum seekers.

Cooperation with honorary consuls, private service providers and commercial intermediaries, as practised already and codified in articles 42, 43 and 45 CCV, jeopardizes data protection and may put refugees' and asylum seekers' rights objectively at risk.

Cooperation with honorary consuls, private service providers and commercial intermediaries in the visa issuing procedure is current practice. The Community Code on Visas provides for a legal framework with a view to ensuring compliance with EU data protection rules, making the Member States ultimately responsible for any breaches thereof. However, under the CCV honorary consuls, private service providers and commercial intermediaries may be entrusted with the very significant tasks of gathering the supporting documents to visa applications, retrieving biometric data, collecting the issuing fee and transmitting the files to the competent consular authority. Under such conditions, as noticed by the European Data Protection Supervisor himself, '[...] Member States will not be able to guarantee the protection of the outsourced data processing [...]'. External service providers, commercial intermediaries and honorary consuls which are not civil servants of the State concerned 'will, despite all other contractual provisions, be subjected to national law of the third country where they are established. [...] [T]his could involve a major risk for the individuals concerned in some third States who would be keen to know which of their citizens have applied for a visa (for political control on opponents and dissidents). [Private entities] [...] would not be in a position to resist pressure from the government [...] of the applicant countries requesting data from them'⁸²⁷.

SOLUTION: To avoid abuse by host countries or by the private entities themselves direct access for refugee visa applicants to the Member States' representations abroad shall be maintained in practice.

As far as cooperation with private service providers is concerned, the provision in article 17(5) CCV that 'the Member States concerned shall maintain the possibility for all applicants to lodge their applications directly at its/their consulates' should be duly observed not only in law, but also in actual practice. Against this background, the European

826 ECJ, Panayotova, C-327/02, ECR [2004] I-11055, § 27.

827 Opinion of the EDPS on (COM (2006) 269 final) — 2006/0088 (COD), OJ C 321/38 of 29.12.2006, p. 29.

Data Protection Supervisor's suggestion to locate the service provider in a place protected under diplomatic inviolability deserves further consideration.

4.7. Data transfers to third countries entail real risks for refugees and asylum seekers

PROBLEM: Data transfers to third countries entail real risks for refugees and asylum seekers.

Transfers of data concerning refugee visa applicants to third countries, as allowed by article 31 VIS Regulation, may seriously hinder compliance with international protection obligations.

No procedures and no remedies have been introduced to ensure conformity therewith.

According to article 31 of the VIS Regulation, substantial data on visa applicants may be transferred to a third country 'if necessary in individual cases for the purpose of providing the identity of third-country nationals, including for the purpose of return, where the following conditions are satisfied: (a) the Commission has adopted a decision on the adequate protection of personal data in that third country in accordance with article 25(6) of Directive 95/46/EC, or a readmission agreement is in force between the Community and that third country, or the provisions of article 26(1)(d) of Directive 95/46/EC apply; (b) the third country [...] agrees to use the data only for the purpose for which they were provided; (c) the data are transferred or made available in accordance with the relevant provisions of Community law, in particular readmission agreements, and the national law of the Member State which transferred or made the data available, including the legal provisions relevant to data security and data protection; (d) and the Member State(s) which entered the data in the VIS has given its consent.'

Although '[s]uch transfers of personal data to third countries [...] shall not prejudice the rights of refugees and persons requesting international protection, in particular as regards non-refoulement', no precise procedures have been established to so guarantee. In the case in which the rights of refugees may have been breached, no specific remedies have been made available in the VIS Regulation and its relationship to the Return Directive⁸²⁸ and/or the Procedures Directive⁸²⁹ for that purpose is unclear.

A closer look reveals additional inaccuracies: From the open-ended fashion in which the provision has been drafted, it appears that any exchange of information in order to make available the identity of the third-country national concerned would be allowed. The reference to 'the purpose of return' looks merely illustrative. This raises doubts of compatibility with the data protection principle of limited purpose of data use. Then, according to (a), it remains unclear why the existence of a readmission agreement in force between the Union and the third country concerned would per se guarantee data protection or non-refoulement, thereby exempting from an individual analysis in each case. As far as (b) is concerned, it seems inadequate to entrust the protection of human rights to a mere declaration by the data recipient which nature and legal effects remain unspecified. In regard of (d), finally, it appears insufficient to obtain the consent of the Member State that

828 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98 of 24.12.2008.

829 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326/13 of 13.12.2005.

entered the data in the VIS, without informing the data subject first and considering his concerns too.

SOLUTION: Specific safeguards must be introduced where refugees'/asylum seekers' data are transferred to third countries, so that EU Member States' protection obligations can be guaranteed.

Taking into account that State persecution is the primary factor provoking the need for international protection, the necessity arises to develop a specific procedure matched with the necessary remedial safeguards to ensure that data transfers to third countries do not encroach upon refugees' and asylum seekers' rights in the context of return or other proceedings.

4.8. Actual access to visas is not guaranteed in practice

PROBLEM: Actual access to visas is not guaranteed in practice. EU Member States have no obligation to be neither present nor represented in all black-listed countries. When absent, visas become inaccessible in practice. The coherence of the pre-entry/entry continuum is thereby imperilled. The inaccessibility of visas in practice combined with carrier sanctions, as elaborated below, renders compliance with refugee rights uncertain.

EU law does not create an obligation for Member States of destination to open embassies around the world. It only recommends, in articles 8 and 40 CCV, the conclusion of representation agreements with other Member States present in a given country to avoid their absence becoming an impediment to obtain visas. Yet, there are several Member States that are currently neither present nor represented in some black-listed States. In addition, to date '[a]ll representations are [...] closed in [...] Liberia, Sierra Leone and Somalia'⁸³⁰. Visas have become inaccessible in those States as a result. Such inaccessibility may well call into question the necessary coherence between pre-entry and entry requirements for the EU system of admission to work properly. As we shall see, in the absence of visas, the incorporation of private carriers to the scene further highlights the need for consistency.

SOLUTION: since visas are not always available in practice, as proposed bellow, the institution of carrier sanctions should be entirely re-thought, if not abandoned.

As already stated, visas do not per se breach the rights of refugees and asylum seekers. Their inaccessibility, therefore, does not constitute in itself an obstacle for refugees or asylum seekers to reach, in practice, the external borders of the EU Member States in order to obtain international protection. As it will be further elaborated hereunder, it is the inaccessibility of visas, de jure or de facto, in combination with boarding rejections by private carriers fearing to be penalized for having transported unduly documented migrants into the EU that pose a problem.

830 Annex 18 to the former Consular Instructions on visas for the diplomatic missions and consular posts, OJ C 326/1 of 22.12.2005, today repealed by the CCV.

5. CARRIER SANCTIONS AND IMMIGRATION LIAISON OFFICERS (ILO):

The enforcement of visa requirements is assisted by legislation passed on carriers' liability⁸³¹ and immigration liaison officers (ILOs)⁸³², which offers the possibility to ensure that only passengers with the requisite travel documentation are able to reach the external border of the Schengen Member States.

Because LTV visas cannot be expected to be granted to refugee visa applicants in every case, due to either legal or material obstacles as expounded above, the role played by these intermediate sheriffs in allowing access to international protection in the EU becomes key.

5.1. No evaluations exist of carrier sanctions' impact on asylum seekers' rights

PROBLEM: No evaluations exist of carrier sanctions' impact on asylum seekers' rights. The real impact of carrier decisions on refugees' and asylum-seekers' rights is unknown, since neither a monitoring system is in place nor a reporting obligation that would help to elucidate it.

According to article 7(3), Member States have an obligation to communicate domestic provisions adopted for the implementation of Directive 2001/51 to the Commission. But no further mechanisms to monitor or to review the application of the instrument in practice and the policy itself have been contemplated. The necessity, legality and proportionality of this pre-entry mechanism seem to be taken for granted, without enquiring into its intrinsic unsuitability to accommodate the international protection obligations of the EU Member States, as it will be explained hereunder.

SOLUTION: In order to understand the real implications of carrier sanctions for improperly documented refugees and asylum seekers, at a minimum, statistical data on the reasons for rejecting boarding as well as information on the handling of individual cases involving prospective passengers in search of international protection should be collected. In addition, a monitoring system by an independent body and/or an obligation on the Member States and the carriers themselves to report on the treatment accorded to refugees and asylum seekers at the boarding stage should be introduced.

5.2. Unclear compatibility of carrier sanctions with international obligations

PROBLEM: Unclear compatibility of carrier sanctions with international obligations. Although both article 26 CISA and Directive 2001/51 refer 'to the obligations resulting from the Geneva Convention', it is not clear what this reference entails and how exactly

831 Article 26 of the Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239/19 of 22.09.2000 [Schengen Convention or CISA hereinafter] and Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, OJ L 187/45 of 10.07.2001 [Directive 2001/51 hereinafter].

832 Council Regulation (EC) No 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network, OJ L 64/1 of 02.03.2004 [ILOs Regulation hereinafter].

refugee rights, both under international and EU law, should be protected.

Article 4(2) Directive 2001/51 further establishes that fines on carriers transporting improperly documented migrants shall be 'without prejudice to Member States' obligations in cases where a third country national seeks international protection'. Does the reference to the Geneva Convention imply that penalties must not be imposed on carriers if the person seeking entry is in need of international protection or does it involve that sanctions may be imposed regardless of refugee entitlements? Half of the Member States has subsequently transposed this clause in a way that takes account of the particular position of those in search of international protection, introducing exculpatory provisions in national law, whereas the other half applies sanctions regardless of the passenger seeking asylum⁸³³. The second option presupposes the existence of a possibility of disconnecting the imposition of sanctions onto carriers from their effects upon refugees, treating each element as separable. However, practice shows that the threat of imposing penalties cannot be severed from its effects on the carrier's behaviour in relation to undocumented migrants. Prudence has led carriers in several documented cases to deny boarding with no other consideration beyond documental accuracy⁸³⁴. Subordinating the rights of refugees and asylum seekers to the will of carriers to assume the risk of taking their plight into consideration has the potential to deprive those entitlements of any useful effect.

The fact that carriers have only been entrusted with the verification of travel documents by article 26(1)(b) CISA leaves compliance with or exemption from other entry (and pre-entry) requirements unchecked. Directive 2001/51, as it was adopted before the Schengen Borders Code, does not refer to articles 3(b), 5(4)(c) and 13(1) SBC. Nor does it provide for any particular procedure to be followed in the case improperly documented migrants are in search of international protection. This does not mean that the 'international obligations' owed to refugees, to which the Schengen Borders Code explicitly refers, vanish when carriers assume the functions of EU Member States' officials with regard to entry. In reality, States cannot contract out their legal obligations under international law. Therefore, the actions or omissions of carriers that may expose their prospective passengers to refoulement or prevent them access to asylum procedures may be attributed to the EU Member State on behalf of which the conduct is carried out, thereby possibly engaging the State's international responsibility on that account⁸³⁵.

SOLUTION: If legally and materially possible, since visas are not always available for refugee applicants, carriers shall be enabled to carry out full entry checks on the basis of all the relevant SBC provisions, so that considerations beyond documental accuracy are properly taken into account.

833 K. Hailbronner and C. Carlitz, 'European Synthesis Report on the Implementation of Directive 2001/51/EC on Carriers Liability,' ODYSSEUS Study on the Conformity Checking of the Transposition by Member States of 10 EC Directives in the Sector of Asylum and Immigration, Commissioned by DG JLS (JLS/B4/2006/03) (on file with the authors), pp. 30-35.

834 ECRE, 'Defending Refugees' Access to Protection in Europe, December 2007, retrievable from: www.ecre.org and UK Refugee Council, 'Remote Controls: How UK Border Controls are Endangering the Lives of Refugees, December 2008, retrievable from: www.refugeecouncil.org.uk.

835 International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001), UNGA A/56/49(Vol.I)/Corr.4. Article 5: '[t]he conduct of a person or an entity which is not an organ of the State [...] but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law'. The ILC's Commentary on article 5, as an example of attribution of State responsibility, refers precisely to those situations in which '[p]rivate or State-owned airlines [have been] delegated [...] certain powers in relation to immigration control or quarantine'.

5.3. No remedies exist against carriers' decisions to deny boarding

PROBLEM: No remedies exist against carriers' decisions to deny boarding. Article 6 Directive 2001/51 grants 'effective rights of defence and appeal' only to carriers. Neither specific procedures, nor remedies have been introduced for those affected by carriers' decisions.

The absence of any means to appeal for refugees and asylum seekers to challenge boarding rejections by carriers 'arguably' amounting to refoulement or preventing access to determination procedures may well constitute a breach of the right to an effective remedy and to judicial protection as disclosed above.

SOLUTION: 'Effective rights of defence and appeal' for those affected by carriers' decisions must be introduced to ensure compliance with EU and international law obligations of the EU Member States.

Directive 2001/51 should include details on the procedures that carriers confronted with asylum seekers should precisely follow and make provision on clear appeal rights against their decisions in a manner compatible with the 'effective remedy' and the 'judicial protection' standards enshrined in article 47 EUCFR. Indeed, both non-refoulement and the right to leave to seek asylum should be fully guaranteed.

5.4. Structural unsuitability of carriers to perform full (pre-)entry controls

PROBLEM: Structural unsuitability of carriers to perform full (pre-)entry controls.

- The private nature of carriers clashes with the public character of the functions they de facto carry out. When asked to check documents, they are in practice indirectly empowered to take full decisions on (pre-)entry.
- According to current EU law such decisions should be taken by public officials only. Otherwise compliance with Member States' international obligations cannot be properly assured.
- Even if carriers would be de jure empowered to make full decisions on entry, it remains unclear how the exercise of effective remedies against their decisions and the right to judicial protection could be upheld in practice in a meaningful way.

Current EU legislation on admission reserves the delivery of visas to Member States' public authorities⁸³⁶ and entrusts checks on compliance with entry requirements exclusively to border officials⁸³⁷. Explicit exceptions should then be introduced to accommodate private carriers within this scheme, as they may de facto waive visa requirements and grant or deny (pre-)entry.

836 Article 4(1) CCV: 'Applications shall be examined and decided only by consulates' (our emphasis). In exceptional cases other public authorities are allowed to issue visas at the external borders, according to articles 35 and 36 CCV. Even where collaboration with private service providers is undertaken, article 43(4) CCV establishes that: '[...] the decision on applications and the printing and affixing of visa stickers shall be carried out only by the consulate'.

837 Article 15(1) SBC establishes that '[t]he border control provided for by articles 6 to 13 shall be carried out by border guards in accordance with the provisions of this Regulation and with national law'. Article 7 SBC reiterates that '[c]ross-border movement at external borders shall be subject to checks by border guards'. In turn, article 2(13) SBC defines border guard as 'any public official assigned, in accordance with national law, to a border crossing point or along the border or the immediate vicinity of that border who carries out [...] border control tasks' (emphasis added).

However, even if the necessary legal amendments were introduced in this direction, it is hard to see how private entities, devoid of the competence and public authority necessary, could properly assume these tasks. Investing carriers with official power seems improbable and subjecting their decisions to the validation of EU Member States' officials posted abroad may collide with the jurisdictional powers of the territorial State in which they act. Beyond legal technicalities, in practice, we do not see how the remedies that have to accompany entry refusals, according to article 13 SBC, and visa denials, pursuant to article 32(3) CCV, plus the concomitant judicial protection that has to be guaranteed, following article 47 EUCFR, could be preserved if carrier sanctions are maintained.

SOLUTION: Thorough discussions must be held with regard to the legal viability of maintaining the institution of carrier sanctions. The impossibility to introduce the necessary legal safeguards in their scheme should lead to the abandonment of the policy altogether.

Once verified that it is impossible to incorporate the necessary legal safeguards to the carriers sanctions' scheme and that refugee rights risk being neglected thereby, the entire institution should be considered incompatible not only with the international obligations to which the EU Member States have subscribed but also with the very EU *acquis* on entry carrier sanctions intend to implement.

5.5. There is very little information available on the activities of ILOs

PROBLEM: There is very little information available on the activities of ILOs.

- Pursuant to article 6 ILOs Regulation, periodical reports on ILOs activities have to be drafted. Yet, their content is not made public.
- Transparency and accountability would require declassification.

Article 1 ILOs Regulation defines an ILO as a representative of a Member State posted abroad 'in order to establish and maintain contacts with the authorities of the host country with a view to contributing to the prevention and combating of illegal immigration, the return of illegal immigrants and the management of legal immigration'. The bulk of their functions, according to article 2, relates prominently to the collection and exchange of information on illegal immigration. Article 4 provides for the legal framework of cooperation between the ILOs of different EU Member States operating in the same region through regular meetings, exchanges of information, the adoption of coordinate positions in regard of contacts with carriers, the organization and attendance at training courses, etc. Periodical reports on their activities are due at the end of each European Presidency, pursuant to article 6. However, the information contained therein remains 'RESTRAINT EU'838. As a way to solve this conundrum, the Commission has proposed to amend the Regulation to give the Parliament access to these reports⁸³⁹.

SOLUTION: The disclosure of existing periodical reports is necessary. The amendment proposed on this point by the Commission to article 6(1) of the ILOs Regulation should

838 Commission Decision 2005/687/EC of 29 September 2005 on the format for the report on the activities of immigration liaison officers networks and on the situation in the host country in matters relating to illegal immigration (notified under document number C (2005) 1508), OJ L 264/8 of 08.10.2005, Annex.

839 Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 377/2004 on the creation of an immigration liaison officers network, COM(2009) 322 final, 08.07.2009, article 1(3), [Commission Proposal to amend the ILOs Regulation hereinafter].

be adopted.

Without factual information it is impossible to judge on the impact that ILOs have on those seeking international protection. For reasons of transparency and accountability, as proposed by the European Commission and requested by the European Parliament, article 6 reports should be declassified⁸⁴⁰.

5.6. ILOs' activities disregard the asylum dimension related to their action

PROBLEM: ILOs' activities disregard the asylum dimension related to their action.

- Article 2 ILOs Regulation, defining the tasks of immigration liaison officers, neglects the possible impact of their activities on refugees' and asylum seekers' rights, omitting any allusion thereto.
- No reference is made in the Regulation to human rights and general principles of EU law.
- No specification of the procedures to be used in cases in which ILOs encounter refugees or asylum seekers or of any remedies available against their actions can be found in the ILOs Regulation.
- The extent to which they interact with 3rd countries and commercial carriers is unclear too.
- These issues remain unaddressed both in the Commission proposal to amend the ILOs Regulation and in the Commission proposal to amend the FRONTEX Regulation⁸⁴¹.
- Closer cooperation with FRONTEX alongside the enhancement of ILOs activities, as it is contemplated in both the Commission proposal to amend the ILOs Regulation and in the Commission proposal to amend the FRONTEX Regulation, should be established only when their powers have been clearly delimited, procedural guarantees put in place and remedial measures and judicial protection made available.

The 'appropriate qualifications of such liaison officers', as referred to in the Preamble, are not specified in the body of the ILOs Regulation. The instrument defers the description of their responsibilities to each sending Member State, which shall ensure that its ILOs comply with national law and with the agreements concluded with the host country or the international organization with which they cooperate. References to EU law and human rights have been obviated. Such omissions are worrisome as it is difficult to conceive, for instance, of any 'ways and means to assist the authorities in host countries in preventing illegal immigration flows originating from or transiting through their territories', as stipulated in article 2(g), without effects on the right of everyone to leave his own country in search of asylum and on the principle of non-refoulement as characterised above. It remains unclear in which concrete ways ILOs are to carry out their responsibilities when confronted with refugees and asylum seekers and what remedies are offered for those cases in which human rights violations occur.

840 Projet Révisé de Rapport sur la proposition de règlement du Parlement européen et du Conseil modifiant le règlement (CE) n° 377/2004 du Conseil relative à la création d'une réseau d'officiers de liaison "Immigration", 2009/98(COD), 29.04.2010.

841 Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX), COM (2010) 61 final, 24.02.2010, [Commission Proposal to amend the FRONTEX Regulation hereinafter].

The Commission proposals are insufficient in this regard. The introduction of a recital in the preamble of the ILOs Regulation stating that the instrument ‘respects the fundamental rights and observes the principles recognised by article 6(2) [TEU] and reflected in the [ECHR] and the [EUCFR]’, although welcome, does not provide for adequate guarantees. Nor does the specification, in article 1(16) of the proposal to amend the FRONTEX Regulation, that ‘[t]he tasks of the liaison officers shall include, in compliance with European Union law and in accordance with fundamental rights, the establishment and maintaining of contacts with the competent authorities of the third country to which they are assigned to with a view to contribute to the prevention of and fight against illegal immigration and the return of illegal immigrants’. The concrete means by which this objective of compliance with EU fundamental rights can be achieved should be clearly spelled out in both Regulations.

This is particularly relevant, especially when ILOs collaborate with commercial carriers in pre-boarding control and when they instruct third countries’ officials on how to manage migration flows. If the role of ILOs is limited to providing ‘[i]nformation sessions or training on the falsification/counterfeiting of travel documents, illegal migration or other relevant topics’⁸⁴² the shortcomings noted previously with regard to carrier sanctions will only be perpetuated. Conversely, in the case in which ILOs are endowed with the power to make decisions on entry (by allowing or refusing boarding at departure), their actions must be subjected to strict compliance, in law and in practice, with all the conditions set out in the SBC, including the exceptions thereto in respect of international obligations binding upon the Member States.

SOLUTION: better specification of ILOs’ tasks and powers, with an unequivocal submission to EU law, human rights and refugee law, and the introduction of appropriate safeguards and remedies is key.

A clearer stipulation on ILOs functions, establishing their concrete powers vis-à-vis migrants and their relation to third countries and private carriers in the prevention of irregular migration is essential. The submission of ILOs’ activities to EU law, in general, and to the SBC and fundamental rights, in particular, should be unequivocal. ‘[E]nhanc[ing] the activities organised by the consular and other services of Member States in third countries and to support the reinforcement of the operational capacity of the immigration liaison officers’ networks [...]’, as Recital 6 of the Commission Proposal to amend the ILOs Regulation suggests, without clearly delimiting their powers and responsibilities, raises legal uncertainty and increases the risk of obliteration of refugees’ and asylum seekers’ rights.

Currently, the EU Draft Common Manual for Immigration Liaison Officers considers the Geneva Convention and the EU acquis on asylum as relevant legislation that ILOs have to take into account, but the text is too general and is not binding. Even if it was, it would still remain unclear in which specific way ILOs are to undertake their tasks in practice in accordance with fundamental rights and which (effective) remedies could be offered in the case violations occur⁸⁴³. Clear procedures and safeguards, matched with real opportunities

842 Draft Common Manual for Immigration Liaison Officers (ILOs) posted abroad by the Member States of the European Union, Council doc. 8418/06 of 25.04.2006, pp. 9 and 11 [EU Draft ILOs Manual hereinafter].

843 As an indication, but without legally binding effect, the IATA Code of Conduct for Immigration Liaison Officers establishes that when ILOs receive requests for international protection they should refer the person to the UNHCR, the appropriate diplomatic mission or a competent local NGO. See International Air Transport Association, A Code of Conduct for Immigration Liaison Officers, October 2002, § 2.3.

for effective judicial protection, should be set out for those situations in which ILOs are confronted with refugees and asylum seekers in the course of their activities.

5.7. It is not certain that the legal safeguards and remedies against ILOs' actions and/or decisions that could be introduced in the ILOs Regulation could be effective in practice

PROBLEM: It is not certain that the legal safeguards and remedies against ILOs' actions and/or decisions that could be introduced in the ILOs Regulation could be effective in practice.

As with the carrier sanctions scheme, even if legal safeguards and judicial remedies were introduced in the ILOs Regulation, it remains unclear how the exercise of effective remedies against their actions and/or decisions and the right to judicial protection could be upheld in practice.

As it will be expounded below, mechanisms of off-shore processing of claims of international protection are structurally unsuited to accommodate the requirements of non-refoulement and the right to leave to seek asylum in a meaningful way. Refer to Part II for further details.

SOLUTION: Thorough discussions must be held with regard to the legal viability of maintaining the institution of ILOs. The impossibility to introduce the necessary legal safeguards in their scheme should lead to the abandonment of the policy altogether.

If verified that it is not possible to incorporate the necessary legal safeguards to the ILOs' scheme and that refugees' and asylum seekers' rights risk being neglected as a result, the entire institution should be considered incompatible not only with the international obligations binding upon the EU Member States, but also with the very EU *acquis* on entry that ILOs intend to implement.

6. JOINT MARITIME OPERATIONS BY THE EU MEMBER STATES AND FRONTEX

In the way towards the establishment of an integrated management system of the external borders of the EU Member States, the need was felt to set up a specialised Agency. Thus, preceding the enactment of the Schengen Borders Code, Regulation 2007/2004 established FRONTEX⁸⁴⁴. As stated in the Preamble and in article 1, the objective is to 'improving the integrated management of the external borders of the Member States of the Union', so as to ensure 'a uniform and high level of control and surveillance' and the 'efficient implementation of common rules' in the field, respecting fundamental rights and the principles enshrined in article 6 TEU and in the EU Charter of Fundamental Rights. Regulation 863/2007 has supplemented the system, establishing the RABIT mechanism for exceptional and urgent situations of mass influx of third-country nationals attempting illegal crossings and regulating the powers of guest officers taking part in joint operations and pilot projects⁸⁴⁵. The amendment insists on compliance with fundamental rights,

844 Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349/1 of 25.11.2004 [FRONTEX Regulation hereinafter].

845 Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council

mentioning that the Regulation should be carried out 'in accordance with Member States' obligations as regards international protection and non-refoulement'. Special emphasis is made in Recitals 16 to 18 on the need to respect the 'obligations arising under the international law of the sea, in particular as regards search and rescue'.

The submission of the Agency to the SBC is not made explicit in the FRONTEX Regulation, due to the Code being posterior. Yet, the Agency should be supposed in application of article 16 SBC, stating that '[o]perational cooperation between Member States in the field of management of external borders shall be coordinated by the European Agency [...], established by Regulation (EC) No 2007/2004'. It is the RABIT Regulation that stipulates in Recital 16 that the instrument 'contributes to the correct application of [...] the Schengen Borders Code'. The amendment reinstates in article 2 the overarching principle of article 3 SBC, according to which the control regime applies 'without prejudice to the rights of refugees and persons requesting international protection, in particular as regards non-refoulement'. The Commission proposal to amend the FRONTEX Regulation proposes to make explicit in article 1 that the Agency is required to observe the Schengen Borders Code, EU law, international law, 'obligations related to access to international protection, and fundamental rights'.

The Agency has been entrusted with several tasks. According to article 3 FRONTEX Regulation, joint operations and pilot projects can be launched at the initiative of the Member States or on the proposal of the Agency. If the Commission amendments are adopted, FRONTEX will be able to initiate border surveillance missions itself, 'in cooperation with the Member States'. To date, FRONTEX has carried out a number of them since it started operations in 2006. For our purposes, HERA provides a good example. The declared purpose of the HERA operation, hosted by Spain, is to prevent illegal immigration by sea and to identify traffickers and smugglers, while increasing operational cooperation between participating Member States and third countries. HERA has been deployed in different phases, since July 2006. HERA I was concerned with the identification of irregular migrants arriving at the Canary Islands⁸⁴⁶. HERA II aimed at reinforcing maritime surveillance, dissuading pateras and cayucos from sailing off Senegal, Mauritania and Cape Verde. When the boats were already at sea, the goal was to intercept them while in the territorial waters of the country of embarkation, handing over the responsibility for returning them ashore to the authorities of the third country concerned⁸⁴⁷. HERA III brought together the two dimensions of HERA I and II, the explicit goal being 'to stop migrants from leaving the shores on the long sea journey'⁸⁴⁸. In 2008, HERA became a permanent operation, to be launched according to the needs identified by FRONTEX. Running from February till

Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers OJ L 199/30 of 31.07.2007 [RABIT Regulation hereinafter].

846 FRONTEX, Press Releases, HERA II Operation to be Prolonged, 13.10.2006 and Longest FRONTEX coordinated operation – HERA, the Canary Islands, 19.12.2006.

847 European Commission News, EU immigration: Frontex Operation, 12.09.2006, Ref: 48181: 'Normally Senegalese boats escort the migrants inshore, start the legal procedure and try to arrest the people that were paid for organizing the journey.' BBC News, Stemming the immigration wave, 10.09.2006, retrievable from: <http://news.bbc.co.uk/2/hi/europe/5331896.stm>: The Spanish Commander in chief declared in this respect that 'boats containing a total of 1,243 people ha[d] been intercepted and returned to shore' and added that if they located 'any illegal boat within 24 miles of the coast they [were] immediately returned.' The boats were escorted to the Canary Islands when found outside that zone.

848 FRONTEX, Press Releases, A sequel of operation HERA just starting, 15.02.2007 and Public Bull. February 2007, Ref. No. 5427/16.02.2007, p. 3.

December, it diverted 5,969 migrants back to Africa⁸⁴⁹. HERA 2009 run from March to December 2009, but official statistics are not available yet⁸⁵⁰.

The NAUTILUS operation, first launched in 2006, has also become permanent afterwards. It covers the central Mediterranean for similar purposes. During the summer of 2009, the mission overlapped with a series of push-backs orchestrated by Italy. Although, according to UNHCR, 'it [was] clear that a significant number from this group [was] in need of international protection'⁸⁵¹, Italy returned at least 900 migrants to Libya between May and July 'without proper assessment of their possible protection needs'⁸⁵². The degree of FRONTEX's involvement in these operations remains unclear⁸⁵³.

6.1. Available evaluations ignore the impact of joint maritime operations on human rights and current monitoring mechanisms are insufficient to ensure compliance with the EU fundamental rights' acquis

PROBLEM: Available evaluations ignore the impact of joint maritime operations on human rights and current monitoring mechanisms are insufficient to ensure compliance with the EU fundamental rights' acquis.

Internal evaluations per operation are carried out by FRONTEX, but their content is classified.

The Commission has conducted its own evaluation, but has shown uncritical with regard to possible flaws in the manner in which joint patrols have been performed.⁸⁵⁴

The external independent evaluation carried out by COWI grants a general satisfecit to FRONTEX, without analyzing the impact on fundamental rights its activities have. ⁸⁵⁵

The amendments proposed by the Commission to the FRONTEX Regulation will not substantially change the current state of affairs.

As the other entry control measures already scrutinized, joint sea patrols may affect the rights of refugees and asylum seekers to non-refoulement and to access international protection in a significant way. Yet, none of the existing (accessible) evaluations embark on a legal analysis of such an impact.

849 Frontex Press Release, HERA 2008 and NAUTILUS 2008 Statistics, 17.02. 2009.

850 Frontex Examples of Accomplished Operations, Hera 2009, available at: http://www.frontex.europa.eu/examples_of_accomplished_operati/art45.html.

851 UNHCR Press Release, UNHCR interviews asylum seekers pushed back to Libya, 14.07.2009.

852 UNHCR Press Release, UNHCR deeply concerned over returns from Italy to Libya, 07.05.2009.

853 Human Rights Watch, Pushed Back, Pushed Around – Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers, Sept.2009, p. 37, retrievable from: <http://www.hrw.org/en/node/85585>; FRONTEX Press Release, Frontex not involved in diversion activities to Libya, 21 09. 2009. See also S Klepp, 'A Contested Asylum System: The European Union between Refugee Protection and Border Control in the Mediterranean', EJML (2010), pp. 1-20, explaining at p. 16 that she received contradictory information from the Maltese Ministry of the Interior, on the one hand, telling her that '700 irregular migrants were brought to Libya within the frame of the Frontex mission Nautilus II', and from the Commanders of the Marine Squadron in charge of the operation, who denied it, on the other hand.

854 Report on the evaluation and future development of the FRONTEX Agency, COM(2008) 67 final of 13.02.2008.

855 Article 33 of the FRONTEX Regulation provides for an independent external evaluation on its implementation after 3 years of activity. The COWI Report fulfils the goal: COWI, External Evaluation of the European Agency for the Management of Operational Cooperation at the *External Borders of the Member States of the European Union*, Final Report (Draft version), January 2009 [COWI Report hereinafter], retrievable from: http://www.frontex.europa.eu/specific_documents/other/.

Each joint patrols' operation and pilot project is to be evaluated as it is completed, according to article 3(3) FRONTEX Regulation, but the evaluations per operation, the risk analysis and the operational plan upon which they are launched are not made public. The annual reports of activities drafted by the Management Board, according to article 20(2)(b) FRONTEX Regulation, furnish a very limited insight in this respect. The amended version of the Regulation, as proposed by the Commission, does not substantially change this state of affairs.

The European Commission has conducted its own evaluation of FRONTEX, as it was requested by the Hague Programme. Although the European Council had explicitly asked for a 'political evaluation', the Commission seems to have taken the overall relevance of the Agency and its mandate for granted, focusing more on the enhancement of its powers and the enlargement of the scope of its responsibilities than on the assessment of its results⁸⁵⁶. The outcome of FRONTEX's activities is presented as 'achievements 2005-2007' beforehand. The Commission values as 'impressive' that 'more than 53,000 persons, for 2006 and 2007 together, have been apprehended or denied entry at the border during these operations'⁸⁵⁷. At the same time, it notes in passing that 'experiences gained from joint operations show that border guards are frequently confronted with situations involving persons seeking international protection or crisis situations at sea'. The solution it proposes, on page 5, is simply to call on FRONTEX to offer specialized courses 'on relevant provisions of European and international rules on asylum, the law of the sea and fundamental rights, in order to contribute to the full respect of these norms'. However, pursuant to article 1(2) of its Regulation, the Agency was supposed since its inception to 'facilitate and render more effective the application of existing and future Community measures relating to the management of external borders', which should be understood as comprising at a minimum the Schengen Borders Code, the FRONTEX Regulation, and the RABIT instrument. One way in which this objective was to be achieved, according to article 5 FRONTEX Regulation, is precisely through the provision of training and the development of a Common Core Curriculum for border guards. It thus ensues that FRONTEX was under an obligation to provide adequate training on the EU borders acquis since the beginning of its activities.

From the little information available it appears that the 53,000 intercepted migrants have been 'apprehended or denied entry at the border' before an asylum application could be lodged or the opportunity to contest the refusal of entry was granted. This may entail very serious breaches of the right to asylum, the principle of non-refoulement and the right to an effective remedy and to judicial protection as elaborated above. Although, according to article 10(2) of the FRONTEX Regulation, the agents participating in joint operations 'shall comply with Community law' in full respect of 'the rights of refugees and persons requesting international protection, in particular non-refoulement'⁸⁵⁸, the Commission fails to provide any details in this regard.

856 Together with the FRONTEX evaluation: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Examining the creation of a European Border Surveillance System (EUROSUR), COM(2008) 68 final and Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Preparing the next steps in border management in the European Union, COM(2008) 69 final, both released on 13.02.2008.

857 The Commission staff working document SEC(2008)150 final provides the breakdown per mission of the statistical data.

858 Article 3 SBC and its twin provision in Article 2 of the RABIT Regulation. See also the Preambles to all three Regulations.

Article 33 provides for an independent external evaluation on the implementation of the FRONTEX Regulation to be conducted three years after the Agency started its activities. The COWI Report fulfils the purpose. Although the Parliament had required the Commission 'to fully evaluate FRONTEX's activities with regard to their impact on fundamental freedoms and rights, including the "responsibility to protect"⁸⁵⁹, the COWI Report does not respond to this demand. The Report establishes that '[e]ffectiveness is assessed on the basis of the coherence between the objectives and goals listed in the Work Programs and the results reported in the General Reports' provided by the Agency to itself, whereas 'impacts are assessed on the basis of their fulfilment of articles 1 and 2 in the FRONTEX Regulation' (§1.4.1). Against this background, the Report highlights some imbalances between the descriptions in Work Programs and the results in the General Reports, subject to improvement (§1.21.4, 1.22.3, 1.25.3). But, in general, it grants an overall satisfecit concerning the accomplishment of the objectives set out in the Regulation, without engaging in an extended legal analysis. Some of the recommendations at the end of the Report show, nonetheless, some criticism. Particularly, the Report invites FRONTEX to 'promote a uniform approach to asylum, migration and other human rights procedures to participating Member States at all joint operations, giving full consideration to international protection standards' (§1.34).

On the basis of the COWI Report, the Management Board has formulated some recommendations that the Commission has taken into account in its proposal to amend the FRONTEX Regulation⁸⁶⁰. The preoccupation to consider the human rights' impact of joint operations transpires in the proposed amendment to article 33, requiring an external evaluation of the Agency's activities every 5 years, which 'shall include a specific analysis on the way the Charter of Fundamental Rights was respected pursuant to the application of the Regulation'. This provision, although making an important step in the right direction, is insufficient to guarantee that the fundamental rights of refugees and asylum seekers will be respected in each individual case.

SOLUTION: The human rights dimension of FRONTEX operations must be well integrated in the Agency's modus operandi. This shall be made clear in the amended version of the FRONTEX Regulation. In parallel, the development of a permanent monitoring system of FRONTEX activities, developed possibly in collaboration with the EASO⁸⁶¹, is recommended, as it will enhance transparency and accountability, thereby contributing to ensure compliance with the EU fundamental rights' acquis.

The amendments proposed by the Commission to the FRONTEX Regulation, although explicitly submitting FRONTEX activities to the respect of 'Union law, International law, obligations related to access to international protection, and fundamental rights' in proposed article 1(1), do not make provision for the necessary means to achieve this objective in concreto. In the short run, in order for the Agency to fulfil its mission in accordance with its mandate, it would be highly recommendable that asylum seekers' and refugees' rights be integrated in risk analyses, feasibility studies, operational plans and evaluations per mission or pilot project coordinated by FRONTEX. The 'description of the tasks and special instructions', in proposed article 1(5), for officers participating in

859 European Parliament resolution of 18 December 2008 on the evaluation and future development of the FRONTEX Agency and of the European Border Surveillance System (EUROSUR), P6_TA(2008)0633, § 23.

860 Recommendations issued following the evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), available at: http://www.frontex.europa.eu/specific_documents/other/.

861 Proposal for a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office, COM(2009) 66 final, 18.02.2009 [EASO hereinafter].

FRONTEX missions should include clear orders on the procedures to be followed when confronted with refugees and asylum seekers. In this connection, as already requested by the European Parliament in its evaluation of the Agency's activities, FRONTEX should also be required to 'publish evaluation reports on joint operations and other coordinated missions, risk analyses, feasibility studies and statistics on migration trends'. This should be coupled with a reporting obligation on the EU Member States and FRONTEX to communicate the specific measures that they take when confronted with persons in need of international protection in the course of each joint operation they undertake⁸⁶². The 'incident reporting scheme' proposed by the Commission could be used to this end. Independent monitoring of FRONTEX border surveillance operations by civil society organisations, in partnership with the EASO, should also be introduced. The 'effective forced-return monitoring system', proposed in article 1(12), could serve as a model.

6.2. There appears to be an ambiguous understanding of maritime obligations

PROBLEM: There appears to be an ambiguous understanding of maritime obligations. EU Member States participating in FRONTEX operations hold no uniform interpretation of their international maritime obligations, in particular with regard to search and rescue (SAR). Some appear to equate interception measures to SAR. However, both should be clearly distinguished. SAR obligations should not be disconnected from other international obligations ensuing from refugee law and human rights. This approach is not correct. Rescue requires disembarkation in a 'place of safety', in full respect of asylum seekers' and refugees' rights. Protection against refoulement, access to asylum and concomitant effective remedies and judicial protection have to be guaranteed.

The HERA operations' goal 'to stop migrants from leaving the shores on the long sea journey and thus reducing the danger of losses of human lives', as well as the Italian push-backs carried out without any consideration of international protection obligations, appear to consider interception as equivalent to a SAR measure. This understanding seems to equate the binomial 'interception + disembarkation in dry land' to search and rescue and to disconnect SAR obligations from subsisting human rights responsibilities. However, these assumptions have no sound legal basis. Interception is not equivalent to search and rescue. It pertains to the category of police powers of the coastal State concerned⁸⁶³, which, as expounded below, are not unlimited. Moreover, interception does not overrule human rights obligations, which observance is implicitly required by the maritime Conventions themselves.

SAR obligations have been defined in customary and treaty law. All major maritime conventions include a SAR obligation binding upon flag and coastal States alike, which

862 Standing Committee of Experts on international migration, refugees and criminal law, Views on the Commission report on the evaluation and future development of the FRONTEX Agency (COM(2008) 67 final), Ref. CM08007 I, 04.04.2008.

863 There is no internationally accepted legal definition of the notion of 'interception'. But see UNHCR, Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach, UN Doc. EC/50/SC/CRP.17, p. 10: interception is understood as encompassing the 'measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination'.

benefits 'any person' anywhere 'in distress at sea'⁸⁶⁴. Rescue has been defined in the Annex to the SAR Convention as an 'operation to retrieve persons in distress, provide for their initial medical or other needs and to deliver them to a place of safety'. The place of safety has not been designated by default. Flexibility in the determination of the port of disembarkation is required to ensure that 'the particular circumstances of the case' are taken into account alongside 'the guidelines developed by the [International Maritime] Organization'. The guidelines provide precisely that '[t]he need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution is a consideration in the case of asylum-seekers and refugees recovered at sea'⁸⁶⁵. As a result, disregarding asylum seekers' and refugees' rights may not only amount to a breach of international protection obligations but also to a violation of maritime law itself.

SOLUTION: The practice of stopping migrants from leaving or diverting them back to African ports without consideration of their particular situation must be discontinued. Specific procedures and remedies must be introduced in FRONTEX legislation to provide adequate legal safeguards to those in search of international protection. Both the FRONTEX Regulation and the guidelines for joint operations should be revised⁸⁶⁶.

During the HERA operation 'more than 1,000 migrants were diverted back to their points of departure at ports at the West African coast'⁸⁶⁷ and Italy has diverted at least 900 persons according to available reports, presumably before any asylum claims were considered. Diversion in these circumstances may amount to refoulement and breach the right of everyone to leave any country in search of international protection. Mechanical referrals to foreign authorities without a prior procedure to ensure the safety of the transfer collide with the procedural facet of the right to seek asylum and to protection against refoulement as characterized above. If the right to an effective remedy is to be respected, transfers to African countries should not 'be executed before the [competent] national authorities [of the EU MS] have examined whether they are compatible with [fundamental rights]' in each individual 'arguable' case⁸⁶⁸. Judicial protection has also to be guaranteed. Preliminary access to the territory of the intercepting Member State(s) may eventually have to be granted for this purpose. Neither the Commission proposal to amend the FRONTEX Regulation nor the draft guidelines for joint maritime operations introduce adequate procedures and remedial measures against interception and refoulement. Whereas the guidelines, as adopted by the Council, introduce a binding provision in Par I § 1.2 of the Annex concerning protection against refoulement, neither procedural safeguards nor remedies have been introduced to that end. Part II of the Annex proposes non-legally binding measures with regard to disembarkation in § 2, which are insufficient to guarantee the observance of the principle in accordance with EU and international legal obligations.

6.3. Ambiguous reading of police powers in each maritime zone

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- 864 Article 98, 1982 United Nations Convention on the Law of the Sea (UNCLOS); Chap. V, 1974 International Convention for the Safety of Life at Sea (SOLAS); Annex, 1979 Search and Rescue Convention (SAR).
- 865 Guidelines on the treatment of persons rescued at sea, IMO Resolution MSC.167(78), 20.05.2004, § 6.17.
- 866 Council Decision (2010/252/EU) of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 111/20 of 04.05.2010 [FRONTEX Guidelines hereinafter].
- 867 FRONTEX Press Releases, HERA III Operation, 13.04.2007 and Public Bull. May 2007, Ref. No. 7248/21.05.2007, p. 3.
- 868 Mutatis mutandis, ECtHR, Conka v Belgium, Appl. No. 51564/99, 05.02.2002, § 79.

PROBLEM: Ambiguous reading of police powers in each maritime zone.
Contrary to what seems to transpire from the Commission study on the law of the sea⁸⁶⁹ and from the guidelines for FRONTEX operations, interception powers of the Member States concerned are not unlimited and are required to be exercised in compliance with their international obligations.

Maritime law circumscribes interception powers of both coastal and flag States, so that they are not left free to act in any of the zones in which the sea has been divided. The UNCLOS delimits State sovereignty in each of the sea areas, so that police powers are exercised with due respect of the UNCLOS itself and of 'other rules of international law', as specified in articles 2(3) and 87(1), which includes refugee law and human rights.

According to articles 92 and 87 UNCLOS, freedom of navigation reigns in the high seas, where ships are subject to the exclusive jurisdiction of their flag State. Only in limited instances may third States exercise jurisdiction. The case of ships of uncertain nationality and stateless ships in regard of which any State enjoys a right of visit is relevant for our purposes. Such a right of visit, according to the very wording of article 110 UNCLOS, appears to simply provide for a right to approach and board the ship to effect a *vérification du pavillon*, 'which must be carried out with all possible consideration'. Such actions as blocking passage, arrest, escort to a port or tow the ship in question do not appear to be straightforwardly justified⁸⁷⁰.

In the contiguous zone, coastal States enjoy 'a limited right of police'⁸⁷¹. Freedom of navigation continues to be the rule, but article 33(1) UNCLOS allows 'the coastal State [to] exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea'. Only such control as it is necessary is allowed. This requires a proportionality test to be carried out. It is unclear whether inspection and return are permitted actions at this level. In any case, States remain constrained to the observance of 'other rules of international law'.

Not even in their territorial sea can coastal States exert unlimited powers. The right of innocent passage, enshrined in article 18 UNCLOS, has to be observed. According to article 19 UNCLOS, passage is rendered non-innocent if a vessel engages in the loading or unloading of persons contrary to the immigration rules of the coastal state. Where non-innocent, the coastal State, pursuant to article 25 UNCLOS, may take all necessary steps to prevent passage. But again, always in accordance with 'other rules of international law', including non-refoulement and the right to leave to seek asylum with its concomitant procedural safeguards. Note, in addition, that the territorial sea has been assimilated to the national territory of the coastal State concerned⁸⁷². Therefore, with regard to EU coastal States, the full asylum *acquis* applies at this level.

SOLUTION: As required by articles 2(3) and 87(1) UNCLOS, it must be made abundantly clear in FRONTEX legislation that interception measures have to conform to 'other rules of international law', considering, in particular, refugees' and asylum seekers' rights under international and EU law.

869 Study on the international law instruments in relation to illegal immigration by sea, SEC(2007) 691 final, 15.05.2007, p. 4.

870 D. Guilfoyle, *Shipping Interdiction and the Law of the Sea*, CUP, Cambridge, 2009, p. 17.

871 D. P. O'Connell, *The International Law of the Sea*, Vol. II, OUP, Oxford, 1984, p. 1058.

872 Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection, COM (2009) 554 final, 21.10.2009, article 3(1).

6.4. Inaccurate attribution of responsibility when FRONTEX and/or EU Member States collaborate with third countries

PROBLEM: Inaccurate attribution of responsibility when FRONTEX and/or EU Member States collaborate with third countries.

When interception is performed in the territorial waters of African countries, EU Member States and FRONTEX tend to consider that the responsibility for those intercepted/rescued belongs to them. However, under international law, this is not always the case.

International cooperation does not relieve EU Member States from their international obligations.

The HERA operations were based on bilateral agreements Spain had signed with Mauritania and Senegal, which content remains secret. FRONTEX has disclosed that the agreements allowed for 'diverting [...] would-be immigrants' boats back to their points of departure from a certain distance of the African coast line', making 'Mauritanian or Senegalese law enforcement officer[s] [...] present on board of deployed Member States' assets [...] always responsible for the diversion'⁸⁷³. In the case of the Italian push-backs no official information is available as for the formal acquiescence of Libya to allow the returns. In any event, the consent by Senegal, Mauritania and Libya does not make them 'always responsible for the diversion', as it seems to be assumed. Cooperation with third countries does not exonerate the EU Member States from their responsibilities under EU and international law.

To determine responsibility in international law what counts is the attributability of the wrongful act in question to the State concerned⁸⁷⁴. Along these lines, the Strasbourg Court in *Xhavara*, as mentioned above, attributed exclusive responsibility to Italy for the acts it perpetrated in the territorial sea of its partner. It explicitly established that: 'La Cour note d'emblée que le naufrage [...] a été directement provoqué par le navire de guerre italien *Sibilla*. Par conséquent, toute doléance sur ce point doit être considérée comme étant dirigée exclusivement contre l'Italie', making clear that: 'Le fait que l'Albanie est partie à la Convention italo-albanaise ne saurait, à lui seul, engager la responsabilité de cet Etat au regard de la Convention pour toute mesure adoptée par les autorités italiennes en exécution de l'accord international en question'. Indeed, in the execution of international agreements Contracting Parties remain subject to their international obligations, without being capable of eschewing their responsibility for any resulting wrongful acts. 'Where States establish [...] international agreements to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the [ECHR] if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such [agreements]'⁸⁷⁵. What is more, the Court considers that '[...] it is not open to a Contracting State to enter into an agreement with another State which conflicts with its obligations under the Convention'⁸⁷⁶. The fact that the African countries with which FRONTEX and the EU Member States collaborate are not Parties to the ECHR excludes their liability under this instrument⁸⁷⁷, highlighting the subsistence of the legal responsibility of each individual EU Member State participating in joint operations 'where the person[s] in

873 FRONTEX, Press Releases, HERA 2008 and NAUTILUS 2008 Statistics, 17.02.2009.

874 Articles 1 and 2, ILC Draft Articles on State Responsibility for International Wrongful Acts.

875 ECtHR, *T.I. v UK* (Dec.), Appl. No. 43844/98, 07.03.2000 and *K.R.S. v UK* (Dec.), Appl. No. 32733/08, 02.12.2008, p. 15.

⁸⁷⁶ *Al-Saadoon v UK*, Appl. No. 61498/08, 02.03.2010, § 138.

877 ECtHR, *Saadi v UK*, 37201/06, 28.02.2008, § 126: '[i]n so far as any liability under the Convention is or may be incurred, it is liability incurred by the Contracting State [...]'].

question had suffered or risk suffering a flagrant denial of the guarantees and rights secured to [them] under the Convention⁸⁷⁸.

SOLUTION: FRONTEX and the EU Member States must be made well aware of the fact that collaboration with third countries in border patrolling and entry control does not make away with the EU and its Member States' protection obligations under international and EU law. Any such collaboration must be made compatible with the observance of these obligations or, this failing, be abandoned.

7. THE EU JOINT RESETTLEMENT PROGRAMME:

Already in 2000, the European Commission, concerned with the issue of 'access to the territory', suggested the possibility of 'processing the request for protection in the region of origin and facilitating the arrival of refugees on the territory of the Member States by a resettlement scheme', as a way 'of offering rapid access to protection'⁸⁷⁹. The US two-tier asylum procedure was mentioned as a model, considering resettlement complementary to the reception of spontaneous arrivals. A feasibility study on the establishment of resettlement schemes in the EU Member States or at EU level was launched⁸⁸⁰. The Commission believed that 'only a common approach [could] create the necessary political and operational basis that [would] produce beneficial effects on terms for access to European territory and allow resettlement to be used for strategic purposes both to assist the European Union and to attain the objectives of the [UNHCR] Agenda for Protection'⁸⁸¹.

In June 2003 the Thessaloniki European Council called on the Commission 'to explore all parameters in order to ensure more orderly and managed entry in the EU of persons in need of international protection [...] with a view to presenting to the Council before June 2004, a comprehensive report suggesting measures to be taken, including legal implications'⁸⁸². In October, the Italian EU Presidency held a seminar in Rome, in order to further progress in this direction. The resettlement feasibility study was examined by the participants and the seminar concluded that 'resettlement [was] an indispensable and essential part of the international protection system, the use of which ha[d] saved many lives'. Among the advantages identified, it was mentioned that resettlement 'offers an immediate access to durable solutions', that it 'allows for the identification of the most vulnerable and needy cases, contributes to more orderly and managed arrivals and enables States to carry out pre-arrival security and health checks'. In addition, resettlement 'enables better planning and management of resources and facilitates the early integration of refugees'. Finally, the seminar established that 'resettlement has a positive impact on the integrity and credibility of the institution of asylum', which could assist in preventing the abuse of the system⁸⁸³.

878 EComHR, *WM v Denmark*, Appl. No. 17392/90, 14.10.1992; *Al-Saadoon v UK*, Appl. No. 61498/08, 02.03.2010.

879 Towards a common asylum procedure and uniform status, valid throughout the Union, for persons granted asylum, COM(2000) 755 final, 22.11.2000, § 2.3.2.

880 Study on the feasibility of setting up resettlement schemes in EU Member States or at EU level, against the background of the Common European Asylum System and the goal of a common asylum procedure, 2003, available at: http://ec.europa.eu/justice_home/doc_centre/asylum/studies/doc_asylum_studies_en.htm.

881 On the common asylum policy and the Agenda for protection, COM(2003)152 final, 26.03.2003, p. 12.

882 Presidency Conclusions, European Council 19-20 June 2003, Council doc. 11638/03, § 26.

883 On the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin, improving access to durable solutions, COM(2004) 410 final, § 19 ff.

Keeping with the deadline, the Commission issued a communication on 'improving access to durable solutions' in June 2004, identifying the key elements of an EU Resettlement Scheme. However, a fully-fledged proposal has not been tabled until September 2009. Building upon the public consultations carried out in the framework of the Green Paper on the future of the Common European Asylum System in 2007⁸⁸⁴ and with the backing of the European Pact on Immigration and Asylum, the Commission has launched a Joint EU Resettlement Programme⁸⁸⁵. The Stockholm programme has welcome the initiative in § 6.2.3, inviting the EU institutions to 'encourage the voluntary participation of Member States in the [...] scheme'. The Programme represents an important step for the Union, supported by a strong institutional consensus, which has to be applauded⁸⁸⁶.

The Commission proposal is divided into 4 chapters. The first provides the background to the proposal; the second identifies the shortcomings of the current situation prevailing in the EU with regard to resettlement; the third section expounds the Joint EU Resettlement Programme proper, identifying the objectives and the guiding principles alongside the different components of the scheme; the fourth division refers to a separate and complementary proposal the Commission has presented to adapt the current Decision governing the European Refugee Fund (2008-2013)⁸⁸⁷.

The Commission characterises resettlement, clearly differentiating it from internal EU-relocation of refugees, as 'one of three so-called "durable solutions" available to refugees', 'generally carried out with the UNHCR'. The mechanism 'targets those refugees whose protection needs have already been clearly established'. Being an 'orderly procedure', providing for safe and legal access to the EU, it is supposed to attenuate the necessity 'to resort to different forms of illegal immigration'. An additional advantage attached to its predictability is 'that reception and integration [of its beneficiaries] can be organized in advance' (§1.2).

The major shortcoming of the current situation is the low-profile engagement of EU Member States in resettlement. Only ten EU Member States have a regular annual scheme and their limited capacity 'contrast[s] sharply with the numbers taken in by other countries in the industrialized world' (§1.3)⁸⁸⁸. Therefore, the principal objective of the joint EU resettlement program is 'to involve more Member States in resettlement activities', so as 'to provide for an orderly and secure access to protection for those resettled' and 'to demonstrate greater solidarity with third countries receiving refugees' (§2.1).

884 Green Paper on the future of the Common European Asylum System, COM(2007) 301 final, 06.06.2007.

885 On the establishment of a Joint EU Resettlement Programme, COM(2009) 447, 02.09.2009 [Joint EU Resettlement Programme hereinafter].

886 Report on the proposal for a decision of the European Parliament and of the Council amending Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the General Programme "Solidarity and Management of Migration Flows" and repealing Council Decision 2004/904/EC, A7-0125/2010, 29.04.2010; Report on the establishment of a joint EU resettlement programme, A7-0131/2010, 03.05.2010; Presidency compromise text, Council doc. 7958/10, 26.03.2010.

887 Proposal for a Decision of the European Parliament and of the Council amending Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme "Solidarity and Management of Migration Flows" and repealing Council Decision 2004/904/EC, COM(2009) 456, 02.09.2009 [Proposal to Amend the ERF].

888 Sweden, Denmark, Finland, The Netherlands, the United Kingdom, Ireland, Portugal, France, Romania and the Czech Republic. For detailed statistics see the Commission Staff Working Document accompanying the Communication on the establishment of a Joint EU Resettlement Programme and the proposal for a Decision of the European Parliament and of the Council amending Decision No 573/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Refugee Fund for the period 2008 to 2013 as part of the General Programme "Solidarity and Management of Migration Flows" and repealing Council Decision 2004/904/EC, Impact Assessment, SEC(2009) 1127 final, 02.09.2009.

Additional flaws, at the practical level, include the lack of structures and procedures for the coordination of national initiatives between the Member States. At present, no exchange of information and no common planning or coordination mechanism of these activities exist. National resettlement schemes are negotiated bilaterally with the UNHCR. The Commission believes that the introduction of the EU programme has the potential to enable closer cooperation and to ensure coordination of the national schemes at EU level. Economies of scale could be fostered and the costs associated with resettlement eventually reduced. This way, the humanitarian impact of the EU could be exponentially increased, raising the Union's profile in international affairs generally and allowing for a strategic use of resettlement. In addition, there is currently no means to identify priorities in a flexible and adaptive manner in the EU sphere. As a result, financial resources do not match real necessities well. The European Refugee Fund is considered to be too rigid to afford an adequate framework to the ever changing circumstances surrounding resettlement needs. According to the Commission, a mechanism is necessary for the common definition of priorities at EU level, with a corresponding financial instrument offering incentives to the Member States to resettle according to those priorities (§2.2 -2.3).

In response to these inadequacies, the Joint EU Resettlement Programme pursues three major objectives: (1) an enlarged humanitarian impact of the EU, with 'greater and better targeted support to the international protection of refugees' world-wide; (2) the strategic use of resettlement, 'ensuring that it is properly integrated into the Union's external and humanitarian policies'; and (3) the cost-effectiveness of EU resettlement efforts (§3).

Several principles underpin the Joint EU Resettlement Programme. First, involvement in the Programme is voluntary. It is expected that the creation of additional financial incentives in a revised version of the European Refugee Fund will attract participation by those EU Member States that currently conduct no resettlement or a very reduced scheme. Second, priorities are to be revised annually, so that evolving needs can be matched with tailored responses. Third, a multiplicity of non-State actors will be involved in the concrete development and implementation of the Programme, such as the UNHCR, IOM, international and local NGOs and local authorities dealing with reception and integration. Fourth, the approach of the Programme towards resettlement will be incremental, both quantitatively and qualitatively. The number of Member States participating should be widened progressively, together with their capacity and the scope of their engagements (§3.1).

The Joint EU Resettlement Programme, as designed, 'will primarily consist of a mechanism which allows for the setting of common annual priorities on resettlement and more effective use of the financial assistance available through the [European Refugee Fund] [...]' (§3.2). A Resettlement Expert Group, will be established, composed of members from both resettlement and non-resettlement Member States and other stakeholders. It will meet on a regular basis to exchange information on targets and specific needs. On the basis of these discussions, the Commission will draft a Decision with the common resettlement priorities, taking account of the UNHCR yearly forecast of resettlement needs. The priorities will be reflected in the amended version of the European Refugee Fund (§3.2.1).

Common needs and priorities defined, strengthened practical cooperation will supplement the scheme. The EASO is expected to provide the structural framework to practical cooperation initiatives undertaken with regard to resettlement. Selection and fact-finding missions, pre-departure orientation programmes, medical screenings, travel or visa arrangements, joint training, reception and integration tools, the identification of best

practices or the launch of pilot projects range among the conceivable activities. Close cooperation with the UNHCR is also deemed key to the success of the Programme.

The Commission considers that an integrated approach between resettlement and other EU external policies would be desirable. 'In particular, coherence with the EU Global Approach to Migration⁸⁸⁹ should be ensured'. It is proposed that resettlement priorities be established not only 'on the basis of current needs', but also 'on the basis of other humanitarian and political considerations identified by the Member States and the Commission, taking into account the specific situation of the third countries concerned, as well as the overall EU relations with these countries' (§3.2.3).

Finally, to ensure progress and continuous relevance, as mandated by article 70 TFEU, the Joint EU Resettlement Programme will periodically be evaluated. The Commission, in close cooperation with the EASO, is to report every year on the resettlement efforts made in the EU, both to the Council and to the European Parliament. A mid-term evaluation will be carried out in 2012, upon consultation with all relevant stakeholders. In 2014, a full revision will be undertaken, so that the necessary improvements and further development of the Programme can be carried out (§3.3).

7.1. The means devised for the identification of common priorities seem insufficient for a truly common approach to resettlement to emerge among the EU Member States

PROBLEM: The means devised for the identification of common priorities seem insufficient for a truly common approach to resettlement to emerge among the EU Member States.

For the identification of common priorities that truly translate a common approach to resettlement, more robust action seems required than periodic discussions at the Resettlement Expert Group.

The low-profile commitment to resettlement the Member States have demonstrated so far reflects a persistent lack of political will across the EU to engage in these activities. To overcome this fundamental limitation, important incentives will have to be introduced for a significant commitment to resettlement to emerge that raises the humanitarian profile of the Union, involves 'more Member States in resettlement' (§2.1), and allows for the orderly management of refugee flows.

SOLUTION: Additional policy tools should be introduced in a coherent framework that appropriately flanks the results achieved through meetings at the Resettlement Expert Group to ensure the development of a common approach to resettlement.

To bring about a common approach to resettlement in the EU, besides discussions at the Resettlement Expert Group, there is a range of policy tools that could be introduced. EU-wide information campaigns conducted in partnership with the UNHCR and the NGO sector may yield practical results. Some kind of twining programs between EU Member States and major resettlement countries may prove equally beneficial. Inviting officials from these

889 Priority actions for responding to the challenges of migration: First follow-up to Hampton Court, COM(2005) 621 final, 30.11.2005; The Global Approach to Migration one year on: Towards a comprehensive European migration policy, COM (2006) 735 final, 30.11.2006; Applying the Global Approach to Migration to the Eastern and South-Eastern Regions Neighbouring the European Union, COM (2007) 247 final, 16.05.2007; Strengthening the Global Approach to Migration: Increasing Coordination, Coherence and Synergies COM(2008) 611 final, 08.10.2008.

countries to the Resettlement Expert Group's meetings could have a major impact on awareness-raising among European policy-makers. The establishment of private sponsorship mechanisms, allowing for the resettlement of refugees by private entities, may also help to build up public acceptance, while creating new opportunities for cooperation among governments, NGOs and the private sector⁸⁹⁰. More substantial financial assistance for those EU Member States engaging for the first time in resettlement activities, as the European Parliament has proposed, could provide an adequate incentive. In the short run, and to foster a solid common understanding among the EU Member States on resettlement, the introduction of an Open Method of Coordination-like scheme, based on the exchange of best practices and mutual-learning, may stimulate the approximation of national policies in this area⁸⁹¹.

7.2. Harmonised procedures and criteria for resettlement have not been envisaged

PROBLEM: Harmonised procedures and criteria for resettlement have not been envisaged.

The identification of common priorities, providing the programme with its main operational goal, is only a first step towards the development of a common EU approach to resettlement.

However, this necessary premise is insufficient to achieve by itself the ultimate humanitarian and strategic aspirations of the programme.

Beyond the identification of common priorities, the proposal should go into further legal detail.

Together with the definition of common priorities at large, other elements have to be considered for a meaningful common approach to emerge. There are many points in which EU Member States' practices and understandings differ with regard to resettlement. The Commission identifies some in its proposal 'with respect to the numerical targets and specific caseloads [...] to resettle, the legal criteria which are used for deciding who to resettle and the partners through which resettlement is carried out' (§3.1).

SOLUTION: If the humanitarian and strategic objectives of the programme are to be fulfilled, it is advisable to go beyond the mere identification of common priorities into significant policy approximation. To this end, more detailed and comprehensive rules should be adopted with regard to the criteria and procedures for EU resettlement. Full harmonisation will possibly have to be envisaged in the medium term. In the long run, permanent processes and structures should be set up at EU level to ensure the effectiveness and continuity of the policy.

The Commission noted in its 2004 Communication on 'improving access to durable solutions' that, among the 'key elements of an EU Resettlement Scheme', a 'general procedural framework' and some minimum 'criteria' to identify its beneficiaries would have

890 UNHCR, Response to the Green Paper on the Common European Asylum System, September 2007, p. 45; available at: <http://www.unhcr.org/refworld/pdfid/46e159f82.pdf>.

891 For a similar proposal see: on the common asylum policy, introducing an open coordination method, COM(2001) 710 final, 28.11.2001. On the potentialities of using OMC-like mechanisms in the implementation of human rights see: O. De Schutter, The Implementation of the EU Charter of Fundamental Rights through the Open Method of Coordination, Jean Monet Working Paper No. 07/04, available at: <http://centers.law.nyu.edu/jeanmonnet/papers/04/040701.rtf> and O. De Schutter and V. Moreno Lax (eds.), Human Rights in the Web of Governance: Towards a Learning-Based Fundamental Rights Policy for the European Union, Bruylant (2010).

to be formulated. This observation continues to be valid today and should be given particular attention if the programme is to produce significant effects.

As noted by the European Parliament, follow-up measures in view of assuring the full integration of resettled refugees should also be included. The development of some sort of monitoring mechanism to guarantee the quality of resettlement in collaboration with the UNHCR and the NGO community would help achieving this aim⁸⁹².

In the longer run, it has been posited that 'an EU-wide resettlement scheme should be expanded into a truly joint European resettlement programme based on common criteria and the commitment of European States to make a significant number of resettlement places available every year. Member States would have to commit to collectively resettling a certain number of refugees, who would be dispersed across Europe according to a fair and equitable system. [...] [A] EU resettlement office could be established [...] to take on a [fully] operational role, placing representatives in regions, planning allocations, coordinating missions with UNHCR, and setting levels and resettlement priorities', in close cooperation with relevant NGOs⁸⁹³. The LIBE Committee has proposed to establish a Permanent Resettlement Unit within the EASO, which could coordinate and evaluate the policy by issuing annual reports and guidelines and liaise with the UNHCR and the NGO sector. Indeed, without permanent structures that prepare for and coordinate resettlement and follow up the subsequent integration of the refugees concerned 'it will not be possible to increase the number of refugees in the EU'. Thus, the incremental dimension of the Programme, as conceived of by the Commission, risks being lost. Therefore, beyond the proposed reform of the ERF, an independent 'resettlement fund' could be created to financially underpin these permanent processes and structures in an adequate way. In these circumstances, an extension of the programme not only to protracted refugee situations but also to urgent humanitarian emergencies, as proposed by several actors, could be better accomplished⁸⁹⁴.

7.3. Participation in the EU resettlement programme is conceived of as voluntary

PROBLEM: Participation in the EU resettlement programme is conceived of as voluntary. In light of articles 78(2)(g) and 80 TFEU, serious doubts ultimately arise as for the voluntary nature of the participation in the resettlement scheme.

On the basis of article 78(2)(g) TFEU, the Union 'shall adopt measures for a common European asylum system comprising: [...] partnership and cooperation with third countries for the purpose of managing the inflows of people applying for [international protection]'. In turn, pursuant to article 80 TFEU, such measures 'shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States' and, '[w]henever necessary, the Union acts adopted [in this realm] shall contain appropriate measures to give effect to this principle'. If a choice is left to the Member States as for the means they can use, it appears that these provisions create an obligation of result. In this light, it is difficult to reconcile an obligation to adopt legal

892 Report on the establishment of a joint EU resettlement programme A7-0131/2010, 03.05.2010, § 16 and 39-45.

893 ECRE, Response to the Green Paper on the Common European Asylum System, September 2007, p. 46; available at: <http://www.ecre.org/files/ECRE%20Green%20paper%20response%20final%20-%20Read%20only.pdf>.

894 Amnesty International-EU Office, Response to the Green Paper on the Common European Asylum System, September 2007, p. 44, available at: http://www.aieu.be/static/documents/2009/AIResponse_EASOProposalApr09.pdf.

measures for the management of refugee inflows in partnership with third countries, governed by the principle of solidarity among the Member States, with the voluntary character of the participation in the resettlement programme the Commission proposes. Of course, other measures than the EU Resettlement Programme could be envisaged, but some measures shall in any event be adopted.

SOLUTION: Once the programme will be officially endorsed, participation therein should be considered compulsory, in light of articles 78(2)(g) and 80 TFEU.

If the Member States have a choice as for the means to 'managing inflows of people' in need of international protection, an obligation of result appears to be inbuilt in these provisions. Once the choice with regard to the means has been made, participation in its implementation should be deemed obligatory. Should a Member State encounter difficulties in meeting its obligations under the resettlement or equivalent scheme, for instance, in the event of 'an emergency situation characterised by a sudden inflow of nationals of third countries', provisional measures may be adopted 'for the benefit of the Member State(s) concerned', according to article 78(3) TFEU. Eventually, the activation of the Temporary Protection Directive could be envisaged, if need be⁸⁹⁵.

7.4. Resettlement shall remain complementary to pre-existing legal obligations

PROBLEM: Resettlement shall remain complementary to pre-existing legal obligations. The complementary nature of resettlement to the reception of spontaneous arrivals and the provision of protection to those in need has not been mentioned in the proposal. There is hence a risk of obliteration of the legal obligations of the Member States in this context.

Although it may be inferred from the general tenor of the proposal and from its drafting history, the Commission forgets to mention explicitly that resettlement must be a complement to – and not a substitute for – the provision of protection to spontaneous arrivals. The existence of a resettlement scheme cannot be used as an argument not to grant admission to spontaneous arrivals; nor should it produce a diminution of procedural guarantees for those who did not wait 'their turn' in their regions of origin to be orderly resettled in the EU.

SOLUTION: The complementary character of resettlement to the reception of spontaneous arrivals should be clearly stated and the legal responsibilities of the EU Member States properly borne in mind.

A recital should be introduced in any legal or policy instrument dealing with resettlement specifying that it remains 'without prejudice to Member States' obligations to determine asylum claims in fair procedures and to provide protection in their territory in accordance with international law⁸⁹⁶.

As an obligation to provide access to asylum or to avoid refoulement may arise extraterritorially, there is room to consider that legal responsibility may be engaged in the

895 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212/12, 07.08.2001.

896 Improving access to durable solutions, § 25.

course of a resettlement operation beyond the terms originally intended. A resettlement scheme would not substitute for compliance with other obligations stemming from international or EU law vis-à-vis the persons concerned. This should be taken into account when designing concrete resettlement operations. Compliance with international obligations shall be ensured in these cases too. Engagement with the region/country of first asylum of those resettled will not diminish the legal obligations of the EU Member States concerned.

7.5. The position of third countries and of other stakeholders should be reinforced

PROBLEM: The position of third countries and of other stakeholders should be reinforced. Better results could be achieved if the position of third parties would be incorporated in the design and the implementation of the EU Resettlement Programme. Coherence with article 78(2)(g) TFEU would thereby be better achieved.

It is asserted that the main objective of the programme is to provide 'orderly and secured access to protection' and 'to demonstrate greater solidarity to third countries in receiving refugees' (§2.1). To maximise its humanitarian impact, in line with article 78(2)(g) TFEU, a multilateral dialogue should be initiated with the countries hosting large numbers of refugees in the regions of origin and transit. This would facilitate cooperation and foster 'the establishment of more commonality of visions, objectives and practices'⁸⁹⁷. In addition, as noted in the Stockholm Programme, 'any development in this area needs to be pursued in close cooperation with the UNHCR and [...] other relevant actors' (§6.2.3).

SOLUTION: The ultimate goals the programme pursues would be better served through the opening of a genuine dialogue with the countries hosting large refugee populations and with other relevant stakeholders. Some form of tripartite agreements, between the EU Member States, the third countries of first asylum concerned and the UNHCR could be envisaged to this end.

Many actors have proposed multilateral approaches to address the problems of refugees. Lately, the Hague Conference on Private International Law has submitted 'Some Reflections on the Utility of Applying Certain Techniques for International Co-operation Developed by The Hague Conference on Private International Law to Issues of International Migration', pleading for the introduction of multilateral approaches that would promote international cooperation, fostering 'the establishment of more commonality of visions, objectives and practices in respect of international migration'⁸⁹⁸. On account of its passed experience, the institutional framework The Hague Conference of International Private Law provides could be used as a neutral forum for discussion. Further details on this proposal are elaborated in Part III of the study, regarding the long-term perspective of the external dimension of the CEAS.

897 'Some Reflections on the Utility of Applying Certain Techniques for International Co-operation Developed by The Hague Conference on Private International Law to Issues of International Migration', Prel. Doc. No. 8, March 2006.

898 Ibid. See also the 'Follow-Up Note', Prel. Doc. No. 23, March 2007; 'Second Follow-Up Note', Prel. Doc. No. 6, March 2008; 'Third Follow-Up Note', Prel. Doc. No. 8, March 2009, available at: http://www.hcch.net/index_en.php?act=progress.listing&cat=5 and H van Loon, 'Vers un nouveau modèle de gouvernance multilatérale de la migration internationale – Réflexions à partir de certaines techniques de coopération développées au sein de la Conférence de La Haye', Liber Amicorum Hélène Gaudemet-Tallon, Dalloz (2008), pp. 439-434.

7.6. The Resettlement Programme follows a selective approach to policy coherence

PROBLEM: The Resettlement Programme follows a selective approach to policy coherence.

It is expected that resettlement coordinates with other EU external policies, in general, and with the Global Approach to Migration, in particular.

Given the current focus of the Global Approach to Migration, this is problematic.

As a matter of EU primary law, stronger emphasis should be put on cross-policy coherence between the EU resettlement programme and the internal asylum acquis. This, however, has been omitted in the Commission proposal.

From the three aims the Global Approach pursues, as echoed in the Stockholm Programme (§6.1.1), the emphasis thus far has been on controlling irregular movement. Given the dissimilar goals each initiative seeks to achieve, it is possible to anticipate frictions when attempting to link the EU Resettlement Programme to the Global Approach to Migration. At the political level, the Commission has proposed that the identification of EU resettlement priorities takes account not only of protection needs but, as mentioned above, also of political considerations relating to 'the specific situation of the third countries concerned, as well as the overall EU relations with these countries'. The adequacy of putting resettlement at the service of a broader migration management concern should be subject to debate. Factoring political considerations, alien to international protection needs, into the definition of resettlement targets risks detracting the programme from its primary humanitarian objective.

The programmes define cross-policy coherence only in horizontal terms. The need to ensure that the external dimension of asylum is consistent with its internal counterpart has been neglected. However, it is established in article 7 TFEU that 'the Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers'. Consistency is one prime characteristic of Union law that the Court of Justice guarantees, pursuant to article 256 TFEU. Therefore, according to article 13(1) TEU, '[t]he Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions'. With regard to its external policies in particular, article 21(3) TEU establishes that '[t]he Union shall ensure consistency between the different areas of its external action and between these and its other policies [...]'. Flagrantly contradictory results between the external and the internal asylum acquis would have to be considered in breach of this legal obligation.

SOLUTION: The adequacy of linking the programme to the Global Approach to Migration should be carefully reviewed. On the other hand, it would be highly advisable to recall that legal coherence between the internal and the external asylum acquis must be guaranteed as a matter of primary law.

When common priorities will be discussed, any agreements reached within the Resettlement Expert Group in regard of selection criteria or resettlement procedures would need to take the relevant internal acquis into account. The fact that the Qualification Directive and the Procedures Directive are in place with regard to internal procedures may prevent the EU from engaging extraterritorially in the promotion of less protective standards. To be sure, this requirement of consistency does not extend per se the scope of

application of the asylum *acquis* abroad, but sets a minimum standard below which the procedures the Union may enact with regard to the extraterritorial initiatives it undertakes should not go. In any case, every EU external action will have to comply with the general principles of EU law, as disclosed in the ECHR and in the relevant provisions of the EU Charter of Fundamental Rights.

8. REGIONAL PROTECTION PROGRAMMES (RPPS)

Regional Protection Programs constitute the response of the European Commission to a debate on extraterritorial processing that sparked in the Union in 2003. At the time, the UK's government commitment to cut by half the number of asylum applications lodged in the British islands led to a proposal to move asylum procedures outside the EU. 'Transit Processing Centres' and 'Regional Protection Zones' were the two main components of this strategy. Certain categories of irregularly arriving asylum seekers would immediately be transferred to the protected areas, have their claims assessed there and either be returned to their country of origin, if found not in need of international protection, or be offered a durable solution, in the EU or elsewhere. The affected case-load was to correspond to a selection of nationalities of countries considered to be generally safe and supposedly producing economic migrants abusing the asylum channel⁸⁹⁹. The UNHCR submitted a 'Three-Pronged Proposal' in response, advancing the idea of placing the camps inside EU territory and pleading for the complementarity between the 'EU prong', which would deal with manifestly unfounded claims, and the 'domestic prong', which would process the rest of the applications⁹⁰⁰.

Honouring the European Council's invitation to establish the merits of these proposals⁹⁰¹, the European Commission issued a Communication⁹⁰². After careful analysis of the British and the UNHCR's proposals, and taking the fears of the NGO sector into account⁹⁰³, Towards more accessible, equitable and managed asylum systems identified the 'basic premises of any new approach to the international protection regime'. The Commission enounced the overall principles that should underpin future proposals, but avoided the definition of any detailed policy instruments. For the Commission, the new approaches would have to fully comply with the international legal obligations ensuing from the Geneva

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- 899 A first version of the UK Government's plan was leaked to the press and is already referred to by The Guardian on 05.02.2003, available at: <http://www.guardian.co.uk/society/2003/feb/05/asylum.immigrationasylumandrefugees>. The draft New Vision for Refugees, is retrievable from: http://www.proasyl.de/texte/europe/union/2003/UK_NewVision.pdf, in its version of 07.03.2003. A later version: New International Approaches to Asylum and Protection, was attached to a letter Tony Blair addressed to Costas Simitis for discussion in the European Council on 10.03.2003, available at: <http://www.statewatch.org/news/2003/apr/blair-simitis-asile.pdf>.
- 900 UNHCR, Three-Pronged Proposal, June 2003, available at: <http://www.unhcr.org/refworld/pdfid/3efc4b834.pdf>.
- 901 Presidency Conclusions, European Council 20-21 March 2003, Council doc. 8410/03, § 63: 'The European Council noted the letter from the United Kingdom on new approaches to international protection and invited the Commission to explore these ideas further, in particular with UNHCR, and to report through the Council [...] in June 2003'.
- 902 Towards more accessible, equitable and managed asylum systems, COM(2003) 315 final, 06.03.2003.
- 903 Amnesty International, Strengthening Fortress Europe in Times of War, March 2003, available at: <http://www.refugeecouncil.org.uk/OneStopCMS/Core/CrawlerResourceServer.aspx?resource=1E1F9524-B02D-4065-BEEE-BDC0FA9330F1&mode=link&guid=6cc9c32da2a74b3b9721e4889774fee1>; ECRE-US Committee for Refugees, Responding to the asylum access challenge, an agenda for comprehensive engagement in protracted refugee situations, April 2003, available at: http://www.ecre.org/resources/Policy_papers/357; UK Refugee Council, Unsafe havens, unworkable solutions, June 2003, available at: http://www.refugeecouncil.org.uk/policy/responses/2003/unsafe_havens.htm; Human Rights Watch, 'An Unjust "Vision" for Europe's Refugees,' June 2003, available at: <http://www.hrw.org/legacy/backgrounder/eca/refugees0603/refugees061803.pdf>.

Convention and the ECHR. Any extraterritorial initiative could only be considered complementary to the CEAS, without rendering in-country reception and protection of spontaneous arrivals obsolete. The Commission also considered that any new approach should be built upon a genuine burden-sharing system, in full partnership with third countries of first asylum hosting large refugee populations. Finally, the root causes of forced displacement would also have to be addressed.

In June 2003, the European Council reiterated its invitation and asked the Commission 'to explore all parameters' of this new approach in 'a comprehensive report suggesting measures to be taken, including legal implications'⁹⁰⁴. In its ensuing Communication, together with protected entry procedures and resettlement, the Commission proposed the establishment of EU Regional Protection Programmes as a specific means to enhance the protection capacity of regions of origin. It avoided any moves towards the extraterritorialisation of asylum procedures and the return of asylum seekers to supposedly safe areas abroad. The Commission conceived the initiative as a 'tool box' of different measures, 'mainly protection oriented' (§51), and including a resettlement component, that would serve to 'addressing protracted refugee situations globally in a comprehensive and concerted approach' (§57). The Hague Programme subsequently endorsed the proposal and invited the Commission to develop the initiative in practice, on the basis of the 'experience gained in pilot protection programmes to be launched before the end of 2005'⁹⁰⁵.

In September 2005, the Commission tabled its Communication on EU Regional Protection Programmes (RPPs)⁹⁰⁶. The text is divided into six parts. The first contains a general introduction to the concept. The second establishes the constituent activities of the Programmes. The Third discusses the factors that have been considered for the selection of the regions where the two pilot programmes have been launched. The fourth part deals concretely with the pilot programme initiated in the Newly Independent States (NIS) of Ukraine, Moldova and Belarus, whereas the fifth section is reserved to the pilot project in Tanzania. The sixth chapter deals with the evaluation, sustainability and timing of the programmes, before the seventh section closes the document with general conclusions.

RPPs, as framed in the Communication, are supposed to respond to the specific needs of the targeted countries in the regions of origin. Accordingly, the emphasis is placed on capacity building, in order to strengthen their ability to deliver adequate protection in protracted situations⁹⁰⁷. In regard of the countries and regions of transit, the focus is larger and also includes enabling 'those countries better to manage migration' (§2). In both cases, the overarching aim 'should be to create the conditions for one of the three Durable Solutions to take place – repatriation, local integration or resettlement' (§5).

Among the conceivable activities, RPPs may include: 'projects aimed at improving the general protection situation in the host country; projects which aim at the establishment of an effective Refugee Status Determination procedure which can help host countries better manage the migration implications of refugee situations [...]; projects which give direct benefits to refugees [...] by improving their reception conditions; projects which benefit the local community hosting the refugees [...]; projects aimed at providing training in protection issues for those dealing with refugees and migrants; a registration component [...]; and a resettlement commitment, whereby EU Member States undertake, on a voluntary basis, to provide durable solutions for refugees by offering resettlement places in their countries' (§6). These activities should be aimed at complementing the humanitarian

904 Presidency Conclusions, European Council 19-20 June 2003, Council doc. 11638/03, § 26.

905 The Hague Programme, Council doc. 16054/04, 13.12.2004.

906 On Regional Protection Programmes, COM(2005) 388 final, 01.09.2005.

907 Protracted situations are those in which 25,000 or more refugees have been living in exile for at least five years: UNHCR Standing Committee, Protracted Refugee Situations, EC/54/SC/CRP.14, June 2004.

action and development programmes of the EU, 'which are already taking place'. Indeed, '[m]aximising the impact of RPPs can be done by assessing where potential protection gaps may exist and ensuring that additional measures complement and add value [...]' (§5).

Concerning the financial means available, the Communication clarifies that 'Regional Protection Programmes will be rooted in actions already existing, notably in the AENEAS⁹⁰⁸ and TACIS⁹⁰⁹ financial programmes, and will not be based on a new financing framework' (§4).

Since 2007, two pilot Regional Protection Programmes have been in place in Tanzania – a region of origin hosting the largest refugee populations in Africa – and in three NIS countries – a major region of transit towards the EU. A number of factors were considered in the selection of these locations, 'principally, the assessment of particular refugee situations in third countries; the financial opportunities available under existing Community funds; existing relationships and frameworks for cooperation between the Community and particular countries or regions; [...][and] the necessity to assure added value [...]' (§9). 'Political considerations' were also taken into account (§10). Some other possible emplacements were explored too. Placing a RPP in North Africa, Afghanistan or the Horn of Africa was assessed by the Commission in consultation with the Member States, but it was eventually discarded. In the particular case of North Africa it was established that 'the more complex nature of the migration situation from North African countries [meant that] a wider approach may be required' (§18). This does not mean, however, that future RPPs would exclude this region⁹¹⁰.

The Commission submitted in its RPP Communication that 'an independent, external evaluation [was] to be carried out by 2007', concerning 'the effects and results of the programmes' (§19). In this regard, the Commission mentions the existence of such external evaluation in its First Annual Report on Immigration and Asylum⁹¹¹. On this basis, and according to the Stockholm Programme call to 'further develop and expand' these programmes in light of the results achieved (§6.2.3), '[i]t has been decided to improve and expand them, in particular in the Horn of Africa (Kenya, Djibouti, Yemen) and north Africa (Libya, Egypt, Tunisia)⁹¹². The evaluation, however, is not publicly available.

8.1. RPPs pursue high ambitions with limited means

PROBLEM: RPPs pursue high ambitions with limited means.
 RPPs draw on existing funds.
 There is no additional institutional set-up underpinning RPPs.
 Therefore, there is a real risk of excessive expectations with regard to RPPs.

908 Regulation (EC) No 491/2004 of the European Parliament and of the Council of 10 March 2004 establishing a programme for financial and technical assistance to third countries in the areas of migration and asylum (AENEAS), OJ L 80/1, 18.03.2004. AENEAS contained a multiannual programme for 2004-2006, which has been replaced by the Thematic Programme 'Cooperation with Third Countries in the areas of Migration and Asylum', based on article 16 of the Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation OJ L 378/41, 27.12.2006, within the framework of the 2007-2013 Financial Perspectives.

909 TACIS is the acronym for the 'Technical Aid to the Commonwealth of Independent States' launched in 1991. In the 2007-2013 EU Financial Perspective, the TACIS Programme has been replaced with the 'European Neighbourhood and Partnership Instrument' for the countries covered by the European Neighbourhood Policy, which includes Ukraine, Belarus and Moldova. Nevertheless, TACIS projects programmed in 2006 will continue to operate until the end of the decade.

910 On the establishment of a Joint EU Resettlement Programme, § 3.2.3.

911 First Annual Report on Immigration and Asylum, COM(2010) 214 final, 06.05.2010.

912 Ibid., p. 6.

Until the external evaluation report is disclosed, it is difficult to gauge the real value of RPPs. However, from the available information some conclusions can be drawn. First of all, it appears that RPPs pursue very high ambitions with rather limited means. Drawing on existing funds, the financial allocations available are insignificant in comparison to the scale of the needs to be addressed. This has led the UNHCR to warn of the risks of excessive expectations. Although '[a]n external evaluation of Regional Protection Programmes [has] concluded that they are a first and successful mechanism to provide more protection for refugees close to regions of origin', there is also ground to consider that 'their impact [is] limited due to limited flexibility, funding, visibility and coordination with other EU humanitarian and development policies, and insufficient engagement of third countries'⁹¹³.

SOLUTION: Given the limited material resources available, as advanced by numerous actors, it is crucial to ensure that the actions covered by RPPs are implemented in full coordination with other protection-oriented activities already undertaken by the EU within other external policies.

The UNHCR has proposed that the comprehensive approach advanced by the Commission in its proposal be implemented, to ensure that the activities covered by the RPPs are carried out in coordination with other development and humanitarian initiatives already in place, avoiding the duplication of efforts and preventing the creation of additional obstacles to the realization of the protection goals to be achieved⁹¹⁴. Other actors also maintain that better coordination of the existing protection-oriented initiatives in the EU development aid, humanitarian assistance and foreign affairs policy may deliver more tangible results than single RPPs operating alone⁹¹⁵. Related areas 'should be rooted in a common understanding of the scope and nature of the refugee problem in the regions of refugee origin'⁹¹⁶. Inter-agency cooperation seems particularly necessary in this context. Consistency could be achieved by coordinating existing working groups dealing with the external dimension of the CEAS. Amnesty International has submitted that the initiatives undertaken within the framework of the European Neighbourhood Policy, the EUROMED cooperation and the High Level Working Group on Asylum and Migration should be coordinated to ensure satisfactory results⁹¹⁷.

8.2. The position of third countries and of other stakeholders should be reinforced

PROBLEM: The position of third countries and of other stakeholders should be reinforced. Better results could be achieved if the position of third parties would be incorporated in the design and the implementation of RPPs. Coherence with article 78(2)(g) TFEU would thereby be better guaranteed. The long-term impact of RPPs in the regions and countries hosting them should be borne in mind.

913 Ibid.

914 UNHCR, Observations on the Communication on Regional Protection Programmes, October 2005, available at: http://www.refugeelawreader.org/inventory.d2?start=600&target=search&i_doctype%5B%5D=0.

915 ECRE, Response to the Green Paper on the Common European Asylum System, p. 42.

916 G Loescher and J Milner, 'The Missing Link: The Need for Comprehensive Engagement in Regions of Refugee Origin,' *International Affairs* (2003), p. 596.

917 Amnesty International, Response to the Green Paper on the Common European Asylum System, p. 43.

Enhanced efficiency may also be achieved through a genuine engagement with the regions of origin and transit hosting these projects. RPPs should take account of the interests and real capacities of the countries concerned, integrating them in the design and the implementation of their activities. As with the Joint Resettlement Programme, a multilateral framework of cooperation is required to this end. Only a full partnership with all relevant stakeholders will generate the ownership necessary for a maintained and sustainable dialogue with these regions. Only by engaging with the particular character of each refugee situation, and by considering the needs, concerns, and capacities of the countries concerned, along with the needs of the refugees themselves, will these situations be possibly resolved.

SOLUTION: To ensure the feasibility of the programmes, the EU Member States should embark on a genuine partnership with the regions hosting the projects. Their needs should be given appropriate consideration, in a spirit of shared responsibility. An effective multilateral commitment, combining resettlement and regional protection is essential⁹¹⁸.

In considering the needs of its partners, the Union should also take account of the long term impact of these programmes. In fact, 'the presence of a large community of refugees may have a detrimental effect on the political stability of the host societies'⁹¹⁹. Assisting third countries in dealing with extensive refugee populations should not result into the further protraction of the situation⁹²⁰. It is important to bear in mind that durable solutions will not always be available in regions of origin or transit for all those who need it. This is why resettlement is key to the success of these initiatives. Resettlement, as part of a genuine burden-sharing endeavour, could reinforce efforts to establish viable asylum systems and to create opportunities for local integration. The experience gathered so far 'shows, however, that resettlement has remained a relatively underdeveloped component'⁹²¹. Considerable efforts are required to make EU Member States engage in a true partnership with these countries in a spirit of shared responsibility.

8.3. RPPs shall remain complementary to pre-existing legal obligations

PROBLEM: RPPs shall remain complementary to pre-existing legal obligations. The complementary nature of RPPs to the reception of spontaneous arrivals and the provision of protection to those in need has not been mentioned in the proposal. There is hence a risk of obliteration of the pre-existing legal obligations of the Member States.

The legitimacy of the actions of the Union in this realm, promoting capacity building for the protection of refugees in regions of origin and transit, as some commentators have observed, depends on maintaining the access to fair and affective asylum procedures in Europe. RPPs should unequivocally be considered complementary to the continued provision of protection in and by the EU Member States.

918 The international institutional framework provided by The Hague Conference of International Private Law could be used for this purpose, in cooperation with the UNHCR and other relevant stakeholders. See notes 159 and 160 above.

919 Amnesty International, EU Regional Protection Programs : Enhancing protection in the region or barring access to the EU territory ?, September 2005, available at: <http://refugeelaw.geh.ox.ac.uk/pdfs/ai-eu-on-rpps-october-2005.pdf>.

920 UNHCR EXCOM, 'Economic and social impact of refugee populations on host developing countries as well as other countries,' Standing Committee, 26th Meeting, EC/53/SC/CRP.4, 10.02.2003.

921 On the establishment of a Joint EU Resettlement Programme, § 3.2.3.

SOLUTION: The complementary character of RPPs to the reception of spontaneous arrivals should be clearly articulated and the legal responsibilities of the EU Member States properly taken into account.

As already expounded above, in particular with regard to FRONTEX-led operations in cooperation with third countries in section 6.4, neither extraterritoriality nor cooperation with other countries or international organisations exempt the EU Member States from compliance with their previously contracted international engagements. Any initiative involving third countries or international organisations will not diminish their legal obligations as they arise from international and EU law.

8.4. RPPs follow a selective approach to policy coherence

PROBLEM: RPPs follow a selective approach to policy coherence. It is expected that RPPs are incorporated into the Global Approach to Migration. Given the current focus of the Global Approach to Migration, this is problematic. As a matter of EU primary law, stronger emphasis should be placed on cross-policy coherence between RPPs and the internal asylum acquis. In particular, regard should be had to the notion of 'effective protection' in the event of a link being established between the existence of RPPs in a particular area and the suitability of that area for the return of refugees and asylum seekers in the context of 'safe third country' procedures.

As with the EU Resettlement Programme, the migration management element of RPPs has raised profound concerns. The 2004 Communication improving access to durable solutions explicitly stated that the 'tool box' should include arrangements that 'would focus on improving the response of third countries and countries of transit to mixed migratory flows, as well as at combating illegal immigration and organised crime' (§51). Although the 2005 RPPs proposal revises the language, and speaks instead of '[p]rojects [...] which can help host countries better manage the migration implications of refugee situations [...]' (§6), the impetus seems to remain the same. The Stockholm Programme confirms that RPPs 'should be incorporated into the Global Approach to Migration' (§6.2.3). The inconveniences of linking protection projects to migration control initiatives, identified with respect to the EU Resettlement Programme above, remain relevant in this regard too. Regional Protection Programmes risk dwelling excessively on migration control priorities, at the expense of genuine humanitarian considerations.

An additional risk some commentators have identified in this context is the question of whether the countries hosting RPPs could be deemed 'safe' for returns by the EU Member States⁹²², which may then process the applications of asylum seekers originating from or having transited through these countries as manifestly unfounded. This would entail the extension of the 'safe third country' concept to countries in the targeted regions. Originally, the idea was indeed that RPPs would include an encouragement for these countries to accept the return of migrants. '[R]eturn could be aimed at the third country's own nationals, as well as other third country nationals for whom the third country has been or could have been a country of first asylum [...]'⁹²³. The condition was that the country concerned offered effective protection. The 2004 Proposal erases any explicit references to

⁹²² K de Vries, 'An Assessment of "Protection in Regions of Origin" in Relation to European Asylum Law,' EJML (2007), pp. 83-103.

⁹²³ Improving access to durable solutions, § 51.

return. However, the extension or not of the 'safe third country' concept to the countries covered by a RPP is ultimately a matter for each individual Member State to decide. It should be considered that the majority of asylum seekers reaching the EU flee not only unsafe countries of origin, but also unsafe regions of origin. The question, thus, arises as for what constitutes 'effective protection' under EU law. In this regard, a general reference to the analysis on 'safe third country' notions in Chapter 4 of this study is in order.

SOLUTION: The adequacy of incorporating protection-oriented initiatives undertaken under the umbrella of RPPs into the Global Approach to Migration should be given thoughtful reflection, so that migration concerns do not detract them from their ultimate humanitarian aspirations. In general, consistency between RPPs and the internal asylum acquis should be ensured as a matter of primary law. In particular, returns to the countries hosting RPPs should not be performed, unless 'effective protection' is accessible there, both in law and in practice.

Significant practical, political and legal obstacles prevent the subordination of asylum systems to migration management strategies. The central aspiration of RPPs should be to facilitate safe and legal access to international protection. The aim should clearly be the prevention of the root causes of forced displacement, not the containment of refugee flows in the regions of origin and transit.

KEY FINDINGS

- A priori, there is no obligation to provide for international protection extraterritorially. Yet, when the EU and/or its Member States exert 'effective control' over an area in foreign territory or over persons abroad, for instance, through the extraterritorialisation of their migration and border policies, their human rights obligations, as ensuing from international and EU law, can be engaged. It should be noted, in addition, that international cooperation, be it with international organisations or with third countries, does not exonerate the Union or its Member States from their respective obligations.
- From the foregoing it follows that, in order to preserve their effet utile, entry and pre-entry controls, in the form of Schengen visas, carrier sanctions, the intervention of ILOs, or the interdiction carried out in the course of a FRONTEX-led operation, shall be designed and implemented in a way that does not deprive refugees and asylum seekers of the protection that the prohibition of refoulement and the right to (leave to seek) asylum afford them in both its facets, substantive and procedural.
- Accordingly, EU migration control and border surveillance legislation must be aligned with the fundamental rights' acquis. To this end, action is required at three levels:
 1. The real impact that entry and pre-entry control measures have on the rights of asylum seekers and refugees should be properly identified. It is, hence, advisable that reporting obligations on the actors concerned, independent monitoring, evaluation mechanisms and the duty to collect specific statistical data relevant to the situation of asylum seekers and refugees in transit be introduced for that purpose. Once the real dimensions of the legal concerns posed by border and migration legislation with regard to refugees' and asylum seekers' rights become known, the streamlining of the existing legislation will be facilitated.
 2. The rights of refugees and asylum seekers must be duly incorporated in migration and border legislation. Specific procedures and adequate legal safeguards, as the vehicles of realization of those rights, must be contemplated therein. The instruments which alignment with the fundamental rights' acquis reveals impossible will have to be abolished.
 3. The entire system of entry/pre-entry control has to be made subject to the democratic oversight of the European Parliament and the judicial control of national and European courts. Effective remedies, which are accessible both in law and in practice, have to be introduced for each individual case in which the person concerned has an 'arguable claim' that his rights have been violated.
- Indeed, full compliance with the prohibition of refoulement and the right to (leave to seek) asylum requires access to adequate procedures and effective remedies. Where these procedures should be conducted is not without significance, since the exercise of rights conferred by EU law cannot be rendered practically impossible or exceedingly difficult and decisions at first instance shall not prejudice the right to effective judicial protection. In theory, therefore, a plethora of territorial and extraterritorial possibilities may seem available to the EU Member States, such as the screening of asylum candidates onboard intercepting vessels or in third countries supposedly safe. Bearing in mind that under EU law the effectiveness of rights must

be preserved, the merits of the extraterritorial initiatives adopted or proposed thus far shall be scrutinized thoroughly.

- Under international law, neither the EU nor its Member States bear a legal duty to provide for the international protection of refugees abroad. From this perspective, there is no external dimension of asylum.
- However, when the Union decides to extraterritorialise its migration policy and to carry it out beyond the national territories of its Member States, then, there ensues an extraterritorial responsibility vis-à-vis the refugees and asylum seekers that the EU and its Member States' authorities encounter in the course of their extraterritorial activities. In this situation these persons are brought under the jurisdiction of the Union and/or its Member States in such a way that EU law, including fundamental rights, becomes applicable and must be duly observed.
- This does not render extraterritorialisation impossible. Nonetheless, extraterritorialisation renders compliance with EU law significantly difficult.
- In a context of prevailing extraterritorial entry controls, to ensure that the right to (leave to seek) asylum and to non-refoulement remain accessible in law and in practice, common measures should be codified to provide a safe and legal access to international protection in the EU. Article 78(2)(g) TFEU provides the Council and the European Parliament with the legal basis to adopt legislative acts 'for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection'. It would further appear that such measures shall be adopted as an integral part of the CEAS that the Union has to develop. The proposed EU Resettlement Programme and Regional Protection Programmes, as analyzed above, give rise to some common findings:
 1. They pursue high ambitions with limited financial and material means. Therefore, to realize their humanitarian aspirations either their resources are increased in accordance with the needs to be addressed, or their coordination with other external humanitarian activities of the EU is assured in practice.
 2. Doubts arise as for the voluntary nature of the participation in these measures, as their proposers maintain. On the basis of article 78(2)(g) TFEU, the Union 'shall adopt measures for a [CEAS] comprising: [...] partnership and cooperation with third countries for the purpose of managing the inflows of people applying for [international protection]'. If a choice is left to the Member States as for the means they can adopt, it appears that this provision creates an obligation of result. In this light, it is difficult to reconcile an obligation to adopt legal measures for the management of refugee inflows in partnership with third countries, with the voluntary character of the participation in the measures which may be eventually adopted. Once the choice of the measures has been made, participation in their implementation should be considered compulsory. Otherwise, article 78(2)(g) TFEU would be rendered superfluous.
 3. To maximise their humanitarian impact, the measures adopted on the basis of article 78(2)(g) TFEU shall translate a multilateral partnership with the countries hosting large numbers of refugees in the regions of origin and transit. Their concerns and capacities shall be taken into account as part of a genuine burden-sharing endeavour. Following the Stockholm Programme,

'any development in this area needs to be pursued in close cooperation with the UNHCR and [...] other relevant actors' (§ 6.2.3).

4. In light of the duty to ensure consistency across the policies of the Union, enshrined in articles 7 TFEU and 21(3) TEU, flagrantly contradictory results between or within the external and the internal asylum acquis would have to be considered in breach of this legal obligation. When determining the group of addressees, the qualification criteria and the procedures for the implementation of article 78(2)(g) TFEU measures, account must be taken of the relevant internal acquis. The fact that the Qualification Directive and the Procedures Directive are in place for internal procedures may prevent the EU from engaging extraterritorially in the promotion of less protective standards. To be sure, this requirement of consistency does not per se extend the scope of application of those instruments abroad, but sets a minimum standard below which the EU legislator shall not go with regard to the extraterritorial measures it may enact. In any case, all EU action remains subject to the general principles of EU law, as disclosed in the ECHR and in the relevant provisions of the EU Charter of Fundamental Rights.
5. On the other hand, linking article 78(2)(g) TFEU measures to the Global Approach to Migration, as promoted by the Stockholm Programme, is problematic. The adequacy of putting protection-oriented initiatives at the service of migration management concerns should be subject to debate. Factoring migration control considerations into the definition of resettlement targets or into the design of RPPs risks detracting these measures from their primary humanitarian objectives.
6. The existence of such measures cannot be used as a pretext not to grant admission or not to provide protection in accordance with international and EU law to spontaneous arrivals. The complementary nature of these measures must be made straightforward.
7. Bearing in mind that an obligation to provide access to asylum or to avoid refoulement may arise extraterritorially, there is room to consider that legal responsibility may be engaged in the course of a resettlement mission or the implementation of an RPP beyond the terms originally intended. The execution of these measures do not substitute for compliance with any obligations arising extraterritorially.

RECOMMENDATIONS

Schengen Borders Code

- The introduction of a monitoring system to check compliance with refugees' and asylum seekers' rights when implementing entry and pre-entry controls is highly recommended.
- Clear entry requirements for refugees and asylum seekers are lacking in EU law. Yet, according to article 77(2) TFEU, the EU legislator shall adopt the rules concerning 'the checks to which persons crossing external borders are subject'. Thus, for the sake of uniformity and legal certainty, the 'special provisions' referred to in article 13 SBC with regard to the crossing of refugees and asylum seekers must be spelled out. For this purpose, it is recommended that the guidelines compiled in the Schengen Handbook without legally binding effect be upgraded to the Code itself.
- Currently, entry refusals are not endowed with suspensive effect. However, on account of the special position of refugees and asylum seekers, the wording of article 13(3) SBC must be brought in line with the requirements of an 'effective remedy' ex article 13 ECHR and article 47 EUCFR.

Visas

- No analysis of the proportionality and the necessity of the EU visa policy has ever been undertaken. Yet, only an open and thorough evaluation will clarify its impact on refugees' and asylum seekers' rights, revealing the advantages and disadvantages of its furtherance as it stands today.
- Considering that under exceptional circumstances human rights obligations may be engaged in embassy cases, in light of the Munaf and WM jurisprudence, it is advisable that visa lists be configured and periodically reviewed bearing in mind not only security and illegal immigration considerations, but also their possible human rights implications so as to enable the EU Member States to adequately fulfil their obligations.
- To achieve the Treaty objective of a 'common policy on visas', the visa requirements for recognized refugees should be uniformized and the discretion accorded to the EU Member States eliminated.
- Equally on account of the Munaf and WM jurisprudence, the conditions and the procedure to issue LTV visas to asylum seekers and refugees yet-to-be-recognized should be clarified in order to enable the Member States concerned to fulfil their international obligations as appropriate.
- The linguistic inconsistencies between articles 19 and 25 CCV must be eliminated, so that refugee visa applicants do not see their applications truncated at the admissibility stage. This way, the appeal rights associated to formal visa refusals will unambiguously be made available to them too.
- Where the Member States collaborate with private entities in the visa-issuing procedure, to avoid abuse by the host countries concerned or by the private entities themselves, direct access to the Member States' representations abroad must be maintained for refugee visa applicants, not only in law, but also in practice. In this connection, the suggestion by the EDPS to locate the service provider in a place protected under diplomatic inviolability deserves further consideration.
- Specific safeguards must be introduced where refugees' and asylum seekers' data are transferred to third countries, so that EU Member States' protection obligations can be properly guaranteed.

- As visas are not always available in practice, as proposed below, the institution of carrier sanctions should be entirely re-thought, if not abandoned.

Carrier sanctions

- In order to understand the real implications of carrier sanctions for improperly documented refugees and asylum seekers, at a minimum, statistical data on the reasons for rejecting boarding as well as information on the handling of individual cases involving prospective passengers in search of international protection should be collected. In addition, a monitoring system by an independent body and/or an obligation on the Member States and the carriers themselves to report on the treatment accorded to refugees and asylum seekers at the boarding stage should be introduced.
- If legally and materially possible, considering that visas are not always available for refugee applicants, carriers must be enabled to carry out full entry checks on the basis of all the relevant Schengen Borders Code requirements and the exceptions thereto, so that considerations beyond documental accuracy are properly taken into account.
- Details on the procedures that carriers confronted with asylum seekers shall precisely follow coupled with effective rights of defence and appeal against their decisions must be introduced so that compliance with EU and international protection obligations can be guaranteed.
- Thorough discussions should be held with regard to the legal viability of maintaining the institution of carrier sanctions. The impossibility to introduce the necessary legal safeguards in their scheme should lead to the abandonment of the policy altogether.

ILOs

- In a context of insufficient information on the concrete powers and activities of ILOs, the disclosure of the existing periodical reports is necessary. The amendment proposed on this point by the Commission to article 6(1) of the ILOs Regulation should be adopted.
- A precise specification of ILOs' tasks and powers, with an unequivocal submission to EU law and human rights, and the introduction of appropriate legal safeguards and judicial remedies for those confronted with their activities is compulsory. Enhancing their role without a prior delimitation of their responsibilities, as it has been proposed by the Commission, increases the risk of obliteration of refugees' and asylum seekers' rights, in breach of EU and international obligations.
- As with carrier sanctions, thorough discussions should be held with regard to the legal viability of maintaining the institution of ILOs. The impossibility to introduce the necessary legal safeguards in their scheme should lead to the abandonment of the policy altogether.

FRONTEX

- Since available evaluations ignore the impact of joint maritime operations on human rights and current monitoring mechanisms are insufficient to ensure compliance with the EU fundamental rights' acquis, the development of a permanent monitoring system of each one of FRONTEX activities, developed possibly in collaboration with the EASO, relevant NGOs and the UNHCR, is highly recommended. The proposed amendment to article 33 of the FRONTEX Regulation, introducing a periodic external evaluation of FRONTEX activities, including a specific analysis on the way the EUCFR was respected, is welcome. However, it might not be sufficient by itself to ensure the observance of refugees' and asylum seekers' rights in each individual case.

- Given the ambiguous understanding by several EU Member States of their interdiction powers and their maritime obligations, it should be made abundantly clear that, as required inter alia by articles 2(3) and 87(1) UNCLOS, interception measures adopted in the course of a border control operation have to conform to 'other rules of international law'. This concerns not only search and rescue obligations but also human rights. The subsequent 'delivery to a place of safety' upon rescue or interception shall take account of the prohibition of refoulement and the right to (leave to seek) asylum that refugees and asylum seekers derive from international and EU law. Therefore, the practice of stopping migrants from leaving African shores or diverting them back without taking into consideration their particular situation must be discontinued.
- To preserve the effet utile of the rights of refugees and asylum seekers found at sea, specific procedures and effective remedies must be introduced in Schengen legislation to provide them with adequate legal safeguards. Accordingly, the human rights dimension of FRONTEX operations must be well integrated, not only in the statement of FRONTEX's mission in article 1 of its Regulation as the Commission has proposed, but also in the Agency's concrete modus operandi. This should be made clear throughout the text of the amended version of the FRONTEX Regulation.
- Where collaboration for the purposes of border patrolling or migration control is undertaken with third countries or international organisations, FRONTEX and the EU Member States must be made well aware of the fact that such collaboration does not make away with the EU and its Member States' obligations under EU and international law. Any such collaboration must be made compatible with the observance of these obligations or, this failing, be abandoned. As ruled by the Strasbourg Court in § 138 of its judgment on Al-Saadoon, 'it is not open to a Contracting State to enter into an agreement with another State which conflicts with its obligations under the [ECHR]'.

EU Resettlement Programme

- Provided that participation in the Programme can be considered voluntary, important incentives will have to be introduced for a significant commitment to resettlement to emerge among the EU Member States. The introduction of an OMC-like scheme may serve the purpose. Multilateral collaboration with countries of first asylum hosting large refugee populations and with other relevant stakeholders should be undertaken. Tripartite agreements, between the EU Member States, the third countries in question and the UNHCR could be envisaged too.
- In our view, in light of articles 78(2)(g) and 80 TFEU, once the programme will officially be adopted, participation therein should be deemed obligatory. If the Member States have a choice as for the means to 'managing inflows of people' in need of international protection, an obligation of result is inbuilt into these provisions. Once the choice with regard to the means has been made, participation in its implementation should be considered compulsory.
- If the humanitarian and strategic objectives of the programme are to be fulfilled, it seems necessary to go beyond the mere identification of common priorities into significant policy approximation. To this end, full harmonization of selection criteria and resettlement procedures should be envisaged in the longer term.
- The complementary character of resettlement to the reception of spontaneous arrivals should be clearly stated. A recital should be introduced in any legal instrument dealing with resettlement specifying that 'it remains without prejudice to Member States' obligations to determine asylum claims in fair procedures and to provide protection in their territory in accordance with international law'.

- The adequacy of linking the programme to the Global Approach to Migration should be carefully reviewed. It is worth recalling in this context that legal coherence between the internal and the external asylum acquis must be guaranteed as a matter of primary law.
- Responsibility may be engaged extraterritorially, in the course of, or as a result of, a resettlement operation. Compliance with international obligations shall be assured in these cases too. The engagement with the region/country of origin of those to be resettled does not diminish the legal obligations of the EU Member States concerned.

Regional Protection Programmes

- Given the limited material resources available, it is crucial to ensure that the projects covered by Regional Protection Programmes are fully complementary to similar protection-oriented activities already undertaken by the EU within other external policies.
- To ensure the feasibility of RPPs, the EU Member States should embark in a genuine partnership with the regions hosting the projects. Their needs should be given appropriate consideration in a spirit of shared responsibility. An effective multilateral commitment, combining resettlement and protection in the region is essential.
- The complementary nature of Regional Protection Programmes to the protection to be granted to spontaneous arrivals by the EU Member States themselves should be clearly articulated.
- The adequacy of incorporating protection-oriented initiatives into the Global Approach to Migration should be given thoughtful reflection, so that migration concerns do not detract the former from their humanitarian aspirations.
- A clause should be introduced to remind that returns to the countries benefiting from RPPs should not be performed, unless 'effective protection' is accessible there.

PART 3: LONG TERM PROSPECTS FOR THE COMMON EUROPEAN ASYLUM SYSTEM

The path on the evolution of the common asylum system must combine multiple parameters. It must be borne in mind that the linchpin of CEAS, the European Asylum Support Office (EASO), has just been adopted and we must address its potential developments on the basis of a text whose negotiation has only just been finalized.

The first parameter to consider is temporal. The opportunities that one can imagine on the evolution of CEAS are mostly to the medium or long term. Indeed, the adoption of the "first generation" of EU legislation on asylum highlights only the distinctive features of CEAS. Only after a thorough evaluation of its implementation, monitoring, institutional development and daily supervision from the judge could the required additions and changes be made. Key elements are missing to provide a reliable overall assessment. In addition, determining elements for the final configuration of CEAS, whether adherence to the Geneva Convention or the prospect of CEAS as a judicial character, are now missing and lengthy procedures to achieve said configurations should not be underestimated.

The second point is the legal context in which potential changes can be made to CEAS. The implementation of the Treaty of Lisbon, in that it subjects the entire common policy on asylum law to the common rule, is the single analysis reference. In the short and medium term, if not also in the long term, all prospective reasoning must be conducted in the current framework of the Treaties without pretending to imagine lines of evolution out of the ordinary. The European Union will sustainably submit to the current distribution of its powers with its member states and to a procedural system within which the common asylum policy must register. It is thus on this basis that the reasoning must be done, without advancing ideas put forward that would require a revolution in the order of things and therefore a revision of treaties, which would in turn doubtfully collect majority support of Member States.

Much can be done however within this context, in the name of pragmatism and efficiency. The renewal of common asylum policy data is significant as much due to the Lisbon Treaty and the Charter of Fundamental Rights, as to the planned accession to the European Convention on Human Rights. Similarly, the rise of EU agencies, from the European Asylum Support Office to Frontex, hints of procedures and considerable developments in relation to those seeking protection. Long regarded as mere public policy of the Union led by the interests of management, the common asylum policy should now be conceived and developed in terms of fundamental rights, a finding which profoundly renews its apprehension.

For all these reasons, six areas of work can be mentioned:

- The legal perspective: CEAS can be more or less profoundly influenced by the entry into force of the Charter of Fundamental Rights and its Article 18 as by the possibility for the EU to accede to the Geneva Convention and the effect can operate a rebalancing of the common policy. Beyond that, we must also consider an eventual transition of the current period of approximation and harmonization of law in a phase where unifying regulation find its place.
- The institutional perspective: the emergence of the European Asylum Support Office should profoundly alter the game of the common asylum policy, according to the

powers that may be assigned to it. The challenge of its growing power is major both in terms of CEAS' consistency and effectiveness.

- The jurisdictional perspective: increasing jurisdictional control of the common asylum is an inevitable consequence of an approach in terms of fundamental rights of the person which is now required, in terms of personal protection, as much as in terms of CEAS' regulation.
- The material perspective: Beyond the Geneva Convention and the international forms of protection, the modifications in protection applications, and notably the concern link to refugees called "climate refugees" will inevitably arise in the Union. Similarly, and from a pragmatic standpoint, it should find new avenues of work for the freedom of movement of protected persons.
- The redistributive perspective: Dublin Regulation being not an instrument of solidarity between Member States, how ensuring a fairer distribution of asylum seekers and protected persons among the Member States of the European Union?
- The external perspective: considering the difficulties of externalising the examination of asylum claims outside the European Union, how to ensure access of applicants to asylum procedures?

SECTION 1: THE LEGAL PERSPECTIVE

The evolution of CEAS will be influenced by the degree of consideration of three parameters of varying importance. The first case is of immediate topicality: article 18 of the Charter of Fundamental Rights, in relation to the right to asylum, implies a challenge for CEAS that must be clarified. The second element to consider is more problematic because it raises the question of accession of the Union to the Geneva Convention and its consequences. The third legal point that may be considered is more punctual and leads to consider the passage of CEAS in its current phase of legislative harmonization towards that of regulation.

1. THE IMPACT OF ARTICLE 18 OF THE CHARTER OF FUNDAMENTAL RIGHTS

The implementation of the Treaty of Lisbon and of the Charter of Fundamental Rights therein, coincides with the adoption of the Stockholm Programme on AFSJ. This simultaneity poses a series of questions about the impact of these texts on the CEAS. Whether it concerns the inclusion of Article 18 of the Charter in the normative system that governs the right of asylum or the authority and scope to be given to this article from the point of view individuals or the judge, this issue is important.

Regarding the authority of the Charter itself, its principle is in Declaration n°1 attached to the Treaty of Lisbon. The afore-mentioned stipulates in its paragraph 1 that "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers ". Its second paragraph states that "This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties."

This specification does not address the specific issue of asylum as proclaimed by the Charter. The terms of this proclamation have raised questions and specific developments that can influence the evolution of CEAS.

1.1. The content of Article 18 of the Charter

Article 18 of the Charter is entitled "Right to Asylum". It states that "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community." Even if the "explanations of the Praesidium" claim to enlighten this article, the wording leads to a statement: that of the complexity of the overlapping of different texts guaranteeing asylum in the EU.

Article 18 therefore requires a very precise legal analysis, given that it has been "much discussed" during the drafting of the Charter⁹²⁴, even in the opinion of the President of the Convention who adopted it. The compromise allowing for its final adoption left serious problems unresolved.

Firstly, Article 18 does not conduct any substantive definition of "the right to asylum" which it obliges, however, to "guarantee". In other words, it does "not specify any of the material conditions for the benefitting of the right of asylum"⁹²⁵, due to lack of consensus on this point. Article 18 is simply the choice of locking up the right to asylum in compliance with very different texts, one that is outside the EU, the Geneva Convention, and two others that found the Union, the TEU and the TFEU.

In order to identify the right to asylum as provided by Article 18 of the Charter, we must thus refer to Article 78 §1 of the TFEU. This provision states that "the Union shall develop a common policy on asylum ... which "must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties". This technique of reference is not a new process for the Union. It establishes a compliance report doubly required by the Charter as well as the TFEU that is inspired by Article 63 §1 of the Treaty of Amsterdam. The latter formulated it in similar terms.

In fact, Article 18 of the Charter is enriched by the Treaty of Lisbon, for the added value lies in the details it provides. On its basis, the Union shall develop a "common policy" of asylum that aims both "to provide an appropriate status to any third-country national requiring international protection" and "to ensure respect for the principle of non-refoulement". This advance made by the TFEU helps identify the merits of the right to asylum. It gives real substance to an obligation that was placed in an unspecified manner since the Treaty of Maastricht. Following the logic of Lisbon, the obligation to respect the right of asylum takes two distinct forms: that of an appropriate status and that of the prohibition of refoulement.

Article 18 of the Charter can be read as: the right of asylum is now "guaranteed" by the formulation of two specific obligations imposed on the Union and its Member States. The first obligation is positive and the Union legislator must take charge: it is providing an "appropriate" status to the applicant for protection in the EU. The second obligation is negative: it prohibits the refoulement of a third-country national requiring international protection. This prohibition is now explicitly supported by EU primary law, following in this way the Geneva Convention.

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G. Braibant, *The Charter of Fundamental Rights of the European Union*, Le Seuil, Paris 2001 p. 148

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C. Ladenburger, "The contribution of the Charter on Civil and Political Rights" in JY Carlier and O. De Schutter, *The Charter of Fundamental Rights of the European Union*, Bruylant 2002 p.115

One can conclude from these findings that the combination of Article 18 of the Charter and TFEU goes beyond a mere recognition of the existence of the right to asylum and of its respect. It now weights on the European Union and its Member States a true "positive obligation" implied by the need to "guarantee" the right to asylum. In the sense that this concept is familiar in the law of the ECHR, this "positive obligation" means an obligation to "ensure" which goes beyond an obligation "not to do", that of the classic prohibition of breaking the Geneva Convention. The obligations derived from Article 18 are not only satisfied by the principle of non-refoulement. They demand that everything be done to allow an effective benefit of that protection, including building an appropriate status.

1.2. The interpretation of Article 18 of the Charter

The authors of the Charter as well of the TFEU have seen fit to expressly rely on the Geneva Convention and the Protocol of 1967 as well as on the Union's founding treaties. This editorial choice must be analysed.

Article 18 of the Charter is entitled "Right to Asylum". In doing so, it maintains a first deliberate confusion between the "right to asylum" in the original sense of the term and of refugee protection that the Geneva Convention regulates. Moreover, the authors of the Charter did not choose a second paragraph stating precisely the obligations of non-refoulement, whether this refers to the application of the Geneva Convention or to the risk of torture or inhumane treatment covered by Article 3 of the ECHR. They preferred to refer the issue to Article 19 §2 of the Charter that covers the second hypothesis.

An examination of the preparatory work of the Charter reveals that the amendments of the Convention' members destined to reduce the right to asylum proclaimed in the Charter for the sole protection of refugees have been voluntarily dismissed by the authors⁹²⁶. These same authors intend then, of course, to go beyond the simple principle of non-refoulement and to provide a broader protection. Finally, the choice to build the asylum in a "right" in the Charter is not explicitly confirmed by the treaties to which Article 18 refers. There is some potential for regression as to the existence of a true "right" of asylum. This term is never mentioned by the TFEU who prefer to refer to a "common policy" on asylum and use the words "system" or "status" without once confirming the existence of a "right to asylum"⁹²⁷.

These various findings have important implications. The substantive scope of the "right to asylum" in the EU is now less dependent of the Geneva Convention than the European treaties themselves. These treaties significantly broaden the scope of asylum through the content of the "common policy" they devote to asylum in Article 78 § 1 TFEU and "common European asylum system" in Article 78 §2 TFEU. If the Geneva Convention is effectively the incompressible threshold of the obligations on the Union and its Member States, nothing is prohibiting the Union to go beyond the simple requirement of non-refoulement, which weights on its member states under the Convention. In reality, that is exactly what happened and a reminder of the timeframe allows for awareness of this. When the authors

926 Cf in this sense C. Ladenburger, "The contribution of the Charter on Civil and Political Rights" in JY Carlier and O. De Schutter, *The Charter of Fundamental Rights of the European Union*, Bruylant 2002 p.114

927 Protocol No. 24 is the same (except its title): it makes mention of asylum only as "an institution" Nor does it mention the Geneva Convention (see H. Battjes, *European Asylum Law and International Law*, Nijhoff Publishers, 2006 p. 113).

of the Charter agreed on the wording of Article 18, in the course of 2000, the common asylum system was still largely virtual. That was not the case when the Charter acquired the status of positive law with the Treaty of Lisbon, almost ten years later, as the whole law of asylum in the first generation had been adopted. This is no doubt not the result of a conscious desire from the authors of the treaty, but this fact changes the whole perspective.

The literal interpretation of Article 18 implies that the reference made to the TEU and TFEU expands and "constitutionnalise" the material scope of the right to asylum in the EU. Since, under the terms of Article 78 §2 TFEU relative to the CEAS, subsidiary protection and temporary protection are integral parts of the CEAS, they can be considered as building blocks of the right to asylum that Article 18 claims to "guarantee"⁹²⁸. "In sum, the right to asylum applies to refugees and may apply to others in need of protection as well"⁹²⁹. Progress for persons seeking international protection is considerable.

Finally, Article 18 of the Charter cannot be read without recourse to "explanations" that accompany the text of the Charter and guide its interpretation. They stress that "the text of the article was based on Article 63 EC Treaty, now replaced by Article 78 of the Treaty on the Functioning of the European Union, which requires the Union to respect the Geneva Convention on Refugees." They add that "it is appropriate to refer to the Protocols relating to the United Kingdom and Ireland, annexed to the Treaties, as well as to Denmark, to determine the extent to which Member States implement the Union's right on the matter and to what extent this Article is applicable to them". Finally, they specify that Article 18 "respects the Protocol on Asylum annexed to treaties"⁹³⁰. From this set, we can infer that the authors of the Treaty of Lisbon have realised the potential of Article 18 and they wanted to set the rules of the game.

1.3. The consequences for the Common European asylum system

The explanations of the Convention on Article 18 of the Charter and its interpretation contain important information for the CEAS. Whether it's the authority or the enforceability of Article 18 of the Charter, the implementation of the CEAS must necessarily take them into account.

1.3.1. The authority of Article 18 of the Charter

First, the right to asylum of Article 18 is "based" on Article 78 TFEU. It thus draws its authority from this article. This formulation is curious since one would be tempted to think that on the contrary, Article 18 was intended to found its own arrangements for its implementation. These are formed by the common asylum policy and the CEAS under article 78 TFEU. This choice results from the express will of the authors of the Treaty.

From a hierarchical standpoint, this precision does not likely make article 18 of the Charter an independent reference standard that the treaty would then implement and develop. Subject to a further interpretation of the CJEU, the opposite approach must therefore be taken.

Secondly, the reference in Article 18 to the Treaties establishing the broad sense (in that they also cover protocols) provides an important indication regarding the scope of territorial

928 Despite the inconsistency of the authors of the Treaty who define subsidiary protection as opposed to uniform status of asylum all the while integrating it into the CEAS ...

929 H. Battjes, *European Asylum Law and International Law*, Nijhoff Publishers, 2006 p.113

930 Protocol No. 24 annexed to TFEU

and material asylum. It is bounded on one hand by the situation defined by the protocols on the opt-out of certain States, on the other hand, by the scope of the Geneva Convention on refugees and, finally, the TFEU itself. Thus, the elements constituting the CEAS are intended to fall under the influence of Article 18.

Thirdly, concerning the personal scope of the right to asylum, the authority attached to the Protocol on Asylum, known as the "Aznar Protocol" has been central to discussions of the treaty. Compliance with this protocol to the Geneva Convention had been raised⁹³¹ at the conclusion of the Treaty of Amsterdam. The question was one of the main reasons for controversy in that it reduces the right to asylum to a right of third-country nationals and not to a right of nationals of the European Union, the latter not having the right to invoke it inside the EU⁹³². It is placed here by the explanations accompanying the Charter as an established principle⁹³³. The Court of Justice, if it had to rule about this, would certainly be forced to take note of this explicit recall of primary law. However, if the issue of accession of the Union to the Geneva Convention were to materialise, the problem of compatibility of Protocol 24 to the Geneva Convention would be openly raised and should be decided, perhaps in a different sense.

The authority of Article 18 of the Charter therefore appears to be already framed both by the treaty itself, the Charter and, finally, by the explanations that accompany it. However, as some doctrinal trends have rightly expressed, the right to asylum of Article 18 is not condemned to inaction, it is not limited to itself⁹³⁴. The use of the terms "with due respect" in the Geneva Convention states that developments are possible on the basis and in accordance with that provision and that ways to "guarantee" the right to asylum are not exclusively those in compliance with the Geneva Convention. A different situation would have involved the use by the authors of the words "by" respect, not "in" respect.

In total, this clarification should not mask the essential: the Charter of Fundamental Rights is part of primary law and must be respected as well by EU itself as by the Member States when they implement it. This obviously applies to Article 18 in the two components that it highlights without question. On the one hand, Article 18 recognizes the existence of a "right" to asylum and, secondly, it requires that this right is "secured".

1.3.2. The "invocability" of Article 18

The proclamation of the right to asylum under Article 18 of the Charter of course also affects the views of individuals likely to invoke its protection. In other words, is it possible for an individual to directly invoke Article 18 of the Charter before the judge? Several readings are possible and will probably require an interpretation of the Court of Justice.

One comment that is the most authoritative on the subject, that of Guy Braibant who chaired the drafting of the Charter, deserves quotation. From his point of view, Article 18 constitutes "one of the few cases where the Charter is not sufficient in itself and where the reading should be combined with other texts"⁹³⁵, from the very will of its authors. The latter, as clearly linking asylum to its conventional application (like the Geneva and TFEU

931 See S.Peers, EU immigration and asylum law, Nijhoff Publishers, 2006, p. 515.

932 Article 1 of Protocol 24: " Given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters.."

933 This position is confirmed by Article 78 TFEU which links the right of asylum to nationals of third countries and realises, therefore, what the Convention had refused to establish.

934 See J-Y. Carlier Asylum and Refugees. Protection law, Academy of International Law, The Hague, Vol. 332 (2007), p.70.

935 G. Braibant, The Charter of Fundamental Rights of the European Union, Le Seuil, Paris 2001 p.147

TEU) would therefore reduce the direct applicability of Article 18. In other words, the right to asylum, a recognised subjective fundamental right, cannot be applied otherwise than through the texts which cement them. In this sense, the direct invocation of Article 18 would have little practical implication for the potential beneficiary, without the aid of texts that apply it, starting with the Geneva Convention, which is the minimum of the protection.

In contrast, another reading of Article 18 can reduce the expression "with due respect" to the intention of the authors of the Charter to ensure this article does not infringe on existing obligations in the matter and, especially, on the compromises between Member States at the Aznar Protocol. In this context, it would less be the direct nature of Article 18 of the Charter than the scope of its application that would be covered by the formula. The authors' intention would have been, firstly, to establish compliance with existing texts and, secondly, to delineate its scope.

We must not overestimate the meaning of this question. As the law stands, retaining a narrow or broad reading of Article 18 in terms of its possible "direct effect" does not change the issue that is truly essential from the perspective of individuals, that of its potential to directly invoke it. Article 18 of the Charter constitutes a "right" and not a principle within the meaning of the Charter. The subjective, individual right to seek asylum does not imply, however, a mechanically "direct effect" within the meaning of the jurisprudence of the ECJ. This requires the satisfaction of three conditions in order to recognise such an effect to a rule: it must be clear, unconditional and sufficiently precise. Clearly, the wording of Article 18 does not meet these conditions and, because its wording is incomplete, it does not allow the right to asylum in the Charter to be self-sufficient. This does not mean that Article 18 cannot be "invoked" before the judge precisely in the sense that the Court of Justice dissociates the concept of direct effect and that of the possibility of "invoking", and cutting across the broader concept of justiciability. For it, direct effect is no longer a necessary condition to invoke a provision of EU law before national courts⁹³⁶.

Any third-country national is entitled to invoke Article 18 to enforce the compulsory nature of right and guarantee that it implies. They can do so through by way of preliminary or by objection before the national judge. From this point of view, the enforceability of Article 18 can both promote a consistent interpretation of EU legislation but also imply that contrary legislation or conduct can be shelved. Finally, Article 47 of the Charter concerning the right to an effective remedy as Article 41 on good administration also seeks to ensure its protection.

A series of consequences follow.

From a normative point of view, if Article 18 does not contain any material, the block of legality that secondary law of the European Union must comply with, is made of the treaty obligations of the Geneva Convention and Protocol of 1967 and of the requirements of the TFEU. The failure of Union legislator to establish an "appropriate status", the refusal to provide a subsidiary or temporary protection as constitutive element of CEAS, can thus be sanctioned.

From a jurisprudential point of view, Article 18 of the Charter also takes all its attention from the founding case law of the Court of Justice, previous to the entry into force of the Amsterdam Treaty, which wants that the legislation derived from Union be interpreted in

light of the provisions of the Charter that the legislator referred to in the motivation of the legislation⁹³⁷.

From an operational perspective, finally, it should be borne in mind that the right of asylum is not granted by the EU but by its member states, which are here reminded of their obligation to respect their Geneva commitment by the Charter. The essentially regulatory intervention of the European Union concerning asylum therefore makes Article 18 an element of law whose implementation requires the support of treaty obligations, without depriving the right to asylum of its subjective character. Basically and regarding the current state of law, Article 18 is essentially a right. Undoubtedly, follows a procedural right to seek asylum and thus have one's application considered. Undoubtedly also, the result is a right to protection against refoulement which may imply a stay as long as the conditions of international protection are met.

In total, the "neutrality" of Article 18 in terms of material content of asylum, in the sense that the proclamation of article 18 does not change the substance of the obligations on the Union, has nothing surprising. The general precautions taken by the authors of the Charter and heavily mentioned in the explanations of the Praesidium fully apply here.

These precautions are primarily protective. They point out solemnly in Article 53 that nothing in the Charter shall be construed to limit or undermine human rights and fundamental freedoms recognised in their respective fields of application, by the law of the Union, international law and international conventions to which the Union or all the Member States adhere. Although not specifically mentioned in Article 53 of the Charter as is the European Convention on Human Rights and Fundamental Freedoms or the constitutions of the Member States, the Geneva Convention is clearly part of these agreements as the primary law refers to it. It is therefore an incompressible foundation for protection.

The concern of the authors of the Charter has also been to delineate the scope of rights and principles of the Charter in its Article 52.

First, according to § 2, « Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties ». This is precisely the case of the right to asylum, as aforementioned, and avoids the reduction of the latter to protection under the Convention of Geneva. Second, §4 also concerns asylum "In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions». Again, the right of asylum may be affected.

For all these reasons, the debate about the scope of Article 18 regarding the CEAS should probably not be overstated, as it is dependent on texts that implement it. Nevertheless, the potential that give its support on the founding treaties, should not be underrated. It is undeniable that it provides today an individual right to seek asylum and that it must be guaranteed, it protects against refoulement without it being possible today and in the current state of the construction of CEAS to decide definitively on the existence of a right to territorial asylum.

937

ECJ, 27 June 2006, European Parliament against the Council, C-540/03.

2. THE ACCESSION OF THE UNION TO THE GENEVA CONVENTION

The Stockholm program suggests a new proposal. It had not been raised during the preparation of the program in question⁹³⁸: the Union might consider engaging in the process of ratification of the Geneva Convention and the Protocol of 1967. Some elements of context should be highlighted before making an inventory of the legal and political problems posed by this perspective at CEAS.

On the political as well as on the symbolic level, it is hardly necessary to emphasise the benefits of such membership regarding the place it would make for the Union in international law on asylum as regarding the effective recognition of the responsibilities entrusted to it in this area. Clearly, establishing a link in this way between international protection guarantee on a regional level by the EU and the international protection established by the United Nations and the Geneva Convention can only be approved for a rational point of view to achieve better efficiency.

Basically, without further ado, it must also be emphasized that there would be consistency in viewing the CEAS based on a tripartite Charter of Fundamental Rights / Geneva Convention / European Convention on Human Rights. We will focus here on technical issues, i.e. on the legal and practical consequences of such a perspective, if it came to be.

2.1. Context

Section 6.2.1 of the Stockholm program called "a common area of protection" is worded as follows: "...The development of a Common Asylum Policy should be based on a full and inclusive application of the Geneva Convention on the status of refugees and other relevant international treaties. Such a policy is necessary in order to maintain the long-term sustainability of the asylum system and to promote solidarity within the EU. Subject to a report from the Commission on the legal and practical consequences, the European Union should seek accession to the Geneva Convention and its 1967 Protocol."

Formally, the proposal of the joining of the Union at the 1951 convention is new but it is not completely surprising. It is due to several converging findings from a preliminary inventory.

The Union's legal position in respect of the Geneva Convention is old but it must be clarified. In addition to the reminder of what the Geneva Convention applies only to "refugees" and not asylum which the European Union aims to guarantee under article 18 of the Charter of Fundamental Rights, it is worth recalling that the EU decided on a purely unilateral level to comply with the requirements of the Geneva Convention, since the Maastricht Treaty (see further).

This choice of the Union is easily explained: this reference is allowed to have a threshold for incompressible protection, indisputable as it binds all its member states at the moment of engagement in approximation of their national asylum policies⁹³⁹. However, this reference

938 The drafts of the Presidency circulated in early October still made no allusion to this question, no more than the communication from the Commission.

939 One of the first initiatives in this area was thus the common position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of

to the authority of the 1951 Convention requires ruling out the possibility that, under the pretext that the Union would participate in the protection obligations of the Geneva Convention alongside its Member States, it would have been legally bound by this text. In this case, we cannot accept the idea of any "succession" of the EU's international obligations imposed on Member States under the 1951 text, as defined in the International Fruit case⁹⁴⁰.

The Union does not replace its Member States regarding their obligations to individuals from the Geneva Convention and its 1967 Protocol in particular as regards the granting of protection and prohibition of refoulement of a protection seeker. Its current position, the voluntary compliance of this text, does not change the entire state responsibilities under the law of the Convention that remain whole. Any consideration of possible future membership of the Union to the Convention must continue to be conducted from this axiom, regardless of the situation of its member states, which remains unchanged and is not intended to be modified by a process of EU accession.

Three points illuminate the reflection concerning the timeliness and necessity of the accession process concerning the CEAS.

First, the attitude of the Union vis-à-vis the Geneva Convention has evolved over time with the progress in integrating its migration policy and its translation in the founding treaties. The weight of obligations derived from the 1951 Convention on the asylum policy of the Union is placed, from the outset, as a basic assumption by the Union. This awareness explains the statement of article K.2. of the Maastricht Treaty referring to the "respect for the Convention on the Status of Refugees of 28 July 1951". It is this condition that allows Member States to engage in the process of intergovernmental cooperation whose action begins, because they know that their international obligations are met.

The obligation to respect the Geneva Convention is reiterated by the Treaty of Amsterdam. It does so in somewhat different terms in Article 63 TEC as the "measures" for asylum must be "consistent with the Convention on the Status of Refugees of 28 July 1951 and the Protocol of 31 January 1967 relating to Status of Refugees and other relevant treaties".

Finally, the formula is even more precise in the treaty on the Functioning of the European Union (TFEU) since it is now all the "common policy on asylum" to be "consistent" with those instruments. It is natural in this context that the question of the definitive legal position of the Union under the Geneva Convention is brought into the open today, even if only for purposes of clarification. This is the meaning of the proposal to settle the problem "from above" that is to say by using accession of the Union in good and due form.

It is good then to realise that the main innovation of the Lisbon Treaty in terms of fundamental rights is constituted by the prospect of EU accession to the ECHR, without question. The principle of this membership is laid down in Article 6 §2 TEU. Its process is about to be committed to and its culmination will not be indifferent in terms of international protection of aliens. The treaty commitment of the European Union in respect of that other source of protection for third-country nationals in the EU⁹⁴¹ is not neutral, even if it raises issues mildly different to the conventional right to asylum. The obvious interaction between

940 the definition of term "refugee" within the meaning of Article 1 of the Geneva Convention of 28 July 1951 relating to the Status of Refugees, OJ L 63, p. 13 March 1996 6
ECJ, December 12, 1972, International Fruit Company NV, C-21 and 24/72, Rec. P. 1219

941 On the basis of Article 3 ECHR

different forms of protection within the CEAS, which is Article 3 of the ECHR strengthened by Article 19 of the Charter, requires strict alignment. This need explains that parallel thinking logically opens in adhering to a convention, the Geneva Convention, taking just as prominent a place in the protection of human rights of third-country nationals.

Finally, the possibility of such a commitment already meets the consent of some Member States that seem in favour of it⁹⁴². They expressed the latter in their stance on the Stockholm program. This attitude may explain the proposal ultimately made by the Stockholm program, which binds much caution since it is primarily talking about a process of exploration. Yet even this does not seem to raise the enthusiasm of the Commission: the deadline that the latter fixed in its Action Plan to establish a simple feasibility study on the issue is set for 2013⁹⁴³! The delivery to this date of this "Report on the legal and practical consequences of EU accession to the Geneva Convention" seemingly comes down to push any prospect of engaging discussion within a reasonable time, without it being explained why...

2.2. The feasibility of accession

Regardless of the outcome of the feasibility study for the Commission to come, the questions posed by the possible accession of the Union to the Geneva Convention are not minor. Its issues are in a sensitive legal and political context.

A parallel analysis, one of the arrangements envisaged for the Union's accession to the European Convention of Human Rights, makes us aware of the unique nature and importance of the questions raised. Indeed, the 1951 Convention as the ECHR are not ordinary treaties, because their task is to protect human rights. If in the case of the ECHR the political position of Member States in terms of membership has now been clarified by specific provisions in treaties, this position remains to be clarified in the case of the Geneva Convention.

Previously, it is worth recalling that under Article 11 of the Vienna Convention on the Law of Treaties, accession to international conventions must be distinguished from its signature and ratification as a mean of expression of consent by a subject of international law to be bound by a treaty. Thus, in terms of relations with the ECHR and in accordance with Article 59 §1, members of the Council of Europe become a party to the ECHR by signature, followed by ratification. However, existing treaties of the Council of Europe, when they are open to the participation of the European Community or Union or, generally provide the expression of consent to be bound through the membership formula. This process is envisaged for the ECHR by Article 6 § 2 TEU.

On this basis, two major technical possibilities open primarily on the Union's accession to the Convention of 1951.

The first is to act directly on the text of the Geneva Convention in order to amend provisions that would prevent the accession of the EU, especially due to the non-state situation of the Union, as discussed further. This is to use the revision procedure of Article 45 of the Convention to help remove these barriers either by making changes to a text or by a specific adjunction to the European Union. The heaviness of such a revision procedure as much as the legal and political risks inherent in this type of manoeuvre is not negligible.

942 Such as for example the Benelux
943 COM (2010) 171 p. 57

Initiating a review process always opens the opportunity, for those who want, to go from the procedural ground to substantive ground. There is a real possibility at this time to see review process, more or less underground, of the obligations presently undertaken by States, at the initiative of third countries willing to ask a price for the acceptance of the Union or even of the Member States concerned willing to get rid of certain constraints.

The technique of an additional protocol to the Geneva Convention is probably preferable in this context, both for political and technical reasons. Such a protocol has the advantage of leaving the text of the convention itself intact and therefore to focus the discussion on the admission of the European Union and the details that must accompany it.

2.3. The competence of the EU to accede to the Geneva Convention

The granting of legal personality to the European Union by the Lisbon Treaty removes any obstacle in principle and the main issue is not about its capacity but about its competence. It concerns the legal possibility for the EU to accede to a text on human rights, as is the Geneva Convention.

The issue arose in 1996 about the possible accession of the Community to the European Convention on Human Rights. Sought on the basis of Article 228 §6 TEC, the Court of Justice matched his refusal to important specification at the time. It remains relevant today in relation to joining the Geneva Convention: "In the current community law, the Community has no competence to accede to the European Convention on the Protection of Human Rights and Fundamental Freedoms, because, first, nothing in the Treaty gives the Community institutions, in general, the power to enact rules on human rights or to conclude international agreements in this area and, secondly, such accession cannot occur through the use of Article 235 of the treaty"⁹⁴⁴.

Hence the choice made later by the Treaty of Lisbon to provide the Union with a specific legal basis to enable it to accede to the ECHR. Article 6 §2 TEU now says that "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties". In addition, Protocol n°8 annexed to the Treaty on the conditions of accession marks the limits of the operation, and in particular stressed the need to observe simultaneously the specificities of EU law and the distribution of competences as defined by the founding treaties.

No specific provision of the Treaty of Lisbon concerns the question of possible accession of the European Union to the Geneva Convention. Without a legal basis comparable to that of Article 6 §2 TEU, it is necessary to use the reasoning conducted in 1996 by the ECJ, which provides a reading to assess the feasibility of such an accession.

First, it is easy to validate the following observation: if the constituent treaties of the EU have provided a specific legal basis for managing the Union's accession to the ECHR, this choice does not mean they intended to exclude any possibility of further authorising the Union to accede to other international treaties on human rights, including the Geneva Convention.

944 ECJ, Opinion 2/94 of March 28th 1996, Community accession to the Convention for the Protection of Human Rights and Fundamental Freedoms European, Court Reports 1996 page I-1759 item 6

Therefore, title V of the TFEU in relation to "international agreements" can be applied. Article 216 §1 provides that "The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope".

An examination of the viability of the accession to the Geneva Convention does fit in this frame. This membership can be considered "necessary to achieve an objective set by this Treaty", which is the protection of refugees under Article 18 of the Charter that has the same value as the Treaty. It falls "under the policies of the Union" which we have seen, and will come back to it, encompass the common asylum policy.

The Union has, therefore, a "competence" in the sense of jurisprudence of the Court to intervene in matters of asylum, be it simply to make rules and/or to conclude agreements on the subject. A priori, the reading of the treaty indicates this since, under Article 78 §1 TFEU, it is said that " The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties".

Hence the remarks made hereunder, of which legal impact is not negligible.

The first is the hierarchical relationship of EU law to the Geneva Convention, which exists since the creation of the third pillar of Maastricht with article K.1., reaffirmed in Amsterdam with Article 63 TEC. This statement of compliance of Community law at that time with the Geneva law coexisted in the treaty with the affirmation of one the same subordination to the ECHR. The Court did not find a sufficient reason in 1996 to conclude the existence of a community "competence" on human rights. This compliance report appears therefore not sufficient by itself.

The second remark is aimed at the very nature of the intervention of the European Union when it comes to asylum. As mentioned in the Tampere conclusions and now as stated by Article 78 §2 TFEU, the EU is developing a "common policy" on asylum. Undoubtedly, the positioning of the Union is now much more strongly marked than it once was, even under the Treaty of Amsterdam. The Union is developing a global approach around a "system" for which the components are carefully labelled: status, protection, procedures, common standards and partnership are common elements in accordance with Article 78 §2 sub a) b) c) d) e), f), g) TFEU. The intensity of the EU intervention is even deeper than it was before the entry into force of the Treaty of Lisbon.

It seems difficult in these conditions not to conclude to the existence of a competence expressly attributed to the Union on asylum by the Member States, masters of the treaties. Indeed, and this is the big difference with the problems posed by the accession to the ECHR without the Community having, at the time, a jurisdiction to intervene in the field of human rights. Here the EU has regulatory power exercised through the ordinary legislative procedure in order to establish a "common asylum system."

Therefore, the external extension of the internal competence of the Union in the field of asylum is not debatable and enables it to commit itself internationally on issues relating to

asylum. It justifies the existence of its jurisdiction to accede to the Geneva Convention. It fits with the requirements of Article 4 § 2 d) TFEU which qualifies this competence of "shared" with regard to agreements relating to the area of freedom, security and justice. Therein lie the main concerns.

The European Union shares its competence on asylum with its Member States, which is a fact. It occupies the normative field more or less efficiently, ventures into the operational field and leaves to states only the sovereign power to grant protection in respect of the common rules. The possible accession of the Union to the Geneva Convention should respect this reality, whether to adjust the commitment of the Union in function of its powers, or not to engage the competences that are, and remain, those of Member States, already parties to the Convention.

In terms of competences held by the Union, the hypothesis of "sharing" is not the rule and one must also take into account the competences that Member States have reserved but that are treated in the Geneva Convention. In the current state of the division of powers between the Union and its Member States, a significant number of points remains strictly a matter of domestic law because the states have retained entire control. We think therefore of questions of education and freedom of religion (Article 4), the regime of property or intellectual rights (Articles 13 and 14), freedom of association (Article 15) or housing (Article 21), not to mention taxation (Article 29) or the granting of nationality. Membership of the Union will have to follow strictly this line of sharing, and articulate it clearly in the instrument of accession.

Given this situation, two precautions could then be taken on the occasion of the accession negotiations. On the one hand, respect for commitments undertaken in the framework of their powers by the Member States could be ensured⁹⁴⁵ by excluding that the EU adheres to the entire convention. This accession would be only partial. On the other hand, one should make a systematic examination of reservations by Member States during their accession to the Convention⁹⁴⁶ in order both to ensure complete compatibility of national laws and the commitment of the Union within this shared competence and to check the maintenance of these reservations in case of jurisdiction retained by the Member States.

None of this is insurmountable, but the technical feasibility of the accession of the Union does not empty the subject of debate. It does not prevent questions about the usefulness or even the practical benefits of such an accession to the Geneva Convention, as discussed further in Section 3.

This debate has the merit of highlighting the increasing complexity of issues arising from the existence of shared competence between the EU and Member States on asylum. Caution or precision, the explicit reminder that the obligations of the Member States on asylum will remain unchanged in case of accession of the Union is essential. The nascent ambiguity attached to operational measures of the Union, through Frontex in particular, should not credit back at the occasion of a possible accession of the Union the idea that the Union is substituted in this case to Member States. They remain accountable to their international responsibilities and any procedure for membership must reaffirm this forcefully. In other words, the accession of the European Union to the Convention

945 Articles 4, 8, 9, 21, 22, 23, 29, 34 of the Convention

946 The sensitive issue of reservations by member states at their own membership should be verified at that time as to their compatibility with these reserves the right to the European Union, which occurred later that commitment. Under section 351 TFEU, the obligations of States are clear: they must give precedence to their involvement in the European Union

complements the activity of international protection undertaken by Member States but it does not change anything with their obligations.

2.4. The ability of the Geneva Convention to accept the accession of the European Union

Things are not as simple as one might think, both due to the non-State character of the Union but also because of where it stands on the international stage. One major obstacle arises in the case of eventual membership: it concerns the nature of the parties to the Geneva Convention. Clearly, the Convention is currently open only to parties States as evidenced by its writing and organisation.

The drafting of the 1951 Convention, if it uses the diplomatic term "high contracting parties" in the preamble, is focused exclusively on the use of "contracting States" (articles 1,3,4,7, 8, 9,10 , 11, 12, 13, 15, 16, 17, 18, 19, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39 , 40, 41, 42, 43, 44, 45). Again, the nature of obligations explains this focus: access to the territory and regulating the situation of foreigners are State prerogatives that the Geneva Convention intends to regulate.

The organisation as the content of the convention confirms that the authors have chosen to reserve for States the opportunity to subscribe. Both the engagement mechanisms as well as the specific provisions highlight this option from the text' drafters.

Thus, the final provisions of the Convention highlight, clearly without ambiguity, that it is open only to the commitment of sovereign states, from the settlement of disputes under Article 39 and the territorial application clause of Article 40 to the explicit wording of Article 39 § 2: "This Convention shall be open for signature on behalf of all States Members of the United Nations, and also on behalf of any other State invited to attend the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons or to which an invitation to sign will have been addressed by the General Assembly. It shall be ratified and the instruments of ratification shall be deposited with the Secretary-General of the United Nations." This means that the case of accession of international organisations has not been envisaged by the drafters of the Convention.

More interestingly, a "federal clause" in the agreement allows us to push the analysis further. The authors were indeed meant to regulate the issue of States called "federal" or "non unitary" in Article 41 of the text. Far from assimilating the European Union to a state model, the parallel is instructive, however, to conclude on the idea that the authors of the convention did not intend to open its ratification on non-state actors.

Article 41 of the Convention regulates the scenario posed when a federal state accedes to the Convention and must meet its responsibilities in an internal system where the normative action is decentralised. When the latter falls within the Federal Government, the latter's obligations under the Convention are identical to those of " Parties which are not Federal States" (article 41 a). When the legislative authority stems from the components of the State and when the latter are not required on the basis of their constitutional system to "take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of states, provinces or cantons at the earliest possible moment" (Article 41 b).

Finally, additional indices confirm the feeling of an inability to see an International organisation accede to the Geneva Convention. Thus, models of instruments accession and succession to the Geneva Convention and Protocol of 1967 are listed in Appendix 1 of the

Handbook on international law on refugees of UNHCR in 2002 resulting from a cooperation between UNHCR, the Inter-Parliamentary Union and the World Organisation of Parliaments. They expressly only provide for the hypothesis of state accession.

The outcome is clearly that the Convention expressly provides for membership of sovereign states only. This presents a significant obstacle to the EU. Reading the 1967 Protocol and in particular Article V of Accession abounds in this sense because this provision makes specific mention that the accession of States Parties to the Geneva Convention, Member States of the United Nations or one of its specialized agencies or "any other state which an invitation to sign will have been addressed by the General Assembly".

The obstacle is real but it is not impossible to overcome. For example, we can see that it arose already in exactly the same words about the European Convention on Human Rights which, in its earlier version to Protocol 14, only provided for the assumption of state membership.

A second question raises in a more punctual manner, that of the disputes clause of Article 38 of the Geneva Convention. It provides that "Any dispute between parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute". It implies that the EU accepts the compulsory jurisdiction of the International Court of Justice that, under Article 34 § 1 of its statute, foresees that "only states may appear before the Court".

This blockage from the international organization is coupled with another point of friction linked, itself, to the specific model of the Union. This requires indeed that the Court of Justice of the Union has exclusive jurisdiction for resolving disputes between its member states.

For these two reasons, the issue of Article 38 of Geneva Convention must be addressed specifically during the negotiations, which should not be impossible given the low likelihood of disputes involving the Union.

2.5. The accession process

The previous findings indicate both the possibility for EU accession and in contrast the impossibility of the Geneva Convention to host a non-State party. Two sets of consequences follow.

The first consequence concerns the Geneva Convention. The accession of the European Union to the 1951 Convention and the 1967 protocol requires either a change in these texts or the conclusion of an additional protocol.

Hypothesis of the revision of the Convention, to be brief, is complex. It would entail focussing on the wording of the parties to the Convention, substituting as appropriate the term "High Contracting Parties" to that of state contractor. This simple amendment to the 1951 Convention should be prior to the filing of the instrument of accession of the European Union. We can also design a language specifically authorizing such membership of the Union. For example, Protocol 14 to the ECHR, which recently entered into force, amended it in this direction with the addition of a paragraph 2 to Article 59 stating that "the European Union may accede to the Convention".

The procedure for achieving this result is organised by Article 45 of the Geneva Convention. The latter provides in its paragraph 1 that any Contracting State may, at any time, request revision of the Convention by notifying the Secretary General of the United Nations. One or more Member States of the Union could make such notification. Given the importance of the issues raised by the prospect of accession, we can legitimately think that the UN General Assembly will be seized of the request to advise on measures to be taken under Article 45 § 2. It is also possible that all Contracting States will be asked to give their opinion on the matter. None of this guarantees neither the speed of the process, nor even the likelihood of completion. Some states may be tempted to use this opportunity to raise the stakes.

Hence the preference could be given at the conclusion of a simple additional Protocol to the Geneva Convention, adding a new concentric circle around the core formed by the Convention of 1951: Geneva Convention, Protocol 1967, Protocol on membership of the European Union. This protocol would be brief, stating also the principle of membership of the European Union to the Convention, then defining the respective jurisdictions on the basis indicated above, finally solemnly reaffirming the full responsibilities of the contracting Member States concerning the text.

The second consequence is of interest to the European Union and the procedure to be implemented in order to make accession to the Convention. Without having a specific legal basis in the TEU as is the case with the ECHR, the common rules applicable to international agreements of the European Union have to apply.

Article 218 TFEU provides, in this respect, that the Council authorise the opening of negotiations on the recommendation of the Commission, adopt negotiating directives, authorise the signing and conclude the agreements while the Commission is conducting these negotiations that would be hypothetical regarding the Geneva Convention. Indeed, the hallmark of an accession treaty in this field is to reduce negotiations to a strict minimum.

In this case, it is even possible to see the Council anticipate the entry into force of the legislation under §5 of article 218 and, on a proposal from the Commission, adopt a decision allowing for the provisional application before the entry into force itself. Then, the decision to conclude would be taken by the Council after approval by the European Parliament, the issue being resolved internally by the ordinary legislative procedure⁹⁴⁷.

It is nevertheless difficult to see how the whole procedure of Article 218 could take place without implementing §11 of the same provision that provides a remedy for consultation at the Court of Justice. This precaution ensures the compatibility of a draft international agreement with European Union law. It provides that "A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not be implemented unless it is amended or the Treaties are revised." A major issue is likely to pose an insurmountable obstacle at that moment on the merits of the Union to accede to the Geneva Convention: the compatibility of Protocol n° 24 to the TFEU on asylum for nationals of European Union, called the "Aznar Protocol".

947 Article 218 §6 alinéa a, v

2.6. The consequences of the accession

Assuming that the technical obstacles mentioned above are overcome, which is perfectly possible, the consequences of accession to the Geneva Convention for the European Union can be assessed summarily.

2.6.1. The problem of the Aznar Protocol

The adoption, on the occasion of the Amsterdam Treaty, of Protocol n° 24 said "Aznar Protocol" on the right to asylum for nationals of the EU, poses an obvious problem that could thwart a membership of Union to the Geneva Convention. A majority share of the doctrine⁹⁴⁸, in fact, puts into question its compatibility with the Convention. If supreme courts do not hesitate to use it to deny asylum to nationals of other Member States⁹⁴⁹, the problem is not as settled as it seems.

The content of Protocol n° 24 is simple: on its basis, Member States undertake not to grant asylum to nationals of another Member State. Its single article explains why: "Given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters. Accordingly, 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", excluding specifically enumerated exceptions (notably under Article 15 ECHR or Article 7 TEU). We also know that the point (d) of the protocol opens the possibility for a Member State to derogate from this principle, but on condition that the application "shall be dealt with on the basis of the presumption that it is manifestly unfounded without affecting in any way, whatever the cases may be, the decision making power of the Member State", the ambiguity of the wording being left open to interpretation⁹⁵⁰.

The question of the compatibility of the principle of "safe countries of origin" presented under this angle with the requirements of the Geneva Convention remains open. Certainly, if, under certain conditions such compatibility may be considered because it does not automate the rejection of the application for protection made by a citizen of the Union, the fact remains that presuming this compatibility by assumption or principle as does the Protocol n°24, is difficult. This is true with respect, for example, to the principle of non-discrimination on grounds of nationality in Article 3 of the Geneva Convention⁹⁵¹. Illustrative in this regard the criticism at the time by UNHCR⁹⁵² against the protocol in question, apparently hostile to the idea that membership in the EU would be an objective and legitimate distinction of making the Member States' situation incomparable to those of third States.

The conditions under which the Charter of Fundamental Rights has been developed, emphasize the permanence of the commitment of some Member States to this option. Its

948 See F. Julien-Laferrière, "The compatibility of the asylum policy of the European Union and the Geneva Convention of 28 July 1951 relating to the Status of Refugees" in *The Geneva Convention of 28 July 1951 relating to the Status of Refugees - 50 years after: Achievements and Prospects*, Bruylant 2001, p. 257

949 See CE, 20 December 2009 OFPRA v. Covaciu, Appl. 305 226, note E. Aubin AJDA 2010 p.796

950 This has not prevented the Kingdom of Belgium to make a statement attached to the Treaty of Amsterdam stressing that freedom of appreciation.

951 Not allowing any reservation.

952 UNHCR, « Position on the proposal of the European Council concerning the treatment of asylum applications from citizens of European Union Member States », annexe à la lettre du Directeur de la Division de la protection of internationale à M. Patijn, Ministre des Affaires étrangères des Pays Bas, 3 février 1997 ; voir également UNHCR Press release 20 juin 1997

drafters did not ultimately choose the option to define the personal scope of Article 18 concerning the right to asylum by targeting specifically "third-country nationals" (which allowed to exclude people from the Union) as had been envisaged at one moment. They nevertheless expressly reaffirmed their commitment to the Protocol n°24. The explanations attached to the Charter concerning Article 18 hence points out that this provision does respect the protocol related to asylum annexed to the treaty.

We can consider this position as being an exclusion clause unforeseen by the Geneva Convention as the CEAS would not be open, hypothetically, to the citizens of the European Union. Two types of reaction can result from this.

The first, a priori, might be legal in nature and come from the Court of Justice of the Union. By review of the accession proposal, it could highlight the legal difficulty of accession, due to the contradiction between a provision of primary law, Protocol 24, and the provisions of the Convention. The second reaction could, of course, be made by third countries opposing that the European Union assumes the right to deviate from the universality of international protection by unilaterally granting itself a certificate of compliance with fundamental rights. One avenue to explore might then be the opening of a specific procedure for application of protection open to citizens of the Union on the basis of the four cases laid down by Protocol n°24 which allow consideration of such a request.

2.6.2. The impact on the principle of legality

The compliance report existing today on the basis of Article 78 of the Treaty of Lisbon TFEU between the "common policy for asylum" and the Geneva Convention makes the latter a central element of the principle of legality. The Court does apply in this way. From this point of view, therefore, The Union's adhesion would modify nothing of the current legal rules regarding compliance of the Geneva Convention by the secondary legislation of the Union and the action of its organs. Promoting the Convention by making real membership would increase significantly the place that the text of 1951 holds in the Union.

The primary interest of the membership is the new status that the Convention could acquire at that time. It would become, first, an instrument directly available to the CJEU who would become a direct interpreter in the same way for the international agreements signed by the Union. Certainly, it does not hesitate already to refer to the Convention, for example on issues related to free movement of Turkish nationals, but has not yet had the opportunity to directly support itself on the treaty text, which should be done very soon concerning the cessation clause of directive 2004/83⁹⁵³. A membership of the Union would give it the direct opportunity⁹⁵⁴ to place itself as direct interpreter, an attitude that the European Court of Human Rights does not adopt. In the same spirit and in some states such as the candidates for enlargement, EU legislation on asylum would become in a certain sense and more clearly a "transposition" of the Geneva Convention.

A second interest resulting from this approach would benefit the influence of the UNHCR. Without confusing its mission of monitoring the Geneva Convention with the one incumbent to the EU institutions and in particular the Court, its power of interpretation of the 1951 convention would certainly be more easily taken into account. One can also imagine that the Court of Justice would rely on Article 35 of the Geneva Convention and the obligation of authorities to cooperate with the High Commissioner to relay the action of the latter in its

953 Cases C-175/08, C-176/08, C-179/08

954 For a willingness to independently interpret the Community legislation on subsidiary protection, see ECJ, February 17, 2009, Meki and Noor Elgafaji Elgafaji, C-465/07

jurisprudence. In any case, the Court would find one more legal basis to further verify the implementation of their commitments by Member States.

This inter-action from the CJEU and from an international convention is not unprecedented and that of the Aarhus Convention⁹⁵⁵ demonstrates that the judge may refer directly to international texts in the performance of its mission and see the latter to be influenced by it. The precedent to Aarhus is interesting insofar as we are also in the presence of an international convention that member states are also parties together with the Union⁹⁵⁶, overlapping articles of the Charter of Fundamental Rights⁹⁵⁷ and intervening in an area of shared jurisdiction. Membership of the Union was therefore obliged to modify some of its secondary legislation, but also to set an original contentious action organised by the Article 12 of Regulation 1367/2007⁹⁵⁸ that allows an NGO to access to CJEU.

In total, this strengthening of the role played by the Geneva Convention in the principle of legality that is imposed on the Union and Member States can only be welcomed, especially, as we noted above, it inscribes itself in parallel with the accession of the Union to the ECHR.

2.6.3. The recognition of the international role of the Union

One of the main benefits of accession of the EU lies in the greater involvement of the latter in the cooperation related to a proper application of the Geneva Convention, particularly at the level of the Commission. One must however notice that participation to the Executive Committee of HCR does not derive automatically from an accession to the Geneva Convention, but from a distinct procedure involving the Economic and Social Committee of the United Nations and based on three criteria: a clear interest for solving the problems of refugees; the largest geographical representation; the quality of membership of the United Nations or of its specialised institutions.

The involvement of the Commission in the mechanisms to ensure proper implementation of the Convention is undoubtedly an excellent thing. The European Union is currently an observer member of the Executive Committee in charge of identifying the general principles of action of the High Commissioner and considering the use of funds and conduct of programs. While observers have no right to vote or to oppose the prevailing consensus on the conclusions and decisions adopted by the Executive Committee, the European Union has a right to speak.

For the EU, moving from observer status to that of full member would obviously be desirable and would reflect the importance of asylum issues for the Union from a material point of view as well as a financial one. Clearly, the negotiations of accession of the EU should lift the difficulty linked to the last requirement referring to the quality of member of the United Nations or of its specialised institutions. Assuming that this is the case, the Member States of the Union should find no grounds for competition and potential conflict with their own views on the issue. This desire shows again that better integration of the

955 Council Decision 2005/370/EC of the European Union of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, OJ L 124 of 17 May 2005 p.1.

956 They therefore remain bound by their own obligations

957 Sections 35 and 37

958 Regulation 1367/2006 of the European Parliament and the Council of 6th September 2006 concerning the enforcement agencies and bodies of the European Community to the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, OJ L 264 of 25 September 2006, p. 13

Union in Geneva device can serve the coherence of the common asylum policy and the CEAS.

In total, the prospect of membership of the Union to the Geneva Convention can be considered both from a political and legal perspective. Legally, comparing advantages and disadvantages is not a zero sum, despite the fact that the 1951 convention is already a source of law for the Union. The disadvantages arising from the removal of technical barriers are likely outweighed by the real added value of strengthening the principle of legality and improving its judicial review. Moreover, in this founding period of the CEAS consolidated by the accession to the ECHR and the entry into force of the Charter consolidates, it is not indifferent to conduct a comprehensive upgrading of the sources of international protection via membership. In other words, the Union's accession to the Geneva Convention will have not only have symbolic effects. Politically, it is undeniable that membership will allow more visibility and a stronger voice of the Union at international level, particularly in the eyes of third countries of origin or transit. It is not indifferent either, that it becomes a full partner for these third countries in this way, without passing through its member States also party to the Convention. However, one should probably be careful about the terms following which the international negotiations on the accession can begin and the dynamics that can then thus be revealed. Scaling down dynamic of commitments made in 1951, denigration of asylum policy in the event of failure or blockage of the negotiations are risks that must be weighed before proceeding further.

3. THE PASSAGE FROM HARMONISATION TO REGULATION IN VIEW OF A EUROPEAN CODE OF ASYLUM

The search for greater coherence in moving towards a genuine common European asylum system often overlooks a simple way of progress towards this goal: the adoption of regulations instead of directives.

The "acquis" on asylum is composed, if we stick to the basics, from three directives (reception conditions, qualification, procedures for asylum) and a regulation on the "Dublin" system for determining the State responsible for examining applications for asylum, excluding the new regulation on the European Asylum Support Office that will be discussed in the next section. Using directives was consistent with the spirit of the Treaty of Amsterdam where Article 63, §1 TEC limited the jurisdiction of the European Community to, unless exceptions, the adoption of "minimum standards" excluding obviously the adoption of regulations. This limitation has disappeared with the Lisbon Treaty, which now permits the adoption of any standard considered adequate in accordance with the principles of subsidiarity and proportionality. The advantage of regulations compared to guidelines deserves attention.

While the directive is an instrument of indirect legislation suitable for harmonisation of legislation of Member States which maintain a certain diversity, regulation is an instrument that has a direct effect resulting in unification of national standards which completely disappears and give way to a single rule on the entire territory of the EU (subject only to the three Member States benefiting from opting outs). The advantages of flexible directives can become disadvantages. A simple example is the Qualification Directive 2004/38 defining the persons eligible for international protection in the European Union and whose Article 15 c) concerns subsidiary protection. This standard that contains an internal contradiction in requiring the proof of an individual threat in case of indiscriminate violence, has been transposed in the opposite way by the Member States. Some, like Belgium have

removed the requirement of individualisation, while others like France have insisted on it, by requiring the applicant to demonstrate that one is directly concerned. We observe that the transposition by Member States extends rather than approximates differences in domestic law of Member States in relation to the text of the Directive.

The adoption of regulations instead of directives would be more appropriate for part of the "acquis" on asylum. Besides the delineation of protected persons and the definition of their rights, we think with regard to asylum procedures of procedural guarantees for asylum seekers. Since they largely correspond to legal obligations for Member States deriving from human rights or general principles of law and they obviously concern essential elements for the rights of asylum seekers, we do not see why they would not be the object of a regulation that would give greater clarity and legal certainty to those concerned. The question of types of asylum procedure seems more appropriate for directives with Member States retaining some flexibility. Asylum procedures are still extremely diverse due to the extremely low harmonising effect of the "asylum procedures" directive of 1st December 2005. Since exactly the same procedural guarantees would be offered to asylum seekers, some diversity of procedures according to the wishes of Member States would not pose problems. In other words, the common asylum procedures would stem from the fact that they rely on identical procedural guarantees whilst remaining diverse in terms of their type within the member states.

It appears, however, that the area of reception conditions continue to lend itself to a directive rather than a regulation since it is difficult to align the level of the rights of asylum seekers on a single standard because of the diversity of the situations encountered in Member States that host highly variable numbers of asylum seekers in very different contexts relating to their living standards and to their degree of experience in this field.

The Commission has opted, for political reasons relating to the political calendar, to submit its proposals on the basis of the Amsterdam Treaty that prevented, as was already mentioned, the use of regulation except where the Dublin system is concerned. Since this decision cannot be questioned because of the monopoly of the initiative that the Commission disposes of, the question of adopting regulations arises only for the future.

It seems reasonable to settle it when the second phase of the common European asylum system will be in place. It is likely that the second generation of standards will still be marked by a number of technical or political inconsistencies more or less important due to the fact they have been adopted separately, even despite the efforts of coordination we can expect from the European institutions to draw parallels between the various texts adopted simultaneously in the same area. The idea of a codification of texts that was addressed by the Commission in its contribution to the preparation of the Stockholm programme regarding immigration should logically be imposed regarding asylum. This could provide the opportunity to adopt for the aspects of the common asylum mentioned above regulations rather than guidelines for the benefit of asylum seekers as well as Member States.

SECTION 2: THE INSTITUTIONAL PERSPECTIVE

1. THE GRADUAL ACCEPTANCE OF THE NEED FOR CO-OPERATION BETWEEN MEMBER STATES

The common asylum policy started to develop with the adoption from 2003 of the legislative instruments analysed in this study. The Commission, however, from the outset stressed the need to accompany the legal harmonisation process through coordination of national asylum policies of Member States to ensure a coherent implementation of the European instruments. It even proposed in 2001 to apply to the model of the European employment policy the open method of coordination to the common asylum policy⁹⁵⁹ by considering the adoption by the Council of Ministers of multiannual guidelines. These guidelines would have been implemented through annual action plans of Member States that the Commission itself would have been responsible for evaluating the results through summary reports.

This proposal having received no response from the Member States whom implicitly but certainly opposed themselves to it concerning asylum as well as immigration, the issue has been left aside until the European Council invited into The Hague programme setting out the priorities in Justice and Home Affairs for the period 2005-2009, "the Council and Commission to establish in 2005 appropriate structures involving the national asylum services to promote a fruitful practical cooperation⁹⁶⁰". If the vocabulary has changed from coordinating to cooperation, the problem remains the same even if it is considered in a less formal setting than the one imagined in 2001. The Commission proposed, on this basis, to reinforce – the term is curious in view of the lack of any earlier progress – the practical cooperation in a communication dated 17 February 2006 entitled "New structures, new approaches: improving the quality of decision making in the Common European Asylum System"⁹⁶¹.

Underlining the need to harmonise the practices of Member States beyond the legislation and to promote greater convergence for the future European common asylum system to be based on mutual trust between Member States, the Commission then proposed the creation of networks with a clear mandate for cooperation in each of the three priority areas identified in the Hague Programme:

- Single procedure for applications for recognition of refugee status and subsidiary protection;
- Information on countries of origin;
- Specific pressures weighing on the reception capacities of certain Member States due to their geographical location.

It added, fourthly in this list, the training of personnel of the asylum offices of the Member States.

959 Communication from the Commission on November 28th, 2001, COM (2001) 710
960 OJEU C 53 of March 3rd, 2005, p.53
961 COM(2006)67

2. THE DELAY IN THE DEVELOPMENT OF PRACTICAL COOPERATION AT INSTITUTIONAL LEVEL

Member states are, up to present, almost the only bodies involved in implementing the European asylum policy at the national level. It is not only about the transposition of EU directives into national law which is naturally a competence of the Member States under the supervision of the Commission, but in particular about the implementation of European and national standards to individual cases, especially by refusing or granting asylum to applicants.

The practical cooperation envisaged by the Commission in its Communication of 2006 did not result in the establishment of the envisaged networks, even if projects developed on an ad hoc basis with the financial support of European Community Refugees Fund in the fields of action envisaged by the Hague Programme (one thinks particularly of the European Asylum Curriculum (EAC) that trained staff of Member States employed in the field of asylum).

Institutionally, the only development has involved the replacement in 2002 of the Cirea (Centre for Information, Reflection and Exchange on Asylum) by Eurasil. While the succession of Eurasil chaired by the Commission to Cirea who was a working group of the Council, logically marks the passage of the EU asylum policy of the intergovernmental era to community era, the new structure bringing together Member States practitioners did not become a structured network and did not provide for the practical cooperation between Member States the institutional framework it needs to get out of the embryonic stage at which it is still limited today.

3. THE PROSPECTS RELATED TO THE CREATION OF THE EUROPEAN ASYLUM SUPPORT OFFICE (EASO)

Noting that "there are still considerable differences between the decisions made in the matter (even in similar cases) due, firstly, to the timidity of harmonising rules laid down by legislation and secondly to the divergent practices of national authorities", the Commission again emphasized in its action plan on asylum of 17 June 2008 the need to accompany the legal harmonisation of effective practical cooperation.

A step was taken by the European Council when it agreed, in line with the Hague Programme, to set up a European Asylum Support Office in the European Pact on Immigration and Asylum concluded in 2008. This office just recently became the object of regulation 439/2010 of 19th May 2010 and is expected to begin effectively functioning in late 2010.

Under this regulation, the duties of this office will be very diverse. They cover support for practical cooperation between Member States, support of Member States under particular pressure and the implementation of the Common European Asylum System. Concerning the office tasks directly related to the issues addressed in this report, it is worth noting:

- the gathering of relevant, reliable, accurate and up-to date information on countries of origin of persons applying for international protection (Article 4);
- the exchange of information between the Member States' asylum authorities and between the Commission and the Member States' asylum authorities concerning the implementation of all relevant instruments of the asylum acquis of the Union. The

Office may create factual, legal and case-law databases on national, Union and international asylum instruments. (Article 11);

- Support the relocation within the Union of beneficiaries of international protection (Article 5);
- Support for external dimensions of the Common European Asylum System (Article 7).

The possibility for the European Asylum Support Office to adopt under Article 12 § 2 "technical documents related to the implementation of asylum instruments of the Union" like "guidelines" or "operating manuals" is particularly interesting. This refers particularly to the guidelines that the Board might adopt on the basis of Article 29, §1, e), to assist Member States in assessing the situation in countries of origin of asylum seekers on the basis of reports prepared by the Director under Article 31, §6, d). Such instruments, if properly used under the supervision of the Court of Justice as we propose (see below), could help the practical cooperation in the field of asylum to increase convergence and ensure continuous quality decision-making by Member States in the field within a framework of European law in accordance with the aspirations expressed in paragraph 5 of the preamble of the organic regulation of the EASO. The political will to act in this direction has already been expressed in the Stockholm program by the European Council that "whichever the Member State where people submit their applications for asylum, it's important that they benefit from an equivalent level of treatment for the conditions of reception, and the same level as to the procedural rules and the determination of their status. The aim should be that similar cases are treated equally and that this process will produce the same result."

The creation of the European Asylum Support Office will enable the practical cooperation to solve the issue of the backlog that has accumulated and becomes clear if one recalls that its equivalent in the field of external borders (Frontex) has been created already nearly six years ago by a regulation of 26th October 2004. Regrettably, however, as we insist in the next section on the legal perspective (see below), the European legislator has decided to curb immediately the Action Office, alleging that it « should have no direct or indirect powers in relation to the taking of decisions by Member States' asylum authorities on individual applications for international protection » (paragraph 14 of the preamble of the Regulation). Besides being unnecessary, such details do not fit into a vision for the future of the European Support Office designed like a minimum instrument of first generation as if it had been adopted on the basis of the Treaty of Amsterdam. While it will have to prepare and accompany the implementation of the second generation of instruments, the adoption of which is scheduled for 2012. The fact that the European Parliament itself has sustained such a restrictive view of the mission of the European Asylum Support Office in its legislative resolution of 7 May 2009 shows that the spirits have not yet realised the changes that are needed in the coming years in order to implement the very ambitious project of setting up a common European asylum among the objectives of the Treaty of Lisbon. Let us hope that the discussion on the revision of the mandate of the Office, which should happen on the basis of the external assessment that it will order no later than 19 June 2014 under article 46 of the Regulation, will provide the opportunity to better align its work with the particularly high claims that the EU feeds with regard to asylum.

SECTION 3: THE JURISDICTIONAL PERSPECTIVE

The culmination of the setting up of CEAS requires a full recognition of the judge at the heart of this system. Developing the role of a "European judge of asylum" would have the

merit to place the issue in terms of protection of a fundamental right and not only of the simple management of a common policy of the Union. The presence of the judge seems natural to organise within the framework of the EU, irrespectively of the powers that must remain those of national judges.

Referring the task of issuing a harmonised reading on asylum in the EU to the European judge, facilitating the exercise of this right must therefore be a reasonable goal to attain. This ambition should be put in its political and legal context and it should be framed in terms of the existing treaties.

The obstacles to overcome in order to achieve this are considerable. The reluctance of Member States to see their prerogatives framed regarding asylum is obviously even stronger with the idea to submit to a European court in this area. Furthermore, recognising the presence of a European judge of asylum, whatever the form and scope, cannot ignore the existence of an already complete contentious system in the Union as well as the presence of mechanisms of legal protection in domestic law. If a jurisdictional response must be given to the current shortcomings of the protection of asylum, this response must, first, fit into the existing architecture and, secondly, be adapted for this area by meeting the special challenges that now need to be resolved.

This means how much, at this stage, the reflection can be seen as premature. It must be here merely to clarify issues and identify key goals. Giving a jurisdictional dimension to the asylum policy at the level of the Union covers a wide range of varied assumptions. It may simply require adjustments of what exist as well as going as far as the creation of a specific court susceptible to guarantee compliance with the rules of the European asylum system.

The reflection is therefore a broad perspective. It can only be conceived from the CEAS' dysfunctions and in light of the contentious system of the European Union that has been radically altered by the Treaty of Lisbon and the prospects of accession to the European Convention on Human Rights (ECHR). In any event, the accession of the Union will allow a judge, the European Court of Human Rights, to ensure in a more direct manner, the compliance with Article 3 of the ECHR, source of the subsidiary protection. This new order underlines, in a caricature fashion, the paradox it would be to reject in principle any intervention by the EU judge in ordinary asylum, where the rise in power of the judge of subsidiary protection is set.

1. RECENT SUGGESTIONS

The prospect of a judicial character of the common asylum policy has been raised twice in recent months. It was done first by the Commission itself in its evaluation of an "integrated approach to protection" at the level of the Union⁹⁶². It was then raised by a Member State, Sweden, just before taking up chairmanship of the European Union.

The point of view of the Commission is expressed with caution in paragraph 4.5 of the above assessment. This refers to the "creation of a European Authority on asylum", which would be responsible for managing and coordinating the common European asylum policy. Probably taking the form of an agency, its mission could be, according to the Commission, to replace "the national judicial and administrative bodies that make decisions on applications for asylum". Centralising all decisions on asylum, it would thus constitute the comm.

962 Action Plan on Asylum: An integrated approach to protection across the EU, SEC (200*) 2030 of June 17th 2008

European instance for asylum and, of course, would likely include a Board of Appeal inserted into the general contentious device of the Union. The aim of this long-term vision clashes with reality, but obviously it has the essential merit of opening a debate provoked by the inadequacies of the current arrangements.

In somewhat different terms, the Swedish Minister for Immigration has raised a similar idea at the JHA Council in February 2009, although this suggestion has neither been a proposal in good and due form, nor even been integrated in the development of the Programme of Stockholm which says nothing about it. It can be summarized in the words of the minister to journalists: "if you get an asylum application, you need a body that says that this decision should apply to all similar applications. Hence the Ministerial conclusion that the Court of Justice should play this determining role.

To all this, it is possible to add the tempered reaction from NGOs and the UNHCR regarding a rise in institutional power, the latter, it seems, particularly preferring the enhancement of the action of national authorities⁹⁶³.

In perspective

Considering the possibility of a full jurisdictional dimension for the European asylum system is part of a scenario now largely theoretical, if not completely illusory. This forward thinking has however several merits.

2. THE ELEMENTS OF THE PROBLEM

The primary interest of the approach is to ask the question in the only legal perspective that it's worth: it is to guarantee the exercise of an individual right of the person by the judge before any other consideration, notably of an administrative or policy type. The second merit is likely to force to rethink the relationship between national and European level regarding the scope of judicial protection provided to asylum seekers. It is now necessary to respond to the too many different solutions that persist in the legal framework, even though the latter is harmonised. Finally, on the eve of the accession of the Union to the ECHR, seeking to streamline and systematise the legal protection of people is simply an objective of common sense.

This approach highlights the benefits of greater involvement of the European judge in asylum: it is both to address current problems and to ensure a common understanding of the legal standards applicable to asylum. But it is probably insufficient to remain at that point.

Any progress of the CEAS on the path of mutual recognition of national asylum decisions depends today, in fact, on further harmonisation of protection. If this approximation is well advanced in terms of legislation, it remains very insufficient in terms of national decisions, each State continuing to retain its discretionary ability to assess situations without the normal mechanisms that ensure the uniform application of law in the European Union be sufficient to remedy the problem. This results in unequal treatment of applicants for protection that is not permissible.

The recent intervention of the Court of Justice in the Elgafaji⁹⁶⁴ Case on the situation in Iraq illustrates the limits on what the CJEU can presently bring. If the Court has certainly

963 SEC (2009) 1376 part. II, annex 2 p. 8
964 CJEU, C-465/07 of 17th February 2009

clarified the concept of subsidiary protection under Article 15, c) of Directive 2004/83, and solved the internal contradiction that this provision involves by stating that should prevail, in exceptional cases, the collective inherent nature of the situation of indiscriminate violence to the detriment of the requirement for individualisation of serious threats, this legal interpretation of the CJEU is not sufficient. As useful and even fundamental as it is, it still leaves to the national authorities the discretion of deciding the level of "blind violence" required to consider whether a civilian being sent back to the country concerned may face, merely due to his presence on the territory, a real risk of serious threat. The Court has certainly reduced the power of interpretation in law of the Member States, but the risk of diverging interpretations of the competent national authorities in fact still exists. The Dutch Council of State has considered the Elgafaji case on the basis of the foregoing interpretation of the Court of Justice that there is not an exceptional situation in Iraq posing serious threats to any civil due to a situation of indiscriminate violence...

2.1. The difficulty of the approach

It is therefore necessary for the Union to reinforce the building of another notch. It could be a further judicial intervention for control of national conducts. This intervention would thus allow the emergence of new European standards to arise in a concrete and operational manner. Referring the task of validating and enforcing them to a court is an interesting line of work, excluding political treatment. The issue is both complex and sensitive.

The problem is complex in that it is not feasible or likely that an entirely new contentious device can be built specifically for asylum, at the precise moment that the Lisbon Treaty has come to reunite the treatment of European jurisdictional issues, turning their backs on the multiple derogatory solutions from Amsterdam. Any creation of a judicial body as with any procedural innovation must be thought out without excessive individualisation outside of the traditional patterns of control of the European public policy, in order to be credible. This reduces the range of possibilities.

The issue is particularly sensitive because it must also respect the traditional dividing lines between the powers of national judges and the justice of the Union. Nothing, in the present state of law, allows in general or specifically for the jurisdiction of the Union to deal with administrative decisions taken at national level to nullify them and, a fortiori, of national judicial decisions. The preliminary ruling of article 267 TFEU as well as the infringement procedure of article 260, simply remain in the framework of a declaratory contentious and not in a contentious of cancellation. The judge of the European Union can therefore neither reform, nor destroy national norms. Again, the reasoning must be brought to completion, at least, without changing the treaties and any solution undermining this division of responsibilities is not possible in the state of the Union's integration.

To this we must add one final element. The planned accession of the Union to the European Convention on Human Rights will probably have little effect to resolve dysfunctions. The judge of the ECHR has only in its power subsidiary protection provided by Article 3 ECHR, it is not the judge of the Geneva Convention. Also, despite the progress to come that we can expect from its presence, there is every reason to believe that the essence of the problem remains unchanged.

3. THE CENTRAL PLACE OF THE COURT OF JUSTICE

Any analysis of the role of the judge in the CEAS must take into consideration the existing contentious modalities, both technically and functionally.

The role of the Court of Justice in control of asylum policy of the European Union has fuelled an old debate. It justified in the eyes of the Member States the restrictions established by the Treaty of Amsterdam in the area of preliminary ruling, at the time of its negotiations. The reasons advanced at the time were essentially the risk of clogging of the Court because of the number of potential applications, which had deterred from going further and founded the organisation of a derogatory preliminary procedure in Title IV TEC.

These restrictions have now disappeared since the Treaty of Lisbon restores full competence to the Court of Justice. In this context, already, the Court shall conduct preliminary rulings to exercise its jurisdiction for interpretation as well as for appreciation of the validity of the legislation of the Union, which it has done, again, very recently⁹⁶⁵. Moreover, the recent introduction of an urgent preliminary question⁹⁶⁶ and obligation to respond "as soon as possible" when a person is detained under Article 267 §4 TFEU, assigns an important role to the Court concerning asylum.

This role is mechanically intended to fully function since the directives establishing the European asylum system have been implemented in Member States and raise questions of the national courts regarding their interpretation and compatibility of national law. It follows that the Court of Justice now plays a central role, almost impossible to circumvent, concerning asylum in the European Union, a role that the justiciability of Article 18 of the Charter will strengthen. Any proposal to increase the place of the judge in the European asylum system must consider this reality.

4. THE WORK HYPOTHESES: REFORM OR ADAPTATION?

From the judge's viewpoint, the rise of the common asylum policy has predictable consequences: the need for judicial intervention to reduce areas of misunderstanding or of conflict with secondary legislation will naturally grow while the risk of a glut of requests related to the number of contentions is real⁹⁶⁷, even if it deserves to be specifically checked.

If one logically concludes that the contentious system of the Union must be adapted to deal with the latter, two options are plausible: breaking away with the establishment of a specific court or that of evolution with expansion of functions of the Court of Justice or of the Tribunal.

965 See for example ECJ, Case Joined Salahadin Abdulla of 2 March 2010, C-175/08, C-176/08, C-178/08 and C-179/08

966 This procedure is governed by articles 23 bis of the Protocol (No 3) on the Statute of the Court of Justice of the European Union (OJEU 2008, C 115, p. 210) and 104b of the Rules of Procedure of the Court

967 See Ex. ECRA, Submission from the European Council on Refugees and Exiles in response to the Commission's Green Paper on the Future Common European Asylum System in COM (2007) 301, p AD5/9/2007/Ext/RW 6

4.1. The reform: a specialised court

The problem of the increasing power of the judge in the Union, and therefore the jurisdictional control of it, is present and these questions are not new. They have mobilised the attention of observers for several decades⁹⁶⁸, both in response to a "crisis" of the jurisdiction of the Union but also in response to a growing social demand. It is clear that despite the proven public needs and solutions outlined by the Treaty of Nice, little has changed, notably with regards to the level of "speciality" of the Union's judicial architecture...

4.1.1. The tracks of specialisation

The attractiveness of a specialised judge has not just arisen only regarding asylum in the EU. Thus, in the related area of data protection, the European Parliament has expressed a similar concern and specifically contemplates a similar process⁹⁶⁹. In its resolution of 25 November 2009 on the Stockholm Programme, the Parliament evoked all at once the need to consolidate into one agency the various actors responsible for the management of large information systems that exist in this area,⁹⁷⁰ but also the urgency of creating a "European Tribunal for Cyber-crime affairs"⁹⁷¹, for reasons that could easily translate to the issue of asylum. The Parliament justified this particular position because of the "significant increase in recent years" of cyber crime cases and "the testing of capacity of national courts".

These two factors, volume of cases involved and the failure of national courts to deal effectively with the problem,⁹⁷² are also at the heart of questions relating to European judicial control concerning asylum. They also justify a specific judicial intervention of the Union, on behalf of a reasonable application of the principle of subsidiarity. Two routes can then unfold.

The first goes to the end of the process undertaken and leads to the creation of a European Court of asylum, concentrating in its hands the final decision to grant protection. This Court can either intervene in appeal of national decisions of refusal, or in the case of the creation of a single Authority, be judge of that authority's decisions. Objectively and for the reasons explained further, this option is not feasible in the medium term.

The second line of work is to try to exploit the technical possibilities made available to the Union by the Treaty of Lisbon. If we want to move towards the specialisation of the European court, the "Copernican"⁹⁷³ revolution started in Nice, has not been interrupted by the Treaty of Lisbon, and one can think in this context towards the creation of a new authority.

Under article 257 TFEU, the European Parliament and the Council may establish "special tribunals" by regulation in accordance with the ordinary legislative procedure. This process is initiated either on a proposal from the Commission and after consulting the Court of Justice or, more originally, by proposal from the Court of Justice itself, and after consulting the Commission. These specialised courts are added to the Tribunal and they can be responsible for dealing at first instance with certain categories of appeals in specific areas.

968 See *The Future of the Union court*, Editions de l'ULB, Brussels, 2002

969 This could allow a hint of regret for the fact that the same type has not been made about the security of asylum

970 Item 147 Resolution

971 A Point of Resolution

972 Failure to have all the elements to decide

973 K. Lenaerts, "The reorganization of the judicial structure of the Union: what angle of approach to take?" in *The Future of the Court ... op. cit.* P. 49

The rules governing the composition and powers of such courts are established by the regulation that establishes them. Their decisions may be appealed on points of law or, when the regulation establishing a specialised court provides it, a right of appeal also on matters of fact, before the Tribunal.

The idea of establishing a "specialised court for asylum" can be seen within this legal and contentious context, the feasibility of the operation not posing any insurmountable technical issues. To consider that asylum constitutes a "specific matter" would allow exploring of this avenue but that is where difficulties arise.

4.1.2. The obstacles to a specialised court

Technically, things are complicated, to the likely point of driving to a cul de sac. The duties that may be assigned to a specialised court constitute indeed the main obstacle. If the primary interest of specialisation lies in the unification within a single jurisdiction for responses to the contentious of asylum, important barriers immediately arise in the current state of law given the prerogatives of the Court of Justice itself.

It is difficult to unify the treatment of all matters relating to asylum within the same judicial body other than the Court of Justice, namely both a judge responsible for authentic interpretation of EU law relating to asylum and a judge in charge of its conform application. Indeed, if one opts for the creation of a specialised court, it cannot interfere with the rules governing the powers that the treaty reserves to the Court of itself, namely for annulment and especially that of preliminary collaboration with national court's. The Court, moreover, has always been very careful in keeping its essential contact with the national courts and has consistently opposed any reform to decentralise this function.

While the treaty, from the Treaty of Nice, opened the possibility included in Article 256, §3 TFEU to entrust the Tribunal to hear and determine questions referred for a preliminary ruling under Article 267, in specific areas laid down by the Statute. In this case, the Tribunal solves the case unless it considers that it requires a decision of principle likely to affect the unity or consistency of Union law and decided to refer the matter to the Court of Justice for a ruling. Moreover, decisions made by the Tribunal on prejudicial questions may exceptionally be subject to review by the Court of Justice, under the conditions and limits set by statute, in case of serious risk to the unity or consistency of Union law. That said, the lack of enthusiasm for the EU to engage in this way should be noticed, since, to date, things have not changed one step in that direction.

Major difficulty, the Lisbon Treaty does not provide the opportunity to share this with the specialised courts that it allows creating. It is doubtful that the Court of Justice will also be supportive in an area as sensitive and specific in terms of fundamental rights that may be the one of asylum.

Assuming that we consider establishing a specialised court for asylum matters, it is hard to see within the current state of the Union's contentious organisation, how it might break the two lines on which it rests: on the one hand, the EU judge cannot determine the internal law to invalidate it and, secondly, the Court intends to retain the monopoly of the preliminary collaboration.

Therefore, the road of a court specialised in the field seems difficult to follow. To increase the judicial character of the European asylum system is then assumed to eventually take the path of adaptation. The device must be structured around the Court of Justice, the

hypothesis of the judicial character of the future European asylum office seeming remote from reality like the one of specialising a judge encounters obstacles.

4.2. Adaptation: expanding the role of CJEU

The Court of Justice⁹⁷⁴ is already competent in asylum both in preliminary ruling and in the infringement procedure against Member States that don't fulfil their obligations, in addition to the contentious of annulment of secondary legislation exclusively reserved to this Court. This raises the question of the possible complementary role that could be given to it. To evaluate this possibility, the issues should be clarified before exploring the possible answers.

4.2.1. The purpose of the intervention of the judge: to regulate the CEAS

The current mismatch between the legal parameters set by EU law and the facts which Member States apply, explains many of the current difficulties with the European asylum system. Wide disparities persist in the assessment of facts by the Member States that no one denies. These differences lead to serious distortions in the granting of protection to asylum seekers, without being remedied and in violation of the principle of equal treatment. Reading in the same way, the commitments made in secondary legislation and making sure to apply them to the different international situations in a converging manner, must therefore be a central objective for the Union. The creation of the European asylum office is a first response, of an administrative type, but still remains insufficient.

The functions entrusted to this office and especially the Member States' insistence in retaining their full discretion⁹⁷⁵, allow believing that this step is not sufficient to fulfil the assigned objective. In other words, the primacy of political reading on law enforcement has every chance to continue. For this reason, support from the judge must be considered in order to facilitate the administrative control of the device. It clearly implies that states are willing to give the judge a place as an expert both within the European Asylum Support Office, as well as in considering the organisation of a genuine collaboration in its business by taking fully into account its judicial dimension. This means that the judge's influence may be exercised in different ways.

A first indicator of the judicial character of the European asylum policy, as a minimum, will be provided by the composition of the European Asylum Support Office. This will set the tone posed by the Union on issues of asylum and its political, administrative or legal priorities. From this point of view, even if the focus is clearly in the regulation on the operational approach and on the role of national administrations of Member States competent in asylum, there is a possibility to develop room for specialised national judges in asylum. The regulation does not exclude it, far from it, since the "working groups" referred to in Article 32 can be constituted of national judges, as experts delegated by Member States authorities. This possibility is interesting because it is very likely that the analysis of the factual situation by a judge or a representative of the Ministry of Interior will not lead to exactly the same conclusion as the angle of view may differ. It would necessarily result in a more balanced reading of situations, assuming that states follow through with it.

974 In the strict sense and not according to Article 19 § 1 TEU hence the name Court of Justice of the European Union covers both the Court of Justice, Tribunal and specialised tribunals.

975 See recital 14: The Office should have no direct or indirect powers in relation to the taking of decisions by Member States' asylum authorities on individual applications for international protection.

A second important indicator of the evolution of the CEAS will reside in the modes of regulation of the European asylum policy. One of the priorities of the future European Asylum Office is that of increasing convergence and ensure ongoing quality of Member States decision-making procedures and this convergence need explains the regulatory function that is given to the office. This feature is exclusively administrative in the current state of the law but there is no reason to imagine that the Judge of the Union provides assistance, if only to ensure the factual of the conditions of factual application of a fundamental right guaranteed by the Treaty.

The success of the European Office will reside in its ability to lead the Member States to subscribe the exercise of their right to grant asylum in a common framework in which legal considerations outweigh political assessments. The contribution of the Support Office is therefore to organise, coordinate and promote exchange of information on asylum, including, and in particular, regarding the processing of applications for protection by national authorities and the responses of national law. On this basis, the Board may adopt "technical documents related to the implementation of EU instruments on asylum"⁹⁷⁶ as "guidelines and operational manuals".

The function of such instruments is essential for the development and improvement of the European asylum system. We can estimate that the Office's task here is to gradually establish a true "administrative doctrine" whose effect will guarantee individuals the unity of application of the European asylum system. Their compatibility with the right of asylum is crucial and it cannot be satisfactory that they do not oblige the member states.

Such an "administrative doctrine" on asylum raises the question of authority regarding the States, especially as this is the only legislative power entrusted to the Office. In the current state of the law in the EU, the legal acts of composing such a doctrine is clear: they are not binding because of lack of a decisive character. They are therefore likely to remain a dead letter and take on no other effect than incentive for the Member States, thereby depriving individuals of relying on the benefit of their interpretation. Either it is simple indications, in no way altering the discretionary power of states to decide, or it's a genuine guidance in the sense that Union law already recognises from other areas, such as the competition law for example. In the first case, the assumption of access to court must be rejected while in the second, things can change and their contentious status is a crucial issue.

The precedent of "guidelines" adopted by the Commission which have nourished a rich contention before the courts of the EU competition law⁹⁷⁷, provides useful guidance. It allows instructive parallels.

It is accepted that these "atypical" actions do not constitute legal acts in the full sense of the term but they are nevertheless likely to involve the institutions in a particular constraint. The Court summarised its case against them in a leading case: "the Court has held, acting on internal measures adopted by the administration, that, if they cannot be regarded as rules of right on observation for which the administration, in any case, will be bound, they dictate nevertheless a rule of conduct indicative of the practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment"⁹⁷⁸ The Court explains the reasons very

976 Article 12 §1

977 C. Vincent, "The normative force of communications and guidelines in European Competition Law, in: C. Thibierge et al. The normative force - Birth of a concept, LGDJ, Bruylant, 2009, pp. 691-703.

978 ECJ, June 28, 2005, Dansk Rørindustri Others v Commission, Case. C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P and C-213/02 P, ECR. P. I-5425, paragraph 209

clearly: "In adopting such rules of conduct and announcing their release they will henceforth apply to cases covered by them, the institution in question limits itself in its power of discretion and cannot depart from those rules under penalty of being found, if any, in respect of a breach of general principles of law such as equal treatment or the protection of legitimate confidence . It cannot therefore be excluded that under certain conditions and according to their content, such rules of conduct having a general application may produce legal effect"⁹⁷⁹".

This reasoning must be transposed to the acts of the European Office, which would establish a link between the action of the European Office and the court of the Union and contribute to a better regulation. In their current design guidelines are nothing more than the expression of how the administration of the Union exercises its discretionary power. Here, in asylum, they are destined to play the same role, except that it is Member States who exercise their own power, and not the Union, but within the application of Union law which is imposed upon them.

It would be logical to require Member States to justify their decisions with regard to the national Office documents, particularly when national decisions diverge, which is a minimum. These documents are, remember, "related to the implementation of EU instruments on asylum" which are binding on States. Such a procedural requirement is nothing but the expression of the obligation of loyal cooperation that weighs on those States under Article 4 §3 TEU. This obligation complies with the textual prohibition that is done in the Office "to give instructions to member states for granting or rejecting applications for international protection"⁹⁸⁰. It merely asks them to explain the reasons leading them to singularise themselves in their application of the common asylum policy, possibly in violation of a fundamental right guaranteed by the Charter and treaties. Thus, the obligation of states to explicitly position themselves in relation to acts of the Office shows the interest in allowing access to the judge.

4.2.2. Pathways to judicial regulation

The Lisbon Treaty opens a new and important trail in contentiousness. Article 263 § 5 TFEU provides that " Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.". There is an opportunity here to explore in order to submit to the Court of Justice acts by which the European Office specifically contributes to the implementation of the CEAS.

Negatively, first of all, it should indeed be able to check the consistency of such an "administrative doctrine" to the principle of legality and especially of course the respect of EU rules governing the right to asylum. The hypothesis that the Office would, under pressure from a majority of Member States, adopt a position contrary to the requirements of European law on asylum should not be dismissed by principle. It would thus be remedied and that judicial review could also contribute largely to legitimising the actions of officers both in terms of certain Member States and public opinion, NGOs and third States. With regard to verification of the legality of the Office, the precedent of "atypical acts" shows precisely the limits of the exercise. Its main merit of enabling individuals concerned to partially open, even in exceptional cases, the judge's door by means of an action for annulment.

979 id. paragraph 211
980 Article 12 paragraph 2

In positive terms, then the conditions under which member states comply with the guidelines of such a doctrine⁹⁸¹ should also be checked, lest persist in the Union divergent behaviour in the application of European law on asylum. The Stockholm Programme refers to this need when it says that " regardless of the Member State in which their application for asylum is lodged, are offered an equivalent level of treatment as regards reception conditions, and the same level as regards procedural arrangements and status determination. The objective should be that similar cases should be treated alike and result in the same outcome"⁹⁸². In terms of control imposed on states, the motivation for their decision to depart from the guidelines should clearly justify a review by the judge, not to mention the interest that the national court of asylum will find in its motivation for control over national decisions.

All this is then assumed to have a particular path of law. We can estimate it to be open in a systematic manner, i.e. for individuals, or choose to reserve it for privileged operators or national judges, in function of the role intended for this contentious path.

The precedent of the Treaty of Amsterdam provides evidence that the construction of a specific law on asylum and immigration open to privileged operators is not inconceivable. Article 68 § 3 TEC, forecast that "The Council, the Commission or a Member State may request the Court of Justice to give a ruling on a question of interpretation of this title or of acts of the institutions of the Community based on this title. The ruling given by the Court of Justice in response to such a request shall not apply to judgments of courts or tribunals of the Member States which have become res judicata "Even though this possibility has never been used under the influence of the earlier treaty, and it offers a valid working hypothesis that doesn't prevent further digging.

One solution would be to virtually replicate this pattern under cover of the potential conceivable appeals of Article 263 §5 TFEU. It would imply to revive the idea of "such appeals in the interest of the law". Lighter than the infringement action, faster than the reference, such an action would serve as a palliative, and could achieve comparable results. In response to a Member State which would voluntarily depart, and in a reasoned way, from the evidence-based analysis of the European Office, it should be possible to ask the Court to clarify the requirements of Union law under the Office's analysis, validating or invalidating the latter. On this basis, the follow-up by European institutions or national judges would be simple to discern: to consider if the interpretation of the state in question constitutes or not a breach of its obligations for the former and to censor national decisions based on a misinterpretation of EU law for the latter.

The real question then would be on the list of beneficiaries of the right to operate such an action. A preferred approach would be of "institutional" type, as required by expanding the list of potential beneficiaries of such an application, for example to the Parliament, the European Office (or even the mediator), the target of regulation by the judge could thus be reached. This choice excludes a right of individual petition.

To do this, Article 263 § 5 TFEU presents a problem: currently, it reserves the possibility of a specific appeal against acts of organs of the Union to "physical or moral persons", which the EU institutions or member states are not.

981 Knowing that "these documents are not intended to give instructions to member states for granting or rejecting applications for international protection" (Article 12 § 2)

982 Point 6.2

If they want to use this medium to create a legal access to the court, with it being recognised that acts of the Office produces "legal effects" as defined in the jurisprudence of the Court of Justice, the scope of such action in interpretation or in the discretion of validity of acts of the European Office would be open to private individuals.

In order not to duplicate other remedies such as prejudicial reference, the remedy should then have a simple and rigorous character to safeguard against the risk of clogging of the Court. One can imagine this:

- Quick access to the judge, based on urgent procedure need for preliminary rulings, once a national decision is motivated in contradiction with the guidelines of the Office is stopped. Far from being a "direct or indirect instruction", the guideline should be confirmed or denied by the judge in an extremely short timeframe.
- A strictly defined purpose, that of compatibility between the actions of officers who supervise the discretion of states and the positive law of asylum, which consequently allows deducing the compatibility of national deviant behaviour.
- An effect erga omnes, i.e. to allow other national systems to draw from the latter consequences, as soon as the question is identified.

In this way, the guarantee by the judge of a uniform application of asylum appears more as its contribution to the regulation of the system as a disruption of the existing law. It may be envisaged without real disruption neither of treaties nor the existing legalities and would contribute, no doubt decisively, to the balance of CEAS.

SECTION 4: THE SUBSTANTIVE PERSPECTIVE

Two questions arise regarding the substance of the right to international protection. Firstly, one regards the definition of protected persons, the issue of "environmental refugees". Then, as regards the status of protected persons, the question of their freedom of movement within the European Union.

1. THE ISSUE OF "ENVIRONMENTAL REFUGEES"

The concept of "environmental refugees" or "climate" has emerged in the discussions on international protection, but international law of refugees is still characterised by a legal vacuum for most people fleeing their home country due to climatic or environmental reasons. The UNHCR opposed itself for this reason, to the use of the term "refugee" relating to the environment or climate.

It is only in certain circumstances that people fleeing their home country due to climatic or environmental reasons may fall within the scope of the Geneva Convention, for example when a government would not attend the victims of natural disasters for one of the five causes stated under the Geneva Convention. Regarding the EU, one can imagine that these people fall under the subsidiary protection in cases where the depletion of natural resources or water supplies due to climate change lead to an armed conflict covered by Article 15, c) of the Qualification Directive. The return to a country gravely affected by climate change to the point where the situation would become unbearable, may also fall within the concept of inhuman or degrading treatments within the meaning of Article 15, b) of the Directive. Finally, Directive 2001/55 of 20 July 2001 on temporary protection could be applied in cases of mass influx of displaced persons due to climatic or environmental reasons, as the cases of people fleeing "areas of armed conflict or endemic violence " or " systematic or

generalised violations of human rights" referred to in Article 2, c) of this Directive are only examples in a non-exhaustive list⁹⁸³, despite the fact that the legislator did not, during the course of preparing this Directive, accept a proposal to include natural disasters in this list⁹⁸⁴.

People fleeing their home country due to climatic or environmental protection can also be fall under domestic law or practices of certain Member States of the European Union. Finland and Sweden are currently the only examples where people can receive temporary protection because of an environmental disaster under a specific provision in the legislation on foreigners. Regarding the practice, it is worth noting that the United Kingdom has granted residence permits to people because of the volcanic eruption in Montserrat in 1995, and such situations can lead to the delivery of residence permits on humanitarian grounds in Denmark.

Knowing that the criteria for entitlement to subsidiary protection should be defined "on the basis of international obligations under instruments of human rights and practices already existing in the Member States" following point 25 of the preamble of the Qualification directive, there is a legal basis, albeit limited, to consider the integration of persons fleeing their country of origin for reasons of climate or environmental in the latter mentioned Directive. It may be recalled here that the European Parliament proposed in 2002, during the discussion of the current qualification directive, that this matter be discussed at the second stage of the construction of a common European asylum system.

The European Council agreed in the Stockholm Programme to further explore the linkages between climate change, migration and development and invited the Commission to present an analysis of the effects of climate change on international migration, including potential effects on immigration in the European Union. The Commission announced in its Action Plan on the implementation of the Stockholm program a communication on this point during the year 2011. The items should be quickly assembled so that the issue of environmental or climate "refugees" be taken into account in the common European asylum system at its inception in 2012. If the recast of the Qualification directive is the appropriate legislative instrument to do so, the idea, in line with the strengthening of the global approach to migration envisaged by the Commission, to use regional protection programmes to assist third countries to strengthen their reception capacities should also be considered due to the fact that most persons could remain in their home region.

2. FREEDOM OF MOVEMENT OF PROTECTED PERSONS

The issue of freedom of movement of protected persons, that is to say, those who have already obtained either refugee status or subsidiary protection, comes up in a rather specific manner in the European Union. It is indeed discussed as much as a question of individual rights of the protected persons as a way to contribute to a better sharing of the burden of asylum between Member States of the European Union. This is particularly the case since solidarity between Member States on asylum is discussed in terms of relocation of protected persons, that is to say, the internal relocation in the EU of persons protected in a Member State experiencing particular pressures on asylum to other Member States better disposed to host a certain number (a pilot project for the benefit of Malta is implemented during the year 2010). Although it is difficult to assess the potential impact of the recognition of freedom of movement for persons protected due to the fact that mobility

983 Article 2, c) does indeed use the term "particularly" before listing the above two cases
984 Council document 6128/01, p.4

would be left to the individuals concerned, it is reasonable to think that it would relieve to some extent the states undergoing particular pressure. Moreover, one can also understand the granting of such freedom to protected persons as a form of compensation for the inability to choose their first asylum country within the European Union because of the Dublin system for determining the responsible State. In this context, it is necessary to devise a mechanism that is as effective as possible for the people and for the Member States concerned.

The Commission has already proposed on 6 June 2007 to extend the scope of directive 2003/109 concerning the status of long-term residents, to beneficiaries of international protection. This proposal was apparently blocked for the reason that some Member States most affected, considered it an insufficient answer to the problem of burden sharing mentioned above. It is arguable that the length of the period of residence required to acquire the status of long-term resident of five years, is actually quite long, despite the fact that the duration of the asylum procedure would be included in the calculation of the number of years required. Moreover, another crucial factor must be taken into account in assessing this proposal.

It is because the relationship between the status of long-term residents issued by a Member State and freedom of movement within the European Union is organised in too loose a manner by directive 2003/109. Article 14 § 2 of chapter of this directive on the residence in other member states actually allows them to examine the situation of their labour market and apply their national procedures regarding the requirements on filling a position, plus they can also apply the priority rules in favour of European citizens and third country nationals legally residing and receiving unemployment benefits. Thus, freedom of movement for long-term residents may be reduced to students and people moving for reasons other than work. As Member States, in transposing the directive 2003/109, widely used the possibility to limit the movement of long-term residents as workers, the above proposal of the Commission may therefore be considered inadequate due to the limited effects it would have if it were to be adopted. Rather, the granting of a genuine free movement⁹⁸⁵ of protected persons must be considered as much from a legal point as from the political viewpoint.

This well-known goal of European law can be achieved in two somewhat complex ways. The first is to provide in the qualification directive or in another text, the provisions granting to persons protected the right to reside in other Member States of the European Union by requesting from the Member State where they intend to settle the recognition of the decision to grant refugee status or subsidiary protection. The second would be to define the rights of persons protected as privileged third-country nationals to reside in other Member States of the European Union and to enable them to obtain from their new asylum country the recognition of their status once they have established their residence. The first method seems more consistent with the wording of Article 79, §2, a) TFEU providing that the common European asylum system has a "uniform status of asylum" (in reality that of refugee) "valid throughout the Union" (such accuracy is not provided in point b) in respect of subsidiary protection). The second seems to be favoured in the Stockholm program providing for the creation of "a framework for the transfer of the protection of beneficiaries of international protection when exercising their rights of residence acquired under the legislation of the EU."

985 We thus question the reasons why the Directive 2009/50 dated 25th May 2009 establishing the conditions for entry and residence of third country nationals for the purpose of highly qualified employment (directive called "blue card") including provisions relating to mobility between member states of interest to beneficiaries of international protection excludes them from its scope

Both methods achieve in reality about the same result in linking mutual recognition and freedom of movement, knowing that the most of the discussions will focus, in both cases, on the conditions the protected person must meet to obtain, in one or another order, the mutual recognition of their status as protected persons or their right to stay. The second seems preferable for the reason that it gives individuals a right to stay as third-country national which should avoid them, provided they are extended the opportunity to get the long-term resident status⁹⁸⁶, to lose their right to stay in the event of application of the cessation clauses, which would be the case if it arose from their status as protected persons.

Based on the idea that granting freedom of stay is, whatever the manner of achieving this, mandatory under Article 79, §2, a) of the Treaty of Lisbon to make the status of refugee (as well as subsidiary protection as this seems desirable and even necessary under the principle of non-discrimination) valid throughout the European Union, it is proposed to extend to protected persons freedom of stay in other Member States to work as an employee or as an independent. This proposal should also help achieve the second objective (above) to alleviate the Member States for whom the asylum system implies particular pressures.

The conditions provided for exercising this freedom would be those of directive 2004/38 of 29 April 2004 on the free movement of EU citizens, upon production of the proof of a promise of employment, proof of employment or of exercise of independent activity. However, a period of residence in the Member State of first asylum would be provided before allowing the exercise of freedom of residence in order, on the one hand, to limit the temptation to abuse the international protection status, on the other, to build confidence between Member States before they are forced to accept on their territory a person benefitting from international protection in another Member State. This period corresponds to the period set by the Commission in its proposal for a recast of the qualification directive for renewal of residence permit, or three years. A protected person would acquire the freedom of movement as a worker with the first renewal of his residence. Besides the fact that the prescribed period is shorter than the one for acquiring the status of long-term residents, even if it does not include the duration of the asylum procedure, this system differs from the above proposal of the Commission in that it creates in the chief of protected persons a genuine uniform individual right to free movement as workers in all Member States of the EU (subject to opt-out of certain Member States). Some limitations compared to free movement of EU citizens could be provided if found necessary, such as a salary equivalent to at least the minimum wage to ensure that the people have adequate resources.

The Commission announced in its Action Plan for implementing the Stockholm program, a communication on "A framework for the transfer of international protection and the mutual recognition of decisions on asylum" for 2014. Such a time limit for a single communication which will then have to be followed by a legislative initiative, which itself will require some time before being adopted, may seem unusually long when taking into account the objective is not only to grant additional rights to protected persons, but also to relieve the Member States facing particular pressures. The argument that we must first achieve a sufficient level of harmonisation and therefore await before the adoption of the second generation of standards for asylum, is hardly convincing when one considers the fact that

986 The above proposal of the commission therefore retains its meaning, except as regards the provisions of the Directive 2003/109 relating to residence in other member States.

Member States did not hesitate to adopt a system for determining the state responsible for examination of an asylum claim such as Dublin based on an implicit form of mutual recognition of negative decisions 30 years ago (the Dublin Convention of 1990) before any form of harmonisation of asylum was even considered in Europe.

SECTION 5: THE DISTRIBUTIVE DIMENSION

1. A DISTRIBUTIVE SYSTEM FOR THE CEAS: OBJECTIVES AND APPROACHES FOR REFORM

Assuming that all pending legislative proposals are adopted, the “second phase” CEAS will not differ significantly from the “first phase” CEAS in its distributional elements. Protection seekers will still be distributed according to the Dublin system – an improved Dublin system, to be sure, but essentially the same system as today (see Dublin Recast Proposal, recital 7). As for protected persons, their relocation within the Union will still be ad hoc and subject to “double voluntarism” (see below, para. 3.2) – although carried out in some cases with the support of the EASO (see art. 5 EASO Regulation). In light of the profound deficiencies observed today, this “improved status quo” approach is unsustainable in the longer term, and a fundamental reconsideration of existing arrangements will be necessary (see EP 2009c:21 and 27; EP 2009b, amendment 39; COM (2009)5.2.2).

At this stage, suggesting detailed mechanisms for the distribution of protection seekers and protected persons would of course be premature. Nothing forbids by contrast, to sketch out some broad orientations for future reform. Before doing so, it is useful to recall some basic parameters.

To begin with, the Treaties lay down a number of principles and objectives that are particularly relevant for distributive arrangements.

- First and foremost, the CEAS will have to be based on full respect for fundamental rights (art. 67 TFEU) including e.g. the right to family life and physical integrity.
- More specifically, it will have to concretise the right of asylum under article 18 CFR, and so guarantee the examination of applications for protection in one Member State at least, ensure respect for the prohibition of refoulement, and offer adequate status to the persons requiring it (see above, Section 1; see also, in this light, art. 78(1) and (2e) TFEU).
- Beyond these fundamental guarantees, the CEAS will have to be “fair” towards third-country nationals (art. 67(2) TFEU) and promote integration once they obtain protection⁹⁸⁷.
- Finally, the CEAS will have to be governed by “the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States” (art. 80 TFEU).

In addition to these Treaty-based principles, the Stockholm Programme has stressed that distributive mechanisms under the CEAS will also have to prevent abuse of the asylum system (paras. 6.2 and 6.2.2.).

987 Although not mentioned in the context of art. 78, but rather in art. 79 (4) TFEU, there can be little doubt that integration constitutes a relevant objective of the common policy on asylum (see Qualification Directive, art. 33; ERF Decision, art. 4; EP 2009c:30 ff ; COM 2009:27).

Finally, and self-evidently, any distributive mechanism will have to be capable of achieving its objectives in an efficient and cost-effective manner.

This is the broad policy framework within which the distributive elements of the CEAS will have to be developed. Before proceeding further, it is worth pointing out one last methodological consideration: distributive mechanisms cannot be devised in isolation. There are at least three key interdependences that will have to be taken into account:

- First, the features (and chances of success) of distributive mechanisms will necessarily depend on the general development of the CEAS in its key regulatory components, and particularly on the level of harmonization and/or centralization in adjudicating claims. Based on the foregoing analysis (see Section 1, para. 3, and Sections 2 and 3), we will proceed on the assumption that the CEAS will be strengthened in all its aspects (e.g. through further harmonization and practical cooperation under the aegis of the EASO), but not revolutionised (e.g. through a full centralisation in the hands of the EU of first instance adjudication – see art. 78 (2e) TFEU – or through the establishment of a European Asylum Court competent to review and annul first instance decision).
- Second, as it emerges from the Treaty itself, the distribution of protection seekers and protected persons is not only a matter of burden sharing. Still, it is closely interconnected to the broader issue of burden sharing. In this regard, we make reference to the study submitted in January 2010 to the European Parliament by the Matrix Team (Matrix 2010), and stress the conclusion that financial burden-sharing must be substantially scaled up in the context of a holistic approach to the issue.
- Third, the distribution of respectively protection seekers and protected persons raises different questions (e.g. in terms of cost, or human rights implications) and accordingly requires differentiated solutions. At the same time, the two aspects cannot be addressed in isolation from each other since they are closely interdependent.

2. TOWARDS A NEW MECHANISM FOR THE DISTRIBUTION OF PROTECTION SEEKERS

2.1. The Dublin system: a dead end

The Stockholm Programme includes the following statement: “[t]he Dublin System remains a cornerstone in building the CEAS, as it clearly allocates responsibility for the examination of asylum application”. We respectfully disagree. Experience has abundantly shown that the Dublin system is an unfair, wasteful, and inefficient system for the distribution of protection seekers. In Part II of the present Report, we have described in detail its shortcomings, and there is no need to enter into any details here. A few reminders are nonetheless useful.

- The treatment of protection seekers under the Dublin Regulation is deeply unsatisfactory. The Regulation: (a) offers insufficient safeguards against refoulement and introduces a striking inequality of treatment deriving from the inconsistency of asylum practices across the Union; (b) it has an adverse impact on family unity and, more generally, on the well-being and integration prospects of protection seekers; (c) it includes insufficient safeguards for vulnerable persons, including ill persons and children. If approved, the Recast Proposal would solve some of the most pressing human rights problems included in this

short summary. Yet, it would fall well short of delivering a satisfactory system. Even under the new Regulation, and unless decisive advances are made in the harmonisation of asylum law and practice, Dublin would remain an “asylum lottery” for protection seekers. Furthermore, the new Regulation would do little to alleviate the anti-integrative effects of the system, since it would not be premised on an allocation of responsibilities based on the real links between protection seekers and Member States. This particular problem is compounded, in the present state of EU Law, by the absence of mechanisms allowing for the mobility or relocation of protected persons between the Member States. In short, and without losing sight of the human rights improvements to be expected from the new Regulation, the “fairness” of the system to protection seekers would remain highly questionable.

- In a “fair sharing perspective”, the system places additional burdens on States that are already overburdened due, in particular, to their geographical position. The new Regulation would provide the tools to avoid specific burden-concentrating effects through the “suspension mechanism”, but it would still fall short of ensuring an equitable (“fair”) distribution of protection seekers among the Member States.
- Finally, the Dublin system suffers from serious deficits in terms of efficiency and cost effectiveness. To recall: Dublin requests are launched for roughly 12% of all asylum requests. While acceptances are frequent, most of the agreed transfers are ultimately not carried out: roughly half of agreed “take backs”, and two thirds of agreed “take charges”, do not take place. Finally, the application of the criteria has practically no incidence on the distribution of responsibilities: the overwhelming majority of asylum applications (more than 96%) are examined in the State where they are first lodged⁹⁸⁸. The financial costs at which such meagre results are bought are not known to this date – and this is certainly a point on which a thorough enquiry is called for. However, the little evidence that is available suggests that they are quite substantial (see ECRE 2008:4; see also SEC (2007)15).

Let us note that there is an obvious connection between the unfairness of the system to protection seekers and to States, on the one hand, and its dismal performance in terms of effectiveness, on the other hand. The Evaluation Report suggests that border States fail to systematically fingerprint illegal entrants, thus reducing the effectiveness of EURODAC as a tool for the implementation of the Dublin criteria (COM (2007a)9). As for protection seekers, evidence suggests that they are engaged in a constant struggle to evade the system through absconding, destroying evidence, and litigation. To an extent, this struggle is successful: uncooperative behaviour accounts among the key factors in the ineffectiveness of the system. However, this “success” comes at a heavy price – for protection seekers themselves, who risk undermining their protection chances, for the integrity of the CEAS, and for the orderly management of migration.

2.2. What needs changing, what is to be kept

On the basis of the preceding observations, there should be no doubt on the fact that the Dublin system is inherently flawed, and that no measure of tinkering can remedy its

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For details on these figures, see Part II, Chapter I, Section V.2.

shortcomings. A distinction must nonetheless be made, in this regard, between the various goals of the system, since some are realistically attainable and others are not.

The system is certainly apt to ensure access to an asylum procedure in the responsible State, especially if amended in the transition between Dublin II and Dublin III. Its shortcoming in this respect is that it is slow and bureaucratic. Furthermore, the system is theoretically apt to fulfil – and fulfils to some extent – its goal of neutralising multiple applications through the “one chance only” principle and take back transfers.

These two functions are linked to the key principles enshrined in article 3 DR: guaranteed access to one procedure, and the “once-chance-only” principle. It is fair to assume, and we will proceed on the assumption, that whatever the distribution system chosen for the third phase of the CEAS, these two key principles will be maintained. For one thing, the idea of abolishing them has not been advanced in the intense debate on the Dublin system. Quite apart from this, article 78(2e) TFEU explicitly calls for a system allocating responsibility for examining protection claims among the Member States. It is hard to see what “responsibility” could mean in this context, if it did not entail that the claim must be examined by the responsible State, and cannot (normally) be pursued with another Member State.

While these central elements of the system are presumably destined to stay, the distributive concept embodied in the criteria could and (in our view) should be reformed entirely since it is unworkable and ineffective. Let us reiterate: in the vast majority of cases, asylum applications become the responsibility of the State where they are first lodged. If that is so, nothing justifies running a complex, bureaucratic, time-consuming, and at times arbitrary system of “objective” responsibility criteria.

As noted above, the chance for an in-depth reconsideration of this aspect was lost in the passage from the first to the second phase of the CEAS. Yet, the Commission has taken the commitment to “evaluat[e] the application of the Dublin Regulation at regular intervals and, once the second phase of the CEAS is in place, of the principles on which it is based” (COM (2008a)7-8). In this perspective, it is useful to consider possible alternative models for the distribution of protection seekers in the CEAS.

2.3. Alternative models for the distribution of protection seekers

2.3.1. The direction for reform: taking protection seekers’ preferences seriously

If the analysis set out above is correct, then it would appear that the Dublin distributive concept suffers from a distinct lack of “user-friendliness”. It exposes them to an asylum lottery, and it disregards to a large extent the preferences of protection seekers, relying instead on a responsibility principle that the latter may with reason regard as arbitrary (“responsibility for entry and stay”). A significantly higher level of convergence in the protection and reception standards throughout the EU would reduce some of the incentives to evade the system, thus solving part of the problem. Still, it would not eliminate protection seekers’ preferences based, e.g., on social networks and previous abode, which the literature suggests are extremely relevant “pull-factors”.

As noted above, disregard for protection seekers’ preferences has considerable costs in terms of welfare and integration, and a strong impact on the system’s legitimacy and effectiveness. It is the reason why the Dublin system so often needs the backing of costly and disruptive coercive measures, such as detention and escorted transfers. From a legal point of view, the importance of this last point cannot be overstated. There is a profound

difference between the coercive removal to a country where the applicant risks onward refoulement, or ill-treatment, and a voluntary transfer to that same country: only in the first case can the transfer amount to refoulement. The same goes for family issues: the right to family unity can only be violated if the separation from family members is imposed (through removal, or refused admission) by the State.

As a general orientation, therefore, we fully support the proposition that the distribution system for the third phase of the CEAS should give greater relevance to the preferences of protection seekers (see EP 2009c:30 ff ; ESC Opinion on the Dublin III Proposal, 16 July 2009, 3.2; UNHCR 2001:5; ECRE 2008:25 ff). This would reflect the view, which we also fully endorse, that was expressed by UNHCR in 2001: “[...] arrangements on transfer of responsibility should not be utilized as instruments of migration control, but rather should be aimed at ensuring that the most appropriate solution is identified in respect of those applicants who, after consideration of their claim, are found to be in need of protection as refugees” (UNHCR 2001:2; emphasis provided).

2.3.2. The UNHCR model

ExCom conclusion No. 15 provides the blueprint for the allocation model that UNHCR has consistently proposed (UNHCR 2001:5, 2007:38), and that the Commission regarded in 2001 as the most credible alternative to the Dublin criteria (COM (2001)4).

In this model, responsibility would lie, as a general rule and as it is currently the case under art. 13 DR, with the State where the application is first lodged. Exceptions would be made only if the protection seeker has a close link with another Member State. In this respect, and drawing on recommendations from UNHCR itself (UNHCR 2001:5), the following links would form the basis for responsibility criteria:

- Family ties (broader than what is proposed in the Recast Proposal), subject to the consent of the persons involved, and
- Possession of a residence permit, also subject to the protection seekers’ consent.

Other links (e.g. previous abode, presence of persons or communities, other than family members and relatives, willing to provide support) would also need to be considered as basis for further criteria, as pointed out in the EP Resolution on the future of the Common European Asylum System (EP 2009a:30-31). At the very least, they should be included in an expanded humanitarian clause, as grounds to derogate from the “default” rule that responsibility lies where the claim is first lodged.

To be sure, such a system would not solve all the problems posed by the existing system, still less ensure the achievement of all the relevant policy goals.

First, and quite clearly, such a system would not necessarily ensure a “fair” distribution of asylum claims, as these would not be allocated according to a predetermined key. It could even be objected that such a system would shift the burden back from the traditional “transit” States at the EU borders to the traditional “destination” States. Such an argument would of course need to be empirically proved. We would in any event observe that:

- At present, more than 96% of the applications are already examined by the State where they are first lodged.
- It is by no means clear that this works to the disadvantage of traditional “destination” States. To the contrary, the majority of take backs are directed to States located at the EU borders (hence the need for the “close links” corrective criteria in the perspective of fair allocation).

- Whatever the case, it is not clear that burden-shifting on traditional “destination” States would be worse than the present situation, in which the Dublin system has the effect of shifting the burden to less resourced border States.

From the standpoint of the protection seeker, the system would also fail to guarantee optimal integration conditions in every case. Protection seekers could still be compelled to lodge their asylum claim in a State other than their preferred one to avoid immediate removal, as it frequently happens today, and not qualify under the “integration-friendly” criteria derogating to the basic default rule.

There is no denying, however, that such a system would considerably improve on the Dublin system. The effectiveness gains, and the cost reductions, would be conspicuous:

- The basic working mechanisms of the existing system would be maintained, thus facilitating the transition – only the criteria listed in art. 9(2) and 10-12 DR would be eliminated, and the others would be suitably amended.
- Responsibility determination would be enormously simplified, inter alia because the asylum applicant would actually have an incentive to provide all the relevant documentation and information.
- Accordingly, “take charge” transfers would always be voluntary and would require the mobilisation of the resources that are devoted, today, to coercive transfers.

The advantages would also be considerable in terms of integration, notwithstanding our preceding observations. The criteria based on illegal entry or on the delivery of a visa that do not reflect real links between the protection seeker and the State concerned (UNHCR 2001:5), would be dropped. All the criteria derogating from the “default” rule, which would consist of an expanded version of the family and humanitarian criteria currently in place, would by contrast be conducive to the welfare and integration of the protection seeker.

As a final point, legal challenges to “take charge” transfers would be practically excluded, due to the element of voluntarism involved.

In short, in spite of some limitations, such a system would have the merit of simplicity, would eliminate the legal problems surrounding the process of responsibility determination, and it would advance the twin goals of being more cost-effective and more integration-friendly.

2.3.3. The ECRE model

Although supporting a reform on the lines of the UNHCR model, ECRE has proposed a more radical departure from the Dublin system. Instead of basing responsibility allocation on predefined criteria, which could only ever constitute an approximation of the protection seekers’ preferences, ECRE advocates giving directly to the protection seeker the choice of the responsible State (ECRE 2009:29 ff).

Such a system would be attractive for several reasons. It would, in fact, maximize the advantages to be expected under the UNHCR model: formalities would be reduced to a minimum, full cooperation could be expected from the protection seekers – while maintaining the “one chance only” principle to guard against abusive behaviour –, and chances of integration through self-determination would be maximised.

But while this would be the optimal system from the perspective of protection seekers, there are reasons to doubt that it would be acceptable for the Member States.

First and foremost, multiple applications are not the only kind of “abuse” that Member States intend to prevent through the Dublin system. Misuse of asylum procedures to secure admission in a particular State for reasons of personal convenience are also targeted. And arguably, a free choice system could presumably work as an incentive to lodge unfounded applications, since the ECRE system could be used as a “ride” to the preferred destination⁹⁸⁹. Whether the considerable advantages of the ECRE model would offset this potential disadvantage – bearing in mind Dublin’s failure to actually steer the distribution of asylum applications – would of course be a wholly political question.

Secondly, and contrary to what empirical evidence suggests concerning the UNHCR model, the system would probably have palpable burden-shifting effects to the detriment of some Member States – the traditional destination States. ECRE itself has acknowledged this (ECRE 2008:30-31). The issue would be, then, whether these States would regard compensation through other burden-sharing mechanisms – financial solidarity, and administrative centralization/cooperation – as a sufficient “insurance”.

2.3.4. Mechanisms based on distributive keys

The models we have examined so far share one basic feature with the Dublin system. They are “responsibility-allocation” mechanisms, rather than schemes aiming at a pre-determined distribution of protection seekers. Of course, in a perspective of fair responsibility sharing, such a scheme could also come into consideration. In particular, a “distributive key” could be agreed at EU level, whereby – as it happens in some federal States – quotas of protection seekers are allotted to the Member States in function of indicators such as population and GDP.

It must be noted that past attempts at establishing such quotas have failed to attract sufficient support among the Member States (see Thielemann 2003:8). But quite apart from political feasibility, the merits of a key-based distribution mechanism would clearly depend on its detailed features, and great variations are conceivable on this point.

First of all, distributive keys indicate the aggregate number of asylum applicants to be assigned to a Member State yearly, but they do not per se determine which Member State is responsible for each individual applicant. Two possibilities could be envisaged.

- First, defining predetermined criteria to be applied by the competent national authorities or by the EASO – although this would mean overstepping a sensitive red line, by giving an EU body the power to impose the admission of an individual on a Member State. Be that as it may, the debate on the responsibility criteria would not be avoided: Dublin, real links, or the choice of the protection seeker? In this regard, we would maintain our position that the criteria would have to be devised along the lines identified by UNHCR, or along the “free choice” model suggested by ECRE. Indeed, available studies on national “dispersal” mechanisms convincingly point out that rigid mechanisms, giving no say to protection seekers and disregarding the protection seekers’ preferences, would undercut integration and invite evasion, much as it is the case today with Dublin (see BOSWELL 2003).
- Second, entrusting the decision to the discretion of the EASO. This could lead to an optimal use of the reception capacities of the Member States. However, apart from representing an even more radical departure from the principle that Member

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It must be stressed that there is no clear empirical evidence supporting or infirming this hypothesis.

States decide on the admission of individuals, a number of difficulties would have to be resolved: how would the EASO take into account "protection differentials" among the Member States? And how would it take into account the preferences and interests of protection seekers?

In addition to defining individual allocation rules, another issue would have to be settled: the nature of the quotas. There is a vast spectrum of possibilities here, and in order to advance reflection we would point out the two extreme models.

"Rigid" quotas would place an absolute ceiling on the number of protection seekers allotted to each Member State. Under such a scheme, protection seekers could not be transferred (or kept) in a State having exhausted its yearly quota, whatever their personal situation and preferences. This solution would, of course, ensure strict abidance by the agreed distribution of responsibilities. However, it would reproduce the problems that exist under the Dublin system: some protection seekers would be absolutely barred from their preferred destination without their having a say, and without their real ties and/or preferences being taken into account. Indeed, unless "family unity" and "humanitarian" exceptions were provided for, the system would exacerbate the problems – including the legal problems – existing under Dublin.

At the other end of the spectrum, a merely indicative key could be devised. Under such a system, protection seeker would still be allocated under the normal responsibility criteria, even to States having exhausted their quota. However, quotas would indicate whether the "capacity" of a Member State is over- or under-utilized at any given moment, and thus allow for activating (and targeting) complementary burden-sharing mechanisms. In such a scenario, strict abidance by the agreed distribution would not necessarily be guaranteed, but the system would still respond to the need of respecting the real links and/or preferences of protection seekers.

2.3.5. A combination of models

All the models that we have discussed above would likely raise political difficulties. The UNHCR and the ECRE models would probably be met with stiff resistance from several Member States. "Distribution keys", as experience makes clear, would be very difficult to agree. It is not our role to pre-empt or to speculate upon the political debates to come.

We would only suggest that, to make any of the above solutions acceptable, they could be combined together and/or coupled with other mechanisms.

There would be value, for instance, in making a gradual passage from Dublin to the UNHCR or ECRE models of responsibility allocation, allowing for experience to be gained and potential problems to be tested empirically before a definitive step forward is taken. In this perspective, the Dublin criteria could be maintained as a "dormant" system (*mécanisme de veille*) and be reactivated on a temporary basis – if at all necessary – through a procedure following by and large the model of art. 31 of the Dublin Recast Proposal. The disadvantage, here, would be to use as a remedy a system whose drawbacks are by now widely documented.

As an alternative, and in order to address the shortcoming of the UNHCR and ECRE proposals, namely that they provide no guarantees as to an "equitable" distribution of protection seekers, these could be complemented through an indicative distribution key, setting out "fair share" indicators. Agreeing on an indicative key might be less prohibitive than agreeing on an actual distribution key. And far from being useless, an indicative key

could serve the purposes that have been sketched out above. Should a Member State receive more applications than its fair share, the following measures could (or would mandatorily) be taken:

- Increased financial assistance from (scaled up) EU funds and operational assistance for reception and processing of asylum applications through the EASO – something that would also prevent “overburdening” crises from turning into “protection” crises, since scaled-up assistance would help maintaining or raising protection and reception standards.
- The activation of EU funded “transfer programmes” to under-burdened States, to be managed by the EASO. In such a scheme, the selected under-burdened State would have an obligation to accept responsibility for transferred protection seekers (see, for a purely voluntary precedent, ERF Decision, art. 1(e), 2(6) and 6(c)). Let us stress that in this model, relocation would however not be compulsory for the protection seeker, as this would recreate the problems that characterize the Dublin system. Rather, the “transfer programmes” should provide protection seekers with incentives and facilities for their voluntary transfer to another Member State (see also: Matrix 2010:146).

Such a composite system could be conducive – at any rate, much more conducive than the Dublin system – to a cost-effective, humane and productive allocation of responsibilities, while providing for robust mechanisms of burden sharing.

2.4. Distribution systems and protection guarantee: on the need to retain the sovereignty clause

Having discussed possible distribution systems for protection seekers, one point must be stressed. As noted above, we assume that the “one-chance only principle” will remain a centrepiece of the future CEAS. The implication is that coercive “take back” transfers will also remain a lasting element of the future CEAS. In our view, this will make it necessary to retain, whatever the “post-Dublin” instrument chosen, the sovereignty clause and all attendant guarantees (e.g. effective remedies) as a safeguard against direct or indirect refoulement.

To explain our position, it is sufficient to recall three legal elements that have been examined at length elsewhere in this Report (see above, Part II, Chapter I, Section I): (a) it is the individual responsibility of each Member State, under the Geneva Convention and ECHR, to ensure that transfers to another State do not result in onward refoulement or inhuman or degrading treatment in the responsible State; (b) such responsibility cannot be circumvented through the application of absolute presumptions of safety; (c) Member States are expected to remain in charge of adjudicating protection claims and providing reception conditions, which means that the possibility of diverging standards of protection and reception will persist.

No doubt, significant progress in the convergence of Member States’ laws and practices would greatly reduce the practical significance of the sovereignty clause. Strict common standards, commanding universal compliance and adequately reflecting international standards, would make it practically impossible to successfully challenge Dublin transfers on protection-related grounds. Doing away entirely with the sovereignty clause, i.e. with the possibility to challenge a transfer on protection-related grounds, would however be incompatible with the Member States’ international obligations.

3. STRENGTHENING DISTRIBUTION MECHANISMS FOR BENEFICIARIES OF INTERNATIONAL PROTECTION

3.1. An alternative to a better allocation of protection seekers?

In devising the alternatives to Dublin, one should also take into account the possible introduction of new rules on the distribution of beneficiaries of international protection. We are referring to the introduction of free movement rights and to the strengthening of internal relocation programmes. We see the value of both initiatives, and we believe that both would be useful elements of the future CEAS.

Before addressing them briefly, however, we would stress that we do not regard them as alternative to reforming the Dublin system. First of all, we see a more productive pre-status determination allocation, and post-status determination mobility, as both desirable in their own right. The needs and aspirations of the concerned persons evolve over time. Allowing for mobility once status is determined would provide an additional chance of continually maximizing the integration, self-reliance and well-being of protected persons. This would be, of course, also to the benefit of the host societies.

Secondly, no hasty assumptions should be made as to whether, and to what extent, the mobility of protected persons would solve the problems raised by the Dublin system.

In this regard, it bears recalling again that, for the time being, the failures of the Dublin system are largely due to the disparities in protection and reception standards that still exist among the Member States. Forms of mobility for protected persons would do nothing to alleviate this problem. Dublin would still be as unfair – a “protection lottery” – and inefficient as it is today.

Assuming that the objective set by the Stockholm Programme would be achieved – namely, “that similar cases [are] treated alike and result in the same outcome [throughout the EU]” – part of the problem would of course disappear. In this scenario, the chief obstacle to a satisfactory functioning of the Dublin system would be its disregard for preferences based on different reception conditions and, crucially, on different integration prospects. In theory, the promise of a chance to relocate to the preferred destination, once recognised as persons in need of protection, could render the whole Dublin concept more acceptable to bona fide protection seekers. Just how much, however, would depend on the credibility of the promise, on the length of the “waiting period” imposed, and on the conditions attached to it. If for instance free movement was extended only to workers, as proposed above (Section 4), free movement would of course constitute a solution only for a fraction of the persons allocated (and potentially mis-allocated) under Dublin.

3.2. A system based on voluntary relocation

The two concepts that are being discussed are, as noted above, free movement rights and relocation programmes. The possibilities and advantages linked to free movement, as well as its possible forms, have already been discussed in Section 4. In the following lines, we will focus on internal relocation, which comes closer to a concept of (planned) distribution. An EU concept of internal relocation of protected persons is slowly taking form. The two key elements of the *acquis* in this regard are: (a) ERF funding for initiatives undertaken by the Member States (see ERF Decision, recital 19, art. 1(e), 2(6) and 6), as well as (b) the competences of the EASO to “promote, facilitate and coordinate” such initiatives in favour

of Member States which are faced with “specific and disproportionate pressure” (see EASO Regulation, recital 6 and art. 5). The European Council, for its part, has provided political impetus for the establishment of relocation programmes to the benefit of overburdened States, and a pilot project for Malta has been launched (see Pact on Immigration and Asylum, IVc).

The central tenet of this emerging re-allocation acquis is double voluntarism, i.e. the agreement of the States and of the individuals concerned. Double voluntarism is, in itself, a valuable principle, ensuring acceptance from all the parties concerned. However, it reduces the chances that significant programmes are implemented.

As was perhaps to be expected, the initiatives taken so far have not yielded significant results: “ad hoc examples have been more symbolic than anything else, as they have had a negligible impact on costs and overall pressures on the country in question” (Matrix 2010:16).

The European Parliament, while expressing support for voluntary relocation mechanisms (EP 2009c:37 and 40), has called for decisive steps forward, such as “the prompt formalisation of the principle of solidarity and fair sharing [...] involv[ing] a system of ‘compulsory and irrevocable solidarity’” (EP Resolution on the Stockholm Programme, para. 56), as well as the establishment of “[b]inding responsibility sharing instruments” (EP 2009a, amendment 39).

In the Stockholm Programme, the European Council has refrained from endorsing such ambitious goals. It has only referred to the “voluntary and coordinated sharing of responsibility”, emphasizing administrative assistance and capacity building in all Member States, rather than re-allocation mechanisms (Stockholm Programme, paras. 6.2.1 and 6.2.2).

The Matrix study submitted to Parliament in January 2010 suggests that considerable benefits could be obtained, in terms of an equitable distribution of responsibilities and burdens, from more ambitious schemes of internal resettlement, including from schemes breaking away from double voluntarism. In other words, introducing compulsory burden sharing, as requested by the European Parliament, would seem to be a sensible and desirable policy option in a burden-sharing perspective.

We would however wish to highlight a key recommendation made in the very same study: “Only physical relocation of protection seekers will make a significant contribution to a more equitable distribution of asylum costs across Member States. If this is to avoid generating significant human costs and additional costs to the Member States, it is crucial that this is based on a voluntary relocation of the protection seeker” (MATRIX 2010:146). This recommendation should also apply, in our view, to the relocation of protected persons. Indeed, in legal terms it applies a fortiori to protected persons. The compulsory transfer (i.e. the expulsion) of a legally residing person would raise serious human rights issues. In the case of refugees, it would be in direct violation of article 32 of the Geneva Convention, which prohibits the expulsion of “refugees lawfully in [the] territory [of State parties] save on grounds of national security or public order”.

In short: taking reallocation initiatives from a symbolic to a significant scale would be a promising avenue for reform. Abandoning double voluntarism might be necessary in order to achieve this, although it would no doubt prove extremely difficult. Abandoning the element of voluntarism on the part of protection seekers would, for its part, be a serious mistake and a source of considerable legal problems.

SECTION 6: THE EXTERNAL PERSPECTIVE

Attempting to strike the right balance between border control, migration management and access to protection, so that 'the necessary strengthening of European border controls [does] not prevent access to protection systems by those people entitled to benefit under them'⁹⁹⁰, several proposals have been formulated engaging directly with the individual refugee and his physical access to the territory of the EU Member States in a safe and orderly way. Two of these solutions have been quite comprehensively formulated and reappear periodically on the table for negotiation at EU level. They, thus, deserve particular attention. Building upon them, and on account of the findings arrived at in Chapter 5 of the study, we present our own proposal for a 'comprehensive approach' to access to international protection at the end. Reflecting this selection, the coming sections deal with (2) offshore processing; (3) protected-entry procedures; and (4) our proposal for a comprehensive approach. The methodology applied responds to the following scheme: (1) the background of the mechanism under consideration is introduced; (2) the newest proposal at EU level is presented; (3) legal and practical shortcomings as for its implementation are identified; and (4) recommendations are made, as appropriate.

1. OFF-SHORE PROCESSING: NATIONAL OR AD HOC PROTECTION PROGRAMMES

1.1. Background

1.1.1. Unilateral Initiatives

Two major resettlement countries, the US and Australia, have conducted, and eventually abandoned, extraterritorial processing schemes. The US Caribbean interdiction programme began as a response to a surged in the number of irregular arrivals from Haiti, immersed in a civil war at the relevant time. A 1981 bilateral readmission agreement with Haiti authorised the US to intercept Haitian asylum seekers in the high seas. Subject to a rudimentary screening procedure onboard US Coast Guards cutters, those determined to have a 'credible fear' were given access to the mainland for full processing; the remainder were directly repatriated to Haiti. Out of the some 1,800 Haitians intercepted from 1981 to 1986, none was reported to had submitted a bona fide asylum claim. All were returned to Haiti without any opportunity to seek judicial review. During the early 1990s, intercepted Haitians were taken to the US Naval Base at Guantanamo Bay for screening by the US Immigration and Naturalization Service. In 1992, however, President Bush-father allowed for direct repatriation to Haiti. The no-screening policy continued until 1994. It was under the Clinton Administration that the Government succeeded in arguing before the US Supreme Court that non-refoulement did not apply beyond US territorial waters, in the Sale case. In response, Haiti's President-in-exile Aristide threatened the US with the suspension of the 1981 agreement. Consequently, President Clinton resumed the pre-screening policy in May 1994, entering into agreements with Jamaica and the Government of the Turks and Caicos Islands to use their territory for extraterritorial processing. No prior screening was undertaken before the transfers to these countries were carried out. Eventually, Aristide returned to office and the outflow of Haitian boat people decreased. Yet, in February 2004, violence broke out again, resulting in a further exodus. On 25 February 2005 President Bush-son announced that any refugee attempting to reach US shores would be turned back. The 'shout test' was, then, introduced. Upon interdiction, only those able to attract

⁹⁹⁰ European Pact on Immigration and Asylum, Council doc. 13440/08, 24.09.2008, p. 11.

the attention of the crew would be given a pre-screening interview. Then, only those successful in convincing the crew that they had a well-founded fear of persecution would be brought to the US for full processing. The rest would be returned without further inquisition. To our knowledge, the Obama Administration continues the interdiction program⁹⁹¹.

The Australian 'Pacific Solution' was instated after the MV Tampa incident⁹⁹². A Norwegian registered container ship had rescued 433 asylum seekers in the waters off Australia in August 2001. At the time, Indonesia was the main transit country for those en route to Australia. Australia was assisting Indonesia with the costs of processing asylum seekers in its territory. They were in the process of signing an agreement on the prevention of people's smuggling and trafficking. When the MV Tampa sought permission to disembark, Australia considered it to be Indonesia's responsibility. At the end, having entered into agreements with Nauru and Papua New Guinea, Australia took the rescuees to these countries. The incident led to the adoption of new domestic legislation on immigration and asylum. Australia excised certain of its islands from its 'migration zone'. No valid asylum claims could be made in those territories thereafter. And it provided that asylum seekers could directly be taken to a 'declared country' for processing. Both in Nauru and Papua New Guinea Australia funded closed reception centres, which were managed by the IOM. Status determination was conducted by Australian immigration officials, initially with the support of the UNHCR, and without any judicial control. Recognised refugees were resettled in neighbouring countries. In February 2008, Australia's new government announced the abandonment of the policy and the closure of the centres in Nauru and Papua New Guinea, however, without excluding the idea of maintaining some sort of off-shore processing for unauthorised arrivals in Australia's excised Christmas Island⁹⁹³.

1.1.2. Multilateral Initiatives

Without concerning directly the issue of off-shore processing, there are two historical examples of multilateral initiatives initiated to resolve a regionally focused exodus with a multi-stage approach. The International Conference on Central American Refugees (CIREFCA – 1987/1994) was incepted to deal with forced displacement in the Central American region ensuing from armed conflict in Honduras, Guatemala and El Salvador. The Comprehensive Plan of Action for Indochinese Refugees (CPA – 1988/1996) tackled the issue of persistent mixed flows from Vietnam to other countries in the South Eastern Asian region. Both entailed the collaboration between countries of origin, facilitating orderly departure and the return of non-refugees; countries in the region, providing first asylum and dealing with the determination of refugee status; and resettlement states, providing for durable solutions extra-regionally to those found in need of international protection. From the international relations perspective, both experiences have been portrayed as examples of successful collective action, illustrating that 'significant global burden- and responsibility-sharing is possible and can lead to durable solutions'⁹⁹⁴. On the other hand, serious

991 D. Evans, 'Florida advocates: Stop deporting Haitian immigrants!', Facing South, 14.05.2009, available at: <http://www.southernstudies.org/2009/05/the-debate-over-floridas-haitian-immigrants-heats-up.html#>

992 Federal Court of Australia, Ruddock and Others v. Vadarlis and Others, 18.09. 2001, [2001] FCA 1329.

993 'Last refugees in Nauru,' Ministry for Immigration and Citizenship, Press Release, 08.02.2008: 'The asylum claims of future unauthorised boat arrivals will be processed on Christmas Island. Christmas Island will soon have an increased capacity for offshore processing of unauthorised arrivals with the opening of the new immigration detention centre built by the former Government. The new centre on Christmas Island will have the capacity to house 400 people with a surge capacity of a further 400 people.' Available at: <http://www.minister.immi.gov.au/media/media-releases/2008/ce08014.htm>.

994 A. Betts, Comprehensive Plans of Action: Insights from CIREFCA and the Indochinese CPA, New Issues in Refugee Research, UNHCR Working Paper No. 120, January 2006, p. 5.

procedural flaws have prompted significant disapproval in legal quarters. Particularly in the case of the CPA, the status determination procedures, run by countries that were not parties neither to the Geneva Convention nor to other major human rights instruments, have been severely criticised⁹⁹⁵. Accordingly, from the legal point of view, any attempt at replicating these experiences should be subject to careful consideration.

Although without subsequent implementation, plans to extraterritorialise asylum procedures have been reiterated in recent times. Denmark submitted in 1986 a proposal for a Resolution to the UN General Assembly, suggesting the establishment of regional processing centres administered by the UN. According to the draft, asylum claims would be processed in these centres and durable solutions would be granted to those found to be in need thereof. Voluntary repatriation would be privileged over 'regional integration', and 'resettlement outside the region' would intervene as a measure of last resort⁹⁹⁶. However, the draft failed to attract sufficient support and was eventually discarded.

In 1993, The Netherlands placed 'reception in the region of origin' on the agenda of the Inter-Governmental Consultations (IGC). The 'Dutch Proposal' was 'distinct from most traditional schemes by referring to the possibility of processing exclusively in the region, and consequently returning asylum-seekers from the territory or borders of participating states to facilities in the region of origin [...]'⁹⁹⁷. Not only processing centres were envisaged, but also camps for the accommodation of applicants, which would be run multilaterally. The proposal was studied in depth, but a series of legal and practical concerns led to the abandonment of the idea. The IGC explicitly stated that 'the "exclusive" option [was] not feasible and as, such, [did] not deserve further elaboration'⁹⁹⁸. A comprehensive account of 'a pro-refugee but anti-asylum strategy' was put forward by the British 'New Vision for Refugees'⁹⁹⁹. It consisted of four components: (1) 'Regional Protection Areas', conceived of as 'artificially created internationally controlled areas', providing for protection and assistance to those accommodated in source regions; (2) the return to those areas of certain categories of asylum seekers, immediately upon the submission of a claim; (3) coercive intervention, sanctions and military action, as means to 'stop the protection need occurring'; and (4) the 'assumption that the main way in which refugees would move to a third country would be through Regional Protection Areas'. Recognised refugees would either be accepted for resettlement or required to integrate locally, whereas those found not to be in need of international protection would be repatriated to their home countries. A later version of the plan, submitted for discussion at the European Council in March 2003, projected that 'Transit Processing Centres' would be introduced alongside 'Regional Protection Areas'¹⁰⁰⁰. The ambition was 'to deter those who enter the EU illegally and make unfounded asylum applications'. To guarantee the deterrent effect, it was proposed that these centres 'be placed on transit routes into the EU'. According to the draft, asylum seekers arriving in the participating Member States would be transferred to a transit processing centre directly to have their applications assessed there.

995 For an example see S. Bari, 'Refugee Status Determination under the Comprehensive Plan of Action (CPA): A Personal Assessment,' IJRL (1992), pp. 487-513.

996 UNGA, International procedures for the protection of refugee: draft resolution, UN Doc A/C.3/41/L.51, 12.11.1986, available at: <http://documents-dds-ny.un.org/doc/UNDOC/LTD/N86/299/46/img/N8629946.pdf?OpenElement>.

997 IGC Secretariat, Working Paper on Reception in the Region of Origin, September 1994, p. 6-7 (emphasis added).

998 IGC Secretariat, Reception in the Region of Origin: Draft Follow-Up to the 1994 Working Paper, August 1995, p. 7.

999 New Vision for Refugees, 07.03.2003, available at: http://www.proasyl.de/texte/europe/union/2003/UK_NewVision.pdf,

1000 New International Approaches to Asylum and Protection, 10.03.2003, attached to a letter Tony Blair addressed to President of the European Council, available at: <http://www.statewatch.org/news/2003/apr/blair-simitis-asile.pdf>.

The centres would be located outside EU territory, possibly managed by the IOM, and financed jointly by the participating Member States. The answer to whether the centres would also host 'illegal migrants intercepted en route to the EU before they had lodged an asylum claim but where they had a clear intention of doing so' was deferred to further discussion. The key question was 'to consider whether such a process should apply to all, or only certain categories of unfounded asylum applicants'.

In response to the British initiative, the UNHCR launched a 'Three-Pronged Proposal'¹⁰⁰¹, a comprehensive model aimed at improving global access to durable solutions both in regions of origin and in destination countries. The 'Regional Prong' addressed the necessity to strengthen protection capacities in source regions, whereas the 'Domestic Prong' proposed measures to rationalize procedures in industrialized states. Bridging them both, the 'EU Prong' engaged in a re-modelling of Blair's 'Transit Processing Centres'. 'Upon arrival anywhere within the territory of EU Member States or at their borders, all asylum seekers from designated countries of origin would be transferred immediately to the centres, except from persons [...] medically unfit to travel or stay in closed reception centres, as well as unaccompanied and separated children'. These closed centres would be located in the territory of the EU Member States, would be funded with EU resources, and would offer rapid and fair processing, according to EU standards. Persons found in need of asylum 'would be distributed fairly amongst Member States, according to a pre-determined key', whereas unfounded applicants would be jointly returned to their countries of origin. In regard of the target group, the UNHCR established that, 'consistent with the objective of tackling the abuse of asylum systems, the main focus would be on populations who consist primarily of economic migrants, that is, persons from specific countries of origin whose asylum applications are likely to be manifestly unfounded'. In December 2003, the Office reviewed its proposal on the 'EU Prong', pleading for the progressive establishment of a comprehensive EU system. The system would, then, comprise EU Reception Centres, an EU Asylum Agency to take charge, in time, of first instance decisions, and an EU Asylum Review Board for appeals. Reception Centres in the revised version were to be open and decision-making was to be undertaken under regular rather than accelerated arrangements¹⁰⁰².

Along these lines, the German Interior Minister at the time insisted in the creation of 'safe zones', 'camps' or, as referred to in later submissions, 'reception facilities' in North Africa with the financial assistance of the EU. A proposal was submitted informally to the Brussels JHA Council in July 2004. The premises would lodge those intercepted en route to the Union, who would otherwise embark on unseaworthy boats to reach European shores. A screening would be undertaken inland to identify prospective refugees. No appeal procedures were envisaged. Those found to be irregular migrants would be returned on the basis of readmission agreements. For those found to be refugees, EU Member States could offer durable solutions, on a voluntary basis.¹⁰⁰³ In the aftermath of the Cap Anamur upheaval,¹⁰⁰⁴ the idea was further elaborated and eventually emerged in a public

1001 UNHCR, Three-Pronged Proposal, June 2003, available at: <http://www.unhcr.org/refworld/pdfid/3efc4b834.pdf>.

1002 UNHCR, A Revised 'EU Prong' Proposal, December 2003, at: <http://www.unhcr.org/refworld/pdfid/400e85b84.pdf>.

1003 Deutsche Presse Agentur, 19.07.2004 and Frankfurter Allgemeine Zeitung, 19.07.2004.

1004 In the summer of 2004, a German NGO vessel, the Cap Anamur rescued some 40 asylum seekers/migrants in the Mediterranean. The Italian authorities requested the flag State to take charge of the rescuees. Germany opposed and Italy eventually allowed disembarkation. However, most of the asylum seekers/migrants were directly returned, seemingly without a proper assessment of their asylum claims. Criminal proceedings were brought against the captain and the president of the NGO for abetting illegal immigration. Both have been absolved by the Agrigento Court on 07.10.2009:

document. In his 'Effective Protection for Refugees, Effective Measures against Illegal Migration',¹⁰⁰⁵ Otto Schily submitted that the scheme would be based on joint interception in the high seas and return to extraterritorial processing centres in North Africa. The centres would not provide full status determination, but only a form of simplified review, whereby those deemed to be refugees would either be transferred to "safe countries in the region of origin" or to the EU. Following the US Supreme Court's understanding in *Sale*, the proposal rested on the assumption that the prohibition of non-refoulement 'has no application on the high seas'.

The Hague Programme, adopted in November 2004, did not contain any official endorsement of any of these proposals. Instead, it invited the Commission to present a 'study, to be conducted in close consultation with the UNHCR, [to] look into the merits, appropriateness and feasibility of joint processing of asylum applications outside the EU territory, in complementarity with the Common European Asylum System and in compliance with the relevant international standards' (§1.3). The Commission plans to launch the study at the beginning of 2010.

1.2. Presentation

The Stockholm Programme, in a rather cryptic language, urges 'the Commission to explore [...] new approaches concerning access to asylum procedures targeting main transit countries, such as protection programmes for particular groups or certain procedures for examination of applications for asylum, in which Member States could participate on a voluntary basis' (§6.2.3.). It omits, however, the invitation to 'the Council and the Commission to develop methods to identify those who are in need of international protection in "mixed flows"' and the reference to 'taking forward the analysis of the feasibility and legal and practical implications of joint processing of asylum applications inside and outside the Union' earlier drafts of the Programme contained¹⁰⁰⁶.

Meanwhile, in the aftermath of the Italian push-backs in the summer of 2009¹⁰⁰⁷, former JLS Commissioner Barrot mentioned in an interview that he would suggest to Libya that it opens 'reception points' for asylum seekers in its territory¹⁰⁰⁸. Elaborating on this idea, the French delegation has tabled a proposal to resolve the 'migration situation in the Mediterranean', through the establishment of 'a partnership with migrants' countries of

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- 1005 <http://cerca.unita.it/data/PDF0114/PDF0114/text42/fork/ref/09281jrs.HTM?key=cap+anamur&first=1&orderby=1>.
'Effektiver Schutz für Flüchtlinge, wirkungsvolle Bekämpfung illegaler Migration. Überlegungen des Bundesministers des Innern zur Errichtung einer EU-Aufnahmeeinrichtung in Nordafrika,' 09.09.2005, available at:
- 1006 http://www.proasyl.de/fileadmin/proasyl/fm_redakteure/Archiv/presseerl/Schily_ueberlegungen.pdf.
Draft Stockholm Programme, version of 16.10.2009, § 5.2.3. and version of 06.10.2009, § 5.2.2., available at: <http://www.statewatch.org/news/2009/oct/stockholm-draft-presidency-programme.pdf>.
- 1007 UNHCR, 'Official: Italy to continue returning would-be immigrants to Libya,' 23.09.2009, available at: <http://unhcr-eu.se/official-italy-to-continue-returning-would-be-immigrants-to-libya/>; 'Follow-up from UNHCR on Italy's push-backs,' 12.05.2009, available at: <http://www.unhcr.org/4a0966936.html>; 'UNHCR interviews asylum seekers pushed back to Libya', 14.07.2009, available at: <http://www.unhcr.org/4a5c638b6.html>. An application has been lodged with the ECtHR by some of the migrants affected: *Hirsi v Italy*, Appl. No. 27765/09. See also UNHCR, 'Hirsi and Others v. Italy – Submission by the Office of the UNHCR' February 2010, available at: <http://www.unhcr.org/refworld/type,AMICUS,,,4b97778d2,0.html>.
- 1008 'Barrot veut des points d'accueil pour les migrants,' Europe1, 12.07.2009, available at: <http://www.europe1.fr/Info/Actualite-France/Politique/Barrot-veut-des-points-d-accueil-pour-les-migrants/>; 'Les dernières propositions de Jacques Barrot ne sont pas convenables,' France Terre d'Asile, 13.07.2009, available at: <http://www.france-terre-asile.org/index.php/component/content/article/1166>; 'Barrot wants reception points in Libya for asylum seekers,' ECRE Weekly Bulletin, 17.07.2009, available at: http://www.ecre.org/files/ECRE_Weekly_Bulletin_17_July_2009.pdf.

origin and of transit, enhancing Member States' joint maritime operations and finding innovative solutions for access to asylum procedures¹⁰⁰⁹.

The proposal is three-folded. In the first place, 'a partnership with third countries of transit and of origin based on reciprocal requirements and operation support' is to be concluded. It is proposed that 'a strong political dialogue' be maintained with both Libya and Turkey, in particular, 'on existing migration routes'. Within this framework, 'the European Union must issue a firm reminder of its requirements while offering its support to those countries' operational capacities'. It is envisaged that practical cooperation be reinforced in the fields of external borders monitoring and the fight against illegal immigration and organised crime. To that effect, the French delegation proposes that readmission agreements be concluded by the EU with these countries that Libya be led to the definition of its Search and Rescue Area and that European immigration liaison officers be stationed in their territories. In exchange, 'their efforts may be accorded appropriate support via the various Community resources'.

The second prong of the initiative aims at 'enhancing joint maritime operations at the EU's external borders'. In this regard, 'FRONTEX's modus operandi in the Mediterranean should be reviewed', so that the Agency can duly intervene at all three levels of action deemed fundamental 'to cope with crisis situations at the maritime borders'. Maritime intervention by the coastal State of departure is considered 'the most relevant', as it happens the 'closest to the illegal immigrants' place of embarkation'. Conversely, high sea intervention is deemed with the potential to create a pull factor and attract migrants 'in order to "provoke" their rescue'. It is, therefore, proposed that air surveillance patrols take over maritime operations at this level. Maritime interception in European waters would complement the other two levels of intervention, being considered 'an effective means of preventing illegal disembarkations and subjecting the intercepted persons to the standard legal procedures'. For these purposes, FRONTEX should be allocated appropriate resources that it could use 'to help finance the whole of this chain of intervention'. This part of the strategy would be supported by a comprehensive return policy, in which FRONTEX and EU funds would play a key role.

The final leg of the French initiative deals with 'innovative solutions concerning asylum'. It is stated that '[e]very care must be taken to ensure that persons apprehended during interceptions or rescues at sea are not exposed either directly or indirectly, in the country to which they are to be repatriated, to the risk of any punishment or treatment which violates the provisions of the [ECHR]. Such persons must be given a genuine opportunity to request and – if a need is established – to obtain international protection'. Two alternatives are proposed. Either an 'ad hoc protection programme' is started in Libya with the participation of the UNHCR and the IOM and the financial support of the EU, or the possibility is offered to lodge asylum applications at the EU Member States' embassies in that country.

The ad hoc protection programme would suppose that persons intercepted at sea under the second prong of the proposal be returned to Libya for processing. UNHCR would be in charge of establishing protection needs. '[S]pecial consideration would have to be given to the situation of such persons and to the guarantees which would be accorded to them in the first country of refuge while their applications were being examined, supported if

1009 Migration situation in the Mediterranean: establishing a partnership with migrants' countries of origin and of transit, enhancing Member States' joint maritime operations and finding innovative solutions for access to asylum procedures, Council doc. 13205/09, 11.09.2009 [Migration situation in the Mediterranean hereinafter].

necessary by the IOM'. The EU, 'in accordance with procedures yet to be determined and within the framework of resettlement operations, would undertake to receive persons recognised as refugees and requiring resettlement on a long-term basis'.

Thereafter, Italy has joined France in this initiative and the proposal was formally submitted to the President of the European Council for further discussion in view of the adoption of the Stockholm Programme¹⁰¹⁰. The Brussels European Council of October 2009 echoes the proposal, calling for a reinforcement of FRONTEX and the intensification of 'the dialogue with Libya on managing migration and responding to illegal immigration, including cooperation at sea, border control and readmission'. Nonetheless, the Presidency also reminds that interceptions should be carried out 'with due regard to ensuring protection for those in need who travel in mixed flows, in accordance with international law'¹⁰¹¹. In February 2010, the Council conclusions on '29 measures for reinforcing the protection of the external borders and combating illegal immigration' have provided renewed support to this initiative¹⁰¹².

The Commission, in response, has issued two proposals, one to amend the FRONTEX Regulation, enhancing the powers of the Agency (at note 111 above), and another one for a Council Decision supplementing the SBC as regards the surveillance of the sea external borders, containing guidelines for FRONTEX-coordinated operations. The second proposal has been adopted by the Council on 26 April 2010 (at note 124 above). According to article 1 of the Decision, joint maritime surveillance is governed by the rules laid down in Part I to the Annex. 'Those rules and the non-binding guidelines laid down in Part II to the Annex shall form part of the operational plan drawn up for each operation coordinated by the Agency'. The Annex, in turn, makes clear that '[t]he especial needs of [...] persons in need of international protection [...] shall be considered throughout all the operation' (§1.3). In particular, the principle of non-refoulement should be observed every time (§ 1.2). The Annex then proceeds to describe when and how interception powers should be used in its legally-binding Part I. As SAR situations may arise in the course of surveillance operations, Part II of the Annex, 'reproduc[ing] and clarify[ing] international and Community rules that already exist' in this regard¹⁰¹³, attempts at establishing a system to determine the port of disembarkation, but without legally-binding effect.

1.3. Assessment

1.3.1. Practical Obstacles

Both the Caribbean interdiction programme and the Pacific Solution have proven prohibitively costly. The safe haven in Guantanamo Bay was closed down less than a year after inception. 'Regarding costs, the US found [the] scheme [...] to be very expensive'¹⁰¹⁴. The Australian experience shows that any savings from reduced processing upon arrival have to be relocated into the off-shore scheme together with considerable additional disbursement. 'The Department of Immigration and Citizenship expended \$289 million between September 2001 and June 2007 to run the Nauru and Manus [Off-shore

1010 Letter of S. Berlusconi and N. Sarkozy to F. Reinfeldt of 23.10.2009 (on file with the authors).

1011 Presidency Conclusions, European Council 29-30 October 2009, Council Doc. 15265/09, 30.10.2009, § 40.

1012 29 measures for reinforcing the protection of the external borders and combating illegal immigration, Council conclusions, Brussels 25-26 February 2010.

1013 Explanatory Memorandum, Commission proposal for FRONTEX Guidelines, COM (2009) 658 final, 27.11.2009, § 5.2.

1014 IGC Secretariat, Reception in the Region of Origin: Draft Follow-Up to the 1994 Working Paper, August 1995, p. 27.

Processing Centres]¹⁰¹⁵. From fiscal year 2002/3 to fiscal year 2005/6, the Pacific Solution represented a net loss of \$900 million for the Australian taxpayer¹⁰¹⁶.

Alongside expenses, the 'New Vision for Refugees' paper identified other major obstacles the feasibility of off-shore processing schemes similar to the Italian-French proposal would encounter. Any such initiatives would 'require considerably more international co-operation on refugees than has been witnessed in recent decades and an international confidence in collectively managing problems'. Yet, Several refugee-hosting countries have already opposed similar proposals when they were consulted in 2003 in the framework of the UNHCR Convention Plus initiative¹⁰¹⁷. In a meeting with UNHCR in September 2004, North African states showed clear resistance to collaborate in the development of off-shore processing schemes¹⁰¹⁸. In July 2009, Libya was offered to start a dialogue with the European Commission on cooperation to jointly manage mixed migration flows, which it has not yet accepted¹⁰¹⁹. If, in addition, Europe is to 'receive persons recognised as refugees and requiring resettlement on a long-term basis', the concrete 'framework of resettlement operations' has first to be established. The development of an intra-EU burden-sharing mechanism seems to be a precondition for any such program to succeed. As referred to above, experience shows, however, that resettlement has remained an underdeveloped component of the EU asylum policy so far. Be it as it may, ultimately, '[t]he main risk is that it will not be possible to provide [abroad] a level of protection that is sufficient for the courts in Europe to recognise the protection as sufficient to safeguard human rights'¹⁰²⁰. Material difficulties are aggravated in the French case by Libya's poor human rights record. The fact that the country is not a party to the Geneva Convention, nor to the ECHR, that it conducts no refugee determination procedures itself, and that, although UNHCR's presence in the country is tolerated, it entertains no official co-operation with the Office, magnifies practical concerns.

1.3.2. Legal Concerns

It is not clear from the Italian-French proposal who would be considered responsible for those intercepted and repatriated to Libya. Under international law¹⁰²¹, 'no State can avoid responsibility by outsourcing or contracting out its obligations, either to another State, or to an international organisation'¹⁰²². Cooperation with Libya would not exonerate EU Member States from their duties under the principle of non-refoulement or the right to leave any country in order to seek asylum. 'Where States establish [...] international agreements to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the [ECHR] if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such [agreements]'¹⁰²³. In addition, '[i]n so far as any liability under the Convention is or may be incurred, it is liability incurred

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- 1015 'Last refugees in Nauru,' Ministry for Immigration and Citizenship, Press Release, 08.02.2008.
1016 M. Kingston, 'Terror, boat people and getting old,' The Sidney Morning Herald, 15.05.2002, available at: <http://www.smh.com.au/articles/2002/05/15/1021415009323.html>.
1017 UNHCR, Convention Plus/Forum Briefing, 07.03.2003, internal summary by the Department of International Protection, quoted by G. Loescher and J. Milner, op. cit., p. 604.
1018 A. Betts, 'Towards a Mediterranean Solution? Implications for the Region of Origin,' IJRL (2006), p. 661.
1019 Commission Working Paper, First Annual Report on Immigration and Asylum, SEC(2010) 535 final, 06.05.2010, p. 31.
1020 New Vision for Refugees, p. 4.
1021 ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts 2001, UNGA A/56/49(Vol.I)/Corr.4.
1022 G. S. Goodwin-Gill, 'The Extraterritorial Processing of Claims to Asylum or Protection : The Legal Responsibilities of States and International Organisations,' U.T.S. Law Review (2007), p. 34.
1023 ECtHR, T.I. v UK (Dec.), Appl. No. 43844/98, 07.03.2000 and K.R.S. v UK (Dec.), Appl. No. 32733/08, 02.12.2008, p. 15.

by the Contracting State [...]'¹⁰²⁴. The fact that Libya, with which FRONTEX and EU Member States would collaborate, is not a Party to the ECHR precludes its liability under that instrument. Independent responsibility of each EU Member State participating in the scheme would subsist, 'where the person[s] in question had suffered or risk suffering a flagrant denial of the guarantees and rights secured to [them] under the Convention'¹⁰²⁵. Nor would the EU Member States participating in the French proposal be able to eschew responsibility under the ECHR by transferring functions to the UNHCR, the IOM or FRONTEX. 'Absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention: the guarantees of the Convention could be limited or excluded at will thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards'¹⁰²⁶.

Also uncertain is the group addressed by the Italian-French proposal. The impression is that all persons intercepted by the Member States, in the high seas or in territorial waters of the participating States, presumably with the intervention of FRONTEX, would be repatriated to Libya, where 'the UNHCR would be responsible for identifying persons in need of protection'.¹⁰²⁷ However, with regard to those who manage to enter the territorial waters of an EU Member State, selecting asylum seekers on the basis of their migration route for off-shore processing may amount to a penalty prohibited under article 31 GC. Recognising that the absence of travel documents or authorization are unrelated to protection needs, article 31(1) GC exonerates refugees from penalties related to their irregular entry. In general, such selection may also contravene article 3 GC, establishing that 'the Contracting Parties shall apply the provisions of [the Geneva] Convention to refugees without discrimination as to race, religion or country of origin'.

It is not specified in the proposal where those intercepted and repatriated to Libya would be accommodated. But as the ultimate aim of the program is to prevent irregular movement, it is conceivable that its drafters envisaged reception centres in Libya to be closed. This entails large-scale detention. The extraterritorial applicability of the ECHR having being recognised¹⁰²⁸, the impossibility to observe article 5 ECHR's requirements in practice should prompt the abandonment of the initiative. The ECHR applies in international waters too¹⁰²⁹. Retention of boat people at sea, transfer to official vessels of the intercepting State or escort to the point of departure against free will, as the FRONTEX Guidelines suggest, constitutes a restriction on physical freedom that may well amount to unlawful detention, unless effective legal safeguards and prompt judicial review can be introduced¹⁰³⁰.

It is not known whether the French proposal envisages transfers to Libya to be automatic. Should that be the idea, EU Member States would risk incurring in direct and indirect breaches of the principle of non-refoulement with regard to those claiming a 'well-founded fear' of persecution or a 'real risk' of ill treatment in Libya or caused by the onwards deportation from Libya to 'the frontiers of territories where [their] life or freedom would be threatened'. According to the legally-binding part of the guidelines for FRONTEX-led operations, '[t]he persons intercepted or rescued shall be informed in an appropriate way so that they can express any reasons for believing that disembarkation in the proposed

¹⁰²⁴ ECtHR, *Saadi v UK*, 37201/06, 28.02.2008, § 126.

¹⁰²⁵ EComHR, *WM v Denmark*, Appl. No. 17392/90, 14.10.1992.

¹⁰²⁶ ECtHR, *Bosphorus v Ireland*, Appl. No. 45036/98, 30.06.2005, § 154.

¹⁰²⁷ Migration situation in the Mediterranean, p. 6.

¹⁰²⁸ ECtHR, *Al-Saadoon and Mufdhi v UK*, Appl. No. 61498/08, 02.03.2010.

¹⁰²⁹ ECtHR, *Women on Waves*, Appl. No. 31276/05, 03.02.2009.

¹⁰³⁰ ECtHR, *Rigopoulos v Spain*, Appl. No. 37388/97, 12.01.1999; *Medvedyev v France*, Appl. No. 3394/03, 10.07.2008.

place would be in breach of the principle of non-refoulement' (§1.2 Part I). As established in the non-binding Part of the Annex, the coordination centre would be informed of the presence of such persons and would then convey that information to the competent authorities of the Member State hosting the operation (§2.2 Part II). No further safeguards or procedural arrangements have been introduced therein. However, according to article 3 ECHR, read in conjunction with article 13 ECHR, an 'arguable claim' that the transfer to Libya would entail such risks requires access to an 'effective remedy'¹⁰³¹ Inter alia, 'the notion of an effective remedy [...] requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible [...]. Consequently, it is inconsistent with article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention'¹⁰³². In these cases, appeals have to be endowed 'with automatic suspensive effect'¹⁰³³. Because onboard screening would not satisfy these requirements¹⁰³⁴, the claimants would have to be taken before the competent courts in Europe before any transfer to Libya takes place. This would translate in a considerable duplication of efforts, rendering the management of such a scheme overly complex. Two procedures would need to be run, one in Europe to decide on the appropriateness of the transfer to Libya and one in Libya to decide on the protection needs of the claimants.

Automatism of the transfers to Libya may breach the notion of an effective remedy on a different account too. The Strasbourg Court has indicated that expulsion orders have to be served in writing, after an individual examination of the case, following a legal procedure previously established by law, stating the reasons and indicating the means and conditions to appeal, before deportation occurs¹⁰³⁵. The opposite would amount to an arbitrary use of force, and, for our purposes, also to the collective expulsion of the migrants concerned in violation of the Convention¹⁰³⁶.

These reasons should induce to the refusal of the Italian-French proposal. Member States should not embark on a system that would hinder the fulfilment of their legal obligations under EU and international law. Some observers have suggested that 'if centres are to be established, they should first of all be established within the European Union and transported only as a model if shown to work satisfactorily'¹⁰³⁷. In the design of such a model, the experience Romania is gathering through its Emergency Transit Centre, providing for temporary evacuation to Romania of persons in urgent need of international protection and their onward resettlement¹⁰³⁸, could be adapted and extended. But all the legal and practical preconditions for the system to deliver should be put in place first. We believe, however, that reinforced and improved systems of territorial processing would be a better investment. It should be understood that most EU Member States' asylum systems, if properly managed and resourced, could deal effectively with the caseloads they face.

¹⁰³¹ Inter alia, ECtHR, *Jabari v Turkey*, Appl. No. 40035/98, 11.07.2000, § 48.

¹⁰³² ECtHR, *Conka v Belgium*, Appl. No. 51564/99, 05.02.2002, § 79.

¹⁰³³ ECtHR, *Gebremedhin v France*, Appl. No. 25389/05, 26.04.2007, § 66.

¹⁰³⁴ On the scepticism of the UNHCR towards onboard processing see: S. Blay, J. Burn and P. Keyzer, 'Interception and Off-shore Processing of Asylum Seekers : The International Law Dimensions,' *U.T.S. Law Review* (2007), p. 17.

¹⁰³⁵ ECtHR, *Abdolkhani and Karimnia v Turkey*, Appl. No. 30471/08, 22.09.2009.

¹⁰³⁶ ECtHR, *Conka v Belgium*, Appl. No. 51564/99, 05.02.2002.

¹⁰³⁷ PACE, Assessment of transit and processing centres as a response to mixed flows of migrants and asylum seekers, C Jonker Rapporteur, 13.06.2007, Doc. 11304, § 61.

¹⁰³⁸ UNHCR, IOM and the Government of Romania, 'Emergency Transit Center (ETC) officially opened in Timisoara, Romania,' Joint press release, 12.03.2009, available at: <http://www.unhcr-budapest.org/index.php/news/107-emergency-transit-center-etc-officially-opened-in-timisoara-romania>; Agreement between the Government of Romania and the Office of the United Nations High Commissioner for Refugees and the International Organization for Migration Regarding Temporary Evacuation to Romania of Persons in Urgent Need of International Protection and their Onward Resettlement, 08.05.2008, available at: <http://www.unhcr.org/refworld/pdfid/4a7c221c2.pdf>.

1.4. Recommendations

The selection of addresses shall neither be discriminatory nor amount to a penalty, as articles 3 and 31 GC have to be observed. Detention must comply with article 5 ECHR levels, both at sea and upon arrival to Libya. Transfers to that country cannot be automatic, since the procedural guarantees attached to protection against refoulement, as established in the ECHR and the EUCFR, must be fulfilled. In this light, considering the overly complex system that would have to be developed, it is highly uncertain that the initiative can be pursued in practice.

On one hand, 'the creation of centres outside Europe would [...] appear highly problematic'¹⁰³⁹, as many doubts exist concerning the ability of national protection programmes to comply with international and EU legal standards. On the other hand, EU Member States should not create situations in which the fulfilment of their obligations under international and EU law cannot be guaranteed. On this account, the initiative, as currently conceived of, shall be abandoned.

The preferred line of action is the investment in better managed and better resourced asylum domestic systems in Europe.

2. PROTECTED-ENTRY PROCEDURES

2.1. Background

In conformity with Tampere's call to 'offer guarantees to those who seek protection in or access to the European Union' (§3), the Commission launched a Study on the feasibility of processing asylum claims outside the EU against the background of the common European asylum system and the goal of a common asylum procedure¹⁰⁴⁰. The study engaged in the scrutiny of the various protected-entry procedures employed by the EU Member States at the time and identified different avenues for policy approximation, ranging from the maintenance of individual initiatives to the creation of Schengen Asylum Visas. Subsequently, the EC Thessaloniki conclusions invited the Commission to examine 'all parameters in order to ensure more orderly and managed entry in the EU of persons in need of international protection' (§26). The Italian Presidency organised a seminar in October 2003, where the feasibility study was submitted to discussion. '[I]t became clear from the Rome Seminar and from Member States' relevant legislative practice that with regard to the potential of Protected-Entry Procedures, there is not the same level of common perspective and confidence among Member States as exists vis-à-vis resettlement'. The Commission announced, accordingly, that it did not 'plan to suggest the setting up [...] of an EU Protected Entry Procedure mechanism as a self standing policy proposal'. It noted, however, that 'in certain circumstances, a protected entry in the EU of

1039 PACE, Assessment of transit and processing centres as a response to mixed flows of migrants and asylum seekers, C Jonker Rapporteur, 13.06.2007, Doc. 11304, § 61; PACE, Resolution 1569 (2007), Assessment of transit and processing centres as a response to mixed flows of migrants and asylum seekers.

1040 Study on the feasibility of processing asylum claims outside the EU against the background of the common European asylum system and the goal of a common asylum procedure, 2003 [PEP Feasibility Study hereinafter], available at: http://ec.europa.eu/justice_home/doc_centre/asylum/studies/doc_asylum_studies_en.htm.

persons with immediate and urgent protection needs could nevertheless be procedurally facilitated [...], though at the full discretion of individual Member States [...]¹⁰⁴¹.

After wide consultations of the relevant stakeholders in the 2007 Green Paper process, the question of how to address mixed flows and 'to establish effective protection-sensitive entry management systems' has resurfaced. In this connection, the Commission has promised to 'examine ways and mechanisms capable of allowing for the differentiation between persons in need of protection and other categories of migrants before they reach the border of potential host States, such as Protected Entry Procedures and a more flexible use of the visa regime, based on protection considerations'¹⁰⁴².

2.2. Presentation

Within the new approaches for the Commission to explore concerning access to asylum procedures, The Stockholm Programme calls for 'certain procedures for examination of applications for asylum' to be introduced in 'main transit countries [...], in which Member States could participate on a voluntary basis' (§6.2.3). A previous draft invited 'the Council and the Commission to develop methods to identify those who are in need of international protection in "mixed flows" [...]'¹⁰⁴³, and a still earlier version expressly called on the EU institutions 'to examining the scope for new forms of responsibility for protection such as procedures for protected entry and the issuing of humanitarian visas'¹⁰⁴⁴.

The French delegation, in its proposal to 'establishing a partnership with migrants' countries of origin and of transit, enhancing Member States' joint maritime operations and finding innovative solutions for access to asylum procedures', as an alternative to setting up an ad hoc protection programme in Libya, has suggested the introduction of a protected-entry procedure from that country. The French delegation has invited the Commission to consider 'the possibility of introducing, in Member States' diplomatic representations in Libya, and with the logistical support of the European Asylum Support Office [...] a specific procedure for the examination of applications for asylum'¹⁰⁴⁵. The procedure 'would aim to identify applications which [...] did not appear to be manifestly unfounded. [...] Persons whose applications were not considered to be manifestly unfounded would be authorised to enter EU territory [...] in order to submit an application for asylum there'.

2.3. Assessment

to the feasibility study, a protected-entry procedure allows 'a third-country national [either] to approach the potential host State outside its territory with a claim for asylum or other form of international protection, [or] to be granted an entry permit in case of a positive response to that claim, be it preliminary or final'. The French proposal appears to be a hybrid between these two possibilities. It foresees the introduction at EU Member States' embassies in Libya of a screening procedure to detect 'manifestly founded' claims or else applications which 'did not appear to be manifestly unfounded'. This may pose problems of correlation with regard to the concept of 'arguable claims' under the ECHR. The term 'arguable' is not readily identifiable with the claim not being 'manifestly ill-founded', since at times the Strasbourg Court has sustained the arguability of a claim rejecting its foundedness only afterwards. In T.I., for instance, the Court considered the claim arguable,

¹⁰⁴¹ Improving access to durable solutions, § 35.
¹⁰⁴² Policy Plan on Asylum, § 5.2.3. (emphasis in original).
¹⁰⁴³ Draft Stockholm Programme, 16.10.2009, § 5.2.3.
¹⁰⁴⁴ Draft Stockholm Programme, 06.10.2009, § 5.2.2.
¹⁰⁴⁵ Migration situation in the Mediterranean, p. 7.

because the case raised concerns about the risks faced upon expulsion, although it was declared inadmissible in the end.¹⁰⁴⁶

The study also suggests that these procedures, which have been running under different forms in the majority of the Member States of the EU-15, can be offered 'either as an exclusive channel to protection in a host State, as a complementary channel, or as an exceptional practice to be activated ad hoc'. It ensues from the text of the proposal that the French delegation envisages the procedure as an exclusive channel to access the EU. Otherwise, it would detract from the deterrent effect it pursues. Yet, it appears that exclusivity 'would shift rather than solve any problem of abuse'. '[P]ersons arriving as asylum applicants today could also chose to simply go underground tomorrow, and bypass any form of system whatsoever'. The development of this mechanism 'can only be brought about if protection seekers find it favourable to select protected-entry procedures over the smuggling option'. It may be worthy to remember that spontaneous asylum seekers could not be penalized on account of their illegal entry in accordance with article 31 GC.¹⁰⁴⁷

The first thing to decide is the definition of the beneficiaries under this scheme. The French proposal addresses the 'examination of applications for asylum'. Under article 2(b) of the current Procedures Directive, '[a]ny application for international protection is presumed to be an application for asylum, unless the person concerned explicitly requests another kind of protection that can be applied for separately'. Thus, subsidiary protection, unless claimed for explicitly and separately, should be understood as being covered by the definition. In addition, it should be taken into account that the Qualification Directive establishes, in articles 13 and 18 that Member States shall grant refugee status or subsidiary protection status to a third country national or a stateless person, who qualifies for it in accordance with the Directive. For the sake of legal consistency, the introduction of additional qualification criteria for the purposes of protected-entry procedures, based on family ties, linguistic abilities or previous visits to the country concerned, should be excluded.¹⁰⁴⁸

The 'procedures yet to be defined'¹⁰⁴⁹, according to which entry from the EU Member States' embassies in Libya would be allowed, as they translate rights individuals directly derive from EU law, would have to be established in a way that does not 'render practically impossible or excessively difficult the exercise of [the] rights [concerned]'¹⁰⁵⁰. Such legislation would also have to make possible the related 'right to effective judicial protection' that article 47 EUCFR guarantees¹⁰⁵¹. Several options could be explored.

(1) Full assessments of asylum claims should not be conducted at embassies. The difficulties of providing access to an effective remedy abroad have already been addressed in the framework of off-shore processing schemes above. If the procedural requirements of EU Law are to be guaranteed, access to information in the adequate language, legal aid, counselling, representation and access to an appeal, have to be ensured.

(2) A better option would, thus, be to grant LTV visas, according to the relevant provisions of the CCV, to those alleging a right to seek asylum, a 'real risk' of ill treatment or a 'well founded fear' of persecution. A valuable alternative to smuggling would be introduced in this case.

¹⁰⁴⁶ ECtHR, *T.I. v UK*, Appl. No. 43844/98, 07.03.2000.

¹⁰⁴⁷ PEP Feasibility Study, p. 61-63.

¹⁰⁴⁸ This is what most countries have done in their protected entry procedures in the past ; see PEP Feasibility Study, p. 73 ff.

¹⁰⁴⁹ Migration situation in the Mediterranean, p. 7.

¹⁰⁵⁰ ECJ, *Rewe*, 158/80, [1981] ECR 1805, § 5; *Peterbroeck*, C-312/93, [1995] ECR I-4599, § 12.

¹⁰⁵¹ ECJ, *Verholen and Others*, C-87/90 and C-89/90, [1991] ECR I-3757, § 24.

(3) Otherwise, if pre-screening proceedings were to be devised in order to establish the arguability of a claim prior to the delivery of a visa for entry, further resources would have to be mobilised. Recourse could be had to NGOs, the UNHCR and the EASO for the purpose of providing legal counselling, translation and representation in situ. Claims could be lodged in person or by post. Interviews should be held by the 'competent national authorities' for the guarantees of effective remedies to be ensured. This could entail the secondment to embassies and consulates of personnel from national asylum authorities¹⁰⁵² or be undertaken by consulate officials themselves, if sufficient prior training is provided. '[T]he guarantees accorded to such persons in the country concerned while their applications [are] examined'¹⁰⁵³ would have to reach the level of 'effective protection' discussed earlier. To avoid imbalances that may amount to discrimination between asylum applicants abroad and spontaneous arrivals to Europe the level of proof could be adapted. In any event, appeals of negative decisions would remain a major concern¹⁰⁵⁴. Compliance with article 13 ECHR and 47 EUCFR require that real access, in law and in practice, to effective remedies be made available in every individual case. This may ultimately entail that entry has to be allowed with a LTV visa for the purpose of judicial review, if no other meaningful option remains.

(4) An intermediate possibility would be to grant entry on LTV visas on the basis of a differentiated presumption. For those still in their country of origin claiming a right to seek asylum or a threat of refoulement, a LTV visa could be delivered on the assumption that they run such a risk. It would be for the asylum authorities of the Member States concerned to disprove the allegation. On the contrary, those claiming a right to (leave to seek) asylum from third countries would have to prove, prior to a LTV visa being delivered, that their life or physical integrity are in peril.

Since international and EU law obligations can be engaged from abroad, in a context of prevailing extraterritorial controls, to ensure that the right to seek asylum and to non-refoulement remain accessible in law and in practice, a common European system of protected-entry procedures should be codified to provide a safe alternative to illegal entry. Article 78(2)(g) TFEU provides the Council and the European Parliament with the legal basis to adopt legislative acts 'for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection'. It would further appear that such measures shall be adopted as an integral part of the CEAS that the Union has to develop. In any event, such procedures would offer a complementary means of access to asylum that would not substitute for the provision of adequate protection to spontaneous arrivals.

2.4. Recommendations

From Article 78(2)(g) TFEU, it appears that some sort of mechanism shall be introduced 'for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection'. Because international and EU law obligations in regard of refugees and asylum seekers can be engaged extraterritorially, in an environment of pervading pre-border controls, the codification of a system of protected-entry procedures to ensure access to protection in a safe and legal manner is advisable.

¹⁰⁵² The Swiss model provided an example of the secondment of asylum decision-makers abroad; see PEP Feasibility Study, p. 129 ff. Yet, the model is currently under discussion; see: Rapport relatif à la modification de la loi sur l'asile et de la loi fédérale sur les étrangers, 19.12.2009., 'Suppression de la possibilité de présenter une demande d'asile à l'étranger,' § 1.3.3. (we thank F. Maiani for this information).

¹⁰⁵³ Migration situation in the Mediterranean, p. 7.

¹⁰⁵⁴ The Swiss Refugee Council has argued that the possibility to appeal from abroad is not effective, in: PEP Feasibility Study, p. 135.

Several arrangements could be envisaged:

Full assessments of asylum claims should be excluded. The difficulties of full off-shore processing have already been highlighted with regard to national protection programmes.

LTV visas could be delivered to those alleging a 'real risk' of ill treatment or a 'well founded fear' of persecution. This option would best accommodate protection concerns, but may render pre-border migration controls redundant.

LTV visas could be granted to arguable claims. Pre-screening proceedings would have to be introduced in conformity with relevant procedural standards under international and EU law, including effective remedies. As with the first option, practical and legal difficulties to ensure effective remedies may lead to the consideration of the fourth alternative.

LTV visas could be issued on the basis of a differentiated presumption. Claims submitted from the country of origin would be presumed arguable, unless the asylum authorities of the Member State concerned disprove it. Claims submitted from third countries would be presumed unfounded, unless the applicant produces proof of the contrary.

In any event, these procedures must remain complementary to spontaneous arrivals.

3. A PROPOSAL FOR A COMPREHENSIVE APPROACH TO ACCESS: PROTECTION-SENSITIVE ENTRY MANAGEMENT SYSTEMS AT ALL STAGES OF THE REFUGEE FLOW

Several actors have advocated for the introduction of protection-sensitive components in border management protocols. The UNHCR's '10-Point Plan of Action', addressing mixed migration flows, provides valuable guidance on this point¹⁰⁵⁵. In some countries, NGOs work in tandem with the UNHCR arranging with border guards for the independent monitoring of border controls, at the external border and in its immediate vicinity¹⁰⁵⁶. Nonetheless, the international protection implications of extraterritorial actions remain largely unchecked. In the 16 October 2009 draft, The Stockholm Programme invited 'the Council and the Commission to develop methods to identify those who are in need of international protection in "mixed flows"' as part of the external dimension of asylum (§5.2.3). The final version, however, relays on the EASO for that task, and solely in the context of joint maritime patrols, requesting it 'to cooperate with FRONTEX wherever possible'(§5.1). Considering the wording and the extension of article 78(2)(g) TFEU, the fact that the Asylum Agency will be endowed with no power to pass legally binding measures for this purpose and that it has only been entrusted with the task of developing techniques to differentiate asylum seekers travelling in mix flows when they find

¹⁰⁵⁵ UNHCR, *Refugee Protection and Mixed Migration: A 10-Point Plan of Action*, (revision) January 2007, available at: <http://www.unhcr.org/refworld/pdfid/45b0c09b2.pdf>; *Implementing the Ten-Point Plan of Action in Southern Europe: Activities Undertaken by UNHCR to Address Mixed Migration in the Context of the Mediterranean/Atlantic Arrivals*, available at: <http://www.unhcr.org/refworld/pdfid/452b6f764.pdf>

¹⁰⁵⁶ Tripartite Memorandum of Understanding on Modalities of Mutual Co-operation and Coordination to Support the Access of Asylum Seekers to the Territory of, and the Asylum Procedures of the Republic of Hungary, 28.12.2006, available at : http://www.unhcr-budapest.org/hungary/images/stories/news/docs/03_Access%20to%20territory/3_2_tripartite%20agreement_HUN/HUNtripartiteENG.pdf. The 2007 report: *Asylum Seekers' Access to Territory and to the Asylum Procedure in the Republic of Hungary* is accessible on: http://helsinki.webdialog.hu/dokumentum/Border_Monitoring_Report_2007_ENG_FINAL.pdf.

themselves already 'at' the external border of the EU Member States constitute serious limitations¹⁰⁵⁷.

There is a pressing need for a comprehensive approach to the issue of access to international protection in the EU, which requires the prior acknowledgment by the EU Member States of the mix character of the migratory flows to which they are confronted and the recognition of extraterritorial protection-related obligations that may be engaged by the actions or omissions of their agents when they operate abroad. The rights of refugees and asylum seekers travelling in mix flows should not be compromised by the extraterritorial intervention of the EU Member States. Those rights should be taken into account at all the stages in which EU migration and/or border controls are carried out.

Comprehensiveness should be understood in two complementary ways. On the one hand, several layers of action should be contemplated so that the different levels in which EU intervention occurs are appropriately covered. At the same time, the management of refugee inflows should be carried out multilaterally, in 'partnership and cooperation with third countries'. The role other stakeholders could play should also be considered. Only a multilateral approach may lead to practical results. All relevant actors should thus be incorporated as partners to the process of border surveillance and migration control. Their contribution, especially in terms of monitoring and counselling, is essential.

Action should be deployed at three different fronts:

Engagement with the regions of origin and transit: A meaningful engagement with the regions of origin and transit may diminish the urge for displacement, if the root causes of forced migration are adequately addressed. In the design of Regional Protection Programs and, in particular, of the resettlement component it includes, the needs and capacities of the countries hosting large refugee populations should be fully taken into account in a spirit of shared responsibility. Only multilateral collaboration, incorporating an inter-agency factor, in close and continuous cooperation with the UNHCR and other relevant stakeholder organisations, may yield satisfactory results at this level.

The institutional framework The Hague Conference of International Private Law provides could be used to this end¹⁰⁵⁸. This proposal is consistent with the call in The Stockholm Programme to the EU institutions to furthering cooperation in civil matters within the framework of the Conference. The European Council urges, indeed, '[t]he Union [to] continue to support the Conference and [to] encourage its partners to ratify the conventions where the EU is or will become a Party or where all Member States are Parties' (§7.6). The European Council considers this to be 'very important with a view to interacting with third countries in a secure and legal environment' (§3.5.1). On this account, the EU could rely on the Hague Conference for the 'adopt[ion] [of] measures for a common European asylum system comprising: [...] partnership and cooperation with third countries for the purpose of managing the inflows of people applying for [international protection]', as mandated by article 78(2)(g) TFEU. The experience the Conference has earned through the years, assembling the EU and its Member States along with other countries in the South and achieving consensus in delicate matters affecting the rights of migrants, comes to its credit. The 1993 Convention on Protection of Children and Co-operation in Respect of

¹⁰⁵⁷ Position of the Council at first reading with a view to the adoption of the Regulation of the European Parliament and of the Council establishing a European Asylum Support Office, Council doc. 16626/09, 16.02.2010.

¹⁰⁵⁸ See note 157 above.

Inter-country Adoption constitutes a case in point¹⁰⁵⁹. The Convention was negotiated and ratified both by western countries and developing States through the intermediary of The Hague Conference. In addition, pursuant to its articles 6 to 11, it comprises a series of equitable arrangements with regard to its implementation, which is entrusted to duly accredited Central Authorities in each Signatory Party, appropriately staffed by qualified personnel, and fully competent to carry out the tasks required by the Convention in a proper way. Central Authorities are supposed, moreover, to co-operate among themselves for the purposes of the Convention. In view of the results achieved, and 'at regular intervals' in any case, '[t]he Secretary General of the Hague Conference [...] shall [...] convene a Special Commission in order to review the practical operation of the Convention'¹⁰⁶⁰, arbitrating among the Parties in case of conflicting positions. Entrusting the conduct of the negotiations and supervision of multilateral arrangements for the management of refugee inflows to a neutral actor seems a good way to ensuring parity among the several States involved.

Action at the external borders and beyond: The reinforcement of domestic asylum systems should prove the best option to manage mixed migration flows, providing effective access to international protection to those requiring it, while fairly dealing with non-refugee arrivals. The incorporation of protection-sensitive elements into the system of border and migration control is crucial. Training, monitoring and reporting of actions undertaken to ensure compliance with refugee law and human rights should be factored in the design of the Integrated Border Management System and the Global Approach to Migration the EU is progressively developing. All actors susceptible of encountering refugees in the course of their migration or border control activities should receive specific training in refugee law and human rights and work on clear instructions on how to handle asylum claims so that the EU Member States properly fulfil their obligations. In this respect, visas, carrier sanctions, ILOs, FRONTEX and RABIT legislation should be clearly streamlined. All the actors concerned should incorporate in their modus operandi clear instructions and legally-binding protocols with regard to the treatment of refugees and asylum seekers providing them with sufficient procedural guarantees. An obligation should be introduced for the EU Member States and its agents to report periodically on the concrete initiatives they undertake to ensure compliance with their international and EU protection obligations. As identified in the first part of the study, transparency and accountability in this area need to be reinforced to guarantee legal and democratic oversight. Referral to asylum authorities upon embarkation or disembarkation should be swift and adequate. Information arrangements and reception conditions should be appropriate to deal with the caseload concerned. The EASO, in close cooperation with the UNHCR and the relevant NGOs, should provide independent monitoring and legal and material assistance throughout the migration journey, not only at points of entry, but at every stage in which EU border or migration controls are conducted. The Asylum Agency, in addition, will provide a forum for exchanges among the actors involved, ensuring the coordination of the scheme. Against this background, Asylum Support Teams should be deployed not only where particular pressures are involved, but at any time joint patrols are launched. Where ILOs would be stationed, EU asylum experts should be seconded too. This will guarantee a harmonious approach to asylum seekers and the uniform application of the EU acquis.

Engagement with single asylum seekers: As an alternative to irregular arrivals, a system of protected-entry procedures could be established to ensure safe and legal access to refugee

¹⁰⁵⁹ Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption of 29 May 1993 [*International Adoption Convention* hereinafter], available at: http://www.hcch.net/index_en.php?act=conventions.text&cid=69.

¹⁰⁶⁰ Article 42 International Adoption Convention.

processing. Several alternatives have been outlined above. A balanced option would be to provide entry on the basis of a differentiated presumption that could always be reversed. For those in the country of origin, claiming a 'real risk' of ill treatment or a threat of refoulement, a visa should be delivered for the purpose of accessing asylum procedures in Europe, unless proof on the contrary is provided by the asylum authorities concerned. From those present in a third country, prior to a visa being delivered, the submission of sufficient proof of persecution or of a 'real risk' of ill treatment would be required. The system could be based on LTV visas in the short run and then turn into a system of Schengen asylum visas. Beneficiaries would have to be distributed evenly in Europe in accordance to a predetermined key ensuring fair responsibility-sharing. Family ties, cultural links and personal preference could also be taken into account to guarantee the humane treatment of applicants and good integration prospects.

4. KEY FINDINGS

- The proposed Protected-Entry Procedures give rise to findings that are common to those arrived at with regard to the EU Resettlement Programme and Regional Protection Programmes. We refer back to them as presented above.
- As far as off-shore processing initiatives are concerned, such as the ad hoc protection programme in Libya that the French delegation has suggested, it is highly uncertain that the programme can be pursued in practice in accordance with international and EU law standards. Considering the overly complex system that would have to be developed for that purpose, the initiative should be abandoned.
- In the medium term, the preferred option is to develop a comprehensive approach to access to international protection in the EU, which incorporates protection-sensitive components into the system of border management and entry control at all its stages, recognising the mix character of migration flows and the extraterritorial applicability of human rights' obligations. Such an approach requires a multilateral management to be effective, conducted in partnership with the regions and countries of first asylum, the UNHCR and other relevant stakeholders.

5. RECOMMENDATIONS

5.1. Protected entry procedures

- From Article 78(2)(g) TFEU, it appears that some sort of mechanism shall be introduced 'for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection'. Because international and EU law obligations in regard of refugees and asylum seekers can be engaged extraterritorially, in an environment of pervading pre-border controls, the codification of a system of protected-entry procedures to ensure access to protection in a safe and legal manner is advisable.
- Several arrangements could be envisaged:
 1. Full assessments of asylum claims should be excluded. The difficulties of full off-shore processing have already been highlighted with regard to national protection programmes.
 2. LTV visas could be delivered to those alleging a 'real risk' of ill treatment or a 'well founded fear' of persecution. This option would best accommodate protection concerns, but may render pre-border migration controls redundant.
 3. LTV visas could be granted to arguable claims. Pre-screening proceedings would have to be introduced in conformity with relevant procedural standards under international and EU law, including effective remedies. As with the first option, practical and legal difficulties to ensure effective remedies may lead to the consideration of the fourth alternative.
 4. LTV visas could be issued on the basis of a differentiated presumption. Claims submitted from the country of origin would be presumed

arguable, unless the asylum authorities of the Member State concerned disprove it. Claims submitted from third countries would be presumed unfounded, unless the applicant produces proof of the contrary.

- In any event, these procedures must remain complementary to spontaneous arrivals.

5.2. National or ad hoc protection programmes

- The selection of addresses shall neither be discriminatory nor amount to a penalty, as articles 3 and 31 GC have to be observed. Detention must comply with article 5 ECHR levels, both at sea and upon arrival to Libya. Transfers to that country cannot be automatic, since the procedural guarantees attached to protection against refoulement, as established in the ECHR and the EUCFR, must be fulfilled.
- On this account, it is very uncertain that the idea of ad hoc protection programmes can be pursued in practice in compliance with international and EU law standards.
- The preferred line of action is the investment in better managed and better resourced asylum domestic systems in Europe.

5.3. Protection-Sensitive Entry Management systems

- In the medium term, the preferred option is to develop a comprehensive approach to access to international protection in the EU, which incorporates protection-sensitive components into the system of border management and entry control at all its stages, recognising the mixed character of migration flows and the extraterritorial applicability of human rights' obligations. Such an approach requires a multilateral management to be effective, conducted in partnership with the regions and countries of first asylum, the UNHCR and other relevant stakeholders.
- Action should be deployed at three levels:
 1. Engagement with the regions of origin and transit, possibly in a neutral forum.
 2. Action at the external borders and beyond, at all the stages of the refugee flow.
 3. Extraterritorial engagement with single asylum seekers.

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