The new Common European Asylum System: an analysis of the progress made by the European Union since the Geneva Convention on refugees of 1951
The new Common European Asylum System:
an analysis of the progress made by the European Union since the
Geneva Convention on refugees of 1951

RELATORE
Ch.mo Professore
Andrea Pierucci
CORRELATORE
Ch.ma Professoressa
Francesca Ferraro

CANDIDATA
Chiara De Capitani
MSI/00094

ANNO ACCADEMICO 2012/2013
**Table of Abbreviations**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>CEAS</td>
<td>Common European Asylum System</td>
</tr>
<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
</tr>
<tr>
<td>COREPER</td>
<td>The Permanent Representatives Committee (in the EU)</td>
</tr>
<tr>
<td>EAFSJ</td>
<td>European Area of Freedom, Security and Justice</td>
</tr>
<tr>
<td>EASO</td>
<td>European Asylum Support Office</td>
</tr>
<tr>
<td>EC</td>
<td>European Community</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
</tr>
<tr>
<td>ECRE</td>
<td>European Council on Refugees and Exiles</td>
</tr>
<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
</tr>
<tr>
<td>EP</td>
<td>European Parliament</td>
</tr>
<tr>
<td>ECSC</td>
<td>European Coal and Steel Community</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>FGM</td>
<td>Female Genital Mutilation</td>
</tr>
<tr>
<td>FRA</td>
<td>Fundamental Rights Agency</td>
</tr>
<tr>
<td>IDPs</td>
<td>Internally Displaced Persons</td>
</tr>
<tr>
<td>JHA</td>
<td>Justice and Home Affairs</td>
</tr>
<tr>
<td>LIBE</td>
<td>Civil Liberties, Justice and Home Affairs (EP Committee)</td>
</tr>
<tr>
<td>LGBT</td>
<td>Lesbians, Gay, Bisexuals and Transgenders</td>
</tr>
<tr>
<td>MEP</td>
<td>Member of the European Parliament</td>
</tr>
<tr>
<td>NGO</td>
<td>Non-Governmental Organisation</td>
</tr>
<tr>
<td>OJ</td>
<td>Official Journal (of the European Union)</td>
</tr>
<tr>
<td>TEU</td>
<td>Treaty on European Union</td>
</tr>
<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
</tr>
<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNHCR</td>
<td>United Nations High Commission for Refugees</td>
</tr>
</tbody>
</table>
Table of Cases

**Court of Justice**

C-26/62, *Van Gend en Loos*, judgment of 5 February 1963
C-6/64, *Costa v Enel*, judgment of 15 July 1964
C-397/01, C-403/01, *Bernhard Pfeiffer and Others v. Deutsches Rotes Kreuz*, judgment of 5 October 2004
C-465/07 *Elgafaji v Staatssecretaris van Justitie*, judgment of 17 February 2009
C-175/08, C-176/08, C-178/08 and C-179/08 *Aydin Salahadin Abdulla and others*, judgment of 2 March 2010
C-57/09, C-101/09, *Bundesrepublik Deutschland v B and D*, judgment of 9 November 2010
C-411/10, C-493/10, *N.S and Others and M.E and Others*, judgement of 21 December 2011
C-648/11, *MA, BT, DA v Secretary of State for the Home Department*, judgment of 6 June 2013
C-199/12, C-200/12, C-201/12, *Minister voor. Immigratie en Asiel v X*, pending

**European Court of Human Rights**

*Soering v. the United Kingdom*, 14038/88, judgment of 7 July 1989
*Conka v. Belgium*, 51564/99, judgment of 5 February 2002
*Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 13178/03, judgment of 12 October 2006
*Rahimi v. Greece*, 8687/08, judgment of 5 April 2011
*Hirsi Jamaal and Others v. Italy*, 27765/09, judgment of 23 February 2012
*S.F. and Others v Sweden*, 52077/10, judgement of 15 May 2012
Contents

Table of Abbreviations
Table of Cases

Introduction

CHAPTER I
The evolution of the right to Asylum since the Geneva Convention (1951) to the first phase of the Common European Asylum System (1999-2005)

1.1 Legal Framework

1.2 The first phase of the Common European Asylum System

1.3 Asylum eligibility in the European Union
  1.3.1 Introduction of temporary and subsidiary protection
  1.3.2 Weakening of the concept of persecution provided by the Convention of Geneva on refugees of 1951

1.4 International Protection in the European Union
  1.4.1 Introduction of new agents of protection
  1.4.2 Improvement and broadening of the rights recognized to international protection seekers by the European Union in comparison with the Geneva Convention of 1951
  1.4.3 Distinctions between beneficiaries of subsidiary protection and refugees
  1.4.4 International protection needs could arise "sur place"

1.5 Procedures for granting refugee status in EU countries
  1.5.1 Procedural guarantees
  1.5.2 Procedures at first instance and common standards for the application of certain concepts an practices
  1.5.3 The concepts of "safe third country" and "safe third country of origin" and "first country of asylum"
  1.5.4 The right to appeal a negative decision on an asylum application

1.6 Reception conditions for asylum applicants
  1.6.1 Benefits and Rights granted to asylum applicants during the examination of their application
  1.6.2 Freedom of movement of asylum applicants

1.7 The Dublin II Regulation and Eurodac
  1.7.1 Mechanisms for determining the Member State responsible for examining an asylum application
  1.7.2 Transferring of asylum applicants to other Member States of the European Union and the sovereignty clause
  1.7.3 The reallocation of asylum seekers within Member States of the European Union
1.7.4 Eurodac, the system for the identification of asylum seekers

1.7.5 the European 'protection lottery': the significant divergences in the recognition rates of asylum seekers between Member States.

CHAPTER II
The new Common European Asylum System

2.1 Shortcomings of the first phase of the EU asylum system
   2.1.1 The 2007 Green Paper of the European Commission
   2.1.2 The Commission's Policy Plan on Asylum of 2008

2.2 Evaluation of the legislative proposals strengthening the new Common European Asylum system (CEAS)
   2.2.1 The new "Qualifications" Directive
   2.2.2 The new "Procedures" Directive
   2.2.3 The new "Reception" Directive
   2.2.4 The "Dublin III" Regulation

2.3 Interinstitutional negotiations on the asylum package
   2.3.1 "This Europe is in crisis"
   2.3.2 The Procedures Directive: the compromises
   2.3.3 The Reception Directive: the compromises
   2.3.4 The Dublin III Regulation: the compromises

2.4 The adoption of the asylum package: the final discussions between the institutions and the parliamentary vote of the package.

CHAPTER III
Case study: innovative interpretations of the Court of Justice and the European Court of Human Rights on the right to asylum

3.1 Judicial protection of human rights within the European Union, an introductory note

3.2 Recent case law of the European Court of Human Rights concerning international protection
   3.2.1 S.F. and Others v Sweden

3.3 Recent case law of the Court of Justice of the European Union concerning international protection
   3.3.1 Bundesrepublik Deutschland v B and D
   3.3.2 Federal Republic of Germany v Y and Z
   3.3.3 MA, BT, DA v Secretary of State for the Home Department

3.4 Concluding remarks to the chapter
Introduction

_Not chaos-like together crushed and bruised, But as the world, harmoniously confused, Where order in variety we see, And where, though all things differ, all agree_\(^1\)

Alexander Pope, *Windsor Forest*

The history of asylum is of a complex nature: originally linked to certain sacred places or as a particular status for privileged individuals, the notion of asylum allows us to examine a number of issues related to the history of Europe itself: its ancient history, its creation of a Modern State subsequent to the Treaty of Westphalia and the establishment of the "unbreakable" bond between sovereignty and territory to the recent creation in 1997 of an European Area of Freedom, Security and Justice where such historically inviolable sovereignty (*domestic jurisdiction*) is brought into question especially by the possibility for a supranational union to legislate in sensitive fields such as asylum and immigration policies.

In a continent marked by its violent history of wars over the extension or preservation of either power and/or territory it is a groundbreaking moment in history that the same States of Westphalia are now willing to share their sovereignty with a supranational entity to regulate the entry and or leaving of people in their own country, their territory.

I would now like to retrace the key points of the creation and evolution of the notion of asylum, first, as a "concession" to a certain territory by a religious "divine" entity\(^2\), then, as a prerogative exercised by the Modern European States and finally, as an expression of international solidarity and cooperation between States, a truer expression of "cosmopolitanism" as foretold by Kant.

---

1 This famous quote derived from the *Windsor Forest* poem by Alexander Pope (now considered controversial because of its promotion of British imperialism and following stance on slavery) was written in reference with the approaching signing of the Peace Treaty of Utrecht in 1713; said treaty put an end to close to two decades of continental war.

Asylum as a divine concession.

Francesca Rescigno has thoroughly described the history of asylum since ancient Greece to the present.

In ancient Greece a modest number of sacred places such as temples, altars and statues of the gods possessed the ability to protect either objects\(^3\) or human beings (such as slaves, debtors and criminals) seeking refuge from the State or vengeful private parties\(^4\). Such places providing immunity and inviolability to any individual seeking refuge were allowed that privilege because of their sacred nature and not on the basis of moral high grounds or ethics (such as respect for human life or human rights): the things or persons coming into contact with a sacred place would somehow share the protection the Gods guaranteed to that place by residing in it. The temple, in particular, was the place where "the Earth would come in contact with the skies, where the communication between the human world and the world of the gods would take place\(^5\)."

Also, any individual violation of sacred places would cause the gods to cast their wrath indiscriminately upon the entire community.

Because of these reasons, the "asylum seeker" of the time could have been indifferently an abused slave as well as a criminal: in fact, a slave could escape to the altar/temple to beg the gods to sell him to a fairer master if he met the requirements of being seriously ill treated and had proof of such terrible treatments\(^6\).

But ancient Greeks envisaged also another form of asylum called "asilia" (meaning "inviolability\(^7\)) to recognize intuittu personae to highly respected individuals (citizens, athletes, strangers or allies) that had particular merits/and or high public considerations. Such subjective rights often consisted in personal freedom and the possibility to initiate trials to defend their rights\(^8\).

In Ancient Rome, the institute of asylum was limited in practice as Romans considered allowing "safety zones" to criminals to seek refuge in as highly in contrast with the principles of due process

\(^3\) Francesca Rescigno underlined how asylum was conceded indifferently to human beings or objects, so that it wasn't uncommon for private parties to deposit their valuable objects or belongings in sacred places and, at the same time, the "public treasury" of the Cities was also kept in such places.


\(^6\) F. Rescigno, Il diritto di asilo, Roma, Carocci, 2011; pp. 21-23.


and the certainty and severity of sanctions. Because of this, the institute of asylum was often reshaped and amended by Roman laws. However, Romans also recognized a series of places and or objects providing protection, although such protection was necessarily temporary. For the Romans, the institute of asylum was intertwined with the institute of exile, which provided the possibility for the defendant during a criminal trial to choose leaving Rome never to return instead of facing the death penalty. The institution of exile was considered a sanction and at the same time a subjective right as, on the contrary of asylum, its application derived from the decision of the defendant himself to leave and not from the will of the gods. In other words, choosing to be exiled also meant escaping the death penalty and or the vengefulness of private parties by leaving one's hometown.

Judaism combined together asylum and exile as an exception to the principle of the lex talionis (the so-called "eye for an eye" rule). The Book of Numbers (the fourth book of the Hebrew bible) required the designation of six cities "that should serve as refuge for Israelis, strangers or hosts that involuntarily killed someone" providing a distinction between premeditated murder and murder "without feeling hate first". Only those that could prove having murdered unintentionally would be welcomed into one of the "asylum cities" whereas those who couldn't would have been pulled away from the altar and delivered to justice. Also, in case a vengeful parent of the deceased were to go to the "asylum city" protecting the murderer to seek vengeance it would have been considered as voluntary homicide instead of the application of the lex talionis because: "the same law that incriminated the fugitive outside the City of asylum is the law that protects him inside of it."

During the Middle Ages the institute of asylum had a period of expansion because of the diffusion of Christianity and its widened interpretation as a moral obligation for good Christians to offer

---

10 F. Rescigno, Il diritto di asilo, Roma, Carocci, 2011; p. 25.
11 From Leviticus, 24:19-21 "And a man who inflicts an injury upon his fellow man just as he did, so shall be done to him [namely,] fracture for fracture, eye for eye, tooth for tooth. Just as he inflicted an injury upon a person, so shall it be inflicted upon him. And one who injures an animal shall pay for it. And one who strikes a person shall be put to death."
12 "For the children of Israel, and for the stranger and for the settler among them, shall these six cities be for refuge, that every one that killeth any person through error may flee thither", Book of Numbers, Nm 35, 15
13 Translated from Italian. F. Rescigno, Il diritto di asilo, Roma, Carocci, 2011; p. 27.
refuge to those escaping criminal sanctions, providing them with the chance to ask for the forgiveness of their sins.\footnote{14}

The notion of asylum was revolutionized to represent the Christian values of charity, penitence and more importantly out of compassion: one must concede asylum not because of his fear of the gods or the respect of sacred places but because the message of Christ\footnote{15} concedes to everyone the possibility to ask for redemption, to repent and be saved.\footnote{16}

However, this new "ecclesiastical asylum" also responded to the need for the Christian Church to try and make prevail God's word to earthly laws by extending its powers and prerogatives over other subjects such as Medieval States.\footnote{17}

In fact, the Medieval State was "a mosaic composed of different pieces: in this mosaic there was no knowledge of a distinction between private and public": in other words, the owner of the land (may he be the king or one of its lords "Seigneurs") was also entitled to its government and maintenance, developing from the VIIIth century in Europe a feudal system where private power over land was to be distributed from kings to lords and from lords to their vassals while the Catholic church, on the other hand, tried to protect its spiritual and territorial prerogatives over its institutions also by "holding its ground" on its right to protect asylum seekers.\footnote{19}

According to Francesca Rescigno and Bruno Nascimbene, the progressive disappearance of ecclesiastical asylum is due to the political growth and creation of sovereign and independent States in Europe.

\begin{flushright}
\footnotesize
\begin{itemize}
\item 14 F. Rescigno, \textit{Il diritto di asilo}, Roma, Carocci, 2011; p. 28.
\item 15 "(Because) Jesus had been exiled himself during his childhood, loving thy neighbour and charity must materialize in hospitality for the fugitive".
\item 16 Also, "the (secular judicial system was far too) inflexible and (acted) merely by (means of) public repression (...) appearing uselessly vindictive and hardly beneficial, because it undervalued the victims and destroyed (not only) the culprit but also the resources he could have."
\end{itemize}
\end{flushright}
Asylum as an expression of State sovereignty

Both the Protestant Reformation and the signing of Treaty of Westphalia in 1648 marked the end of the Holy Roman Empire and inaugurated the modern European State system. Such historical changes eradicated the feudalistic notion of "territoriality" as the private property of the sovereign over its land by interpreting it instead as an expression of sovereignty of the State within public law.

The new Westfalian System dramatically reshaped the structure of international relations and created new "modern sovereign States" by establishing their sovereignty and the principle of non-intervention in matters within their domestic jurisdiction, widening the rex est imperator in regno suo and the cuius regio eius religio principles by delegitimizing any interference from authorities that historically controlled these same States: the Catholic Church and the Holy Roman Empire. This new concept of Westphalian Sovereignty defined the modern "sovereign" State as a set of governing institutions that have sovereignty over a well defined territory and population.

This shift of sovereignty from the Catholic Church to modern States transpires also in the following changes to the institution of asylum. Francesca Rescigno notes that "...as religious asylum was rooted in the respect (felt by) a part of a community for certain places deemed sacred and so immune to acts of coercion, (this new) territorial asylum is rooted in the sacred and inviolable character the community recognizes to its own territory" and "(the institute of asylum) reappeared with a new configuration: territorial or political asylum found its reason of being in the inviolability of a State's borders and in the resulting necessity to guarantee a stranger's safety (...) from the eventual punishing demands of another State". She further notes that in the Constitution of France of 1793 affirmed that the French population would concede asylum to strangers banished from their homeland "pour la cause de la liberté"; although said Constitution never entered into force, this highly symbolic article defines a right to asylum free of any religious connotations and acknowledges its existence within the principles of the freedom, equality and solidarity that originated with the French revolution.

---

20 For more information on the history of International Relations and the changes brought by the Treaty of Westphalia and the Protestant Reform, See: F. Mazzei, Relazioni Internazionali, Milano, Egea, 2012; pp.89-107.
22 "Article 120. - (Le peuple français) Il donne asile aux étrangers bannis de leur patrie pour la cause de la liberté. - Il le refuse aux tyrans"
Asylum as a right protected by international law.

"Territoriality" has been the dominant characteristic of the modern sovereign States since their creation as wars in Europe over defining borders and frontiers among States were very common. It is then easily conceivable why European States would have felt (and still feel) reluctant to share power over their territory with a supranational institution such as the European Union. In particular, in the context of this study, the regius prerogative of controlling who can enter and exit one's territory has always been a sensitive area considered within the domestic jurisdiction of States allowing no external interference from other States or organizations.

Francesca Ferraro has examined the translation of "sovereignty through territoriality" to the creation of a shared sovereignty in an European area of Freedom, Security and Justice (EAFSJ). According to her and many other European Union experts, the first theories on the creation of unions between States based on international law with the intent of establishing perpetual peace can be traced to Immanuel Kant's 1795 work "Perpetual Peace: A Philosophical Essay".

Kant's works provide a number of insightful theories on how perpetual peace could be established worldwide, mainly, he recognizes the importance of republican rule over democracy because "by republicanism he meant a form of rule in which sovereignty is not absolute, but restrained and divided. (...) From a Kantian point of view, some (democracies) are simply the 'wrong kind of democracies' and should not be expected to behave as peacefully as those that avoid concentrations of power in a single person or institution". As Francesca Ferraro notes "(Kant) anticipated a nineteenth century issue with analysing the relations between democracy and totalitarianism" and, from Kant's definition of a republican constitution she states that, in fact, "the effective limitation of a State's sovereignty can provide a non utopic possibility of peace".

\[24\] Cosmopolitism or "cosmopolitan law-right" according to Kant
\[25\] He believes peace not a natural state which is why it must be established, "created": "The state of peace among men living side by side is not the natural state (status naturalis); the natural state is one of war. This does not always mean open hostilities, but at least an unceasing threat of war".
\[26\] C. Lord and E. Harris quoted in F. Ferraro in Libertà e Sicurezza nell'Unione Europea, Pisa, Pisa University Press, 2012; p. 43.
\[28\] "The only constitution which derives from the idea of the original compact, and on which all juridical legislation of a people must be based, is the republican. This constitution is established, firstly, by principles of the freedom of the members of a society (as men); secondly, by principles of dependence of all upon a single common legislation (as subjects); and, thirdly, by the law of their equality (as citizens)."
Although limited to its Member States such 'perpetual peace' did take place within the European Union since its creation as an 'economically driven' community. Indeed, the European Coal and Steel Community as proposed by Robert Schuman during his famous declaration of 1950 was bound to eradicate war within Europe by "sharing" sovereignty between States in order to follow limited and specific economic goals:

"The pooling of coal and steel production (...) will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims (...) The solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible. The setting up of this powerful productive unit, open to all countries willing to take part and bound ultimately to provide all the member countries with the basic elements of industrial production on the same terms, will lay a true foundation for their economic unification".

The European continent went from being a European Coal and Steel Community built on the ashes of two World Wars to a state of peace for over 60 years within the European Union, without a single war on its territory since Schuman's declaration.

But Kant did not only foresee the importance of relative sovereignty (in the form of republicanism) in order to promote peace between States. He promoted, in order to achieve perpetual peace, the establishment of a law of nations to be founded on a federation of free States: we might believe this theory to have turned to reality with the creation to the European Union and its wide legislation, treaties and Charter of Human Rights.

Finally, with regards to this study, Kant established as his third definitive article for perpetual peace The law of world citizenship is to be united to conditions of universal hospitality.

In this Article, although Kant never uses the term "asylum" he clearly envisages a specific status very similar to nowadays' definition of asylum seeker: a person travelling to another State (freedom of movement within the limits of universal hospitality) that has to be welcomed (not treated as an enemy, providing basic access conditions to asylum seekers) and that should not be treated with hostility and/or sent back when this would lead to his destruction (requirement of the asylum seeker's well founded fear of being persecuted and principle of non refoulement):

"Hospitality means the right of a visiting foreigner not to be treated as an enemy (when he arrives in the land of another). It is all right to refuse him this acceptance into society if the refusal doesn't have fatal consequences for him; but as long as he conducts himself peacefully and doesn't push forward, he is not to be treated with hostility. (...) he has a right to visit, a right that all men have to offer themselves as potential members of any society. All men have this right by virtue of their common possession of the surface of the earth, where (because it is a finite sphere) they can't spread out for ever, and so must eventually tolerate each other's presence. Originally no-one had more right than anyone else to any particular part of the earth. This community - of all men- is divided up by the seas and deserts (...) but ships and camels (...) enable people to approach each other across these ungoverned regions and, using mankind's common right to the face of the earth, create a possibility of - peaceful- interaction"33.

Francesca Ferraro notes that Kant acknowledges this right to travel the world as a condition imposed by the world's geographical and physical dimensions: it's the sphericity of the globe itself to "force" men into meeting and coming into contact with each other34.

Finally, Kant concludes his essay by declaring that:

"(natural laws lay down that people arriving from foreign lands have a right to try to interact with the locals). In this way distant parts of the world can come to relate peaceably with one another, in ways that it will eventually be covered by laws, moving the human race ever closer to a constitution establishing world citizenship"35.

and

"The peoples of the earth have now gone a good distance in forming themselves into smaller or larger communities; this has gone so far that a violation of rights in one place is felt throughout the world. So the idea of a law of world citizenship is not a legal flight or fancy; rather, it is necessary to complete the unwritten code of civil and international law and also mankind's written laws; and so it is needed for perpetual peace"36.

Francesca Ferraro also underlines how Kant's predictions on the possibility of Perpetual Peace are not founded in some belief of inherent goodness in human nature (also called 'anthropological optimism'), on the contrary, Kant is very pessimistic with regards to human nature but he believes that, although "nature wills otherwise" by separating peoples with different languages and religions:

"These (differences) bring with them a tendency to mutual hatred and pretexts for war; but the growth of civilization and men's gradual approach to greater harmony in their principles finally lead to peaceful agreement. This is not like the 'peace' that despotism (in the graveyard of freedom) produces by sapping everyone's energies; rather, it is produced and maintained by lively level competition among these energies".

That is, the potential for conflict due to living in a shared space that puts in direct contact different "languages, cultures, religions" leading to a history of violence can at some point take place a dialogue, a creation of common principles that creates coexistence instead of conflict and peace instead of war.

One might believe from reading these passages that Kant foresees the world as a "cosmopolitan community" where violations of human rights shall one day disappear inside and between States as well as wars and conflicts. This might mean that in a world of perpetual peace there should be no need for the institute of asylum or, put another way, the right to asylum exists because we do not yet live in a world of perpetual peace. Considering the above and knowing Kant's Eurocentrism it is safe to say that this theory came true within the European Union: because of its establishment as a supranational entity based on the rule of law, its objectives to promote peace inside and outside of the borders of the European Union and because of its respect for fundamental rights as guaranteed

37 He states: "This ease in making war, together with rulers' lust for power - something that seems inborn in human nature - is thus a great hindrance to perpetual peace". See I. Kant., (1795) Perpetual Peace: A Philosophical Essay, in the version by Jonathan Bennett presented at www.earlymoderntexts.com/pdf/kantpeac.pdf; p.3.
40 Similarly, International Relations Studies theorist Axelrod defined a liberal approach to the Games Theory where there is a resulting process of cooperation between rival States after a certain number of "defections" from one another.
41 Preamble of the Treaty on European Union: "drawing inspiration (...) from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law ".
42 Preamble of the Treaty on the European Union: "Resolved to implement a common foreign and security policy (...) to promote peace, security and progress in Europe and in the world".
by the Charter of Fundamental Rights\(^43\) it is quite unlikely for a European citizen to ask for refuge in another country within or outside the European Union.

In the wake of World War II, almost two hundred years after Kant's essay on "Perpetual Peace" the European Continent was devastated and barely surviving a conflict distinguished by a violence unknown to the European territory: a violence based on discrimination and ruthlessly directed against civilians indifferently to children, women and the elderly and fought with weaponry so destructive Albert Einstein was quoted saying "I know not with what weapons World War III will be fought, but World War IV will be fought with sticks and stones" meaning that another war so brutal and destructive would have necessarily led to the end of mankind as we know it.

It is in the spirit of never repeating history after two world wars in less than half a century that countries worldwide decided to take preventive actions in the form of supranational organizations (such as the United Nations (founded in 1945 to replace the "failed" League of Nations\(^44\)) and the European Coal and Steel Community in 1951) in order to prevent wars between one another. In the same period have been adopted a series of international Conventions and Declarations such as the Universal Declaration of Human Rights in 1948\(^45\), the European Convention on Human Rights of 1950 and the Geneva Conventions\(^46\) of 1949 that "were intended to fill the gaps in international humanitarian law exposed by the conflict"\(^47\).

\(^{43}\) Article 6, Treaty on the European Union: "The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties".

\(^{44}\) See M. Panebianco *Dalla Società delle Nazioni all'ONU: le grandi Organizzazioni Internazionali*, Napoli, Ferraro, 1979; pp 7-14.

\(^{45}\) "Given the gaps of the UN Charter with regards to human rights, the first step (taken) by the General Assembly was to undertake (the mission of) drafting a catalogue of international rights that could be accepted by all Member States to the United Nations. States quite dissimilar for their ideology and policies, such as the United States and the URSS, States with different economic and political systems, (...) States inspired by different religious visions: Christians (the occidental and South American countries), Muslims (such as Saudi Arabia, Afghanistan, Turkey, Pakistan etc.), Hinduism (such as India) or of Buddhist traditions (such as China). It was so necessary to find the least common denominator, both for the conception of the relation between State and the individual, both to individuate the (existence of) fundamental human rights". Unofficial translation of A. Cassese., *I diritti umani oggi*, Roma-Bari, Editori Laterza, 2005; p.32.

\(^{46}\) These conventions in particular had the objectives to ameliorate: the condition of the wounded and sick in armed forces in the field, the condition of the wounded, sick and shipwrecked members of armed forces at sea and defining the treatment of prisoners of war and granting the protection of civilian persons in time of war.

In 1950, a resolution of the General Assembly of the United Nations replaced the International Refugee Organization (IRO) with the United Nations High Commissioner for Refugees (UNHCR)\(^{48}\) which was supposed to offer subsidiary help to the General Assembly in resolving problems related to the protection and integration of European refugees in their host countries or helping them going home.

One year later, with still hundreds of thousands of refugees wandering through Europe since the end of World War II, a United Nations conference in Geneva adopted the Convention relating to the Status of Refugees\(^ {49}\). Although such Convention was limited to protecting European Refugees and to the events occurring before 1951, its 1967 Protocol expanded its scope worldwide and eliminated time constraints\(^ {50}\). The UNHCR is the "guardian" of said Convention and Protocols.

According to *Refugees* Magazine\(^ {51}\) edited by the UNHCR, this convention "was the first truly international agreement covering the most fundamental aspects of a refugee’s life. It spelled out a set of basic human rights which should be at least equivalent to freedoms enjoyed by foreign nationals living legally in a given country and in many cases those of citizens of that State. It recognized the international scope of refugee crises and the necessity of international cooperation, including burden-sharing among States, in tackling the problem".

Indeed, the Convention Relating to the Status of Refugees of 1951 brought a series of groundbreaking innovations to the status of refugees: its definition of refugee as well as the establishment of the "non-refoulement" principle that are now considered customary international law (*Jus cogens*) and from which no derogations are permitted\(^ {52}\).

I will now analyse in detail said innovations.

---

\(^{48}\) At that time the UNHCR had a mandate for three years, since a 2003 resolution its mandate is permanent, as long as refugees will exist.

For a thorough description of the history on the creation of the UNHR, see: V.P. Nanda., *Refugee Law and Policy*, Connecticut, Greenwood Press, 1989; pp. 3-10. And:


\(^{50}\) See:


The Convention defines a "refugee" as any person who:

"(...) owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

According to this article, the requirements for the status of refugee are:

A. A well-founded fear of persecution.

Although the Convention does not define the term "persecution", Art. 33.1 states that Member States shall not expel a refugee to a State where its life and freedom would be menaced because of his race, his religion, his nationality or his membership of a particular social group or political opinion allowing a general interpretation of what an act of persecution might entail.

It is worth noting that fifty years later the Statute of the International Criminal Court in its Art.7.1 lists "Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender (...), or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court..." as one of the crimes against humanity, expanding the reasons of persecution to gender and cultural grounds. Article 7 (2) furtherly defines the notion of 'persecution': "Persecution means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity".

55 Established in 2002 in the Hague, Netherlands, this permanent tribunal prosecutes individuals for crimes committed against humanity, war crimes, genocide and crimes of aggression. 123 States are as of 2013 parties to the Statute of the Court.
56 For more information on the definition of 'persecution', relevant case law and the history of the International Criminal Court see: Cassese, A., Lineamenti di diritto internazionale penale, Bologna, Il Mulino, 2005;
According to Paolo Benvenuti57, acts of persecution imply serious and detrimental consequences to the victim: the severity of the deprivation of fundamental rights is what distinguishes "acts of persecution" from "acts of discrimination".

B. The refugee is outside his country of nationality.

According to Refugees Magazine58 "Refugees are people who have crossed an international border into a second country seeking sanctuary". Whereas "Internally displaced persons (IDPs) may have fled for similar reasons, but remain within their own territory and thus are still subject to the laws of that State". According to the same source, Internally displaced persons are estimated to be 20-25 millions of people worldwide.

C. The refugee is unable or unwilling to avail himself/herself of the protection of that country, or to return there, for fear of persecution.

Although the Convention does not state why a person should be unable or unwillingly avail himself/herself of the protection of a given country, Article 1(C)A establishes that "this Convention shall cease to apply to any person if (...) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality";

These requirements help us distinguish the term refugee from the wider category of migrants: while the concept of refugee is a specific aspect to the general migratory phenomenon59, not all migrants are seeking refuge and/or are entitled to the asylum status.

Indeed, while in 2009 the total population of international migrants was estimated around 214 million people only 7-8% of them are refugees and asylum seekers60.

Also, we need to distinguish the terms asylum seeker from refugee: while the first is someone who has asked the government for protection under international law and has not had a decision on their

---

59 The term Migration defines "the movement of people, usually across borders". For a thorough explanation of the differences between the terms "migration", "forced migration" and "asylum", see: M. O'Neill., Asylum, Migration and Community, Bristol, The Policy Press, 2010; pp.4-6.
case yet, the second has proven that they need protection under international law and the government has granted them refugee status.

According to the UNHCR\textsuperscript{61} State protection exists when: "Governments are responsible for enforcing a country’s laws. When they are unable or unwilling to do so, often during a conflict or civil unrest, people whose basic human rights are threatened flee their homes, often to another country, where they may be classified as refugees and be guaranteed basic rights". Furthermore, according to a widely accepted interpretation of the Convention (and the already mentioned Art1(C)A) the agent of persecution must not necessarily be an agent of the State but can also be a rebel movement, a local militia, a criminal group that operates inside the territory of the State and in spite of which the State can not or does not want to oppose resistance to protect its citizen's rights\textsuperscript{62}.

\textit{Rights to be recognized to asylum seekers}

The Geneva convention contains a number of rights attributed to asylum seekers such as:

- the right to freedom of religion (Article 4),
- the right to access the courts (Article 16),
- the right to work (Articles 17 to 19),
- the right to housing (Article 21),
- the right to education (Article 22),
- the right to public relief and assistance (Article 23),
- the right to freedom of movement within the territory (Article 26),
- the right to be issued identity and travel documents (Articles 27 and 28),
- the right not to be punished for illegal entry into the territory of a contracting State (on grounds of national security or public order) (Article 31),
- the right not to be expelled, except under certain, strictly defined conditions (Article 32).

But the most "innovative" and internationally recognized right is the principle of non refoulement as defined by Article 33\textsuperscript{63}:

\textsuperscript{61} Public Information Section of the United Nations High Commissioner for Refugees, "1951 Geneva Convention 50th Anniversary" in Refugees Magazine, Issue 123, 2001;
\textsuperscript{62} P. Benvenuti., "La Convenzione di Ginevra sullo status dei rifugiati" in La tutela internazionale dei diritti umani. Norme, garanzie, prassi (a cura di Laura Pineschi), Milano, Giuffrè Editore, 2006;
\textsuperscript{63} For a comprehensive analysis of the evolution and application of the non-refoulement principle, see: F. Salerno., "L'obbligo internazionale di non-refoulement dei richiedenti asilo" in Diritti umani e diritto
"No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

However, there are exceptions to the rule as stated in paragraph 2 of the same Article:

"The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country".

The Convention also excludes certain categories of people from refugee protection:

- people who committed a crime against peace, a war crime, a crime against humanity
- people who committed a serious (non political) crime outside of their country of refuge
- people who are guilty of acts contrary to the purposes and the principles of the United Nations.

These provisions were taken in order to preclude criminals from abusing the asylum system in order to escape judicial responsibility for their criminal acts (an example could have been the German Nazis who escaped legal and judicial prosecution at the end of World War II by going into hiding in Southern America).

The evolution of the right to asylum in the European Union

Having traced an overall picture of the institute of asylum and its historical evolution, I would now like to introduce the subject of this study.

Given the premises on the Convention relating to the Status of Refugees of 1951 (Geneva Convention), I would like to analyse how the institute of asylum has evolved in the European Union legislation and jurisprudence and how the soon to be adopted 2013 "Asylum package" retraces and redefines the criteria established by the Geneva Convention more than sixty years ago.

The objective of this new asylum package is the creation of a proper Common European Asylum System which will replace the previous Directives adopted between 1999 and 2005 defining the "minimum standards" for an European policy on asylum. The issue at stake is: has the European
Union succeed in offering asylum seekers a fair, respectful and innovative system to guarantee and promote their rights at an European level?

Three Directives and one Regulation in particular will call into question the historically driven "sovereignty of the State over their territory" and the concepts of "domestic jurisdiction" : The "Directive on standards for the qualification of third country-nationals or stateless persons as beneficiaries of internal protection", the "Directive laying down standards for the reception of asylum seekers", the Directive on "common procedures for granting and withdrawing international protection" and the Dublin III Regulation "Application for international protection lodged in one of the Member States by a third-country national or a stateless person". I would like to put particular emphasis on these four initiatives as they constitute the "biggest step" for European States in "sharing their sovereignty" with the European Union on such sensible fields.
Could this be the beginning of Kant's foretold "world citizenship"?

Does this package provide a wider protection of human rights? Has the Geneva Convention's protection of fundamental rights been interpreted extensively by the Luxembourg Court? What has changed in the past 60 years and have the policies concerning asylum evolved with history, facing new problems such as new types of international protection seekers?
CHAPTER I
The evolution of the right to Asylum since the Geneva Convention (1951) to the first phase of the Common European Asylum System (1999-2005)

1.1 Legal Framework

From the right of asylum to the right to asylum: from 'minimum-standards' policies to a concrete European-wide asylum system?

While the first policies and legal basis can be retraced back to the Universal Declaration of Human Rights (UDHR) of 1948\(^64\), major steps to improve the right to asylum were taken sporadically over the course of the following 50 years.

The Schengen Agreement of 1985 and the Schengen Implementation Convention of 1990 were aimed at removing checks at the internal borders between Member States of the Schengen Area therefore establishing free movement of persons within the internal market and a series of rules on responsibility for processing application for asylum.

Later on, the Dublin Convention of 1990 established both the criteria for determining which Member State is responsible for considering an asylum application\(^65\) and the one chance rule according to which each individual has the right to lodge only one asylum claim in one Member State within the territory of the European Union in order to prevent the asylum shopping phenomenon where individuals would request asylum in various Member States in order to increase their chances of recognition of their status.

Some rules dealing indirectly with asylum have since been adopted in the framework of the European Political Cooperation foreseen by the Single European Act (which amended in ’87 the European Community founding treaties) and in the framework of the intergovernmental cooperation in justice and home affairs (so called “Third Pillar”) foreseen in 1993 by the Maastricht Treaty.

---

\(^64\) Adopted in 1948 by the United Nations General Assembly, Article 14 paragraph (1) states that: "Everyone has the right to seek and to enjoy in other countries asylum from persecution".

\(^65\) According to the Dublin Regulation, A person seeking protection cannot decide which country is to process his/her application: such Member State has to be identified through a hierarchy of criteria depending on the age, place of arrival and possession or not of visas by the applicant. The most commonly used criteria establishes that the application has to be evaluated by the State through which the asylum seeker first entered.
However, it was only in 1999 with the introduction of the concept of an Area of Freedom, Security and Justice (EAFSJ) after the entry in force of the Treaty of Amsterdam that the European Institutions faced the task to finally adopt a complete set of common European legislation on asylum. Indeed, Article 1 (5) of the Treaty of Amsterdam states:

"The Union shall set itself the following objectives: (...) to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime".

Such area of freedom, security and justice has to be interpreted according to Francesca Ferraro "as the embryonic (stage) of a public political European space (...) a place where European citizenship becomes the key to the development of an European-wide civil society". Indeed, she states, "the actual area of freedom, security and justice is composed by different intersected sovereignties and none of them can be declared exclusive. Sovereigns are the States; sovereign is the Treaty that unites them; (...) sovereign are the free and equal individuals, entitled to rights they can claim (in Court) also against the States they belong to and against violations of (the European Union) against them. (...) Sovereignty is not unitary and exclusive, but widespread and shared".

The Treaty of Amsterdam also transferred from "third" to the community method (the so called "first pillar") the policies related to the external border control, asylum, migration, the free movement of persons inside the EU and of judicial cooperation in civil matters. Under the "community method" the European Parliament plays a wider role by adopting with the Council the Commission's proposals, the Council decides at qualified majority and the Court of Justice monitors the compliance with the Treaties of these legislative acts as opposed to the intergovernmental method where Parliament and Commission would play a lower role and the Court of Justice would have no say in the matter.

66 Olga Ferguson Sidorenko notes that "there is no explicit definition to be found in the EU and EC Treaties on what is to be understood under the expression 'area of freedom, security and justice' (...) a brief consideration on the meaning of 'area', 'freedom', 'security' and 'justice' from an asylum perspective is well justified". She then proceeds to define 'area' as the external borders of the Union, 'freedom' as both "a concept of fundamental rights and freedoms, including protection fro many form of discrimination (...) and as freedom of movement of persons". 'security' as two sides of the same coin : both as maintaining of the internal security of Member States which might require excluding a person from refugee status and safeguarding the rights of persons in need of international protection inside the territory of Member States, finally, she defines 'justice' as access to justice and fair treatment of asylum seekers. See Sidorenko. O.F., The Common European Asylum System, The Hague, T.M.C Asser Press, 2007; pp. 21-24.


The entry into force of the Treaty of Amsterdam has been followed by an increasing number of strategic documents and legislative acts adopted over a very short amount of time and vowed to better protect refugees: such initiatives increased not only in number, but also in content and quality of protection.

In particular, the first phase of the Common European Asylum System established between 1999 and 2005 has settled the foundations of a common European policy on asylum, described thoroughly later on in this dissertation.

Ten years after the Amsterdam Treaty the Treaty of Lisbon took some considerable qualitative leaps forward both by transforming the previous minimum-standards provisions into a common policy and by giving binding effect equal to the Treaties to the Charter of Fundamental Rights\textsuperscript{69}. This meant that the Charter as signed and proclaimed in 2000 went from being a "reference document" for the EU institutions to being directly enforceable by the Court of Justice of the European Union and national courts\textsuperscript{70}, its rights becoming legally binding for the Union, its Institutions but also its Member States as regards the implementation of Union law\textsuperscript{71}.

The EU Treaties (TEU and TFEU) and the Charter actively guarantee the right to asylum and promote the development of a common policy on asylum while prohibiting harmful or degrading treatment of asylum seekers.

Indeed, Article 67 (2) and 78 of Treaty on the Functioning of the European Union states:

"1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.

2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is


\textsuperscript{70} Art. 6(1) of the Treaty on the European Union (TEU) : “the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights”.

fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals.  

and

"1. 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.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:

(a) a uniform status of asylum for nationals of third countries, valid throughout the Union;
(b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;
(c) a common system of temporary protection for displaced persons in the event of a massive inflow;
(d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;
(e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;
(f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;
(g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection."

3. In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

As far as the Charter of Fundamental Rights is concerned, asylum seekers benefit from a series of rights in their favor:

Article 4 - Prohibition of torture and inhuman or degrading treatment or punishment: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

Article 18 - Right to asylum: "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".

72 Article 67 of the Treaty on the Functioning of the European Union (ex Article 61 TEC and ex Article 29 TEU)
73 Article 78 of the Treaty on the Functioning of the European Union (ex Articles 63, paragraphs 1 and 2, and 64(2) TEC)
The choice of wording of this Article is crucial: on the contrary to the previous EU acts, the Charter is no longer referring to a "right of asylum" Member States can choose to grant after examining a person's application but explicitly introduces a "right to asylum" that all asylum seekers should be entitled to as long as they fulfil the requirements of the Geneva Convention and the European Treaties. In other words, while the right "of" asylum allows all asylum seekers to ask for asylum while the right "to" asylum directly entitles them to refuge within the European Union. Asylum is a right that has to be granted, not conceded at each State's discretion.

This Article on the right 'to' asylum has yet to be put to practice and needs an interpretation by the Court of Justice clearly stating its extended value and scope.

Article 19 - Protection in the event of removal, expulsion or extradition: "No one may be removed, expelled or extradited 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 or punishment."

With the entry into force of the Lisbon Treaty and the alignment of the legal value of the Charter of Fundamental Rights to the Treaties finally translated fundamental rights (and the right to asylum specifically) to the highest level among sources of law. Judges and Governments of Member States are now bound to respect and abide by the rights protected by the Charter and Treaties and any individual could directly invoke the Charter of Fundamental Rights in national courts within the European Union.

**The relationship between the European Union and the European Convention on Human Rights.**

The European Union and in particular the Court of Justice gave great importance to the European Convention on Human Rights, a convention drafted in 1950 by the then newly founded Council of Europe, an organisation that counts nowadays 47 Member States and whose Convention protects over 800 million people.

---

74 And have their application examined by Member States within certain standards and procedures.

75 Y. Pascouau., *La politique migratoire de l'Union Européenne: De Schengen à Lisbonne*, LGDJ, Coll. Thèses, n° 34, 2010; pp.171-172. And:

76 With the formal exception of Poland and the United Kingdom were, as stated in Protocol (No) 30 to the Treaties on the application of the charter, that restricts the interpretation of the charter by the Court of Justice and the national courts of these two countries (in particular regarding rights relating to solidarity). However national judges can invoke the same fundamental right to asylum as "general principle" of EU law.

In fact, the Treaty of Maastricht of 1992 stated in Article F paragraph (2) that the European Union was bound to respect fundamental rights as guaranteed by the European Convention on Human Rights. The Treaty of Lisbon added to that same Article (now Article 6 of the Treaty on the European Union) a paragraph stating that the Union will accede to the European Convention on Human Rights. Negotiations on the EU accession started soon after the entry into force of the Lisbon Treaty.

The 5th of April 2013 negotiators of the Council of Europe and the European Union have finalised the draft accession agreement of the European Union to the European Convention on Human Rights (ECHR); this will strengthen the protection of human rights in the European Union as the European Court of Human Rights (ECtHR) will be able to scrutinize all acts of the European Union (of its institutions and bodies) for their compatibility with the ECHR:

"The accession will complete the EU’s system of protecting citizens' fundamental rights and is therefore of high symbolic and practical significance for EU citizens and anyone who lives in the Union. Of symbolic significance because through its accession the EU, as a public authority, submits all its action to external judicial review and control in human rights matters". This will reinforce the credibility of the human rights’ system in Europe and of its external policy.

Although the European Convention on Human Rights does not contain any express provision relating to the right to asylum, the jurisprudence of the European Court of Human Rights has interpreted extensively some of the Convention's rights in order to protect asylum seekers and refugees, in particular, Article 3 forbidding torture and degrading treatments, Article 2 on the

Also, for an interesting selection of case-law on the use of Articles 5,6 and 8 in asylum related cases, see:
And:
81 According to Francesca Rescigno, Article 3 forbidding torture and degrading treatments has been considered by the European Court of Human Rights as limiting the possibilities of expulsion, extradition, removal, refoulement of strangers from Member States, in that it prevents Member States from sending strangers to third countries where fundamental rights risk to be violated. This responsibility of the Member State would persist even if such degrading treatments were to happen after the arrival of the individual in the third country. F. Rescigno, Il diritto di asilo, Roma, Carocci, 2011; pp. 94-95.
right to life\textsuperscript{82}, Article 6 on the right to a fair trial, Article 8 on the right to respect for private and family life\textsuperscript{83} and Article 5 on the right to liberty and security\textsuperscript{84}.

In the midst of the establishment of these Treaties, Charts and Conventions, the so-called hard law in the hierarchy of sources of the European Union, a group of decisive steps in the form of Directives and Regulations were taken to establish the first common grounds for a Europe-wide common policy on asylum between 1999 and 2005. I will now analyse these "first steps" in detail.

1.2 The first phase of the Common European Asylum System

The Preamble of the Tampere Presidency Conclusions of 1999 states:

"The European Council is determined to develop the Union as an area of freedom, security and justice by making full use of the possibilities offered by the Treaty of Amsterdam. The European Council sends a strong political message to reaffirm the importance of this objective and has agreed on a number of policy orientations and priorities which will speedily make this area a reality" and "The European Council reaffirms the importance the Union and Member States attach to absolute respect of the right to seek asylum. It has 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".

Following the guidelines provided by the Tampere Conclusions, the European Union adopted several legislative measures between 1999 and 2005 to provide common minimum standards for asylum in order to better harmonize asylum policies within the European Member States\textsuperscript{85}. The four most important legislative measures were:

\textsuperscript{82} Often used to justify the principle of expulsion of asylum seekers in countries where they would risk their life or inhuman, degrading treatments such as in the \textit{Soering v. the United Kingdom} case where the Court established in 1989 that the extradition of a German citizen to the United States to face charges of capital murder would amount to him being sentenced to death.

\textsuperscript{83} "The function of families and relatives in migratory processes both internal and transoceanic has been the subject of studies for many years (...). Numerous research has shown how family (ties) have been during the migrations of the last century and are still nowadays a resource that helps facing the difficulties and traumas accompanying these phenomenons of change and to absorb them. Even in eras where communications and geographic mobility were not as easy and as fast as nowadays', families granted, during these migratory processes that could bring fragmentation and breaking of the family community, important forms of continuity of the personal sense of belonging". Unofficial translation: F. Balsamo, \textit{Famiglie di Migranti. Trasformazioni dei ruoli e mediazione culturale}, Roma, Carocci, 2003; pp.17-18.

\textsuperscript{84} "The right to liberty under Article 5 is applicable to the detention of refugees prior to deportation from or on their arrival into a Convention State". See U. Kilkelly., \textit{The Child and the European Convention on Human Rights}, Aldershot-Hants-Burlington, Dartmouth, Ashgate, 1999; p.214.

\textsuperscript{85} This "harmonization" of national asylum policies is even more important when considering that some Member States of the European Union, although having included very progressive rights for asylum seekers within their Constitution (such as Italy and France), did not implement these rights with national law or on the contrary restricted the forward-thinking wording of the articles in their Constitutions.
- Directive on reception conditions for asylum-seekers (2003/9/EC), also referred to as the "Reception" Directive,
- Directive on qualifications for becoming a refugee or a beneficiary of subsidiary protection status (2004/83/EC), also referred to as the "Qualifications" Directive,
- Directive on Asylum Procedures (2005/85/EC), also referred to as the "Procedures" Directive,
- The "Dublin II" Regulation, which determines which EU State is responsible for examining an asylum application (Regulation 343/2003).

Other measures adopted were:
- Creation of a European Asylum Support Office (Regulation 439/2010)
- Eurodac Regulation (Regulation 2725/2000)
- Creation of the European Refugee Fund (Decision 2000/596/EC)

1.3 Asylum eligibility in the European Union

1.3.1 Introduction of temporary and subsidiary protection

According to the Tampere European Council Multiannual programme:

"This (Common European Asylum) System should include, in the short term, (...) the approximation of rules on the recognition and content of the refugee status. It should also be completed with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection. (...) The European Council urges the Council to step up its efforts to reach agreement on the issue of temporary protection for displaced persons on the basis of solidarity between Member States."

Following these instructions the European Union adopted a series of Directives re-defining the status of refugees, asylum seekers and a number of options for those not responding to the

---

For the case of Italy, see :
Nascimbene, B., Lo straniero nel diritto italiano, Milano, Giuffrè Editore, 1988; p.3-19
For the cases of France, Germany, Italy and Spain, see:
For the cases of Germany, Britain and Switzerland, see:
Steiner, N., Arguing about Asylum: The Complexity of Refugee Debates in Europe, New York, St. Martin's Press, 2000;
86 Presidency Conclusions of the Tampere European Council (15 and 16 October 1999)
qualifications required for asylum protection, widening dramatically the standards of protection usually recognized by international law:

- The Temporary Protection Directive of 2001, following the conflicts in former Yugoslavia and Kosovo, recognized that cases of mass influx of displaced persons who were unable to return to their country of origin had become more substantial in Europe and such issue needed to be addressed by setting up exceptional schemes to offer immediate temporary protection to such persons for maximum three years. This Directive applies in particular when there is a risk that the standard asylum system might be struggling to cope with a very high number of demands for protection from a mass influx of displaced persons and might have a negative impact on the individual examination of their requests. Although the provisions within this Directive have not been used in practice yet this Directive is highly innovative as it provides a comprehensive set of rights to people who do not necessarily fall within the requirements for asylum protection (as there is not necessity of the "persecution" criteria to ask for temporary protection).

- The Qualification Directive introduces the concept of subsidiary protection for applicants who do not qualify for the refugee status but are at serious risk of suffering serious harm if they were to return to their country of origin. International protection (both for refugees or beneficiaries of subsidiary protection) may be withdrawn if the circumstances in the country of origin change to a degree that protection is no longer required or if the applicant has committed serious non-political crimes (such as for example: crimes against peace, war crimes, crimes against humanity). Such protection, however "subsidiary" and complementary to the refugee status, is highly innovative and not recognized within the standards of the Geneva Convention of 1951, granting a wider interpretation as to who can benefit from international protection.

87 See: Favilli, C., “Il Trattato di Lisbona e la politica dell’Unione Europea in materia di visti, asilo e immigrazione”, in Diritto, immigrazione e cittadinanza, n. 2, 2010;
89 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".
90 According to the Directive, "serious harm" consists of:
- death penalty or execution
- torture or inhuman or degrading treatments or punishment of an applicant in its country of origin
- serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.
1.3.2 Weakening of the concept of persecution provided by the Convention of Geneva on refugees of 1951

As previously mentioned, the concept of persecution provided by the Geneva Convention of refugees of 1951 was very vague, resulting in the possibility for restrictive interpretations both of the definition of "act of persecution" and of "agents of persecution" by Member States of the European Union.

For example, according to Steve Peers\(^\text{91}\), the Qualification Directive "requires a fundamental change to the traditional interpretation of the Geneva Convention applied in some Member States (in particular France and Germany) by stating the the 'actors of persecution' need not be the State but may also be private parties if it can be 'demonstrated' that the State, or parties controlling the State, in "unable or unwilling to provide protection against non-State agents".

Indeed, the Directive enlists in Article 6 a series of possible actors of persecution or serious harm left unspecified in the Geneva Convention on Refugees of 1951:

(a) the State;
(b) parties or organisations controlling the State or a substantial part of the territory of the State;
(c) non-State actors, if it can be demonstrated that the State and or parties or organisations controlling the State or a substantial part of its territory, including international organisations, are unable or unwilling to provide protection against persecution or serious harm.

With regards to the necessity of the criteria of persecution in order for the State to avail international protection, as previously mentioned, any Member State of the European Union could now bypass such pre-requisite either:

- by granting temporary protection to mass influxes of displaced persons of third countries, following the establishment by the Council of the presence of a an existing or imminent mass influx of displaced persons as provided by the Directive on Temporary Protection\(^\text{92}\).
- by granting subsidiary protection status to people threatened by indiscriminate\(^\text{93}\) harmful violence if they were to return to their country of origin. This means there is no need for them to be "persecuted" in order to receive such protection.

---

92 Article 5 of Directive 2001/55/EC
93 Term which implies that violence may extend to people irrespective of their personal circumstances
With regards to subsidiary protection although recital 26 of the Qualification Directive\(^94\) states that:

"Risks to which a population of a country or a section of the population is generally exposed do normally not react in themselves an individual threat which would qualify as serious harm".

However, the Court of Justice clarified in the Elgafaji\(^95\) judgment that the requisite of a "serious and individual threat to a civilian's life\(^96\)" also consisted in the real risk for any individual to being subject to a serious threat if returned to the relevant country because of the high degree of indiscriminate violence characterising the armed conflict taking place in the country:

"covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place – assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred – reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive".

The Qualification Directive also clearly defines what constitutes an act of persecution (left unspecified in the Geneva Convention on refugees of 1951). Acts of persecution must be "sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights" or be "an accumulation of various measures, including violations of human rights which (are) sufficiently severe as to affect an individual in a similar manner as (a severe violation of basic human rights)"\(^97\) then lists a series of examples as to what constitutes an act of persecution such as:

- acts of physical or mental violence, including acts of sexual violence,
- legal, administrative, police and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner,
- prosecution or punishment, which is disproportionate or discriminatory,
- denial of judicial redress resulting in a disproportionate or discriminatory punishment,

\(^94\) Directive 2004/83/EC
\(^95\) Judgment C-465/07 Elgafaji v Staatssecretaris van Justitie, judgment of 17 February 2009.
\(^96\) Article 15 (c) of Directive 2004/83/EC states that "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict".
\(^97\) Article 9 of Directive 2004/83/EC
- prosecution or punishment for refusal to perform military service in a conflict, where performing military serving would include participating in heinous crimes (such as crimes against humanity, war crimes etc.),
- acts of a gender-specific or child-specific nature. This provision in particular is an innovation to the definition of "refugees" provided by the Geneva Convention on Refugees of 1951.

Finally, the Directive specifies the possible grounds of persecution by thoroughly defining the concepts set out in Article 1.A of the Geneva Convention, tacitly forbidding possible restrictive interpretations of these concepts left unexplained by the Convention in the 1950's.

So, the reasons for persecution as carefully defined by the Directive\textsuperscript{98} are:

- Race: acts of persecution shall include considerations of colour, descent or membership of a particular ethnic group,
- Religion: includes the holding of theistic, non-theistic and atheistic beliefs,
- Nationality: is not confined to citizenship but includes any membership to a group determined by its cultural, ethnic or linguistic identity, common geographical or political origins or its relationship with the population of another State,
- Membership of a particular social group: in this case in particular the Directive recognizes a rather large margin of discretion as to what constitutes a particular social group, Article 10 (d) provides that "members of that group shall share an innate characteristic or a common background that cannot be changed or share a characteristic or belief that is so fundamental to identity of conscience that a person should not be forced to renounce it and that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society".

The Directive lists as an example the possibility of groups sharing the same sexual orientation or gender. According to Steve Peers, Member States are "split" as to consider these examples as part of a "particular social group" and take different approaches concerning gender-based persecution\textsuperscript{99}. Nevertheless, because sexual orientation is not regarded as being part of a particular social group within the meaning of the Geneva Convention, its introduction in the Qualification Directive however vague and unclear is highly innovative for the protection of lesbian, gay, bi-sexual and transgender (LGBT) rights.

\textsuperscript{98}Article 10 of Directive 2004/83/EC
- Political opinion: includes holding an opinion on the potential actors of persecutions (so not necessarily the State of origin itself) whether that opinion, thought of belief, corresponds to reality or not.

In conclusion, both the Temporary Protection Directive and the Qualification Directive "weaken" the concept of persecution as defined in the Geneva Convention of 1951 in the sense that they both widen its interpretation (for example by defining very carefully what might constitute a social group) and by finding other criteria suitable for protection that do not require any type of persecution at all (such as the possibility to grant temporary or subsidiary protection).

This allows both victims of targeted or indiscriminate violations of their fundamental rights (especially Article 3 ECHR forbidding torture, degrading or inhumane treatments) in third countries to seek for protection in the European Union.

Also, the explicit yet "incomplete" cited reasons of persecution allow an evolutive interpretation of who might be considered a victim of persecution and is necessary to keep European human rights effective and up to date.

1.4 International Protection in the European Union

Other substantial improvements introduced by the Qualification Directive regard the possibility for international protection seekers to apply for protection also to non-State actors and benefit from a series of rights considerably strengthened and evolved compared with the rights provided by the Geneva Convention on Refugees of 1951.

1.4.1 Introduction of new agents of protection

Article 7 of the Qualification Directive introduces actors of protection new to the Geneva Convention on Refugees of 1951. While the article recognizes the most customary actor of protection, the State, it also introduces the possibility to parties or organisations, including international organisations that control the State or a substantial part of the territory of the State to grant protection inside its territory. The Council shall assess whether such bodies effectively control and provide protection inside their territory.

Steve Peers notes that "Member States which consider that clans, tribes or NGOs can offer such protection" have been criticised by the European Commission in its impact assessment of the
Directive because "in practice, protection provided by these actors proves to be ineffective or of short duration".

Indeed, the Court of Justice seems to be very careful in considering international organisations as actors of protection. Steve Peers duly notes the considerations of the Court of Justice in the Abdulla judgment, where the court stated that:

"The Directive does not preclude the protection from being guaranteed by international organizations, including protection ensured through the presence of a multinational force in the territory of the third country'.

The adequacy of the protection provided must be verified on an individual basis, considering 'in particular, the conditions of operation of, on the one hand, the institutions, authorities and security forces and, on the other, all groups or bodies of the third country which may, by their action or inaction, be responsible for acts of persecution against the recipient of refugee status if he returns to that country', as well as the application of the law in practice in that country and 'the extent to which basic human rights are guaranteed' there.

Article 8 prescribes the possibility for "internal protection", when Member States determine that an applicant does not need international protection in the territory of the European Union if in a part of its country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and said applicant could be expected to stay in that part of the country.

1.4.2 Improvement and broadening of the rights recognized to international protection seekers by the European Union in comparison with the Geneva Convention of 1951

Chapter VII of the Qualification Directive defines the content of international protection and obliges Member States to "take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents..."
I shall now compare the rights guaranteed to international protection beneficiaries laid down by the Geneva Convention on Refugees of 1951 with the rights contained in the Qualification Directive of 2004:

- The principle of non refoulement, as granted by Article 33 of the Geneva Convention on Refugees of 1951 was transposed into Article 21 of the Qualification Directive substantially unchanged.
- The right to work as laid down by Articles 17 to 19 of the Geneva Convention on refugees is substantially in line with Article 26 of the Qualification Directive although the Directive adds two provisions obliging Member States to "ensure that beneficiaries of (subsidiary protection or refugee status) have access to activities such as employment-related education opportunities for adults, vocational training and practical workplace experience, under conditions to be decided by the Member States".
- Access to education: while Article 22 of the Geneva Convention provided contracting States should have granted refugees the same treatment accorded to nationals regarding elementary education, the Directive dramatically widens those standards by granting in Article 27 full access to the education system to all minors granted refugee or subsidiary protection status (under the same conditions as nationals).
- With regards to access to social welfare, the provisions of the Geneva Convention contained in Article 23 are mostly in line with the provisions of Article 28 of the Qualification Directive.
- While the right to housing should be regulated to result as favourable as possible for refugees according to Article 21 of the Geneva Convention, the same right is downgraded to being granted under equivalent conditions as other third country nationals legally residing in the Member State according in Article 31 of the Qualification Directive.
- Freedom of movement within the territory of the host Country is altogether equal in both Article 26 of the Geneva Convention and Article 32 of the Qualification Directive.
- Article 34 of the Geneva Convention on the progressive assimilation and naturalization of refugees within the host country has been somewhat limited to the accessibility to integration programmes within the Member State (Article 33), without necessarily establishing a strategy at national level for such programmes.

103 Article 20 of Directive 2004/83/EC
104 Article 26 paragraphs (2) and (4) of Directive 2004/83/EC
The Qualification Directive also introduced a few innovative rights not contemplated in the Geneva Convention on Refugees of 1951 such as:

(1) The right to information, introduced by Article 22 in the Directive that states:

"Member States shall provide persons recognised as being in need of international protection, as soon as possible after the respective protection status has been granted, with access to information, in a language likely to be understood by them, on the rights and obligations relating to that status".

(2) The Directive also introduces, in the same spirit of the 2003 Directive on the right for immigrants to family reunification\textsuperscript{105}, the right to family unity for seekers of international protection. The right to family reunification is particularly important because:

"Although the right to seek and enjoy asylum in another country is an individual human right, the individual refugee should not be seen in isolation from his or her family. The role of the family as the central unit of human society is entrenched in virtually all cultures and traditions, including the modern, universal legal ‘culture’ of human rights\textsuperscript{106}.”

Although the Conference of Plenipotentiaries on the 1951 Convention on Refugees declared that "the unity of the family (...) is an essential right of the refugee\textsuperscript{107}” the Convention does not explicitly confer a right to family reunification to refugees. Nevertheless Article 23 of the Qualification Directive, titled "maintaining family unity" entails that "Member States shall ensure that family unity can be maintained" and that "Member States may decide that this Article also applies to other close relatives who lived together as part of the family at the time of leaving the country of origin, and who were wholly or mainly dependent on the beneficiary of refugee or subsidiary protection status at the time". Also, the definition assigned to "family members" in Article 2 (h) includes "the spouse of the beneficiary of refugee or subsidiary protection status or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married

\begin{footnotes}
\item[105] Directive 2003/86/EC of 22 September 2003 on "the Right to Family Reunification".
\item[106] K. Jastram., K. Newland., Family Unity and Refugee Protection, Cambridge University Press (Published online), 2009.
\item[107] Final Act of the 1951 United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Recommendation B.
\end{footnotes}
couples under its law relating to aliens“, including same-sex couples to benefit from the right to family unity in the Member States that recognize same-sex unions\textsuperscript{108}.

(3) The Qualification Directive also promotes in Article 29 access to health care for both beneficiaries of refugee or subsidiary protection status under the same eligibility conditions as nationals of their host countries.

(4) Moreover the Qualification Directive repeatedly promotes the pursuit for Member States to take into account the best interests of the child when dealing with minors, especially non-accompanied ones. For instance Article 20 (3) and (5) states:

"When implementing this Chapter, Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors (...), single parents with minor children (...)."

and

"The best interest of the child shall be a primary consideration for Member States when implementing the provisions of this Chapter that involve minors."

Furthermore Article 30 in specifically dedicated to unaccompanied minors:

"As soon as possible after the granting of refugee or subsidiary protection status Member States shall take the necessary measures, to ensure the representation of unaccompanied minors by legal guardianship or, where necessary, by an organisation responsible for the care and well-being of minors, or by any other appropriate representation including that based on legislation or Court order."

Additionally, the article provides that siblings shall be kept together as far as possible and changes of residence limited to a minimum. Finally, Member States should try to trace the members of the minor's family as soon as possible.

\textsuperscript{108} "Nine Member States allow this, subject to certain conditions (Belgium, Czech Republic, Denmark, Germany, Finland, Luxembourg, Netherlands, Spain, UK). This is not allowed in 14 Member States and the situation is unclear in 4 others." from \textit{Same-Sex Couples, Free Movement of EU citizens, Migration and Asylum}, factsheet by the Fundamental Rights Agency of the European Union, 2009; available at: http://fra.europa.eu/sites/default/files/fra_uploads/1225-Factsheet-homophobia-couples-migration_EN.pdf
With regards to the issue of voluntary repatriation, the Qualification Directive introduces with Article 34 the possibility for Member States to provide assistance to refugees or beneficiaries of subsidiary protection who wish to repatriate to their Country of origin.

1.4.3 Distinctions between beneficiaries of subsidiary protection and refugees

"A key issue in the Directive is the possibility for Member States to distinguish between beneficiaries of subsidiary protection and persons with refugee status, as regards the content of the rights which Member States must guarantee."\(^{109}\)

Steve Peers notes considerable differences between the two statuses of protection, almost always in disfavour of beneficiaries of subsidiary protection. For instance:

- With regards to family reunification, Member States can define the conditions required for family members of persons with subsidiary protection status to access to certain benefits such as their residence permits and assistance for voluntary repatriation\(^{110}\).
- While residence permits for refugees must be valid for at least three years, the same permits for subsidiary protection beneficiaries must be valid for at least one year, without any explanation as to why the need for subsidiary protection should be shorter that the need for asylum\(^{111}\).
- Access to work also differs between the two statuses: while Member States shall authorise both to engage in employed or self-employed activities, they have an option to prioritise access to employment for beneficiaries of subsidiary protection for an undefined period of time\(^{112}\). On the contrary, while employment-related education, vocational training and practical work experience are offered to beneficiaries of refugee status under equivalent conditions as nationals beneficiaries of subsidiary protection are availed such benefits under conditions to be decided by the Member States\(^{113}\).
- Access to social assistance and health care must be offered on the same basis as national but can be limited to "core benefits" for beneficiaries of subsidiary protection\(^{114}\).
- Integration programmes, while considered mandatory to better integrate refugees are deemed optional for persons with subsidiary protection status\(^{115}\).

---

110 Article 23 (2) of Directive 2004/83/EC
111 Article 23 (1) and (2) of Directive 2004/83/EC
112 Article 26 paragraphs (1) and (3) of Directive 2004/83/EC
113 Article 26 paragraphs (2) and (4) of Directive 2004/83/EC
114 Article 28 paragraphs (1) and (2) and Article 29 paragraphs (1) and (2) of Directive 2004/83/EC
1.4.4 International protection needs could arise "sur place"

Last but not least, the Directive introduces the possibility - not contemplated within the Geneva Convention on Refugees of 151 - that the need for international protection may arise *sur place*, meaning after the applicant's departure from his/her country of origin. The UNHCR welcomed this innovation since:

"Even where it cannot be established that the applicant has already held the convictions or orientations in the country of origin, the asylum seeker is entitled to the right of freedom of expression, freedom of religion and freedom of association (...). Such freedoms include the right to change one's religion or conviction, which would occur subsequent to the departure e.g. due to the disaffection with the religion on policies of the country of origin, or greater awareness of the impact of certain policies."

1.5 Procedures for granting refugee status in EU countries

The Directive on minimum standards on procedures in Member States for granting an withdrawing refugee status, also known as the "Procedures Directive", presented by the European Commission in 2001, was adopted in 2005 after particularly difficult negotiations watering down the initial draft of the Commission and proposed amendments by the European Parliament:

"Taking the very good European Commission's draft as a starting point, the long process of inter-State negotiations resulted in an Amended proposal (...) which contained no binding commitment to satisfactory procedural standards, allowing scope for Member States to adopt or continue worse practices in determining asylum claims."

The Directive's main objectives were to harmonize and improve the quality of procedures for granting and withdrawing refugee status in the Member States of the European Union.

The Directive applies to all applications for asylum made within the territory (including borders or transit zones) of the Member State and for all individual procedures for both the refugee status and the subsidiary protection status; the Directive and can also apply for any other kind of international

---

115 Article 33 paragraphs (1) and (2) of Directive 2004/83/EC
116 Article 20 of Directive 2004/83/EC
118 Directive 2005/85/EC
protection and does not apply in cases of request for diplomatic or territorial asylum submitted to representations of Member States\(^\text{120}\).

However, the Directive has been criticised because, as Steve Peers noted "a number of provisions in the preamble and the main text, as well as provisions of other EU asylum legislation suggest that a decision-maker must first consider the possibility of granting Geneva Convention refugee status, before considering granting subsidiary protection status", establishing an implicit "hierarchy between applications" for Geneva Convention status and for the subsidiary status. The UNHCR noted indeed that:

"The structure of decisions in the majority of States surveyed addressed the decision on refugee status before subsidiary protection status: Belgium, Bulgaria, the Czech Republic, Finland, France, Germany and the UK (...)\(^\text{121}\)."

This hierarchy between statuses is detrimental for applicants qualified to ask for subsidiary protection, as both types of protection should be evaluated on the same level (on this matter the UNHCR advised the European Union to use check lists to guide the structure and content of decisions\(^\text{122}\)).

Also, the Directive contains very few to no provisions establishing particular procedures for vulnerable categories or persons with special needs such as women, unaccompanied minors, elderly applicants, applicants with disabilities or victims of torture, sexual violence and persons suffering from post-traumatic stress disorder.

For instance, a UNHCR statistical research\(^\text{123}\) show that yearly a high amount of women (around 20'000 women every year) seek asylum from female genital mutilation (FGM) practising countries of origin in the European Union. In some European countries, these women from FGM practising countries amount up to 20% of female asylum applicants and, in Malta and Italy, between 2008 and 2011, their number amounted respectively to 66 and 90% of female asylum applicants\(^\text{124}\).

---

\(^{120}\) Article 3 of Directive 2005/85/EC


\(^{122}\) UN High Commissioner for Refugees, Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations, March 2010; p. 29.


These examples prove, sadly, that women fleeing for gender-related violence are common and numerous, which is why the European Union should promote better "sensitive" standards for processing claims of vulnerable categories of persons including women.

1.5.1 Procedural guarantees

Chapter II of the Directive, titled "Basic principles and guarantees" lays down a series of rights and guarantees to asylum seekers such as:

1. the possibility for the applicant to obtain informations about the procedures
2. opportunities for a personal interview
3. minimum requirements for the decision making process
4. access to legal assistance.

To my understanding the strong and weak points of this Chapter of the Directive are the following. The strong points are these guarantees and rights recognised to applicants for the asylum status:

(1) Article 6 paragraph (2) establishes the right to have access to an asylum procedure. The same Article provides that Member States might require that applications for asylum be made in person and/or that the applicant might provide applications on behalf on his/her dependants (with regards to the right to family unity laid down by the Qualification Directive). Member States may also determine when and how a minor can make an application on his/her own behalf or if such application has to be lodged by a representative.

(2) Article 7 grants the right to remain in the Member State pending the examination of the application although with the exception of cases where a person is surrendered to another State or international criminal court-tribunal.

(3) Article 8 and 9 provide that Member States shall not reject or exclude applications because "they have not been made as soon as possible" and that decisions on the approval or rejection of such applications have to be taken after an appropriate examination. The same Articles later define an appropriate examination of an asylum application as individual, objective, impartial, examined by a knowledgeable personnel and taken with precise and up-to-date informations from various sources (such as the United Nations High Commissioner for Refugees) on the general situation in

125 Article 3 paragraph (4) of Directive 2005/85/EC
the countries of origin of applicants for asylum (and if necessary of the countries through which they have transited) and given in writing. However, the UNHCR noticed that the application in practice of these Articles and especially of the individual assessment of each application was not carefully respected:

"(...) the examination of over 1,000 individual decisions and case files across the participating States led UNHCR to question whether in some the requirements of Article 9 (...) in conjunction with Article 8 (...) to provide individualized reasons in fact and law following the refusal of an asylum application have been effectively implemented in practice".\(^\text{126}\)

Also, the structure and content of decisions varied greatly for example in the evidence assessed and standards of proof applied\(^\text{127}\). The decisions examined by the UNHCR consisted in "brief generic and standard legal paragraphs":

"As such there was no evidence that these applications were examined and these decisions taken individually, objectively and impartially".\(^\text{128}\)

(4) Applicants for asylum also benefit from a series of guarantees listed in Article 10:

- They must be informed in a language which they may reasonably be supposed to understand of the procedure to be followed and of their rights and obligations during the procedure as well as the possible consequences of not complying with their obligations and/or not cooperating with the authorities. They also shall be informed of the result of the decision in a language that they may reasonably supposed to understand when they have not been assisted or represented by a legal adviser or other counsellor and when free legal assistance is not available.

However, in practice, the UNHCR noticed that in most States surveyed the decision is provided only in the host State's language and the translation is either provided orally when serving the decision or through a legal adviser. The UNHCR recommends all information to be provided to the


applicants in a language they demonstrably do understand, and not merely are "supposed to understand". 129.

They must receive gratuitously the services of an interpreter for submitting their case to the competent authorities when necessary and, when the decision is served by post, it is difficult to verify if understandable by the applicant.

Once again, these provisions are often not respected in practice, as a UNHCR research revealed "widespread misconduct" of interpreters where they omitted to interpret some of the applicant's statements and/or modified the statements of the applicants. Some interpreters even added "their own comments or personal observations" and responded to questions for and on behalf of the applicant. 130.

Applicants shall be informed in a reasonable time frame of the decisions concerning their application for asylum.

- When applicants are given a negative response on their applications for asylum they shall also receive informations on how to challenge that decision.

(5) Applicants for asylum have the right to a personal interview on their application for asylum with a person competent under national law to conduct such interview. Such personal interview may be omitted when the determining authority is able to take a positive decision using the evidence available or has already had a meeting with the applicant for the purpose of assisting him/her with his/her application or considers the application to be unfounded. A personal interview should be confidential and take place without the presence of family members. 132. The personal interview shall be transcribed in a written report accessible to the applicant and, whether the applicants refuses to approve the contents of the report, the reasons of his refusal shall be entered in his file and shall not prevent the determining authority from taking a decision on his/her application. 133.

130 UN High Commissioner for Refugees, Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations, March 2010; p.34.
131 Article 12 of Directive 2005/85/EC
133 Article 14 of Directive 2005/85/EC
Sadly, in practice, the UNHR noted a series of problems with the application of these previsions to vulnerable categories of people such as children:

"The research found that in the absence of a specific requirement in the (Directive), national legislation on the circumstances in which a child shall be given the opportunity of a personal interview in the asylum procedure is divergent, in some cases absent"\textsuperscript{134}.

This could be the case also for women, many of whom may have been subjected to gender-specific violence:

"UNHCR has been informed that in no Member State of focus in this research is the provision of same-sex interviewer and interpreter mandatory. Moreover, the provision of a same-sex interviewer and interpreter is not mandatory or automatic, even for applications which raise the issue of sexual violence. (...) UNHCR observed a significant number of personal interviews in which the interviewer and/or interpreter were not gender-appropriate. For example:
- in two interviews (...) in the Czech Republic, the applicants and interviewers were female but the interpreters were male. Both female applicants claimed to have been subjected to sexual violence and were asked to detail this during the personal interview (...).
- Three interviews (...) in Finland in which issues of sexual violence and forced abortions were raised, but neither the interviewer nor the interpreter was of the same sex as the applicant\textsuperscript{135}.

(6) Article 21 guarantees the UNHCR access to asylum-seekers (including those in detention and in airport or port transit zones) and information on individual asylum applications pending or taken.

(7) Finally, Member States shall collect in a discrete manner informations on individual cases, without disclosing sensitive informations on the existing applications for asylum, the alleged actors of persecution and/or obtain informations from the alleged actors of persecution in a manner that would result in such actors being directly informed of the fact that an application has been made by an applicant in particular, jeopardising "the physical integrity of the applicant and his/her dependants, or the liberty and security of his/her family members still living in the country of origin"\textsuperscript{136}.

\textsuperscript{134} UN High Commissioner for Refugees, Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations, March 2010; p.23.

\textsuperscript{135} UN High Commissioner for Refugees, Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations, March 2010; pp. 141-143.

\textsuperscript{136} Article 22 of Directive 2005/85/EC
As for the weak points of Chapter II, they mostly concern the possible cases of detention of asylum applicants and right to free legal assistance. With regards to the latter, the UNHCR has severely criticised the Directive:

"In UNHCR's view, the right to legal assistance and representation is an essential safeguard, especially in complex European asylum procedures. Asylum-seekers are often unable to articulate cogently the elements relevant to an asylum claim without the assistance of a qualified counsellor because they are not familiar with the premise grounds for the recognition of refugee status and the legal system of a foreign country. Quality legal assistance and representation is, moreover, in the interest of States, as it can help to ensure that international protection needs are identified early. The efficiency of first instance procedures is thereby improved. While guaranteeing free legal assistance and representation against negative decisions is a step in the right direction, UNHCR regrets that this is not available in first instance procedures. (...) Adequate provision should additionally be made for asylum-seekers with special needs (unaccompanied children, victims of torture and other traumatic experiences) who generally require additional legal, as well as other, assistance."\(^{137}\)"

Indeed, one of the most criticised Article of the Directive is Article 16 on the Right to legal assistance and representations. Said Article provides a right to free legal assistance only in very few restricted cases:

- only for procedures before a court/tribunal and not for onward appeals or reviews, re-hearings,
- only to those who do not have sufficient resources to pay for legal assistance themselves,
- only if the appeal or review is likely to succeed.

Moreover, Member States may also:

- Impose monetary and/or time limits to the use of free legal assistance "provided that such limits do not arbitrarily restrict access to legal assistance and/or representation",
- Demand to be reimbursed (wholly or partially) for any expenses granted whether the applicants financial situation should improve considerably or if the decision to grant such benefits was taken on the basis of false information by the applicant.

These previsions appear even more dreary when translated into practice: the UNHCR noted that in some Member States lengthy processes for granting free legal assistance could negate their usefulness in appeal processes with short deadlines or the requirements for said legal aid were impossible to fulfil in practice. Also, the UNCHR noticed a lack of available lawyers competent in

refugee law and in some Member States the effective opportunities to obtain legal assistance for an appeal was "limited for appellants in the accelerated procedure or in detention"\textsuperscript{138}.

Also, although the Directive grants unaccompanied minors certain procedural guarantees in Article 17 that have been welcomed by the UNHCR as an explicit reference to the principle of the "best interest of the child"\textsuperscript{139}, they remain confined to unaccompanied minors and subsequently do not concern all minors or other vulnerable categories.

With regards to the possible cases of detention, Article 18 is extremely vague and incomplete. The Article states "Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum" and "Where an applicant for asylum is held in detention, Member States shall ensure that there is a possibility of speedy judicial review" without any mention to the possible grounds for detention and without limiting the detention of an asylum seeker as a last resort by the authorities:

"A list of grounds for the detention should be exhaustive and its interpretation should be narrow in order to prevent possible cases of arbitrary detention of asylum applicants. Moreover, one has to bear in mind that persons genuinely seeking international protection could have already gone through persecution and detention before they were able to lodge their asylum claim in the country of asylum. Therefore the detention of persons seeking asylum should always be well-considered and appropriately justified\textsuperscript{140}.

Furthermore, and extensive interpretation of this Article would violate the provisions contained in Article 31 paragraph (2) of the Geneva Convention on Refugees of 1951 that forbids restrictions to the movements of asylum seekers unless if necessary and applied until they have received the results of their application for the asylum status:

"The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission in another country. (...)\textsuperscript{141}".


\textsuperscript{139} The prevision of considering the "best interests of the child" has often been put aside by Member States as shown for example in the \textit{Rahimi} case (ECtHR, Application n.8687/08) where a 15 years old Afghan unaccompanied boy was detained in Greece for two days in an overcrowded, unhygienic cell he had to share with adults and was later released without either housing arrangements, means of subsistence or legal representation. After spending one night in the streets, he received help from humanitarian associations. For more informations of the case, see: Del Guercio, A., "Minori stranieri non accompagnati e Convenzione europea dei diritti umani: il caso \textit{Rahimi}" in\textit{ Diritti umani e diritto internazionale}, Milano, Franco Angeli, Volume 5, Number 3, 2011.


\textsuperscript{141} Article 31 of the United Nations Convention relating to the Status of Refugees of 1951.
1.5.2 Procedures at first instance and common standards for the application of certain concepts and practices

Chapter III on procedures at first instance has also been widely criticised for its provisions on accelerated and inadmissibility procedures and the concept of "safe third country".

First, as Olga Ferguson Sidorenko\textsuperscript{142} and Steve Peers\textsuperscript{143} pointed out, while Article 23 paragraph (2) establishing that Member States shall ensure that examination procedures "should be concluded as soon as possible, without prejudice to an adequate and complete examination" would seem to establish an innovative, fair and quick access to the asylum status for asylum seekers the obligation for Member States to examine an application within a certain period of time might jeopardise the equity and thoroughness of the examination process. Indeed, as Steve Peers notes:

"The UNHCR report\textsuperscript{144} stated that in some Member States, accelerated procedures were 'the norm' and concluded that in some cases, the time limits applying to accelerated procedures made it 'extremely difficult' to ensure that basic procedural safeguards were upheld\textsuperscript{145}."

Moreover, while paragraph (3) provides that Member States might accelerate or prioritise any examination where the application "is likely to be well-founded or where the applicant has special needs" the following paragraph (4) lists a series of reasons mostly regarded as "negative" to the applicant's file for which Member States might also accelerate or prioritise the examination, presumably to deny such applicant the right to asylum. Such "negative" reasons allowing an accelerated or prioritised procedure include:

- the applicant has only raised issues that are not relevant or of minimal relevance to the examination of whether he/she qualifies as a refugee,
- the applicant clearly does not qualify as a refugee,
- the application is considered unfounded because the applicant is from a safe country of origin,

\textsuperscript{144} UN High Commissioner for Refugees, \textit{Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations}, March 2010; pp. 222-223.
- the applicant has misled the authorities by presenting false informations and/or documents or withheld relevant informations and/or documents relating to his identity and/or nationality that could have had a negative impact on the decision,
- the applicant has filed other applications for asylum stating different personal data,
- the applicant has not produced information establishing (with a certain degree of certainty) his/her identity or nationality. It might be also possible that he/she in bad faith destroyed or disposed of an identity or travel document,
- the applicant has made inconsistent, contradictory, improbable or insufficient representations that put into question the veridicity of his/her having been persecuted,
- the applicant has submitted a subsequent application which does not raise any relevant new elements with respect to his/her particular circumstances or the situation of his/her country of origin,
- the applicant has failed (without reasonable cause) to make his/her application earlier, having had the opportunity to do so,
- the applicant is making an application just to delay or frustrate the enforcement of an earlier or imminent decision which would result in his/her removal of the host Country
- the applicant has failed without good reason to comply with the obligations required by the Procedure and Qualification Directive,
- the applicant entered the territory of the Member State unlawfully or prolonged his/her stay unlawfully and without good has either not presented himself/herself to the authorities and/or filed an application for asylum as soon as possible, given the circumstances of his/her entry,
- the applicant is a danger to the national security or public order of the Member States, or the applicant has been expelled for serious reasons of public security and public order in national law,
- the applicant refuses to comply with an obligation to have his/her fingerprints taken,
- the application was made by an unmarried minor after the application of the parent/s responsible for the minor has been rejected.

There is a great number of issues with many of the provisions just listed, mainly for three reasons:

(1) They do not consider the cases of vulnerable persons (victims of violence, children) which should require a regular procedure. Especially in the case for accompanied children whose application results seem to rely exclusively on the rejection of the application of their parents.
(2) Some of the "negative" reasons justifying an accelerated procedure seem arbitrary: there is no European-wide accepted definition of "threat to public order or security" and such grounds might be used as an excuse to remove "easily" asylum seekers from a Member State (similarly as the expulsion of legal and illegal Roma travellers from France in 2010), the lack of information or the "lateness" of the application might also be symptoms to a lack of awareness or knowledge by possible candidates to the right to asylum to the procedures they have to follow in order to acquire such status. Also, while the lack of identification papers might be a ruse to try and obtain the asylum status it might also be the result of the difficult situations many refugees have to go through to access Europe's outer borders, especially by sea. Also, many provisions are exclusively based on the lack of requirements for the asylum status (such as the presumption of suffered persecution) or if the applicant "clearly does not qualify" as a refugee leaving entirely to the discretion of Member States to evaluate if those criteria are met or not.

These reasons are too vague and might lead to abuse by Member States that, in order to rapidly examine as many applicants as possible on a very short amount of time might end up preventing applicants from a fair, thorough and individual examination of their claim.

Indeed, the UNHCR also noted in analysing 1000 written decisions that in several States the quality of decisions varied greatly between the general procedure and decisions in accelerated, border and admissibility procedures. While the first often "evidenced good practice, fulfilling the requirements to set out reasons in fact and law" the latter "did not necessarily exhibit sufficient reasoning". Also, in some cases time-frames seemed excessively short to the correct evaluation of applications:

"Some time-frames for the examination of applications are extremely short. In three States, accelerated procedures applied to applicants at the airport or in detention are two or three days respectively."

(3) While the acceleration of the examination of a procedure should be an exceptional measure, the UNHCR noted that in some Member States the acceleration of the examination appeared to be the norm.

---

With regards to the inadmissibility of applications, Article 25 defines an application as 'inadmissible' when Member States are not required to examine whether the applicant qualifies as a refugee because:

- another Member State has granted refugee status to the applicant,
- a country which is not a Member State is considered as a first country of asylum for the applicant,
- a country which is not a Member State is considered as a safe third country for the applicant.

The inadmissibility of an application because of the supposedly "safe" situation of a third country of origin is not a criteria to take for granted as I will analyse later on\textsuperscript{149},
- the applicant is allowed to remain in the territory of the Member State concerned on some other grounds,
- the applicant has lodged an identical application after a final decision,
- a dependant of the applicant lodges an application after being 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.

\textit{1.5.3 The concepts of "safe third country", "safe third country of origin" and "first country of asylum"}

Article 27 of the Procedures Directive on the safe country concept has raised a number of criticisms\textsuperscript{150} and jurisprudence as to what classifies a States as "safe" and how such status should not be considered static but subject to changes and should not prevent Member States from ensuring that "if the concept is applied, case-by-case consideration of the safety of a particular country for a particular applicant is always assured, even when there has been national designation of the country as safe"\textsuperscript{151}.

Furthermore, the UNHCR showed how the list of States considered 'safe countries of origin' varies greatly between Member States\textsuperscript{152}: these divergences are worrying because they reflect naive and

\begin{flushright}
149 See 1.5.3 below. \\
151 UN High Commissioner for Refugees, \textit{Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations}, March 2010; p. 61. \\
\end{flushright}
simplistic evaluations from some Member States as to which countries can or cannot be considered safe countries, objectively putting asylum-seekers lives at risk. If the concept of 'safe countries of origin' was to be applied, Member States should at least analyse thoroughly and regularly the situation in those States and share their observations and results with other Member States in order to achieve a more harmonized, coherent and thorough list shared between Member States.

For instance, Hungary, a Member State of the European Union, has sent approximately 450 applicants to Serbia in 2011 because the latter was considered a "safe country"; however a recent UNHCR report recommended not to consider Serbia as a safe third country of asylum, and that "countries therefore should refrain from sending asylum seekers back to Serbia". Indeed, the Hungarian Helsinki Committee showed some concerns with the Serbian asylum system with regards to limited access to protection, dangers of chain refoulement and the poor reception conditions of applicants. There have been concerns on whether to consider automatically "safe" Member States of the European Union (see infra).

The Article classifies a safe third country as a place where the person seeking asylum will be treated in accordance with the following principles:

- life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion,
- the principle of non-refoulement is respected,
- the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law is respected,
- the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

On the same premises, Article 29 originally provided that the Council would adopt a minimum common list of third countries which should have been regarded by Member States as safe countries of origin. However, Article 29 was 'struck down' by the Court of Justice ensuring that only Member States can introduce laws regarding 'safe countries of origin'. Accordingly Article 30 defines how Member States can designate at national level a list of 'safe countries of origin' that Annex II of the Directive defines as:

---

154 For more information see the Hungarian Helsinki Committee's Report on Serbia: Serbia As a Safe Third Country: A Wrong Presumption, September 2011, available at: http://www.refworld.org/docid/4e815dec2.html
155 after voting (qualified majority required) on a proposal from the Commission and after consultation with the European Parliament.
"A country is considered as a safe country of origin where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2004/83/EC, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.

In making this assessment, account shall be taken, inter alia, of the extent to which protection is provided against persecution or mistreatment by:

(a) the relevant laws and regulations of the country and the manner in which they are applied;
(b) observance of the rights and freedoms laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and/or the International Covenant for Civil and Political Rights and/or the Convention against Torture, in particular the rights from which derogation cannot be made under Article 15(2) of the said European Convention;
(c) respect of the non-refoulement principle according to the Geneva Convention;
(d) provision for a system of effective remedies against violations of these rights and freedoms".

However, paragraph (2) of Article 30 allows a derogation for existing national laws (before the 1st of December of 2005) on "safe countries of origin" as long as persons in these third countries are neither subjected to persecution or torture, inhuman or degrading treatments and a further derogation is allowed for the so-called supersafe third countries: States which have ratified and observe the Geneva Convention and the ECHR where persons sought irregular entry or have already entered their territory. Said States can decide in that case not to examine the asylum application of these persons157.

The Directive subsequently provides158 that claims from nationals of recognised 'safe third countries of origin' are to be qualified as unfounded. The UNHCR noted that some Member States do not examine at all individual applications of applicants from 'safe countries of origin' while other Member States allow applicants the "opportunity to rebut the presumption of safety of the country of origin" on the basis of their own circumstances, however, they also have the burden of proof that their State of origin is not safe for them159. For example, an Amnesty International report on the situation of irregular migrants and asylum seekers in Greece stated that:

157 Article 36 of Directive 2005/85/EC
158 Article 31 of Directive 2005/85/EC
"In some instances, the nationality of asylum-seekers, and whether or not their country of origin was considered safe were among the determining criteria influencing the decision of the authorities to detain them during the determination of their asylum claims. Police authorities in Samos told Amnesty International in June 2009 that if the asylum-seeker's country of origin was one where returns can take place, such as Iraq, the deportation order was accompanied with an order to continue the detention of the individual concerned"\textsuperscript{160}.

Article 26 defines cases where a country can be considered to be a 'first country of asylum' for a particular applicant for asylum in case he/she has been recognised in that country as a refugee and can still avail himself/herself of that protection or he/she enjoys sufficient protection in that country (that also respects the principle of \textit{non refoulement}).

Article 28 on 'unfounded applications' has also raised concerns because it allows to define an application for asylum as unfounded if the determining authority has established that the applicant does not qualify for refugee status whereas an asylum application should be rejected as unfounded only if the applicant does not qualify neither for refugee status nor for other forms of international protection:

"(The UNHCR) is concerned that a rejection of the asylum application on refugee grounds only may create the impression that no international protection needs exist, even if complementary/subsidiary protection needs are subsequently recognized. (...) In this case the UNHCR would like to reiterate the importance of a single procedure in which all protection needs are examined before a decision is taken on the asylum application"\textsuperscript{161}.

The Articles contained in Section IV of the Directive pertain to the possibility to introduce subsequent applications in the same Member State when a person has previously withdrawn or abandoned his/her previous application or the Member State has decided to apply this procedure after taking a decision on the previous application.

Chapter IV sets out procedures for the withdrawal of refugee status whenever "new elements or findings arise indicating that there are reasons to reconsider the validity of (a person's) refugee status"\textsuperscript{162}.


\textsuperscript{162} Article 37 of Directive 2005/85/EC
1.5.4 The right to appeal a negative decision on an asylum application

"Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal against (decisions concerning their asylum application)\(^{163}\)."

According to Steve Peers, the right to appeal is of 'practical importance' given the fact that 28% of appeals overturned previously negative decisions in asylum cases in 2008\(^{164}\).

Article 39 paragraph (2) on the right for Member States to provide time limits for the applicant to appeal a previous decision on his asylum application raises some questions in practice as the time limits range between Member States vary greatly, between 2 (for France and some cases in the United Kingdom) and 60 days (in Greece and Spain)\(^ {165}\). Also, the UNHCR has considered that "some of the time limits imposed by Member States are too short, and may impede the right to an effective remedy", for example:

"(...) the 48 hour period within which applicants at the border in France, and applicants in detained fast-track procedures in UK, must submit an appeal is insufficient. It may not allow the applicant to exercise his/her right to obtain legal assistance, or, for the legal representative to adequately prepare the relevant argumentation and additional evidence. A further difficulty in France is the fact that all documentation must be submitted in French, and no translation or interpretation is provided. In the UK, women are said to face particular problems in such procedures because the process is too fast for many women to have a realistic chance to disclose gender-related persecution, particularly rape and sexual violence. In the UK, particular problems also arise with refusals on safe third country grounds, which are subject to a three-day time limit which in practice affords insufficient time to lodge a judicial review challenge\(^{166}\)."

Article 39 paragraph (3) allows "the lack of suspensive effect of appeal\(^{167}\)" as it provides that Member States can decide if the remedy pursuant can or can not remain in the Member State evaluating his/her pending appeal. This provision clearly goes against a consolidated jurisprudence of the European Court of Human Rights. For example, in the Case Conka v. Belgium the Court considered in 2002 that when complaints concern a violation of Article 3 ECHR (prohibition of

torture, inhuman or degrading treatment or punishment) they require a suspensive effect on which "the effectiveness of a remedy depends\textsuperscript{168}, and by which asylum seekers shall thereby not be removed from the territories of the Member States before their case has been definitely refused.

Finally, Chapter VI lays down the final provisions. As Steve Peers duly noted, a 'notable point' is the temporal scope of the Directive: Article 44 provides that Member States shall apply the content of the Directive only for applications for asylum lodged (or withdrawn) after the 1st December 2007.

1.6 Reception conditions for asylum applicants
Directive 2003/9/EC of 2003 sets out minimum standards of reception conditions for asylum applicants. Its aim is to ensure that asylum applicants have a 'dignified standard of living' harmonised throughout the European Union in order to both grant them basic necessities (as many asylum seekers do not have the means to support themselves) while waiting for the results of their examination, and both to limit asylum applicants' secondary movements, often 'influenced by the variety of conditions for their reception'\textsuperscript{169}.

The Directive only applies to asylum applicants; however, Member States may apply this Directive to persons claiming other forms of status (although not temporary protection or requests for territorial or diplomatic asylum submitted to the representations of Member States).

Member States have to inform within 15 days applicants of their rights and obligations with regards to reception-related benefits\textsuperscript{170}. They also have to provide applicants with a document certifying their status as asylum seekers or that they are allowed to stay in the territory of the Member State within 3 days of their application\textsuperscript{171}.

Reception conditions may be reduced or withdrawn if rules on reporting and providing information are not respected and/or if the applicant has already lodged an application in the Same Member State or concealed financial resources and therefore shouldn't have had the right to benefit from certain material reception conditions or didn't make his asylum claim as soon as reasonably practical after his arrival in that Member State\textsuperscript{172}.

\textsuperscript{168} Conka \textit{v.} Belgium, 51564/99, Council of Europe: European Court of Human Rights, 5 February 2002; p.36 (paragraph 13).
\textsuperscript{169} Preamble of the Directive, paragraphs (7) and (8)
\textsuperscript{170} Article 5 of Directive 2003/9/EC
\textsuperscript{171} Article 6 of Directive 2003/9/EC
\textsuperscript{172} Article 16 of Directive 2003/9/EC
1.6.1 Benefits and Rights granted to asylum applicants during the examination of their application

The Directive provides a series of benefits and recognises a series of rights for all applicants staying in the European Union's territory while waiting for the final decision on their protection claims:

(1) Assistance to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence\(^\text{173}\) that includes for instance housing, food, clothing\(^\text{174}\).

(2) Right to family unity when accommodation is provided by the Member State\(^\text{175}\).

(3) Medical care\(^\text{176}\) although, according to the UNHCR, this provision should also contain medical counselling on the grounds of reproductive health matters, psychological counselling free of charge and appropriate training and sensitisation of medical personnel dealing with patients of different cultural backgrounds\(^\text{177}\).

(4) Schooling and education for minor children\(^\text{178}\).

(5) Special treatments for vulnerable categories or persons with special needs: Articles 17, 18, 19 and 20 of the Directive provide special benefits or rights to vulnerable categories 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. For instance, Article 20 States that:

"Member States shall ensure that, if necessary, persons who have been subjected to torture, rape or other serious acts of violence receive the necessary treatment of damages caused by the aforementioned acts".

According to the Commission's report on the application of the Directive, its main problem was connected with the meagre allowances granted in some Member States to asylum applicants:

"The main problems concerning application of the Directive were discovered in Member States where asylum seekers are given financial allowances. These allowances are very often too low to cover subsistence (...). The amounts are only rarely commensurate with the

\(^{173}\) Article 13 of Directive 2003/9/EC
\(^{174}\) Article 2 paragraph (j) of Directive 2003/9/EC
\(^{175}\) Article 8 of Directive 2003/9/EC
\(^{176}\) Article 15 of Directive 2003/9/EC
\(^{178}\) Article 10 of Directive 2003/9/EC
minimum social support granted to nationals, and even when they are, they might still not be sufficient, as asylum seekers lack family and/or other informal kinds of support”179.

On the civil society side, the European Council on Refugees and Exiles (ECRE)180 also tried to find out whether the existing material reception conditions were meeting the needs of asylum seekers in the European Union's Member States and collected conflicting results with regards to housing, food, clothing and access to health care:

"There seems to be a mixed picture with regards to the provision of clothing. (...) Overall, all countries for which we have received information through the questionnaire do provide some sort of clothing provision. In Luxembourg, however, asylum seekers are provided clothing in the form of vouchers, which can only be used to obtain second-hand clothes and do not cover shoes. The Netherlands give asylum seekers a one-off allowance of 36,30 Euro to cover their clothing costs. It is questionable, in both examples, whether the current provisions can adequately fulfil the clothing needs of asylum seekers. (...) All Member States covered in this report provide some housing for asylum seekers in kind, which normally involves placing them in reception centres. However, it emerged from the information collected through the questionnaire that there are not enough places to accommodate all asylum seekers in reception centres and that the cash allowance provided for those not receiving housing in kind, if provided at all, is usually not sufficient to rent independent accommodation. (...) In the United Kingdom, many asylum seekers are housed in sub-standard private accommodation, which is prejudicial to their health, in a poor state of repair, or lacking adequate amenities (...) It has been observed that eight Member States, (...) give food ‘in kind’, but this is only to asylum seekers in certain reception centres. A good practice has been observed in Austria and the Netherlands, where the policy of reception centres is increasingly to let asylum seekers buy and cook their own food as much as possible. Those who do not enjoy self-catering facilities or who are not housed in reception centres receive either food in kind or a specific amount of cash to pay for their food expenses. This is not the case in France, Greece and Lithuania, where asylum seekers do not receive any specific cash allowance for their food expenses. Instead, in France and Lithuania, asylum seekers are supposed to pay for their food from the general cash allowances they receive.

180 ECRE description from the ecre.org website:
"The European Council on Refugees & Exiles (ECRE) is a pan-European Alliance of refugee-assisting non-governmental organisations. ECRE is concerned with the needs of all individuals who seek refuge and protection within Europe. It aims to promote the protection and integration of refugees in Europe based on the values of human dignity, human rights, and an ethic of solidarity. ECRE seeks to achieve this aim by: Advocating a fair and humane European asylum policy and by promoting the development of a comprehensive and coherent response by the international community to refugee movements. Strengthening networking between refugee-assisting non-governmental organisations in Europe. Developing the institutional capacity of refugee-assisting non-governmental organisations in Europe".
Greece does not seem to provide asylum seekers who live outside of reception centres with any additional cash allowances for any of their expenses. (...) Most of the nine Member States for which we received information through the questionnaire provide free of charge access to health services similar to nationals for asylum seekers throughout the asylum procedure. However, two States apply restrictions to this provision. Lithuania only provides for necessary medical assistance, i.e. emergency assistance, and otherwise gives cash allowances/vouchers for minor medical expenses. Luxembourg provides for free medical treatment during the first three months of the asylum application, but after this period asylum seekers have to pay for their medical visits, though they are able to claim back up to 80% of the total cost encountered.\textsuperscript{181}

\subsection*{1.6.2 Freedom of movement of asylum applicants}

Although the first phrase of Article 7 paragraph (1) of the Reception Directive would seem to provide a right to freedom of movement for asylum applicants within the territory of Member States in line with Article 26 of the Geneva Convention on Refugees, the Directive then enlists a wide series of possible restrictions to said right or, on the contrary, lacks restrictions to the possibility to detain asylum applicants.\textsuperscript{182}

First, the host member State might restrict the freedom of movement of their applicants by assigning them to a specific area of their territory; however, said area "shall not affect the unalienable sphere of private life and shall allow sufficient scope for the guaranteeing access to all benefits under this Directive".\textsuperscript{183} Luckily, the Commission's application report states that the majority of Member States grant the right to free movement in their entire territory.\textsuperscript{184}

Secondly, the right to free movement might be limited for a number of reasons related to public interest or to allow the swift processing of applications.\textsuperscript{185}

\begin{itemize}
  \item \textsuperscript{182} This is particularly worrying since most Member States have legislation providing the possibility to detain foreigners upon arrival in the State. For example, France has more than 100 \textit{zones d'attente}: "small rooms, for instance in police stations, hotel rooms, administration offices" where they detain immigrants upon entry in their territory. From: G. Cornelisse., \textit{Immigration Detention and Human Rights: Rethinking Territorial Sovereignty}, Leiden-Boston, Martinus Nijhoff Publishers, Volume 19 of "Immigration and Asylum Law and Policy in Europe", 2010; p.8-9.
  \item \textsuperscript{183} Article 7 paragraph (1) of Directive 2003/9/EC
  \item \textsuperscript{185} Article 7 paragraph (2) of Directive 2003/9/EC
\end{itemize}
Lastly, with regards to the possibility to detain asylum applicants, the Directive provides that "when it proves necessary" (for example for legal reasons or reasons of public order) Member States can "confine an applicant to a particular place".186

Member States seem to have interpreted this provision extensively, given that, according to the Commission's report, "detention is foreseen by all Member States on numerous grounds":

"from exceptional circumstances – Germany –to the general practice of detention of all asylum seekers illegally entering the Member State except for those with special needs – Malta".187

The situation in practice is worsened by the fact that both the Procedures Directive and the Reception Directive do not provide a specific time limit for detention, granting Member States the right to detain for a copious amount of time asylum seekers:

"The length of detention varies from 7 days (Portugal) to 12 months (Malta, Hungary) or even an undefined period (United Kingdom, Finland)".188

Also, the Commission notes that "serious problems might arise in Member States which do not exclude the detention of asylum seekers with special needs": indeed, most Member States authorise the detention of minors and many of them even authorise the detention of unaccompanied minors.189

For instance, a delegation of the European Parliament's competent parliamentary Committee (LIBE190) visited Belgium's detention centres and discovered with the help of some NGOs that in

---

186 Article 7 paragraph (3) of Directive 2003/9/EC
190 "Committee responsible for:
1. the protection within the territory of the Union of citizens' rights, human rights and fundamental rights, including the protection of minorities, as laid down in the Treaties and in the Charter of Fundamental Rights of the European Union;
2. the measures needed to combat all forms of discrimination other than those based on sex or those occurring at the workplace and in the labour market;
3. legislation in the areas of transparency and of the protection of natural persons with regard to the processing of personal data;
2006 over 627 minors were put in detention centres.\textsuperscript{191} In its report citation is made of a study of the Université Libre de Bruxelles of 1999 on the psychological after-effects on a child detained:

"holding families with children is, from the point of view of the rights of the child and their well -being, unacceptable under current circumstances. The detention of children is currently applied in rather an arbitrary manner and not as an exceptional last resort. For some groups, detention is automatic, particularly for families who fall within the scope of the Dublin Convention. In this context, detention has effectively become automatic, and consequently trivialised."\textsuperscript{192}

The situation of detained women is some countries is also quite frightening:

"Conditions in detention centres in Malta have been deplorable for women. Single women have been forced to share living quarters with single men, and both government and non-government agencies attest to significant rates of pregnancy in detention. Until relatively recently no contraception was distributed in detention centres. There has been a suggestion that women have resorted to pregnancy as a way to gain release from the closed centres and be relocated to open centres, as single women are not classified as vulnerable. (...) "Vulnerable persons" refers to elderly persons, persons with a disability, lactating mothers and pregnant women" (...). A recent report by the European Commission (...) found that waiting periods for assessments could extend into months."\textsuperscript{193}

However, the Commission's report cited above on the transposition of the Reception Directive tries to limit the discretionary power of Member States with regards to detention by specifying that automatic detention without evaluating first the situation of the person in question is contrary to the Directive and that the length of the detention which "prevents detained asylum seekers from enjoying the rights guaranteed under the Directive" has to be duly justified (for example in instances of public order policing).\textsuperscript{194}

\textsuperscript{191} European Parliament, Report on a visit to closed detention centres for asylum seekers and immigrants in Belgium by a delegation of the Committee on Civil Liberties, Justice and Home Affairs (LIBE), 11 October 2007, PE404.456v01-00; p.6.

\textsuperscript{192} As quoted in European Parliament, Report on a visit to closed detention centres for asylum seekers and immigrants in Belgium by a delegation of the Committee on Civil Liberties, Justice and Home Affairs (LIBE), 11 October 2007, PE404.456v01-00; p.6.


1.7 The Dublin II Regulation and Eurodac

The Dublin II Regulation\textsuperscript{195}, which entered into force in 2003, establishes a series of hierarchical criteria in order to establish which Member State is responsible for examining an asylum application. Therefore its objective\textsuperscript{196} is to avoid the phenomenon of \textit{refugees in orbit}\textsuperscript{197}, asylum seekers unnecessarily transferred from a country to another and to prevent asylum-seekers from abusing the system by submitting multiple applications in different countries.

\textit{1.7.1 Mechanisms for determining the Member State responsible for examining an asylum application}

The criteria to identify the Member State responsible for an asylum application are to be applied on the basis of the situation of the asylum seeker at the time he lodged his/her first application within a Member State and in the order in which they are presented in the Regulation, listed as follows\textsuperscript{198}:

1. The right to family unity.

If the asylum seeker is an unaccompanied minor, "the Member State responsible for examining the application shall be that where a member of his or her family is legally present, provided that this is in the best interest of the minor. In the absence of a family member, the Member State responsible is that where the minor has lodged his/her application for asylum"\textsuperscript{199}. However, the European Council on Refugees and Exiles\textsuperscript{200} noticed that in practice:

"the best interests of children will rarely be served by being uprooted and transferred back to a State

\textsuperscript{195} Regulation 343/2003, which replaced the previous set of rules on responsibility for asylum applications defined by the Schengen Convention and Dublin Convention of 1990.

\textsuperscript{196} As was for the case for the Dublin Convention of 1990.

\textsuperscript{197} "A refugee who, although not returned directly to a country where they may be persecuted, is denied asylum or unable to find a State willing to examine their request, and are shuttled from one country to another in a constant search for asylum" according to http://www.refugeethesaurus.org.

\textsuperscript{198} Article 5 paragraphs (1) and (2) of Regulation 343/2003

\textsuperscript{199} Article 6 of Regulation 343/2003

where they have no ties or family members and "(in the UK) cases have been observed where children have been transferred to other Member States (...), kept in detention for long periods and then deported back to their country of origin (...)."

For adults, if the asylum seeker has a family member who has either been allowed to reside as a refugee in a Member State or his application is being examined by that Member State, the same State shall be responsible for examining the asylum application of the latter, "provided that the persons concerned so desire".

Also, asylum applications submitted by several members of a family simultaneously or on close dates can be examined together.

2. If the applicant possesses a valid or expired residence permit or visa

Whenever the asylum seeker is in possession of a valid residence document or visa, the Member State that issued is the one responsible for examining the asylum application. Where the asylum seeker is in possession of more than one valid residence document or visa issued by different Member States, the responsibility for examining the asylum application will be assumed by the Member State that issued the residence document conferring the right to the longest period of residency or, in the case of visas, the one having the latest expiry date and, at last, if visas are of the same type and, if they're not, the Member State that issued the visa having the longest period of validity and/or expiry date.

If the asylum seeker is in possession of one or more residence documents or visas that have respectively expired less than two years earlier for the first, less than six months for the latter, but where the asylum seeker has not left the territories of the Member States since, that same Member State is responsible for his/her asylum application.

3. Illegal entry or stay in a Member State of the applicant

---

203 Article 7 and 8 of Regulation 343/2003
204 Article 14 of Regulation 343/2003
205 Article 9 of Regulation 343/2003
206 Article 9 of Regulation 343/2003
If the asylum seeker has irregularly entered the territory of a Member State, that Member State will be responsible for examining his/her asylum application. "This responsibility shall cease 12 months after the date on which the irregular border crossing took place" 207.

If 12 months have passed since the asylum seeker has entered the territory of a Member State and he/she has since then been living for a continuous period of at least five months in another Member State (before lodging his/her asylum application), that Member State becomes responsible for examining the application. In case the applicant has been living for a period of time of at least five months within the European Union in several Member States, the Member State where he/she lived most recently shall be responsible for examining the asylum application 208.

4. Legal entry of the applicant in a Member State

When an asylum seeker lodges an asylum claim in a Member State where he/she is not required to obtain a visa, that Member State will be responsible for examining the asylum application 209.

5. Application for asylum in an international transit area of an airport.

When the third country national has applied for asylum in an international transit area of an airport, that Member State will be responsible for examining the application 210.

6. If - on the basis of the criteria just listed - no Member State responsible for the asylum application can be designated.

"Where no Member State responsible for examining the application for asylum can be designated on the basis of the criteria listed in this Regulation, the first Member State with which the application for asylum was lodged shall be responsible for examining it" 211.

---

207 Article 10 paragraph (1) of Regulation 343/2003
208 Article 10 paragraph (2) of Regulation 343/2003
209 Article 11 of Regulation 343/2003
210 Article 12 of Regulation 343/2003
211 Article 13 of Regulation 343/2003
Article 15 of the Directive provides the possibility, because of humanitarian reasons, to bring together family members and/or dependant relatives. This clause can be applied for example in situations of dependency, presence of unaccompanied minors, procedural issues. Nevertheless, because this clause is applied rarely and "in a restrictive manner\textsuperscript{212} I will not furtherly analyse its provisions.

Lastly, Chapter VI of the Dublin II Regulation, in order to prevent the abuse of asylum procedures in the form of multiple applications in different Member States in order to extent an applicant's stay in the EU, provides a series of tools for Member States to cooperate better and find as soon as possible which of them is responsible for an application and/or examine applications of asylum seekers. For instance:

"Each member State shall communicate to any Member State that so requests such personal data concerning the asylum seeker as is appropriate, relevant and non-excessive (...)\textsuperscript{213}"

and

"Member States may, on a bilateral basis, establish administrative arrangements between themselves concerning the practical details of the implementation of this Regulation, in order to facilitate its application and increase its effectiveness\textsuperscript{214}.

1.7.2 Transferring of asylum applicants to other Member States of the European Union and the sovereignty clause

The Dublin II Regulation provides that the Member State responsible for the asylum application must take charge of the applicant and complete the examination of the application for asylum\textsuperscript{215}. However, exceptions to this rule are numerous and very common in practice: a Member State might also choose to send an asylum seeker to a third country "in compliance with the provisions of the Geneva Convention\textsuperscript{216}" (applying the so-called "safe third country concept" previously

\textsuperscript{212} According to an ECRE report, this clause covers 0.5\% of all outgoing requests in 2010 and has never been used in Greece, Hungary, France, Slovakia and the Netherlands.
From: European Council on Refugees and Exiles (ECRE), "Dublin II Regulation: Lives on hold" - European Comparative Report, February 2013; p.49.

\textsuperscript{213} Article 21 of Regulation 343/2003
\textsuperscript{214} Article 23 of Regulation 343/2003
\textsuperscript{215} Article 16 of Regulation 343/2003
\textsuperscript{216} Article 3 paragraph (3) of Regulation 343/2003
examin[217]) or claim the responsibility of another Member State for examining the application[218], a Member State might also choose to examine an asylum application that does not fall under its responsibility thus applying the "sovereignty clause" recognized by the Regulation[219].

While I previously analysed the issues of the "safe third country" and "safe country of origin" concepts[220], these two last provisions of the Regulation entailing the presumption of safety of Member States of the European Union[221] have also been recently discredited by the Court of Justice and the European Court of Fundamental Rights.

The leading example of bad practice within the European Union seems to be Greece[222], a popular State of entry for many asylum seekers that has often been accused of breaching asylum-seeker's fundamental rights and where European and several national Courts urged Member States not to transfer their asylum applicants to.

Indeed, a UNHCR report states that:

"At the end of January 2011, there were some 666 cases relating to Dublin transfers to Greece pending before the ECtHR. (...) in quite a number of countries, higher national courts were by then suspending all Dublin transfers to Greece upon appeal automatically."[223]

In M.S.S v. Belgium and Greece[224] the European Court of Fundamental Rights in January 2011 found Greece guilty of violating:

---

217 See 1.5.3 above.
218 Articles 17, 18 and 19 of the Regulation provide that, if a Member State to which an asylum application was submitted considers that another Member State is responsible, it can call on that Member State as soon as possible to take charge of the applicant. A request to take charge of an applicant has to be made within three months otherwise the responsibility falls on the State in which the application has been lodged; also, a request to take charge or to take back an applicant should provide all the necessary information for the Member State requested to determine its responsibility on that application. Finally, when the requested State accepts to take charge of or to take back the person concerned, the State where the application was lodged shall notify the applicant of its transfer and examination procedure taking place in another State.
219 Article 3 paragraph (2) of Regulation 343/2003
220 See 1.5.3 above.
221 The 'presumption of safety' of Member States of the European Union is also declared in paragraph (2) of the Preamble of Regulation 343/2003 that states: "Member States (...) are considered as safe countries for third-country nationals"
222 For a thorough examination of the case law asserting the poor situation of asylum seekers in Greece see: Marchegiani, M., Regolamento Dublino II e clausola di sovranità: il caso greco dinanzi all'Alto Commissariato per i rifugiati, Diritti umani e diritto internazionale, Milano, Franco Angeli, Volume 4, Number 2, 2010; pp.452-457.
223 UN High Commissioner for Refugees, Updated UNHCR Information Note on National Practice in the Application of Article 3(2) of the Dublin II Regulation in particular in the context of intended transfers to Greece, 31 January 2011; p.2.
224 M.S.S v. UK, Application no. 30696/09, 21 January 2011. The case has been summarized very well by S. Lieven: "In M.S.S, an Afghan national entered through Greece, without applying for asylum there. He made a claim to that effect in Belgium. Pursuant to the Dublin Regulation, the Belgian authorities took an order to transfer him back to Greece. After having appealed the decision in Belgium, and asked the ECtHR to grant a provisional measure to suspend the transfer, which were both refused, he was finally transferred to Greece. He then complained to the
- Article 3 of the ECHR because of the applicant's detention conditions since: "M.S.S was transferred to Greece, where he was immediately placed in detention in a reduced space, together with some other 20 detainees, with conditional access to sanitary facilities, no ventilation, nowhere to sleep, very little to eat, and in extremely poor hygienic conditions"\textsuperscript{225}.

- Article 3 of the ECHR because of the applicant's living conditions in Greece since: "having no address to notify and no means of subsistence, he went to live in a park in a state of complete destitution"\textsuperscript{226}.

- Article 13 and 3 of the ECHR "because of the deficiencies in the asylum procedure followed in the applicant's case and the risk of his expulsion to Afghanistan without any serious examination of the merits of his asylum application and without any access to an effective remedy"\textsuperscript{227}.

This and several other cases\textsuperscript{228} further prove that no presumption of safety for asylum seekers should be applied on a general basis neither to countries outside the European Union, neither in countries within it.

In the words of Violeta Moreno-Lax:

"The presumption of safety underpinning the regime cannot outweigh the realities on the grounds as disclosed in general information provided by reliable actors. (...) Neither the uneven distribution of migration burdens, nor a minimalist reading of the Dublin Regulation absolves Member States of their human rights responsibilities"\textsuperscript{229}.

\begin{flushright}
\textsuperscript{227} For more information, see: UN High Commissioner for Refugees, \textit{Updated UNHCR Information Note on National Practice in the Application of Article 3(2) of the Dublin II Regulation in particular in the context of intended transfers to Greece}, 31 January 2011; pp.2-3.
\textsuperscript{228} Such as cases C-411/10 N.S and C-493/10 \textit{M.E and Others} for example. For a thorough analysis of both cases, see L. Grasso., "Rispetto dei diritti fondamentali di richiedenti asilo ed operatività della sovereigny clause del Regolamento Dublino II" in \textit{Diritto pubblico comparato ed Europeo}, Torino, G. Giappichelli editore, Volume II, 2012.
\end{flushright}
Lastly, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU (Frontex)\textsuperscript{230} by cooperating with Greek authorities in detaining migrants in Greek detention facilities was accused by Human Rights Watch of exposing individuals to inhuman and degrading treatment thus being 'complicit in human rights violations'\textsuperscript{231}. Following this and many other reprimands from relevant NGOs the rules governing the Agency were modified in order, among other things, to develop codes of conduct to guarantee compliance with fundamental rights and the principle of non refoulement in order to try and prevent future human rights violations from the Agency\textsuperscript{232}.

According to the revised Frontex Regulation\textsuperscript{233}:
"...The Agency shall fulfil its tasks in full compliance with the relevant Union law, including the Charter of Fundamental Rights of the European Union ("the Charter of Fundamental Rights"); the relevant international law, including the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 ("the Geneva Convention"); obligations related to access to international protection, in particular the principle of non-refoulement;..."\textsuperscript{234}.

Moreover Article 2 of the original Regulation has been amended by inserting a new paragraph according to which:
"In accordance with Union and international law, no person shall be disembarked in, or otherwise handed over to the authorities of, a country in contravention of the principle of non-refoulement, or from which there is a risk of expulsion or return to another country in contravention of that principle. The special needs of children, victims of trafficking, persons in need of medical

\textsuperscript{230} Frontex promotes, coordinates and develops European border management in line with the EU fundamental rights charter applying the concept of Integrated Border Management. Frontex helps border authorities from different EU countries work together. Frontex’s full title is the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. The agency was set up in 2004 to reinforce and streamline cooperation between national border authorities'. From: http://www.frontex.europa.eu/about-frontex/mission-and-tasks


\textsuperscript{232} Anna Liguori and Novella Ricciuti analyzed accurately the changes to Frontex's Regulation (now Regulation 1168/2011 of 25 October 2011) and whether they improve or not the standards of protection of human rights followed by the Agency.


\textsuperscript{234} Article 1, paragraph 2, second alinea of the amended text.
assistance, persons in need of international protection and other vulnerable persons shall be addressed in accordance with Union and international law.¹²³⁵.

1.7.3 The reallocation of asylum seekers within Member States of the European Union

Paragraph (8) of the Preamble of the Dublin II Regulation states that:

"The progressive creation of an area without internal frontiers in which free movement of persons is guaranteed (...) and the establishment of Community policies regarding the conditions of entry and stay of third country nationals, (...) makes it necessary to strike a balance between responsibility criteria in a spirit of solidarity".

However, the main criticism expressed towards this Regulation by several scholars and by the jurisprudence of the Court of Justice is specifically on the lack of express solidarity clauses in the text. Indeed, the Dublin II Regulation, by establishing a hierarchical list of criteria to find the State responsible to examine an asylum application²³⁶ only worsens the load of applications to be examined by Member States geographically situated on the external, southern and eastern borders of the European Union while "freeing" Member States whose territory is less easily accessible (such as Northern European States) from sharing the work of examining and/or accepting asylum seekers in their territory.

As Olga Ferguson Sidorenko notes:

"These criteria seem to be based on the idea that responsibility shall be attributed to the Member State most involved in the asylum seeker's entry into or presence in the EU territory

---

¹²³⁵ To better implement these provisions Article 26 (a) has been inserted on the Agency's Fundamental Rights Strategy according to which:

1. The Agency shall draw up and further develop and implement its Fundamental Rights Strategy. The Agency shall put in place an effective mechanism to monitor the respect for fundamental rights in all the activities of the Agency.
2. A Consultative Forum shall be established by the Agency to assist the Executive Director and the Management Board in fundamental rights matters. The Agency shall invite the European Asylum Support Office, the Fundamental Rights Agency, the United Nations High Commissioner for Refugees and other relevant organisations to participate in the Consultative Forum. On a proposal by the Executive Director, the Management Board shall decide on the composition and the working methods of the Consultative Forum and the modalities of the transmission of information to the Consultative Forum. The Consultative Forum shall be consulted on the further development and implementation of the Fundamental Rights Strategy, Code of Conduct and common core curricula.
3. A Consultative Forum shall prepare an annual report of its activities. That report shall be made publicly available.
4. A Fundamental Rights Officer shall be designated by the Management Board and shall have the necessary qualifications and experience in the field of fundamental rights. He/she shall be independent in the performance of his/her duties as a Fundamental Rights Officer and shall report directly to the Management Board and the Consultative Forum. He/she shall report on a regular basis and as such contribute to the mechanism for monitoring fundamental rights.
5. The Fundamental Rights Officer and the Consultative Forum shall have access to all information concerning respect for fundamental rights, in relation to all the activities of the Agency.";

²³⁶ See 1.7.1 above.
(by granting him a residence permit of visa, by insufficiency guarding its external borders, or by authorising entry without a visa)".

In practice, Member States heavily overloaded by asylum applications progressively develop deficiencies in their management of asylum seekers and their applications. This is definitely the case of Greece where:

"According to FRONTEX, 90 percent overland asylum seekers enter through Greece. In this case, if one of the asylum seekers applies for asylum in another Member State and no higher criteria is applicable, Greece becomes the responsible Member State. Consequently, Member States are able to decline responsibility for asylum claims and the Greek asylum system is heavily overloaded."  

This lack of solidarity between Member States is indeed very regrettable also in light of Article 80 of the TFEU which considers solidarity an essential element of these policies. An area of freedom, security and justice should allow asylum applicants to ask for asylum in countries where they would feel more at home and integrate easily because of cultural, traditional, family reasons and not oblige them to ask for asylum in their first country of entry.

1.7.4 Eurodac, the system for the identification of asylum seekers

For the effective application of the Dublin Convention, the Council adopted a Regulation on the establishment of Eurodac, a system for the comparison of fingerprints in order to determine whether a person applying for asylum has already lodged an application in one of the European Union’s Member States before.

1.7.5 The European 'protection lottery': the significant divergences in the recognition rates of asylum seekers between Member States.

As concluding remarks on the Dublin II Regulation as well as the first phase of the Common European Asylum System, I wish to emphasize another important issue within the level of protection granted in European Union: the alarming divergence in recognition rates of asylum seekers between Member States render asking for protection in the European Union a "protection lottery" for international protection seekers.

As the European Council on Refugees and Exiles (ECRE) states on its report on the implementation of the Dublin II Regulation:

239 Council Regulation No 2725/2000
"The Dublin II Regulation is based on an erroneous presumption that an asylum seeker will receive equivalent access to protection in whichever Member State a claim is lodged.\textsuperscript{240}

Indeed, the rates of recognition of international protection vary greatly between Member States and are an issue.

A Eurostat report\textsuperscript{241} on asylum decisions within the European Union for 2011 states the rates of recognition of international protection status for each Member State; the recognition rate at first instance for some States is worrying in: Ireland (5.4%), Greece (2.1%), Cyprus (2.6%), Luxembourg (3.4%), Lithuania (7.5%) and Romania (7.1%).

Other States show far better rates: Czech Republic (46.5%), Portugal (52%), Slovakia (54.2%), Malta (55%). The Czech Republic and Malta are examples of good practice since their rate of status recognition after successful appeals are also quite high: 51.3% for the Czech Republic and 71.4% for Slovakia.

On the same issue, the European Council on Refugees and Exiles, adding using the statistical data offered by the UNHCR of 2011 created the following map titled \textit{Asylum lottery in the EU} that clearly displays the significant divergences between all Member States\textsuperscript{242}:

\begin{center}
\textbf{Positive decisions on asylum applications (\%)}
\end{center}
\begin{center}
\textbf{2011}
\end{center}

Overall, according to the Eurostat Report, the average rate of recognition of international protection within the European Union at first instance was 25.1% and 19.2% on appeal for a total of 84,100 beneficiaries of protection in 2011.


\textsuperscript{242} The map is also available at: http://www.ecre.org/component/content/article/56-ecre-actions/294-asylum-lottery-in-the-eu-in-2011.html
In conclusion, the Dublin II system seems even more "unfounded" when such important divergences exist between member States: transferring an asylum seeker in a country with a low percentage of status recognitions might be equal to sending him/her back to the country he/she is escaping from.

Also, this divergence in numbers shows that the harmonization of national legislation on a "Common European Asylum System" is far from complete in practice. We can only hope the second phase of the Common European Asylum System - which I will analyze in the following chapter - will provide for higher recognition rates of international protection status, equivalent for all Member States within the European Union.
CHAPTER II
The new Common European Asylum System
2.1 Shortcomings of the first phase of the EU asylum system

2.1.1 The 2007 Green Paper of the European Commission

In June 2007 the European Commission presented a Green Paper on the future Common European Asylum system with the intention of launching a wide debate on the issue, the results leading to the establishment of a new joint action programme.

First, the Commission explained the goals for the second (and final) stage of the architecture of the European Common Asylum System. While the first stage's aims were to harmonize the Member State's legal framework on the basis of common minimum standards the second stage should:

1. achieve a higher common standard of protection
2. provide greater equality in protection across the European Union
3. ensure a higher degree of solidarity between Member States.

Review of the "Qualifications" Directive

With regards to the Qualification Directive the Commission proposes uniform protection standards by harmonizing the pre-existing eligibility criteria, clarifying the concepts used to define the grounds of protection (in order to minimise possible divergent interpretations) and possibly grant the same rights and benefits to both beneficiaries of asylum and subsidiary protection status through one single uniform status.

Also, the Commission notes the necessity to protect certain categories of persons who, although not eligible for international protection according to the standards of the existing Directive, are however protected against removal under the obligations imposed by international refugee or human rights. The Directive cites for example persons who are not removable because of health issues or unaccompanied minors.

---

245 Also: "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 possibility of transfer of protection responsibilities once a beneficiary of protection takes up residence in another Member State".
On these issues, the Commission cites two very compelling case judged by the European Court of Human Rights worth citing:

1. In Case *D.v. The United Kingdom*\(^{246}\) the Court established that the removal of "D" an alien drug courier dying of Aids from the United Kingdom "would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment in violation of Article 3 (of the European Convention on Human Rights)\(^ {247}\)."

2. In Case *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*\(^ {248}\) an unaccompanied 5 year old girl was detained in a centre for adults and removed from Belgium without any psychological or educational support by a qualified staff. Although an illegal immigrant, her being in an extremely vulnerable situation having been separated by her family and being extremely young "she therefore indisputably came within the class of highly vulnerable members of society to whom the Belgian State owed a duty to take adequate measures to provide care and protection". In not doing so, "in the Court's view, the second applicant’s detention in such conditions demonstrated a lack of humanity to such a degree that it amounted to inhuman treatment"\(^ {249}\).


\(^{247}\) "The Court notes that the applicant is in the advanced stages of a terminal and incurable illness. At the date of the hearing, it was observed that there had been a marked decline in his condition and he had to be transferred to a hospital. His condition was giving rise to concern (...). The limited quality of life he now enjoys results from the availability of sophisticated treatment and medication in the United Kingdom and the care and kindness administered by a charitable organisation. He has been counselled on how to approach death and has formed bonds with his carers (...). The abrupt withdrawal of these facilities will entail the most dramatic consequences for him. It is not disputed that his removal will hasten his death. There is a serious danger that the conditions of adversity which await him in St Kitts will further reduce his already limited life expectancy and subject him to acute mental and physical suffering. Any medical treatment which he might hope to receive there could not contend with the infections which he may possibly contract on account of his lack of shelter and of a proper diet as well as exposure to the health and sanitation problems which beset the population of St Kitts (...). While he may have a cousin in St Kitts (see paragraph 18 above), no evidence has been adduced to show whether this person would be willing or in a position to attend to the needs of a terminally ill man. There is no evidence of any other form of moral or social support. Nor has it been shown whether the applicant would be guaranteed a bed in either of the hospitals on the island which, according to the Government, care for AIDS patients (...). The Court also notes in this respect that the respondent State has assumed responsibility for treating the applicant's condition since August 1994. He has become reliant on the medical and palliative care which he is at present receiving and is no doubt psychologically prepared for death in an environment which is both familiar and compassionate. Although it cannot be said that the conditions which would confront him in the receiving country are themselves a breach of the standards of Article 3 (art. 3), his removal would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment".


\(^{249}\) See also: M, Pertile,, *La detenzione amministrativa dei migranti e dei richiedenti asilo nella giurisprudenza della Corte europea per i diritti umani: dal caso Mubilanzila al caso Muskhadzhiveva*, Diritti umani e diritto internazionale, Milano, Franco Angeli, Volume 4, Number 2, 2010.

\(^{249}\) *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 13178/03, Council of Europe: European Court of Human Rights, 12 October 2006; p. 20.
On the same grounds, the Commission has noted serious inadequacies in defining and processing the applications of vulnerable asylum seekers and that often Member States do not have the "necessary resources, capacities and expertise"\textsuperscript{250} to provide an appropriate response to their needs. In order to provide an appropriate response to situations of vulnerability the Commission has proposed:
- to regulate what constitutes adequate medical and psychological assistance and counselling for traumatised persons, victims of torture and trafficking and minors (especially unaccompanied ones),
- to develop appropriate interview techniques for these categories,
- to lay down rules on what constitutes relevant criteria for assessing claims based on gender and child specific persecution.

\textit{Review the "Procedures" Directive}

As far as the Procedures Directive\textsuperscript{251} is concerned, the Commission criticises it for "(providing) a number of procedural standards rather than (...) a 'standard procedure'" because of the wide margin of manoeuvre left to Member States in deciding on accelerated procedures, border procedures and inadmissible applications and promotes the idea to establish a mandatory single procedure to evaluate asylum and subsidiary protection applications.

The Commission also emphasized the need to strengthen the legal safeguards "accompanying the crucial initial stage of border procedures and in particular the registration and screening process"\textsuperscript{252} and to redefine the concepts of safe country of origin, safe third-country and safe European third-countries.

\textit{Review the "Reception" Directive}

With regards to the Reception Conditions Directive "the wide margin of discretion left to Member States by several key provisions of this Directive results in negating the desired harmonisation effect"\textsuperscript{253}. For instance "wide variations have been observed in the standards of reception conditions as well as in access to health care".

\begin{footnotesize}
\footnote{251}{Directive 2005/85/EC of 1 December 2005}
\end{footnotesize}
Also, there are too many divergences between Member States policies on access to the labour market for asylum seekers. The Green Paper notes both the conditions and the time-frame required to access the labour market vary greatly among Member States and should be better harmonized. The Commission also notes the detrimental application of detention measures to asylum seekers that prevents them from the effective enjoyment of the rights guaranteed by the Directive.

*Review the Dublin system*

On the Dublin system, the Commission notes "it was not devised as a burden sharing instrument" and, although its Evaluation Report has showed transfers to be equally balanced between border and non-border States, the Dublin system may "result in additional burdens on Member States that have limited reception and absorption capacities" and might find themselves "under particular migratory pressures because of their geographical location". A system which clearly allocates responsibility for examining claims within the European Union is still necessary and other factors could be taken into account (such as the capacities of Member States to both process asylum applications and offer long-term solutions to refugees).

Finally, the Commission in its 2007 Green Paper considered other possible options to improve the European Common Asylum System such as maximising the effectiveness of funds released by the European Refugee Fund, supporting with external policies measures third countries in addressing asylum and refugee issues, developing "common positions" and sharing know-hows with and between Member States and other international organisations.

2.1.2 The Commission's Policy Plan on Asylum of 2008

Taking stock of the responses submitted to the 2007 Green Paper with the Commission's evaluations of the implementation of the different Directives and regulations led to the European Commission's Policy Plan on Asylum, presented in 2008. The purposes of the Commission's policy plan on asylum are threefold:

---


(1) To bring more harmonisation to standards of protection by further aligning the EU Member State's asylum legislation. To achieve this, the Directives on reception conditions for asylum seekers, asylum procedures and standards for qualification as refugees or persons needing international protection have to be amended.

Regarding the Reception Directive\textsuperscript{256}, the Commission proposed the following improvements\textsuperscript{257}:
- "cover persons seeking subsidiary protection, ensuring consistency with the rest of the asylum acquis;"
- ensure greater equality and improved standards of treatment with regard to the level and form of material reception conditions;
- provide for simplified and more harmonised access to the labour market, ensuring that actual access to employment is not hindered by additional unnecessary administrative restrictions, without prejudice to Member States' competences;
- incorporate procedural guarantees on detention; and
- guarantee that the special needs of vulnerable persons, such as children, women, victims of torture or person with medical needs, are identified immediately and that adequate care is available for them”.

Concerning the Asylum Procedures Directive\textsuperscript{258}, the Commission's aims were \textsuperscript{259}:
- "setting up of a single, common asylum procedure thus providing for a comprehensive examination of protection needs under both the Geneva Convention and the EU's subsidiary protection regime;"
- establishing obligatory procedural safeguards as well as common notions and devices, which will consolidate the asylum process and ensure equal access to procedures throughout the Union;
- accommodating the particular situation of mixed arrivals, including where persons seeking international protection are present at the external borders of the EU; and
- enhancing gender equality in the asylum process and providing for additional safeguards for vulnerable applicants”.

Regarding the Qualifications\textsuperscript{260} Directive, the Commission were to\textsuperscript{261}:
- "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;"
- define with more precision when non-State parties may be considered as actors of protection. In particular, the Commission will consider the need to stipulate in greater detail

the criteria to be used by Member States authorities in order to assess the capacity of a potential actor of protection to provide effective, accessible and durable protection; - clarify the conditions for the application of the concept of internal flight alternative i.e. the conditions under which it may be considered that an applicant for asylum has a genuine protection alternative in a certain part of his/her country of origin, taking into account recent developments in the case law of the European Court of Human Rights; and - reconsider the level of rights and benefits to be secured for beneficiaries of subsidiary protection, in order to enhance their access to social and economic entitlements which are crucial for their successful integration, whilst ensuring respect for the principle of family unity across the EU”.

(2) To improve effective and well-supported practical cooperation. In order to achieve this objective, the European Parliament and Council of the European Union have indeed established with Regulation (EU) 439/2010 in 2010 an European Asylum Support Office whose objectives are, according to Article 2:
- to "facilitate, coordinate and strengthen practical cooperation among Member States" on the many aspects of asylum and help improving the implementation of the CEAS.
- to support to Member States subject to particular pressure on their asylum and reception systems.
- to become an independent source of information on all issues regarding asylum policies and legislation, therefore developing cooperation among Member States on asylum by promoting exchanges of information on best practices, writing annual reports on the overall situation of asylum in the European Union, training asylum officials and assisting in the relocation of beneficiaries of international protection etc.

(3) To increase solidarity and sense of responsibility among EU States, and between the EU and non-EU countries in particular by improving the "Dublin" system and establishing solidarity mechanisms. This principle of external solidarity should be improved also by intensifying collaboration between the EU and non-EU countries.

2.2 Evaluation of the legislative proposals strengthening the new Common European Asylum system (CEAS)
I will now try and analyse the principal changes brought to the first instruments established by the Common European Asylum System following the presentation of the European Commission's policy plan in 2008 and if said changes effectively improved the right to asylum throughout the European Union.

I will start my description of each Directive/Regulation by analysing their preambles first since, as noted by Steve Peers, "changes to the preamble (...) (are) significant because the EU's Court of
Justice often refers to the preamble to legislation (including as regards EU immigration and asylum law) to interpret that legislation.\(^{262}\)

### 2.2.1 The new "Qualifications" Directive

In 2011, the European Union adopted the recast Qualification Directive\(^{263}\) repealing the previous Directive of 2004. The new Directive broadens its scope from "laying down minimum standards for the qualification of (...) (asylum seekers)\(^{264}\) to laying down common standards required for the qualifications of beneficiaries of international protection and establishing a uniform status for refugees or persons eligible for subsidiary protection\(^{265}\).

The Directive clearly improves its preceding Directive in a number of fields: I will now analyse individually the most relevant changes to the previous Directive.

1. The Directive broadens the definition of "family members" to include not only the spouse or unmarried partner as well as unmarried children, but also any other adult legally responsible for any unmarried minor applying for asylum\(^{266}\);

2. The Directive clarifies the concept of "actors of protection": indeed, the previous Directive had been criticised because of the possibility for "parties and organisations, including international organisations, controlling the State or a substantial part of the territory of the State" to offer protection to international protection seekers that had proven to be ineffective and leaving too much discretion to such parties and/or organisations\(^{267}\).

The new Directive now specifies that, for both States and parties or organisations, "protection against persecution or serious harm must be effective and of a non temporary nature" and that Member States, in assessing whether an international organisation effectively controls the State (or at least a substantial part of its territory) and can provide protection have to take into account "any guidance which may be provided in relevant Union acts" (and not only in Council acts as required in the previous version of the Directive).


\(^{263}\) Directive 2011/95/EU

\(^{264}\) Article 1 of Directive 2004/83/EC

\(^{265}\) Article 1 of Directive 2011/95/EU

\(^{266}\) Article 2 paragraph (j) of Directive 2011/95/EU

\(^{267}\) See 1.4.1 above.
(3) The possibilities for a Member State to refuse international protection on the grounds of a possible "internal protection" of the applicant are now limited to the cases where the person concerned would have access to protection against persecution or serious harm there and can safely and legally travel to and gain admittance to the part of the country where he would be safe and could be expected to settle to 268.

(4) With regards to what constitutes an act of persecution, the Directive is amended to include not only the acts of persecution defined by the previous Directive, but also the absence of protection by the State or other actors of protection to the previously listed269 possible acts of persecution270.

(5) The Directive includes gender identity as a possible ground of protection thus strengthening protection against gender-related persecution and possibly including intersex271 and transgender persons to the list of possible victims of persecution272. Indeed, if Member States could choose in the previous Directive to consider (or not) gender related aspects as characteristics for belonging to a particular social group without by themselves being "reasons of persecution" they are now obliged to give them due consideration "for the purposes of determining membership of a particular social group or identifying a characteristic of such a group"273.

(6) The Directive removes many distinctions to the rights granted to refugees and the rights granted to beneficiaries of subsidiary protection in the fields of: family unity274 (by removing the power for Member States to define special conditions for family members of persons with subsidiary protection) and access to employment275, healthcare276 and access to integration facilities277. Although some differences between the two statuses remain as regards the residence permit278 as well as access to social welfare279, the renewal of the residence permit for beneficiaries of subsidiary protection has been extended from one to at least two years of validity.

268 Article 8 of Directive 2011/95/EU
269 See 1.3.2 above.
270 Article 9 paragraph (3) of Directive 2011/95/EU
272 Article 10 paragraph (d) of Directive 2011/95/EU
274 Article 23 of Directive 2011/95/EU
275 Article 26 of Directive 2011/95/EU
276 Article 30 of Directive 2011/95/EU
277 Article 34 of Directive 2011/95/EU
278 Article 24 of Directive 2011/95/EU
279 Article 29 of Directive 2011/95/EU
This approximation of the two statuses is a good response to most of the notable differences I examined in the previous chapter of this work.\(^{280}\)

(7) Article 26 of the modified Directive also offers better access to employment related education opportunities and vocational training and introduces an Article\(^ {281}\) on the procedures for recognition of professional qualifications, foreign diplomas, certificates and other formal qualifications.

(8) Finally, the Directive adds to the category of vulnerable persons victims of human trafficking and persons with mental disorders\(^ {282}\) and promotes better standards for unaccompanied minors\(^ {283}\).

In conclusion, the Qualification Directive, already welcomed by the UNHCR in 2006 as a "cornerstone of the emerging common European asylum system"\(^ {284}\), was further improved - also by following many of the UNHCR recommendations - by its recast version of 2011.

Still, according to an ECRE report "the recast proposal does not fully address a number of issues which are considered at odds with international refugee and human rights standards"\(^ {285}\). Some of these issues concern the presence of non-State actors as potential actors of protection, the requirements for belonging to a particular social group are still too strict\(^ {286}\), the grounds for subsidiary protection are still too vague and do not protect all categories of persons who are in need of protection but do not qualify for refugee status and "national security reasons and conviction for a 'particularly serious crime' are maintained as quasi-exclusion grounds under the revocation provisions, which is potentially in breach of Member State's obligations under the 1951 Refugee Convention".

2.2.2 The new "Procedures" Directive

The Commission's proposal for a new Procedures Directive was published October the 21st of 2009 and an amended text has been approved in second reading by the European Parliament the 12th of June 2013.

---

280 See 1.4.3 above.
281 Article 28 of Directive 2011/95/EU
282 Article 20 paragraph (3) of Directive 2011/95/EU
283 Article 31 of Directive 2011/95/EU
286 Since Article 10 (1) (d) requires sharing an innate characteristic that cannot be changed and have to be perceived as a distinct group by the surrounding society.
I will evaluate this Directive by highlighting the modifications arising from the interinstitutional negotiations in the framework of the so called "trialogue" that took place on 27 November 2012, 3 years after the Commission's initial proposal. The result of these dialogues has been mirrored in the Council Position published on the 31st of May 2013. The Directive's scope, as stated in the Commission's proposal of 2012 was to simplify and consolidate procedural notions and devices and improving coherence between asylum instruments for both asylum and subsidiary protection seekers. The long process of negotiations finally resulted in a series of important changes to the original Directive of 2005:

(1) The newly modified paragraph (2) of the Preamble adds that an EU 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", thus finally introducing a "principle of solidarity" left unmentioned in the previous version of the Directive. In that spirit of administrative cooperation, the new Article 49 provides, in order to improve cooperation between Member States that:

"Member States shall each appoint a national contact point and communicate its address to the Commission. The Commission shall communicate that information to the other Member States.

Member States shall, in liaison with the Commission, take all appropriate measures to establish direct cooperation and an exchange of information between the competent authorities".

(2) The main objective of the text as adopted by the EP is to "further develop the standards for procedures in Member States for granting and withdrawing international protection" and the

---

287 Informal tripartite meetings attended by representatives of the European Parliament, the Council of the European Union and the European Commission
Preamble lists a series of improvements to the efficiency of the first phase of the Common European Asylum System and establishes a series of guarantees to a correct examination of applications.

For instance, Member States now have restricted time limits to register international protection applications (3 days for asylum applications and 6 days for subsidiary protection applications\textsuperscript{293}) and they have ensure that a person who has made an application for international protection has an effective opportunity to lodge it as soon as possible\textsuperscript{294}.

A new amendment provides that the authorities evaluating applications for international protection should first determine whether the applicants qualify as refugees and, if this isn't the case, determine whether applicants are however eligible for subsidiary protection\textsuperscript{295}: this provision is very welcome as it allows for a greater margin of protection of applicants whose claim can now be evaluated on two grounds: for asylum or subsidiary protection.

Also, although Member States can still accelerate the examination procedure of applications likely to be unfounded or where there are serious national security or public order concerns, they are now bound to introduce reasonable time-limits for certain procedural steps that can not prejudice an adequate and complete examination from being carried out and the applicant's effective access to basic principles and guarantees provided for in the Directive\textsuperscript{296}. In the same spirit, in case Member States are faced with a large number of simultaneous applications for international protection, instead of shortening the personal interviews of their applicants thus lowering the standards of their


\textsuperscript{293} However, Article 6 paragraph 4 provides an exception: "Where simultaneous applications for international protection by a large number of third-country nationals or stateless persons make it very difficult in practice to respect the time-limit (...), Member States may provide for that time-limit to be extended to 10 working days".


procedural guarantees, they shall provide instead that the qualified personnel of another authority be temporarily involved in conducting such interviews.

Likewise, if applicants request it, they should be provided at first instance, free of charge, with legal and procedural informations and representation taking into account their particular circumstances and regardless of the likeliness of success of their review/appeal. Applicants could, subject to certain conditions, be granted free legal assistance also during appeal procedures. Although these modifications should be welcomed as they allow more people to benefit from legal assistance, the time and monetary limits provided by the previous Directive to free legal assistance are left unchanged and might result in free legal assistance only for short, uncomplicated cases.

Persons present in territorial waters of a Member States should be brought on land and have their application examined hence broadening the scope of the Directive, previously limited to applications made inside the territory or in the transit zones to the territorial waters of Member States. Indeed, even "applications for international protection made in a Member State to the authorities of another Member State carrying out border or immigration controls there shall be dealt with by the Member State in whose territory the application is made".

297 Indeed Article 16 now provides that “When conducting a personal interview on the substance of an application for international protection, the determining authority shall ensure that the applicant is given an adequate opportunity to present elements needed to substantiate the application in accordance with Article 4 of Directive 2011/95/EU as completely as possible. This shall include the opportunity to give an explanation regarding elements which may be missing and/or any inconsistencies or contradictions in the applicant's statements”.


299 Paragraph (22) of the Preamble and Article (19) of Council of the European Union, Position of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (Recast), Brussels, 31 May 2013; Interinstitutional File: 2009/0165 (COD);

300 Paragraph (23) of the Preamble and Article (20) of Council of the European Union, Position of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (Recast), Brussels, 31 May 2013; Interinstitutional File: 2009/0165 (COD);


302 Article 3 paragraph (1) of Council of the European Union, Position of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (Recast), Brussels, 31 May 2013; Interinstitutional File: 2009/0165 (COD);

These provisions partially respond to the UNHCR's recommendations\(^{304}\) and relevant doctrine providing that the principle of non-refoulement applies also to asylum seekers at sea and therefore must not be expelled or ignored risking, in many cases, their death by drowning or thirst\(^{305}\).

However, they are limited to the territorial waters a State and it remains unclear which rules are to be applied to migrants present in extra-territorial waters.

We can only hope States will take into consideration/account the recent *Hirsi* case where the ECtHR established that applicants intercepted on the high seas\(^{306}\) has have a right to apply for asylum and not being returned to a country where they would be exposed to violations of their fundamental rights under the ECHR\(^{307}\).

When there are indicators of the possibility of international protection seekers at border crossing points and in detention facilities information should be made for them on the possibility to apply for international protection. Also, basic communication is necessary to enable the competent authorities to understand if persons declare their wish to apply for international protection should be ensured through interpretation arrangements\(^{308}\). Member States should also allow organisations and persons providing advice and counselling to have access to applicants present at external borders\(^{309}\).

---


\(^{305}\) For a complete analysis on the scope of the principle of non refoulement see:


\(^{306}\) This means that the State concerned has to act in compliance with the ECHR also outside of his territory.


\(^{307}\) The *Hirsi* case (Application n. 27765/09 of 23 February 2012) has been summarized very well by a FRA Report:

"*In Hirsi Jamaa and Others v. Italy*, the applicants were part of a group of about 200 migrants, including asylum seekers and others, who had been intercepted by the Italian coastguards on the high seas while (...). The migrants were summarily returned to Libya (...) and were given no opportunity to apply for asylum. No record was taken of their names or nationalities. The ECtHR noted that the situation in Libya was well-known and easy to verify on the basis of multiple sources. (...) Italian authorities knew, or should have known, that the applicants, when returned to Libya as irregular migrants, would be exposed to treatment in breach of the ECHR and that the would not be given any kind of protection. They also knew, or should have known, that there were insufficient guarantees protecting the applicants from the risk of being arbitrarily returned to their countries of origin, which included Somalia and Eritrea. (...)


Member States who adopted the 1995 Directive\(^{310}\) on the protection of individuals with regard to the processing of personal data and on the free movement of such data are explicitly required to act accordingly when processing the personal data of international protection applicants\(^{311}\).

Personal interviews can no longer be omitted when the determining authority has already had a meeting with the applicant for the purpose of assisting him/her with his/her application or considers the application to be unfounded\(^{312}\) and must be conducted in a way to make the applicant feel "at ease" for example by ensuring that the interviewer does not wear a military or law enforcement uniform and that interviews with minors are conducted in a child-appropriate manner\(^{313}\).

If the applicant agrees to, he might be subjected to a medical examination in order to further prove his/her being persecuted or seriously harmed in the past\(^{314}\).

Finally, where restrictions have been provided to the reception and evaluation of applications as well as the time for interviewing applicants\(^{315}\) in cases of numerous simultaneous applications for international protection the Directive requires Member States to inform the Commission as soon as the reasons for applying those exceptional measures have ceased to exist and at least on an annual basis. Also, "the information shall, where possible, include data on the percentage of the applications for which derogations were applied to the total number of applications processed during that period"\(^{316}\).

(3) With regards to applicants in need of special procedural guarantees, the new Directive improves substantially their protection and/or guarantees with a series of amendments, thus partially responding to the criticisms of the previous Directive on its rigidity and inflexibility.

---

\(^{310}\) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

\(^{311}\) Paragraph (52) of the Preamble of Council of the European Union, Position of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (Recast), Brussels, 31 May 2013; Interinstitutional File: 2009/0165 (COD);

\(^{312}\) Ex Article 12 of Directive 2005/85/EC

\(^{313}\) Article 15 of Council of the European Union, "", Brussels, 31 May 2013; Interinstitutional File: 2009/0165 (COD);


\(^{315}\) Articles 6 paragraph (5), Article 14 paragraph (1) and Article 31 paragraph (3)

For instance:

The Directive defines an "applicant in need of special procedural guarantees" as any applicant "whose ability to benefit from the rights and comply with the obligations provided for in this Directive is limited due to individual circumstances". The introduction of this 'vague' definition is very positive as it allows an extensive and evolving interpretation of who might need special procedural guarantees in the future.

Member States now have to identify applicants in need of special procedural guarantees within a reasonable period of time after an application is made (although the Preamble states: "before a first instance decision is taken") and should be provided with adequate support. If the need for special procedural guarantees becomes apparent at a later stage of the procedure Member States should address it nonetheless. The Directive also lists the characteristics of persons that may be in need of special procedural guarantees:

"due to their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence".

Also, if said procedural guarantees to applicants with special needs could not be provided in cases of accelerated or border procedures, the applicant should be exempted from those procedures.

Procedural guarantees for unaccompanied minors have also been furtherly improved in Article 25 (ex Article 17) of the modified Directive.

317 Article 2 paragraph (d) of Council of the European Union, Position of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (Recast), Brussels, 31 May 2013; Interinstitutional File: 2009/0165 (COD);


Member States can choose to base their national measures dealing with identification and documentation of symptoms and signs of torture or other serious acts of physical or psychological violence \(^{323}\) on the 1999 \textit{Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment} (also known as Istanbul Protocol) \(^{324}\). This manual's guidelines contain the best international know-how resulting from three years of analysis undertaken by more than 75 experts in law, health and human rights, representing 40 organizations/institutions from 15 countries \(^{325}\).

Examination procedures should be gender-sensitive and gender-related claims should be "properly" taken into account in procedures based on the concepts of safe third country, safe country of origin or subsequent applications \(^{326}\). Indeed, most of the personnel dealing with the applicant must be of the same sex: for instance, if the applicant is searched "that search should be carried by a person of the same sex" \(^{327}\) and interpreters and interviewers, if requested, should be of the same sex of the applicant; interviewers should also in all cases take into account the applicant's gender, sexual orientation and gender identity \(^{328}\).

---

\(^{322}\) I can cite, as an example of the improvement brought by these provisions, the newly modified Article 25 paragraph (5) that states: "Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for international protection where, following general statements or other relevant indications, Member States have doubts concerning the applicant's age. If, thereafter, Member States are still in doubt concerning the applicant's age, they shall assume that the applicant is a minor".

\(^{323}\) Including acts of sexual violence.


\(^{325}\) UN Office of the High Commissioner for Human Rights, \textit{Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment} ("Istanbul Protocol"), 2004, HR/P/PT/8/Rev.1; p.11.


\(^{328}\) Article 15 paragraph (3) of Council of the European Union, \textit{Position of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection} (Recast), Brussels, 31 May 2013; Interinstitutional File: 2009/0165 (COD);
When examining applications the personnel now has the possibility to seek advice from experts on particular issues: "such as medical, cultural, religious, child-related or gender issues". Member States may no longer take a single decision covering all dependants of an applicant for international protection if by doing so they would disclose particular circumstances of an applicant which could "jeopardise his or her interests, in particular in cases involving gender, sexual orientation, gender identity and/or age-based persecution".

And, finally, with regards to the "substance" of their protection during their applications:

"Member States shall ensure that where applicants have been identified as applicants in need of special procedural guarantees, they are provided with adequate support in order to allow them to benefit from the rights and comply with the obligations of this Directive throughout the duration of the asylum procedure".

(4) The modified Directive puts a lot of emphasis on the personnel dealing with international protection seekers: from the officials who first come into contact with the asylum seekers to the authorities examining the applications, they must all be duly qualified and or trained to deal with applicants, especially those with special needs:

"With a view to ensuring effective access to the examination procedure, officials who first come into contact with persons seeking international protection, in particular officials carrying out the surveillance of land or maritime borders or conducting border checks, should receive relevant information and necessary training on how to recognise and deal with applications for international protection, inter alia, taking due account of relevant guidelines developed by EASO."


"Member States shall designate for all procedures a determining authority which will be responsible for an appropriate examination of applications in accordance with this Directive. Member States shall ensure that such authority is provided with appropriate means, including sufficient competent personnel, to carry out its tasks in accordance with this Directive.\textsuperscript{333}

also

"(...) Persons interviewing applicants pursuant to this Directive shall also have acquired general knowledge of problems which could adversely affect the applicants' ability to be interviewed, such as indications that the applicant may have been tortured in the past.\textsuperscript{334}

finally:

"(...) Member States shall ensure that those other authorities which are likely to receive applications for international protection such as the police, border guards, immigration authorities and personnel of detention facilities have the relevant information and that their personnel receive the necessary level of training which is appropriate to their tasks and responsibilities and instructions to inform applicants as to where and how applications for international protection may be lodged.\textsuperscript{335}

(5) On the concepts of "safe country of origin", "safe third country" and "European safe third country", following the numerous criticisms on these notions often found by the jurisprudence to be untrue in practice\textsuperscript{336}, the new Directive limits the use and possible interpretations of these concepts:

1. By requiring Member States to obtain precise and up-to-date information and only from relevant sources such as the Council of Europe, UNHCR, EASO\textsuperscript{337} and regularly reviewing

\textsuperscript{333} Article 4 paragraph (1) of Council of the European Union, Position of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (Recast), Brussels, 31 May 2013; Interinstitutional File: 2009/0165 (COD);

\textsuperscript{334} Article 4 paragraph (3) of Council of the European Union, Position of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (Recast), Brussels, 31 May 2013; Interinstitutional File: 2009/0165 (COD);

\textsuperscript{335} Article 6 of Council of the European Union, Position of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (Recast), Brussels, 31 May 2013; Interinstitutional File: 2009/0165 (COD);

\textsuperscript{336} See 1.5.3 above.

\textsuperscript{337} Paragraph (39) of the Preamble of Council of the European Union, Position of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on common procedures for...
the situation in those countries. And, "when Member States become aware of a significant change in the human rights situation in a country designated by them as safe, they should ensure that a review of that situation is conducted as soon as possible and, where necessary, review the designation of that country as safe"\textsuperscript{338}.

2. Member States now have to notify periodically the Commission about the third countries to which the concepts of "safe country of origin", "safe third country" and "European safe country" are applied. The Commission as well should "regularly inform the European Parliament on the result of its reviews"\textsuperscript{339}.

3. Applicants shall be allowed to challenge the application of the concepts of "first country of asylum"\textsuperscript{340}, "safe third country"\textsuperscript{341} and "European safe third country"\textsuperscript{342} on the grounds that the country concerned is not safe for them in their particular circumstances.

4. The paragraph allowing a derogation from the established definition of "safe countries of origin" because of existing national laws (before the 1st of December of 2005) allowing Member States to review countries of origin as "safe" as long as persons in these third countries are neither subjected to persecution or torture, inhuman or degrading treatments has been removed\textsuperscript{343}.

5. Finally, the requirements to apply the "safe third country" concept have been widened to include the absence of risk of serious harm for the applicant if he/she were to return there\textsuperscript{344}.


\textsuperscript{341} Article 38 paragraph (2) of Council of the European Union, \textit{Position of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (Recast)}, Brussels, 31 May 2013; Interinstitutional File: 2009/0165 (COD);


\textsuperscript{343} Ex Article 30 paragraph (3) of Directive 2005/85/EC.

In conclusion, especially thanks to the new provisions requiring Member States to regularly review and obtain precise and up-to-date information from relevant sources such as the Council of Europe, UNHCR, EASO\textsuperscript{345} and the obligation for Member States to allow applicants to challenge the application of the concepts of "first country of asylum", "safe third country" and "European safe third country" on their case might sensibly improve the situation in practice and prevent other cases of malpractice (such as in Greece and Serbia\textsuperscript{346}) from happening.

(6) With regards to Chapter III of the Directive on procedures at first instance, there are numerous improvements.

Member States still have to examine applications within six months, however, whereas in the previous version of the Directive they could extend that time-limit without any justification and/or further time-limit, they can now extend the procedure for a total maximum of 12 months and under specific circumstances, where:

"(a) complex issues of fact and/or law are involved;
(b) a large number of third-country nationals or stateless persons simultaneously apply for international protection, making it very difficult in practice to conclude the procedure within the six-month time-limit;
(c) where the delay can clearly be attributed to the failure of the applicant to comply with his or her obligations under Article 13\textsuperscript{347}.

and if necessary in order to ensure an adequate and complete examination of the application for international protection\textsuperscript{348}.

Grounds for accelerating a procedure have been limited; previously Member States could accelerate procedures in the following circumstances:

- the applicant clearly does not qualify as a refugee or for refugee status in a Member State under Directive 2004/83/EC,

\textsuperscript{345} Paradoxically, the EASO itself is subject to monitoring by Dr. Neil Falzon, based in Malta (where he lectures International Human Rights Law at the Faculty of Laws and EU Migration and Asylum Law at the European Documentation and Research Centre at the University of Malta) that keeps a close eye on the activities of EASO through his blog: http://easomonitor.blogspot.it/

\textsuperscript{346} See 1.5.3 above.

\textsuperscript{347} Article 31 paragraph (3) of Council of the European Union, Position of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (Recast), Brussels, 31 May 2013; Interinstitutional File: 2009/0165 (COD);

\textsuperscript{348} Article 31 paragraph (3) of Council of the European Union, Position of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (Recast), Brussels, 31 May 2013; Interinstitutional File: 2009/0165 (COD);
- the country - which is not a EU Member State - is considered to be a safe third country for the applicant,
- the applicant has filed another application for asylum stating other personal data,
- the applicant has failed without reasonable cause to make his/her application earlier, having had opportunity to do so,
- the applicant has failed without good reason to comply with obligations referred to Article (4) A and (2) of Directive 2004/83/EC or with certain obligations of the applicant and if he has withdrawn or abandoned the application,
- the application was made by an unmarried minor after the applications of its parents were rejected and no relevant new elements were raised with respect to his/her conditions or the situation in his/her country of origin.

Although these provisions have been eliminated in the recasted\(^{349}\) version of the Directive, the possibility to accelerate (and/or conduct examinations of procedures at the border or in transit zones) remain in other worrying circumstances, especially when concerning applicants considered to be from a safe country of origin\(^{350}\) and when the applicant may, for serious reasons, be considered a danger to the national security or public order of the Member State\(^{351}\), since there is still no definition at European level of what constitutes a threat to national security and/or public order.

Member States are still not required to examine applications considered "inadmissible". However, before deciding on the inadmissibility of an application (except for subsequent applications) they now have to conduct a personal interview with the applicant on the admissibility of his/her application so that he/she can justify his/her reasons for obtaining international protection\(^{352}\).

(7) The newly modified Chapter V on appeal procedures also shows some substantial improvements:

\(^{349}\) "recasted" is a text which amends and replaces a previous text.

\(^{350}\) Article 8 paragraph (b) of Council of the European Union, Position of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (Recast), Brussels, 31 May 2013; Interinstitutional File: 2009/0165 (COD);

\(^{351}\) Article 8 paragraph (j) of Council of the European Union, Position of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (Recast), Brussels, 31 May 2013; Interinstitutional File: 2009/0165 (COD);

\(^{352}\) Article 34 of Council of the European Union, Position of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (Recast), Brussels, 31 May 2013; Interinstitutional File: 2009/0165 (COD);
Time limits for appealing a decision, which were a major concern for the UNHCR concerning Directive 2005/85/EC and when translated into practice now have to be "reasonable" in order not to render exercising the right to an effective remedy impossible for the applicant:

"Member States shall provide for reasonable time-limits and other necessary rules for the applicant to exercise his or her right to an effective remedy (...). The time-limits shall not render such exercise impossible or excessively difficult."

Applicants can now appeal decisions considering their application to be unfounded and the Directive finally recognises generally the suspensive effect of appeal procedures:

"Member States shall allow applicants to remain in the territory until the time-limit within which to exercise their right to an effective remedy has expired and, when such a right has been exercised within the time-limit, pending the outcome of the remedy.

with, however, some exceptions: "manifestly unfounded", "inadmissible" and discontinued applications.

Overall, this new Directive seems to respond well with the issues raised and analysed in Chapter I of this work. Although there are many restrictions and exceptions to otherwise good provisions, the new text of the Directive as a whole has to be welcomed since it seems to have been drafted to respond to the practical issues raised by Directive 2005/85/EC during the past few years, especially with regards to vulnerable categories, the often long and overly-bureaucratic time-frames to analyse claims and the over-generalisation of the concepts of "safe third country", "safe countries of origin" and "European safe countries", often found to be more damaging than helpful in reality.

---

353 See 1.5.4 above.
355 Article 46 paragraph (1) of Council of the European Union, Position of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (Recast), Brussels, 31 May 2013; Interinstitutional File: 2009/0165 (COD);
The Directive seems to respond adequately to the European Commission's Goals in the Policy Plans of Asylum of 2008\textsuperscript{357}, especially with regards to:

- accommodating the particular situation of mixed arrivals, including where persons seeking international protection are present at the external borders of the EU; and
- enhancing gender equality in the asylum process and providing for additional safeguards for vulnerable applicants\textsuperscript{358}.

Depending on the transposition and translation of this Directive in practice, we could expect some sensible improvements in the processing of international protection claims. Further simplifications of procedures, better provisions of language/translation tools to help applicants with their claim, wider provisions for legal aid and further restrictions to the possibility for States to accelerate procedures and/or consider them inadmissible or unfounded should however be improved in the future.

2.2.3 The new "Reception" Directive

The Commission's proposal for a new Reception Directive was published December the 3rd of 2008 and the amended text has been approved by the European Parliament on June the 12th 2013. As in the previous case I will evaluate the new text by taking account of the modifications agreed in the fifth trialogue\textsuperscript{359} that took place on 27 June 2012\textsuperscript{360}, 4 years after the Commission's initial proposal. The result of these dialogues has been mirrored in the Council Position published the 14th of December 2012\textsuperscript{361}.

The long process of negotiations finally resulted in a series of important changes to the original Directive of 2003:

\begin{itemize}
\item 357 For more information, see 2.1.2 above.
\item 359 Informal tripartite meetings attended by representatives of the European Parliament, the Council of the European Union and the European Commission
\end{itemize}
(1) The Directive’s scope has been extended to include also beneficiaries to subsidiary protection and puts greater emphasis on reception conditions for vulnerable people, whose reception needs now have to be "a primary concern of national authorities". Indeed, Member States have to assess whether the applicant is an applicant with special reception needs within a reasonable period of time, indicate the nature of such needs and ensure that they are addressed (even if they become apparent at a later stage in the asylum procedure). The Directive includes to the category of vulnerable people already listed in the 2003 Directive the following persons: victims of human trafficking, persons with serious illnesses and persons with mental disorders and explicitly mentions, as victims of sexual violence, victims of female genital mutilation.

(2) While the Directive of 2003 only included as "family members" spouses, unmarried partners in a stable relationship and unmarried, dependent children of the applicant the recast Directive includes:
- unmarried children regardless of their being dependant or not from the applicant,
- the father, mother or adult responsible for the applicant when he is a minor and unmarried.

(3) As initially proposed by the European Parliament, the Directive contains new provisions in relation to joint housing: Member States must ensure that the best interests of the child and of dependant adult applicants to other family members are taken into account and that said persons are accommodated together with close adult relatives.

366 Article 2 paragraph (c) of Council of the European Union, Position of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (Recast), Brussels, 14 December 2012; Interinstitutional File: 2008/0244 (COD);
367 See paragraph (22) of Council of the European Union, Position of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (Recast), Brussels, 14 December 2012; Interinstitutional File: 2008/0244 (COD);
Member States shall also take into consideration gender and age-specific concerns and the situation of vulnerable persons in relation to applicants when establishing housing arrangements and "take appropriate measures to prevent assault and gender-based violence, including sexual assault and harassment" within accommodation centres.

(4) Sadly, the provisions regarding the language for informing applicants of their rights remains the same although the wording has changed from "(Member States shall inform applicants) in a language (...) (they) are reasonably supposed to understand" to "a language that the applicants understand or are reasonably supposed to understand". The same rule goes for the detention of applicants where they have to be informed of the reasons of their confinement.

However, the Directive adds a provision preventing Member States from imposing any unnecessary or disproportionate documentation or other administrative requirements on asylum seekers.

(5) The grounds for detention have been delimited in paragraphs (15) to (20) and by adding two new Articles (Articles 8 and 9) to the Directive dedicated exclusively to the possibility for Member States to detain international protection applicants as long as they act in accordance with Article 31 of the Geneva Convention relating to the Status of Refugees of 28 July 1951 by not detaining an applicant for the sole reason they are seeking international protection. Paragraph (15) of the Directive states that:

"Applicants may be detained only under very clearly defined exceptional circumstances laid down in this Directive and subject to the principle of necessity and proportionality with regard to both to the manner and the purpose of such detention. Where an applicant is held in detention he or she should have effective access to the necessary procedural guarantees, such as judicial remedy before a national judicial authority".

---

368 Article 18 paragraph (3) of Council of the European Union, Position of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (Recast), Brussels, 14 December 2012; Interinstitutional File: 2008/0244 (COD);

369 Article 9 paragraph (4) of Council of the European Union, Position of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (Recast), Brussels, 14 December 2012; Interinstitutional File: 2008/0244 (COD);


371 Paragraph (15) and Article 8 paragraph (1) of the Directive: "The detention of applicants should be applied in accordance with the underlying principle that a person should not be held in detention for the sole reason that he or she is seeking international protection, particularly in accordance with the international legal obligations of the Member States and with Article 31 of the Geneva Convention"
Also, the European Parliament negotiated the new paragraph (16) requiring that Member States, in respect of the notion of 'due diligence' are required to ensure that the time needed to verify the grounds for detention are as short as possible and that said verification needs to be carried out in the shortest possible time.

Moreover, according to paragraph (18) applicants in detention should be treated with respect of human dignity "and their reception should be specifically designed to meet their needs in that situation". In particular, said paragraph obliges Member States to ensure that Article 37 of the 1989 UN Convention on the Rights of the Child is applied and a new paragraph has been added to the Article on minors (now Article 23) stating "Member States shall ensure a standard of living adequate for the minor's physical, mental, spiritual, moral and social development" thus responding to some of the European Commission's concerns regarding detention of minors as expressed by case *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, cited in the previously mentioned Commission's Green Paper of 2007. This provision can be welcomed cautiously in light of the fact that there is no express provision in the ECHR forbidding the detention of children neither in Article 5 or 8 so this Directive, however subtly, improves the rights on the child with regards to detention.

Finally, members of the fifth dialogue added the provision that detention of asylum seekers should be a measure of last resort; paragraph (20) of the Directive now states:

"In order to better ensure the physical and psychological integrity of the applicants, detention should be a measure of last resort and may only be applied after all non-custodial alternative measures to detention have been duly examined. Any alternative measure to detention must respect the fundamental human rights of applicants".

---

372 Article 37 of the 1989 UN Convention on the Rights of the Child states that:

"States Parties shall ensure that:
(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action".


Nevertheless the new Directive raises a great number of issues when dealing with detention of international protection applicants.

For instance, although one of the main objectives of the Directive was to restrain and limit the possibilities for Member States to detain international protection applicants, by listing a series of exceptions the Directive does the opposite and raises some questions with regards to its respect to Article 31 of the Geneva Convention on refugees. Said Article, previously mentioned, requires that any restriction to freedom of movement should be "necessary". One might wonder if the exceptions prescribed by the Directive can honestly be defined as "necessary", for instance:

- The Directive includes a series of cases where some reception guarantees might not be practicable during detention because of the geographic location or specific structure of the detention facility, however, they must be temporary and applicable only in exceptional circumstances\(^{375}\),
- Article 8 paragraph (3) provides that applicants may be detained:
  1. in order to determine or verify their identity or nationality,
  2. to determine those elements on which the application for international protection is based (which could not be obtained in the absence of detention, in particular when there is a risk of the applicant escaping),
  3. in order to decide, in the context of a procedure, on the applicant's right to enter the territory,
  4. when the detained applicant is subject to a return procedure and the Member State, concerned can assume on the basis of objective criteria (including that he or she already had the opportunity to access the asylum procedure), that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision,
  5. when protection of national security or public order so requires,
  6. with other reasons in accordance with Article 28 of the Dublin Regulation.

In conclusion, there are too many reasons justifying detention of an applicant for international protection and most do not seem necessary and/or could result in practice of possible excuses for Member States to detain applicants justifying said detention because of necessity.

Other important issues of the new Directive with regards to detention are:

1. The possibility for judicial but also administrative authorities to order the detention of one or more international protection seekers\(^{376}\),

2. In case of a judicial review of the detention order applicants would have access to free legal assistance in very restricted cases\(^{377}\).

3. It is possible for Member States to resort to prison accommodation for applicants, if accommodation in other detention facilities is unavailable\(^{378}\).

4. Vulnerable persons and applicants with special reception needs might be detained, although under exceptional circumstances and/or as a measure of last resort\(^{379}\).

5. The lack of temporary restrictions to detention is also worrying. And although "an applicant shall be detained only for as short a period as possible\(^{380}\) in practice detentions periods are often lengthy. For example, an Amnesty International report on Greece reported that:

"In effect, asylum-seekers can be detained for lengthy periods in poor conditions, in facilities not designed for long-term detention. (...) In January 2010, Amnesty International was informed about three Turkish asylum-seekers of Kurdish origin who had been arrested in early September 2009, and were still detained in the holding facility of the Aliens' Police Directorate in Thessaloniki. According to their lawyer, the three had asked for asylum immediately after being arrested and their application was forwarded to the Asylum Department in Thessaloniki within a few days of their detention. Their claim was examined over four months later, at the end of January 2010\(^{381}\).

The deprivation of liberty caused by detaining illegal immigrants or international protection seekers is very detrimental both for immigrants wishing to apply for international protection and for applicants for international protection who are being unnecessarily deprived of their freedom instead of receiving the appropriate care and 'welcoming' they deserve.

Indeed, with regards to the first issue, Amnesty International noted that in Greece:

\(^{376}\) Article 9 paragraphs (2) and (3) of Council of the European Union, *Position of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (Recast)*, Brussels, 14 December 2012; Interinstitutional File: 2008/0244 (COD);


"many individuals in need of international protection are discouraged from applying for asylum out of fear of being detained for longer. In other cases individuals withdraw their asylum applications having suffered prolonged detention in poor conditions."\textsuperscript{382}

For the latter, fleeing from the grim and/or persecutory situations in their country of origin, they shouldn't be "welcomed" by being restricted to locations that might further worsen the trauma they faced before and while escaping. For instance, a delegation of the European Parliament's LIBE Committee to described in 2007 detention centres in Belgium:

"there is a strong prison atmosphere: a high presence of guards, barbed wire, video surveillance and a disciplinary regime that extends to isolation. The possibilities for exercise are very limited (around two hours per day) as are the possibilities of contact with the outside world (it is possible to telephone out by paying for a telephone card but not to receive calls, except from one's lawyer). Another problem that is often very difficult for the detainees, some of whom have lived in Belgium for years and have links with the country, is that visits from family and friends are impossible in centres located near an airport. The NGOs also complained about the uncertain nature of their right to visit the centres: this right is at the discretion of the Ministry of the Interior and may be withdrawn by the authorities without any reason."\textsuperscript{383}

also:

"The main feature of deportations is their lack of accountability. External controls are virtually non-existent, internal controls are sporadic, there is no video surveillance and the chances that a complaint should actually succeed are virtually nil. The NGOs report numerous cases of violence during deportations."\textsuperscript{384}

(6) With regard to the situation of minors, the amended Article 23 the Directive states that Member States, when assessing the best interests of the child, shall take due account of the following factors:


\textsuperscript{383} European Parliament, "Report on a visit to closed detention centres for asylum seekers and immigrants in Belgium by a delegation of the Committee on Civil Liberties, Justice and Home Affairs (LIBE)", 11 October 2007, PE404.456v01-00; p.8.

\textsuperscript{384} European Parliament, "Report on a visit to closed detention centres for asylum seekers and immigrants in Belgium by a delegation of the Committee on Civil Liberties, Justice and Home Affairs (LIBE)", 11 October 2007, PE404.456v01-00; p.8.
- family reunification possibilities;
- the minor's well-being and social development, taking into particular consideration the minor's background;
- safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking;
- the views of the minor in accordance with his or her age and maturity.

Also, Member States shall ensure that minors have access to leisure activities, including recreational and to open-air activities[^385].

Slight improvements were also made in the fields of schooling and education for minors[^386] and now "Member States shall not withdraw secondary education for the sole reason that the minor has reached the age of majority" and access to education cannot be postponed for more than three months since the lodging of an application (the 2003 Directive provided the possibility for an extended period of a year in particular cases). Also, Member States have to provide preparatory classes, including language classes, to minors where it is necessary to facilitate their access and participation in national education.

(7) With regard to employment, the Directive ensures that applicants have access to the labour market no later than 9 months following the lodging of their application on the condition that "a first instance decision by the competent authority has not been taken and the delay cannot be attributed to the applicant" (the previous Directive had a longer time-limit of a year[^387]).

(8) Member States shall now ensure that material reception conditions provide an adequate standard of living for applicants which, other than guaranteeing their subsistence (as provided in the 2003 Directive) also has to protect their physical and mental health[^388].


[^387]: Article 15 paragraph (1) of Council of the European Union, Position of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (Recast), Brussels, 14 December 2012; Interinstitutional File: 2008/0244 (COD);

In the same manner, the provisions on access to health care have been widened to include treatment of serious mental disorders and appropriate mental healthcare for applicants with special reception needs when needed.\(^{389}\)

(9) The Directive partially addresses the issues pointed out by ECRE with regards to material reception conditions in the form of financial allowances or vouchers, often found insufficient to provide a dignified standard of living for asylum seekers. States now have to determine the value of said allowances and/or vouchers so that they ensure adequate standards of living for nationals.\(^{390}\)

(10) Member States can now withdraw material reception conditions for applicants only under exceptional and duly justified cases.\(^{391}\) However, Member States can now reduce or withdraw material reception conditions when the applicant has lodged a subsequent application in same the Member State. Finally, Member States shall under all circumstances ensure access to health care in accordance and shall ensure a dignified standard of living for all applicants.\(^{392}\)

(11) Amended Article 20 of the 2003 Directive (now Article 25) provides that Member States shall ensure that persons who have been subjected to torture, rape or other serious acts of violence receive the necessary treatment for the damage caused by such acts and in particular provide them access to appropriate medical and psychological treatment or care.

In conclusion, in spite of the many positive amendments included in this Directive the bigger picture of reception conditions for international protection seekers has not been dramatically improved. In fact, Professor Steve Peers defined the first recast proposals for the Procedures and Reception Condition Directives as "putting lipstick on a pig":


\(^{390}\) Article 17 paragraph (5) of Council of the European Union, Position of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (Recast), Brussels, 14 December 2012; Interinstitutional File: 2008/0244 (COD);


\(^{392}\) Article 20 paragraph (5) of Council of the European Union, Position of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (Recast), Brussels, 14 December 2012; Interinstitutional File: 2008/0244 (COD);
"Taken as a whole, the amended proposals will not require Member States to raise their standards very much, in particular to the extent that raising those standards would cost money. (...) the second phase of of the Common European Asylum System (...) look(s) a lot like the first phase. There would be largely cosmetic changes to the current inadequate standards. To borrow President Obama's phrase, this would be like 'putting lipstick on a pig'”\textsuperscript{393}.

I do believe that most of his criticism remains valid even with the recent modifications brought by the negotiations between the European Parliament and the Council of the European Union.

Indeed, the criticisms expressed by the Commission in the Green Paper of 2007 with regards to the "wide margin of discretion left to Member States by several key provisions of this Directive"\textsuperscript{394} for example in the "wide variations have been observed in the standards of reception conditions as well as in access to health care" remain mostly unchanged.

However, there are some important points of the Directive that need to be welcomed. For instance, the Directive respected most of the Commission's proposals for improvement contained in the Policy Action Plan of 2008 as:
- The Directive also covers persons seeking subsidiary protection; See point (1).
- The Directive ensures greater equality and improved standards of treatment with regard to the level and form of material reception conditions; See points (8), (9), (10) and (11).
- The Directive provide a simplified and more harmonised access to the labour market, under shorter time-frames; See point (7).
- The Directive delineates a series of procedural guarantees on detention; although the exceptions allowing the detention of international protection applicants remain too many. See point (5).
- The Directive guarantees that the special needs of vulnerable persons, such as children, women, victims of torture or person with medical needs, are to be identified immediately and that adequate care is available for them. See points (1), (2), (3), (5), (6).

\textbf{2.2.4 The "Dublin III" Regulation}


\textsuperscript{393} S. Peers., Statewatch Analysis: Revised EU asylum proposals: "Lipstick on a pig", Statewatch News Online, June 2011, ISSN 1756-851X; p.4.
The text could be considered a compromise agreed with the Permanent Representatives Committee the 28th of July 2012\textsuperscript{395}, 4 years after the Commission's initial proposal, and reflected the position of the Council at first reading, published the 14th of December 2012\textsuperscript{396}. The new Regulation, adopted 10 years after its previous version of 2003 and 23 years after the Dublin Convention of 1990 brings a series of important changes to the previously established mechanisms for determining the Member State responsible for examining an application for international protection lodged in a Member State of the European Union:

(1) The scope of the Regulation, like all instruments of the new asylum package, has been extended to include applications for subsidiary protection\textsuperscript{397}.

(2) The Regulation provides some additional guarantees to family unity and the rights of the child. For instance, it establishes that the best interests of the child\textsuperscript{398} as well as the respect for family unity\textsuperscript{399} should be a primary consideration of Member States. When processing together applications for international protection of the members of one family, Member States shall not separate them\textsuperscript{400} and, furthermore:

\textsuperscript{395} The document is not supposed to be public but has been published nevertheless by Statewatch at this link: http://www.statewatch.org/news/2012/jul/eu-council-dublinII-12202-12.pdf
\textsuperscript{397} Preamble, paragraph (10) of Council of the European Union, Position of the Council at first reading with a view to the adoption of 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), Brussels, 14 December 2012, Interinstitutional File: 2008/0243 (COD);
\textsuperscript{398} Paragraph (13) of the Preamble and Article 6 of Council of the European Union, Position of the Council at first reading with a view to the adoption of 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), Brussels, 14 December 2012, Interinstitutional File: 2008/0243 (COD);
\textsuperscript{399} Paragraph (14) of the Preamble of Council of the European Union, Position of the Council at first reading with a view to the adoption of 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), Brussels, 14 December 2012, Interinstitutional File: 2008/0243 (COD);
\textsuperscript{400} Paragraph (15) of the Preamble of Council of the European Union, Position of the Council at first reading with a view to the adoption of 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), Brussels, 14 December 2012, Interinstitutional File: 2008/0243 (COD);
"In order to ensure full respect for the principle of family unity and for the best interests of the child, the existence of a relationship of dependency between an applicant and his or her child, sibling or parent on account of the applicant's pregnancy or maternity, state of health or old age, should become a binding responsibility criterion. When the applicant is an unaccompanied minor, the presence of a family member or relative on the territory of another Member State who can take care of him or her should also become a binding responsibility criterion”.  

and

"Where, on account of pregnancy, a new-born child, serious illness, severe disability or old age, an applicant is dependent on the assistance of his or her child, sibling or parent legally resident in one of the Member States, or his or her child, sibling or parent legally resident in one of the Member States is dependent on the assistance of the applicant, Member States shall normally keep or bring together the applicant with that child, sibling or parent, provided that family ties existed in the country of origin, that the child, sibling or parent or the applicant is able to take care of the dependent person and that the persons concerned expressed their desire in writing".

(3) The Regulation includes a series of legal safeguards such as:

- the right for the applicant to be informed of the application of this Regulation and of a personal interview in order to facilitate the determination of the Member State responsible for his application,

- the right to an effective remedy in respect of decisions regarding transfers to the Member State responsible exercisable within a reasonable period of time by the applicant,

---

401 Paragraph (16) of the Preamble of Council of the European Union, Position of the Council at first reading with a view to the adoption of 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), Brussels, 14 December 2012, Interinstitutional File: 2008/0243 (COD);

402 Article 16 of Council of the European Union, Position of the Council at first reading with a view to the adoption of 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), Brussels, 14 December 2012, Interinstitutional File: 2008/0243 (COD);

403 Article 4 of Council of the European Union, Position of the Council at first reading with a view to the adoption of 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), Brussels, 14 December 2012, Interinstitutional File: 2008/0243 (COD);

However, the Article provides, in line with the other Directives of the package that said information shall be provided in writing ‘in a language that the applicant understands or is reasonably supposed to understand’.

404 Paragraph (18) of the Preamble and Article (5) of Council of the European Union, Position of the Council at first reading with a view to the adoption of 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), Brussels, 14 December 2012, Interinstitutional File: 2008/0243 (COD);

405 Paragraph (19) of the Preamble and Article 27 of Council of the European Union, Position of the Council at first reading with a view to the adoption of 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
- the obligation of Member States to promote voluntary transfers and to "ensure that supervised or escorted transfers are undertaken in a humane manner, in full compliance with fundamental rights and respect for human dignity, as well as the best interests of the child and taking utmost account of developments in the relevant case law, in particular as regards transfers on humanitarian grounds".

- the duty of Member States to pay for the costs necessary to transfer an asylum seeker to the Member State responsible for his/her application and communicate to said Member State all appropriate and relevant data concerning the person to be transferred so that the competent authorities in that State can provide that person with adequate assistance upon arrival (with health care if needed, for example).

The Regulation also limits the possibilities of detention for the purpose of transferring an applicant, mostly mirroring the provisions of the Reception Directive. One might doubt whether these new provisions will have any positive impact in practice on the applicant's rights.

(4) With regards to the processing of personal data and the use of Eurodac, the Regulation lists a series of guarantees for international protection seekers such as:

---

406 Paragraph (24) of the Preamble of Council of the European Union, Position of the Council at first reading with a view to the adoption of 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), Brussels, 14 December 2012, Interinstitutional File: 2008/0243 (COD);

407 Article 30 of Council of the European Union, Position of the Council at first reading with a view to the adoption of 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), Brussels, 14 December 2012, Interinstitutional File: 2008/0243 (COD);

408 Article 31 of Council of the European Union, Position of the Council at first reading with a view to the adoption of 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), Brussels, 14 December 2012, Interinstitutional File: 2008/0243 (COD);

409 Article 32 of Council of the European Union, Position of the Council at first reading with a view to the adoption of 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), Brussels, 14 December 2012, Interinstitutional File: 2008/0243 (COD);

410 Article 28 of Council of the European Union, Position of the Council at first reading with a view to the adoption of 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), Brussels, 14 December 2012, Interinstitutional File: 2008/0243 (COD);
"Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data applies to the processing of personal data by the Member States under this Regulation.\(^{411}\)

and

"The exchange of an applicant's personal data, including sensitive data on his or her health, prior to a transfer, will ensure that the competent asylum authorities are in a position to provide applicants with adequate assistance and to ensure continuity in the protection and rights afforded to them. Special provisions should be made to ensure the protection of data relating to applicants involved in that situation, in accordance with Directive 95/46/EC.\(^{412}\)

The Regulation finally states that Member States should ensure the security of transmitted personal data and avoid unlawful and/or unauthorized access, disclosure, alteration or loss of personal data.\(^{413}\) In order to do so Member States shall punish misuse of data processed by foreseeing adequate penalties (administrative and/or criminal).\(^{414}\)

(5) A provision that might go unnoticed but that is instead one of the most important changes to the Regulation is that Member States are not only bound by their obligations under instruments of international law but also by the relevant case-law of the European Court of Human Rights.\(^{415}\) As we will see further on, there are many relevant judiciary cases on the Dublin II and Dublin III regulations that consistently improve their content.

\(^{411}\) Paragraph (26) of the Preamble of Council of the European Union, Position of the Council at first reading with a view to the adoption of 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), Brussels, 14 December 2012, Interinstitutional File: 2008/0243 (COD);

\(^{412}\) Paragraph (27) of the Preamble of Council of the European Union, Position of the Council at first reading with a view to the adoption of 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), Brussels, 14 December 2012, Interinstitutional File: 2008/0243 (COD);

\(^{413}\) Article 38 of Council of the European Union, Position of the Council at first reading with a view to the adoption of 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), Brussels, 14 December 2012, Interinstitutional File: 2008/0243 (COD);

\(^{414}\) Article 40 of Council of the European Union, Position of the Council at first reading with a view to the adoption of 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), Brussels, 14 December 2012, Interinstitutional File: 2008/0243 (COD);

\(^{415}\) Paragraph (32) of the Preamble of Council of the European Union, Position of the Council at first reading with a view to the adoption of 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), Brussels, 14 December 2012, Interinstitutional File: 2008/0243 (COD);
(6) As a matter of fact, a new provision of the Regulation seems to have been written especially to repair the flaws found by the Court of Justice and the European Court of Human Rights\textsuperscript{416} of the implicit 'presumption of safety' contained in the previous version of the Regulation and often detrimental to asylum seekers transferred and/or examined in certain European Member States:

"Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible. Where the transfer cannot be made pursuant to this paragraph to any Member State designated on the basis of the criteria set out in Chapter III or to the first Member State with which the application was lodged, the determining Member State shall become the Member State responsible\textsuperscript{417}.

On the same grounds, the possibility to send an applicant to a third country has to be done in accordance with the new Procedures Directive\textsuperscript{418}.

Also, whenever the Commission has established a "mechanism for early warning, preparedness and crisis management" for cases where the particular situation of certain Member States, due to a substantiated risk of particular pressure on their asylum system might risk not applying the provisions within this Regulation. In this case, the Commission shall make recommendations to the State and ask it to draw up an action plan to correct the flaws within its system\textsuperscript{419}.

\textsuperscript{416} See 1.7.2 above.
\textsuperscript{417} Article 3 paragraph (2) of Council of the European Union, \textit{Position of the Council at first reading with a view to the adoption of 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)}, Brussels, 14 December 2012, Interinstitutional File: 2008/0243 (COD);
\textsuperscript{418} Article 3 paragraph (2) of Council of the European Union, \textit{Position of the Council at first reading with a view to the adoption of 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)}, Brussels, 14 December 2012, Interinstitutional File: 2008/0243 (COD);
\textsuperscript{419} Article 33 of Council of the European Union, \textit{Position of the Council at first reading with a view to the adoption of 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)}, Brussels, 14 December 2012, Interinstitutional File: 2008/0243 (COD);
In conclusion, although the mechanisms provided by the Directive still seem overly bureaucratic and a series of further improvements could have been made (especially with regards to procedural safeguards, family reunification and vulnerable categories of people) altogether the new Directive fixes many of the flaws found by the recent jurisprudence of the Court of Justice and the European Court of Human Rights and/or recent reports by relevant NGO’s. This is notably the case of:

- The explicit inclusion of the best interests of the child principle, interpreted in the rights of unaccompanied minors to obtain representation and assistance during all procedures and the obligation for Member States to identify as soon as possible their family members, siblings or relatives on the territory of Member States\(^{420}\). These provisions in particular provide an answer to the doubts raised by an ECRE report\(^ {421}\) declaring that:

  "In Italy a family tracing procedure does not exist in practice with respect to the Dublin procedure\(^ {422}\)"

and

"A 14-year-old Afghan child was apprehended at the Hungarian border and stated that he wanted to reach his brothers in Switzerland due to problems at home. Neither the Border Police nor the guardian appointed to his case asked any further questions regarding his situation, family members or the reason he fled his country. He was expelled from Hungary to Serbia under the re-admission agreement as the Hungarian authorities deemed that there was no issue of refoulement\(^ {422}\)"

- The obligation for Member States to complete the examination of an application when that person has been transferred to the responsible Member State\(^ {424}\). This was notably not the case in Greece

---

\(^{420}\) Article 6 paragraphs (2) and (4) of Council of the European Union, *Position of the Council at first reading with a view to the adoption of 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)*, Brussels, 14 December 2012, Interinstitutional File: 2008/0243 (COD); 

\(^{421}\) It is interesting to note that the report also provided an example of good practice in the Netherlands, where "accompanied children are assigned to a guardian from the expert guardianship organisation Nidos. Nidos is an independent guardianship and family supervision agency which appoints by law guardians for unaccompanied children. These independent guardians play a supervisory role in ensuring the best interests of the child and are responsible for their care and education". From European Council on Refugees and Exiles (ECRE), *"Dublin II Regulation: Lives on hold" - European Comparative Report*, February 2013; p.31. 


\(^{424}\) Article 18 of Council of the European Union, *Position of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms..."
when a 2006 ECRE report disclosed that the Greek authorities had interrupted the examination of asylum applicants returned to its territory since 2004 on the basis of a national decree allowing "the Ministry of Public Order to interrupt the examination of an asylum claim when the applicant 'arbitrarily leaves his/her stated place of residence". In other words:

"In practice, the Greek authorities use this provision to 'interrupt' the asylum claims of individuals having transited illegally to other Member States and subsequently use this as a justification for denying these individuals access to an asylum procedure when returned to Greece under Dublin. The most striking aspect of this practice is that even when the Greek authorities have accepted responsibility for the asylum claim following a request by another State, an interruption decision is subsequently issued prior to transfer to Greece. Thus, when the applicant is returned to Greece, upon arrival they are informed of the interruption decision, issued with a deportation order and are detained prior to expulsion."  

- Finally, the new "mechanism for early warning, preparedness and crisis management" introduced by Article 33 also establishes an European-wide "health check" able to address the deficiencies of certain Member State's asylum systems. It must be noted, however, that the recent N.S case introduced the possibility to literally suspend the Dublin system whenever sending an asylum seeker to another Member State would amount to him/her seriously risk a violation of his/her fundamental rights. Since Member States are bound to comply with the rulings of the Court of Justice from now on they will have to suspend all transfers to any Member State subject to deficiencies within its asylum system, even though this prevision does not comply with the Dublin III Regulation itself.

---

427 Case C-411/10, N.S and Others, 21 December 2011. The case has been summarized very well by S. Lieven: "The N.S case concerned an Afghan asylum seeker who sought asylum in the UK. As he had entered the European Union through Greece, the United Kingdom could transfer him back to his country, Greece being the responsible Member State for the asylum application according to the Dublin Regulation. Mr N.S appealed against the decision to transfer him to Greece, claiming that his human rights would be infringed by such a transfer. A couple of months earlier this year, the European Court of Human Rights (ECtHR) had already declared with its judgment in the case M.S.S v. UK that the transfer of an asylum applicant to Greece under the Dublin Regulation was contrary to the ECHR and had to be suspended. Indeed, the Greek asylum system was overloaded and a lot of deficiencies occurred".


For a comprehensive analysis on the case in Italian, see: Morghese, G., "Regolamento Dublino II e applicazione del principio di mutua fiducia tra Stati membri: la pronunzia della Corte di giustizia nel caso N.S e altri" in Studi sull'integrazione europea, Bari, Cacucci Editore, Volume VII, Number 1, 2012;
2.3 Interinstitutional negotiations on the asylum package

2.3.1 "This Europe is in crisis"

_This Europe is in crisis_\(^{428}\), states the Italian translation to the title of Professor Jürgen Habermas's latest book on democracy in the European Union\(^{429}\), it focuses on the deficiencies of democracy within the European Union where, even with the progress made by the Lisbon Treaty, the objectives to promote a wider association of European citizens and to further empower the European Parliament remains insufficient.

For the purposes of this work and in the spirit of Professor Habermas's latest book I will now analyse a series of documents which I have found via Statewatch\(^{430}\), a non-profit organization founded in 1991 that monitors the state and civil liberties in the European Union.

Statewatch has published online the Council's of the European Union amended proposals for the Reception and Procedures Directives and Dublin III Regulation, a series of documents not supposed to be accessible to the public where the discussions and compromises between the different EU institutions are stated clearly and, therefore, are classified as LIMITE documents.

When reading the proposals for said Directives and Regulation as amended by the COREPER\(^{431}\), one might note the many difficulties faced within the European Institutions to settle on an agreement and, most of all, how democracy within the European Union is very fragile and often underrated.

Indeed, this situation is due to the fact that the European Parliament has been often pressured by Member States to accept low-level compromises in order to save the whole package. The Council of the European Union, representing the interests of Member States, happens pressure the same way the Commission - who should represent the interests of the European Union - as well as the

\(^{428}\) J. Habermas., _Questa Europa è in crisi_, Roma-Bari, Giuseppe Laterza & Figli Spa, 2012;

\(^{429}\) The original title of the book is _Zur Verfassung Europas - Ein Essay_, published by Suhrkamp Verlag, Berlin, 2011;

\(^{430}\) Official website: http://www.statewatch.org

\(^{431}\) The Permanent Representatives Committee: 'responsible for preparing the work of the Council of the European Union. It consists of representatives from the Member States with the rank of Member States’ ambassadors to the European Union and is chaired by the Member State which holds the Council Presidency". From: http://europa.eu/legislation_summaries/glossary/coreper_en.htm
European Parliament - which is the only directly elected institution representing the citizens of the European Union.

As previously mentioned in the beginning of this thesis, asylum is a very sensitive policy and Member States often unwillingly accept to cede part of their sovereignty to supranational entities (such as the European Union) over their territory and their power to decide who can or cannot enter and/or stay within its borders.

The Procedures and Reception Directives as well as the Dublin III Regulation are certainly the most "sensitive areas" of the Asylum Package because they frame the possibility for States to govern their borders and within their territory, they oblige them to harmonize administrative practices and funding. All in all Member States administrations could feel this supranational legal framework as a threat their domestic jurisdiction and are not inclined to accept easily.

This explains why negotiations on these three instruments have been so painful and lasted over five years. It also explains why Member States, as represented by the Council of the European Union, did not compromise on certain points that would have required a greater responsibility on their part towards asylum seekers.

I will now analyse some of the changes required by the Council, starting from the Reception Directive.

2.3.2 The Procedures Directive: the compromises

The internal documents published by Statewatch make evident a series of negotiations between the European Parliament and the Council mostly with regards to time-limits (the Council wishing for wider time-ranges than the European Parliament), some restrictions to the admissibility and substance of procedures and the possibility for free legal assistance but, as in the case of the Reception Directive (which we will analyse further on) probably the most questionable negotiations were on the standards of protection for vulnerable categories of people. For instance:

The European Parliament proposed an amendment to strictly prohibit the detention of minors in all circumstances, not accepted by the Council\textsuperscript{435}.

The European Parliament was also asking stricter limits to the time-frame available for Member States to identify applicants in need of procedural guarantees. Although the final version of Article 24 provides that Member States must identify said applicants "within a reasonable period of time" (the Preamble states: "before a first instance decision is taken") the European Parliament wished for their recognition as soon as their application was lodged:

"Member States shall ensure that applicants in need of special procedural guarantees are identified in due time, as soon as an application for international protection is lodged. To that end, Member States shall establish procedures in national law with a view to identifying whether the applicant has special needs and indicating the nature of such needs in accordance with Article 22 of Directive [.../.../EU] (the Reception Conditions Directive)\textsuperscript{436}.

Finally, the European Commission's initial proposal to grant more time and support in preparing their interview for victims of torture and other types of violence was also not accepted by the Council and not included in the final text:

"In cases where the determining authority considers that an applicant has been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, the applicant shall be granted sufficient time and relevant support to prepare for a personal interview on the substance of his/her application. Particular attention shall be given to those applicants who did not mention their sexual orientation at the outset\textsuperscript{437}."


2.3.3 The Reception Directive: the compromises

Again the internal documents published by Statewatch\(^{438}\) make clear that the Council watered down a series of amendments to the Preamble of the Directive proposed by the European Parliament. This is the case for the paragraph that promoted an increase of funding:

"In order to cover improvements in standards for the reception of asylum seekers there should be a proportionate increase in the funds made available by the European Union in order to provide adequate support for the costs of such improvements, especially in the case of Member States which are facing specific and disproportionate pressures on their asylum systems, due in particular to their geographical or demographic situation"\(^{439}\).

It is also the case for the Commission’s proposal obliging Member States not to impose penalties or any restrictions on movement on asylum seekers on account of illegal entry or presence, modified by the Council of the European Union\(^{440}\).

The Directive could have contained a series of important amendments improving the treatment of vulnerable persons that have however not been accepted by the Council:

(1) While the European Parliament wished to insert an amendment stating that "unaccompanied minors shall never be detained"\(^{441}\) the Council replaced it with Article 11 paragraph (3)'s first line: "Unaccompanied minors shall be detained only in exceptional circumstances".

(2) With regards to the education of minors, the European Parliament proposed the following amendment, not accepted by the Council:


"Member States shall support full access to education systems and support the minor in learning the language of the Member State, hence contributing to its integration in the host society."442

(3) Also, with regards to the definition of "family members"443, the Commission's initial proposal included minor siblings of the applicants but neither the European Parliament or the Council of the European Union accepted said provision.

(4) The European Parliament proposed an amendment including "dependent adults with special needs" to the category of family members, but said provision was not accepted neither by the Council of the European Union, nor by the Members of the fifth trialogue.

(5) Article 22 paragraph (c) states that "only vulnerable persons in accordance with Article 21 may be considered to have special reception needs and thus benefit from the specific support provided in accordance with this Directive" and, although the list of categories of vulnerable people contained in Article 21 seems rather wide, the Directive should not restrict the possibility of other types of vulnerable people asking for special treatment.

(6) The Council also disregarded the European Parliament's amendment to forbid the possibility to detain international protection applicants in prisons.444

This might prove to be even more dreary if applied to vulnerable categories (including children and/or victims of torture, rape or other serious acts of violence).

Also with regards to the possibilities for detention, it is interesting to note when analysing Steve Peers's comment to the new Directive445 how, once again, some Member States pushed for a "far-
reaching" ground of detention whereas the Danish Presidency would have dropped it instead, proving some Member States' fear of being taken advantage of when dealing with asylum seekers.

With regard to employment, while the Commission's initial proposal obliged Member States to grant access to the labour market to applicants maximum 6 months after the lodging of their application, the Council wished for a 12 month waiting period. As Steve Peers wrote, the institutions, to reach an agreement "split the difference" by establishing a maximum waiting period of 9 months.

Also, the possibility for free legal aid when appealing a negative decision was and is still very limited also on account of the Council's restrictions probably due to financial reasons.

Overall, the Council's conservative stance is very clear in the documents.

2.3.4 The Dublin III Regulation: the compromises

In this Regulation also there are clear differences between the initial text proposed by the Commission, the European Parliament's proposed amendments and the final agreed text of compromises negotiated with the Council of the European Union.


446 Steve Peers is referring to the previously mentioned Article 8 paragraph (3) (d) : (An applicant may be detained only:) when he or she is detained subject to a return procedure under 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, in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision;


The most noticeable change to the Commission's initial proposal is the removal of a mechanism to suspend transfers to Member States unable to manage the flux on asylum-seekers thus risking of violating their fundamental rights. More specifically, the Commission's initial proposal stated that:

"The application of this Regulation may, in certain circumstances, create additional burdens on Member States faced with a particularly urgent situation which places an exceptionally heavy pressure on their reception capacities, asylum system or infrastructure. In such circumstances, it is necessary to lay down an efficient procedure to allow the temporary suspension of transfers towards the Member State concerned and to provide financial assistance, in accordance with existing EU financial instruments. The temporary suspension of Dublin transfers can thus contribute to achieve a higher degree of solidarity towards those Member States facing particular pressures on their asylum systems, due in particular to their geographical or demographic situation."\(^{449}\).

This mechanism was bound to be applied also whenever the Commission considered the level of protection for applicants for international protection "not in conformity with Community legislation on asylum" in a Member State\(^{450}\).

As noted by Steve Peers\(^{451}\), the mechanism not accepted by Member States was replaced with the early warning mechanism described by Article 31 of the final text, which I analysed before. Ironically, this suspension mechanism, although not part of the Regulation, was recently introduced and rendered binding to all Member States by the jurisprudence of the Court of Justice in the N.S case\(^{452}\).

As for family members, the Commission's initial proposal widened the definition provided by Article 2 of the Dublin II Regulation\(^ {453}\) to include the married minor children and minor siblings of the applicant but said amendments were not accepted by the Council\(^ {454}\).

---


\(^{452}\) Case C-411/10, N.S and Others, 21 December 2011. See2.2.4 above.

\(^{453}\) Regulation 343/2003

Another important change to the initial proposal was the requirement for Member States wishing to apply the 'sovereignty clause' to do so only if the applicant agreed so\textsuperscript{455}. This provision was very important since an applicant for asylum might have good reasons to wish for his application to be examined by the responsible Member States and should have a say on whether the country they're in should be allowed to examine their application or not. An ECRE report showed that some countries do not allow at all asylum seekers to have a say on their application of the sovereignty clause; for example, this is the case in Germany:

"In Germany the sovereignty clause may be applied against the wishes of the asylum seeker for economic or procedural reasons. The consent of the asylum seeker is not a requirement for applying the sovereignty clause"\textsuperscript{456}.

The Council, however, did not accept this change to the previous Regulation.

The Commission also provided, free of exemptions, for free legal assistance and/or representation for applicants appealing a transfer decision who could otherwise not afford it. The Council however added a long series of restrictions rendering the possibility for such free legal assistance really difficult in practice\textsuperscript{457}.

Finally, the Council also added a series of "minor" changes weakening some legal safeguards such as the requirement to provide information to asylum seekers and widening the possibilities for their detention\textsuperscript{458}.

Like all the examined legal texts in this Chapter, the Council's stance on the Regulation has proven to be very conservative and shown again his reluctance to accept changes that would request funding and/or shared solidarity between Member States on mass influxes of international protection seekers.

\textsuperscript{456} European Council on Refugees and Exiles (ECRE), "Dublin II Regulation: Lives on hold" - European Comparative Report, February 2013; p.47.
\textsuperscript{458} For a thorough examination of the changes provided by the Council in the compromise text as of June 2012 see Statewatch Analysis: The revised 'Dublin' rules on responsibility for asylum-seekers: a missed opportunity by Professor Steve Peers, University of Essex, Statewatch News Online, June 2012, ISSN 1756-851X;
2.4 The adoption of the asylum package: the final discussions between the institutions and the parliamentary vote of the package.

On the 7th of June 2013 the Council of the European Union issued, a few days before the plenary discussion and vote on the package, a series of statements regarding the results of negotiations on the asylum package.

Overall, the Council expressed enthusiasm in the results reached during the trilogue meetings between representatives of the Institutions and underlined many times the numerous improvements brought by the new Directives and Regulations on the standards of protection of international protection seekers\(^459\).

The Commission however was more cautious in expressing a positive opinion on the asylum package, noticing in an elegant manner the flaws remaining unaddressed within the packages and the differences between the Commission’s initial proposals and the versions agreed upon after the trilogues on the Reception\(^460\) and Procedures\(^461\) Directives and the Eurodac and Dublin III\(^462\) Regulations.


\(^460\) With regards to the Receptions Directive, the Commission noticed a series of differences between its initial Proposal and the agreed upon version. I have already analysed in the 2.3.3 subchapter of this work the main differences: a narrowed down definition of family members, a stricter definition of who can be considered a “vulnerable person”, limited healthcare, reduction or withdrawal of certain material conditions, access to the labour market, possibilities for detention of an applicant, very limited possibilities for free legal assistance and representation during appeal procedures.


\(^461\) With regards to the Procedures Directive, the Commission noticed a series of differences between its initial Proposal and the agreed upon version. I have already analysed in the 2.3.2 subchapter of this work the main differences: the level of guarantees of unaccompanied minors has been lowered, in the identification of persons with special needs, the possibility for legal assistance has been restricted along lowering the standards of admissibility and substance of procedures.


\(^462\) With regards to the Dublin III Regulation, the Commission noticed a series of differences between its initial Proposal and the agreed upon version. I have already analysed in the 2.3.4 sub-chapter of this work the main differences: especially the removal of the mechanism to suspend transfers to Member States unable to manage the flux on asylum-seekers thus risking of violating their fundamental rights and a narrowed down definition of family members.

For more informations, see the Commission's *Communication from the Commission to the European Parliament concerning the position of the Council on the adoption of a proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for...*
Finally, the "real" public discussion between members of the European Parliament and representatives of the European Commission and Council took place during the Plenary Session in Strasbourg on the 11th of June 2013.

The debate focused mostly on the conservative amendments brought in order to reach an agreement with the Council, to which the Council of the European Union's representative, Lucinda Creighton, did not respond.

Right wing political group members of the European Parliament expressed their discontent on the possibility for illegal immigrants or terrorists to take advantage of the system in order to access legally the territory of the European Union and/or stated that granting these provisions to international protection seekers would still not respond to the reasons causing them to flee from their countries of origin. It is interesting to note that one member in particular, Philip Claeys first declared this package, like the Schengen area, would not have been a good thing and that States need to keep their sovereignty and independence on deciding who can enter their territory. He then concluded his statement by saying the Eurodac Regulation could be a useful instrument to fight terrorism and organised crime within asylum seekers trying to enter the European Union.

These complaints were then addressed and criticised by numerous other Members of the European Parliament who claimed that people fleeing from their hometown should not be treated with the presumption of them being criminals on the loose. Renate Weber, ALDE spokesperson for the liberal group in LIBE Committee in particular stated that:

"Criminals do not need our regulations or Directives to come, those who do are not criminals and they are not the enemies and should not be considered as such by some governments or people.

(...) The beauty of the European Union is that we do not only have legislation on asylum but also laws to cooperate with countries from where they come from to help them. It's not up to the European union to stop all the wars (...) (but, on the other hand, we have to) show the same solidarity other countries showed Europeans (...) (during the two World Wars)".

---

463 Such as Timothy Kirkhope
464 Such as Kyriacos Triantaphyllides, Franciska Keller, Nadja Hirsch, Nikos Chrysogelos, Ismail Ertug
465 Group of the Alliance of Liberals and Democrats for Europe
Other Members\textsuperscript{466}, mostly from Mediterranean countries also complained about the lack of solidarity clauses in the Dublin III Regulation and that because their countries of origin were already too poor to take care of their own citizens, they shouldn't have the "burden" to deal with numerous asylum applications.

Andrew Brons advised members of the European Parliament in favour of the package to:

"host asylum seekers themselves and give them their money instead of making the poor of every country pay for them".

This debate shows, once more, how international protection seekers are still considered with suspicion and how even members of the European Parliament cling to the sovereignty of their State towards their territory.

It is also interesting to note that, at least in the case of Italy, the majority of serious crimes and with the worse social consequences (such as organised crime) are committed almost exclusively by nationals\textsuperscript{467}. Indeed, a study conducted in 2002 on trafficking of human beings in Italy\textsuperscript{468} reports that mafious associations rarely include foreigners in the leading roles of the criminal hierarchy casting them instead in the lower levels of selling and or transporting drugs. The report also states that:

"the equation clandestinity = criminality that has become for some an ideological propaganda slogan does not correspond to the statistical evidence (available). It is an error (...) to combine the two terms without noticing that if migrants commit crimes they are more than often the victims (of crimes)"\textsuperscript{469}.

Looking again at the asylum package, the European Parliament as already stated in this study, adopted the Procedures and Reception Directive as well as the Eurodac and Dublin III Regulations the following day, June the 12th of 2013.

Since then they have already been published on the Official Journal L 180 of the 29 June 2013\textsuperscript{470}:


\textsuperscript{466} Lorenzo Fontana, Mara Bizzotto, Georgios Papanikolaou, Dimitrios Droutsas


\textsuperscript{468} F. Spiezia., F. Frezza., N.M. Pace., Il traffico e lo sfruttamento di esseri umani. Primo commento alla legge di modifica alla normativa in materia di immigrazione ed asilo, Milano, Giuffrè Editore, 2002;

\textsuperscript{469} Unofficial translation, F. Spiezia., F. Frezza., N.M. Pace., Il traffico e lo sfruttamento di esseri umani. Primo commento alla legge di modifica alla normativa in materia di immigrazione ed asilo, Milano, Giuffrè Editore, 2002; p.3

responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person\textsuperscript{471},

- Eurodac Regulation: Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints\textsuperscript{472},


It is worth recalling that these texts complete the previously adopted "Asylum Package" components such as:

- the "Qualification Directive": Directive on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (Directive 2011/95/EU of 13 December 2011)\textsuperscript{475}.

- the Regulation establishing a European Asylum Support Office (Regulation 439/2010 (EU) of 19 May 2010)\textsuperscript{476}.

\textsuperscript{475} Available at: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=EN&numdoc=32011L0095
\textsuperscript{476} Available at: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=EN&numdoc=32010R0439
CHAPTER III
Case study: innovative interpretations of the Court of Justice and the European Court of Human Rights on the right to asylum

3.1 Judicial protection of human rights within the European Union, an introductory note

As previously stated in this work the jurisprudence of both the Court of Justice of the European Union (CJEU) and of the European Court of Human Rights (ECtHR) play a key role in broadening the standards of protection of fundamental rights.

Indeed, the Court of Justice of the European Union has the jurisdiction to give preliminary rulings providing as a result innovative and progressive interpretations of the current EU legislation. These preliminary rulings can be requested by any national judge and can have consequences for all Member States of the European Union, meaning that national judges have:
- when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a Directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Directive in order to achieve an outcome consistent with the objective pursued by the Directive.
- to set aside any provision of national law found to be conflicting with EU law.

As far as the "Strasbourg Court" (ECtHR) is concerned, it is worth recalling that its jurisprudence is also relevant in the EU legal framework notably due to Article 6 paragraph (3) of the Treaty on the European Union which provides that the fundamental rights guaranteed by the ECHR constitute general principles of the Union's law thus allowing the "Luxembourg" judges to refer to the ECHR and the relevant case law provided by its Strasbourg Court (ECtHR).

It is worth recalling that as a rule the judgments of the "Strasbourg" judges deal with the specific cases and lack the general horizontal effect of the judgments of their "Luxembourg" fellows. However they have recently tried to mirror the Luxembourg logic by developing the "Pilot

477 Article 267 of the Treaty on the Functioning of the European Union
479 Bernhard Pfeiffer and Others v. Deutsches Rotes Kreuz (joined Cases C-397/01 to C-403/01), paragraphs (115), (116), (118) and (119).
480 See Van Gend and Loos (C-26/62) and Costa-Enel (C-6/64) rulings where the CJEU ruled respectively the direct applicability and primacy of the Community law (now EU law) over national legislation. For more information see: K-D. Borchardt., L'ABC du droit de l'Union Européenne, Luxembourg, Office des publications de l'Union Européenne, 2010; pp.124-130.
Likewise, the Court stated explicitly in the Simmental judgment (C-106/77) that: "Every national court must, in a case within its jurisdiction, apply community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the community rule".
judgments" procedure\textsuperscript{481} (because approximately two-thirds of the admissible complaints are repetitive cases\textsuperscript{482}).

By so doing when Convention violations are systematic the Strasbourg judge of the European Court of Human Rights is able via the pilot judgment procedure to give ECHR Member States clear indications on the source of their violations as well as the type of remedial measures needed to resolve them. In practice, these procedures extend the Court's competences from judging cases from being taken on an individual case-to-case basis to having a general, de facto binding effect for the States part to the ECHR\textsuperscript{483}. In other words:

"The very fact that pilot judgments are focused on the identification of systematic malfunctioning of the domestic legal order and on the indication of appropriate general remedial measures normatively extends the binding effect of the Court's judgment and changes their legal nature, accentuating the Court's constitutional function. The pilot judgments' legal nature reveals features combining individual and general effect in the domestic legal order by extending an individual complain procedure through elements of judicial review of legislation"\textsuperscript{484}.

That having been said the Strasbourg judges cannot rule on compliance of the EU institutions acts with the ECHR (the EU is not yet a party to the Convention). However, because of their competence on EU Member States legislation the Strasbourg Court is to "indirectly scrutinize"\textsuperscript{485} EU acts, thus creating a close cooperative relationship between the two Courts.

Needless to say that such a relationship will be even closer when the EU will also become formal contracting party of the ECHR in accordance with Article 6 TEU and Protocol 10 of the ECHR. As a result protection of fundamental rights will be further strengthened in the European Union as the

\textsuperscript{481} "Pilot judgment Procedure: a process whereby the ECtHR can decide to select one or more of a number of cases deriving from the same root cause. The Court will seek to achieve a solution that extends beyond the particular case or cases so as to cover all similar cases raising the same issue. One important feature of the procedure is the possibility of adjourning or "freezing" the examination of all other related cases for a certain period of time. The system has been in place since 2004 as a means to alleviate the excessive case overload of the Court". From: European Parliament Directorate-General for Internal Policies, study conducted by Lazarus, L., Costello, C., Ghanea,N., Ziegler, K., Desai, R., Hill-Cawthorne, L., Jones, B., \textit{The Evolution of Fundamental Rights Charters and Case Law}, Brussels, Policy Department C: Citizen's Rights and Constitutional Affairs, 2011; p.74


\textsuperscript{483} Professor Giuseppe Cataldi notes that the ECHR's rights are also directly applicable by national judges in numerous foreign national systems. See G. Cataldi., "La natura self-executing delle norme della CEDU" in \textit{La Tutela dei Diritti umani in Europa tra sovranità statale e ordinamenti sovranzoniali}, Padova, CEDAM, 2010; pp.574-575.


European Court of Human Rights (ECtHR) will be able also to scrutinize all acts of the European Union Institutions, Agencies and bodies for their compatibility with the ECHR.

Given the importance both Courts have in extending and harmonising the rights granted by EU law I will now analyse some of the most recent, important cases concerning asylum and the protection of international protection applicants.

3.2 Recent case law of the European Court of Human Rights concerning international protection

3.2.1 S.F. and Others v Sweden

The S.F. and Others v Sweden judgment of 15 May 2012 by the European Court of Human Rights constitutes an interesting case of protection needs arising *sur place*.

The case concerned a complaint by an Iranian family who fled from Iran to Sweden out of fear of being persecuted because of their involvement with a Kurdish-rights political party. The Court found that although the applicants' activities in Iran were not sufficient to entail a risk of persecution by the Iranian Government, their following political activities in Sweden justified their fear that they might be subjected to torture or inhuman or degrading treatment if deported back to Iran. In other words, the applicants' activities while in the host country (or "*sur place*") led to the probability of them being persecuted if they were to return to their country of origin.

Indeed, both applicants' dissident activities in Sweden included reporting human rights violations in their country of origin:

"the first applicant (...) submitted that he had been actively involved for the Kurdish cause on Newroz TV, where he had expressed criticism and continuously informed, inter alia, about the situation for Kurds and the severe human rights violations in Iran. He had also been interviewed on TV concerning his own reasons for leaving Iran. Newroz TV was allegedly monitored by the Iranian intelligence services. The second applicant submitted that, in addition to her work for Newroz TV, she had been working for other Kurdish broadcasting services, that she had performed approximately 30 interviews and that she had worked on translations for Amnesty International’s international secretariat in London. They submitted that they had been involved in substantial political sur place activity and that this activity was known to the Iranian authorities".

---

486 ECtHR, Application n. 52077/10.
487 S.F. and Others v Sweden, paragraph (24)
"Regarding their personal situation and sur place activities they referred to a collection of internet links, to some of the articles written by the applicants, four compact discs with a summary of their content and links to several interviews and further articles on the internet. They submitted that the second applicant could be found on at least 200 sites on Google and the first applicant could also be found on several sites. They submitted a selection of printouts of internet sites and articles to prove that they were actively promoting human rights in Iran in general and the rights of Kurds in particular. The first applicant, who was now a full member of the KDPI, also submitted a membership certificate.\(^{488}\)

Given the situation of Iran and its active repression of activists and political opponents combined with the government's monitoring of Internet communications, the Court declared that the deportation of the applicants to Iran would give rise to a violation of Article 3 of the ECHR.\(^ {489}\)

In conclusion, although the ECtHR can not directly judge on the European Union's law, its decision is in line with Article 5 of both the Qualifications Directive of 2004\(^ {490}\) and its recast version of 2011\(^ {491}\). In the 2004 Directive said Article entails that:

1. A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on events which have taken place since the applicant left the country of origin.
2. A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on activities which have been engaged in by the applicant since he left the country of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin.
3. Without prejudice to the Geneva Convention, Member States may determine that an applicant who files a subsequent application shall normally not be granted refugee status, if the risk of persecution is based on circumstances which the applicant has created by his own decision since leaving the country of origin”.

3.3 Recent case law of the Court of Justice of the European Union concerning international protection

3.3.1 Bundesrepublik Deutschland v B and D

In joined cases Bundesrepublik Deutschland v B and D\(^ {492}\) the Court gave the 9th of November 2010 its interpretation on the content of Article 12 paragraph (2) commas (b) and (c) of the Qualifications Directive of 2004\(^ {493}\) which provides that:

---

488 S.F. and Others v Sweden, paragraph (54)
489 “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.
490 See 1.4.4 above
"A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:

(...) (b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;

(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations”.

According to these premises, two Turkish nationals of Kurdish origin found their applications for asylum refused or withdrawn on the grounds of their past membership to a Kurdish terrorist organisation, the PKK\(^{494}\).

However, the Court noted that their affiliation to a terrorist association did not *per se* prevent them from having a case-by-case assessment on their involvement in the organisation incriminated. Indeed, according to the Court, both the Qualifications Directive and the Geneva convention allow the exclusion of a person from refugee status on the basis of the serious non-political crimes that person has committed, and not solely on his/her membership to a terrorist association:

"(...) it should be noted that points (b) and (c) of Article 12(2) of Directive 2004/83 – in the same way, moreover, as points (b) and (c) of Article 1F of the 1951 Geneva Convention – permit the exclusion of a person from refugee status only where there are ‘serious reasons’ for considering that ‘he … has committed’ a serious non-political crime outside the country of refuge prior to his admission as a refugee or that ‘he … has been guilty’ of acts contrary to the purposes and principles of the United Nations”\(^{495}\).

and

"(...) even if the acts committed by an organisation on the list forming the Annex to Common Position 2001/931 because of its involvement in terrorist acts fall within each of the grounds for exclusion laid down in Article 12(2)(b) and (c) of Directive 2004/83, the mere fact that the person concerned was a member of such an organisation cannot automatically mean that that person must be excluded from refugee status pursuant to those provisions”\(^{496}\).
In other words, the competent authority before taking a decision excluding a person from refugee status must examine all relevant circumstances of his/her individual responsibility in the perpetration of terrorist acts according to a series of criteria:

"(...) his position within the organisation; the extent of the knowledge he had, or was deemed to have, of its activities; any pressure to which he was exposed; or other factors likely to have influenced his conduct.

Any authority which finds, in the course of that assessment, that the person concerned has – like D – occupied a prominent position within an organisation which uses terrorist methods is entitled to presume that that person has individual responsibility for acts committed by that organisation during the relevant period, but it nevertheless remains necessary to examine all the relevant circumstances before a decision excluding that person from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 can be adopted."\(^{497}\).

Also, according to the Court, these exclusion clauses are penalty for acts committed in the past by the applicants and do not entail thereby the automatic right for the concerned authorities to consider these persons as a "present" danger for the host Member State. There are other provisions within the Directive on the necessary measures the competent authorities can take where a person represents a present danger to the Member State\(^{498}\).

Lastly, the Court declared that Member States may still decide to grant a right of asylum under their national law to a person otherwise excluded from refugee status pursuant to one of the exclusion clauses laid down in the Directive, provided that the other kind of protection does "must not (...) be confused with refugee status within the meaning of Directive 2004/83 (...)\(^{499}\).

### 3.3.2 Federal Republic of Germany v Y and Z

The joined cases of Federal Republic of Germany v Y and Z\(^{500}\) involved a dispute between the Federal Administrative Court of Leipzig and two Pakistani nationals of Ahmadiyya faith\(^{501}\). In their country of origin, Pakistan, the activities of the Ahmadiyya community were particularly confined and restricted: Y and Z could not profess their faith publicly without their practices being considered blasphemous and for this reason they sought asylum in Germany.

\(^{497}\) Bundesrepublik Deutschland v B and D, paragraph (97) and (98).
\(^{498}\) Bundesrepublik Deutschland v B and D, paragraphs (100) to (105).
\(^{499}\) Bundesrepublik Deutschland v B and D, paragraphs (113) to (121).
\(^{500}\) Joined Cases C-71/11 and C-99/11
\(^{501}\) The Muslim Ahmadiyya community is an Islamic reformist movement
Accordingly, the Court gave the 5th of September 2012 its interpretation on the content of Articles 2 comma (c) and 9 paragraph (1) comma (a) of the Qualifications Directive of 2004 with regards to the meaning of act of persecution and specifically acts of persecution against a particular religion or lack thereof. Article 2 comma (c) of the Directive defines a refugee as:

(...) a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;

Article 9 paragraph (1) comma (a) describes what constitutes an act of persecution:

"(Acts of persecution within the meaning of article 1 A of the Geneva Convention must) (...) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms"

In other words, the main issues with the asylum applications of Y and Z were:

Firstly, that it wasn't their membership to a particular religion that could have caused their persecution from Pakistan but the public manifesting of their beliefs, thus raising the question whether there is a requirement of discretion in order to avoid persecution. Indeed:

"Article 298 C of the Pakistani Criminal Code provides that members of the Ahmadiyya religious community may face imprisonment of up to three years or a fine if they claim to be Muslim, describe their faith as Islam, preach or propagate their faith or invite others to accept it. Moreover, under Article 295 C of that code, any person who defiles the name of the Prophet Mohammed may be punished by death or life imprisonment and a fine."  

Accordingly, both applicants could have probably returned to Pakistan and, by keeping their beliefs to themselves, would have not being subjected to persecutions from the State and/or third parties.

---

503 Article 10 comma (b) of the Directive states that: "(Member States shall take the following elements into account when assessing the reasons for persecution:) the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief"
504 Federal Republic of Germany v Y and Z, paragraph (31)
However, both parties proved that their religious beliefs were a defining part of their identity and that their religion provided the need to live one's faith on the open:

"In the event of their return to Pakistan, they could not continue to practice their religion in public without being exposed to a risk of persecution, a factor which must be taken into account in any asylum procedure to determine whether they should be granted refugee status.

In its judgments of 13 November 2008, the Sächsisches Oberverwaltungsgericht considered that, for a devout Ahmadi in Pakistan, whose religious convictions include the belief that that faith should be lived in public, the situation in that country constitutes a serious violation of religious freedom. In view of the threat of severe punishment as well as the numerous unimpeded attacks by extremist groups, common sense would suggest that an Ahmadi should refrain from all public acts of worship.

According to the findings of the Sächsisches Oberverwaltungsgericht, Y and Z are deeply committed to their faith and their life was actively shaped by it in Pakistan. They continue to practice their religion in Germany and consider that the public practice of their faith is essential in order for them to preserve their religious identity.”

Strictly speaking, should the applicants be expected to abstain from observing their faith in public since doing so would have given rise to a risk to life, physical integrity or freedom for them?

The Court found that whether an act of persecution concerns religious freedoms in the private or public life of the applicant, it is the severity of the violation of religious freedom to define if those actions constitute an act of persecution.

"(...) Acts which may constitute a ‘severe violation’ within the meaning of Article 9(1)(a) of the Directive include serious acts which interfere with the applicant’s freedom not only to practice his faith in private circles but also to live that faith publicly”.

Competent authorities have to assess the severity of these acts on two grounds:
- if the acts interfering with the right of freedom of religion are, by their nature or repetition, sufficiently severe to amount to persecution.
- on the severity of their consequences for the person concerned, especially if the observance of a certain religious practice in public is "of particular importance to the person concerned in order to preserve his religious identity, (...) even if the observance of such a religious practice does not constitute a core element of faith for the religious community concerned".

505 Federal Republic of Germany v Y and Z, paragraphs (38) to (40).
506 Federal Republic of Germany v Y and Z, paragraph (63).
507 Federal Republic of Germany v Y and Z, paragraph ().
At last, the Court concluded that "authorities cannot reasonably expect the applicant to abstain from (...) religious practices." Furthermore, even though both applicants had not yet been subjected to severe acts of persecution at the time of the trial, their fear of being persecuted was to be considered well-founded since, in the light of their personal circumstances, their return to their country of origin and their engaging in religious practices would have exposed them to a real risk of persecution.

In a similar case pending judgment by the Court, the Council of State of the Netherlands also asked the CJEU if foreign homosexual nationals can be expected to conceal their orientation in their country of origin in order to avoid persecution.

These cases are of great interest since they offer a wider concept of "acts of persecution", declaring that forms of persecution may also exist whenever, upon return to their country of origin, persons are forced to conceal their political convictions, sexual orientation or religious beliefs and practices to avoid serious harm.

3.3.3 MA, BT, DA v Secretary of State for the Home Department

The recent MA, BT, DA v Secretary of State for the Home Department judgment considered the 'unusual' case of three unaccompanied minors with no family members present in the EU territory and who lodged asylum claims in different countries of the European Union. This very particular case is not contemplated in the provisions of the Dublin II Regulation and specifically in Article 6 providing that:

"Where the applicant for asylum is an unaccompanied minor, the Member State responsible for examining the application shall be that where a member of his or her family is legally present, provided that this is in the best interest of the minor.

In the absence of a family member, the Member State responsible for examining the application shall be that where the minor has lodged his or her application for asylum".

508 Federal Republic of Germany v Y and Z, paragraph (80).
509 Minister voor. Immigratie en Asiel v X, Joined Cases C-199/12, C-200/12, C-201/12.
510 Case C-648/11, judgment of 6 June 2013.
511 And neither in the Dublin III Regulation for that matter, since the recasted Regulation only adds to the previous version that "In the absence of a family member, a sibling or a relative as referred to in paragraphs 1 and 2, the Member State responsible shall be that where the unaccompanied minor has lodged his or her application for international protection, provided that it is in the best interests of the minor" (Article 8, paragraph (4)).
Since the minors had no family present in the territory, transited through numerous Member States where they lodged multiple asylum claims to their names their situation did not correspond to any of the criteria established by the Regulation.

The CJEU, taking into account the child's best interests not to prolong unnecessarily the procedure for determining the Member State responsible declared that Article 6 of the Dublin II Regulation should be interpreted as designating as responsible the Member State in which the minor is present after having lodged an application there.

3.4 Concluding remarks to the chapter

Law is not only made by legislatures but also by the courts. In applying pre-existing legislative rules, courts have also to interpret them, specify their general content and sometimes fill the gaps unaddressed by lawmakers.

This process is called judicial law making and its effects on the laws and principles governing States as well as supranational entities can be imperceptible to substantial. Some judgments pave the history of their countries and several judgments have shaped the European Union as it is now.

The cases I analysed in this chapter tell us a lot about the possible future steps of the European policies on asylum and, on the other hand, fill some of the gaps I examined in the recently adopted asylum package.

These judgments all have one thing in common: they lead the way for a more humane system based on decisions taken on an individual case-by-case basis.

In this system, persons have to be granted protection as quickly and efficiently as possible\(^512\), taking into account their genuine fear of persecution rather than limiting grounds for protection to a constricted list of reasons\(^513\), giving a second chance to those who deserve it\(^514\).

While the Geneva Convention was clearly drafted to respond to the historic necessities of the time, these cases show us how much the image of asylum seekers has and is still evolving over the years.

\(^{512}\) Case *MA, BT, DA v Secretary of State for the Home Department*. See 3.3.3 above.

\(^{513}\) Cases *S.F. and Others v Sweden* and *Federal Republic of Germany v Y and Z*. See 3.2.1 and 3.2.2 above.

\(^{514}\) Case *Bundesrepublik Deutschland v B and D*. See 3.3.1 above.
and how especially supranational courts broaden the content and the scope of asylum rights in order to include all persons fleeing away from their countries or origin for serious reasons.

In conclusion, I believe the *Federal Republic of Germany v Y and Z* judgment among all the analysed cases to be of particular significance since it establishes that any person unable to live publicly her or his own identity has a right to seek protection. People should not be expected to hide their individuality, to abstain from the right of seeking happiness.

515 See 3.2.2 above.
Conclusions

"Rosalyn Higgins defines sovereignty as "the entitlement of a State to act as it wishes at the international level - the ability to resist intervention from the international community". This traditional concept of sovereignty embodies several assumptions of great concern to displaced communities: that only States are in charge of the creation and implementation of international human rights and humanitarian law, that international law is made exclusively with the consent of States, and that no one is allowed to interfere with the way in which a State treats its own inhabitants".516

In this work I tried to analyse the evolution of the right of asylum through history, the leitmotiv being how asylum has always been the prerogative of a higher authority - spiritual or earthly - on a certain space; a space at first limited to sacred grounds, then to a nation's territory, finally to the European continent.

Another common thread of this study is how authorities hold on tightly to the policies regarding people entering their territory, paying little to no attention to those leaving. States have always been fearful of "intruders" to their territory, strangers in their cities, difference in their unobtainable quest for homogeneity.

It is interesting to note how the policies of the European Union analysed in this work have and are still suffering from the Member State's mistrust of asylum seekers but managed at the same time to progressively create a common asylum system that, although subject to many flaws, provides wider and harmonized standards of protection to international protection seekers who otherwise relied only on the State's decisions.

Although the recasted Qualifications Directive dramatically ameliorated the situation of international protection seekers both by recognising different types of protection and broadening the list of people entitled to ask for protection there is still a lot of progress to be made.

The Reception and Procedures Directives have been designed to comply with bureaucratic and money-saving standards instead of acting out of human compassion whereas the Dublin III Regulation, which could have brought substantial improvements to the principle of solidarity within the European Union has failed in doing remaining an instrument vowed to distribute asylum seekers around Europe instead of listening and responding to their needs.

The conclusions to my analysis of the new asylum package are that while the European Union took considerable steps forwards as to who is entitled to benefit from international protection, granting several important safeguards adaptable to the evolving figure of asylum seekers in our ever changing society, it didn't do much to improve the content of international protection and how said protection is acquirable by international protection seekers. Indeed, there are far too many possible instances where Member States can prolong time-frames for registering and examining applications as well as possibilities to detain international protection applicants even when considered particularly vulnerable (such as women, minors and unaccompanied minors) or with special needs (such as people having health issues). At last, the Dublin III Regulation failed both in establishing a real solidarity mechanism between States, both in responding to the many criticisms accusing some Member States of systematically violating the international protection's applicants rights.

Thankfully, many of these issues have already been addressed by the "European Courts": both the ECtHR and the CJEU have limited the discretionality of Member States in many important fields at the same time introducing important safeguards further improving asylum seeker's rights. For example, the CJEU established in the N.S case the 'suspension mechanism' legislators could not agree upon while negotiating the Dublin III Regulation\(^\text{517}\) and filled the gaps in the legislation regarding the examination of unaccompanied minor's applications while keeping in mind the best interests of the child\(^\text{518}\). We can only hope this strict cooperation between judges and legislators will establish little by little a common European asylum system worthy of the European Union.

In this mixed picture it also remains to be seen how the different European nations will abide by the rules, whether policy makers, bureaucrats and judges will improve the standards of protection or stick to the minimums required.

Overall, the application of these new rules will allow over time to concretely judge the quality of their improvements or the incompleteness of their provisions.

\(^{517}\) See 2.3.4 above.
\(^{518}\) MA, BT, DA v Secretary of State for the Home Department judgment. See 3.3.3 above.
United in diversity being the official motto of the European Union, we can only hope this new asylum system will also have an impact on how politics consider asylum seekers and therefore how they are perceived by society.

Because some still consider asylum seekers with suspicion and as potential criminals trying to escape from their responsibilities\textsuperscript{519} it is absolutely necessary to launch a Europe wide debate on these issues that are often distorted by the news and used as scapegoats by politicians to promote their political agenda.

The common misconception that terrorists could be hidden between asylum seekers and/or that the number of asylum seekers is so high to constitute a threat to a nation's economy are inherently false. First, because terrorists avoid the deep scrutiny linked to an asylum procedure and prefer to follow “ordinary procedures” to enter a given state and, secondly, because on average the European Union receives yearly as many applications for asylum as South Africa\textsuperscript{520} so the supposed "threat" asylum seekers pose to a nation's economy clearly has to be re-dimensioned.

Furthermore, Article 80 of the TFEU requires asylum, border and migration policies of the European Union and their implementation to be governed by the principle of solidarity and fair sharing of responsibility but until now Member States have made little to no effort to put this principle into practice. A fair and equitable asylum system within the European Union can't be achieved unless Member States actively cooperate with each other.

Further steps could also be taken to promote a dialogue between civil society and the European institutions in order to further legitimize the democracy deficit within the European union. This would encourage a bottom-up approach allowing experts working on the field, thus closer to fundamental rights issues on a daily, practical basis, to share their know how with the European institutions (and vice versa).

In conclusion, I would like to point out that my choice to analyse the institute of asylum since its creation in Greece and its expansion as a right recognized by International laws was not accidental.

\textsuperscript{519} See 2.4. above.
\textsuperscript{520} “In 2009, for instance, there were approximately 246,000 asylum claims in the EU while there were nearly as many, 220,000, in South Africa alone”. Citation by António Guterres, United Nations High Commissioner for Refugees at the Informal Meeting of EU Ministers of Justice and Home Affairs, Brussels, 15 July 2010. The whole statement is available at: http://www.unhcr.org/4c44034f9.html.
I believe that the right of asylum born inside the European territory and having expanded to become a internationally recognized right because Europeans from around the continent sought refuge after the Second World War teaches us something about ourselves that we as a community decided to forget with the passing of time. We Europeans must not forget where we come from. Our common roots tie us to thinkers and philosophers who created our morals and ethics and who believed we are stronger when we cooperate as a community, that we become more united when we learn to accept each other's differences. We must remember the compassion and kindness we benefited from when our continent had been devastated by wars and apply it to others who are living now what we endured in our own homes over 60 years ago.

In order to achieve an European area of Freedom, Security and Justice, we must always remember that European Union's policies have now to be centred around individuals and that we are more efficient as a Union rather than separate States, more powerful when we accept and make the most of our cultural differences, more just when we remember we are legislating on people's lives, not merely administering our territories.

"The necessity of pursuing happiness (is) the foundation of liberty. As therefore the highest perfection of intellectual nature lies in a careful and constant pursuit of true and solid happiness; so the care of ourselves, that we mistake not imaginary for real happiness, is the necessary foundation of our liberty. The stronger ties we have to an unalterable pursuit of happiness in general, which is our greatest good, and which, as such, our desires always follow, the more are we free from any necessary determination of our will to any particular action (...)"

John Locke, An Essay Concerning Human Understanding
Bibliography

1. Books - Opere


Balsamo, F., *Famiglie di Migranti. Trasformazioni dei ruoli e mediazione culturale*, Roma, Carocci, 2003;


Kant, I., (1795) *Perpetual Peace: A Philosophical Essay*, in the version by Jonathan Bennett presented at www.earlymoderntexts.com


Panebianco, M., *Dalla Società delle Nazioni all'ONU: le grandi Organizzazioni Internazionali*, Napoli, Ferraro, 1979;

Pascouau, Y., *La politique migratoire de l'Union Européenne: De Schengen à Lisbonne*, LGDJ, Coll. Thèses, n° 34, 2010;


2. Papers and publications in journals

Benvenuti, P., "La Convenzione di Ginevra sullo status dei rifugiati" in *La tutela internazionale dei diritti umani. Norme, garanzie, prassi* (a cura di Laura Pineschi), Milano, Giuffrè Editore, 2006;


Favilli, C., “Il Trattato di Lisbona e la politica dell’Unione Europea in materia di visti, asilo e immigrazione”, in *Diritto, immigrazione e cittadinanza*, n. 2, 2010;


143

Morandi, N., "La normativa comunitaria sul diritto di asilo", in *Diritto, immigrazione e cittadinanza*, 2005;


Morghese, G., "Regolamento Dublino II e applicazione del principio di mutua fiducia tra Stati membri: la pronunzia della Corte di giustizia nel caso N.S e altri" in *Studi sull'integrazione europea*, Bari, Cacucci Editore, Volume VII, Number 1, 2012;


Pertile, M., "La detenzione amministrativa dei migranti e dei richiedenti asilo nella giurisprudenza della Corte europea per i diritti umani: dal caso Mubilanzila al caso Muskhadzhiveva" in *Diritti umani e diritto internazionale*, Milano, Franco Angeli, Volume 4, Number 2, 2010;


Rebasti, E., "Corte Europea dei diritti umani e sistema comune europeo in materia d'asilo" in *Diritti umani e diritto internazionale*, Milano, Franco Angeli, Volume 5, Number 2, 2011;

Salerno, F., "L'obbligo internazionale di non-refoulement dei richiedenti asilo" in *Diritti umani e diritto internazionale*, Milano, Franco Angeli, Volume 4, Number 2, 2010;

Tancredi, A., "Assicurazioni diplomatiche e divieto 'assoluto' di refoulement alla luce di alcune recenti pronunzie della Corte europea dei diritti umani" in *Diritti umani e diritto internazionale*, Milano, Franco Angeli, Volume 4, Number 1, 2010;
3. Official Documents

United Nations General Assembly


United Nations High Commissioner for Refugees


UN High Commissioner for Refugees, *Updated UNHCR Information Note on National Practice in the Application of Article 3(2) of the Dublin II Regulation in particular in the context of intended transfers to Greece*, 31 January 2011;

**UN Office of the High Commissioner for Human Rights**

UN Office of the High Commissioner for Human Rights, *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Istanbul Protocol"),* 2004, HR/P/PT/8/Rev.1;

**European Parliament**

European Parliament, *Report on a visit to closed detention centres for asylum seekers and immigrants in Belgium by a delegation of the Committee on Civil Liberties, Justice and Home Affairs (LIBE)*, 11 October 2007, PE404.456v01-00;

**European Parliament Papers and Studies**


**European Commission**


European Commission, *Communication from the Commission to the European Parliament concerning the position of the Council on the adoption of a 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*, Brussels, 10 June 2013, Interinstitutional File: 2008/0243;
Council of the European Union


Council of the European Union, Position of the Council at first reading with a view to the adoption of 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), Brussels, 14 December 2012, Interinstitutional File: 2008/0243;

Council of the European Union, Final steps towards a Common European Asylum System, Luxembourg, 7 June 2013, PRESSE 230;

European Union Agencies and Bodies


Non-Governmental Organizations

European Council on Refugees and Exiles (ECRE), Comments from the European Council on Refugees and Exiles on the European Commission Proposal to recast the Qualification Directive, March 2010;

European Council on Refugees and Exiles (ECRE), *"Dublin II Regulation: Lives on hold" - European Comparative Report*, February 2013;


Hungarian Helsinki Committee, *Serbia As a Safe Third Country: A Wrong Presumption*, September 2011;


Statewatch Analysis: *Revised EU asylum proposals: "Lipstick on a pig"* by Professor Steve Peers, University of Essex, Statewatch News Online, June 2011, ISSN 1756-851X;

Statewatch Analysis: *The revised 'Dublin' rules on responsibility for asylum-seekers: a missed opportunity* by Professor Steve Peers, University of Essex, Statewatch News Online, June 2012, ISSN 1756-851X;
4. Links and Press Articles


International Thesaurus of Refugee Terminology Website: http://www.refugeethesaurus.org

Statewatch, monitoring the state and civil liberties in Europe: http://www.statewatch.org

EASO Monitor Following the European Asylum Support Office (EASO), by aditus foundation, a Malta-based human rights NGO: http://easomonitor.blogspot.it


Refworld, UNHCR's decision-support tool for country of origin research and refugee status decisions: http://www.refworld.org/

EUR-Lex, free access to European Union law and other documents considered to be public: http://eur-lex.europa.eu

Earlymoderntexts, versions of some classics of early modern philosophy, and a few from the 19th century, prepared with a view to making them easier to read while leaving intact the main arguments, doctrines, and lines of thought: http://www.earlymoderntexts.com

European Union Agency for Fundamental Rights: http://fra.europa.eu


European Council on Refugees and Exiles (ECRE): http://www.ecre.org

The UN's refugee agency (UNHCR) website: http://www.unhcr.org