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## A NEW ASYLUM POLICY FOR EUROPE?!

Opting for a rights-based approach  
and what this would mean

by

Dorothea Keudel-Kaiser, Giuliana Monina,  
Bettina Scholdan, and Katrin Wladasch



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## Executive Summary

Being forced to flee because of war and violence or fear of persecution is one of the worst experiences one can make in a lifetime. The international community has agreed to provide for international protection in such cases by way of offering the status of a refugee and complementary forms of protection. Since the end of World War II however, there has never been a higher number of people forcibly displaced than now (about 65 Mio in 2015, not including those, who had to leave because of environmental disasters). More than four fifths of these displaced people stay in so-called “developing countries”, which leads to a situation that would require solidarity and assistance from Europe.

The Common European Asylum System of the EU (CEAS) contains rules to harmonise asylum procedures, reception conditions of protection seekers, the status as well as qualification criteria for beneficiaries of international protection. Another element of the CEAS is the Dublin system, which has often been referred to as “the cornerstone” of the CEAS. However, this system – which in itself has often been criticized by human rights experts – has never been implemented in line with its formal requirements and has collapsed confronted with large groups of protection seekers and the unpreparedness of EU Member States to cope with this situation. This collapse has not come completely unexpected as the inadequacy of its application in practise had been the point of criticism by civil society and human rights experts from the very beginning.

By now it has become manifest that the European asylum system is in a situation that requires urgent and fundamental change – which can also be seen as a chance and not only as a problem. So far, the EU and its Member States have concentrated on the fight against irregular migration and asylum abuse rather than on providing international protection. This approach proves to be not only problematic from a human rights point of view and deadly for many persons wishing to seek protection in Europe. It has also become clear that a “Fortress Europe” does not provide for a long-term solution of the global refugee crisis. Therefore, our leading question for a reform of the system and/or for creating a new system oriented on the obligation to protect is:

What would a Common European Asylum System have to look like, if we change perspective to a rights-based approach?

When we analyse the current system from the perspective of a person seeking protection we find that

- there are very limited channels for protection seekers to arrive in the EU in a legal, safe and dignified way and thus limited possibilities to exercise the right to seek asylum,
- a few Member States at the EU external border have to manage high number of arrivals and applications,
- there are divergences in recognition rates, procedures and reception conditions at the national level,
- there is no functioning, fair and sustainable system in place for sharing the responsibility for international protection applicants among the EU Member States,
- there is a focus on border control policies rather than on guaranteeing refugees’ rights and ensuring protection,

- reception of applicants for international protection, who are waiting for the determination of their claim, often does not meet human rights standards.

So what has to be done?

### Increase legal entry channels

First of all, legal entry channels for those in need of protection have to be increased to make sure that people in need of protection do not have to put their lives at risk in order to reach Europe. Increasing the legal avenues to reach the EU will not only contribute to ensure the respect of the right to asylum, but also help Member States in the fight against smuggling, as well as relieve the Member States with external borders and their reception system from most of the pressure. This could be achieved by way of:

- Lifting carrier sanctions on transport companies and visa requirements at least for those countries of origin, where there are the greatest protection needs
- Making use of humanitarian visas
- Further elaborating resettlement programmes that aim at transferring refugees from the state in which they have sought protection to a third state that admits them and in which they are granted permanent residence status
- Increasing family reunification possibilities
- Considering the possibility to apply temporary protection mechanisms in cases of emergency and in case of high numbers of arrivals

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### Common and coherent standards and practise

The Geneva Refugee Convention and international human rights treaties contain obligations to protect persons forcibly displaced that have to be guaranteed by all EU Member States. Such obligations derive also from EU sources, in particular the EU Charter of Fundamental Rights of the European Union and a number of secondary law instruments forming the Common European Asylum System.

One of the biggest challenges of the Common European Asylum System lies in the implementation of these standards, and in the wide divergences among the national asylum systems of the EU Member States in terms of recognition rates, asylum procedures and reception conditions. More harmonisation could be achieved by the following means:

#### **The creation of a centralised authority of the European Union**

In the long term the best option would be the establishment of a centralised EU authority responsible for the determination of all international protection claims lodged in the EU. This would mean that a common and uniform legal framework would have to be established.

Opting for this approach would help to ensure equal standards and high procedural safeguards. An EU authority would determine the status of an applicant according to the very same rules in each and any case and this status would then have to be recognised by all EU Member States. A uniform approach



would reduce the risks of a “protection lottery” and the differences in recognition rates of certain Member States compared to others.

The creation of an EU authority however requires major institutional reforms that are feasible only in the long term. Moreover, an issue of concern would be the lack of external control – at least as long as the EU is not a party to the ECHR.

### **Supported Processing**

It is already common practice that expert teams coming from one EU Member State provide support to another Member State in selected phases of the determination procedure, such as during registration and identification. Such a practise can promote the development of a common understanding of standards. It can contribute to more convergence and harmonisation in procedures, an increase in mutual trust among the Member states and consequently serve to implement a more coherent European Asylum system “through the back-door”. Opting for this mutual support would also mean to build on existing practise.

What is needed in order to really benefit from a system built upon supported processing is to ensure that standards are applied in line with the international obligation to protect. There is a clear need to monitor how decisions are made and what exactly they are based on. It might be a quite challenging task to ascertain the accountability of foreign officials. Moreover, it would still be different national legislations that would have to be applied, maintaining a margin for divergences in asylum decisions.

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### **Reforming Dublin and sharing responsibilities**

Once protection seekers have arrived in the EU, the main question is who should be responsible for processing their applications for international protection. The so-called Dublin system, which currently regulates the allocation of responsibilities among the EU Member States, has failed to establish a mechanism in line with the principle of solidarity and fair sharing of responsibility enshrined in article 80 TFEU. A fundamental reform would be the way to go. In this regard, an allocation system should

- ensure that considerations regarding the best interest of the child and family unity are absolute priorities,
- take into account the preferences of international protection seekers, e.g. verifiable and relevant substantial links such as for example evidence of past working experience, professional qualifications obtained from a certain country, knowledge of languages, and existence of local sponsor,
- apply a distribution key in combination with family criteria and verifiable preferences of the applicants,
- avoid coercive measures as much as possible and ensure that measures aimed at preventing secondary movements are in full compliance with fundamental rights, and especially with human dignity.

### Ensure adequate living conditions

The obligation to protect does not end with granting access to asylum procedures. It entails also the obligation

- a) in the short-term perspective, to provide those who have applied for refugee status with adequate living conditions and
- b) in the long-time perspective, to provide those who have obtained refugee status or subsidiary protection with the same living conditions as the own citizens.

Providing for such adequate standards of living in a non-discriminatory and sustainable way is not only a question of willingness but also a question of socio-economic and socio-political relevance. A sharing of responsibilities also with regard to social and economic aspects will be necessary and has to be ensured at the level of the EU.

## List of abbreviations

CEAS	Common European asylum system
CEPS	Centre for European Policy Studies
CJEU	Court of Justice of the European Union
UNCRC	United Nations Convention on the Rights of Child
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EMN	European Migration Network
EU	European Union
EUCFR ExComm	Charter of Fundamental Rights of the European Union Executive Committee (of UNHCR)
FRA	European Union Agency for Fundamental Rights
ICCPR	International Covenant on Civil and Political Rights
RCD RQD	Reception Conditions Directive recast Qualification Directive
SBC	Schengen Border Code
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNCAT	United Nations Conventions against Torture
UNHCR	United Nations High Commissioner of Refugees

# 1 Introduction

## *The starting point*

Every day we are confronted with news of people fleeing persecution and war; of people dying on their way to Europe; of refugees being rejected at the borders; of people being stuck in overcrowded refugee camps and reception centres in inhuman conditions; and of children being separated from their families. In the current context of massive migration, human rights are being violated in many ways.

According to the UN High Commissioner for Refugees (UNHCR), in 2015, more than 60 million persons were displaced<sup>1</sup> – the highest figure since the end of the Second World War. European countries, which are among the richest and most stable countries in the world, have only been modestly affected by these population movements compared to other regions with poorer and less stable countries. Nevertheless, European countries still today face much higher numbers of persons in need of international protection compared to previous years. Already for many years the subject of criticism for its flaws and weaknesses, the existing common European asylum system (CEAS) has turned out to be incapable of adequately dealing with this “new reality”. As a result, persons in need of international protection are suffering.

The EU appears to have been unable to find an adequate answer to the current situation. Instead of opening up debate on how to guarantee that people in need receive the best possible assistance, instead of opening safe and legal entry channels, and instead of agreeing to major reforms of the CEAS to comply with human rights obligations, the EU and its Member States have gone in the opposite direction. There are three main trends:

- *States try to limit the number of asylum seekers entering their country.* This may be by: introducing guidance levels on the maximum number of asylum seekers allowed entry into a country, like in Austria; officially declaring that a country is not ready to admit asylum seekers at all, like Poland; or the temporary closing of borders, like in Hungary. This self-centred approach, and lack of solidarity, leads to those EU Member States most directly affected, such as Greece, being over-burdened and has major consequences for the lives and well-being of persons seeking protection and arriving at European borders. In direct contrast to the humanistic values the EU claims to represent, these asylum seekers are exposed to unacceptable conditions.
- *The prioritisation of security over protection.* Security in this context is understood as internal security as opposed to a broader concept of human security, and is used as a justification for limiting human rights.
- *Outsourcing the obligation to protect.* In order to prevent those who are considered not to qualify for asylum or subsidiary protection from risking their lives (and entering the territory

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<sup>1</sup> T. Gaynor (2015) “2015 likely to break records for forced displacement – study”, on UNHCR News website, available at: <http://www.unhcr.org/news/latest/2015/12/5672c2576/2015-likely-break-records-forced-displacement-study.html> (last accessed 04.06.2016).

of the EU) the EU is seeking ways to externalise some of its obligations, with the risk that basic human rights standards might no longer be guaranteed. The EU-Turkey agreement is the most recent example for this approach.

These developments show the EU and its Member States are increasingly ignoring their essential legal obligations towards persons in need of protection.

There are a number of principles and rights that are owed to persons in need of protection, which the EU and its Member States must respect. They stem in particular from the Convention Relating to the Status of Refugees (Geneva Refugee Convention, GRSC), but also from general human rights treaties such as the European Convention on Human Rights (ECHR), the UN International Covenant on Civil and Political Rights (ICCPR) and the UN Convention on the Rights of the Child (UNCRC). These treaties have all been ratified by all EU Member States. There are also separate obligations under EU law.

Of particular importance are the principle of *non-refoulement* (the prohibition of returning or expelling a person back to a country where they would be exposed to a real risk to life or liberty) and the right to asylum. Both of these form part of the EU Charter of Fundamental Rights (EUCFR) as laid down in Articles 18 and 19 para 2 EUCFR; the prohibition of *refoulement* is, according to the case-law of the European Court of Human Rights (ECtHR), also guaranteed by Article 3 ECHR. The right to asylum starts with the obligation to admit asylum seekers into the territory of a secure country, and ends with the long-term stabilisation of the living conditions of the refugee – so-called “durable solutions”.

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The tenor of the current political debate is that human rights standards have to be respected, but, given the current emergency situation, full respect is not always feasible. In spring 2016, the European Commission criticised the Austrian government for its announcement to set an annual limit of asylum applications and close Austrian borders. Then Austrian chancellor Werner Faymann responded by stating that law was up to legal experts, “on a political level, we stick with our decisions”<sup>2</sup>. This position of decoupling politics from legal standards seems to counteract the rule of law as a cornerstone of democracy and thus the idea of a rights-based approach in an alarming way. The EU as well as its Member States have well-defined responsibilities towards persons in need of protection, and this obligation does not end at European borders. The EU has to meet its responsibilities at every single step of refugees’ journeys, from the situation in crisis countries (1), transit countries (2), on escape routes (3) and at European borders (4), to the situation inside the EU (5).

- (1) The so-called “refugee crisis” – a choice of term that speaks for itself – is partly perceived as an external event threatening the EU. It seems to be overlooked that the EU and its Member States are, at least partly and jointly responsible for the situation in crisis countries, and for the root causes of migration. It is a well-known fact that EU Member States supply arms and military equipment, which fuel the very conflicts that refugees are fleeing.<sup>3</sup> EU Member States

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<sup>2</sup> <http://orf.at/stories/2325441/2325442/> (last accessed 28.06.2016)

<sup>3</sup> See Caritas Europa (2016) *Migrants and Refugees have rights!*, p. 18, available at: <http://www.caritas.eu/news/migrants-and-refugees-have-rights> (last accessed 04.06.2016); and E. Löschner (2016) *Flüchtlingskrise – globale Antwort: Zu den “Stakeholder” zählen auch die Waffenexporteure* (04.01.2016)

have also been – and continue to be – involved in military action in a number of countries that people are fleeing from. The participation of EU Member States in military operations in Afghanistan, Libya and Iraq, for example, are seen by many as having contributed to the worsening of conflicts and the further polarisation and radicalisation of factions.<sup>4</sup>

On a general and historical level it can be argued that European countries have gained, and continue to maintain, their generally high standards of living at the expense of poorer countries, and are thus at least partly responsible for those socio-economic conditions that have resulted in, amongst other things, movement of persons suffering the consequences of the EU countries' policies.

- (2) The EU has to respect its human rights obligations and fulfil its responsibilities when it cooperates with those transit countries through which refugees pass on their way to Europe. Current EU policy is instead aimed at preventing people from coming to the EU by, amongst other measures, externalising border management- for example through the EU cooperation programmes with Libya and Morocco which entail the financing and establishment of tighter border controls.<sup>5</sup> As a result, refugees, who have fled their home countries because of conflict, are being detained in transit countries and are at risk of being exposed to inhuman treatment. With these agreements, therefore, the EU itself risks violating human rights standards. This external dimension is also called into play when the EU pre-conditions development aid on readmission clauses for failed asylum seekers.<sup>6</sup>
- (3) The EU must assume its responsibilities on the routes that asylum seekers take. The logical and very obvious step would be to create legal entry channels to the EU. This would solve many of the problems linked to unsafe passages and should therefore be the top priority. As long as people have to take irregular routes to reach safe countries, the EU must make all possible efforts to save lives.
  - a. At sea, the EU must ensure that people are not returned to unsafe countries contrary to the principle of *non-refoulement*, but are instead disembarked at safe locations inside or outside the EU. It further has to be ensured that action against smugglers does not endanger passengers' lives, and is conducted in full compliance with human right obligations. Human rights considerations should be given a central role in the conduct of joint Frontex operations.
  - b. In terms of land migration routes, the closure of borders or of whole routes, such as the Balkan route, is unacceptable because it likely leads to the violation of the right to seek asylum. Further, they leave protection seekers often stranded in living conditions in border regions which are degrading and let them be subject to the increasing use of coercive measures.

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available at: <http://alpinepeacecrossing.org/wp-content/uploads/2016/01/Standard-Online-4.1.16-Langfassung1.pdf> (last accessed 04.06.2016).

<sup>4</sup> See Caritas Europa (2016) *Migrants and Refugees have rights!*, p.18, available at:

<http://www.caritas.eu/news/migrants-and-refugees-have-rights> (last accessed 04.06.2016).

<sup>5</sup> Ibid, p.30.

<sup>6</sup> Ibid, p.31

- (4) When persons in need of protection arrive at European borders, the EU is obliged to provide reception conditions in line with the EU Acquis (Reception Conditions Directive – RCD) and to ensure access to fair asylum procedures. The situation that has emerged in the so-called “hotspots” in Italy and Greece has been characterised by over-crowding and an inability to provide basic security, particularly for the most vulnerable protection seekers such as women and children.<sup>7</sup> These conditions are nowhere close to fulfilling basic human rights standards. This is even truer of the situation in Turkey, to where the EU is seeking to “outsource” some of its obligations. Vis-à-vis the obligation to ensure access the closing of borders and the placing of arbitrary limits on successful asylum claims are highly problematic.
- (5) Once an asylum seeker has finally arrived within an EU Member State, which accepts his/her asylum application, his/her long journey is far from over. The obligation to protect also includes an obligation to guarantee adequate living conditions whilst procedures are being finalised.

#### *The crisis of the common European asylum system*

The CEAS, which has had major design flaws since the beginning, has failed to pass the practical test in the last few years. In fact, it has actually collapsed. Three major shortcomings of the system are apparent:

- First of all, it does not provide legal entry channels. This has resulted in thousands of people dying on their way to EU Member States, and a whole economy being built on providing irregular routes and access.
- The mechanism for allocating the responsibilities for international protection applications among EU Member States, the so-called “Dublin system”, has failed to provide a solution for Member States and persons in need of protection. The current system is unable to ensure a fair and sustainable sharing of responsibilities among EU Member States, nor does it take into consideration the interests and necessities of the persons in need of protection.
- Still today there are great divergences between EU Member States in terms of reception conditions, recognition rates, and procedures and safeguards during the determination of international protection claims. Those seeking protection are effectively subject to a risk of “protection lottery”.

Considering these major flaws in the European asylum system and its serious implications for human rights, the present study intends to put the perspective of those whose human rights are endangered at centre stage. It is therefore logical to start off with the “obligation to protect” as the core requirement regarding state and EU responsibility towards persons seeking protection within their sphere of influence.

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<sup>7</sup> See Human Rights Watch (2016) *Greece: Refugee “Hotspots” Unsafe, Unsanitary* (19.05.2016) available at: <https://www.hrw.org/news/2016/05/19/greece-refugee-hotspots-unsafe-unsanitary> (last accessed, 29.5.2016).

The study begins by outlining the legal foundations of the obligation to protect on the international and European level, before focusing the analysis on the three above-mentioned topics: the question of how to create legal entry routes into the EU as a fundamental step towards reducing the risks on refugee routes; the issue of reforming or replacing the Dublin system; and the question of how true harmonisation within the EU can be realised through the joint processing of asylum applications. In a closing outlook we very briefly also refer to the legal as well as socio-political factors relevant to the realisation of human rights once people seeking protection have entered asylum procedures.

What the study does not cover, but would be a very interesting issue for further research, is the dimension of EU action in countries of transit, which today is too much led by security aspects and aspects of border protection rather than aspects of human rights protection. A change of approach in this regard could give a new stimulus to actual developments and might offer new perspectives for people on their flights.

### *Acknowledgments*

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<sup>8</sup> See for example Ludwig Boltzmann Institut für Menschenrechte (2015): *BIM Positionspapier Nr. 6, Menschenrechtliche Verpflichtungen in der aktuellen Flüchtlingssituation*, available at: [http://bim.lbg.ac.at/sites/files/bim/attachments/bim\\_position\\_nr\\_6\\_24092015.pdf](http://bim.lbg.ac.at/sites/files/bim/attachments/bim_position_nr_6_24092015.pdf) (last accessed 31.05.2016)

## 2 The obligation to protect

Where a state violates or cannot guarantee the fundamental human rights of its citizens or stateless persons residing on its territory, forcing them to flee abroad, international law foresees different forms of international protection.

### 2.1 Protection status under international law – the right to asylum

#### *Refugee status*

The most important form of international protection in this context is the status of “refugee”. Under Article 1.A (2) of the Geneva Refugee Convention, a refugee is a person who is outside of his or her country of nationality and, owing to a well-founded fear of persecution on specific grounds, is unable or unwilling to avail him or herself of the protection of that state. The five specified grounds of persecution are: race, religion, nationality, membership of a particular social group, or political opinion.<sup>9</sup> Some persons may be excluded from refugee status under Article 1.F because of prior serious criminal conduct.<sup>10</sup> They might still benefit from an absolute prohibition on *refoulement* in certain circumstances, e.g. where it would put them at risk of being tortured.

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Ultimately, international protection serves to provide surrogate protection for human rights where the state of nationality has failed in its duty towards its citizens to protect their fundamental rights. The 1951 Refugee Convention thus foresees a gradual assimilation of the rights of refugees with the rights of nationals in the state of refuge. This underlines “the fundamental purpose of the 1951 Convention [...] to provide a refugee with the “tools” to enable him or her to rebuild his or her life.”<sup>11</sup>

Article 18 EUCFR guarantees the “right to asylum, with due respect for the rules of the Geneva Convention of 28 July 1951.” The CJEU has so far avoided opportunities to define the meaning of Article 18 EUCFR. According to the UNHCR, the right to asylum includes “access to territories for the purpose of admission to fair and effective processes for determining status and international protection needs”, ensuring refugees and asylum-seekers the exercise of fundamental rights and freedoms, and the “attainment of a secure status.”<sup>12</sup>

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<sup>9</sup> See UNHCR (2011) Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status: under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, available at: <http://www.unhcr.org/3d58e13b4.html> (last accessed 04.06.2016).

<sup>10</sup> *Ibidem*, p.149.

<sup>11</sup> E. Lester (2011) „Article 25“ in: A. Zimmermann, J. Dörschner and F. Machts (eds.) (2011) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford: OUP, pp. 1129-1146, p. 1131, para. 2.

<sup>12</sup> UNHCR (2012) UNHCR Statement on the right to asylum, UNHCR’s supervisory responsibility and the duty of States to cooperate with UNHCR in the exercise of its supervisory responsibility (issued in relation to *Zuheyir Freyeh Halaf v. the Bulgarian State Agency for Refugees (C-528/11)*) para. 2.2.9; available at: <http://www.refworld.org/docid/5017fc202.html> (last accessed 04.06.16).

In addition to Article 18 EUCFR, the right to dignity (Article 1 EUCFR), and the principle of legal certainty<sup>13</sup> also support a link between the right to asylum and the need for stability and certainty.

#### *Complementary or subsidiary protection*

(Potential) victims of severe human rights violations that are not linked to any of the five enumerated grounds of persecution will not benefit from refugee status, but may still be the beneficiaries of complementary or subsidiary protection (as defined in the recast EU Qualification Directive, see below). In particular, international and European law oblige states to refrain from returning anyone to a country where he or she faces a real risk of torture or cruel, inhuman or degrading treatment, in accordance with the principle of *non-refoulement*.

#### *Protection under the recast EU Qualification Directive*

The recast EU Qualification Directive has adopted the definition of refugee given in the 1951 Refugee Convention, as developed by European jurisprudence.<sup>14</sup> In addition, the Directive defines persons eligible for subsidiary protection as those who face “serious harm”, defined as: the “death penalty or execution”,<sup>15</sup> “torture or inhuman or degrading treatment or punishment” in a country of origin,<sup>16</sup> or a “serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.”<sup>17</sup> The application of exclusion grounds to applicants for subsidiary protection is problematic as it undermines the absolute prohibition of *refoulement* under Article 3 ECHR.<sup>18</sup>

Under the recast Asylum Procedures Directive, refugee status and eligibility for subsidiary protection are examined in a single procedure.<sup>19</sup> The UNHCR recommends states accord the same rights to the beneficiaries of complementary protection as they do to Convention refugees.<sup>20</sup>

#### *Particularly vulnerable individuals*

Migrant arrivals often include vulnerable individuals. Women, children, survivors of torture and victims of trafficking, as well as the mentally ill, have specific needs that states must take into account. Of particular importance is the principle that primary consideration must be given to the best interests of

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<sup>13</sup> ECJ/C-345/06 *Heinrich* (judgment) (10.03.2009) para. 44; ECJ/C-158/06 *Stichting ROM-projecten v Staatssecretaris van Economische Zaken* (judgment) (21.06.2007).

<sup>14</sup> Article 10, Council Directive 2011/95/EU (13.12.2011).

<sup>15</sup> Article 15(a) Council Directive 2011/95/EU (13.12.2011).

<sup>16</sup> Article 15(b) Council Directive 2011/95/EU (13.12.2011).

<sup>17</sup> Article 15(c) Council Directive 2011/95/EU (13.12.2011); *Elgafaji v Staatssecretaris van Justice* CJEU/C-465/07 (judgment) (17.02.2009) para. 12.

<sup>18</sup> Article 17 Council Directive 2011/95/EU (13.12.2011); for a critique see C. Costello (2015) *The Human Rights of Migrants and Refugees under European Law*, Oxford: OUP, pp. 225-226.

<sup>19</sup> Article 10(2) Council Directive 2013/32/EU (26.06.2013).

<sup>20</sup> UNHCR – Division of International Protection (2012) *Summary Conclusions on International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence* (20.12.2012) para. 24-26, available at: <http://www.refworld.org/docid/50d32e5e2.html> (last accessed 04.06.2016).

any child who is affected by a decision – a principle included in Article 24 (2) EUCFR.<sup>21</sup> Children may also not be detained except “as a measure of last resort and for the shortest appropriate period of time.”<sup>22</sup> The EU Asylum directives also take into account the specific needs of vulnerable persons.<sup>23</sup>

In recent times, new situations have arisen that are not adequately covered by the 1951 Refugee Convention and other instruments of international protection. What about people who due to the effects of climate change are confronted with hostile living conditions? The term “climate refugee” does exist in research, but it does not exist in the refugee definition of the 1951 Refugee Convention or other legal sources of international protection. There is hence a need to develop norms to protect individuals who flee life-threatening circumstances or are particularly vulnerable, above all so-called “climate refugees”, persons forced to leave their countries because of economic destitution, and persons stranded without legal status.<sup>24</sup>

## 2.2 The content of human rights obligations

### 2.2.1 Non-refoulement

The principle of *non-refoulement* imposes a duty on states to refrain from sending back, or causing to be sent back, a person to a territory where he or she faces a risk of severe violations of fundamental human rights. Before returning someone to their country of nationality or a third country, EU Member States are obliged to verify in an individual examination whether or not to do so would give rise to a breach of the *non-refoulement* obligation under international law.

The principle is to be found in Article 33 of the 1951 Refugee Convention that prohibits expulsion (i.e. deportation) and *refoulement* (i.e. return from the border), “in any manner whatsoever”, of anyone to a country “where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>25</sup> Expulsion may nevertheless be allowed where a refugee poses a danger to the security of a country of refuge.<sup>26</sup>

However, Article 3 ECHR and Article 19 EUCFR contain an absolute prohibition of *refoulement* where it might lead to torture or cruel, inhuman or degrading treatment, including the death penalty, irrespective of the reason for which this treatment might be inflicted, or the conduct of the applicant.<sup>27</sup> In principle, other severe violations of core rights enshrined in the ECHR, such as the right to life and

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<sup>21</sup> Article 3(1) UNCRC; see also *R (MA and others) v Secretary of State for the Home Department* CJEU/C-648/11 (judgment) (06.06.2013) para. 59.

<sup>22</sup> Article 37 (b) UNCRC.

<sup>23</sup> See, e.g., Article 20 (3) Council Directive 2011/95/EU (13.12.2011); Articles 25 and 31(7)(b) Council Directive 2013/32/EU (26.06.2013); Article 6 Dublin III Regulation.

<sup>24</sup> For a proposal, see, A. Betts (2010) “Soft Law and the Protection of Vulnerable Migrants”, in: *Georgetown Immigration Law Journal*, Vol. 24, Issue 4, pp. 533-552.

<sup>25</sup> Article 33 (1) 1951 Refugee Convention.

<sup>26</sup> Article 33 (2) 1951 Refugee Convention.

<sup>27</sup> ECtHR - *Chahal v the United Kingdom*, Appl. no. 22414/93 (judgment) (15.11.1996); ECtHR - *Saadi v. Italy*, Appl. no. 37201/06, (Judgment) (28.04.2008) para.s 125, 138; Article 15(c) Council Directive 2011/95/EU (13.12.2011); *Elgafaji v Staatssecretaris van Justice* CJEU/C-465/07 (judgment) (17.02.2009).

the right to fair trial, may also give rise to a duty of *non-refoulement*.<sup>28</sup> Article 3 of the United Nations Convention Against Torture (CAT), Article 7 ICCPR, and Article 16 of the UN International Convention for the Protection of All Persons from Enforced Disappearance provide additional protection in this regard.

The ECtHR and the CJEU have been called upon to decide challenges to transfers under the Dublin mechanism. Both European courts found that Dublin transfers must not happen where the transferring Member State is aware of “systemic deficiencies” in the asylum procedure and reception conditions of the receiving Member State resulting in substantial grounds to believe there is a real risk of inhuman or degrading treatment within the meaning of Article 3 ECHR or 4 EUCFR.<sup>29</sup>

### 2.2.2 Prohibition of collective expulsion

In order not to violate the prohibition of collective expulsion under Article 4 of Protocol 4 ECHR and Article 19 (1) EUCFR, any removal decision must be based on an individual examination of the particular circumstances of a foreigner, who must also have an opportunity for an effective review of any adverse decision.<sup>30</sup>

### 2.2.3 Respect for human rights during status determination

#### *Procedural safeguards*

The UNHCR Handbook and Executive Committee Conclusions provide important guidance on the basic procedural safeguards for ensuring fair and effective refugee status determination.<sup>31</sup> National authorities in the EU must organise their judicial systems in a way that affords the procedural rights guaranteed in the 1951 Refugee Convention,<sup>32</sup> Article 13 ECHR (right to an effective remedy)<sup>33</sup> as well as Articles 41 (right to good administration) and 47 EUCFR (procedural guarantees in administrative and judicial proceedings).<sup>34</sup> The most important safeguards derived from these sources are: the right

<sup>28</sup> ECtHR - *Othman (Abu Qatada) v. the United Kingdom*, Appl. No. 8139/09, 09.05.2012.

<sup>29</sup> *N.S and others v Secretary of State for the Home Department* CJEU/C-411/10 (judgment) (21.12.2011); ECtHR - *M.S.S. v Belgium and Greece*, Appl. No. 30696/09 (judgment) (21.11.2011).

<sup>30</sup> ECtHR - *Hirsi Jamaa and others v Italy*, Appl. no. 27765/09 (judgment) (23.02.2012); ECtHR - *Čonka v Belgium*, Appl. no. 51564/99 (judgment) (05.02.2002); ECtHR - *Sultani v France*, Appl. No. 45223/05 (judgment) (26.09.2007) para.s 80-81.

<sup>31</sup> UNHCR (2011) Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status: under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, pp. 37-42, available at: <http://www.unhcr.org/3d58e13b4.html> (last accessed 04.06.2016); UNHCR ExCom Conclusion No. 8 (XXVIII) – 1977 Determination of Refugee Status, para. (e).

<sup>32</sup> W. Kaelin, M. Caroni and L. Heim (2011) „Article 33 (1)“, in: A. Zimmermann, J. Dörschner and F. Machts (eds.) (2011) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford: OUP, pp. 1327-1395, p. 1356, para. 127.

<sup>33</sup> ECtHR - *Čonka v Belgium*, Appl. no. 51564/99 (judgment) (05.02.2002) para. 84.

<sup>34</sup> ECJ/C-63/08 *Pontin v. T-Comalux SA* (judgment) (29.10.2009) para.s 43-44.

to information;<sup>35</sup> the right to be heard;<sup>36</sup>; the ability to prepare and submit evidence;<sup>37</sup> access to free legal assistance and an interpreter; notification of any decision;<sup>38</sup> and sufficient time to consult with legal counsel and prepare and submit an appeal with suspensive effect.<sup>39</sup> Decisions should be made by a clearly identified, official authority, who has been trained in the relevant law.<sup>40</sup>

#### *Accelerated procedures*

Accelerated procedures are not prohibited as long as they comply with essential procedural safeguards.<sup>41</sup> Some legal issues are not appropriate for an accelerated procedure: for example, the question of an internal protection alternative, or exclusion from refugee status.<sup>42</sup> The CJEU has recently affirmed that the desire to expedite proceedings must not affect negatively the right to an effective remedy.<sup>43</sup>

#### *Admission to the territory as a corollary of procedural safeguards*

Neither the 1951 Refugee Convention nor the *non-refoulement* provisions in relevant human rights treaties explicitly oblige states to admit a protection seeker to its territory.<sup>44</sup> However, the relevant UNHCR Executive Committee Conclusions acknowledge that fair and effective procedures will be highly

<sup>35</sup> UNHCR (2010) UNHCR Statement on the right to an effective remedy in relation to accelerated asylum procedures, para. 14-15, available at <http://www.unhcr.org/4deccc639.html> (last accessed 04.06.16).

<sup>36</sup> Article 41 EUCFR.

<sup>37</sup> M.G. and N.R. v Staatssecretaris van Veiligheid en Justitie CJEU/C-383/13 PPU (judgment) (10. 9. 2013) para. 32; M.M. v Minister for Justice, Equality and Law Reform CJEU/C-277/11 (judgment) (22. 11. 2012) para 81.

<sup>38</sup> M.M. v Minister for Justice, Equality and Law Reform CJEU/C-277/11 (judgment) (22. 11. 2012) para. 88.

<sup>39</sup> ExCom Conclusion No. 8 (XXVIII) – 1977 *Determination of Refugee Status*, para (e)(vi); ECtHR - *Čonka v Belgium*, Appl. no. 51564/99 (judgment) (05.02.2002) para. 80-85; ECtHR - *I.M. v France*, Application No. 9152/09 (judgment) (02.05.2012) para.s 150-152; ECtHR - *Chahal v the United Kingdom*, Appl. no. 22414/93 (judgment) (15.11.1996) para. 154.

<sup>40</sup> ExCom Conclusion No. 8 (XXVIII) – 1977 *Determination of Refugee Status*, para. (e)(i) and (iii); R. Hofmann and T. Löhr (2011) “Part Six Administrative Measures, Introduction to Chapter V: Requirements for Refugee Determination Procedures”, in: A. Zimmermann, J. Dörschner and F. Machts (eds.) (2011) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford: OUP, pp. 1081-1128, p. 1126, para. 133.

<sup>41</sup> W. Kaelin, M. Caroni and L. Heim (2011) “Article 33 (1)”, in: A. Zimmermann, J. Dörschner and F. Machts (eds.) (2011) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford: OUP, pp. 1327-1395, p. 1357, para. 130; K. Wouters (2009) *International Legal Standards for the Protection from Refoulement*, Morsel: Intersentia, p. 157; UNHCR (2010) *UNHCR Statement on the right to an effective remedy in relation to accelerated asylum procedures*, para.s 5 and 16, available at <http://www.unhcr.org/4deccc639.html> (last accessed 04.06.16).

<sup>42</sup> W. Kaelin, M. Caroni and L. Heim (2011) “Article 33 (1)”, in: A. Zimmermann, J. Dörschner and F. Machts (eds.) (2011) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford: OUP, pp. 1327-1395, p. 1357, para. 131.

<sup>43</sup> Ghezelbash v. Staatssecretaris van Veiligheid en Justitie, CJEU/C-63/15 (judgment) (07.06.2016), para.s 56-57.

<sup>44</sup> K. Wouters (2009) *International Legal Standards for the Protection from Refoulement*, Morsel: Intersentia, p. 147.

unlikely where an asylum-seeker is not admitted to the territory of the deciding state.<sup>45</sup> In order to be effective, “remedies have to be materially and legally accessible.”<sup>46</sup> In any case, Article 31 of the 1951 Refugee Convention prohibits the penalisation refugees on account of their “illegal” entry.

*First country of asylum, safe third country, safe country of origin*

The concepts of first country of asylum, safe third country and safe country of origin are codified in Section III of the recast Asylum Procedures Directive.<sup>47</sup> The concept of safe country of origin presumes that the human rights situation in law and practice is such that the country’s nationals would not have a genuine claim to international protection.<sup>48</sup> The concept of first country of asylum assumes a protection seeker was recognised as a refugee or a beneficiary of complementary protection in a third country and would continue to receive such protection upon return.<sup>49</sup> The concept of safe third country supposes a protection seeker would have access to a fair and effective asylum procedure in a country of transfer.<sup>50</sup> A protection seeker must be given an opportunity to challenge these presumptions of safety in an individual examination and with an effective remedy.<sup>51</sup>

None of these concepts originate from international law itself.<sup>52</sup> They have arisen to control secondary movements of protection seekers and to avoid situations where no state agrees to assume responsibility for admitting an asylum seeker.<sup>53</sup> Overall, the determining question under international law is whether the third state in question will offer “effective protection” against *refoulement* or fundamental human rights violations.<sup>54</sup> In order to be effective, protection must not fall below the

<sup>45</sup> ExCom Conclusion No. 82 (XLVIII) – 1997 *Safeguarding Asylum*, para. (d) (iii); Excom Conclusion No. 81 (XLVIII) – 1997 *General Conclusion on International Protection*, para. (h); see also Excom Conclusion No. 99 (LV) *General Conclusion on International Protection* – 2004, para. (l); R. Hofmann and T. Löhr (2011) “Part Six Administrative Measures, Introduction to Chapter V: Requirements for Refugee Determination Procedures”, in: A. Zimmermann, J. Dörschner and F. Machts (eds.) (2011) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford: OUP, pp. 1081-1128, pp. 1103-1105, para. 53-58 (and sources in fn. 110).

<sup>46</sup> V. Moreno-Lax (2012) “Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea”, in: *International Journal of Refugee Law*, Vol. 23, Issue 2, pp. 174-220, p. 214.

<sup>47</sup> Article 35-40 Council Directive 2013/32/EU (26.06.2013).

<sup>48</sup> For a discussion of necessary safeguards see EU Fundamental Rights Agency (2016) *Opinion of the European Union Agency for Fundamental Rights* concerning an EU common list of safe countries of origin, available at: [http://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2016-opinion-safe-country-of-origin-01-2016\\_en.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-opinion-safe-country-of-origin-01-2016_en.pdf) (last accessed 04.06.2016).

<sup>49</sup> R. Hofmann and T. Löhr (2011) “Part Six Administrative Measures, Introduction to Chapter V: Requirements for Refugee Determination Procedures”, in: A. Zimmermann, J. Dörschner and F. Machts (eds.) (2011) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford: OUP, pp. 1081-1128, p. 1116, para. 89.

<sup>50</sup> *ibidem*

<sup>51</sup> *ibidem* (discussing safe country of origin concept).

<sup>52</sup> *ibidem*, p. 1110, para. 71-72.

<sup>53</sup> J. van Selm (2001) *Access to Procedures “Safe Third Countries”, “Safe Countries of Origin” and “Time Limits”* Geneva: UNHCR para. 5, available at: <http://www.unhcr.org/3b39a2403.html> (last accessed 04.06.2016).

<sup>54</sup> R. Hofmann and T. Löhr (2011) “Part Six Administrative Measures, Introduction to Chapter V: Requirements for Refugee Determination Procedures”, in: A. Zimmermann, J. Dörschner and F. Machts (eds.) (2011) *The 1951*

human rights threshold necessary for ensuring a person would not be forced to return to a territory where he or she would be not safe (“chain *refoulement*”) or would be subjected to conditions amounting to cruel, inhuman or degrading treatment. The UNHCR considers only parties to the 1951 Refugee Convention and its 1967 Protocol able to provide effective protection.<sup>55</sup>

While the 1951 Refugee Convention does not provide for the free choice of a country of asylum, there is no obligation for a protection seeker to apply for asylum in a place of transit.<sup>56</sup>

#### 2.2.4 The right to family unity

Family unity is one of the most important elements for assisting a protection beneficiary to resume a normal life.<sup>57</sup> Although the 1951 Refugee Convention does not explicitly regulate the right to family life, the principle of family unity is specifically mentioned as an “essential right of the refugee” in the resolution of the Conference of Plenipotentiaries.<sup>58</sup> Over the years, the importance of this principle has been continuously reiterated by UNHCR.<sup>59</sup>

The principle of family unity is further guaranteed by a number of international treaties. At the European level, Article 8 ECHR and Article 7 EUCFR guarantee the right to “private and family life”. In the context of the rights of the child, family unity must be read together with the principle of the best interest of the child, as laid down by the UNCRC. Article 22(2) UNCRC obliges states to trace the parents or other relatives of an unaccompanied refugee child for the purposes of family reunification, as long as this is in the child’s best interest. Article 10 UNCRC asks states to deal with requests to enter or leave their territory for the purposes of reunifying children with their relatives “in a positive, humane and expeditious manner.” The principle of the best interest of the child must be factored into decisions on the right to family life under the ECHR and the EUCFR.<sup>60</sup>

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*Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford: OUP, pp. 1081-1128, p. 1115, para. 86; S. H. Legomsky (2003) “Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection”, in: *International Journal of Refugee Law*, Vol. 15, Issue 4, pp. 567-677, p. 571: see also ExCom Conclusion No. 87 (L) – 1999 *General Conclusion on International Protection*, para.s (j) and (l).

<sup>55</sup> R. Hofmann and T. Löhr (2011) “Part Six Administrative Measures, Introduction to Chapter V: Requirements for Refugee Determination Procedures”, in: A. Zimmermann, J. Dörschner and F. Machts (eds.) (2011) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford: OUP, pp. 1081-1128, p. 1112, para. 79.

<sup>56</sup> UNHCR (1994) *Position on Readmission Agreements, “Protection Elsewhere” and Asylum Policy* (01.08.1994) available at: <http://www.refworld.org/docid/3ae6b31cb8.html> (last accessed 04.06.2016).

<sup>57</sup> UNHCR (2012) UNHCR’s Response to the European Commission Green Paper on the Right to Family Reunification of Third Country Nationals Living in the European Union (Directive 2003/86/EC) (Feb. 2012) p. 17, available at: <http://www.refworld.org/docid/4f55e1cf2.html> (last accessed 04.06.2016); ExCom Conclusion No. 104 (LVI) – 2005 Conclusion on Local Integration, para. n (iv).

<sup>58</sup> 1951 Refugee Convention, Resolution 2198 (XXI) adopted by the UNGA, Recommendation B.

<sup>59</sup> For example EXCOM Conclusions no.9 (XXVIII) on Family Reunion (1977); EXCOM Conclusions no.24 (XXXII) on Family Reunification (1981); EXCOM Conclusion no.85 (XLIX) 1998.

<sup>60</sup> ECtHR - *Nuñez v. Norway*, Appl. no. 55597/09 (judgment) (28.06.2011) para.s 78 and 84; Article 24(2) EUCFR.



According to the ECtHR States have the right to control the entry, residence, and expulsion of aliens; in doing so they must however respect the right to private and family life. Interferences with this right can raise issues under Article 8 ECHR.<sup>61</sup>

Under EU law, the recast Qualification Directive acknowledges the right to family unity. Article 23 provides for derivative protection for close family members, and, in an important step, it has also broadened the category of family members eligible for this benefit.<sup>62</sup> The importance of preserving the family unit is recognised by the Dublin Regulation (see Part 3). The Family Reunification Directive also establishes a right to family reunification and sets up more favourable conditions for refugees.<sup>63</sup> Whilst the provisions of the recast Qualification Directive and the Dublin Regulation address family members who are already in the EU territory, the Family Reunification Directive applies when family members reside outside the EU.

### 2.2.5 The scope of protection in so-called mass influx situations

In its Conclusion No. 100, the UNHCR Executive Committee (ExCom) defined mass influx situations as involving a rapid arrival of a large number of protection seekers, overwhelming the response capacity of the receiving states and rendering individual assessments of protection claims unfeasible.<sup>64</sup> Different measures are typically implemented in such situations, including group determinations of the need for international protection, temporary admission and burden-sharing.

In 1981, the ExCom held that States should admit refugees at least on a temporary basis, and should “[i]n all cases”, “scrupulously” respect “the fundamental principle of *non-refoulement* – including non-rejection at the frontier.”<sup>65</sup> In 2014, the UNHCR proposed minimum standards for so-called mass influx situations, including “protection against arbitrary or prolonged detention”, “non-discriminatory, humane and dignified treatment”, access to basic services, freedom of movement (“except as may be warranted by national security, public order or public health considerations”), physical security, and special care for vulnerable individuals.<sup>66</sup>

<sup>61</sup> ECtHR- *Tuquabo-Tekle and Others v the Netherlands*, Appl. no. 60665/00 (judgment) (01.03.2006) para.s 44, 47, 48 and 50.

<sup>62</sup> According to Article 23 (3) Council Directive 2011/95/EU (13.12.2011) the notion of family members now includes not only the spouse or unmarried partner and the minor children, but also “the father, mother or another adult responsible for the beneficiary of international protection whether by law or by the practice of the Member State concerned, when that beneficiary is a minor and unmarried”; see also Article 31 (5) Council Directive 2011/95/EU (13.12.2011) on the obligation to trace family members of unaccompanied minors.

<sup>63</sup> See Chapter V of the Council Directive 2003/86/EC (22.09.2003) on the right to family reunification.

<sup>64</sup> UNHCR - ExCom Conclusion No. 100 (LV) – 2014 *Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations*, available at: <http://www.unhcr.org/41751fd82.html> (last accessed 04.06.2016).

<sup>65</sup> ExCom Conclusion No. 22 (XXXII) – 1981 Protection of Asylum-Seekers in Situations of Large-Scale Influx, para. II, A, 1-2.

<sup>66</sup> UNHCR (2014) *Guidelines on Temporary Protection or Stay Arrangements*, para. 6, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=5304b71c9&query=%22mass%20influx%22> (last accessed 04.06.2016)

States have deployed different means of group determination, including prima facie recognition and temporary protection. In a prima facie recognition procedure, a State may acknowledge refugee status of a large group of individuals, without an individual determination, where their claim to refugee status is manifest and based on similar grounds (e.g. the flight of an ethnic minority at risk of ethnic cleansing).<sup>67</sup> Such group determination is only appropriate for recognition of refugee status. “Decisions to reject,” e.g. for exclusion purposes, or at cessation, “require an individual assessment.”<sup>68</sup> States could also adopt a “prima facie” approach in individual procedures, functioning as “evidentiary benefit,” where an individual can demonstrate he or she belongs to a particular class known to need protection.<sup>69</sup>

Temporary protection also recognizes the need for international protection, but does not recognize refugee status. It simply grants a right to remain on the territory of the host State, with concomitant basic rights as outlined above. The early model of temporary protection, in response to the armed conflict in the former Yugoslavia foresaw that States should conduct individual procedures to identify needs for protection, once the emergency phase had ended.<sup>70</sup> Temporary protection schemes were also used as a response where receiving States were not signatories to the 1951 Refugee Convention.<sup>71</sup> UNHCR remarked, in 2001, “that the [ExCom] Conclusion [No 22] was never intended as a substitute for standards of protection under the 1951 Convention.”<sup>72</sup> It asserted its position that the 1951 Refugee Convention was adaptable to situations of mass influx, especially where the objective circumstances made the need for protection objectively and readily apparent.<sup>73</sup>

Group determination is appropriate for positive decisions, such as prima facie recognition of refugee status where this status is manifest, or temporary protection through a right to remain without status

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<sup>67</sup> UNHCR, Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status, HCR/GIP/15/1, 24 June 2015, para

<sup>68</sup> UNHCR, Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status, HCR/GIP/15/1, 24 June 2015, para 20, para 28 (discussing individual examination of applications for exemption from cessation); UNHCR Guidelines on the Application in Mass Influx Situations of the Exclusion Clauses of Article 1F of the 1951 Convention relating to the Status of Refugees (February 2006), <http://www.refworld.org/pdfid/43f48c0b4.pdf>, para 18

<sup>69</sup> UNHCR, Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status, HCR/GIP/15/1, 24 June 2015, para 20, para 28 (discussing individual examination of applications for exemption from cessation), para 41-42.

<sup>70</sup> UN High Commissioner for Refugees (UNHCR), The Scope of International Protection in Mass Influx, 2 June 1995, EC/1995/SCP/CRP.3, available at: <http://www.refworld.org/docid/3ae68cc018.html> [accessed 30 March 2016], para 20.

<sup>71</sup> UN High Commissioner for Refugees (UNHCR), The Scope of International Protection in Mass Influx, 2 June 1995, EC/1995/SCP/CRP.3, available at: <http://www.refworld.org/docid/3ae68cc018.html> [accessed 30 March 2016], para 21.

<sup>72</sup> UNHCR, Protection of Refugees in Mass Influx Situations: Overall Protection Framework, 19 February 2001, para 8; see also UNHCR, Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status, HCR/GIP/15/1, 24 June 2015, para 26.

<sup>73</sup> UNHCR, Protection of Refugees in Mass Influx Situations: Overall Protection Framework, 19 February 2001, para 8.

determination until the emergency has been dealt with. “Decisions to reject” (e.g. for exclusion purposes or cessation) require an individual assessment.<sup>74</sup>

The ExCom encourages mechanisms for burden-sharing and international solidarity,<sup>75</sup> but underlines the fact that international obligations for protection do not depend on the existence of such mechanisms.<sup>76</sup> States overwhelmed by the mass influx of protection seekers have a duty to ask for and accept assistance to fulfil their obligations.<sup>77</sup> Third states also arguably have a duty to provide assistance to refugee-hosting countries under the principle of solidarity, even though states are reluctant to accept such a duty.<sup>78</sup>

In 2001, the EU adopted a directive for a temporary protection mechanism<sup>79</sup> – which has so far not been made use of (see also Part 3.2.5 for further discussion). Article 78 (3) TFEU authorises the Council to adopt provisional measures for the benefit of a Member State faced with a sudden mass influx of third country nationals. Allocation of responsibility for examining an application for international protection is regulated under the Dublin regime – most recently the Dublin III Regulation. This is the system that collapsed with the arrival of large numbers of protection seekers in the summer of 2015.

## 2.3 The sources and scope of obligations

### 2.3.1 The sources of EU and EU Member States’ human rights obligations

Under Article 78 TFEU and Article 18 EUCFR, EU legislation and policies must respect the 1951 Refugee Convention and other relevant treaties. The EU Asylum Acquis codifies many of these obligations, as interpreted by European courts, even though some provisions still fall short of international law requirements.<sup>80</sup>

In contrast to EU Member States, the EU is not party to the Council of Europe. However, it is bound in its actions by the EUCFR (Article 52). And the EUCFR defines the ECHR as the minimum standard for human rights protection in the EU (Article 53). The jurisprudence of the ECtHR is therefore relevant to interpreting obligations under the EUCFR.<sup>81</sup>

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<sup>74</sup> UNHCR (2015) *Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status* (24.06.2015) para.s 20 and 28, available at: <http://www.unhcr.org/558a62299.html> (last accessed 04.06.2016).

<sup>75</sup> UNHCR - ExCom Conclusion No. 100 (LV) – 2004 Cooperation and Burden and Responsibility Sharing in Mass Influx Situations, para. (j).

<sup>76</sup> Ibidem, Preamble, Recital 7.

<sup>77</sup> W. Kaelin, M. Caroni and L. Heim (2011) “Article 33 (1)”, in: A. Zimmermann, J. Dörschner and F. Machts (eds.) (2011) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford: OUP, pp. 1327-1395, p. 1380, para. 137.

<sup>78</sup> See A. Hurwitz (2011) *The Collective Responsibility of States to Protect Refugees*, Oxford: OUP, pp. 138-144.

<sup>79</sup> Council Directive 2001/55/EC (20.07.2001) “on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.”

<sup>80</sup> For a critique of the recast directives under international law, see V. Chetail, P. De Bruycker, F. Maiani (eds.) (2016) *Reforming the Common European Asylum System: The New European Refugee Law*, Leiden: Brill/Nijhoff.

<sup>81</sup> Article 52 (3) EUCFR.

Article 21 TFEU commits the EU in its external interactions to its founding principles, including “human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for [...] international law.”

EU Member States are individually bound by the human rights obligations emanating from treaties they have ratified. In particular, all Member States are parties to the ECHR and the EUCFR, and also the ICCPR,<sup>82</sup> CAT,<sup>83</sup> and the UNCRC.<sup>84</sup>

Due to its supervisory role under Article 35 of the 1951 Refugee Convention, UNHCR position papers are considered to be persuasive guidance,<sup>85</sup> and the conclusions of the UNHCR Executive Committee are indicative of states’ understanding of their obligations towards refugees.<sup>86</sup>

### 2.3.2 The territorial scope of human rights obligations

26 Under international and European law, the EU and its Member States must respect the human rights of persons present on their own territory. Human rights obligations can also extend to acts occurring outside the territory, establishing so-called extraterritorial jurisdiction.

In the official view of the Commission, the EU Asylum Directives (in contrast to the Schengen Border Code) do not apply to situations on the high seas.<sup>87</sup> The Procedure Directive does not apply to requests for international protection made extraterritorially.<sup>88</sup> The EU, under Article 78 TFEU, would nevertheless be bound by its obligations under the 1951 Refugee Convention and the EUCFR, which know no territorial limitation to their application.<sup>89</sup> Arguably, Article 21 TEU provides a legal basis for an obligation on the EU to respect and ensure respect for human rights in its cooperation with states

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<sup>82</sup> Article 7 ICCPR prohibits *refoulement* to serious and irreparable harm.

<sup>83</sup> Article 3 CAT prohibits *refoulement* to torture, cruel, inhuman, or degrading treatment.

<sup>84</sup> Article 22 UNCRC provides specific protection for refugee children.

<sup>85</sup> J. McAdam (2011) “Interpretation of the 1951 Convention”, in: A. Zimmermann, J. Dörschner and F. Machts, (eds.) (2011) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford: OUP, p. 111, para. 112.

<sup>86</sup> J. McAdam (2011) “Interpretation of the 1951 Convention”, in: A. Zimmermann, J. Dörschner and F. Machts (eds.) (2011) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford: OUP, p. 112, para. 117.

<sup>87</sup> Letter of 15 July 2009 from Mr Jacques Barrot, Vice-President of the European Commission (cited in ECtHR - *Hirsi Jamaa and others v Italy*, Appl. No. 27765/09 (judgment) (23.02.2012) para. 34); see also C. Costello (2015) *The Human Rights of Migrants and Refugees under European Law*, Oxford: OUP, p. 251.

<sup>88</sup> Article 3(1) Council Directive 2013/32/EU (26.06.2013).

<sup>89</sup> W. Kälin et al. (2011) “Article 33 (1)”, in: A. Zimmermann, J. Dörschner and F. Machts (eds.) (2011) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford: OUP, pp. 1327-1395, pp. 1361-62, para.s 86-91; V. Moreno-Lax (2011) “The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model”, in: A. Zimmermann, J. Dörschner and F. Machts (eds.) (2011) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford: OUP, pp. 1657-1683, p. 1664, para. 59.14, 59.15; M. Den Heijer (2011), *Europe and Extraterritorial Asylum*, Doctoral Thesis, Leiden University, pp. 215-216.

adjacent to its external borders. Member States would also be bound by their independent obligations under the ECHR, the ICCPR and CAT, insofar as they have extraterritorial application.<sup>90</sup>

The ECtHR has assumed jurisdiction for extraterritorial acts, including outside the Council of Europe area, in a variety of circumstances:<sup>91</sup> where a State exercises *effective overall control* over an area, for example through occupation or strong military presence;<sup>92</sup> where a State exercises diplomatic or consular functions or public powers with the consent of the territorial State;<sup>93</sup> where government agents or persons acting on behalf of the State in foreign territory had “*physical power or control*” over the applicant.<sup>94</sup> Even absent territorial control, the ECtHR has emphasized general positive obligations of Council of Europe Member States to secure the rights under the Convention at least through diplomatic means.<sup>95</sup>

In the context of international protection, the ECtHR has assumed extraterritorial jurisdiction for flag states of ships, including during maritime rescue operations on the high seas or conduct in third-state territorial waters,<sup>96</sup> and for government forces intercepting and “exercising full and exclusive control” over foreign vessels.<sup>97</sup> The European Commission of Human Rights has affirmed jurisdiction over the

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<sup>90</sup> ECtHR - *Medvedyev and Others v. France*, Appl. no. 3394/03 (judgment) (29.03.2010); ECtHR - *Hirsi Jamaa and others v Italy*, Appl. No. 27765/09 (judgment) (23.02.2012); Committee Against Torture *J.H.A. v. Spain*, CAT/C/41/D/323/2007 (decision) (21.11.2008).

<sup>91</sup> For a recent summary see ECtHR - *Hassan v. UK*, Appl. no. 29750/09 (judgment) (16.09.2014), para 74; ECtHR - *Al-Skeini and Others v. the UK*, Appl. no. 55721/07 (judgment) (07.07.2011), para 142. See also T. Gammeltoft-Hansen (2013) *Access to Asylum, International Refugee Law and the Globalisation of Migration Control*, Cambridge: CUP, pp. 107-112, 149-157; Sarah Miller (2009), “Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction” in *European Journal of International Law*, Vol. 20, Issue 4, pp. 1223–1246, pp. 1226-1229 (discussing the evolution of the Grand Chamber’s jurisdictional tests from *Banković and Others v. Belgium and 16 Other Contracting States* (Appl. No. 52207/99) (decision) (19.02.2001) and *Issa and Others v. Turkey*, Appl. no. 31821/96 (judgment) (16.11.2004) to *Öcalan v. Turkey*, Appl. no. 46221/99 (judgment) 12.05.2005).

<sup>92</sup> See, e.g., ECtHR - *Hassan v. UK*, Appl. no. 29750/09 (judgment) (16.09.2014), para 74; ECtHR - *Jaloud v. the Netherlands*, Appl. no. 47708/08 (judgment) (20.11.2014), para 139; ECtHR - *Al-Skeini and Others v. the UK*, Appl. no. 55721/07 (judgment) (07.07.2011); ECtHR - *Cyprus v. Turkey*, Appl. no. 25781/94 (judgment) (10.05.2001), para.s 151-152.

<sup>93</sup> ECtHR - *Hassan v. the United Kingdom* (application no. 29750/09), 16.09.2014, para 132.

<sup>94</sup> See, e.g., ECtHR - *Hassan v. the United Kingdom*, Application no. 29750/09 (judgment) (16.09.2014), para 136; see also ECtHR - *Öcalan v. Turkey*, Appl. no. 46221/99 (judgment) (12.05.2005), para. 91. Even though jurisdiction was not at issue in that case, the ECtHR also found a violation of the right to freedom of expression where a Portuguese warship was deployed close to a Dutch vessel to effect a prohibition to enter Portuguese territorial waters for the purpose of protest. See M. Den Heijer (2011), *Europe and Extraterritorial Asylum*, Doctoral Thesis, Leiden University, p. 245 (discussing ECtHR - *Women on Waves and Others v. Portugal*, Appl. No. 31276/05 (judgment) Doctoral Thesis, Leiden University t) (03.02.2009).

<sup>95</sup> ECtHR - *Ilășcu and others v. Moldova and Russia*, Appl. No 48787/99 (judgment) (08.07.2004), para 330-331; see also M. Den Heijer (2011), *Europe and Extraterritorial Asylum*, Doctoral Thesis, Leiden University, pp. 53-55.

<sup>96</sup> ECtHR - *Hirsi Jamaa and others v Italy*, Appl. No. 27765/09 (judgment) (23.02.2012), para.s 76-82.

<sup>97</sup> ECtHR - *Medvedyev and Others v. France*, Appl. no. 3394/03 (judgment) (29.03.2010, para.s 65-67.

actions of States towards persons present in their consular premises.<sup>98</sup> UK courts discussed ECHR obligations in the context of UK immigration liaison officials acting at a foreign airport.<sup>99</sup>

It is less clear to what extent a state has an obligation towards persons following their removal to their country of nationality or a third state.<sup>100</sup> The ECtHR found that a state cannot absolve itself of its obligations under the ECHR by concluding bilateral agreements on readmission, such as under the Dublin mechanism.<sup>101</sup> Human rights obligations may override conflicting obligations, such as extradition treaties.<sup>102</sup> Council of Europe Member States have an obligation to refrain from entering into agreements, which would require them to violate the rights of persons who have come under their jurisdiction.<sup>103</sup> In the context of detainee transfers, the ECtHR found a positive obligation to obtain additional assurances that the human rights of transferees will be respected, monitor their well-being and assist them in their legal efforts to obtain their rights.<sup>104</sup>

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Another unsettled question is the extent of Member States' obligations, or, if such should be established in the future, of a mobile EU Schengen centre, regarding visa petitions of international protection seekers. The 1951 Refugee Convention presupposes a refugee is outside his or her country of origin. Where pre-clearance measures effectively prevent persons seeking protection from leaving their country of origin, without any effort to determine the validity of their claim, UNHCR has argued this contravenes a good-faith application of the 1951 Refugee Convention.<sup>105</sup> Yet, it may be difficult to present a causal link between the rejection of a visa petition and any ensuing harm to the

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<sup>98</sup> ECmHR - *W.M. v. Denmark*, Appl. No. 17392/90 (decision) (14.10.1992); see also the discussion of the UK Court of Appeal judgment in *B. v. Secretary of State* (EWCA Civ 1344) in C. Costello (2015) *The Human Rights of Migrants and Refugees under European Law*, Oxford: OUP, p. 244.

<sup>99</sup> UK House of Lords R (European Roma Rights Centre and others) v. Immigration Officer at Prague Airport and Another UKHL 55 [2004] (judgment) (09.12.2004).

<sup>100</sup> K. Wouters (2009) *International Legal Standards for the Protection from Refoulement*, Mortsel: Intersentia, p. 164.

<sup>101</sup> ECtHR - *T.I. v. United Kingdom*, Appl. No. 43844/98 (Judgment) (07.03.2000) p. 15; see also UNHCR (1994) *Position on Readmission Agreements, "Protection Elsewhere" and Asylum Policy* (01.08.1994) available at: <http://www.refworld.org/docid/3ae6b31cb8.html> (last accessed 04.06.2016); on the validity of diplomatic assurances see, e.g., ECtHR - *Othman (Abu Qatada) v. the United Kingdom*, Appl. No. 8139/09, (judgment) (09.05.2012) para.s 188-189.

<sup>102</sup> Soering

<sup>103</sup> ECtHR – *Al-Saadoon and Mufdhi v. the United Kingdom*, Appl. No. 69498/08 (judgment) (02.03.2010), para.s 137-143.

<sup>104</sup> ECtHR – *Al Nashiri v. Romania*, Appl. No. 33234/12 (judgment) (18.09.2012) para. 333 -336.

<sup>105</sup> UNHCR intervention before the House of Lords in the case of European Roma Rights Centre and Others v. Immigration Officer at Prague Airport, Secretary of State for the Home Department, 28.09.2004, para 106, <http://www.refworld.org/docid/41c1aa654.html>; See discussion in UK House of Lords - R (European Roma Rights Centre and others) v. Immigration Officer at Prague Airport and Another UKHL 55 [2004] (judgment) (09.12.2004), para.s 26-27, 43.

applicant.<sup>106</sup> In any case, extraterritorial measures should satisfy the principle of legality.<sup>107</sup> Overall, a rights-based extraterritorial processing scheme would require a careful set-up of procedural and substantive safeguards in order to be an adequate complement to territorial processing of claims for international protection.<sup>108</sup>

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<sup>106</sup> UK House of Lords - R (European Roma Rights Centre and others) v. Immigration Officer at Prague Airport and Another UKHL 55 [2004] (judgment) (09.12.2004), para 21.

<sup>107</sup> M. Den Heijer (2011), *Europe and Extraterritorial Asylum*, Doctoral Thesis, Leiden University, pp. 261-262.

<sup>108</sup> M. Den Heijer (2011), *Europe and Extraterritorial Asylum*, Doctoral Thesis, Leiden University, pp. 164-165, 214-217

## 3 The EU Asylum Acquis

### 3.1 Introduction

#### 3.1.1 The emergence of the EU Asylum Acquis

The EU Asylum Acquis is a body of agreements, directives, and regulations relating to the protection of asylum seekers and refugees in the EU.<sup>109</sup> It emerged out of twenty years of increasing cooperation on asylum policy.<sup>110</sup> The entry into force of the Treaty of Amsterdam in 1999 signed a major development conferring new competences in field of asylum, borders and immigration to the EU. Soon after the European Council agreed to work towards the establishment of a Common European Asylum System (CEAS).<sup>111</sup> The creation of the CEAS started with a first set of measures aiming at setting up “minimum standards” (1999-2004). With the objective of establishing a more harmonised system and addressing the shortcomings of the first generation of instruments, a second phase of CEAS was initiated in 2004 with the Hague Programme and concluded in June 2013 with the approval of a recast asylum package. This included the recast Asylum Procedures Directive, recast Reception Conditions Directive, the Dublin III Regulation on the allocation of responsibility for the processing of asylum claims, and a recast Eurodac Regulation on taking and sharing fingerprints. These combine with the recast Qualification Directive, already adopted in 2011.

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The entry into force of the Lisbon Treaty in 2009 represents another key achievement. With this Treaty the establishment of the CEAS is no longer a general policy objective but a legal obligation binding upon all Member States and EU institutions. Article 78 of the Treaty for the Functioning of the European Union (TFEU) establishes that the EU shall develop a common policy on asylum in compliance with the principle of *non-refoulement*, the 1951 Refugee Convention and its Protocol, and other relevant treaties. For this purpose, article 78 (2) TFEU empowers the EU to establish a “uniform status” of asylum and subsidiary protection, “common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status” as well as “criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection” and “standards concerning the conditions for the reception of applicants for asylum or subsidiary protection”.

The Lisbon Treaty also transformed the EUCFR – which enshrines the right to asylum (Article 18) and the right to non-refoulement (Article 19) – into an instrument binding on the EU and on Member States implementing Union law.<sup>112</sup> It also gave the CJEU full jurisdiction over matters of international

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<sup>109</sup> For a complete overview of relevant instruments see EU Fundamental Rights Agency (2014) *Handbook on European law relating to asylum, borders and immigration*, Luxembourg: Publications Office of the European Union, Annex 1, 2, 3, p. 266ff.

<sup>110</sup> For a history see, e.g., S. Peers (2011) *EU Justice and Home Affairs Law*, Oxford: OUP, pp. 4-93.

<sup>111</sup> European Council, Tampere European Council 15 and 16 October 1999, Presidency Conclusions, para 13.

<sup>112</sup> Article 6(1) TEU.



protection.<sup>113</sup> Member States retain competencies in the areas of national security and law enforcement.<sup>114</sup>

In 2010, the European Commission (the Commission) established the European Asylum Support Office (EASO) to strengthen harmonisation and coordination.

Notwithstanding the positive developments seen with the entry into force of the Lisbon Treaty and the second phase of the CEAS, the most pressing issues are left untouched: such as the question of access to protection, and the need for more safe, legal and dignified pathways to the EU; the establishment of a fair responsibility-sharing mechanism; and the setting up of a truly harmonised system to meet the primary aims of the CEAS – the establishment of a “uniform status” and common procedures across the Union.

The Part below addresses each of these problematic issues in turn, trying on the one hand to identify the main challenges and on the other hand to suggest possible solutions.

## 3.2 Legal entry channels for persons in need of protection

### 3.2.1 Background

Every year thousands of people put their lives at risk crossing the Mediterranean Sea in order to reach the EU. This is largely due to the fact that, even if they qualify for refugee or subsidiary protection status, they have no other way to access the EU’s international protection procedures. The possibilities for people in need of protection to legally enter and stay in an EU Member State are extremely limited. This is however a precondition for the application of the EU Asylum Acquis, which is triggered only when applications are lodged in EU territory, at EU borders or in the territorial waters or transit zones of Member States.

The debate is not new. EU institutions and Member States have been discussing the issue of access to protection and the opportunity for more legal pathways since the Tampere Council of 1999.<sup>115</sup> With the ever more frequent tragic events in the Mediterranean, the debate has been revitalised in recent years.<sup>116</sup>

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<sup>113</sup> Article 19 (3) TEU.

<sup>114</sup> Article 4(2) TEU ; Article 72 TFEU.

<sup>115</sup> For a more detailed overview of the EU policies and trends concerning humanitarian visas see European Parliament – Policy Department (2014) *Humanitarian visas: option or obligation?*, p. 29 et seq., available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509986/IPOL\\_STU%282014%29509986\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509986/IPOL_STU%282014%29509986_EN.pdf) (last accessed 05.06.2016).

<sup>116</sup> See European Commission (2013) *Communication – On The Work Of The Task Force Mediterranean* (04.12.2013) p.12; European Commission (2015) *Communication – A European Agenda on Migration* (13.05.2015) available at: [http://ec.europa.eu/lieuva/documents/power\\_pointai/communication\\_on\\_the\\_european\\_agenda\\_on\\_migration\\_en.pdf](http://ec.europa.eu/lieuva/documents/power_pointai/communication_on_the_european_agenda_on_migration_en.pdf) (last accessed 19.05.2016); and European Commission (2016) *Communication – Towards A Reform Of The Common European Asylum System And Enhancing Legal Avenues To Europe* (06.04.2016) available at:

Under the present EU framework, the common visa policy – which covers short-term stay up to three months – does not take into account the specific situation of those seeking international protection and makes entry into the EU extremely difficult. All citizens of refugee producing countries are required to have visas (Visa List Regulation).<sup>117</sup> The Visa Code further establishes a number of legal criteria that have to be fulfilled, such as for example having a valid passport, a completed visa application form, a recent identity photograph and other documents.<sup>118</sup> People fleeing war and persecution are often not equipped with the necessary documents. From a practical point of view, lodging a visa application in certain third countries is impossible. In some (such as Liberia, Somalia and Sierra Leone) there is no consular representation of EU Member States, whilst in others (e.g. Syria) the visa sections of embassies have been temporary closed.<sup>119</sup>

The lack of legal and safe pathways to the EU is not only caused by restrictive visa policies, but also by carrier sanctions established by the so-called “Carrier Sanctions Directive”.<sup>120</sup> Despite the Schengen Borders Code, having a clause in favour of the rights of refugees and other persons seeking international protection, putting private actors, in this case airline carriers in charge of checking travel documents, makes it difficult, of not impossible, to apply these rights.<sup>121</sup>

The increasing use of “non-entrée policies” by the Member States has further aggravated the problem. There are two recent trends in this regard: On the one hand, Member States answer the “reception crisis” with the closure of their borders. The package of restrictive measures agreed on by Austria, Slovenia, Croatia, Serbia and the Former Yugoslav Republic of Macedonia, which aim to stop the migration flow along the Western Balkan migration route, has been (quite rightly) strongly criticised by human rights organisations.<sup>122</sup> These border closures have most likely led to the violation of the right to seek asylum, as protection seekers are forcibly prevented from lodging asylum claims

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 package/docs/20160406/towards\_a\_reform\_of\_the\_common\_european\_asylum\_system\_and\_enhancing\_legal\_avenues\_to\_europe\_-\_20160406\_en.pdf (last accessed 05.06.2016).

<sup>117</sup> See Regulation (EC) No 539/2001 (as amended). This Regulation establishes two common lists, one including the countries whose citizens must have a visa when crossing the external borders, and the other the countries whose citizens are exempt from that requirement.

<sup>118</sup> Regulation (EC) No 810/2009 (13.07.2009) (as amended). According to the Visa Code there are three types of Schengen visas: uniform visas (article 2(3)); LTV visas article 2(4) and 25; and airport transit visas (article 2(5)). Moreover, for some TCNs a visa is required also for the simple transit through the international transit area of airports.

<sup>119</sup> See European Commission State “Notifications: Member States consular presence” (15.01.2016) available at: [http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/borders-and-visas/visa-policy/docs/20151019\\_1\\_annex\\_28\\_ms\\_consular\\_representation\\_20\\_en.xlsx](http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/borders-and-visas/visa-policy/docs/20151019_1_annex_28_ms_consular_representation_20_en.xlsx) (last accessed 19.05.2016).

<sup>120</sup> Council Directive 2001/51/EC (28.06.2001) supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985.

<sup>121</sup> V. Moreno-Lax (2015) Europe in Crisis: Facilitating Access to Protection, (Discarding) Offshore Processing and Mapping Alternatives for the Way Forward, *Red Cross EU Office*, p. 35, available at: [http://reliefweb.int/sites/reliefweb.int/files/resources/Europe%20in%20Crisis\\_Dr%20Moreno.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/Europe%20in%20Crisis_Dr%20Moreno.pdf) (last accessed 19.05.2016).

<sup>122</sup> See, for example, the open letter by the Open Society Foundation Serbia to European leaders signed by a number of organisations working along the Western Balkan migration route, available at: <http://www.fosserbia.org/sr/novosti/open-letter.html> (last accessed 31.05.2016)

anywhere but in Greece. This hardly offers effective protection. The rejection of protection seekers of certain nationalities violates the principle of non-discrimination (Article 4 1951 Refugee Convention). The border closures also leave protection seekers stranded in inadequate conditions in border regions, and have led to the use of increasingly coercive measures against them.<sup>123</sup> The policies of individual EU Member States, such as Austria, are aimed at preventing persons in need of protection from reaching their territories. In April 2016, the Austrian parliament adopted a new asylum law, allowing the government to declare a “state of emergency” when the number of asylum applications “poses a threat to public order or national security.”<sup>124</sup> When a state of emergency is declared, the police are allowed to reject asylum seekers at the border, on the questionable assumption that all states neighbouring Austria are safe third countries. In our view, this law violates European and international law in several respects, particularly with regard to the right to an effective remedy, the prohibition of collective expulsion and the risk of chain refoulement.<sup>125</sup>

On the other hand, the EU is increasingly outsourcing its obligation to protect, with the aim of preventing persons in need of protection from coming to EU borders. The most recent and worrying example of this is the EU-Turkey agreement, which, according to the Commission, aims “to end the irregular migration from Turkey to the EU”, to target people smugglers’ business, and to remove “the incentive to seek irregular routes to the EU.”<sup>126</sup> According to the Commission, the agreement is “in full accordance with EU and international law.”<sup>127</sup> This has to be doubted. The Agreement assumes that Turkey is a safe country for protection seekers, and thus makes it possible to return protection seekers who could have applied for or had protection in Turkey.

<sup>123</sup> Human Rights Watch (2016) “Greece/Macedonia: Asylum Seekers Trapped at Border” (11.02.2016) available at: <https://www.hrw.org/news/2016/02/11/greece/macedonia-asylum-seekers-trapped-border> (last accessed 19.05.2016); Human Rights Watch (2016) “EU/Balkan/Greece: Border Curbs Threaten Rights” (01.03.2016) available at <https://www.hrw.org/news/2016/03/01/eu/balkans/greece-border-curbs-threaten-rights> (last accessed 19.05.2016).

<sup>124</sup> See for example: EurActiv.com with AFP (2016) “Austria moves to block asylum seekers with tough new rules”, (31.03.2016) available at: <http://www.euractiv.com/section/justice-home-affairs/news/austria-moves-to-block-asylum-seekers-with-tough-new-rules/> (last accessed 19.05.2016); P Kingsley (2016) “Ban Ki-moon attacks ‘increasingly restrictive’ EU asylum policies”, in: *The Guardian online* (28.04.2016) available at: <http://www.theguardian.com/world/2016/apr/27/austria-set-to-bring-in-stringent-new-law-on-asylum-seekers> (last accessed 05.06.2016); Zeit Online (2016) “Österreich ermöglicht Grenzschießung für Flüchtlinge” (27.04.2016) available at: <http://www.zeit.de/politik/ausland/2016-04/oesterreich-asyl-gesetz-verschaerfung-fluechtlinge> (last accessed 19.05.2016).

<sup>125</sup> See also Ludwig Boltzmann Institute of Human Rights (2016) *Stellungnahme zur geplanten Änderung des Asylgesetzes* (Statement on the proposed amendment of the asylum law) (20.04.2016) available at: <http://bim.lbg.ac.at/de/artikel/aktuelles/stellungnahme-zur-geplanten-anderung-des-asylgesetzes> (last accessed 05.06.2016).

<sup>126</sup> See Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation (16.12.2013), OJ L 134/3 (7.5.2014), and Council Decision (EU) 2016/551 (23.03.2016), OJ L 95/9 9.4.2016, which anticipated the entry into force of the Agreement to 1 June 2016. See also European Commission (2016) *Fact Sheet – EU-Turkey Agreement: Questions and Answers* (19.03.2016) available at: [http://europa.eu/rapid/press-release\\_MEMO-16-963\\_de.htm](http://europa.eu/rapid/press-release_MEMO-16-963_de.htm) (last accessed 19.05.2016).

<sup>127</sup> European Commission (2016) *Fact Sheet – EU-Turkey Agreement: Questions and Answers* (19.03.2016) available at: [http://europa.eu/rapid/press-release\\_MEMO-16-963\\_de.htm](http://europa.eu/rapid/press-release_MEMO-16-963_de.htm) (last accessed 19.05.2016).

There are however several reasons why Turkey cannot be said to be “safe”. First, Turkey retains a geographical restriction on the application of the 1951 Refugee Convention, restricting its application to refugees originating from European countries.<sup>128</sup> Second, within Turkey there are continuing inadequacies in the treatment of protection seekers, including alleged violations of the principle of *non-refoulement*. Many sources show that the fundamental rights of refugees and migrants are not ensured there.<sup>129</sup> This was also confirmed by decision of the Greek Appeal Committee, which affirmed that Turkey cannot be considered a safe third country.<sup>130</sup> The Agreement raises further human rights issues. As it was outlined in Chapter 1, the assessment of whether a third country constitutes a first country of asylum or a safe third country requires a careful and individualised case-by-case exam, as otherwise the prohibition of collective expulsion under Article 4 of Protocol No 4 ECHR would be violated. Moreover, the implementation of the Agreement has also resulted in the mandatory detention of all protection seekers who are screened in so-called hotspots, raising concerns that such detention is arbitrary under Article 31(2) Geneva Refugee Convention and Article 9 ICCPR, where alternatives to detention would be available. In consequence, UNHCR has withdrawn its cooperation inside the hotspots.<sup>131</sup>

As it was widely denounced, the detention conditions in hotspots in Greece are unacceptable and have been defined as “catastrophic”, “unsafe” and “unsanitary”.<sup>132</sup> The lack of access to legal aid and information further puts at risk the right to asylum. The fact that the EU-Turkey cooperation additionally establishes the 1:1 scheme resettling one Syrian refugee from Turkey in the EU for each Syrian refugee readmitted to Turkey from Greece is, in our view, an inadequate approach, as it barter refugees against refugees. The argument put forward by the Commission that the EU-Turkey agreement would help to prevent people from choosing dangerous journeys, and therefore help combat smuggling, is a paradox. With no attempt to tackle the root causes of migration nor to increase legal pathways to the EU, the reality is that people are left with no other choice but to choose ever-more dangerous ways to try to come to Europe and resort to smugglers. With the agreement, the EU undermines its credibility as a community that embodies humanist values. The EU and its Member

<sup>128</sup> Emanuela Roman, Theodore Baird, and Talia Radcliffe (2016) Why Turkey is Not a “Safe Country” available at: <http://www.statewatch.org/analyses/no-283-why-turkey-is-not-a-safe-country.pdf> (last accessed 10.06.2016). See also Steve Peers (2016) The final EU/Turkey refugee deal: a legal assessment, available at: <http://eulawanalysis.blogspot.co.at/2016/03/the-final-euturkey-refugee-deal-legal.html>.

<sup>129</sup> See, for example, ECRE (2016) *EU-Turkey deal: trading people and outsourcing the EU's responsibilities*, available at <http://www.ecre.org/eu-turkey-deal-trading-in-people-and-outsourcing-the-eus-responsibilities/> (last accessed 31.05.16); HRW (2016) Turkey: Border Guards Kill and Injure Asylum Seekers, available at: <https://www.hrw.org/news/2016/05/10/turkey-border-guards-kill-and-injure-asylum-seekers>.

<sup>130</sup> For a summary of the decision see: <http://www.asylumlawdatabase.eu/en/content/greece-appeals-committee-issues-decisions-turkey-safe-third-country>.

<sup>131</sup> Melissa Fleming, UNHCR redefines role in Greece as EU-Turkey deal comes into effect (22 March 2016) <http://www.unhcr.org/en-us/news/briefing/2016/3/56f10d049/unhcr-redefines-role-greece-eu-turkey-deal-comes-effect.html>.

<sup>132</sup> See for example HRW (2016) Greece: Refugee “Hotspots” Unsafe, Unsanitary, available at: <https://www.hrw.org/news/2016/05/19/greece-refugee-hotspots-unsafe-unsanitary>. Amnesty International, Greece: Refugees detained in dire conditions amid rush to implement EU-Turkey deal, available at: <https://www.amnesty.org.uk/press-releases/greece-refugees-detained-dire-conditions-amid-rush-implement-eu-turkey-deal>.

States risk making themselves dependent upon Turkey and vulnerable to being pressured into making unacceptable compromises in the area of human rights protection. On several occasions in recent weeks the EU and its Member States have appeared to step back from openly criticising Turkey for violations of basic human rights such as press freedom, apparently out of a fear of jeopardising the agreement.<sup>133</sup>

As outlined above, the limitations on the territorial application of the EU instruments described above, the lack of legal channels to the EU and the “non-entrée policies” being enforced by Member States, mean that it is increasingly difficult – if not almost impossible – for international protection applicants to access the EU territory. Often, they have no other choice but to resort to smugglers, thus putting themselves at the mercy of dangerous organised crime networks and unseaworthy boats, in the attempt to reach EU shores. Too many have died this way, and there is an urgent need for action.

Some EU institutions, human rights organisations and think tanks have proposed a number of options as to how legal entry channels to the EU could be strengthened or created. The FRA has for example identified a number of existing practices that could be used to increase the possible ways for a person in need of international protection to arrive safely and legally to the EU. These range from refugee-related schemes, such as resettlement with the UNHCR, humanitarian admissions or visas, and temporary protection; to regular mobility schemes, such as family reunification, labour and students’ mobility schemes, and medical evacuation.<sup>134</sup> The discussion below primarily addresses four different legal entry channels: resettlement, humanitarian visa, family reunification, and temporary protection. The first, resettlement, is currently receiving the most attention and is the policy favoured by the Commission. The second, humanitarian visa, would enable asylum seekers to legally enter the EU and apply within EU borders. The third, family reunification, would be very important from a human rights point of view, but has been widely neglected. Additionally, we look at a measure that could and should be applied in these circumstances, but currently is not: temporary protection.

### 3.2.2 Resettlement

#### 3.2.2.1 Background and definition

The UNHCR defines resettlement as follows:

“**Resettlement** involves the selection and transfer of refugees from a State, in which they have sought protection, to a third State, which has agreed to admit them – as refugees – with permanent residence status. The status provided ensures protection against *refoulement* and provides a resettled refugee and his/her family or dependants with access to rights similar to

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<sup>133</sup> See, for example, A Spence (2016) “EU ‘sacrifices’ press freedom for Turkish help” (05.05.2016): in *Politico*, available at: <http://www.politico.eu/blogs/spence-on-media/2016/05/eu-sacrifices-press-freedom-for-turkish-help-migration-refugees-crisis-turkey-deal-erdogan-boehmermann/> (last accessed 19.05.2016).

<sup>134</sup> European Agency for Fundamental Rights (2015) *Legal entry channels to the EU for persons in need of international protection: a toolbox* (Feb. 2015) available at, [http://fra.europa.eu/sites/default/files/fra-focus\\_02-2015\\_legal-entry-to-the-eu.pdf](http://fra.europa.eu/sites/default/files/fra-focus_02-2015_legal-entry-to-the-eu.pdf) (last accessed 05.06.2016).

those enjoyed by nationals. Resettlement also carries with it the opportunity to eventually become a naturalized citizen of the resettlement country.”<sup>135</sup>

In the framework of resettlement, the consideration of an asylum application of an individual takes place “while that person is in another country outside the EU (usually a transit country).”<sup>136</sup> The authorities of the receiving state decide whether resettlement takes place and which groups are resettled.<sup>137</sup> The assessment is usually carried out by the UNHCR.<sup>138</sup>

Resettlement as a refugee protection tool has been in use since the beginning of the last century (first implemented after the First World War). In the EU, however, it is still not widely used. According to the UNHCR, in 2015, the files of over 134,000 refugees were submitted for consideration by resettlement countries<sup>139</sup> (compared to an estimated number of 960,000 refugees in need of protection).<sup>140</sup> On an annual basis, only 80,000 resettlement places are globally available. In 2015, out of this number, only 8,155 places were offered by the EU.<sup>141</sup> Compared to other countries such as the US (the world’s top resettlement country)<sup>142</sup> or Australia and Canada, this number is very low.

In the face of the “reception crisis”, the EU made some efforts to strengthen the European resettlement policy during the last few years. In 2012, the joint Union resettlement programme was launched under the asylum, migration and integration fund. The (voluntary) programme provides EU Member States with funding for the reception and integration of mainly highly vulnerable resettled

<sup>135</sup> UNHCR (2011) *Resettlement Handbook* (revised ed.) Geneva: UNHCR, p. 3, available at: <http://www.unhcr.org/46f7c0ee2.html> (last accessed 19.05.2016).

<sup>136</sup> See Centre for European Policy Studies (2015) *Enhancing the Common European Asylum System and Alternatives to Dublin* (04.08.2015) p. 11, available at: <https://www.ceps.eu/publications/enhancing-common-european-asylum-system-and-alternatives-dublin> (last accessed 05.06.2016).

<sup>137</sup> European Agency for Fundamental Rights (2015) *Legal entry channels to the EU for persons in need of international protection: a toolbox* (Feb. 2015) p.7, available at, [http://fra.europa.eu/sites/default/files/fra-focus\\_02-2015\\_legal-entry-to-the-eu.pdf](http://fra.europa.eu/sites/default/files/fra-focus_02-2015_legal-entry-to-the-eu.pdf) (last accessed 05.06.2016).

<sup>138</sup> The seven categories of selection criteria are: refugees with legal or physical protection needs, victims of torture, refugees with medical needs, women and girls at risk, family reunification cases, children and adolescents at risk following a best interests determination, refugees for whom no other alternative durable solution is available. European Agency for Fundamental Rights (2015) *Legal entry channels to the EU for persons in need of international protection: a toolbox* (Feb. 2015) p. 7 available at, [http://fra.europa.eu/sites/default/files/fra-focus\\_02-2015\\_legal-entry-to-the-eu.pdf](http://fra.europa.eu/sites/default/files/fra-focus_02-2015_legal-entry-to-the-eu.pdf) (last accessed 05.06.2016).

<sup>139</sup> UNHCR (undated) *Resettlement*, available at: <http://www.unhcr.org/pages/4a16b1676.html> (last accessed 19.05.2016).

<sup>140</sup> Red Cross EU Office (2015) *Position paper: Resettlement in the European Union* (19.06.2015) available at: [http://www.redcross.eu/en/upload/documents/pdf/2015/Migration/RCEU\\_Resettlement%20in%20the%20EU\\_FinalJune2015.pdf](http://www.redcross.eu/en/upload/documents/pdf/2015/Migration/RCEU_Resettlement%20in%20the%20EU_FinalJune2015.pdf) (last accessed 19.05.2016).

<sup>141</sup> The biggest number of persons was resettled in Norway (2,375) followed by the UK (1,865) Sweden (1,850) and Finland (1,005). Austria resettled 760 persons, Germany 510 (Eurostat (2015) *Resettled persons – annual data*, available at: <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tps00195&plugin=1> (last accessed 05.06.2016)).

<sup>142</sup> 73.000 refugees resettled in the US during 2014, which is more than 70 per cent of total resettlement admission (UNHCR (2015) *Statistical Yearbook 2014* (08.12.2015) p. 43 et seq., available at: <http://www.unhcr.org/56655f4c0.html> (last accessed 19.05.2016).

refugees.<sup>143</sup> It particularly supports those countries that consider establishing long-lasting resettlement programmes. Up until today, only 15 of the 28 EU Member States provide regular refugee resettlement programmes.<sup>144</sup> The European Council and the European Commission have stated on several occasions that an increase in contributions to global resettlement efforts is necessary, along with the setting up of a voluntary pilot scheme on resettlement across the EU with the contribution of all Member States.<sup>145</sup> In response to the Commission recommendation for a European resettlement scheme in June 2015<sup>146</sup>, 27 EU Member States and other Dublin associated states agreed in July 2015 to resettle 22,504 persons in clear need of international protection within two years.<sup>147</sup> According to the Commission, as of April 2016, only 5,677 people out of the agreed 22,504 have been resettled in the EU.<sup>148</sup> This is still a very low number. The picture becomes even darker when taking into account the new EU-Turkey agreement, when it was decided to use most of the remaining places for resettlement from Turkey.<sup>149</sup> This is not only problematic in terms of the number of places available, but also with regard to human rights standards. The integration of a resettlement programme into the framework of the 1:1 scheme and the trading of persons in need of protection cannot be considered as adequate in terms of the obligation to protect. The following discusses the pros and cons of resettlement in general, without referring to the resettlement scheme, which is part of the EU-Turkey deal.

<sup>143</sup> G Szmitt (2012) *Joint EU Resettlement Programme* (11.06.2012) available at : [http://www.resettlement.eu/sites/icmc.ttp.eu/files/COM%20Joint%20EU%20Resettlement%20Programme\\_1.06.2012.pdf](http://www.resettlement.eu/sites/icmc.ttp.eu/files/COM%20Joint%20EU%20Resettlement%20Programme_1.06.2012.pdf) (last accessed 19.05.2016).

<sup>144</sup> Red Cross EU Office (2015) *Position paper: Resettlement in the European Union* (19.06.2015) p. 2, available at: [http://www.redcross.eu/en/upload/documents/pdf/2015/Migration/RCEU\\_Resettlement%20in%20the%20EU\\_FinalJune2015.pdf](http://www.redcross.eu/en/upload/documents/pdf/2015/Migration/RCEU_Resettlement%20in%20the%20EU_FinalJune2015.pdf) (last accessed 19.05.2016).

<sup>145</sup> See, for example, European Council (2015) *Statement - Special meeting of the European Council, 23 April 2015*, available at: <http://www.consilium.europa.eu/en/press/press-releases/2015/04/23-special-euco-statement/> (last accessed 05.06.2016). The European Commission pointed to the importance of resettlement efforts in the Migration Agenda and the subsequent communications and reports. See, for example, European Commission (2016) *Second report on relocation and resettlement* (12.04.2016) available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160412/communication\\_second\\_report\\_relocation\\_resettlement\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160412/communication_second_report_relocation_resettlement_en.pdf) (last accessed 19.05.2016).

<sup>146</sup> European Commission (2015) *Recommendation on a European resettlement scheme* (08.06.2015) available at: [http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/general/docs/recommendation\\_on\\_a\\_european\\_resettlement\\_scheme\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/general/docs/recommendation_on_a_european_resettlement_scheme_en.pdf) (last accessed 19.05.2016).

<sup>147</sup> See European Commission (2016) *First Report on relocation and resettlement* (16.03.2016) p. 16, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160316/first\\_report\\_on\\_relocation\\_and\\_resettlement\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160316/first_report_on_relocation_and_resettlement_en.pdf) (last accessed 19.05.2016).

<sup>148</sup> European Commission (2016) *Second report on relocation and resettlement* (12.04.2016) available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160412/communication\\_second\\_report\\_relocation\\_resettlement\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160412/communication_second_report_relocation_resettlement_en.pdf) (last accessed 19.05.2016).

<sup>149</sup> *Ibidem*, p.7.

### 3.2.2.2 *Critical evaluation of the status quo and alternative approaches*

There is consensus among experts that resettlement is in general a very good and useful tool, as it provides for legal entry into the EU and offers long-term prospects for the persons in need of protection. The UNHCR ascribes three main functions of resettlement as: 1) a tool for providing international protection, 2) a durable solution for large groups of refugees, and 3) an expression of international solidarity and responsibility sharing.<sup>150</sup> The key problems lie in different aspects of the implementation of the tool in terms of criteria and procedures, and with regard to the number of places available.

Having different standards for the implementation of the CEAS in Member States is also problematic. In its second report on resettlement, the Commission points to differences between the EU Member States in selection criteria, the length of procedures, integration tools and the number of places available.<sup>151</sup> To reduce these differences, the Commission has called for an “exchange of best practices and experiences among the resettling countries.”<sup>152</sup> A stronger role for the EASO in the coordination of resettlement programmes – as suggested by the Commission in the latest proposal for a transformed Asylum Agency – could also be a means of raising and aligning standards.<sup>153</sup> The EASO could ensure that there is an exchange between stakeholders of experiences and best practices.<sup>154</sup> It might be useful to go a step further and to elaborate a common European resettlement procedure with common criteria. In this regard, it would be helpful to transform the Commission’s recommendation into a binding measure, as foreseen in the Migration Agenda.<sup>155</sup> Many experts advocate this, as it would help to establish EU-wide principles that comply with human rights standards.<sup>156</sup> It could also help to avoid discriminatory practices. Given the free choice of Member

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<sup>150</sup> UNHCR (2011) *Resettlement Handbook* (revised ed.) Geneva: UNHCR, p. 3, available at: <http://www.unhcr.org/46f7c0ee2.html> (last accessed 19.05.2016).

<sup>151</sup> See European Commission (2016) *Press Release: Relocation and Resettlement: EU Member States urgently need to deliver* (16.03.2016) available at: [http://europa.eu/rapid/press-release\\_IP-16-829\\_en.htm](http://europa.eu/rapid/press-release_IP-16-829_en.htm) (last accessed 19.05.2016).

<sup>152</sup> *ibidem*

<sup>153</sup> European Commission (2016): Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 (04.05.2016) available at: <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-271-EN-F1-1.PDF> (last accessed 19.05.2016).

<sup>154</sup> Red Cross EU Office (2015) *Position paper: Resettlement in the European Union* (19.06.2015) p. 6, available at: [http://www.redcross.eu/en/upload/documents/pdf/2015/Migration/RCEU\\_Resettlement%20in%20the%20EU\\_FinalJune2015.pdf](http://www.redcross.eu/en/upload/documents/pdf/2015/Migration/RCEU_Resettlement%20in%20the%20EU_FinalJune2015.pdf) (last accessed 19.05.2016).

<sup>155</sup> “If necessary this [the resettlement scheme] will be followed up with a proposal for a binding and mandatory legislative approach beyond 2016.” See European Commission (2015) *Communication - A European Agenda on Migration* (13.05.2015) p.5, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/communication\\_on\\_the\\_european\\_agenda\\_on\\_migration\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf) (last accessed 19.05.2016).

<sup>156</sup> See, for example, V. Moreno-Lax (2015) Europe in Crisis: Facilitating Access to Protection, (Discarding) Offshore Processing and Mapping Alternatives for the Way Forward, *Red Cross EU Office*, p. 33, available at:



States as to whom to resettle, this is one of the big challenges of resettlement. It needs to be ensured that Member States select the most vulnerable, rather than those who, in their view, are the most suitable.<sup>157</sup> The announcement by some Member States that they will only accept Christian refugees can be seen as an expression of this problem.<sup>158</sup> There is also the question of who in practice monitors the resettlement programmes and sanctions discriminatory practices. Although monitoring and safeguards are integrative parts of the UNHCR resettlement practice,<sup>159</sup> many questions remain. There is, for example, no possibility of formally raising an objection or appealing against the denial of a resettlement place where someone is not accepted for the programme.

The second problematic point is the insufficient number of resettlement places. In this regard, the transformation of the Commission's recommendations into a binding measure would be useful. It could help to enforce the implementation of the resettlement programme and raise the number of available places. Another means of reaching this goal could be to involve private sponsors. This is practice commonly used, for example, in Canada, where the private sponsorship of refugee programmes has been used since the 1970s. NGOs, churches, communities, and other affiliated groups of individuals enter into an agreement with the Canadian Department of Citizenship and Immigration, and provide the sponsored refugee with basic assistance during the first year after his or her arrival. This assistance takes the form of both material (accommodation, clothing etc.), and practical support (such as personal help to learn the language, to find employment etc.).<sup>160</sup> In some EU Member States, such as the UK, serious consideration is being given to the establishment of comparable practices.<sup>161</sup> If additional to existing resettlement arrangements, private sponsorship would offer additional places to refugees who are, for whatever reason, not coming through existing programmes. They would give the public and civil society organisations the opportunity to play a practical role in welcoming refugees. This could also have a positive effect on the integration of refugees, as well as on the general climate towards refugees in the society. There are, however, also problematic aspects to private sponsorship. One of them is that, in a certain sense, the refugee becomes dependent upon the sponsor. It needs to

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[http://reliefweb.int/sites/reliefweb.int/files/resources/Europe%20in%20Crisis\\_Dr%20Moreno.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/Europe%20in%20Crisis_Dr%20Moreno.pdf) (last accessed 19.05.2016).

<sup>157</sup> Centre for European Policy Studies (2015) *Enhancing the Common European Asylum System and Alternatives to Dublin* (04.08.2015) p. 12, available at: <https://www.ceps.eu/publications/enhancing-common-european-asylum-system-and-alternatives-dublin> (last accessed 05.06.2016).

<sup>158</sup> See, for example, the written question of the European Parliament to the Commission on this subject: Parliamentary questions (2015) "Subject: Voluntary relocation and resettlement schemes and discrimination on grounds of religion" (03.09.2015) available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2015-012412&language=EN> (last accessed 19.05.2016).

<sup>159</sup> UNHCR (2011) *Resettlement Handbook* (revised ed.) Geneva: UNHCR, Ch. 7.1, available at: <http://www.unhcr.org/46f7c0ee2.html> (last accessed 19.05.2016).

<sup>160</sup> *Ibidem*, p.6.

<sup>161</sup> In October 2015, The British National Refugee Welcome Board presented "A Citizens' guide to private sponsorship of refugees", entailing interesting reflections and propositions on private sponsorship schemes that might serve as guidelines for an EU-wide establishment of a similar practice. RefugeesWelcome.org ((2015) *A Citizens' guide to private sponsorship of refugees* (Oct. 2015) available at <http://www.refugees-welcome.org.uk/wp-content/uploads/2015/12/Citizensguide-to-private-sponsorship-in-the-UK.pdf> (last accessed 19.05.2016).

be ensured that refugees can benefit from public support in the event that they are not fully integrated and independent after the first year. Another potentially problematic feature that provokes a large amount of ambivalence towards such schemes again relates to selection criteria. The advantage – and at the same time the danger – of this model is that sponsors can select the refugees they particularly want to help.<sup>162</sup> This might help to create personal links and render integration into society much easier, but there is a danger of discriminatory practices and “cherry picking.” Again, it would have to be ensured that the most vulnerable persons are resettled, not just the ones who, for economic or cultural reasons are of most interest.

A similar, but slightly different option, that would help to better integrate resettled refugees into civil society, would be to make EU funding through the AMIF not only available to Member States, but also to civil society organisations, as proposed by the Red Cross EU Office.<sup>163</sup>

Furthermore Member States should consider to establish additional resettlement places specifically dedicated to emergency humanitarian situations, similarly to the humanitarian admission schemes responding to emergency situations.<sup>164</sup> Again, Canada may serve as an example with its Urgent Protection Program. Canada responds to emergency requests from the UNHCR and offers protection, through resettlement, for persons facing immediate threats to their life or safety.<sup>165</sup> Of course, these emergency programmes have to comply with the same standards as regular resettlement schemes. In our view, it is very important to establish such programmes, but in addition to already existing programmes, and additional to the current number of resettlement places set by the Commission. Moreover, such programmes have to be put into place under different conditions than is now the case under the EU-Turkey agreement.

### 3.2.3 Humanitarian Visas

Humanitarian visas constitute a “protected entry procedure” according to which a third country national may “approach the potential host state outside its territory with a claim for asylum or other form of international protection”.<sup>166</sup> Humanitarian visas differ from resettlement, temporary protection and offshore processing, as the final determination procedure of the international protection claim is conducted within the EU territory.

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<sup>162</sup> This is also the situation in Canada where private sponsors may identify a refugee they wish to assist.

UNHCR (2011) *Resettlement Handbook* (revised ed.) Geneva: UNHCR, p. 6, available at: <http://www.unhcr.org/46f7c0ee2.html> (last accessed 19.05.2016).

<sup>163</sup> Red Cross EU Office (2015) *Position paper: Resettlement in the European Union* (19.06.2015) p. 5, available at: [http://www.redcross.eu/en/upload/documents/pdf/2015/Migration/RCEU\\_Resettlement%20in%20the%20EU\\_FinalJune2015.pdf](http://www.redcross.eu/en/upload/documents/pdf/2015/Migration/RCEU_Resettlement%20in%20the%20EU_FinalJune2015.pdf) (last accessed 19.05.2016).

<sup>164</sup> *Ibidem*, p. 4.

<sup>165</sup> UNHCR (2011) *Resettlement Handbook* (revised ed.) Geneva: UNHCR, p. 8, available at: <http://www.unhcr.org/46f7c0ee2.html> (last accessed 19.05.2016).

<sup>166</sup> European Parliament (2014) Rights and Constitutional Affairs with Iben Jensen, Ulla, Humanitarian visas: option or obligation?, p. 8, available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509986/IPOL\\_STU\(2014\)509986\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509986/IPOL_STU(2014)509986_EN.pdf).

As outlined above, the present EU framework concerning visas does not take into account the specific situation of those seeking international protection and makes entry into the EU extremely difficult.

The only refugee-sensitive provision is article 25 of the Visa Code, which regulates the so called “Limited Territorial Validity visas”, and provides that this type of visas shall “exceptionally” be issued “when the Member State consider it necessary on humanitarian grounds, for reasons of national interest or because of international obligations” (article 25).<sup>167</sup>

The reference to “international obligations” supports the view that article 25 enables Member States to issue a visa if a person asks for asylum or is otherwise in need of international protection. However the wording “international obligations” is not included among the reasons for waiving the ordinary admissibility requirements laid down by article 19 of the Visa Code. This makes the scope of the provision remain unclear, and should be clarified.

Other problems with Limited Territorial Validity visas are the lack of a dedicated procedure,<sup>168</sup> and the poor geographic coverage for collecting/processing visa applications.<sup>169</sup>

### 3.2.4 Family reunification

#### 3.2.4.1 Background and definitions

As recalled above, the principle of family unity is considered as an “essential right of the refugee” by the UN Conference of Plenipotentiaries adopting the 1951 Convention. For people who have fled from persecution and war, reunification with family members is the first priority.<sup>170</sup> A number of studies based on practical experiences show that family reunification is a precondition for the well-being and health of people who have experienced trauma caused by war and flight. It is also crucial for all aspects of their integration into the host society, effecting language learning, job finding and general interaction within society.<sup>171</sup>

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<sup>167</sup> See Regulation (EC) No 810/2009 (13.07.2009) (as amended), Article 25.

<sup>168</sup> European Parliament (2014) Rights and Constitutional Affairs with Iben Jensen, Ulla, Humanitarian visas: option or obligation?, available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509986/IPOL\\_STU\(2014\)509986\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509986/IPOL_STU(2014)509986_EN.pdf) (last accessed 12.06.2016).

<sup>169</sup> European Agency for Fundamental Rights (2015) Legal entry channels to the EU for persons in need of international protection: a toolbox (Feb. 2015) available at, [http://fra.europa.eu/sites/default/files/fra-focus\\_02-2015\\_legal-entry-to-the-eu.pdf](http://fra.europa.eu/sites/default/files/fra-focus_02-2015_legal-entry-to-the-eu.pdf) (last accessed 05.06.2016).

<sup>170</sup> See Red Cross EU Office and ECRE (2014) *Disrupted Flight: The Realities of Separated Refugee Families in the EU*, available at: [http://www.redcross.eu/en/upload/documents/pdf/2014/Asylum\\_Migration/RCEU%20ECRE%20-%20Family\\_Reunification%20Report%20Final\\_HR.pdf](http://www.redcross.eu/en/upload/documents/pdf/2014/Asylum_Migration/RCEU%20ECRE%20-%20Family_Reunification%20Report%20Final_HR.pdf) (last accessed 19.05.2016).

<sup>171</sup> *Ibidem*, p.5, See also European Commission (Directorate-General for Research) (2012) *Socio-Economic Research: Family Reunification Evaluation Project FARE* (June 2002) available at: <http://bookshop.europa.eu/en/family-reunification-evaluation-project-fare-pbKINA21102/> (last accessed 05.06.2016).

Family reunification may also serve as an additional legal entry channel for international protection seekers who have a family member in EU. As we have seen above, international protection seekers may also use regular mobility schemes to access the EU territory legally.

Under EU law, the right to family reunification is regulated by Council Directive 2003/86/EC of 22 September 2003 (Family Reunification Directive).<sup>172</sup> The Family Reunification Directive applies to third country nationals holding a residence permit (so called “sponsor”), including to refugees. The Directive does not however apply to beneficiaries of subsidiary protection (article 3 (c)).

If the sponsor is a refugee, the Directive sets out more favourable conditions (Chapter V of the Directive) aiming at facilitating family unity. Just to give a few examples, the Directive allows for the possibility to extend the definition of “family member” ; sets more favourable provisions in terms of unaccompanied minors and evidentiary requirements; and under certain conditions a waiver of the requirement to prove stable and regular finances and sickness insurance, and of the minimum residence requirement.

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The rights enshrined by the Family Reunification Directive may, however, be subject to various limitations, and Member States have a lot of room for manoeuvre in the application of the Directive.

In April 2014, as a result of the first implementation report<sup>173</sup> and a broad public consultation on family reunification in 2011-2012, the Commission adopted a Communication giving guidance on the application of the Family Reunification Directive.<sup>174</sup> It specifically called upon Member States not to use the margin of appreciation, which they enjoy under the Directive, “in a manner that would undermine the objective of the Directive and the effectiveness thereof.”<sup>175</sup>

#### 3.2.4.2 *Critical evaluation of the status quo and alternative approaches*

Many institutions responded to the Commission’s public consultation and the resulting Communication giving guidance on the application of the Directive, and put forward their own proposals on how effective family reunification for refugees might be achieved. We believe the most important observations and recommendations on family reunification made by NGOs and international organisations, with which we fully agree, are the following:<sup>176</sup>

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<sup>172</sup> Council Directive 2003/86/EC (22.09.2003) available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003L0086&from=EN> (last accessed 05.06.2016).

<sup>173</sup> European Commission (2008) Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right of family reunification (08.10.2008) available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1424367406878&uri=CELEX:52008DC0610> (last accessed 19.05.2016).

<sup>174</sup> European Commission (2014) Communication – on guidance for application of Directive 2003/86/EC on the right to family reunification (03.04.2014).

<sup>175</sup> European Commission (2014) Communication – on guidance for application of Directive 2003/86/EC on the right to family reunification (03.04.2014), p. 3.

<sup>176</sup> The following proposals are extracted from the following publications: Red Cross EU Office and ECRE (2014): *Disrupted Flight. The Realities of Separated Refugee Families in the EU*, p. 5, available at: [http://www.redcross.eu/en/upload/documents/pdf/2014/Asylum\\_Migration/RCEU%20ECRE%20-%20Family\\_Reunification%20Report%20Final\\_HR.pdf](http://www.redcross.eu/en/upload/documents/pdf/2014/Asylum_Migration/RCEU%20ECRE%20-%20Family_Reunification%20Report%20Final_HR.pdf) (last accessed 19.05.2016; See also European

Although the importance of the Directive is widely recognized, there are problems with its implementation. Experts point to a number of practical obstacles to family reunification that have to be removed: such as high application fees, the requirements for application documents that are difficult to provide, high travel costs and other costs associated with applications such as visa fees and DNA testing. Further, the income and housing conditions required by many Member States should be reconsidered – they are often set unrealistically high. A very important point is access to procedures: effective access to embassies and consulates abroad have to be ensured.

Scholars as well as UNHCR claim that the application of the Directive should be extended in two ways: 1) the beneficiaries of subsidiary protection should have the same rights as refugees; and 2) the term “family” should be interpreted in a wider sense (going beyond the “nuclear family”). “Dependency on the refugee” should not only be interpreted in the sense of financial dependency, but also in the sense of emotional and social dependency.

Experts demand rapid processing of family reunification claims for two main reasons: to avoid people risking their lives by choosing dangerous journeys; and to facilitate integration in the host country. At the same time, the individual circumstances of the applicants have to be thoroughly taken into account.

Moreover, basic fundamental rights have to be ensured throughout application procedures. The rights of the child have to be respected. Age assessment procedures, for example, should not affect the well being of children. The UNHCR *Guidelines on Determining the Best Interests of the Child* should be the point of reference.<sup>177</sup> Beneficiaries of international protection must have the possibility of being legally assisted throughout the whole procedure.

### 3.2.5 Temporary protection

#### 3.2.5.1 Background and definition

In 2001, the EU adopted a directive for a mechanism on temporary protection, applying to all EU Member States except Denmark.<sup>178</sup> It was designed against a background of conflict in the former Yugoslavia, which led to the arrival of many persons in need of protection in the EU. Temporary

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Commission (Directorate-General for Research) (2012) *Socio-Economic Research: Family Reunification Evaluation Project FARE* (June 2002) available at:

<http://bookshop.europa.eu/en/family-reunification-evaluation-project-fare-pbKINA21102/> (last accessed 05.06.2016);

Caritas Europa (2016) *Migrants and Refugees have rights!*, p.31, available at:

<http://www.caritas.eu/news/migrants-and-refugees-have-rights> (last accessed 04.06.2016); UNHCR (2012)

*Refugee Family Reunification*, available at: <http://www.unhcr.org/4f54e3fb13.pdf> (last accessed 19.05.2016);

Caritas Europa et al (2012) *75 NGOs call the EU Member States and the European Commission to safeguard family life of migrants and refugees* (31.05.2016) available at:

[http://www.ccme.be/fileadmin/filer/ccme/20\\_Areas\\_of\\_Work/01\\_Refugee\\_Protection/120606\\_-\\_FamilyLife\\_NGO\\_statement\\_75.pdf](http://www.ccme.be/fileadmin/filer/ccme/20_Areas_of_Work/01_Refugee_Protection/120606_-_FamilyLife_NGO_statement_75.pdf) (last accessed 19.05.2016).

<sup>177</sup> UNHCR (2008) *Guidelines on Determining the Best Interests of the Child* (May 2008) available at:

<http://www.unhcr.org/4566b16b2.pdf> (last accessed 19.05.2016).

<sup>178</sup> Council Directive 2001/55/EC (20.07.2001) available at: [http://eur-](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:212:0012:0023:EN:PDF)

[lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:212:0012:0023:EN:PDF](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:212:0012:0023:EN:PDF) (last accessed 19.05.2016).

protection (TP) is a procedure of an exceptional character designed for emergency situations, where a huge number of displaced persons (a so-called “mass influx”) flee armed conflicts, violence or human right violations, and arrive at the same time – be it by spontaneous arrivals or evacuation programmes.<sup>179</sup> The rationale behind temporary protection is that in such emergency situations, individual refugee status determination is not immediately practicable.<sup>180</sup> It is thus replaced by a “generalised form of protection to all members of a large group”.<sup>181</sup> Upon a proposal from the Commission, the European Council can establish a temporary protection regime with a qualified majority. The duration of temporary protection is foreseen to be one year. It may be extended by a maximum of two years when the reasons for the temporary protection regime persist. Member States have the duty to make access to the EU territory as easy as possible by facilitating visa obtainment.<sup>182</sup> The Directive includes a number of obligations towards the beneficiaries: the right to obtain a residence permit, access to employment, access to suitable accommodation, access to education (for minors), and the possibility of family reunification. The Directive foresees some elements of burden sharing between the Member States.<sup>183</sup>

The Directive has not yet been used. In the EU Migration Agenda, which sets out the short-term and long-term priorities of EU Asylum policies, it is not even mentioned.

### 3.2.5.2 *Critical evaluation*

Experts and NGOs have generally welcomed the Directive and argue that it should be used. The UNHCR, the European Parliament<sup>184</sup> and civil society organisations have several times criticised the fact that it is not applied to the current situation in Europe. Many experts state that, given the high numbers of refugees, especially from Syria, who are trying to come to Europe or have already arrived, the activation of the Directive is long overdue.<sup>185</sup> The big advantage of the Directive is that it applies not

<sup>179</sup> Council Directive 2001/55/EC (20.07.2011) available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:212:0012:0023:EN:PDF> (last accessed 19.05.2016).

<sup>180</sup> See <http://www.ecre.org/topics/areas-of-work/protection-in-europe/81-temporary-protection.html> (19.05.2016).

<sup>181</sup> <http://www.ecre.org/topics/areas-of-work/protection-in-europe/81-temporary-protection.html> (19.05.2016).

<sup>182</sup> “The Member States shall, if necessary, provide persons to be admitted to their territory for the purposes of temporary protection with every facility for obtaining the necessary visas, including transit visas. Formalities must be reduced to a minimum because of the urgency of the situation. Visas should be free of charge or their cost reduced to a minimum.” Article 8/3 of the Temporary Protection Directive, see Council Directive 2001/55/EC (20.07.2011) available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:212:0012:0023:EN:PDF> (last accessed 19.05.2016).

<sup>183</sup> See Article 25, Directive 2001/55/EC (20.07.2011) available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:212:0012:0023:EN:PDF> (last accessed 19.05.2016).

<sup>184</sup> See E. Giuld, C. Costello, M. Garlick and V. Moreno-Lax (2015) *Enhancing the Common European Asylum System* (Sept. 2015) p. 10, available at: <https://www.ceps.eu/publications/enhancing-common-european-asylum-system-and-alternatives-dublin> (last accessed 05.06.2016).

<sup>185</sup> For this and the following, see for example, ECRE (2016) *Information Note on the Council Directive 2001/55EC*, available at: <http://www.ecre.org/component/downloads/downloads/118.html> (last accessed 19.05.2016); C. Orchard and D. Chatty (2014) *High time for Europe to offer temporary protection to refugees from Syria?* (02.10.2014) on *openDemocracy*, available at: <https://www.opendemocracy.net/can-europe-make->

only to people already in Europe, but also permits the entry of persons in need of protection to the EU via safe and legal entry channels – either through the provision of visas or through an assisted evacuation scheme. Given the broad definition of the categories of persons falling within the scope of the Directive (“displaced persons”), its use would help to protect a broad range of people, not only refugees within the meaning of the 1951 Convention. The fact that no status determination is needed would save time and resources. This would relieve the completely overburdened national asylum agencies, and would provide Member States with the necessary time for setting up a legally well-founded and well organised registration system – instead of closing their borders. Temporary protection does not hinder refugees to seek for asylum.<sup>186</sup> Another advantage is that the programme would be launched EU-wide, thus contributing to responsibility sharing between EU Member States. Offering collective temporary protection for refugees fleeing from war and crimes against humanity would be a strong signal not only to the victims but also to the societies of EU Member States. The signal would be that temporary protection refugees will be protected and provided for a certain time, which will be used to prepare them for repatriation into safe and stable regions of their home countries, in particular by educating them in measures, procedures and techniques of reconciliation and reconstruction. Such a policy would also help to avoid a dramatic depopulation in Syria and Iraq that would aggravate the reconstruction of the region for decades. Since also many well-educated and prosperous people escaped decisive knowledge and infrastructure would be lost respectively missing.

However, there are a number of criticisms about the Directive.<sup>187</sup> First of all, while its use might help accelerate procedures, it does not help to solve the “reception crisis”. Nevertheless, the precondition is that people are welcomed and accommodated by the Member States. Second, the beneficiaries of temporary protection are not granted the same rights as asylum seekers. Permission to work, for example, is limited, as is access to healthcare, which is only granted in emergency situations. However, the restriction of freedom of movement of the hosting state can be seen as an advantage in order to avoid free movement all over Europe with increasing challenges for the administration of refugees. The strongest challenge will be that people cannot stay for longer than three years with this status. It is very unlikely that people that flee to Europe from crisis regions, especially Syria, will be able to return before the expiry of this period. For this group in particular, prima facie recognition is a better tool: In a prima facie recognition procedure, a State may acknowledge refugee status of a large group of individuals, without an individual determination, where their claim to refugee status is manifest and based on similar grounds (see 2.2.5).

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it/cynthia-orchard-dawn-chatty/high-time-for-europe-to-offer-temporary-protection-to (last accessed 19.05.2016); H. Tretter (2016) “Vorübergehender Schutz als möglicher Ausweg” (31.01.2016) *Die Presse*, available at: [http://diepresse.com/home/recht/rechtallgemein/4915957/Fluchtlingskrise\\_Vorubergehender-Schutz-als-moglicher-Ausweg](http://diepresse.com/home/recht/rechtallgemein/4915957/Fluchtlingskrise_Vorubergehender-Schutz-als-moglicher-Ausweg) (last accessed 19.05.2016). See also H. Tretter (ed.), *Temporary Protection für bosnische Flüchtlinge in Europa*, Volume I and II (2000, 2005) on the various functioning models of TP in several European states.

<sup>186</sup> Article 17 Temporary Protection Directive: Persons enjoying temporary protection must be able to lodge an application for asylum at any time.

<sup>187</sup> For a critical evaluation of the Directive see, for example, ECRE (2016) *Information Note on the Council Directive 2001/55EC*, available at: <http://www.ecre.org/component/downloads/downloads/118.html> (last accessed 19.05.16).

Generally, the temporary protection status may mean even more uncertainty for people who are not able to return to their countries of origin, in terms of their being able to build a new life in Europe. Another problematic aspect could be the fact that the Directive does not include provisions on procedures. This might lead to differences between different EU Member States. The Directive also does not provide for the possibility of an appeal where temporary protection is denied.<sup>188</sup> On the other hand, taking into account the total collapse of the Dublin system with its strict and non-negotiable state obligations, the margin of appreciation which the Directive is offering to EU Member States might be a chance to encourage them to make common cause, to take over responsibility for TP refugees and to develop flexibly proper procedures and programmes which are in accordance with the standards of the Directive *and* with the legal and general framework of the hosting state.

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<sup>188</sup> ECRE (2016) *Information Note on the Council Directive 2001/55EC*, available at: <http://www.ecre.org/component/downloads/downloads/118.html> (last accessed 19.05.2016).



## 4 To reform Dublin, or to go beyond Dublin? An allocation system favourable to the interests of persons in need of protection

The so-called “Dublin system” has been subject to unanimous criticism from civil society organisations and academics, and there have been a series of key judgments from European and national courts revealing associated human rights abuses. However, the EU and its Member States have so far missed the opportunity to fundamentally rethink the system, leaving it unequipped to cope with today’s migration realities in a way that is human rights oriented. After briefly describing the background of and the flaws in the Dublin system, we will present a number of elements that should be taken into account to better protect the fundamental rights of persons in need of protection.

### 4.1 Background and limitations

The issue of allocating responsibility for international protection applications – first governed by the Dublin Convention,<sup>189</sup> and subsequently the Dublin II Regulation – is today regulated by the Dublin III Regulation.<sup>190</sup> This entered into force in all EU Member States, and all four Schengen associated countries, on 1 January 2014. The Dublin system works in parallel to the Eurodac,<sup>191</sup> a large-scale database storing the biometric data (fingerprints) of asylum seekers and migrants who have been apprehended in connection with irregular border crossings.

Civil society organisations and academics<sup>192</sup> agree that Dublin has intrinsic flaws that require urgent and comprehensive reform. We share the following concerns.

#### *Lack of harmonisation: a protection lottery*

The Dublin system is based on the use of the so-called “safe country” concept. This is the presumption that all EU Member States should be considered “safe”, and offer the same level of protection. This presumption has proven to be widely wrong. The strong divergences in recognition rates, procedures and safeguards enjoyed by protection seekers during the determination of claims in different Member States, tell us that even today asylum-seekers entering the EU are subject to a “protection lottery”.

European and domestic courts have played a key role in revealing the inconsistencies of the “safe country” concept. After the ECtHR’s leading judgment *M.S.S. v. Belgium and Greece*<sup>193</sup> opened the way,

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<sup>189</sup> Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities (“Dublin Convention”) (15.06. 1990) OJ C 254 , pp. 1-12.

<sup>190</sup> European Parliament and Council Regulation (EU) No 604/2013 (26.07.2013) p. 31–59.

<sup>191</sup> European Parliament and Council Regulation (EU) No 604/2013 (26.07.2013) p. 1–30.

<sup>192</sup> JRS, Protection Interrupted (n 68); S. Fratzke (2015) *Not Adding Up: The Fading Promise of Europe’s Dublin System* Brussels: Migration Policy Institute Europe; European Parliament – Policy Department (2014) *New approaches, alternative avenues and means of access to asylum procedures for persons seeking international protection* (Oct. 2014) available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL\\_STU%282014%29509989\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL_STU%282014%29509989_EN.pdf) (last accessed 18.05.2016).

<sup>193</sup> ECtHR – *M.S.S. v Belgium and Greece*, Appl. No. 30696/09 (judgment) (21.11.2011).

a series of domestic and European judgments found Dublin transfers to certain Member States in violation of Article 3 ECHR or Article 4 EUCFR, due to the deficiencies of asylum procedures and reception conditions in the receiving countries.<sup>194</sup>

*Family unity criteria are too rarely applied*

The practical application of the “Dublin criteria” is particularly problematic. The Dublin III Regulation set up a number of hierarchical criteria for determining responsibility for applications for international protection. The primary criteria to be taken into considerations are those based on the best interest of any children (Article 8) and on family unity (Articles 9-11). These are followed by the criteria of issuance of residence documents or visas (Article 12), and the criteria of irregular entry or stay (Article 13). In addition to the abovementioned criteria, the Regulation further identifies: the “dependency” criterion (Article 16), a “discretionary” and a “humanitarian” clause (Article 17). These provide tools for MSs to further preserve family unity, offer protection to particularly vulnerable persons, and more in general mitigate the rigidity of the Dublin criteria.

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The practical application of the criteria rarely respects this hierarchy. In particular, the recent evaluation of the Dublin III Regulation confirmed that the family unity criteria – the first in the hierarchy, and the only one to take into account the protection seekers’ perspective – are too rarely applied. It also showed that the procedures for evaluating family connections are widely ineffective in practice.<sup>195</sup>

*Uneven distribution: the lack of solidarity with key border states*

Contrary to the requirement that the interests of children and family unity are given precedence, Member States place a disproportionate emphasis on irregular entry and stay.<sup>196</sup> This has put particular pressure on the domestic systems of the Member States at the EU’s external borders, which, due to their geographical location, are the main entry points into the EU. As a result, the system fails to ensure a fair and sustainable sharing of responsibilities amongst the EU Member States. This perceived unfairness at the heart of the Dublin rules has in practice encouraged both applicants *and* Member

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<sup>194</sup> ECtHR – *Tarakhel v. Switzerland*, Appl. No. 29217/12 (judgment) (04.11.2014); *N.S v United Kingdom and M.E v Ireland* CJEU/C-411/10 and C-493/10 (decision) (21.12.2011). For a better overview on this topic see: European Legal Network on Asylum (2015) *Information Note Dublin transfers post-Tarakhel: Update on European case law and practice* (Oct 2015).

<sup>195</sup> European Commission (DG Migration and Home Affairs) (2016) *Evaluation of the Implementation of the Dublin III Regulation – Final Report* (18.03.2016) p. 31, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation\\_of\\_the\\_implementation\\_of\\_the\\_dublin\\_iii\\_regulation\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation_of_the_implementation_of_the_dublin_iii_regulation_en.pdf) (last accessed 05.06.2016).

<sup>196</sup> This has been again confirmed by the latest evaluation of the Dublin III Regulation. European Commission (DG Migration and Home Affairs) (2016) *Evaluation of the Implementation of the Dublin III Regulation – Final Report* (18.03.2016) p. 27, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation\\_of\\_the\\_implementation\\_of\\_the\\_dublin\\_iii\\_regulation\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation_of_the_implementation_of_the_dublin_iii_regulation_en.pdf) (last accessed 05.06.2016).

States to “circumvent the system”.<sup>197</sup> Lately, many Member States have resorted to a “wave through approach” while others have introduced temporary internal border controls and fences.

### *Coercion*

The Dublin system is inherently and ever-increasingly linked to the wide use of coercion, such as detention, forced transfers from one Member State to another, and forced fingerprinting.<sup>198</sup> Considering the inherent vulnerability of protection seekers, these measures should be reduced as much as possible, as they may not only raise problems from a fundamental rights point of view, but are also likely to have a detrimental effect on the overall functioning of the system, affecting applicant cooperation and encouraging secondary movements and legal challenges to Dublin transfers.<sup>199</sup> As is widely pointed out in the literature,<sup>200</sup> in the long run such coercive approaches have repercussions for the applicants’ chances to integrate and rebuild a new life. This not only has negative consequences for the applicant’s future, but it also has negative implications for the host Member State, upon which the applicant is more likely to continue to be dependent financially.

### *No proper mechanism to cope with emergency situations*

Finally, recent developments have demonstrated that the system is unequipped to deal with emergency situations and a sudden increase in arrivals. As a reaction to the recent large-scale arrivals, the Commission has adopted a new intra-EU emergency relocation mechanism,<sup>201</sup> and a so-called “hotspots approach”. So far, however, the practical implementation of the relocation mechanism has been largely unsatisfactory. As of April 2016, out of the 160,000 applicants initially anticipated, only 1,145 had been relocated. This clearly illustrates that the measure has not found much favour among

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<sup>197</sup> Maiani, F, *The Dublin III Regulation: A New Legal Framework for a More Humane System?*, in: Chetail, V, De Bruycker, P and Maiani, F (2016): *Reforming the Common European Asylum System: The New European Refugee Law*, Brill/Nijhoff, p. 108.

<sup>198</sup> European Commission (2015) *Commission Staff Working Document on Implementation of the Eurodac Regulation as regards the obligation to take fingerprints* (27.5.2015). For an analysis on the obligation to fingerprint from a fundamental rights perspective see: FRA (2015) *Fundamental rights implications of the obligation to provide fingerprints for Eurodac* (May 2015, available at: [http://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2015-fingerprinting-focus-paper\\_en.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/fra-2015-fingerprinting-focus-paper_en.pdf) (last accessed 05.06.2016).

<sup>199</sup> Maiani, F, *The Dublin III Regulation: A New Legal Framework for a More Humane System?*, in: Chetail, V, De Bruycker, P and Maiani, F (2016): *Reforming the Common European Asylum System: The New European Refugee Law*, Brill/Nijhoff, p. 110.

<sup>200</sup> ECRE, *Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered*, March 2008, at 25-29; Amnesty International, *Lives adrift. Refugees and migrants in peril in the central Mediterranean*, September 2014, p. 60; Jesuit Refugee Service, *Rescued What Next? Protection Seekers Stranded In Sicily*, October 2014; S. Fratzke, *Not Adding Up: The Fading Promise of Europe’s Dublin System*, cit, pp. 20 e 25. For a wider perspective, see also T.A. Aleinikoff (2015) *Policy Brief From Dependence to Self-Reliance: Changing the Paradigm in Protracted Refugee Situations*, (May 2015) Washington DC: Migration Policy Institute.

<sup>201</sup> Council Decision (EU) 2015/1601 (22.09.2015); and Council Decision (EU) 2015/1523 (14.09.2015).

Member State, some of whom have requested temporary suspensions,<sup>202</sup> have decided not to participate at all,<sup>203</sup> or have even challenged it before the CJEU.<sup>204</sup>

Moreover, the mechanism seems to repeat the same mistakes of Dublin in so far as it does not take into account the applicants' preferences.<sup>205</sup> This has resulted in significant numbers of migrants refusing to cooperate with authorities for the purpose of fingerprinting,<sup>206</sup> as well as in migrants being detained in closed centres in inadequate conditions. Similar concerns can be raised for so-called "hotspots", which have been criticised by civil society organisations for having an unclear legal basis, for having grossly inadequate reception conditions and inadequate opportunities to access procedures.<sup>207</sup>

All of these factors have had serious repercussions on the overall functioning of the Dublin system, as well as long-lasting consequences on the level of mutual trust between Member States. They therefore require urgent action.

<sup>202</sup> This is for example the situation of Austria. Austria benefits from a temporary suspension of the relocation of up to 30 per cent of applicants allocated to Austria under Council Decision (EU) 2015/1601. As a consequence Austria has a one year suspension for the relocation of 1 065 persons. Austria however should still be relocating (and submitting pledges for) the remaining allocations.

<sup>203</sup> European Commission (2016) *Second report on relocation and resettlement* (12.04.2016) p. 3, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160412/communication\\_second\\_report\\_relocation\\_resettlement\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160412/communication_second_report_relocation_resettlement_en.pdf) (last accessed 19.05.2016).

<sup>204</sup> *Slovakia v Council* C-643/15 (15.01.2016); *Hungary v Council* C-647/15 (15.01.2016); see also Z. Vikarska (2015) "The Slovak Challenge to the Asylum-Seekers' Relocation Decision: A Balancing Act" (29.12.2015) in *EU Law Analysis*, available at: <http://eulawanalysis.blogspot.co.at/2015/12/the-slovak-challenge-to-asylum-seekers.html> (last accessed 05.06.2016).

<sup>205</sup> V. Moreno-Lax (2015) *Europe in Crisis: Facilitating Access to Protection, (Discarding) Offshore Processing and Mapping Alternatives for the Way Forward*, *Red Cross EU Office*, p. 14, available at: [http://reliefweb.int/sites/reliefweb.int/files/resources/Europe%20in%20Crisis\\_Dr%20Moreno.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/Europe%20in%20Crisis_Dr%20Moreno.pdf) (last accessed 19.05.2016).

<sup>206</sup> Italian Parliamentary Commission for the Protection and Promotion of Human Rights (2016) "Report on Centres for Identification and Expulsion [Rapporto Sui Centri Di Identificazione Ed Espulsione]" (Feb, 2016) p. 22, available at: [https://www.senato.it/application/xmanager/projects/leg17/file/repository/commissioni/dirittumaniXVII/rapporto\\_cie.pdf](https://www.senato.it/application/xmanager/projects/leg17/file/repository/commissioni/dirittumaniXVII/rapporto_cie.pdf) (last accessed 05.06.2016).

<sup>207</sup> See European Council on Refugees and Exiles (ECRE) and the European Legal Network on Asylum (ELENA) *letter to the Commissioner for Migration, Home Affairs and Citizenship*, *European Commission* (25.01.2016) available at: [http://www.accem.es/ficheros/documentos/pdf\\_noticias/2016\\_pdf/ELENA%20letter%20relocation-hotspots%20EC.pdf](http://www.accem.es/ficheros/documentos/pdf_noticias/2016_pdf/ELENA%20letter%20relocation-hotspots%20EC.pdf) (last accessed 05.06.2016); and European Parliament – Policy Department *On the frontline: the hotspot approach to managing migration* (May 2016) available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556942/IPOL\\_STU\(2016\)556942\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556942/IPOL_STU(2016)556942_EN.pdf) (last accessed 05.06.2016).

## 4.2 Reforming the Dublin system in line with fundamental rights

The above mentioned relocation measures put forward by the Commission are only temporary measures aimed at coping with an emergency situation.<sup>208</sup> They do not address the more profound concerns attaining to the Dublin system. For years, civil society, academia and think-thanks have presented different ideas on how to change the Dublin system.<sup>209</sup> They argue that there is a need to radically reform the present situation by rethinking the system from its foundations.<sup>210</sup>

The Commission appears to have taken up some of this criticism in its Communication of April 2016, which initially tabled two different options for reforming the Dublin system.<sup>211</sup> The first would have aimed at supplementing the current system with a corrective fairness mechanism. The second would have set up a new system for allocating asylum applications in the EU based on a distribution key. Perhaps unsurprisingly, when putting forward a proposal for a recast Dublin Regulation (Dublin IV proposal),<sup>212</sup> the Commission opted for the less ambitious option, i.e. “corrective fairness option”,<sup>213</sup>

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<sup>208</sup> Council Decision (EU) 2015/1601 (22.09.2015); and Council Decision (EU) 2015/1523 (14.09.2015).

<sup>209</sup> Amongst others the following studies have been conducted: European Parliament – Policy Department (2010) *What system of burden-sharing between Member States for the reception of asylum seekers?* (22.01.2010) available at: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/419620/IPOL-LIBE\\_ET\(2010\)419620\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/419620/IPOL-LIBE_ET(2010)419620_EN.pdf) (last accessed 05.06.2016); European Parliament – Policy Department (2014) *New approaches, alternative avenues and means of access to asylum procedures for persons seeking international protection* (Oct. 2014) available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL\\_STU%282014%29509989\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL_STU%282014%29509989_EN.pdf) (last accessed 18.05.2016); and European Commission (2013) *Study on the Feasibility and legal and practical implications of establishing a mechanism for the joint processing of asylum applications on the territory of the EU* (13.02.2013) available at: [http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/common-procedures/docs/jp\\_final\\_report\\_\\_final\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/common-procedures/docs/jp_final_report__final_en.pdf) (last accessed 05.06.2016).

<sup>210</sup> For a comprehensive overview of the alternative approaches to the Dublin system see: R. Williams (2015) *Beyond Dublin: A Discussion Paper for the Greens/EFA in the European Parliament* (18.03.2015) available at: [http://www.greens-efa.eu/fileadmin/dam/Documents/Policy\\_papers/Beyond\\_Dublin\\_paper\\_final.pdf](http://www.greens-efa.eu/fileadmin/dam/Documents/Policy_papers/Beyond_Dublin_paper_final.pdf) (last accessed 05.06.2016).

<sup>211</sup> European Commission (2016) *Communication – Towards A Reform Of The Common European Asylum System And Enhancing Legal Avenues To Europe* (06.04.2016) available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160406/towards\\_a\\_reform\\_of\\_the\\_common\\_european\\_asylum\\_system\\_and\\_enhancing\\_legal\\_avenues\\_to\\_europe\\_-\\_20160406\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160406/towards_a_reform_of_the_common_european_asylum_system_and_enhancing_legal_avenues_to_europe_-_20160406_en.pdf) (last accessed 05.06.2015).

<sup>212</sup> European Commission (2016) Proposal for a Regulation 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) (04.05.2016) available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/dublin\\_reform\\_proposal\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/dublin_reform_proposal_en.pdf) (last accessed 05.06.2016).

<sup>213</sup> European Commission (2016) Proposal for a Regulation 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) (04.05.2016) available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/dublin\\_reform\\_proposal\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/dublin_reform_proposal_en.pdf) (last accessed 05.06.2016)..

and for a series of amendments aimed at “streamlining the Dublin Regulation and improving its efficiency”.

It is, of course, too early to draw any conclusions. However, we believe that the following should be taken into account in any future reform of the Dublin system in order for it to be compatible with fundamental rights.

### 1. *Make the best interests of the child and family unity considerations an absolute priority*

In light of the UNCRC, Article 8 ECHR, and Article 24 EUCFR, any future allocation system must give primary consideration to the best interest of the child in the case of both accompanied and unaccompanied minors. Minors are particularly vulnerable and their situation must be given special consideration.

Provided that it is in the best interest of the child, Member States should always reunite children with their families. In the absence of a family member or a relative, and in cases of multiple applications, responsibility should be allocated according to the CJEU judgment in *MA and others*:<sup>214</sup> i.e. the Member State where the unaccompanied minor is physically present – where he/she most recently applied – should be responsible. Transferring unaccompanied minors from one state to another runs counter to the best interest of the child as it further delays access to procedures and, therefore, the care and attention children need. In this regard, the latest proposal of the Commission is problematic as it suggests that in such situations “the Member State of *first* application” should be responsible for an unaccompanied minor, “unless this is not in the best interests of the minor”. This ignores the CJEU judgment in *MA and others*.<sup>215</sup> Moreover, we believe that the Commission should go back to its 2014 proposal<sup>216</sup> that when an unaccompanied minor has not yet applied in the Member State where he/she is physically present, the authorities should be under an obligation to “inform” the child of the possibility of applying for international protection there, and give him/her an “effective opportunity” to apply.

Similarly, in accordance with Article 8 ECHR and Article 7 EUCFR, any new mechanism for the allocation of responsibilities amongst Member States should give absolute priority to the right to respect for private and family life. In this regard, we welcome the May 2016 Dublin IV proposal, to extend the definition of family members to sibling/s of the applicant and family relations formed after leaving the country or origin but before arrival in EU territory. However, further steps should include: closer monitoring to ensure the correct application of the family unity criteria; facilitating family tracing procedures; and more realistic evidentiary requirements for proving family connections.

### 2. *Priority given to verifiable individual preferences*

As established by the 1979 recommendation of the Executive Committee, refugee’s preferences “as regards the country in which he wishes to seek asylum [...] should as far as possible be taken into

<sup>214</sup> R (MA and others) v Secretary of State for the Home Department CJEU/C-648/11 (judgment) (06.06.2013).

<sup>215</sup> R (MA and others) v Secretary of State for the Home Department CJEU/C-648/11 (judgment) (06.06.2013).

<sup>216</sup> European Commission (2014) Proposal for a Regulation a Regulation of the European Parliament and of the Council amending Regulation (EU) No 604/2013 as regards determining the Member State responsible for examining the application for international protection of unaccompanied minors with no family member, sibling or relative legally present in a Member State (26.06.2014) available at: <http://ec.europa.eu/transparency/regdoc/rep/1/2014/EN/1-2014-382-EN-F1-1.Pdf> (last accessed 05.06.2016).

account.”<sup>217</sup> On the basis of this recommendation, a consortium of NGOs proposed to allocate responsibility according to the “free choice” of the asylum seeker,<sup>218</sup> with the aim of establishing a more “equitable, solidarity-based system of sharing responsibility”. According to this proposal, the Member State responsible will be the one where the applicant voluntarily decides to lodge an application.<sup>219</sup> While this approach would certainly overcome the problem of coercion, it would, however, not necessarily solve the issue of the fair sharing of responsibilities amongst Member States. This could entail the risk that Member States would engage in a “race to the bottom”, voluntarily worsening standards in terms of procedures and reception conditions, in order not to become the main destination country.

In contrast, we find the approach recently proposed by the International Institute of Humanitarian Law, under the symbolic name “Athens Regulation”, very interesting.<sup>220</sup> Their model would be to align the allocation of responsibility for the international protection of applicants with the general principles for the determination of jurisdiction used in civil, commercial and criminal matters. The determination of jurisdiction in asylum procedures would therefore be identified on the basis of the “material connection of a situation or a person with the State’s legal order and territory, and the need to ensure an efficient and speedy development of the legal procedure”. Similar to the free choice model, this approach tries to remove coercion, however it does so by identifying *objective, verifiable and genuine* links between the applicant and a particular Member State. As “relevant substantial links” the author mentions the presence of family members or relatives, evidence of past work experience, professional qualifications obtained from a certain country, knowledge of languages, or the existence of a local sponsor. The authors suggest that such links should be identified with the support of asylum liaison officers and EASO experts. Only when there are no substantial links should a mandatory quota approach – based upon the reception capacity of each Member State – be applied.

We support this proposal and believe that objective, verifiable and genuine links, such as those proposed by the International Institute of Humanitarian Law, could represent a valid alternative to current practice.

### 3. *A distribution key subsidiary to family and other applicants’ links*

<sup>217</sup> Excom Conclusion No. 15 (XXX) - 1979 Refugees without an Asylum Country,, UNHCR (2001) Revisiting the Dublin Convention: Some Reflections by UNHCR in Response to the Commission Staff Working Paper (19.01.2001) p. 5.

<sup>218</sup> Pro Asyl (ed.) *Memorandum – Allocation of refugees in the European Union: for an equitable, solidarity-based system of sharing responsibility* (Mar. 2013) available at [https://www.proasyl.de/wp-content/uploads/2013/03/Memorandum\\_Dublin\\_engl.pdf](https://www.proasyl.de/wp-content/uploads/2013/03/Memorandum_Dublin_engl.pdf) (last accessed 05.06.2016).

<sup>219</sup> See Excom Conclusion No. 15 (XXX) - 1979 Refugees without an Asylum Country,, UNHCR (2001) Revisiting the Dublin Convention: Some Reflections by UNHCR in Response to the Commission Staff Working Paper (19.01.2001) p. 5; also UN Human Rights Council (2015) Report of the Special Rapporteur of Human Rights for Migrants A/HRC/29/36, § 66.

<sup>220</sup> M. Di Filippo (2016) *Policy Brief - From Dublin to Athens: A Plea for a Radical Rethinking of the Allocation of Jurisdiction in Asylum Procedures* (Jan. 2016) available at <http://statewatch.org/news/2016/feb/eu-from-dublin-to-athens-reforming-dublin-reg-1-16.pdf> (last accessed 05.06.2016).



In order to ensure that a new system is fairer not only for applicants but also for Member States, family unity criteria and criteria based on other verifiable individual preferences could be combined with a quota approach or a distribution key. These would be applied where an applicant has no substantial link to an EU Member State, or if the Member State concerned is already disproportionately burdened.<sup>221</sup>

A *pure* distribution key approach risks reproducing the same mistakes of the present system, by not properly taking into consideration the applicants' perspective. This would, again, risk encouraging secondary movements and poorer cooperation between applicants and authorities: for example as has been the case with fingerprinting in the emergency relocation scheme.<sup>222</sup>

However a *subsidiary* distribution key approach applying where an applicant has no substantial link to an EU Member State, or if the Member State concerned is already disproportionately burdened could mitigate this problem.<sup>223</sup>

There are a number of proposals as to the factors that should be taken in consideration in a possible distribution key. Some of these are based on the German model (population size, size of the Member State territory, and GDP).<sup>224</sup> Others, such the one used by the Commission in the emergency relocation mechanism, introduce some variations (the size of the population; GDP; average number of spontaneous asylum applications; number of resettled refugees per one million inhabitants over the period 2010-2014; unemployment rate).<sup>225</sup> It is not the purpose of this study to outline a viable distribution key. However we share the view of the European Parliament that any distribution key should be "based on appropriate indicators relating to Member States' reception and integration capacities, such as Member States' GDP, population and surface area and beneficiaries' best interest and integration prospects".<sup>226</sup>

<sup>221</sup> M. Di Filippo (2016) *Policy Brief - From Dublin to Athens: A Plea for a Radical Rethinking of the Allocation of Jurisdiction in Asylum Procedures* (Jan. 2016) available at <http://statewatch.org/news/2016/feb/eu-from-dublin-to-athens-reforming-dublin-reg-1-16.pdf> (last accessed 05.06.2016).

<sup>222</sup> Italian Parliamentary Commission for the Protection and Promotion of Human Rights (2016) "Report on Centres for Identification and Expulsion [Rapporto Sui Centri Di Identificazione Ed Espulsione]" (Feb, 2016) p. 22, available at: [https://www.senato.it/application/xmanager/projects/leg17/file/repository/commissioni/dirittiumaniXVII/rapporto\\_cie.pdf](https://www.senato.it/application/xmanager/projects/leg17/file/repository/commissioni/dirittiumaniXVII/rapporto_cie.pdf) (last accessed 05.06.2016).

<sup>223</sup> M. Di Filippo (2016) *Policy Brief - From Dublin to Athens: A Plea for a Radical Rethinking of the Allocation of Jurisdiction in Asylum Procedures* (Jan. 2016) available at <http://statewatch.org/news/2016/feb/eu-from-dublin-to-athens-reforming-dublin-reg-1-16.pdf> (last accessed 05.06.2016).

<sup>224</sup> The German distribution key is based on three criteria: E. R. Thielmann (2003) "Between Interests and Norms: Explaining Burden-Sharing in the European Union" in: *Journal of Refugee Studies*, Vol. 16, No. 3, pp253-273, available at: <http://personal.lse.ac.uk/thielema/Papers-PDF/JRS-16-3-BS-Interests-Norms.pdf> (last accessed 05.06.2016).

<sup>225</sup> For a detailed analysis see International Centre for Migration Policy Development (2014) *An Effective Asylum Responsibility-Sharing Mechanism* (Oct. 2014) available at: [http://www.icmpd.org/fileadmin/ICMPD-Website/ICMPD\\_General/Publications/2014/ICMPD\\_TP\\_Responsibility\\_Sharing\\_October\\_FINAL.pdf](http://www.icmpd.org/fileadmin/ICMPD-Website/ICMPD_General/Publications/2014/ICMPD_TP_Responsibility_Sharing_October_FINAL.pdf) (last accessed 05.06.2016).

<sup>226</sup> European Parliament (2012) Resolution on enhanced intra-EU solidarity in the field of asylum

In order to motivate Member States to participate in such a mechanism, the introduction of financial compensation for the Member States carrying most of the burden could be considered.<sup>227</sup> In particular, Member States under particular pressure should be eligible for receiving more financial resources, including from the Asylum and Migration Fund.

Finally, one should not forget that any new system for the allocation of responsibility would have to be coordinated with a wider reform of legal entry channels into the EU (see chapter 3.2.). As shown by the emergency relocation mechanism, the “hotspot approach” cannot work if Member States with external borders remain the main point of access into the EU. There is therefore an urgent need to increase legal pathways into the EU so that applicants do not continue to arrive only at the EU’s southern borders. If legal pathways were increased considerably, Member States with external borders and their reception systems would be significantly relieved, with positive consequences for the overall functioning of the system, and, of course, for the lives of thousands of applicants who could benefit from more humane and dignified reception conditions.

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4. *Reduce coercion and establish common procedures and reception conditions in conformity with fundamental rights*

Coercive measures, such as detention and forced fingerprinting, should be reduced as much as possible. It has been pointed out by many NGOs and scholars<sup>228</sup> that the only credible way to minimise secondary movements across the EU is to take applicants’ family and substantial links more into consideration, and to enhance processing capacity and reception conditions in all Member States. This would help ensure that the rights of international protection applicants and beneficiaries are respected in all Member States. The same approach has been recommended by the UN Special Rapporteur on the Human Rights of Migrants, François Crépeau, who affirmed: “Standardizing reception conditions and refugee status determination procedures throughout the European Union should be a top priority, in order to avoid “asylum dumping” and stress on the countries that offer better conditions.”<sup>229</sup>

In this regard, differences between Member States – in terms of the outcome of procedures, recognition rates, the international protection status granted, and reception conditions – should be urgently addressed. The need for the better harmonisation of procedures could be addressed through

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(2012/2032(INI)) (11.09.2012) § 47.

<sup>227</sup> J. C. Hathaway and R. A. Neve (1997) “Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection”, in: *Harvard Human Rights Journal*, Vol. 10 , pp. 115-211, available at: <http://repository.law.umich.edu/cgi/viewcontent.cgi?article=2621&context=articles> (last accessed 05.06.2016); on tradable quotas see J. Fernández-Huertas Moraga and H. Rapoport (2014) *Discussion Paper Tradable Refugee-Admission Quotas and EU Asylum Policy* (Nov. 2014) available at: <http://ftp.iza.org/dp8683.pdf> (last accessed 05.06.2016).

<sup>228</sup> European Parliament – Policy Department (2014) *New approaches, alternative avenues and means of access to asylum procedures for persons seeking international protection* (Oct. 2014) available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL\\_STU%282014%29509989\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL_STU%282014%29509989_EN.pdf) (last accessed 18.05.2016).

<sup>229</sup> UN Human Rights Council (2015) Report of the Special Rapporteur of Human Rights for Migrants A/HRC/29/36, § 66.

legislative harmonisation, closer monitoring, an increase in the use of supported processing, and, in the long term, centralisation at the EU level of the determination procedures.

As for the reception conditions, urgent steps need to be taken to improve the situation in hotspots, and, more generally, in overburdened Member States. In this regard, more support to EU front-line Member States is required. Although Greece and Italy are being supported in the identification of protection seekers through the hotspot approach, still today they remain responsible for the applicants' reception, processing and returns.

More generally, any measures aimed at preventing secondary movements should be in full compliance with fundamental rights, and especially with human dignity. In this last regard, the latest Commission's proposals raise serious and fundamental rights issues. These include proposals to introduce an *obligation* upon protection seekers to apply for protection in the Member State of first irregular entry sanctioned with a curtailment of material reception rights and accelerated processing procedures where applicants fail to comply with such an obligation. This is of even greater concern where existing reception conditions in certain Member States are already incompatible with fundamental rights. Moreover, as established by the CJEU in its judgment *Cimade and Gisti*,<sup>230</sup> international protection applicants are entitled to the full benefit of the RCD, including from a Member State that seeks to transfer an applicant to another Member State pursuant the Dublin procedure.

##### 5. *Mutual recognition of positive asylum decisions, transfers of international protection and increased mobility rights*

Finally, another proposal advanced by various scholars and NGOs to mitigate the coercive effects of the current system aims to increase the mobility rights of the beneficiaries of international protection. Under the present system, it is still very difficult for refugees and the beneficiaries of subsidiary protection to take up residence in another EU Member State, due to the demanding conditions set by the Long Term Residence Directive<sup>231</sup> and the gaps in framework concerning the transfer of international protection and the mutual recognition of asylum decisions.

We therefore share the view that the mutual recognition of positive asylum decisions and “transfers of international protection”<sup>232</sup> could improve the present anomalous situation in which the system

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<sup>230</sup> *Cimade and Groupe d'information et de soutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, CJEU/C-179/11 (judgment) (27.09.2012).

<sup>231</sup> Council Directive 2003/109/EC (25.11.2003) (as amended) available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1461153836175&uri=CELEX:02003L0109-20110520> (last accessed 05.06.2016).

<sup>232</sup> ECRE (2014), *Mutual recognition of positive asylum decisions and the transfer of international protection status within the EU*. Discussion Paper, available at: <http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/ECRE-%20Mutual%20recognition%20and%20transfer%20of%20status%20within%20EU%20.pdf> (last accessed 31.05.2016) See also Centre for European Policy Studies (2015) *Enhancing the Common European Asylum System and Alternatives to Dublin* (04.08.2015) p. 39, available at: <https://www.ceps.eu/publications/enhancing-common-european-asylum-system-and-alternatives-dublin> (last accessed 05.06.2016); S. Peers (2012) “Transfer of International Protection and European Union Law”, in: *International Journal of Refugee Law*, Vol. 24, No. 3, pp. 527–560; European Parliament – Policy Department

recognises negative decisions but remains silent on the mutual recognition of positive decisions, and does not facilitate the free movement of beneficiaries. As will be seen below, this would be a way of not only introducing a de facto corrective fairness mechanism into the Dublin criteria, but it would also be a step forward in the realisation of the promises set out in the TFEU: i.e. the establishment of “a uniform status for asylum for nationals of third countries, valid throughout the Union” (Article 78 TFEU).

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(2014) New approaches, alternative venues and means of access to asylum procedures for persons seeking international protection (Oct. 2014) pp. 57-58, available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL\\_STU%282014%29509989\\_EN.pdf?utm\\_content=buffer17527&utm\\_medium=social&utm\\_source=twitter.com&utm\\_campaign=buffer](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL_STU%282014%29509989_EN.pdf?utm_content=buffer17527&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer) (last accessed 05.06.2016); See also L. Egesberg, J. van Selm,, E. Tsolakis and J. Doomernik (2004) Study on The transfer of protection status in the EU, against the background of the common European asylum system and the goal of a uniform status, valid throughout the Union, for those granted asylum (25.06.2004) European Commission, available at <http://bookshop.europa.eu/en/study-on-the-transfer-of-protection-status-in-the-eu-against-the-background-of-the-common-european-asylum-system-and-the-goal-of-a-uniform-status-valid-throughout-the-union-for-those-granted-asylum-pbNE6104872/> (last accessed 05.06.2016)

## 5 More harmonisation through joint and supported processing

### 5.1 Background and definitions

As described above, one of the big challenges of the CEAS is the very different implementation of the EU Acquis in different EU Member States, and the resulting wide divergences among national asylum systems in terms of recognition rates, procedures and reception conditions. This problem has recently been recognised by the Council of the European Union, which, in its conclusion on the convergence of asylum decision practices, noted “considerable differences [...] between Member States in terms of the outcome of procedures, the recognition rates and the international protection status granted”.<sup>233</sup> Despite the fact that the Lisbon Treaty has empowered the EU to go beyond “minimum standards”, the recast Asylum Procedures Directive continues to allow Member States to retain a wide degree of flexibility to set lower standards in some key areas, such as special procedures, safe country concepts, and the right to legal aid.<sup>234</sup> The divergences in recognition rates amongst Member States are particularly worrisome. For example, whilst the average recognition rate for Eritreans across EU Member States in 2014 was around 80 per cent, the figure decreases dramatically for Greece (50 per cent) and France (only 26 per cent). In the second quarter of 2015, the UK also only recognised 34 per cent.<sup>235</sup> Similarly there are divergences in the *type* of status granted to applicants of the same nationalities, which can vary significantly depending on national policies. For example, in 2015 Syrian nationals were normally granted refugee status in certain countries (Germany, UK), and subsidiary protection status in others (Sweden). Further, despite improvements brought about by the recast APD, the current EU-wide system still provides for a high degree of complexity and a large number of special procedures – regular, accelerated, prioritised, admissibility, border, as well as special rules on subsequent applications – that Member States *may* decide to implement through national legislation. All this certainly increases the margin for an “asylum protection lottery” across Member States.

There are various ways in which better harmonisation could be achieved. One approach, based on the assumption that the main problem lies in the incorrect implementation of existing standards, would be to *strengthen the Commission’s monitoring and enforcement policy* with a more extensive use of infringement procedures and strategic litigation. This was in fact the approach preferred by EU institutions in the aftermath of the adoption of the second phase of the CEAS.<sup>236</sup> The Commission

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<sup>233</sup> Council of the European Union (2016) *Draft Conclusions on convergence in asylum decision practices* (18.03.2016) available at: <http://data.consilium.europa.eu/doc/document/ST-7255-2016-INIT/en/pdf> (last accessed 05.06.2016).

<sup>234</sup> S. Peers (2013) “The second phase of the Common European Asylum System: A brave new world – or lipstick on a pig?” in: *Statewatch.org* (08.04.2013) p. 15.

<sup>235</sup> Asylum Information Database (2015) Annual Report 2014/2015 Common asylum system at a turning point: Refugees caught in Europe’s solidarity crisis (31.08.2015) p. 21.

<sup>236</sup> The European Council’s Strategic Guidelines set up: “The full transposition and effective implementation of the CEAS is an absolute priority. This should result in high common standards and stronger cooperation, creating a level playing field where asylum seekers are given the same procedural guarantees and protection throughout the Union. It should go hand in hand with a reinforced role for the European Asylum Support Office (EASO) particularly in promoting the uniform application of the acquis. Converging practices will enhance mutual trust and allow to move to future next steps.” See European Council (2014) Conclusions adopted on

appears to have recently taken this up by launching a considerable number of infringement procedures since the adoption of the Strategic Guidelines.<sup>237</sup>

Stepping up the monitoring phase may not be enough, however. The *adoption of further legislation in the form of regulations* may be an additional way to ensure greater convergence between the asylum systems of EU Member States. This appears to be a path favoured by the Commission, which has promised legislative proposals for reforming the Asylum Procedures and Qualification Directives. Indeed, the Commission mentioned the possibility of transforming this through regulations in its Communication of April 2016.<sup>238</sup> Legislative harmonisation could have a positive effect on the overall coherence of the CEAS. However, it is important to avoid the downgrading of human rights standards in the process of harmonization. Future legislation must remain in compliance with the 1951 Refugee Convention, international human rights law obligations, as well as the EUCFR and the jurisprudence of the European courts.

Another way to achieve better harmonisation could be through supported or joint processing. We agree that the joint processing of asylum applications is “an important tool in achieving more convergence of decision-making and addressing the current disparities between the EU Member States.”<sup>239</sup> At least since the set-up of the “Hague programme” (“Strengthening Freedom, Security and Justice in the European Union”)<sup>240</sup> in 2004, many ideas of what joint processing could look like have been discussed in EU Member States, and within EU institutions, international organisations and think tanks etc.<sup>241</sup> In 2013, the Commission published a study on “the feasibility and legal and practical

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26/27 June 2014: Strategic Guidelines, §7. The Agenda on Migration sets out the same goal and promises that the Commission will support this with “a new systematic monitoring process, to look into the implementation and application of the asylum rules and foster mutual trust”. See European Commission (2015) Communication – A European Agenda on Migration (13.05.2015) available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/communication\\_on\\_the\\_european\\_agenda\\_on\\_migration\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf) (last accessed 18.05.2016).

<sup>237</sup> EU Commission Infringements of EU Home Affairs Law: Asylum Infringements, available at: [http://ec.europa.eu/dgs/home-affairs/what-is-new/eu-law-and-monitoring/infringements\\_by\\_policy\\_asylum\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-is-new/eu-law-and-monitoring/infringements_by_policy_asylum_en.htm) (last accessed 19.05.2016).

<sup>238</sup> European Commission (2016) *Communication – Towards A Reform Of The Common European Asylum System And Enhancing Legal Avenues To Europe* (06.04.2016) available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160406/towards\\_a\\_reform\\_of\\_the\\_common\\_european\\_asylum\\_system\\_and\\_enhancing\\_legal\\_avenues\\_to\\_europe\\_-\\_20160406\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160406/towards_a_reform_of_the_common_european_asylum_system_and_enhancing_legal_avenues_to_europe_-_20160406_en.pdf) (last accessed 05.06.2015).

<sup>239</sup> ECRE (2013) *Enhancing Intra-EU solidarity tools to improve quality and fundamental rights protection in the Common European Asylum System*, p. 37, available at: [http://www.emnbelgium.be/sites/default/files/publications/intra-eu\\_solidarity\\_-\\_full\\_paper1.pdf](http://www.emnbelgium.be/sites/default/files/publications/intra-eu_solidarity_-_full_paper1.pdf) (last accessed 31.05.2016).

<sup>240</sup> The Hague Programme had included as key measure “a common European asylum system with a common procedure and a uniform status for those who are granted asylum or protection by 2009.” See: EurActiv.com (2005) *Hague programme – JHA programme 2005-10* (19.05.2005) available at: <http://www.euractiv.com/section/security/linksdossier/hague-programme-jha-programme-2005-10/#ea-accordion-background> (last accessed 18.05.2016).

<sup>241</sup> European Parliament – Policy Department (2014) *New approaches, alternative avenues and means of access to asylum procedures for persons seeking international protection* (Oct. 2014) p. 9, available at:

implications of establishing a mechanism for the joint processing of asylum application on the territory of the EU”, based on interviews and workshops with key stakeholders and Member States etc.<sup>242</sup>

The study explores different options for joint processing, categorised in the following way:

- “supported processing”, where “the processing [...] of asylum applications is conducted jointly by officials of two or more Member States, under the coordination of the European Asylum Support Office (EASO), in support of another Member State in crisis or with a view to preventing a crisis”; and
- “joint processing” in the real sense, defined as “an arrangement under which all asylum claims inside the EU are processed jointly by an EU authority assuming responsibility for both preparation and decision on all cases, as well as subsequent distribution of recognised beneficiaries of international protection”.<sup>243</sup>

There are also considerations of realising supported processing outside Europe. The Commission has referred to this possibility, for example, in its communication on the Task Force Mediterranean in 2013.<sup>244</sup> Here it stressed that processes outside Europe should always be “without prejudice to the existing right of access to asylum procedures in the EU.”<sup>245</sup> Human rights organisations claim that, if externally supported processing is to be further considered, there is a need for a full assessment of “its implications for the protection of the fundamental rights of the individuals whose asylum applications would be processed in such a system.”<sup>246</sup> They stress that, whereas joint processing inside the EU already raises many legal questions, joint processing outside the EU brings with it even greater difficulties. Who would conduct the processing of asylum applications? How can it be guaranteed that

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[http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL\\_STU%282014%29509989\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL_STU%282014%29509989_EN.pdf) (last accessed 18.05.2016).

<sup>242</sup> European Commission (2013) Study on the Feasibility and legal and practical implications of establishing a mechanism for the joint processing of asylum applications on the territory of the EU (13.02.2013) p. 16, available at: [http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/common-procedures/docs/jp\\_final\\_report\\_\\_final\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/common-procedures/docs/jp_final_report__final_en.pdf) (last accessed 19.05.2016).

<sup>243</sup> ibidem

<sup>244</sup> European Commission (2013) *Communication – on the work of the Task Force Mediterranean* (04.12.2013) para. 2.4, available at: [http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/docs/20131204\\_communication\\_on\\_the\\_work\\_of\\_the\\_task\\_force\\_mediterranean.pdf](http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/docs/20131204_communication_on_the_work_of_the_task_force_mediterranean.pdf) (last accessed 19.05.2016).

<sup>245</sup> The Commission proposed that EASO, FRA and Frontex and, where relevant, UNHCR, ILO or IOM, should be involved in the execution.

<sup>246</sup> See, for example ECRE (2014) *An Open and Safe Europe – What Next?*, p. 20, available at: <http://ecre.org/component/downloads/downloads/844.html> (last accessed 19.05.2016).

procedural safeguards will be observed?<sup>247</sup> It is questionable whether supported processing outside Europe would comply with the 1951 Refugee Convention or other international human rights.<sup>248</sup>

The following considerations are limited to joint processing inside the EU. We adopt the Commission's differentiation between "supported" and "joint processing".

## 5.2 Supported processing

### 5.2.1 Status quo

The key institution regarding the envisaged harmonisation of the CEAS, and the strengthening of supported processing, is the European Asylum Support Office (EASO). This was established in 2010, and took up its responsibilities in 2011.<sup>249</sup> Its main task is to enhance practical cooperation amongst Member States on asylum-related matters, and to assist Member States in implementing their obligations under the CEAS. Additionally, it provides ad hoc support to Member States whose asylum and reception systems are under particular pressure – as is now the case in Greece. Examples for the first category of cooperation are the "pilot projects testing aspects of joint processing"<sup>250</sup> that the EASO started in 2014. The core feature of these projects is that expert teams from EU Member States provide support for selected phases of national processes, such as interviewing claimants or the identification of people with medical needs.<sup>251</sup> Up until now, there is not much information available on these projects. Based on information provided by stakeholders, experts have stated that the projects have probably had a positive impact, mainly due to the opportunity for sharing experiences and good practices.<sup>252</sup> An example of ad hoc projects aimed at helping Member States under particular pressure

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<sup>247</sup> Ibidem, see also: UNHCR (2013) *Draft Proposal for a Central Mediterranean Initiative: EU Solidarity for rescue at sea, protection and comprehensive responses* (16.10.2013) p. 7, available at: <http://www.refworld.org/pdfid/52c172f84.pdf> (last accessed 19.05.2016). For a discussion, see, for example, G. Madeline (2015) "The Potential and Pitfalls of Extraterritorial Processing of Asylum Claims" (Mar. 2015) *Migration Policy Newsroom*, available at: <http://www.migrationpolicy.org/news/potential-and-pitfalls-extraterritorial-processing-asylum-claim> (last accessed 05.06.2016).

<sup>248</sup> ECRE (2013) *Enhancing Intra-EU solidarity tools to improve quality and fundamental rights protection in the Common European Asylum System*, p. 37, available at: <http://www.ecre.org/component/downloads/downloads/688.html> (last accessed 18.05.2016).

<sup>249</sup> Regulation (EU) No 429/2010 (19.05.2010) available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:132:0011:0028:EN:PDF> (last accessed 19.05.2016).

<sup>250</sup> Guild et al. (2014) *New approaches, alternative avenues and means of access to asylum procedures for persons seeking international protection* (Oct. 2014) p. 49, available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL\\_STU%282014%29509989\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL_STU%282014%29509989_EN.pdf) (last accessed 18.05.2016).

<sup>251</sup> M. Garlick (2014) *Strengthening refugee protection and meeting challenges: The European Union's next steps on asylum*, in: *MPI Policy Brief Series*, Issue No 5, p. 7. To avoid "political, legal, linguistic and financial questions", the scope of the cooperation is limited. See European Parliament – Policy Department (2014) *New approaches, alternative avenues and means of access to asylum procedures for persons seeking international protection* (Oct. 2014) p. 49, available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL\\_STU%282014%29509989\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL_STU%282014%29509989_EN.pdf) (last accessed 18.05.2016).

<sup>252</sup> Guild et al. (2014) *New approaches, alternative avenues and means of access to asylum procedures for persons seeking international protection* (Oct. 2014) p. 48, available at:



are the hotspots recently implemented in Greece and Italy.<sup>253</sup> In this last context, the main task of EASO is to support national authorities “to help to fulfil their obligations under EU law and swiftly identify, register and fingerprint incoming migrants.”<sup>254</sup> Additionally, EASO helps to implement the relocation scheme by assisting the process of matching potential beneficiaries with Member States.

Since the Commission published the Agenda on Migration, the strengthening of the EASO has moved to the centre of debate. The Commission has suggested in its latest proposal a regulation on the European Union Agency which would transform the EASO into a fully-fledged European Union Agency for Asylum.<sup>255</sup> This envisaged transformation includes an enhanced mandate and expanded tasks, such as: ensuring a greater convergence in the assessment of applications for protection across the Union; strengthening practical cooperation between EU Member States; promoting Union law and operational standards; and operating the new “reference key” (see chapter 4). The role of the agency in operational support will also be expanded, including through the establishment of expert support teams (minimum 500 persons). The proposal does not, however, include the transfer of competency for conducting asylum procedures and decision-making from Member States to the supranational level (see chapter 3.2).

### 5.2.2 Critical evaluation

In general, experts stress the positive effects of supported processing. These include:<sup>256</sup>

- The exchange of ideas and good practices. Officials who interact can learn from each other, and this contributes to a common understanding and a harmonisation of approaches.
- The support of Member States by (EU) delegations can help enhance the standard of asylum systems, and improve consistency in asylum decision-making. It can thus contribute to better compliance with international standards.

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[http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL\\_STU%282014%29509989\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL_STU%282014%29509989_EN.pdf) (last accessed 18.05.2016).

<sup>253</sup> See, for example, European Commission (2016) *Second report on relocation and resettlement* (12.04.2016) available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160412/communication\\_second\\_report\\_relocation\\_resettlement\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160412/communication_second_report_relocation_resettlement_en.pdf) (last accessed 19.05.2016); European Commission (2015) *Communication – Progress Report on the Implementation of the hotspots in Italy*.

<sup>254</sup> See European Commission (undated) *The Hotspot Approach to Managing Exceptional Migratory Flows* [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/2\\_hotspots\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/2_hotspots_en.pdf) (last accessed 19.05.16).

<sup>255</sup> European Commission (2016) *Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010* (05.05.2016) available at [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/easo\\_proposal\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/easo_proposal_en.pdf) (last accessed 19.05.2016).

<sup>256</sup> See, for example Guild et al. (2014) *New approaches, alternative avenues and means of access to asylum procedures for persons seeking international protection* (Oct. 2014) available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL\\_STU%282014%29509989\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL_STU%282014%29509989_EN.pdf) (last accessed 18.05.2016).; M. Garlick (2014) *Strengthening refugee protection and meeting challenges: The European Union’s next steps on asylum* (June 2014) in: *MPI Policy Brief Series*, Issue No 5, p. 7.

- Ad hoc support by expert teams can especially help Member States better cope with large-scale arrivals. This has the additional positive effect of demonstrating solidarity between the Member States.

But scholars also emphasise some negative aspects of supported processes. First of all, there are practical obstacles such as language barriers, and the fact that experts/judges have to operate in asylum systems which they are not familiar with.<sup>257</sup> Even more importantly, a number of questions arise with regard to human right standards. It has to be ensured that the main focus lies on protection and that supported processing does not include the detention or forced relocation of asylum seekers.<sup>258</sup> It also has to be ensured that access to procedural guarantees is provided.<sup>259</sup> Full compliance with the 1951 Refugee Convention and human rights standards has to be guaranteed.

64 It is more than questionable whether this is currently the case in the so-called “hotspots”. The framework conditions under which supported processing takes place in Greek and Italian hotspots at the moment is very problematic and does not comply with EU law or the EUCFR. According to organisations working on the ground, the conditions in these hotspots, and the actions taken within them, are in violation of the recast Asylum Procedure Directive, as well as the RCD.<sup>260</sup> The following are just some of the problematic points. The pre-identification phase, essential for the initial separation between asylum seekers and “irregular migrants”, takes place directly after disembarkation. Refugees who have just arrived are in many cases traumatised and probably not in a condition to answer a questionnaire deciding their future.<sup>261</sup> Reception capacities in hotspots are not commensurate with the number of arrivals – the requirements of the RCD are thus not met. National authorities are so completely overburdened that high quality procedures cannot be ensured. There are insufficient numbers of support staff, including EASO members, and it is also questionable whether those in charge of decision-making always have the necessary qualifications.<sup>262</sup> It is not clear which

<sup>257</sup> ECRE (2013) *Enhancing Intra-EU solidarity tools to improve quality and fundamental rights protection in the Common European Asylum System*, p. 6, available at: <http://www.ecre.org/component/downloads/downloads/688.html> (last accessed 18.05.2016).

<sup>258</sup> ECRE (2014) *An Open and Safe Europe – What Next?*, p. 20, available at: <http://ecre.org/component/downloads/downloads/844.html> (last accessed 19.05.2016); ECRE (2013) *Enhancing Intra-EU solidarity tools to improve quality and fundamental rights protection in the Common European Asylum System*, available at: <http://www.ecre.org/component/downloads/downloads/688.html> (last accessed 18.05.2016).

<sup>259</sup> Therefore, ECRE and other organisations claim that the UNHCR should play a prominent role. ECRE (2014) *An Open and Safe Europe – What Next?*, p. 20, available at: <http://ecre.org/component/downloads/downloads/844.html> (last accessed 19.05.2016);

<sup>260</sup> See, for example, the report on the CIE (Lampedusa) by the Human Rights Commission of the Italian Senate. Amongst other problematic aspects, the pre-identification phase directly after the disembarkation is a particular worrying aspect: Refugees who just arrived are in many cases traumatised and probably not in the condition to answer a questionnaire deciding their future. See <http://ecre.org/component/content/article/70-weekly-bulletin-articles/1415-lampedusa-hotspot-shows-severe-deficiencies-states-the-italian-senate-.html> (last accessed 18.05.2016).

<sup>261</sup> *ibidem*

<sup>262</sup> See, for example, the questions ECRE ELENA posed on this question to Commissioner Avramopoulos in an open letter: European Council on Refugees and Exiles (ECRE) and the European Legal Network on Asylum (ELENA) *letter to the Commissioner for Migration, Home Affairs and Citizenship, European Commission*

authority has ultimate responsibility for activities in hotspots or who exactly is involved in decision-making.<sup>263</sup> From the beginning, conditions were problematic, but they became untenable with the implementation of the EU-Turkey agreement.<sup>264</sup> In March 2016, the UNHCR decided to redefine its role in the Greek Hotspots because “they have now become detention facilities”.<sup>265</sup> Mutual learning and the exchange of best practices is hardly possible under these circumstances.

We clearly see the big advantages of supported processing. We believe that the collaboration of experts and judges, and the exchange of views and experiences of the different legal systems that comes with it, might help to achieve a certain level of harmonisation (“harmonisation through the backdoor”). We back the idea of a “progressive approach” in supported processing. In particular, the actors concerned should start with the simplest form of supported processing initiatives and then build upon them once they have proven effective and in line with human right standards.<sup>266</sup> We strongly support the strengthening of mutual learning and cooperation between EU Member States, as foreseen in the latest suggestions of the Commission on how to reform the EASO. But to be successful, supported processing has to take place under different circumstances. The situation in the hotspots is certainly not acceptable. We therefore suggest the need to consider other forms of EU reception centres, as for example proposed by the Centre for European Policy Studies (CEPS).<sup>267</sup>

We believe that supported processing can be very helpful as ad hoc responses to failures in the system. In the long-term, however, one may need to adopt a more innovative approach and explore further possibilities in order to realise a truly common *European* asylum system. Even if this may not be politically feasible today, we believe that it is worth discussing more ambitious ideas with the aim of bringing a vision into a debate that is too often anchored to the urge to address only the latest “crisis” or “emergency”. With this in mind, the following discussion on joint processing concentrates on the most far-reaching option: the idea of transferring the asylum determination process to the

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(25.01.2016) available at :

[http://www.accem.es/ficheros/documentos/pdf\\_noticias/2016\\_pdf/ELENA%20letter%20relocation-hotspots%20EC.pdf](http://www.accem.es/ficheros/documentos/pdf_noticias/2016_pdf/ELENA%20letter%20relocation-hotspots%20EC.pdf) (last accessed 05.06.2016).

<sup>263</sup> See, for example, European Council on Refugees and Exiles (ECRE) and the European Legal Network on Asylum (ELENA) *letter to the Commissioner for Migration, Home Affairs and Citizenship, European Commission* (25.01.2016) available at :

[http://www.accem.es/ficheros/documentos/pdf\\_noticias/2016\\_pdf/ELENA%20letter%20relocation-hotspots%20EC.pdf](http://www.accem.es/ficheros/documentos/pdf_noticias/2016_pdf/ELENA%20letter%20relocation-hotspots%20EC.pdf) (last accessed 05.06.2016)

<sup>264</sup> European Commission (2016) Fact Sheet – EU-Turkey Agreement: Questions and Answers (19.03.2016) available at: [http://europa.eu/rapid/press-release\\_MEMO-16-963\\_de.htm](http://europa.eu/rapid/press-release_MEMO-16-963_de.htm) (last accessed 19.05.2016).

<sup>265</sup> M. Flemming (2016) UNHCR redefines role in Greece as EU-Turkey deal comes into effect (22.03.2016) UNHCR Briefing Notes, available at: <http://www.unhcr.org/56f10d049.html> (last accessed 19.05.2016).

<sup>266</sup> Guild et al. (2014) *New approaches, alternative avenues and means of access to asylum procedures for persons seeking international protection* (Oct. 2014) available at:

[http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL\\_STU%282014%29509989\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL_STU%282014%29509989_EN.pdf) (last accessed 18.05.2016)

<sup>267</sup> Centre for European Policy Studies (2015) *Enhancing the Common European Asylum System and Alternatives to Dublin* (04.08.2015) p. 17, available at: <https://www.ceps.eu/publications/enhancing-common-european-asylum-system-and-alternatives-dublin> (last accessed 05.06.2016).

supranational EU level, by establishing an EU Asylum Agency with a decision-making mandate for all international protection claims lodged in EU territory (see chapter 5.3.).

### 5.3 Joint processing

#### 5.3.1 Current proposals

As described above, there are many different proposals as to what supported or joint processing should look like. Some of them culminate in joint processing in the strict sense: that is to say a completely harmonised and EU-based approach with an EU authority taking binding decisions on international protection applications, and being responsible for the operation of a distribution key – as described by model 4 of the Commission study referred to above. This model has been further elaborated by a number of scholars and think-thanks.

According to Goodwin-Gill, who puts forward the proposal for a “European Migration and Protection Agency”, “there can be no Common European Asylum System that is not a *European* one, in which protection decisions are taken by a European institution, appealable to a European court, and in which the decisions are valid region-wide – a European refugee or protected status to be enjoyed across a Europe without internal borders.”<sup>268</sup>

In April 2015,<sup>269</sup> the CEPS also joined the call for the elimination of divergences between EU Member States in the processing of asylum applications, and recommended a two-phase approach. The first phase envisages the expansion of the competences and mandate of the EASO. The second phase involves the transformation of the EASO into a “common European asylum service” responsible for processing asylum applications and determining responsibilities across the EU, with competence for overseeing a uniform application of EU asylum law.

The Commission has also advanced the possibility of transferring responsibility for the processing of asylum claims from the national to the EU level.<sup>270</sup> It issued a Communication that considered the possibility of establishing a single and centralised decision-making process, both for first-instance decisions and appeals. The Commission did, however, point out that this reform would require “major institutional transformations” and “substantial resources”, and thus could only be envisaged in the long-term. In its latest regulation proposal, it proposed a strengthening of the EASO, but without transferring the responsibility for asylum decisions to the supranational level.<sup>271</sup>

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<sup>268</sup> G. S. Goodwin-Gill (2015) *Regulating “Irregular” Migration: International Obligations and International Responsibilities*, An International Workshop National and Kapodistrian University of Athens Faculty of Law (20.03.2015) pp. 1-14.

<sup>269</sup> S. Carrere, D. Gros and E. Guild (2015) “What priorities for the new European agenda on migration” (22.04.2015) in: *CEPS Commentary*, available at: <https://www.ceps.eu/system/files/MigrationPriorities.pdf> (last accessed 05.06.2016).

<sup>270</sup> European Commission (2016) *Communication – Towards A Reform Of The Common European Asylum System And Enhancing Legal Avenues To Europe* (06.04.2016).

<sup>271</sup> European Commission (2016) *Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010* (05.05.2016) available at

There are still many open questions and doubts as to if and how this new EU body could actually work in practice. The sub-chapter below attempts to identify the main issues that such an approach would raise.

### 5.3.2 On the possibility of a centralised EU authority

To begin with one should assess whether the current legal framework allows for an EU determination authority. Asylum issues, as with all matters concerning freedom, security and justice, fall under the shared competence between the Union and its Member States (Articles 2 and 4 TFEU). With the Lisbon Treaty, EU competence in asylum matters is no longer limited to setting “minimum standards”, and the treaties do allow the EU to adopt measures pursuing full harmonisation in asylum matters. This is reflected in Article 78 (2) TFEU, which provides for a clear legal basis for the EU to adopt measures establishing a CEAS, comprising, amongst others things, *uniform* statuses, a *common* system of temporary protection, and *common* procedures. Whether the potential to fully harmonise could also encompass the conferring of a competence to decide on individual applications for international applications is not clear.<sup>272</sup> However, in the 2013 Feasibility Study the authors concluded that Article 78, together with Article 80 TFEU represent a sufficient legal basis.<sup>273</sup> We share this view.

Yet, harmonisation measures must also respect the principles of subsidiarity and proportionality (Article 5 TEU).<sup>274</sup> While more research is certainly needed, the persistent divergences among national asylum systems – e.g. in relation to recognition rates, procedures, the safeguards enjoyed pending the determination of claims, and reception conditions – certainly support a strong argument in favour of more EU action and the greater exercise of EU competence in this field.<sup>275</sup> In fact, in the long term, a more European system with EU-based procedures and decisions can represent the only way forward towards the fulfilment of the treaties’ provisions.

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[http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/easo\\_proposal\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/easo_proposal_en.pdf) (last accessed 19.05.2016).

<sup>272</sup> ECRE (2013) Enhancing Intra-EU solidarity tools to improve quality and fundamental rights protection in the Common European Asylum System, p. 42, available at:

<http://www.ecre.org/component/downloads/downloads/688.html> (last accessed 18.05.2016).

<sup>273</sup> European Commission (2013) Study on the Feasibility and legal and practical implications of establishing a mechanism for the joint processing of asylum applications on the territory of the EU (13.02.2013) p. 75, available at: [http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/common-procedures/docs/jp\\_final\\_report\\_final\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/common-procedures/docs/jp_final_report_final_en.pdf) (last accessed 19.05.216).

<sup>274</sup> The subsidiarity principle sets out that the EU should exercise its competence only if the objectives of the proposed action cannot be sufficiently achieved by the Member States, and can be better achieved by the EU. Similarly, the principle of proportionality provides that the EU should act only if EU action is suitable and necessary to achieve a desired end as well as whether the measure has an excessive effect on the applicant's interests. Craig, De Burca (2015) EU Law: Text, Cases, and Materials, *OUP*, p. 551.

<sup>275</sup> European Commission (2013) Study on the Feasibility and legal and practical implications of establishing a mechanism for the joint processing of asylum applications on the territory of the EU (13.02.2013) available at: [http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/common-procedures/docs/jp\\_final\\_report\\_final\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/common-procedures/docs/jp_final_report_final_en.pdf) (last accessed 19.05.216).

Should the EU decide to go down this path, more questions will need to be addressed: for example, who will act as an EU determination authority? Who will have authority for second-instance decision-making? And what role should EASO play?

In the debate concerning EU processing, the first proposal considered was built around the notion of a “European judge of asylum”, established either on the basis of Article 257 TFEU, under which the EU Parliament and Council may establish “special tribunals”, or by expanding the role of the CJEU.<sup>276</sup> The idea of involving the UNHCR in the decision-making process was only initially considered by the Feasibility Study of 2013. The idea was subsequently dropped, as it was said that the UNHCR would best serve its mandate as the guardian of the 1951 Refugee convention by retaining its independence and maintaining a solely monitoring and advisory role. The CEPS has instead proposed the establishment of a “service” along the lines of the European Central Bank or the European System of Central Banks (the Eurosystem).<sup>277</sup> Amongst others, the ECRE has mentioned the possibility of an EU Commissioner for Refugees as an independent body, similar to the Ombudsperson.<sup>278</sup>

Perhaps inspired by the success of the EASO, the option most often suggested is that the role of an EU determining authority should be taken up by an EU agency.<sup>279</sup> This could be a new agency or a further development of the EASO. In the case of the latter, the mandate of the EASO would need to be considerably expanded. Its founding regulation sets up clear boundaries and establishes that: “The Support Office should have no direct or indirect powers in relation to the taking of decisions by Member States' asylum authorities on individual applications for international protection” (Recital 14).<sup>280</sup>

<sup>276</sup> European Parliament – Policy Department (2010) *Setting up a Common European Asylum System: Report on the application of existing instruments and proposals for the new system* (Aug. 2010) p. 448, available at: [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/libe/dv/pe425622\\_/pe425622\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/pe425622_/pe425622_en.pdf) (last accessed 19.05.2016).

<sup>277</sup> S. Carrere, D. Gros and E. Guild (2015) “What priorities for the new European agenda on migration” (22.04.2015) in: *CEPS Commentary*, available at: <https://www.ceps.eu/system/files/MigrationPriorities.pdf> (last accessed 05.06.2016).

<sup>278</sup> ECRE (2013) *Enhancing Intra-EU solidarity tools to improve quality and fundamental rights protection in the Common European Asylum System*, p. 43, available at: <http://www.ecre.org/component/downloads/downloads/688.html> (last accessed 18.05.2016).

<sup>279</sup> M. Shapiro (2011) “Independent Agencies”, in: P. Craig and G. De Burca (eds.) *The Evolution of EU law*, Oxford: OUP, p. 112.

<sup>280</sup> Regulation (EU) No 439/2010 (19.05.2010) p. 11–28. The restrictive phrasing of the EASO regulation was strongly criticised in the 2010 Parliamentary Study, which defined it as “unnecessary” and not in line “with a vision for the future of the European Support Office designed like a minimum instrument of first generation as if it had been adopted on the basis of the Treaty of Amsterdam”. See European Parliament – Policy Department (2010) *Setting up a Common European Asylum System: Report on the application of existing instruments and proposals for the new system* (Aug. 2010) p. 448, available at: [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/libe/dv/pe425622\\_/pe425622\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/pe425622_/pe425622_en.pdf) (last accessed 19.05.2016).

But an *EU agency* with decision-making powers for asylum claims raises additional questions. Bearing in mind the restrictive approach of the CJEU,<sup>281</sup> what sort of mandate exactly could an EU agency be granted? And would an EU agency be a sufficiently independent authority for this task? Though not in the same terms and for a much more technical field of expertise, a useful comparison can be found in the design and functioning of other EU agencies with decision-making powers.<sup>282</sup> So far there are different ideas about what the mandate of the agency should include. In addition to the question of competence to determine international protection claims, Goodwin-Gill proposes that the agency should have a broad mandate, which respects the principle of *non-refoulement*, and carries out monitoring functions on arrival and reception.<sup>283</sup> Nowak's proposal goes even further. He argues that the EU authority should deal "with all applications as well as with installing the necessary accommodation facilities on the basis of a single European budget".<sup>284</sup>

Having an agency with responsibility for reception has the advantage of addressing problems associated with the divergences in reception conditions amongst Member States. But it may raise additional problems in terms of competence, as the TFEU only provides for the adoption of "standards" in this field, as does the RCD (which refers to "equivalent level of treatment as regards reception conditions" (Recital 5)). As for the possibility of an agency fulfilling a monitoring function regarding reception facilities – which the EMN reports is conducted only in few Member States<sup>285</sup> -- other specialised monitoring bodies may be better suited to carry out this role, both in terms of expertise and independence. Further, an additional monitoring function could be conducted by the FRA. On the other hand, the functions currently carried out by EASO will need to be continued, thus raising the issue of whether one single authority could assume both roles.

Whatever shape the first instance authority will take, an appeal system will be required in line with the right to an effective remedy as enshrined by the EUCFR and the ECHR. Again, several options are in

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<sup>281</sup> Meroni & Co., *Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* CJEU/C-9/56 (judgment) (13.06.1958).

<sup>282</sup> For example, in literature the following agencies are normally classified as "agencies with decision making powers": the Office for Harmonisation of the Internal Market (OHIM) the Community Plant Variety Office (CPVO) the European Aviation Safety Agency (EASA) the Agency for the Cooperation of Energy Regulators (ACER) and the European Institute of Innovation and Technology (EIT); or with "pre-decision making powers": European Medicines Agency (EMA) the European Food Safety Agency (EFSA) the European Union's Judicial Cooperation Unit (EUROJUST) the European Maritime Safety Agency (EMSA) the European Centre for Disease Control (ECDC) the European Railway Agency (ERA) and the European Chemicals Agency (ECHA). See M. Chamon (2016) *EU Agencies Legal and Political Limits to the Transformation of the EU Administration*, Oxford: OUP.

<sup>283</sup> G. S. Goodwin-Gill (2015) *Regulating "Irregular" Migration: International Obligations and International Responsibilities*, An International Workshop National and Kapodistrian University of Athens Faculty of Law (20.03.2015).

<sup>284</sup> Manfred Nowak and Antonia Elisabeth Walter, "The crisis of the European refugee policy", 2016 not yet published.

<sup>285</sup> European Migration Network (2014) *The Organisation of Reception Facilities for Asylum Seekers in different Member States*, p. 19.

principle available.<sup>286</sup> One could think about extending the mandate of the existing CJEU, or establishing ad hoc appeal boards or a European Court of Protection, as Goodwin-Gill suggests. To be able to ensure swift access to protection, both first-instance and second-instance bodies will need to have national branches, so as to remain close to protection seekers.

The next logical step would be to argue that the status granted by the EU authority should be valid across the whole EU territory. This would not only address an anomaly typical of the asylum field which, though providing for “common standards”, does not address the question of the mutual recognition of positive decisions,<sup>287</sup> but it would also mitigate the non-functioning of the Dublin system – as described above.

The transfer of responsibilities to the EU level raises the problem of accountability and external control, especially in the aftermath of the CJEU Opinion 2/13.<sup>288</sup> As the EU is not (yet) a party to the ECHR, the ECtHR will not have the necessary jurisdiction to review EU decisions on asylum. This will deprive applicants of the existing possibility of having their claims reviewed by a human rights court. Past experience has shown that this plays a crucial role in upholding the rights of international protection seekers and migrants. However, under the TEU, the EU has an obligation to accede to the ECHR, and so in the long term the problem of a missing external control should be overcome.

Member States are very cautious about the idea of transferring the responsibility for determining asylum claims to the EU level. Migration and asylum policy – but also more general jurisdictional powers – forms an essential feature of Member States’ sovereignty. However, an EU asylum authority would have advantages for Member States. By eliminating the divergences between national asylum procedures, EU processing would significantly reduce differences in recognition rates, thus functioning as an additional driver for a fairer sharing of responsibilities amongst Member States.<sup>289</sup> As for applicants and beneficiaries, the system would mean equal and high-quality procedural rights in all EU Member States, as well as more mobility rights once protected status is granted.

Of course, provided that the risk of downgrading human rights standards is avoided, and that the EU agency is empowered to adopt decisions in full compliance with human rights principles, this approach could offer a solution to the problem of an “asylum protection lottery”, and could achieve a truly *common* European asylum system.

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<sup>286</sup> Guild et al. (2010) *Setting up a Common European Asylum System: Report on the application of existing instruments and proposals for the new system* (Aug. 2010) p. 448, available at: [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/libe/dv/pe425622\\_/pe425622\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/pe425622_/pe425622_en.pdf) (last accessed 19.05.2016).

<sup>287</sup> See inter alia: C. Costello and E. Hancox (2015) “The recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Seeker and the Vulnerable Refugee” in: V. Chetail, P. De Bruycker, F. Maiani (eds.) *Reforming the Common European Asylum System: The New European Refugee Law*, Leiden: Brill, pp.377-445.

<sup>288</sup> CJEU – *Opinion 2/13*, 18 December 2014.

<sup>289</sup> Manfred Nowak and Antonia Elisabeth Walter, “The crisis of the European refugee policy”, 2016 not yet published.



## 6 Outlook: How to ensure human rights standards after access to asylum procedures

The focus of this study has been to analyse human rights obligations in relation to access to asylum procedures. These issues are also those upon which political debate concentrates. But what about those who have obtained access to asylum procedures but remain in the position of “asylum seeker” for a period of months or years? What about their status in the societies within which they are living?

This sub-chapter seeks to address human rights standards and the core EU legal framework that are relevant for the phase after having accessed asylum procedures. Furthermore we also very briefly discuss the relevance of guaranteeing for them from a socio-political perspective. This is carried out by way of a brief look at the issues rather than a comprehensive analysis, and the following purely aims to highlight some of the main questions that need to be addressed in the development and implementation of an asylum system in line with human rights requirements.

### 6.1.1 International human rights standards

The 1951 Refugee Convention makes it clear in Articles 17-24 that, depending on their level of attachment to the host state, refugees must be granted access to the labour market; that receiving countries must provide access to domestic education systems; and that labour market conditions, access to adequate housing, and social welfare systems, must meet the same minimum requirements that apply to other aliens. What is not always so clear is, which obligations states have to fulfil towards those persons, whose status is not yet determined – who are lawfully present, but not lawfully residing (yet).

International human rights law, while limiting political rights to citizens, recognises socio-economic rights as adhering to “everyone”, including those seeking asylum, without any distinction according to race, colour, sex, language, religion, political opinion, national or social origin, property, birth or other status. Such rights include a right to an adequate standard of living (including food, adequate housing and health care), the right to work, and the right to elementary education. This does not mean that everyone has the right to enjoy the same standard of living, but simply that certain *minimum standards* must be guaranteed for everyone.

### 6.1.2 The EU legal framework

The EU legal framework presented in previous chapters goes beyond the question of access to asylum procedures and procedural standards. Rather it also refers to minimum standards in relation to the living conditions of those applying for international protection, those who have obtained refugee status or those who are benefiting from subsidiary protection. The so-called Qualification Directive<sup>290</sup> extends the scope of rights guaranteed to all beneficiaries of international protection (recognised

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<sup>290</sup> European Parliament and Council Directive 2011/95/EU (13.12.2011) available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0095&from=EN> (last accessed 05.06.2016).

refugees and recipients of so-called “subsidiary protection”). It addresses access to employment and healthcare and improves access to rights and integration measures.

The situation of asylum seekers from the moment of their application for asylum is far more disputed and difficult to harmonise. According to the RCD (recast)<sup>291</sup> access to employment for an asylum seeker must be granted within a maximum of nine months. However, this does not mean that after waiting nine months asylum seekers automatically have access to the labour market. Member States can still require asylum seekers to apply for work permits, or impose employment rules that give priority to the nationals of the host state, other EU nationals and *recognised* refugees. Nevertheless, the RCD, “in order to promote the self-sufficiency of applicants and to limit wide discrepancies between Member States”,<sup>292</sup> does require that applicants be given effective access to the labour market.<sup>293</sup>

Another issue that has been widely discussed is the amount of financial or in-kind assistance provided to asylum seekers, and the minimum standards in this regard. Material reception conditions are defined in Article 17 as including housing, clothing and daily expenses allowances. The CJEU in *Cimade and Gisti* required financial assistance to “be sufficient to ensure a dignified standard of living and adequate for the health of applicants and capable of ensuring their subsistence.” Guaranteeing family unity by ensuring access to adequate housing was explicitly addressed by the court.

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The recast RCD refers to international human rights standards and the concept of dignity (Article 1 EUCFR) in its recitals – but fails to refer to these standards in its material part, which defines “reception conditions.” Some authors have discussed whether respect for the principle of human dignity requires Member States to actively take a rights-based approach.<sup>294</sup> But an open question remains as to who defines what a dignified life looks like. “Intuitively, it has to do with notions of (self)-respect, autonomy, privacy, integrity, and self-determination.”<sup>295</sup>

Even if never applied in practise, also minimum standards for temporary protection have been designed at EU level.<sup>296</sup> They include *inter alia* the right to engage in employment, the right to have access to suitable accommodation, the right to receive necessary assistance in terms of social welfare, the right to medical care, and the right for children under 18 years of age to access the education system under the same conditions as nationals of the host Member State.

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<sup>291</sup> European Parliament and Council Directive 2013/33/EU (recast) (26.06.2013) available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033&from=EN> (last accessed 05.06.2016).

<sup>292</sup> Recital 23, RCD (recast).

<sup>293</sup> Article 15, 2 RCD (recast).

<sup>294</sup> Suggested for example by L. Thornton in (undated) “Law, Dignity & Socio-Economic Rights: The Case of Asylum Seekers in Europe”, available at: <http://www.fp7-frame.eu/wp-content/materiale/w-papers/Law-Dignity-Socio-Economic-Rights-The-Case-of-Asylum-Seekers-in-Europe.pdf> (last accessed 05.06.2016).

<sup>295</sup> Catherine Dupre, Article 1, Commentary Peers, p. 18, para 1.32.

<sup>296</sup> Council Directive 2001/55/EC (20.07.2001) (Temporary Protection Directive) available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:212:0012:0023:EN:PDF> (last accessed 05.06.2016).

The EU-wide harmonisation of reception conditions was primarily aimed at limiting secondary movements of asylum seekers and refugees to countries where they hope to benefit from higher standards.

### 6.1.3 Socio-economic and socio-political perspectives

The rise in the number of asylum seekers has led to pressure on the systems currently in place, particularly in those countries located at the Southern borders of Europe and which receive the highest percentage asylum seekers. Political debate tends not to be about the need to grant asylum or how this can be realised in the best possible way, but rather about the economic and/or cultural integration capacities of receiving countries. However, the economic impact of large numbers of asylum seekers on a receiving country is seen as being limited, and often even beneficial in the long run by socio-economic experts.<sup>297</sup> The short-term impact might be characterised by higher public spending that will only be partly offset by economic stimulation through associated investment, jobs and consumption. But in the long run, economic impact is normally relatively neutral. However, any assumptions that can be made about the long-term economic impact of large numbers of refugees depend on the educational backgrounds and competencies of the people arriving in the host country, and their early and successful integration into the labour market.<sup>298</sup> Further research which takes into account socio-economic factors from a human rights perspective would be very interesting.

Another issue that is stimulating public debate even more than economic arguments is the potential impact of large numbers of refugees on the cultural and religious traditions of receiving societies. Fears of losing national or local identities, or the achievements of “modern” societies, can mix with a general hostility towards anyone perceived as “foreign”, and drive societal division and conflict. Questions relating to how societies with changing populations should be guided in a way that overcomes these fears will need to be addressed in the near future. This will necessarily have to include reflections upon how to guarantee adequate living conditions for everyone in society, how to develop a common understanding of common values and principles, and how to reorganise our societies in such a way as to eradicate structural inequalities. Respecting human rights and dignity will have to be at the core of such deliberations instead of the fear of losing privileges and inherited rights.<sup>299</sup>

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<sup>297</sup> See, for example, A. Melander and K. Pichelmann (2015) *An economic assessment of asylum seeker inflows: Spectaculat and disturbing images, unspectacular economic impacts* (06.11.2015) Vienna: ÖGfE Policy Brief 37, available at: [http://oegfe.at/wordpress/wp-content/uploads/2015/11/OEGfE\\_Policy\\_Brief-2015.37\\_Pichelmann-Melander.pdf](http://oegfe.at/wordpress/wp-content/uploads/2015/11/OEGfE_Policy_Brief-2015.37_Pichelmann-Melander.pdf) (last accessed 05.06.2016); and OECD (2015) “How will the refugee surge affect the European economy” (Nov. 2015) in: Migration Policy Debates n 8, available at: <https://www.oecd.org/migration/How-will-the-refugee-surge-affect-the-European-economy.pdf> (last accessed 05.06.2016).

<sup>298</sup> See, for example, International Monetary Fund (2016) *The Refugee Surge in Europe: Economic Challenges* (Jan 2016) available at: <https://www.imf.org/external/pubs/ft/sdn/2016/sdn1602.pdf> (last accessed 05.06.2016)

<sup>299</sup> See, for example, J. Niessen (2012): International Migration, Human Development and Integrating Societies. Foundation for European Progressive Studies, <http://www.feps-europe.eu/assets/40dcb173-2235-4ccf-a2ab-36b4f84b7912/final%20study.pdf> (last accessed 05.06.2016).

## 7 Conclusions and Recommendations

There is no doubt that the EU and its Member States are facing a crisis of their system in place for handling many cases of people seeking for international protection at the same time. This crisis however is not really surprising as the Common European Asylum System had been characterised by severe deficiencies from the very beginning, and even more so in its concrete implementation over the years of setting it into practise.

A core problem of the system has been that it has left the human rights based approach of providing protection to those that were forced to flee for an approach that is much more targeted at protecting the borders and the perception capacities of Member States. Three main shortcomings are apparent: Protection seekers have very limited ways to access the EU and its Common European Asylum System; the current system of allocation of responsibility between the Member States fails to ensure a fair and sustainable responsibility-sharing; the great divergences between EU Member States in terms of reception conditions, recognition rates, and procedures and safeguards result in protection seekers being subject to a risk of “protection lottery”.

Opting for a rights based approach for the EU and its Member States would mean to:

- Ensure the rights of persons in need of protection are at the centre of any laws or policies concerning asylum and immigration and at their practical implementation
- Take into account the perspective of those seeking protection
- Provide for legal, safe and dignified channels for accessing the European Union and its Common European Asylum System
- Develop a common system of processing international protection applications and ensure that it is applied in a consistent and coherent way in all EU Member States.
- Ensure equal access to international protection procedures and application of common standards in all EU Member States
- Ensure that individual rights of international protection seekers are guaranteed at each stage of their journey. This can include the rights of the child, the right not to be discriminated, access to legal aid, etc.
- Ensure that decisions granting international protection taken in one Member State are recognised by all others (mutual recognition)
- Apply a human rights perspective on reception conditions and living conditions of applicants

We have in our research put the focus on access to the asylum system of the EU, access to application procedures and the criteria of, responsibilities for as well as legal framework of such. These areas consequently are also those on which we provide more detailed recommendations, which follow below:

### 7.1 Increase legal entry channels

Every year thousands of protection seekers do not have any other choice but to put their lives at risk crossing the Mediterranean Sea in order to reach the EU. Too many have died this way, and there is an urgent need to act. In order to prevent further death, legal pathways to the EU should be increased.

Increasing the legal ways to reach the EU will not only contribute to ensure the respect of the right to asylum but also help Member States in the fight against smuggling, as well as relieve the Member States with external borders and their reception system from most of the pressure. In this regard, we recommend to:

#### **7.1.1 Visas**

- Lifting carrier sanctions on transport companies and visa requirements at least for those countries of origin, where there are the greatest protection needs
- Adopt measures on humanitarian visas. A step in this regard should be to clarify the scope of the provisions concerning Limited Territorial Validity visas regulated by the Visa Code, and to establish EU dedicated procedures for humanitarian visas in compliance with the principle of *non-refoulement* and the right to asylum. In order to facilitate the application for humanitarian visas by persons in need of protection, the EU should guarantee a better geographical coverage for collecting/processing visa applications.

#### **7.1.2 Resettlement**

- Further elaborate programmes that aim at transferring refugees from the state in which they have sought protection to a third state that admits them and in which they are granted permanent residence status (resettlement programmes)
- Ensure a common European approach with common definitions of selection criteria
- Develop ways of increasing the readiness of Member States to admit refugees by ways of resettlement by executing EU pressure or by financial benefits
- Involve private sponsors as this could help to widen the possibilities and might also have positive effects on the integration of refugees and on the general climate towards refugees in society.
- Consider the Establishment of additional resettlement places specifically dedicated to emergency humanitarian situations. Emergency however in no case may lead to downgrading of international protection standards.

#### **7.1.3 Family reunification**

- Increase the possibilities for family members to reunite with beneficiaries of international protection residing in EU Member States. This could be done by:
  - Extending the scope of the Family Reunification Directive to beneficiaries of subsidiary protection, who should have the same rights as refugees;
  - Interpreting the term “family” in a wider sense (going beyond the “nuclear family”). “Dependency on the refugee” should not only be interpreted in the sense of financial dependency, but also in the sense of emotional and social dependency.
- Remove practical obstacles to family reunifications, as for example high application fees, requirements of application documents that are difficult to provide for as well as high travel costs and other costs of procedural requirements such as visa fee and DNA testing.
- Speed up the processing of family reunification claims in order to avoid that people risk their lives by choosing dangerous journeys and to facilitate the integration in the host country.

#### **7.1.4 Temporary protection**

In order to increasing legal entry channels to the EU, the EU and its Member States should also consider the application of the Temporary Protection Directive in cases of emergency and high numbers of arrivals.

### **7.2 Reforming Dublin**

Once the protection seekers have arrived in the EU, the main question is who should be responsible for processing their application for international protection. The so-called Dublin system, which currently regulates the allocation of responsibilities among the EU Member States, has failed to establish a mechanism in line with the principle of solidarity and fair sharing of responsibility enshrined in article 80 TFEU. A reform would be the way to go. In this regard, an allocation system should:

- Ensure that the best interest of the child and family unity considerations are absolute priorities in any allocation system. The notion of family members should be expanded for example by including families established outside the country of origin during the flight and siblings. Member States and EU institutions should make efforts to ensure that family members can live together from the very beginning by facilitating family tracing procedures as well as alleviating evidentiary requirements needed to prove family connections.
- Take into account the verifiable individual preferences of international protection seekers. In addition to family links, primary consideration should be given also to “verifiable and relevant substantial links” such as for example evidence of past working experience, professional qualifications obtained from a certain country, knowledge of languages, and existence of a local sponsor etc.
- When no family ties or substantial links between the applicant and a Member State can be found or when the concerned EU Member State is already disproportionately burdened, other criteria should be applied. We deem that a distribution key applied in combination with family criteria and verifiable preferences of the applicants may offer a more sustainable and fairer alternative.
- Replace the criterion of “first entry and stay” and establish a system for the allocation of responsibilities that is more in line with the principle of solidarity and fair sharing enshrined in Article 80 TFEU; or ensure that it is applied as a last resort, as also clearly established by the current Dublin system, which puts it at the bottom of the hierarchy.
- Coercive measures should be avoided as much as possible, and any measure aimed at preventing secondary movements should be in full compliance with fundamental rights, and especially with human dignity.

### **7.3 Towards a more harmonised asylum system within the EU – joint or supported processing**

Further to the problems concerning the allocation of responsibilities, one of the biggest challenges of the Common European Asylum System lies in the wide divergences among the national asylum systems of the EU Member States in terms of recognition rates, procedures and reception conditions. In order to achieve more harmonisation,

In a long-term, we recommend:

- The establishment of an EU authority responsible for the determination of all international protection claims lodged in the EU in order to guarantee truly common procedures and a uniform status valid throughout the EU. EU centralised processing would significantly reduce the risk of a “protection lottery” and grant applicants equal and high quality procedural rights in all EU Member States. This would impact also the attractiveness of certain Member States as compared to others, thus functioning as an additional driver for a fair sharing of responsibilities among the Member States.

In a short-term we support the idea of a „progressive approach“ suggesting that the EU institutions and the Member States could take the following steps:

- Wider use of supported processing and cooperation between EU MS as foreseen in the latest suggestions of the Commission how to reform EASO. We see supported processing as an important means to achieve more convergence and harmonisation in procedures and as a tool to increase mutual trust among the Member States.
- Mutual recognition of positive asylum decisions and the possibility to transfer international protection.
- Ensure that the existing standards are correctly implemented by strengthening the Commission’s monitoring and enforcement policy with a more extensive use of infringement procedures. Civil society also plays a key role in monitoring the correct implementation of the EU Asylum Acquis, for example with strategic litigation or research. This should be facilitated by allocating more funding.
- Ensuring greater convergence between the national asylum systems of EU Member States by the adoption of further legislation in the form of regulations, especially in the field of procedures.

It is of key importance to avoid that efforts towards harmonisation result in a downgrading of human rights standards. Any future legislation or joint/supported processing must remain in compliance with the 1951 Refugee Convention, international human rights law obligations, as well as the EUCFR and the jurisprudence of the European courts.

**Also find the study online:**

<http://bim.lbg.ac.at/en/euasylumpolicy>



**Die Studie finden Sie auch online:**

<http://bim.lbg.ac.at/de/euasylpolitik>



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