



Institute for
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The Second Phase of the Common European Asylum System:

A Step Forward in the Protection of Asylum Seekers?

Federica Toscano

IES WORKING PAPER 7/2013

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ISSN Number: 2034-6697
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Pleinlaan 2, B-1050 Brussels, Belgium

ABSTRACT

The aim of this paper is to analyse what is the impact of the second phase of the creation of the Common European Asylum System (CEAS) in the protection of rights of Asylum Seekers in the European Union.

The establishment of a CEAS has been always a part of the development of the Area of Freedom, Security and Justice. Its implementation was planned in two phases: the first one, focused on the harmonisation of internal legislation on minimum common standards; the second, based on the result of an evaluation of the effectiveness of the agreed legal instruments, should improve the effectiveness of the protection granted.

The five instruments adopted between 2002 and 2005, three Directives, on Qualification, Reception Conditions and Asylum Procedures, and two Regulations, the so-called “Dublin System”, were subjected to an extensive evaluation and modification, which led to the end of the recasting in 2013.

The paper discusses briefly the international obligations concerning the rights of asylum seekers and continues with the presentation of the legal basis of the CEAS and its development, together with the role of the Charter of Fundamental Rights of the European Union in asylum matters.

The research will then focus on the development in the protection of asylum seekers after the recasting of the legislative instruments mentioned above. The paper will note that the European standards result now improved, especially concerning the treatment of vulnerable people, the quality of the application procedure, the effectiveness of the appeal, the treatment of gender issues in decision concerning procedures and reception. However, it will be also highlighted that Member States maintained a wide margin of appreciation in many fields, which can lead to the compression of important guarantees. This margin concerns, for example, the access to free legal assistance, the definition of the material support to be granted to each applicant for international protection, the access to labour market, the application of the presumptions of the “*safety*” of a third country.

The paper will therefore stress that the long negotiations that characterised the second phase of the CEAS undoubtedly led to some progress in the protection of Asylum Seekers in the EU. However, some provisions are still in open contrast with the international obligations concerning rights of asylum seekers, while others require to the Member State consider carefully its obligation in the choice of internal policies concerning asylum matters.

ABOUT THE AUTHOR

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1 Introduction

During the European Council held in Tampere in 1999 Member States agreed on the creation of a Common European Asylum System (CEAS), based on the full and inclusive application of the Geneva Convention on Refugee Rights, as part of the development of the Area of Freedom, Security and Justice. The system should include “a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status”. The implementation was planned in two phases: the first phase should be focused on the harmonisation of internal legislation on minimum common standards; the second, based on the result of an evaluation of the effectiveness of the agreed legal instruments, should improve the effectiveness of the protection granted.

The legislative process carried out between 2002 and 2005 resulted in the adoption of five instruments: three Directives, on the qualification of persons in need of international protection², Reception Conditions³ and Asylum Procedures⁴, and two Regulations, the so-called “Dublin System”, setting the rules on the competence on the analysis of applications from third-country nationals and stateless persons, and establishing a database containing the finger prints of asylum seekers.

In 2006 the Commission initiated the process of evaluation of the first phase, to prepare a solid basis for the recasting of the mentioned legislative instruments. The two main conclusions of this evaluation were: firstly, in many situations a good level of harmonisation did not correspond to a uniformity of procedures and practices adopted internally, due to the large margin of appreciation left to Member States; secondly, the legislative framework contained many shortcomings with respect to international obligations concerning human rights, as often highlighted by the case law of the European Court of Human Rights.

Negotiations for the adoption of the Recast of the mentioned Directives and Regulations, expected initially to be concluded in 2010, proved to progress rather slowly. The only instrument adopted within the second deadline, which was 2012, was the Recast Qualification Directive. The Recast Directives on Asylum Procedure⁵ and Reception Conditions⁶ were eventually adopted on the 26th June 2013, together with the Regulations Dublin III⁷ and EUODAC, despite the fact that proposals from the Commission were tabled many years before.

This paper aims to analyse if the second phase of the CEAS resulted in an increase to the guarantees granted to asylum seekers, with respect to the specific rights to which they are entitled and, more generally, to the rights granted by international human rights instruments, as specified by the case law.

¹ Council of the European Union Presidency Conclusions Tampere, 1999, p. 14.

² Council Directive 2004/83/EC on Asylum Qualification.

³ Council Directive 2003/9/EC on Reception Conditions.

⁴ Council Directive 2005/85/EC on Asylum Procedures.

⁵ Directive 2013/32/EU on Asylum Procedures (Recast).

⁶ Directive 2013/33/EU on Reception Conditions (Recast).

⁷ Regulation No 604/2013 Dublin III.

For these purposes, the first section is dedicated to the description of the international standards concerning asylum and refugee law, while the second section presents the legal basis of the CEAS and its development, together with the role of the Charter of Fundamental Rights of the European Union (EU) in asylum matters.

The third section analyses in detail the improvements introduced in the second phase and their effect on both the protection of asylum seekers and the compliance with international standards, in particular concerning qualification of beneficiaries of protection, reception conditions, asylum procedures, and special guarantees to be granted to vulnerable people.

Even if it is not the scope of this paper to analyse if this second phase reached the aim of establishing a common system or not, some considerations will turn to the impact that certain provisions have on the level of homogenisation of the procedures in the EU. Discrepancies in the treatment of people and in the process of applications have an impact not only on the general standard of protection granted to asylum seekers in the EU, but also on the decision of asylum seekers to lodge the application in one country rather than others, or to move towards it.

2 The Right to Asylum in International Law: A Brief Overview

2.1. Asylum Seekers in the Geneva Convention on the Rights of Refugees

Article 1A, paragraph 1, of the 1951 Convention applies the term “refugee”, first, to any person considered a refugee under earlier international arrangements. Article 1A, paragraph 2, to be read together with the 1967 Protocol and therefore without the time limit, offers instead a general definition: a refugee is any person who is outside their country of origin and unable or unwilling to return there or to avail themselves of its protection, on account of a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular group, or political opinion.

The recognition of refugee status is an act merely declaratory and not constitutive. “Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognised because he is a refugee”⁸. The declarative nature of this accreditation has a fundamental consequence: the duty of protection arises, regardless of the formal recognition of the status, if the subject is victim of a situation that meets the criteria listed in Article 1 of the Convention and if he lies in the area of jurisdiction of a foreign state. This means that the asylum seeker, “alleged refugee”, has the right to access the territory of that State and consequently both the right to request the formal recognition of qualifications and to access to a fair and efficient procedure for the evaluation of its need to be granted international protection. A different approach would undermine significantly the effectiveness and usefulness of the Convention. A “Convention Refugee” would be severely damaged by not being able to exercise the rights guaranteed by international law only because his request of status recognition is still pending (not to mention that often these assessment proceedings can also require long time, especially in case of migration flows).

⁸ UNHCR, Handbook 1992, p. 28.

In the Convention there are several provisions that obviously aim for the protection of asylum seekers before the formal recognition of their status, though they are never mentioned.

One very clear example is Article 31, which states in its first paragraph:

“The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”

This provision obviously refers to the refugees have not yet been formally recognised: a different interpretation would compromise the aim of the Convention.

For this same reason, other rights granted from the Convention to refugees need to be applied to all asylum seekers present in the territory of the state of refuge, even if they entered illegally⁹.

Secondly, it is relevant to realise that the rights granted in the Convention can be classified into five categories: the core of the basic rights guaranteed to all refugees by the mere fact of being under the jurisdiction of the State of Asylum¹⁰; the rights applicable to those who are physically present within a state's territory¹¹; those applicable to who is lawfully within¹²; those that relate to refugees lawfully staying; those recognised as those who can demonstrate a durable residence in the country of asylum¹³. The scheme of the rights granted by the Convention provides for a strengthening of the protection that follows the strengthening of the link between the asylum seeker with the host state. The first three categories are typical of asylum seekers, or of those who, waiting for the formal recognition of the status of refugee, are already under the jurisdiction of a foreign state.

It is important to underline that the Convention does not contain any obligation for Member States to formally recognise refugee status¹⁴, but this does not mean that the rights mentioned should not be granted to asylum seekers' rights therein, even if no procedure for the declaration of the status is carried on¹⁵, accordingly to the declaratory nature of the qualification of refugee. This is of particular importance in legal orders in which it is foreseen a system like to one of “temporary protection” of the EU, that does not require a recognition of a particular status.

2.2. The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) contains the Right of Asylum at Article 14: “Everyone has the right to seek and to enjoy in other countries asylum from persecution”.

⁹ Lauterpacht, Bethlehem, 2003, p. 116.

¹⁰ These are “non-discrimination” (Article 3), “movable and immovable property” (Article 13), “access to courts” (Article 16(1)), “rationing” (Article 20), “education” (Article 22), “fiscal charges” (Article 29), “non-refoulement” (Article 33), “naturalization” (Article 34).

¹¹ These are “freedom of religion” (Article 4), “right to receive identity documents” (Article 27), “right not to be penalized for illegal entry” (Article 31 (1)) and “right not to be subjected to unjustified and arbitrary restrictions on freedom of movement” (Article 31 (2)).

¹² These are “right not to be expelled” (Article 32), “freedom of movement” (art.26) and “right to access to employment” (Article 17).

¹³ Hathaway, 2005, p. 156.

¹⁴ UNHCR, Handbook, par. 189.

¹⁵ Hathaway, 2005, p. 185.

The right of an individual to look for protection from persecution in another country, different from the country of origin, is recognised in the Universal Declaration, but it does not entail any obligation for the country to grant this protection.

The Commission for Human Rights proposed another wording for this Article. The original Article 12, later Article 14, was expressed as following: "Everyone has the right to seek and be granted, in other countries, asylum from persecution".¹⁶

However, the United Kingdom proposed to substitute the word "be granted" with "to enjoy". This weaker formulation was welcomed by the other national delegations, which were against the inclusion of an international obligation to grant asylum "unless that right was granted by a treaty"¹⁷. This position reflects what the predominant opinion was in those years: to grant asylum was a sovereign right of the state, and not a right of the individual. The only obligation of the state was to respect the decision about granting asylum taken from another state in its area of jurisdiction¹⁸.

This situation has not yet changed, even after 1951, following the Geneva Convention on the Rights of Refugees. In its Preamble the Convention refers to the need to implement forms of international cooperation in order to provide a satisfactory solution to the problem of asylum seekers, but in the preparatory work there is a clear Commission desire to leave more space to the discretion of each Member in the fulfilment of obligations about granting asylum¹⁹. The Convention recognises the need to grant protection to those who have a well-founded fear of being victims of persecution, and provides for the obligations of treatment of these individuals fleeing from their areas of origin in the hands of the states; however, it does not contain any specific obligation to grant the entry to the country in order to achieve long-lasting protection, as well as any right to obtain asylum in the state of refuge.

2.3. The UN Declaration on Territorial Asylum

Following the drafting of the UDHR and the Geneva Convention, the UN Commission on Human Rights attempted to bring to place more stringent guarantees for the protection of the right to asylum in other new international instruments²⁰. The Commission on Human Rights drafted the so-called UN Declaration on Territorial Asylum²¹, which the General Assembly adopted unanimously in 1967. The Declaration gathered the principles shared by the international community who was still very careful not to interfere with the sovereignty of the states. In fact, Article 2 clearly points out that people who have the right expressed in Article 14 of the UDHR are the subject of interest in the entire international community, but that this interest shall be pursued "without prejudice to the sovereignty of States and the purposes and principles of the United Nations". The main aim of the Declaration was to crystallise the principle that all states must respect the decision of another state to grant protection to an asylum seeker in its territory. The state of asylum is the one that assesses, on an exclusive basis, the situation, as sovereign in its territory, and choose the criteria on which to base this assessment²².

¹⁶ UNGAOR Summary Records of Meetings, 1948, "Annexes", p. 24.

¹⁷ Ibidem, p. 330.

¹⁸ Goodwin-Gill, McAdam 2007, p. 359.

¹⁹ Ibidem, p. 362.

²⁰ Goodwin-Gill, McAdam, 2007, pp. 361-362.

²¹ UN Declaration on Territorial Asylum. 1967.

²² Ibidem, Article 1 (3): "It shall rest with the State granting asylum to evaluate the grounds for the grant of asylum."

The Declaration was followed by the establishment, in the early 1970s, by a group of experts from the UN which had as its task the elaboration of a text that could raise to the International Convention on Territorial Asylum, and later by the call, in 1977 a conference for approval of the "draft resolution" drawn up by the Commission. The goal was not reached²³ because of the deep differences between delegations²⁴ and the clash over the need for a system suitable for the protective nature of mass flows, and not just for the individual²⁵.

2.4. The European Convention on Human Rights (ECHR)

The lack of progress in the UN in establishing a right to asylum in the hands of the individual have not discouraged the attempts made by some states to achieve the same goal through regional measures. This is the reason why asylum seeker protection has always been a very hot topic in the political agenda of the Council of Europe.

In the ECHR there is not an article that expressly provides for the right of asylum. Notwithstanding, Article 3 acts as a guarantee for asylum seekers and refugees against refoulement to countries in which they may be subjected to torture or other inhuman and degrading treatment, it was immediately clear that a prediction of this kind is not sufficient: it was necessary to remedy the lack of an explicit recognition of the right in question. For this reason, in 1960 the Parliamentary Assembly recommended that the Committee of Ministers develop a second protocol to the Convention, to include those civil and political rights that were not considered in the original Convention and the First Protocol²⁶. However, the wording proposed by the Assembly on that occasion did not include an explicit reference to the right of asylum. An attempt to progress was done in 1961, when the Parliamentary Assembly issued a Recommendation "on the right of asylum" which, recalling its earlier recommendation on the second protocol, emphasised the need for states to confer political refugees "right to seek, receive and enjoy asylum to the extent compatible with safeguarding their own legitimate interest"²⁷. This formulation was innovative compared to the one used so far by the UN, however, it was eventually not included in the draft article proposed by the Recommendation, where the peaceful expression "to seek and to enjoy" appeared again. However, the express prohibition of "rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is well-founded fear of persecution endangering his life, physical integrity or liberty in that territory" was included. This expression recognises a wider protection compared to the one of Article 3 of the Convention; however, the key step of the express recognition of a right of asylum in the Convention was not done then or never to date.

The Court of Human Rights has strengthened the protection of asylum seekers through its case law, especially concerning the right to non-refoulement.²⁸

²³ Report of the UN Conference on Territorial Asylum, 1977.

²⁴ F. Leduc, 1977, p. 239.

²⁵ Ibidem, p. 225.

²⁶ Council of Europe, Recommendation n°234, 1960.

²⁷ Council of Europe, Recommendation n°293, 1961, Recital 2.

²⁸ ECHR, Soering v. The United Kingdom, no. 14038/88; Cruz Varas and Others v. Sweden, no. 15576/89; Siliadin v. France, no. 73316/01; Ahmed v. Austria, no. 25964/94.

3 The Right to Asylum in the European Union

3.1. Positive and Negative Aspects to Complementary Protection

The UNHCR has repeatedly stressed the need for Member States to interpret broadly the refugee definition contained in Article 1A of the Convention, in order to ensure the widest possible application of the protection provided. The Executive Committee also encourages states to retract the person seeking asylum in the criteria laid down by the Convention, if possible, rather than within the scope of complementary instruments²⁹ and to respect, even in these situations, the obligation of non-refoulement³⁰. The reason why the Executive Committee and UNHCR urged to ensure protection of the extensive application of the Convention rather than to apply complementary measures based on the international system of protection of human rights lies in the fact that the latter may result in an inadequate alternative source of effective protection. As several authors have pointed out, together with the UNHCR, many states undertook obligations in the field of human rights at the formal level, then do not provide appropriate measures at the national level to ensure an effective remedy to victims of violations of their rights. This is due to several reasons: for example, the fact that the meaning of the terms used in these legal instruments is very broad, and therefore the protection is too generic, or that in some systems the protection is intended only to citizens of the state and not to foreigners present on the territory.

On the contrary, the Refugee Convention provides for specific and absolute obligations, focusing the protection on the particular needs and the category. Quoting McAdam:

“If the substantive rights of beneficiaries of complementary protection were dependent on human rights law, the quality of protection would be contingent on the combination of treaties ratified (and implemented) by the State, and status would consequently be very inconsistent.”³¹

This consequence has also been recognised by the European Court on several occasions. In the Gurung case, the Court of Appeal of the UK ruled that “a successful claimant under the Human Rights Convention, even if found to be irremovable unless Article 3 is to be violated, is not entitled to receive any status. As a matter of current policy only he is granted certain civil, political social and economic rights and he may also get exceptional leave to remain for varying periods”³². However, the Executive Committee (ExCom) underlined also that “complementary forms of protection provided by States to ensure that persons in need of international protection actually receive it are a positive way of responding pragmatically to certain international protection needs”³³.

These needs are what urged the EU to elaborate an internal CEAS, characterised by several legal instruments and, in particular, by the creation of the complementary system of subsidiary protection for the protection of asylum seekers who, even if not a target of persecutory practices, are still in danger of life or serious violation of fundamental rights. In this section we are going to analyse first what the Charter of

²⁹ ExCom, Conclusion on Complementary Forms of Protection, 2005, preamble and par i)

³⁰ Ibidem, par. m).

³¹ McAdam, 2007, p. 204.

³² United Kingdom, Asylum and Immigration Tribunal, Gurung v. Secretary of State for the home Department, par.145. See also ECHR, Vijayanathan and Pusparajah v. France, no. 17550/90; 17825/91, par. 46.

³³ ExCom, 2005, Conclusion n. 103 (LVI).

Fundamental Rights states about Asylum, secondly what structure for the protection of Rights of Asylum Seekers has been settled by the CEAS, in its first phase.

3.2. The Charter of Fundamental Rights of the European Union

This document, drawn up by the Convention of 62, a body created specifically mandated by the Council of Europe and consisting of 15 representatives of the Member States, 16 Members of the European Parliament and 30 representatives of the national parliaments, as a European Commissioner, the Portuguese Antonio Vitorino, was officially signed in Nice in 2000 (and this is why it is also called the "Nice Charter"). It is a paper consisting of 54 articles, which collects the civil, political, economic and social rights recognised by the Member States. The aim was to consolidate the fundamental rights already stated in other instruments of EU³⁴ and its formulation is inspired at various national and international documents such as, for example, the constitutions of European countries or the Conventions adopted within the Council of Europe and the UN. Despite the importance of this text, it remained for years without legal binding force until 2009, the entry into force of the Lisbon Treaty.

Article 18 states that "the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union". The article refers to Article 63 of the EC Treaty, which established the obligation for the Council to adopt, within five years after the ratification of the Treaty, a series of measures on asylum, concerning the determination of the Member State responsible for examining the request, minimum standards for the reception and the granting or revocation of refugee status. These technical measures relating to asylum, refugees, displaced persons and immigration in general clearly suggest that the Charter refers to the right of the individual to seek asylum in EU countries, rather than a general right to obtain asylum in the EU, therefore not adding anything substantial to what is already provided for by Article 14 of the UDHR. The Charter, by referring to the Refugee Convention, sets that the international obligations derived from the Convention are standard to be respected by European legislation in the definition and rules of protection of asylum seekers. Therefore, this article plays an important role, especially after the Treaty of Lisbon, when the Charter acquired legally binding status.

3.3. The Common European Asylum System (CEAS)

3.3.1. Legal Basis

Article 61 TEC stated that the final aim of European legislation on Asylum is to achieve the "progressive establishment of an area of freedom, security and justice". At the same time, the Member States of the EU aimed also at the adoption of measures who could limit secondary movements of asylum seekers in this area, as it is stated in the preambles of every legislative instrument that have been adopted in this field. In order to achieve these goals, it was necessary to proceed with the harmonisation of the legislation of Member States in these matters. Therefore, Member States agreed to create a CEAS, setting up a legal framework defining common minimum standards in the field of asylum ensuring fairness, efficiency and transparency³⁵.

The Treaty of Amsterdam, adopted in 1997, established the basis of the future CEAS at Article 63 TEC, where the layout of the system was also addressed. This article establishes four categories of statuses: "refugee status", "temporary protection" for "refugees" and "displaced persons", "international protection" (in

³⁴ Ibidem, Article 51(2).

³⁵ Commission Green Paper 2007, p. 2.

following legal instruments called “subsidiary protection”) and protection of “asylum seekers” or “applicants”. The article required also the adoption of some rules on qualification and on procedures, as well as “reception standards”, “criteria and mechanisms” for allocation of applicants and measures on “family reunification”. The Treaty required also the adoption of these measures within five years of its entry into force.

3.3.2. *The First Phase of the CEAS*

The treaty did not mention explicitly the CEAS. This name appeared for the first time during the Tampere European Council of 1999, when the European Council, while agreeing on a work programme for the development of the Area of Freedom, Security and Justice, agreed also upon the establishment of a CEAS, based on the standards of the Geneva Convention. The system should include “a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status.”³⁶. The status “international protection” mentioned above was here defined as “subsidiary protection” and was meant to offer “appropriate status to any person in need of such protection”. The so-called Tampere Programme, adopted during the Council, also pointed out that the CEAS should be implemented in two phases. The first phase should be focused on the harmonisation of internal legislation on minimum common standards, while the second, based on the result of an evaluation of the effectiveness of the agreed legal instruments, should improve the effectiveness of the protection granted.

The call for the second phase was issued in November 2004, through the adoption of the Hague Programme, and was meant to be concluded by the end of 2010.

The European legislation on international protection elaborated on this first phase of the CEAS addressed all the subject matters mentioned in the EC treaty as follows.

The Qualification Directive (QD)³⁷, which in the terms of the Commission, is the “heart”³⁸ of the CEAS, sets rules on “qualification” as “refugees” and “persons in need of international protection”, as well as the “content” of the protection granted. As it will be analysed more in detail later³⁹, this directive defines what the criteria to be qualified as refugee in a broader way with respect to the Geneva Convention are. It also defines the category of “persons eligible for subsidiary protection”, who do not qualify for refugee status, but are nevertheless at risk of suffering serious harm their country of origin, and the minimum set of rights to be granted to them.

The Asylum Procedures Directive (APD)⁴⁰, on “procedures for granting and withdrawing refugees’ status”, addressed procedures for dealing with application for asylum: it applies to applicants for refugee protection⁴¹ and may apply to applications for subsidiary protection⁴². The directive defines the beginning and end of the asylum seeker status⁴³ and the minimum procedural standards that

³⁶ Council of the European Union Presidency Conclusions Tampere 1999, p. 14.

³⁷ Council Directive 2004/83/EC on Asylum Qualification.

³⁸ Commission Explanatory Memorandum, p. 3.

³⁹ See chapter 4.2.

⁴⁰ Council Directive 2005/85/EC on Asylum Procedures.

⁴¹ PD, Article 3(1).

⁴² PD, Article 3(3).

⁴³ Hemme 2005, p. 196.

shall be respected by Member States pending the examination of the application, concerning for example interviews, legal assistance, detention and appeals. This Directive contains also some concepts such as “safe country of origin” and “safe third-country”.

The Reception Conditions Directive (RCD)⁴⁴ lays down the minimum standards for various aspects of the protection of Asylum Seekers, including, for example, information, residence, freedom of movement, employment and education.

As a necessary complement of these instruments, the Dublin Regulation (Dublin) sets out the criteria to define when a Member State is competent to analyse the application for international protection from a third-country national. The main goal of this instrument is to ensure that an asylum seeker has access to an asylum procedure in one of the EU Member States, on the basis of responsibility criteria. The main principle is that the state responsible for processing an application is the one through which the asylum seeker entered in the EU. However, the Regulation sets also a hierarchy of criteria that take into consideration particular situations, as the principle to ensure family reunification. The so-called “Dublin System” is supported by EURODAC⁴⁵, a database containing fingerprints of asylum seekers which is operative since 2003.

The main purpose of the first stage of the CEAS, meaning from 1999 to 2006, was the harmonisation of national legislation on the “minimum standards” set by the legislative instruments adopted, as required by the Article 63 TEC⁴⁶. Member States have been since then obliged to implement these standards in their national legal orders. However, they were not prevented to adopt domestic conditions that are more favourable for the beneficiary of the Community legislation, especially if this is necessary to comply with other obligations under international law. This is also clarified in the directives on Qualification, Procedures and on Reception Standards, where it is observed that “Member States may introduce or retain more favourable standards, in so far as those standards are compatible with this Directive”⁴⁷. A more favourable treatment granted by a Member State would be perfectly in line with the objectives of the CEAS: “[i]t is in the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions for third-country nationals or stateless persons who request international protection from a Member State”⁴⁸. As we will see, these standards have often been criticised for being too open to appreciation from the Member States, endangering the effectiveness of the harmonisation and the respect of international obligations.

In 2006 the Commission initiated the process of evaluation of the first phase of the CEAS to have some solid basis for the adoption of an improved second phase of the CEAS, as required by the Hague Programme⁴⁹. The Commission carried on a detailed comparison of the measures adopted by Member States, to evaluate the results of the harmonisation; the Commission realised as well that in some situations good level of harmonisation did not correspond to good level of protection of people in need of international protection.

A great role in the revision of the system was played by the case-law of the ECtHR. As was mentioned in the first section, EU Member States have been often condemned for providing inadequate reception condition and for the violation of the prohibition of refoulement, even when the practices condemned were in line

⁴⁴ Council Directive 2003/9/EC on Reception Conditions.

⁴⁵ Council Regulation (EC) 2725/2000 establishing EURODAC.

⁴⁶ Article 63 (1) (b), (c), (d), 2 (a) and (3) (a).

⁴⁷ Article 3 QD I, art 4 APD I and art.4 RSD I.

⁴⁸ Recitals of QD I, RCD I and APD I.

⁴⁹ Council of the EU 2005, The Hague Programme.

with the standards set by the legislation of the EU⁵⁰. This revealed many gaps in respect of international obligations that required to be taken into account in the planning of the second phase of the CEAS.

Furthermore, the recent history of the Mediterranean Sea leads also to a large phenomenon of mass fluxes from North Africa to Southern European Countries, which often calls for increased solidarity in the area of asylum. The Southern Countries urged the EU to find solutions to ensure that responsibility for processing asylum applications and granting protection is shared equitably among all Member States.

In 2007 the Commission published a Green Paper who pointed out the main weaknesses of the CEAS and the basis to draft the second phase. In the Green Paper it is stated that “the goal of this second phase is to achieve both a higher common standard of protection and greater equality in protection across the EU and to ensure a higher degree of solidarity between EU Member States”⁵¹. The Commission recognised the necessity to improve all aspects of the asylum process, starting from the moment in which the individual seek from protection in the EU, until when a durable solution is found, trying to fill all gaps of the current *acquis*, but also pursuing a further harmonisation based on higher standards⁵².

3.3.3. The Impact of the Treaty of Lisbon on the Asylum System

The Treaty of Lisbon, entered into force on the 1st December 2009, defined an important evolution in European asylum policies. First, it completed the process of inclusion of measures about asylum into common policies of the EU. With the abolition of the pillar system, the objective of the constitution of an area of freedom, security and justice is now subjected to ordinary legislative procedure and to full jurisdiction of the European Court of Justice⁵³.

More important, the Lisbon Treaty embraces explicitly the need of a second phase of the CEAS. While the obligations deriving from Treaty of Amsterdam were limited to the adoption of minimum standards, the current Treaty strengthens significantly the legal basis for a common policy on asylum and subsidiary protection. Article 78 of the TEU requires the adoption of “measures for a common European asylum system”, which should include a uniform status of asylum valid in every Member State and common procedures towards the requests of international protection received from third-countries nationals⁵⁴. The Treaty requires explicitly building the common policy on the concept of solidarity between Member States⁵⁵. The text addresses also the need to adopt uniform standards concerning the conditions of reception of asylum seekers⁵⁶, revealing the aim to raising the bar of the standards characterising the first phase of the harmonisation.

It is also important to mention again that the Treaty of Lisbon gives a legal binding character to the Charter of Fundamental Rights of the EU. The obligations deriving from the Geneva Convention, which are recalled in the Article 18 of the Charter, have now legal binding value and should be enforced in the European legislative instruments. This means also that the European Court of Justice is now

⁵⁰ ECHR, *Hirsi Jamaa and Others v. Italy*, no. 27765/09.

⁵¹ Commission Green Paper 2007, p. 3.

⁵² *Ibidem*.

⁵³ Article 67(1) TFEU, art. 78(2).

⁵⁴ Article 78(2).

⁵⁵ Article 67(2) TFEU, “[the Union] shall frame a common policy on asylum immigration and external border control, based on solidarity between Member States (...).”

⁵⁶ *Ibidem*, lett.f.

competent in judging violations of Article 18 of the Charter, and therefore violations of the Geneva Convention. The ECJ will be competent to judge violations of these obligations even if committed by countries who opted out its competence to interpret legislation passed under the asylum and immigration sections of the Treaty, like UK and Denmark⁵⁷.

The Treaty of Lisbon foresees also the adhesion of the EU to the ECHR: as a consequence, the Court in Strasbourg will be competent to judge the compliance of European legislation with the provisions of the ECHR and the case law related.

It is also important to recall here that the Treaty of Lisbon allows now any court of a Member State to ask for preliminary rulings, and not only national courts of final instance. This should enable, as was highlighted by the European Parliament, the development of a larger body of case law in the field of asylum.

3.3.4. *The Stockholm Programme*

At the end of 2009 the European Council adopted another quinquennial programme for the development of the AFSJ, to define the priorities in the field of justice and home affairs for the period from 2010 to 2014 (it is therefore the standing one). Since the objective of the Hague Programme to conclude the second phase of the CEAS in 2010 was not achieved, the Stockholm Programme reaffirms the need of establishing a unique asylum procedure and a uniform status of international protection and defines the end of 2012 as “key policy objective for the Union”⁵⁸.

The programme has been highly criticised for being very generic, for not including many of the requests that the Commission addressed in 2009 to the Parliament and the Council⁵⁹ and therefore, for being a “marche arrière”⁶⁰ in the path toward the aims settled for this second phase of CEAS. Firstly, the programme assigns a central role to the European Asylum Support Office (EASO) to foster an effective cooperation on asylum matters and the respect of the principle of solidarity between Member States⁶¹. However, no compulsory burden-sharing mechanism is planned. Instead, the programme insists on a solidarity based on a voluntary basis, to be achieved “through a broad and balanced approach”⁶²: the Commission is invited to consider a mechanism “for the voluntary and coordinated sharing of responsibility between Member States”⁶³, which does not seem to respond to the needs claimed by Mediterranean countries after the recent increase of asylum seekers approaching their frontiers from North Africa and south-eastern countries. Secondly, although the Programme recalls concepts like “unique asylum procedures” and “uniform status”, it does not clarify the content of those definitions. Thirdly, the programme gives an alarming importance to the return policies, whose effectiveness and sustainability are considered “an essential element of a well-managed migration system within the Union”⁶⁴. The document encourages in this field cooperation with the countries of transit and of origin, as well as the establishment of agreements on return solutions. Although in the last years the Commission stressed the importance of an effective policy on removal and return, it highlights as well the importance of procedures, to be carried “in accordance with the law and with human dignity”, together with the monitoring

⁵⁷ Migration Watch UK 2008, par. 7.

⁵⁸ European Council The Stockholm Programme 2009, p. 27.

⁵⁹ Commission Communication to the European Parliament and the Council 2009.

⁶⁰ Forum Réfugiés 2010, p. 76.

⁶¹ European Council The Stockholm Programme 2009, p. 32.

⁶² Ibidem.

⁶³ Ibidem.

⁶⁴ Ibidem, p. 30.

of the implementation of the related directive⁶⁵, especially “as regards the effective enforcement of expulsion measures, detention, appeal procedure and treatment of vulnerable people”⁶⁶. Regrettably, none of these concepts is mentioned in the Stockholm Programme.

3.3.5. *The Second Phase of the CEAS: A Path Full of Obstacles*

In the run-up to the entry into force of the Treaty of Lisbon and the adoption of the Stockholm Programme, the European Commission tabled various legislative proposals. The first measure proposed in 2009 was the establishment of a permanent structure to support practical cooperation amongst EU Member States in the field of asylum – the already mentioned EASO. It also tabled proposals for Recast Directives on Reception Conditions (2008), Asylum Procedures (2009), Asylum Qualification (2009), as well as proposals for a Recast Dublin Regulation (2008) and a Recast EURODAC Regulation (2009), all based on the shortcomings identified during the evaluation of the first phase instruments. In particular, the Commission observed that “the agreed common minimum standards [had] not created the desired level playing field”⁶⁷.

Regrettably, negotiations proved to progress rather slowly. If at the moment of the adoption of the Stockholm Programme it was evident that the initial 2010 deadline for the completion of the CEAS would not be met, the postponement of the deadline to 2012, foreseen in the European Pact on Immigration and Asylum, adopted in 2008⁶⁸, and then in the Programme itself, proved to be insufficient.

The only instrument adopted within the second deadline was the Recast Qualification Directive (QD II), in 2012. The recast directives on Asylum Procedure (APD II)⁶⁹ and Reception Conditions (RCD II)⁷⁰ were eventually adopted on the 26th June 2013, together with the Regulation Dublin III⁷¹, despite the fact that a second version of the mentioned proposals of the Commission was already transmitted to the European Parliament and the Council in 2011 for the two directives, and in 2008 for the Regulation.

4 Key Issues for the Protection of Asylum Seekers: between the First and the Second Phase of the CEAS

4.1. The Personal Scope of the CEAS

The scope of the legislative instruments that are part of the CEAS is restricted *rationale personae* to third-country nationals and stateless persons⁷². This restriction has been strongly criticised as it excludes the application of European Asylum Law to EU citizens. The Geneva Convention never mentions the possibility to predetermine the safety of a country with respect to the violation of fundamental rights or the commission of acts of persecution. On the contrary, Article 3 of the Convention states that “the Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin”. The UNHCR

⁶⁵ Directive 2008/115/EC on Return.

⁶⁶ Commission Communication to the European Parliament and the Council 2009, p. 27.

⁶⁷ Commission Policy Plan on Asylum 2008, p. 4.

⁶⁸ Council of the European Union, European Pact on Immigration and Asylum, 2008, 11, it is mentioned that the European Commission should “present proposals for establishing, in 2010 if possible and in 2012 at the latest, a single asylum procedure [...]”.

⁶⁹ Directive 2013_32_EU on Asylum Procedures.

⁷⁰ Directive 2013_33_EU on Reception Conditions.

⁷¹ Regulation No 604/2013 Dublin III.

⁷² QD, Article 1.

Handbook⁷³ states clearly that in the determination of the refugee status it is necessary to ascertain the relevant facts of the case⁷⁴. Therefore, any decision taken on the assumption of respect of human rights in a certain country is a violation of the Geneva Convention. Therefore, the automatic and reciprocal recognition of safety results in a violation of international obligations towards refugees and also of the Charter of Fundamental Rights. Despite that, the Treaty of the European Union includes a Protocol which states the following: “Given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters”, unless procedures have been initiated against that country for infringement of human rights⁷⁵. The safety of the country is therefore presumed on the basis that Member States have agreed to be bound by Article 6 TEU, which recognises the legal value of the Charter of Fundamental Rights, and of the recognition given by EU to the principles included in the ECHR. This is obviously insufficient to grant an effective protection of the fundamental rights of a person, as it has been also recognised by the European Court of Justice⁷⁶ and the European Court of Human Rights⁷⁷. However, the instruments adopted during the second phase of the CEAS do not widen the personal scope of the Common Asylum System, which still only includes the standards to be respected limited to third-country nationals and stateless persons.

Although the right to free movement allows an EU citizen to set up anywhere in the EU without strict limits, the choice of the legislator remains highly contestable. An asylum seeker is a person who is entitled to a certain treatment and certain rights because of his or her particularly vulnerable position. The nature of the facts that led to the need to leave the country of origin or of residence does not change because they happened within the EU, nor the consequences that they entailed. An EU citizen who is in this vulnerable position cannot have access to the reception standards, which are granted to other asylum seekers in a similar situation, once at the border or in the territory of another Member State. A fugitive who is also an EU citizen will not have access to measures ensuring an adequate standard of living⁷⁸; if this person belongs to one of the vulnerable groups to which the CEAS gives a specific attention, he or she will not be granted the same support or benefits. It is also important to recall that the prohibition of non-refoulement includes the prohibition to extradite a refugee and that in the EU extradition is regulated through agreements between Member States. Now the EU legislation does not protect EU citizen who comply with all requirements to apply for international protection, apart from the nationality.

4.2. Qualification

The EU legislation on asylum recognises four statuses: applicant, refugee, beneficiary of subsidiary protection and beneficiary of temporary protection. The rules on the recognition of these statuses are laid down mainly in the Qualification and in the Temporary Protection Directives.

The original Qualification Directive was adopted only in 2004, later than other core legal instruments of the first phase of the CEAS, notwithstanding its relevance for the effectiveness of the system. On the contrary, it was the first one to be agreed upon during the second phase. The Directive has an essential role in the CEAS. First of all, it establishes minimum standards for the qualification of the beneficiaries of the protection granted by the EU, who are in general the “persons genuinely in need of

⁷³ UNHCR, Handbook 1992.

⁷⁴ *Ibidem*, par. 29, par. 195.

⁷⁵ Protocol 24 TEU.

⁷⁶ ECJ, Joined Cases C-411/10 and C-493/10, par. 86.

⁷⁷ ECHR, *Hirsi Jamaa and Others v. Italy*, application no. 27765/09, par. 116.

⁷⁸ Article 17 RCD II.

international protection”⁷⁹: the directive excludes from the protection those who are allowed to remain in the territory of a Member State “on a discretionary basis on compassionate or humanitarian grounds”⁸⁰. Secondly, it provides a minimum level of benefits to the ones owing these statuses⁸¹. Member States are still encouraged to introduce more favourable standards⁸², even if the disappearance of the word “minimum” in the title of the QD II weakens inevitably this indication.

The status of “applicant” was not mentioned in the Directive of 2004. The first definition of applicant can be found in the Reception Conditions Directive of 2003⁸³ and was later included in the Regulation Dublin II and in the Asylum Procedure Directive of 2005 as well. The Recast Qualification Directive contains an amended definition of applicant⁸⁴. While in the original wording an “applicant” was every third-country national or stateless person who made an application for “asylum”, the current definition is limited to people who want to apply for “international protection”, where this expression includes both refugee status and subsidiary protection. This amendment excludes the application of the Directive (and the entire CEAS) to asylum seekers that are obviously ineligible for both statuses. These are not only economic migrants, but also people who cannot be sent back to their country of origin according to international law, but are not eligible for subsidiary protection⁸⁵.

Concerning the status of “refugee”, the preamble clarifies that the rules on qualification are in the sense of the Refugee Convention. However, it is necessary to underline once more that in both the original Directive and the Recast, the definition is limited to “third-country nationals” and “stateless persons”, contrary to “any person”, as written in the Geneva Convention.

The category of “beneficiary of subsidiary protection” was included to recognise practices already existing in some Member States to implement international obligations. It was therefore necessary to harmonise the system of protection of those who do not qualify as refugee, but “substantial grounds have been shown for believing that the person concerned, if returned [...] would face a real risk of suffering serious harm [...] and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country”⁸⁶. The definition of “serious harm” is contained at Article 15 of both the original and the recast Directives.

The Directive provides an obligation upon the Member States to grant the status each time the applicant is eligible in accordance with the law⁸⁷. These two provisions, which were already mentioned in the original text, are essential to ensuring the effectiveness of the CEAS.

Temporary protection is a status that can be granted in case of a mass influx of displaced persons. Displaced persons can be people eligible for the declaration of the two statuses mentioned above or people fleeing for other reasons, like endemic violence, armed conflict, or systemic and generalised violation of human rights⁸⁸. A Council Decision shall recognise the existence of a situation of mass influx.

⁷⁹ QD (I), Preamble, par. 6. QD (II), Preamble, par. 12.

⁸⁰ QD (I), Preamble, par. 9. QD (II), Preamble, par. 15.

⁸¹ QD (I), Preamble, par. 6. QD (II), Preamble, par. 12.

⁸² See Preamble.

⁸³ Art. 2 c) “‘applicant’ or ‘applicant for asylum’ means a third country national or stateless person who has made an application for asylum in respect of which a final decision has not yet been taken”.

⁸⁴ QD II, Article 2(j).

⁸⁵ See Chapter 3.2.2.

⁸⁶ QD II, Article 2(f).

⁸⁷ For refugee status, art. 13; for subsidiary protection Article 15.

⁸⁸ Council Directive 2001/55/EC on Temporary Protection, Article 2.

After this brief description of the categories of people of concern of the EU, I will address the key issues that were controversial in the first phase, comparing them with the frame set by the recast of the Qualification Directive.

4.2.1. A Better Compliance with Article 1C of the Refugee Convention

The QD I was not completely compatible with the Refugees Convention in the part in which did not provide the non-application of the cessation clause when the refugee can invoke “compelling reasons arising out of previous persecution for availing himself or herself of the protection of the country of nationality” or former habitual residence⁸⁹. This exception is now included in Article 11, in the case of refugees, but also in Article 16, which rules the cessation of subsidiary protection.

The QD II also strikes out the possibility offered to the Member States to reduce the benefits of the two mentioned statuses in case the conditions for their recognition were created on purpose through the active engagement of the asylum seeker⁹⁰ which would frustrate the objective of protection.

4.2.2. The Compatibility with the Obligations of Non-Refoulement

The statuses of beneficiaries of subsidiary and temporary protection were created because many asylum seekers in need of international protection do not fall into the scope of the Geneva Convention, but of other human rights instruments.

This is the case of the asylum seekers entitled for protection against refoulement under Article 3 ECHR, Article 3 CAT⁹¹ and Article 7 CCPR⁹², who are not necessarily refugees. The ECHR, the Committee against Torture and the Human Rights Committee often underlined that the refusal to grant protection and the consequent refoulement to the country of origin where there is the risk to be subject to the prohibited treatments constitutes a violation of the mentioned obligations⁹³. However, the first phase of the CEAS addressed the obligations under the prohibitions of non-refoulement only partially⁹⁴ and the same approach has been maintained in the QD II. The reluctance to enlarge the scope of the subsidiary protection is evident also from the fact that none of the international human rights legal instruments mentioned above is recalled in the Preamble of the QD II. Some provisions that are clearly in contrast with the international obligations were also maintained. Firstly, the Preamble to the Recast Directive pose the condition that asylum seekers need to be “genuinely” in need of protection⁹⁵.

Secondly, Article 17 of QD II excludes again from the protection not only asylum seekers who committed crimes mentioned in Article 1C of the Refugee Convention, but also the ones who committed “serious crime”⁹⁶, without defining the meaning of the adjective “serious” and therefore leaving large space to interpretation and application of this exclusion clause. The clause that allows Member States to exclude from subsidiary protection the asylum seekers that committed whatever crime punishable in their country of origin with

⁸⁹ Refugee Convention, Article 1C.

⁹⁰ QDI, Article 20 par. 6 and 7.

⁹¹ UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

⁹² UN International Covenant on Civil and Political Rights.

⁹³ Concerning art. 3 ECHR, see *Soering v. The United Kingdom*, par. 91. Concerning Article 3 CAT, see *Orhan Ayas v. Sweden*, Communication n. 97/1997; Concerning Article 7 CCPR, HRC, General Comment n.20(44) (article7), 1992, par. 9.

⁹⁴ Battjes 2005, p. 221.

⁹⁵ QD II, Preamble, (2)2.

⁹⁶ *Ibidem*, Article 17, par. 1 b).

imprisonment and that escaped to avoid the sanction was also maintained in the recast. This means that the category of persons entitled to protection against refoulement does not coincide with the scope of persons entitled to subsidiary protection, and therefore this article is definitely not compatible with the international obligations to protect asylum seekers against refoulement.

4.2.3. The Assimilation of the Two Statuses

The QD II addresses positively the call of the Stockholm Programme to proceed with a complete approximation of the rights and benefits to be granted to refugees and beneficiaries of subsidiary protection⁹⁷.

The decision to align the standards granted to the two groups is evident already from the Directive's title, which merges the two categories of protection into one, "beneficiaries of international protection". This approach is confirmed in the amendments of Chapter VII, which defines the content of international protection. The provisions on minimum benefits are now ensured almost equally to both groups, contrary to what was the case before: the revised Directive removes most of the previous differences in the minimum standards of treatment of persons with subsidiary protection, which concerned access to employment, education, procedures for recognition, social welfare and healthcare. In the QD II difference remains only with respect to the duration of the residence permit, which shall be issued for a minimum of three years to refugees and one year to beneficiaries of subsidiary protection.

4.2.4. Agents of Protection

Among the agents that the QD II accredits as potential agents of protection, non-state actors are listed together with the State. The article was not amended despite the call of UNHCR⁹⁸ and ECRE⁹⁹ to exclude non-state actors from Article 7. Parties and organisations, including international organisations, do not have the attributes of a state and therefore do not have both the ability to enforce the rule of law and the same obligations under international law. This inevitably limits their ability to provide and ensure an effective protection which complies with international standards, or which could be subjected to the review of a competent authority. The Commission proposed to include the requirement for the actor be "willing and able to enforce the rule of law", but the amendment was not adopted in the final version of the Directive. The article only requires the willingness to "offer protection".

In addition to that, the second paragraph of Article 7, which requires positively the protection to be "effective and of a non-temporary nature", continues specifying that this protection is to be considered provided when actors take "reasonable steps to prevent the persecution or suffering of serious harm". The wording used is largely open to the interpretation of Member States and weakens noticeably the control of the effectiveness of the protection granted in the country of origin.

4.2.5. Internal Protection

A positive change regards the assessment of the possibility for the asylum seeker to avail himself of protection in his or her country of origin, which is now subjected to a stricter scrutiny. In order to declare the lack of need of international protection, it is now necessary to verify that the applicant can

⁹⁷ Ibidem, par. 39.

⁹⁸ UNHCR Comments on the European Commission's proposal for a Directive on qualification, 2010, p. 5.

⁹⁹ ECRE, Guidelines, p. 7.

“safely and legally travel to and gain admittance to that part of the country and can reasonably expected to settle there”¹⁰⁰. It is also now required to the Member State to base its evaluation on “precise and up-to-date information [...] obtained by relevant sources, such as UNHCR and EASO”¹⁰¹. This is a considerable step forward, that ensures an effective evaluation of the availability and accessibility of real protection in the country of origin.

4.2.6. Acts of Persecution

The QD II equalises the absence of protection against acts of persecution to the active conduct of persecution¹⁰², which was the only behaviour considered as relevant in the original text. The failure or refusal to act on the part of the actors of protection is an important element to be taken into consideration, especially when it comes to situations in which offensive acts are knowingly tolerated by authorities. This has particular relevance in gender basis claims, as underlined by the UNHCR¹⁰³.

4.2.7. The Relevance of Gender-Related Claims

The QD II amended the previous Article 10 including the obligation to give due consideration to gender related aspects, including gender identity, in determining the membership to a particular social group. In the old text, gender issues were mentioned together with the statement that they should not create the presumption of membership to a group, creating in these cases a relevant obstacle to obtaining the protection granted by the Directive. The inclusion of gender claims is extremely important, especially if we consider that this element is not considered in the Geneva Convention and consequently in the Charter of Fundamental Rights. Only in 1995 the Executive Committee called upon a consideration of female as specific category in special need of being granted international protection¹⁰⁴, long time after the adoption of the final text of the Convention: since the recommendations of the Executive Committee do not have legally binding value, it was essential to ensure the inclusion of the criteria of gender in the text of the Directive.

4.3. Reception

The Reception Conditions Directive (RCD) is the main legislative instrument which addresses the conditions that Member States shall grant to asylum seekers who made an application for international protection in the terms specified in the QD II. The transposition and the implementation of the original Directive, adopted in 2003 and applicable to all Member States, with the exception of Ireland and Denmark, were evaluated by the European Commission in 2007¹⁰⁵, and the findings used to prepare the proposal for recast in 2009. The European Commission noted that at the time the Directive was largely applied also with respect to applicants for subsidiary protection, contrary to what provided by the text, who was limited to refugee due to the fact that at the time of the adoption of the RCD I, the negotiations around the QD were not concluded yet. In its report, the Commission acknowledged that the Directive left large margin of appreciation to Members States, notably in regard to access to employment, health care, level and form of material reception conditions, free movement rights and needs of vulnerable persons. The wide liberty left to Member States in the implementation of these standards was often criticised by scholars, due to the result in a lack of respect of international obligations and non-homogeneity.

¹⁰⁰ QD II, Article 8 (1).

¹⁰¹ Ibidem, (2).

¹⁰² Article 9, (2).

¹⁰³ UNHCR 2010, p. 8.

¹⁰⁴ ExCom, Conclusion n.39 (XXVI) 1985.

¹⁰⁵ Report on the application of Directive on reception of asylum seekers, 2007.

The findings of the Commission confirmed that the practices concerning reception are very different from country-to-country, besides the fact that many countries have also failed in complying with the standards that the Directive provides. This result goes against the purposes of the RCD, which is stated in the Preamble of both the original and the recast: the harmonisation aims to limit secondary movements¹⁰⁶, influenced by the difference of conditions offered by the Member States. In the conclusions, the Commission states clearly that these difference “undermines the objective of creating a level playing field in the area of reception conditions”.

When analysing the standards on reception condition of asylum seekers, and their compliance with international law, it is necessary to have a look to the international provisions about discrimination in the enjoyment of human rights. The Geneva Convention contains an article dedicated to the principle of non-discrimination, article 3, which specifies that articles shall be applied without distinction of race, religion or country of origin. This provision is a prohibition of discrimination not only among refugees, in relation to access to conventional protection, but also between refugees and citizens. Other provisions contained in the Convention are intended to ensure equal rights between citizens and asylum seekers: in Articles 20, 21 and 29, for example, it is clearly emphasised that refugees should be treated as citizens with regard to livelihood, primary education and taxation. Since these are rights that require only the presence on the territory, they are claimable by asylum seekers as well. However, the protection granted by this article of the Convention has a very limited scope.

This is why it is important to read this Directive together with the provision contained in the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR), which requires to grant to “anyone”¹⁰⁷ a minimum standards of rights, starting from Article 11, “an adequate standard of living for himself and his family” and “the continuous improvement of living conditions”. The Executive Committee, aware of the reluctance of some countries to comply with the Covenant, has often recommended that reception conditions “respect human dignity and applicable international human rights law and standards” and grant “basic support needs, including food, clothing, accommodation, and medical care, as well as respect for their privacy”¹⁰⁸. In identifying what is the minimum standard or rights to ensure to everyone at the moment of reception, the anti-discrimination clause at Article 2 (2) of the Covenant, which guarantees to “everyone” the rights protected by the text, plays a key role. As a result, refugees and asylum seekers are subject to the obligations of States to respect the right to health, to adequate housing, social care, education and work. In support to the application of this provision to asylum seekers, the Committee on Economic, Social and Cultural Rights has recently pointed out that governments must ensure them full protection from acts and laws that could be discriminatory, for example when it comes to access to housing¹⁰⁹. Article 4 says that the state may subject such rights to limitations, but only if they are determined by law, they are compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

The fact that rights contained in the Covenant can be achieved progressively does not exclude the obligation of states to grant those rights to asylum seekers as well as to nationals and foreign people in general. The ESC Committee confirmed that the Covenant contains an obligation to ensure at least a minimum level of enjoyment of the rights contained in the ICESCR to everyone who is under the jurisdiction of the

¹⁰⁶ RCD I, Preamble, par. 8. RCD II, Preamble, par. 12.

¹⁰⁷ ICECCR, Article 1.

¹⁰⁸ ExCom, Conclusion n. 93 (LIII), 2002, par. b).

¹⁰⁹ Concluding Observations of the Committee on Economic, Social and Cultural Rights: Belgium, U.N. ESCOR, 10th Sess., 27th mtg., U.N. Doc. E/C.12/1994/7 (1994) par. 14.

state, unless it can be demonstrated not to have the resources to meet this minimum level¹¹⁰.

After this brief recall of the international obligations concerning reception, I am going to describe the relevant changes in the Directive after the recast, how they improve or not the situation of asylum seekers and how the Directive complies with International obligations.

4.3.1. Scope of the Directive

It was necessary to widen the scope of the RCD after the adoption of the QD and to take into consideration the more recent assimilation of the two statuses of “refugee” and “beneficiary of subsidiary protection” under the unique category “beneficiaries of international protection”. This is the reason why Article 3 of the RCD II says that the Directive applies to the third-country nationals and stateless persons who made an application for international protection. Here comes the first problematic aspect of the recast. As we mentioned above, the category of beneficiary of subsidiary protection does not unequivocally include all human beings entitled of international protection against refoulement: in this way, the standards described in the RCD II will not apply to those victims of torture or other inhuman or degrading treatment that do not fall into the scope of the QD II. This limit is also strengthened by par. 4, which leaves up to the Member State to decide if to apply the Directive in connection with procedures other than the mentioned ones.

Concerning the territorial application of the Directive, although at first sight the scope seems to be significantly widened by the inclusion of the territorial waters and the transit zones, a more attentive analysis of the wording used reveals many gaps with the international standards. The elements added reflect the consolidated international opinion on the extent of the territorial scope of the prohibition of refoulement¹¹¹; however, the recast does not take into consideration the extraterritorial scope of the same prohibition. The expression contained in Article 33 of the Refugee Convention, which prohibits refoulement “in any manner whatsoever”, convinced many scholars that the responsibility of the Member State is extended to all people subject to or within their jurisdiction, as it is for other Human Rights legal instruments¹¹². This is very important in particular with respect to the action of the Coastal State in the Contiguous Zone and in the High Seas¹¹³. This situation seems to be addressed by the Recital 8 of the Preamble, which states that the Directive shall “apply during all stages and all types of procedures concerning applications for international protection and in all locations and facilities hosting applicants”, although, the recital continues by saying “for as long as they are allowed to remain in the territory of the member states as applicants”, which may lead to the interpretation that the Directive does not apply to asylum seekers who are awaiting transfer under the Dublin III Regulation.

¹¹⁰ General Comment n.3, The Nature of States Parties Obligations (Article 2, par. 1 of the Covenant), U.N. Comm. on Econ., Soc. & Cult. Rts., 5th Sess., at par. 2, U.N. Doc. E/1991/23 (1991).

¹¹¹ For Transit Zones, see ECHR, *Amuur v. France*, no. 19776/92. For territorial waters, see UN GA, Convention on the Law of the Sea (UNCLOS), 10 Dec. 1982, Article 2(3): “The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law”.

¹¹² Lauterpacht, *Bethlehem*, 2003, p. 67.

¹¹³ Lauterpacht, *Bethlehem*, 2003, p. 11; Wouters, 2009, p. 54.

4.3.2. Information and Documentation

The results that the Article 5 allows for are improved, due to the fact that by striking out the expression “as far as possible” Member States are always obliged to make an effort to provide written information in an understandable language for the applicant. However, the language chosen can still be one that the applicant is “reasonably supposed to understand”. This might, in practice, endanger the effectiveness of the information provided¹¹⁴.

Concerning the documentation, a step forward could have been taken by including the prohibition for the Member States to impose “any documentation or other administrative requirements on asylum seekers before granting the rights to which they are entitled” under the Directive, as proposed by the Commission. Regrettably, the text adopted prohibits only the imposition of “unnecessary or disproportionate documentation”, which may still lead to an inappropriate level of burden on the applicant, especially considering the particular situation.

4.3.3. General Rules on Material Reception Conditions and Health Care

Article 17 of the RCD II contains some improvements with respect to the former Article 13 of the old Directive. The obligation for the Member States to provide “an adequate standard of living for applicants” corresponds better to international obligations, compared to the previous requirement to ensure “a standard of living adequate for the health of applicants”. The latter statement opened the possibility of lowering the standards according to age, gender and personal situation of the asylum seeker. The special attention reserved to the specific situation of “vulnerable persons”, which positively substitutes the expression “persons who have special needs”¹¹⁵, is also an important achievement.

However, the article contains two very dangerous elements which have a potential negative effect on the entire system of protection of rights of applicants, and they are both included in the fifth paragraph of Article 17. Firstly, the Member States have total discretion in determining the material support to be granted in order to ensure adequate standards of living. This wide discrepancy will result in the realisation of very different practices in the Member States not only reducing, but encouraging the secondary movement of asylum seekers within the EU. Secondly, it is now permissible to grant less favourable material support to asylum applicants compared to nationals, “in particular where material support is partially provided in kind or where those level(s), applied for nationals, aim to ensure a standard of living higher than that prescribed for applicants under this Directive”. Additionally, they struck out the obligation to duly justify this decision, which was included in the original proposal from the Commission. Member States are now allowed to proceed with a different treatment of nationals and asylum seekers, even if facing in similar conditions (besides the fact that the situation of an asylum seekers is always more vulnerable compared to nationals). The final formulation of this paragraph is not only in obvious violation of the obligation of non-discrimination contained in the Covenant, but also has the effect of suggesting and approving differences in treatment based solely on the nationality of the person in need of material support.

Concerning the reduction or the withdrawal of material reception conditions, it should be seen as positive that Member States must now justify the cases in which they proceed with a withdrawal¹¹⁶. Also positive is that they are obliged in any case to provide access to health care (in the limits of Article 19) and a

¹¹⁴ UNHCR, 2010, p. 5.

¹¹⁵ See chapter 4.5.

¹¹⁶ RCD II, Article 20 (1).

dignified standard of living, even in case of sanctions, reduction or withdrawal. However, it has to be remarked that even if the formulation of paragraph 2 changed, the substance is still the same as before: an asylum seeker may still be granted a reduced reception condition on the basis of an unreasonable delay in the lodging of the application. The evaluation of what is “reasonably practicable” is left to the discretion of national authorities.

4.3.4. Access to Employment

In the comments to its proposal, the Commission clarified the importance of granting quick access to the labour market in order to prevent the exclusion of the beneficiary of international protection from the host society, to promote self-sufficiency, to reduce costs to the state through the payment of additional social welfare to applicants and to discourage illegal working. This is the reason why the Commission proposed to ensure access to employment no later than six months from the lodging of the application for international protection, in accordance to the maximum duration of the Asylum Procedure adopted in the frame of the recast of that Directive. While this last provision was eventually adopted, the RCD II extends the deadline to nine months, which is happily lower than the former deadline of 12 months. Regrettably, the Directive maintains in the second paragraph, the provision allowing the Member States to give priority to EU citizens or other third-country nationals.

It is also relevant to underline that the new paragraph 2 mentions explicitly the obligation of ensuring an effective access to the labour market; however, this wording ensures Member States a large amount of leeway and does not set concrete criteria to ensure the effectiveness of this access. Furthermore, the following article leaves to the Member States’ discretion the access to vocational training for asylum seekers. This discretion is granted even though “vocational guidance and training programmes, policies and techniques” are mentioned in the ICESCR as an essential step in the full realisation of the right to work¹¹⁷.

4.3.5. Access to Healthcare

The Recast Directive takes into consideration the protection of mental health and the treatment of mental disorders, which although if object of the protection required by the ICESPR¹¹⁸, was never mentioned in the RCD I. Apart from that, no substantial step forward has been undertaken to strengthen the access to health care for asylum seekers. Article 19 remains very weak, ensuring only the access to emergency care and essential treatment of illness, and leaving to the discretion of the Member State the decision to provide a more favourable standard. There are no doubts that this falls short of the obligation put forth in the Covenant, which states that everyone has the right to enjoy the “highest attainable standard of physical and mental health”.

4.3.6. Detention

The Recast Directive includes four brand new articles dedicated to the detention of asylum seekers. The definition of the grounds for, the guarantees to asylum seekers and the conditions of detention is a very good improvement compared to the former legal framework, which was extremely short, vague and open to arbitrary decision and legal uncertainty.

It is important to highlight that Article 8 clearly states that an applicant cannot be held in detention because he or she is an applicant, in accordance with Article 31 of the Refugee Convention, which prohibits the imposition of penalties, on

¹¹⁷ ICESCR, Article 6.

¹¹⁸ Ibidem, Article 12.

account of the illegal entry or presence of refugees in a Member State. The second paragraph of the aforementioned article also specifies that the detention is to be considered a last resort, to be applied only if other less coercive measures cannot be used. For this reason, the RCD II also requires a “necessity test” to demonstrate that the decision to proceed with detention is not arbitrary, but based on individual assessment.

However, the grounds for detention mentioned in the following paragraph are quite wide and some of them may in practice lead to long term or indefinite detention, contrary to what prescribed by the international obligations.

The Geneva Convention itself allows restrictions on the movement of asylum seekers, (although it does not explicitly mention detention) if they are necessary in order to allow the regularisation of the status or waiting for a transfer to a third-country competent to examine its request¹¹⁹. However, the analysis of the preparatory work reveals that this limitation of freedom of movement, requested to control situations of mass influx and to verify the identity of persons claiming the status, must be a temporary measure, lasting no more than a few days¹²⁰. Article 32 instead provides for the possibility of detaining a refugee who is waiting to be expelled for reasons of national security or public order. The article mentioned, also highlights the fact that this decision must be taken in accordance with the principles of due process.

Article 8 of the Recast Directive does not mention any time-limit for the lawful detention of applicants (Article 9 only mentions that the time should be “as short as possible”), which together with the large list and wide definition of grounds mentioned in paragraph 3, might lead to a disproportionate use of detention. The paragraph starts by justifying cases in which detention may be useful to determine or verify the identity or the nationality of the applicant. As UNHCR stated in their comment on the proposal of the Commission, “the simple inability to produce identification documents should not be automatically interpreted as an unwillingness to cooperate, or an assessment that the individual is at risk of absconding”, and the need to verify nationality may lead to indefinite detention of stateless persons¹²¹. Letters b), c) and f) are also dangerous provisions, which may lead to the detention of applicants through the entire procedure, which, as we have seen, may last six months, or even during the procedure which decides which Member State will deal with the application.

The Directive requires that detention facilities ensure the provision of proper reception conditions, for example the access to leisure activities, including in open air¹²², and also that detained applicants are kept separately from ordinary prisoners. However, the Directive allows Member States to seek a derogation from this article, in duly justified cases and for the shortest time possible. Notwithstanding these requirements, the derogation enables Member States to locate a large number of applicants in inadequate structures, therefore violating international obligations concerning detention of asylum seekers.

The Directive also provides very weak guarantees to the detained applicant. The Commission proposed that detention ordered by administrative authorities (which is the case in most cases) shall be confirmed by judicial authorities within 72 hours of the beginning of the detention. The adopted text only mentions the obligation to provide a “speedy judicial review” to be conducted ex officio and/or at request. The Directives leave the determining of the review deadline to the Member States.

¹¹⁹ Refugee Convention, Article 31 (2).

¹²⁰ Hathaway, 2005, p. 420.

¹²¹ UNHCR 2010, p. 9.

¹²² Article 10.

Control over the non-arbitrary character of detention is warranted at the international level by the Covenant on Civil and Political Rights (ICCPR) in Article 9 (4) (the Human Rights Committee has emphasised that this article can be applied to all prisoners, including those that are for immigration issues¹²³) and Article 5 (4) of the ECHR. These articles, being almost identical, require that anyone subjected to measures restricting his or her freedom of movement shall be granted the right to a judicial review, without undue delay so as to verify the legality of detention. The HRC emphasised the fact that the article implicitly provides some criteria to be applied in case of preventive detention: "if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law, information of the reasons must be given and court control of the detention must be available as well as compensation in the case of a breach"¹²⁴. Although Article 9(4) of the Covenant is not one of its mandatory provisions, Article 5(4) of the ECHR can be derogated only in very specific situations, for example in case of war or other danger to the nation, in the narrow limits that the situation requires. Therefore, the Convention does not allow any derogation concerning reception of asylum seekers.

It does not appear that all grounds for detention come from the necessity of ensuring public security and the level of guarantees requested by international standards. There also seem to be some problems with respect to the right of the detained applicant to be informed. In this situation it is sufficient to merely suppose that the language used to communicate is understood.¹²⁵

On the positive side, is the fact that the sixth paragraph obliges Member States to provide free legal assistance and representation by someone suitably qualified. However, this is only provided in cases of judicial review. The Member State is also given the possibility to reduce the access to free assistance if the applicant does not lack sufficient resources (par. 7) and, in this case, to not provide a more favourable treatment with respect to nationals.

4.3.7. Appeal

The new Article 26(1) strengthens the grounds on which asylum seekers may challenge decisions relating to reception conditions, by extending their appeal rights to include all decisions relating to "withdrawal or reduction" of reception conditions. In addition, recast Article 26(2) provides for legal assistance free of charge where the asylum seeker cannot afford the costs and "in so far as it is necessary to ensure their effective access to justice". The article also requires that the assistance and representation be provided by "suitably qualified persons" with no conflicting interest with the applicant. These safeguards reflect the case law of the ECHR and the EU Charter, and improve the likelihood of access to an effective remedy, which is essential to ensure consistent adherence to the entitlements set out in the Directive.

Regrettably, the article makes it possible for Member States not to provide legal assistance free of charge during the appeal when the competent authority considers that the action has "no tangible prospect of success". The wide margin left to the Member State in the implementation of this provision and the discretionary power granted by the Directive to the authority in the evaluation of the situation is not balanced by any objective criteria to define what is a "tangible prospect of success", such as new documentation or a change in the situation of the conditions of the applicant. It is hard to see how this provision could not lead

¹²³ UNHRC, CCPR General Comment, 1982, par. 1.

¹²⁴ *Ibidem*, par. 4.

¹²⁵ Article 9 par. 4.

to an increase in the difficulty for applicants without sufficient resources to get access to an effective remedy and a successful appeal.

4.4. Procedures

The new Article 26(1) strengthens the grounds on which asylum seekers may challenge decisions relating to reception conditions, by extending their appeal rights to include all decisions relating to “withdrawal or reduction” of reception conditions. In addition, recast Article 26(2) provides for legal assistance free of charge where the asylum seeker cannot afford the costs and “in so far as it is necessary to ensure their effective access to justice”. The article also requires that the assistance and representation be provided by “suitably qualified persons” with no conflicting interest with the applicant. These safeguards reflect the case law of the ECtHR¹²⁶ and the EU Charter¹²⁷, and improve the likelihood of access to an effective remedy, which is essential to ensure consistent adherence to the entitlements set out in the Directive.

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4.4.1. Scope of the Directive on Asylum Procedures

The territorial scope of the Directive has been enlarged in the same terms of the Recast of the Reception Conditions Directive, therefore it can be addressed with the same critics. The personal scope has been widened to meet the novelties introduced by the QDII. The Directive also takes into account the approximation between the statuses of refugee and beneficiary of subsidiary protection, and for this reason the standards for the European Asylum Procedure shall be applied to both type of applications, generally referred to in the terms “applications for international protection”¹²⁸, consistently with the instruments previously adopted. Article 3 makes it possible for Member States to apply the same standards for the applications that are falling out of the scope of this legislative instrument.

4.4.2. The First Country of Asylum

The Recast Regulation on the determination of the Member State responsible for examining the application, often indicated as Dublin III, reaffirms the prominent role of the first country of asylum in the hierarchy of criteria to be applied¹²⁹. However, while in the previous system the competence of the First Country was the general rule, to be applied automatically unless the applicant was a minor or issues concerning family reunification were involved, now Article 3 of Dublin III states clearly that Member States shall examine “any application for international protection [...] on the territory of anyone of them”. Even though the main criterion to identify the responsibility is still the First Country, the change in the wording of Article 3 weakens its automatic application. Member States are not bound by this criterion if they consider that there are relevant elements to be taken into consideration, for example the interest of the applicant to apply in that

¹²⁶ M.S.S. v. Belgium and Greece, application no. 30696/09, par. 301.

¹²⁷ Article 47 on the right to effective remedy and fair trial.

¹²⁸ APD II, Article 1 b).

¹²⁹ Dublin III, Article 7(2).

State or the risk of violations of human rights in the countries reached before. This change is more compatible with the recommendation of the Executive Committee, which has explicitly required Member States consider all the reasons why the asylum seeker has advanced his request for asylum in their country instead of the other one¹³⁰, in particular if concerning Family Reunification¹³¹.

As a matter of fact, countries often bounced their responsibilities concerning asylum applications to each other, or refused some requests due to the simple fact that the applicant entered another territory before.

One example is what happened recently in Germany¹³², where four Syrian asylum seekers were sent back to Hungary, although in this state reception conditions for asylum seekers have been severely criticised for years. In the opinion of Germany, the Hungarian authorities were the only competent jurisdiction, due to the fact that these men passed through the Hungarian territory to reach Germany. This decision was consistent with the requirements of the Dublin II Regulation¹³³ and with Protocol 24 of the Treaty on the European Union, but was at the same time violating humanitarian and conventional obligations that the state is required to respect¹³⁴. In light of these obligations, an asylum seeker could have been legitimately sent back to Hungary only if it was ensured that he could effectively enjoy the protection of his or her fundamental rights.

A more protective approach of the rights of the asylum seekers toward the automatic resettlement in the first country of asylum is also included in the ASP II: applicants can now challenge the application of the concept of first country of asylum to their situation¹³⁵.

4.4.3. Responsible Authorities

The article concerning the determining authority, meaning the authority responsible for the applications for international protection, now includes an explicit obligation for the Member State to provide “appropriate means [...] to carry out its tasks”¹³⁶. Although the Directive does not define extensively the means that are to be considered appropriate, it mentions explicitly the obligation to employ personnel that is “sufficiently competent”¹³⁷. As specified further in the same article¹³⁸, the Member State is obliged to provide the authorities with a specific training on the subjects mentioned in Article 6(4) of the Regulation establishing the EASO¹³⁹: international human rights and asylum acquis, handling asylum applications from minors and vulnerable persons with specific needs, interview techniques and use of information on the countries of origin. The reference to the trainings provided by EASO clarifies the intentions of the Directive to create a class of functionaries with a homogenous preparation as a tool to achieve the homogenisation of the procedures. Another positive note is the mandatory training on the treatment of vulnerable applicants, which contributes to granting effectiveness to the other legislative improvements

¹³⁰ ExCom Conclusion n.15, (XXX), 1979.

¹³¹ ExCom Conclusion N. 88 (L), 1999.

¹³² ECRE Weekly Bulletin 2012.

¹³³ Dublin II, Art.10 “Where it is established [...] that an asylum seeker has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for asylum”.

¹³⁴ On the indirect responsibility in the violation of human rights see ECHR, *Soering v. The United Kingdom*, *Cruz Varas and Others v. Sweden*, *Hirsi Jamaa and Others v. Italy*.

¹³⁵ APDII, Article 35.

¹³⁶ *Ibidem*, Article 4(1).

¹³⁷ *Ibidem*.

¹³⁸ *Ibidem*, par. 3.

¹³⁹ Regulation no. 439/2010 establishing a European Asylum Support Office.

concerning the categories of vulnerable people, in this Directive and in others mentioned above.

The former Article 4 contained a list of situations in which the Member State was allowed to designate an authority other than the determining one. In the Recast, the list is limited to two exceptions: procedures concerning the determination of the Member State responsible for the examination of the application (Dublin III) and procedures for granting or refusing permission to enter carried on at the borders¹⁴⁰. The maintenance of this last exception has an important negative direct consequence: the Member State is not obliged to provide to the authority at the border the same training that the determining authority has to undertake, although both have the same competences when it comes to examination of the claim and interviewing of the applicants. This difference is hardly justifiable, especially if we consider that a large number of applications take place at the moment when asylum seekers present themselves at the borders of a Member State and already at that moment they are under the scope of International and European obligations. Furthermore, the possibility of applying accelerated procedures at the border requires very well trained personnel to deal with them in an appropriate way. The difference is however mitigated by the fact that Article 6 requires that Member States ensure that all authorities likely to receive applications get the “necessary level of training which is appropriate to their tasks and responsibilities”¹⁴¹ even if it is left to the State to evaluate what is to be considered “appropriate”.

It is important to underline that the Directive does not identify which type of authority should be addressed when applying for international protection. Member States are free to choose the determining authority, but as the Executive Committee concluded, in order to grant effective access, the authority in charge needs to be easily recognisable for the asylum seeker¹⁴². This is something that the Member State should take into consideration in the decision of information to be granted to asylum seekers according to Article 8¹⁴³.

4.4.4. Access to Procedures and Examination of the Applications

The Recast Directive includes an explicit obligation that gives applicants an effective way to lodge the application for international protection as soon as possible¹⁴⁴: the registration of these applications shall also happen in specific timeframes, that is three working days, extendable to ten in case of simultaneous applications from a large number of third-country nationals or stateless persons. This obligation is functional to the effectiveness of the prescription that obliges Member States to process the applications and conclude the procedure within six months from the moment when the application was lodged¹⁴⁵. The timeframe of six months is also a relevant improvement, considering that previously the obligation was to process applications as soon as possible. The article grants the possibility of extending the time limit for a maximum period of nine months in specific circumstances, namely in case of large number of simultaneous applications, failure of the applicant to comply with his or her obligations and in the very generic case when “complex issues of fact and/or law are involved”. However, the Member State is required to duly justify the circumstances that require such extensions and to inform the applicant about this delay and the expected time when the decision will be taken, this last one upon request.

¹⁴⁰ Ibidem, (2).

¹⁴¹ APDII, Article 6 par. 1.

¹⁴² ExCom Conclusion No. 8 (XXVIII) – 1977, par. e).

¹⁴³ See next paragraph.

¹⁴⁴ Ibidem, Article 6, par. 2.

¹⁴⁵ Ibidem, Article 31, par. 3.

The access to the procedure for determining the status is a crucial moment: any attempt to restrict access to this procedure, such as a time limit to apply, a mandatory form or an obligation to present particular documents for the purpose of validity of the application itself, are all measures that can potentially result in a breach of the obligation of non-refoulement, given the delicacy of the situation that asylum seekers are in¹⁴⁶. This is why the request should be accepted in any form, as long as the intent is clear. Therefore, while Member States are now free to elaborate on their internal rules on the form to be adopted for the application, it would have been positive to include a restriction on Member States who impose excessively strict rules concerning the form. Positively, the Directive prohibits excluding the rejection of applications “on the sole ground that they have not been made as soon as possible”¹⁴⁷. The Executive Committee does not deny the legitimacy of the request to apply within a certain period of time, however, it points out that failure to comply with this limit and other formal requirements should not lead to an automatic rejection of its application¹⁴⁸, although it may be an element, according to the UNHCR, which can weaken the credibility¹⁴⁹.

On the other hand, Member States are allowed to impose an obligation of cooperation on asylum seekers “in so far as such obligations are necessary for the processing of the application”. The Directive provides several examples of obligations, such as the production of documents that are relevant for the procedure and the apparition at a certain time. The Recast does not specify what kind of consequences may entail from the violation of these obligations, although the inadmissibility of the request is definitely excluded¹⁵⁰. However, this provision might contribute to imposing unnecessary burdens upon the asylum seeker and therefore lead to the violation mentioned above.

A positive improvement of the Directive regarding the rights of applicants is the inclusion of a right to be informed of the possibilities of applying for international protection for all third-country nationals or stateless persons held in detention facilities or present at border crossing points and external borders¹⁵¹. This obligation also includes the provision of arrangements of interpretation necessary to facilitate the access to the asylum procedures. The right to be informed has also been strengthened by the fact that Member States are required to ensure that organisations and persons providing advice and counselling to applicants have effective access to them.

4.4.5. *Personal Interview*

According to the fact that definitions of refugees and beneficiaries of international protection are individualistic definitions, both at international and at European level, a procedure respecting these obligations requires a precise analysis of each single application. This is the reason why the International Law Association, when establishing the standards that every asylum procedure should respect, stated that every applicant for international protection is entitled “to a full opportunity, through interview and hearing, to present his or her claim”¹⁵².

The articles concerning the personal interview of the applicants are one of the major improvements granted by the Recast Directive: the right mentioned by the

¹⁴⁶ ECRE, Guidelines on Fair and Efficient Procedures 1999, p. 2.

¹⁴⁷ APDII, Article 10, par. 1.

¹⁴⁸ ExCom, Conclusion No. 15 (XXX), 1979, par. i).

¹⁴⁹ UNHCR, Fair and Efficient Asylum Procedures 2001, par. 20; for an application of this principle see ECHR, Jabari v. Turkey, no. 40035/98, §40.

¹⁵⁰ See below.

¹⁵¹ APDII, Article 8.

¹⁵² International Law Association Resolution 6/2002 Articles 11-12.

International Law Association has been significantly strengthened through the amendments adopted.

The first improvement concerns the authority in charge of conducting the interview, which should be the determining authority¹⁵³. This authority as we have seen before, should have received a specific training on interviewing procedures and on approaching people in a particularly vulnerable situation.

Moreover, a specific provision has been added regarding the situation when a large number of applications are submitted simultaneously. It is now required that even in this situation the step of the personal interview is not skipped during the procedure, and that even the personnel of another authority temporarily involved is provided in advance with the same training mentioned above. It is also required that the interviewers receive information about how to recognise particular situations that might have an effect on the conduct of the interview, such as the fact that the applicant may have been tortured in the past. In this context it is also important to recall Article 15: while before it was enough to use personnel “sufficiently competent” to take into account the circumstances surrounding the application “insofar as it is possible to do so”¹⁵⁴, the new formulation of the article loses the adverb “sufficiently” and the final expression, excluding any possibility of derogation from Member States.

Furthermore, it is now required that authorities take into consideration not only the cultural origin, but also “gender, sexual orientation, gender identity” of the applicant. The attention given to gender-related issues in this recast and in the one concerning the Reception Condition Directive responds to recommendations by UNHCR and the Executive Committee¹⁵⁵, although gender issues were neglected in the text of international instruments. The newly included provisions favouring the involvement of interviewer and interpreters of the same sex of the applicant¹⁵⁶ are aiming as well to create a situation that respects the vulnerability of the asylum seeker and favours trust of the personnel, improving the quality of the personal interview and therefore of the procedure in general. The provision that prohibits the interviewer from wearing military or law enforcement uniforms aims to achieve the same result¹⁵⁷.

Concerning the communication between interpreter and applicant, the provisions concerning the choice of the language for the interview have been reversed: it is now obligatory to use the language preferred by the applicant, unless another one is demonstrated to be as or more efficient in terms of comprehensibility for both sides involved.

The new article concerning the content of a personal interview also ensures a contribution to the quality of the procedure. First of all, the mandatory elements of the interview are the same facts and circumstances that the Directive on Qualification requires be assessed during the examination of the application. Secondly, the applicant shall be given the opportunity to explain missing elements, as well as inconsistencies and contradictions that may rise¹⁵⁸. Furthermore, all substantial elements (and not only the essential ones, as required by the former Directive) should be either reported or collected in a transcript. Member States are now obliged to ensure that these documents are not only available to the applicant for his or her approval, which is now mandatory. Member States are required to ensure that applicants can comment

¹⁵³ APDII, Article 14, par. 1.

¹⁵⁴ APD I, Article 13, par. 3 a).

¹⁵⁵ See chapter 4.2.7.

¹⁵⁶ APD II, Article 15, par. 3 b), c).

¹⁵⁷ Ibidem, d).

¹⁵⁸ APDII, Article 16.

and clarify in written or oral form the content of the interview before the decision of the authority.

Another very positive improvement is the reduction of the list of exceptions to the conduct of a personal interview. According to the Recast Directive, the interview can be omitted only in two cases: when the authority is already able to take a positive decision or when the applicant is unfit or unable to be interviewed due to circumstances beyond his or her control, which need to be confirmed by a medical professional. All other reasons for exception mentioned in the former Directive, for example unfounded applications, have been excluded in the recast, granting in practice the right to be interviewed to every applicant, unless there is already certainty concerning a positive outcome of the procedure. This improvement is perfectly in line with what was also wished by the Red Cross, which in a recent position paper stated, “[...] personal and individual interview must be mandatory for all types of procedures”¹⁵⁹.

4.4.6. *Legal Assistance and Representation*

While defining the obligations that States need to respect towards applicants, the International Law Association declared that asylum seekers need to be assured legal advice or representation, if possible without cost¹⁶⁰. Accordingly, the Directive obliges Member States to ensure free legal and procedural information on the procedure “in the light of the applicant’s particular circumstances”¹⁶¹. The Member State is also obliged, if requested, to provide information concerning the reason of the negative decision and the ways in which this could be challenged; even if in this last case the fact that the state should support the costs is not explicit mentioned, the title of the article ensures an interpretation in this sense.

The Directive provides legal representation free of charge only in the case of appeals procedures¹⁶² and upon request; furthermore, Member States can include limitations in their legal orders in case it is considered by “a court or tribunal or other competent authority to not have tangible prospect of success”¹⁶³. This restriction is very general and risks limiting the access to an effective remedy: as a matter of fact, it does not take into consideration that new elements can emerge and circumstances can change during the appeal procedure, giving the mentioned authorities the opportunity to judge *a priori* upon the result of the appeal. This is particularly dangerous especially with respect to decisions taken in the frame of accelerated procedures. The provision that enables the applicant to appeal the decision not to grant free legal assistance and representation does not mitigate the effects of this restriction. If the applicant does not have resources to appeal the negative decision on his or her application, he or she will, most likely, not have resources to appeal the refusal to grant free legal representation.

The result is an article that is very complicated and extremely open to appreciation from Member States: it does not create a well-functioning frame to avoid violation of international obligation to grant effective remedy in the national legal orders.

4.4.7. *The Concept of Safe Third-Countries*

International law does not prohibit transfers of responsibilities between States, whether they are based on a case-by-case basis, or fall within systems or

¹⁵⁹ Red Cross 2010, p. 5.

¹⁶⁰ International Law Association Resolution 6/2002 Article 11.

¹⁶¹ APDII, Article 19(1).

¹⁶² APDII Article 20(1).

¹⁶³ APDII, Article 20(3).

arrangements of "responsibility-sharing", designed to relieve, for example, some of the hardships created by large flows of migrants. As long as these agreements do not circumvent their obligation to specifically assess whether the partner state is to be considered really "safe". The state that proceeds with the "resettlement" will have to check, first, if the safety of the asylum seeker transferred will be guaranteed in that territory, so that the transfer does not expose them to the risk of violation of his or her fundamental rights. Secondly, it should assess that the asylum seeker will not be returned to the territory of origin before an effective examination of his or her statements, and therefore that appropriate procedures are actually accessible in this third state¹⁶⁴. In the recent case *Hirsi*¹⁶⁵, the European Court ruled against Italy for its rejection of Somali and Eritrean asylum seekers to Libya, knowing that in this country they would have been exposed to treatment contrary to the European Convention. Furthermore, in the opinion of the Court the fact that Libya has not adhered the Geneva Convention and does not cooperate with the UNHCR, was a clear indication that this resettlement would have exposed the asylum seekers to an arbitrary decision on the return to their country of origin. This is also confirmed by the fact Libya does not provide procedures for protection of the right to asylum.

The former Directive introduced the concept of "European Safe Third Country", meaning a list of countries that should have been adopted by the Council and therefore uniformed the approach to asylum applications in the EU. This was never realised in practice, and therefore this possibility was stricken out in the Recast. Nevertheless, the APDII allows Member States to adopt national lists of safe countries. These lists should be periodically reported to the Commission and should be based on the criteria included in Article 39¹⁶⁶. The fact that this provision was retained in the current Directive is evidence of the very different view of each Member State in the evaluation of which country should be considered safe, which is an approach that is incompatible with the establishment of the CEAS and with its aims.

In general, the concept of "Safe Country" can undermine asylum seekers' access to a fair and efficient asylum procedure and prevent persons in need of international protection to have access to such protection. The recast improved the situation by including the obligation of Member States to grant to the applicant the possibility to challenge a decision on the safety of the third-country and on the probability to have his or her life threatened in that territory¹⁶⁷, however the article still gives a lot of space to indirect violations of international obligations.

4.4.8. Appeal

Some considerations have already been implemented concerning the widening of the possibilities to challenge the decision based on the presumption of a country being "safe" or the decision to resettle an applicant on the basis of the Regulation Dublin III. However, the major achievement in the protection of this right is the mandatory suspension of the application of a negative decision not only pending the outcome of the remedy, but also until the time when this remedy can still be

¹⁶⁴ UNHCR 1989, part N par. 23.

¹⁶⁵ ECHR, *Hirsi Jamaa and Others v. Italy*, application no. 27765/09.

¹⁶⁶ APDII, Article 39:

"A third country can only be considered as a safe third country for the purposes of paragraph 1 where:

(a) it has ratified and observes the provisions of the Geneva Convention without any geographical limitations;

(b) it has in place an asylum procedure prescribed by law; and

(c) it has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and observes its provisions, including the standards relating to effective remedies."

¹⁶⁷ APDII, Article 39(3).

exercised. This inclusion is consequent to a recent statement of the European Court of Human Rights: an effective remedy should provide “firstly “independent and rigorous scrutiny of any complaint [...] and secondly, the possibility of suspending the implementation of the measure impugned”¹⁶⁸. In the same case, the Court stated also that the remedy is effective when all rejected applicants have full access to information concerning the possibilities to challenge this decision and the other related rights¹⁶⁹. Therefore, Article 19 does not seem to be completely in accordance with this obligation, when it provides that this kind of information shall be given “on request”¹⁷⁰.

4.4.9. Accelerated Procedures

The possibility of applying accelerated procedures responds to the need to process asylum applications in a rapid and efficient manner. However, it also entails a compression of the guarantees that are granted through the normal procedure. This is why both UNHCR and the Council of Europe expressed the importance that this acceleration is applied exclusively to cases which are clearly well founded, allowing a swift positive decision on the asylum application or those cases which are clearly abusive or manifestly unfounded, in order to exclude the non-genuine applications¹⁷¹.

Article 31 of the APD II reduced the number of cases to which accelerated procedures can be applied; nevertheless, the list is still quite controversial. It is however to be noticed that the Recast Directive has also strengthened the range of safeguards that cannot be disrespected in any procedure. For example, the Member States are obliged to carry out a personal interview in each case¹⁷² and to set reasonable time limits, in order to ensure an adequate and complete examination of the application, which can always be exceeded if necessary¹⁷³. Furthermore, the court or tribunal in charge of the decision on the appeal has the power to suspend the negative decision taken after the accelerated procedure and to grant the applicant the possibility to stay in the territory of the Member State, pending the more extensive procedure concerning the remedy¹⁷⁴. The inclusion of the prohibition to apply Article 31(8) to the cases regarding vulnerable people is also an important safeguard¹⁷⁵.

However, the list of cases to which a compression of general guarantees is applicable also contains cases that UNHCR judged inappropriate for such procedures. Article 31(8) includes cases in which the applicant submits irrelevant information or has made improbable representations contradicting sufficiently verified country-of-origin information. This means that according to the exception provided by Article 17, in these cases Member States are not obliged to grant access to the report or the transcript of the interview before the decision of the authority. The applicant will not have the possibility to make comments or provide clarifications of what he or she declared during the interview.

Moreover, the application of accelerated procedure to applicants who entered unlawfully in the territory of the Member State can lead to the violation of Article 31 of the Refugee Convention. This article prohibits all sanctions of asylum seekers entered illegally in the territory of a country, if they presented

¹⁶⁸ Hirsi c. Italia, par. 198; also Shamayev and Others v. Georgia and Russia, Application no. 36378/02, par. 460.

¹⁶⁹ Ibidem, par. 204.

¹⁷⁰ APDII, Article 19(1).

¹⁷¹ CoE Accelerated asylum procedures, 2 and UNHCR Comments on amended proposal, 2012, p. 27.

¹⁷² APDII, Article 14 par. 2.

¹⁷³ APDII, Article 31 par. 9.

¹⁷⁴ APD, Article 46 par. 5.

¹⁷⁵ Ibidem.

themselves “without delay to the authorities and show good case for their illegal entry or presence”. As Godwin-Gill stated, “[t]he policy of prosecuting or otherwise penalizing illegal entrants, those present illegally or those who use false travel documentation, without regard to the circumstances of flight in individual cases, [...] amount to a breach of a State’s obligations in international law”¹⁷⁶.

4.5. Vulnerable Groups

Any applicant seeking international protection is in a vulnerable position; however, certain circumstances, personal characteristics, or especially traumatic experiences require special attention. Such ‘vulnerable groups’ include, but are not limited to, children (especially children separated from their parents), disabled people, the elderly or seriously ill, pregnant women, single parents with children and victims of torture, rape or any other form of psychological, physical or sexual violence.

The second phase of the CEAS puts a special focus in setting higher standards of guarantees concerning the members of these groups. This is particularly visible in the Recast of the Reception Conditions Directive. The Commission already identified in the related report of 2007 that one of the main shortcomings of the Directive was an identification procedure of the people with special needs: “[i]dentification of vulnerable asylum seekers is a core element without which the provisions of the RCD aimed at special treatment of these persons will lose any meaning”¹⁷⁷.

The RCD I already had a chapter dedicated to “person with special needs”, which took into consideration the particular situation of minors, unaccompanied minors, disabled people, elderly people, pregnant women and single parents with children. The title was amended in “Provision for Vulnerable Persons” and in Article 21 new groups are recalled: victims of human trafficking, persons with serious illnesses, persons with mental disorders and victims of female genital mutilation.

The most important improvement in the protection of vulnerable people is the inclusion of an obligation to assess whether the applicant has special reception needs, and what these needs are, not only at the moment of the lodging of the application, but in every moment of the procedure¹⁷⁸. This assessment should not be a mandatory administrative procedure: this means that it can be carried out in a simplified format, more suitable to the particular condition of the applicant. Once the determining authority, which according to the APD II should undergo a mandatory training on how to handle these applications¹⁷⁹, verifies the existence of those, the vulnerability of the person is assumed. From that moment, the applicant should have access not only to the specific support granted by this Directive, but also to all other special provisions related to the determination of the Member State responsible and to asylum procedures. The inclusion of the obligation to ensure support for persons with special needs throughout the asylum procedure and to provide for appropriate monitoring of their situation even afterwards is a positive step forward in the proper treatment of these particular situations¹⁸⁰.

The Recast Directive on Asylum Procedures also significantly improves the guarantees granted to vulnerable people willing to apply for international protection. One important improvement to the application is the exclusion of accelerated and border procedures to applicants in need of special procedural guarantees when adequate support cannot be provided. However, it would have been desirable to completely

¹⁷⁶ Godwin-Gill 2001, pp. 34-35.

¹⁷⁷ Commission Report on RCD, 2007, p. 9.

¹⁷⁸ RCDII, Article 22.

¹⁷⁹ APD II, Article 4(1).

¹⁸⁰ Ibidem, par. 4.

exclude vulnerable people from these procedures, and to automatically grant them the suspension of the decision in case of appeal.

Other improvements, already mentioned above have been adopted with respect to the mandatory specific training of determining and substituting authorities, the choice of personnel involved in the procedure and the importance given to the best interest of the child, gender and sexual orientation issues.

In these last paragraphs there will be some details concerning two particular groups of vulnerable people, which have been granted special attention in this second phase.

4.5.1. Minors and Unaccompanied Minors

The Recast Regulation Dublin III strengthens the need to prioritise family reunification in the case of unaccompanied minors and married minors whose spouse is not present. Article 8 states that in these cases, the Member States responsible for the examination of the application is the one where a family member or a sibling of the minor is legally present, “provided that it is in the best interest of the child”. The Directive also requires an individual examination of the family member, to ensure that he or she is able to take care of the child. In the same article, the Regulation empowers the Commission to adopt delegated acts to rule on the criteria and procedures to be applied in these situations, with the only limit being the best interest of the child, which is again confirmed to be the cornerstone of all provisions related to minors in the CEAS.

When it comes to reception, the RCDII incorporates the requirement for a Best Interest Assessment and Determination for children¹⁸¹. The primary role attributed by the Directive to the best interest of the child helps ensure that Member States’ practices and treatment of children adhere to their obligations under Article 3 of the UN Convention of the Rights of the Child. The obligation to ensure access to leisure and open-air activities is also a relevant element that highlights the sensibility that characterises the approach to minor asylum seekers. Similar positive considerations can be drawn from Article 24, which requires an immediate appointment of a qualified guardian or representative for an unaccompanied or separated minor, who can act in the child’s best interest: the minor is now also explicitly entitled to the right to be immediately informed of the designation of the representative. The article also includes a more decisive obligation on Member States concerning the tracing of family members, to be started as soon as possible after the application for international protection; an obligation which is included also in the Recast Qualification Directive at Article 31.

The vulnerable situation of minors is taken into proper consideration also in the Directive concerning asylum procedures. As stated above, the APDII entails the obligation to carry on a personal interview for every application received from the authorities. The interview is an action that is very invasive of the personal sphere of the applicants, and therefore the particular sensitivity of children that have already experienced, in most of the cases, traumatic moments linked to the abandonment of their country of origin needs to take into account. This is the reason why Article 15(3) i) requires that “interviews with minors are conducted in a child appropriate manner”.

4.5.2. Victims of Torture and Violence

The RCD II now requires the obligation to always ensure to this particular category of vulnerable people the necessary treatment of damage caused by the

¹⁸¹ UNHCR, 2010, p. 18.

acts to which they were subjected. In the former Directive, the special treatment was to be provided only if necessary.

At the same time, it is required to provide an appropriate training to those working with these victims and to bind them with confidentiality, as we saw above. This obligation was provided before only towards unaccompanied minors and ensures a higher and more appropriate standard of treatment of these particular cases.

5 Conclusions

The long negotiations that characterised the second phase of the CEAS undoubtedly led to some progress in the protection of Asylum Seekers in the EU.

This progress concerns especially the categories of vulnerable people. It is now mandatory to assess the existence of special needs and to ensure support throughout the entire duration of the procedure¹⁸². Once the vulnerability is assessed, the applicant is granted access to a higher standard of guarantees than before: the authorities dealing with the reception and their interview need to attend trainings on how to handle specific needs¹⁸³; applicants are ensured exclusion from the application of accelerated procedures (unless adequate support is provided)¹⁸⁴; improved provisions concerning reception and procedures are dedicated to minors and victims of torture. The consideration of gender issues in decisions concerning procedures and reception is also a relevant novelty¹⁸⁵.

The quality of the asylum procedures improved, for example by the definition of timeframes for the process of applications, the mandatory specific training for determining authorities and the obligatory personal interview, whose outcome is accessible for clarifications and comments before the decision on the application.

It is also important to underline that recasts take into consideration the recent case law of the ECtHR: for example, we have already discussed how the “*Hirsi case*” influenced the introduction of the automatic suspension of the application of a negative decision in order to allow the appeal and during the related procedure¹⁸⁶.

These and other achievements positively mark the outcome of the negotiations concerning the recast of the CEAS legislative instruments, resulting in an improved level of protection of asylum seekers’ rights in the EU.

However, the framework created by the mentioned Directives and Regulations still fails in addressing very important issues, creating incompatibilities with some international obligations.

First, the scope of the CEAS is limited to third-country nationals and stateless persons and excludes EU citizens, contrary to the fact that international law requires that the protection of human and refugees’ rights be granted to “everyone”, and to what is stated by the European Court of Justice as well¹⁸⁷.

To continue, one of the most serious concerns is related to the detention of asylum seekers. Notwithstanding a step forward has been made with respect to the previous

¹⁸² See chapter 4.5.

¹⁸³ See chapter 4.4.3.

¹⁸⁴ See chapter 4.4.8.

¹⁸⁵ See chapters 4.2.7, 4.3.3., 4.4.5.

¹⁸⁶ See chapter 4.4.8.

¹⁸⁷ See chapter 4.1.

legal framework, the grounds for detention are still quite wide and can lead to long term or indefinite detention, contrary to what is prescribed by international obligations. The system also provides very weak guarantees to the detained applicant, concerning judicial review, detention facilities and the particular situation of stateless people. The reasons that can justify the detention of children are also quite undefined¹⁸⁸.

Furthermore, it is evident that Member States maintain a broad margin of appreciation in the application of the concept of a “safe country”, which can also lead to the creation of national list, about which the European Commission should only be informed. Even if it is now mandatory to enable the applicant to challenge the application of this concept to his or her situation, there are still important consequences at first instance, for example in the application of accelerated procedures, and moreover guarantees in case of appeal are reduced¹⁸⁹.

The limitations provided to the access to free legal assistance are also quite disappointing, especially because they may have a negative impact on the effectiveness of the remedy¹⁹⁰.

Moreover, some very important considerations need to be made with respect to the assimilation of the statuses of beneficiary of subsidiary protection and refugees. This is in general a very positive achievement, which significantly improves the guarantees granted to the first category of applicants and responds to the concerns of both UNHCR and Executive Committee regarding the creation of complementary systems of protection¹⁹¹. However, as a result of this assimilation, the guarantees of the CEAS are no longer to be applied in general to asylum seekers, as it was before, but will be limited to the person applying for the recognition of these two statuses. Considering that the category of persons entitled to protection against *refoulement* does not coincide with the definition of “beneficiary of subsidiary protection”, and considering the broad character of the related exclusion clauses¹⁹², a large number of asylum seekers is now excluded from the application of the standards of the CEAS, unless the Member State decides so. Due to the fact that Article 41(1) of the Recast Asylum Procedures Directive prohibits the Member State from returning a rejected applicant whose application was judged inadmissible or unfounded if this would lead to direct or indirect *refoulement*, these asylum seekers might find themselves in a limbo where the respect of their fundamental rights is not ensured.

Therefore, this research leads to the following conclusion: notwithstanding the positive progress made by the second phase of the CEAS, the crucial decisions about a decisive step forward in the protection of asylum seekers in the EU are still in the hands of the Member States.

¹⁸⁸ See chapter 4.3.6.

¹⁸⁹ See chapter 4.4.7.

¹⁹⁰ See chapter 4.4.6 and 4.3.7.

¹⁹¹ See chapter 3.1.

¹⁹² See chapter 4.2.2.

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