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IMPROVING US AND EU IMMIGRATION SYSTEMS

# **The European Union and the Challenges of Forced Migration: From Economic Crisis to Protection Crisis?**

by Vincent Chetail and Céline Bauloz



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**Improving EU and US Immigration Systems' Capacity for Responding to Global  
Challenges: Learning from experiences**

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**The European Union and the Challenges of Forced Migration:  
From Economic Crisis to Protection Crisis?**

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## **Improving EU and US Immigration Systems' Capacity for Responding to Global Challenges: Learning from experiences**

The project is co-funded by the European Commission in the framework of the Pilot Projects on “Transatlantic Methods for Handling Global Challenges in the European Union and United States”. The project is directed at the Migration Policy Center (MPC – Robert Schuman Centre for Advanced Studies – European University Institute, Florence) by Philippe Fargues, director of the MPC, and Demetrios Papademetriou president of the Migration Policy Institute (MPI) the partner institution.

The rationale for this project is to identify the ways in which EU and US immigration systems can be substantially improved in order to address the major challenges policymakers face on both sides of the Atlantic, both in the context of the current economic crisis, and in the longer term.

Ultimately, it is expected that the project will contribute to a more evidence-based and thoughtful approach to immigration policy on both sides of the Atlantic, and improve policymakers’ understanding of the opportunities for and benefits of more effective Transatlantic cooperation on migration issues.

The project is mainly a comparative project focusing on 8 different challenges that policymakers face on both sides of the Atlantic: employment, social cohesion, development, demographic, security, economic growth and prosperity, and human rights.

For each of these challenges two different researches will be prepared: one dealing with the US, and the other concerning the EU. Besides these major challenges some specific case studies will be also tackled (for example, the analysis of specific migratory corridor, the integration process faced by specific community in the EU and in the US, the issue of crime among migrants etc.).

Against this background, the project will critically address policy responses to the economic crisis and to the longer-term challenges identified. Recommendations on what can and should be done to improve the policy response to short-, medium- and long term challenges will follow from the research. This will include an assessment of the impact of what has been done, and the likely impact of what can be done.

Results of the above activities are made available for public consultation through the websites of the project:

- <http://www.eui.eu/Projects/TransatlanticProject/Home.aspx/>
- <http://www.migrationpolicy.org/immigrationsystems/>

*For more information:*

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## **Executive Summary**

The current economic crisis occurs at a turning point of the EU asylum policy. After a frenetic phase leading up to the adoption of numerous EU directives and regulations, the Common European Asylum System (CEAS) has now entered a second phase of consolidation of the asylum *acquis*. This new impulse paves the way for a re-assessment of the whole CEAS with a view to ensuring a genuine common asylum policy. Against such a background, it is timely to consider whether the EU has developed the appropriate means to achieving harmonization. Indeed, all stakeholders are aware that the CEAS is losing edge, revealing its limits, not only in terms of refugee protection, but also as regards its capacity for properly fulfilling its main objective: the establishment of a truly common asylum system.

However, the recurrent temptation to tighten migration controls in times of recession inevitably begs the question of its impact on the current consolidating phase of the EU asylum policy. In the midst of this reflective period, the present Report aims at reassessing the CEAS through a critical overview of its four main strategic pillars:

- preventing access to EU territory;
- combating ‘asylum-shopping’;
- criminalizing failed asylum-seekers and enforcing their return;
- promoting the integration of refugees duly recognized as such.

This four-pronged strategy has proved instrumental in alleviating asylum pressure in the last decade and will probably be even more in the wake of the current recession. The most pressing challenge is that of preventing the economic crisis from transforming into a protection crisis at the expense of refugee rights.

## Introduction

The current economic crisis has prompted scholars to explore its multilevel impacts on global migration.<sup>1</sup> Although much of the debate has focused on the effect of the recession on migrant workers, refugees are far from being immune from the economic crisis. The reasons for this are to be found at both the micro- and the macro-level.

At the micro/individual level, refugees are being prompted to leave their countries due to a complex and mixed set of motivations and factors. While the major pushing factors of forced migration are armed conflicts and human rights violations, such a determinant cannot be divorced from the broader socio-economic context within the countries of origin.<sup>2</sup> As matter of facts, socio-economic deprivation and discrimination in access to basic services are often compelling reasons to flee persecution.<sup>3</sup> It is thus predictable that the current economic crisis would further destabilize economically fragile countries of origin, and, in turn, exacerbate the immediate causes of forced displacement.<sup>4</sup>

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<sup>1</sup> Among the prolific literature on the economic crisis and its impact on migration see B. Gosh, *The Global Economic Crisis and Migration. Where Do we Go from Here?*, Geneva, IOM, 2010; I. Awad, *The Global Economic Crisis and Migrant Workers: Impact and Responses*, International Migration Programme, Geneva, International Labour Office, 2009; G. Beets & F. Willekens, *The Global Economic Crisis and International Migration: An Uncertain Outlook*, The Hague, Netherlands Interdisciplinary Demographic Institute, November 2009; M. Cali & S. Dell'Erba, *The Global Financial Crisis and Remittances. What Past Evidence Suggests*, Working Paper 303, London, Overseas Development Institute, 2009; S. Castles, "Migration and the Global Financial Crisis: A Virtual Symposium", in S. Castles & M.J. Miller, *Update 1 – February 2009; Migration and the Global Financial Crisis: A Virtual Symposium*, 2009, available at: <http://www.age-of-migration.com/uk/financialcrisis/updates/1a.pdf> (last visited 10 October 2010); J. Dobson, A. Latham & J. Salt, *On the Move? Labour Migration in Times of Recession. What Can We Learn From the Past*, Policy Network Paper, London, Policy Network, 6 July 2009, available at: [http://www.geog.ucl.ac.uk/research/mobility-identity-and-security/migration-research-unit/pdfs/on\\_the\\_move.pdf](http://www.geog.ucl.ac.uk/research/mobility-identity-and-security/migration-research-unit/pdfs/on_the_move.pdf) (last visited 10 October 2010); F. Düvell, "The Crisis and its Possible Impact on Global Migration", in S. Castles & M.J. Miller, *Update 1 – February 2009; Migration and the Global Financial Crisis: A Virtual Symposium*, 2009, available at: <http://www.age-of-migration.com/uk/financialcrisis/updates/1f.pdf> (last visited 10 October 2010); M. Fix et al., *Migration and the Global Recession, A Report Commission by the BBC World Service*, Washington, D.C., Migration Policy Institute, 2009; International Organization for Migration (IOM), *The impact of the Global Economic Crisis on Migrants and Migration*, IOM Policy Brief, March 2009, available at: [http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/policy\\_and\\_research/policy\\_documents/policy\\_brief\\_gfc.pdf](http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/policy_and_research/policy_documents/policy_brief_gfc.pdf) (last visited 10 October 2010); P. Martin, *The Recession and Migration: Alternative Scenarios*, Working Paper 13, Oxford, International Migration Institute, 2009, available at: <http://www.imi.ox.ac.uk/pdfs/imi-working-papers/wp13-martin> (last visited 10 October 2010); D.G. Papademetriou, M. Sumption & W. Somerville, *Migration and the Economic Downturn: What to Expect in the European Union*, Migration Policy Institute, January 2009, available at: <http://www.age-of-migration.com/uk/financialcrisis/updates/1e.pdf> (last visited 10 October 2010); J. Sward, *Migration and the Financial Crisis: How will the Economic Downturn Affect Migrants?*, Briefing, Brighton, Development Research Centre on Migration, Globalisation & Poverty, February 2009, available at: <http://www.dfid.gov.uk/R4D/PDF/Outputs/MigrationGlobPov/BP17.pdf> (last visited 10 October 2010).

<sup>2</sup> See also in this sense E. Feller, "Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come", *International Journal of Refugee Law*, 18(3-4), 2006, 509-536, at p. 515; C. Boswell, *Addressing the Causes of Migratory and Refugee Movements: the Role of the European Union*, *New Issues in Refugee Research*, Working Paper No. 73, Geneva, UNHCR, December 2002, at pp. 6-7; E.R. Thielemann, *Why EU Policy Harmonisation Undermines Refugee Burden-Sharing*, *National Europe Centre Paper No. 101*, 2004, at p. 12.

<sup>3</sup> From a purely legal perspective, violations of economic and social rights are plainly able to be considered as a persecution under the refugee definition spelled out in Article 1 A(2) of the Geneva Convention relating to the Refugee Status. For further discussions see M. Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*, Cambridge, Cambridge University Press, 2007.

<sup>4</sup> Further, the UNHCR budget would probably decrease due to the economic recession, thus undermining the funding of humanitarian aid and leading more people to leave. As acknowledged by UNHCR, "The current economic downturn will intensify pressure to maintain and increase funding from traditional donors while searching for new funding source." UNHCR, *UNHCR Global Appeal 2010-2011 – Identifying Needs and Funding Requirements*, Geneva, UNHCR Fundraising Reports, 1 December 2009, at p. 71.

However, an upsurge in the number of asylum-seekers has not yet occurred. On the contrary, statistics show that the refugee situation worldwide has been fairly stable over the past several years.<sup>5</sup> In the European Union (EU), available data indicates only a slight increase in terms of asylum applications lodged in 2008–2009.<sup>6</sup> A total of 260,730 claims were registered in 2009, which represents a 1.8 per cent increase compared to 2008.<sup>7</sup> The number of asylum claims has even slightly declined in the last two years, with an approximate 2.3 per cent decrease from 2009 to 2010.<sup>8</sup> But while data has shown no major increase in asylum applications in the EU so far, it is too early to draw any definitive conclusion as to the future. Furthermore, in global terms, the EU is a marginal destination region for asylum-seekers. The greatest number of refugees and asylum-seekers remain in the Global South. Around 80 per cent of the world refugee population is hosted by developing countries, whereas only 16 per cent are in Europe.<sup>9</sup> As acknowledged by the UN High Commissioner for Refugees, ‘the notion that there is a flood of asylum-seekers into richer countries is a myth.’<sup>10</sup> While geographical proximity with countries of origin constitutes probably the most direct reason for explaining the disproportionate burden placed on the Third World,<sup>11</sup> restrictive measures adopted by Western States in their own asylum policies represent a non-negligible – albeit indirect – factor. As a result of the recent economic downturn, the global imbalance in the share of the refugee population will likely persist, and may even be further aggravated by Western restrictionism.

This highlights a second and probably more decisive impact of the economic crisis on refugee protection at the macro-/State level. Indeed Western States have regularly revisited their asylum policies in the light of their own economic and domestic concerns. From that angle, asylum policies can be typically described as a precarious balance between self-interested calculations of States and their

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<sup>5</sup> UNHCR, 2009 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons, Geneva, UNHCR Division of Programme Support and Management, 15 June 2010, at p. 1 and 6. The total number of refugees in 2008 stood at 15.2 million, similar to 2009. A total of 0.8 million of asylum-seekers were listed in 2008, compared to one million in 2009. See also UNHCR, *Asylum Levels and Trends in Industrialized Countries 2009: Statistical Overview of Asylum Applications Lodged in Europe and Selected non-European Countries*, Geneva, UNHCR Division of Programme Support and Management, 23 March 2010, at p. 4.

<sup>6</sup> The statistical data relied upon here are those compiled by the UNHCR and Eurostat. It is noteworthy that the findings of these agencies slightly diverge from one report to another. The present analysis should, therefore, be considered as an approximation of asylum seekers’ flows towards the EU, and as indicative of the current trends.

<sup>7</sup> Eurostat, “Around 261,000 asylum applicants from 151 different countries were registered in the EU-27 in 2009”, *Statistics in Focus*, Issue 27/2010, 18 June 2010, at p. 2. According to UNHCR data, 246,200 new claims were registered in 2009, constituting an increase of 3 per cent compared to 2008. UNHCR, *Asylum Levels and Trends in Industrialized Countries 2009*, op. cit., at p. 4. While no major shift can be perceived in migration flows, there has nonetheless been significant changes in asylum claims’ repartition between Member States, thus re-shaping the ranking list of EU top destination countries. In 2009, France was in first position, followed by the United Kingdom, Germany, Sweden, and Italy. Eurostat, “Around 261,000 asylum applicants from 151 different countries were registered in the EU-27 in 2009”, op. cit., at p. 2; UNHCR, *Asylum Levels and Trends in Industrialized Countries 2009*, op. cit., at p. 5–7.

<sup>8</sup> According to EU data, around 6,000 fewer asylum applicants registered in the EU-27 in 2010 as compared to 2009. Eurostat, “Asylum Applicants and First Instance Decisions on Asylum Applications in 2010”, *Data in Focus*, Issue 5/2011, 29 March 2011, at p. 1. Compared to 2009, France remained the top destination country in 2010. *Ibid.*, at p. 2. At the time of writing, no comparison of these statistics is possible as UNHCR has not yet released its 2010 report on *Global Trends*.

<sup>9</sup> UNHCR, 2009 *Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons*, op. cit., at p. 1 and 6. UNHCR notes that out of the 10.4 million of refugees under UNCHR’s mandate, 8.7 million have remained in States neighboring their country of origin. *Ibid.*, at p. 6.

<sup>10</sup> UN High Commissioner for Refugees, António Guterres, quoted in “Upsurge in Asylum Seekers in Industrialized World a Myth, says UNHCR Chief”, Geneva, UNHCR Press Releases, 23 March 2010, available at: <http://www.unhcr.org/4ba880059.html> (last visited 10 October 2010).

<sup>11</sup> In 2009, UNHCR found that the main source of countries of refugees ranged from Afghanistan, to Iraq, Somalia, the Democratic Republic of Congo, Myanmar, Colombia, Sudan, Viet Nam, Eritrea and Serbia. UNHCR, 2009 *Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons*, op. cit., at p. 8.

obligations under international refugee law.<sup>12</sup> Against such a background, economic recession has been a traditional driving force for reshaping and undermining refugee protection, as graphically illustrated by the adoption of restrictive legislations in the aftermath of the first oil shock in 1973. Making no exception to the rule, the current economic crisis might well pave the way to a protection crisis.

Notwithstanding any future increase in asylum-seeker flows, the current economic downturn and the correlative exacerbation of States' restrictionism would probably result in the decline of the number of refugees duly recognized by European States. Zetter explains:

This perverse outcome [i.e. the decrease in the official number of recognized refugees] might occur, not as the direct impact of the financial crisis on the causes of forced migration, but because receiving states will make an even stronger case to ratchet up the legal and policy measures which they have so successfully applied in the last decade to deter and restrict refugee claimants.<sup>13</sup>

While this phenomenon is anything but new, restrictive asylum policies are now encapsulated within the Common European Asylum System (CEAS), which has erected at the community level measures initially conceived on the domestic level. With the entry into force of the Amsterdam Treaty in 1999, asylum was brought within the competence of the European Community, prompting the dramatic development of the communitarian harmonization process.<sup>14</sup> As a result of this effervescence, the CEAS is nowadays founded upon a battery of numerous directives and regulations aimed at regulating – and arguably restricting – the multiple facets of refugee protection.<sup>15</sup> In parallel to this legal machinery, policy orientations defined by the European Council have been the engine as well as the underpinning of this unprecedented expansion of community law in a field traditionally considered a matter of domestic concern.<sup>16</sup>

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<sup>12</sup> See generally V. Chetail, "Migration, droits de l'homme et souveraineté: le droit international dans tous ses états", in V. Chetail (ed.), *Mondialisation, migration et droits de l'homme: le droit international en question / Globalisation, Migration and Human Rights: International Law under Review*, Brussels, Bruylant, 2007, at pp. 13–133.

<sup>13</sup> R. Zetter, "Forced Migration in an Era of Global Financial Crisis – What Will Happen to Refugees?", in S. Castles & M. J. Miller, *Update 1 – February 2009: Migration and the Global Financial Crisis: A Virtual Symposium*, 2009, at p. 2, available at: <http://www.age-of-migration.com/na/resources/updates/1b.pdf> (last visited 10 October 2010).

<sup>14</sup> Treaty of Amsterdam of 2 October 1997, OJ C 340, 10 Nov. 1997 (entry into force: 1 May 1999). The Treaty of Amsterdam integrated migration and asylum within the purview of the area of freedom, security and justice (Title IV). Most notably, Article 63 laid down a five-year programme to develop the necessary measures on migration (Art. 63(3)) and asylum (Art. 63(1) and (2)).

<sup>15</sup> For a critical assessment of the CEAS, see notably P. de Bruycker et al., *Setting up a Common European Asylum System: Report on the Application of Existing Instruments and Proposals for the New System*, Study, European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, Doc. PE 425.622, August 2010 (provisional version; on file with the authors); E. Guild, S. Carrera & A. Faure Atger, *Challenges and Prospects for the EU's Area of Freedom, Security and Justice: Recommendations to the European Commission for the Stockholm Programme*, CEPS Working Document No. 313, April 2009; O. Ferguson Sidorenko, *The Common European Asylum System*, The Hague, T.M.C. Asser Press, 2007; A. Baldaccini, E. Guild & H. Toner (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Oxford/Portland, Hart Publishing, 2007; H. Battjes, *European Asylum Law and International Law*, Martinus Nijhoff, The Hague, 2006; E. Guild, "The Europeanisation of Europe's Asylum Policy", *International Journal of Refugee Law*, 18(3–4), 2006, 630–651; F. Julien-Lafferrière, H. Labayle & Ö. Edström (eds.), *The European Immigration and Asylum Policy: Critical Assessment Five Years After the Amsterdam Treaty*, Brussels, Bruylant, 2005; E. Guild, "Seeking Asylum: Storm Clouds Between International Commitments and EU Legislative Measures", *European Law Review*, 29(2), April 2004, 198–218; G. Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, The Hague/Boston/London, Martinus Nijhoff Publishers, 2000.

<sup>16</sup> Among the various European Council meetings, some adopted important conclusions on asylum: Council of the European Union, Tampere European Council 15 and 16 October 1999, Presidency Conclusions [hereinafter "Tampere Conclusions"]; Council of the European Union, Seville European Council 21 and 22 June 2002, Presidency Conclusions, EU Doc. 13463/02, Brussels, 24 Oct. 2002 [hereinafter "Seville Conclusions"]; Council of the European Union, Thessaloniki European Council 19 and 20 June 2003, Presidency Conclusions, EU Doc. 11638/03, Brussels, 1 Oct. 2003 [hereinafter "Thessaloniki Conclusions"]; Council of the European Union, Brussels European Council 4 and 5 November 2004, Presidency Conclusions, EU Doc. 14292/1/04, Brussels, 8 Dec. 2004, see annex I, at p. 11, "The Hague



Against this frenetic legislating phase, it is notable that the current economic crisis occurs at a turning point for the CEAS. The EU has now entered a second phase of consolidation of the asylum *acquis*, requiring a re-assessment of the whole CEAS. Awareness has been raised on the merits and limits of the existing system, thereby prompting the European Commission to embark on the recasting of asylum regulations and directives.<sup>17</sup> It explained in its *Action Plan Implementing the Stockholm Programme*:

During the next few years focus will be on consolidating a genuine common immigration and asylum policy. The current economic crisis should not prevent us from doing so with ambition and resolve. On the contrary, it is more necessary than ever to develop these policies, within a long-term vision of respect for fundamental rights and human dignity and to strengthen solidarity, particularly between Member States as they collectively shoulder the burden of a humane and efficient system. Once these policies consolidated, progress made should be assessed against our ambitious objectives.<sup>18</sup>

In the midst of this reflective period, the present Report aims at reassessing the CEAS through a critical overview of its four main strategic pillars:

- preventing access to EU territory;
- combating ‘asylum-shopping’;
- criminalizing failed asylum-seekers and enforcing their return;
- promoting integration of refugees duly recognized as such.

This four-pronged strategy has proved instrumental in alleviating asylum pressure in the last decade and will most certainly be even more in the wake of the current recession. The most pressing challenge raised by the economic crisis is probably that of preventing such an enduring dynamic of collective restrictionism from translating into a protection crisis at the expense of refugee rights.

## 1. Preventing Access to EU Territory: The Strategy of Containment in the Global South

From a policy perspective, the CEAS has been encapsulated within a predominating migration control approach with the view to containing asylum-seekers in the Global South. The underlying and implicit objective is to evade responsibility: hindering the access of asylum-seekers to the EU territory allows European States to escape their correlative obligations under human rights law and the 1951 Geneva Convention.<sup>19</sup> With this aim, three main categories of measures determine the contours of this

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Programme: Strengthening Freedom, Security and Justice in the European Union”; Council of the European Union, The Stockholm Programme – An open and secure Europe serving and protecting the citizens, EU Doc. 17024/09, Brussels, 2 Dec. 2009.

<sup>17</sup> Commission of the European Communities: Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Recast), COM(2008) 820 final, Brussels, 3 December 2008; Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast), COM(2008) 815 final, Brussels, 31 December 2008; Proposal for a Directive of the European Parliament and of the Council on Minimum Standards on Procedures in Member States for Granting and Withdrawing International Protection (Recast), COM(2009) 554 final, Brussels, 21 October 2009; Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (Recast), COM(2009) 551 final/2, Brussels, 23 October 2009.

<sup>18</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Delivering an Area of Freedom, Security and Justice for Europe’s Citizens, Action Plan Implementing the Stockholm Programme, COM(2010) 171 final, Brussels, 20 April 2010, at p. 7.

<sup>19</sup> Geneva Convention Relating to the Status of Refugees, 189 UNTS 150, 28 July 1951 (entry into force: 22 April 1954), complemented by its Protocol Relating to the Status of Refugees, 606 UNTS 267, 31 January 1967 (entry into force: 4

preventive strategy, ranging from pre-entry to post-entry access prevention, and the externalization of asylum processing.

### 1.1. Pre-Entry Access Prevention Measures: The First Rampart in Fortress Europe

Pre-entry access measures are used to thwart asylum-seekers' arrival within the European territory, by creating various obstacles along the migration routes. Although this battery of preventive measures was officially set up to target undocumented migrants, its indiscriminate nature has also directly affected asylum-seekers. Persons in need of international protection have thus proved to be the collateral victims of this pre-entry machinery.

As a pre-requisite for access to the EU, visa requirements are imposed on individuals of listed third countries.<sup>20</sup> Whereas 'illegal immigration' is explicitly recognized as one of the criteria determining the listed third countries,<sup>21</sup> no distinction has apparently been made for major refugee-producing countries which all figure on the 'blacklist'.<sup>22</sup> Asylum-seekers are not exempted from visa requirements, nor do they benefit from more favorable visa procedures. As a result, they often fail to satisfy the necessary conditions to be granted visa documentation, and tend to rely on some form of deception to access the EU. This sole alternative was recognized already in 1990 by the High Court in London in the following terms: 'Somebody who wishes to obtain asylum in this country [...] has the option of: 1) lying to the UK authorities in order to obtain a tourist or some sort of visa; 2) obtaining a credible forgery of visa; 3) obtaining an airline ticket to a third country with a stop over in the UK.'<sup>23</sup> In order to counter any such attempts, respect for visa requirements is guaranteed by a system of sanctions on carriers transporting undocumented migrants,<sup>24</sup> coupled with the posting of Member States' airport/immigration liaison officers abroad to supervise border check controls.<sup>25</sup> Heavy fines imposed on carriers act as a powerful incentive for careful checks of travel documents, thereby making these private entities into guardians of European territory. Although their penalization is formally

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October 1967). See most notably T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control*, Cambridge, Cambridge University Press, 2011; E. Haddad, "The External Dimension of EU Refugee Policy : A New Approach to Asylum?", *Government and Opposition*, 43(2), 2008, 190–205; J.J. Rijpma & M. Cremona, *The Extra-territorialisation of EU Migration Policies and the Rule of Law*, European University Institute Working Papers, LAW No. 2007/01, 2007, at p. 12; C. Boswell, "The 'External Dimension' of EU Immigration and Asylum Policy", *International Affairs*, 79(3), 2003, 619–638.

<sup>20</sup> Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), OJ L 243, 15 September 2009, 1. See also Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation), OJ L 218, 13 August 2008, 60; Council Regulation 539/2001/EC of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ L 81, 21 March 2001, 1.

<sup>21</sup> Recital 5 of Regulation 539/2001/EC.

<sup>22</sup> See V. Moreno Lax, "Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees", *European Journal of Migration and Law*, 10, 2008, 315–364, at p. 324; E. Guild, "Between Persecution and Protection, Refugees and the New European Asylum Policy", *Cambridge Yearbook of European Legal Studies*, 3, 2000–2001, 169–199, at p. 178; ECRE, *Defending Refugees' Access to Protection in Europe*, ECRE, December 2007, at p. 27.

<sup>23</sup> *Reg v. Secretary of State for the Home Department, Ex parte Yassine* [1990] Imm AR 354, at 359–360.

<sup>24</sup> Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22 September 2000, 19, Art. 26; Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, OJ L 187, 10 July 2001, 45. On related obligations imposed on carrier sanctions, see also Council Directive 2004/82/EC of 20 April 2004 on the obligation of carriers to communicate passenger data, OJ L 261, 6 August 2004, 24.

<sup>25</sup> Council Regulation (EC) No 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network, OJ L 64, 2 March 2004, 1, Art. 1.

speaking without prejudice to Member States' international obligations,<sup>26</sup> carriers follow a purely business-oriented approach irrespective of asylum-seekers protection needs.

With the view to physically hinder arrival of migrants at the border, FRONTEX was established in 2004 to ensure 'a uniform and high level of control and surveillance'.<sup>27</sup> Following its robust agenda, FRONTEX undertook between 2005 and 2009 50 joint operations and 23 pilot projects in collaboration with Member States, concentrating efforts on the major migratory routes used to access the EU.<sup>28</sup> However, interceptions of migrants by FRONTEX have rarely taken into account the mixed nature of migration flows, considering asylum-seekers alike 'irregular migrants' to the detriment of their need for international protection.<sup>29</sup>

By treating asylum-seekers as mere migrants, these 'remote border controls'<sup>30</sup> have been applied at the expense of Member States' international protection obligations. From a legal perspective, these measures are flawed from the outset as they rely on an (un)intentional misconception of the scope and content of international obligations. As with migration control measures, respect for international law does not stop at EU borders. Indeed, international protection obligations under international refugee law and human rights law still apply to extraterritorial activities undertaken under a State's effective control.<sup>31</sup> The *non-refoulement* principle has thus extraterritorial reach,<sup>32</sup> rendering it plainly applicable to Member States' joint interception operations with FRONTEX on the high seas, for

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<sup>26</sup> Directive 2001/51/EC, *op. cit.*, Art. 4(2).

<sup>27</sup> Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349, 25 November 2004, 1, Recital 1. See also Art. 1(2). FRONTEX has been operational as of 1 May 2005.

<sup>28</sup> The three major migration routes leading to the EU territory are: first, the Western and Central Mediterranean route (notably through the Canary Islands, Spain, and Libya, Italy), second, the Eastern Mediterranean route (through Turkey and Greece) and, third, the Eastern land route (particularly through Russia and Ukraine). See Commission of the European Communities, Commission Staff Working Document, Third Annual Report on the Development of a Common Policy on Illegal Immigration, Smuggling and Trafficking of Human Beings, External Borders, and the Return of Illegal Residents, SEC(2009) 320 final, Brussels, 9 March 2009, at p. 3; FRONTEX, FRAN Quarterly, Issue 2, Apr. – Jun. 2010, Doc. 13792, Warsaw, Risk Analysis Unit, September 2010, at pp. 10–18. For a survey of FRONTEX operations, see: [http://www.frontex.europa.eu/examples\\_of\\_accomplished\\_operati/](http://www.frontex.europa.eu/examples_of_accomplished_operati/) (last visited 10 October 2010). FRONTEX mandate has further been complemented by RABIT, a mechanism for rapid border intervention in case of urgent and unexpected mass influxes of third-country nationals: Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanisms and regulating the tasks and powers of guest officers, OJ L 199, 31 July 2007, 30.

<sup>29</sup> See, for instance, S. Carrera, The EU Border Management Strategy, FRONTEX and the Challenges of Irregular Immigration in the Canary Islands, CEPS Working Document No. 261, March 2007, at pp. 25–26; J. Jeandesboz, Reinforcing the Surveillance of EU Borders, The Future Development of FRONTEX and EUROSUR, CEPS, Challenge, Liberty & Security, Research Paper No. 11, August 2008, at pp. 15–16.

<sup>30</sup> V. Guiraudon, "Before the EU Border: Remote Control of the 'Huddle Masses'", in K. Groenendijk, E. Guild & P. Minderhoud (eds.), *In Search of Europe's Borders*, The Hague, Kluwer Law International, 2003, 191–214.

<sup>31</sup> See notably European Court of Human Rights (ECtHR), *Amuur v. France*, Chamber, Judgment, Application No. 19776/92, 15 June 1996, at paras. 38–49; *Loizidou v. Turkey*, Grand Chamber, Judgment (preliminary objections), Application no. 15318/89, 23 March 1995, at paras. 61–64; *Öcalan v. Turkey*, Grand Chamber, Judgment Application no. 46221/99, 15 May 2005, at para. 91; *Issa and Others v. Turkey*, Judgment, Application no. 31821/96, 16 November 2004, at para. 71.

<sup>32</sup> E. Lauterpacht & D. Bethlehem, "The Scope and Content of the Principle of Non-Refoulement: Opinion", in E. Feller, V. Türk & F. Nicholson (eds.), *Refugee Protection in International Law: UNCHR's Global Consultations on International Protection*, Cambridge, Cambridge University Press, 2003, at p. 67; G.S. Goodwin Gill & J. McAdam, *The Refugee in International Law*, 3rd ed., Oxford, Oxford University Press, 2007, at pp. 385–387; V. Moreno Lax, "Must EU Borders have Doors for Refugees?", *op. cit.*, at pp. 332–344. K. Wouter, *International Legal Standards for the Protection from Refoulement*, Antwerp – Oxford – Portland, Intersentia, 2009, pp. 530–533.

instance.<sup>33</sup> The recurring risk of international law violations is further exacerbated by a minimalist reading of the Geneva Convention. This is notably illustrated by the strict interpretation of Article 31(1), which prohibits the imposition of penalties on asylum-seekers who unlawfully enter or reside in the host territory.<sup>34</sup> In this respect, carriers' liability circumvents this obligation by imposing penalties on companies, rather than on asylum-seekers. However, the net result of these measures remains an indirect sanctioning of undocumented asylum-seekers by thwarting their illegal entry, and ultimately undermining the very object and purpose of the Geneva Convention.

## 1.2. Post-Entry Prevention Measures: The Underlying Burden-Shifting Strategy of the 'Safe Third-Country' Concept

Complementing pre-entry migration controls, a second set of preventive measures has been erected at the post-entry level for the purpose of barring access to effective international protection within the EU to asylum-seekers already present on a Member State's territory. In this respect, asylum-seekers' removal outside the EU to a 'safe third country' has been the keystone of this burden-shifting strategy, thereby contributing to the EU prevention policy. Despite criticisms, the concept of 'safe third country' has been enshrined in the Procedures Directive as a ground for refusal to examine an asylum claim and remove an applicant with a view to him/her receiving protection elsewhere.<sup>35</sup>

Although formalistically not infringing the international obligation of *non-refoulement*, such burden-shifting practice should be properly and narrowly carried out in order to ensure the effective protection of asylum-seekers.<sup>36</sup> But this is precisely where the Procedures Directive fails to keep its promises. Albeit recognizing that, as a pre-requisite, the third country has to be a party to the Geneva Convention and to respect the principle of *non-refoulement*,<sup>37</sup> the level of protection required in the third country is of a general and vague character, and is thus prone to subjective and varying appreciations by Member States.<sup>38</sup> This discretion left to Member States is further exacerbated by national lists of third countries

<sup>33</sup> S. Klepp, "A Contested Asylum System: The European Union Between Refugee Protection and Border Control in the Mediterranean Sea", *European Journal of Migration and Law*, 12, 2010, 1–21, at pp. 14–19.

<sup>34</sup> "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 I, 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." For a comment on this essential provision see G.S. Goodwin-Gill, "Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection", in E. Feller, V. Türk & F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, op. cit., 185–252; R. Dunstan, "United Kingdom: Breaches of Article 31 of the 1951 Refugee Convention", *International Journal of Refugee Law*, 10(1–2), 1998, 205–213.

<sup>35</sup> Arts. 25(2)(c) and 27 of the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326, 13 December 2005, 13. The concept of "safe third country" is also referred to in the Dublin Regulation (Art. 3(3)). Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50, 25 February 2003, 1.

<sup>36</sup> On this issue see in addition to the above-mentioned references on the principle of non-refoulement V. Chetail, "Le principe de non-refoulement et le statut de réfugié en droit international", in V. Chetail & J.-F. Flauss (eds.), *La Convention de Genève du 28 juillet 1951 relative au statut des réfugiés – 50 ans après: bilan et perspectives*, Brussels, Bruylant, 2001, 3–61 ; V. Chetail, "Le droit des réfugiés à l'épreuve des droits de l'homme: bilan de la jurisprudence de la Cour européenne des droits de l'homme sur l'interdiction du renvoi des étrangers menacés de torture et de traitements inhumains ou dégradants", *Revue belge de droit international*, 37(1), 2004, 155–210 ; V. Chetail, "Le Comité des Nations Unies contre la torture et l'expulsion des étrangers: dix ans de jurisprudence", *Revue suisse de droit international et européen*, 26(1), 2006, 63–104. For a comprehensive overview of safe third country removals see A. Hurwitz, *The Collective Responsibility of States to Protect Refugees*, Oxford, Oxford University Press, 2009.

<sup>37</sup> Art. 27(1)(a) to (d) of the Procedures Directive.

<sup>38</sup> In this sense, see also ECRE, *Comments from the European Council on Refugees and Exiles on the European Commission Proposal to Recast the Asylum Procedures Directive*, ECRE, May 2010, at pp. 37–38. The Commission's proposal for recasting the Directive only adds the risk of serious harms (as defined as a ground for eligibility to subsidiary protection

automatically considered as safe, thereby failing to ensure asylum-seekers' effective protection with due regard to their particular circumstances on a case-by-case basis.<sup>39</sup> In the same vein, the mere reference to situations '[w]here the third country does not permit the applicant for asylum to enter its territory' as a ground for falling back on the responsibility of Member States is not precise enough to guarantee that the asylum-seeker will be admitted onto the national territory and have his/her claim examined.<sup>40</sup> Removal to a third State should only be undertaken when the concerned Member State has itself ascertained that the third country will effectively admit the asylum-seeker into its territory.<sup>41</sup> This lack of proper safeguards reflects the EU's unilateral policy towards third countries. Although the conclusion of readmission agreements attempts to fill a lacuna in this respect, third countries remain reluctant to accept asylum-seekers removed from EU territory.<sup>42</sup>

Against such a background, however, a study of the UN High Commissioner for Refugees (UNHCR) reveals a scarce application of safe third country removals by Member States, thereby considering this notion as 'largely superfluous'.<sup>43</sup> Whatever its practical impact, the diversion of responsibilities inherent to this notion is intrinsically part of a broader prevention strategy: the externalization and regionalization of asylum.

### 1.3. The Ultimate Prevention Measures: The Recurring Temptation of Externalization

Furthering this strategy of evasion from responsibility, the externalization of asylum requests processing implies a substantial – if not total – 'divestment' of European States from asylum proceedings. The logic underlying such a notion is to examine asylum-seekers claims in extraterritorial processing centers, established outside the EU in transit countries or refugee-producing regions. Hence, by diverting asylum procedures extraterritorially, externalization process regionalizes asylum procedures – and often protection – in transit areas or regions of origin.<sup>44</sup> However, diversion of responsibilities to countries which already carry the greater part of the worldwide refugee burden is

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in the Qualification Directive) to the criteria for determining the safety of a third country, without, however, substantially changing the level of protection required therein. See Commission of the European Communities, Recast Proposal on the Procedures Directive, op. cit., Art. 32(1)(b).

<sup>39</sup> A community list of safe third countries is further prescribed by Art. 29, but this has been abandoned by the Commission's Recast Proposal. See also ECRE, Comments from the European Council on Refugees and Exiles on the European Commission Proposal to Recast the Asylum Procedures Directive, op. cit., at p. 38; UNHCR, Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice, Geneva, UNHCR, March 2010, at p. 61; UNHCR, UNHCR Comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on Minimum Standards on Procedures in Member States for Granting and Withdrawing International Protection (COM(2009)554, 21 October 2009), Geneva, UNHCR, August 2010, at pp. 34–35.

<sup>40</sup> Art. 27(4) of the Procedures Directive.

<sup>41</sup> In addition to effective respect for the principle of non-refoulement by third-countries, UNHCR Executive Committee (EXCOM) has recalled that the asylum-seekers be 'permitted to remain there and [...] be treated in accordance with recognized basic human standards until a durable solution is found for them'. UNHCR EXCOM, Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection, EXCOM Conclusion No. 58 (XL), 13 October 1989, para. f(ii). See also, UNHCR EXCOM, Refugees Without an Asylum Country, EXCOM Conclusion No. 15(XXX), 16 October 1979, para. iv. For further comments see notably C. Costello, "The Asylum Procedures Directive and the Proliferation of Safe Country Practices", European Journal of Migration and Law, 3, 2005, 35–70 at pp. 48–49 and 60–61; ECRE, Comments from the European Council on Refugees and Exiles on the European Commission Proposal to Recast the Asylum Procedures Directive, op. cit., at p. 39.

<sup>42</sup> Concerning readmission agreements, see part 3 below.

<sup>43</sup> UNHCR, Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice, op. cit., at p. 60.

<sup>44</sup> See generally K. M. De Vries, "An Assessment of 'Protection in Regions of Origin' in Relation to European Asylum Law", European Journal of Migration and Law, 9, 2007, at pp. 83–103; G. Noll, "Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones", European Journal of Migration and Law, 5, 2003, 303–341.

not undertaken with due consideration to their precarious economic situation and human rights/refugee law records. Gilbert observed in this sense that:

The intertwining of refugee and immigration policies makes protection subordinate to numbers. However, given that there are still the same number of people needing protection from persecution, the EU is simply pushing people further away and into dependency on states that have fewer resources with which to cope and where the guarantees provided to the refugee are weaker, a problem that will only worsen as the EU expands.<sup>45</sup>

In echo to similar strategies carried out by other Western States (such as the United States and Australia),<sup>46</sup> the externalization of asylum processing gained momentum within the Union after the 2003 United Kingdom (UK) proposal for the creation of ‘transit processing centers’ and ‘regional protection zones’.<sup>47</sup> Even though the UK proposal was much criticized and ultimately not adopted, the idea of extraterritorial processing centers remained high on the EU agenda under the guise of ‘enhancement of the protection capacity of regions of origin’,<sup>48</sup> eventually leading to the adoption of Regional Protection Programmes (RPPs) in 2005.<sup>49</sup> Furthering the aim of protection capacity-building of transit and regions of origin through a wide range of support projects financed by EU funds, two pilot programmes have been established since 2007: one in Western Newly Independent States (Ukraine, Moldova, and Belarus), a transit region, and the other in the refugee-producing region of the Great Lakes, in Tanzania.<sup>50</sup> Conceived as a more nuanced form of extraterritorial processing than the one proposed by the UK, RPPs nonetheless fail to hide the real objective of asylum regionalization outside the EU.<sup>51</sup> In this sense, it is not even clear whether they should be seen as a complement to traditional asylum claims proceedings within the EU, or as a one-sided alternative.<sup>52</sup> While the

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<sup>45</sup> G. Gilbert, “Is Europe Living Up to Its Obligations to Refugees?”, *European Journal of International Law*, 15, 2004, at p. 984.

<sup>46</sup> Both the United States (with respect to Haitian asylum-seekers) and Australia (concerning Asian refugees transiting most notably through Indonesia) have had recourse to offshore processing.

<sup>47</sup> See UK Government, *New Vision for Refugees*, 7 March 2003, available at: [http://www.proasyl.de/texte/europe/union/2003/UK\\_NewVision.pdf](http://www.proasyl.de/texte/europe/union/2003/UK_NewVision.pdf) (last visited 20 October 2010); and UK Government, *New International Approaches to Asylum Processing and Protection*, attached to a letter from the former UK Prime Minister Tony Blair to Mr. Costas Simitis dated of 10 March 2003 and available at: <http://www.statewatch.org/news/2003/apr/blair-simitis-asile.pdf> (last visited 20 October 2010). For more information on the UK Proposal, refer to: Commission of the European Communities, *Communication from the Commission to the Council and the European Parliament: Towards More Accessible, Equitable and Managed Asylum Systems*, COM(2003) 315 final, Brussels, 3 June 2003. It is furthermore noteworthy that the UK proposal inscribed itself into a discussion on extraterritorial processing already initiated by the Commission in 2002: Commission of the European Communities, *Communication from the Commission to the Council and the European Parliament, Towards a Common Asylum Procedure and a Uniform Status, Valid Throughout the Union, for Persons Granted Asylum*, COM(2000) 755 final, Brussels, 22 November 2000, at p. 9, 2.3.2.

<sup>48</sup> See, most notably, *Thessaloniki Conclusions*, op. cit., para. 26 which called on the Commission to further ‘explore all parameters in order [...] to examine ways and means to enhance the protection capacity of regions of origin’; Commission of the European Communities, *Communication from the Commission to the Council and the European Parliament on the Managed Entry in the EU of Persons in Need of International Protection and the Enhancement of the Protection Capacity of the Regions of Origin: “Improving Access to Durable Solutions”*, COM(2004) 410 final, Brussels, 4 June 2004, especially at paras. 49 and ff where the Commission refers for the first time to Regional Protection Programmes [“Improving Access to Durable Solutions”]; *Hague Programme*, op. cit., para. 1.6.2.

<sup>49</sup> Commission of the European Communities, *Communication from the Commission to the Council and the European Parliament on Regional Protection Programmes*, COM(2005) 388 final, Brussels, 1 September 2005 [“Communication on Regional Protection Programmes”]. See also *Stockholm Programme*, op. cit., para. 6.2.3.

<sup>50</sup> Other programmes are supposed to be established in the Horn of Africa (Kenya, Djibouti and Yemen) and North Africa (Libya, Egypt and Tunisia): European Commission, *Report from the Commission to the European Parliament and the Council, First Annual Report on Immigration and Asylum (2009)*, COM(2010) 214 final, Brussels, 5 May 2010, at p. 6.

<sup>51</sup> For a similar assessment see notably S. Lavenex, “Shifting Up and Out: The Foreign Policy of European Migration Control”, *West European Politics*, 29(2), 2006, at p. 337; E. Haddad, “The External Dimension of EU Refugee Policy: A New Approach to Asylum?”, op. cit., at p. 203.

<sup>52</sup> See, in this sense, N. El-Nany, “Who is the New European Refugee”, *European Law Review*, 33(3), 2008, 313–335, at p. 331.

Commission appears cautious in vaguely tracing the contours and content of RPPs, parallel proposals from Member States – such as the 2009 French initiative backed by Italy – have taken a more hard-line approach on extraterritorial processing centers by clearly envisaging them in *lieu* of status determination in the Union.<sup>53</sup>

Acting as a sort of compromise to externalization, durable solutions and in particular resettlement within the EU are nevertheless conceived as an ‘important factor demonstrating the partnership element of Regional Protection Programmes to third countries’.<sup>54</sup> The EU Resettlement Programme<sup>55</sup> accordingly aims to gather Member States together on an annual basis to determine the quota of persons they are willing to resettle within their country and allot them an equivalent monetary compensation from the European Refugee Fund.<sup>56</sup> However, the voluntary basis for participation undermines the stated objective of burden-sharing with third countries: currently, only ten Member States are involved in the programme with some others considering resettlement on an *ad hoc* basis only.<sup>57</sup> Whereas resettlement within the EU can be considered a positive step, this lack of involvement begs the question of the sincerity of the whole scheme. The Joint EU Resettlement Programme may appear indeed as a mere alibi for the establishment of RPPs, and more generally for the externalization and regionalization of asylum.

## 2. Combating Asylum Shopping and Bogus Refugees: The Obsession of Suspicion as the Primary Stimulus of European Harmonization

More than a stand-alone facet of EU asylum policy, the strategy of combating asylum shopping and bogus refugees represents both the trigger and the continuing *raison d’être* of the communitarization of

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<sup>53</sup> One facet of the three-pronged French initiative envisioned the establishment of ‘ad hoc protection programmes’ (i.e. processing centers) in Libya, in collaboration with UNHCR and the International Organization for Migration, with the possibility of the resettlement of recognized refugees within the EU. The French Delegation of the Council of the European Union, Migration Situation in the Mediterranean: Establishing a Partnership with Migrants’ Countries of Origin and of Transit, Enhancing Member States’ Joint Maritime Operations and Finding Innovative Solutions for Access to Asylum Procedures, EU Doc. 13205/09, Brussels, 11 September 2009, at p. 6, Title 3 ‘Innovative solutions concerning asylum’.

<sup>54</sup> Communication on Regional Protection Programmes, *op. cit.*, at p. 4, para. 7.

<sup>55</sup> Commission of the European Communities, Communication from the Commission to the European Parliament and the Council on the Establishment of a Joint EU Resettlement Programme, COM(2009)447 final, Brussels, 2 September 2009 [“Communication on a Joint EU Resettlement Programme”]. See also previous communications elaborating the resettlement scheme: Commission of the European Communities, Communication on Regional Protection Programmes, *op. cit.*, at p. 4; Commission of the European Communities, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: Policy Plan on Asylum: An Integrated Approach to Protection Across the EU, COM(2008) 360 final, Brussels, 17 June 2008, at p. 10, 5.2.2. The launch of the EU Resettlement Scheme was then welcomed both by the Council and the Parliament: see the Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizen, *op. cit.*, at p. 72; European Parliament Resolution of 18 May 2010 on the Establishment of a Joint EU Resettlement Programme, EU Doc. P7\_TA(2010)0163, 18 May 2010. The Programme is supported by UNHCR, see M. H. Sunjic, “UNHCR and Partners Lobby for Joint European Resettlement Scheme”, News Stories, Geneva, UNHCR, 17 May 2010, available at: <http://www.unhcr.org/4bf1619c6.html> (last visited 1 October 2010).

<sup>56</sup> See Communication on a Joint EU Resettlement Programme, *op. cit.*, at p. 4; Decision No 573/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Refugee Fund for the period 2008 to 2013 as part of the General Programme ‘Solidarity and Management of Migration Flows’ and repealing Council Decision 2004/904/EC, OJ L 144, 6 June 2007, 1, see more specifically recital 18, Art. 2(1)(d) and Art. 6(e).

<sup>57</sup> See European Parliament, “A Joint EU Resettlement Programme for Refugees”, News Letter, 23–24 March 2011, Brussels Plenary Session, available at: <http://www.europarl.europa.eu/en/pressroom/content/20110314NEW15456/7/html/A-joint-EU-resettlement-programme-for-refugees> (last visited 10 May 2011); Communication on a Joint EU Resettlement Programme, *op. cit.*, at pp. 3–4. EU Member States involved in the annual resettlement scheme are Sweden, Denmark, Finland, the Netherlands, the UK, Ireland, Portugal, France, Romania and the Czech Republic. Germany, for instance, has so far participated only on an *ad hoc* basis.

asylum. With the establishment of an ‘area without internal frontiers’,<sup>58</sup> suspicions have been raised over asylum-seekers’ abuses in taking advantage of the abolition of intra-Member States borders to freely move towards States with the most protective host conditions. Many observers acknowledge that:

In other words, it is the generalised suspicion vis-à-vis forum shopping that fuels harmonization of the national legislation regulating asylum seekers’ access to the status of refugee, the procedure for the application examination and the reception conditions.<sup>59</sup>

Such a negatively-charged atmosphere results in a ‘harmonization from the bottom’ of European legislation through three complementary measures: first, the elimination of secondary movements; second, a generalization of accelerated asylum procedures; and third, the harmonization of both reception standards for asylum-seekers and their eligibility to refugee status.

## 2.1. Elimination of Secondary Movements: The Use and Abuse of the Dublin Regime

Suppressing secondary movements of asylum-seekers for combating asylum-shopping within the EU has been the key objective of the 2003 Dublin Regulation, which replaced the 1990 Dublin Convention.<sup>60</sup> This mechanism aims at determining the State responsible for the examination of asylum applications. As a result, asylum-seekers have only one opportunity of lodging an asylum claim within the whole EU territory. With a view to identifying the responsible State, the Regulation lays down six criteria in hierarchic order: family unity; the Member State having issued prior documentation (residence permits or visas); the State whose borders were irregularly crossed by the asylum-seeker, or which has allowed entry on its territory by waiving visa requirements; the State on whose international transit area of an airport the asylum-seeker made his or her claim; and ultimately – when the prior criteria do not apply – the State with which the first asylum claim was lodged.<sup>61</sup>

These criteria call for three main remarks. First, they do not take into account the wishes or preferences of asylum-seekers, despite repeated UNHCR recommendations.<sup>62</sup> Instead, the criteria seek to objectively designate those Member States with the most responsibility for the presence of the asylum-seekers within European territory. Second, family unity – the only criterion related to the personal situation of the asylum-seeker – is of dubious international legality as it is stringently limited to the nuclear conception of the family.<sup>63</sup> Third, given the alternative nature of these criteria, responsibility

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<sup>58</sup> Art. 13 of the Single European Act of 28 February 1986, OJ L 169, 29 June 1987, 1 (entry into force: 1 July 1987), which is nowadays included in Art. 26 of the Consolidated Version of the Treaty on the Functioning of the European Union, OJ C 83, 30 March 2010, 47 (as amended by the Treaty of Lisbon of 13 December 2007, OJ C 306, 17 December 2007, 1 (entry into force: 1 December 2009)).

<sup>59</sup> S. Barbou Des Places & H. Oger, “Making the European Migration Regime: Decoding Member States’ Legal Strategies”, *European Journal of Migration and Law*, 6, 2005, 353–379, at p. 371.

<sup>60</sup> Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (Dublin Convention) of 15 June 1990, OJ C 254, 19 August 1997, 1 (entry into force: 1 September 1997).

<sup>61</sup> See Arts. 6 to 13 of the Dublin Regulation.

<sup>62</sup> See for instance, UNHCR Executive Committee, Refugees Without an Asylum Country, EXCOM Conclusion No. 15(XXX), 16 October 1979, para h) iii; UNHCR Executive Committee, Refugee Children and Adolescents, EXCOM Conclusion No. 84(XLVIII), 17 October 1997, para (b)(i); UNHCR Executive Committee, Protection of the Refugee’s Family, EXCOM Conclusion No. 88(L), 8 October 1999; UNHCR, UNHCR’s Observations on the European Commission’s Proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (COM(2001) 447 final), Geneva, UNHCR, February 2002, at pp. 2–3 especially; UNHCR, *The Dublin II Regulation: a UNHCR Discussion Paper*, Geneva, UNHCR, Apr. 2006, at p. 11–12.

<sup>63</sup> Under the Regulation, family members are limited to spouses, minor children and his/her father mother or guardian (Art. 2(i)). Such a strict delimitation does not appear to be in line with the right to family life as enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 8; 213 UNTS 222, 4 November 1950 (entry into force: 3 September 1953)) and the 2000 Charter of Fundamental Rights of the European Union (Art.7; OJ C



tends in practice to be allotted to the first Member State whose borders were crossed by the asylum-seeker or where an asylum claim was lodged.<sup>64</sup> One may thus wonder whether such a sophisticated mechanism was really necessary to come to the obvious conclusion that responsibility for examining asylum claims lies with States of first entry or those where applications were initially lodged.

Given that responsibility falls principally back on Member States located at the external borders of the Union, the Dublin mechanism exacerbates the already disproportionate burden placed on these countries: ‘Hence, [...] Dublin II regulation is about shifting responsibilities between MS [Member States] rather than sharing these.’<sup>65</sup> Moreover, the Dublin scheme is counter-productive to the stated objective of ‘rapid processing of asylum claims’.<sup>66</sup> Indeed, it adds a supplementary – and sometimes rather long – procedural step for determining the responsible State, before any substantial examination of the asylum claim can be carried out.

More fundamentally, the Dublin Regime is based on the false premise of equivalent protection provided in all Member States, recognized as ‘safe countries for third-country nationals’.<sup>67</sup> Moreover, there is no right of judicial review against transfer decisions undertaken under the Dublin mechanism.<sup>68</sup> Against such a background, the automatic presumption concerning the safety of the responsible State entails a risk that States breach their international obligations and, in particular, the principle of *non-refoulement*. More than a risk, it is nowadays a reality, as illustrated by the Greek reception conditions which gave rise to the first case of the European Court of Human Rights (ECtHR) concerning the Dublin Regulation. In its 2011 *M.S.S. v. Belgium and Greece* ruling, the Grand Chamber found Belgium in breach of Article 3 of European Convention on Human Rights (ECHR) for having transferred an asylum-seeker to Greece under the Dublin scheme, because of the ‘deficiencies in the asylum procedure in Greece’ and the degrading ‘conditions of detention and living conditions’ therein.<sup>69</sup>

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364, 18 December 2000, 1 (entry into force: 1 December 2009)). In this sense, see notably A. Hurwitz, *The Collective Responsibility of States to Protect Refugees*, op. cit. at pp. 96–101; F. Maiani, *L’unité familiale et le système de Dublin: entre gestion des flux migratoires et respect des droits fondamentaux*, Basel, Helbing & Lichtenhahn, 2006.

<sup>64</sup> See, F. Maiani & V. Vestad, *Reflection Note on the Evaluation of the Dublin System and on the Dublin III Proposal*, European Parliament, Directorate-General Internal Policies, Policy Department C, Citizens Rights and Constitutional Affairs, PE 410.690, March 2009, at p. 2.

<sup>65</sup> Matrix Insight Ltd, E. Thielemann, R. Williams & C. Boswell, *What System of Burden-Sharing Between Member States for the Reception of Asylum-Seekers?*, Study, European Parliament, Directorate-General for Internal Policies, Policy Department Citizens’ Rights and Constitutional Affairs, 2010, at p. 166. In this sense, see also: D. Vanheule, J. van Selm & C. Boswell, *The Implementation of Article 80 TFEU on the Principle of Solidarity and Fair Sharing of Responsibility, Including its Financial Implications, between the Member States in the Field of Border Checks, Asylum and Immigration*, Study, European Parliament, Directorate-General for Internal Policies, Policy Department Citizens’ Rights and Constitutional Affairs, 2011, at p. 94; M. Collyer, “The Dublin Regulation, Influences on Asylum Destinations and the Exception of Algerians in the UK”, *Journal of Refugee Studies*, 17(4), 2004, 375–400, at p. 383; C. Costello, “The Asylum Procedures Directive and the Proliferation of Safe Country Practices”, op. cit., at p. 46; G. Gilbert, “Is Europe Living Up to Its Obligations to Refugees?”, op. cit., at pp. 970–971; M. Garlick, “The EU Discussions on Extraterritorial Processing: Solution or Conundrum”, *International Journal of Refugee Law*, 18(3–4), 2006, 601–629 at p. 608 especially; UNHCR, *The Dublin II Regulation: a UNHCR Discussion Paper*, op. cit., at p. 12; ECRE, *Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered*, ECRE, March 2008, at pp. 12–13. See also concerns raised by the EU itself: European Parliament Resolution of 2 September 2008 on the evaluation of the Dublin system, EU Doc. 2007/2262(INI), at para. 5, asking ‘the Commission to bring forward proposals for burden-sharing mechanisms which could be put in place in order to help alleviate the disproportionate load which could fall on certain Member States, in particular the border Member States, but do fit into the Dublin system’.

<sup>66</sup> This objective is expressly stated in Recital 4 of the Dublin Regulation.

<sup>67</sup> Recital 2 of the Dublin Regulation.

<sup>68</sup> This weakness was also pinpointed by the European Commission whose recast proposal on the Dublin Regulation foresees a right to appeal against transfer decisions. However, this judicial review is not accompanied by automatic suspensive effects. Commission of the European Communities, *Recast Proposal on the Dublin Regulation*, op. cit., Article 26.

<sup>69</sup> ECtHR, *M.S.S. v. Belgium and Greece*, Grand Chamber, Judgment, Application No. 306/09, 21 January 2011, respectively at paras. 352–358 and 366–368 especially. This case echoed the previous ruling relating to the Dublin Convention in *T.I. v. the United Kingdom*, Decision on Admissibility, Application No. 43844/98, 7 March 2000, where the Court found that

This ruling unveils in turn the real weaknesses of the Dublin regime. Moved by its eagerness to combat asylum-shopping, the EU has taken for granted that harmonization between Member States already exists in the asylum field, thereby permitting such automatic determination scheme. However, despite efforts made in this sense, EU asylum harmonization has still not been achieved, as notably demonstrated by the existing asylum procedures.

## 2.2. Generalization of Accelerated Asylum Procedures as a Stand-Alone Migration Control Tool

Ubiquitous concerns raised by both asylum-shopping and bogus refugees have warranted the harmonization of asylum procedures, with the adoption of the 2005 Procedures Directive.<sup>70</sup> In practice, however, the Directive has not produced the expected level of harmonization, thereby revealing its main weaknesses. Indeed, the whole Directive is extremely complex and is further exacerbated by the wide discretion left to Member States in their implementation of the Directive.<sup>71</sup> The most obvious and worrisome issue is provided by accelerated procedures.

With the aim of speeding up asylum procedures to exclude those abusing the asylum system, the Directive lays down an extensive list of 16 grounds for ruling out a claim as manifestly unfounded.<sup>72</sup> Among these numerous grounds, some are of a wide and ambiguous character. Two particularly telling examples concern situations in which the applicant ‘has raised issues that are not relevant or of minimal relevance’ for the examination of his claim and where the asylum-seeker ‘clearly does not qualify as a refugee or for refugee status in a Member State’.<sup>73</sup> In the absence of any further specification, these two vague grounds are prone to the subjectivity of Member States’ decision-makers. They can virtually cover any asylum applications, thereby superseding full examinations on their substance. As a result, accelerated procedures may become the rule rather than the exception.

Among various other concerns raised by such fast-track procedures, the very notion of ‘safe country of origin’ is widely criticized.<sup>74</sup> Safe countries of origin are pre-determined on the basis of national lists,

(Contd.) \_\_\_\_\_

[...] while the Dublin Convention may pursue laudable objectives, its effectiveness may be undermined in practice by the differing approaches adopted by Contracting States to the scope of protection offered; and further noted, ‘that the indirect removal in this case to an intermediary country [i.e., Germany], which is also a Contracting State does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention’. See also, P.N. Papadimitriou & I.F. Papageorgiou, “The New ‘Dubliners’: Implementation of European Council Regulation 343/2003 (Dublin-II) by the Greek Authorities”, *Journal of Refugee Studies*, 18(3), 2005, at pp. 299–318; C. Costello, “The Asylum Procedures Directive and the Proliferation of Safe Country Practices”, *op. cit.*, at pp. 47–48; S.W. Allard, “Casualties of Disharmony: The Exclusion of Asylum Seekers Under the Auspices of the Common European Asylum System”, *Emory International Law Review*, 24, 2010, 295–330, at pp. 325–327; S. Barbou Des Places, *Le dispositif Dublin 2 ou les tribulations de la politique communautaire d’asile*, EUI Working Paper LAW No. 2004/6, Florence, European University Institute, 2004, at pp. 22–23; UNHCR, *Observations on Greece as a Country of Asylum*, Geneva, UNHCR, December 2009; Amnesty International, *The Dublin II Trap: Transfers of Asylum-Seekers to Greece*, London, Amnesty International, March 2010, at p. 10.

<sup>70</sup> See Recitals 5 and 6 of the Procedures Directive.

<sup>71</sup> On the drafting history of this Directive, see D. Ackers, “The Negotiations on the Asylum Procedures Directive”, *European Journal of Migration and Law*, 7, 2005, 1–33.

<sup>72</sup> Art. 23(4)(a) to (o) of the Procedures Directive.

<sup>73</sup> Art. 23(4)(a) and (b) respectively.

<sup>74</sup> Art. 23(4)(c)(i) and Art. 31 of the Procedures Directive. By virtue of Annex II, safe countries of origin are defined in broad terms as countries where ‘there is generally and consistently no persecution [...], no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict’. Such determination further requires Member States to take into account the level of protection from such ‘persecution and mistreatment’ provided in the country of origin, by assessing its legal situation, its observance for the (non-derogable) rights of the ECHR, International Covenant on Civil and Political Rights and the Convention against Torture, its respect of the principle of non-refoulement and the availability therein of effective remedies against violations of any such rights.

similarly to the logic of safe third countries.<sup>75</sup> Although the safety presumption can be rebutted by the asylum-seeker on the basis of his/her particular circumstances,<sup>76</sup> such individual evaluation requires a full examination of the claim's substance which is hardly reconcilable with the very nature of accelerated procedures. More generally, the concept of safe country of origin suggests the EU's undeclared objective of managing refugee flows through collective refusals of asylum claims.

The underlying migration control strategy of the EU asylum policy is also at the heart of many other contentious issues raised by the Procedures Directive. Three important weaknesses undermining the rights of asylum-seekers are regularly pinpointed. First, even though personal interviews are acknowledged as an essential guarantee, they are subject to numerous and vague exceptions, notably applicable in accelerated procedures. But it is precisely in such cases that interviews are crucial for assessing the credibility of asylum claimants.<sup>77</sup> The Commission's recast proposal rightly envisages the suppression of any exceptions to personal interviews in accelerated procedures.<sup>78</sup> Second, free judicial assistance for asylum-seekers who lack sufficient resources is limited to first appeal procedures.<sup>79</sup> As a critical guarantee for asylum-seekers, free judicial assistance should nonetheless also be granted during the first stage of asylum procedures undertaken by administrative authorities.<sup>80</sup> Third, while the right to judicial review is explicitly recognized by the Directive,<sup>81</sup> the effectiveness of this remedy is conceived in particularly vague terms.<sup>82</sup> Whereas the Directive incidentally refers to international obligations in general, the right to remain in the territory pending the appeal procedure is not explicitly spelled out in line with the standards developed by the European Court of Human Rights.<sup>83</sup>

In sum, the whole logic of the Procedures Directive aims at preserving Member States discretion and allowing opportunities for derogations. Asylum procedures accordingly tend becoming a stand-alone migratory control tool rather than a proper means for identifying persons in need of international protection. Such observation is not peculiar to asylum procedures. It also concerns reception standards and refugee definition which constitute the third set of measures in this 'race to the bottom' harmonization.

### 2.3. Harmonization from the Bottom: Reception Standards and Refugee Definition

As a further consequence of the EU obsession with combating asylum-shopping, a material harmonization process has been carried out to curtail the varying attractive levels of protection between Member States. While such harmonization has taken place to some extent, the recurring discretion left to Member States and the vagueness of their obligations has impeded its purported achievement. In this respect, two key areas are worth further consideration.

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<sup>75</sup> Art. 30. Community lists are envisioned by Art. 29 but are now excluded from the Commission's Proposal to recast the Directive. European Commission, Recast Proposal on the Procedures Directive, *op. cit.*, at pp. 7–8.

<sup>76</sup> Art. 31(1) of the Procedures Directive.

<sup>77</sup> See Art. 12(2) of the Procedures Directive.

<sup>78</sup> Recast Proposal on the Procedures Directive, *op. cit.*, Art. 13(2).

<sup>79</sup> Art. 15(3)(a) and (b) of the Procedures Directive.

<sup>80</sup> This is also the position taken by the Commission in its Recast Proposal on the Procedures Directive, *op. cit.*, new Art. 18.

<sup>81</sup> Art. 39(1) of the Procedures Directive.

<sup>82</sup> *Ibid.*, Art. 39(3). See E. Brouwer, "Effective Remedies for Third Country Nationals in EU Law: Justice Accessible to All?", *European Journal of Migration and Law*, 7, 2005, 219–236, at p. 227; R. Byrne, "Remedies of Limited Effect: Appeals under the Forthcoming Directive on EU Minimum Standards on Procedures", *European Journal of Migration and Law*, 7, 2005, 71–86 at pp. 76–78; S. Mullally, *Manifestly Unjust: A Report on the Fairness and Sustainability of Accelerated Procedures for Asylum Determinations*, Commissioned by the Irish Refugee Council, September 2001, at p. 30; N. Kelley, "International Refugee Protection Challenges and Opportunities", *International Journal of Refugee Law*, 19(3), 401–439, at p. 427.

<sup>83</sup> See in particular ECtHR, *Jabari v. Turkey*, Judgment, Application No. 400035/98, 11 July 2000, at para. 50.

First, the Reception Directive has attempted to harmonize living conditions of asylum-seekers with the view ‘to limit the secondary movements [...] influenced by a variety of conditions for reception’.<sup>84</sup> Of major concern for Member States is the employment of asylum-seekers. In this highly sensitive field, the Directive prohibits their employment for an initial period to be determined by Member States.<sup>85</sup> This time-frame is nonetheless limited to a maximum of one year, in cases when the first instance decision on the claim has not yet been rendered and when such delay cannot be attributed to the applicant.<sup>86</sup> Notwithstanding this rather long time-limit, Member States still decide on the conditions for granting access to the labor market and may give priority to other individuals, such as EU nationals.<sup>87</sup> These limitations have been primarily conceived to dissuade economic migrants from using asylum procedures as a means to enter and stay within the EU. However, the ability of Member States to decide on the length of employment interdiction and access to the labor market runs against the stated objective of harmonization, as some national reception conditions may appear more attractive – or more restrictive – than others.<sup>88</sup> Further exacerbating this lack of harmonization, the Directive does not foresee, for the moment, similar reception conditions to persons seeking subsidiary protection, acknowledged by the EU as another ground for protection in parallel to refugee status.<sup>89</sup>

The second main area identified by the EU as requiring harmonization concerns eligibility for international protection as laid down by the Qualification Directive with regard to both refugee status and subsidiary protection.<sup>90</sup> The rationale of such harmonization process is notably underlined in Recital 7 of the Qualification Directive, stating that ‘[t]he approximation of rules on the recognition and content of refugee and subsidiary protection status should help to limit the secondary movements of applicants for asylum between Member States, where such movement is purely caused by differences in legal frameworks’. However, although improvements have been made by the Directive (such as the inclusion of non-State actors of persecution),<sup>91</sup> its loose wording allows diverging

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<sup>84</sup> Recital 8 of the Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31, 6 February 2003, 18 [“Reception Directive”].

<sup>85</sup> Art. 11(1) of the Reception Directive.

<sup>86</sup> Art. 11(2) of the Reception Directive. In its Recast Proposal on the Reception Directive, the Commission envisages to reduce this duration. According to its new Article 15(1), ‘Member States shall ensure that applicants have access to the labour market no later than 6 months following the date when the application for international protection was lodged’: European Commission, Recast Proposal on the Reception Directive, *op. cit.*, p. 24.

<sup>87</sup> Art. 11(1) and (4). See K. Groenendijk, “Access of Third Country Nationals to Employment under the New EC Migration Law”, in F. Julien-Laferrrière, H. Labayle & Ö. Edström, *The European Immigration and Asylum Policy: Critical Assessment Five Years After the Amsterdam Treaty*, *op. cit.*, at pp. 150–153.

<sup>88</sup> K. Hailbronner, *Minimum Standards for the Reception of Applicants for Asylum in the Member States – Assessment (Summary) of the Implementation of the 2003 Directive and Proposals for a Common European System of Asylum (CEAS)*, Briefing Note, European Parliament, Directorate-General Internal Policies, Policy Department C, Citizens Rights and Constitutional Affairs, Doc. PE 393.294, June 2008, at pp. 6–7; UNHCR, *UNHCR Annotated Comments on Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers*, Geneva, UNHCR, July 2003; ECRE, *The EC Directive on the Reception of Asylum-Seekers: Are Asylum Seekers in Europe Receiving Material Support and Access to Employment in Accordance with European Legislation?*, AD3711/2005/EXT/SH, ECRE, November 2005, at pp. 14–16.

<sup>89</sup> Recital 16 of the Reception Directive stating that Member States are ‘invited’ to apply the Directive provisions to other persons than those seeking refugee status. In its proposal to recast the Directive, the Commission proposes the enlargement of the Directive scope in order to cover applicants for subsidiary protection. Commission of the European Communities, Recast Proposal on the Reception Directive, *op. cit.*, Recital 13 and Art. 2(a) and (b).

<sup>90</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304, 30 September 2004, 12.

<sup>91</sup> Art. 6 of the Qualification Directive.

interpretations by Member States.<sup>92</sup> Three telling examples illustrate the extent to which such imprecision leads to inconsistent implementation of the Directive, ultimately hindering harmonization.

First, the broadening of the scope of actors of protection to cover non-State actors (including international organizations) has not been asserted with sufficient precision as regards their capacity to provide effective protection in countries of origin.<sup>93</sup> Second, the same observation can be made with regard to the concept of the ‘internal flight alternative’, and in particular its two prerequisites (i.e. the reasonableness of access to part of the country and the effective availability of protection) for denying asylum applications and returning the claimant to part of his/her country of origin.<sup>94</sup> Such recurring lacks of precision not only impede true harmonization among Member States, but also raise controversial conceptual issues.<sup>95</sup> The very notion of non-State actors of protection coupled with internal flight alternative may justify refusal of asylum applications because of the mere presence of a peacekeeping operation within a part of a country of origin. The European Court of Justice considered in a 2010 ruling that ‘the actors of protection referred to in Article 7(1)(b) of the Directive may comprise international organisations controlling the State or a substantial part of the territory of the State, including by means of the presence of a multinational force in that territory’.<sup>96</sup> Such a general assertion is, however, highly questionable for the Qualification Directive presupposes a State-like level of protection even in presence of international organizations. In particular, Article 7(2) requires ‘an effective system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection’. As a matter of facts, international organizations will rarely reach the protection threshold required by the Directive. It is mainly – if not exclusively – circumscribed to international transitional administrations and other peace operations entitled by Chapter VII of the UN Charter to operate an effective legal system in place of or in support to the State concerned.<sup>97</sup>

Beyond the legal controversies surrounding the exact scope of Article 7, by conceiving international organizations as actors of protection the EU reveals its global regionalization strategy. Restrictive asylum policies have been consistently coupled with the financing of humanitarian/assistance programmes carried out by international organizations for the implicit – but ultimate – purpose of maintaining displaced persons in the Global South. With this backdrop, it comes as no surprise that the number of internally displaced persons in refugee-producing countries has

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<sup>92</sup> Commission of the European Communities, Commission Staff Working Document accompanying the Proposal for a Directive on minimum standards for the qualification and status of third-country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, Summary of the Impact Assessment, SEC(2009), Brussels, 21 Oct. 2009, at pp. 1–2.

<sup>93</sup> According to Art. 7(1)(b) of the Qualification Directive, ‘[p]rotection can be provided by [...] parties or organizations, including international organizations, controlling the State or a substantial part of the territory of the State’. Further general guidelines are provided by paragraph 2: ‘Protection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm and the applicant has access to such protection.’

<sup>94</sup> Art. 8 of the Qualification Directive.

<sup>95</sup> For a critical evaluation of Art. 7 and its application by Member States, see notably UNHCR, *Asylum in the European Union, A Study of the Implementation of the Qualification Directive*, Geneva, UNHCR, November 2007, at p. 47–52; UNHCR, *UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted*, Geneva, UNHCR, January 2005, at pp. 18–19; ECRE, *The Impact of the EU Qualification Directive on International Protection*, ECRE, October 2008, at pp. 16–17.

<sup>96</sup> ECJ, *Salahadin Abdulla & Others v. Bundesrepublik Deutschland*, Grand Chamber, Joint cases C-175/08; 176/08; 178/08; and 179/08, 2 March 2010, at paras. 76 and 101(1).

<sup>97</sup> For further discussions see V. Chetail, ‘La réforme de l’asile: prélude à la banalisation européenne du droit des réfugiés’, *Journal de droit International*, 131(3), 2004, 817–865, at pp. 849–850.

become particularly significant: by the end of 2009, there were 27.1 million internally displaced persons compared to 15.2 million refugees and 983,000 asylum-seekers.<sup>98</sup>

A third example of a grey zone created by the Directive is the ground for subsidiary protection based on ‘indiscriminate violence in situations of international or internal armed conflict’.<sup>99</sup> The determination of the very existence of an ‘armed conflict’ has led to diverging interpretations among Member States.<sup>100</sup> For instance, eligibility to subsidiary protection of Iraqi asylum-seekers has been highly dependent on the country of destination: France and the United Kingdom have recognized the situation in Iraq as a non-international armed conflict, while other Member States, such as Romania and Sweden, have refused to come to this obvious conclusion.<sup>101</sup>

In light of the above, one cannot but conclude that the elimination of secondary movements, the generalization of accelerated procedures and other related measures governing reception conditions and refugee definition have failed to achieve true harmonization. Instead, the so-called ‘common minimum standards’ coupled to their vagueness and imprecision represent an instrumental tool for Member States to control the number of recognized refugees. As a result, recognition rates of refugee status and subsidiary protection are widely disparate from one Member State to another, thereby institutionalizing a true ‘asylum lottery’ within the EU.<sup>102</sup> The fate of asylum-seekers coming from the same country with identical backgrounds and similar risks to their life and basic rights depends on the Member State responsible for examining their claims, rather than on their actual need for international protection. The wide disparity in refugee status recognition rates and the correlative discriminatory treatment of asylum-seekers remain the most worrying aspect of Member States practice and ultimately constitute the key challenge of the CEAS. This was notably acknowledged by the UN High Commissioner António Guterres:

Common European Asylum System is more necessary than ever but we remain a long way from achieving this goal, as a look at some recent figures demonstrates. According to Eurostat data, for

<sup>98</sup> UNHCR, 2009 Global Trends, *op. cit.*, at pp. 1–2.

<sup>99</sup> Art. 15(c) of the Qualification Directive. See generally P. de Bruycker, “Le niveau d’harmonisation législative de la politique européenne d’immigration et d’asile”, in F. Julien-Laferrrière, H. Labaye & Ö. Edström (eds.), *The European Immigration and Asylum Policy: Critical Assessment Five Years After the Amsterdam Treaty*, Brussels, *op. cit.*, 45–75, at p. 53; H. Battjes & T. Spijkerboer, “The Systematic Nature of the Common European Asylum System”, in F. Julien-Laferrrière, H. Labaye & Ö. Edström (eds.), *The European Immigration and Asylum Policy: Critical Assessment Five Years After the Amsterdam Treaty*, *op. cit.*, 263–277, at pp. 269–274; R. Piotrowicz & C. Van Eck, “Subsidiary Protection and Primary Rights”, *International and Comparative Law Quarterly*, 53, 2004, 107–138; J. McAdam, “The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime”, *International Journal of Refugee Law*, 17, 2005, 461–516; H. Storey, “EU Refugee Qualification Directive: a Brave New World?”, *International Journal of Refugee Law*, 20(1), 2008, 1–49.

<sup>100</sup> See, H. Lambert & T. Farrell, “The Changing Character of Armed Conflict and the Implications for Refugee Protection Jurisprudence”, *International Journal of Refugee Law*, 22(2), 2010, 237–273. The ambiguity inherent to the wording of this Article was indeed not solved by the ECJ preliminary ruling in 2009, which focused on the reconciliation of two specific contradictory terms (i.e., that of ‘individual threat’ flowing from ‘indiscriminate violence’). ECJ, *Meki Elgafaji & Noor Elgafaji v. Staatsecretaris van Justitie*, Case C-465/07, 17 February 2009. On this preliminary ruling, see, R. Errera, “The CJEU and Subsidiary Protection: Reflections on Elgafaji and After”, *International Journal of Refugee Law*, 23(1), 2011, 93–110.

<sup>101</sup> UNHCR, *Asylum in the European Union, A Study of the Implementation of the Qualification Directive*, *op. cit.*, at pp. 76–78; UNHCR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum Seekers*, Geneva, UNHCR, April 2009, at pp. 18–19; ECRE, *The Impact of the EU Qualification Directive on International Protection*, *op. cit.*, at p. 27. For a more detailed account on the jurisprudence of Sweden, see, J. Magnusson, “A Question of Definition – The Concept of Internal Conflict in the Swedish Aliens Act”, *European Journal of Migration and Law*, 10, 2008, 381–409.

<sup>102</sup> ECRE, *Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered*, *op. cit.*, at p. 5. ECRE notes that ‘over 80% of Iraqi asylum seekers succeed at first instance in some Member States, versus literally none in some others’. See also, A. Lewis, “Big rise in Afghan Child Migrants”, *BBC News*, 1 March 2010, available at: <http://news.bbc.co.uk/2/hi/europe/8434139.stm> (last visited 20 October 2010).

instance, the rate of recognition of Somali asylum applicants in EU Member States varied in 2009 between 4% and 93%. The recognition rate for Iraqi asylum-seekers in the two EU countries receiving the largest number of applications was 66% and 27% respectively. Similarly, for the EU country receiving the largest number of Afghan asylum applications, the recognition rate was 44%, while the recognition rate in the country receiving the next largest number of applications was just 1%.<sup>103</sup>

In the light of these diverging figures, it is furthermore the very legitimacy of asylum applications' refusals that is called into question. Subsequent detention and forced removal of failed asylum-seekers risk thus being carried out against persons genuinely in need of international protection.

### 3. Criminalizing Asylum-Seekers and Enforcing their Removal: The Repressive Side of the EU Asylum Policy

The criminalization of undocumented migrants and their subsequent forced removals have been a traditional key component of the EU migration policy, as reiterated by the 2009 Lisbon Treaty.<sup>104</sup> However, this coercive approach to migration control has been incrementally transposed within the EU's asylum policy. Detention of asylum-seekers during their status determination or, if protection is denied, pending their return undoubtedly constitutes the most obvious manifestation of such criminalization. In turn, the removal of failed asylum-seekers has largely been enforced through coercive measures and readmission agreements with third countries.

#### 3.1. Detaining Asylum-Seekers: The Rule Rather than the Exception

As the intrinsic corollary to any migration control strategy, the EU has adopted a wide range of measures seeking to criminalize not only third-country nationals for their illegal entry or residence, but also any third person or entity which may have facilitated or assisted their entry or residence within a Member State.<sup>105</sup>

As a rule, criminalization of asylum-seekers is circumscribed by international norms protecting their right to seek asylum. Article 31(1) of the Geneva Convention prohibits penalties for asylum-seekers 'on account of their illegal entry or presence'. However, this essential provision has been undermined by States' literal interpretations. While *criminal detention* has consensually been ruled out, States' rhetoric has focused on *administrative retention* for the very purpose of examining asylum claims or, in case of negative decision, pending removal. Despite such neutralization of Article 31(1),

<sup>103</sup> Remarks of United Nations High Commissioner for Refugees António Guterres at the Informal Meeting of EU Ministers of Justice and Home Affairs, Brussels, 15 July 2010, available at: <http://www.unhcr.org/4c44034f9.html> (last visited 20 October 2010). In the same vein see, E. Guild, S. Carrera & A. Eggenschwiler, *Informing the Asylum Debate*, CEPS Background Briefing, 2009, at p. 3.

<sup>104</sup> Art. 79(2)(c) of the Consolidated version of the Treaty on the Functioning of the European Union, laying down, as one of its objective, that of combating 'illegal immigration and unauthorised residence, including [through] removal and repatriation of persons residing without authorization'.

<sup>105</sup> Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328, 5 December 2002, 17; Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the legal framework to prevent the facilitation of unauthorized entry, transit and residence, OJ L 328, 5 December 2002, 1, defining the criminal penalties that can be imposed against any person who has assisting the irregular entry, transit or residence of a third-country national. See also Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, OJ L 187, 10 July 2001, 45 (concerning carrier sanctions); Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings, OJ L 203, 1 August 2002, 1. Employers are also subject, inter alia, to financial sanctions and criminal penalties, by virtue of the Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L 168, 30 June 2009, 24.

it remains that, whatever the terminology used, any deprivation of liberty must be carried out in due respect with human rights law.<sup>106</sup> Article 5(1)(f) of the European Convention on Human Rights explicitly permits ‘the lawful arrest or detention of a person to preventing his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition’. Any detention must nonetheless be ‘in accordance with a procedure prescribed by law’. This not only requires a legal basis in domestic law, but also refers to the quality of that law which must be ‘sufficiently accessible and precise, in order to avoid all risk of arbitrariness’.<sup>107</sup> As a further means of ensuring non-arbitrary detention, asylum-seekers have the right to be informed of the reasons for their arrest<sup>108</sup> and the right to a judicial review for challenging the lawfulness of their detention.<sup>109</sup> Conceived as an extreme measure, priority should be given to other monitoring alternatives, such as reporting requirements, residency requirements, provision of a guarantor, release on bail, and open centers.<sup>110</sup>

These well-established human rights law standards are surprisingly not mentioned in the Asylum Procedures Directive. Its Article 18(1) simply restates that ‘Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum’. However, no precise grounds for detention are laid down by the Directive, neither is detention envisaged as a last resort alternative. Although Member States must comply with their human rights obligations when implementing detention measures, the imprecision of the Directive’s provision has given rise to disparate practice among Member States.<sup>111</sup> The need to further delimit grounds of detention was recognized by the Commission in its *Recast Proposal on the Reception Directive*:

When it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant to a particular place in accordance with national legislation, if other less coercive measures cannot be applied effectively. An applicant may only be detained to a particular place: (a) in order to determine, ascertain or verify his identity or nationality; (b) in order to determine the elements on which his application for asylum is based which in other circumstances could be lost; (c) in the context of a procedure, to decide on his right to enter the territory; (d) when protection of national security and public order so requires.<sup>112</sup>

<sup>106</sup> See notably ECtHR, *Amuur v. France*, op. cit., at paras. 38–49. See more generally, K. Hailbronner & the Odysseus Network, Study on “Refugee Status in EU Member States and Return Policies”, Final Report, Study carried out on the behalf of the European Parliament, 2005, at pp. 138–139; N. Kelley, “International Refugee Protection Challenges and Opportunities”, op. cit., at pp. 430–431; C. Teitgen-Colly, “La détention des étrangers et les droits de l’homme”, in V. Chetail (ed.), *Mondialisation, migration et droits de l’homme: le droit international en question*, op. cit., pp. 571–618; C. Galina, *Immigration, Detention and Human Rights Rethinking Territorial Sovereignty*, Leiden, Martinus Nijhoff Publishers, 2010.

<sup>107</sup> ECtHR, *Amuur v. France*, op. cit., at para. 50. See also, ECtHR, *Saadi v. the United Kingdom*, Grand Chamber, Judgment, Application No. 13229/03, 28 January 2008, at paras. 67–74.

<sup>108</sup> Art. 5(2) ECHR.

<sup>109</sup> Art. 5(4) ECHR. See also, ECtHR, *Amuur v. France*, op. cit., at para. 53.

<sup>110</sup> UNHCR, UNHCR’s Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, Geneva, UNHCR, 26 February 1999, Guideline 4. See also, ECtHR, *Saadi v. United Kingdom*, op. cit., at para. 70.

<sup>111</sup> K. Hailbronner, *Minimum Standards for the Reception of Applicants for Asylum in the Member States – Assessment (Summary) of the Implementation of the 2003 Directive and Proposals for a Common European System of Asylum (CEAS)*, op. cit., at pp. 5–6.

<sup>112</sup> *Recast Proposal on the Reception Directive*, op. cit., at p. 6 of the Explanatory Memorandum and new Art. 8(2). These grounds of detention are manifestly influenced by the position of UNHCR. See: UNHCR’s Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, op. cit., Guideline 3; and UNHCR Executive Committee, *Detention of Refugees and Asylum-Seekers*, EXCOM Conclusion No. 44(XXXVII), 13 October 1986, at para. (b), laying the following legitimate grounds for asylum-seekers’ detention: ‘to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protection national security or public order’.



However, this does not concern the detention of failed asylum-seekers pending their removal, which is governed by the Return Directive.<sup>113</sup> Article 15(1) of the Directive permits detention in two main circumstances, ‘in particular when [...] there is a risk of absconding or [when] the third-country national concerned avoids or hampers the preparation of return or the removal process’.<sup>114</sup> Moreover, the Return Directive explicitly lays down the obligation for Member States to ensure periodical review of the lawfulness of detention.<sup>115</sup> Finally, the necessity of detention is specifically linked to a reasonable prospect of removal, thereby ruling out cases of indefinite detention without deportation.<sup>116</sup> Although these elements constitute a welcome clarification of the Member States’ obligations, the Return Directive remains open to criticisms.<sup>117</sup> Two particularly crucial issues are indeed subject to controversies.

First, though not criminals, failed asylum-seekers can be subject to disproportionate lengthy periods of detention. Indeed, while detention shall normally not exceed six months,<sup>118</sup> a twelve-month extension can be ordered where removal is delayed for two reasons: first, when the third-country national impedes his/her return by his/her lack of cooperation; or second, when Member States have difficulties in ‘obtaining the necessary documentation from third countries’.<sup>119</sup> While the first reason may be justified where lack of cooperation implies fraudulent behavior on the part of the failed asylum-seeker, the second ground is far more questionable. Indeed, it refers to circumstances external to the individual, over which he/she cannot have any control, but which will warrant the extension of his/her detention.<sup>120</sup> Second, a major source of concern is also raised by the possibility to detain unaccompanied minors and families with minors.<sup>121</sup> The detention of unaccompanied minors is hardly

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<sup>113</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24 December 2008, 98.

<sup>114</sup> Art. 15(1) of the Return Directive. This list, however, is not exhaustive as provided by the reference ‘in particular’ within the said Article.

<sup>115</sup> Arts. 15(2)(a) and (b) and 15(3) of the Return Directive. Such review can be either automatic, or on request of the third-country national. It has to be accessible as speedily as possible when detention is ordered, and further reassessed at reasonable intervals of time. Review needs to be of a judicial nature when the detention order was taken by an administrative authority, or when detention is prolonged.

<sup>116</sup> Art. 15(4) of the Return Directive. See, ECtHR, *Saadi v. the United Kingdom*, op. cit., at para. 74 ruling that, for a detention under Article 5(1)(f) not to be arbitrary, the ‘length of the detention should not exceed that reasonably required for the purpose pursued’ (i.e., that of deportation).

<sup>117</sup> For a critical account of the Return Directive, see: A. Baldaccini, “The EU Directive on Return: Principles and Protests”, *Refugee Survey Quarterly*, 28(4), 2009, 114–138; D. Acosta, “The Good, the Bad and the Ugly in EU Migration Law: Is the European Parliament Becoming Bad and Ugly? (The Adoption of Directive 2008/15: The Returns Directive)”, *European Journal Migration Law*, 11, 2009, 19–39; A. Baldaccini, “The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive”, *European Journal of Migration Law*, 11, 2009, 1–17; C. Phuong, “Minimum Standards for Return Procedures and International Human Rights Law”, *European Journal of Migration Law*, 9, 2007, 105–125; P. Ceriani Cernadas, “La Directiva de Retorno de la Unión Europea: apuntes críticos desde una perspectiva de derechos humanos”, *Anuario de Derechos Humanos*, 2009, 85–94; M.B. Olmos Giupponi, *Improving the EU Immigration System: Reflections in the Light of the Return Directive*, Working Papers, Max Weber Programme 2009/39, Florence, European University Institute, 2009; M.B. Olmos Giupponi, *The Rights of Undocumented Migrants in the Light of Recent International Practice in Europe and America*, Working Papers, Max Weber Programme 2009/03, Florence, European University Institute, 2009.

<sup>118</sup> Art. 15(5) of the Return Directive.

<sup>119</sup> Art. 15(6)(a) and (b) of the Return Directive.

<sup>120</sup> See also in this sense, ECRE, *ECRE Information Note on the Directive 2008/115/EC of the European and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, op. cit., at p. 21; UNHCR, *UNHCR Position on the Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals*, op. cit., at p. 2.

<sup>121</sup> Art. 17 of the Return Directive.

compatible with the best interests of the child, a consideration notably required by the Convention on the Rights of the Child.<sup>122</sup>

While detention of failed asylum-seekers may fall short of respecting their basic human rights, it is only the first step of their long journey back home. The primary objective of this repressive machinery is to secure their effective removal to their countries of origin.

### 3.2. Securing the Effective Removal of Asylum-Seekers at any Price

The effective removal of failed asylum seekers is principally ensured by two complementary sets of measures: first, at the operational level, through the enforcement of return decisions with coercive measures; and, second, at the legal level, by means of readmission agreements concluded with third countries.

As far as the first set of measures is concerned, the Return Directive distinguishes two situations following a removal decision. First, States may give the third-country national a voluntary period of departure, ranging from seven to thirty days.<sup>123</sup> Second, in cases where a voluntary period of departure has not been granted by the Member State or where it has not been respected by the individual, Member States can undertake ‘all the necessary measures’ to enforce removal,<sup>124</sup> including, as a last resort, coercive ones.<sup>125</sup> While the granting of a voluntary departure by Member States should be encouraged, returns enforced by recourse to force must be strictly limited to what is permissible under human rights law.<sup>126</sup> However, the Directive fails to properly circumscribe such recourse to coercive measures, simply indicating that it ‘shall be proportionate and shall not exceed reasonable force’.<sup>127</sup> Although a general reference is further made to respect for ‘fundamental rights’ and the ‘dignity and physical integrity of the third-country national’,<sup>128</sup> the persistent abuses committed by States’ enforcement agents during deportation call for a stricter legal framework in due accordance with human rights standards.<sup>129</sup>

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<sup>122</sup> Art. 3 of the Convention on the Rights of the Child, 1577 UNTS 3, 20 November 1989 (entry into force: 2 September 1990). See also Art. 37 and Committee on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, UN Doc. CRC/CG/2005/6, 1 September 2005, at paras. 61–63, considering detention of children as an exceptional measure which should be carefully regulated in line with the best interests of the child and its vulnerable situation. See also ECRE, ECRE Information Note on the Directive 2008/115/EC of the European and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, *op. cit.*, at p. 23.

<sup>123</sup> Art. 7 of the Return Directive.

<sup>124</sup> Art. 8.

<sup>125</sup> Art. 8(4).

<sup>126</sup> See in this sense, Council of Europe, Committee of Ministers, Ad hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons, Twenty Guidelines on Forced Return, CM(2005) 40, 4 May 2005, Guideline 19 on means of restraints. See also, Council of Europe, Committee of Ministers, Ad hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons, Comments on the Twenty Guidelines on Forced Return, CM(40) Addendum final, 20 May 2005, comment on Guideline 19.

<sup>127</sup> Art. 8(4) of the Return Directive.

<sup>128</sup> *Ibid.*: ‘They [coercive measures] shall be implemented as provided for in national legislation in accordance with fundamental rights and with due respect for the dignity and physical integrity of the third-country national concerned.’

<sup>129</sup> A telling example may be given with the death of a failed asylum-seeker from Angola in October 2010, resulting from an apparently excessive use of force by his three escort guards during his deportation from the UK to Angola: M. Taylor, ‘Deportation Death Raises Questions Over ‘Proportionate Force’’, *The Guardian*, 14 October 2010, available at: <http://www.guardian.co.uk/uk/2010/oct/14/deportation-death-jimmy-mubenga> (last visited 30 October 2010); R. Zamora, *Asylum Seeker Dies During Deportation*, Syracuse University College of Law, Impunity Watch, 22 October 2010, available at: <http://impunitywatch.com/?p=14767> (last visited 30 Oct. 2010). An independent report counted nearly 300 cases of alleged abuses of the use of force on asylum-seekers during detention and removal in the UK between January 2004 and June 2008: Birnberg Peirce & Partners, *Medical Justice & the National Coalition of Anti-Deportation*

To complement these coercive measures for enforcing effective removal, the EU has attempted to secure the consent of third countries for readmitting failed asylum-seekers. Readmission agreements have proved to constitute a crucial component of the EU removal policy.<sup>130</sup> In addition to bilateral agreements concluded on an individual basis by Member States, thirteen readmission agreements are currently in force between the EU and third countries: namely Hong Kong,<sup>131</sup> Macao,<sup>132</sup> Sri Lanka,<sup>133</sup> Albania,<sup>134</sup> Russia,<sup>135</sup> Ukraine,<sup>136</sup> the Former Yugoslav Republic of Macedonia,<sup>137</sup> Bosnia and Herzegovina,<sup>138</sup> Montenegro,<sup>139</sup>

(Contd.) \_\_\_\_\_

Campaigns, Outsourcing Abuse, The Use and Misuse of State-Sanctioned Force During the Detention and Removal of Asylum Seekers, Jul. 2008, at p. 2.

<sup>130</sup> On readmission agreements, see C. Billet, “EC Readmission Agreements: A Prime Instrument of the External Dimension of EU’s Fight against Irregular Migration. An Assessment after Ten Years of Practice”, *European Journal of Migration and Law*, 12, 2010, 45–79; N. Coleman, *European Readmission Policy, Third Country Interests and Refugee Rights*, Leiden/Boston, Martinus Nijhoff Publishers, 2009; A. Roig & T. Huddleston, “EC Readmission Agreements: A Re-evaluation of the Political Impasse”, *European Journal of Migration and Law*, 9, 2007, 363–387; M. Benchikh, “Les accords de réadmission”, in V. Chetail (ed.), *Mondialisation, migration et droits de l’homme: le droit international en question*, op. cit., 664–687; F. Julien-Laferrière & N. Jouant, “L’éloignement des ressortissants de pays tiers”, in F. Julien-Laferrière, H. Labayle & Ö. Edström (eds.), *The European Immigration and Asylum Policy: Critical Assessment Five Years After the Amsterdam Treaty*, op. cit., at pp. 236–245. Besides readmission agreements, readmission clauses are also included in treaties of association or cooperation and entail the same readmission obligation, albeit without laying down all the procedural details. They are often the starting point for further negotiations. A prominent example is given by Article 13 of the 2000 Cotonou Agreement obliging the Africa, Caribbean and Pacific Group of States and the EU to readmit their nationals illegally staying in their respective regions. Partnership Agreement between the Members of the Africa, Caribbean and Pacific Group of States on the one part, and the European Community and its Member States of the other part, signed at Cotonou on 23 June 2000, OJ L 317, 16 December 2000, 3, see Art. 13(5) (entry into force: 1 April 2003).

<sup>131</sup> Agreement between the European Community and the Government of Hong Kong Special Administrative Region of the People’s Republic of China on the readmission of persons residing without authorisation OJ L 17, 24 January 2004, 25 (entry into force: 1 March 2004).

<sup>132</sup> Agreement between the European Community and the Macao Special Administrative Region of the People’s Republic of China on the readmission of persons residing without authorisation, OJ L 143, 30 April 2004, 99 (entry into force: 1 June 2004).

<sup>133</sup> Agreement between the European Community and the Democratic Socialist Republic of Sri Lanka on the readmission of persons residing without authorisation, OJ L 124, 17 May 2005, 43 (entry into force: 1 May 2005).

<sup>134</sup> Agreement between the European Community and the Republic of Albania on the readmission of persons residing without authorisation, OJ L 124, 7 May 2005, 22 (entry into force: 1 May 2006).

<sup>135</sup> Agreement between the European Community and the Russian Federation on the readmission of persons residing without authorisation, OJ L 129, 17 May 2007, 38 (entry into force: 1 June 2007).

<sup>136</sup> Agreement between the European Community and Ukraine on the readmission of persons residing without authorisation, OJ L 332, 18 December 2007, 46 (entry into force: 1 January 2008).

<sup>137</sup> Agreement between the European Community and the former Yugoslav Republic of Macedonia on the readmission of persons residing without authorisation, OJ L 334, 19 December 2007, 1 (entry into force: 1 January 2008).

<sup>138</sup> Agreement between the European Community and Bosnia and Herzegovina on the readmission of persons residing without authorisation, OJ L 334, 19 December 2007, 65 (entry into force: 1 January 2008).

<sup>139</sup> Agreement between the European Community and the Republic of Montenegro on the readmission of persons residing without authorisation, OJ L 334, 19 December 2007, 25 (entry into force: 1 January 2008).

Serbia,<sup>140</sup> Moldova,<sup>141</sup> Pakistan,<sup>142</sup> and Georgia.<sup>143</sup> Other agreements are still subject to ongoing negotiations, such as those with Morocco, Turkey, Cape Verde, China, and Algeria.<sup>144</sup>

However, the conclusion of such agreements raises a considerable challenge for the EU. Their asymmetric nature renders them unattractive to third countries getting few benefits from their involvement.<sup>145</sup> In this respect, the EU strategy has evolved from a threatening attitude towards third countries to a more collaborative behavior.<sup>146</sup> The 2002 Seville Conclusions of the Council are illustrative of the strong position initially taken by the EU which made development cooperation with third countries conditional upon their efforts to combat irregular migration, including the conclusion of readmission agreements.<sup>147</sup> As a result of the limits inherent to such a unilateral and hard-line approach, the EU readmission strategy has been reformulated for underlying the positive linkages between migration and development.<sup>148</sup> Despite the new emphasis for a more collaborative approach with third countries, one could argue, however, that the EU has simply dropped the stick in favor of the carrot. Only the method changes, for the ultimate objective remains the same: associate third countries in controlling access to the European territory and secure effective removal of undocumented migrants through the conclusion of readmission agreements.

Alongside the obvious risks of manipulation, the most telling shortcoming is the persistent gap between the rhetorical posture of European States and their concrete actions to strengthen the positive impact of migration on development. The dilemma at the heart of this new strategy resumes from an internal incoherence in the logic of readmission agreements. Readmission fundamentally pertains to the migration control strategy, while promoting the attractiveness of readmission agreements implies visa facilitations and other measures easing migratory movements towards the EU. For the moment at least, promises of legal immigration opportunities as a counterpart to third States' commitments to fight irregular migration and conclude readmission agreement have still to be fulfilled. The mitigated

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<sup>140</sup> Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorisation, OJ L 334, 19 December 2007, 45 (entry into force: 1 January 2008).

<sup>141</sup> Agreement between the European Community and the Republic of Moldova on the readmission of persons residing without authorisation, OJ L 334, 19 December 2007, 148 (entry into force: 1 January 2008).

<sup>142</sup> Agreement between the European Community and the Islamic Republic of Pakistan on the readmission of persons residing without authorisation, OJ L 287, 4 November 2010, 52 (entry into force: 1 December 2010).

<sup>143</sup> Agreement between the European Union and Georgia on the readmission of persons residing without authorisation, OJ L 52, 25 February 2011, 47 (entry into force: 1 March 2011).

<sup>144</sup> For an overview of all agreements, see the European Commission's Home Affairs webpage on the external dimension of migration: [http://ec.europa.eu/home-affairs/doc\\_centre/immigration/immigration\\_relations\\_en.htm](http://ec.europa.eu/home-affairs/doc_centre/immigration/immigration_relations_en.htm) (last visited 20 October 2010).

<sup>145</sup> See for instance L. B. Tokuzlu, *Burden-Sharing Games for Asylum Seekers Between Turkey and the European Union*, European University Institute Working Papers, RSCAS 2010/05, Robert Schuman Centre for Advanced Studies, 2010, at p. 8.

<sup>146</sup> On the evolution of the EU strategy, see V. Chetail, "Paradigm and Paradox of the Migration-Development Nexus", *German Yearbook of International Law*, 51, 2009, 183–215.

<sup>147</sup> European Council, Presidency Conclusions (Seville Conclusions), 21–22 June 2002, EU Doc. 13463/02, paras. 35 and 36.

<sup>148</sup> Commission of the European Communities, Communication from the Commission to the Council and the European Parliament, Integrating Migration Issues in the European Union's Relations with Third Countries, COM(2002) 703 final, Brussels, 3 December 2002; Commission of the European Communities, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Migration and Development: Some Concrete Orientations, COM(2005) 390 final, Brussels, 1 September 2005; Council of the European Union, Global Approach to Migration: Priority Actions Focusing on Africa and the Mediterranean, EU Doc. 15744/05, Brussels, 13 December 2005; Council of the European Union, A Comprehensive European Migration Policy, in Brussels European Council, Presidency Conclusions, 14–15 December 2006, EU Doc. 16879/1/06, 6; Council of the European Union, Brussels European Council, Presidency Conclusions, 21–22 June 2007, EU Doc. 11177/1/07, see para. 17 especially; Council of the European Union, European Pact on Immigration and Asylum, EU Doc. 13440/08, 24 September 2008, 2.

results which have been reached in promoting legal immigration beg the question of whether the EU is truly willing to pay the price for collaborating with third countries on the basis of mutual interests.

#### 4. Promoting the Integration of ‘Regular’ Migrants: The Double Face of Asylum

As reflected in the Lisbon Treaty,<sup>149</sup> the integration of regular migrants constitutes an indivisible and indispensable complement to the preceding strategic pillars, for it legitimizes in turn migration controls and the correlative fight against irregular migration. This strategy was explicitly recognized by the Seville European Council under those terms:

Measures taken in the short and medium term for the joint management of migration flows must strike a fair balance between, on the one hand, a policy for the integration of lawfully resident immigrants and an asylum policy complying with international conventions [...], and, on the other, resolute action to combat illegal migration and trafficking in human beings.<sup>150</sup>

Emphasis has increasingly been placed on the importance of laying down a comprehensive framework for the integration of third-country nationals residing legally within the EU, to the extent that it forms today a core component of EU asylum and migration policy. However, in the field of asylum, integration policy has had side effects, institutionalizing a weakening of international protection.

##### 4.1. The General Framework of the EU Integration Policy

Although the integration of regular migrants as a stand-alone component of the EU agenda has not always been free from ambiguities,<sup>151</sup> it has progressively become a core facet of the European immigration policy. Echoing the 1999 Tampere Conclusions,<sup>152</sup> the 2009 Stockholm Programme reaffirms the importance of integration, as one of the highest priorities on the Union’s agenda:

A more vigorous integration policy should aim at granting them [‘regular’ migrants] rights and obligations comparable to those of EU citizens. This should remain an objective of a common immigration policy and should be implemented as soon as possible, and not later than 2014.<sup>153</sup>

From the inception of its integration policy, the EU Commission and Council have recognized that successful integration entails corollary rights and obligations granted to regular migrants ‘comparable

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<sup>149</sup> Art. 79(4) of the Consolidated version of the Treaty on the Functioning of the European Union, *op. cit.*, stating that: ‘The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of Member States.’

<sup>150</sup> Seville Conclusions, *op. cit.*, at para. 28.

<sup>151</sup> On the post-September 11 securitization policy, see S. Carrera, ‘Integration’ as a Process of Inclusion for Migrants? The Case of Long-Term Residents in the EU, CEPS Working Documents No. 219, Mar. 2005, at pp. 4 and 5.

<sup>152</sup> Tampere Conclusions, *op. cit.*, conclusions no. 18 to 21 on the ‘Fair treatment of third country nationals’. More specifically, conclusion 18 emphasizes that, with the aim to ensure a fair treatment of third-country nationals who reside legally with the EU, ‘[a] more vigorous integration policy should aim at granting them rights and obligations comparable to those of EU citizens’. Subsequent conclusions lay down the direction of such integration policy, which includes: ‘the fight against racism and xenophobia’ (conclusion 19); ‘the need for approximation of national legislations on the conditions for admission and residence of third country nationals’ (conclusion 20); and the approximation of the legal status of third-country nationals to ‘that of Member States’ nationals’ implying ‘a set of uniform rights which are as near as possible to those enjoyed by EU citizens; e.g. the right to reside, receive education, and work as an employee or self-employed person, as well as the principle of non-discrimination vis-à-vis the citizens of the State of residence’ (conclusion 21).

<sup>153</sup> Stockholm Programme, *op. cit.*, at p. 64, subtitle 6.1.4. on ‘Proactive policies for migrants and their rights’.

to those of EU citizens',<sup>154</sup> and conceived it as 'a two-way process involving adaptation on the part of both the immigrant and of the host society'.<sup>155</sup> This conception of integration has since then guided the EU in its progression from a disparate system of national measures to a 'coherent European Union framework'.<sup>156</sup> Among the various EU documents referring to integration,<sup>157</sup> of particular importance are the 'Common Basic Principles for Immigrant Integration Policy in the European Union' of the European Council and the 'Common Agenda for Integration' of the Commission, both laying down the main elements of integration policies.<sup>158</sup>

While the EU determines the shape of integration policies, their content may vary from one type of regular migrant to another.<sup>159</sup> Thus, the categorization established by the EU distinguishes between 'labour migrants, family members admitted under family reunion arrangements, refugees and persons enjoying international protection'.<sup>160</sup> The level of integration is then defined on the basis of the length of regular stay of third-country nationals. In other words, 'the longer a third country national resides legally in a Member State, the more rights and obligations such a person should acquire'.<sup>161</sup>

This 'incremental approach'<sup>162</sup> has not spared the field of asylum. Leaving aside the peculiar case of temporary protection,<sup>163</sup> such gradual conception of integration has also influenced the fate of recognized refugees and beneficiaries of subsidiary protection in their host countries.

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<sup>154</sup> See Tampere Conclusions, *op. cit.*, conclusions no. 18 and 20; Commission of the European Communities, Communication from the Commission to the Council and the European Parliament on a Community Immigration Policy, COM(2000) 757 final, Brussels, 22 November 2000, at p. 9 and 15.

<sup>155</sup> Commission of the European Communities, Communication from the Commission to the Council and the European Parliament on a Community Immigration Policy, *op. cit.*, at p. 19.

<sup>156</sup> Thessaloniki Conclusions, *op. cit.*, at para. 31, see also para. 28.

<sup>157</sup> Commission of the European Communities, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on Immigration, Integration and Employment, COM(2003) 336 final, Brussels, 3 June 2003; The Hague Programme, *op. cit.*, subtitle 1.5.; Commission of the European Communities, Communication from the Commission, Policy Plan on Legal Migration, COM(2005) 669 final, Brussels, 21 December 2005, at p. 9; Council of the European Union, European Pact on Immigration and Asylum, EU Doc. 13440/08, Brussels, 24 September 2008, at p. 6, recommendation (g); Stockholm Programme, *op. cit.*, subtitles 6.1.4 and 6.1.5.

<sup>158</sup> See respectively, "Common Basic Principles for Immigrant Integration Policy in the European Union", annexed to Immigrant Integration Policy in the European Union, in Council of the European Union, Press Release, Doc. 14615/04, Brussels, 19 November 2004, at pp. 19–24; Commission of the European Communities, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, A Common Agenda for Integration: Framework for the Integration of Third-Country Nationals in the European Union, COM(2005) 389 final, Brussels, 1 September 2005.

<sup>159</sup> Except for the prohibition of discrimination and racism which apply to all third-country nationals without distinction. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19 July 2000, 22–26; and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2 December 2000, 16–22. Nonetheless both Directives do not 'cover differences of treatment based on nationality' and include a non-prejudice clause as regards 'provisions governing the entry and residence of third-country nationals and their access to employment and to occupation'. See Directive 2000/43/EC, recital 13; and Directive 2000/78/EC, recital 12.

<sup>160</sup> Commission of the European Communities, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on Immigration, Integration and Employment, *op. cit.*, at p. 18. This kind of categorization is upheld from the Communication from the Commission to the Council and the European Parliament on a Community Immigration Policy, *op. cit.*, at p. 15.

<sup>161</sup> Commission of the European Communities, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on Immigration, Integration and Employment, *op. cit.*, at p. 18.

<sup>162</sup> *Ibid.*

#### 4.2. The Incremental Integration Approach: Institutionalizing a Precarization of Asylum?

Persons in need of international protection are undoubtedly more inclined to be integrated into a host society than others as, by definition, they cannot return to their country of origin. In this respect, refugee status is relatively well protected under the Qualification Directive.<sup>164</sup> In comparison, the content of subsidiary protection is less comprehensive, thus institutionalizing a substantial variance in treatment between the two statuses. Five differences are particularly striking, especially as they all concern crucial factors for the successful integration of any person in need of international protection. These cover residence permits, family reunification, access to employment and vocational training, social protection, and access to integration programmes.

First, the Directive ensures security of residence for both statuses types, but considerably limits such a right for beneficiaries of subsidiary protection: refugees are entitled to a minimum three-year renewable residence permit, while those granted subsidiary protection benefit only from a minimum one-year renewable permit.<sup>165</sup> Such differentiation in the length of residence permits reflects the conception that refugee status has traditionally been apprehended as a durable and stable establishment in the country of asylum, while subsidiary protection is perceived as a temporary status. Member States can thus reassess the well-foundedness of the subsidiary protection claim after a brief period of one year, and return the person to his/her country if he/she would no longer be exposed to any serious harm therein.<sup>166</sup> As the content of protection is dependent on the length of residence, such differentiation not only involves an unjustified undermining of residence security, but legitimizes as well the watering down of the whole integration framework for beneficiaries of subsidiary protection, as exemplified by the right to family reunification, to employment, to social protection, and access to integration programmes.

Second, the right to family reunification is also subject to disparities between refugee status and subsidiary protection. The Family Reunification Directive only addresses refugees,<sup>167</sup> not beneficiaries of subsidiary protection.<sup>168</sup> As for the Qualification Directive, its Article 23(1) recognizes the importance of maintaining the family unity of persons recognized under both types of statuses. Nonetheless, treatment reserved for family members of subsidiary protection beneficiaries can be considerably watered down by Member States which retain a broad discretion for defining their rights and benefits.<sup>169</sup>

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<sup>163</sup> Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212, 7 August 2001, 12.

<sup>164</sup> The UNHCR considers however that the Qualification Directive does not fully reflect the protection provided by the 1951 Geneva Convention: UNHCR, UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, op. cit., at p. 35.

<sup>165</sup> Qualification Directive, Art. 24(1) for refugees and 24(2) for those entitled to subsidiary protection.

<sup>166</sup> On the grounds leading to cessation, see Art. 16 of the Qualification Directive. For 'revocation of, ending of or refusal to renew subsidiary protection status', see Art. 19.

<sup>167</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3 October 2003, 12–18. See Chapter V on 'Family reunification of refugees', Arts. 9–12.

<sup>168</sup> Beneficiaries of subsidiary protection are expressly excluded from the scope of the Directive on the right to family reunification by its Article 3(2)(c).

<sup>169</sup> According to Art. 23(2), 'in so far as the family members of beneficiaries of subsidiary protection status are concerned, Member States may define conditions applicable to such benefits'. The only restriction to such broad discretion relies on the rather vague obligation for Member States to ensure that 'any benefits provided guarantee an adequate standard of living'. See on this issue J.-Y. Carlier, "Réfugiés: Identification et statut des personnes à protéger: la Directive 'Qualification'", in F. Julien-Laferrrière, H. Labayle & Ö. Edström (eds.), *The European Immigration and Asylum Policy: Critical Assessment Five Years After the Amsterdam Treaty*, op. cit., at pp. 317–318; H. Battjes, *European Asylum Law and International Law*, op. cit., at p. 492; ECRE, *Include Refugees and their Families in EU Integration Policies*, Doc. AD28/10/2008/Ect/BJ, ECRE Recommendations to the 2008 Ministerial Conference on Integration, 3 November 2008, at

Third, while the general right to work is recognized for beneficiaries of refugee status and subsidiary protection alike, access to employment for the latter category is nonetheless restricted by considerations as regards ‘the situation of the labour market in the Member States [...] including for possible prioritisation of access to employment for a limited period of time to be determined in accordance with national law’.<sup>170</sup> The same difference of treatment applies to vocational training whose access is subject to the ‘conditions to be decided by Member States’,<sup>171</sup> a constraint not imposed on refugees.<sup>172</sup> Such restrictive access to employment and other related opportunities is clearly counterproductive with the stated objective of integration. Indeed, employment has been explicitly acknowledged by the Council as a ‘key part of the integration process’ in its 2004 ‘Common Basic Principles for Immigrant Integration Policy in the European Union’.<sup>173</sup>

Fourth, social protection has also been subjected to substantial limitations when applied to beneficiaries of subsidiary protection. Both provisions on social welfare and health care provide for broad exceptions, giving Member States the possibility to restrict social assistance and health care only ‘to core benefits which will then be provided at the same levels and under the same eligibility conditions as nationals’.<sup>174</sup> Furthermore, the watering down of health care is arguably not in line with international obligations on the right to health, as notably prescribed by the International Covenant on Economic, Social and Cultural Rights.<sup>175</sup>

Fifth, as the ultimate example of the precarisation of subsidiary protection, the very access to integration programmes differs from one status to the other. Whereas refugees benefit from full access to integration programmes,<sup>176</sup> beneficiaries of subsidiary protection may be granted access to such programmes at the discretion of Member States when it is considered ‘appropriate’.<sup>177</sup>

The undermining of subsidiary protection through the watering down of these five rights is inherently flawed for two main reasons. First, such a difference of treatment is inconsistent with the very objective of integration. Second, the risk that prompted both refugees and beneficiaries of subsidiary protection to flee their country of origin is of a similar nature. Hence, once in the host country, both need the same level of protection. This was recently recognized by the Commission in its Proposal for recasting the Qualification Directive:

When subsidiary protection was introduced, it was assumed that this status was of a temporary nature. As a result, the Directive allows Member States the discretion to grant them a lower level of rights in certain respects. However, practical experience acquired so far has shown that this initial assumption was not accurate. It is thus necessary to remove any limitations of the rights of

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p. 3, available at: [http://www.ecre.org/files/ECRE\\_Recommendations\\_2008\\_Conference\\_on\\_Integration.pdf](http://www.ecre.org/files/ECRE_Recommendations_2008_Conference_on_Integration.pdf) (last visited 10 October 2010).

<sup>170</sup> Art. 26(3) of the Qualification Directive. H. Battjes, *European Asylum Law and International Law*, op. cit., at p. 492; K. Groenendijk, “Access of Third-Country Nationals to Employment under the New EC Migration Law”, op. cit., at pp. 162–166.

<sup>171</sup> Art. 26(4) of the Qualification Directive which concerns more specifically ‘employment-related education opportunities for adults, vocational training and practical workplace experience’.

<sup>172</sup> Art. 26(2).

<sup>173</sup> Council of the European Union, “Common Basic Principles for Immigrant Integration Policy in the European Union”, op. cit., principle no. 3.

<sup>174</sup> Arts. 28(2) on social welfare and 29(2) on health care of the Qualification Directive.

<sup>175</sup> International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, 16 December 1966 (entry into force: 3 January 1976). See in this sense, UNHCR, UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (OJ L 304/12 of 30.09.2004), op. cit., at p. 44. See more generally, V. Chetail & G. Giacca, “Who Cares? The Right to Health of Migrants”, in A. Clapham & M. Robinson (eds.), *Realizing the Right to Health*, Zürich, Rüffer & Rub, 2009, 224–234.

<sup>176</sup> Art. 33(1) of the Qualification Directive.

<sup>177</sup> Art. 33(2) of the Qualification Directive.



beneficiaries of subsidiary protection which can no longer be considered as necessary and objectively justified.<sup>178</sup>

Given the absence of a rationale justifying this differential treatment and its counter-productive effects, one can wonder whether the watering down of the subsidiary protection is not meant to attain another objective. With this dual status, there is a risk that Member States seek circumventing the Geneva Convention in favor of more malleable and precarious subsidiary protection. The exceptional and subsidiary nature of such protection has not impeded Member States from granting considerable subsidiary protection to the detriment of refugee status. The similarity of recognition rates of both statuses tends to confirm such assertion.<sup>179</sup> One can thus suspect that Member States have granted subsidiary protection to persons who would be otherwise eligible to the refugee status. As long as the scope of protection of these two statuses are not harmonized, such practices will thus remain in breach of the Geneva Convention.

With a view to enhancing integration of both refugees and beneficiaries of subsidiary protection, the Council has recently extended the scope of the Long-Term Residents Directive to those granted international protection.<sup>180</sup> A positive step has undoubtedly been taken with this amendment, as beneficiaries of both statuses will now be able to benefit from freedom of movement within the EU as well as, to some extent, equality of treatment with EU nationals in social and economic matters.<sup>181</sup> Nonetheless, the differential treatment between refugees and beneficiaries of subsidiary protection is *per se* not challenged for this long-term status can only be granted after a five-year residence in an EU Member State.<sup>182</sup> It will consequently be accessible only to those whose international protection has not, during this period, ceased, been revoked, ended or refused to renew in accordance with the Qualification Directive.<sup>183</sup> Moreover, eligibility to long-term status is still subject to conditions, particularly that relative to the stable and regular financial situation of the third-country national

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<sup>178</sup> Commission of the European Communities, Recast Proposal on the Qualification Directive, *op. cit.*, at p. 8, subtitle 6.

<sup>179</sup> Eurostat, indeed, indicates that, from the first quarter of 2009 to the fourth quarter of 2010, the proportion of recognized refugees oscillated between 11% and 14%, while 8% to 13% of decisions taken concerned the granting of subsidiary protection. See Eurostat, “Asylum Applicants and Decisions on Asylum Applications in Q1 2009”, Data in Focus, Issue 30/2009, 29 July 2009, at p. 8; Eurostat, “Asylum Applicants and Decisions on Asylum Application in Q2 2009”, Data in Focus, Issue no. 39/2009, 23 September 2009, at p. 8; Eurostat, “Asylum Applicants and First Instance Decisions on Asylum Applications in Q3 2009”, Data in Focus, Issue no. 3/2010, 3 February 2010, at p. 8; Eurostat, “Asylum Applicants and First Instance Decisions on Asylum Applications in Q4 2009”, Data in Focus, Issue no. 18/2010, 4 May 2010, at p. 8; Eurostat, “Asylum Applicants and First Instance Decisions on Asylum Applications in Q1 2010”, Data in Focus, Issue no. 32/2010, 15 July 2010, at p. 8; Eurostat, “Asylum Applicants and First Instance Decisions on Asylum Applications in Second Quarter 2010”, Data in focus, Issue 42/2010, 7 October 2010, at p. 8; Eurostat, “Asylum Applicants and First Instance Decisions on Asylum Applications in Third Quarter 2010”, Data in focus, Issue 1/2011, 19 January 2011, at p. 12; and Eurostat, “Asylum Applicants and Decisions on Asylum Applicants in Fourth Quarter 2010”, annexed to “Asylum Applicants and First Instance Decisions on Asylum Applications in 2010”, *op. cit.*, at p. 19.

<sup>180</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16, 23 January 2004, 44–53; Directive of the European Parliament and of the Council amending Council Directive 2003/19/EC to extend its scope to beneficiaries of international protection, EU Doc. PE-CONS 66/10, Brussels, 16 March 2011. As recital 2 of the amendment emphasises: ‘The prospect of obtaining long-term resident status in a Member States after a certain time is an important element for the full integration of beneficiaries of international protection in the Member State of residence.’

<sup>181</sup> *Ibid.*, see recital 6. The long-term residence permit grants third-country nationals both the possibility to move to another Member State (Chapter III of the Long-Term Residents Directive) as well as equal treatment with EU citizens as regards access to employment, educational and vocational training, recognition of professional diplomas, social security, social assistance and social protection, tax benefits, access to good and services, and freedom of association and affiliation (*Ibid.*, Art. 11(1)).

<sup>182</sup> *Ibid.*, Art. 4(1).

<sup>183</sup> For refugees, see Arts. 11 and 14 of the Qualification Directive; for beneficiaries of subsidiary protection, see Arts. 16 and 19.

‘without recourse to the social assistance system of the Member State’.<sup>184</sup> Against such a requirement, the precarious employment situation of subsidiary protection beneficiaries prescribed by the Qualification Directive might well prevent them from acceding to such self-sufficiency over a five-year period.

## 5. The Way Forward: Towards a Holistic Approach to Migration and Asylum

All the ingredients are there for the economic crisis to transform into a protection crisis. As exemplified by the four pillars of the EU strategy, the key challenge lies in sparing refugees from becoming the collateral victims of migration controls. While migration management remains a traditional State competence, its tightening during times of recession should not be undertaken to the detriment of international refugee law and human rights law.

Paradoxically, States’ obsession with combating asylum abuses has not only been a driving force of the communitarization process, it also poses the biggest obstacle to the EU asylum system itself. Recent practice has demonstrated that the CEAS is losing edge, revealing its limits, not only in terms of refugee protection, but also as regards its ability to properly fulfill its main objective: the harmonization of asylum policies. First, the recurrent fear of abuses has undermined harmonization because the adoption of often vague and general standards has been aimed, above all, at ensuring a substantial margin of discretion for Member States rather than elaborating a truly common system of asylum. Second, the indiscriminate nature of the migration control machinery has encouraged the development of irregular alternatives for asylum-seekers to reach the EU, thereby impeding any efficient management of refugee flows. By transposing its restrictive stance on migration control in the field of asylum, the EU has become trapped in a vicious circle where restrictions impede true harmonization and fuel, in turn, irregular migration.

Against such a background, it is timely to consider whether the EU developed the appropriate means to achieve harmonization. Ensuring an authentic common asylum system requires from the EU some honest self-questioning with due regard to the obvious limits of the current system and lessons that can be learned therefrom. Such need for change ultimately calls for concrete actions. In this respect, two alternatives could be explored by the EU: a minimalist and a maximalist approach.

### 5.1. The Minimalist Approach: Improving the Existing Common Asylum System

The minimalist alternative aims to improve the existing system by taking its current weaknesses into consideration, as well as any lessons learned from the implementation of EU legislation. This course of action is the one favored by the Commission, as amply demonstrated by its recent proposals for recasting the various asylum directives and regulations. However this option presupposes a change both in legislative methodology and in the content of the CEAS.

At the methodological level, adoption of regulations should be favored over directives in order to establish a truly ‘common European asylum system’.<sup>185</sup> Although directives have initially provided a flexible tool for facilitating the adoption of minimum standards, the future consolidation of the asylum *acquis* can only be fulfilled by effective and strict implementation measures, thereby calling for regulations.

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<sup>184</sup> Art. 5(1)(a) of the Long-Term Residents Directive. See also recital 4 of Directive of the European Parliament and of the Council amending Council Directive 2003/19/EC to extend its scope to beneficiaries of international protection: ‘Beneficiaries of international protection should therefore be able to obtain long-term resident status in the Member State which granted them international protection subject to the same conditions as other third-country nationals’ (emphasis added).

<sup>185</sup> Consolidated version of the Treaty on the Functioning of the European Union, Art. 78(2) which, in contrast to the Amsterdam Treaty, does not call for the adoption of minimum standards, but for a genuine harmonization of the CEAS.

Concerning the content of the asylum *acquis*, its re-evaluation should emphasize due respect for international law and responsibility-sharing, in a spirit of true cooperation with a view to harmonization. It is precisely to enhance these aspects of the CEAS that the EU recently created the European Asylum Support Office (EASO), based on a threefold mandate aiming at, first, ‘supporting practical cooperation on asylum’; second, providing ‘support for Member States subject to particular pressure’; and, third, ‘contribut[ing] to the [harmonized] implementation of the CEAS’.<sup>186</sup> Notwithstanding any future positive contributions to the system, the EASO appears an *ad hoc* response to mitigate the flaws of the CEAS rather than a genuine mechanism tackling the root causes of its weaknesses. In order to secure both the effective international protection of refugees and a coherent common asylum system in line with its stated objective of harmonization, all pillars of the EU asylum policy need to be significantly modified. With this view, a set of concrete recommendations can be advanced.

At the prevention level:

- A protection dimension should be mainstreamed in all EU pre-entry access prevention measures in order to ensure full respect of the 1951 Geneva Convention and human rights instruments. More specifically, enhanced transparency of visa requirements, carrier sanctions, ILOs and FRONTEX should be accompanied by the clear accountability of Member States relying on such extraterritorial measures. Member States should further have the responsibility to: first, ensure the proper training of ILOs and FRONTEX for identifying asylum-seekers in mixed flows with due respect to the principle of *non-refoulement*; second, monitor their activities by, for instance, securing the presence of national asylum experts; and third, impose reporting duties upon them in order to provide prompt and effective redress.
- The establishment of EU protected entry procedures (PEPs) should ensure that access to the EU is not closed to genuine refugees and should, indeed, encourage legal entry within the EU. Rather than taking the form of extraterritorial processing, PEPs should be conceived as an alternative means for asylum-seekers to enter European territory and have their claims examined. In this way, PEPs could take the form of visas granted to refugees, most notably through the use of limited territorial validity visas, as prescribed by Article 25 of the Visa Code.
- Reliance on the safe third-country concept as a post-entry prevention measure should not be undertaken without a prior case-by-case assessment of the effectiveness of the protection provided in the third country, irrespective of presumptions established by national lists. Further, return to such countries should not be undertaken on a unilateral basis, but should be based on the prior acceptance by third countries to admit asylum-seekers.
- Establishment of RPPs should be more explicitly linked to the EU Resettlement Programme in order to ensure that the EU assumes its share of the burden. Such responsibility-sharing scheme presupposes, however, that participation within the Resettlement Programme should be more systematic on the basis of predetermined criteria.

At the harmonization level:

- The Dublin II scheme should be rethought on the basis of the two following considerations. First, it requires as a minimum the broadening of the criteria for family reunification in due accordance with human rights law. Second, the ‘safety’ of EU Member States should not be presumed but subject to prior assessment and further periodical evaluation. The removal of an applicant to an EU country no longer satisfying the safety requirement should be barred under Dublin II.

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<sup>186</sup> Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ L 132, 29 May 2010, 11. See Chapter 2, ‘Duties of the Support Office’, and respectively Sections 1, 2 and 3.

- Notwithstanding the need to broaden the scope of the Procedures Directive to beneficiaries of subsidiary protection and the need for prompt application processing, the use of accelerated procedures for ‘manifestly unfounded’ claims should remain the exception rather than the rule. Grounds of a too vague character should not warrant acceleration of proceedings, and should ultimately be suppressed from the list of manifestly unfounded claims.
- With a view to respecting the fundamental procedural guarantees of asylum-seekers, the Procedures Directive should: ensure a full right to personal interviews restricted only in exceptional circumstances and under strictly limited and precise conditions; give asylum-seekers access to free judicial assistance from the first administrative asylum instance; define precisely the content of effective judicial reviews; and ensure the suspensive effect of appeal procedures.
- In order to ensure the effective curtailment of secondary movements by the establishment of truly harmonized standards, the key notions and rules of both Reception Directive and Qualification Directive should be refined in more precise terms and leave less discretion to Member States in their implementation.

At the level of criminalization and return:

- Both the Procedures Directive and the Return Directive should explicitly lay down the grounds for detaining asylum-seekers in a manner which is consistent with the principle of necessity and the last-resort nature of detention as provided in human rights law.
- Detention of minors should be truly exceptional in due respect with the best interests of the child.
- As far as forced removals of failed asylum-seekers, conditions delimiting the use of coercive measures in last resort should be precisely and strictly laid down in order to ensure due accordance with Articles 2 and 3 of the ECHR.

At the integration level:

- The content of international protection granted to refugees and beneficiaries of subsidiary protection should be totally harmonized. In particular, full access to employment opportunities is crucial for ensuring their integration within the host society and for alleviating their economic dependence on Member States.

## **5.2. The Maximalist Approach: Towards a Radical Reshaping of the EU Migration and Asylum Policy**

Albeit numerous and sometimes quite substantial, the above-mentioned modifications are bottom-line changes to redress the recurrent weaknesses of the EU asylum system. However, their *ad hoc* nature will not be sufficient to address the more systemic flaws of the CEAS, which call for a more radical reshaping. A maximalist approach thus implies an ambitious reflection on the whole EU asylum and migration policy. In this respect, two main considerations should guide any total redrawing.

First, the new asylum system should be built upon *the creation of a communitarian asylum procedure*. Indeed, the communitarization process will never achieve true harmonization by continuing to consider the EU as the sum of its 27 Member States, leaving room for 27 ways of implementing CEAS measures, varying from one State to another. Asylum claim processing should rather be appraised exclusively at community level, ensuring both harmonization of decisions as well as fair and equal treatment of all asylum-seekers within the EU. This unique procedure should be drawn up on the basis of three main and complementary components:

1. The creation of a two-steps communitarian procedure of asylum exclusively managed by the EU as the best guarantee for the equitable and prompt treatment of all asylum applications and for securing true harmonization:

- The Union should create an administrative authority to undertake examinations of all asylum claims within the EU.
  - Appeals to decisions should be addressed to a specialized jurisdiction created especially for the occasion.
2. A quasi-automatic system of responsibility-sharing between Member States for the repartition of those granted international protection:
- Distribution of beneficiaries of international protection should be determined with due consideration to both refugees' and Member States' circumstances. On the one hand, respect for the principle of family unity should be given as much consideration as possible, so as to enhance effective integration within the host society. On the other hand, the responsibility-sharing system should aim at avoiding disproportionate asylum pressures being placed on some Member States. With this view, Member States' relative national measures – such as their gross domestic product, population size and density – could guide this scheme of responsibility-sharing.
3. Integration of beneficiaries of international protection within Member States should be supported by an EU compensation fund:
- An EU compensation fund should be established to help Member States where international protection beneficiaries have been allocated. The European Refugee Fund might form the basis of such a compensation fund, which should, however, be essentially devoted to funding integration measures for refugees and beneficiaries of subsidiary protection.

Second, complementing the creation of a communitarian asylum procedure, any reshaping of the CEAS should be integrated within a *holistic approach to migration*. Indeed, despite its specificities, forced migration is itself part of the more general phenomenon of global migration and cannot be completely divorced from such a broader context. One major systemic flaw in the current system thus stems from the EU's one-sided attitude towards migration which has created an inextricable bias both as regards its relationship with third countries and its disproportionate focus on irregular migration. It is therefore essential for the EU to adopt a more balanced approach in order to ensure the coherence of its own policies. With this in mind, two sets of interrelated recommendations should be followed by the Union:

- First, the EU should favor a *truly collaborative relationship with third countries*. While cooperation with third countries is already one of its stated objectives, the EU and its Member States still appear reluctant to translate mere rhetoric into practice. Even though unilateral action remains a recurrent temptation, any comprehensive policy should reflect the very transnational nature of the migration phenomenon which involves, by definition, three different stakeholders: migrants, countries of origin and destination countries. To be successful, the EU migration policy needs a sincere and effective collaboration with third countries.
- In order to give full weight to its global approach to migration, the EU should promote a *more ambitious policy of legalizing labor migration*. Its longstanding bias against irregular migration has overshadowed any true balanced and holistic management of migration. Worse, it has actually been counter-productive as measures for combating irregular migration have themselves fuelled the never-ending development of irregular routes towards the EU. The only way to stop this vicious circle would be for the EU to open up legal channels of labor migration. The real maximization of benefits for both countries of origin and countries of destination should supersede Member States' fear for their labor markets. Indeed, labor migrants not only help to alleviate poverty within their country of origin through remittances, but also contribute positively to the economic development of the destination countries. In this sense, the World Bank estimated that an increase of 3 per cent of temporary migrant workers in industrialized countries in 2001-2025 would generate a global gain superior to those

obtained from total trade liberalization.<sup>187</sup> Despite the traditional restrictive impulses of States when managing immigration in times of recession, legalizing labor migration may ironically prove to be one of the most promising avenues for tackling the current economic crisis.

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<sup>187</sup> World Bank, *Global Economic Prospects. Economic Implication of Remittances and Migration*, Washington, D.C., World Bank, 2006, at p. 41.

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