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The Common European Asylum System and human rights

CLEER WORKING PAPERS **2014/7**

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

CLEER

The Common European Asylum System and human rights: enhancing protection in times of emergencies

Claudio Matera and Amanda Taylor (eds.)

CLEER WORKING PAPERS **2014/7**

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

THE COMMON EUROPEAN ASYLUM SYSTEM AND HUMAN RIGHTS: ENHANCING PROTECTION IN TIMES OF EMERGENCIES

CLAUDIO MATERA AND AMANDA TAYLOR (EDS.)

CLEER WORKING PAPERS **2014/7**

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LIST OF TERMS AND ABBREVIATIONS

AFSJ	Area of Freedom Security and Justice
CEAS	Common European Asylum System
CJEU	European Court of Justice
COI	Country of Origin Information
EASO	European Asylum Support Office
ECE	European Convention on Establishment
EChFR	European Charter of Fundamental Rights
ECHR	European Convention on Human Rights
ECRE	Pan- European Umbrella Organisation for Refugee
ECtHR	European Court of Human Rights
EEAS	European External Action Service
EPS	Early warning and Preparedness System
ESC	European Social Charter
EU	European Union
EUCFR	European Charter on Fundamental Rights
FRA	European Union's Fundamental Rights Agency
IMO	International Organisation for Migration
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
LTV	Limited Territorial Validity
MoU	Memorandum of Understanding
PEPs	Protected entry procedures
QD	Qualification Directive
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees

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PREFACE

This edited volume of the CLEER Working Papers Series is the second and last of two volumes dedicated to the theme '*Human Security: a new framework for enhanced human rights in the EU's foreign security and migration policies*'. This research programme was co-sponsored by the LLP Programme of the European Union through a Jean Monnet grant. This research project was elaborated by Dr. Tamara Takács, Academic Programme Coordinator of CLEER and Senior Researcher at the T.M.C. Asser Instituut and Claudio Matera, who was a researcher in EU law at the T.M.C. Asser Instituut until the Fall of 2014. The project ran until September 2014 and was implemented also in cooperation with Dr. Aaron Matta, now Senior Researcher at The Hague Institute for Global Justice.

This volume is built upon the conference organised by CLEER on the 4th of July 2014 and elaborates further upon the different topics that were covered on that occasion. We would like to thank all the speakers and moderators that participated on that occasion and Tomasz Pradzynski for the help in preparing this volume.

The Editors
The Hague/Brussels
December 2014

THE COMMON EUROPEAN ASYLUM SYSTEM AND ITS SHORTCOMINGS IN PROTECTING HUMAN RIGHTS: CAN THE NOTION OF HUMAN SECURITY (HELP TO) FILL THE GAPS?

Claudio Matera

1. INTRODUCTION

The present volume is the second published for the CLEER Working Papers series and under the CLEER research project titled 'Human Security as a new operational framework for enhancing Human Rights protection in the EU's Security & Migration Policies'. In the framework of activities carried out under the aforementioned research project, a group of experts were asked to consider the extent to which the concept of human security could influence the response of the EU to humanitarian crises. This volume builds upon the conference organised by CLEER on the 4th of July 2014 and aims to address a number of questions pertaining to the application of the Common European Asylum System (CEAS). Whilst the conference considered the role that the concept of human security might play in the development of the CEAS and the application of legislative instruments thereof so as to maximise the level of protection and the rights of asylum seekers, the reader will find that human security considerations are often translated into human rights ones, a terrain in which lawyers are more familiar with. Yet, the concept of human security permeates through the whole volume since each contribution discusses the necessity to consider the protection needs of asylum seekers into the analysis and application of the CEAS *acquis*. This introductory contribution has a twofold purpose. Firstly, it wishes to present the topic of this volume and consider the extent to which human security can play a role in the interpretation and application of the EU's CEAS (Sections 2 to 4). Secondly, this introductory contribution will provide the reader with an overview of the different contributions (5).

2. SETTING THE SCENE: THE COMMON EUROPEAN ASYLUM SYSTEM AND ITS HUMAN RIGHTS SHORTCOMINGS

With the entry into force of the Lisbon Treaty, three fundamental changes were brought to the EU's Area of Freedom, Security and Justice (AFSJ). First, the European Parliament gained the status of co-legislator under the ordinary legislative procedure for most aspects of all the different policies that compose the AFSJ.[1] Secondly, the limitations affecting the jurisdiction of the Court of Justice

[1] Some exceptions have remained: Art. 80 (3) on family law, 82 (2) on approximation of substantive criminal law, Art. 86 on the establishment of the European Public Prosecutor. For an

of the European Union (CJEU) were lifted, albeit with some temporary restrictions, so as to cover all instruments adopted in the AFSJ.[2] Thirdly, the European Charter on Fundamental Rights (EUCFR) entered into force and subsequently has the same status as the Treaties.[3] Whilst these three fundamental innovations have brought an end to some systemic deficiencies that were affecting the credibility and legitimacy of the EU's AFSJ, [4] at the substantive level the democratic shift has not yet been translated in to a more liberal policy for the AFSJ.[5] This is also the case of the CEAS, which is still affected by a number of shortcomings in relation to the respect of the rights of asylum seekers and migrants.[6] By way of example suffice here to mention the launch of operation Triton to patrol the external maritime border of the EU,[7] the transfers system of the Dublin Regulation[8] and the thorny application of Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers, now amended by Directive 2013/33/EU.[9]

At the same time the European Union (EU) and its CEAS are under the pressure of an increasing flow of individuals fleeing from zones of war, famine and unrest and seeking protection within the Member States of the EU. This means that the Member States have to face an increase in the number of people trying to reach EU soil and asking for protection. It can be argued that the various emergencies affecting north and central Africa on the one side, and the middle east on the other have brought the EU in the midst of a humanitarian crisis that has consistently grown, at least, since 2011 and that does not appear to be nearing an end. Facing these challenges the EU has consolidated its *acquis* on asylum, with the adoption of new instruments amending pre-existing legislation.[10] However, the results thus far obtained are far from being satisfactory, both from a substantive and an institutional perspective.

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analysis see S. Peers, 'Mission Accomplished? EU Justice and Home Affairs Law After the Lisbon Treaty', 48 *Common Market Law Review* 2011, 667-681.

[2] S. Peers, *idem*, 681-685.

[3] Art. 6(1) TEU.

[4] The vertical distribution of competencies between the EU and the Member States is still puzzling. In this regard see the contribution by Paula Garcia-Andrade in this volume.

[5] For a Commentary see S Peers, 'Justice and Home Affairs Law since the Treaty of Lisbon: A Fairy-Tale ending?', in D. Acosta Arcarazo and C. Murphy (eds.), *EU Security and Justice Law. After Lisbon and Stockholm* (Oxford: Hart 2014), 17-37.

[6] There is rather an increasingly focused attention by scholars on these issues. In relation to border controls see S. Trevisanut, 'Which Borders for the EU Immigration Policy? Yardsticks of International Protection for EU Joint Borders Management', in L. Azoulai and K. de Vries (eds.), *EU Migration Law. Legal Complexities and Political Rationales* (Oxford: OUP 2014), 106-148. See also S Peers, *supra* note 5 and V. Moreno-Lax, 'Life After Lisbon: EU Asylum Policy as a Factor of Migration Control, in D. Acosta Arcarazo and C. Murphy (eds.), *EU Security and Justice Law. After Lisbon and Stockholm* (Oxford: Hart 2014), 146 -167.

[7] The latest events in this respect are the launch of Operation Triton and Operation Mos Maiorum Council Doc. 10 July 2014, n. 11671/14. See the contribution of P. Cuttitta in this volume.

[8] Dublin Regulation, i.e. Regulation 604/2013, *OJ* [2013] L180/31, 29.6.2013, see the contribution of Wijnkoop for a recent overview.

[9] See the contributions of Wijnkoop and Slingenberg in this volume.

[10] See the contribution by Wijnkoop for a general overview.

In relation to substantive aspects of the application of the CEAS, the first aspect that comes to mind is the development of an integrated border management amongst the Member States that has been oriented towards impeding access to EU soil under the veil of the fight against illegal migration and traffickers of human beings. Secondly, and from a regulatory perspective, the transfer system under the Dublin Regulation[11] has revealed itself as a system of forced transfers that places an unfair burden on Member States placed at the external border of the Schengen area, and that does not sufficiently consider the needs and requests of asylum seekers. Moreover, the anchorage of the Dublin system to the principle of mutual trust and the presumption of equivalence in the standards of protection granted to asylum seekers has been dismantled by a number of judgments in which the systemic deficiencies and violations of the rights of asylum seekers have been evidenced.[12] Thirdly, the system has thus far failed to effectively deliver common protection standards since the Qualification Directive[13] and the Reception Conditions Directive[14] have been implemented differently amongst the Member States with the result that the consistent application of these instruments depends to a very large extent on the expanding role of the CJEU and the ECtHR in the field of asylum law.[15]

From the institutional perspective, the biggest disappointment possibly relates to the application of the solidarity principle which, according to Article 80 TFEU, should govern the application of the EU competences on borders, migration and asylum policies.[16] Yet, Member States appear reluctant to take into due account this principle when developing the EU's CEAS. For example, the refusal to respect the solidarity principle emerges in relation to Directive 2001/55 on temporary protection, an instrument specifically adopted 'to establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries', which has never been applied.[17]

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[11] Regulation 604/2013 of 26 June 2013 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), *OJ* [2013] LO180/31, 29.6.2013.

[12] For an analysis of the existing challenges between human rights protection standards and the CEAS see S Peers, *EU Justice and Home Affairs Law* (Oxford: OUP 2011), 314-324.

[13] Directive *OJ* [2004] 2004/83/EC, 29.04.2004 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* [2004] L304/12, 30.09.2004. That Directive has now been repealed by Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, *OJ* [2011] L337/9, 20.12.2011.

[14] Directive 2003/9/EC, laying down minimum standards for the reception of asylum seekers, now repealed by Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), *OJ* [2013] L180/96, 26.06.2013.

[15] See the contribution by Slingenberg and Visser in this volume.

[16] Also Art. 67 (2) TFEU refers to the principle of solidarity as the cornerstone of the EU policies on borders, migration and asylum.

[17] 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

All in all, it seems that, as Moreno-Lax has observed, the existing links between asylum and migration policy have gradually been used to apply, also in the field of the CEAS, an approach which focuses on migration control rather than focusing on the needs of individuals seeking international protection.[18] As a result of this, '*protection obligations have been given a strict territorial understanding…and without solid statistical or other evidence, asylum has been apprehended as a secondary route to immigration*' with the result that '*refugees have been characterised as potentially bogus and the abuse of international protection systems as a scourge to eradicate*.'[19] These considerations confirm that, at present, the development of the CEAS is affected by a conceptual flaw whereby the development of this policy has been anchored to the securitization of borders rather than on the protection of individuals. And since the underpinning narrative of the CEAS continues to prioritise the fight against unauthorised entry, academics and practitioners are left with the task of interpreting the existing legislation in a manner consistent with the Geneva Convention on refugees and the European Convention on Human Rights.[20]

3. THE ADDED VALUE OF HUMAN SECURITY

Against the paradigm that prioritises the securitization of national and EU borders against the need to secure the protection of individuals seeking refuge in the EU, the concept of human security offers an opportunity to recalibrate the interpretation and application of the CEAS. The concept of human security was developed in reaction to traditional, or realist, notions of national security which focused on the security of states from military threats.[21] Human security is characterised by shifting this paradigm from a subjective and a material perspective. First, in relation to the subjective dimension, human security positions human beings and their protection from threats at the centre of attention. Secondly, in relation to the material dimension, human security calls for an expansion of the notion of 'security threat' so as to go beyond the link with conflicts and military activities so as to include: *'any event or process that leads to large-scale death or lessening of life chances and undermines states as the basic unit of the international system*.'[22]

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efforts between Member States in receiving such persons and bearing the consequences thereof, *OJ* [2001] LL 212/12, 7.8.2001.

[18] V. Moreno-Lax, *supra* note 6, at 165.

[19] V. Moreno-Lax, ibid., at 166.

[20] F. Ippolito, 'The Contribution of the European Courts to the Common European Asylum System and its ongoing recast process', 20 *MJ2* 2013, 261-281.

[21] D. Gasper, 'Human Security: From Definitions to Investigating a discourse', in M. Martin and T. Owen (eds.), *Routledge Handbook of Human Security* (Oxford, New York: Routledge 2014), 28-42.

[22] UN, In Larger Freedom, available at <http://www.un.org/en/events/pastevents/in_larger_freedom.shtml>.

Human security was introduced in the larger context of the works of the United Nations Development Programme (UNDP) in the early 90s.[23] Since then, the concept has been used to define, in relation to the activities of the UNDP, agendas for action by national governments with a view to increasing the level of security enjoyed by individuals worldwide. Human security brings together a diverse set of issues, from fundamental and civic liberties to health, social and economic rights, and has been mostly used by UN-related bodies, organs and *fora.* From a scientific perspective, the concept has been used and connected with the doctrine of responsibility to protect and humanitarian intervention.[24] Human security aims at protecting the vital core of all human lives and wishes to enhance the protection and the safety of individuals from threats against their physical integrity, dignity and fundamental freedoms. In this respect the expression human security is often considered to embody two distinct and fundamental freedoms: freedom from fear (related to physical integrity and the protection of other freedoms such as freedom of expression, religion, etc.) and freedom from want (which is related to socio-economic rights and civil liberties).[25]

Human security is often referred to as a concept, but it can be understood as an approach too. In the latter sense, using a human security approach indicates that the analysis of a certain situation –may it be man-made or natural– is conducted from the perspective of the affected individuals, focusing specifically on the impact that a specific threat may have on their security. In other words, using a human security approach calls for a 'reorientation of the concept of security from the state to the individual and communities, and the broadening of the nature of security threats of concern beyond purely military ones'[26] with the result that this approach can foster human rights protection and the application of, for instance, specific instruments such as the Geneva Convention of 1951 and the CEAS; consequently such an approach allows to depart from the restrictive approaches that too often characterise EU migration and asylum discourses.

[23] For an analyses on the development of the Human Security concept see A. Sen, 'Birth of a concept', in M. Martin and T. Owen (eds.), *Routledge Handbook of Human Security* (Oxford, New York: Routledge 2014) 17- 28.

[24] In relation to these aspects, see the T. Takács and A. Matta (eds), 'Human Security as a tool for comprehensive approach for human rights and security linkages in EU foreign policy', 5 *CLEER Working Papers Series* 2014, available at <http://www.asser.nl/cleer/publications/working-papers/cleer-wp-20145-matta-tak%C3%A1cs-eds/>.

[25] Numerous publications touch upon these issues. For a comprehensive approach to the concept of human security and its evolution see M. Martin and T. Owen (eds.), *Routledge Handbook of Human Security* (Oxford, New York: Routledge 2014).

[26] A. Edwards and C. Ferstman, 'Humanising non-citizens: the convergence of human rights and human security', in A. Edwards and C. Ferstman (eds.), H*uman Security and Non-Citizens. Law, Policy and International Affairs* (Cambridge: CUP 2010), at 21.

4. HUMAN SECURITY AS A COMPLEMENT TO ENHANCE AND EXPAND THE SCOPE OF PROTECTION GRANTED UNDER THE CEAS

Strategic documents such as the European Security Strategy[27] and In Larger Freedom[28] have placed a lot of emphasis on the emergence of a new understanding of what constitutes a security threat and the paradigm has shifted from state-centred and military factors to other concerns that include famine, terrorism, organised crime and climate change. From the perspective of applying protection instruments developed within the CEAS, this should have been translated, for instance, in the application of instruments such as Temporary Protection Directive[29] in order to give protection to individuals *also* affected by new and emerging security threats. This is where a human security approach could positively influence the application of the existing instruments of the CEAS.

To this date, however, the shift from the old military-oriented notion of security threat has been mostly used as a justification to adopt repressive and policing measures rather than to expand the scope of application of existing instruments. In the fields of migration and asylum, this has been translated into what has been described as 'Fortress Europe' and the confusion of immigration, irregular migration and asylum seekers as a new type of (security) threat.[30] Unfortunately, such understanding is biased by the fact that it is solely oriented to the security of EU citizens and disregards founding provisions such as Article 3(5) TEU, international obligations, and other provisions such as Article 78 (1) TFEU and Article 18 ECFR. In this respect then, a human security approach allows to shift the paradigm of the CEAS back to the protection of individuals fleeing insecure situations so as to guarantee their safety and ultimately their dignity as human beings. Therefore, human security allows us to go back to the genuine purpose of the CEAS: the protection of individuals. Yet, human security remains a non-legal concept and it remains to be seen whether its use could have an added value from the legal perspective.

Promoters of human security have repeatedly held that human rights constitute the normative backbone of the concept. Both models postulate that sovereignty of states is not absolute when it comes to human dignity, civil liberties and fundamental freedoms. Critics have argued that human security is of no added value and that it is a concept without teeth.[31] Yet, recent academic de-

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[27] European Security Strategy (12 December 2003), available at <www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf>.

[28] *Supra* note 22.

[29] Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, *OJ* [2001] L212/12, 07.08.2001.

[30] See V. Moreno-Lax, *supra* note 6 and E. Papastavridis, 'Fortress Europe' and Frontex: Within or Without International law?, 79 *Nordic Journal of International Law* 2010, 75-11.1

[31] In relation to asylum law see F. Nicholson, 'Protection and empowerment: strategies to strengthen refugees' human security', in see A. Edwards and C Ferstman (eds.), *Human Security and Non-Citizens, Law, Policy and International Affairs* (Cambridge: CUP 2010), 82-124, at 116; see also S. Tadjbakhsh, 'In defense of the broad view of human security', in M. Martin and

velopments reveal that the relation between human rights and human security is more complex and nuanced than that.[32] For the purposes of this study and these introductory remarks, it can be inferred that human security emerges as a tool to strengthen the *operationalisation* of human rights: therefore, because human security represents a conceptual framework, it can be used to promote a holistic approach for the protection of human rights with a view to prioritising human rights concerns in the interpretation of the various legislative instruments composing the CEAS.

A first moment in which a human security approach could foster the protection of human rights is the interpretative one. Human rights protection instruments are characterised by a certain dynamism in their interpretation. This approach, also known as a teleological method of interpretation has been expressly adopted, for instance, by the European Court of Human Rights (ECtHR) since its decision on corporal punishment in 1978 in the case of *Tyrer*.[33] In this perspective, human security can contribute to widening the scope of protection of certain specific rights with a technique similar to the one adopted by the ECtHR in relation to Article 8 ECHR and the protection of the environment.[34]

Another way in which human security can foster human rights protection is by anchoring the concept to the respect of human dignity, an obligation now codified in Article 1 of the EUCFR.[35] In relation to the application of human security in the context of the CEAS, suffice here to mention that in more than once occasion the core of refugee law has been identified with the protection of human dignity.[36] In this respect it could be argued that human security relates to the protection of human dignity for it aims to protect inalienable and non-derogable rights as protected by Article 15(2) ECHR and, by virtue of Articles 1 and 53 EUCFR, also protected within the EU legal order.

Finally, a third way in which a human security approach could foster the application of the different protection mechanisms existing at EU level is the promotion of autonomous concepts in EU asylum law in order to widen the scope

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T. Owen (eds.), *Routledge Handbook of Human Security* (Oxford, New York: Routledge 2014), 43-60, at 47.

[32] For an analysis of the different ways in which human security and human rights come to play a role in migration and asylum law see A. Edwards and C Ferstman (eds.), *Human Security and Non-Citizens, Law, Policy and International Affairs* (Cambridge: CUP 2010).

[33] ECtHR, *Tyrer v. the United Kingdom,* Appl. No. 5856/72, 25 April 1978. See para. 31 of the decision: 'The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field. Indeed, the Attorney-General for the Isle of Man mentioned that, for many years, the provisions of Manx legislation concerning judicial corporal punishment had been under review.'

[34] ECtHR, *Powell and Rayner v. the United Kingdom,* Appl. No. 9310/81, 21 February 1990 and ECtHR, *López Ostra v. Spain,* Appl. No. 16798/90, 9 December 1994.

[35] Moreover, the duty to respect human dignity and the right to dignity is mentioned not only as a founding value of the Union, but also as a propeller in the external action of the Union Art. 21 TEU.

[36] V Türk, 'Protection Gaps in Europe? Persons fleeing the indiscriminate effects of generalized violence', UNHCR/DIP, 18 Jan 2011.

of application of its protection instruments. This was the case, for instance, in the recent *Diakité* case in which the CJEU considered that for the purpose of applying Article 15(c) of the Qualification Directive on subsidiary protection,[37] EU courts were not obliged to follow the notion of internal armed conflict stemming from international humanitarian law.[38]

All in all, using a human security approach in the interpretation and application of the CEAS would entail the promotion of a holistic approach to human rights protection against more restrictive paradigms. However, such an approach objectively poses some challenges and raises some doubts. Firstly, from a formal perspective, it should be made clear that a human security approach would necessarily have to abide by the existing hierarchy of norms and sources of legal obligations within the EU legal order. This is to say that human security can only *integrate* the interpretation and application of existing provisions and could not be used to introduce new forms of protection at the judicial level. Also from an academic perspective, developing and using a human security approach in the interpretation of the CEAS can be an added value only if such theory is developed within the realm of the existing legal framework. Secondly, the use of a concept such as human security also carries the risks of negatively affecting legal certainty and the rule of law. Indeed, whilst one of the advantages of the concept resides in its flexibility and wide applicability, this flexibility could nonetheless negatively affect the consistent application of EU rules within the EU legal system with the possible consequence of fragmenting the application of the CEAS among the Member States.

5. THE CONTENT OF THIS VOLUME

Against the background of the observations that have proceeded, the last section of this introductory essay wishes to present the different contributions of this volume. The present volume covers a number of components of the CEAS so as to reflect the different contexts in which human security consideration and human rights should be strengthened.

In the first paper, **Paolo Cuttitta** analyses some ten years of border control and humanitarian operations carried out by the Italian government in the Mediterranean Sea. In the aftermath of the tragedy occurring half a mile from the Italian island of Lampedusa in which 336 migrants lost their life in an attempt to reach Italian and European soil, the Italian government launched Operation

[37] Directive 2011/95/EC on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, *OJ* [2011] L337/9, 20.12.2011.

[38] ECJ, Case C-285/12*, Aboubacar Diakité* v. *Commissaire général aux réfugiés et aux apatrides,* [2014]*, NYR,* avaliable at <http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130de1f7a9e6c446340b899a9fbe2a2254da3.e34KaxiLc3eQc40LaxqMbN4ObhmKe0?text=&docid=147061&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=99771>. For an analysis see C. Matera, 'Another Parochial Decision ? The Common European Asylum System at the crossroad between IHL and Refugee Law in Diakité', *Questions of International Law* 2015, Forthcoming.

Mare Nostrum with a view to patrol and secure the waters of the Mediterranean Sea close to the Italian coast in what can be described as a humanitarian mission to prevent other tragedies from taking place. By analysing some ten years of different missions carried out by Italian authorities to secure the strait of Sicily, as well as a number of policing activities to prevent the irregular crossing of the maritime border, Cuttitta shows how humanitarian and policing objectives have been combined; yet he concludes that a thorough analysis of the different instruments adopted by Italian authorities reveal that in spite of a growing humanitarian concern exclusionary policies remain central to the development of national and EU border policies – as operation Triton confirms.

With the second paper **Myrthe Wijnkoop** provides an overview of the evolution of the CEAS. From her contribution it emerges that while the EU has developed a remarkable legislative framework in the past 15 years, there are a number of unsolved problems that negatively affect its application that have not yet been confronted by EU authorities and that are not discussed in the new guidelines on the AFSJ adopted in June 2014. By way of conclusion, she proposes a number of recommendations for policy makers so as to bring human rights concerns at the top of the EU agenda.

One of the difficulties of managing migration flows resides in the current instability of the southern neighbourhood of the EU. In order to prevent tragedies such as the one occurring in Lampedusa in October 2013, one possibility that the EU and its Member States have is to engage with third countries to regulate migration and control borders. In her contribution **Paula García Andrade** looks at national responses to manage mixed flows of migrants from the perspective of the existing rules on the distribution of competences between the EU and its Member States. In her analysis the author looks at a number of initiatives promoted at a national level on border controls and on protected entry systems so as to understand the extent to which Member States can autonomously develop such policies. Yet, the analysis conducted goes beyond the institutional level and in her conclusions reflects on whether, from a human rights perspective, it is better for the EU to control more tightly the initiatives adopted at national level.

The following essay looks at one of the most recent developments which has occurred within the CEAS: the establishment of the European Asylum Support Office. In his essay **Robert K. Visser** looks at the inherent difficulties connected with migration and asylum legislation in order to analyse how such an Agency can contribute to a harmonious development of the CEAS. From Visser's essay it clearly emerges how the panoply of instruments adopted at EU level on the one side and the objective difficulties in applying asylum laws on the other can benefit from the establishment of an independent office dedicated to foster the consistent application of EU rules and to promote the application of the solidarity principle amongst the member States.

In the subsequent contribution, the volume offers an analysis of recent decisions of the CJEU on the application of the Qualification Directive. In her contribution **Amanda Taylor** looks at recent developments pertaining to the interpretation of the notion of persecution codified in the Qualification Directive

and the Geneva Convention. The author criticises the methodology used by the CJEU because it appears to be disproportionately anchored to Article 3 ECHR. According to Taylor the method developed by the Court runs the risk of delimiting too much the sphere of application of the Qualification Directive and proposes an alternative argument in which human security could be understood as a means to fulfil the obligations stemming from the Geneva Convention.

In the final essay **Lieneke Slingenberg** discusses the thorny issue of reception conditions for asylum seekers. In a time of an enduring economic crisis and unemployment, social and economic rights of refugees inevitably become part of the debate on the reception of third country nationals; in her essay the author looks at the specific issue of access to employment for asylum seekers and refugees in order to ascertain the extent to which the existing legislation adopted at EU and national level complies with other human rights protection instruments existing at the European level. In her analysis the author argues in favour of an integrative approach between EU and conventional standards so as to develop a coherent and comprehensive framework in the field of access to employment for asylum seekers and refugees within the EU.

6. CONCLUSION

In the past sixteen years the European Union has developed a remarkable legislative framework covering a plurality of aspects linked to refugee law. Yet, its development has also been affected, because of objectively existing links, by the securitisation of the EU's borders and restrictive immigration policies. Moreover, contrary to the existing rules applicable within the context of the internal market, EU asylum law and its application throughout the Member States has not been subject to equivalent scrutiny by the European Commission with negative consequences for the consistent application of the rules and, naturally, for the rights of the individuals concerned. In the coming years, the EU needs to address human rights protection within the CEAS more effectively, invest in the formation of national authorities and scrutinise more effectively on the application of the different components of the CEAS; using a human security approach could contribute to address these challenges and the different contributions of this volume provide an interesting analysis of the different challenges ahead.

FROM THE *CAP ANAMUR* TO *MARE NOSTRUM*: HUMANITARIANISM AND MIGRATION CONTROLS AT THE EU'S MARITIME BORDERS

Paolo Cuttitta[1]

1. INTRODUCTION

At the time of writing, the Italian government has announced that operation *Mare Nostrum* – which was presented as a humanitarian mission aimed at rescuing lives in the Strait of Sicily, when it was launched in 2013 – will not be extended after October 2014. However, saving migrants' lives and protecting their human rights will remain among the declared aims of the Italian and European border policies and practices.

Indeed, humanitarian concerns have progressed towards centre stage in the public discourse about migration and border controls in the last decade. While earlier stages of the Europeanisation of migration and border policies were framed mainly, if not solely, in security terms, the humanitarian narrative was gradually incorporated into the language of European policy-makers after the turn of the century.[2]

Nine years before the launch of *Mare Nostrum*, a rescue operation carried out by the German humanitarian ship *Cap Anamur* had resulted in accusations from the Italian authorities of aiding and abetting illegal immigration. Considering that *Mare Nostrum* is doing the same thing for which three persons were brought to court in 2004, one might think that much has changed after the *Cap Anamur* case. In this paper, I ask the question of what has really changed. In order to provide some basis for answering this question, I try to shed some light on the history of interceptions and rescue interventions in the Strait of Sicily, and to assess the actual function of the operation *Mare Nostrum* by analysing it against the background of Italian and European border policies and, more

[1] I am grateful to Bernd Kasparek, Claudio Matera and Amanda Taylor for their comments on an earlier draft of this paper, as well as to Emanuela Roman for her comments on my presentation at the conference 'Le frontiere mobili del Mediterraneo', Palermo, 3-4 November 2014.

[2] See *inter alia* D. Fassin, 'Compassion and Repression: The Moral Economy of Immigration Policies in France', 20 *Cultural Anthropology* 2005, 362-387; M. Agier, *Managing the Undesirable. Refugee Camps and Humanitarian Government* (Cambridge: Polity Press 2011); W. Walters, 'Foucault and Frontiers. Notes on the Birth of the Humanitarian Border', in U. Bröckling, S. Krasmann and T. Lemke (eds.), *Governmentality: Current Issues and Future Challenges* (New York: Routledge 2011), 138-164; G. Campesi, 'The Arab Spring and the Crisis of the European Border Regime. Manufacturing Emergency in the Lampedusa crisis', 59 *EUI Working Paper RSCAS* 2011, available at <http://cadmus.eui.eu/bitstream/handle/1814/19375/RSCAS_2011_59.pdf?sequence=1>; P. Cuttitta, 'Borderizing the Island. Setting and Narratives of the Lampedusa Border Play', 13 *Acme: An International E-Journal for Critical Geographies* 2014, 196-219.

specifically, of the cooperation framework established between the two shores of the Mediterranean.

Section 2 analyses the rise of the humanitarian narrative in the language of European policy documents and Italian laws, as well as of statements made by Italian policy-makers. Section 3 makes a comparison between *Mare Nostrum* and previous patrolling activities carried out by Italian authorities in the Strait of Sicily, in order to assess whether and in how far *Mare Nostrum* marks a difference with the past. Section 4 continues the comparison by taking into consideration the Italian policies of pushing back or deporting migrants, as well as that of preventing them from leaving through increased cooperation with North African countries. Section 5 summarises a few cases of rescue by private seafarers to suggest that non-state actors were *de facto* discouraged from rescuing people without the state's authorisation, even after the *Cap Anamur* case. Section 6 provides an update about the end of *Mare Nostrum* and the launch of the Frontex operation *Triton*.

2. THE HUMANITARIANISATION OF THE EUROPEAN SEA BORDER

At the EU level, the humanitarianisation of the sea border can be first traced in official documents to late 2004. It has been argued, indeed, that the emergence of European humanitarianism was a consequence of the *Cap Anamur* case, which sparked the debate on boat migrants that summer.[3] In June 2004, while cruising the international waters of the Strait of Sicily, the German humanitarian ship *Cap Anamur* came across an inflatable dinghy with 37 people aboard. The dinghy had partially deflated and was taking in water, while the engine was over-heating and letting off fumes. All passengers were taken on board the *Cap Anamur*.[4] They claimed to be Sudanese and declared that they wanted to ask for asylum in Europe. The Italian island of Lampedusa was 100 miles (around 180 km) away, while Malta was almost twice as far.[5] Libya was by far closer, but it could not be considered as a safe haven.

As the Lampedusa harbour was too small for the *Cap Anamur*, the shipmaster asked for permission to land at Porto Empedocle, in Sicily, on 29 June. The day after, as soon as the permission was granted, the humanitarian ship headed northwards. Immediately before the *Cap Anamur* entered Italian territorial waters, however, the Italian authorities suddenly revoked the permission. The Berlusconi government declared that it was not its responsibility to receive the migrants and examine their asylum applications, and sent navy ships and helicopters in order to prevent the German vessel from crossing the sea border. Germany, as the flag state of the *Cap Anamur*, declared it was not responsible either. Both Italy and Germany attempted to pass the buck to Malta, arguing

[3] See S. Mezzadra and B. Neilson, *Border as Method, or, the Multiplication of Labor* (Durham/London: Duke University Press 2013), 170-171.

[4] E. Bierdel, *Ende einer Rettungsfahrt. Das Flüchtlingsdrama der Cap Anamur* (Weilerswist: Ralf Liebe 2006), at 65.

[5] The exact location was latitude 33°46,5984N, longitude 12°15,4908E. See E. Bierdel, *supra* note 4, at 110.

that the ship had transited Maltese territorial waters after rescuing the migrants. The authorities of Malta denied any involvement, making clear that they had never been aware of the *Cap Anamur* transiting their territorial waters. In any case, it would have been difficult to consider a mere passage as an entry in the sense of the Council Regulation (EC) No. 343/2003 of 18 February 2003 (hereafter, Dublin regulation).[6] Furthermore, Malta argued that the *Cap Anamur* should have brought the migrants to Libya, the country closest to the place of rescue. In sum, nobody wanted the rescued migrants to land on their territory.

The dispute went on for eleven days, during which the ship had to wait at the border of Italian territorial waters. On 6 July the German and Italian Interior ministers, O. Schily and G. Pisanu, deemed it necessary to stick to the Dublin regulation and insist that Malta take the migrants, because an exception in this case would represent '*a dangerous precedent and could pave the way for numerous abuses*'. According to the two ministers, the *Cap Anamur* case also required '*clarification in many respects*'.[7] On the *Cap Anamur* food started running out: as a consequence, humanitarian organisations travelled from Sicily to ensure basic supply. The prolonged forced waiting time ended up affecting the mental balance of the rescued people. Some of them threatened to throw themselves overboard. On 11 July the master of the *Cap Anamur*, fearing that he might no longer be able to guarantee the safety of the people on board, declared a state of emergency, asked the Italian authorities for permission to land and informed them that in the absence of a formal authorisation he would find himself constrained to enter the harbour even without the authorities' consent – which is what happened in the end. The German ship met no resistance when it entered Italy's territorial waters without authorisation. However, immediately upon landing at Porto Empedocle, the ship was confiscated while the shipmaster (S. Schmidt), the first officer (V. Dachkevitch) and the head of the humanitarian organisation *Cap Anamur* (E. Bierdel) were all detained under the charge of aiding and abetting illegal immigration.[8]

Immediately after the *Cap Anamur* case, the German Interior Minister, O. Schily, proposed the establishment of European reception camps for asylum seekers in North Africa, arguing that this would also prevent casualties during the sea crossing.[9] The proposal was never formalised at EU level. However, the European Council of November 2004 recognised '*that insufficiently managed migration flows can result in humanitarian disasters*', expressed '*its utmost concern about the human tragedies that take place in the Mediterranean as a result of attempts to enter the EU illegally'* and called '*upon all States to inten-*

[6] V. Della Fina, 'Cap Anamur Case, Tribunal of Agrigento, First Criminal Section, Judgment of 15 February 2010', 13 *Yearbook of International Humanitarian Law* 2011, at 544.

[7] Ministero dell'Interno, 'La vicenda della nave Cap Anamur all'esame dei Ministri dell'Interno Pisanu e Schily', available at <http://www.interno.gov.it/mininterno/site/it/sezioni/sala_stampa/comunicati/comunicato_568.html?pageIndex=10&year=2004>.

[8] In 2009, after a five-year trial, the court (Tribunale di Agrigento, I Sezione Penale, I Collegio. 7 October 2009) acquitted the three accused from all charges, recognizing that they had acted for humanitarian reasons and not for profit.

[9] See *inter alia* J. Valluy, 'La nouvelle Europe politique des camps d'exilés: genèse d'une source élitaire de phobie et de répression des étrangers', 57 *Cultures & Conflits* 2005, 13-69.

sify their cooperation in preventing further loss of life'.[10] It also declared that it would welcome '*initiatives by Member States for cooperation at sea, on a voluntary basis, notably for rescue operations*'.[11] In 2005 the 'Global Approach to Migration' – a policy document adopted by the European Council – called on Frontex to establish a surveillance system using '*modern technology with the aim of saving lives at sea and tackling illegal immigration*'.[12] Such a surveillance system was established in October 2013. It is called Eurosur and aims to strengthen the exchange of information and the operational cooperation between member states, as well as between them and Frontex '*for the purpose of detecting, preventing and combating illegal immigration and cross-border crime and contributing to ensuring the protection and saving the lives of migrants*'.[13] Finally, after the Lampedusa tragedy, the EU Council of 24-25 October 2013 expressed '*its deep sadness at the recent and dramatic death of hundreds of people in the Mediterranean which shocked all Europeans. Based on the imperative of prevention and protection and guided by the principle of solidarity and fair sharing of responsibility*', the Council concluded that '*determined action should be taken in order to prevent the loss of lives at sea and to avoid that such human tragedies happen again*'[14] and that '*[s]wift implementation by Member States of the new European Border Surveillance System (EUROSUR) will be crucial to help detecting vessels and illegal entries, contributing to protecting and saving lives at the EU's external borders*'.[15]

It was only after the long blame game of July 2004 that the question of rescuing people at sea landed, as such, on the EU agenda as one of the official aims of border controls. In Italy, instead, the humanitarianisation of the sea border had already become visible in 2002. The amendments made to the Italian immigration law that year, introduced stricter penalties for smugglers if the lives or physical safety of the smuggled persons have been put at risk during the smuggling process, and if the smuggled persons have been subjected to inhuman or degrading treatment.[16] By doing this, the Italian legislator seemed to aim at enhancing the safety of irregular travels in general, by protecting not only the right to life, but also the right to physical integrity, the right to be treated humanely, and the right not to be tortured. For the first time, the human secu-

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[10] Council of the European Union, 'Brussels European Council 4/5 November 2004 Presidency Conclusions' (5 November 2004), at 21, available at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/82534.pdf>.

[11] Ibid., at 25.

[12] Council of the European Union, 'Brussels European Council 15/16 December 2005 Presidency Conclusions' (30 January 2006), at 10, available at <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/87642.pdf>.

[13] Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur), *OJ* [2013] L295/11, 6.11.2013.

[14] Council of the European Union, 'European Council 24/25 October 2013 Conclusions' (25 October 2013), at 17, available at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/139197.pdf>.

[15] Ibid., at 18.

[16] Art. 11 Law No. 189 of 30 July 2002 *Modifica alla normativa in materia di immigrazione e di asilo* [Amendments to the immigration and asylum law], GU [2002] Serie Generale no. 199, Suppl. Ordinario n. 173, 26.8.2002.

rity of migrants was clearly placed at the service of border controls. As this paper shows, however, the relationship has never been reciprocal: border controls are not placed at the service of the human security of migrants, because their actual aim is to prevent people to reach a place of safety in Europe.

In 2003, the cooperation agreement signed by the Italian government with Gadhafi's Libya was publicly justified with the '*strong determination*' of both parties to '*jointly tackle criminal organisations devoted to the smuggling of human beings and the merciless exploitation of clandestine migrants*'.[17] Similarly, the 2007 Italian-Libyan agreement allowing for joint border patrols along the Libyan coast was presented as the best way to stop '*the smugglers' vessels. By doing this, it will be possible to tackle such activities much more effectively, thus saving many human lives and disrupting the criminal organisations*'.[18] In 2009, when the pushback operations were started, the Italian prime minister described them as '*an act of great humanity […] because they prevent tragedies at sea*'.[19]

This is exemplary of a shift taking place from a mostly securitarian approach to smuggling, which presented facilitators as criminals harming societies, to the mixed securitarian-humanitarian approach, focusing also on the humanitarian consequences of crime. Importantly, the stress is put only on the humanitarian consequences of smuggling and trafficking activities, and not on the humanitarian consequences of the policies and practices carried out by European and North African state authorities.[20]

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[17] Ministero dell'Interno, 'Comunicato stampa. Firmata dal Ministro dell'Interno Pisanu un'intesa operativa con la Libia sulle modalità pratiche della collaborazione per la lotta all'immigrazione clandestina' (3 July 2003), available at <http://www.interno.it/mininterno/export/sites/default/it/sezioni/sala_stampa/comunicati/comunicato_353.html_1278249885.html>.

[18] Ministero dell'Interno, 2007a, 'Notizie. Immigrazione clandestina: il Ministro dell'Interno Amato firma a Tripoli un accordo per il pattugliamento congiunto della costa libica' (29 December 2007), available at <http://www.interno.it/mininterno/export/sites/default/it/sezioni/sala_stampa/notizie/immigrazione/0871_2007_12_29_ministro_Amato_firma_a_Tripoli_accordo_per_il_pattugliamento_congiunto.html>.

[19] Adnkronos, 'Migranti, premier: respinti per umanità. Maroni: politica che dà grandi risultati' (25 May 2009), available at <http://www.adnkronos.com/IGN/News/Politica/?id=3.0.3354936348>.

[20] See the reports: Human Rights Watch, 'Turned Away. Summary Returns of Unaccompanied Minor Children and Adult Asylum Seekers from Italy to Greece' (22 January 2013), available at <http://www.hrw.org/print/reports/2013/01/22/turned-away>; Médecins Sans Frontières, 'Violence, Vulnerability and Migration. Trapped at the Gates of Europe. A report on the situation of sub-Saharan migrants in an irregular situation in Morocco' (March 2013), available at <http://www.msf.org/sites/msf.org/files/migrants_in_morocco_report.pdf>; Amnesty International, 'Scapegoats of Fear. Rights of Refugees, Asylum-Seekers and Migrants Abused in Libya' (June 2013), available at <http://www.amnesty.org/en/library/asset/MDE19/007/2013/en/5310f0f7-1ff4-4acd-bfd8-e3e2c082d7d3/mde190072013en.pdf>; Amnesty International, 'Frontier Europe. Human Rights Abuses on Greece's Border with Turkey' (July 2013), available at <http://www.amnesty.org/en/library/asset/EUR25/008/2013/en/d93b63ac-6c5d-4d0d-bd9f-ce2774c84ce7/eur250082013en.pdf>; Pro Asyl, 'Pushed Back. Systematic Human Rights Violations against Refugees in the Aegean Sea and at the Greek-Turkish Land Border' (7 November 2013), available at <http://www.proasyl.de/fileadmin/fm-dam/l_EU_Fluechtlingspolitik/proasyl_pushed_back_24.01.14_a4.pdf>; Amnesty International, 'The Human Cost of Fortress Europe. Human Rights Violations Against Migrants at Europe's Borders' (July 2014), available at <http://www.amnesty.nl/sites/default/files/public/eur_050012014__fortress_europe_complete_web.pdf>; Jesuit Refugee Service Malta, 'Beyond Imagination. Asylum Seekers Testify to Life in Libya' (January 2014), available at

3. THE OPERATION *MARE NOSTRUM*

Since October 2013 a number of vessels, helicopters, airplanes, drones and personnel of the Italian Navy, Army, Air Force, *Carabinieri*, *Guardia di Finanza*, Coast Guard and Police have been permanently patrolling the international waters of the Strait of Sicily, in search for migrants to be rescued, within the operation *Mare Nostrum*. The mission was launched as early as two weeks after 3 October 2013: on that day, 366 people had drowned after their fishing-boat sank only half a mile before reaching the Italian island of Lampedusa. Although many thousands of people had already died in the attempt to cross the Mediterranean before, this particular incident caused an unprecedented sensation in Italy and Europe alike – because of both the larger number of people involved, and the fact that it happened so close to European soil. As a response, the Italian government launched *Mare Nostrum* and presented it as a humanitarian mission, whose declared aim was to save human lives. Indeed, around 100,000 migrants have been rescued by Italian navy ships alone in ten months.[21]

Because of its life-saving goal, *Mare Nostrum* has been praised and supported not only by almost all Italian political parties (the only criticism coming from a part of the opposition accusing it of attracting more migrants, and therefore also possibly increasing the absolute number of casualties),[22] but also by humanitarian organisations, which called on the Italian and European institutions not to reduce the search and rescue capacity in the Mediterranean after the Italian government announced that *Mare Nostrum* would end because of financial constraints in October 2014, only a year after its launch.[23]

<https://www.jrs.net/assets/Publications/File/Beyond-imagination-jesuit-refugee-service-malta-libya-report.pdf>.

[21] On 11 November 2014, at the 'Fundamental Rights and Migration to the EU' conference, organized by the EU Fundamental Rights Agency in Rome, the Director of the Central Unit for Immigration and Border Police Management of the Italian Interior Ministry, G. Pinto, explained that over 155,000 people have been rescued since January 2014. Around 100,000 of them have been rescued by Italian navy ships, 30,000 by cargoes and other private vessels contacted by the Italian Coast Guard, 25,000 by the Italian Coast Guard as well as by the Italian vessels engaged within the Frontex *Hermes* operation.

[22] See Camera dei Deputati, 'Resoconto Stenografico. Seduta di venerdì 16 maggio 2014' (16 May 2014), available at <http://documenti.camera.it/leg17/resoconti/assemblea/html/sed0230/stenografico.pdf> and Camera dei Deputati, 'Resoconto Stenografico Audizione. Seduta di martedì 8 aprile 2014' (8 April 2014), available at <http://documenti.camera.it/leg17/resoconti/commissioni/stenografici/pdf/30/audiz2/audizione/2014/04/08/leg.17.stencomm.data20140408.U1.com30.audiz2.audizione.0004.pdf>. According to Frontex, the '[r]atio between confirmed fatalities and arrivals in the Central Mediterranean during the first eight months of 2014 compared to the same period in 2013 increased from an average of 0.4 of confirmed deaths per 1 000 detections in 2013 to 1.4 per 1 000 detections in 2014'. See Frontex, 'Africa-Frontex Intelligence Community Joint Report' (October 2014), at 26, available at <http://ffm-online.org/wp-content/uploads/2014/12/AFIC_2013.pdf>. However, the increased surveillance of the Strait of Sicily might have drastically reduced the number of both the missing persons and the unreported casualties, which would undermine Frontex' theory of an increased mortality rate.

[23] See Amnesty.it, 'Mare nostrum non termini. Amnesty International scrive al governo italiano. Domani un convegno a Roma', 16 October 2014, available at <http://www.amnesty.it/Il-governo-italiano-non-termini-Mare-nostrum-lettera-a-governo-italiano>, Unhcr.it, 'Unhcr Expresses Grave Concern on the Termination of Mare Nostrum Operation', 16 October 2014, available at <http://www.unhcr.it/news/unhcr-profonda-preoccupazione-per-la-fine-delloperazione-mare-nostrum>,

However, the Italian operation has not only one, but two declared aims. Although the stress was mainly put on the humanitarian aim of saving lives at sea, *Mare Nostrum* was also presented, from the beginning, as a security mission aiming at capturing smugglers. Indeed, besides the thousands of migrants rescued, authorities can also boast about the hundreds of smugglers detained. A particular event attests to the security nature of the mission: in November 2013, an Italian navy vessel spotted a smugglers' fishing-boat immediately after it had left the migrants on a smaller boat on the high seas, and chased the smugglers, shooting at their vessel until it sank and the smugglers could be apprehended. Indeed, navy ships are used to identify people, to interrogate them and to detect smugglers: in order to do this, not only military personnel but also police officers are on board. Even if there are dead migrants on board or people reportedly missing, Italian authorities on *Mare Nostrum* vessels only interrogate migrants as to their own identity and try to gather information useful for arresting presumptive smugglers, while abstaining from any investigation activity that could lead to the identification of the dead or missing people. Generally speaking, the fact that state authorities regularly collect information and compile statistics regarding the apprehension of live migrants, while they don't collect or disclose to the public systematic data on border deaths,[24] is an indicator of their ambiguous attitude towards the issue of human security. In the specific case of *Mare Nostrum,* it suggests that the security aims of the Italian operation still outweigh the humanitarian ones. Furthermore, *Mare Nostrum* aircraft and vessels are part and parcel of the operational cooperation framework that has long been established between Italy and North African countries.[25] Within such framework, based on the provision of training programmes and technical equipment, on practical cooperation and exchange of information, migrant boats are intercepted and returned by force by Libyan border guards.[26]

Medicisenzafrontiere.it, 'Mare Nostrum: Tempo scaduto. Il governo Italiano non può rinnegare il proprio impegno di continuare a salvare i profughi in mare', 17 October 2014, available at <http://www.medicisenzafrontiere.it/notizie/comunicato-stampa/mare-nostrum-tempo-scaduto-il-governo-italiano-non-può-rinnegare-il> and the report of Amnesty International, 'Lives Adrift. Refugees and Migrants in Peril in the Central Mediterranean' (30 September 2014), available at <http://www.amnesty.org/en/library/info/EUR05/007/2014/en>, at 25.

[24] T. Last and T. Spijkerboer, 'Tracking Deaths in the Mediterranean', in T. Brian and F. Laczko (eds.), *Fatal Journeys. Tracking Lives Lost during Migration* (Geneva: International Organisation for Migration 2014), 85-107; S. Grant, 'Irregular Migration and Frontier Deaths. Acknowledging a Right to Identity', in M.-B. Dembour and T. Kelly (eds.), *Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States* (Abingdon: Routledge 2011), 48-70; I. Kovras and S. Robins, 'Missing Migrants: Deaths at Sea and Addressing Migrant Bodies in Lesbos', in H. Donnan, M. Hurd and Carolin Leutloff-Grandits (eds.), *Border crossings* (Manchester: Manchester University Press forthcoming).

[25] See P. Cuttitta, 'The Case of the Italian Southern Sea Borders: Cooperation across the Mediterranean?', in G. Pinyol (ed.), *Immigration flows and the management of the EU's southern maritime borders* (Barcelona: Cidob Edicions 2008), 45-62; J.-P. Cassarino (ed.), *Unbalanced Reciprocities. Cooperation on Readmission in the Euro-Mediterranean Area* (Washington D.C.: Middle East Institute 2010); L. Bialasiewicz, 'Off-shoring and Out-sourcing the Borders of EUrope: Libya and EU Border Work in the Mediterranean', 17 *Geopolitics* 2012, 843-866; P. Cuttitta, 'Migration Control in the Mediterranean *Grenzsaum*. Reading Ratzel in the Strait of Sicily', 29 *Journal of Borderlands Studies* 2014, 117-131.

[26] See *infra*, section 4.

Once it has been made clear that *Mare Nostrum* has both a humanitarian and a security aim, what deserves to be stressed is that military vessels and aircraft are in fact not a novelty in the Strait of Sicily, nor is it a novelty that they carry out both rescue missions and security activities. In October 2013 the Italian government opted less for a qualitative than for a quantitative change, by strongly increasing the already existing patrolling activities. Within the operation *Constant Vigilance*, indeed, Italian military vessels and aircraft have been patrolling the Strait of Sicily since 2004. While *Constant Vigilance* was never presented as a 'humanitarian mission', *Mare Nostrum* only (yet significantly) increased the number of vessels, aircraft and personnel deployed in the framework of the previous operation: the estimated cost of *Mare Nostrum* is around 9.5 million Euro per month, whereas the monthly budget of *Constant Vigilance* is only 1.5 million Euro per month. In quantitative terms there is a big difference, but in qualitative terms – in terms of what Italian authorities actually do in the Strait of Sicily – there is hardly a difference, because *Constant Vigilance* is also engaged in both rescue missions and security activities.

Moreover, if we go further back in time, we realise that military vessels and police vessels started patrolling the international waters of the Strait of Sicily as early as 1995 – eighteen years before *Mare Nostrum*, nine years before *Constant Vigilance*. From the beginning, Italian border guards were confronted with the duty to rescue people: in 1997, they claimed that they were not able to forcibly divert migrant boats back to Tunisia, because migrants sinking their own vessels resulted in the legal obligation for authorities to rescue them and bring them to Italy.[27] Then, from 2002 onwards, the number of navy ships involved in migration controls was increased. That year, the Italian immigration law was extensively amended. Among other things, the new regulation explicitly allowed for Italian ships, within the limits set by international law, to board vessels suspected of being involved in smuggling activities, to search them and, if evidence is found that the vessels are engaged in the smuggling of migrants, to escort them to an Italian port.[28] The new regulation was highly publicised by the centre-right government as an important move against illegal immigration. In fact, it could not obviously add anything to what Italian authorities were already allowed to do according to international law, nor did it add anything to what Italian ships had already been doing in international waters. Importantly, the emphasis was mainly put on security, not on humanitarian concerns. However, migrants were still 'rescued', first, and then brought to Italy, except in the very rare and exceptional cases in which Tunisia accepted to take migrants back from international waters, upon the request of Italian authorities that first intercepted the migrants and then contacted their Tunisian counterparts.[29] In 2003, a governmental decree

[27] See Comitato parlamentare Schengen-Europol, 'Sopralluogo a Lampedusa (18-19 e 20 luglio 1997)', available at <http://www.camera.it/_bicamerali/schengen/sopralluoghi/AGRIGENT.htm>.

[28] Art. 11 Law No. 189 of 30 July 2002, *supra* note 16.

[29] On 21 October 2003, '*twenty-eight clandestine immigrants were intercepted in three different vessels few miles away from Pantelleria and handed over to a Tunisian patrol boat. […] The transshipment took place 14 miles south of Pantelleria, in international waters*' (Repubblica.it, 'Clandestini in Tunisia, accordo col Viminale', 21 October 2003, article on file with the author, my

was issued to regulate i.a. the '*continuous patrolling activities*' of Italian navy ships and aircraft in international waters. The decree specified that activities tackling irregular migration must always aim at '*safeguarding human life and respecting human dignity*'.[30] Then, in 2004, the operation *Constant Vigilance* was launched, and the activities didn't change significantly: according to governmental guidelines, the priority of interceptions was always rescuing lives.[31] Even in 2011, when arrivals to Southern Italy drastically increased in the wake of the Arab Spring, saving lives '*was at the top in the hierarchy of priorities […], at that time maybe in daily operational activities more than in the public discourse*'.[32] With regard to the geographical extent of patrolling activities, *Mare Nostrum* has surely covered on a more regular basis the area close to the border of Libyan national waters. However, Italian navy aircraft or ships often spotted vessels and carried out rescue interventions tens of miles south of the Italian territorial sea, sometimes much closer to the Libyan than to the Italian maritime boundary, also in earlier times. For example, this was the case both in the period preceding the *Cap Anamur* case and in the months before the Lampedusa tragedy and the launch of *Mare Nostrum*, with migrants being sighted and rescued up to 88 miles south of Lampedusa, as well as up to 170 miles south-east of Sicily.[33]

In sum, there seems to have been a continuity in qualitative terms as regards the engagement of Italian authorities in rescuing migrants in distress at sea, in spite of the humanitarian rhetoric that has been surrounding the *Mare Nostrum* mission since it was launched in October 2013, presenting it as something new. The humanitarian side of Italian sea border controls is less novel than it seems, instead innovations are apparent in intelligence, most notably the identification procedure and the fact that migrants are sometimes held on board for several

translation). A year later '*six clandestines intercepted by the Guardia di Finanza 25 miles south of Lampedusa were handed over to a Tunisian patrol boat. After receiving first aid assistance from the Italian unit, the immigrants […] were handed over to the Tunisian military*' (Ansa.it, s. t., 22 October 2004, article on file with the author, my translation).

[30] Ministero dell'Interno, *Decreto Ministeriale 14 luglio 2003. Disposizioni in materia di contrasto all'immigrazione clandestina*, G.U. serie generale n. 220 of 22.09.2003 (my translation).

[31] See Consiglio dei ministri, 'Documento programmatico relativo alla politica dell'immigrazione e degli stranieri nel territorio dello Stato per il 2004-2006' (6 May 2005), available at <http://www.governo.it/Presidenza/DICA/immigrazione/DPPI_04052005_2.pdf>.

[32] F. Pastore and E. Roman, 'Implementing Selective Protection. A Comparative Review of the Implementation of Asylum Policies at National Level Focusing on the Treatment of Mixed Migration Flows at EU's Southern Maritime Borders', *FIERI Working Papers* 2014, available at <http://fieri.it/wp-content/uploads/2014/11/WP_FIERI_FINAL_Implementing-Selective-Protection_PastoreRoman_Oct-2014.pdf>.

[33] See i.a. Repubblica.it, 'Affonda un altro barcone. Tutti salvi i clandestini', 19 June 2003, available at <http://www.repubblica.it/online/cronaca/sbarcoquattro/salvi/salvi.html>; Repubblica.it, 'Avvistato, sesto barcone carico di clandestini in 24 ore', 29 October 2003 (article on file with the author); Il Manifesto, 'Sbarco record a Lampedusa', 30 October 2003 (article on file with the author); Ansa.it, 'Duecento migranti soccorsi a Lampedusa', 26 August 2013, available at <http://www.ansa.it/web/notizie/rubriche/topnews/2013/08/26/Duecento-migranti-soccorsi-Lampedusa_9203202.html>; Repubblica.it, 'Emergenza sbarchi nel canale di Sicilia soccorsi mille migranti su cinque barconi, 17 September 2013, available at <http://palermo.repubblica.it/cronaca/2013/09/17/news/eemergenza_sbarchi_nel_canale_di_sicilia_soccorsi_mille_migranti_su_cinque_barconi-66703040/>.

days before they are brought to land, thus turning navy ships to floating detention centres.

4. PUSHING BACK, DEPORTING AND PREVENTING FROM LEAVING

Of course, rescuing and bringing to Italy is different from pushing back to Libya or Tunisia. Indeed, there have been periods when Italy, going far beyond the above-described occasional cases in which migrants were handed over to Tunisian authorities on the high seas, carried out pushback operations systematically. From 2009 to 2010, for example, migrants were pushed back to Libya directly from international waters. In 2012 such practice was ruled unlawful by the European Court of Human Rights in the *Hirsi* case – in the only case in which a group of deportees were able to file an appeal.[34] Even in this period, though, intercepted migrants were not left to die.[35] When there were people in need of medical care on a boat, all passengers were generally taken to Lampedusa first: the persons in need were disembarked, while the others were pushed back to Libya from there. The latter case (with people being returned after entering Italian national waters) recalls to memory the period from October 2004 to March 2006, in which over 3,000 people were returned to Libya from Italian territory[36] (not from international waters, as it was mostly the case in the period 2009-2010) short after their landing. Incidentally, the people deported from 2004 to 2006 were also 'rescued' first, then they were brought to Lampedusa (or other Italian ports), and only later were they returned to Libya.

However, the fact that no pushbacks and no deportations have been carried out within the *Mare Nostrum* framework has nothing to do with the operation itself: it has rather to do with the policy that the last three Italian governments[37] decided to follow after the *Hirsi* case, long before *Mare Nostrum*, and that even previous governments had already followed in the past.

Moreover, the policy of repatriating the so-called 'economic migrants' (all those – e.g. Egyptian and Tunisian citizens – who can be returned by force without blatantly violating the principle of *non refoulement*) was continued also after the launch of *Mare Nostrum*. Such persons are first rescued, then they are brought to Italy, and finally they are returned to their home countries, in so far as the home countries cooperate – which they do, at least to some extent. Not only does the way in which border patrols operate in the Strait of Sicily remain largely unchanged since the launch of *Mare Nostrum*, but the decisions on whether to allow disembarked people to remain in Italian territory or to deport

[34] The Court held that the push-back of 24 Eritrean and Somali people carried out in May 2009 had violated Art. 3 (prohibition of inhuman or degrading treatment), Art. 4 of protocol 4 (prohibition of collective expulsion) and Art. 13 (right to effective remedy) of the Council of Europe's Convention for the protection of human rights and fundamental freedoms. See ECtHR, *Hirsi Jamaa and Others v. Italy*, Appl. No. 27765/09, 23 February 2012.

[35] However, see *a contrario* section 5 of this paper.

[36] See E. Paoletti, *The Migration of Power and North-South Inequalities. The Case of Italy and Libya* (Basingstoke: Palgrave Macmillan 2010), at 146.

[37] The governments led by M. Monti (November 2011 – April 2013), E. Letta (April 2013 – February 2014) and M. Renzi (February 2014 – present).

them follow the same guidelines that oriented Italian border management before *Mare Nostrum*.

A further crucial feature of Italian and European border policies remains stagnant in spite of the increased humanitarian rhetoric surrounding *Mare Nostrum*: the fact that such policies still aim at preventing people from leaving North Africa and reaching Europe, regardless of their origin and motivation to migrate. While no pushback operations have been carried out from international waters by Italian vessels after the *Hirsi* case, Libyan patrols have carried out many interceptions of migrant boats both in Libyan national waters and in international waters. Such interceptions are carried out in the interest of Italy and Europe, which thus circumvent the principle of *non-refoulement* through practices that can be described as 'preventive *refoulement*'[38] or 'neo-*refoulement*'.[39]

Italy and the EU, indeed, keep making agreements on police cooperation with Libya as well as with the other North African countries; they keep providing such countries with aid programmes (offering training courses for border guards as well as funding for the construction of border police facilities) and technological equipment (all-terrain vehicles, patrol boats, night vision devices, instruments for the detection of false and falsified documents) in order for them to curb irregular migration to and from their territories.

In 2013, for example, the EU started a two-year border and assistance mission (EU-BAM) in Libya. Its aim is to train and advise Libyan authorities in order for them to strengthen border controls and prevent migrants from leaving or intercept them on the sea. Italy has been providing technical equipment and training programmes for Libyan border guards since 2003 and currently aims at resuming joint patrols in Libyan waters.[40] During the last EU-Libya meeting, in July 2014, the Libyan Prime Minister A. Thinni '*made a point of thanking the Italians, whose country, he said, had generously supplied Libya with boats to prevent migrant vessels from leaving Libya's waters*'. Thinni also '*asked for EU cooperation especially in training, technology and the construction of new detention centres. He requested that three new centres be constructed in Libya*'.[41]

This is particularly disconcerting, however, given that it is well known that torture and inhuman and degrading treatments are part of everyday life in Libyan detention centres, as numerous reports of human rights organisations have documented. In April 2014, for example, Human Rights Watch interviewed 138 migrants and asylum seekers who were detained in Libya: 100 of them (over

[38] C. Marchetti, 'Expanded Borders: Policies and Practices of Preventive *Refoulement* in Italy', in M. Geiger and A. Pécoud (eds.), *The Politics of International Migration Management* (Basingstoke: Palgrave Macmillan 2010), 160-183.

[39] J. Hyndman and A. Mountz, 'Another Brick in the Wall? Neo-*Refoulement* and the Externalization of Asylum by Australia and Europe', 43 *Government and Opposition* 2008, 249-269.

[40] Stranieriinitalia.it, 'Profughi. Pinotti: Accoglienza nelle caserme, l'Onu in Libia contro gli sbarchi', 3 July 2014, available at <http://www.stranieriinitalia.it/attualita-profughi._pinotti_accoglienza_nelle_caserme_l_onu_in_libia_contro_gli_sbarchi_18948.html>.

[41] Libyaherald.com, 'Libya wants EU partnership to fight illegal migration', 11 July 2014, available at <http://www.libyaherald.com/2014/07/11/libya-wants-eu-partnership-to-fight-illegal-migration/#axzz376kwszqe>.

72 per cent of the sample) declared they had been tortured or abused.[42] Libyan officials also impose bribes on detained migrants who want to be released from endless *incommunicado* detention.

Life in Libya is not much easier for migrants outside the detention centres. They run the risk of being killed by border guards when they try to enter Libyan territory (alone in June 2014 twelve people were shot dead after crossing the border from Sudan),[43] and they also happen to be shot at when they try to set off towards Europe.[44] More generally, they are subjected to exploitation and grave abuses from the local authorities, employers and population, as well as from their own smugglers.

For migrants, indeed, there is hardly a difference between being pushed back by Italian authorities from international waters and being intercepted and returned (be it from Libyan national waters or from the high seas) or being prevented from leaving by Libyan authorities. The only difference is that, theoretically, those pushed back by Italy have the right to file a claim with the European Court of Human Rights. However, such right can hardly be exercised in practice once people have been deported.

The European policy of trying to prevent people from leaving Libyan land and sea territory, as well as to let Libya push them back from international waters on behalf of Europe (and with the support of European funding, equipment and training programmes), results in people being abused and their right to physical integrity to be violated in Libya rather than on the sea, in spite of the humanitarian rhetoric of European migration and border policies. Significantly, ten years after the first proposal to establish reception centres in Africa, the Italian Interior Minister, A. Alfano, took up the proposal again, arguing that this would prevent the ill-treatment of migrants by smugglers as well as deaths at sea.[45] Once again, humanitarianism is used in order to justify policies aimed at preventing people from reaching a place of safety in Europe.

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[42] A 33-year old Eritrean man described the treatment reserved to people who had been caught while trying to escape: they '*stripped off their shirts, threw water all over them, and then whipped them with rubber on their backs and heads for about half an hour*'. A 27-year old Somali man said: '*the guards […] whipped me with metal wire and beat and punched me all over my body. I also saw them hang four or five people upside-down from the tree outside the entrance door and then beat and whip their feet and stomach*'. Finally, a 21-year old Somali woman reported the treatment received when she arrived with a group of 23 women: '*the guards put us in a room, told us to take off our clothes and then put their fingers inside our vaginas*'. See Human Rights Watch, 'Libya: Whipped, Beaten, and Hung from Trees', 22 June 2014, available at <http://www.hrw.org/print/news/2014/06/22/libya-whipped-beaten-and-hung-trees>.

[43] Madote.com, 'Sudanese Court Fines Rescued Illegal Ethiopian and Eritrean Migrants', 7 July 2014, available at <http://www.madote.com/2014/07/sudanese-court-fines-rescued-illegal.html?showComment=1404793379638>.

[44] Bbc.com, 'Migrant boat 'shot at' as it left Libya', 13 October 2013, available at <http://www.bbc.com/news/world-europe-24514340>; Repubblica.it, 'Spunta video-choc: 'Fermati sennò muori'. Così i libici danno la caccia ai clandestini', 18 May 2009, available at <http://www.repubblica.it/2009/05/sezioni/cronaca/immigrati-8/clandestini-video/clandestini-video.html>.

[45] See Repubblica.it, 'Immigrazione, Alfano: Portare richieste asilo in Africa', 31 October 2014, available at <http://www.repubblica.it/politica/2014/10/31/news/immigrazione_alfano_portare_richieste_asilo_in_africa-99445825/?ref=search>.

5. HUMANITARIANISM: A STATE PREROGATIVE?

As says Fassin,[46] humanitarianism is part and parcel of global governmentality. However, while non-state actors (NGOs, private firms, political movements etc.) also participate in the humanitarian government of migration and borders, which means that states cannot monopolise the issue entirely, the latter still maintain a dominant position. This section summarises some cases showing that non-state actors were *de facto* discouraged from rescuing people without the state's authorisation even after the *Cap Anamur* case and the consequent rise of the humanitarian narrative.

In 2007 seven Tunisian fishermen rescued forty-four migrants on the high seas and brought them to Lampedusa: they were charged with facilitating illegal immigration and prosecuted by an Italian court. After four years they were acquitted from all charges,[47] like the accused of the *Cap Anamur* case, but in the meantime their fishing boats and fishing licenses had been confiscated, so their lives had been ruined.

Furthermore, many vessels that happened to meet and assist migrants in distress were forced to wait in international waters for days and days, even more than a week, before Italy, Malta, the flag state, and sometimes other countries involved (e.g. Tunisia) decided who had to take the migrants. This was the case of vessels as different as the Spanish trawler *Francisco y Catalina* in 2006, the Turkish cargo *Pinar* in 2009, the Spanish Nato warship *Almirante Juan de Borbón* in 2011 and the Greek-Liberian tanker *Salamis* in 2013, to name but a few. The fear of being prosecuted or simply wasting time and money ends up discouraging non-state actors from rescuing people, which inevitably increases the risk of death for those attempting the sea crossing. The survivors of the Lampedusa tragedy of 3 October 2013 said private vessels did not stop to assist them during the journey. This was only one of the many occasions on which private seafarers reportedly turned a blind eye to migrants in distress. In January 2008, instead, a migrant was the victim of something more than indifference. Four months after the Tunisian fishermen had been arrested for rescuing migrants, an Italian fisherman was arrested on Lampedusa under the accusation of murder. He had met a boatload of migrants on the high seas. One of them had swum to his fishing-boat to ask for help, but the fisherman prevented him from getting on board by beating him and throwing him into the water. His body was never recovered.[48]

While they are discouraged from taking action upon their own initiative, private seafarers are often asked by state authorities to intervene on their behalf if they are close to boats in distress. In such cases, commercial ships are asked to take migrants on board and either hand them over to Italian navy ships or bring them to the nearest Italian port. On at least one occasion, however, Italy report-

[46] D. Fassin, *Humanitarian Reason. A Moral History of the Present* (Berkeley: University of California Press 2012).

[47] Corte di Appello di Palermo, Terza Sezione Penale (21 September 2011).

[48] See Repubblica.it, 'Il comandante di un peschereccio accusato della morte di un naufrago', 11 January 2008, available at <http://www.repubblica.it/2007/11/sezioni/cronaca/immigrati-3/omicidio-peschereccio/omicidio-peschereccio.html>.

edly used a private vessel to circumvent the prohibition of *refoulement*: on 4 August 2013 the Turkish commercial ship *Adakent* was asked by the Italian authorities to rescue a group of migrants in international waters, in the Libyan search and rescue zone. The migrants were brought to Tripoli, and it is unclear whether it was Italian or Libyan authorities that instructed them to do so. It is documented, instead, that on the same day the Italian authorities instructed the Greek-Liberian tanker *Salamis* to bring 102 rescued migrants from international waters back to Libya, but the ship refused to do so and headed for Malta instead.[49]

Finally, even state actors sometimes fail in what they claim to be their mission of rescuing people. A 2012 report by the Council of Europe has tried to shed light on the case of the 'left-to-die boat', a dinghy that remained adrift off Libyan coasts for two weeks in March 2011.[50] 63 passengers died, while the remaining nine survived only because they were washed up on the Libyan coast before it was too late. The report ascertained that Italian, Maltese and NATO authorities had been aware of the migrants being in distress but refrained from intervening. However, it was impossible to achieve a satisfactory degree of clarity on all responsibilities, because specific questions asked to specific agencies and authorities remained unanswered. More recently, on 11 October 2013, over 260 people died after sending an SOS to the Italian authorities from the Maltese search and rescue zone, because Italy waited for Malta to take the lead of rescue operations, although an Italian navy ship was close to the sinking vessel, and when the rescue boats arrived, most migrants had already drowned.[51] These two cases are exemplary of how the violence of the European border, well hidden behind the veil of humanitarianism, can operate '*less through the direct action of a singular actor than through the inaction of many*'.[52] Sadly, however,

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[49] Timesofmalta.com, 'Update 8: Government requests ship master to return to rescue location', 5 August 2013, available at <http://www.timesofmalta.com/articles/view/20130805/local/tanker-carrying-migrants.480832>; Amnesty International, 'Lives Adrift, *supra* note 23, at 40-41; Council of Europe, 'The left-to-die boat: actions and reactions', Doc. 13532 (9 June 2014), available at <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=20940&lang=en>, at 11. The Italian deputy Interior minister F. Bubbico expressed the government's position on both the Adakent and the Salamis case at a hearing before the Committee on Migration, Refugees and Displaced Persons of the Parliamentary Assembly of the Council of Europe on 4 February 2014, see Interno.gov.it, 'Audizione del vice ministro sen. Bubbico presso la Commissione Migrazione dell'Assemblea Parlamentare del Consiglio d'Europa' available at <http://www.interno.gov.it/it/mininterno/export/sites/default/it/assets/files/28_2014/2014_02_05_audizione_bubbicoo_Consiglio_Europa.pdf>.

[50] Council of Europe, 'Lives lost in the Mediterranean Sea: who is responsible?' (29 March 2012), available at <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf>. See also C. Heller, L. Pezzani and Situ Studio, 'Forensic Oceanography. Report on the Left-To-Die Boat', s.d., available at <http://www.fidh.org/IMG/pdf/fo-report.pdf >, and Council of Europe, 'The left-to-die boat: actions and reactions', *supra* note 49.

[51] F. Gatti, 'Lampedusa, passing the buck of responsibilities: this is how they left the Syrian children drown' (28 November 2013), available at <http://espresso.repubblica.it/internazionale/2013/11/28/news/lampedusa-buck-passing-on-the-massacre-so-they-left-syrians-children-drown-1.143363>.

[52] C. Heller and L. Pezzani, 'Liquid Traces: Investigating the Deaths of Migrants at the EU's Maritime Frontier', in Forensic Architecture (ed.), *Forensis. The Architecture of Public Truth* (Berlin: Sternberg Press 2014), at 659.

even *Mare Nostrum*'s direct action aimed at saving lives at sea proved unable to stop border deaths: over 3,000 people lost their lives in the Mediterranean in 2014,[53] and most of them died on the sea routes to Italy, in spite of the considerable contribution to rescue activities provided by the Italian military/humanitarian operation.[54]

6. THE END OF *MARE NOSTRUM* AND THE LAUNCH OF FRONTEX *TRITON*

Contrary to the announcements made by the Italian government in the summer, *Mare Nostrum* did not end completely on 31 October 2014 but was extended for a further two-month period. However, its budget and capacity were strongly reduced.[55] If no further extension is granted, the Italian mission will expire on 31 December 2014. The Italian calls for a European mission to take over the humanitarian tasks of *Mare Nostrum* remained unheard. The EU decided only to strengthen the presence of its border agency Frontex in the waters surrounding Italy, by launching the operation *Triton*. On 1 November *Triton* replaced the two previously existing Frontex operations hosted by Italy (*Aeneas,* controlling the waters south-east of Italy, off the coasts of Apulia and Calabria, and *Hermes,* patrolling the Strait of Sicily). 15 member states have already contributed to the new Frontex mission by providing technical equipment and border guards, but the monthly budg*et al*located to Triton (2.9 million Euro) is less than a third of the budget of *Mare Nostrum*. Furthermore, the Frontex mission has officially no humanitarian mandate and is rather aimed at supporting the Italian authorities in controlling the border and collecting intelligence. However, following the humanitarian rhetoric that also permeated the EU border agency in recent years,[56] Frontex executive director G. Arias Fernandez stressed that 'saving lives will remain an absolute priority'.[57] Again, the main difference with *Mare Nostrum* is supposed to be, besides the smaller budget available, the geographical extent of patrolling activities, since the area to be patrolled by Frontex' vessels and aircraft should not exceed 30 nautical miles from the Italian coastline, thus leaving the zone next to Libyan territorial waters without any surveillance. However,

[53] T. Brian and F. Laczko, 'Migrant Deaths: An International Overview', in T. Brian and F. Laczko (eds.), *Fatal Journeys. Tracking Lives Lost during Migration* (Geneva: International Organization for Migration 2014), 15-43, at 20.

[54] Frontex has suggested that the mortality rate has increased (see *supra* note 22).

[55] See *supra* note 45.

[56] See N. Perkowski, 'A normative assessment of the aims and practices of the European border management agency Frontex', 81 *RSC Working Paper Series* 2012, available at <http://www.rsc.ox.ac.uk/files/publications/working-paper-series/wp81-normative-assessment-frontex-2012.pdf>; G. Campesi, 'Frontex, the Euro-Mediterranean Border and the Paradoxes of Humanitarian Rhetoric', 2 *South East European Journal of Political Science* 2014, 126-134; K. Franko Aas and H. Gundhus, 'Policing Humanitarian Borderlands: Frontex, Human Rights and the Precariousness of Life', *British Journal of Criminology* forthcoming.

[57] Frontex, 'Frontex Launches Joint Operation Triton' (31 October 2014), available at <http://frontex.europa.eu/news/frontex-launches-joint-operation-triton-JSYpL7>.

Italian navy ships and aircraft will likely continue patrolling wider areas of the international waters, as they used to do even before *Mare Nostrum*.

7. CONCLUSIONS

Through a brief review of institutional documents and press reports, I have shown that the importance of the humanitarian narrative in the language of European policy-makers has increased since the turn of the century. The decision to present *Mare Nostrum* as a humanitarian mission was a further step in this process. In spite of the strong humanitarian rhetoric surrounding it, however, I have shown that *Mare Nostrum* is not much more humanitarian than previous patrolling activities carried out in the Strait of Sicily, the main difference being quantitative (the drastic budget increase) rather than qualitative. After pointing out that *Mare Nostrum* is also a security mission, I have then argued that its role must be analysed – and its degree of 'humanitarianism' assessed – against the background of the actual aims of Italian and European border policies, paying particular attention to the existing cooperation framework with Libya and other North African countries.

Such an analysis unveils the ambiguities of 'humanitarianised' border policies whose main aim, in fact, is still to prevent people from leaving and to deport the unwanted. Indeed, the concept of human security is used in order to enhance the safety and the right to asylum only of those who manage to leave Libyan, Egyptian or, more recently, Turkish coasts and are intercepted by Italian vessels after reaching international waters and before drowning or dying of dehydration. Since 2011, and especially after the *Hirsi* judgement, all Italian governments have declared that no more pushback operations will be carried out towards Libya, which is where most migrant boats come from. However, Italy is still engaged in strengthening international police cooperation in order to prevent migrants from leaving North African shores. Far from seeing their human security enhanced, people who are prevented from leaving countries such as Libya pay the human cost of Italian and European migration controls by suffering torture and inhuman and degrading treatments in North Africa.

Furthermore, the 'left-to-die' boats and the state's attitude of *de facto* discouraging private seafarers from rescuing people in distress at sea, as well as the reluctance of states to collect and disclose to the public information about border deaths, also raised the question about the monopoly of the state over human life and death,[58] as well as about the dominant position of states in the humanitarian government of migration. It could be concluded that the humanitarian border is but a fig leaf for covering up exclusionary policies aimed at denying opportunities for asylum and protection in Europe. However, the importance of the change in the language of border policies should not be played

[58] See M. Albahari, 'Death and the Moral State: Making Borders and Sovereignty at the Southern Edges of Europe', 136 *CCIS Working Paper* 2006, available at <http://www.ccis-ucsd.org/PUBLICATIONS/CCIS%20Albahari%20death%20and%20the%20moral%20state%20june%2015%202006.pdf>.

down too much. On the one hand, the use of words can be instrumental, but, on the other hand, it is also true that words can end up changing the minds, the attitudes and possibly the plans and actions of the actors involved, also including policy-makers and border guards. In the future, this process might result in the human security of migrants to become the main concern not only of interception operations but also, and most of all, of migration and border policies as a whole.

HUMAN SECURITY AND CEAS: BRINGING HUMAN RIGHTS INTO THE CENTRE OF THE EU'S ASYLUM POLICIES

Myrthe Wijnkoop

INTRODUCTION

> '*Upon arrival we were immediately detained. There was no official who provided us with information or who we could ask questions to. We didn't receive any food or water for two days. I got sick after two days, but there was no doctor. There were no beds, we slept on a piece of cardboard. There were no showers. There was a toilet, but it had no running water, so it got really dirty with all these people using it. We were often beaten and kicked by the police officers. This usually happened when we tried to ask them something. After 20 days the police told us we would be released on the condition that we would immediately leave the country. If not, they threatened to detain us indefinitely*.'

The young Somali man who later shared these experiences, endured in Greece, with the Dutch Council for Refugees in the autumn of 2009,[1] was never informed about any possibility to apply for asylum, nor was he given any other kind of information on the asylum procedure and on his rights under the EU *acquis*. He never spoke to a lawyer, nor was there at any time an interpreter present.

From this and many other accounts and reports,[2] the conclusion could be drawn, at the time, that Greece, an EU Member State, violated human rights of

[1] Dutch Council for Refugees, Finnish Refugee Advice Center, Proasyl and Refugee and Migration Justice, 'Complaint against Greece to the Commission of the European Communities concerning failure to comply with community law' (10 November 2009).

[2] Pro Asyl, Group of Lawyers for the rights of refugees and migrants, 'The truth may be bitter, but it must be told: the situation of refugees in the Aegean see and the practices of the Greek coast guard' (October 2007); Norwegian Organisation for Asylum Seekers (NOAS), the Norwegian Helsinki Committee (NHC), and Greek Helsinki Monitor (GHM), 'A gamble with the right to asylum in Europe: Greek asylum policy and the Dublin II Regulation' (April 2008); UNHCR, 'UNHCR position on the return of asylum seekers to Greece under the Dublin regulation' (April 2008); Human Rights Watch, 'Stuck in a revolving door: Iraqi and other asylum seekers and migrant at the Greece/ Turkey entrance to the European Union' (November 2008); Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe following his visit to Greece 8-10 December 2008 (19 February 2009); Amnesty International Public Statement, 'Greece: Proposed changes to asylum procedures flagrantly violate international law' (15 May 2009); UNHCR Press Release, 'The UN Refugee Agency expresses concern over proposed Presidential Decree on Asylum' (14 May 2009); Austrian Red Cross and Caritas Austria, 'The situation of persons returned by Austria to Greece under de Dublin Regulation', *Report of a fact-finding mission to Greece* (23-28 May 2009); CPT, 'Report to the Government of Greece in the visit to Greece', *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)* (30 June 2009); Doctors without Borders, 'Greece: They could not understand why they and their children were being detained' (9 September 2009); Human Rights Watch, 'Greece: unsafe and unwelcoming shores' (12 October 2009).

asylum seekers and refugees as it failed to comply with key EU asylum legislation. The European Commission re-initiated an infringement procedure by the end of 2009, which urged the Greek government to present an Action Plan to improve the situation.[3] However, it was the ruling of the European Court on Human Rights in 2011 in the *M.S.S* case that put an end, not to the situation in Greece itself, but to the Dublin transfers as the human rights situation in Greece no longer justified the principle of mutual trust.[4] By not allowing other Member States to send asylum seekers back to Greece, asylum seekers were protected from further harm and denial of fundamental rights.

The concept of 'human security' is based on the principle that 'all individuals, in particular vulnerable people, are entitled to freedom from fear and freedom from want, with an equal opportunity to enjoy all their rights and fully develop their human potential',[5] and deals with threats to those individuals and their impact on the right to live in safety and dignity.

This paper reflects upon the European asylum framework as a system for the protection of fundamental rights of asylum seekers and refugees, and thus with the protective ambit of human security: the freedom from want and freedom from fear**.** It will look at the various policy programmes and political agendas since the start of the harmonisation of European asylum standards, and the role of fundamental human rights of individual asylum seekers therein. It will also consider relevant legal developments, and attempts to draw some conclusions on lessons learned as well as ideas for the future.

1. TAMPERE 1999: TOWARDS THE ESTABLISHMENT OF THE COMMON EUROPEAN ASYLUM SYSTEM (CEAS)

In May 1999 the Amsterdam Treaty entered into force, making it possible to create binding minimum norms on the EU level in order to harmonise EU asylum systems. The aim of the CEAS was to create a level playing field, where any person seeking protection would be treated in the same way, according to the same standards, wherever they apply for asylum.

At the Tampere Council later that year, the need for harmonisation was underlined as a means to prevent asylum shopping and provide for better standards of protection throughout Europe:

> '*It would be in contradiction with Europe's traditions to deny (such) freedom to those whose circumstances lead them justifiably to seek access to our territory. This in*

[3] See for example: Joint statement by Mr Christos Papoutsis, Minister of Citizen Protection of Greece and Cecilia Malmström, European Commissioner in charge of Home Affairs, 'Greece and the Commission agree to enhance cooperation on reforming the Greek asylum system', *MEMO/10/450* (27 September 2010), available at <http://europa.eu/rapid/press-release_MEMO-10-450_nl.htm>; European Council, 'Greek National Action Plan on Asylym Reform and Migration Management', *DOC 10327/13 LIMITE* (3 June 2013), available at http://www.aedh.eu/Greek-Action-Plan-on-Asylum-and.html.

[4] ECHR, *M.S.S. v Greece and Belgium*, Appl. No. 30696/09, 21 January 2011.

[5] A/RES/60/1, Human Security, '*Human Security*, World Summit Outcome 2005', *A/RES/60/1*, para. 143.

turn requires the Union to develop common policies on asylum and immigration, while taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes. These common policies must be based on principles which are both clear to our own citizens and also offer guarantees to those who seek protection in or access to the European Union.'[6]

The feeling at that time was that the harmonisation of EU asylum law and policies was very much based on a human rights approach and definitely protection oriented. European leaders spoke proudly of their shared commitment to freedom, based on human rights, democratic institutions and rule of law and underlined their absolute respect of the right to seek asylum: '*The European Council reaffirms the importance the Union and Member States attach to absolute respect of the right to seek asylum. It has agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement*.'[7]

The harmonisation process would consist of two phases. During the initial five-year period, ending in 1 May 2004, minimum standards were to be developed on reception conditions, asylum procedures, qualification criteria for eligibility of protection and on situations of temporary protection needs, as well as new regulations on the allocation of responsibility for asylum claims ('Dublin') and Eurodac.[8] The second phase would subsequently deal with a 'common asylum procedure and uniform status.

During the years that followed, it became clear that to achieve an agreement between, then, 25 Member States on issues dealing with asylum and refugee protection was not going to be easily done; let alone achieving minimum standards. Negotiations at Council level proved to be difficult, complex and long.

Amongst the relevant issues to be discussed, core questions came to the forefront, namely: Who needs protection? What is protection? What are the relevant procedurals safeguards? How should the reception facilities look like and what services should be available for asylum seekers?

It was the first time that rules on asylum were negotiated between this many States on such a detailed level. This could be considered as an achievement in itself. What was the result five years later? There were Directives on temporary protection,[9] reception conditions[10] and qualification for protection.[11]

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[6] European Council, 'Presidency Conclusions' (15-16 October 1999), Conclusion 3.

[7] Ibid., Conclusion 13.

[8] Art. 63 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, *OJ* [1997] C 340/01, 10.11.1997.

[9] Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on the measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (20 July 2001).

[10] Council Directive 2003/9/EC on laying down minimum standards for the reception of asylum seekers (27 January 2003).

[11] Council Directive 2004/83/EC on Minimum Standards for the Qualification of Third Country Nationals and others in need of international protection (29 April 2004).

A 'political agreement' consisted on standards for asylum procedures.[12] And the Dublin II Regulation was adopted.[13] Thus, almost all of the legislative instruments setting minimum standards on asylum, as foreseen in the harmonisation agenda of the Amsterdam Treaty and the Tampere programme, were adopted within the five-year deadline.

But what about the parameters set at Tampere with respect to the protection-sensitive approach and human rights standards? The general assessment was that the whole first phase of the legislative process had become a 'race to the bottom' with regard to international (legal) standards and principles, and in some respects it even went below minimum standards.

The results proved to be a great disappointment from a human rights perspective. ECRE[14] stated for example:

> '*The promise of protection delivered by the EU Heads of State at the Tampere Summit in 1999 left many of us full of hope that harmonisation would bring better protection for persons fleeing persecution and better solutions to the problems faced by governments. What we went on to witness was five years of difficult negotiations not driven by the spirit of Tampere, but driven by most European governments' aim to keep the number of asylum seekers arriving as low as possible and by their concerns to tackle perceived abuses of their asylum systems. Countries showed little sense of solidarity and pursued their narrow national agendas at great cost to refugees and to the building of a fair and efficient European protection system. This took place in a generally deteriorating public climate of growing hostility towards asylum seekers and refugees, and widespread irresponsible media reporting compounded by a lack of political leadership at national level*.'[15]

Similar statements reiterated that a lowering of human rights had transpired:

> '*The cumulative effect of these proposed measures is that the EU will greatly increase the chances of real refugees being forced back to their home countries*.'[16]And '*when refugees cannot seek asylum because of off-shores barriers, or are detained for excessive periods in unsatisfactory conditions, or are refused entry because of restrictive interpretations of the Convention, the asylum system is broken and the promise of the Convention too*.'[17]

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[12] Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, *Doc. 8771/04, Asile 33* (29 April 2004). The Directive (2005/85/EC) was eventually adopted on 1 December 2005.

[13] Council Regulation (EC) No 343/2003 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 (18 February 2003).

[14] The pan-European umbrella organisation for refugee(assisting) organisations, available at <www.ecre.org>.

[15] ECRE, 'Broken promises-Forgotten principles. An ECRE evaluation of the development of EU minimum standards for refugee protection Tampere 1999- Brussels 2004', available at http://www.ecre.org/topics/areas-of-work/introduction/97.html.

[16] UNHCR Press release, 'Lubbers calls for EU asylum laws not to contravene international law' (29 March 2004), available at http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=40645bd77&query=Protecting%20Refugees.

[17] UN Secretary General Kofi Annan, 'Address to the European Parliament' (29 January 2004).

From a human rights perspective, the concerns regarding this first phase of harmonisation were the following. First, there had been a clear failure to achieve a significant level of harmonisation of asylum laws across the European Union and many aspects of the minimum standards were left to the discretion of Member States. For example, provisions had been agreed allowing Member States to deny asylum seekers support, and leave them destitute during the reception phase, unable to access social assistance, health care, employment and integration programmes. The exceptions allowed did not ensure that differences in standards of protection between Member States were eliminated. The Qualification Directive 2004/83/EC clearly differentiated between persons with refugee status and those with subsidiary forms of protection by systematically according the latter a lower level of rights, and excluding them completely from others, such as the right to family reunification.[18]

Furthermore, it seemed like the whole negotiation and decision making process (consultation procedure, with limited competence by the European Parliament) allowed for the 'worst practices' of individual States to be transposed into EU legislation rather than fostering the sharing of best practice. Many provisions adopted in the Asylum Procedures Directive, such as those on the 'safe third country', 'super safe third country', safe country of origin, accelerated procedures and appeals, lacked the necessary safeguards to ensure that anyone seeking asylum could be sent to a country where they may face persecution, including death, torture or degrading treatment. And lastly, the sharing of responsibility between EU countries was not sufficiently improved; rather, it was feared that disproportionate responsibility would increasingly fall on Member States with southern and eastern EU external borders as a result of the mechanism agreed to allocate responsibility in the Dublin II Regulation.

Fortunately, there were some positive elements. For the first time, Member States agreed on legally binding, and thus enforceable, protection standards. And although minimal, and sometimes even below international standards, certain countries within the EU needed in fact to improve their own national systems to abide by these new standards. For candidate States, compliance with the asylum *acquis* would be a precondition for accession. Moreover, the recognition of the 1951 Refugee Convention within EU legislation as the standard of reference reaffirmed its continuing relevance as the instrument for refugee protection.[19]

2. THE HAGUE PROGRAMME: SECOND PHASE 2004-2009

The subsequent multi-annual programme, The Hague Programme, aimed at the establishment of a common asylum procedure and a uniform status for those who were granted asylum or subsidiary protection.[20] More specifically, this meant

[18] See more in detail, ECRE's Broken promises, *supra* note 15.

[19] See Art. 78 TFEU.

[20] European Council Conclusions, 'The Hague Programme: strengthening freedom, security and justice in the European Union' (5 November 2004).

further alignment of national asylum systems in order to create better and more harmonised standards of protection. This second phase of the establishment of a CEAS was to be built on a thorough and complete evaluation of the legal instruments that had been adopted in the first phase. Furthermore, it was based on solidarity and fair sharing of responsibility, including its financial implications and closer practical cooperation between Member States.[21] The Hague Programme, concluded under Dutch Presidency, also drew extensively on the external dimension of EU asylum policy: partnerships with third countries, including the regions and countries of origin. In this regard the Council also called upon all third countries to accede and adhere to the Geneva Convention on Refugees.[22] References were again made, in line with primary law and jurisprudential doctrine of the European Union, to human rights standards and treaties.[23] In order to actively promote (not only to respect) the protection of human rights, it was outlined that the Charter of Fundamental Rights would be incorporated in the Constitutional Treaty and that Union would accede to the European Convention on Human Rights.[24]

In practice, however, it became more and more visible that the common minimum standards had not created the desired level playing field. The differences in decisions recognising or rejecting asylum requests of applicants from the same countries of origin pointed to a critical flaw in the system. Even after some legislative harmonisation at EU level had taken place, a lack of common practice, different traditions and diverse sources of information on countries of origin were, among other reasons, producing divergent results.[25] This went against the 'Tampere' principle of providing equal access to protection across the EU.

Meanwhile, the European Commission, implementing the measures following from the Hague Programme, initiated the evaluation of the first phase instruments. Through impact assessments, expert meetings with Member States, academics and civil society, gathering documentation and reporting on national implementation and practices, the Commission tried to identify shortcomings and proposed amendments to the existing legislative framework.[26] From

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[21] Ibid., Chapter III, paras. 1.2-1.3.

[22] Ibid., Chapter III, para. 1.6.

[23] As a general principle: 'Fundamental rights, as guaranteed by the European Convention on Human Rights and the Charter of Fundamental Rights in Part II of the Constitutional Treaty, including the explanatory notes, as well as the Geneva Convention on Refugees, must be fully respected.' Chapter II para I of the Hague programme

[24] Ibid., Chapter II, para. 2.

[25] See for example: ECRE, 'Survey on Subsidiary/Complementary Forms of Protection in EU Member States'(July 2004); UNHCR, 'Asylum in the EU. A study of the implementation of the Qualification Directive' *(*November 2007); ECRE, 'Memorandum to the JHA Council. Ending the asylum lottery- Guaranteeing refugee protection in the EU' *(*April 2008); ECRE, 'Impact of the EU Qualification Directive on International Protection' (October 2008). UNHCR also did a big report into differing rates of recognition

[26] See European Commission, 'Proposal for a recast of the Directive laying down minimum standards for the reception of asylum-seekers', *COM (2008)815 final* (3 December 2008); European Commission, 'Proposal for a recast of the Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person

the explanatory paragraphs in these 'recast' proposal, it can be concluded that the international human rights standards and the international and European jurisprudence are considered relevant legal frameworks for this assessment.

Again, and perhaps even more in comparison to the first phase process, the negotiations on the Commission's proposals for higher and more harmonising standards were long and difficult. Member States were already suffering from 'legislative fatigue' and there was even less political will than before to improve protection levels for asylum seekers and refugees, and to fully comply with existing human rights standards. The deadline of 2010 was postponed to 2012; the Commission recast proposal on the Asylum Procedures Directive needed to be re-drafted[27] and it was not up until 2013 that the second phase instruments were all adopted.

And again, from a human rights perspective, the results could have been better. In general terms, the protection standards with regard to reception conditions improved only slightly. Modest improvements were made with respect to asylum procedures and qualification for protection. With respect to 'Eurodac' the standards were even lower (i.a. more and easier access to fingerprint system).[28] And last but not least, the Dublin system remained the cornerstone of the CEAS.[29]

The rules on allocation of responsibility for asylum claims have been highly controversial from the beginning. Besides issues such as (unnecessary) movement of people across Europe (prolonged) detention periods awaiting transfers, unwanted separation of families, the Dublin system, which places a large 'burden' on the European Member States geographically located at the southern (and eastern) borders of the EU, eventually led to serious human rights violations, as these countries couldn't (and won't) comply with the EU *acquis*. The perverse nature of this system was also acknowledged by both the European Court on Human Rights (EctHR)[30] and the Court of Justice of the European Union (CJEU)[31] It was however clear from the beginning that the Council would

("Dublin II")', *COM(2008) 820* (3 December 2008); European Commission, 'Proposal for a recast of the Regulation concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin II Regulation' *COM(2008) 825* (3 December 2008); European Commission, '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', *COM(2009)551* (21 October 2009); European Commission, 'Proposal for a recast of the Directive on minimumstandards for procedures in Member States for granting and withdrawing international protection', *COM(2000)554* (21 October 2009).

[27] European Commission, 'Amended proposal for a Directive on common procedures for granting and withdrawing international protection status (recast)', *COM 2011 319 final* (1 June 2011).

[28] See also Meijers Committee, 'Note on the Eurodac proposal (COM(2012) 254', *CM1216* (10 October 2012), available at http://www.commissie-meijers.nl/commissiemeijers/pagina.asp?pagkey=149205.

[29] See for a comprehensive overview on the substance of the recast of the asylum instruments: S. Peers, 'The second phase of the Common European Asylum System. A brave new world- or lipstick on a pig?', Statewatch Analysis (8 April 2013), available at <*www.statewatch.org/analyses/no-220-ceas-second-phase-2.pdf*>.

[30] See *supra* note 4.

[31] ECJ, Case C-411/10, *N.S.and M.E* v. *United Kingdom* [2011] *ECR* I -00000.

not accept an alternative to the Dublin system. And thus, the Commission's proposal for a Dublin III Regulation left the responsibility rules essentially unchanged. It proposed several amendments to enhance the efficiency of the system and to improve the level of protection for asylum-seekers within it. One of those amendments entailed a formal suspension procedure. But this was also unacceptable for Member States in light of the principle of mutual trust. The Council however did agree upon an *early warning and preparedness mechanism* as a tool to identify, in a timely manner, particular pressures on Member States' asylum systems. This mechanism may not repair the flaws of the Dublin system, however it might have a potential for the future.[32]

3. DECEMBER 2009: LISBON TREATY AND THE EU CHARTER ON FUNDAMENTAL RIGHTS

When talking about bringing human rights to the centre of the CEAS, some legal developments should be mentioned here as they have an impact on the EU asylum *acquis.*

In December 2009, the Lisbon Treaty on the functioning of the European Union (TEU) entered into force.[33] Since then, the objectives of CEAS are a legally binding part of the EU Treaties (Article 78 TEU). This means (amongst others) that all national courts can put forward preliminary questions to the CJEU. The Court's rulings on the interpretation of the EU a*cquis* contribute to the uniform interpretation of legislation and, consequentially, contribute to harmonising national practices.

In addition, with the entry into force of the Lisbon Treaty, the EU Charter on Fundamental Rights became legally binding. During the European Council in June 1999 it was decided that the Union needed its own human rights document. Fundamental rights laid down in the ECHR and the common constitutional traditions of Member States already constituted the basic principles of Community law.[34] However, the Union did not have its 'own' human rights document. After a decision at the Council of June 1999, the EU Charter on Fundamental Rights was formally adopted on 7 December 2000 and comprised both of classic human rights, as well as economic and social rights, and certain third generation rights such as a clean environment. Although an important source from the start, the Charter only has binding effect since December 2009. It follows from article 6(1) TEU that the Charter has the same legal value as the Treaties,[35] that it is a primary source of law and that all EU legislation should be in conformity with Charter provisions. Article 51(1) of the Charter states that the provisions

[32] See *infra*, Section 4.

[33] *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community OJ* [2007] C 306, 17.12.2007.

[34] Ibid., Art. 6.

[35] See also M. T. Gil-Bazo, 'The Charter of Fundamental Rights of the European Union and the Rights to be granted asylym in the Union's law', 27 *Refugee Survey Quaterly* 2008, 34-35.

of the Charter are addressed to the Institutions and bodies of the Union and to the Member States when they are implementing Union law.[36]

In short, not only does the EU have its own legally binding Fundamental Rights Charter, which can be used to enhance protection for refugees and asylum seekers,[37] the EU asylum acquis is also subjected to judicial scrutiny of the CJEU, which helps to achieve a proper application, interpretation and implementation thereof.

The role of the European Courts in providing a central role for human rights within the CEAS should definitely not be underestimated. Several rulings, both of the ECtHR and CJEU, have proved to be essential in maintaining human rights standards within EU asylum law, for instance the cases of *M.S.S,*[38] *Hirsi,*[39] and *N.S*.[40]

4. STOCKHOLM PROGRAMME 2010-2014: CONSOLIDATION AND PRACTICAL COOPERATION

In the meantime, a third multi-annual policy Programme was adopted in 2010 during the Swedish presidency: The Stockholm Programme.[41] Whilst the negotiations on the recast proposals were ongoing, this Programme did not contain any further plans on binding asylum instruments. Rather, it focussed on *consolidation* (implementation of the second phase instruments) and *practical cooperation* as a tool for further harmonisation. The idea was that the legal framework would be in place, and that harmonisation was now a more 'hands-on' concept. Harmonisation should be further enhanced through practice, and on the basis of solidarity and responsibility-sharing. This also followed from (new) article 80 of the Treaty on the Functioning of the European Union (TFEU) which requires '*asylum, border and migration policies of the Union and their implementation to be governed by the principle of solidarity and fair sharing of responsibility among the Member States and appropriate Union acts where necessary to give effect to this principle'.*

Clear examples of this focus on practical cooperation are inherently part of the work of the EU Agencies such as European Asylum Support Office, Frontex (EU Border Agency) and FRA (Fundamental Rights Agency).[42]

In the context on intra EU solidarity and responsibility sharing, attention should be paid to the potential of the early warning mechanism as a solidarity tool. This

[36] According to the explanatory notes with the Charter (2007/C 303/02) PbEU 2007 C303/17) this means not only the implementation of Union law, but in all cases where there is sufficient EU context (see ECJ, Case C617/10, *Åklagaren* v. *Hans Åkerberg Fransson* [2013] *ECR* I-105).

[37] See also ECRE and Dutch Council for Refugees, 'The application of the EU Charter on Fundamental Rights to asylum procedural law' (October 2014), available at www.ecre.org/component/downloads/downloads/937.html.

[38] See *supra* note 4.

[39] ECHR, *Hirsi v. Italy,* Appl. No. 27765/09, 23 February 2012.

[40] See *supra* note 4.

[41] Council of Europe, 'The Stockholm Programme – An open and secure Europe serving and protection the citizens' (2009).

[42] See contributions by Matera, Visser de Andarde.

mechanism should be fully explored and maximised given the political consensus surrounding its adoption. One way of exploring its potential in light of human rights obligations and the first decade of CEAS developments is the establishment of a permanent health and quality check of the CEAS. This could be done through a well-resourced early warning mechanism that allows for in-depth monitoring of all aspects of the CEAS and triggers remedial action where indicators show a lack of capacity or quality in a Member State's asylum practice.

In order to have a comprehensive picture of national compliance with the EU *acquis* based on human rights standards, reliable and up-to-date data collection is vital. In this respect the following suggestions can be made:

- need for improved collection of more sophisticated statistical data, but also on the types of decisions taken as well as the procedures used for processing asylum applications and the backlog at first instance and appeal stage;
- information on actual staff resources in available for asylum authorities, capacity of each reception system, availability of interpreters and legal assistance at all stages of the procedure as well as procedural safeguards and facilities for vulnerable asylum seekers;.
- the detention of asylum seekers and their conditions in detention centres must be closely monitored;
- finally, the level of implementation of the EU asylum standards and Member States' compliance with such standards must be taken into account in the operation of the early warning mechanism.

In order to make such a system based on quality assessment of national asylum systems operating and functioning, a full range of sources such as NGO's, academics and human rights monitoring systems are necessary, as well as quality assessment teams within EASO, involving independent experts, and with a substantial role for UNHCR in its monitoring role on the adherence to the Refugee Convention.[43]

The Stockholm Programme ends this year. Within EU institutions it has been decided that there will not be a next multi-annual programme. In June this year, the Council adopted Strategical Guidelines as a post-Stockholm policy agenda.[44] The level of ambition seems low and the guidelines provide little guidance for the future. The Strategic Guidelines focus predominantly on border control, return and readmission, and prevention of irregular migration. There are hardly any references to human rights or protection-sensitive approaches.

Although the most pressing issue on the European asylum and migration agenda is how to prevent human tragedies at the Mediterranean, and as well as how to secure access to protection in conformity with international human rights standards, the Guidelines only indirectly mention the issue of legal avenues

[43] See for more details ECRE, 'Enhancing Intra-EU Solidarity tools to improve quality and fundamental rights protection in the Common European Asylum System' (January 2013), available at http://www.ecre.org/component/content/article/56-ecre-actions/315-enhancing-intra-eu-solidarity-tools.html.

[44] European Council Conclusions, *EUCO 79/14* (26-27 June 2014), para. 8.

to protection through the reference to implementing the actions identified by the Task Force Mediterranean.[45] During the October 2014 Justice and Home Affairs Council, the agenda was shaped a bit further when discussing action to better manage migration flows.[46] But it remains to be seen what the agenda will be for the coming years and if it indeed proves to be possible to achieve a genuine CEAS based on fundamental human rights.

5. CONCLUSIONS AND RECOMMENDATIONS

When taking into account the past 15 years of building a CEAS, some concluding remarks and possible recommendations, or thoughts for the future, come to mind.

First, the proof of the pudding is in the eating. References to human rights standards and international treaties are easily made, but harder to put into practice. And if words are not translated into actions, they remain empty shells and they will become less and less valuable.

Furthermore, there is a need for an effective system of accountability for Member States who do not comply with the *acquis*. The case of Greece and Dublin transfers, where it took years and years of human rights reports, astonishing accounts of victims of human rights violations, endless debates in various settings before a European judge ruled what was already publicly acknowledged. It was late, too late for many asylum seekers who were detained or pushed back by the Greek authorities.

The political discussions and the policy developments over the last 15 years also show that issues of national sovereignty and the protection of borders remain the primary focus of States, and not the human rights of individuals. With respect to the current discussion on the need for legal channels for protection and safe access to the EU, the debate appears to be stagnant. There is a need for new arguments and new actions to bring the debate further and to put human rights into the centre of the debate.

Some thoughts for the future to conclude:

1) In order to establish an effective system of intra EU solidarity, which is also briefly mentioned in the Strategic Guidelines, the early warning system from the Dublin III Regulation should be developed into a real permanent health and quality check of national asylum systems.
2) Civil society should be more involved in the further building of CEAS. Use should be made of their knowledge and practical experiences within all aspects of the harmonisation.
3) Strategic litigation is a useful tool for both the purpose of harmonisation as well as enforcing the human rights of asylum seekers and enhancing the

[45] European Commission Communication on the work of the Task Force Mediterranean, *COM (2013) 869* (4 December 2013).

[46] JHA Council Conclusion, 'Taking action to better manage migratory flows', *Doc. no. 14141/14* (9-10 October 2014), at 5.

protection standards within the EU. However, this runs against the risk of becoming a heavy burden on the already large caseload of the European Courts; this could be (partly) prevented by making strategic choices in litigation, or seeking strategic partnerships within the Europe.

4) Border control and cooperation with third countries must become more protection sensitive. The issue of establishing (more) legal channels for protection is one of the most relevant subjects on the European agenda for the coming years.

INITIATIVES OF EU MEMBER STATES IN MANAGING MIXED FLOWS IN THE MEDITERRANEAN AND THE EU DISTRIBUTION OF COMPETENCES

Paula García Andrade

1. INTRODUCTION

Social and political instability in several African countries led to uprisings and violent conflicts that, since 2011, have produced an increased inflow of migrants and asylum seekers towards the territory of EU Member States. The Mediterranean Sea in particular has witnessed a new surge of perilous journeys with dramatic results,[1] while the current refugee crisis in Syria continues to aggravate.[2]

Apart from the EU response, the Governments of some Member States have also tried to manage unilaterally the arrival of mixed migration flows in the region through different instruments. The main measures adopted and/or proposed at national level can be categorised into two types of actions, according to the objectives pursued. On the one hand, border control measures have been deployed by certain EU Member States in cooperation with third countries aimed at preventing the arrival of irregular migrants to European shores, intensifying the efforts they have entertained in previous years. On the other hand, Member States have set up or discussed the possibility of establishing legal avenues intended to facilitate the orderly arrival of people in need of international protection, reducing the risks inherent to irregular and unsafe methods to access European soil. The efforts invested in this second objective have been however less remarkable.

The aim of this paper is to analyse these national initiatives from the perspective of the distribution of competences in the EU, dividing our analysis into two parts corresponding to each category of actions described above. After presenting some examples of the practice developed at national level, our main objective will be to explore whether Member States' actions are legitimate in view of the scope of Union competences in these fields and, in the affirmative, to ascertain whether EU law imposes any constraints or limitations to the margin of national discretion. A final section, in the form of concluding remarks, will allow

[1] See UNHCR, 'More than 1,500 drown or go missing trying to cross the Mediterranean in 2011' (31 January 2012), available at <http://www.unhcr.org/4f2803949.html>. The numbers of deaths at sea are estimated in 500 in 2012, 600 in 2013, and 800 until the summer of 2014: UNHCR, 'Urgent European action needed to stop rising refugee and migrant deaths at sea' (24 July 2014), available at <http://www.unhcr.org/53d0cbb26.html>.

[2] Since the beginning of the conflict in 2011, 3 million people have fled Syria to neighbouring countries and 6.5 million are internally displaced. See a complete picture at <http://syrianrefugees.eu/>.

us to complete this analysis by determining which level of action, national or supranational, is to be preferred in order to ensure to a greater extent the protection of human rights.

2. COOPERATION WITH THIRD COUNTRIES ON BORDER CONTROLS

2.1 **Member States' practice**

Certain EU Member States, especially the most affected by the increasing arrivals of migrants and asylum seekers by reason of their geographical location, have renewed their efforts in subscribing border control arrangements with countries of origin and transit. For instance, Italy and Spain, traditionally very active in deploying a so-called 'migration diplomacy', have brought up to date the arrangements they had concluded with some North African countries in order to cope with the migration crisis of 2005-2006.

Firstly, with regard to Italy, the focus is to be put on its relationship with one of its main partners, Libya. Among various formal and informal agreements aimed at fighting against irregular immigration, a Technical cooperation Protocol, signed between both countries in December 2007,[3] allowed for the deployment of joint maritime patrols, a possibility that would be implemented through a Memorandum of Understanding (hereafter, MoU) subscribed in February 2009, after the Treaty of Friendship, Cooperation and Partnership of 2008 had resumed cooperation in this field.[4] Even after the fall of the Gadhaffi regime, Italy signed, in June 2011, a migration agreement with the Libyan National Transit Council, providing for mutual assistance in the fight against irregular immigration, including repatriation.[5]

These arrangements have served as enabling instruments for the Italian push-back policy, mainly developed in 2009, by which Italian authorities intercepted people on the high seas, including asylum seekers, and returned them back to Libya, with the collaboration of the latter's Government. In July 2012, after the judgment of the ECtHR in case *Hirsi Jamaa and others* v. *Italy*, the Italian Government informed that its bilateral agreement with Libya for the return of migrants intercepted at sea had been suspended,[6] and that any individuals

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[3] See A. Di Pascale, 'Migration Control at Sea: The Italian Case', in B. Ryan, V. Mitsilegas (eds.), *Extraterritorial Immigration Control. Legal Challenges* (Leiden: MartinusNijhoff 2010), 297-300.

[4] Trattato di amicizia, partenariato e cooperazione tra la Repubblica italiana e la Grande Giamahiria araba libica popolare socialista, fatto a Bengasi il 30 agosto 2008, *Gazzetta Ufficiale della Repubblica Italiana, 18.02.2009, Serie generale, n. 40.*

[5] Italian Ministry of Foreign Affairs, 'Immigrazione: Frattini firma un accordo con il Cnt libico', *press release* (17 June 2014), available at <http://www.esteri.it/MAE/IT/Sala_Stampa/ArchivioNotizie/Approfondimenti/2011/06/20110617_FrattiniCntLibico.htm>. See B. Nascimbene, A. Di Pascale, 'The "Arab Spring" and the Extraordinary Influx of People who Arrived in Italy from North Africa', 13 *European Journal of Migration and Law* 2011, at 356.

[6] Action plan from the Italian Government in the case ECtHR, *Hirsi Jamaa and others* v. *Italy*, Appl. No. 27765/09, 23 February 2012.

intercepted in the future would be taken to special centres in Italy with the objective of assessing their situation in full respect of their rights.[7] However, a *de facto* push-back policy seemed to persist, judging by the incidents in which commercial ships were involved.[8]

After the tragedy that hit the island of Lampedusa in October 2013[9], Italy launched Operation *Mare Nostrum*, which was described by the Italian Government as a mainly national humanitarian operation to rescue human lives, although having security objectives as well.[10]

Spain has also suffered the migration effects of the 'Arab Spring' events, although numbers are neither comparable to those received by Italy, nor to those of the previous migration crisis endured by Spain in 2006.[11] The latter has prompted the conclusion of several border control arrangements with the authorities of Morocco, Senegal, Mauritania, Cape Verde, Gambia, Guinea or Guinea Bissau,[12] some of which have been explicitly renewed recently. It is the case, for instance, of Mauritania, transit country with which a MoU has been subscribed in 2014, between the Spanish *Guardia Civil* and the Mauritanian *Gendarmerie*, establishing joint patrols at sea to be deployed in the territorial waters and contiguous zone of Mauritania, and, for the first time, also at land.[13] In this context, the Spanish *Guardia Civil* implements the West Sahel project, co-financed by the EU and aimed at the promotion of joint land patrols with

[7] See FRA, 'Fundamental rights at Europe's southern sea borders', *Report* (March 2013), for human rights implications of border control practices.

[8] In August 2013, it was reported that the Italian authorities had ordered two commercial ships to proceed to the rescue of migrants near the Libyan coast and to transport them to Libyan soil. While the Liberian oil tanker, Salamis, disregarded the order, the Adakent, a Turkish cargo ship, followed it and turned 96 rescued migrants over the Libyan authorities. See N. Frenzen, 'Was the captain of the Salamis right?', *Malta Today*, 13 August 2013, available at <http://www.maltatoday.com.mt/news/national/29041/was-the-captain-of-the-salamis-right-20130812#.VHh-VMNKG9A0>.

[9] On 3 October 2013, a vessel capsized near the coast of Lampedusa coming from Libya, causing the loss of over 359 lives: El País, 'Más de 200 fallecidos en el incendio de un barco con inmigrantes en Lampedusa', 3 October 2013, available at <www.elpais.com>.

[10] See Italian Ministry of Defence, 'Mare Nostrum Operation', available at <http://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx>. See the contribution of P. Cuttitta to this volume. In October 2014, this national operation was put to an end, and Italian efforts were to be supported by Frontex operation Triton, more focused in border management. See European Commission, 'Frontex Joint Operation 'Triton' – Concerted efforts to manage migration in the Central Mediterranean', *press release* (7 October 2014); ECRE, 'Mare Nostrum to end', *ECRE Weekly Bulletin* (10 October 2014).

[11] In 2011, arrivals by sea into Spain increased 18% (5,443) in comparison with the previous year (3,632), in any case well below the numbers of 2006 (39,180): Spanish Ministry of Interior, 'Balance 2013. Lucha contra la inmigración irregular' (April 2014), available at <http://www.interior.gob.es/documents/10180/1207668/balance_2013_inmigracion_irregular.pdf/132387b3-d93b-4485-8a5b-1a734359764c>.

[12] See P. García Andrade, 'Extraterritorial Strategies to Tackle Irregular Immigration by Sea: A Spanish Perspective', in B. Ryan, V. Mitsilegas (eds.), *Extraterritorial Immigration Control. Legal Challenges* (Leiden: Martinus Nijhoff 2010), 311-346.

[13] Guardia Civil, 'El director general de la Guardia Civil y el director general de la Gendarmería de Mauritania firman un Memorando de cooperación en materia de inmigración irregular', *press release* (28 March 2014), available at <http://www.interior.gob.es/web/interior/prensa/noticias/>.

Mauritania, Senegal and Mali, including training and provision of technical equipment.[14]

Morocco remains, of course, another key Spanish partner, with which joint sea border patrols are in place since 2003.[15] An agreement on cross-border police cooperation has been signed in 2010 with the objective of preventing and coordinating fight against terrorism, cross-border criminality, especially organised crime, drug and arms trafficking, illegal immigration and trafficking of human beings.[16]Although this is not – apparently – a measure in itself but rather a reaction to the events, attention is to be paid also to the incidents of February 2014 in the Hispano-Moroccan border in Ceuta that, in fact, hide what seems to constitute a usual practice, consisting of the so-called 'hot repatriations', the immediate handing over of migrants to Moroccan authorities, without following any procedure, or any guarantees, including the *non-refoulement* principle.[17]

2.2 **Analysis of competences**

From the perspective inspiring this paper, the question to address next is whether these kinds of arrangements on the interception of migrants at sea, concluded by Member States with the authorities of third countries respects the distribution of competences in the EU.

It is indeed possible to argue in favour of the existence of an EU external competence on border controls on the basis of the doctrine of implied powers,[18] by deducing a competence to conclude international agreements in this field from article 77 TFEU. However, the implementation of border controls is still in the hands of Member States. *A priori*, this would not be relevant since EU conventional powers normally derive from its normative powers, being indifferent that the EU rules are to be applied by Member States.[19] Nevertheless, in this case, cooperation with third countries concerns the execution of border controls. Although the EU has exhaustively regulated the field, leaving no margin of discretion to Member States to legislate on the rules to be applied in border

[14] Ibid.

[15] See P. García Andrade, *supra* note 12.

[16] Acuerdo entre el Gobierno del Reino de España y el Gobierno del Reino de Marruecos en materia de cooperación policial transfronteriza, hecho «ad referendum» en Madrid el 16 de noviembre de 2010, *BOE* nº 116 (15 May 2012).

[17] 15 persons of Sub-Saharan origin lost their lives when trying to enter Spain from Morocco through the *Tarajal* beach after the Spanish response: El País, 'Una tragedia de 10 minutos y 14 muertos', 13.02.2014, available at <www.elpais.com>.

[18] Initiated with ECJ, Case 22/70, *Commission* v. *Council* (ERTA) [1971] *ECR* 25 and ECJ, Opinion 1/76 [1977] *ECR* 741, and codified in the Treaties, at the Lisbon reform, in Art. 216(1) TFEU.

[19] Reason why the fact that the implementation of an international agreement covering a field of EU exclusive competence corresponds to Member States' authorities does not justify recourse to mixity. See A. Rosas, 'Mixed Union-Mixed Agreements', in M. Koskenniemi (ed.), *International Law Aspects of the European Union* (The Hague, Kluwer Law International 1998), at 130, and N. Neuwahl, 'Shared powers or combined incompetence? More on mixity', 33 *Common Market Law Review* 1996, 675-676.

controls,[20] the power to exercise those controls still corresponds to Member States' authorities. Former Article 62(2)(a) TEC clearly preserved Member States' power to implement border controls since the EC was competent to adopt measures on 'standards and procedures *to be followed by Member States* in carrying out checks on persons'.[21] The Treaty of Lisbon transformed this national exclusive power into an EU concurrent competence, by suppressing, in Article 77(2)(b) TFEU, the reference to Member States' application of EU rules. Nevertheless, this has not been reflected in secondary law yet,[22] and therefore the power to conclude arrangements with third countries remains at the national level.[23]

The creation of the FRONTEX Agency certainly implies an increasing intervention of the EU at the operational level in this field, but, in our view, it has not altered this state of affairs yet, since the Agency lacks any executive powers on border controls. The working arrangements the Agency is empowered to subscribe with competent authorities of third countries, can only address issues within the Agency's mandate.[24] Moreover, joint operations deployed by Member States on the basis of their own arrangements and out of the Agency's umbrella are also legitimate, provided that this cooperation complements the action of the Agency and does not jeopardise the attainment of its objectives.[25] These conditions cannot, however, be checked without an adequate flow of information from Member States to the Agency and the proper monitoring of the real risk of overlap between national and supranational action.[26]

3. AVENUES TO FACILITATE ACCESS TO PROTECTION

3.1 **Member States' practice**

As a reaction to the refugee crisis in the Mediterranean region, some Member States have adopted national schemes providing for the humanitarian admission

[20] Regulation No. 562/2006 of the European Parliament and of the Council, of 15 March 2006, establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), *OJ* [2006] L 105/1, 13.4.2006.

[21] Emphasis added.

[22] See the Schengen Borders Code and Art. 1(2) of FRONTEX Regulation No. 2007/2004 *OJ* [2004] L 349/1, 25.11.2004.

[23] Protocol 23 to the EU Treaties on external relations of the Member States with regard to the crossing of external borders may be precisely interpreted as a reference to agreements related to the implementation of border controls, provided that they do not affect the uniform application of EU rules. See P. García Andrade, *La acción exterior de la Unión Europea en material migratoria: un problema de reparto de competencias* (Valencia: Tirant lo Blanch, forthcoming), on the distribution of external competences in the EU and its application to the different components of the EU migration policy.

[24] Art. 14.2 of Regulation No. 2007/2004. See also Art. 14(7) which refers to the need to include provisions concerning the role and competence of the Agency in bilateral agreements concluded by Member States with third countries.

[25] Art. 2(2), paras. 1-2, of Regulation No. 2007/2004.

[26] Art. 2(2), para. 3, of Regulation No. 2007/2004, after the reform operated by Regulation No. 1168/2011.

of individuals with protection needs in third countries seriously affected by generalised violence and armed conflicts. Beneficiaries of these expedited programmes are granted temporary or permanent residence in the receiving country, depending on national legislation. For instance, in March 2013, Germany announced the launch of a humanitarian admission programme at federal level in order to admit 5,000 Syrians from Lebanon, successively increased up to 20,000, prioritising those with humanitarian needs, people with family links in Germany and individuals who can contribute to the reconstruction in Syria. A two-year temporary status has been granted to the beneficiaries of the programme.[27] Ireland adopted, in March 2014, a similar programme allowing for the admission of Syrians having close relatives in the country.[28] Another example could be the controversial Italian Decree of 5 April 2011, providing for the granting of temporary residence permits on humanitarian grounds to citizens from North African countries, arrived in the country from January to April 2011.[29] Resettlement schemes are another form of protection and burden-sharing in which EU Member States have also been involved, especially with regard to Syrian refugees, albeit in a very modest way.[30]

Protected entry-procedures (hereafter, PEPs) also retain our attention as a projected measure, since, as explained below, they have been repealed in those Member States where previously in force. PEPs are defined as arrangements allowing a non-national to approach the potential host State outside its territory with a claim for asylum or other form of international protection, and to be granted an entry permit in case of a positive response to that claim, be it preliminary or final.[31] The diplomatic representation abroad could therefore be used merely to receive the asylum claim, which would be sent to competent authorities within state territory, or could be also entitled to process the application for international protection, proceeding to the status determination abroad.[32] This mechanism would offer a legal and secure alternative to illegal immigration and smuggling, reducing the risk of tragedies at sea.

Some EU Member States such as Austria, Denmark, The Netherlands or Spain have adopted PEPs by law in the past, although have afterwards been

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[27] UNHCR, 'First group of Syrian refugees flies to Germany', *News Stories* (11 September 2013), available at <http://www.unhcr.org/523076919.html>; UNHCR, 'UNHCR welcomes Germany's decision to extend Humanitarian Admission Programme to an additional 10,000 Syrian refugees' (13 June 2014), available at <http://www.unhcr.org/539afe256.html>.

[28] Irish Naturalisation and Immigration Service, 'Syrian Humanitarian Admission Programme', available at <http://www.inis.gov.ie/en/INIS/Pages/SYRIAN%20HUMANITARIAN%20ADMISSION%20PROGRAMME>.

[29] As national residence permits they allowed for freedom of movement in the Schengen area, thus motivating the well-known controversies with France: See B. Nascimbene and A. Di Pascale, *supra* note 5, at 352 *et seq*.

[30] For information, see the website of European Resettlement Network and, in particular, <http://resettlement.eu/news/crisis-syria>. See also Norway, France, Belgium & Netherlands pledge to admit more refugees from Syria ahead of UNHCR Conference, *ECRE Weekly Bulletin* (27 November 2014).

[31] G. Noll *et al*., 'Study on the feasibility of processing asylum claims outside the EU against the background of the common European asylum system and the goal of a common asylum procedure', *Danish Centre for Human Rights, European Commission* (2002), at 20.

[32] Ibid., at 21.

eliminated.[33]On the basis of their legislation, an individual was able to submit an asylum application in a diplomatic or consular representation in a third country of transit or even also in third countries of origin.

In Spain, for instance, an individual could, under the 1984 Law on asylum, lodge an asylum claim in Spanish diplomatic missions or consular offices in third countries.[34] The claim would be forwarded to the Ministry of Foreign Affairs and then subject to the same procedure as the claims submitted in Spanish territory. The individual was allowed to travel to Spain once asylum was granted, or before in situations of immediate danger. This form of PEP has been eliminated by the new Spanish legislation on asylum. According to Law 12/2009, Spanish ambassadors may only authorise the transfer to Spain of applicants whose physical integrity is at risk, in order to lodge an application for asylum in Spain.[35]

Switzerland, although not part of the EU, was the only European country still maintaining an 'embassy procedure', allowing a third-country national to file an asylum application in a Swiss diplomatic representation both in countries of transit and countries of origin.[36] Nevertheless, this specific procedure has been repealed in September 2012, except for situations of clearly life-threatening danger, and replaced by humanitarian visas.[37]

At EU level, albeit present in the EU institutional discourse for quite long, especially since 2003, the possibility to establish PEPs has recently received renewed attention.[38] The debate was re-launched when, preparing for the adoption of the Stockholm programme, the Commission explicitly suggested procedures for protected entry and humanitarian visas to be considered as forms of responsibility for protection.[39] In this context, and specifically addressing the situation in the Mediterranean before the current crisis, the French delegation, supported by Italy, also asked to take into account the possibility to establish a specific procedure for examining applications for asylum in Member States'

[33] CIR, 'Exploring avenues for protected entry in Europe' (March 2012), 37 *et seq*.; G. Noll *et al*., *supra* note 31.

[34] Art. 4(3) of the Spanish Law 5/1984 on Asylum [Ley reguladora del derecho de asilo y de la condición de refugiado, *BOE* nº 74, 27.3.1984] and Art. 4(3) of Royal Decree 203/1995 [Real Decreto 203/1995, de 10 de febrero, por el que se aprueba el Reglamento de aplicación de la Ley 5/1984, *BOE* nº 52, 2.3.1995].

[35] Art. 38 of the Spanish Law 12/2009 on Asylum [Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria, *BOE* nº 263, 31.10.2009] and Fourth Additional Provision of the draft regulation on asylum, available at <http://www.migrarconderechos.es/legislationMastertable/legislacion/primer_borrador_reglamento_Ley_12_2009>.

[36] See CIR, *supra* note 33, 52-60; G. Noll *et al*., *supra* note 31, 129-138.

[37] Swiss Federal Office for Migration (FOM), available at <https://www.bfm.admin.ch/content/bfm/en/home/themen/einreise/faq.faq_24.html>.

[38] For the evolution of the EU policy debate on this issue, see CIR, *supra* note 33, 30-37 and U. Iben Jensen, 'Humanitarian visas; option or obligation?', *European Parliament* (2014), available at <www.europarl.europa.eu/studies>, at 29 *et seq*. See also E. Guild and V. Moreno-Lax, 'Current challenges for international refugee law, with a focus on EU policies and EU co-operation with the UNHCR', *Briefing Paper EXPO/B/DROI/2012/15*, para. 5(3).

[39] European Commission Communication, 'An area of freedom, security and justice serving the citizen', *COM (2009) 262* (10 June 2009), at 30.

diplomatic representations in Libya, so that persons whose claims were not manifestly unfounded would be authorised to enter the EU.[40]

The European Commission has been a vigorous defender of establishing PEPs and, in particular, humanitarian visas, starting at Member States' level,[41] and followed by EU action.[42] The possibility of a coordinated approach to humanitarian visas was again highlighted when identifying the measures to be adopted by the Task Force Mediterranean, set up after the Lampedusa tragedy of October 2013,[43] and reiterated in the Commission's position issued ahead of the new strategic guidelines adopted by the European Council in June 2014.[44] The introduction of PEPs has also been actively supported by the European Parliament.[45]

3.2 **Analysis of competences**

Regarding programmes of humanitarian admission, the Union is competent to adopt measures to this effect on the basis of Article 78(2)(c) TFEU. This internal competence has been exercised by the EU with the adoption of Directive 2001/55 on temporary protection,[46] which constitutes the 'humanitarian admission programme' of the EU by setting up an exceptional procedure to provide, in the event of a mass or imminent mass influx of displaced persons from third countries, immediate and temporary protection to such persons.[47] This procedure is to be decided by the Council, by qualified majority, on a proposal from the Com-

[40] It was also suggested to set up an *ad hoc* protection programme in Libya for persons intercepted at sea and repatriated there so that those considered as refugees could be resettled in the EU, an idea quite similar to the controversial British proposal to create transit processing centres: 'Migration situation in the Mediterranean', *Council doc. nº 13205/09* (11 September 2009).

[41] For the national practice on the granting of humanitarian visas, see U. Iben Jensen, *supra* note 38, 41-48.

[42] See, *inter alia*, Communication 'on the common asylum policy and the Agenda for protection', *COM (2003) 152* (26 March 2003); Communication 'Towards more accessible, equitable and managed asylum systems', *COM (2003) 315* (3 June 2003); Communication '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* (4 June 2004); Communication 'Policy plan on asylum. An integrated approach to protection across the EU', *COM (2008) 360* (17 June 2008); COM (2009) 262, at 28.

[43] European Commission Communication, 'On the work of the Task Force Mediterranean', *COM (2013) 869* (4 December 2013).

[44] European Commission Communication, 'An open and secure Europe: making it happen', *COM (2014) 154* (11 March 2014), at 7.

[45] See, *inter alia*, European Parliament, Resolution of 2 April 2014 on the mid-term review of the Stockholm Programme, *2013/2024(INI)*, point 83; Resolution of 23 October 2013 on migratory flows in the Mediterranean, with particular attention to the tragic events off Lampedusa, *2013/2827(RSP)*, points G, 21-22; Resolution of 9 October 2013 on EU and Member State measures to tackle the flow of refugees as a result of the conflict in Syria, *2013/2837(RSP)*, points G and 12.

[46] Directive 2001/55, 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, 7.8.2001. It was based on former Art. 63(2)(a) and (b) TEC.

[47] In particular, although not exclusively, when there is a risk of overload of the asylum system. See Art. 2(a) of Directive 2001/55.

mission which shall examine any request by a Member State.[48] This mechanism has never been activated in practice, neither to face the Syrian refugee crisis, although requests have been made to this effect.[49]

But does the existence of Directive 2001/55 mean that Member States cannot establish independent national schemes of temporary protection? It is true that the status granted to persons under the mechanism set up by the Directive is clearly minimal and can be upgraded by Member States.[50] However, once the supranational temporary protection regime is activated by the Council, we presume that the adoption of an independent national regime would be contrary to Directive 2001/55. Some authors take a step further, affirming that the Directive precludes from establishing new national temporary protection schemes, an interpretation based on the terms of the Directive itself, as well as on a systematic reading of the EU asylum *acquis*, whose objective is to create a common European asylum system in which secondary movements within EU Member States are to be avoided.[51] Still, another possible interpretation would point against the withdrawal of the national power to adopt regimes of temporary protection,[52] when 'mass influx of displaced persons' of an exceptional character cannot be established, that is, when the circumstances described in Directive 2001/55 are not met. It can also be inferred from the Asylum, Migration and Integration Fund that national *ad hoc* humanitarian admission programmes are in conformity with EU law.[53]

As far as PEPs are concerned, their establishment and, more specifically, the issuance of humanitarian visas, is usually included into the so-called 'external dimension of asylum',[54] whose controversial importance has been reflected in primary law in the last reform of the Treaties. Article 78(2)(g) TFEU thus, refers to the partnership and cooperation with third countries for the purpose of managing inflows of persons applying for asylum, subsidiary protection or tem-

[48] Art. 5 of Directive 2001/55. See, *inter alia*, N. Arenas Delgado, El *sistema de protección temporal de desplazados en la Europa comunitaria* (Universidad de Huelva 2005).

[49] At the beginning of 2011, Italy requested to the Council to activate this exceptional procedure, with support from Malta. The JHA Council of 11-12 April 2011 refused. See B. Nascimbene and A. Di Pascale, *supra* note 5, 346-348. See also demands of the EP regarding the situation in Syria: EP, Resolution of 9 October 2013 on EU and Member States measures to tackle the flow of refugees as a result of the conflict in Syria, *2013/2837 (RSP)*, point 14.

[50] See Art. 3(5) and 7 of Directive 2001/55.

[51] See S. Peers, *EU Justice and Home Affairs Law* (Oxford: Oxford University Press, 3rd ed. 2011), at 342, and B. Nascimbene and A. Di Pascale, *supra* note 5, at 354.

[52] See N. Arenas, 'The Concept of 'Mass Influx of Displaced Persons in the European Directive Establishing the Temporary Protection System', 7 *European Journal of Migration and Law* 2005, 439-440. See also A. Skordas, 'Council Directive 2001/55/EC' in K. Hailbronner (ed.), *EU Immigration and Asylum Law. Commentary on EU Regulations and Directives* (München: Beck, Hart, Nomos 2010), 803-870.

[53] See Art. 2(b), 5(3) and 7 of Regulation No. 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, *OJ* [2014] L 150/168, 20.5.2014. See contra S. Peers, *supra* note 51, interpreting the previous rules on the European Refugee Fund.

[54] Included as thematic priority of the Global Approach to Migration and Mobility, the political framework inspiring the EU's cooperation with third countries on migration issues: see 'Council Conclusions on the Global Approach to Migration and Mobility', *Council doc. 9417/12* (3 May 2012), para. 28.

porary protection. This provision cannot be interpreted as an explicit external competence of the EU, but rather as a new objective of the EU asylum policy, presented as an internal competence of the EU,[55] from which an implied external competence could be inferred.[56] Consequently, Article 78(2)(g) might be used as a legal basis for internal acts aimed at reinforcing protection capacities of third countries, such as Regional Protection Programmes; or resettlement programmes.[57] However, the implications of cooperating with third countries are lacking when dealing with humanitarian visas. An internal legal basis that responds to the real objective and content of PEPs is therefore needed.

Firstly, if the envisaged PEP implies providing for the reception and processing of asylum claims by the diplomatic representation abroad, the EU would be able to regulate it under 78(2)(d) TFEU, conferring competence to legislate on 'common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status'.[58] Directive 2013/32, the 'Procedures Directive', which constitutes the exercise of this competence,[59] is only applicable to claims for international protection filed in the territory of a Member State.[60] Nevertheless, this act does not prevent Member States from regulating applications submitted abroad.

If the idea is, on the contrary, limited to humanitarian visas authorising the individuals to enter an EU Member State and apply for international protection inside the territory, an amendment to the Procedures Directive would not be required. The grounds of protection to be examined and the protection granted would be, in any case, those provided in the 'Qualification Directive', Directive 2011/95,[61] with the caveat that in cases where the diplomatic mission would be

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[55] Art. 78(2) TFEU specifies the fields of the asylum policy in which the European Parliament and the Council shall legislate.

[56] See G. De Baere, 'The basics of EU external relations law: an overview of the post-Lisbon constitutional framework for developing the external dimensions of EU asylum and migration policy', *in M. Maes, M.-C. Foblets and P. De Bruycker (eds.), External Dimension of European Migration Law and Policy / Dimensions externes du droit et de la politique d'immigration et d'asile de l'UE (Bruxelles: Bruylant 2011), at 1*68.

[57] For the Joint EU resettlement program, see Regulation No. 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, OJ [2014] L 150/168, 20.5.2014, replacing Decision No. 281/2012, *OJ* [2012] L 92/1, 30.3.2012.

[58] Before the Lisbon reform, the EC was, on the contrary, only competent to adopt 'minimum standards on procedures *in Member States* for granting or withdrawing refugee status' on the basis of Art. 63(1)(d) TEC [emphasis added].

[59] Directive 2013/32 of the European Parliament and of the Council, of 26 June 2013, on common procedures for granting and withdrawing international protection (recast), *OJ* [2013] L 180/60, 29.6.2013.

[60] Art. 3(1) and 2 of Directive 2013/32 provides that '1. This Directive shall apply to all applications for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of the Member States, and to the withdrawal of international protection. 2. This Directive shall not apply to requests for diplomatic or territorial asylum submitted to representations of Member States'.

[61] Directive 2011/95 of the European Parliament and of the Council, of 13 December 2011, on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, *OJ* [2011] L 337/9, 20.12.2011.

able to process the asylum claim abroad, the refugee status could not be granted, but only other forms of protection.[62]

Focusing therefore on humanitarian visas, as the EU institutional debate currently does, we shall turn to the fields of borders and short-term visas, in which the EU is clearly competent on the basis of Articles 77(2)(b) and (a) TFEU, respectively. In our view, these provisions sufficiently enable the EU institutions to adopt a legal framework for the creation of humanitarian visas. The subsidiarity principle, in its positive dimension, would even militate in favour of the exercise of EU competences for that purpose. The adoption of common rules, or at least initially a common approach, is needed in order to avoid a disproportionate burden for Member States accepting to adopt PEPs or even to ensure the creation of PEPs at EU level.[63]

Nevertheless, it is important to simultaneously evaluate whether existing EU legislation on borders and visas prevents Member States from unilaterally adopting PEPs. Assuming that the protection visa would be a short-term visa, the field is almost completely occupied by the EU,[64] especially after the entry into force of the Visa Code.[65] Nonetheless, when the entry conditions or visa requirements are not met, the Visa Code allows Member States to, in use of a certain margin of discretion, issue visas of limited territorial validity (hereafter, LTV visas) – valid only for one or more Member States – on humanitarian grounds, national interest or because of international obligations.[66] Article 25 of the Visa Code thus legitimates the granting of humanitarian visas by EU Member States.[67]

However, from the terms of Article 25 together with a systematic interpretation of the Visa Code, it can be inferred that Member States shall grant LTV visas exceptionally, on an *ad hoc* basis, without it being possible that an individual lodges an application for a LTV visa.[68] Taking into account that Regulation 810/2009 establishes the procedure and conditions for issuing any short-term visa for transit through, or stays on the territory of Member States not exceeding 90 days,[69] it is doubtful, in our view, that providing, in national legislation, for specific procedural rules on humanitarian visas would be in conformity with the Visa Code.[70] Consequently, Member States may issue humanitarian visas in

[62] The status of refugee corresponds, both according to the Geneva Convention and Directive 2011/95, to third-country nationals who are outside their country of nationality.

[63] See CIR, *supra* note 33, at 62; U. Iben Jensen, *supra* note 38, at 11.

[64] See however A. Meloni, 'The Community Code on Visas: Harmonisation at last?', 34 *European Law Review* 2009, 671-695.

[65] Regulation No. 810/2009 of the European Parliament and of the Council, of 13 July 2009, establishing a Community Code on Visas (Visa Code), *OJ* [2009] L 243/1, 15.9.2009.

[66] See Art. 25 of Regulation No. 810/2009.

[67] See U. Iben Jensen, *supra* note 38.

[68] See U. Iben Jensen, *supra* note 38, at 21. See also V. Moreno-Lax, '(Extraterritorial) Entry Controls and (Extraterritorial) Non-Refoulement in EU law', *in M. Maes, M.-C. Foblets and P. De Bruycker (eds.), External Dimension of European Migration Law and Policy / Dimensions externes du droit et de la politique d'immigration et d'asile de l'UE (Bruxelles: Bruylant 2011), at 430.* For the inconsistencies of the provisions on LTV visas, see also 430-432, as well as U. Iben Jensen, *supra* note 38, at 21 *et seq*.

[69] Art. 1(1) of Regulation No. 810/2009.

[70] Contra G. Noll *et al*., *supra* note 31.

the form of LTV visas in exceptional cases,[71] when the applicant does not meet visa and entry conditions into the Schengen area but his protection needs justify the facilitation of a legal avenue for entering the EU. The adoption of a specific procedure for the regular issuance of humanitarian visas for protection needs would apparently require the intervention of the EU, most probably as an amendment to the Visa Code, currently under revision.[72]

The recourse to humanitarian visas by EU Member States would not be problematic either with regard to external border controls, since non-compliance with some of the entry conditions into the Schengen area does not prevent national authorities from authorising entry on humanitarian grounds or because of international obligations.[73]

4. CONCLUDING REMARKS

In general terms, it may be concluded that Member States' practice with regard to border control cooperation with third countries and the establishment of PEPs is respectful of the distribution of competences in the EU, and, at the same time, that there is room for Union action in both fields. With the aim of deciding which level of action is to be preferred, it seems interesting to adopt a human rights perspective. Consequently and leaving aside now other legal and political considerations related to the EU system of competences, we may wonder which level of action, national or supranational, would ensure to a greater extent the protection of human rights.

A priori, it would make no difference to opt for EU or Member States' intervention, since both are bound by the same obligations on fundamental rights. The EU Charter of Fundamental Rights replicates the ECHR, to which, in addition, the EU as such will also adhere. However, in practice, some nuances might tip the scales in favour of the Union.

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[71] It is even possible to argue in favour of an obligation to issue humanitarian visas by Member States on the basis of the Visa Code, ECJ case-law and their human rights obligations: U. Iben Jensen, *supra* note 38, 26-27; S. Peers, 'Do potential asylum – seekers have the right to a Schengen visa?', *EU Law Analysis* (20 January 2014), available at <http://eulawanalysis.blogspot.co.uk/2014/01/do-potential-asylum-seekers-have-right.html> and 'External processing of applications for international protection in the EU', *EU Law Analysis* (24 April 2014), available at <http://eulawanalysis.blogspot.co.uk/2014/04/last-autumns-huge-loss-of-lives-near.html>. See also G. Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?', 17 *International Journal of Refugee Law* 2005, 542-573.

[72] See in this regard U. Iben Jensen, *supra* note 38. A proposal to recast and amend the Visa Code was presented by the Commission in April 2014 and is currently under discussion in the European Parliament and the Council: European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the Union Code on Visas (Visa Code)', *COM (2014) 264* (1 April 2014).

[73] Art. 5.4(c) of Regulation No. 562/2006. Den Heijer points out that 'this brings about the paradox that refugees are not generally exempted from the visa requirement, except at the very moment when that requirement is enforced, namely when it is ascertained whether the person can comply with the entry conditions set forth in the SBC': M. Den Heijer, *Europe and Extraterritorial Asylum* (Oxford: Hart 2012), 173-174.

The situation in the external borders would not probably change or improve in case border controls were implemented by an EU border guard corps and, therefore, the arrangements on joint patrols were concluded by the EU. When joint patrols take place in the territorial waters of third countries, the implementation of controls corresponds to the third-country's agents. The only difference would thus lie on the allocation of international responsibility on the basis of an effective control criterion, in case of human rights violations by the latter.

Concerning the setting up of PEPs, it seems that Member States would not foresee unilateral action as they could trigger a 'pull factor' effect for asylum seekers, as well as a disproportionate burden for those Member States adopting new legal avenues for protection. In this case, the argument would proceed as follows; as PEPs may enhance human rights protection and they only seem politically feasible if adopted at EU level, only EU action will promote human rights. Moreover, at supranational level, the Union could put solidarity into practice, through EASO support, relocation programmes and financial resources. In addition, PEPs could reduce the recourse to the Dublin system, since the country to which the asylum seeker wishes to travel would coincide with the country responsible for examining his asylum application according to Dublin criteria, the country of first arrival or country issuing the visa. Reducing the use of Dublin rules enhances human rights protection in view of its current functioning.

Pending a decision, coherence is much needed. What is the point of promoting legal avenues to access protection in the EU when, simultaneously, the implementation of EU border policy hinders that access? Consequently, the insistence of EU institutions such as the Commission on adopting humanitarian visas is to be welcome, but to be credible it should start by making use of the infringement procedure when Member States' efforts on border controls fragrantly violate human rights.

TWO REALITIES: STRIKING THE BALANCE[1]

Robert K. Visser

INTRODUCTION

Asylum is as old as the world is. The history of mankind is a history of migration. When Adam and Eve left The Garden of Eden, they became the first migrants. Ever since, there has been a long history of migration. At the same time the subject of migration gives rise to emotions and debates. A closer look is therefore required. In order to do so, the two realities of migration have to be realised and recognised. Subsequently, it is necessary to strike the balance between the two. Human rights have different aspects that have to be brought together. After explaining the very nature of asylum and international protection, a state of play of the Common European Asylum System is given. The role of EASO, the European Asylum Support Office, concludes this article.

I. THE OPPOSING REALITIES OF MIGRATION

Two realities to face

In the area of migration we have to face two opposing realities. We live in a world that recognises and values the fundamental rights of men and women. We are proud of these rights. We especially recognise human rights. These are acknowledged in the Universal Declaration of Human Rights[2] and in regional declarations, such as the European Convention on Human Rights,[3] the EU Charter of Fundamental Rights[4] and similar declarations in other parts of the world. We cherish the values they express. We hold them to be '*self-evident*'; we believe that all humans are created equal. Even though sometimes the interpretation of how to deal with human rights in practice might vary between different regions and cultures, the mere existence of human rights is undisputed. Even dictators often refer to human rights, although they reserve the right on how to interpret and how to apply them exclusively to themselves.

At the same time we have lived for many hundreds of years in communities. Maybe we have even done so already since the beginning of time. In these

[1] This article is an adapted text of the author's contribution to the CLEER Conference on 'Human Security as a legal framework to analyse the Common European Asylum System', 4 July 2014, Centre for the Law of EU External Relations (CLEER) and T.M.C. Asser Institute, The Hague.

[2] UN General Assembly, Universal Declaration of Human Rights 1948, 217 A (III).

[3] European Convention of Human Rights as amended by Protocols Nos. 11 and 14, 1950, 5 ETS.

[4] Charter of Fundamental Rights of the European Union, *OJ* [2009] C 326/391, 26.10.2012.

communities we are bound together by tradition, by culture, or by the fate of history. As a community we claim the right and the obligation to take care of our collective safety and security; the right to protect the community, the right to organise in our own way, the way in which we want to live. All of this is aimed at the benefit and the general interest of the community.

It is these two different realities that make living together on the same planet sometimes so complicated. Here we have real dilemmas to face. To put it simply: how does one reconcile the legitimate principle that all humans are equal and have equal rights on the one hand and the even widely accepted principle that members of a community have the right and even the obligation to take care of each other and to protect and defend their common interests on the other hand? This is the very essence and intrinsic tension of the debate on migration.

To strike the balance

Is it possible to reconcile these seemingly contradictory principles? At this point it should be noted that both these principles are focused on protection, but with a seemingly opposite effect. One puts the universal character of protection first; the other prioritises the protection of the community. That is the real dilemma of migration. The only way to reconcile them is to make choices. A choice between two principles that is human, logical and legitimate. But this is the only way we can organise our world as it is right now. We have no choice, but to choose.

Why do people migrate?

We can easily imagine many reasons to migrate: getting away from a bad situation, fleeing from danger, seeking a better future, or just seeking adventure, looking for something new. We all might consider doing so. No one should be blamed when one actually does migrate.

At the same time, we have to take into account the other reality. That is the obligation to protect the legitimate rights of those who are members of the community, of those who also have the right to protection. We accept this principle, provided that it stays within the framework of universally accepted rights.

That is exactly where we have to strike the balance. Our response can and must be fair. The right to organise the internal affairs of any community also implies the right of the community to decide who can join it and under which conditions. This means that access to that community can in general be subject to scrutiny before entering, e.g. visa requirements, work permits, proof of subsistence, and other requirements to be met before entering the territory of the community. It does also mean the right to refuse entry if those requirements are not met. Moreover, it also implies the right to regulate the entry of those who are seeking a new life, a new future, in a new place. This is a logical consequence of the fact that we accept communities as legitimate entities. That is part of the concept of human society and its security as we know it.

At the same time we want to live up to the other reality, the one linked to universal human rights. That is where we have to draw the line. Starting from these two realities, we have to ask ourselves what is a fair way to cope with all this. What can we do to respect both legitimate principles? If we really want to live up to both expectations, the only way is to seek and strike a fair balance. We have to make a positive choice for those people who are really in need of protection. For those people, each community shall open up its borders. We call them asylum seekers. Those who are really in need shall not be stopped at the border, shall not be refused entry. They shall be able to enter the territory and seek protection. They shall be received with dignity as fellow human beings. That is the essence of universal human rights.

That is also where it comes to the test. The test is whether we can cope with those two realities. Two realities that we all claim to believe in. Two realities that we want to live up to in our day to day life. This balance means to determine between those who are really in need of protection and those who ask for entry for other reasons. That is a difficult choice. It is so much easier to give in to any request, any claim, and any situation. But that would be denying reality. A reality of differences between groups and the different situations that people find themselves in. On the one hand people have the right to move, but on the other hand people have the right to protect their community and their way of life. That is how we have organised the world. We have to face that reality.

Asylum is legal migration

Let us have a closer look at those migrants who ask for protection. What do they really ask for, what are they seeking? They seek a safe place for themselves and their families. They seek a safe place to live, a place with a future. They seek legal existence, a future as recognised and accepted citizens, a legitimate place in society. Let us realise that those who seek international protection are not illegal migrants. They are migrants who ask for legal entry to a country. Asylum is not about people who enter a country illegally and who try to hide and make a living by illegal means. Asylum is about people who seek protection in society in a legal way. Whatever the reason to apply for protection, whatever the reason to flee and ask for entry, asylum seekers want a new opportunity to build their life, their future and that of their family. Asylum seekers, therefore, are legal migrants.

The asylum reality

Let's turn to the reality of the asylum process. What does an asylum request mean? Asylum is a right.[5] As any right it has to be established, to be judged on

[5] Art. 14 of the Universal Declaration of Human Rights states that 'Everyone has the right to seek and to enjoy in other countries asylum from persecution.' Moreover, Art. 18 of the EU Charter of Fundamental Rights states: 'The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to

its content. If it is requested on the right grounds it has to be granted and the consequences have to be provided, meaning integration in the receiving society. If there are no grounds for protection, the request has to be denied and the consequences have to be faced, meaning that the person does not get legal stay and has to leave the country. From a governmental perspective these two sides of the asylum process have always to be taken into account. Either the request is granted, or it is to be rejected. The asylum process is about these two sides, accepting and integration, or rejection and return. If one considers that only 34% in 2013 were granted protection and 66 % were rejected, one can realise the reality behind this.[6]

II. A COMMON EUROPEAN ASYLUM SYSTEM

Organising the different realities in the EU

Within the two realities as described above, we want to be humane to all our fellow human beings. If someone is really in need we want to help. That is part of our human instinct, a very noble and good part. To live up to this we organise ourselves.

In the EU we have set up a system of protection to help those who really need it and Europe is a very positive example in this respect. This is maybe contrary to what is seen and said in the public debate. An unsuspected source, William Lacy Swing, the Director General of the International Organisation for Migration (IOM) recently said as follows:

> '*I should also like to pay homage to the EU: very few regions face greater migration challenges and opportunities; and very few regions of the world have devoted more thought and resources to migration issues than Europe*.'[7]

Maybe this comes as a surprise to many. It is contrary to the common tone of the public debate. It is maybe contrary to the common perception. We are so used to vehemently arguing about the issue of migration, that we have come to ignore what and how much we really do; what we do for migrants and asylum seekers. The EU has set up a positive system that is providing protection to those in need. A system that is aiming to live up to the values we commonly assert. It is certainly not perfect, but it is much more than just a start. It is a comprehensive system. It is a system that is based on common values and human rights. It is a system that provides a compulsory EU legal framework for all Member States.

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the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union'.

[6] EASO Annual Report on the Situation of Asylum in the EU 2013 2014, available at <http://easo.europa.eu/wp-content/uploads/EASO-AR-final1.pdf>.

[7] Ambassador Swing, Director General, at the High-Level Conference 'Open and safe Europe – what's next?' (29/30 January 2014), available at <https://scic.ec.europa.eu/streaming/index.php?es=2&sessionno=8cbe9ce23f42628c98f80fa0fac8b19a>.

How it started

Let's go back to history for a moment. The debate on the protection of refugees really started in Europe in the aftermath of the Second World War. The result was the Geneva Convention of 1951. This Convention aimed at dealing with the large numbers of displaced persons in Europe after the war. Over the years a more general approach to refugees arose from this specific situation. The Geneva Convention has for many years aligned the question of how to deal with the subject of refugees. It has become the focus point for a universal approach. After the fall of the Berlin Wall and the end of the East-West conflict in 1989, the concurring globalisation and related migration, a new reality came about.

In this context need for new action was felt.[8] This resulted in a series of policy actions. The Treaty of Maastricht of 1992 provided the legal basis for EU actions in the field of Justice and Home Affairs. The European Council of Tampere in 1999[9] set out the first Programme on asylum and migration. This was followed by *The Hague Programme*[10] in 2004 and the *Stockholm Programme*[11] in 2009. The European Council of 27 June 2014 set out Strategic Guidelines[12] on this subject for the coming years. At the same time a comprehensive set of EU legislation was decided in 2004/2005, establishing the first phase of the Common European Asylum System and characterised by minimum standards. This package was improved and further developed in 2011/2013 in the second phase of the Common European Asylum System aimed at harmonisation.[13]

Furthermore, in 2011 the European Asylum Support Office (EASO) was established to provide operational and practical support and expertise to foster the implementation of the Common European Asylum System.[14] The EU asylum acquis takes the principles of the Geneva Convention[15] as a starting point. But the EU has built a system that is wider and elaborate, adding both rights and procedural guarantees. As will now be argued, the EU protection system goes beyond international refugee obligations.

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[8] For an overview of the development of the CEAS see the contribution by Myrthe Wijnkoop in this volume.

[9] The Tampere Programme, 'Towards a Union of Freedom, Security and Justice' (1999), available at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00200-r1.en9.htm>.

[10] The Hague Programme, 'Strengthening Freedom, Security and Justice in the EU' (2004), available at <http://easo.europa.eu/wp-content/uploads/The-Hague-Programme.pdf>.

[11] The Stockholm Programme, 'An open and secure Europe serving and protecting citizens' (2009), available at <http://easo.europa.eu/wp-content/uploads/Stockholm-Programme.pdf>.

[12] European Council Conclusions (27 June 2014), available at <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/143478.pdf>.

[13] For the development of EU asylum legislation see S. Peers, *EU Justice and Home Affairs Law* (Oxford: Oxford University Press 2013); and J-C Piris, *The Lisbon Treaty, a legal and political analysis* (Cambridge: Cambridge University Press 2010).

[14] Regulation (EU) No. 439/2010 of the European Parliament and the Council establishing a European Asylum Support Office (19 May 2010), *OJ* [2010] L 132/11, 19.05.2010.

[15] Geneve Conventions 1949, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17512-English.pdf>.

A comprehensive EU legal framework on asylum

At the national level, in our day to day work, we are very much used to looking at the legal side of asylum from the national perspective. There is national asylum law. We know that somehow that law contains elements of international legislation, especially the Geneva Convention, as well as EU legislation. Too little we realise that by now the legal reality is the other way around. The EU legal framework on asylum is the constituent factor for the asylum laws of Member States. Only when and where the EU framework leaves options, there is room for national legislation. National legislation that goes outside of the EU legal framework is not allowed. So from the legal perspective the EU is already implementing a real Common European Asylum System. Certainly with the adoption of the so called EU asylum package in 2013, there is a legal system in place that sets quality standards, harmonised procedures and common approaches. Of course there are always more elements to be desired and to further develop. The Common European Asylum System has now entered the second phase. New phases will follow.

From common legislation to law in action

So we have a common legal framework in place. But how does it work in practice? Does the operational situation in the Member States reflect this common system?

One of the main instruments to build the European Union is by agreeing on European legislation, which means adopting common laws. In many aspects the EU is a legal construction, built by Treaties which are commonly agreed between Member States. The implementation and the enforcement of these common laws are mainly left to the Member States. To ensure the equal application is, finally, the task of the Court of Justice of the European Union, with of course a role for the European Commission as the 'Guardian of the Treaties'. In many areas this system works effectively. But in some areas the establishment of supporting structures was deemed necessary to ensure coherent implementation. EU agencies, such as Frontex, Europol and EASO have been established with that aim.

Similar cases, similar procedures, similar outcome

In the end, the real goal of legislation is to influence the reality on the ground. In the case of asylum the aim is to have similar procedures and similar outcomes for similar cases.

This situation has not been reached yet. But to what extent, we don't really know exactly. We should be cautious when comparatively analysing. We can compare certain situations, but we cannot compare any situation just like that. For example, it is clear that we cannot expect a country like Estonia to take as many asylum seekers as a country like Germany. Also the countries, from which asylum seekers are coming from, differ from Member State to Member State,

resulting in different outcomes for asylum requests. The reason for this can be very diverse, for example the existence of migrant communities, historical ties, a common language or geographical proximity. Furthermore there is a swiftly changing reality in the area of migration and asylum. For example: Poland, Hungary and Bulgaria are faced with large numbers of asylum requests, a situation not anticipated a few years ago. Italy has been for some years amongst the top receiving asylum countries. Currently EASO is working on more refined ways to look into the question of what is relevant to compare and what not.

III. THE ROLE OF EASO

So how is it possible to ensure effective implementation and adequate operational practices? How does one achieve the desired convergence on the ground? First of all it is the responsibility of the Member States. Let's not forget this essential part of reality. The Member States have to transpose and implement EU legislation.

In addition, there is a common European support structure in place. EASO has been established to support the Member States by stimulating more convergence in the field of asylum and by assisting Member States with the implementation of the Common European Asylum System.[16] In this context, EASO acts as a centre of expertise on asylum. EASO is an instrument of solidarity. The common goal is, similar cases, similar procedures, and similar outcomes. EASO provides support through a number of avenues.

i) *Training*

An essential means to ensure EU-wide convergence of asylum practices is to implement similar training for all persons involved in the asylum process in the different Member States. To that end EASO provides training to asylum officials and develops training materials both in the area of the Common European Asylum System, as well as in practical skills such as interviewing minors and vulnerable groups. The cornerstone of EASO training activities is the EASO Training Curriculum,[17] a common vocational training system designed for asylum officials and other target groups such as managers and legal officers throughout the EU.

EASO training covers core aspects of the asylum procedure in interactive modules. EASO also develops training for the judiciary and engages in other relevant training initiatives. These include the development of training in cooperation with other EU agencies, such as Frontex. In addition to the permanent training activities, EASO delivers *ad hoc* training sessions in response to the specific needs of Member States under pressure. To this end it has delivered training sessions in Bulgaria, Greece, Italy, Luxembourg, and Sweden. In 2013

[16] See Regulation No. 439/2010, *supra* note 14.

[17] EASO Training Curriculum (March 2014), available at <http://easo.europa.eu/wp-content/uploads/BZ0413152ENC.pdf>.

alone in total, over 2100 asylum officials were trained through the EASO Training Curriculum.[18]

ii) *Country of Origin Information*

Country of Origin Information (COI) is essential for asylum officials during the asylum determination process. Country of Origin Information can also play a significant role in the implementation of a Common European Asylum System. Common Country of Origin Information will contribute to more convergence in the assessment of a situation in country and thus to further harmonisation of decisions. To stimulate more common COI, EASO now has set up 7 COI specialist networks (Iran, Iraq, Somalia, Syria, Pakistan, Afghanistan, and the Russian Federation), as well as a Strategic COI Network. These networks, consisting of national experts, meet regularly with the aim of pooling information and resources, exchanging good practices and jointly developing new products and approaches. To support this work, EASO has developed a common COI report methodology. [19] Moreover, EASO manages the EU-COI portal, which is a single entry point to national COI databases, so COI researchers can search for relevant COI in databases of other EU Member States and to EASO COI documents. The COI portal is being further developed with connections to additional national databases.

In 2013, over 2100 new COI documents were made available via this portal. In addition, EASO drafts reports on key countries of origin, such as Afghanistan, Somalia and Chechnya, reflecting this common format and methodology.[20]

iii) *Early warning and Preparedness System*

EASO Early warning and Preparedness System (EPS) provides risk analysis of asylum influx from third countries. Regular data collection on asylum from Member States allows for the assessment of the capacity of Member States to cope with the influx of asylum seekers they are receiving and enables a prompt detection of shortcomings and needs, thus allowing efficient and timely action to prevent critical situations. By using this system, EASO provides a constant informative function, i.e. monthly trend reports, quarterly asylum reports and ad hoc trend analysis, which are published on the EASO website.[21]

iv) *Quality*

Quality is essential to the development of the CEAS. EASO maps procedures, identifies, shares and contributes to the establishment of best practices. Based

[18] Ibid.

[19] COI report methodology (July 2012), available at <http://easo.europa.eu/wp-content/uploads/BZ3012618ENC.pdf>.

[20] For more information, please visit <http://easo.europa.eu/asylum-documentation/easo-publication-and-documentation/>.

[21] Available at <www.easo.europa.eu>.

on an analysis of the needs, EASO assists Member States to improve the quality of their asylum processes by developing and sharing practical tools, as well as manuals on the practical implementation of EU asylum legislation.

v) *Operational support*

An essential instrument in EASO's toolbox is providing operational support to the Member States' asylum systems that are under pressure or presenting specific needs. By organising Asylum Support Teams of Member States experts and EASO experts, an effective system has been put into practice to assist Member States when needed. Since becoming operational, EASO has provided operational support to 6 Member States and has ongoing operational support missions in Greece, Italy, Bulgaria, and Cyprus. [22]

vi) *External dimension*

The external dimension is a natural and indissoluble part of migration. EASO has an important role to play in the external dimension of the Common European Asylum System: support to third countries.

EASO seeks to strengthen asylum and reception capacity in third countries in order to better protect asylum seekers, facilitating the EU resettlement of refugees from outside the EU by EU Member States, and cooperating with third countries in matters connected with EASO's duties and activities. This includes supporting the implementation of regional protection programmes, and other actions relevant to durable solutions. In 2013, EASO has elaborated an external action strategy that defines the approach and general framework within which the agency will develop its work related to the external dimension of the CEAS.[23] In this context, EASO currently has an on-going project with Tunisia, Jordan and Morocco. This project promotes the participation in the work of both EASO and Frontex.

vii) *Cooperation is key*

Cooperation is key in the area of migration. It is essential that all actors concerned join forces. EASO's cooperation with the Member States and the Commission is a day-to-day reality, as is the cooperation with UNHCR and civil society. Cooperation with the Commission and with Eurostat aims to improve the necessary statistical data and information. Cooperation with Frontex, the Fundamental Rights Agency and other EU agencies takes place in many fields, from operations and training, to sharing information and statistics. Cooperation on the external dimension means cooperation with the European External Action

[22] Operating Plans and accompanying documents, available at <http://easo.europa.eu/asylum-documentation/easo-publication-and-documentation/>.

[23] EASO External Action Strategy (June 2012), available at <http://easo.europa.eu/wp-content/uploads/EASO-External-Action-Strategy.pdf>.

Service (EEAS) of the EU, the Commission, Frontex, UNHCR, and many other organisations. Training of asylum officials has been developed in close cooperation with many actors ranging from Member States, the Commission, and UNHCR to members of courts and tribunals and civil society.

viii) *Facilitators of irregular migration*

There is also the other side of migration. Migration is also a business and often involves criminal activities. Now more attention is given to this side of the coin. Recently EASO has started a special project together with Frontex, Europol, and Eurojust to obtain a better understanding on how these criminal networks of facilitators operate. A dedicated project with Malta and Italy aims to get a better insight into the organisation and functioning of these networks. The first results are expected end of 2014.[24]

ix) *Joint processing*

Joint processing has been an on-going discussion. Recently EASO has started a number of pilot projects to test its possibilities. In several areas, such as Dublin procedures, screening, and referral of vulnerable groups pilots have been realised. In this context, EASO has been able to test, together with Member States and Norway, in a very short period of time, the added value that practical cooperation in the field of joint processing can bring. The preliminary pilot projects clearly show that there are various aspects of the asylum procedure that can be done jointly and that many technical aspects contain similar elements. Moreover, the concept of joint processing is promising even though there are some challenges, mainly due to national legislation. Trust and mutual recognition are key to the success of such initiatives. Through the preliminary pilot projects, many Member States' officials experienced a new level of trust when they got access to other Member States' actual caseload. Recognising the fact that after all, challenges of a case worker or a decision maker are in nature the same as in other Member States, created an atmosphere of solidarity on a very practical level that should be further increased. EASO is currently conducting further and more wide-ranging pilot projects with a continuum of several steps of the asylum procedure.

IV. CONCLUSION

Solidarity, what is it and what it is not?

To conclude, solidarity is a word often heard and used these days. It is an essential element of living together in a Union. What would the EU be if it were

[24] For more information on this project see EASO's Newsletter (September 2014), at 14, available at <http://easo.europa.eu/wp-content/uploads/EASO-Newsletter-September.pdf>.

not a system of solidarity? But what does solidarity mean between Member States? Since the entry into force of the Lisbon Treaty[25] solidarity is part of the EU *acquis*. Solidarity is not charity. Solidarity between Member States must be based on the responsibility of each partner. Only if there is an equal understanding of responsibility there can be solidarity. This means that there must be mutual trust. Trust that all care in a responsible way for the common good. Based on this trust the discussion on solidarity can and will be a rational and honest one. This mutual trust and responsibility is the key to a common future. If one looks at the debate in the EU that feeling is sometimes lacking and that is maybe why many are afraid of thinking about the future, about the necessary next steps. Take for example mutual recognition. Mutual recognition of asylum decisions within the EU is the logical next step of an asylum system that functions within an area of free movement of persons and without internal borders (as far as Schengen is concerned).

A next step that is maybe less complicated and far-reaching as is sometimes thought. Look, for example, at the Qualification Directive, article 33 (2a): '*Member States may consider an application for international protection as inadmissible only if: another member States has granted international protection;*.'[26] This provision means in effect the acceptance of a decision of another Member State. Let's also look at the example of the Schengen visa, decisions of one Member State on the basis of common EU legislation and accepted by other Member States. Therefore, the foundations are already there, but it is clear that there absolutely needs to be a minimum of trust between Member States to make the next step. If myths and images distort reality and poison the debate, this will be difficult to achieve. That is why facts and figures are so important.

On this basis, the EU needs to have an open and sincere debate on the way ahead. It is only by working together that a truly Common European Asylum System can be further developed.

[25] See for example in the area of asylum Art. 80 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, *OJ* [2007] C 306, 13.12.2007, available at <http://europa.eu/lisbon_treaty/full_text/index_en.htm>. For more examples of solidarity clauses see J-C Piris, *supra* note 13, 275-276.

[26] Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (26 June 2013), *OJ* [2013] L 180, 29.6.2013, 60–95.

THE CJEU AS AN ASYLUM COURT: WHAT ROLE FOR HUMAN SECURITY DISCOURSES IN THE INTERPRETATION OF PERSECUTION IN THE QUALIFICATION DIRECTIVE?

Amanda Taylor

'*The interpretation of the law, rather that the law itself, is what matters most in asylum cases*.'

Dr. Connie Oxford

1. INTRODUCTION

The Court of Justice of the European Union (CJEU) is playing an ever important role in the development of European asylum law. Definitional and interpretative guidance of EU asylum legislation[1] by the CJEU has been vital in contributing to this development. With a steadily increasing amount of jurisprudence from the CJEU, thanks to the removal of restrictions for preliminary references provided for by the Lisbon Treaty,[2] the CJEU's application of EU asylum law is all the more instrumental given that both primary and secondary EU legislation make explicit reference to the application of EU asylum law in accordance with the 1951 Convention relating to the Status of Refugees and its 1967 Protocol relating to the Status of Refugees (Geneva Convention), which constitutes the centrepiece of international refugee protection.[3] Therefore, whilst the interpretation of the Geneva Convention by Member States has, up until the Treaty of Amsterdam, been largely a domestic affair, the CJEU is now tasked with applying and interpreting the 1951 Convention, including the definition of a refugee, through its reading of EU asylum law. Firstly, the Treaty of the Functioning of the European Union states that EU asylum policy must be applied in conformity with the Geneva Convention.[4] Secondly, Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficia-

[1] EU competence to legislate in asylum matters was originally provided for in Title IV, Art. 63 Treaty on the European Community (TEC) *OJ* [1999] C 340, 10.11.1997 as modified by the Treaty of Amsterdam where legislation was adopted to allocate responsibility for an asylum application, the qualification of a refugee and minimum standards of procedures, reception and temporary protection, later known as the Common European Asylum System. Legislative competence for asylum is now found in Art. 78 of the Treaty on the Functioning of the European Union *OJ* [2009] C 306/1, 17.12.2007.

[2] Art. 68 (TEC) as modified by the Treaty of Amsterdam limiting requests for preliminary rulings to only courts of last instance was abolished in the Treaty of Lisbon.

[3] Convention relating to the Status of Refugee 1951, 606 *UNTS,* at 267 and Protocol relating to the Status of Refugees 1967 606 *UNTS,* at 267.

[4] See Section 2 of this paper.

ries of international protection,[5] otherwise known as the Qualification Directive (QD), directly transposes the codification of rights which are listed in the Geneva Convention.

Along with the *lex specialis* nature of the Geneva Convention in EU law, the CJEU's pivotal role in the interpretation of the Qualification Directive must also be done in accordance with the full application of the European Charter of Fundamental Rights (EChFR) and must be interpreted in line with the European Convention on Human Rights (ECHR) and International treaties, which have been ratified by Member States.[6] It is the interpretation of key terms of the Qualification Directive, in light of this layered framework, which has come recently to the forefront in CJEU case law and will be the subject of a critical examination in this paper.

The present article will pay particular attention to the interpretation by the CJEU of the notion of persecution, which has been directly transposed into the Qualification Directive from the Geneva Convention and is the defining element for refugee status. It will firstly track the implications of the Court's methodology and approach to the notion of persecution in the context of applying the QD in two particular cases. This critical examination will propose that in spite of the *lex specialis* position of the Geneva Convention in the Qualification Directive and EU primary law, the CJEU has instead preferred to transpose the yardstick of violations of torture, inhumane or degrading treatment or punishment listed in Article 3 of the ECHR[7] to measure the contours of persecution in the QD. The article will propose that specific reliance on certain rights in a regional instrument could risk delimiting the scope of persecution quite considerably. The second section will, thus, revert back to the foundational principles of international refugee law, in order to set the stage for a modification of the prevailing CJEU paradigm in EU asylum law. It will be within this framework that the vehicle of Human Security will be presented as a means to keep faithful to the object and purpose of the Geneva Convention, as a driver of refugee protection and as a way to ensure that interpretative guidance in EU asylum legislation is not solely placed on any one specific treaty.

2. THE INTERPRETATIVE ROLE OF THE CJEU IN EU ASYLUM LAW: PARAMETERS AND CONTENT OF THE QUALIFICATION DIRECTIVE

Directive 2011/95/EU establishes standards and common criteria to be followed by all EU Member States for the recognition of refugees.[8] It implements the

[5] Directive 2011/95/EU of the European Parliament and the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, *OJ* [2011] L 337/9, 20.12.2011.

[6] See Section 2 of this paper.

[7] Art. 3 Prohibition of torture: No one shall be subjected to torture or to inhuman or degrading treatment or punishment, European Convention of Human Rights as amended by Protocols Nos. 11 and 14, 1950, 5 *ETS*.

[8] See Recital 6, *supra* note 5. It is the recast legislation of Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons

Convention's definition of a refugee[9] and is one of few pieces of legislation which attempts at defining the Convention's notion of 'being persecuted.'[10] The definition of persecution in Article 9 of the QD[11] is one which is crucial given that the term is left undefined in the 1951 Convention. Arguably, then, the articulation and elaboration of the modalities of persecution[12] in the Qualification Directive seek to guide Member States domestic authorities in the application of the Geneva Convention.[13] Thus, Member States not only have a public international law duty to comply with the Geneva Convention, they are further legally obliged to transpose the elaborated definition, codified in the Qualification Directive, into their domestic national systems. Given that the term persecution in International refugee law is accepted as being the cornerstone of refugee law and the linchpin to all other provisions in the Convention,[14] CJEU jurisprudence impacts significantly upon the transposition of Convention obligations by Member States and is all the more important given that no centralised judicial mechanism is foreseen within the Convention itself, adding to the potential trans-regional use of the Court's case law.

Nevertheless, the interpretative task of the Court is made particularly complex given the plurality of sources that are explicitly incorporated into the EU's asylum framework and that are to be taken into account when interpreting the Union *acquis*, including the QD.[15] Firstly, in addition to the Preamble of the QD, which states that Union asylum legislation must be achieved through the Conventions

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as refugees or as persons who otherwise need international protection and the content of protection granted, one of the initial legislative instruments to make up the Common European Asylum System, *OJ* [2004] L 304/12, 30.9.2004.

[9] Art. 1A (2) *supra* note 3 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it' is used verbatim in the Qualification Directive in Art. 2(d).

[10] H. Storey, 'Persecution: Towards a working definition' in V. Chetail and C. Bauloz (ed), *Research Handbook on International Law and Migration* (Graduate Institute of International and Development Studies, 2014), 459-518.

[11] *Supra* note 5, Art. 9 Acts of persecution 1. In order to be regarded as an act of persecution within the meaning of Art. 1(A) of the Geneva Convention, an act must: (a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Art. 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a).

[12] *Supra* note 5 acts of Persecution (Art. 9) Actors of persecution (Art. 6) Actors of protection (Art. 7) International Protection (Art. 8).

[13] ECJ, Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla and Others* [2010] *ECR* I-01493 para. 52; ECJ, Cases C-71/11 and C-99/11, *Federal Republic of Germany v Y and Z* [2012] *ECR* I-0000 ; ECJ, Cases C-199/12 to C-201/12, *Minister voor Immigratie en Asiel v X, Y and Z* [2013], *NYR* para. 39.

[14] See *supra* note 10, at 480.

[15] It is well settled case law from the CJEU that secondary EU legislation must be interpreted and applied so as to safeguard fundamental rights: ECJ, Case C-5/88, *Wachauf [1989] ECR 2609;* ECJ*, Case* C-101/01, *Lindquist [2004] QB 1014;* ECJ*, Case* C-540/03, *Parliament v Council [2006] ECR I-5769.*

full and inclusive application,[16] Article 78(1) TFEU highlights that the Union policy on asylum must be in accordance with the Geneva Convention, and other relevant Treaties.[17] By implication this means that all EU secondary legislation in asylum matters, along with the interpretation given to it by the CJEU, must comply with the Convention.

Secondly, the CJEU must interpret EU legislation in accordance with International human rights Treaties and the European Convention on Human Rights.[18] Thirdly, since the entry into force of the Treaty of Lisbon, the Charter of Fundamental Rights is now primary legislation[19] and, accordingly, conformity with the Charter, including the right to asylum,[20] will be a requirement for the validity of the Union's secondary legislation and must be interpreted in light of this source.[21] The CJEU is, thus, faced with a panoply of inter-related human rights systems, some of which directly relate to asylum law and the granting of status and others which relate to the safeguarding of persons against expulsion.[22] According to Advocate General Maduro, this interaction can be used to enrich the integrity of each system whilst forging a 'European area of protection of fundamental rights.'[23] However, behind this opportunity for a constructive constitutional pluralism[24] resides the CJEU's recent jurisprudence on the definition of 'persecution' in the QD. It is submitted that in two previous referrals to the

[16] Recital 2 and 3 of the Qualification Directive.

[17] 1.The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties. This has also been confirmed by the CJEU in ECJ, Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Abdulla and Others* [2010] *ECR* I-1493 paras. 53 and 54; ECJ, Case C-31/09, *Bolbol* [2010] *ECR* I-0000 para. 38; ECJ, Cases C-57/09 and C-101/09, *Germany v. B and D* [2010] *ECR* I-10979 para. 78.

[18] Not only is this specified in Art. 78 TFEU (other relevant Treaties) but the CJEU has consistently ruled that the ECHR has a particularly important place as a source of general principles of Fundamental Rights and are taken into account regularly by the CJEU: ECJ, Case 222/84, *Johnston* [1986] *ECR* 1651.

[19] Art. 6(1) TEU.

[20] Art. 18 Charter of Fundamental Rights of the European Union, *OJ* [2009] C 326/391, 26.10.2012.

[21] Art. 51 Charter of Fundamental Rights of the European Union, *OJ* [2009] C 326/391, 26.10.2012.

[22] In this regard the European Court of Human Rights has been extremely articulate in developing obligations on States akin to the principle of *non-refoulement* through the use of Art. 3 and exceptionally other Arts. where there has been a flagrant breach. See ECtHR, *Soering v United Kingdom*, 11 EHRR 439, 1989; ECtHR *Chahal v. United Kingdom*, 23 EHRR 413, 1996; ECtHR *Nasri v France,* A/324 21 EHRR, 1996; ECtHR *M.S.S v Belgium and Greece*, Appl. No. 30696/09, 2011 09 to name but a few.

[23] AG Opinion, CJEUECJ, AG Opinion Case C-465/07, *Meki Elgafaji, Noor Elgafaji v Staatssecretaris van Justitie* Elgafaji [2009] *ECR I*-921, para. 22.

[24] Used by C. Costello to mean the 'desirable mode of interaction between human rights regimes, whereby each cultivates a degree of openness to the others, whilst maintaining its own integrity.' EDAL presentation 2014, available at <http://www.asylumlawdatabase.eu/en/content/edal-conf-2014-plenary-session-17-jan-dr-cathryn-costello>.

court (*Federal Republic of Germany v Y,Z*[25] and *Minister voor Immigratie en Asiel v X,Y,Z*)[26] the CJEU has pursued a piecemeal approach when applying the available interpretative sources, excessively deferring to Article 3 of the ECHR in its interpretation of Article 9 QD, acts of persecution. Arguably this fails to take account of the specificities of refugee law, including the entrenched status of the Geneva Convention in the Qualification Directive and the Charter in the hierarchy of the Union's sources and risks disconnecting persecution from a systemic understanding of refugee law; notably protection.

2.1 ECHR as a point of departure for the CJEU in its definition of persecution

The CJEU's judgment in *Germany v Y and Z* was the first on the interpretation of persecution in the QD. The preliminary reference was submitted by the German Federal Administrative Court who had received an appeal from the Bundesamt concerning the future manifestation of religion and whether this would amount to persecution within the meaning of Article 9(1) of the QD. In particular, the case concerned two Pakastani Ahmadiyya's who claimed that membership of this community had forced them to leave Pakistan due to physical violence and imprisonment. Indeed, the Pakastani Criminal Code stipulates that members of the Ahmadiyya religious community may face imprisonment or even punishment by death for propagating their faith.[27] In response, the Bundesamt ruled that there was insufficient evidence to find that the applicants had a well-founded fear of persecution due to their religious orientation if returned back to Pakistan.[28] This was principally because they had not shown that the 'core area' of freedom of religion had been infringed, meaning that the right to manifest ones faith in private had not been restricted.[29] Conversely, restrictions on the public manifestation of faith, unless to avoid the death penalty,[30] did not fall within the core area and were not enough to amount to persecution since public worship could be refrained upon.[31] In order to clarify which religious activities fell under the definition of persecution in the QD, the German Federal Administrative Court referred three questions to the CJEU; firstly, do all restrictions to the right to freedom of religion, as outlined in Article 9 of the ECHR and Article 10 of the Charter of Fundamental Rights,[32] amount to persecution in the QD, or only those

[25] ECJ, Case C-71/11 and C-99/11, *Federal Republic of Germany v Y and Z* [2012] *ECR* I-0000.

[26] ECJ, Case C-199/12 to C-201/12, *Minister voor Immigratie en Asiel v X, Y and Z* [2013], *NYR.*

[27] *Supra* note 25 para. 31.

[28] Ibid.,para. 33.

[29] See Advocate General Bot Opinion, *supra* note 25, para. 16.

[30] BVerfG, 19 Dec 1994, 2 BvR 1426/91.

[31] *Supra* note 25, para. 17.

[32] See Art. 9, *supra* note 7 and *supra* note 10 – Freedom of thought, conscience and religion
1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are

measures which affect the core of the right. Secondly, if only the core is protected what does this comprise of, and thirdly, if an individual were able to abstain from religious practice in public would this still amount to a well-founded fear of persecution in the QD.[33]

In response to the above questions, the CJEU concluded that all kind of acts which interfere with the right of freedom of religion are to be assessed, regardless of whether the act affects the *forum internum* or *forum externum* of the right.[34] Furthermore, an interference with the right to religion could be so serious as to be comparable to a violation of an EHCR non-derogable right, listed in Article 15 of the Convention[35] but this would have to be a severe violation with a significant effect on the person.[36] In addition, an act will amount to one of persecution where the gravity is equivalent to a violation of a non-derogable right under the ECHR.[37] The court later simplifies this in its conclusion by stating that an act will amount to persecution where the subject, as a consequence of exercising his right to religious freedom, runs a real risk of *inter alia* being subject to torture, inhuman or degrading treatment or persecution.[38] No further elaboration is given by the CJEU on how to assess whether a violation of the right to religion, as protected by Article 9 ECHR and Article 10 ChFR is comparable in terms of severity, significance or gravity as a violation of a non-derogable ECHR right, nor is any further explanation given as to the meaning of '*inter alia*', notably whether other fundamental rights are to be taken into account and if so which ones.[39] Lastly, the CJEU concluded that abstaining from religious activity is not relevant to the assessment of a well-founded fear of and would in fact counter the protection which the Directive is to afford the applicant.

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prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. Art. 10 Freedom of thought, conscience and religion 1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.

[33] *Supra* note 25, para. 78.

[34] *Supra* note 25, para. 62.

[35] Art. 15: Derogation in time of emergency 1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.2. No derogation from Art. 2, except in respect of deaths resulting from lawful acts of war, or from Arts. 3, 4 (para. 1) and 7 shall be made under this provision 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

[36] *Supra* note 25, paras. 57-58.

[37] Para. 61.

[38] Para. 72.

[39] See in particular L. Leboeuf and L. Tsourdi, 'Towards a Re-definition of Persecution? Assessing the Potential Impact of Y and Z', 13 *Human Rights Law Review* 2013, 402-415.

The approach of the Court in this case risks delimiting the ambit of persecution in the Qualification Directive quite considerably for two reasons.[40] Firstly, the CJEU has put in place a consequential test, which places emphasis on the concrete consequences resulting from the exercise of religious freedom rather than assessing when interference with the enjoyment of the right becomes an act of persecution itself. In other words, and as Lehmann points out, the Court has chosen to pursue a line of argumentation which determines the severity of an act as persecutory on the basis of 'the nature of the repression' rather than on the particular aspect of religious freedom that is being restricted.[41] Whereas some authors have praised the court for focusing on the possible persecutory effects that could accompany the exercise of a right,[42] the present author believes that too strong a focus on the degree of sanctions as a marker of persecution could obviate from an assessment of the actual infringement of the right, particularly troublesome where the sanction is only viewed as persecutory if it concerns ill-treatment. Arguably, by not capturing the residual content of the right and the criteria for establishing the harm necessary to amount to persecution in the context of religious orientation itself, the CJEU has failed to take into account guidance from both the UNHCR and Human Rights Committee which lists persecution for reasons of religion as discrimination, including restrictions and limitations on religious belief, forced conversion, and forced compliance with religious practices.[43] This approach has partially been adopted in Article 9(2) of the Qualification Directive, which lists non-exhaustive examples of acts of persecution. These not only include physical or mental violence, but also discriminatory legal, administrative, police and/or judicial measures, prosecution or punishment as well as denial of judicial redress which is discriminatory. Therefore, not only has the CJEU ignored the wording of the QD, they have also pursued a type of line drawing exercise, between the right and consequences, where the emphasis is placed far more on the latter to the apparent exclusion of the former, an approach which the Court has, unfortunately, continued to follow in X,Y and Z.

Secondly, and as indicated above, the CJEU has equated the severity of sanctions of religious freedom as amounting to persecution where a non-derogable right is violated, thus, where there is a risk of torture, inhuman and degrad-

[40] For a detailed analysis see J. Lehmann, 'Persecution, Concealment and the Limits of a Human Rights Approach in (European) Asylum Law- The case of Germany v Y and Z in the Court of Justice of the European Union', *International Journal of Refugee Law* 2014, avaliable at <http://ijrl.oxfordjournals.org/content/early/2014/03/26/ijrl.eeu006.full.pdf>.

[41] See J.Lehmann who argues that the Court has followed the approach of the AG heavily in this regard noting that persecution is characterised 'not by the fact that it occurred in the sphere of freedom of religion, but by the nature of the repression inflicted on the individual and its consequences.'

[42] See L. Tsourdi, 'On the Borders of Refugee Protection: The impact of Human Rights on Refugee Law- Comparative Practice and Theory', *Final Conference Report* 2013, avaliable at <http://rli.sas.ac.uk/wp-content/uploads/2012/07/FINAL-Conference-Report.pdf>.

[43] See UN High Commission for Refugees (UNHCR), 'Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Art. 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees', *HCR/GIP/04/06* (28 April 2004) , available at <http://www.refworld.org/docid/4090f9794.html>.

ing treatment as listed in the ECHR. Arguably, in this manner, the Court has chosen to carve out an Article 3 ECHR threshold for assessing when a violation of the right to freedom of religion amounts to persecution in the QD, whilst failing to recognise that persecution in International refugee law is not limited solely to Article 3 ECHR breaches. This is made clear in the wording of both Article 9(1)(a) of the QD, referring to 'basic human rights' and Article 9(1)(b) of the QD, which lists the accumulation of various measures, including violations of *human rights* as constituting an act of persecution. Given the obligation of EU legislation to comply with the Charter, as noted above, and the reference to compliance with International treaties in both the TFEU and the Preamble of the QD when applying EU asylum law, it is clear that reference to human rights in Article 9(1) of the QD is not limited to the rights contained within Article 3 of the ECHR but should be interpreted as encompassing a broader spectrum of human rights as codified by international and EU instruments. Indeed, the CJEU's reasoning is highly reminiscent of the ECtHR's judgment in *M.E. v France*[44] and *N.K. v France*[45] which concerned the *expulsion* of Coptic Christians to Egypt and the Ahdmadiyya to Pakistan. In both cases the ECtHR held that the return of both applicants would violate Article 3 if they were to be returned to their country of origin because of threats of physical harm due to their religion. Whilst this seems to be a logical conclusion when assessing Article 3 breaches under the ECHR, to import the same Article 3 yardstick for assessing persecution in EU asylum claims seems to be a far too narrow approach for the definition of persecution, elaborated upon by the Qualification Directive itself as well as the interpretation given to the term by academics and practitioners.[46]

The second case to consider what constitutes an act of persecution was the referral by the Dutch *Raad van State in X, Y and Z*. In a case which attracted much attention partly due to the very powerful jurisprudence to come out of the UK, New Zealand, Australia and ECtHR[47] previously on the assessment of lesbian, gay, bisexual, transgender and intersex (LGBTI) refugee claims, the context of the referral concerned three male asylum applicants from Sierra Leone, Uganda and Senegal respectively. In all three countries, domestic legislation criminalises homosexual acts, where if convicted the individual faces different terms of imprisonment. Consequently, the applicants argued that if they

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[44] ECtHR, *M.E. v France*, Appl. No. 50094/10, 2013.

[45] EctHR, *N.K v France,* Appl. No. 7974/11, 2013.

[46] See *supra* note 10; For further arguments on this point see International Commission of Jurists, 'X, Y and Z: a glass half full for "rainbow refugees"? The International Commission of Jurists' observations on the judgment of the Court of Justice of the European Union in X, Y and Z v. Minister voor Immigratie en Asiel' 2014, avaliable at <http://www.refworld.org/pdfid/538dca6f0.pdf>. European Council on Refugees and Exiles, 'Position on the Interpretation of Article 1 of the Refugee Convention', *ECRE* (September 2000), para. 46, available at <http://www.ecre.org/topics/areas-of-work/protection-in-europe/155.html>; UNHCR Guidelines on International Protection: Gender-Related Persecution within the context of Art. 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (2002), available at <http://www.unhcr.org/3d58ddef4.html>.

[47] UKSC, HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department [2010] UKSC 31; Refugee Appeal No. 74665/03 [2005] INLR 568 NZ; Appellant S395/2002 v Minister for Immigration and Multicultural affairs [2003] 216 CLR 473 Australia.

were returned to their country of origin they would face persecution on grounds of their homosexuality. In the referral, the CJEU was asked whether homosexuals, for the purpose of an application for refugee status, can be regarded as a particular social group and whether legislation in a country of origin which criminalises homosexuality, can amount to an act of persecution where the sanction is a threat of prosecution.[48] In response to the membership question, the CJEU referred to Article 10(1)(d), which lists criteria for the definition of a particular social group,[49] and recognised that the distinct identity of homosexuals, perceived as being different by surrounding society, was supported in this case due to the existence of criminal law specifically targeting homosexuals.[50] This is very curious and arguably contradictory given that the CJEU later ruled that the existence of legislation criminalising homosexuality *per se* did not reach 'the level of seriousness'[51] to constitute an act of persecution within the meaning of Article 9(1).[52] In other words, although the CJEU used criminal legislation to signify that a group had been singled out, thus fulfilling the criteria of Article 10(1)(d), the Court did not consider the existence of criminal legislation as a sufficient indicator of persecution itself. Instead, the Court ruled that only a term of imprisonment *which is actually applied* as a sanction for committing homosexual acts would amount to an act of persecution within the meaning of Article 9.[53] Therefore, and in a similar line of reasoning to *Germany v Y and Z*, the CJEU has compartmentalised the criminal provision and the sanction which accompanies it: rather than focusing on the criminal provision itself, which arguably infringes the right to human dignity[54] and the right to private and family life[55] the Court has instead focused on the severity of sanctions which must be *actually applied* following the breach of the criminal legislation, rather than the breach of the individual's right itself.

Whilst the ECHR is not explicitly referred to, the requisite severity, for the sanction to be persecutory is still termed in the language of an ECHR non-

[48] *Supra* note 26, para. 37. The other question presented to the court but due to space constraints will not be discussed here was similar to the concealment question posed to the Court in Y and Z, notably, can an applicant be expected to conceal or exercise restraint in acts that would trigger persecutory treatment and would this, consequently, negate a well-founded fear of persecution. The CJEU followed a similar line of reasoning as in Y and Z concluding that the Directive did not lay down limits on the attitudes members of a PSG must adopt with respect to their identity in Art. 10(1)(d) and thus questions of avoidance or restraint are redundant for the purpose of refugee determination.

[49] Art. 10 (d) of the Qualification Directive; a group shall be considered to form a particular social group where in particular: – members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and – that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.

[50] *Supra* note 26, para. 48.

[51] Para. 53.

[52] S. Chevlan, 'XYZ v Minister voor Immigratie en Asiel – Case Comment' (November 2013), avaliable at <http://www.scribd.com/doc/182631663/XYZ-v-Minister-voor-Immigratie-en-Asiel-Case-Comment-S-Chelvan-8-November-2013-pdf>.

[53] *Supra* note 26, para. 61.

[54] *Supra* note 20, Art. 1.

[55] *Supra* note 20 Art. 7.

derogable right violation, i.e. deprivation of liberty. Granted, the CJEU was asked whether legislation criminalising homosexuality fulfils the criteria of persecution outlined in Article 9(1)(a) and Article 9(2)(c),[56] which refers only to prosecution or punishment disproportionate or discriminatory. The referral did not ask the Court to assess whether the criminal legislation breached Article 9(2)(b) which addresses the sole existence of discriminatory measures.[57] Thus, whilst the CJEU was confined from the outset it is, nonetheless, worth noting that the Court did not once engage with the vast amount of literature and case law on legislation which criminalises homosexuality and the climate of fear that accompanies it. A running trend in literature highlights that this type of legislation does not necessarily have to be enforced for it to amount to persecution.[58] Not once does the Court look at the legislation through the prism of the right to privacy,[59] the right to non-discrimination on grounds of sexual orientation[60] or the right to human dignity[61] to assess whether the criminal legislation itself has violated them and whether this would be sufficiently serious to be persecutory.

A trajectory line is thus emerging whereby CJEU jurisprudence has defined persecution as a violation of a non-derogable ECHR right when brought about by actions falling into the ambit of another fundamental right.[62] No attention is paid to the infringement of the fundamental right itself.

2.2 **The dangers of an ECHR surfeit**

The two cases above have shown complacency by the Court to define persecution as anything other than a non-derogable ECHR right. This is problematic for three principal reasons. Firstly, it goes against a consensus position by both academics and the UNHCR that the contours of 'persecution' in the Geneva Convention are circumscribed according to International human rights law, not to a specific regional treaty, and not to treatment which only amounts to torture, inhumane or degrading treatment.[63] As Storey highlights, when interpreting the

[56] Art. 9 para. 2(a) QD. Acts of persecution as qualified in para. 1 can, inter alia, take the form of: (c) prosecution or punishment which is disproportionate or discriminatory;

[57] Art. 9 para. 2(b) QD legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner.

[58] Interestingly enough the ECtHR has been a fervent supporter of establishing an infringement of Art. 8 where these laws exist. ECtHR, *Dudgeon v UK*, Appl. No.. 35765/97, 2000; ECtHR, *Norris v Ireland*, Appl. No. 10581/83, 1998. Notably, UN High Commissioner for Refugees (UNHCR), 'Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Art. 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees', *HCR/GIP/12/01* (23 October 2012), available at <http://www.refworld.org/docid/50348afc2.html>, highlights that the climate of fear and impunity for non-state agent harm due to the existence of such laws amounts to persecution.

[59] *Supra* note 20, Art. 7.

[60] *Supra* note 20, Art. 21(1).

[61] *Supra* note 20, Art. 1.

[62] *Supra* note 39, at 79.

[63] As Storey notes *supra* note 10 early approaches to the definition of persecution referred to Art. 33 of the Geneva Convention when defining the Art. 1(A) of the Geneva Convention. See A. Zimmermann, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Oxford: Oxford University Press 2011), 1387-9. This approach was rebutted by the UNHCR and

definition of persecution, what is crucial is that it is based on international human rights norms, not on the provisions of one specific Treaty.[64] Therefore, the interpretation of the QD and its application should take into due account other international instruments such as the International Covenant of Civil and Political Rights[65], the International Covenant on Economic, Social and Cultural Rights[66] and the Universal Declaration of Human Rights.[67]

Moreover, at issue is not solely the category of the right, but an assessment of the nature of threat or restriction and the seriousness of the harm threatened.[68] Consequently, a mechanical application of Article 3 ECHR directly contradicts the wording of EU secondary law, namely the Qualification Directive which does not limit the scope of persecution to physical harm, but also refers to discriminatory judicial, legal and administrative measures.[69] Furthermore, Article 9(1)(b) explicitly stipulates that an act of persecution can arise from an accumulation of various measures, including violations of human rights. This mirrors UNHCR guidance on the definition of persecution which calls for recognition on cumulative grounds that measures including lesser human rights violations can be aggregated and then amount to a serious human rights violation and thus persecution.[70] In other words, an applicant may face discrimination, which on its own may not be sufficiently severe to amount to persecution, yet taken together with the geographical, historical and ethnological context and atmosphere within the country could be enough to amount to a well-founded fear of persecution.

Secondly, to refer solely to the ECHR in its determination would be to bring the thresholds of derogable and non-derogable rights from the Convention into asylum law. Whilst, Article 9(1)(a) of the QD makes specific reference to Article 15(2) of the ECHR as a yardstick to measure whether a violation of a human right is sufficiently severe to be an act of persecution, the use of the words 'in particular' serves to highlight the illustrative and non-exhaustive approach of the article. It would be ill advised to determine an act of persecution on the basis of a non-derogable ECHR right given that non-derogability differs accord-

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others as an overly restrictive reading, however. Since then reference is constituently made to the human rights framework when assessing the definition of persecution. J.C.Hathaway, *The Law of Refugee Status* (Toronto: Butterworths 1991).

[64] *Surpa* note 10, at 471.

[65] International Covenant on Civil and Political Rights (ICCPR) 999 *UNTS* 171 and 1057 *UNTS* 407 / 1980 ATS 23 / 6 ILM 368.

[66] UN General Assembly, 'International Covenant on Economic, Social and Cultural Rights', *UNTS* (16 December 1966), at 3.

[67] UN General Assembly, Universal Declaration of Human Rights 1948, 217 A (III).

[68] R. Haines 'Gender-Related persecution', in E.Feller, V.Tolk and F.Nicholson (eds.), *Refugee Protection in International Law* (Cambridge: Cambridge University Press 2003), at 329.

[69] In addition see Art. 9(2) of the Qualification Directive.

[70] UN High Commissioner for Refugees (UNHCR), 'Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', *HCR/1P/4/ENG/REV* (December 2011), at 84. An approach that has also been recognised by the ECHR in *NA v UK* 'the need to consider all relevant factors cumulatively and the need to give appropriate weight to the general situation in the country of destination derive from the obligation to consider all relevant circumstances of the case.'

ing to the International human rights Treaty.[71] As pointed out by Battjes, Article 4 of the ICCPR, in contrast to Article 15(2) of the ECHR, lists the right to freedom of thought, conscious and religion as non-derogable rights.[72] This touches upon the idea that whilst a human rights violation is indicative of persecution, the thresholds of derogability, particular to each Human Rights system, should not be determinative for the assessment of 'sufficiently severe' in the QD. Severity should instead depend on a host of factors including, but not limited to, the general situation in the country of origin (comprised of legislation, societal behaviour, cultural acceptance) the nature and severity of the harm to the right, the nature of the State response and the effect on the person concerned.[73] To replicate the same human rights defeasible standards into refugee law would necessarily bring a normative hierarchy into the protection system. This could result in the downplaying of rights which are seen as being inferior, ie socio-economic rights and could consequently legitimise certain acts of persecution, thus undercutting the autonomous and wider scope of harm relevant for the Convention's and QD's refugee definition.[74]

Thirdly, and linked to the point mentioned above, there is the danger of blindfully transposing the ECtHR's standards on derogable rights in the context of a *non-refoulement* case to the interpretation of persecution in the Qualification Directive. Naturally, ECtHR jurisprudence will be taken into account when there is a risk of a corresponding Charter right being violated.[75] Furthermore, it is to be noted that the Court has previously taken progressive steps in the protection of the freedom to manifest one's religion[76] and has defined discriminatory legislation as being, itself, persecutory.[77] In this regard, however, it has to be underlined that the ECtHR has its own tailored thresholds when there is a risk to a derogable right if the applicant were sent back to the country of origin. The threshold is a risk of a 'flagrant denial' of a derogable right,[78] which has proved exceptionally difficult to substantiate. However, with the ECtHR maintaining that

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[71] See AG Sharpston Opinion who argues for the converse 'Article 9 refers to the indefeasible rights in the ECHR, and that should be the reference point for assessing acts of persecution', *supra* note 26, para. 72.

[72] H. Battjes, *European Asylum Law* (Leiden: Martinus Nijhoff Publishers 2006), at 233.

[73] This interpretation comes out of a cumulative reading of Arts. 4, 7 9 and 10 of the Qualification Directive.

[74] *Supra* note 40, at 79 where Lehmann points out that the ambit of Human Rights Law and Refugee law are related they are still independent. 'Whist Human Rights accepts that the State can put in place limits on the exercise of fundamental rights, ie in times of emergency, refugee law is presumed on state insecurity and the breakdown of the bond between citizen and State in the country of origin. To place a justification on a human rights restriction in refugee law would be to flout the safeguards of the Refugee Convention.'

[75] *Supra* note 20, Art. 52.

[76] ECtHR, *Z and T v UK*, Appl. No. 27034/05, 2006.

[77] *Supra* note 58. Although recent EctHR jurisprudence on sexual orientation cases have been highly regressive, advocating the highly criticised notion of concealment ECtHR, *M.E v Sweden,* Appl. No. 71398/12*,* 2014.

[78] ECtHR, *Soering v United Kingdom*, 161 (ser. A) 113, 1989; ECtHR, *Einhorn v. France*, Appl. No. 71555/01, 2001 ; and ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, Appl. No. 8139/09 ECHR 56, 2012.

'very limited assistance can be derived from derogable rights themselves'[79], it would be dangerous to export this threshold to the QD especially since flagrant denial appears to be far more stringent than serious violations.[80] Yet, the CJEU appears to be moving in this direction with both Advocate General Sharpston and Advocate General Bot in *Federal Republic of Germany v Y,Z* and *Minister voor Immigratie en Asiel v X,Y,Z* equating persecution under the QD with a systemic infringement of fundamental rights[81] and deprivation of the most essential rights.[82] This paves the way for an unreasonably high threshold of persecution which would implicitly rely on the scope of *non-refoulement* under the ECHR to define persecution. However, this would not only contradict the distinctive wording of the Qualification Directive but also the interpretation given to persecution by the UNHCR and academics.[83]

The arguments above have shown that the CJEU remains latched on to an ECHR paradigm, when interpreting 'persecution' for the purposes of applying the QD. This consequently afflicts the scope of the Directive's application by requiring a high threshold of principally physical harm to prove persecution. This is to the detriment of international protection and fails to be faithful to the wording of the QD and the plurality of human rights sources which the court is obliged to take into account when interpreting EU asylum law, as highlighted in the Preamble of the Qualification Directive.[84] In the next section it will be argued that the prevailing starting point for judicial dialogue amongst both the CJEU and national courts could be displaced so as to take another approach into account, specifically one which looks to the Geneva Convention as the primary referent point and its object and purpose. One such paradigm which aligns with the purpose of the Convention, providing a fertile terrain for discussion is the notion of Human Security.

3. A SYSTEMIC INTERPRETATION OF PERSECUTION: PROTECTION AND SECURITY

As highlighted above, persecution has not been defined in the Geneva Convention, its *travaux preparatoires* nor is any definitional guidance provided in the documents preceding it, ie the 1938 Intergovermental Committee on Refugees[85] and the 1946 IRO Constitution, which incorporates 'persecution, or fear, based

[79] ECtHR, *Soering v United Kingdom* , 161 (ser. A) 113, 1989.

[80] This appears to be the case given that only one claim of a derogable article under the ECHR has been successful to stop *refoulement.* ECtHR, *Othman (Abu Qatada) v. the United Kingdom,* Appl. No. 8139/09 ECHR 56, 2012.

[81] *Supra* note 25, para. 28; *Supra* note 26, para. 41.

[82] *Supra* note 25, para. 29.

[83] See UNHCR, *supra* note 46.

[84] Preamble of QD (17) With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by the obligations under instruments of international law to which they are party, including in particular those that prohibit discrimination.

[85] Intergovernmental Committee on Refugees (1947) 1 International Organisation 144 including persons forced to emigrate on account of political opinions, religious beliefs or racial origin.

on reasonable grounds of persecution because of race, religious, nationality or political opinions' as an objection to a refugee's repatriation.[86] Whilst it is clear that the notion of persecution is a component of the refugee concept, no food for thought was given to the elaboration of persecution itself. It is in this manner that Article 31.1 of the Vienna Convention on the Law of Treaties, ie the ordinary meaning to be given to the terms of a treaty, is rendered particularly difficult to apply.[87]

Nevertheless, the context, object and purpose of the Geneva Convention may be better established, especially when one takes account of the 'preconditions' for refugeehood which were first established in the British Aliens Act 1905.[88] As McAdam notes the Aliens Act refers to a permission to land where an 'immigrant seeks to avoid prosecution, or punishment on religious or political grounds for an offence of a political character, or persecution, involving danger of imprisonment or danger to life or limb.'[89] Underpinning these conditions was the concept of protection, thus the Aliens Act focused on particular groups of 'immigrants', who would be most in need of the UK's assistance. This foreshadowed later developments in international documents which referred to 'guarantees for a refugee's security,'[90] and later explicit reference that persecution is interdependent with a failure by the State to perform its duty of protection to its own population; being outside his country of origin, a refugee is one who 'no longer enjoys the protection of the government of that country.'[91] Thus, from very early on a link had been made between a failure by the State to protect the safety of a particular group within its territory and the need for the international community to step in and provide its own assistance to the group. As Hathaway, Matthew, Foster and Storey all point out 'the 1951 Convention and its predecessors were responses by the international community to the fact that under international law refugees were people defined by the failure of their own State to protect them.'[92]

It is in this inextricable linkage between persecution and notions of protection that the metric of security, notably the individual's security, becomes the clearest indicator of when the bond between individual and state has broken down. Whilst many lawyers would balk at the notion of Human Security which has emerged from a socio-political forum with no normative elements,[93] it may be

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[86] Constitution of the International Refugee Organisation (entered into force 20 Aug 1948) 18 *UNCTS* 3.

[87] Art. 31.1 United Nations, Vienna Convention on the Law of Treaties 1969, 1155 *UNTS*, at 33.

[88] For a very well articulated article which re-assess the origins of persecution please refer to J. McAdam, 'Rethinking the origins of 'Persecution' in refugee law,' 25 *International Journal of Refugee Law* 2014, 667.

[89] *Supra* note 88, at 688.

[90] League of Nations, 'Russian Refugees: Draft report to the Fifth Committee' (20 September 1922), *Supra* note 88, at 675.

[91] *Supra* note 88, at 688.

[92] P. Matthew, JC Hathaway and M. Foster, 'The Role of State protection in Refugee Analysis', 15 *Int'l J. Refugee L.* 15, 3 (2003),: 444-60;, *Supra* note 10, at 483.

[93] The notion emerged from a UNDP report in 1994 which stated that the concept of security had been too narrowly construed in terms of territorial sovereignty. Thus the idea of human

far more suited to the determination of persecution in the Refugee Convention and consequently the QD than one might otherwise think. This is principally because Human Security focuses on the need of protection, on concrete human rights norms, on the indivisible and interdependent nature of human rights and views threats to the physical integrity of individuals as security threats.[94] As a consequence of its emphasis on the safety of an individual and the clear correlation between insecurity and infringements of human rights, the security paradigm has been present in UNHCR guidance, case law and academic writing. To illustrate, the UNHCR Handbook pays much attention to the cumulative effect of measures not in themselves amounting to persecution (ie discrimination in different forms) that could nonetheless have adverse factors (ie general atmosphere of insecurity in the country of origin) which, in conjunction with minor infringements of human rights, could constitute persecution.[95] This is further reiterated by Feller who states that cumulative factors can make life in the country of origin so insecure, from many perspectives that the only way out of this predicament is to leave the country.[96] A clear embodiment of this approach is Article 9(1)(b) of the QD which, as mentioned earlier, views an act of persecution as an accumulation of *various measures* … which are sufficiently severe as to affect an individual *in a similar manner* as 9(1)(a). Arguably, the term 'measures' could be interpreted as factors such as internal displacement, failure of state *infra*structure, poverty, famine and disease which render the security of an individual very precarious. This approach has, interestingly, been taken by the ECtHR in *NA v UK* and *Sufi and Elmi v UK* where the court ruled that removal to Sri Lanka and Somalia respectively, would breach Article 3. In both cases the Court took account of the security situation, including situations of heightened insecurity and gave a thorough assessment of all relevant factors which would increase the risk of ill treatment, including general violence, forcible recruitment, and safety of travel.[97]

By taking broader social, political and economic elements into account, then, Human Security notions could be treated as a set of indicia to demonstrate persecution. By highlighting some factors or characteristics which have led to insecurity, Human Security could indicate human rights breaches and bring the full ambit of the Charter's provisions and International human rights Treaties

security would be to include safety from chronic threats such as hunger, disease and repression. As well as sudden and hurtful disruptions in the patterns of daily life. See L. Sunga, 'The Concept of Human Security: Does it add anything of value to international legal theory or practice?', in M.Frick, A.Oberprantacher (eds.), *Power and Justice in International Relations, Interdisciplinary Approaches to Global Challenges* (London: Ashgate 2009), at 133. See H. Lambert and T. Farrell, 'The Changing Character of Armed Conflict and the Implications for Refugee Protection Jurisprudence', 22 *International Journal of Refugee Law* 2010, for a discussion on how Human Security can provide added value to refugee claims for those fleeing armed conflict.

[94] A. Edwards, 'Human Security and the Rights of Refugees: Transcending Territorial and Disciplinary Borders', 30 *Michigan Journal of International Law* 2008-2009 at 802.

[95] See UNHCR, *supra* note 46., paras. 51-53.

[96] *Supra* note 10, at 466.

[97] ECtHR, *N.A v UK*, Appl. No. 25904/07, 2008, para. 120 and ECtHR, *Sufi and Elmi v. United Kingdom*, Appl. Nos. 8319/07 and 11449/07,2011.

into sharper relief.[98] Arguably, the Human Security approach would run into difficult definitional waters when assessing the criteria needed for 'sufficiently serious' and 'severe violation' of a right. Nonetheless, questions into an individual's security could establish a far more comprehensive forum from which Article 9 QD, especially Article 9(1)(b) can operate from. The paradigm would be significantly more in line with the protection purposes of the Convention along with the pluralistic sources that help to identify persecution, than is the current hierarchal normative approach of the CJEU.

4. CONCLUSION

The findings in both cases discussed in this article have shown that the CJEU has pursued a definition of persecution in the QD which makes it very difficult for applicants to prove persecution when the harm inflicted is anything less than torture, inhuman or degrading treatment. By concentrating on the nature of a repressive act, which must reach the threshold of Article 3 ECHR to be sufficiently severe to fulfil the requirements of Article 9 QD, the Court has ignored the persecutory breach of the right itself and has ultimately advocated a narrow application of persecution. The Court's benchmark risks detaching the notion of persecution from its origins and purpose, creating a somewhat autonomous and insufficiently informed case law on EU asylum provisions and, consequently, the Geneva Convention. Conversely, by retracing the purpose of persecution in the Geneva Convention, the article has highlighted that persecution, protection and security are interdependent and by taking into account an individual's security, an objective marker of human rights violations can be easily identified. Human Security can thus help to realign the physical harm paradigm that the CJEU has espoused in *Germany v Y and Z* and *Dutch Raad van State v X, Y and Z* to focus in on a broader array of social, economic and political circumstances. This would be in conformity with both the wording of the Qualification Directive and the panoply of International human rights instruments that accompany the interpretation of persecution in International refugee law.

[98] See B. Miltner,' Human Security and protection from refoulement in the maritime context', in A. Edwards and C. Fersterman (eds.), *Non-Citizens: Law, Policy and International Affairs* (Cambridge: Cambridge University Press 2010) who presents this argument.

ASYLUM SEEKERS' ACCESS TO EMPLOYMENT: TENSIONS WITH HUMAN RIGHTS OBLIGATIONS IN THE RECAST OF THE DIRECTIVE ON RECEPTION CONDITIONS FOR ASYLUM SEEKERS[1]

Lieneke Slingenberg[2]

1. INTRODUCTION

One of the components of the first phase of the Common European Asylum System (CEAS) is Directive 2003/9/EC, laying down minimum standards for the reception of asylum seekers.[3] This directive deals with different aspects of the reception of asylum seekers, such as restrictions of freedom and detention, schooling, employment, material reception conditions, health care and special needs of vulnerable asylum seekers. In 2013, after many years of difficult negotiations, a recast of this Directive was adopted (Directive 2013/33/EU).[4]

This paper will focus on Member States' obligations under Directive 2013/33/EU with regard to asylum seekers' access to employment. Asylum seekers access to the labour market has been described as one of their most important material rights as well as one of their most controversial.[5] This paper will show that the legislative history of the revised Directive confirms this dual character of the right to work.

According to Article 78 TFEU, the revised Directive (like the other elements of the CEAS) must be in accordance with the Refugee Convention and other 'relevant treaties'.[6] Such an explicit reference to sources of international law outside EU law is rare in primary EU law. With regard to the CEAS the Refugee Convention and other relevant treaties have thus been incorporated into primary EU law, as a result of which they are a direct standard of review.[7]

The purpose of this paper is to examine how the rules on employment in Directive 2013/33/EU relate to the Refugee Convention and other relevant trea-

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[1] This paper is based on my monograph *The Reception of Asylum Seekers under International Law. Between Sovereignty and Equality* (Oxford: Hart Publishing 2014).

[2] I thank Pieter Boeles for his comments on an earlier version of this paper.

[3] *OJ* [2003] L31/18, 6.2.2003 based on Art. 73k(1)(b) of the Treaty of Amsterdam.

[4] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), *OJ* [2013] L180/96, 26.06.2013.

[5] A. Edwards, 'Human Rights, Refugees and the Right 'to Enjoy' Asylum', 17 *International Journal of Refugee Law* 2005*,* 293-330.

[6] Art. 78(1) Treaty on the Functioning of the European Union, *OJ* [2009] C 306/1, 17.12.2007.

[7] H. Battjes, *European Asylum Law and International Law* (Boston/Leiden: Martinus Nijhoff Publishers 2006), 97-105; R. Uerpmann-Wittzack, 'International Law as an Element of European Constitutional Law', 9 *Jean Monnet Working Paper* 2003, at 40.

ties. In this paper, the European Convention on Human Rights (ECHR) and the European Social Charter (ESC)[8] will be referred to as 'other relevant treaties' since these treaties provide protection in the socioeconomic field, are explicitly referred to in primary EU law,[9] and have been ratified by all EU Member States.

This paper will argue for an integrated or holistic approach towards interpretation of these three human rights conventions. In other words, it will argue that a human rights convention should be interpreted and applied in coherence with other human rights conventions. While this is an important requirement under international law,[10] it also serves to enhance the concept of human security, the common theme of this edited volume. While many different definitions have been brought forward for this concept, and opinions differ as to the need for and usefulness of this concept,[11] agreement exists as to the relevance of human rights for the achievement of human security.[12] It is generally acknowledged that human rights lie at the core of human security and it has been argued that 'the best way to achieve human security is through the full and holistic realisation of all human rights'.[13] This paper contributes to this purpose by identifying the full content of human rights obligations for states in one particular area: asylum seekers' access to employment.

2. ACCESS TO THE LABOUR MARKET IN DIRECTIVE 2013/33/EU

As part of the second phase of the CEAS, the Commission issued a proposal for a recast of Directive 2003/9 in December 2008.[14] In May 2009, the European Parliament adopted its position on the proposal, which approved most of the proposed amendments.[15] The Council documents on this proposal reveal, however, that the proposed changes encountered opposition from a significant number of Member States and no agreement was reached on this proposal. Delegations wanted 'a better balance between, on the one hand, high standards

[8] The term ESC in this paper refers to both the 1961 European Social Charter and to the Revised one of 1996. The provisions discussed in this paper are identical in both conventions. All EU Member States are party to at least one of the two instruments. All EU Member States are party to at least one of the two instruments.

[9] See preamble to and Art. 6 of TEU, Art. 151 TFEU, preamble to and Art. 52 of the Charter of Fundamental Rights of the European Union *OJ* [2000] C364, 18.12.2000.

[10] See Art. 31(3)(c) of the Vienna Convention on the Law of Treaties. See also ECtHR, *Demir and Baykara* v. *Turkey,* Appl. No. 34503/97, 12 November 2008, para. 76.

[11] See the contribution of Matera in this volume.

[12] See, e.g., W. Benedek, 'Human Security and Human Rights Interaction', 59 *International Social Science Journal* 2008, 7-17; G. Oberleitner, 'Human Security and Human Rights', *ETC Occasional Paper Series* No. 8 (June 2002), available at <http://www.hs-perspectives.etc-graz.at/typo3/fileadmin/user_upload/ETC-Hauptseite/publikationen/Occasional_papers/Human_Security_occasional_paper.pdf> ; B.G. Ramcharan, *Human Rights and Human Security* (Boston: Martinus Nijhoff Publishers 2002).

[13] W. Benedek, *supra* note 12, at 13.

[14] Commission of the European Communities, 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*.

[15] EP-PE_TC1-COD(2008)0244.

of reception conditions for applicants for international protection and, on the other hand, the administrative and financial implications for Member States'.[16]

The Commission presented a modified proposal for a recast of Directive 2003/9 in June 2011[17] and put forward that this modified proposal granted Member States more flexibility and latitude and better ensured that they have the tools to address cases where reception rules are abused and/or become pull factors. After difficult negotiations, Directive 2013/33 was formally adopted on 26 June 2013 and entered into force upon its publication on 29 June 2013. Member States should implement this Directive into their national laws before 21 July 2015.

Access to the labour market has been one of the key issues pending the negotiations between the European Parliament and the Council. Under Directive 2003/9/EC Member States are allowed to withhold access to the labour market for a year and are only obliged to provide access to said market if no decision on the asylum application at first instance had been taken within a year, providing that this delay could not be attributed to the asylum seeker. In addition, Member States are allowed to s*et al*l kinds of conditions and to prioritise EU citizens and legally staying third-country nationals.[18] According to the Commission, the margin of discretion granted to states by these rules was too large.

The Commission therefore initially proposed a number of substantial changes in the provision on access to the labour market. The most important change it proposed was to lay down that Member States should ensure access to the labour market no later than six months following the lodging of an asylum application.[19] While the European Parliament agreed and therefore did not amend these proposals,[20] the Council could not agree with them. The German, French and United Kingdom's delegations brought forward in a joint contribution that access to the labour market should not be authorised after six months, but after a year: '*Otherwise, we will be adding a new element that makes claiming asylum more attractive, and will encourage the integration of asylum seekers making their eventual removal more difficult if their claim is ultimately rejected*'.[21] Some Member States also proposed to include again the condition that a first-instance decision has not yet been taken, 'so as to avoid access to the labour market becoming a pull factor'.[22]

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[16] Council document 6394/1/12 REV 1, *ASILE 24*, at 1.

[17] European Commission, Amended proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (recast)*, COM(2011) 320 final*.

[18] Art. 16 of Directive 2003/9/EC.

[19] Art. 15(1) of the Commission proposal, *supra* note 14.

[20] European Parliament legislative resolution of 7 May 2009 on the proposal for a directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (recast) (COM(2008)0815 – C6-0477/2008 2008/0244(COD)).

[21] Council Document 12168/11, *ASILE 54*, at 3.

[22] Council Document 14178/11, *ASILE 75*, at 40. The Netherlands adopted the position that access to the labour market should be withdrawn as soon as a first negative decision has been taken on the asylum application. The reason being that to be in (legal) employment contributes to one's integration into the host society, which is not desirable if the chances of getting a residence permit are slim (*Kamerstukken I,* 2010/11, 22 112, no. EV, at 9).

Eventually, a compromise was reached in allowing asylum seekers access to the labour market after nine months, while maintaining the other restricting conditions. According to the EU Council: '*Allowing access three months earlier is based on two counter-balancing considerations: on the one hand, the considerations that earlier access makes applicants economically independent sooner – thereby lowering the risk of exploitation on the black market and decreasing the need for public support – and that earlier access allows them to integrate more effectively in the host society; on the other hand, the consideration that earlier access possibly makes it attractive for economic migrants who do not qualify for international protection, to attempt to exploit the asylum system*'.[23]

The final text of Article 15(1) of Directive 2013/33 reads as follows:

> '*Member States shall ensure that applicants have access to the labour market no later than 9 months from the date when the application for international protection was lodged if a first instance decision by the competent authority has not been taken and the delay cannot be attributed to the applicant*.'

Hence, asylum seekers should have access to the labour market after nine months, but only if a first instance decision has not yet been taken. If the authorities reject the application within nine months (or if a delay on the decision can be attributed to the asylum seeker), Member States may deny asylum seekers access to the labour market pending possible appeal procedures. This article therefore still allows Member States to, under certain conditions, deny access to the labour market pending the entire asylum procedure.

Article 15(2) of Directive 2013/33 stipulates that Member States may decide the conditions for granting access to the labour market. This means that Member States may, for example, require a work permit or decide on the length of time an asylum seeker is allowed to work. The discretion of states in this regard is not unlimited, however, as this paragraph also stipulates that Member States should ensure that asylum seekers have *effective* access to the labour market. Finally, Article 15(2) still contains the possibility for member states to, for reasons of labour market policies, give priority to Union citizens and nationals of States parties to the Agreement on the European Economic Area, and to legally resident third-country nationals.

The third paragraph of Article 15 prescribes that *if* an asylum seeker has access to the labour market, this shall not be withdrawn during appeal procedures, where an appeal against a negative decision has suspensive effect, until such time as a negative decision on the appeal is notified.

This means that under Directive 2013/33/EU, Member States still have a rather wide margin of discretion and can deny asylum seekers present on their territory access to their labour markets. The next sections will examine how

[23] Statement of the Council's reasons, 'Council Position (EU) of the Council at first reading, with a view to the adoption of a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)' (June 2013), at 24.

these provisions of the Directive relate to the Refugee Convention and other relevant treaties.

3. THE REFUGEE CONVENTION: NO RESTRICTIVE MEASURES FOR REFUGEES WITH STRONG TIES IN THE HOST STATE

The Refugee Convention is most famous for the definition of a refugee and for the prohibition of *refoulement*. It does, however, also contain important material rights for refugees living in the territory of a host state.

In domestic law, the term 'refugee' is usually reserved for people who have been recognised as refugees within the meaning of the Refugee Convention by the authorities of the host state. Under international refugee law, it is, however, generally accepted that formal recognition by a state as a refugee within the meaning of the Refugee Convention is not necessary in order to fall under the scope of the convention.[24] The recognition as refugee by the state of refuge has thus a declaratory instead of a constitutive character.[25] Since asylum seekers might meet the definition of refugee as laid down in the Refugee Convention and, consequently, might be entitled to some of the benefits of the convention as from the moment they arrive in the host state, they have to be treated as refugees pending the determination of their status. Otherwise, states run the risk of acting in violation of the Refugee Convention by withholding important rights from genuine refugees.[26] This means that asylum seekers generally fall under the personal scope of the Convention.

For distributing material rights, the Convention contains a rather sophisticated system of qualifying conditions and standards of treatment. On the one hand, it distinguishes between refugees 'in', 'lawfully in', 'residing in' and 'lawfully staying in' the territory of a State party to the Convention. The quality of the presence or residence on the territory is therefore decisive for the eligibility, for most of the rights laid down in the Refugee Convention. On the other hand, it employs absolute and relative standards of treatments. With regard to a number of rights, refugees need to be treated the same as nationals, most-favoured aliens or aliens generally, while other provisions grant absolute rights to refugees. In combining these different qualifying conditions and standards of treatment,

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[24] A. Grahl-Madsen, *The Status of Refugees in International Law. Vol. I. Refugee Character* (Leiden:

AW Sijthoff 1966), 340-341; J.C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press 2005), 158-159; T.P. Spijkerboer and B.P. Vermeulen, *Vluchtelingenrecht* (Nijmegen: Ars Aequi Libri 2005), at 70; UNHCR Handbook, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Geneva: UNHCR 1992), para. 28.

[25] See also recital 14 of the preamble of the Directive 2004/83/EC 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* [2004] L304/12, 30.9.2004 and recital 21 of Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), *OJ* [2011] L337/9, 20.12.2011.

[26] H. Battjes *supra* note 7, 493-494; J.C. Hathaway, *supra* note 24, 156-157.

the Convention tries to find a balance between the needs of the refugee and those of the host state.[27]

The precise meaning of these different qualifying conditions is regularly debated in legal doctrine.[28] Opinions differ as to whether all or only a subset of asylum seekers are 'lawfully present' on the territory and whether asylum seekers are able to 'stay lawfully' on the territory during the asylum procedure. In my view, the most convincing interpretation entails that asylum seekers cannot yet 'stay' lawfully on the territory, but can, under certain conditions, be 'lawfully present' on the territory pending their asylum procedure. The determination of whether someone 'resides' on the territory is of a factual nature and is mainly dependent on the passage of time.[29]

The Convention contains a specific provision on access to the labour market: Article 17. While this provision contains a number of clear and detailed obligations for host states, it receives strikingly little attention in case law and literature on the rights of refugees and asylum seekers.[30] The first paragraph only applies to refugees who are lawfully staying on the territory and arguably, therefore, not to asylum seekers. The second paragraph is wider in scope and of relevance for asylum seekers. It reads:

> '*In any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting State concerned, or who fulfils one of the following conditions:*
> *(a) He has completed three years' residence in the country;*
> *(b) He has a spouse possessing the nationality of the country of residence. A refugee may not invoke the benefit of this provision if he has abandoned his spouse;*
> *(c) He has one or more children possessing the nationality of the country of residence*.'

Since this provision is not limited to refugees 'lawfully in' or 'lawfully staying in' the territory, it applies to all asylum seekers who have completed three years of residence or who have a spouse or one or more children possessing the nationality of the country of residence. With regard to asylum seekers who fulfill these conditions, restrictive measures 'for the protection of the national labour market' may not be applied. This means, for example, that they may not be subjected to the condition that they may only be employed if no nationals are available for the job in question.[31] On the other hand, this implies that they *can* be subjected to restrictive measures also imposed on nationals and to re-

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[27] See also K. Hailbronner, 'Reception Conditions of Asylum Seekers', in C.D. Urbano de Sousa and P.
De Bruycker (eds), *The Emergence of a European Asylum Policy* (Brussels: Bruylant 2007), at 162.

[28] See for a summary of the different opinions: A. Edwards, *supra* note 5, at. 322 and L. Slingenberg, *supra* note 1, 115-119 and 128-129.

[29] L. Slingenberg, *supra* note 1, 109-132.

[30] Exceptions are A. Edwards, *supra* note 5 and J.C. Hathaway, *supra* note 24 .

[31] Weis, cited in J.C. Hathaway, *supra* note 24, at 761.

strictive measures imposed on aliens which have another purpose than protecting the national labour market, e.g. national security or political considerations.[32]

The unqualified power for EU Member States to prioritise EU citizens and legally staying third-country nationals over asylum seekers 'for reasons of labour market policies' under Directive 2013/33/EU, is not in conformity with this obligation stemming from the Refugee Convention. Asylum seekers who have resided on the territory for more than three years or who have a spouse or one or more children possessing the nationality of the host state, may not be subjected to policies that prioritise other non-nationals with regard to access to the labour market.

A more difficult question is how the other discretionary options laid down in the EU Directive relate to Article 17(2) of the Refugee Convention, e.g. the possibility to deny access to the labour market during the first nine months; to deny access during the entire asylum procedure if a first instance decision has been taken within nine months; and to subject asylum seekers' access to the labour market to all kinds of other 'conditions'. If Member States make use of these possibilities in order to protect their national labour markets, this clearly violates Article 17(2) of the Refugee Convention with regard to asylum seekers who reside on the territory for more than three years or have a spouse or children possessing the nationality of the host state. The legislative history of the Directive shows, however, that these possibilities were mainly introduced for reasons related to immigration control. States were concerned that by allowing further-reaching access to the labour market, asylum seekers would easier integrate into society –which could hinder possible deportations or voluntary return – and that it would act as a pull factor for potential migrants. These reasons do not entirely or necessarily coincide with the protection of the national labour market.

It could be argued that the objective of preventing asylum seekers' integration into society is contrary to the object and purpose of Article 17(2). The purpose of Article 17(2) seems to be to achieve the lifting of labour restrictions 'in favour of those refugees who have a special link with their country of refuge'.[33] Trying to prevent the integration of refugees who fulfil one of the conditions laid down in Article 17(2), and therefore have already established a special link with their host state, seems to be contrary to the very purpose of this article.

4. THE ESC: LIBERALISATION OF RULES ON LABOUR MARKET ACCESS

The (revised) European Social Charter has a limited personal scope. According to the appendix, non-nationals are only covered if they are nationals of other contracting parties lawfully resident or working regularly within the territory of a contracting party. This limited personal scope does, however, not apply to the

[32] J.C. Hathaway, *supra* note 24, at 761-2; A. Grahl-Madsen, *Commentary on the Refugee Convention 1951. Articles 2-11, 13-37* (Geneva: UNHCR 1997), commentary no. 5 to Art. 17.

[33] A. Grahl-Madsen, *supra* note 32, commentary no. 5 to Art. 17, referring to the origins of this provision.

Article 12(4) on the right to social security, Article 13(4) on the right to social and medical assistance, Article 18 on the right to engage in employment and Article 19 on the right of migrant workers to protection and assistance.[34]

With regard to access to the labour market, Article 18 is relevant. It reads:

> '*The right to engage in a gainful occupation in the territory of other Parties*
> With a view to ensuring the effective exercise of the right to engage in a gainful occupation in the territory of any other Party, the Parties undertake:
> 1. *to apply existing regulations in a spirit of liberality;*
> 2. *to simplify existing formalities and to reduce or abolish chancery dues and other charges payable by foreign workers or their employers;*
> 3. *to liberalise, individually or collectively, regulations governing the employment of foreign workers; and recognise:*
> 4. *the right of their nationals to leave the country to engage in a gainful occupation in the territories of the other Parties*.'

The wording implies that it only applies to nationals of other contracting parties. This follows from the reference to 'other parties' and 'any other party' in the heading, the first sentence and paragraph 4 of the article. In addition, this is in keeping with paragraph 18 of Part I ESC. Part I ESC contains a general statement of rights and principles setting out the aim of the policies of contracting parties. Each paragraph in Part I corresponds to the article of Part II with the same number. Paragraph 18 reads:

> '*The nationals of any one of the Contracting Parties have the right to engage in any gainful occupation in the territory of any one of the others on a footing of equality with the nationals of the latter, subject to restrictions based on cogent economic or social reasons*.'

Harris and Darcy note that Part I states objectives which may go beyond the specific terms of the obligation in the corresponding article in Part II, but cannot be taken to fall below the requirements laid down in Part II.[35] Consequently, since paragraph 18 of Part I explicitly refers to nationals of any one of the contracting parties, Article 18 (of Part II) cannot be interpreted as providing protection to all non-nationals. According to Harris and Darcy, this is also evident from the *travaux préparatoires*.[36] This means that asylum seekers only fall under the personal scope of Article 18 if they are a national of another contracting party.

With regard to this limited personal scope, attention should be paid, however, to a relevant provision of the Refugee Convention. Article 7(2) of the

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[34] The appendix holds: 'Without prejudice to Article 12, paragraph 4, and Article 13, paragraph 4, the persons covered by Articles 1 to 17 and 20 to 31 include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned'. These articles apply to all nationals of other contracting parties (Arts. 12, 18 and 19) or to nationals of other contracting parties who are 'lawfully within' the territory of a contracting party (Art. 13).

[35] D. Harris and J. Darcy, *The European Social Charter* (Ardsley: Transnational Publishers 2001), at 204.

[36] Ibid., at 203.

Refugee Convention stipulates that '[a]fter a period of three years' residence, all refugees shall enjoy exemption from legislative reciprocity in the territory of the Contracting State'. Again, we see the relevance that the Refugee Convention attaches to physical presence in a given territory for a period of three years. If refugees reside on the territory for more than three years, they should be exempted from legislative reciprocity. 'Legislative reciprocity' must be distinguished from 'diplomatic reciprocity'. 'Legislative reciprocity' means a system whereby a state is prepared to grant benefits to any alien, provided that the country of nationality of the alien provides the same benefits to the citizens of the state concerned. In this system, the rule of reciprocity is a means of achieving equal rights and benefits for one's own nationals abroad. 'Diplomatic reciprocity' means a system whereby a state grants benefits only to 'preferred' nationals of states with which he has a special relationship or particularly close ties, such as partner states in an economic or political union.[37]

Before the inclusion of this right in the ESC, the right to engage in a gainful occupation was already laid down in the European Convention on Establishment (ECE).[38] The preamble to this convention recognises 'the special character of the links between the member countries of the Council of Europe' and affirms 'that the rights and privileges which they grant to each other's nationals are conceded solely by virtue of the close association uniting the member countries of the Council of Europe by means of its Statute'. Hence, the ECE should be seen as an instrument establishing and affirming a special relationship between a number of states. The right to engage in a gainful occupation laid down in this convention should, therefore, be seen as a right based on 'diplomatic reciprocity'.

It can be argued, however, that with the inclusion of the right to engage in a gainful occupation in another Contracting Party in the ESC, which is a general human rights instrument, this right is no longer based on a system of 'diplomatic reciprocity', but on 'legislative reciprocity' instead. Indeed, the Charter's preamble explicitly places the ESC within the context of human rights law – by referring to 'the maintenance and further realisation of human rights and fundamental freedoms' and to 'every effort in common to improve the standard of living and to promote the social well-being of both their urban and rural populations' – and does not pay attention to the 'special links' between the Member States of the Council of Europe.

An important consequence of this interpretation is that asylum seekers can no longer be subjected to the condition of reciprocity stemming from Article 18 after three years' residence in the territory of a contracting state. Accordingly, asylum seekers fall under the personal scope of Article 18 if they are a national of one of the contracting parties, or if they have resided on the territory of a contracting party for at least three years.

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[37] A. Grahl-Madsen, *supra* note 32, commentary no. 5 to Art. 7. See also J.C. Hathaway, *supra* note 24, 192-204.

[38] CETS no. 019, available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=019&CM=4&CL=ENG>.

For asylum seekers falling under the personal scope of article 18 ESC, states are obliged to apply the existing rules in a spirit of liberality, to simplify formalities and to liberalise the rules on access to employment. Especially this latter obligation is of relevance for EU legislation, as the other obligations lie more in the sphere of national application and discretion. It is an obligation of continual improvement to a certain level after which the obligation is to maintain the *status quo*.[39] This obligation can therefore be seen as the opposite of a prohibition on adopting retrogressive measures or of a standstill clause, as there is an explicit obligation of *improvement* up to a certain point.

Article 18 ESC does provide no indications as to when this 'liberal' level has been reached. The appendix to the ESC states, with regard to paragraph 18 of Part I and Article 18 of Part II, that these provisions 'do not prejudice the provisions of the European Convention on Establishment'. Hence, the provisions of the ECE are not affected by Article 18 ESC and remain in force. In view of the explicit reference to these provisions in the appendix of the ESC, they can serve as a source of inspiration for the interpretation of Article 18 ESC.

Article 10 ECE provides that contracting parties '*shall authorise nationals of the other Parties to engage in its territory in any gainful occupation on an equal footing with its own nationals, unless the said Contracting Party has cogent economic or social reasons for withholding the authorisation*'. Article 12 ECE provides that '*nationals of any Contracting Party lawfully residing in the territory of any other Party shall be authorised, without being made subject to the restrictions referred to in Article 10 of this Convention, to engage in any gainful occupation on an equal footing with nationals of the latter Party, provided they comply with one of the following conditions: a) they have been lawfully engaged in a gainful occupation in that territory for an uninterrupted period of five years; b) they have lawfully resided in that territory for an uninterrupted period of ten years; or c) they have been admitted to permanent residence*'.[40]

Hence, only nationals of contracting parties who are 'lawfully residing' are entitled to complete equal treatment with nationals, provided they fulfil another, quite restrictive, qualifying condition. As regards other nationals of contracting parties, the ECE allows states to withhold employment authorisation on the basis of 'cogent economic or social reasons'. As these provisions remain in force, the obligation of Article 18 ESC to liberalise the rules does not affect the possibility for states to withhold employment authorisation on the basis of cogent economic or social reasons for foreigners who are not yet lawfully resident on their territory. This also follows from paragraph 18 of Part I of the ESC, which explicitly refers to restrictions based on cogent economic or social reasons.

For asylum seekers who fall under the personal scope of the ESC – i.e. asylum seekers who are nationals of other contracting parties, or who have resided on the territory of an ESC contracting party for at least three years – the state should bring forward weighty reasons to justify the difference in treatment

[39] D. Harris and J. Darcy, *supra* note 35, at 209.

[40] This approach resembles the approach of the Refugee Convention under which rights are granted to refugees on the basis of an 'incremental system', whereby legal status and passage of time are relevant factors for an accretion of right.

as regards access to the labour market between nationals and asylum seekers. In view of the state obligations under the Refugee Convention, one could argue that for asylum seekers who reside for more than three years on the territory, reasons related to the protection of the national labour market are not 'cogent' reasons. In any case, Article 18 ESC seems to imply that the burden of proof lies on the state to convincingly show that denial of access to the labour market for asylum seekers falling under the personal scope is strictly necessary for economic or social reasons.

With regard to Directive 2013/33/EU, it can be noted that there has been an, albeit modest, liberalisation of the rules as compared to Directive 2003/9/EC. The possibility to deny asylum seekers access to the labour market throughout the entire asylum procedure, however, still exists. A complete denial of access to the labour market is difficult to converge with the obligation to liberalise the rules governing the employment of non-nationals. With regard to asylum seekers who are a national of one of the contracting parties to the ESC, or who have resided on the territory for more than three years, it could, therefore, be argued that this possibility is not in conformity with Article 18 ESC.

5. THE ECHR: PROTECTION FOR MIGRANTS WITH LEGAL RESIDENCE STATUS

The ECHR does not contain a provision on access to employment or the right to work. The European Court on Human Rights has often stressed that the convention does not guarantee a right to work.[41] In *Coorplan-Jenni GMBH and Hascic v Austria,* however, after repeating this general observation, the Court added:

> '*Nevertheless, the Court does not exclude that the refusal of a corresponding permit to a foreigner legally residing in his host state and willing to work may affect the concerned foreigner's possibility to pursue a professional activity to such a significant degree that there are consequential effects on the enjoyment of his right to respect for his "private life" within the meaning of Article 8 of the Convention* (...).'[42]

The Court explicitly mentions 'legal residence' in this case as a relevant condition for a complaint about access to employment under Article 8.

The case of *I. v. the Netherlands* concerned a complaint of an asylum seekers who had been denied a residence permit on the basis of Article 1F of the Refugee Convention,[43] but could not be expelled by the state because that

[41] ECtHR, *Jazvinsky* v. *Slovak Republic,* Appl. No. 33088/96, 7 September 2000 (dec).

[42] ECtHR, *Coorplan-Jenni GMBH and Hascic* v. *Austria,* Appl. No. 10523/02, 24 February 2005 (dec).

[43] Art. 1F of the Refugee Convention provides as follows: 'The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

would interfere with Article 3 ECHR. The applicant had been, as a consequence, present on Dutch territory for more than ten years already, but was not allowed to work nor considered eligible for social benefits. The applicant complained that this situation was in violation of Article 8 ECHR. The Court however simply held:

> '*As regards the argument that the applicant is not allowed to work and thus earn a living, the Court finds that this does not raise an issue under Article 8 as neither this nor any other Convention provision guarantees a right to work*.'[44]

Arguably therefore, even though the Court does not exclude the possibility that the denial of a work permit to a non-national violates Article 8 ECHR, this possibility seems to be limited to non-nationals who are *legally residing* in the host state. As has been argued above, asylum seekers are generally not able to fulfil this condition. The ECHR seems, therefore, not to limit the discretion for states to limit and condition asylum seekers' access to the labour market.

6. THE ECHR: PROTECTION AGAINST NATIONALITY DISCRIMINATION BASED ON ARGUMENTS OF RECIPROCITY?

Another question that could be addressed here is a theoretical one. From the foregoing section it appeared that with regard to asylum seekers who are nationals of one of the contracting parties to the ESC, EU Member States have an explicit obligation to make an effort to liberalise the rules on access to employment. Member States could of course fulfil this obligation by liberalising the rules for all categories of asylum seekers. But would it be possible for the Member States to only liberalise the rules for asylum seekers who are a national of one of the contracting parties to the ESC (and for all asylum seekers who have been residing on the territory of a contracting party of the ESC for more than three years)? In that case, the Directive would make a distinction on the basis of nationality. A relevant question is then how such a distinction relates to the prohibition of discrimination, laid down in Article 14 and Article 1 of Protocol no. 12 to the ECHR.

The European Court of Human Rights (ECtHR) generally requires 'very weighty reasons' to justify a distinction solely based on nationality.[45] Would the conclusion of an international convention based on reciprocity be regarded by the Court as a sufficient weighty reason to justify a distinction based on nationality?

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.'

[44] ECtHR, *I* v. *the Netherlands,* Appl. No. 24147/11, 10 July 2012 (dec), para. 48. See also ECtHR, *K* v. *the Netherlands,* Appl. No. 33403/11, 25 September 2012 (dec), para. 46 and ECtHR, *A.* v. *the Netherlands,* Appl. No. 60538/13, 12 November 2013 (dec).

[45] See among others: ECtHR, *Gaygusuz* v. *Austria,* Appl. No. 17371/90, 16 September 1996; ECtHR, *Koua Poirrez* v. *France*, Appl. No. 40892/98, 30 September 2003; ECtHR, *Luczak* v. *Poland,* Appl. No. 77782/01, 27 November 2007;*),* ECtHR, *Andrejeva* v. *Latvia,* Appl. No. 55707/00 18 February 2009.

There is no specific case law on discrimination on the basis of nationality with regard to access to employment, and existing case law about nationality discrimination in other fields shows a mixed picture. A clear answer can therefore not be provided to this question.

With regard to distinctions based exclusively on nationality in the field of social benefits, the Court does generally not accept the argument of states that they are not bound by reciprocal agreements to provide for equal treatment.[46] With regard to distinctions based not exclusively on nationality – but also on immigration status – in the field of social benefits and with regard to the distinctions based on nationality in the field of immigration control, the Court has, however, accepted the argument that EU nationals are subject to preferential treatment, because the Union forms a 'special legal order'.[47]

This difference could be explained by the distinction between legislative reciprocity and diplomatic reciprocity.[48] The EU is an obvious example of a legal system based on diplomatic reciprocity whereby a state grants benefits only to preferred nationals of states with which he has a special relationship or particularly close ties. On the basis of this line of thought, it could be argued that states' obligations under the ESC cannot serve as a justification for distinctions based on nationality as regards access to employment, because the ESC is based on legislative reciprocity and not on diplomatic reciprocity.

On the other hand, it could be argued that the field of access to the labour market shows more resemblance with the field of access to the territory than with the field of social benefits. Under international law, states have more discretion as regards the regulation of access to their labour markets than as regards the regulation of access to their social security systems.[49] In this vein, it could be argued that the Court's case law shows that only in the field of social security, arguments based on reciprocity are not valid. In fields where states have more discretion under international law, such as immigration and access to the labour market, arguments based on reciprocity can be accepted as sufficiently weighty to justify distinctions based on nationality.

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[46] *Gaygusuz* v. *Austria*, *supra* note 45, para. 51; ECtHR, *Koua Poirrez* v. *France, supra* note 45, para. 49. In cases concerning social benefits that do not distinguish on nationality, but on less suspect conditions, such as residence, the Court generally accepts that states have the right to enter into reciprocal agreements (see for example ECtHR, *Efe v. Austria,* Appl. No. 9134/06, 8 January 2013). In *Carson v. the United Kingdom,* the Grand Chamber of the Court held that 'it would be extraordinary if the fact of entering into bilateral arrangements in the social security sphere had the consequence of creating an obligation to confer the same advantages on all others living in all other countries. Such a conclusion would effectively undermine the right of States to enter into reciprocal agreements and their interest in so doing' (ECtHR, Appl. No. 42184/05, 16 March 2010, para. 89).

[47] ECtHR, *Ponomaryovi* v. *Bulgaria,* Appl. No. 5335/05, 21 June 2011, para. 54 and ECtHR, *Moustaquim* v. *Belgium,* Appl. No. 12313/86, 18 February 1991, para. 49.

[48] See section 4 above.

[49] L. Slingenberg, *supra* note 1.

7. CONCLUDING REMARKS

The EU Council stated that the difficult negotiations about asylum seekers' access to the labour market has resulted in a provision in Directive 2013/33/EU that finds a balance between the individual interests of asylum seekers and the interests of the state. This paper shows, however, that for the regulation of asylum seekers' access to employment under the Directive to be fully in line with the Refugee Convention and other relevant conventions, the individual interests of (certain categories of) asylum seekers should get more attention.

This does not mean that Article 15 of Directive 2013/33/EU actually violates these conventions. Even though the recast Directive lays down 'standards' and no 'minimum norms' anymore, it still allows Member States to introduce or retain more favourable provisions for asylum seekers.[50] In addition, Article 15 leaves Member States a lot of discretion when implementing this provision. However, if this provision is supposed to be fully in accordance with these conventions, and not to allow for treatment that falls short of the obligations contained therein, some adjustments should be made.

The Directive would more fully reflect Member States' obligations under these conventions if the possibility to deny access to employment during the entire asylum procedure and the possibility to prioritise other aliens over asylum seekers would be deleted. This should, in any case, apply to asylum seekers who have resided on the territory for more than three years and for asylum seekers who are a national of one of the contracting parties to the ESC. It could be argued, however, that in order to be fully in line with Article 14 ECHR and/or Article 1 of Protocol no. 12 to the ECHR, this should apply to all categories of asylum seekers.

On the basis of the research in this paper, and taking the obligations resulting from the three human rights conventions together, a number of common relevant factors come to the fore. First of all, the reasons brought forward by states to lay down restrictions for asylum seekers' access to employment appear to be relevant. This is relevant for establishing whether asylum seekers with certain social ties to the host state may be subjected to such restrictions under the Refugee Convention. In addition, the stated objective of restrictive measures is relevant for examining whether the required level of liberality of the regulations has been reached under the ESC. 'Cogent economic or social reasons' appear to be necessary to justify a difference in treatment between asylum seekers falling under the personal scope of the ESC and nationals with regard to labour market access. This means that it is the task of the (national or EU) judge to assess the relevance and persuasiveness of the reasons brought forward by states.

Another concept that appears to be relevant for identifying states' obligations on asylum seekers' labour market access, is the concept of nationality. Under the Refugee Convention, asylum seekers who have a spouse or one or more children possessing the nationality of the host state receive extra protection.

[50] Art. 4 of Directive 2013/33/EU.

Under the ESC, asylum seekers only fall under the personal scope if they possess the nationality of a contracting state to the ESC. Under the ECHR, however, distinctions based explicitly and exclusively on nationality should be justified by the state and, arguably, even require 'very weighty reasons'. On this point, an integrative interpretation of member states' obligations under the three conventions could, therefore, provide additional protection for asylum seekers. If an integrative approach is adopted, it could be argued that the protection that is offered by more specialised conventions to a particular subgroup of asylum seekers, should apply to all asylum seekers present on the territory.

An integrative approach is also of relevance for the identification of Member States' obligations under the ESC. A reading of Member States' obligations under the ESC in combination with their obligations under the Refugee Convention results in a widening of the personal scope of the provision on access to employment and an identification of irrelevant reasons for justifying certain distinctions.