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European Asylum Law and the ECHR: An Uneasy Coexistence

Laurens Lavrysen*

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* Ph.D. Researcher, Human Rights Centre, Ghent University, Belgium. This is an elaborated version of the draft paper presented at the Legal Research Network Conference on "Human Rights and Their Impact on Various Fields of the Law" in Göttingen on 15 September 2011. I would like to thank the anonymous reviewer of the Goettingen Journal of International Law for his or her useful comments. Unless stated otherwise, this paper concerns the state of affairs of a continuously evolving field of the law on 30 November 2011.

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Abstract

During the last two decades the European Union has become a major actor in the field of asylum law. Meanwhile, human rights law, in particular the European Convention on Human Rights (ECHR), has become of paramount importance in this field. This paper highlights certain areas of concern in the European Asylum System from the viewpoint of the ECHR. It particularly focuses on the Dublin II Regulation, the reception conditions and the detention of asylum seekers.

A. Introduction

During the 1990's and the 2000's the European Union (EU) has developed an extensive set of instruments in the field of asylum law. The emerging European Asylum Law should however not be considered in a legal vacuum: ever since the 1951 Geneva Convention relating to the Status of Refugees and the subsequent 1967 Protocol, international law has been of paramount importance in this field. In the last decades the protection of refugees and asylum seekers has been particularly shaped by evolutions in international human rights law.

At the level of the Council of Europe, the European Court of Human Rights (ECtHR), the supranational court supervising the European Convention on Human Rights (ECHR), has contributed significantly to the protection of asylum seekers in Europe.

Firstly, under Art. 3 ECHR, the prohibition of torture and of inhuman or degrading treatment or punishment, the Court has developed extensive case-law concerning asylum seekers. According to the ECtHR, "expulsion by a Contracting State of an asylum seeker may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he was returned."[1] In this context, it is of crucial importance that asylum

[1] E.g. *Vilvarajah and Others v. The United Kingdom,* ECHR (1991) Appl. No. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, Series A, No. 215, 34, para. 103. Art. 3 ECHR also prohibits "refoulement" of a person to a country where he or she

seekers have the possibility of demanding a binding interim measure from the ECtHR under Rule 39 of the Rules of Court[2] to prevent such an expulsion. Secondly, the ECtHR has developed procedural guarantees in asylum cases under Art. 13 ECHR, the right to an effective remedy against breaches of the ECHR or its protocols,[3] and Art. 4 Protocol No. 4, the prohibition of collective expulsions.[4] Finally, Art. 5 ECHR, the right to liberty and security, is particularly important in the context of detention of asylum seekers,[5] while Art. 8 ECHR, the right to respect for private and family life, provides some protection against the expulsion of asylum seekers with a family in the host country.[6]

This paper will focus on the impact of human rights law, in particular the ECHR, on European Asylum Law. As an exhaustive analysis would be beyond the scope of a short paper, this paper will highlight a few important recent developments which have redefined this relationship. The entry into force of the Lisbon Treaty has made some changes to the EU constitutional framework in the field of asylum law and significant changes to the EU system of human rights protection. Meanwhile discussions are on-going about the introduction of new pieces of legislation, recasting the current EU asylum instruments. A recast Qualification Directive was adopted at the end of 2011, while it is expected that the other recast instruments will be

runs a real risk of being subjected to the death penalty (*Al-Saadoon and Mufdhi v. the United Kingdom*, ECHR (2010) Appl. No. 61498/08, para. 120).

2 Art. 34 ECHR, the prohibition of hindering the effective exercise of the individual applicant's right of application, is the legal basis for the binding character of interim measures (*Mamatkulov and Askarov v. Turkey*, ECHR (2005), Appl. Nos. 46827/99 and 46951/99, para. 128).

3 In particular the requirement that a remedy against a removal measure must have suspensive effect, e.g. *Čonka v. Belgium,* ECHR (2002), Appl. No. 51564/99, para. 79; *Gebremedhin v. France,* ECHR, (2007), Appl. No. 25389/05, para. 58.

4 In particular the requirement that aliens cannot be compelled, as a group, to leave a country, except when such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group, e.g. *Čonka v. Belgium*, ECHR (2002), Appl. No. 51564/99, para. 59.

5 See *infra* no. F.

6 Such an expulsion constitutes an interference with the right to respect for the family life, which can only be justified in so far as it is "in accordance with the law" and when it is "necessary in a democratic society" in the interests of a legitimate aim. E.g. *Amrollahi v. Denmark*, ECHR (2002), Appl. No. 56811/00, para. 28. The right to private life provides some protection against the expulsion of "settled migrants" without a family life in the host country (e.g. *Üner v. The Netherlands,* ECHR (2006), Appl. No. 46410/99, para. 59).

adopted in the course of 2012. The ECtHR on its turn has had the opportunity to touch upon the application of EU asylum instruments, in particular in the case of *M.S.S. v. Belgium and Greece*.

First this paper will give an introduction to the EU system of human rights protection (B.), as well as to the competences of the EU in the field of asylum law and the main instruments of European Asylum Law (C.). Subsequently the paper will focus on some important human rights challenges presented to European Asylum Law, in particular the "Dublin II" system of responsibility for examining asylum applications (D.), the reception (E.) and the detention of asylum seekers (F.).

B. Fundamental Rights and the European Union

Since the entry into force of the Lisbon Treaty, Art. 6 of the Treaty on European Union (TEU) provides a threefold system of human rights protection in the EU legal system: the Charter of Fundamental Rights, the accession to the European Convention on Human Rights (ECHR) and the general principles of the Union's law.[7]

I. Charter of Fundamental Rights

1. General Provisions

The Charter of Fundamental Rights of the European Union, in the adapted version of 12 December 2007,[8] has acquired "the same legal value as the Treaties" at the entry into force of the Lisbon Treaty.[9] The Charter can thus be considered as a third treaty, besides the TEU and the Treaty on the Functioning of the European Union (TFEU).[10]

The Charter is addressed "to the institutions, bodies, offices and agencies of the Union [...] and to the Member States only when they are

7 S. Peers, 'Human Rights in the EU Legal Order: Practical Relevance for EC Immigration and Asylum Law', in S. Peers & N. Rogers (eds), *EU Immigration and Asylum Law – Text and Commentary* (2006), 115, 132.

8 Charter of Fundamental Rights of the European Union, 14.12.2007, *OJ 2007 C* 303/ 1 [Charter].

9 Art. 6 para. 1 Treaty on European Union (TEU). See Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, *OJ 2007 C 306/156* for some restrictions in the applicability of the Charter with regard to these countries.

10 R. Barents, *Het Verdrag van Lissabon* (2008), 537.

implementing Union law."[11] The provisions of the Charter are thus binding on Member States, but only "when they act in the scope of Union law".[12] As the EU has developed a comprehensive set of asylum instruments, most decisions in asylum matters taken by Member States will come within the scope of EU law.[13] The Charter further explicitly provides that it does not extend the field of application of Union law beyond the powers of the Union or "establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties."[14]

The Charter distinguishes between "rights" and "principles". Rights must be "respected" while principles must only be "observed".[15] Principles "may be implemented by legislative and executive acts [...]. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality" and can thus not be considered as subjective rights.[16]

With regard to Charter rights which correspond to rights guaranteed by the ECHR, the Charter states that "the meaning and scope of those rights shall be the same as those laid down by the said Convention", without however preventing Union law to provide "more extensive protection".[17] A list of these corresponding rights is incorporated in the Explanations relating to the Charter.[18] Thereby the ECHR is partially incorporated in the Charter and thus in EU primary law.[19] Charter provisions recognizing "fundamental rights as they result from the constitutional traditions common to the Member States [...] shall be interpreted in harmony with those traditions."[20]

The Charter contains a general limitations clause. Limitations on the exercise of the rights and freedoms guaranteed by the Charter are only acceptable when they are "provided for by law" and "respect the essence of

11 Art. 51 para. 1, first sentence Charter of Fundamental Rights of the European Union [Charter].

12 Explanations relating to the Charter of Fundamental Rights [Explanations relating to the Charter], *OJ 2007.C303/32*.The Explanations provide guidance to the interpretation of the Charter and "shall be given due regard by the courts of the Union and of the Member States." (Art. 52 para. 7 Charter).

13 Peers, *supra* note 7, 137.

14 Art. 51 para. 2 Charter.

15 Art. 51 para. 1, second sentence Charter.

16 Art. 52 para. 5 Charter.

17 Art. 52 para. 3 second sentence Charter.

18 Explanations relating to the Charter, *OJ 2007 C 303/*33-34.

19 W. Weiß, 'Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights After Lisbon', 7 *European Constitutional Law Review* (2011) 1, 64, 70.

20 Art. 52 para. 4 Charter.

those rights and freedoms."[21] Limitations are also subject to the proportionality principle, which requires that they are "necessary" and that they "genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."[22]

Nothing in the Charter, including the general limitations clause, "shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all Member States are party, including the [ECHR], and by the Member States' constitutions."[23] This provision is intended to maintain the current level of fundamental rights protection.[24]

2. Specific Provisions

Some of the substantive Charter provisions are particularly important from the viewpoint of EU asylum law. Art. 18 of the Charter stipulates that "[t]he right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union."According to Battjes, the right to asylum is the right to a durable solution, which includes the right to an appropriate status[25]. The Charter is the first document since the Universal Declaration of Human Rights (UDHR) to contain a right to asylum.[26] The Geneva Convention only recognizes the principle of non-refoulement[27] and implicitly the right to seek, but not the right to enjoy asylum.[28] Nor does the ECHR or its Protocols guarantee such a right.[29]

21 Art. 52 para. 1, first sentence Charter.
22 Art. 52 para. 1, second sentence Charter.
23 Art. 53 Charter.
24 Explanations relating to the Charter , *OJ 2007 C 303/*35.
25 H. Battjes, *European Asylum Law and International Law* (2006), 112-114.
26 Art. 14 UDHR recognizes both the right to seek and the right to enjoy asylum from persecution (D. McGoldrick, 'The Charter and United Nations Human Rights Treaties' in S. Peers & A. Ward (eds), *The EU Charter of Fundamental Rights* (2004) 83, 113-114).
27 Art. 33 para. 1 Convention Relating the Status of Refugees (Geneva Convention 1967).
28 S. Da Lomba, *The right to seek refugee status in the European Union* (2004), 8-10.
29 E.g. *Chahal v. The United Kingdom*, ECHR (1996) Appl. No. 22414/93, para. 73.

Art. 19 para. 2 of the Charter on its turn provides that "[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment." This incorporates the case-law of the ECtHR regarding Art. 3 ECHR, the prohibition of torture and of inhuman or degrading treatment or punishment.[30]

Art. 47 para. 2 of the Charter is relevant in the context of asylum and expulsion procedures. This provision states that "[e]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented." This corresponds to Art. 6 para. 1 ECHR, the right to a fair trial, but unlike the latter provision, Art. 47para. 2 Charter is not confined to the determination of civil rights and obligations or of a criminal charge.[31] The ECtHR has ruled that Art. 6 para. 1 ECHR is not applicable in the context of decisions concerning the entry, stay and deportation of aliens.[32] Art. 47 para. 2 ECHR on the other hand does cover migration and asylum procedures.[33]

Finally Art. 6 of the Charter states that "[e]veryone has the right to liberty and security of person." This provision corresponds to Art. 5 ECHR, the right to liberty and security[34]. This provision may be particularly relevant in the context of the detention of asylum seekers.

II. Accession to the ECHR

The Lisbon Treaty provides that the European Union shall accede to the European Convention on Human Rights.[35] Thereby the Member States

30 Explanations relating to the Charter, *OJ 2007 C 303/*24.

31 Explanations relating to the Charter, *OJ 2007 C 303/* 30.

32 *Maaouia v. France,* ECHR (2000) Appl. No. 39652/98, para. 40.The Court has however accepted extensive procedural obligations in asylum and migration cases under Art. 13 ECHR, the right to an effective remedy (e.g. *Čonka v. Belgium*, ECHR (2002) Appl. No. 51564/99; *Gebremedhin v. France,* ECHR (2007), Appl. No. 25389/05).

33 See European Court of Justice Case 69/10, *Brahim Samba Diouf vs. Minister for Labour, Employment and Immigration (Luxembourg)* [ECJ 28 July 2011] (court decision not yet reported).

34 Explanations relating to the Charter, *OJ 2007 C 303/*19.

35 Art. 6 para. 2 TEU. As early as 1979 the European Commission called for the accession to the ECHR (European Commission, Memorandum on the accession of the European Communities to the Convention for the Protection of Human Rights and

have met the objections of the Court of Justice, which had ruled that the accession to the ECHR "would be of constitutional significance" and therefore required a treaty basis[36]. Since the entry into force of Protocol No. 14 to the ECHR on 1 June 2010, the new Art. 59 para. 2 ECHR stipulates that "[t]he European Union may accede to the Convention".

On 7 July 2010 official talks started between the European Commission and the Council of Europe on the EU's accession to the ECHR. At the end of the negotiations an accession agreement will be concluded between the 47 contracting parties of the ECHR and the European Union, acting by unanimous decision of the Council and with consent of the European Parliament.[37] The accession agreement needs ratification by all EU and Council of Europe Member States. The ratification process will probably take some years.[38]

A protocol to the Lisbon Treaty requires that the accession agreement "shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to […] the specific arrangements for the Union's possible participation in the control bodies of

Fundamental Freedoms, 2 May 1979, Com (1979) 210 final, Bulletin of the European Communities, Supplement 2/79, 8).

36 Opinion of the Court on the Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 2/94, ECR *1996, I-01759*.

37 Press release European Commission no. IP/10/906, http://www.europa.eu/rapid/pressReleasesAction.do?reference=IP/10/906&format=DOC&aged=1&language=EN&guiLanguage=en (last visited 22 April 2012). The Council of Europe Steering Committee for Human Rights has published a Report to the Committee of Ministers on the elaboration of legal instruments for the accession of the European Union to the European Convention on Human Rights, 14 October 2011, CDDH(2011)009 and a Final version of the draft legal instruments on the Accession of the European Union to the European Convention on Human Rights, 19 July 2011, CDDH-UE(2011)16, available at http://www.coe.int/t/dlapil/cahdi/source/Docs 2011/CDDH-UE_2011_16_final_en.pdf (last visited 2 May 2012). On this draft agreement, see X. Groussot, T. Lock & L. Pech, *Adhésion de l'Union européenne à la Convention européenne des droits de l'homme: analyse juridique du projet d'accord d'adhésion du 14 octobre 2011* (7 November 2011) available at http://www.robert-schuman.eu/question_europe.php?num=qe-218 (last visited 2 May 2012).

38 H. Mahony, 'EU bid to join human rights convention poses tricky questions' (2010) available at http://euobserver.com/18/29711 (last visited 2 May 2012). It took almost six years before Protocol No. 14 was ratified by all Council of Europe member states, due to obstruction by Russia.

the European Convention […]"[39] Other technical issues that need to be solved relate inter alia to the relationship between the Court of Justice and the ECtHR, e.g. the possibility of the introduction of a preliminary reference procedure by which the Court of Justice could request an interpretation of the ECHR from the ECtHR[40] and the question of whether the EU will also accede to the Protocols to the ECHR.[41]

While the European institutions are already bound by the ECHR as a matter of European law,[42] as a result of the accession, the European Union's international responsibility under the ECHR for human rights violations may be engaged. By acceding, the EU will equally subject itself to external scrutiny in the field of human rights, i.e. the jurisdiction of the European Court of Human Rights. Currently the ECtHR declares applications directed against the European Union inadmissible *ratione personae.*[43]

The ECtHR however, does examine nationally implemented EU measures. In the famous *Bosphorus*-case,[44] the European Court of Human Rights stated that there's a presumption that actions taken by Member States in the execution of EU legal obligations[45] are in compliance with the ECHR, because the protection of fundamental rights by the European Union is considered to be "equivalent" to that of the Convention system.[46] This presumption can however be rebutted "if, in the circumstances of a particular case, it is considered that the protection of Convention rights was

39 Protocol relating to Art. 6 para. 2 of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, *OJ C* 17 (2007), 306/ 155.

40 For more details: Steering Committee for Human Rights, Technical and legal issues of possible EC/EU accession to the European Convention on Human Rights, 53th meeting, 25-28 June 2002, CDDH(2002)020 Addendum 2, available at www.coe.int/t/dghl/standardsetting/cddh/Meeting reports committee/53rd_en.pdf (last visited 2 May 2012).

41 Weiß, *supra* note 19, 91.

42 By application of the general principles of EU law (see B.III) or indirectly through the Charter (see B.I, 1).

43 E.g. *Connolly v. 15 EU Member States,* ECHR (2008) Appl. No. 73274/01.

44 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland,* ECHR (2005), Appl. No. 45036/98.

45 The Court restricted the *Bosphorus*-presumption to Community law in the strict sense, at that time the first pillar of the European Union (para. 72). In the light of the abolition of the pillar structure by the Lisbon Treaty, the presumption arguably applies to all areas in which the Court of Justice has full jurisdiction.

46 *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirket v. Ireland,* ECHR (2005) Appl. No. 45036/98, para. 165.

manifestly deficient."[47] The presumption does not apply to acts falling outside a Member State's strict EU legal obligations, in particular when they exercise State discretion.[48] It is possible that the ECtHR will change its deferential attitude towards the EU in the event of EU accession to the ECHR,[49] as this attitude is justified by the fact that the EU is currently not a party to the ECHR[50].

III. General Principles

The TEU states that fundamental rights, in particular as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of EU law.[51] This is the explicit recognition of the case-law of the Court of Justice, which has accepted that

> "fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the member states, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those states. Similarly, international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of community law."[52]

The Court of Justice however only examines the compatibility of national legislation with fundamental rights in so far as it falls within the scope of application of European law.[53]

47 *Id*., para. 156.
48 *M.S.S. v. Belgium and Greece*, ECHR (2011), Appl. No. 30696/09, para. 338.
49 F. van den Berghe, 'The EU and Issues of Human Rights Protection: Same Solutions to More Acute Problems?', 16 *European Law Journal* (2010) 2, 112, 149.
50 Weiß, *supra* note 19, 95
51 Art. 6 para. 3 TEU.
52 Case 4/73, *Nold v. Commission, [1974]*, ECR 491 para. 13.
53 E.g. Case 12/86, *Demirel v. Stadt Schwaebish Gmuend*, [1987] ECR 3719, para. 28; Peers, *supra* note 7, 117.

The importance of general principles as source of fundamental rights in the European Union will undoubtedly decrease as the Charter has acquired legal binding effect and the Union will accede to the ECHR. The general principles nonetheless allow the Court of Justice to provide for a higher standard of protection than the Charter and the ECHR or for additional rights.[54] The general principles may also be relevant in so far as their scope might be broader than the scope of the Charter: a restrictive interpretation of the latter may not include situations in which Member States take actions which derogate from EU law, as in such circumstances Member States are not "implementing Union Law".[55] According to the Court of Justice, such actions do come within the scope of application of European law and therefore the general principles are applicable.[56]

IV. Conclusion

The three systems of human rights protection overlap to a high degree. In case of divergence, the standards which provide the highest level of protection should be applied.[57] The ECHR has been assigned a preeminent position in this construction, which is structurally reflected in the references to the ECHR as a minimum standard with regard to corresponding Charter rights and as a primary source of the general principles of EU law.

C. Common European Asylum System

At the entry into force in 1993 of the Maastricht Treaty, the European Union gained competences in the field of asylum and immigration policy as a part of the now abolished third pillar concerning "Justice and Home Affairs".[58] The Amsterdam Treaty, which entered into force in 1999, incorporated asylum and immigration policy in the Treaty establishing the

54 Weiß, *supra* note 19, 92.

55 Art. 51 para. 1, first sentence Charter. See C. Franklin, 'The Legal Status of the EU Charter of Fundamental Rights after the Treaty of Lisbon', 15 *Tilburg Law Review* (2010-2011) 2, 137, 153-155.

56 E.g. Case 260/89, *ERT v. DEP*, [1991] ECR I-2925. The explanations suggest that the scope of the Charter should be interpreted in line with the case-law of the Court of Justice on the scope of the general principles (Explanations relating to the Charter , *OJ 2007.C 303*/32), excluding such a restrictive interpretation of Art. 51, para. 1, first sentence, Charter.

57 Weiß, *supra* note 19, 74-75.

58 Art. K.1. Treaty of Maastricht (TEU); Battjes, *supra* note 25, 28.

European Community (since 2009: TFEU), thus transferring this area from the third (intergovernmental) to the first (supranational) pillar.[59] The growing EU competences in this field are reflected in the so-called Tampere Conclusions in which the European Council agreed to work towards the establishment of a Common European Asylum System.[60]

I. Competences

Asylum and immigration policy are part of Title V TFEU, the so-called "Area of Freedom, Security and Justice".[61] Measures in the field of asylum and immigration law must be adopted jointly by the European Parliament and the Council, deciding by qualified majority,[62] in accordance with the ordinary legislative procedure.[63] The Lisbon Treaty extends the competences of the Court of Justice: the Court now principally has full jurisdiction in the Area of Freedom, Security and Justice under the same conditions as other fields of EU law.[64] This will undoubtedly lead to a

59 Battjes, *supra* note 25, 29.

60 Tampere European Council 15 and 16 October 1999 – Presidency Conclusions, SN 200/99, www.europarl.europa.eu/summits/tam_en.htm, para. 14 (last visited 3 April 2012); Battjes, *supra* note 25, 30.

61 P. Craig, 'The Treaty of Lisbon, process, architecture and substance', 33 *European Law Review* 2, 2008, 137, 142.

62 Art. 16 (3) Treaty on European Union (TEU) provides that "(t)he Council shall act by a qualified majority, except where the Treaties provide otherwise." See Craig, *supra* note 61, 154.

63 Art. 78 (asylum) and Art. 79 (immigration) TFEU. The ordinary legislative procedure is outlined in Art. 294 TFEU. Before the entry into force of the Lisbon Treaty, co-decision was already required in the field of asylum law and the Council already acted by qualified majority, while in the field of immigration law unanimity in the Council was required and the European Parliament was merely consulted (S. Peers, 'Legislative Update: EU Immigration and Asylum Competence and Decision-Making in the Treaty of Lisbon', 10 *European Journal of Migration and Law*, 2008, 219, 240).

64 See S. Carruthers, 'The Treaty of Lisbon and the Reformed Jurisdictional Powers of the European Court of Justice in the Field of Justice and Home Affairs', *European Human Rights Law Review* (2009) 6, 784-804. The main restriction to the Court's jurisdiction is Art. 276 TFEU, which states that "[i]n exercising its powers regarding the provisions of Chapters 4 and 5 of Title V of Part Three relating to the area of freedom, security and justice, the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security." As a transitional measure, the

significant increase of the Court's activities in the field of asylum and immigration law.[65]

The European Parliament and the Council have the competence to adopt measures for a Common European Asylum System, comprising a uniform status of asylum (a) and subsidiary protection (b), a common system of temporary protection for displaced persons in the event of massive inflow (c), common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status (d), criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection (e), standards concerning the conditions for the reception of applicants for asylum or subsidiary protection (f) and partnership and cooperation with third countries in the context of asylum or temporary protection (g).[66]

At first sight, the Lisbon Treaty has not significantly changed the competences in the field of asylum law[67]. Interestingly however, while the old Art. 63 of the Treaty establishing the European Community (ECT) generally only allowed for the adoption of "minimum standards" in the field of asylum law,[68] Art. 78 TFEU no longer contains this limitation.[69] This is highly relevant from the viewpoint of human rights protection. Before the Lisbon Treaty, it may well have been argued that the Member States still exclusively bore the final responsibility for the development of a legal framework which effectively protects the fundamental rights of asylum seekers – as they were free to provide more protection than EU "minimum standards". As the EU has gained harmonisation competences, the positive obligation to provide such a legal framework[70] has arguably (at least

Court's jurisdiction will remain unchanged with respect to old "third pillar" acts which have been adopted before the entry into force of the Lisbon Treaty, until these acts are amended or until five years have elapsed since the entry into force (Art. 10 Protocol on transitional provisions, *OJ C.* 17 December 2007, No. 306, 159). These restrictions are however irrelevant in the field of asylum law.

65 Peers, *supra* note 63, 219.On the restrictions of the old Art. 68 of the Treaty Establishing the European Community, see S. Peers, 'Finally 'Fit for Purpose'? The Treaty of Lisbon and the End of the Third Pillar Legal Order', 27 *Yearbook of European Law* (2008) 1, 47, 48-51.

66 Art. 78 para. 2 TFEU. For an elaborate discussion, see Peers, *supra* note 63, 219-247.

67 For a comparison of the TFEU before and after the Treaty of Lisbon, see *Id., 232-238.*

68 With the exception of Art. 63 para. 1, a), ECT which constituted the legal basis for the Dublin system.

69 Peers, *supra* note 63, 232-238, 233.

70 Starner considers the *"duty to put in place a legal framework which provides effective protection for Convention rights"* as the first and foremost type of positive obligation

partially)[71] shifted in its direction. After the accession to the ECHR,[72] the international responsibility of the EU may thus be engaged if it fails to comply with that positive obligation. To avoid this situation, it is necessary that the Court of Justice applies its increased jurisdiction to raise standards of human rights protection in the field of EU asylum law. This is particularly important in the light of the upcoming recasts of major pieces of EU asylum legislation.

II. Instruments

1. Qualification Directive

In order to understand the scope of European Asylum Law – and thus of this paper – it is necessary to first discuss the Qualification Directive[73]. This Directive lays down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.[74] The Directive does not prevent Member States from introducing

under the ECHR (S. Karner, 'Positive Obligations Under the Convention' in J. Lowell & J. Cooper (eds) *Understanding Human Rights Principles* (2001), 147). Similarly A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004), 5.

71 The case *Ilaşcu and Others v. Moldova and Russia*, ECHR (2004) Appl. No. 48787/99, is a perfect example of how the same situation can attract the international responsibility of two distinct parties to the Convention, each within their own competences.

72 See above chapter B, subtitle II.

73 On 13 December 2011 a recast version of the Qualification Directive was adopted: 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 (recast) (Recast Qualification Directive). Directive 2004/83/EC will be repealed with effect from 21 December 2013 (Art. 40 Recast Qualification Directive), the transposition deadline of the recast directive (Art. 39, para. 1 Recast Qualification Directive). Unless stated otherwise, this paper will discuss Directive OJ L 304, 2004/83/EC; Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (Qualification Directive).

74 Art. 1 Qualification Directive. Besides these two statuses, European Asylum Law also provides for a temporary protection status in case of a mass influx of displaced

or retaining more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, insofar as those standards are compatible with the Directive.[75]

The Directive defines a refugee as:

> "a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply."[76]

This definition encompasses all elements necessary for the determination of refugee status as set out in the Geneva Convention.[77] A

persons, which must be established by the Council, see: Council Directive 2001/55/EC of 20 July 2001on 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 end bearing the consequences thereof (Temporary Protection Directive). This procedure has not been applied so far. On this Directive, see S. Peers & N. Rogers, *EU Immigration and Asylum Law* (2006), 453-485.

75 Art. 3 Qualification Directive. Similarly, Art. 3 Recast Qualification Directive.

76 Art. 2 (c) Qualification Directive. Similarly Art. 2 (d) Recast Qualification Directive. The reasons for persecution are set further explained in Art. 10 Qualification Directive. Art. 10 Recast Qualification Directive takes gender related aspects more seriously in defining whether a group constitutes "a particular social group" and explicitly stresses the need to give due consideration to gender identity.

77 Under the Geneva Convention, a "refugee" is "any person who [...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence […], is unable or, owing to such fear, is unwilling to return to it" (Art. 1, A, (2) Convention relating to the Status of Refugees, Geneva, 28 July 1951, as amended by the Protocol relating to the Status of Refugees, New York, 31 January 1967 (Geneva Convention 1967)). Art. 12 Qualification

notable difference however is that the Directive is only applicable to third-country nationals – persons who do not have the nationality of an EU Member State – while the Geneva Convention does not contain a geographical limitation. This is in line with a Protocol which was annexed to the Treaty establishing the European Community (the current TFEU) at the adoption of the Treaty of Amsterdam, which principally states that an asylum application made by a national of a EU Member State may not be taken into consideration or declared admissible.[78] The Protocol's application will be incompatible with respectively Art. 33 para. 1 Geneva Convention and/or Art. 3 ECHR as well as Art. 19 para. 2 of the Charter, if it results in the removal of an EU citizen to a Member State where there is a well-founded fear of persecution and/or a real risk of ill-treatment.[79]

The Qualification Directive provides a second type of international protection: subsidiary protection is "complementary and additional to the refugee protection enshrined in the Geneva Convention".[80]

A person eligible for subsidiary protection is:

"a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds

Directive incorporates the exclusion grounds of Art. 1, D, E and F Geneva Convention 1967; Battjes, *supra* note 25, 222.

78 Protocol on asylum for nationals of Member States of the European Union, OJ *.C.* 10 November 1997, No. 340, 103. The Qualification Directive explicitly states that it is "without prejudice to" this Protocol (consideration 13). The Protocol contains a very restrictive list of exceptions: (a) when the Member States derogate from the ECHR in application of Art. 15 ECHR; (b) if a procedure under Art. 7, para. 1 TEU has been initiated; (c) if the Council, in application of Art. 7, para. 1 TEU, has established the existence of a "serious and persistent breach" of the values referred to in Art. 2 TEU; or (d) if a Member State unilaterally decides to do so, but only if it immediately informs the Council and if the application is dealt with on the basis of a presumption that it is manifestly ill-founded. Belgium has made a declaration to the protocol, in which it stated that "it shall, in accordance with the provision set out in point (d) [...], carry out an individual examination of any asylum request made by a national of another Member State" (*OJ .C.* 10 November 1997, No. 340, 144). Strikingly, Spain had lodged the proposal for the Protocol, exactly because Belgium had refused to extradite a Basque couple which was suspected of aiding ETA terrorists.

79 The case of *M.S.S. v. Belgium and Greece* ECHR (2011), Appl. No. 30696/09 illustrates that a removal to an EU Member State may well violate Art. 3 ECHR, see D.3.

80 Preamble, (24) Qualification Directive.

> have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country."[81]

Art. 15 defines serious harm as (a) the death penalty or execution, (b) torture or inhuman or degrading treatment or punishment in the country of origin or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.[82]

Refugee and subsidiary protection apply regardless whether the actor of persecution or serious harm is "(a) the State, (b) parties or organisations controlling the State or a substantial part of the territory of the State or (c) non-State actors, if it can be demonstrated that the actors mentioned in (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm [...]."[83]

The Qualification Directive further determines the content of the international protection, including the principle of non-refoulement, the issuance of a residence permit and access to employment, education, health care and social assistance.[84] Generally speaking, the rights attached to the

81 Art. 2 (e) Qualification Directive. Similarly Art. 2 (f) Recast Qualification Directive. Art. 17 Qualification Directive is comparable to Art. 12 but slightly broader; Battjes, *supra* note 25, 264.

82 Similarly Art. 15 Recast Qualification Directive. The Court of Justice has ruled that "the word 'individual' must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place […] reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive." (Case 465/07, Elgafaji v. Staatssecretaris van Justitie (Netherlands), *[2009] ECR, I-921*, para. 35. This is conform with the case-law of the ECHR, which has accepted that in the most extreme cases of general violence, there may be a real risk of ill-treatment (in the sense of Art. 3 ECHR) simply by virtue of exposing an individual to such violence. See *NA v. The United Kingdom,* ECHR (2008), Appl. No. 25904/07, para. 115.

83 Art. 6 Qualification Directive. Similarly Art. 6 Recast Qualification Directive.

84 Art. 20-34 Qualification Directive.

refugee status are more elaborate than those attached to the subsidiary protection status.[85]

2. Other Instruments

Other important EU asylum instruments are the Asylum Procedures Directive,[86] the Reception Conditions Directive[87] and the Dublin II Regulation.[88] While the latter will be discussed extensively in the next chapter, the first two need some further elaboration here.

The Asylum Procedures Directive lays down minimum standards for the granting and withdrawing of refugee status.[89] It applies to all asylum applications made in the territory, including at the border or in the transit zones of a Member State, as well as to the withdrawal of refugee status.[90] The Directive generally guarantees a right of access to an asylum procedure and the right to remain in the Member State until a first instance decision

85 The Recast Qualification Directive approximates the rights of refugees and of beneficiaries of subsidiary protection, but continues differentiation between these statuses with respect to residence permits (Art. 24 Recast Qualification Directive) and access to social welfare (Art. 29 Recast Qualification Directive) and integration facilities (Art. 34 Recast Qualification Directive).

86 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (Asylum Procedures Directive).

87 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (Reception Conditions Directive).

88 Council Regulation 2003/343/EC of 18 February 2003, (OJ 2003 L 050) 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 (Dublin II Regulation).

89 On this Directive, see elaborately Peers & Rogers, *supra* note 74, 367-452.

90 Art. 3 para. 1 Asylum Procedures Directive. Art. 35 however contains the possibility of derogating from a high number of guarantees with respect to procedures at the border or in transit zones. The Directive does not concern subsidiary protection procedures, unless when Member States apply a single procedure for refugee claims and claims for subsidiary protection (Art. 3 para. 3 and Peers & Rogers, *supra* note 74, 367. The Commission Proposal for a recast of the Directive however does cover all procedures for granting and withdrawing of international protection status (see: Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast), COM(2011) 319 final).

has been made.[91] It contains a number of procedural guarantees[92] and minimum requirements for the decision-making process.[93] Applicants must enjoy the right to an effective remedy before a court or a tribunal against decisions on their asylum application.[94] The Directive further contains common standards and practices related to the rejection of asylum applications: it enumerates the grounds on which applications can be declared inadmissible[95] or (manifestly) ill-founded[96] and makes provision for the use of accelerated procedures in these cases.[97] Applications can *inter alia* be declared inadmissible when a Member State is not responsible in accordance with the Dublin II Regulation[98] or when a country which is not a Member State is considered as a "first country of asylum"[99] or as a "safe third country".[100]

The Reception Conditions Directive in turn lays down minimum standards for the reception of asylum seekers in the Member States.[101] The Directive applies to all third country nationals and stateless persons who make an application for asylum at the border or in the territory of a Member State, but only as long as they are allowed to remain on the territory as asylum seekers.[102] The Directive grants asylum seekers the right to obtain

91 Art. 6 and 7 Asylum Procedures Directive. The Directive allows an exception on the right to remain in the case of a subsequent application which will not be examined or in cases of extradition (Art. 7 para. 2).

92 Such as a right to information about procedures (Art. 10) , the opportunity of a personal interview (Art. 12); the right to legal assistance and representation (Art. 15).and specific guarantees for unaccompanied minors (Art. 17).

93 E.g. decisions are taken individually, objectively and impartially (Art. 8 para. 2, a)), are given in writing (Art. 9 para. 1) and, in case of rejection, state the reasons in fact and in law as well as written information on how to challenge a negative decision (Art. 9 para. 2).

94 Art. 39 Asylum Procedures Directive. The fact that the Directive allows for non-suspensive appeals is incompatible with Art. 13 ECHR (Peers & Rogers, *supra* note 74, 408.).

95 Art. 25 Asylum Procedures Directive.

96 Art. 28 Asylum Procedures Directive.

97 Art. 23 para. 4 Asylum Procedures Directive.

98 Art. 25 para. 1 Asylum Procedures Directive.

99 Art. 25 para. 2, b) and Art. 26 Asylum Procedures Directive.

100 Art. 25 para. 2, c) and Art. 27 Asylum Procedures Directive. Unnecessary to say that these last two concepts entail the risk of indirect refoulement (see below).

101 On this Directive, see Peers & Rogers, *supra* note 74, 297-322.

102 Art. 3 para. 1 Reception Conditions Directive. The Directive does not apply to applicants for subsidiary protection, but Art. 3 para. 4 however allows states to decide to apply the Directive in connection with procedures for deciding on applications for

documentation and to principally move freely within the territory of the host Member State.[103] It generally requires Member States to make provisions on material reception conditions – such as housing, food, clothing or financial allowances[104] – to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence.[105] The Member States must ensure that applicants receive the necessary health care[106] and that asylum seeking minors and minor children of asylum seekers have access to the education system under similar conditions as nationals of the host Member State.[107] The Directive allows for access, under restrictive conditions, to the labour market and to vocational training.[108] It also contains specific provisions concerning persons with special needs, such as minors, unaccompanied minors and victims of torture and violence.[109]

While the Reception Conditions Directive essentially is a humanitarian instrument, its underlying aim is to discourage asylum seekers from moving from one Member State to another: the harmonization of reception conditions should help to limit the secondary movements of asylum seekers within the EU influenced by the variety in the level of reception conditions in the diverse Member States.[110] In Da Lomba's words, "the need to ensure respect for human dignity was balanced against the

kinds of protection other than that emanating from the Geneva Convention. The Commission proposal for a recast of the Reception Conditions Directive however does cover all applicants for international protection (see Art. 3 Amended proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (Recast), COM(2011) 320 final.

103 Art. 6 and 7 Reception Conditions Directive. The freedom of movement is however far from absolute, see below chapter F.

104 Art. 2 (j) defines "material reception conditions" as "the reception conditions that include housing, food and clothing, provided in kind, or as financial allowances or in vouchers, and a daily expenses allowance."

105 Art. 13 para. 2. Art. 14 deals with the modalities for material reception conditions.

106 Art. 15 para. 1 Reception Conditions Directive. This must at least include emergency care and essential treatment of illness.

107 Art. 10, para. 1 Reception Conditions Directive.

108 Art. 11 and Art. 12 Reception Conditions Directive.

109 Respectively Art. 18, Art. 19 and Art. 20 Reception Conditions Directive.

110 Consideration 8 Reception Conditions Directive. According to Peers & Rogers, there is however "little or no evidence that secondary movements are made on this basis" (Peers & Rogers, *supra* note 74, 306.) similar consideration was made at the drafting of the Asylum Procedures Directive, see Consideration 6 Asylum Procedures Directive.

overall restrictive objectives of the EU asylum policy as well as financial considerations."[111]

As both the Asylum Procedures Directive and the Reception Conditions Directive lay down minimum standards, Member States are explicitly allowed to maintain or introduce more favourable conditions, insofar as these are compatible with the respective directive.[112]

D. Dublin II Regulation

I. Content Regulation

The so-called Dublin II Regulation, named after the preceding Dublin Convention,[113] contains a hierarchical list of criteria to determine which EU Member State is responsible for the examination of an asylum application lodged in one of the Member States by a third-country national.[114] The objective of the Regulation is to avoid "asylum shopping", i.e. the lodging of asylum applications in several Member States or the travelling to a preferred Member State to apply for asylum after transiting other States.[115] The criteria must be applied in the order in which they are set out in the Regulation.[116]

111 Da Lomba, *supra* note 28, 220.

112 Art. 5 Asylum Procedures Directive and Art. 4 Reception Conditions Directive.

113 Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, Dublin, 15 June 1990. On this Regulation, see Peers & Rogers, *supra* note 74, 221-257.

114 Applicants for subsidiary protection are not included in the Dublin II Regulation, which predates the Qualification Directive. The Commission Proposal for a recast of the Dublin II Regulation however encompasses every application for international protection (Art. 1 Commission Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Recast) (Commission Proposal Dublin II), Com(2008) 820 final/2). The Regulation applies to the 27 EU Member States as well as to Norway, Iceland, Switzerland and Liechtenstein.

115 Battjes, *supra* note 25, 27.

116 Art. 5 para. 1 Dublin II Regulation.

A first set of criteria is related to reasons of family reunification.[117] A second set of criteria relates to the issuance of residence permits or visas.[118] The most well-known criterion is that of the country where the asylum seeker has irregularly entered the European Union.[119] Subsequent criteria relate to a third-country national entering the territory of a Member State in which the need for him or her to have a visa is waived.[120] and to the application made at the international transit area of an airport of a Member State,[121] in both instances that Member State shall be responsible. When no Member State can be designated on the basis of these criteria, the first Member State with which the application was lodged shall be responsible.[122] With the exception of the criteria related to family reunification, the Dublin system is thus designed to allocate responsibility to that Member State which has played the most important part in the entry of the asylum seeker concerned.[123]

Regardless of these criteria, the Member State where the asylum application is lodged can decide on the basis of the so-called "sovereignty clause" to examine the application[124]. Moreover any Member State may, at the request of another Member State, accept to examine an application on humanitarian grounds based in particular on family or cultural considerations, on condition that the persons concerned consent[125].

The Regulation provides that the designated Member State is obliged to "take charge of" an asylum seeker who has lodged an application in a different Member State or to "take back" an applicant who already lodged an application in the designated Member State, which is under examination, has been withdrawn by the applicant or has been rejected.[126] The Regulation further specifies the procedure for the submission of and the response to

117 Art. 6-8 Dublin II Regulation. These criteria have been criticized for defining the concept of family too narrowly, in line with the western concept of the nuclear family (e.g. Da Lomba, *supra* note 28, 122.).
118 Art. 9 Dublin II Regulation.
119 Art. 10 para. 1 Dublin II Regulation.
120 Art. 11 Dublin II Regulation.
121 Art. 12 Dublin II Regulation.
122 Art. 13 Dublin II Regulation.
123 Da Lomba, *supra* note 28, 119.
124 Art. 3 para. 2 Dublin II Regulation.
125 Art. 15 para. 1 Dublin II Regulation.
126 Art. 16 para. 1 Dublin II Regulation.

"take charge" or "take back" requests, including strict time limits, and the "transfer" to the designated Member State.[127]

II. Criticism

The Dublin II Regulation has been widely criticised for failing to adequately protect asylum seekers' fundamental rights.[128] According to the United Nations High Commissioner for Refugees (UNHCR), "a basic assumption underlying the Dublin system is not yet fulfilled – namely, the premise that asylum-seekers are able to enjoy generally equivalent levels of procedural and substantive protection, pursuant to harmonized laws and practices, in all Member States."[129] This fact has led to the result that "many individuals transferred under Dublin do not have their claims properly considered or may even be denied access to a procedure altogether."[130] The huge differences in success rates of asylum applications in different Member States have been correctly labelled as an "asylum lottery".[131] There

127 Art. 17-20 Dublin II Regulation.

128 E.g. M. Kengerlinsky, 'Shifting Borders: Immigration, Refugee and Asylum Matters & Public Policy: Immigration and Asylum Policies in the European Union and the European Convention on Human Rights: Questioning the legality of restrictions', 12 *Georgetown Public Policy Review* (2006-2007), 101, 110.

129 'UNHCR Comments on the European Commission's Proposal for a recast of the Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person (Dublin II) (Com(2008) 820, 3 December 2008) and the European Commission's Proposal for a recast of the Regulation of the European Parliament and of the Council concerning the establishment of 'Eurodac' for a comparison of fingerprints for the effective application of [the Dublin II] Regulation] (COM(2008) 825, 3 December 2008)', 1-2 (March 2009) available at http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&query=COM%282008%29+825%2C+3+December+2008&x=0&y=0 (last visited 2 May 2012). According to the European Council on Refugees and Exiles (ECRE), "[t]he Dublin II Regulation is based on an erroneous presumption that an asylum seeker will receive equivalent access to protection in whichever Member State a claim is lodged" (ECRE, 'Report on the Application of the Dublin II Regulation in Europe', 169 (March 2006) available at http://www.ecre.org/component/content/article/57-policy-papers/135-report-on-the-application-of-the-dublin-ii-regulation-in-europe.html (last visited 2 May 2012) [ECRE Report].

130 *Id.*

131 ECRE, 'Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered', 15 (March 2008) available at http://www.ecre.org/component/content/

equally exists a great divergence in the level of reception conditions in the different Member States.[132] The Regulation has also been criticized for being an incentive for States to resort to an increased use of detention in order to secure Dublin II transfers.[133]

The fact that entry controls are linked to the allocation of responsibility under the Dublin II Regulation, has been criticized for creating unequal burdens depending on a State's geographical location.[134] This is contrary to Art. 80 TFEU, which states that "[t]he policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States."[135]

Moreover, while "efficiency" appears to be one of the primary objectives of the Dublin II Regulation, its operation is inefficient, expensive and time-consuming.[136] It does not achieve its goal of reducing the number of multiple applications.[137] According to the European Council on Refugees and Exiles (ECRE), "[a]t best, the Dublin Regulation adds a lengthy, cumbersome procedure to the beginning of the asylum process."[138] This lengthy process, with its numerous deadlines, unnecessarily prolongs the

article/57-policy-papers/134-sharing-responsibility-for-refugee-protection-in-europe-dublin-reconsidered.html (last visited 2 May 2012) [ECRE Responsibility].

132 Amnesty International, 'The Dublin II Trap' (March 2010) available at http://www.amnesty.org/en/library/info/EUR25/001/2010/en, 35-41 (last visited 2 May 2012).

133 ECRE Report, 169. See below, chapter F, III, 2.

134 E.g. Da Lomba, *supra* note 28, 137; ECRE Report, 169. While in practice the majority of the actual transfers are not directed towards Member States located at an external border (Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system, 6 June 2007, COM(2007) 299 final), the proper operation of the Dublin system would lead to a significant increase in the number of applicants in certain border countries (European Parliament's Committee on Civil Liberties, Justice and Home Affairs, Report on the evaluation of the Dublin system, 2 July 2008, A6-0287/2008, 12).

135 The old Art. 63, para. 2, (b) Treaty establishing the European Community strove to "a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons."

136 ECRE Responsibility, 10.In reality few transfers are actually agreed on and more than half of the agreed transfers never happen. See similarly the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, Report on the evaluation of the Dublin system, 2 July 2008, A6-0287/2008.

137 ECRE Responsibility, 11.

138 *Id.*

State of uncertainty in which asylum seekers find themselves and unnecessarily delays refugees' integration in the host country.[139]

Unsurprisingly, some have therefore argued that it might be better to do away with the Dublin system altogether.[140] In the opponents' view, it would be better to allow asylum seekers the freedom to choose in which Member State they lodge an asylum application[141] – Member States receiving disproportionately high numbers of asylum seekers would then be compensated by a financial burden sharing instrument.[142] This would be more in line with the freedom of movement, a fundamental principle of EU law,[143] as it does not compel asylum seekers to apply in a Member State not of their choosing.[144] Others have argued in favour of a system in which an asylum application is first examined by an EU body, instead of an individual Member State.[145] In the case of a positive decision, a refugee would then be distributed over the Member States on a quota basis.

III. European Court of Human Rights

On 21 January 2011, the European Court of Human Rights issued the long-anticipated Grand Chamber judgment in the case of *M.S.S. v. Belgium and Greece*. The case concerned an Afghan asylum seeker who was transferred by Belgium to Greece in application of the Dublin II Regulation. At his arrival in Greece, he was placed in detention for three days. After his release he had to live on the streets, without accommodation or means of

139 *Id*., 26.

140 ECRE Report, 170.

141 ECRE Responsibility, 29-30.As an alternative, ECRE proposes the use of criteria which indicate a significant connection of an asylum seeker with a particular Member State.

142 ECRE Report, 170.

143 Art. 45 Charter and Art. 3 para. 2 TEU.

144 ECRE Responsibility, 7.

145 C. Clarke, 'The EU and migration: A call for action' (1 December 2011) available at http://www.cer.org.uk/publications/archive/essay/2011/eu-and-migration-call-action, 18 (last visited 2 May 2012); 'UNHCR Working Paper A Revised "EU Prong" Proposal' (22 December 2003) available at http://www.unhcr.org/refworld/docid/400e 85b84.html (last visited 2 May 2012). Such a system, or even worse, a system of processing in centers outside the EU (see M. Garlick, 'The EU Discussions on Extraterritorial Processing: Solution or Conundrum?', 18 *International Journal of Refugee Law* (2006) 3-4, 601-629, is however contrary to the need for integration of refugees from day one (ECRE Responsibility, 27).

survival. Later he was detained for seven more days, after a failed attempt to leave Greece, after which he was again abandoned to live on the streets.

One of the applicant's complaints concerned his "indirect refoulement" by Belgium. As explained above, Art. 3 ECHR prohibits the expulsion of a person to a country where he or she runs a real risk of being subjected to torture or to an inhuman or degrading treatment or punishment. In the case of *T.I. v. The United Kingdom*, the Court had already ruled that "the indirect removal […] to an intermediary country […] does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention."[146] Therefore, when they apply the Dublin Regulation, "the States must make sure that the intermediary country's asylum procedure affords sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Article 3 of the Convention."[147] As States can refrain from transferring asylum seekers to the designated Member State on the basis of the "sovereignty clause", such a transfer does not strictly fall within their international legal obligations and therefore the *Bosphorus*-presumption does not apply.[148]

In the earlier case of *K.R.S. v. The United Kingdom*, concerning the Dublin II transfer of an Iranian asylum seekers from the United Kingdom to Greece, the Court had stated that "in the absence of any proof to the contrary, it must be presumed that Greece will comply with [Art. 3 ECHR] in respect of returnees including the applicant."[149] In light of the numerous reports issued in recent years regarding the deficiencies of the asylum procedure in Greece, the Court adopted the different view in *M.S.S. v. Belgium and Greece* that:

> "it was in fact up to the Belgian authorities, faced with the situation described above, not merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice. Had they done this, they would have seen that the risks the applicant

146 *T.I. v. The United Kingdom,* ECHR (2000), Appl. No. 43844/98.
147 *M.S.S. v. Belgium and Greece,* ECHR(2011), Appl. No. 30696/09, para. 342.
148 *Id*., para. 339-340.
149 *K.R.S. v. The United Kingdom,* ECHR (2008), Appl. No. 32733/08.

> faced were real and individual enough to fall within the scope of Article 3."[150]

Therefore the Court ruled that Belgium had violated Art. 3 ECHR by transferring the applicant to Greece.[151] The Court found a further violation of Art. 3 ECHR by Belgium, because the transfer had knowingly exposed the applicant to detention and living conditions that amounted to degrading treatment.[152]

This ruling more or less implies the end of mutual trust in European Asylum Law: transferring States should not just presume that other Member States comply with their international obligations. When an issue arises under Art. 3 ECHR, they are obliged to apply the "sovereignty clause".

IV. Recast Regulation

The concern about the capacity of countries like Greece to comply with European minimum standards on asylum procedures and reception conditions is reflected in the 2008 Commission proposal to recast the Dublin II Regulation. The proposal contains a procedure which will allow the Commission – on its own initiative or on the initiative of another Member State – to suspend the Dublin II transfers to a Member State when "circumstances prevailing in [the Member State concerned] may lead to a level of protection for applicants for international protection which is not in conformity with Community legislation, in particular with [the Reception Conditions Directive] and [the Asylum Procedures Directive]."[153] The proposal further provides that a Member State may request the Commission to temporarily suspend incoming Dublin II transfers when faced with "a particularly urgent situation which places an exceptionally heavy burden on its reception capacities, asylum system or infrastructure, and when the transfer of applicants for international protection in accordance with this Regulation to that Member State could add to that burden."[154] The

150 *M.S.S. v. Belgium and Greece,* ECHR (2011), Appl. No. 30696/09, para. 359.

151 *Id.*, para. 360.

152 *Id*., para. 367-368. The transfer of M.S.S. equally violated Art. 4 (the prohibition of torture and of inhuman or degrading treatment or punishment) and Art. 19 para. 2 of the Charter of Fundamental Rights, both with respect to the risk of indirect refoulement as with respect to the exposure to inhuman and degrading detention and living circumstances.

153 Art. 31 para. 2-3, Commission Proposal Dublin II.

154 Art. 31 para. 1 Commission Proposal Dublin II.

Commission proposal has been slightly amended by the European Parliament[155] and is currently being discussed by the Council.

In the Council, however, there is fierce opposition to the idea of a suspension mechanism,[156] which makes it highly likely that the proposal will eventually be dropped. The Polish presidency has even made a counterproposal to instead introduce an "early warning system", which will allow the Commission to make recommendations to a Member State, inviting it to draw up a "preventive action plan" in case it identifies problems in the application of that Member States' asylum system.[157] If that "preventive action plan" does not lead to an improvement, the Commission, in cooperation with the Member State concerned, may elaborate a "crisis management action plan". The Member State concerned will have to submit regular reports on the implementation of these plans.

While it is unclear at this moment whether Poland's proposal will be endorsed by the Council, it is likely that the final version of the recast Dublin II Regulation will not contain a strong mechanism in order to avoid asylum seekers being transferred to Member States where they risk indirect refoulement or inhuman or degrading detention and living circumstances. As the *M.S.S.* judgment makes clear that such a transfer is prohibited, a strong mechanism is highly feasible because it would allow the EU institutions to monitor whether the basic assumption of the Dublin II system – that the receiving Member State offers asylum seekers a sufficient level of human rights protection – is fulfilled in practice. It is in any event clear that the current powers of the Commission to initiate infringement proceedings before the Court of Justice against a Member State which fails to comply with European law[158] are insufficient.[159]

155 Position of the European Parliament adopted at first reading on 7 May 2009 with a view to the adoption of Regulation (EC) No …/2009 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ *C* 5 August 2010, No. 212, E/371.

156 See e.g. Council Discussion Paper No. 15561/10, 29 October 2010.

157 Council Discussion Paper No. 16782/11, 14 November 2011.

158 As provided for by Art. 258 TFEU.

159 The Commission has initiated proceedings against Member States for failure to respect the transposition deadline of the Reception Conditions Directive and the Asylum Procedures Directive, but never for a failure to respect the minimum standards themselves.

The lack of a strong mechanism is particularly problematic in the light of the upcoming accession of the EU to the ECHR: the case-law of the ECtHR shows that the international responsibility of a State under the ECHR is engaged when domestic law makes lawful a treatment which breaches a Convention right.[160] In the future, it can therefore equally be argued that the EU is internationally responsible for a Dublin transfer by one Member State to another, in violation of the ECHR, because EU law makes such transfers lawful without however providing sufficient safeguards to prevent a violation of the human rights of asylum seekers.

E. Reception Conditions

A second interesting aspect of the *M.S.S.* judgment from the viewpoint of European Asylum Law is the applicant's complaint about his living circumstances in Greece. It should first be noted that the Court, as a body supervising a civil and political rights instrument, is generally quite reluctant to enter the sphere of social and economic rights.[161] The Court has however held that "the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention."[162] Sometimes socio-economic interests can be protected from the angle of "negative" obligations – i.e. obligations of the State authorities not to interfere arbitrarily with Convention rights – for example the protection against eviction of a family from a Romani caravan site.[163] The main potential for the Court to enhance the protection of human rights in the socio-economic sphere, however lies in the doctrine of "positive"

160 E.g. *Young, James and Webster v. the United Kingdom,* ECHR (1981), Appl. Nos 7601/76 and 7806/77, para. 49; *VgT Verein gegen Tierfabriken v. Switzerland,* ECHR (2001), Appl. No. 24699/94,, para. 47; *Khurshid Mustafa and Tarzibachi v. Sweden*, ECHR (2008), Appl. No. 23883/06, para. 34.

161 E.g. E. Palmer, 'Protecting Socio-Economic Rights through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights', 2 *Erasmus Law Review* (2009) 4, 397-425.

162 *Airey v. Ireland,* ECHR (1979), Appl. No. 6289/73, para. 26. See also *Sidabras and Džiautas v. Lithuania***,** ECHR, (2004), Appl. Nos 55480/00 and 59330/00, para. 47.

163 *Connors v. The United Kingdom,* ECHR (2004), Appl. No. 66746/01.

obligations.[164] These types of obligations necessitate that States actively protect and fulfil[165] Convention rights.

So far, the Court has refused to read extensive positive obligations in the socio-economic sphere into the Convention. The Court has for example stated that:

> "Article 8 does not in terms recognise a right to be provided with a home. Nor does any of the jurisprudence of the Court acknowledge such a right. While it is clearly desirable that every human being [has] a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the Contracting States many persons who have no home. Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision."[166]

The Court nonetheless does not exclude that a refusal to solve the housing problem of an individual suffering from a severe disease might in certain circumstances raise an issue under Art. 8 ECHR, because of the impact of such refusal on the private life of the individual.[167] In the case of *Müslim v. Turkey*, the Court has also held that Art. 8 ECHR and Art. 3 ECHR do not oblige Member States to give refugees financial assistance to enable them to maintain a certain standard of living.[168]

The Grand Chamber, however, distinguishes the case of M.S.S. v. Belgium and Greece from the Court's earlier case law. Because "the obligation to provide accommodation and decent material conditions has now entered into positive law and the Greek authorities are bound to comply with their own legislation, which transposes Community law, namely [the Reception Conditions Directive]"[169] and because asylum seekers are a

164 This doctrine was first applied in *Marckx v. Belgium,* ECHR (1979), Appl. No. 6833/74, in which the Court stated that Art. 8 ECHR, the right to respect for family life, "does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective 'respect' for family life" (para. 31).

165 The distinction between obligations to respect, to protect and to fulfill stems from the work of Asbjørn Eide; *The Right to Adequate Food as a Human Right*, Report prepared by Mr. A. Eide, UN Doc E/CN.4/Sub.2/1987/23.

166 *Chapman v. The United Kingdom,* ECHR (2001), Appl. No. 27238/95, para. 99.

167 *Marzari v. Italy,* ECHR (1999), Appl. No. 36448/97.

168 *Müslim v. Turkey,* ECHR (2005), Appl. No. 53566/99, para. 85.

169 *Id*., para. 250.

particularly underprivileged and vulnerable population group in need of special protection,[170] the Court ruled that "the Greek authorities must be held responsible, because of their inaction, for the situation in which [the applicant] has found himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs"[171] and that Greece thereby violated Art. 3 ECHR.[172]

The subsequent case of *Rahimi v. Greece* concerned the lack of care for a 15 year old Afghan unaccompanied minor. At arrival in Greece, he was placed in detention for two days, after which he was abandoned to live on the streets. The Court recalled the case of *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* in which it stated that unaccompanied minors can be considered to belong to a "class of highly vulnerable members of society to whom the […] State owed a duty to take adequate measures to provide care and protection as part of its positive obligations under Article 3 of the Convention."[173] The Court particularly emphasized the fact that the Greek authorities had neglected to appoint a legal guardian, although this was required by Greek law, in transposition of the Reception Conditions Directive.[174] The Court further attached importance to the lack of shelter and support, recalling the findings of the *M.S.S.* judgment.[175] Therefore the Court concluded that there had been a violation of Art. 3 ECHR.[176]

In both cases, the Court has attributed decisive power to the obligations under the Reception Conditions Directive in finding a violation of Art. 3 ECHR. This is confirmed by Judge Rozakis in his concurring opinion to the M.S.S. judgment, in which he states that "[t]he existence of those international obligations of Greece – and notably, vis-à-vis the European Union – to treat asylum seekers in conformity with these requirements weighed heavily in the Court's decision to find a violation of Article 3."

In the case of *M.S.S. v. Belgium and Greece*, the applicant was found to be in a situation which was incompatible with Art. 13 Reception

170 *Id.*, para. 251.
171 *Id*., para. 263.
172 *Id*., para. 264.
173 *Rahimi v. Greece,* ECHR (2011), Appl. No. 8687/08, para. 87; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium,* ECHR (2006), Appl. No. 13178/03, para. 55.
174 *Rahimi v. Greece,* ECHR (2011), Appl. No. 8687/08, para. 88.
175 *Id*., para. 90-93.
176 *Id*., para. 94.

Conditions Directive, which generally requires that "Member States shall make provisions on material reception conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence."[177] The applicant's situation in Rahimi v. Greece was in turn incompatible with Art. 19 Reception Conditions Directive, which requires that "Member States shall as soon as possible take measures to ensure the necessary representation of unaccompanied minors by legal guardianship or, where necessary, representation by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation."[178]

By attributing decisive power to the obligations under the Reception Conditions Directive, the ECtHR strengthens the impact of this instrument. Invoking Art. 3 ECHR may be a good substitute for directly invoking the provisions of (the domestic legislation implementing) the Reception Conditions Directive. Firstly the Court does not appear to require that the authorities' inaction breaches the Reception Conditions Directive in the strictest sense. It is sufficient that the situation of an asylum seeker reaches the minimum level of severity required by Art. 3 ECHR and that this results from an inaction on the part of the authorities which can be linked to one of the obligations under the Reception Conditions Directive. Secondly, Art. 3 ECHR constitutes a subjective right, while this might not be the case for the provisions of (the domestic legislation implementing) the Reception Conditions Directive. In this respect it is necessary to mention the case-law of the Court of Justice concerning the direct effect of directives: an individual can only invoke the provisions of a directive which has not been transposed at the expiry of the transposition deadline or which have not been transposed correctly, in so far as these provisions are unconditional and sufficiently precise.[179]

A more fundamental issue is whether one can really maintain that the scope of Art. 3 ECHR is defined by obligations under the Reception Conditions Directive. The question of whether a State has violated a preventive positive obligation under Art. 3 ECHR generally depends on

177 Art. 13 para. 2 Reception Conditions Directive.

178 Art. 19 para. 1 Reception Conditions Directive.

179 E.g. Court of Justice, 28 April 2011, no. C-61/11 PPU, El Dridi, para. 46. In Peers' and Rogers' view, the guarantees for asylum seekers in the Reception Conditions Directive meet the conditions for direct effect (Peers & Rogers, *supra* note 74, 303). In the absence of an explicit ruling of the Court of Justice in this sense, invoking Art. 3 ECHR will however avoid the potential direct effect pitfall.

whether or not the authorities concerned took "reasonable steps" to prevent ill-treatment of which they "had or had to have had knowledge".[180] The State thus only has to provide justification for an alleged lack of such "reasonable steps", insofar as a situation comes within the scope of Art. 3 ECHR or not. This solely depends on whether the required "minimum level of severity" was attained or not.[181] The legality of a situation is irrelevant for determining whether or not that situation comes within the scope of Art. 3 ECHR – to hold otherwise would allow States themselves to determine the minimum level of human rights protection, which is contrary to the counter-majoritarian function of human rights.

The correct starting point of the Court's analysis should thus have been to establish that the situations of *M.S.S.* and *Rahimi* attained the "minimum level of severity". The subsequent step would have been to rule that by failing to comply with its obligations under the Reception Conditions Directive,[182] the Greek authorities had not taken "reasonable steps" to remedy the situations of *M.S.S.* and *Rahimi* of which they had been well aware. This implies that the situation of extreme destitution in which asylum seekers sometimes find themselves – regardless of whether this situation is lawful under European law or not – can reach the threshold of Art. 3 ECHR. Similarly, such a situation may be in violation of Art. 4 of the Charter, which equally prohibits torture and inhuman or degrading treatment or punishment and has the same meaning and scope of Art. 3 ECHR.[183] It can thus be examined whether the Reception Conditions Directive is compatible with Art. 3 ECHR and Art. 4 of the Charter – this would always be the case if the scope of these provisions would depend on the content of the Reception Conditions Directive, which makes no sense whatsoever.

When the recast version of the Reception Conditions Directive is adopted, the Court of Justice may be called upon to examine *in abstracto*

180 E.g. *Z. and Others v. the United Kingdom,* ECHR (2001), Appl. No. 29392/95, para. 73.

181 E.g. *Gäfgen v. Germany,* ECHR (2010), Appl. No. 22978/05, para. 88.

182 Such an approach would be comparable with the one the Court takes in environmental cases under Art. 8 ECHR. In these cases the Court generally finds a violation of the State's positive obligations under Art. 8 ECHR when the domestic authorities fail to comply with or to enforce domestic environmental legislation (e.g. *Fadeyeva v. Russia,* ECHR (2005), Appl. No. 55723/00, para. 97). The failure to comply with domestic law is essentially problematic from the viewpoint of the rule of law, an important underlying principle of the ECHR (e.g. Broniowski v. Poland, ECHR (2004), Appl. No. 31443/96, para. 184).

183 Explanations relating to the Charter, 18.

whether it provides sufficient protection against potential inhuman or degrading living circumstances. For example, Peers and Rogers have argued that the exclusion from the scope of the Reception Conditions Directive of persons whose asylum application has been rejected but who have not been expelled may be incompatible with Art. 3 ECHR if these persons are thereby left in a situation of destitution.[184] Similarly, the Court may examine whether the restrictive conditions to which certain guarantees of the Reception Conditions Directive are subjected are compatible with Art. 3 ECHR.

F. Detention of Asylum Seekers

I. Arbitrary Detention

Art. 9 para. 1 ICCPR explicitly and Art. 5 para. 1 ECHR implicitly prohibit arbitrary detention. The latter is acknowledged in the case law of the ECtHR: "any measure depriving the individual of his liberty must be compatible with the purpose of Article 5 (art. 5), namely to protect the individual from arbitrariness."[185] The notion of "arbitrariness" *inter alia* prohibits the granting of absolute discretion to a single authority or the discriminatory use of detention, and is linked to ethical standards such as justice and reasonableness.[186] The aim of this notion is the maximization of personal liberty,[187] which is clearly illustrated by the structure of both Art. 9 para. 1 ICCPR and Art. 5 para. 1 ECHR, which both primarily and principally guarantee a right to personal liberty and only secondarily and restrictively allow for deprivation of liberty. In Marcoux's words, therefore,"[t]he more a law operates to deprive individuals of the right to personal liberty, the more such a law becomes arbitrary. At the same time, the state has a correspondingly greater duty to justify its actions."[188] This justification requires reference to certain universally recognized goal values and the use of necessity and proportionality arguments.[189] Necessity which

184 Peers & Rogers, *supra* note 74, 304-305.
185 E.g. *Bozano v. France,* ECHR (1986), Appl. No. 9990/82, para. 54.
186 L. Marcoux, 'Protection from Arbitrary Arrest and Detention Under International Law', 5 *Boston College International & Comparative Law Review* (1982) 2, 345, 370-371.
187 *Id*., 369.
188 *Id*, 374.
189 *Id*.

is thus directly connected to the prohibition of arbitrariness generally requires the use of the least intrusive means to achieve a certain legitimate aim.[190] Detention without considering the least intrusive means is thus unnecessary and arbitrary.[191] With respect to the detention of asylum seekers, this is clearly established in the case-law of the Human Rights Committee (HRC) and slowly emerging in the case-law of the ECtHR.

II. Asylum Detention

Art. 5 para. 1, f) ECHR allows "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country." The meaning of this provision was clarified by the Grand Chamber of the ECtHR in the case of *Saadi v. The United Kingdom*. The case concerned an Iraqi Kurd who had lodged an asylum application upon arrival at London-Heathrow airport, but who was subsequently detained for seven days in a special facility for asylum seekers. According to the Court any entry is "unauthorised" until a State has authorised it and the Court "does not accept that, as soon as an asylum seeker has surrendered himself to the immigration authorities, he is seeking to effect an "authorised" entry, with the result that detention cannot be justified under the first limb of Article 5 para. 1 (f)."[192] The Court thereby permits the detention of asylum seekers "in certain

190 R. Alexy, *A Theory of Constitutional Rights* (2002), 66.

191 In a comment to the *Saadi* judgment, O'Nions argues that "necessity" cannot be separated from "arbitrariness" and "proportionality" and that it is impossible to conceive of these concepts in isolation, H. O'Nions, 'No Right to Liberty: the Detention of Asylum Seekers for Administrative Convenience', 10 *European Journal of Migration and Law* (2008) 2, 149, 181 and 184. Similarly, G. Cornelisse, 'Human Rights for Immigration Detainees in Strasbourg: Limited Sovereignty or a Limited Discourse?', 6 *European Journal of Migration and Law* (2004) 2, 93, 108-109.

192 *Saadi v. The United Kingdom,* ECHR (2008), Appl. No. 13229/03, para. 65. This was criticized by Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä in their dissenting opinion. In their view, "asylum seekers who have presented a claim for international protection are ipso facto lawfully within the territory of a State." Therefore the first limb of Art. 5, para. 1, f) cannot be applied to asylum seekers, as the aim of this provision is "to prevent illegal immigration, that is, entry into or residence in a country based on circumvention of the immigration control procedures." In the dissenters' view, the majority thus unjustifiably assimilated the situation of asylum seekers to that of ordinary immigrants.

circumstances, for example while identity checks are taking place or when elements on which the asylum claim is based have to be determined."[193]

The ECtHR does not require such detention to be "reasonably considered necessary, for example to prevent the person concerned from committing an offence or fleeing",[194] it must however be "carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country; and the length of the detention should not exceed that reasonably required for the purpose pursued."[195]

Recent case law however suggests that some Sections of the Court are slowly moving away from the Grand Chamber's rejection in Saadi of a necessity test under Art. 5 para. 1, f).[196] Such a test is accepted under most sub-paragraphs of Art. 5 para. 1 ECHR.[197] In the case of Hilda Hafsteinsdóttir v. Iceland, concerning the repeated detention of an alcohol-intoxicated woman on the basis of Art. 5 para. 1, e),[198] the Court for instance held that "[t]he detention of an individual is such a serious measure that it is only justified where other, less stringent measures have been considered and found to be insufficient to safeguard the individual or the public interest which might require that the person concerned be

193 *Id*. In the dissenters' view, however, detention under Art. 5, para. 1,) cannot be justified if it pursues "a purely bureaucratic and administrative goal, unrelated to any need to prevent [an] unauthorised entry into the country."

194 *Id*., paras 72-73. According to the dissenters, however, "the requirements of necessity and proportionality oblige the State to furnish relevant and sufficient grounds for the measure taken and to consider other less coercive measures, and also to give reasons why those measures are deemed insufficient to safeguard the private or public interests underlying the deprivation of liberty." In their view, "the question of alternatives to detention should have been considered by the majority."

195 *Id*., para. 74.

196 See L. Lavrysen, 'Less stringent measures and migration detention: overruling Saadi v. UK?' (25 January 2012) available at http://strasbourgobservers.com/2012/01/25/less-stringent-measures-and-migration-detention-overruling-saadi-v-uk/ (last visited 2 May 2012).

197 See references *Saadi v. The United Kingdom,* ECHR (2008), Appl. No. 13229/03, para. 70.

198 Art. 5 para. 1, e) allows "the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants."

detained."[199] As the Court made clear in Hilda Hafsteinsdóttir, the "less stringent measures" test (or necessity test) is linked to the requirement that detention can only be lawful in the absence of arbitrariness. In the cases of Rahimi v. Greece and Popov v. France, the Court held that the detention of a minor under Art. 5 para. 1, f) ECHR can only be justified insofar as it can be considered to be "a measure of last resort which could not be replaced by any other alternative."[200] This clearly resonates the requirements of Art. 37, b) of the Convention on the Rights of the Child (CRC).[201] In the case of Yoh-Ekale Mwanje v. Belgium, the Court applied a similar "less stringent measures" test. The Court held that the detention of an HIV-positive Cameroonian woman violated Art. 5 para. 1, f) ECHR, because "the authorities had not considered a less severe measure capable of safeguarding the public interest."[202] These cases show that the Court's case law increasingly recognizes that the detention of asylum seekers and migrants is arbitrary if there are "less stringent measures" available.

A strict necessity requirement similarly but unambiguously flows from the case-law of the Human Rights Committee, the monitoring body of the International Covenant on Civil and Political Rights (ICCPR).[203] Art. 9 para. 1 ICCPR prohibits arbitrary detention and arrest. The HRC has stated that "the notion of "arbitrariness" must not be equated with "against the law" but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context."[204] According

199 *Hilda Hafsteinsdóttir v. Iceland,* ECHR (2004), Appl. No. 40905/98, para. 51.

200 Originally: "une mesure de dernier ressort à laquelle aucune alternative ne pouvait se substituer", see *Popov v. France,* ECHR (2012), Appl. Nos. 39472/07 and 39474/07, para. 119, and similarly *Rahimi v. Greece,* ECHR (2011), Appl. No. 8687/08, para. 109.

201 "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time." In Rahimi, the Court explicitly refers to Art. 37 CRC (para. 108).

202 Originally: "les autorités n'ont pas envisagé une mesure moins sévère […] pour sauvegarder l'intérêt public de la détention", see *Yoh-Ekale Mwanje v. Belgium,* ECHR (2011), Appl. No. 10486/10, para. 124.

203 The Court of Justice takes the ICCPR into account when applying the general principles of EU law, see e.g. Court of Justice, 17 February 1998, no. C-249/96, Grant, para. 44.

204 HRC, 3 April 1997, no. 560/1993, A. v. Australia, para. 9.2.

to the HRC it is not *per se* arbitrary to detain individuals requesting asylum,[205] but "detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individuals, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal."[206] The Committee therefore requires States to demonstrate "that, in the light of the author's particular circumstances, there were no less invasive means of achieving the same ends, that is to say, compliance with the state party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions […]".[207]

Art. 6 of the Charter of Fundamental Rights in combination with the general limitation clause of Art. 52 para. 1, only allows limitations of the right to freedom insofar as these are "necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others." Although the Court of Justice has not yet interpreted the scope of this necessity criterion, any such interpretation should require that less stringent measures are considered and found to be insufficient to achieve a legitimate aim.

III. EU Asylum Law

1. General

In the context of asylum detention, the ECtHR has clearly held that "there must be adequate legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by the Convention."[208] It is therefore not sufficient that every case of detention is justified *in concreto* the law itself should also provide protection against arbitrary detention *in abstracto*. As the European Union has gained important competences in the field of asylum law, the positive obligation to

205 *Id*., para. 9.3.
206 *Id*., para. 9.4.
207 HRC, 28 October 2002, no. 900/1999, C. v. Australia, para. 8.2. See also HRC, 6 August 2003, no. 1014/2001, Baban et al. v. Australia, para. 7.2; HRC, no. 1069/2002, Bakhtiyari v. Australia, para. 9.3.
208 *Amuur v. France,* ECHR (1996), Appl. No. 19776/92, para. 53.

provide a legal framework which protects asylum seekers from arbitrary detention has simultaneously shifted in its direction.

Art. 18 of the Asylum Procedures Directive requires that "Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum." Although this provision expresses a generally negative stance towards the detention of asylum seekers,[209] it does not provide real safeguards to properly limit Member States in their use of detention.[210] Art. 7 Reception Conditions Directive generally protects the freedom of movement of asylum seekers, but para. 3 allows Member States "[w]hen it proves necessary, for example for legal reasons or reasons of public order, [… to] confine an applicant to a particular place in accordance with their national law." While "confinement" is not in itself defined, it is clear that it covers "detention", as the notion of "detention" itself is defined as "confinement of an asylum seeker by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement".[211]

These provisions allow for the detention of asylum seekers for a wide variety of reasons. Although detention is only allowed insofar as it is considered "necessary", the lack of a list of limited detention grounds entails the risk of arbitrary use of detention. Many asylum seekers are simply detained on the formal basis that it is likely that they will abscond before the completion of the asylum procedure.[212] In Peers' and Rogers' view, "[t]here is a real danger […] that in the face of having to apply certain minimum standards of reception to asylum applicants, Member States will find it increasingly convenient to resort to the use of detention."[213] This risk is exacerbated by the fact that the Reception Conditions Directive does not explicitly link the necessity criterion to the need to adequately consider

209 Hailbronner argues that "if this clause is to be given any useful meaning, it must be based on a distinction between a set of legitimate reasons like prevention of unauthorised entry and residence, danger of flight etc.", see: K. Hailbronner, 'Detention of Asylum Seekers', 9 *European Journal of Migration and Law* (2007) 2, 159, 169.

210 ECRE, 'Information Note on the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status', 18 (October 2006) available at http://www.unhcr.org/refworld/publisher,ECRE,,,464317ab2,0.html (last visited 2 May 2012).

211 Art. 2 k) Asylum Procedures Directive. See Peers & Rogers, *supra* note 74, 304.

212 Da Lomba, *supra* note 28, 246.

213 Peers & Rogers, *supra* note 74, 304.

alternatives to detention. The lack of provision for such alternatives to detention risks making the necessity criterion meaningless.

The Commission proposal to recast the Reception Conditions Directive is more ambitious. The proposal introduces a strict necessity test: "[w]hen it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively."[214] The proposal further enumerates an exhaustive list of grounds for the detention of asylum seekers: "an applicant may only be detained: (a) in order to determine or verify his/her identity or nationality; (b) in order to determine, within the context of a preliminary interview, the elements on which the application for international protection is based which could not be obtained in the absence of detention; (c) in the context of a procedure, to decide on the right to enter the territory; (d) when protection of national security or public order so requires."[215] Member States must "ensure that rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, are laid down in national law."[216] Detention must be limited to "as short a period as possible" and can only be maintained for as long as the detention grounds are applicable.[217] The proposal further sets out procedural guarantees for asylum seekers placed in detention[218] and imposes minimum standards for detention conditions, including the requirement that "[d]etention shall only take place in specialised detention facilities."[219] The proposal finally contains stricter rules for the detention of vulnerable persons and persons with special reception needs.[220] At this point it is unclear whether the Commission proposal will be adopted without significant amendments. In the past, discussions in the Council on asylum instruments have systematically led to a decrease in the level of human rights protection for asylum seekers in the final document.

214 Art. 8 para. 2 Amended proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (Recast) (Commission Proposal Reception Conditions), COM (2011) 320 final.
215 Art. 8 para. 3 Commission Proposal Reception Conditions.
216 Art. 8 para. 4 Commission Proposal Reception Conditions.
217 Art. 9 para. 1 Commission Proposal Reception Conditions.
218 Art. 9 Commission Proposal Reception Conditions.
219 Art. 10 Commission Proposal Reception Conditions.
220 Art. 11 Commission Proposal Reception Conditions.

The proposal appears to be more in line with the (lenient) case law of the ECtHR. The addition of a strict necessity criterion would be in conformity with the necessity test under Art. 9 para. 1 ICCPR and Art. 6 of the Charter, as well as the prohibition of arbitrariness under Art. 5 para. 1 ECHR. The obligation to consider less coercive alternatives is also to be hailed. Sub-paragraphs (a) and (b) are construed in a way that can only justify detention in very restrictive circumstances. Sub-paragraph (c) can however be criticized as it allows for wide interpretation and thus may provide justification for the systematic detention of asylum seekers during the examination of their asylum application.[221] As the detention grounds in the Commission proposal are "without prejudice [...] to detention in the framework of criminal proceedings",[222] sub-paragraph (d) is worrying because it is unclear how these goals cannot be served within the said framework. It is highly feasible that, in the event that the Commission proposal is adopted without significant amendments, these grounds are interpreted restrictively by the Court of Justice.

It is a missed opportunity that the proposal does not entirely endorse the UNHCR guidelines on detention of asylum seekers, which recognize that "as a general principle asylum-seekers should not be detained."[223] In the light of the increasing amount of literature on alternatives for detention,[224] it

221 ECRE, 'Comments from the European Council of Refugees and Exiles on the European Commission Proposal to recast the Reception Conditions Directive' (April 2009) http://www.ecre.org/topics/areas-of-work/protection-in-europe/142.html, 7 (last visited 2 May 2012).

222 Art. 8 para. 3 Commission Proposal Reception Conditions.

223 UNHCR, Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers' Guideline 2 and 3 (26 February 1999) http://www.unhcr.org/refworld/docid/3c2b3f844.html (last visited 2 May 2012). The guidelines however allow some room for exceptions in more limited circumstances.

224 E.g. 'UNHCR Alternatives to Detention of Asylum Seekers and Refugees' (April 2006) at http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4472e8b84&page=search (last visited 2 May 2012); UNHCR 'Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants' (April 2011) available at http://www.unhcr.org/refworld/docid/4dc935fd2.html (last visited 2 May 2012); International Detention Coalition, 'There are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention' (May 2011) available at http://www.scribd.com/fullscreen/54661929?access_key=key-ptqwr6iqwxth9v8zbne (last visited 2 May 2012); Amnesty International, 'Irregular Migrants and Asylum-Seekers: Alternatives to Immigration Detention' (April 2009) available at http://www.amnesty.org/en/library/info/POL33/001/2009 (last visited 2 May 2012); 'Summary Conclusions of Global

is clear that the detention of asylum seekers will almost never be justified *in concreto*. Moreover, as the objective of asylum detention generally is to have some amount of control over the whereabouts of asylum seekers,[225] it is important to note that evidence shows that in destination States, the likelihood of absconding is very low as asylum seekers want to be recognised as lawful residents.[226] In any event, the aims mentioned to justify detention are already served in the asylum procedure itself: if an asylum seeker fails to cooperate with the authorities (sub-paragraphs (a) to (c)) or constitutes a danger to national security or public order (sub-paragraph (d)), Member States can apply an accelerated procedure and – if their legislation allows so – even declare an application manifestly ill-founded.[227] Asylum detention can only be justified insofar as it actually serves these aims better, which will only rarely be the case. It would therefore have been preferable if the Commission proposal had construed the detention grounds more narrowly or, even better, simply prohibited detention.

2. Dublin Detention

The Commission proposal to recast Dublin II also contains safeguards to avoid excessive use of detention in the context of the procedure to transfer an asylum seeker or an applicant for subsidiary protection to the responsible Member State. As asylum seekers are frequently detained in the context of these procedures,[228] the lack of such safeguards in the current Dublin II Regulation is striking.[229] The proposal in turn only allows for detention in

Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons', 23 *International Journal of Refugee Law* (2011) 4, 876-883.

225 Da Lomba, *supra* note 28, 245

226 O'Nions, *supra* note 191, 180.

227 See Art. 23 para. 4, Art. 28 para. 2 and Art. 11 Asylum Procedures Directive. The Commission Proposal for a Recast of the Asylum Procedures Directive brings some changes (see Art. 31 para. 6, Art. 32 para. 2 and Art. 13), but still allows to serve the listed aims.

228 UNHCR, 'The Dublin II Regulation. A UNHCR Discussion Paper', 52-55 (April 2006) available at http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4445fe344&page=search; ECRE, 'Report on the Application of the Dublin II Regulation in Europe', 162 (March 2006) http://www.ecre.org/topics/areas-of-work/protection-in-europe/135.html (last visited 2 May 2012).

229 The Commission tried to incorporate a provision on Dublin detention in the Asylum Procedures Directive, this provision was however not included in the final version. See Art. 18 Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status,

case of a significant risk of absconding. The detention must be proven to be necessary, on the basis of an individual assessment of each case, and is only allowed if other less coercive measures cannot be applied effectively.[230] In this respect, the proposal explicitly requires Member States to take into consideration alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, an obligation to stay at a designated place or other measures to prevent the risk of absconding.[231] The proposal only allows detention after the decision to transfer has been notified to the applicant, which is only possible after the requested Member State has agreed with the transfer.[232] It does not contain time limits, but only allows detention for the shortest period possible, which shall be no longer than the time reasonably necessary to fulfil the required administrative procedures for carrying out a transfer.[233]

The adoption of this proposal would be a significant advancement in preventing the arbitrary use of detention in the context of the Dublin II procedure. Even if the proposed provision is adopted, the Dublin system will continue to lead to a widespread use of detention. These cases of detention are primarily motivated by the need of maintaining the Dublin system itself – a system which has proven to be totally inefficient in practice and which compromises the fundamental rights of asylum seekers – rather than actually serving a real legitimate aim. One could therefore argue that the Dublin system in itself is incompatible with the positive obligation to provide a legal framework to protect asylum seekers against the unnecessary and arbitrary use of detention. If one wishes to avoid arbitrary detention, it is therefore preferable to do away with the Dublin system altogether.

G. Conclusion

Over the past two decades, the European Union has become a major actor in the field of asylum law. Ever since its emergence, the relationship between European Asylum Law and human rights law has nonetheless been

COM(2002) 326 final, which restricts the use of detention to the situation when another member state has agreed on the take charge or take back request, to prevent an asylum seeker from absconding or effecting an unauthorized stay, for a maximum period of one month.

230 Art. 27 para. 2 Commission Proposal Dublin II.

231 Art. 27 para. 3 Commission Proposal Dublin II.

232 Art. 27 para. 4 Commission Proposal Dublin II.

233 Art. 27 para. 5 Commission Proposal Dublin II.

tense. European Asylum Law mainly focuses on preventing abuses of the asylum system, restricting secondary movements of asylum seekers and efficiently disposing of asylum applications, rather than on adequately protecting the human rights of asylum seekers. This is related to the broader context of the emerging "Fortress Europe": economic migrants are unwanted because of the alleged threat they pose to the sustainability of the model of the welfare State. As asylum seekers are primarily regarded as potential economic migrants, rather than as persons who may be in need of international protection, asylum law risks becoming an instrument of a restrictive immigration policy[234].

The emphasis of the Dublin II system of establishing which Member State is responsible to examine an asylum application, lies too much on efficiency and burden sharing considerations, rather than on human rights concerns. The basic assumption of the Dublin II system – that the receiving Member State offers asylum seekers a sufficient level of human rights protection – has not been fulfilled. Dublin transfers may therefore expose asylum seekers to inhuman or degrading detention and living circumstances, as well as to the risk of indirect refoulement. The European Court of Human Rights has recently made clear in its *M.S.S.* judgment that Art. 3 ECHR prohibits such transfers. The EU urgently needs a strong mechanism to monitor the Reception Conditions Directive and the Asylum Procedures Directive. The suspension mechanism provided for in the Commission proposal for a recast of the Dublin II Regulation would be a significant improvement.

In the *M.S.S.* judgment, the Court has equally made clear that inhuman or degrading living circumstances violate Art. 3 ECHR. By referring to the obligations under the Reception Conditions Directive, the Court has strengthened the binding force of this document, thus compelling member States to take this piece of legislation seriously. This finding also requires the EU institutions to ensure that the recast of the Reception Conditions Directive sufficiently protects asylum seekers against destitution.

The Reception Conditions Directive and the Asylum Procedures Directive lack sufficient safeguards to properly limit the Member States' use of detention, which exposes asylum seekers to the risk of being arbitrarily detained. In the light of the frequent use of detention in Dublin procedures, the lack of safeguards in the Dublin II Regulation is particularly striking. In

234 See similarly O'Nions, *supra* note 191, 155;O'Nions labels this as "the climate of non-entrée".

order to avoid being branded as arbitrary, human rights law demands that a detention is necessary to achieve a legitimate aim, which requires that less stringent measures have been considered and found to be insufficient. Although Commission proposals for a recast of these instruments are a step in the right direction, it would have been preferable to even further restrict the detention grounds, or even better, to simply prohibit the detention of asylum seekers. As the operation of the Dublin system in itself leads to a widespread use of detention, it would even be preferable to do away with this system altogether.

This paper has identified certain problematic aspects of European Asylum Law. These aspects should be duly remedied by the EU institutions while recasting the existing asylum instruments. In the light of the EU's increasing commitment towards human rights law, the effective respect for human rights should always be the primary concern of European Asylum Law.