THE CONTRIBUTION OF THE EUROPEAN COURTS TO THE COMMON EUROPEAN ASYLUM SYSTEM AND ITS ONGOING RECAST PROCESS

Francesca Ippolito*

ABSTRACT

A 'Common European Asylum System' (CEAS) based on the full and inclusive application of the Geneva Convention has been developed according to the principles and aims of the Tampere European Council in October 1999 (further elaborated by The Hague Programme adopted in November 2004). However, significant discrepancies and differences between Member States' asylum law and policy still exist, and it has yet to be effectively realized. A recast of the adopted series of important legislative measures harmonizing common minimum standards in the area of asylum is now ongoing. This article will highlight the progressive role played by the Court of Justice of the European Union together with the European Court of Human Rights in the ongoing recast process, particularly in terms of ensuring a higher standard of protection of basic human rights.

Keywords: asylum; CEAS; European Court of Human Rights; European Court of Justice; protection standards

§1. INTRODUCTION

Cooperation between Member States on asylum issues is a late arrival on the European scene. But since the entry into force of the Treaty of Amsterdam, which changed the nature of asylum policy from a 'question of common interest' into veritable 'European' measures, the achievements have been significant. A 'Common European Asylum System' (CEAS) based on the full and inclusive application of the Geneva

* Lecturer in International and EU Law, University of Cagliari.

Convention has been developed according to the principles and aims of the Tampere European Council in October 1999 (further elaborated by The Hague Programme adopted in November 2004). In particular, a series of important legislative measures harmonizing common minimum standards in the area of asylum have been adopted: a Directive on reception conditions for asylum seekers, a Directive on the qualifications for becoming a refugee or a beneficiary of subsidiary protection status, a Directive on asylum procedures and the Dublin II Regulation.[1] Nonetheless, the wide scope of discretion – either explicitly afforded to Member States or implicitly derived from the lack of clarity – of many provisions of the existing legislation has still led to significant discrepancies and differences between Member States' asylum law and policy. The second phase of legislation is now underway in order to adequately and comprehensively address this problem.[2] It aims to introduce a significant shift in the nature of the legislation by introducing mandatory obligations for the Member States together with the abolition of opt-out clauses and the 'full' harmonization of both procedures and standards, which are also in line with the changes made by the Lisbon Treaty and with the European Council's ambitious commitment to establish 'a common area of protection and solidarity based on a common asylum procedure and a uniform status for those granted international protection' as set out in the Stockholm Programme of 2009.[3]

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1 See 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, [2004] OJ L 304/12; Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, [2005] OJ L 326/13; Council Regulation No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national, [2003] OJ L 50/1.

2 The first package of proposals includes the 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, COM (2008) 820 final; the Proposal for a Regulation of the European Parliament and of the Council concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EC) No. 343/2003, COM (2008) 825 final; the Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers, COM (2008) 815 final and the Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection, COM (2009) 554 final, and a new Directive of the European Parliament and of the Council 2011/95/EU on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, [2011] OJ L 337/9. In order to help the stagnant (stuck) negotiations, the European Commission in June 2011 presented a modified proposal for the Directive on the reception conditions of asylum seekers, COM (2011) 320 final; as well as a modified proposal for the Directive on minimum standards on procedures in Member States for granting and withdrawing international protection, COM (2011) 319 final.

3 Council Document 17024/09, 'The Stockholm Programme – An open and secure Europe serving and protecting the citizens', 2 December 2009, http://register.consilium.europa.eu/pdf/en/09/st17/st17024.en09.pdf (last visited 16 April 2013).

This article intends to highlight the progressive role played by the Court of Justice of the European Union (CJEU) – in a mutual dialogue with the European Court of Human Rights (ECtHR) – in this recast process, particularly in terms of ensuring a higher standard of protection of basic human rights. From a methodological perspective, the analysis will be structured without following a thematic criterion. Thus, a 'vertical' analysis of whether and to what extent the European Courts' (by which is meant both the CJEU and ECtHR) case law would have had any impact on the main achievements and shortcomings of each amended EU legislative act, considered separately, one by one, has been discarded. A cross-cutting examination of the whole instrument after the recast has been given preference on the basis of a functional criterion: what types of effects has the European Courts' case law had *globally* on the EU legislator at work? Starting from the case where the European Courts' case law has been taken into consideration in order to avoid a recast (Section 1), this article goes on to examine any possible direct (Section 2) and indirect (Section 3) role played by the CJEU's and ECtHR's case law on the EU institutions involved in the recast proposals. The analysis then considers the cases where the European Courts have had only a partial impact (Section 4), and the margins for these Courts to be used as supplementary tools for the enhancement of asylum seekers' protection under the CEAS (Section 5), pointing out what we might call the growing *de facto* 'judicial' character of the common asylum policy.

§2. LUXEMBOURG CASE LAW AS FORMAL JUSTIFICATION IN ORDER TO *AVOID* THE RECAST

At present only one of the CEAS instruments under recast has been adopted in its amended version: Directive 95/2011/EU on standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, with regard to a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted. The European Commission has addressed the need for further harmonization regarding both the grounds and the content of protection in order to place the EU standards in line with international refugee and human rights law and standards. Analogously it has underlined how the purposes of the amendments were to remove all differences in the treatment of the two categories which cannot be considered as objectively justified, thus progressing towards uniformity of protection while maintaining the distinction between the two statuses. However, though stakeholders further stressed the need for clarification of Article 15(c), the European Commission explicitly referred to CJEU case law in order to exclude the necessity of a legislative recast as regards the provision defining the criteria of eligibility for subsidiary

protection.[4] The *Elgafaji* decision[5] should thus have provided the appropriate well-timed 'interpretative guidance' on the requirement of the existence of a 'serious and individual threat' in Article 15(c) especially in the light of the fact that 'the relevant provisions were found to be compatible with the ECHR'.[6] But contrary to the Commission's assessment, the *Elgafaji* decision has not improved the protection system by preventing national jurisdictions from interpreting the requirement imposed by Article 15 in different ways.[7] Nor has this decision removed doubts as to the interpretation of the term 'individual', specifically in relation to whether Article 15(c) requires a higher level of proof than Article 15(a) and (b), and whether the provision's scope is broader than that of Article 3 ECHR (European Convention on Human Rights).

In particular, when the Court addressed the internal contradiction in Article 15(c), its claim that Article 15(c) has its own field of application[8] was not warranted, as the concept of 'individual threat' is interpreted quite broadly and is not linked to the condition that 'the applicant adduces evidence that he is specifically targeted by reason of factors particular to his personal circumstances'. Hence, the 'individual threat' would be violated if substantial grounds were shown for believing that a civilian who is returned to the relevant country would face a real risk of being subjected to the threat of serious harm solely on account of his presence on the territory of that country or region. In order to demonstrate such a risk the applicant is not required to adduce evidence that he would be specifically targeted by reason of factors particular to his personal circumstances.[9] Nevertheless, the CJEU considered that such a situation would be 'exceptional' in the context of such a high level of indiscriminate violence, implicating civilians and indicating armed conflict in the territory from which refuge is sought. So the more the applicant could show that he was specifically affected by factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection.[10]

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4 Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, COM (2009) 551 final, p. 6.

5 Case C-465/07 *Elgafaji c. Staatssecretaris van Justitie* [2009] ECR I-00921. The Court was asked to give a preliminary ruling on whether the existence of a serious and individual threat to the life or person of the applicant for subsidiary protection is subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his circumstances and, if not, to indicate the criterion on the basis of which the existence of such a threat can be considered to be established.

6 COM (2009) 551 final.

7 European Council on Refugees and Exiles (ECRE) March 2010, www.ecre.org/topics/areas-of-work/protection-in-europe/148.html (last visited 25 March 2013).

8 Case C-465/07 *Elgafaji*, para. 36.

9 Ibid., para. 35.

10 Ibid., para. 39. Such an interpretation is in line with Recital 26 which stipulates that widely shared risks do not normally 'create an individual threat, while it leaves open the possibility that in certain exceptional circumstances they may abnormally' create such a risk.

Although the scope of Article 15(c) is apparently broader than Article 3 ECHR, this is not so in practice:[11] the interpretation and protection provided by the Strasbourg judges in *NA v. United Kingdom*[12] and, more recently, in *Sufi and Elmi v. United Kingdom*[13] is very similar. In particular, *in NA v. United Kingdom*, the ECtHR expressly considered the earlier decision in *Vilvarajah v. the United Kingdom* and stated that Article 3 ECHR should not be interpreted so as to require an applicant to show the existence of special distinguishing features if he could otherwise show that the general situation of violence in the country of destination was of a sufficient level of intensity to create a real risk that any removal to that country would violate Article 3 of the Convention. Indeed the Court adopted such an approach only in the most extreme cases of general violence (where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return).[14] In *Sufi and Elmi v. United Kingdom*, the ECtHR was similarly called upon to examine whether substantial grounds were shown for believing that the applicant, in this case if deported to Somalia, would face a real risk of being subject to treatment contrary to Article 3 ECHR on account of the general situation of violence there. In this case the Court underlined that it was not persuaded that Article 3 of the Convention, as interpreted in *NA*, does not offer comparable protection to that afforded under the Directive. In particular, according to the Strasbourg judges, 'the threshold set by both provisions may, in exceptional circumstances, be attained in consequence of a situation of general violence of such intensity that any person being returned to the region in question would be at risk simply on account of their presence there'.

So the CJEU decision – useful though it is – does not present the advantages described by the Commission. This is contrary to what emerged, for instance, in *Abdulla*, where it

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11 Ibid. Note that at para. 44 the CJEU in an *obiter dictum* held that the interpretation given in *Elgafaji* of the relevant provisions of Directive 2004/83 was fully compatible/compliant with the ECHR, including the case law of the European Court of Human Rights relating to Article 3 of the ECHR, namely case *NA v. United Kingdom*. See in the same sense, P. Tiedemann, 'Subsidiary Protection and the Function of Article 15 (c) of the Qualification Directive', 31 *Refugee Survey Quarterly* 1 (2012), p. 138, according to whom 'Article 15(c) is completely covered by Article 15(b). Thus, Article 15(c) is ultimately superfluous'.

12 ECtHR, *N.A. v. the United Kingdom*, Judgment of 17 July 2008, App.No. 25904/07, para. 115.

13 ECtHR, *Sufi and Elmi v. United Kingdom*, Judgment of 28 November 2011, App.Nos. 8319/07 and 11449/07.

14 ECtHR, *F.H. v. Sweden*, Judgment of 20 January 2009, App.No. 32621/06, para. 93, where the Court – faced with the provision of an asylum and residence permit to an Iraqi national who had left the country due to his fear of Saddam Hussein and his regime – concludes that whilst the *general situation* in Iraq, and in Baghdad, is insecure and problematic, it is not so serious as to cause, by itself, a violation of Article 3 of the Convention if the applicant were to return to that country. Therefore it has to establish whether the applicant's personal situation is such that his return to Iraq would contravene Articles 2 or 3 of the Convention. Likewise, in ECtHR, *Mawaka v. The Netherlands*, Judgment of 1 June 2010, App. No. 29031/04, para. 41, according to the Court, 'the general situation in the DRC at the present time certainly gives cause for concern […], with the circumstances in the Kivu provinces in the north-east being particularly dire'. However, the Court noted that there was no reason to assume that the applicant would be expelled to the north-eastern part of the DRC, and held that the situation in the rest of the DRC is not one of such extreme general violence that there exists a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return.

may be usefully inferred that, within the system of Council Directive 2004/83/EC, 'the possible cessation of the refugee status occurs without prejudice to the right of the person concerned to request the granting of subsidiary protection status'. Thus, a person who has revoked refugee status still has the right to apply for subsidiary protection status.

In contrast, the ECtHR jurisprudence might be able to provide guidance to the competent national authority for the assessment of applications for subsidiary protection as well as have an impact on the future national application of the *Elgafaji* principle. Indeed it was the *Sufi and Elmi* decision that identified some specific (not exhaustive) criteria for assessing what the level of severity of a situation of general violence must be to reach the threshold of a '*real risk*'.[15] The practical impact of *Elgafaji* on the EU legislator was rather a political one, avoiding a difficult compromise in the negotiation process of the recast on such a sensitive point. And the point was: what is the level of 'blind violence' required for the Court to consider that a civilian who is returned to his country of origin runs a real risk of a serious threat to his life merely due to his presence on its territory?

§3. STRASBOURG AND LUXEMBOURG CASE LAW AS DIRECT SOURCES OF INSPIRATION FOR THE RECAST

The approach that has been analysed in the previous paragraph is not the only approach the European Commission has had as regards European case law. In quite opposite terms the European Commission has also expressly recalled the developing case law of the Court of Justice of the European Union (this time together with the ECtHR's jurisprudence) in order to justify the necessity of amending the current standards of protection for asylum seekers. This is particularly true as regards the ongoing recast process of the Asylum Procedures Directive. The European Commission included specific justifications in answer to the reservations expressed by some Member States during the negotiations of the recast proposal in what can be perceived as a general clause of the 'judicial legitimacy' of many amendments. It will be sufficient here to recall, in particular, the Commission's reply to the German and Belgian reservations on legal assistance and representation respectively, in Article 23(1) and Article 23(1)(b) of the Procedures Directive, and its response to Lithuania's reservation concerning Article 31(7) on the reasonable time limits for the adoption of a decision in the procedure at first instance. In these cases the Commission anchored the reason for its proposal to the fact that the provisions of the current Directive were no longer in line with the case law of the ECtHR, while the new provisions reflect exactly the case law of that jurisdiction.

Furthermore, the Commission explained the rationale behind the revision of current procedural guarantees in terms of its leading to more consistent application of procedural principles with fundamental rights 'as it is informed by developing case law of the Court

15 ECtHR, *Sufi and Elmi v. United Kingdom,* para. 241.

of Justice of the European Union and the European Court of Human Rights, especially concerning the right to an effective remedy'.[16] In this regard, the influence of the ECtHR case law (and similarly, that of the CJEU) is appreciable both in general and in more specific terms. First of all, *Salah Sheekh*[17] and *NA*[18] require an examination of all the facts of the case and the foreseeable consequences of the removal of the applicant to the country of destination. This examination is called for as the situation in the country of destination may change in the course of time. An amended Article 46(3) of the Asylum Procedures Directive provides that 'Member States shall ensure that the effective remedy provides for a full examination of both facts and points of law, including an *ex nunc* examination of the international protection needs pursuant to the Qualification Directive'.[19]

According to *Gebremedhin v. France*[20] and *M.S.S. v. Belgium and Greece*, appeals against transfer decisions require a remedy with suspensive effect if there is an arguable claim that the prohibition of *refoulement* will be violated upon expulsion. This played an important role in the formulation of Article 46(5) of the amended Asylum Procedures Directive.[21] Similarly important was the *Dorr* case before the CJEU,[22] which specified how accessibility to the remedy would be completely denied by the immediate enforcement of a decision ordering expulsion, and *Factortame I* and *Unibet*,[23] according to which a remedy cannot be considered effective when irreparable harm may be done before the final judgment has been reached. The Commission in particular stated, with reference to Document 15040/11, that the grounds included in its proposal reflected the maximum possible in light of the case law.

Analogously, when Article 46(4) of the amended Asylum Procedures Directive (at first reading) introduced time limits, both the CJEU and the ECtHR were decisive. The CJEU in *Wilson*[24] defined the effectiveness of the remedy as 'actual access within a reasonable period to a Court which is competent to give a ruling on fact and law'. On the other hand, the *Bahaddar v. the Netherlands* (ECtHR judgment)[25] emphasized that: 'time limits should not be so short or applied so inflexibly, as to deny an applicant a realistic opportunity to prove his or her claim' has been determinant. Indeed, in the *I.M. v. France* case, a time limit of 48 hours was deemed not to be compliant with Article 13 ECHR. Moreover, in the specific context of remedies in accelerated procedures, in *Diouf*,[26] the

16 COM (2011) 319 final, p. 4.
17 ECtHR, *Salah Sheekh v. The Netherlands*, Judgment of 11 January 2007, App.No. 1948/04, para. 136.
18 ECtHR, *N.A. v. United Kingdom,* para. 112.
19 Council document 8958/12 on the amended proposal for a Directive of the European Parliament and the Council on common procedures for granting and withdrawing international protection status (Recast), 24 April 2012, p. 138.
20 ECtHR, *Gebremedhin v. France,* Judgment of 26 April 2007, App.No. 25389/05.
21 Council document 8958/12, p. 141.
22 Case C-136/03 *Dorr* [2005] ECR I-4759.
23 Case C-213/89 *Factortame I* [1990] ECR I-2433 and Case C-432/05 *Unibet* [2007] ECR I-2271.
24 Case C-506/04 *Wilson* [2006] ECR I-8613.
25 ECtHR, *Bahaddar v. The Netherlands,* Judgment of 22 May 1995, App.No. 25894/94.
26 Case C-69/10 *Diouf*, Judgment of 28 July 2011, not yet reported.

CJEU recognized the admissibility of a national practice of denying an asylum seeker the right to appeal against an administrative authority's decision to deal with the claim under the accelerated procedure (providing only for the right to appeal against the final decision). Furthermore, according to Advocate General Bot in *HID and BA*,[27] while the use of the nationality of the applicant as a criterion serving as the basis of a prioritized or accelerated procedure is not contrary to the principle of non-discrimination (which it is up to the national judges to verify), it might be the case if the effects of these procedures, *by their structure and the applicable time-limits* are to deprive a *specific* national of the guarantees required by Article 23 of the amended Asylum Procedures Directive.[28]

§4. STRASBOURG AND LUXEMBOURG CASE LAW AS INDIRECT SOURCES OF INSPIRATION FOR THE RECAST

The Asylum Procedures Directive recast examined in the previous paragraph is illustrative of the attitude of the European legislator in explicitly indicating that the proposal was drawn up in the light of existing CJEU and/or ECtHR case law. However, despite the lack of any explicit reference to the CJEU and/or ECtHR jurisprudence by the EU legislator in the rephrasing of CEAS provisions as well as in documents annexed to the amendments proposed, the content of many of them still reflect the thought of these judicial authorities. In the same Asylum Procedures Directive recast, for instance, the fact that the personal and individual interview must be mandatory for all types of procedures[29] is clearly affected by the case law where the ECtHR has recognized the importance of a personal interview in order to ensure an appropriate examination of the asylum claim and a proper assessment of the credibility of the claimant's account.[30]

Concerning the Dublin Regulation, although any previous reference to the case law of the European Court of Human Rights disappeared in the compromise Dublin Regulation text of September 2012 (both in the recitals as well as in the main provisions),[31] it was largely

27 Opinion on Case C-175/11 *HID and BA*, Judgment of 6 September 2012, not yet reported.

28 Opinion of Advocate General Bot in Case C-175/11 *HID and BA*, Judgment of 6 September 2012, not yet reported, para. 70.

29 See COM (2011) 319 final. The European Parliament and the Council aimed to complete negotiations in December 2012, but did not do so for unknown reasons as of the end of the year.

30 See for example ECtHR, *Nasimi v. Sweden*, Judgment of 16 March 2004, App.No. 38865/02; ECtHR, *Charahili v. Turkey,* Judgment of 13 April 2010, App.No. 46605/07, para. 57; see also ECtHR, *Ahmadpour v. Turkey*, Judgment of 15 June 2010, App.No. 12717/08, para. 38; ECtHR, *R.C. v. Sweden*, Judgment of 9 March 2010, App.No. 41827/07, para. 52.

31 Council document 12202/12 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 [First reading], 13 July 2012. While originally Article 26(3)(c) provided that 'transfers shall be carried out in accordance with the Charter of Fundamental Rights of the European Union as well as other international obligations of the Member States, *including relevant*

the influence of *M.S.S. v. Belgium and Greece*[32] that led to the introduction of the (albeit not automatic)[33] right to an effective remedy in decisions regarding transfers to the Member State responsible for examining an asylum seeker's claim. Moreover, the agreement backed by the LIBE Committee in September 2012 listed other important procedural safeguards such as the right to a personal interview to help determine which Member State is responsible for processing an application, and the obligation for Member States to provide free legal assistance on request in the case of the review of a transfer decision, unless a court decides that there are no tangible prospects of success for such an appeal.

The CJEU's jurisprudence (*N.E. and N.S.*)[34] subsequent to the ECtHR judgment of *M.S.S. v. Belgium and Greece* has also influenced the European Parliament in proposing the Council approved amendment on Article 3(2) in the first reading. Indeed the ECtHR rebutted the presumption recognized in *K.R.S. v. United Kingdom*,[35] according to which the system created by the Dublin Regulation alongside the Member States' additional obligations under Council Directive 2005/85/EC (Asylum Procedures Directive) and Council Directive 2003/9/EC (Reception Conditions Directive) 'protects fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance'. Like the presumption that remedies organized at the EU level respect the requirements of the ECHR (*Bosphorus*) – as it is not acceptable to place automatic reliance on the arrangements made under the Dublin Regulation – in this case, the presumption must be that each Member State will abide by its obligations under

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case law from the European Court of Human Rights', the compromise text agreed in July simply states that 'the transfer decision shall be taken within a reasonable period of time, while permitting close and rigorous scrutiny of the request'. Furthermore, deletion was agreed as regards Recital 29, as proposed by the European Commission and further agreed by the European Parliament, according to which '[i]n accordance with case-law of the European Court of Human Rights, the effective remedy should cover both the examination of the application of this Regulation and of the legal and factual situation in the Member State to which the applicant is transferred in order to ensure that international law is respected'. However, there remains a reference to Article 47 of the EU Charter of Fundamental Rights whose right to an effective remedy applies to any negative asylum decision and thus offers broader protection than the ECHR.

32 ECtHR, *M.S.S. v. Belgium and Greece*, Judgment of 21 January 2011, App.No. 30696/09.

33 The amended version of Article 26 provides the possibility of such a suspensive effect through the fact that national legislation should be obliged to provide alternatively for the possibility for the applicant to remain on the territory of the state concerned pending the outcome of his/her remedy; or an automatic suspension of the transfer which lapses after a certain reasonable period of time, during which a decision by a court or a tribunal whether to grant a suspensive effect of any appeal or review shall have been taken after a close and rigorous scrutiny of the request; or the person concerned is given the opportunity to request a court or tribunal – within a sufficiently reasonable period of time – to suspend the implementation of the transfer decision pending the outcome of his/her appeal or review.

34 Joined Cases C-411/10 and C-493/10 *N.S. and M.E.*, Judgment of 21 December 2011, not yet reported, para. 86 and 94.

35 ECtHR, *K.R.S. v. United Kingdom*, Judgment of 2 December 2008, App.No. 32733/08, where, considering the Dublin Regulation alongside Member States' additional obligations under Council Directive 2005/85/EC and Council Directive 2003/9/EC the ECtHR stated that the system so created 'protects fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance'.

Council Directives 2005/85/EC and 2003/9/EC to adhere to minimum standards in asylum procedures and to provide for minimum standards for the reception of asylum seekers. The CJEU in *N.E. and N.S.* did not acknowledge national duties of 'verifying' and 'enquiring' into potential breaches, whereas the Advocate General suggested that there is a duty to assume responsibility under Article 3(2) of the Regulation, when one or more of the fundamental rights enshrined in the Charter (not merely Article 4) may be violated.[36]

Instead the CJEU introduced a more passive requirement when the Member States 'could not be unaware' that the Procedures and Reception Directives are not being implemented effectively in the destination state so that there are 'systemic deficiencies in the asylum procedure and reception conditions for asylum applicants' resulting in inhuman or degrading treatment within the meaning of Article 4 of the Charter.[37] The compromise text agreed by the Council in July 2012 reflects the Court's ruling in *N.E. and N.S.* in order to uphold the sending Member State's responsibility for determining the claim *ex* Article 3(2) Dublin Regulation.[38] Unfortunately, the legislator does not take the opportunity to better clarify under which circumstances there are 'systemic deficiencies in the asylum procedure and reception conditions for asylum applicants'.

Moving on to the amended version of the Reception Conditions Directive, the ECtHR's case law once more plays a significant role in the modified proposal of 2011[39] in ensuring that alternatives to detention are always available. In particular, the trend of resistance to fully applying the necessity test to the detention of *irregular migrants* has started to be reversed by certain sections of the ECtHR. This happens when detention contrasts with respect for family life. It also happens when it appears that other measures (less severe measures) could have been taken according to the 'vulnerability' of the asylum seeker – which as the decisive factor should take precedence over considerations relating to the second applicant's status as an illegal immigrant (when this would be the case due to his/her illegal entry in the state's territory),[40] or when other measures would have been more conducive to the best interests of the child as guaranteed by Article 3 of the Convention on

36 See Opinion of Advocate General Trstenjak in Joined Cases C-411/10 and C-493/10 *N.S. and M.E.*, para. 116.

37 Joined Cases C-411/10 and C-493/10 *N.S. and M.E.*, para. 86 and 94. On the contrary, 'serious' risks of infringements of individual provisions of the Common European Asylum System Directives in the Member State primarily responsible are not sufficient to create an obligation on the part of the transferring state to assume responsibility for the asylum examination, provided these infringements do not also violate the Charter rights of the asylum seeker to be transferred.

38 Article 3(2); Council document 16332/12 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 [First reading], Political Agreement, 21 November 2012, p. 35.

39 See COM (2011) 320 final. While the EP and the Council completed negotiations in July 2012, the Cypriot Presidency waited (for no known reason) until the end of December 2012 to suggest that the Council adopt its first-reading position. For unknown reasons, the Council did not do so.

40 ECtHR, *Mubilanzila Mayeka e Kaniki Mitunga v. Belgium*, Judgment of 12 October 2006, App.No. 13178/03, para. 83. This is due to the fact that quite often the person applying for the international protection had illegally entered the Member State.

the Rights of the Child,[41] or according to the health status of the applicant.[42] Therefore, the provision of the Directive stating that the detention of asylum seekers should only occur as a measure of last resort 'if other less coercive alternative measures cannot be applied effectively' seems in line with the above mentioned jurisprudence. However, this provision appears to be a less strict version of the recast than the previous version, according to which detention should only occur after other non-custodial alternatives have proven to be or have been deemed to be insufficient in relation to the individual.[43]

The new Article 9(2) of the amended version of the Reception Conditions Directive, which introduces both the national obligation to inform asylum seekers of the reasons for detention and the issue of speedy judicial review of detention, reveals a similar capacity to affect the recast process for the Strasbourg judges. Indeed when assessing whether the detention conditions are indeed in violation of Article 3 of the Convention, the ECtHR, takes into consideration the systematic placement of asylum seekers in detention without informing them of the reasons for detention,[44] besides imposing a 'speedy' judicial review of the detention decision.[45] Moreover, the cases of *Benham v. United Kingdom*[46] and *Perks and others* v. *United Kingdom,*[47] and recently the case of *Shabelnik v. Ukraine*[48] – in which the ECtHR reiterates that where a deprivation of liberty is at stake the interests of justice in principle call for legal representation – influenced the formulation of new

41 ECtHR, *Rahimi v. Greece*, Judgment of 5 April 2011, App.No. 8687/08, para. 107–110. The same line of reasoning appeared subsequently in *Popov v. France*, App.Nos. 39472/07 and 39474/07 where the Court stressed that detention of (asylum seeking) minors can only be justified insofar as it can be considered to be a 'measure of last resort which could not be replaced by any alternative'.

42 ECtHR, *Yoh-Ekale Mwanje v. Belgium*, Judgment of 20 December 2011, App.No. 10486/10, concerned an HIV-positive Cameroonian woman who had been irregularly staying in Belgium since the rejection of her request for family reunification with her Dutch partner living in Belgium. She was held for almost four months in a closed transit centre with a view to her deportation. Her state of health, which had deteriorated during her detention, and her need for emergency medical care were decisive for the Court. In that case, according to the Court, in the absence of a consideration of 'less severe measures', detention cannot be considered to be closely connected to the detention ground and is therefore arbitrary.

43 This would be in line with ECtHR, *Saadi,* para. 70 and the judgments cited as well as with the interpretation of Article 31(2) of the Geneva Convention as proposed by Carlier and Hathaway according to which it imposes a test of necessity in the sense of an obligation 'to rely on less intrusive restrictions on freedom of movement, unless detention is clearly required'. See J.-Y. Carlier, 'L'accès au territoire et à la détention de l'étranger demandeur d'asile',79 *Revue trimestrielle des droits de l'homme* (2009), p. 806; J.C. Hathaway, *The right of refugees under International Law* (Cambridge University Press, Cambridge 2005), p. 429.

44 ECtHR, *M.S.S. v. Belgium and Greece,* para. 226.

45 ECtHR, *Louled Masoud v. Malta*, Judgment of 27 July 2010*,* App.No. 24340/08*;* ECtHR, *Chahal v. United Kingdom*, Judgment of 15 November 1996 App.No. 22414/93; ECtHR, *Yavuz v. Austria,* Judgment of 27 May 2004, App.No. 46549/99. Slightly differently, the CJEU defined a 'reasonable' period for an appeal to a court or tribunal. See: Case C-506/04 *Wilson* [2006] ECR I-8613 and Case C-63/08 *Pontin* [2009] ECR I-10467.

46 ECtHR, *Benham v. United Kingdom*, Judgment of 10 June 1996, App.No. 19380/92.

47 ECtHR, *Perks and Others* v. *United Kingdom*, Judgment of 12 October 1999, App.Nos. 25277/94, 25279/94, 25280/94, 25282/94, 25285/94, 28048/95, 28192/95, 28456/95.

48 ECtHR, *Shabelnik v. Ukraine*, Judgment of 19 February 2009, App.No. 16404/03.

Article 9(5) and (6), and Article 26 of the Reception Conditions Directive. The *M.S.S. v. Belgium and Greece* judgement on the duration of detention appears similarly decisive. Its decisiveness lies not in the actual amendments to Article 9 – which only provide that detention 'shall be for as short a period as possible' – but in its interpretation: the duration of the detention, four days and one week respectively, are not regarded as insignificant.

§5. THE INCOMPLETE IMPRINT OF STRASBOURG AND LUXEMBOURG CASE LAW ON THE RECAST

Whereas CJEU and ECtHR case law has had a direct and indirect influence on the content of the EU legislative amendments, in many cases the imprint of European case law has only been partial. Let us start with *M.S.S. v. Belgium and Greece*. The ECtHR took into account the failure by Greece to comply with the standards in the Reception Conditions Directive when it found Greece in breach of Article 3 of the ECHR. According to the Court the Reception Conditions Directive contains a positive obligation to provide accommodation and decent material conditions to asylum seekers, and Article 3 of the ECHR requires the state to ensure that detention conditions are compatible with respect for human *dignity*. Although a specific reference to 'dignified' standards as regards detention conditions has been introduced, the whole approach of the recast of the Reception Conditions Directive only introduces cosmetic changes into the original Directive.

Moving on to the Dublin Regulation recast (first reading), the amended provision on unaccompanied minors[49] currently does not specify whether – in the presence of multiple applications – responsibility lies with the state where the minor first applied for asylum or with the state where the minor most recently applied. The European Parliament and the Council have invited the European Commission to revise the new Article 8(4) once the Court of Justice has ruled on the case *M.A. and Others*.[50] In a spirit of compromise, and

49 See new Article 8, Council document 12202/12.

50 Case C-648/11 *M.A. and Others v. Secretary of State for the Home Department,* Application of 17 February 2011. The compromise text agreed (Council document 12202/12) held that '[i]n the absence of a family member, a sibling or a relative as mentioned in paragraphs 1 and 2, the Member State responsible for examining the application shall be that where the unaccompanied minor has lodged his/her application for international protection and where he/she is present, provided that this is in the best interests of the minor'. But it is accompanied by the Joint Statement by the Commission, the Council and the European Parliament on the consideration of the Court of Justice ruling on the above mentioned case C-648/11 *M.A. and Others v. Secretary of State for the Home Department*. The Court decided the case on 6 June 2013 establishing that 'The second paragraph of Article 6 of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national must be interpreted as meaning that, in circumstances such as those of the main proceedings, where an unaccompanied minor with no member of his family legally present in the territory of a Member State has lodged asylum applications in more than one Member State, the Member State in which that minor is present after having lodged an asylum application there is to be designated the "Member State responsible"'.

in order to ensure the immediate adoption of the proposal, the Commission committed itself to following the indications of the CJEU. However, it was concerned to underline how this is 'limited to these specific circumstances and not creating a precedent'. Instead the Council acted more cautiously and only committed itself to considering the possible amendment to the rules: it did not commit to adopting the amendment.

Likewise, on the issue of information and counselling at borders and in detention facilities (Article 8), whilst the *Hirsi and Jamaa* ruling implies that the availability of information is a basic element for the respect of the non-refoulement principle, the compromise in the Council has been restrictive compared to the position of the European Commission and European Parliament: this information should be provided under the condition that there are indications that the third country national or stateless person wishes to make a request for international protection.

Furthermore, looking at the humanitarian clause of the Dublin Regulation, the new operational clause allocating responsibility on this basis introduced by Article 16A(2)[51] is partially in line with the recent judgment *K*.[52] The text of the new provision in Article 16(A)(2) is still compliant with the part of the judgment which introduced the automatic obligation/duty to take responsibility when the conditions stated in the humanitarian clause are satisfied. Article 16(A)(2) still provides that in a situation of dependence the Member State is 'normally obliged' to keep the family members together (on the condition that the family ties existed in the country of origin).

However, through recourse to a teleological reading of the provision (contrary to the opinion of AG Trstenjak) the Court gave an extensive interpretation of the concept of 'dependency', referring it both to situations where the asylum seeker is dependent on the family, and situations where a family member present in that state is dependent on the assistance of the asylum seeker. Under the same line of reasoning, the notion of 'family' for the purposes of Article 15 of the current Regulation has been read as necessarily having a wider meaning than the definition of 'family members' under Article 2(i) of the same Regulation. Thus, a relationship between mother-in-law and daughter-in-law belongs to the circle of 'family members and other dependent relatives' within the meaning of the current Article 15(1) of the Dublin Regulation.[53] Article 16(A)(2) of the 2012 Regulation as agreed between the European Parliament and the Council would instead only apply specifically to children, siblings and parents who are legally resident.

51 Council document 12202/12.

52 Case C-245/11 *K*, Judgment of 6 November 2012, not yet reported.

53 Ibid., para. 38 and in the Opinion of AG Trstenjak in Case C-245/1 *K*, para. 60–62.

§6. STRASBOURG AND LUXEMBOURG CASE LAW AS A SUPPLEMENTARY TOOL FOR THE ENHANCEMENT OF PROTECTION OF ASYLUM SEEKERS UNDER THE CEAS

Apart from the above mentioned form of direct or indirect influence (albeit sometimes partially) on the ongoing recast, the European Courts' case law also serves as a tool for the interpretation of ambiguous concepts contained in the CEAS instruments which have not been addressed in the recast. For instance, the CJEU has had the chance to complement the EU legislators' work as regards the so-called exclusion clauses and the cessation clauses. In *Bolbol*[54] the Court was asked if a stateless person of Palestinian origin from the Gaza Strip who sought asylum in Hungary should be excluded from refugee status just because she would be eligible for assistance and protection provided by – or because she had already availed herself of – the assistance and protection of UNRWA (United Nations Relief and Works Agency for Palestinian Refugees in the Near East). The Court took the opportunity to clarify that it is not sufficient for a person just to be 'eligible' for assistance and protection from a UN agency, other than UNHCR, in order to be excluded from refugee protection status: that person should actually avail himself of such protection or assistance. Case *Abed El Karem El Kott Mostafa and Others*[55] will give the Court a second chance to further examine Article 12(1)(a) with regard to the meaning of 'the benefits of this Directive' to which Palestinian refugees who have been receiving protection or assistance from UNRWA are entitled. In particular, does it encompass the mere right to apply for refugee status? Or, as proposed by Advocate General Sharpston, will the recognition of refugee status as the cessation of the UNRWA assistance necessarily and simultaneously engender a 'well-founded fear of being persecuted' by, for instance, bringing applicants within the wording of Article 2(c) of the Directive when 'such protection or assistance has ceased for any reason'?

In *Germany v. B. and D. and Others*[56] the CJEU highlighted that the mere fact that the person concerned was a member of a terrorist organization cannot automatically mean that that person must be excluded from refugee status pursuant to those provisions of the Directive. There must be serious reasons for considering that, in the context of his activities within that organization, the person concerned can be held personally responsible for acts of terrorism. Such an individual assessment of responsibility has to be made in light of both objective and subjective criteria.[57] Moreover, according to

54 See Case C-31/09 *Bolbol* [2010] ECR I-5539, para. 49. For a comment see P.J. Cardwell, 'Determining Refugee Status Under Directive 2004/83: Comment on Bolbol (C-31/09)', 36 *European Law Review* 1 (2011), p. 135–145.

55 Reference for preliminary ruling, Case C-364/11 *Abed El Karem El Kott Mostafa and Others,* Judgment of 19 December 2012, not yet reported.

56 Joined Cases C-57/09 and C-101/09 *Germany v. B. and Germany v. D. and others* [2010] ECR I-10979.

57 Ibid., para. 97. As pointed out by the Advocate General Mengozzi in his Opinion of 1 June 2010, the Court of Justice – in the different context of the public order's limit to freedom of workers – has suggested

the Court, Member States can also grant asylum, under their national law, to a person who was excluded from refugee status under Article 12(2) of the Qualification Directive, 'provided that that other kind of protection does not entail a risk of confusion with refugee status within the meaning of the directive'.[58]

The auxiliary role for the CJEU on the cessation clauses in *Abdulla and Others*[59] made it clearer when the change of circumstances in the country of origin will justify the revocation of refugee status: the end of persecution is not sufficient, what is necessary is the demonstration of the country of origin's inability or, conversely, its ability to ensure protection against acts of persecution.[60] In particular, the competent authorities of the Member State must verify, having regard to the refugee's individual situation, that the actor or actors of protection referred to in Article 7(1) of the Directive have taken reasonable steps to prevent the persecution, that they therefore operate, *inter alia*, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection if he ceases to have refugee status.

However, such an obligation does not extend to the general living conditions and the availability of a minimum standard of living in the refugee's country of nationality, as Advocate General Mazàk proposed in his Opinion at paragraph 63.

Instead the CJEU has not yet had the opportunity to address the legal and practical problems related to the *de facto* provisions on exclusion and cessation clauses from refugee status contained in the recast Directive – the exceptions to non-refoulement which go beyond what is permissible under the Refugee Convention.[61] However, thanks to the extended powers provided by the Lisbon Treaty for the CJEU on asylum matters it will not be long before the Court examines the question of the problematic nature of national security reasons and convictions for a 'particularly serious crime': these have been maintained as quasi-exclusion grounds under the revocation provisions and as mandatory exclusion from subsidiary protection.

The CJEU will either soon clarify whether Article 15(c) can be interpreted independently from Common Article 3 of the four Geneva Conventions of 12 August 1949 listing the

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that 'although a person's past association cannot, in general, justify a decision refusing him the right to move freely within the Community, it is nevertheless the case that present association, which reflects participation in the activities of the body or of the organization as well as identification with its aims and its designs, may be considered a voluntary act of the person concerned and, consequently, as part of his personal conduct'. See CJEU, Case C-41/74 *Van Duyn* [1974] ECR I-1337, para. 17.

58 Joined Cases C-57/09 and C-101/09 *Germany v. B. and Germany v. D. and Others*, para. 121.

59 Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and Others* [2010] ECR I-1493.

60 But see contra, for a more strict interpretation of the CJEU's reasoning: S. Boutruche, 'The Court of Justice of the EU and the Common European Asylum System: Entering the third phase of harmonization', 12 *Cambridge Yearbook of European Legal Studies* (2009–2010), p. 65.

61 Articles 14(4) and 14(5).

criteria for determining whether such an 'internal armed conflict' exists,[62] or whether an interpretation that adheres more strictly to the Geneva Conventions as clarified by the international jurisprudence has to be preferred. An example of such clarification is the *Tadìc* decision, according to which the definition of non-international armed conflict encompasses situations where 'there is […] protracted armed violence between governmental authorities and organised armed groups or between such groups within a State'.[63]

The CJEU might be similarly decisive in enhancing the protection of asylum seekers on the basis of their belonging to a particular social group according to Article 10(1) of the Qualification Directive. Article 10(1) sets out the common criteria for the interpretation of the reasons of persecution provided in the Geneva Convention relating to the status of refugees, providing a non-exhaustive list of elements to be taken into account when assessing these reasons. Moreover, the recast gives due consideration to sexual orientation and gender identity when they may be related to certain legal traditions and customs (resulting in for example genital mutilation, forced sterilization, forced abortion). However, the provision still remains contestable for appearing to require the satisfaction of both tests – the requirement that a group is to have 'a distinct identity in the relevant country' (objective test), and that such distinctiveness is to be on the basis that the group 'is perceived as being different by the surrounding society' (a subjective test which may require evidence of the views of members of a particular society). The denial of status to particular groups that are defined by an innate characteristic but that are not seen as set apart from society, or vice versa,[64] might be overturned by the CJEU. Indeed the Court has been asked about this through a preliminary reference by the Dutch Council of State in three separate cases of gay asylum seekers from three different countries of origin (Senegal, Sierra Leone and Uganda). The Dutch Council of State asked whether homosexuals can be considered as 'a social group' in the sense of the Directive, and whether national

62 Case C-285/12 *Aboubacar Diakite v. Commissaire général aux réfugiés et aux apatrides,* reports of case not yet available. Question referred by the Conseil d'État (Belgium) on 7 June 2012.

63 ICTY, *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94–1-A, 2 October 1995, para.70.

64 ELENA Survey, October 2008, 20, citing ECRE, Information Note, 10; ECRE Green Paper Response, 18. See also ECRE, Comments from the European Council on Refugees and Exiles on the European Commission Proposal to Recast the Qualification Directive, 12 March 2010, www.unhcr.org/refworld/docid/4b9e39e12.html (last visited 30 March 2012), 11 [2.5]. The UNHCR has recommended a revision to Article 10(1)(d): in order to 'avoid any protection gaps, UNHCR recommends that the Directive permit the alternative, rather than cumulative, application of the two concepts': at 8. It hence recommends 'amending Article 10(1)(d) to replace 'and' at the end of the first subsection with 'or'. This will make it clear that a person requires protection both in cases where he or she is a member of a particular group and in cases where he or she is perceived to be such'. See: UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted COM (2009) 551 final, p. 8.

authorities can expect applicants to conceal their sexual orientation after their return to their country of origin.[65]

However, while expecting a lesbian, gay, bisexual or transgender person to be compelled to forsake or conceal their sexual orientation and gender identity would mean to conceal aspects fundamental to her/his identity, the general reasoning applied by the Court in the Joined Cases *Y and Z*[66] can hardly be set for other categories in similar situations. In that case, in particular, two Pakistani nationals who were members of the Ahmadiyya community applied in Germany for asylum and protection as refugees claiming that they were forced to leave Pakistan because of their membership of that religious community. According to the Court, in assessing an application for refugee status on an individual basis, the national authorities cannot reasonably expect the applicant to abstain from the manifestation or practice of certain religious acts. The subjective circumstance that the observance of a certain religious practice in public, which is subject to the restrictions at issue, is of particular importance to the person concerned in order to preserve his religious identity is a relevant factor to be taken into account in determining the level of risk of persecution to which the applicant will be exposed in his country of origin on account of his religion, even if the observance of such a religious practice does not constitute a core element of faith for the religious community concerned. Indeed, the protection afforded on the basis of persecution on religious grounds extends both to forms of personal or communal conduct which the person concerned considers to be necessary to him – namely those 'based on … any religious belief' – and to those prescribed by religious doctrine – namely those 'mandated by any religious belief'. In particular, the assumption that gay applicants for refugee status 'have a choice (and perhaps even a responsibility) to behave in their respective countries of origin in a manner that reduces the risk of acts of persecution on grounds of their sexual orientation' runs 'counter to their right to respect for the sexual identity'.[67]

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65 While on 1 December 2010, the Highest Court of Nordrhein-Westfalen in Germany already called for clarification on Article 10(1)(d) of the Qualification Directive asking, first, whether homosexuals should be considered as members of a group that 'share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it', and if there are any 'specific prohibitions for the protection of public order and morals' relevant when interpreting and applying Article 10(1)(d); repealed in 2011.

66 Joined Cases C-71/11 and C-99/11 *Y and Z,* Judgment of 5 September 2012, not yet reported.

67 See Opinion of Advocate General Sharpston in Cases C-199/12, C-200/12 and C-201/12, *X, Y and Z*, 11 July 2013, not yet reported, para. 58.

§7. CONCLUDING REMARKS

As shown in the paper, in general terms, the complexity and difficulty involved in developing a CEAS is represented, on the one hand, by the different perceptions of what asylum is, what measures it requires and the status and rights of those seeking international protection and, on the other hand, by the multifaceted dimension of managing asylum in the context of which the geo-political situation of a given Member State may be a decisive factor both in that government's approach to the treatment of asylum seekers and in the latter's preference for one European country over another. Specifically, this has meant that to date in the EU context, Member States have conceptualized the management of asylum and thus implemented EU asylum law in significantly different ways, Greece being a case in point. In turn, this has led to a situation whereby there are huge disparities between Member States as regards the level and standard of protection, negatively impacting upon both asylum seekers and individual Member States.

The recasting of key legislative EU instruments concerning the treatment, status and rights of those seeking international protection – as well as other initiatives concerning the external dimension of EU asylum policy such as the proposed EU resettlement scheme – aims to redress the gaps and weaknesses in the existing legislation. In particular, the recast intends to ensure a higher standard of protection of basic human rights in accordance with international and European human rights law while eliminating the wide scope of discretion, either explicitly afforded to Member States or implicitly derived from the lack of clarity of many provisions of the current legislation, thus reducing the still significant discrepancies and differences between Member States' asylum law and policy. This paper shows that in some instances the recasting process clearly attempts to ensure a stronger level of legal protection which is largely thanks to the direct or indirect judicial impact of both of the European Courts on its content.

Nevertheless, the picture is rather a mixed one as some key concepts still remain unchanged. For instance, even though according to the ECtHR *asylum seekers are all 'particularly vulnerable' due to everything they have already endured,*[68] the new Reception Conditions Directive fails to strictly and duly consider the vulnerability of some asylum seekers with special reception needs when it allows for the detention of unaccompanied asylum seeking children 'in exceptional circumstances' and when it lists examples of who should benefit from these special reception needs in Article 21 and in Annex I.

68 ECtHR, *M.S.S. v. Belgium and Greece*, para. 232.

Furthermore, while the ECtHR reminds us on a daily basis that the Safe Third Country (STC) and the Safe Country of Origin (SCO) concepts[69] are irreconcilable with the ECtHR case law[70] and inconsistent with international refugee law,[71] the new proposal allows both case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe. It is therefore important that asylum seekers should continue to have the possibility to challenge the application of the safe third country concept on the grounds that the third country is not safe in his/her particular circumstances. An analogous obligation of a regular review process – but this time conducted at the national level without the participation of the European Commission or the European Parliament – has been introduced regarding the situation in third countries designated as safe countries of origin (SCO) by national authorities. In effect the national designation of third countries as SCO is still permitted, although to date this has still not led to a uniform set of legal rules in the Member States.[72] The deletion of these national designations, which was called for by the European Parliament in its amendments to the original recast, has not been supported by the Commission in its amended version of the proposal. This is due to the fact that further harmonization will be realistic only in the future; once the EASO

69 For an analysis of the application of these concepts, see among others: M. Kjaerum, 'The Concept of Country of First Asylum', 4 *International Journal of Refugee Law* 4 (1992), p. 514–530; K. Hailbronner, 'The Concept of "Safe Country" and Expeditious Asylum Procedures: A Western European Perspective', 5 *International Journal of Refugee Law* 1 (1993), p. 2–32; E. Kjaergaard, 'The Concept of "Safe Third Country" in Contemporary European Refugee Law', 6 *International Journal of Refugee Law* 4 (1994), p. 644–655; A. Achermann and M. Gattiker, 'Safe Third Countries: European Development', 7 *International Journal of Refugee Law* 1 (1995), p. 19–38; K. Zwaan, *Veilig derde land. De exceptie van het veilig derde land in het Nederlands asielrecht* (Katholieke Universiteit Nijmegen, Nijmegen 2003); M.T. Gil-Bazo, 'The Practice of Mediterranean States in the Context of The European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited', 3 *International Journal of Refugee Law* 4 (2006), p. 571–600; J.Y. Carlier, *Droit d'asile et des refugiés. De la protection aux droits* (Martinus Nijhoff, Leiden 2008), p. 158–167.

70 See lastly ECtHR, *Hirsi Jamaa and Others v. Italy,* Judgment of 23 February 2012, App.No. 27765/09 and ECtHR, *M.S.S. v. Belgium and Greece*.

71 See ECRE, *Guidelines on Fair and Efficient Procedures for Determining Refugee Status*, 1999, para. 21(c) and 119(c). See also S. Da Lomba, *The Right to Seek Refugee Status in the European Union* (2nd edition, Intersentia, Antwerp 2008); O. Ferguson Sidorenko, *The Common European Asylum System: Background, Current State of Affairs, Future Direction* (T.M.C. Asser Press, The Hague 2007).

72 In most instances, the more favourable guarantees proposed by national parliaments are not taken into consideration by the governments who generally have the final decision about the list of SCOs (for instance, Denmark, Ireland, Lithuania). This is also the case where Member States have opted for lists on an informal basis, for example, the Czech Republic, Finland, Norway and Romania with the risk of a lack of any form of publicity and/or control and an excessive discretion in the revision process, or they have a prerogative on drafting such decisions. Austria is one of two Member States where the proposed list drafted by the competent section in the Ministry of the Interior has to be approved by the Parliament while in Germany it is up to the government to give the final approval after a mere consultation of the parliament. Research carried out by the UNHCR found that 'there are a number of Member States with national legislation in place permitting the application of the safe country of origin concept on a case-by-case basis, without a transparent, formal, published act of national designation as required by Article 30 APD' (see UNHCR, *Improving Asylum Procedures,* 66).

has the capacity to support in a sustainable manner the replacement of national lists by drafting reports on countries of origin based on relevant, reliable, accurate and up-to-date country of origin information gathered in a transparent and impartial manner, by the development of a common format and a common methodology for presenting, verifying and using information on countries of origin, and analysis of the information on countries of origin.

However, the opposite approach was adopted towards Albania and Kosovo by the governments of Belgium and France (where the *Conseil d'État* annulled the French administration's decision to add these countries to the French SCO list). In these two cases the Directive's provision impairs the objective of the harmonized system envisaged under the Lisbon Treaty and risks undermining access to a fair and efficient procedure.

The recast of the Procedures Directive positively introduces a time limit for access to the procedure: national authorities would have 72 hours from the moment a person has expressed his or her wish to apply for international protection. Whilst the aim is to reduce legal uncertainty, giving asylum seekers quicker access to those benefits provided for in the Reception Conditions Directive, more flexibility (up to 10 days) is built in for Member States when they are confronted with large numbers of asylum applications in order to derogate from these procedural standards. In order to prevent any abuse and the risk of potential asylum seekers being returned before being registered as applicants at all, the European Parliament proposed reducing the extension to 7 days and attaching to it the onus of communicating as soon as possible to the Commission about the use of – and the grounds for – applying the extended time limit.

While the Dublin recast proposal obliges Member States to report on their asylum management, the statistical data requested from the Member States do not necessarily indicate whether the fundamental rights of the asylum seekers are protected in these states. This would instead have been the case if the EU legislator, according to *M.S.S. v. Belgium and Greece* and *N.S. and M.E.,* were also obliged to report on the criteria referred to here, such as the length of the procedure, the detention conditions and reception capacity in relation to the inflow of asylum seekers.[73]

So there is still scope for further strengthening fundamental rights for those seeking international protection in the European Union. The jurisprudence of both of the European Courts should have a rather more important influence on the implementation stage of the new legislative instruments of the second phase of the CEAS. This is due to its possible accession to the Geneva Convention and the attached 1967 Protocol promoted by the Stockholm Programme,[74] but mostly to the European Union's

73 Letter of 26 March 2012 from the Meijers Committee to the EU Council on the proposal of the former Polish Presidency and the current Danish Presidency to install a process for early warning, preparedness and management of asylum crises (Council document 15055/11) in the recast of the Dublin Regulation.

74 The European Council has endorsed the view that the EU 'should seek accession to the 1951 Geneva Convention and its 1967 Protocol', see Presidency of the European Council, 'The Stockholm Programme

accession to the ECHR[75] and the 'constitutionalization'[76] of the material scope of the right to asylum in the EU by Article 18 of the Charter of Fundamental Rights (CFREU) which implies a consistent interpretation of EU asylum legislation. An optimization of 'judicial cooperation' between the two European refugee law courts in the light of a complementary[77] and mutually reinforcing judicial 'integrated European approach' could further develop a veritable 'European' *ius commune* on asylum protection.

– An open and secure Europe serving and protecting the citizen', Doc. No. 17024/09, available online: http://register.consilium.europa.eu/pdf/en/09/st17/st17024.en09.pdf (last visited 16 April 2013), p. 69, para. 6.2.1.

75 See Article 6(2) TEU.

76 Study for the European Parliament, 'Setting up a Common European Asylum System, Report on the Application of existing instruments and proposals for the new system', 2010, p. 430.

77 As Callewaert eloquently puts it, in J. Callewaert, '"Unionisation" and "Conventionalisation" of Fundamental Rights in Europe', in J. Wouters, A. Nollkaemper and E. De Wet (eds.), *The Europeanisation of Public International Law: the Status of Public International Law in the EU and its Member States* (T.M.C. Asser Press, The Hague 2008), there is 'a kind of bilateral interplay between the EU and Convention law, thereby producing a twofold process of "conventionalisation" of Union law and "unionisation" of Convention law, though with different timings and intensities'.