

MPC – MIGRATION POLICY CENTRE



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The Directive 2003/9/EC

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EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES
MIGRATION POLICY CENTRE (MPC)

The Directive 2003/9/EC
Providing the highest level of protection and contributing to the
establishment of Common European Asylum System (CEAS)

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Mission statement

The Migration Policy Centre at the European University Institute, Florence, conducts advanced research on global migration to serve migration governance needs at European level, from developing, implementing and monitoring migration-related policies to assessing their impact on the wider economy and society.

Rationale

Migration represents both an opportunity and a challenge. While well-managed migration may foster progress and welfare in origin- as well as destination countries, its mismanagement may put social cohesion, security and national sovereignty at risk. Sound policy-making on migration and related matters must be based on knowledge, but the construction of knowledge must in turn address policy priorities. Because migration is rapidly evolving, knowledge thereof needs to be constantly updated. Given that migration links each individual country with the rest of the world, its study requires innovative cooperation between scholars around the world.

The MPC conducts field as well as archival research, both of which are scientifically robust and policy-relevant, not only at European level, but also globally, targeting policy-makers as well as politicians. This research provides tools for addressing migration challenges, by: 1) producing policy-oriented research on aspects of migration, asylum and mobility in Europe and in countries located along migration routes to Europe, that are regarded as priorities; 2) bridging research with action by providing policy-makers and other stakeholders with results required by evidence-based policy-making, as well as necessary methodologies that address migration governance needs; 3) pooling scholars, experts, policy makers, and influential thinkers in order to identify problems, research their causes and consequences, and devise policy solutions.

The MPC's research includes a core programme and several projects, most of them co-financed by the European Union.

Results of the above activities are made available for public consultation through the website of the project: www.migrationpolicycentre.eu

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Abstract

On the basis of international law and subject to their treaty obligations, states have the right to control the entry of foreign nationals into their territories. However, when dealing with individuals seeking international protection, a state's margin of appreciation is narrower. In this case, indeed, the freedom of each sovereign should be exercised in accordance with human rights standards and should guarantee the highest level of protection. After discussing the development of human rights and asylum policies in the European Union, this paper examines Directive 2003/9/EC of 27 January 2003, laying down the minimum standards for the reception of asylum seekers in the light of human rights obligations and tries to determine whether this legal instrument contributed to the establishment of the Common European Asylum System. In addition, assessment of Commission's proposals will be provided in order to establish whether future amendments will be essential in providing asylum seekers with the highest level of protection and in setting common standards in the EU reception area.

Table of Contents

Chapter 1 – Introduction.....	1
Chapter 2 - Human Rights and the Development of Common Asylum System in the <i>European Union</i>	2
Chapter 3 - Reception of the Asylum Seekers – Directive 2003/9/EC	4
Chapter 4 - Second Phase of the Asylum Legislation	11
4.1 Proposal for a Directive of the European Parliament and of the Council Laying Down Minimum Standards for the Reception of Asylum Seekers.....	11
4.2. <i>Amended Proposal for a Directive of the European Parliament and of the Council Laying Down Standards for the Reception of Asylum Seekers</i>	12
5. Conclusion.....	14
Bibliography	16

Chapter 1 – Introduction

Persecution, conflicts and generalized violence are all factors for individuals seeking shelter and safety in another country. In order to flee from their original residence, with the intention of gaining international protection, asylum seekers risk their lives by taking to sea on leaking boats or climbing over razor-wire fences.¹ Most are undocumented and cross borders illegally. Nevertheless, these groups of individuals are in the utmost need of special protection from international society on account of their position.

Forced to travel by violence, refugees and asylum seekers should be guaranteed the widest possible exercise of rights and fundamental freedoms enshrined in international human rights documents. Therefore, with the understanding of the nature of the problem, state authorities should treat displaced persons, who are not able to return to their home countries, fairly with respect to their dignity and rights.

The European Union recorded 257,815 asylum applications in 2010, 55,095 (25%) of which received protection status in the EU in first instance procedures: refugee, subsidiary protection and humanitarian.² The level of asylum applications in Member States has always been very low: according to the Green Paper on the future of Common European Asylum System in EU 15 and EU 25 the highest number of applications from 1986-2006 was 700,000 for 1992.³ This number apparently decreased during 2006 and amounted to about 200,000.⁴ New asylum applications in EU 27 came, instead, to 181,770.⁵ According to the 2006 Green Paper 52,555 applicants were granted this status, and 136,325 were rejected.⁶ The number of non-status decisions amounted to 45,070.⁷ Most of the applicants were from Iraq; however, a high number of applications came from Russian citizens as well as from the citizens of Serbia and Montenegro.⁸

The aim of the European Union has been to establish a common policy on asylum which would ensure a high standard of protection for asylum seekers and refugees on the basis of fair and effective procedures. Despite this clear objective, the UN High Commissioner for Refugees stated, on World Refugee Day in 2005, that “unfortunately, finding safety in today’s world is becoming increasingly difficult. While developing countries, least able to afford it, host most of the world’s refugees, many industrialized nations continue to impose ever stricter controls on asylum. All of us bear a responsibility for ensuring that those genuinely in need of international protection receive it”.⁹

The need for better quality and enhanced harmonization of standards in international protection have been established and reaffirmed by the conclusions at Tampere, the Hague and Stockholm. However, the discretion allowed to Member States by the secondary legislation of the EU in a number of key areas puts the above mentioned objective under question.

The aim of this paper is to determine whether efforts for establishing a Common European Asylum System (CEAS) at the EU level are sufficient. To this end, the paper only examines Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

¹ <http://www.unhcr.org/pages/4a1d406060.html>; checked 19 November 2011

² Annual Report on Immigration and Asylum (2010), COM (2011) 291 Final, Brussels, 24.05.11, P 5

³ Ibid, P 21

⁴ Ibid

⁵ Ibid, P 22

⁶ Ibid, P 24

⁷ Ibid

⁸ Ibid, P 25

⁹ http://www.unhcr.org.ua/unhcr_mol/news.php?ip=1&press_id=20&lang=m; checked 19 November 2011

First of all, the paper discusses the development of asylum systems and human rights in the European Union. The discussion is followed by an in-depth analysis of Council Directive 2003/9/EC and the human rights implications of this document. In order to determine whether the Directive has been successful in establishing a common area of international protection, while complying with human rights obligations, the article will scrutinize the national legislation and subsequent practice of different Member States. In addition, an analysis of proposals (initial as well as amended) of the Directive presented by the European Commission will be provided. The paper examines whether the objectives of the Union to build a fair and coherent asylum policy will be met by 2012. In addition, the paper evaluates the human rights considerations of these amendments and determines the need to advance toward a Common European Asylum System (CEAS).

Chapter 2 - Human Rights and the Development of Common Asylum System in the European Union

According to article 14 (1) of the Universal Declaration of Human Rights “Everyone has the right to seek and to enjoy in other countries asylum from persecution”. Despite the soft law nature of the Declaration, this right and subsequent guarantees deriving from refugee status are ensured by the 1951 UN Convention Relating to the Status of Refugees, the 1967 Protocol amending the 1951 UN Convention and also by other international human rights documents which are compulsory for all the Member States of the European Union. Notwithstanding the obligations provided by these documents, the European Union with its Member States took significant time and effort to include refugees and asylum seekers in its policies and legal instruments. Furthermore, the negotiations on Directive 2003/9/EC on asylum reception conditions explicitly demonstrated resistance from Member States for the recognition of rights of asylum seekers.

Such resistance may be a consequence of human rights occupying the status of a second order within the Community Law.¹⁰ On the other hand, the case law of the ECJ states that fundamental rights form an integral part of the general principles of law the observance of which the Court ensures.¹¹

Be this as it may, the development of trade, economy and fiscal areas were always the main objectives of the EU. The Single European Act (SEA) of 1986 primarily focused on economic activities. The Act did not deal with the issue of refugees and asylum seekers; nevertheless, the annex of the Commission’s White Paper on the integration of 1985 includes refugees.¹²

A first important development in the field of asylum was provided by the Maastricht Treaty with the creation of the Treaty on the European Union. An important contribution to these amendments was the inclusion of a human rights clause (article 6 TEU) ensuring that fundamental human rights formed the general principles of Community law. The TEU was the most vital document, as it required dealing with asylum and immigration at the European Union level.¹³

However, the existing asylum and immigration policies of the EU demanded their advancement to a more progressive stage. Indeed, new title IV on visas, asylum, immigration and other policies relating to the free movement of persons, provided by the Treaty of Amsterdam, was inserted in the EC Treaty. Article 61 EC established the need to adopt measures in the field of asylum together with

¹⁰ Damian Chalmers, *European Union*, Cambridge University Press, Cambridge, 2007, P 234

¹¹ Joined cases C-465/00, C-138/01 and C-139/01 *Osterreichischer Rundfunk* (2003) ECR I-4989, Case 11/70 *Internationale Handelsgesellschaft v Einfuhr-und Borrratstelle fur Getreide und Futtermittel* (1970) ECR 1125; The development was also considerable when the court recognized and referred to number of human-rights treaties and established the particular status of the European Convention on Human Rights (ECHR) in Case 260/89 *Eliniki Radiophonia Tileorassi (ERT) v Dintiki* (DEP) 1991 ECR I-2925

¹² Elspeth Guild, ‘The Europeanization of Europe’s Asylum Policy’, *International Journal of Refugee Law*, 2006, P 634

¹³ *Ibid*

safeguarding rights of third- country nationals. Another important piece was article 63 of the Treaty Establishing the European Community which determines that measures on asylum should be adopted in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967. These measures include not only minimum standards for the reception of asylum seekers in the Member States, but also minimum standards for the qualification of third-country nationals as refugees and for granting and withdrawing refugee status. In addition, article 63 also necessitated the adoption of the criteria and mechanisms for determining which Member State is considering an application on asylum, submitted by the third-country nationals in one of the Member States. The Treaty of Amsterdam marked the moment when the Community started to adopt non-discriminatory policies.¹⁴

The 1999 Tampere Conclusions also deserve attention in the development of the Common European Asylum System. The importance of respecting human rights and asylum was reaffirmed during the Tampere meeting. The outcome resulted in the agreement to implement a Common Asylum Policy and to create a Common European Asylum System, where the Geneva Convention of 1951 would be applied in its entirety. The principle of *non-refoulement* was once again reiterated as being of paramount importance in the field of asylum.

The 2004 Hague Program, which was adopted on 5 November 2004 aimed to strengthen the idea of a Common European Asylum System, with cooperation between Member States, including the harmonization of internal procedures and the consistent status of persons to whom the asylum status has been granted. The Hague Program determined ten priorities (which were equally important) for the next five years of which four are relevant to international protection. These included the full development of policies monitoring and promoting respect for the fundamental rights of all people (including asylum seekers and not only citizens of the European Union), establishing a common asylum area with effective harmonized procedures around the Union. In order to prevent the marginalization of asylum seekers from a host society, the Hague Program established the importance of integration policies.¹⁵ As a result, the program stipulated the establishment of a European Framework on Integration, which would be based on respecting human rights and combating discrimination.¹⁶ Last, but not least the necessity of sharing responsibility and solidarity between the Member States was recognized as an essential tool in meeting, in the most efficient manner possible, the objectives of freedom, security and justice.¹⁷

Further progress was made with the Stockholm Program with its objective of working toward migration with more focus on an individual.¹⁸ The Stockholm Program recognized that a well-managed migration policy is beneficial to all stakeholders. As there were still divergent approaches in Member States in considering asylum applications, the European Council decided on the establishment of the Common European Asylum System (CEAS): this was to be accomplished by 2012. To this end, the CEAS called for a comprehensive asylum policy by strengthening solidarity and sharing responsibility among Member States.¹⁹ The main idea of the Stockholm Program lies in developing high standards of protection and giving due regard to “fair and effective procedures capable of preventing abuse”.²⁰ Notably, the Program recognized the importance of providing equivalent level of treatment in reception conditions, during procedural arrangements and for the

¹⁴ Anja Wiesbrock, *Legal Migration to the European Union: Ten Years After Tampere*, Wolf Legal Publishers, Nijmegen, the Netherlands, second revised edition 2010, P 140

¹⁵ European Commission Communication, *The Hague Program: Ten priorities for the next five years - The Partnership for European renewal in the field of Freedom, Security and Justice* COM (2005), 0184 Final, 10.05.2005

¹⁶ Ibid

¹⁷ Ibid

¹⁸ http://www.se2009.eu/en/meetings_news/2009/7/15/stockholm_programme_in_focus; checked 19.11.2011

¹⁹ European Council, *The Stockholm Programme*, 10/11 December 2009

²⁰ Ibid

status determination of all asylum seekers in the EU.²¹ An outstanding achievement was to determine the establishment of a Common European Asylum System on “a full and inclusive application” of the 1951 Geneva Convention relating to the Status of Refugees and other international human rights documents.²² Additionally, it was recommended that the Union should access to the Geneva Convention and its protocol.²³ In order to build a sustainable and coherent asylum policy, the Program acknowledged the need for cooperation between the Member States and their active collaboration with third countries, hosting large numbers of asylum seekers.²⁴

The European Pact on Immigration and Asylum of 24 September, 2008 should also be mentioned while developing a common asylum system in the EU. The Pact established five main objectives, including the construction of a Europe of Asylum. In the Pact the European Council recognized the existence of considerable disparities between the Member States concerning the granting of international protection and the forms that protection takes. In the same document the European Council reiterated the responsibility of each Member State to grant protection and refugee status; however, it also stressed that the time has come to take new initiatives to complete the establishment of a Common European Asylum System in order to provide a higher degree of protection. The advanced level of protection of asylum seekers was also stressed by the Commission in its asylum action plan.²⁵

Chapter 3 - Reception of the Asylum Seekers – Directive 2003/9/EC

On 27 January 2003 the Council adopted Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers in the Member States. The Directive is applicable to all Member States except Denmark and Ireland. It should have been transposed into the national legislation by 6 February, 2005 (Article 26). The main objectives of the Directive were to harmonize the internal laws of the Member States in the area of reception conditions of asylum seekers and to provide common procedures and uniform statuses for asylum. However, the wide discretion granted by the Directive to Member States in the key areas discussed below show that the Directive has significant flaws and that the objective of creating “a level playing field” in terms of reception has not been achieved yet.

First and foremost, the Directive as a whole lacks foreseeable and precise norms. This can be one of the bases of the wide margin of appreciation granted to the Member States as well as a violation of international human rights standards. Legal certainty and the preciseness of legal norms are essential contributions in avoiding the risk of arbitrary actions on the part of the Member States. These principles are the basis of the European Law as well. They require the European Law to be clear and its consequences foreseeable.²⁶ As defined by the European Court of Justice (ECJ) in *Opel Austria* “Community legislation must be certain and its application foreseeable by individuals”.²⁷ The principle of legal certainty requires that every measure of the institutions having legal effect must be clear and precise.

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 the Member State as long as they are allowed to remain in the territory as asylum seekers, as along with to family members (Article 3 (1)). It is applicable

²¹ Ibid

²² Ibid

²³ Ibid

²⁴ Ibid, note: to this end the European Council recommended the development of Regional Protection Programs (RPPs)

²⁵ European Commission Communication, Policy Plan on Asylum – an Integrated Approach to Protection Across the EU, COM (2008), 360 Final, 17.6.2008

²⁶ Damian Chalmers, *European Union*, Cambridge University Press, Cambridge, 2007, P 454

²⁷ *Opel Austria v Council*, Case T-115/94 (1997)ECRII-39

from the time a third-country national submits an application for international protection until the final decision on said application.²⁸ The Directive does not apply to requests for diplomatic or territorial asylum submitted to representations of Member States (Article 3 (2)). According to the report from the Commission to the Council and to the European Parliament on the application of Directive 2003/9/EC no problems were identified addressing the scope of the directive. In addition to the individuals mentioned in article 3, most of the Member States apply the Directive for subsidiary protection as well.²⁹ Over time different approaches have been detected in applying the Directive. The Netherlands and Estonia for example, do not apply it to persons at the admissibility stage, while the United Kingdom, Greece and Cyprus apply it to those individuals who have already registered for obtaining a status or who already hold a particular ID card.³⁰

According to article 5 of the Directive, Member States are obliged to inform asylum seekers within fifteen days of the submission of documents about relevant benefits and obligations, which the asylum seekers must comply with. The Directive requires information about legal assistance and organizations that might assist the applicants. Such information should be provided in a language that the applicant may reasonably be supposed to understand. Other forms of delivering information are not established by the Directive. As a result, access to information is sometimes problematic in several Member States. In Cyprus, Slovenia, Germany and Malta information on organizations for providing legal assistance to applicants are not sufficient.³¹ In addition, the number of languages in which the information is available also differs between the Member States. Malta uses three different languages here, while Austria has information in thirty four different languages. Considering the vulnerable position of asylum seekers, a sensitive approach and efficient mechanisms for discussing applications are essential in guaranteeing their rights in an initial phase. For this reason it is vital that individuals seeking international protection are duly notified about their guarantees. This is especially crucial for detained asylum seekers as “rights for persons deprived of their liberty will be of little value if the persons concerned are unaware of their existence”.³² According to the Seventh General Report of the European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment (CPT) detained migrants should always be provided with documents where their rights, accessible measures and precise procedures relating to them are enumerated. Notification of the rights and obligations of asylum seekers should be provided in as many languages as possible, as asylum seekers may have difficulties in verbal communication and perhaps will not understand the language in which documents are represented to them in the host community. Duly provided information is essential, as it plays a key role if the asylum seeker should wish to challenge the decisions of the administration.

Article 6 of the Directive guarantees the issuance of the document stating the name of the applicant which confirms the status of the individual and the right to stay in the territory of the Member State. The Commission identified problems in time limits for supplying asylum seekers with such documents. Together with incompliance with the deadline determined by the Directive, certain Member States have not invoked such limits in their national legislations. In addition, documents stating names are issued mostly by Member States only to non-detained asylum seekers; save in the Netherlands, Cyprus and Italy. Differences are also established in the contents and forms of these documents. The validity time of documents also varies from state to state.

²⁸ European Commission Communication on the Application of Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers, COM (2007), 745 Final, 26.11.2007, P 3

²⁹ The failure to indicate subsidiary protection during the adoption of the Directive was mainly due to the fact that EU *aquis* did not foresee such a term during that period

³⁰ European Commission Communication on the Application of Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers, COM (2007), 745 Final, 26.11.2007, P 3

³¹ European Commission Communication on the Application of Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers, COM (2007), 745 Final, 26.11.2007, P 4

³² European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment, 12th General Report (CPT/Inf(92)3), Para. 44

Right to residence and freedom of movement are guaranteed by article 7 of the Directive. Limitations of these rights may be justified on the basis of public interest, public order or when necessary, for the speedy processing and effective monitoring of the individual's application. In addition, the Directive gives the possibility to national authorities to require applicants to inform the competent authorities of their current address and to immediately notify the authorities of any change of address. Restrictions and limitations in the right of free movement, as well as granting the right to choose one's residence, vary between the Member States. Prior authorization may represent a precondition for leaving residence in certain jurisdictions.

According to article 10, Member States shall grant minors access to education under similar conditions as nationals of the host Member State for as long as an expulsion measure against them or their parents is not actually enforced. The Directive states that access to the education system shall not be postponed for more than three months from the date when application for asylum was submitted by the minor or his/her parents. The document establishes the possibility of extending three months to one year, where specific education is provided in order to facilitate access to the education system. According to the report from the Commission to the Council and to the European Parliament on the application of Directive 2003/9/EC, access to primary schools is not problematic. However, access to secondary education may depend on those places available and the decision of the local authorities.

There have also been delays in access to the education system. Appalling as it may seem, many Member States deny access to education to detained minors or limit that access.³³ On the other hand, in certain Member States there are special classes in detention facilities where minors can gain education.³⁴ This possibility is mainly provided in Latvia, the Czech Republic, Lithuania and Sweden. According to article 13 of the International Covenant on Economic, Social and Cultural Rights (CESCR), "the State Parties to the present covenant recognize the right of everyone to education". Ensuring the right to education both in a normative and practical setting is important for the development of human personality and for participating in society freely. To this end education should be available and accessible for everyone without discrimination. Accessibility includes three important factors: 1) Non-discrimination; 2) Physical accessibility (including in detention centers) and 3) Economic accessibility.³⁵ In the last case state parties to the CESCR "are required to progressively introduce free secondary and higher education". Educational systems should also be acceptable and adaptable to the individuals concerned.³⁶

The importance of providing free secondary education is based on the objective to complete basic education and to determine one's own future development. According to article 13 (2; b) CESCR secondary education "shall be made generally available and accessible to all by every appropriate means and in particular by the progressive introduction of free education". According to the Committee on economic, social and cultural rights "progressive introduction" implies the following: while states must give priority to free primary education, they still have an obligation to take concrete steps towards achieving free secondary education".³⁷ As developed countries, Member States of the European Union are in a position to take all appropriate means to ensure that everyone, including asylum seekers, have prompt and free access to both primary and secondary education. In this regard the extension of access to education for a year or the limiting of detained minors should be prohibited.

³³ European Commission Communication on the Application of Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers, COM (2007) 745 Final, 26.11.2007, P 8

³⁴ Ibid

³⁵ GE.04-41302 (E) 070604, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 12 May 2004, HRI/GEN/1/Rev.7, P 73

³⁶ Ibid

³⁷ Ibid, P 74

Employment and vocation training are ensured by articles 11 and 12 of the Directive. According to article 11, Member States can set a period of time, during which an applicant cannot have access to the labor market. In several Member States such access is restricted in time. Unfortunately, contrary to the requirements of the Directive, Lithuania does not provide for the possibility of access to the labor market in its national law at all.³⁸ In certain Member States a work permit may be needed to access the labor market.³⁹ Access to employment is an essential tool for integrating foreign nationals. Such access then could be beneficial not only for the individual, but also for the host Member States. In particular, employment raises the self sufficiency of the asylum seeker and reduces the financial responsibility of the host state. Therefore, it is crucial to offer asylum seekers employment, at least on a part time basis, as soon as possible after their arrival, in order to ensure their social and economic well-being.

Article 13 of the Directive ensures that material reception conditions should be available to applicants when they make their application. However, it does not state the way these general material reception conditions should be met. In addition, material reception conditions may be provided in kind, or in the form of financial allowances or vouchers. Article 14 ensures that if housing is provided in kind then it should guarantee an adequate standard of living. According to the Directive, the family life of applicants provided with the housing is protected. In addition, Member States may set modalities for material reception conditions different than those provided in article 14, but for a reasonable period which should be as short as possible. However, these different conditions shall in any case cover the applicant's basic needs.

The wide discretion granted by the Directive in terms of material reception conditions has caused some major problems. Types of housing in certain Member States are provided according to the stage of the procedures. Providing financial assistance for accommodation needs is very rare. If a financial allowance is provided, this is low and is not commensurate with the minimum social support granted to nationals in most of the Member States.⁴⁰ The manner of providing asylum seekers with food and clothes also varies between Member States. Other problems regarding material reception conditions include the scarce number of places for asylum seekers and the conditionality of family unity on particular procedural requirements.⁴¹ In addition, reception conditions for individuals in detention are in certain cases not adequate.⁴²

Housing, be it in special centers or in detention facilities, shall always be adequate. The importance of this right is strengthened by the reasoning that the right to adequate housing generally is related to enjoying other rights. Therefore, the housing type should not be differentiated according to procedural stages, but shall always be adequate. The dimension of this right includes not only right to privacy and home, but also the widest possible protection to family life. Limiting the right of family members to be housed together runs counter to the requirements of article 10 of the International Covenant on Economic, Social and Cultural Rights (CESCR). Therefore, the protection of this right has a core importance in terms of human rights protection. The right to housing generally does not only encompass having the mere shelter, "rather it should be seen as the right to live somewhere in security, peace and dignity".⁴³ According to the Commission on Global Strategy for Shelter the term "adequate housing" encompasses adequate space, lightning, privacy, and position in relation to facilities which

³⁸ European Commission Communication on the Application of Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers, COM (2007), 745 Final, 26.11.2007, P 8

³⁹ Ibid

⁴⁰ European Commission Communication on the Application of Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers, COM (2007), 745 Final, 26.11.2007, P 6

⁴¹ Ibid

⁴² Ibid

⁴³ The right to adequate housing (Art.11 (1)), *CESCR General comment 4*: Committee on Economic, Social and Cultural Rights 13/12/91. Para 7

are needed for the individual. In the Committee's view, adequate housing should include the availability of services and facilities that are important for health and security, sanitation and clean drinking water.⁴⁴ The housing should not also pose a danger to the right to health.

Article 16 of the Directive gives the possibility of reducing or withdrawing reception conditions. To this end, the Directive provides conditions, such as the applicant abandoning the place of residence determined by the competent authority without informing said authority or without permission from that authority. Likewise there are consequences if the asylum seeker does not comply with reporting duties or with requests to provide information or to appear for personal interviews concerning the asylum procedure during a reasonable period according to national law. Reception conditions may also be reduced or withdrawn if the applicant conceals financial resources and unduly benefits from material reception conditions. According to Para 3 of the same article, Member States may determine sanctions for serious breaches in the rules of the accommodation centers and for seriously violent behavior. Such decisions shall be taken individually, objectively and impartially and those affected shall be provided with reasons subsequently. But in no case shall the material reception conditions be withdrawn before a negative decision is made. In spite of the fact that this article includes some positive aspects while making a decision on the reduction or withdrawal of reception conditions (such as taking the particular situation of the person concerned and the proportionality principle into consideration), problems are detected by the Commission in this area as well. In particular, the possibility of reducing or withdrawing reception conditions in the Member States is determined in situations not established by the Directive.⁴⁵ Such practices have been identified in the Netherlands, Finland, Germany, and Austria. In addition, no minimum level of sanctions is determined by the Directive, which also causes significant problems.

According to Article 31 (1) of the Convention Relating to the Status of Refugees "Contracting States shall not impose penalties on account of their illegal entry or presence of refugee who coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence". Therefore any asylum seeker looking for international protection should be provided with the right to enter the country and the imposition of any kind of penalty, either financial charges or detention, should be prohibited.

The 2001 Commission Proposal on the minimum standards for the reception of asylum applications (Directive 2003/9/EC) restricted the detention of individuals seeking asylum on the basis of discussing their application.⁴⁶ The proposal has been amended, and the current Directive 2003/9/EC no longer includes the prohibition. The possibility of detention while an application for international protection is being lodged is provided by article 7(3) of the Directive. This article entitles the Member States to confine an applicant to a particular place in accordance with their national laws when it proves necessary, for example for legal reasons or for reasons of public order.

The confinement of the applicant to a given place has raised some questions about the applicability of the Directive to detainees. The Directive does not explicitly use the word "detention". Therefore, several member states argued that the Directive does not concern the detainees and that it does not apply to the detention issue as a whole, while other Member states have disputed this, coming to an opposite conclusion.⁴⁷

⁴⁴ Ibid, Para 8 (b)

⁴⁵ European Commission Communication on the Application of Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers, COM (2007), 745 Final, 26.11.2007, P 6

⁴⁶ European Commission Communication on Laying Down Minimum Standards for the Reception of Asylum Seekers, COM (2001), 181 Final, 3.4.2001

⁴⁷ http://www.detention-in-europe.org/index.php?option=com_content&task=view&id=101&Itemid=130; checked on 19.11.2011

The confinement of an asylum seeker by a Member State within a particular place, where the applicant is deprived of his/her freedom of movement in no doubt implies detention. According to the report of the Commission to the Council and to the European Parliament on the application of Directive 2003/9/EC there are serious problems in the applicability of the Directive in all premises where asylum seekers are allocated. Some Member States, including the United Kingdom, Belgium, Italy, the Netherlands, Poland, Luxembourg and Cyprus do not apply it in detention centers, while in other Member States it is not applicable in transit zones. As provided by the European Court of Human Rights in *Amuur vs. France* deprivation of liberty also involves detention in an international zone, which is a transit zone.⁴⁸ Therefore, the Directive is applicable in transit zones as well. The grounds of detention as well as its length vary from seven days to twelve months depending on the Member States in question.⁴⁹ In addition, the United Kingdom and Finland have established an undefined period of detention for persons seeking international protection.⁵⁰ As the length of detention is not established exactly, this means depriving asylum seekers of essential guarantees, such as access to the labor market.

According to article 5 ECHR, “everyone has the right of liberty and security of a person”. The article provides the right of deprivation of liberty only in cases where the lawful detention of a person is provided by the competent court order. Deprivation of liberty should be made in compliance with the ECHR and should not constitute an arbitrary abuse of rights. What constitutes “arbitrary” was established by the Human Rights Committee, which stated that unnecessary detention could be regarded as arbitrary treatment.⁵¹

One more important aspect of article 5 ECHR is compensation. This right is also provided by article 9 (5) of the Covenant on Civil and Political Rights. Article 5(5) ECHR establishes such a right and provides that everyone who has been the victim of unlawful detention shall have the right to compensation.

A wide margin of appreciation of the Member States to detain asylum seekers was determined by the ECtHR in the case of *Saadi vs UK*.⁵² The Court reiterated the restriction on arbitrary deprivation of liberty and reaffirmed that detention should be a genuine part of the process determining whether to grant the right of asylum to a given individual. According to the Court detention should not last further of possible justifications. The ECtHR in its case law took the same direction as the ECHR and stated that the detention should be necessary to be justified.⁵³ It is difficult to understand why detaining individuals seeking international protection for more than 3 months is necessary, as such an examination should be made on a case-by-case basis. On the other hand, the deprivation of liberty for lengthy periods as currently employed by the Member States is in clear violation of article 5 ECHR. Detaining asylum seekers for undetermined periods is obviously disproportional to the aim pursued and may result in the degrading treatment of an individual, as that individual endlessly awaits the decision on his/her legal status.⁵⁴

In addition, Directive 2003/9/EC does not state any legal guarantees against the detention of asylum seekers lodging an application. It must be deemed, that such procedures are provided by national legislation. As established by the ECtHR in the *Kurt v Turkey*, “any act of deprivation of

⁴⁸ *Amuur vs France*, European Court of Human Rights, *Application no. 19776/92*, 25 June 1996

⁴⁹ European Commission Communication on the Application of Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers, COM (2007), 745 Final, 26.11.2007, P 7

⁵⁰ *Ibid*

⁵¹ *A vs Australia*, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (1997)

⁵² *Saadi vs United Kingdom*, European Court of Human Rights, *Application No 13229/03*, 29 January 2008

⁵³ *Al-Nashif vs Bulgaria*, European Court of Human Rights, *Application No 50963/99*, 20 September 2002

⁵⁴ Such treatment is prohibited by the Convention Against Torture, article 3 of the European Convention on Human Rights and Fundamental Freedoms and article 7 of the International Covenant on Civil and Political Rights

liberty should be in compliance with the material and procedural laws enshrined in the national legislation of the state".⁵⁵ In that regard, it should be mentioned that the national legislation of many Member States are not harmonized and provide general common guarantees and not precise assurances from arbitrariness.

Therefore, the practice of Member States is not in compliance with the requirements of the ECHR. Furthermore, the Directive does not provide any provision on the authorities responsible for issuing the detention order. It only grants the Member States the right to detain asylum applicants when it proves necessary either for legal reasons or for questions of public order. The location of the detention centre is not covered by the Directive either. This determination is important in order to avoid the confinement of asylum seekers with prisoners, charged with criminal offences under the national jurisdiction of the Member State. From the perspective of human rights, this kind of confinement runs counter to the dignity of the individual asylum seeker.

For the effective enjoyment of rights under the ECHR and other international human rights documents, availability together with accessibility of effective remedies should be ensured. In case of the violations of rights set in the Convention, article 13 ECHR ensures access to an effective remedy before a national authority. In addition, article 6 ECHR determines that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. This right is also ensured by article 47 of the Charter of Fundamental Rights of the European Union. The right to appeal against (negative) decisions of administrative as well as judicial bodies plays a crucial role for an asylum seeker.

Unfortunately the practice of several Member States does not give the applicants the possibility of challenging certain decisions. While all Member States provide the possibility of appealing decisions on detention, this option is not provided for decisions regarding freedom of movement, withdrawing or reducing reception conditions or, indeed, for other decisions not relating to detention. In the case of withdrawing or reducing reception conditions decisions are sometimes not substantially justified.

Unfortunately, the Directive itself does not include the possibility of appeal against the decision on detention. The revision of the lawfulness of such decisions is the most vital constitutive part of the right to liberty and security. Article 5 (4) ECHR grants individuals who are deprived of their liberty the right to launch proceedings by which the lawfulness of their detention will be decided. The case law of the ECtHR determined judicial review to be an effective remedy.⁵⁶ Such a decision should be made promptly by the court and in the case of unlawful detention, the individual should be released. However, the Directive also lacks the specific provisions on the release of the order. In addition to the fact that the Directive fails to regulate detention in line with human rights, it also does not set minimum standards for the harmonization of national laws. The determination of the right to complaint is essential, as article 5 carries an imperative character. It protects persons from the deprivation of liberty and gives them guarantees for the rapid restoration of derogated rights. Furthermore, the Directive lacks regulation on compensation in cases of unlawful detention.

Despite the fact that the Directive provides certain guarantees for the vulnerable asylum seekers, their needs are, in many cases, not guaranteed by national legislation. The assurances provided by the Member States often vary, including access to special facilities. As an appalling factor, the inexcusable practice of detaining unaccompanied minors is still valid in many Member States. The vulnerable position of asylum seekers also requires other guarantees not provided by the Directive. This pattern takes away from the right to enjoy freedom of religion, guaranteed under article 9 of the ECHR. Individuals seeking international protection may need to practise their religion alone or with the others.

⁵⁵ *Kurt vs Turkey*, European Court of Human Rights, Application No 15/1997/799/1002, 28 May 1998

⁵⁶ *Chahal v United Kingdom*, European Court of Human Rights, Application no. 22414/93, 15 November 1999

Chapter 4 - Second Phase of the Asylum Legislation

4.1 Proposal for a Directive of the European Parliament and of the Council Laying Down Minimum Standards for the Reception of Asylum Seekers

According to the Stockholm Program the establishment of the Common European Asylum System by 2012 remains a key objective for the European Union. As the asylum policy framework, and in this case the Directive 2003/9/EC, failed to establish common minimum standards for the reception conditions of asylum seekers the Commission considered proposing a new initiative for setting common standards on asylum. To this end, the Commission discussed the potential design of a future asylum policy with all relevant stakeholders.⁵⁷ The divergent approaches of the Member States in the reception of asylum seekers, the low level of the applications submitted for international protection and the need to concentrate more on subsidiary protection resulted in the development of a more integrated approach to international protection across the EU.⁵⁸ On the basis of eighty-nine contributions, the Commission prepared future policy plan and proposed an amended version of the Directive 2009/9/EC.⁵⁹

The policy plan determines that the Common European Asylum System (CEAS) should ensure the accessibility of international protection for those in need in the European Union. At the same time, future asylum policy recommends facilitating protection in third countries and establishing common procedures for making decisions on the more efficient receipt of asylum seekers. Other positive features include the consideration of special and individual needs of vulnerable groups and the coherence of asylum strategy with other policies operating in the EU. Most importantly, the policy plan reflects the significance of practical cooperation between Member States, sharing responsibility with each other and providing solidarity mechanisms as enshrined in the Hague Program.⁶⁰

“For better and more harmonized standards of protection through further alignment of Member State’s asylum legislations” the Commission provided 2 proposals for amending the Directive 2003/9/EC. The first proposal was adopted at the same time as the recasting of the Dublin and Eurodac Regulations. The aim of the proposals was to address gaps and deficiencies discovered in Member States’ legislation and subsequent practices after transforming Directive 2003/9/EC into their national laws.

In order to avoid secondary movements, amended proposal of 2008 foresees a more humane approach toward the reception conditions of asylum seekers and states that the main objective of the proposal is to ensure higher standards of treatment among asylum seekers, standards that would guarantee a dignified level of living in line with international law. To this end, the document proposes amendments in almost every field established in the Directive. Specifically, the proposal recommends extending the scope of the directive and applying it to the applicants for subsidiary protection. The notion of subsidiary protection is not provided by the current Directive, as the EU *acquis* did not include the term during the adoption of its legal instrument. However, the current EU *acquis* contains this concept, meaning that the scope of individuals to whom the Directive shall apply should be extended. As mentioned above, in practice most of the Member States apply the Directive to subsidiary protection. In spite of the fact, that the practice of the Member States complies with recent developments, normative regulation is also essential. The importance of legal determination is based on differences in subsidiary protection and international protection, which, as a consequence will require objective and justified differences in treatment. In addition, amendments to the current

⁵⁷ European Commission Communication, Policy Plan on Asylum – an Integrated Approach to Protection Across the EU, COM (2008), 360 Final, 17.6.2008

⁵⁸ Ibid

⁵⁹ Note that, the Commission proposed a Directive laying down minimum standards for the reception of asylum seekers twice

⁶⁰ See above, P 8-9

Directive establish the applicability of the instrument to all types of asylum procedures and to all geographic areas. Hence, the proposal provides a more flexible approach and tries to be facilitative in hosting a number of asylum seekers.

As already mentioned in the previous chapter, ensuring access to the labor market is beneficial not only for an asylum seeker, but also for the host Member State. To this end, the proposal includes amendments to guarantee fair access to employment, ensuring the self-sufficiency of the asylum seeker as well as his/her better integration into the host society. Undoubtedly, easier access to the labor market means avoiding illegal work. In producing two-fold benefits, the proposal establishes access to employment in a maximum of six months after submitting an application for asylum. It is a welcoming factor, that the Directive provides a maximum time limit for access to the labor market. However, in order to guarantee the highest level of socio-economic protection, this period should be reduced. On the other hand, determining a maximum timeframe is a useful step toward developing a common standard for employment.

Positive amendments are also introduced in the area of material reception conditions. In order to provide a better standard of living, the proposal suggests restricting the impoverishment of asylum seekers and respecting fundamental rights in any case. To this end, the proposal limits the circumstances under which reception conditions can be fully withdrawn and ensures that asylum seekers will always benefit from access to the necessary treatment of illness and mental disorders. The most constructive aspect offered by the amended Directive is to limit the circumstances when Member States exceptionally set up modalities for material reception conditions different from those determined by the Directive in force. This amendment, together with setting more common standards in material reception conditions, will result in providing an adequate standard of living for asylum seekers. However, it is essential that the new Directive introduces clear norms which ensure adequate reception conditions in every phase of the application process.

Significant amendments are introduced to the rules regulating the detention of asylum seekers. In particular, the proposal tries to ensure that detention is not arbitrary and that fundamental rights are respected at every stage. It imposes a requirement to treat detained asylum seekers in a dignified manner and to offer special care to vulnerable applicants. It should be emphasized that the proposal forbids detention only on the basis of seeking international protection. It ensures that detention should be necessary and proportional and should be allowed only in exceptional cases. Individual assessment of each case is also ensured by the amended Directive. Most importantly, the proposal prohibits the detention of unaccompanied minors which is not the case with the Directive currently in force. The proposal was in line with not only European human--rights standards and the case law of the ECtHR, but also with the 1951 Geneva Convention Relating to the Status of the Refugees. As already mentioned above, protection from arbitrariness is the main component of detention. To avoid such arbitrariness, detention should be necessary and proportional to the aim pursued. The core requirement in protecting individuals in detention would be met in each case where this amendment was adopted. However, more precise requirements should be introduced by the Directive in order to avoid further differences in the practices of the Member States.

The amended Directive recognizes the importance of identifying and addressing the special needs of asylum seekers, something vital not only for access to appropriate treatment, but also for quality in any decision making. To this end, amendments to the Directive ensure that national measures are in place in order to immediately identify such needs. In addition, the proposal requires providing reception conditions in a manner to meet the needs of vulnerable asylum seekers.

4.2. Amended Proposal for a Directive of the European Parliament and of the Council Laying Down Standards for the Reception of Asylum Seekers

The amended proposal was discussed in the Council under the Czech and Swedish Presidencies, but no agreement was reached on the text. As a result the Commission amended its proposal, which in the

Commission's view will establish a fair and efficient system being advantageous both for the Member States and for asylum seekers.

The objective of the modified proposal is to clarify and provide more flexible reception standards in order to make the implementation of EU norms in national legislation easier. This is provided by proposing better defined legal norms, simplified standards and rules that are more adaptable and that do not require high financial and administrative efforts.

The new proposal mainly concentrates on the detention of asylum seekers and subsequent guarantees, access to the labor market and the level of health-care provided for vulnerable individuals. Importantly the new proposal ensures that relevant measures are in force in Member States to ensure compliance with the new standards.

Unfortunately, in contrast with the 2008 amendments, the modified proposal allows more instances of the withdrawal of material support. On the other hand, withdrawal can take place only when necessary guarantees are applied and the situation of vulnerable asylum seekers is always taken into strong consideration. Even if it is a constructive approach to identify and constantly foresee the needs of vulnerable individuals, extending the possibility of withdrawing material support can significantly harm an individual. One can argue that acknowledging the importance of self-sufficiency of asylum seekers and making access to the labor market easier will reduce the need for material support from the host state. However, it should also be considered that access to the labor market may take too long and reducing material support will in no case avoid marginalization from the host society.

The new proposal concentrates more on ensuring a dignified standard of living in detention as well as in other facilities. As provided by the proposal, identifying special reception needs has implications not only in terms of relevant treatment but also in terms of the quality of considering requests and making appropriate decisions. Particularly, the new proposal tries to regulate the approach toward identifying the special needs of vulnerable applicants and continues the monitoring of individual cases systematically. In spite of the positive elements that the new proposal tries to establish, it does not ensure equal treatment in access to health care as guaranteed to the nationals of the Member States due to the position of the European Parliament and the Council.

The amended proposal recognizes the need to establish strict and exhaustive EU rules on detention, in order to guarantee that it is not arbitrary and that human rights and fundamental freedoms are always respected. The new proposal reiterates the requirements of the previous one and states that detention can be used only in exceptional cases and to that end the principles of proportionality and necessity should be satisfied. In *A. vs Australia* the Human Rights Committee has stressed that when detention is not necessary, then it meets the threshold of arbitrariness.⁶¹ The prohibition of arbitrary detention was also reiterated by the ECtHR in *Saadi vs United Kingdom*, where the Court stated that confinement should be conducted in good faith.⁶² Therefore, the prohibition of arbitrary confinement is a positive step toward ensuring the compliance of new legal norms with human rights standards and for setting common standards in the EU. As a very constructive development, the new proposal attaches the importance of access to effective remedy and free legal advice. It aims to introduce a more country specific approach and more adaptable conditions of detention. This is especially beneficial for those countries which, due to their geographic location, are facing greater difficulties in considering applications for asylum. In contrast with the Directive currently in force and the first proposal to amend the Directive 2003/9/EC, the new proposal requires that reception conditions in detention comply with the human rights standards and ensures that the dignity of each individual is fully respected. Even if this determination is a positive element, the Directive should provide more precise norms in order to avoid further divergences in national legislation. In addition, it should specifically determine that confinement with prisoners or in prison cells should be avoided and that the division of

⁶¹ *A vs Australia*, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (1997)

⁶² *Saadi vs United Kingdom*, European Court of Human Rights, Application No 13229/03, 29 January 2008

female and male detainees should be guaranteed save for family reasons. In the case of special family needs the adequate privacy and consent of individuals should be guaranteed. In addition, the new Directive should also ensure the monitoring of the detention centers by different international and national organizations and NGOs.

The amended proposal foresees the possibility of detention of unaccompanied minors in order to avoid abductions. According to the amended proposal this form of detention should be provided only if it is in the best interest of the child and only if alternative measures have proved to be insufficient. To comply with the ECHR and the case law of the ECtHR the amended proposal ensures that detention can only be utilized if necessary reception conditions are offered for the unaccompanied minors and that it will not impair the health and well-being of such minors. This amendment will significantly improve the position of unaccompanied minors. However, the new Directive should determine that these minors can only be placed in special centers. It should also provide more specific guarantees of access to education, healthcare and other facilities essential for the development of the minors in such centers. In addition, leisure, adequate to the age of minors and particularities of ethnicity, age and religion should also be guaranteed. Otherwise, the norm will not only run counter to the human rights requirements, but will also pose problems in setting common standards for receiving minor asylum seekers in the territory of the Member State.

As the analysis of the current Directive and its amendments demonstrate, new norms provided by the proposals are essential in the development of CEAS. This is crucial not only for harmonizing national legislation but also for setting common MS practice. Yet, newly established norms are, in a number of cases, still vague. In addition, in several instances discussed above, they do not provide sufficient guarantees for the effective protection of the rights of asylum seekers and they still grant Member States wide margin of appreciation. Therefore, it is essential that new amendments are carefully examined, in order to adopt legal instruments which will ensure achieving the aims pursued by Tampere, the Hague and Stockholm programs.

5. Conclusion

The vulnerable position of asylum seekers on foreign soil requires careful consideration in terms of their application for international protection. On the one hand, establishing a Common European Asylum System is essential in laying down common standards on procedures, status and for guarantees of asylum seekers in the Member States. However, such regulation should not provide discretion to MSs to derogate from obligations to respect and to protect human dignity and rights enshrined in different international and regional human rights documents.

The European Union has taken significant steps to develop the Common European Asylum System. The outcomes of the meetings in Tampere, the Hague and Stockholm were directed to harmonize the national legislation of the Member States and to realize implemented legal norms in practice there. Further developments included the advancement of human rights in different policies of the European Union and undertaking more human rights obligations for the Union itself. The notion of asylum cannot operate separately from human rights considerations, as subsequent guarantees are essential for persons seeking international protection. Unfortunately, the wide discretion granted to the Member States by Directive 2003/9/EC has become the basis of the failure to establish common minimum standards of regulating asylum reception. In addition, it fell short in establishing essential guarantees for asylum seekers found in the 1951 UN Convention on the Status of the Refugees, European Convention on Human Rights and other international human rights documents.

In order to improve the quality of the existing legal framework on the reception of asylum seekers, the Commission has adopted a subsequent policy plan establishing an integrated approach to protection across the EU. In addition it has proposed significant amendments to the Directive currently in force. The first proposal of the Commission largely addresses the modification of norms with a better defined human rights approach, and the second proposal concentrates on establishing more

clarified and flexible reception conditions. Amendments to Directive 2003/9/EC will significantly contribute to developing Common European Asylum System and to enhancing human rights in such a system. However, these amendments still need further elaborations in order to achieve the objective of establishing a Common European Asylum System in the EU. On the one hand, proposals provide asylum seekers with important guarantees not enshrined in the current Directive. Yet, the vague nature of the guarantees still grant Member States wide margin of appreciation in interpreting provisions and setting consequent practices in their national jurisdictions.

And indeed, there is still the urgent need for efforts to establish a Common European Asylum System, which would meet the EU's commitment to fairness, human rights and dignity. Until then, the Common European Asylum System will remain a myth: an ambitious objective which fails to ensure equal access to international protection across the European Union.

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