



The protection of vulnerable individuals in the context of EU policies on border checks, asylum and immigration

**Maija Mustaniemi-Laakso, Mikaela Heikkilä, Eleonora Del Gaudio,
Sotiris Konstantis, Maria Nagore Casas, Dolores Morondo,
Venkatachala G. Hegde, Graham Finlay**



31 May 2016



Large-Scale FP7 Collaborative Project

GA No. 320000

1 May 2013-30 April 2017

The protection of vulnerable individuals in the context of EU policies on border checks, asylum and immigration

Work Package No. 11 – Deliverable No. 3

Due date	31 May 2016
Submission date	31 May 2016
Dissemination level	PU
Lead Beneficiary	Åbo Akademi University
Authors	Maija Mustaniemi-Laakso, Mikaela Heikkilä, Eleonora Del Gaudio, and Sotiris Konstantis (Åbo Akademi University) Maria Nagore Casas and Dolores Morondo (University of Deusto) Venkatachala G. Hegde (Indian Society of International Law) Graham Finlay (University College Dublin)

<http://www.fp7-frame.eu>

Acknowledgements

The research leading to these results has received funding from the European Commission's Seventh Framework Programme (FP7/2007-2013) under the Grant Agreement FRAME (project n° 320000).

The authors are grateful to the anonymous internal peer reviewers for the valuable and insightful comments on the draft version of the report. The authors also acknowledge the helpful editing support of Raija Hanski (Institute for Human Rights, Åbo Akademi University). The authors further wish to thank Stephen Phillips (Institute for Human Rights, Åbo Akademi University) for the English language editing of the manuscript. All errors obviously remain the authors' own.

Executive summary

The present report discusses the protection of particularly vulnerable individuals in the context of EU policies on border checks, asylum and immigration. With a view to evaluate human rights integration in the external and internal EU policies in the field, the report studies how the protection of vulnerable individuals is ensured in, for example, border control procedures, asylum qualification, reception conditions and immigrant integration. Based on a critical analysis of relevant literature and reports by non-governmental and international organisations, the report formulates policy recommendations to further enhance the protection of vulnerable groups and individuals in the area of EU border checks, asylum and immigration policies.

The report builds upon earlier research conducted within the FRAME project, in particular the report ‘Fundamental Rights in the Institutions and Instruments of the Area of Freedom, Security and Justice’ (2014) and the report ‘Critically Assessing Human Rights Integration in AFSJ Policies’ (2016). In these reports, concern was expressed over the fact that security considerations increasingly trump protection concerns in the EU’s policies on border checks, asylum and immigration. Attention was also drawn to the lack of coherence in the integration of human rights in the EU’s policy responses in this field. The present report deepens the analysis by focusing on particularly vulnerable individuals.

In the introductory chapter it is noted that vulnerability in today’s human rights rhetoric is typically portrayed in collective terms: *vulnerable groups* are to be provided with special protection, as their human rights are at a particular risk of being violated. While such a group-based approach to vulnerabilities is often essential it may sometimes, however, be counterproductive. It has been noted that labelling all individuals deemed to belong to a specific group as vulnerable may be (further) disempowering. An overly strong reliance on the group-based notion of vulnerability may also overshadow other sources of vulnerability. The report therefore emphasises the fact that vulnerability is not a static state of affairs attached only to particular groups, but fluctuates with situations and contexts. By looking at the concept in this dynamic and contextual way, and as socially embedded, the report analyses vulnerability as relational to the institutional and societal contexts where it is produced. This approach also entails that the eradication of societal practices and structures that maintain disadvantages or indirect discrimination is seen as especially important.

The report consists of five case studies addressing different stages and dimensions of the asylum and migration processes within the EU, as well as of a case study discussing vulnerability caused by statelessness in South Asia (India). More specifically:

- in Chapter II, vulnerability is assessed in the context of border management, in particular the passive and active interception measures of which the EU and its Member States make use to prevent irregularly arriving migrants from reaching the territory of the Union. The main argument of the chapter is that these measures constitute in and of themselves another source of vulnerability for asylum-seekers.

- in Chapter III, asylum detention in Italy is considered. The case study pinpoints that deprivation of liberty is a serious interference with an individual's fundamental rights, and can as such sustain and generate vulnerability. The chapter discusses how the migration control measures in Italy create vulnerability *per se*. It further stresses the need to pay particular attention to the special needs of vulnerable asylum-seekers in the context of detention.
- Chapter IV focuses on the situation of unaccompanied minors in Greece, a frontline country in the migration crisis which at the same time is facing severe financial difficulties. A central question in the chapter is the degree to which the best interests of the child principle is observed in relation to these minors. An important point made in the chapter is that the unaccompanied minors' initial vulnerability is often aggravated by the difficult reception conditions they encounter in the country.
- In Chapter V, the focus is on gender violence and gender-based persecution against women as grounds for asylum claims. The starting-point of the chapter is that international conventions and national asylum policies have historically tended to overlook the specific position of female asylum-seekers and the gendered nature of refugee situations. The chapter identifies the legal developments that have taken place and highlights persisting deficits. The incoherence in the way different EU States handle gender-related asylum claims is noted with concern. It is argued that more attention should be given to the ways in which asylum systems contribute to the vulnerabilisation of women.
- Chapter VI addresses the human rights situation of low-paid third-country migrant workers in Ireland, and especially their integration. In the chapter it is argued that the low-paid migrant workers are particularly likely to have their economic and social rights violated, unprotected or unfulfilled, and to experience discrimination or to suffer from poverty, marginalisation or social exclusion. It is argued that this vulnerability is often the result of Ireland's unequal and discriminatory provision of access to social supports, education and training and remedies for unfair working conditions. As such, this chapter also emphasises the fact that vulnerability is often socially embedded.
- in Chapter VII, the statelessness phenomenon in South Asia is addressed. The chapter notes that due regard should be paid to the root causes of statelessness and the vulnerability that is subsequently created. To overcome structural sources of vulnerability, cultural and societal power structures nationally and regionally need to be addressed and regional cooperation should be enhanced. In relation to the EU approach to statelessness in South Asia, it is suggested that the issue of statelessness as a source to vulnerability could be more clearly taken up as a part of the human rights dialogue process with the states in the area. Measures could also be taken for increased normative guidance in relation to human rights and for facilitation of regional dialogues within South Asia on the issue of statelessness.

In the concluding chapter a number of critical challenges in recognising and addressing vulnerability within migration and asylum policies of the EU are identified. It is stressed that in order to address vulnerability it is necessary to better understand and acknowledge the varying sources of vulnerability. As asylum-seekers and irregular migrants are prone to be contextually vulnerable, it is argued that the adoption of societal measures and structures that mitigate vulnerability and build resilience is key. A more coherent approach to vulnerability is needed, and vulnerability as a factor that specifies state obligations should be fully recognised. Assessing and monitoring vulnerability and vulnerability responsiveness is also very important. The report concludes with an urgent call for enhanced cooperation and solidarity to alleviate the plight of vulnerable individuals.

This report is updated to 15 May 2016.

Table of Contents

Acknowledgements.....	ii
Executive summary.....	iii
Table of figures	xii
List of abbreviations.....	xiii
I. Introduction (<i>Author: Majja Mustaniemi-Laakso</i>).....	1
A. Research context, objectives and methodology.....	1
B. The concept of vulnerability	2
C. Vulnerability of asylum-seekers and irregular migrants.....	9
D. Vulnerability in EU policies on asylum and irregular migration.....	11
1. On the concept of vulnerability as applied within the EU	11
2. The EU approach to vulnerable asylum-seekers and irregular migrants.....	14
E. Interpreting human and fundamental rights through the ‘vulnerability lens’: The ECtHR and CJEU approach	24
1. Recognition of vulnerability highlights negative consequences.....	25
2. Recognition of vulnerability specifies obligations incumbent on states	26
F. Structure of the report.....	28
II. The instruments of pre-border control in the EU: A new source of vulnerability for asylum-seekers? (<i>Author: Maria Nagore Casas</i>)	30
A. Introduction	30
B. The main EU and Member States’ instruments of pre-border control	34
1. Background	34
2. Passive and active interception	38
C. Compatibility of the EU’s and Member States’ instruments of pre-border control with the international protection of refugees and the principle of non-refoulement	48
1. Extraterritorial applicability of <i>non-refoulement</i> principle.....	49
2. Responses to the gaps in the protection of refugees.....	52
3. Extraterritorial application of the Schengen Border Crossing Regime	56
D. Conclusions and recommendations.....	56
III. Vulnerability and detention: A study on asylum detention in Italy (<i>Author: Eleonora Del Gaudio</i>)	60

A.	Introduction and overview.....	60
1.	Background	60
2.	Objectives and focus of the study.....	66
3.	Structure and approach	66
B.	The EU and asylum detention of vulnerable persons.....	67
1.	Asylum detention of vulnerable persons: legal guarantees	67
2.	Asylum detention of vulnerable persons and human rights law/fundamental rights	74
C.	Asylum detention in Italy	78
1.	Introduction and background	78
2.	Asylum detention in Italy: The legal and institutional framework	80
3.	Asylum detention of vulnerable persons: The human rights challenges.....	83
D.	Conclusions and recommendations.....	96
IV.	Unaccompanied minors in Greece: are children’s best interests being served? (Author: <i>Sotiris Konstantis</i>)	101
A.	Introduction	101
B.	Protecting unaccompanied children as a vulnerable group	103
1.	Definition of a UAM	103
2.	UAMs and vulnerability.....	104
3.	Special protection for UAMs.....	105
4.	Best interests of the child principle	107
C.	Reception conditions for UAMs in Greece.....	114
1.	The Greek version of the best interest of the child principle for UAMs: Between lack of infrastructure and lack of policies.....	114
2.	The dysfunctional system of guardianship	117
3.	Accommodation: An ‘invitation’ to abscond?.....	122
4.	UAMs and the European solidarity challenge.....	130
D.	Concluding remarks and recommendations.....	131
1.	Judicial mechanisms need to be supplemented by political accountability structures	133
2.	Need to design a central authority for guardianship.....	137
3.	Quantitative and qualitative improvement of reception facilities	138
V.	Gender violence and gender-based persecution against women as grounds for asylum claims (Author: <i>Dolores Morondo</i>).....	140

A.	Gender and asylum	140
1.	Introducing gender perspectives in asylum law and policy	140
2.	Sexual and gender-based violence and gender persecution	144
3.	Specific challenges regarding gender-based persecution in asylum claims	146
B.	The normative framework	148
1.	General public international law.....	149
2.	The Council of Europe and the Istanbul Convention	152
3.	The EU	154
C.	Assessments regarding coherence and vulnerability	158
1.	Coherence issues	159
2.	Vulnerability.....	160
VI.	Economic and social rights and integration: The case of low-paid third-country migrant workers in Ireland (<i>Author: Graham Finlay</i>)	163
A.	Introduction	163
1.	Low-paid third-country migrant workers in Ireland	163
2.	Low-paid workers in Ireland as members of vulnerable groups	164
B.	Integration	168
1.	Generally on integration	168
2.	Ireland's integration policy and its absence	175
C.	Access to social and economic rights and the three categories of low-paid migrant workers	177
1.	Legally resident low-paid workers	177
2.	Refugees and persons with international protection status	181
3.	Irregular migrants	183
D.	A human rights-based policy for low paid non-EEA migrant workers in Ireland.....	184
E.	Recommendations	186
1.	Legally resident low-paid workers	186
2.	Refugees and persons with international protection status	187
3.	Irregular migrants	187
F.	Final conclusion.....	188
VII.	Unrecognised vulnerability? Migration and statelessness in South Asia, with a special focus on the Indian treatment of intra-Asian refugee flows (<i>Author: Venkatachala G. Hegde</i>)	189
A.	Introduction	189

1.	Existence of stateless persons within South Asia	189
2.	Main reasons for their existence	189
3.	Aim of this case study	191
B.	Stateless persons as a vulnerable group.....	192
C.	India and the legal treatment of statelessness.....	193
1.	India's North-East Provinces	193
2.	Amendments to Indian citizenship laws and the impact on vulnerable groups.....	194
3.	India-Pakistan borders	195
4.	Sri Lankan Tamils.....	196
5.	Chakmas.....	197
D.	The impact of nationality laws on the creation of statelessness in South Asia.....	200
E.	The non-applicability of the international treaty framework in South Asia	205
F.	EU responses and challenges to deal with statelessness issues within South Asia	206
G.	Conclusions	209
VIII.	Concluding remarks: From proclaiming acknowledgement of vulnerability to de facto vulnerability-sensitive practices? (Authors: Mikaela Heikkilä and Maija Mustaniemi-Laakso)	211
A.	Understanding and addressing sources of vulnerability.....	211
1.	Understanding vulnerability as a dynamic and multi-dimensional human quality	211
2.	Identifying institutional and structural sources of vulnerability for migrants and asylum-seekers	212
3.	Creating and maintaining societal structures that mitigate vulnerability and build resilience	213
B.	The adoption of a more coherent approach to vulnerability	214
1.	Lack of congruence between human rights undertakings and praxis	214
2.	Policy incoherence: Securitisation should not trump individual assessment of protection needs	216
3.	Coherence between the actions of the different EU Member States	217
C.	Adopting a 'vulnerability lens' to state obligations	218
1.	Recognising vulnerability as a factor that specifies state obligations	218
2.	Assessing and monitoring vulnerability and vulnerability responsiveness	219
3.	Awareness raising and training for vulnerability responsiveness.....	220
D.	The need to take responsibility for addressing vulnerability.....	221
1.	Beyond borders does not mean beyond obligations.....	221

2.	Responsibility for addressing vulnerability cannot be outsourced to private actors	222
E.	An urgent call for enhanced cooperation and solidarity to alleviate the plight of vulnerable individuals	223
1.	Political will to change course from a policy of non-entrée and exclusion towards a policy of access and inclusion	223
2.	Addressing vulnerability in a union based on solidarity	224
	Bibliography	227
A.	Legal and policy instruments	227
1.	Treaties	227
2.	Regulations.....	229
3.	Directives	230
4.	Decisions	231
5.	European Council documents	232
6.	Council documents.....	232
7.	Commission documents (COM and SEC documents)	233
8.	European Parliament documents	235
9.	Other instruments adopted by EU institutions or bodies.....	236
10.	Decisions, recommendations and resolutions adopted by other international organisations 236	
B.	Case-law	239
1.	CJEU case law	239
2.	ECtHR case law	240
3.	Other case law	241
C.	Literature	242
1.	Books.....	242
2.	Book chapters	244
3.	Journal and yearbook articles	247
4.	Handbooks, reports and opinions.....	250
D.	Other sources.....	265
1.	Internet pages	265
2.	Press releases, speeches and statements.....	269
3.	Blog entries	271

4. Newspaper articles 272

5. Other 274

Table of figures

Figure 1: Trend of Arrivals in Italy 2000 – 2015	61
Figure 2: Arrivals at sea along the Eastern (Greece) and Central (Italy) Mediterranean routes, 5 January-19 April 2016	61

List of abbreviations

AALCO	Asian-African Legal Consultative Organization
AAPSU	All Arunachal Pradesh Students Union
AASP	All Assam Sangram Parishad
AASU	All Assam Students Union
AFSJ	Area of Freedom, Security and Justice
AIDA	Asylum Information Database
AIR	All India Reporter
AMIF	Asylum, Migration and Integration Fund
APD	Asylum Procedure Directive
ASEAN	Association of South East Asian Nations
BIA	Best interests assessment
BID	Best interests determination
BIP	Best interests principle
CAMM	Common Agenda on Migration and Mobility
CARA	Centri di Accoglienza per Richiedenti Asilo (Centre for Accommodation of Asylum Seekers)
CAS	Centri di Accoglienza Straordinaria (Emergency Reception Centre)
CCRC	Committee for Citizenship Rights of the Chakmas
CCRCAP	Committee for Citizenship Rights of the Chakmas of Arunachal Pradesh
CDA	Centri di Accoglienza (Accommodation Centre)
CDEG	Steering Committee for Equality between Women and Men
CEAR	Comisión de Ayuda al Refugiado (Spanish Commission for Refugee Assistance)
CEAS	Common European Asylum System
CEDAW	UN Convention on the Elimination of All Forms of Discrimination against Women
CEPS	Centre for European Policy Studies

CETS	Council of Europe Treaty Series
CFSP	Common Foreign and Security Policy
CIE	Centri di Identificazione ed Espulsione (Identification and Removal Centre)
CIR	Consiglio Italiano per Rifugiati (Italian Council for Refugees)
CISA	Convention Implementing the Schengen Agreement
CJEU	Court of Justice of the European Union
CMLR	Common Market Law Review
CoE	Council of Europe
COMPAS	Centre on Migration, Policy and Society
CPSA	Centri di Primo Soccorso e Accoglienza (First Aid and Reception Centre)
CRC	UN Convention on the Rights of the Child
CRPD	UN Convention on the Rights of Persons with Disabilities
DC	District Collector
DEVAS	Detention of Vulnerable Asylum-seekers in the EU
EASO	European Asylum Support Office
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe)
ECR	European Court Reports
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EEA	European Economic Area
EEAS	European External Action Service
EKKA	National Center for Social Solidarity
EMN	European Migration Network
ENOC	European Network of Ombudspersons for Children
EPIC	Employment for People in Immigrant Communities

EPIM	European Programme for Integration and Migration
EU	European Union
Eurodac	European Dactyloscopy
Eurojust	European Union’s Judicial Cooperation Unit
Europol	European Police Office
Eurostat	Statistical Office of the European Union
Eurosur	European Border Surveillance System
EVASP	Enhancing Vulnerable Asylum Seekers Protection
EWL	European Women’s Lobby
ExCom	Executive Committee
FGM	Female genital mutilation
FRA	European Union Agency for Fundamental Rights
FRC	First Reception Center
Frontex	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
FRS	First Reception Service
FTDA	France terre d’asile
GAMM	Global Approach to Migration and Mobility
GC	Grand Chamber (European Court of Human Rights)
GCR	Greek Council for Refugees
GDP	Gross Domestic Product
GNIB	Garda National Immigration Bureau
GRETA	Group of Experts on Action against Trafficking in Human Beings (Council of Europe)
HRBAD	Human rights-based approach to development
HRW	Human Rights Watch
IASC	Inter-Agency Standing Committee

IC	Identity Certificate
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on the Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
IDP	Internally displaced person
ILO	International Labour Organization
ILOs	Immigration Liaison Officers
IMDT	Illegal Migrants (Determination by Tribunal)
IOM	International Organization for Migration
IRCT	International Rehabilitation Council for Torture Victims
JRS	Jesuit Refugee Service
LGTBI	Lesbian, gay, transgender, bisexual and intersex persons
MIPEX	Migrant Integration Policy Index
MPEPIL	Max Planck Encyclopedia of Public International Law
MRCI	Migrant Rights Centre Ireland
MSF	Medecins sans Frontiers
NERA	National Employment Rights Authority
NGO	Non-governmental organisation
NHRC	National Human Rights Commission
NPAR	National Plan of Action against Racism
OAU	Organization of African Unity
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
OJ	Official Journal of the European Union
PD	Presidential Decree

PIO	Person of Indian Origin
RCD	Reception Conditions Directive
RSQ	Refugee Survey Quarterly
SAARC	South Asian Association for Regional Cooperation
SAHRDC	South Asia Human Rights Documentation Centre
SBC	Schengen Borders Code
SC	Supreme Court
SCC	Supreme Court Cases
SPRAR	Sistema di Protezione per Richiedenti Asilo e Rifugiati (Protection System for Asylum Seekers and Refugees)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
THB	Trafficking in human beings
TUC	Trades Union Congress
UAM	Unaccompanied minor
UDHR	Universal Declaration of Human Rights
UKHL	United Kingdom House of Lords
UN	United Nations
UNDG	United Nations Development Group
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNTS	United Nations Treaty Series

I. Introduction (Author: Maija Mustaniemi-Laakso)

A. Research context, objectives and methodology

Recent years have been marked by a sharp increase in the number of asylum-seekers arriving in the European Union (EU) Member States, with over 1,015,000 persons crossing the Mediterranean to arrive irregularly in Europe in 2015.¹ Over 160,000 refugees reached Europe in perilous conditions by sea during the first months of 2016 alone.² The majority of the migrants arriving at the European borders are in need of international protection.³

The present report discusses the protection of these particularly vulnerable individuals, with specific attention paid to (unaccompanied) children, stateless persons, women, and unskilled workers in the context of EU policies on border checks, asylum and immigration. With a view to assessing the coherence of human rights integration in the external and internal EU policies in this field, the report studies how the protection of vulnerable individuals is ensured in, for example, border control procedures, asylum qualification, reception conditions and immigrant integration. The report consists of six case studies addressing different stages and dimensions of the asylum and migration processes. Based on a critical analysis of relevant literature and reports by non-governmental organisations (NGOs) and international organisations, the study formulates policy recommendations to further enhance the protection of vulnerable groups and individuals in the area of EU border checks, asylum and immigration policies.

The report builds upon earlier research conducted within the FRAME project, in particular the report 'Fundamental Rights in the Institutions and Instruments of the Area of Freedom, Security and Justice' (2014) and the report 'Critically Assessing Human Rights Integration in AFSJ policies' (2016).⁴ In these reports, concern was expressed over the strong securitisation approach by the EU to the currently unfolding arrival of migrants and asylum-seekers in the EU, often leading to the failure to see the individual in the midst of the refugee situation. Attention was also drawn to the lack of congruence in the integration of human rights in the EU's policy responses to issues related to migration and asylum. Drawing on the

¹ United Nations High Commissioner for Refugees (UNHCR), 'Refugees/Migrants Emergency Response Mediterranean' <<http://data.unhcr.org/mediterranean/regional.php>> accessed 30 March 2016.

² International Organization for Migration (IOM), 'Mediterranean Migrant Arrivals in 2016: 164,752; Deaths: 531' (Missing Migrants Project, 29 March 2016) <<http://missingmigrants.iom.int/mediterranean-migrant-arrivals-2016-164752-deaths-531>> accessed 30 March 2016.

³ UNHCR, 'Refugees/Migrants Emergency Response Mediterranean' <<http://data.unhcr.org/mediterranean/regional.php>> accessed 30 March 2016.

⁴ See further Viljam Engström and Mikaela Heikkilä, *Fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice* [2014] <<http://www.fp7-frame.eu/wp-content/materiale/reports/09-Deliverable-11.1.pdf>> accessed 8 May 2015; and Mikaela Heikkilä, Maija Mustaniemi-Laakso, Suzanne Egan, Graham Finlay, Tamara Lewis, Julia Planitzer, Helmut Sax, Lisa Maria Heschl and Stefan Salomon, *Report critically assessing human rights integration in AFSJ policies* [2015] <<http://www.fp7-frame.eu/wp-content/materiale/reports/22-Deliverable-11.2.pdf>> accessed 10 May 2016.

findings of the two earlier reports, the present report deepens the analysis of the said concerns, especially with regard to particularly vulnerable individuals.

The subsequent parts of the introduction give the background and lay down the theoretical and conceptual frameworks for the case studies in this report. The introduction scrutinises the concept of vulnerability, the legal framework related to vulnerability, the general approach to vulnerability in EU asylum and migration policies, as well as the interpretation of the law with a vulnerability focus in the said policy field.

B. The concept of vulnerability

While everyone is equally entitled to human rights, international human rights law provides for specific protection and special measures in order for some groups of individuals to be able to enjoy their human rights on an equal footing. Such groups are deemed to be in need of enhanced protection due to their *particular* vulnerability or due to structural inequality.⁵ Such special protective regimes or instruments have been adopted, for example, in relation to women (e.g., the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW), children (e.g., the Convention on the Rights of the Child, CRC), and individuals with disabilities (e.g., the Convention on the Rights of Persons with Disabilities, CRPD).⁶

⁵ For background, see, Alexandra Timmer (with the collaboration of Jenny Goldschmidt, Antoine Buyse and Anja Mihr), *Concepts of human rights, democracy, and the rule of law: a literature review* [2013] <<http://www.fp7-frame.eu/wp-content/materiale/reports/01-Deliverable-3.1.pdf>> accessed 8 February 2016, 10-11. For universality and particularity in human rights, see, Alexandra Timmer, Balázs Majtényi, Katharina Häusler and Orsolya Salát, *The EU's conceptualisation and operationalisation of the concepts of human rights, democracy and rule of law* [2014] <<http://www.fp7-frame.eu/wp-content/materiale/reports/10-Deliverable-3.2.pdf>> accessed 8 February 2016, 9. The report notes that the particular protection of vulnerable groups does not undermine the primacy of universality of human rights, on the contrary: '*Vulnerable groups are the litmus test for human rights, democracy and rule of law: focusing on vulnerable groups uncovers whether the commitment to these ideals only extends to the people in power, or whether they truly include everyone.*' See, also, Joana Abrisketa, Cristina Churruca, Cristina de la Cruz, Laura García, Carmen Márquez, Dolores Morondo, María Nagore, Lorena Sosa and Alexandra Timmer, *Report on the assessment of consistency in the prioritisation of human rights throughout EU policies* [2015] <<http://www.fp7-frame.eu/wp-content/uploads/2015/08/FRAME-Deliverable-12.2-Submitted-30-July-2015.pdf>> accessed 8 February 2016, 19, which cautions against 'too easily' assuming the universality of human rights to protect vulnerable people. Stating that 'the relationship between vulnerability and human rights is complex and contested' in that human rights are inherently built to protect the invulnerable human rights subject, the report concedes that people 'who do not fit this archetype have often found great difficulty in obtaining protection through [sic] human rights law'. At the same time, the authors note, the logic of human rights constitutes an important emancipatory tool for vulnerable people.

⁶ While these instruments do not directly refer to the groups they are designed to protect and empower as vulnerable, their inherent rationale is to counteract and mitigate vulnerability through special safeguards and measures to enable such groups to enjoy all their human rights to the full.

The notion of vulnerability is expressly used, for example, by the United Nations (UN) and, as will be discussed below, to a certain degree by the EU.⁷ The European Court of Human Rights (ECtHR) is also increasingly referring to vulnerability and vulnerable groups in its case law.⁸ Some have therefore even spoken of a ‘progressive “vulnerabilisation” of European law’.⁹ The devotion of specific attention to the so-called vulnerable groups is also a central element of the human rights-based approach to development (HRBAD), which since the early 2000s has been adopted and/or advocated by several states and international organisations, including the EU.¹⁰

Although the term ‘vulnerability’ is frequently used in legal and political rhetoric,¹¹ as a legal concept it remains ambiguous and even contested.¹² In the human rights setting the concept generally refers to

⁷ See, e.g., United Nations Development Programme (UNDP), *Human Development Report 2014: Sustaining Human Progress: Reducing Vulnerabilities and Building Resilience* (UNDP 2014); UNHCR, *Caring for the Vulnerable* <<http://www.unhcr-centraleurope.org/en/what-we-do/caring-for-the-vulnerable.html>> accessed 12 May 2016; and Audrey R. Chapman and Benjamin Carbonetti, ‘Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights’ (2011) 33(3) *Human Rights Quarterly* 682.

⁸ On this legal development, see further Lourdes Peroni and Alexandra Timmer, ‘Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law’ (2013) 11(4) *International Journal of Constitutional Law* 1056.

⁹ Francesca Ippolito and Sara Iglesias Sánchez, ‘Introduction’ in Francesca Ippolito and Sara Iglesias Sánchez (eds), *Protecting Vulnerable Groups: The European Human Rights Framework* (Hart 2015) 5.

¹⁰ Council of the European Union, ‘Council Conclusions on a rights-based approach to development cooperation, encompassing all human rights’ [19 April 2014]; and Commission, Staff working document, *Tool-Box for a Rights-Based Approach, Encompassing all Human Rights for EU Development Cooperation* (30 April 2014). For a discussion, see, David D’Hollander, Axel Marx and Jan Wouters, ‘Integrating Human Rights in EU Development Cooperation Policy: Achievements and Challenges’, *FRAME Working Paper No. 134* (April 2014) <<http://www.fp7-frame.eu/wp-content/materiale/w-papers/WP134-DHollander-Marx-Woutersx.pdf>> accessed 30 March 2016. For a definition of the HRBAD, see, e.g., United Nations Development Group (UNDG), ‘Statement on a Common Understanding of a Human Rights-Based Approach to Development Cooperation’, *UN Interagency Workshop on a Human Rights-Based Approach in the Context of UN Reform*, Stamford, 2003.

¹¹ See, e.g., Joana Abrisketa, Cristina Churruca, Cristina de la Cruz, Laura García, Carmen Márquez, Dolores Morondo, María Nagore, Lorena Sosa and Alexandra Timmer, *Report on the assessment of consistency in the prioritisation of human rights throughout EU policies* [2015] <<http://www.fp7-frame.eu/wp-content/uploads/2015/08/FRAME-Deliverable-12.2-Submitted-30-July-2015.pdf>> accessed 8 February 2016, 16; and Cristina Churruca Muguruza, Felipe Gómez Isa, Daniel García San José, Pablo Antonio Fernández Sánchez, Carmen Márquez Carrasco, Ester Muñoz Nogal, María Nagore Casas and Alexandra Timmer, *Report mapping legal and policy instruments of the EU for human rights and democracy support* [2014] <<http://www.fp7-frame.eu/wp-content/materiale/reports/05-Deliverable-12.1.pdf>> accessed 8 February 2016, 129–166.

¹² Lourdes Peroni and Alexandra Timmer, ‘Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law’ (2013) 11(4) *International Journal of Constitutional Law* 1056, 1058 and 1061. On the conceptualisation of vulnerability and the usage of the term, see, e.g., Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013). See also Cristina Churruca Muguruza, Felipe Gómez Isa, Daniel García San José, Pablo Antonio Fernández Sánchez, Carmen Márquez Carrasco, Ester Muñoz Nogal, María Nagore Casas and Alexandra Timmer, *Report mapping legal and policy instruments of the EU for human rights and democracy support* [2014] <<http://www.fp7-frame.eu/wp-content/materiale/reports/05-Deliverable-12.1.pdf>> accessed 8 February 2016, 130–131; and Joana Abrisketa, Cristina Churruca, Cristina de la Cruz, Laura García, Carmen Márquez, Dolores Morondo, María Nagore, Lorena Sosa and Alexandra Timmer, *Report on the assessment of consistency in the prioritisation of human rights throughout EU*

groups and persons that ‘require special attention to ensure that they enjoy their human rights, because their perspectives are not automatically included in the actions and thoughts of dominant groups’, that is, ‘the people whose rights are most at risk of being violated’.¹³ While there is no established definition of vulnerability in the ECtHR’s case law, the Court has — to ‘attend to the constructed disadvantage of certain groups’, as Peroni and Timmer put it¹⁴ — acknowledged the vulnerability of persons belonging to certain groups of persons, such as the Roma, persons with disabilities, minors and sexual minorities.¹⁵ In so doing, the Court has attached specific attention to harm experienced by certain groups of persons through, for example, prejudice and stigmatisation, as well as social disadvantage and material deprivation.¹⁶

In other words, vulnerability in today’s human rights rhetoric is typically portrayed in collective terms: *vulnerable groups* are to be provided with special protection as their rights are perceived to be at a particular risk of being violated. The additional and specific human rights guarantees of these groups are often, as seen above, consolidated in group-differentiated catalogues of rights that belong to a given group of individuals due to a specific character that the individuals possess or a specific experience that they share. In general, such a collective approach to the protection of vulnerable individuals is seen to be justified and necessary. This is the case, for example, for children, who due to their relative immaturity and developing character are seen to by default require special protection.¹⁷ A group-based methodology may be vital in terms of securing *substantive equality*, in other words, the equality of results and the

policies [2015] <<http://www.fp7-frame.eu/wp-content/uploads/2015/08/FRAME-Deliverable-12.2-Submitted-30-July-2015.pdf>> accessed 8 February 2016, 16–23.

¹³ Alexandra Timmer, Balázs Majtényi, Katharina Häusler and Orsolya Salát, *The EU’s conceptualisation and operationalisation of the concepts of human rights, democracy and rule of law* [2014] <<http://www.fp7-frame.eu/wp-content/materiale/reports/10-Deliverable-3.2.pdf>> accessed 8 February 2016, 10.

¹⁴ Lourdes Peroni and Alexandra Timmer, ‘Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law’ (2013) 11(4) *International Journal of Constitutional Law* 1056, 1062.

¹⁵ For an overview, see, e.g., Francesca Ippolito and Sara Iglesias Sánchez, ‘Introduction’ in Francesca Ippolito and Sara Iglesias Sánchez (eds), *Protecting Vulnerable Groups: The European Human Rights Framework* (Hart 2015) 3; and Lourdes Peroni and Alexandra Timmer, ‘Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law’ (2013) 11(4) *International Journal of Constitutional Law* 1056, 1063–1070.

¹⁶ For an overview, see, Lourdes Peroni and Alexandra Timmer, ‘Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law’ (2013) 11(4) *International Journal of Constitutional Law* 1056, 1064–1070.

¹⁷ This too, has to be balanced with the recognition of children’s agency. The CRC represents a shift from the firm nurturance approach characterising the 1924 and 1959 Declarations on the Rights of the Child, to the recognition of the child as an autonomous, although not independent, human being; ‘no longer a passive object of care’. For a discussion, see, e.g., Eugene Verhellen, ‘Changes in the Images of the Child’ in Michael Freeman and Philip Veerman (eds), *The Ideologies of Children’s Rights* (Martinus Nijhoff 1992) 79–94. The key provision in terms of children’s agency, Article 12(1) of the CRC, provides for the right of the child ‘who is capable of forming his or her own views’ to freely express those views in ‘all matters affecting the child’, and obligates the States parties to ensure that the views of the child are given ‘due weight’ ‘in accordance with the age and maturity of the child’. See, Convention on the Rights of the Child. The significance of the participatory element of the CRC is underlined by the fact that the Committee on the Rights of the Child has identified Article 12 as one of the fundamental principles of the CRC, along with the right to life, survival and development and the principles of non-discrimination and best interests of the child. See, Committee on the Rights of the Child, General Comment No 5, para 12; and CRC/C/5 (1991), General Guidelines regarding the form and content of initial reports to be submitted by States Parties under Article 44, Paragraph 1(a), of the Convention.

abolition of practices and structures that sustain indirect discrimination.¹⁸ At the same time, a group-based approach may sometimes be counterproductive.¹⁹

It has been noted that labelling all individuals deemed to belong to a specific group as vulnerable or marginalised may be (further) disempowering.²⁰ The categorisation of a person belonging to a particular group as vulnerable may mask the capabilities of individuals to resist and to affect the course of their lives,²¹ and may downplay or deny the agency of the person perceived as vulnerable.²² Considering the multidimensional abilities individuals have, such labelling may be misleading in terms of priority and policy setting.²³ Exclusive reliance on a group-based methodology may moreover overshadow the other different and sometimes multiple sources and contexts that vulnerabilise individuals.²⁴ In this sense, the collective approach to vulnerability raises some of the same concerns that have been discussed in the context of group rights, also referred to as collective rights, in terms of restraining the attention paid to the rights of the individual members of the group.²⁵ This has led Peroni and Timmer, among others, to caution against an exclusively collective approach to vulnerability, calling for a ‘reflective use of group vulnerability’.²⁶

¹⁸ See, e.g., Lourdes Peroni and Alexandra Timmer, ‘Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law’ (2013) 11(4) *International Journal of Constitutional Law* 1056, 1057. On substantive equality, see, e.g., Oddný Mjöll Arnardóttir, ‘Non-Discrimination in International and European Law: Towards Substantive Models’ (2007) 25(2) *Nordisk Tidsskrift for Menneskerettigheter* 140, 143–144; Andrew Byrnes, ‘Article 1’ in M. A. Freeman, C. Chinkin and B. Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (OUP 2012) 55–56; and Jukka Kumpuvuori and Martin Scheinin, ‘Treating the Different Ones Differently’ in Jukka Kumpuvuori and Martin Scheinin (eds), *The United Nations Convention on the Rights of Persons with Disabilities: Multidisciplinary Perspectives* (Center for Human Rights of Persons with Disabilities VIKE 2009) 56–58. See, generally, e.g., UN Committee on the Elimination of Discrimination against Women (2004) General recommendation no. 25 on temporary special measures, UN doc. HRI/GEN/1/Rev.7; and Convention on the Rights of Persons with Disabilities (CRPD, adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3, arts 2 and 5.

¹⁹ See, e.g., Alexandra Timmer, Balázs Majtényi, Katharina Häusler and Orsolya Salát, *The EU’s conceptualisation and operationalisation of the concepts of human rights, democracy and rule of law* [2014] <<http://www.fp7-frame.eu/wp-content/materiale/reports/10-Deliverable-3.2.pdf>> accessed 8 February 2016, 10.

²⁰ For a discussion, see, Hisayo Katsui, Eija M. Ranta, Sisay A. Yeshanew, Godfrey M. Musila, Maija Mustaniemi-Laakso and Alessandra Sarelin, *Reducing Inequalities: A Human Rights-based Approach in Finland’s Development Cooperation with Special Focus on Gender and Disability — A Case Study on Ethiopia and Kenya* (Åbo Akademi University Institute for Human Rights 2014) 26.

²¹ Cf Naila Kabeer, *Reversed Realities: Gender Hierarchies in Development Thought* (Verso 1994) 223–224.

²² Lourdes Peroni and Alexandra Timmer, ‘Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law’ (2013) 11(4) *International Journal of Constitutional Law* 1056, 1072–1073.

²³ Hisayo Katsui, Eija M. Ranta, Sisay A. Yeshanew, Godfrey M. Musila, Maija Mustaniemi-Laakso and Alessandra Sarelin, *Reducing Inequalities: A Human Rights-based Approach in Finland’s Development Cooperation with Special Focus on Gender and Disability — A Case Study on Ethiopia and Kenya* (Åbo Akademi University Institute for Human Rights 2014) 26.

²⁴ Lourdes Peroni and Alexandra Timmer, ‘Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law’ (2013) 11(4) *International Journal of Constitutional Law* 1056, 1071.

²⁵ For a discussion on the criticism on group rights, see, e.g., Kristin Henrard, *Minority Protection in Post-Apartheid South Africa: Human Rights, Minority Rights and Self-Determination* (Praeger 2002) 17–18.

²⁶ Lourdes Peroni and Alexandra Timmer, ‘Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law’ (2013) 11(4) *International Journal of Constitutional Law* 1056, 1057.

The current report shares this perspective on vulnerability. While a group-based approach to vulnerabilities is in many regards justified, it is essential to recognise that solely focusing on group-based vulnerability risks veiling parallel individual and context-based vulnerabilities. Based on the conceptualisation of the term by Fineman, this report therefore approaches vulnerability as an inherent aspect of human condition that is ‘universal and constant’.²⁷ Consequently, as Fineman argues, there is no state of *invulnerability* — all humans are vulnerable — but there are different levels of *resilience* to cope with or mitigate vulnerability.²⁸ Such resilience, which embodies the agency of an individual, is socially produced and is hence sustained, enhanced and hampered by institutional and other arrangements and relationships in a society.²⁹ This is why, to mitigate vulnerability, our attention should increasingly turn to designing and sustaining structures and strategies within societies — and addressing the inherently unequal elements in them. The concept of vulnerability can be seen as a ‘heuristic device’, as described by Fineman, to that end.³⁰

Importantly, resilience as understood in this sense is not a static state of affairs attached to a given characteristic or experience of an individual, such as disability or age, but fluctuates with situations and contexts. Such fluctuation depends on the assets, as well as the ‘resources and relationships available to any specific individual’ in any given time over her or his course of life.³¹ The degree of resilience of an

²⁷ Martha Albertson Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 *Yale Journal of Law and Feminism* 1, 1. See, also, Martha Albertson Fineman, ‘Fineman on Vulnerability and Law’ *New Legal Realism Conversations* [blog], 30 November 2015 <<https://newlegalrealism.wordpress.com/2015/11/30/fineman-on-vulnerability-and-law/>> accessed 9 February 2016. For an excellent overview and discussion on the vulnerability thesis and human rights as developed and understood by key vulnerability theorists, see, Alexandra Timmer, ‘A Quiet Revolution: Vulnerability in the European Court of Human Rights’ in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013) 148–151.

²⁸ For Fineman’s conceptualisation of vulnerability, see, e.g., Martha Albertson Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 *Yale Journal of Law and Feminism* 1; Martha Albertson Fineman, ‘Equality, Autonomy, and the Vulnerable Subject in Law and Politics’ in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013); and Martha Albertson Fineman and Anna Grear, ‘Introduction: Vulnerability as Heuristic — An Invitation to Future Exploration’ in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013). See, also, Martha Albertson Fineman, ‘Fineman on Vulnerability and Law’ *New Legal Realism Conversations* [blog], 30 November 2015 <<https://newlegalrealism.wordpress.com/2015/11/30/fineman-on-vulnerability-and-law/>> accessed 9 February 2016.

²⁹ See, e.g., Martha Albertson Fineman, ‘Fineman on Vulnerability and Law’ *New Legal Realism Conversations* [blog], 30 November 2015 <<https://newlegalrealism.wordpress.com/2015/11/30/fineman-on-vulnerability-and-law/>> accessed 9 February 2016; and Martha Albertson Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 *Yale Journal of Law and Feminism* 1, footnote 27.

³⁰ Martha Albertson Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 *Yale Journal of Law and Feminism* 1, 9. For a discussion, see, e.g., Martha Albertson Fineman and Anna Grear, ‘Introduction: Vulnerability as Heuristic — An Invitation to Future Exploration’ in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013).

³¹ Martha Albertson Fineman, ‘Fineman on Vulnerability and Law’ *New Legal Realism Conversations* [blog], 30 November 2015 <<https://newlegalrealism.wordpress.com/2015/11/30/fineman-on-vulnerability-and-law/>> accessed 9 February 2016 (quote). For a discussion, see, Martha Albertson Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 *Yale Journal of Law and Feminism* 1, 11–12.

individual is essentially determined by the quality and quantity of such assets or resources that the person has at her or his disposal at a given moment in time.³² The differences among persons and in their degree of vulnerability find, according to Fineman, their source in the level of access to these resources and assets.³³ Resilience should therefore be understood as, but not limited to, ‘particular, varied and unique on the independent level’,³⁴ dependent on factors that may transcend individual characteristics or status. Individual characteristics such as disability and age — as well as different contexts, situations, and relationships — can be seen as pointers of ‘exposure, or probability for vulnerability to be manifested or realized in the form of dependency’,³⁵ and as such give reason for specific measures to mitigate vulnerability.

Therefore, while human vulnerability is universal, it is also *particular* in the sense that our degree of resilience is dependent on the web of the different characteristics, contexts, and institutional and other relationships that we possess or in which we find ourselves.³⁶ Consequently, while, for example, the ECtHR’s approach to vulnerability does not fully embrace the conception of vulnerability as a human embodiment, the designation of some groups of persons as *particularly* vulnerable can be seen to be in line with the idea of vulnerability as a human condition that does not exclude agency and is qualified by different levels of resilience.³⁷

According to many commentators, it is here that the added value, or *raison d’être*, of the recognition of vulnerability lies. As we acknowledge vulnerability, we direct our attention to ‘where it is most necessary — to the people whose human rights are most likely to be violated’.³⁸ By looking at the concept in a dynamic and contextual way, and as socially embedded, we see vulnerability as relational to the

³² Martha Albertson Fineman, ‘Equality, Autonomy, and the Vulnerable Subject in Law and Politics’ in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013) 21.

³³ For a discussion, see, Martha Albertson Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 *Yale Journal of Law and Feminism* 1, 13–22; and Linnéa Wegerstad and Niklas Selberg, ‘Interview with Professor Martha Albertson Fineman’ (2011) 34 *Retfaerd* 4, e.g., 10–13.

³⁴ Martha Albertson Fineman, ‘Equality, Autonomy, and the Vulnerable Subject in Law and Politics’ in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013) 21. See, also, *ibid*, 22–24.

³⁵ Martha Albertson Fineman ‘Fineman on Vulnerability and Law’ *New Legal Realism Conversations* [blog], 30 November 2015 <<https://newlegalrealism.wordpress.com/2015/11/30/fineman-on-vulnerability-and-law/>> accessed 9 February 2016.

³⁶ For a discussion, see, e.g., Martha Albertson Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 *Yale Journal of Law and Feminism* 1, 10.

³⁷ See, e.g., Lourdes Peroni and Alexandra Timmer, ‘Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law’ (2013) 11(4) *International Journal of Constitutional Law* 1056, 1059–1074. For a discussion on the ECtHR approach to conceptualization of vulnerability, see, Alexandra Timmer, ‘A Quiet Revolution: Vulnerability in the European Court of Human Rights’ in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013) 151–162.

³⁸ Joana Abrisketa, Cristina Churruca, Cristina de la Cruz, Laura García, Carmen Márquez, Dolores Morondo, María Nagore, Lorena Sosa and Alexandra Timmer, *Report on the assessment of consistency in the prioritisation of human rights throughout EU policies* [2015] <<http://www.fp7-frame.eu/wp-content/uploads/2015/08/FRAME-Deliverable-12.2-Submitted-30-July-2015.pdf>> accessed 8 February 2016, 21.

institutional and societal contexts where it is produced.³⁹ Likewise, by bringing the concept of resilience to the fore, we attach our interest and attention to the institutions and structures that should be responsive to different degrees of resilience.⁴⁰ In this sense, the approach to vulnerability chosen in this report turns the attention from the *symptoms* of inequality to the *roots* of inequality. This means that we see *substantive equality*, which aims at equality of results and the eradication of practices and structures that maintain disadvantages or indirect discrimination, as a goal in institutional and other societal planning and implementation.⁴¹ With a view to enabling inclusion and equality, active measures are needed.⁴² To achieve substantive equality, care should also be taken that vulnerability based on more than one ground is duly taken into account in policies.

This idea of active measures being needed for substantive equality is also incorporated in the specific human rights instruments referred to in the beginning of this section that are designed to protect particularly vulnerable groups. Reference in the CRPD is, for example, made to the '[s]pecific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities'.⁴³ CEDAW, for its part, sets forth appropriate measures, including legislation and temporary special measures, with a view to enabling women to enjoy all of their human rights.⁴⁴

When the concept of vulnerability is interpreted in this way, it '*does something*',⁴⁵ it has '*transformative potential*' as regards the way in which we interpret, value and remake law — including human rights law — and societal structures.⁴⁶ Most importantly, this reconceptualisation makes it possible for us to turn away from a *patronising* and *group-based approach* to vulnerability. Instead we can adopt an *empowering*

³⁹ Cf. Joana Abrisketa, Cristina Churruca, Cristina de la Cruz, Laura García, Carmen Márquez, Dolores Morondo, María Nagore, Lorena Sosa and Alexandra Timmer, *Report on the assessment of consistency in the prioritisation of human rights throughout EU policies* [2015] <<http://www.fp7-frame.eu/wp-content/uploads/2015/08/FRAME-Deliverable-12.2-Submitted-30-July-2015.pdf>> accessed 8 February 2016, 21.

⁴⁰ See, e.g., Martha Albertson Fineman and Anna Grear, 'Introduction: Vulnerability as Heuristic — An Invitation to Future Exploration' in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013) 2–3.

⁴¹ For a discussion, see, Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale Journal of Law and Feminism* 1.

⁴² See, generally, e.g., UN Committee on the Elimination of Discrimination against Women (2004) General recommendation no. 25 on temporary special measures, UN doc. HRI/GEN/1/Rev.7, para 31; and Convention on the Rights of Persons with Disabilities (CRPD, adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3, arts 2 and 5.

⁴³ Convention on the Rights of Persons with Disabilities (CRPD, adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3, art 5.

⁴⁴ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, e.g. arts 2–5.

⁴⁵ Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11(4) *International Journal of Constitutional Law* 1056, 1057.

⁴⁶ Martha Albertson Fineman and Anna Grear, 'Introduction: Vulnerability as Heuristic — An Invitation to Future Exploration' in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013) 10.

approach to vulnerability, acknowledging the agency of individuals and based on removing structures that sustain or create vulnerability.⁴⁷

C. Vulnerability of asylum-seekers and irregular migrants

Above we saw how the notion of vulnerability can be perceived as a universal character conditioned by different degrees of resilience. It was also noted that the debate on vulnerability is moving beyond strict categorisation of groups and individuals into vulnerable and invulnerable: it is increasingly recognised that vulnerability can be externally created by society. This may be highly relevant in a context such as the refugee crisis, where the fate of an individual by definition is dependent on many external factors such as the collaboration and assistance by others either individually or through institutional and societal arrangements, and where an individual may be exposed to multiple factors that cause or accentuate vulnerability.

In addition to the causes pushing individuals to leave their homes in their countries of origin, people seeking international protection are often vulnerable to exploitation and abuse as they are, due to the scarcity of viable avenues of migration, forced to use dangerous routes and to rely on the smugglers' organisations to seek protection.⁴⁸ Also, migrants who have not been persecuted in their countries of origin may be vulnerable, or may become vulnerable due to contextual and/or personal circumstances.

Where migrants are staying within the EU irregularly after having received a negative asylum decision, their position is typically marked by uncertainty. Asylum-seekers and irregular migrants are therefore prone to be contextually vulnerable, even where they do not belong to the groups traditionally recognised as vulnerable. The difficulties migrants face are often aggravated due to vulnerabilities linked to their citizenship and immigration status. A desire to hide from authorities may make it impossible for irregular migrants to access services such as health care and protection against violence by the police. This often exposes them to further vulnerability by effectively preventing them from claiming their fundamental rights and subjecting them to exploitative working conditions in low-skilled occupations within the labour market.⁴⁹ They are also typically in a marginalised position in terms of language skills, access to

⁴⁷ For a discussion on the protection and empowerment approaches, see, Joana Abrisketa, Cristina Churruca, Cristina de la Cruz, Laura García, Carmen Márquez, Dolores Morondo, María Nagore, Lorena Sosa and Alexandra Timmer, *Report on the assessment of consistency in the prioritisation of human rights throughout EU policies* [2015] <<http://www.fp7-frame.eu/wp-content/uploads/2015/08/FRAME-Deliverable-12.2-Submitted-30-July-2015.pdf>> accessed 8 February 2016, 22.

⁴⁸ For a discussion, see, Mikaela Heikkilä, Maija Mustaniemi-Laakso, Suzanne Egan, Graham Finlay, Tamara Lewis, Julia Planitzer, Helmut Sax, Lisa Maria Heschl and Stefan Salomon, *Report critically assessing human rights integration in AFSJ policies* [2015] <<http://www.fp7-frame.eu/wp-content/materiale/reports/22-Deliverable-11.2.pdf>> accessed 10 May 2016.

⁴⁹ FRA, *Fundamental Rights of Migrants in an Irregular Situation in the European Union* [2011], 7–8; and Ryszard Cholewinski, 'The Human and Labor Rights of Migrants: Visions or Equality' in David Weissbrodt and Mary Rumsey (eds), *Vulnerable and Marginalised Groups and Human Rights* (Edward Elgar 2011) 177, 219.

employment and social support networks, and excluded from democratic decision-making in the countries where they reside.⁵⁰

A reconceptualisation of vulnerability and the parameters for defining vulnerability beyond the traditionally recognised vulnerable groups is hence necessary in the context of asylum and irregular migration. To a certain extent this is what happened in recent ECtHR case law.⁵¹ The context of seeking asylum is recognised by the Court — although it is not expressing itself in the vocabulary of resilience — as a factor that has a negative impact on an individual’s degree of resilience and therefore accentuates her or his vulnerability.⁵² This is, in particular, visible in the Court’s ruling in the *M.S.S.* case. In the words of the Court, the applicant in *M.S.S.* was an asylum-seeker, who was ‘particularly vulnerable’ and underprivileged.⁵³ In finding so, the Court referred both to the individual experiences of the applicant in the specific case at hand and to the situation of asylum-seekers in general.⁵⁴

Essential to the Court’s analysis in *M.S.S.* is the contextual finding of decreased resilience of the applicant and the effect of such a condition on the measures that the state was to take. More specifically, the Court attached significance to the fact that the ‘applicant’s distress was *accentuated* by the vulnerability inherent in his situation as an asylum seeker’ and that special protection measures therefore needed to be taken in order to address his vulnerability.⁵⁵ In its reasoning, the Court pointed to the fact that the applicant was completely dependent on the state in the fulfilment of his basic needs and that his vulnerability — or diminished resilience — was largely due to the significant shortcomings of the Greek asylum system in terms of reception conditions, procedural safeguards and administrative hurdles to access employment.⁵⁶

⁵⁰ See, Alexandra Timmer, Balázs Majtényi, Katharina Häusler and Orsolya Salát, *The EU’s conceptualisation and operationalisation of the concepts of human rights, democracy and rule of law* [2014] <<http://www.fp7-frame.eu/wp-content/materiale/reports/10-Deliverable-3.2.pdf>> accessed 8 February 2016, 47.

⁵¹ ECtHR case law has, however, suffered from lack of consistency in this regard and has not always managed to capture and address the vulnerability of irregular migrants. See, e.g., Alexandra Timmer, ‘A Quiet Revolution: Vulnerability in the European Court of Human Rights’ in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013) 158: ‘The Court’s vulnerability reasoning with regard to “irregular” migrants is complex and problematic. Regrettably but not surprisingly, the Court often fails to respond to the vulnerability of asylum seekers.’ For a discussion on the Court’s approach to vulnerability in context of migration, see, *ibid*, 158–160.

⁵² *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR 21 January 2011), para 232.

⁵³ *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR 21 January 2011), para 251. See, however, Judge Sajó’s dissenting opinion in this regard. *M.S.S. v Belgium and Greece* App no 30696/09 (ECHR 21 January 2011), (Grand Chamber, Partly Concurring and Partly Dissenting Opinion of Judge Sajó).

⁵⁴ *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR 21 January 2011), paras 232–233. See, also, Lourdes Peroni and Alexandra Timmer, ‘Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law’ (2013) 11(4) *International Journal of Constitutional Law* 1056, 1068–1070, for an analysis on whether the Court’s finding points to the recognition of the vulnerability of asylum-seekers as a group.

⁵⁵ *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR 21 January 2011), paras 233 (emphasis added) and 251.

⁵⁶ *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR 21 January 2011), paras 253–255, 258–262.

The ECtHR also recognised the *compounded vulnerability* of some asylum-seekers,⁵⁷ that is, the fact that among asylum-seekers are individuals who belong to several vulnerable groups. This was expressly done in the *Tarakhel* case, which concerned the proposed return to Italy from Switzerland of a family of eight, including six children. The Court found, with reference to the *M.S.S.* case, that the Swiss authorities were under an obligation to secure individual guarantees that the applicants would be met in a manner adapted to the ages of the children were the applicants to be returned to Italy under the Dublin scheme. In deciding the case, the Court paid specific attention to the children's 'extreme vulnerability' and specific needs as defined both based on their age and lack of independence and their status as asylum-seekers.⁵⁸ What could be called a gliding scale appraisal should therefore be applied to assessing the degree of resilience and vulnerability of an individual in a given situation. In considering needs and rights, care should be taken that the different – and at times multiple – types of individual, contextual and group-based vulnerabilities of asylum-seekers are duly assessed and addressed.⁵⁹

D. Vulnerability in EU policies on asylum and irregular migration

1. On the concept of vulnerability as applied within the EU

The notions of 'vulnerability' and 'vulnerable groups' have been in frequent use in EU policy documents guiding both the Union's internal and external action. The concepts can, for example, be found in the 2010 European Council strategy 'The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens' (Stockholm Programme) and in the 2012–2014 Strategic Framework on Human Rights and Democracy.⁶⁰ The protection of vulnerable groups has been asserted as a priority in EU (human rights) policy.⁶¹

⁵⁷ The term 'compounded vulnerability' is used by Timmer in Alexandra Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights' in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013) 161. For a discussion on the Court's approach to compounded vulnerability, see, *ibid*, 161–162.

⁵⁸ *Tarakhel v Switzerland* App no 29217/12 (ECtHR 4 November 2014), para 99.

⁵⁹ See in this regard, e.g., Convention on the Rights of Persons with Disabilities (CRPD, adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3, Preamble and art 6.

⁶⁰ European Council, 'The Stockholm Programme – An open and secure Europe serving and protecting citizens' 2010/C 115/01 [2010], 9; and Council of the European Union, 'Human Rights and Democracy: EU Strategic Framework and EU Action Plan', 11855/12 [2012] Annex II, 3.

⁶¹ For an overview, see Cristina Churruca Muguruza, Felipe Gómez Isa, Daniel García San José, Pablo Antonio Fernández Sánchez, Carmen Márquez Carrasco, Ester Muñoz Nogal, María Nagore Casas and Alexandra Timmer, *Report mapping legal and policy instruments of the EU for human rights and democracy support* [2014] <<http://www.fp7-frame.eu/wp-content/materiale/reports/05-Deliverable-12.1.pdf>> accessed 8 February 2016, 130. See, also, Francesca Ippolito and Sara Iglesias Sánchez, 'Introduction' in Francesca Ippolito and Sara Iglesias Sánchez (eds), *Protecting Vulnerable Groups: The European Human Rights Framework* (Hart 2015) 4.

Lately, however, a growing uneasiness with the notion of vulnerability has been discernible within the EU,⁶² and the concept has, for example, been dropped from the latest Strategic Framework on Human Rights and Democracy for the years 2015–2019. The Council has instead chosen to refer to the protection of children and women and to ‘cultivating an area of non-discrimination’.⁶³ A similar change is noticeable between the Stockholm Programme (2010–2014)⁶⁴ and the succeeding new strategic guidelines for legislative and operational planning within the AFSJ for the years 2015–2019 (Strategic Guidelines 2015–2019), where no reference to vulnerability is made but some specific protection needs with regard to, for example, children and victims of crime are identified.⁶⁵ Based on this, it may be asked whether the EU is moving towards an increasingly *implicit* conceptualization of vulnerability addressing specific protection needs of individuals or groups of individuals, rather than operating with the concepts of ‘vulnerability’ and ‘vulnerable groups’.⁶⁶

Whether used explicitly or implicitly, the notion of vulnerability in EU policies is generally made use of in a markedly *group-based* sense. In other words, in the EU documents vulnerability is often seen as a characteristic that belongs to certain groups of individuals – such as children, the Roma and sexual minorities – not as a universal characteristic of human beings subject to different levels of resilience in the sense described by Fineman.⁶⁷ This is the approach taken, for example, in the Reception Conditions Directive, which enlists groups to be considered as particularly vulnerable for the purposes of the Directive, including minors, unaccompanied minors, persons with disabilities and victims of rape or

⁶² Analysis of recent interview data indicates certain uneasiness with the concept of vulnerable groups at the EEAS because it ‘undermines the agency of people’. See, Alexandra Timmer, Balázs Majtényi, Katharina Häusler and Orsolya Salát, *The EU’s conceptualisation and operationalisation of the concepts of human rights, democracy and rule of law* [2014] <<http://www.fp7-frame.eu/wp-content/materiale/reports/10-Deliverable-3.2.pdf>> accessed 8 February 2016, 11.

⁶³ Council of the European Union, ‘Council Conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019’ 10897/15 [2015] Annex.

⁶⁴ European Council, ‘The Stockholm Programme – An open and secure Europe serving and protecting citizens’ 2010/C 115/01 [2010], 4 and 9-10.

⁶⁵ European Council, ‘Council Conclusions 26–27 June 2014’ [2014], 6.

⁶⁶ cf Ippolito and Sánchez, who note that the ‘notion of vulnerability is implicitly present in many areas of EU competence which directly affect the legal position of individuals. In this regard, from the outset of the European integration project, EU law has enhanced the legal situation of workers [...] and has provided a solid framework for the prohibition of discrimination in different fields.’ Such impact, according to the authors, ‘has been considerably enlarged with the introduction of competences in the area of freedom, security and justice, where the European Union has identified different situations in which vulnerability is taken into account, such as with regard to the victims of crimes, asylum-seekers, trafficked persons and unaccompanied minors.’ See Francesca Ippolito and Sara Iglesias Sánchez, ‘Introduction’ in Francesca Ippolito and Sara Iglesias Sánchez (eds), *Protecting Vulnerable Groups: The European Human Rights Framework* (Hart 2015) 4.

⁶⁷ cf Cristina Churruza Muguruza, Felipe Gómez Isa, Daniel García San José, Pablo Antonio Fernández Sánchez, Carmen Márquez Carrasco, Ester Muñoz Nogal, María Nagore Casas and Alexandra Timmer, *Report mapping legal and policy instruments of the EU for human rights and democracy support* [2014] <<http://www.fp7-frame.eu/wp-content/materiale/reports/05-Deliverable-12.1.pdf>> accessed 8 February 2016, 131. The authors note, ‘The EU uses the term in its particular sense: EU policy documents do not conceive of vulnerability as an enduring and universal aspect of the human condition, but as something that some particular groups suffer from. [...] The professed purpose of the EU is to do good for vulnerable groups: the purpose is to protect their fundamental rights and empower them. The danger is however that the EU does exactly the opposite: by applying the term “vulnerable” only to certain disfavoured groups in society, the EU risks reinforcing the very vulnerability that it seeks to address.’

physical or sexual violence.⁶⁸ In some instruments a so-called *factors approach* has been adopted, listing the causes for vulnerability of certain people, such as age or gender, rather than referring to vulnerable groups as such.⁶⁹ Yet, both of the approaches generally fall short of recognising vulnerability produced, enhanced or sustained by institutional and structural design.⁷⁰

Hence, while the notion of vulnerability figures in many of the EU's legislative and policy instruments, its use within the EU appears to be somewhat inconsistent. It seems safe to say that a comprehensive understanding of vulnerability has not yet matured within the Union.⁷¹ This is in particular true if one looks beyond the group-based notion of vulnerability.

The Court of Justice of the European Union's (CJEU) case law presents a mix of the explicit and the implicit approaches to addressing vulnerability, with the Court sometimes expressly finding an applicant vulnerable, whilst in other cases inherently basing its judgment on the vulnerability of the applicant.⁷² What is interesting is that the Court's case law indicates that the CJEU — as opposed to the general EU policy that is seemingly focused on the group-based definition of vulnerability — is willing to take into

⁶⁸ Directive of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants of international protection [2013] OJ L 180/96, art 21.

⁶⁹ Joana Abrisketa, Cristina Churruca, Cristina de la Cruz, Laura García, Carmen Márquez, Dolores Morondo, María Nagore, Lorena Sosa and Alexandra Timmer, *Report on the assessment of consistency in the prioritisation of human rights throughout EU policies* [2015] <<http://www.fp7-frame.eu/wp-content/uploads/2015/08/FRAME-Deliverable-12.2-Submitted-30-July-2015.pdf>> accessed 8 February 2016, 20.

⁷⁰ See, e.g., Muguruza et al., arguing, 'EU policy should focus less on individual characteristics, and more on the societal arrangements that construct these vulnerabilities.' See, Cristina Churruca Muguruza, Felipe Gómez Isa, Daniel García San José, Pablo Antonio Fernández Sánchez, Carmen Márquez Carrasco, Ester Muñoz Nogal, María Nagore Casas and Alexandra Timmer, *Report mapping legal and policy instruments of the EU for human rights and democracy support* [2014] <<http://www.fp7-frame.eu/wp-content/materiale/reports/05-Deliverable-12.1.pdf>> accessed 8 February 2016, 172. See, also, Abrisketa et al., arguing, 'The factors approach to vulnerability is often to be desired, as at least it explains why certain people are rendered vulnerable. This lessens the risk of carrying a stigma with it. A factor approach is also to be desired because it entails less risk of essentializing people as vulnerable: a factors approach leaves more room for the idea that once a cause of particular vulnerability is removed, the people involved are less vulnerable. However, the strength of the factors approach to vulnerability does depend of course on which vulnerability-factors the EU recognizes. If these are only individualistic factors (such as health or biological sex) and not socio-structural factors (such as discrimination), as outlined above, the EU's conception of vulnerability remains narrow and limited.' See, Joana Abrisketa, Cristina Churruca, Cristina de la Cruz, Laura García, Carmen Márquez, Dolores Morondo, María Nagore, Lorena Sosa and Alexandra Timmer, *Report on the assessment of consistency in the prioritisation of human rights throughout EU policies* [2015] <<http://www.fp7-frame.eu/wp-content/uploads/2015/08/FRAME-Deliverable-12.2-Submitted-30-July-2015.pdf>> accessed 8 February 2016, 21.

⁷¹ Cf Francesca Ippolito and Sara Iglesias Sánchez, 'Introduction' in Francesca Ippolito and Sara Iglesias Sánchez (eds), *Protecting Vulnerable Groups: The European Human Rights Framework* (Hart 2015) 4. See, also, Alexandra Timmer, Balázs Majtényi, Katharina Häusler and Orsolya Salát, *The EU's conceptualisation and operationalisation of the concepts of human rights, democracy and rule of law* [2014] <<http://www.fp7-frame.eu/wp-content/materiale/reports/10-Deliverable-3.2.pdf>> accessed 8 February 2016, 99-100, arguing, 'Having no clear definition at hand on who is to be counted as "vulnerable group", makes it difficult to evaluate the prioritisation of this topic by EU external actions beyond the use of the term "vulnerable group" in documents.'

⁷² See, Thomas Burri 'Pomfr: Reviewing protecting vulnerable groups — What about Hector Salamanca and Donald Gately?' *European Law Blog* [blog], 7 January 2016 <<http://europeanlawblog.eu/?p=3061>> accessed 9 February 2016. See, Francesca Ippolito and Sara Iglesias Sánchez (eds), *Protecting Vulnerable Groups: The European Human Rights Framework* (Hart 2015) for an interesting overview of the Court's case law regarding vulnerability.

account external factors that accentuate vulnerability. This aspect of the CJEU's case law will be addressed in further detail below.

2. The EU approach to vulnerable asylum-seekers and irregular migrants

Migration management is a key area of EU action. The Strategic Guidelines 2015–2019, for example, recognise the management of 'migration in all its aspects' as one of the priority fields of the EU.⁷³ Similarly, the Strategic Framework on Human Rights and Democracy, which sets forth the EU's approach to human rights in its external policy on human rights and democracy, ascertains migration and asylum policies as one of the central areas of action.⁷⁴ The urgency and necessity of addressing migration is further highlighted, for example, in the 2015 Agenda on Migration, which sets out immediate and more long-term steps to be taken to address irregular migration into the EU.⁷⁵

a) Two-level perspective to vulnerability

As regards the EU legislation on migration and asylum, a two-level approach to vulnerability is discernible. Asylum-seekers as a collective are recognised as a vulnerable group, and within this group particularly vulnerable groups are identified. The two-level approach will be briefly outlined below.

(1) Asylum-seekers as a vulnerable group

At the general level, as evidenced by the specific protective schemes, the EU legislator has approached asylum-seekers as a vulnerable group as such.⁷⁶ The secondary legislation aimed at protecting asylum-seekers includes the recently revised directives on asylum procedures, reception conditions and

⁷³ European Council, 'Council Conclusions 26–27 June 2014' [2014], 19.

⁷⁴ Council of the European Union, 'Council Conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019' 10897/15 [2015] Annex, 21–23. See also, Council of the European Union, 'Human Rights and Democracy: EU Strategic Framework and EU Action Plan', 11855/12 [2012] Annex II, 2–3.

⁷⁵ European Commission, Commission Communication: A European Agenda on Migration [2015] COM(2015) 240 final.

⁷⁶ Ulrike Brandl and Philip Czech, 'General and Specific Vulnerability of Protection-Seekers in the EU: Is There an Adequate Response to Their Needs?' in Francesca Ippolito and Sara Iglesias Sánchez (eds), *Protecting Vulnerable Groups: The European Human Rights Framework* (Hart 2015) 262. See, also, *ibid*, 263–264. See, also, Commission, 'A Common European Asylum System' [2014], 3, referring to the CEAS as '[a]n area of protection and solidarity for the most vulnerable'.

qualifications;⁷⁷ the revised Eurodac regulation;⁷⁸ and the revised Dublin Regulation.⁷⁹ These instruments have as their objective to further harmonise standards of protection across EU Member States and to ensure respect for the fundamental rights of asylum-seekers through procedural and other safeguards.

Also, the CJEU has recognised the vulnerability of asylum-seekers in the face of institutional arrangements that do not sufficiently take account of their diminished degree of resilience. For example, in the joint cases of *N.S.* and *M.E.*, in which the CJEU was faced with facts similar to the *M.S.S.* case decided by the ECtHR, the Court paid decisive attention to the ‘systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers’ as grounds for blocking the transfer of asylum-seekers to Greece.⁸⁰ The CJEU found that under the circumstances in the country there were substantial grounds to believe that an asylum-seeker would face a real risk of being subjected to inhuman or degrading treatment if transferred to Greece.⁸¹

Subsequent to the CJEU decision, Article 3(2) was inserted into the Dublin III Regulation to the effect of barring transfers to a EU Member State, where

there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union.⁸²

⁷⁷ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60, Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L180/96, and Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9.

⁷⁸ Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice [2013] OJ L180/1.

⁷⁹ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/31. The 2003 Dublin regulation was preceded by the 1990 Dublin Convention.

⁸⁰ Case C-411/10 and C-493/10, *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] CJEU 21 December 2011 ECR I-13905, para 94.

⁸¹ Case C-411/10 and C-493/10, *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] CJEU 21 December 2011 ECR I-13905, para 94.

⁸² Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/31, art 3(2).

Notably, therefore, in recognising the ‘systemic flaws’ in the asylum system as a hurdle for transfers, the Dublin system now embraces the notion of societally constructed vulnerability.⁸³

(2) Particular vulnerability

At the more specific level, the EU secondary legislation pertaining to asylum-seekers and migrants specifies certain categories of protection-seekers to whom enhanced obligations are owed due to their particular vulnerability. Children, unaccompanied minors, persons with disabilities, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other forms of psychological, physical or sexual violence, are examples of groups that often are viewed as vulnerable.⁸⁴

While the necessity to take the special needs of particularly vulnerable applicants into account is acknowledged in many EU instruments regulating migration,⁸⁵ the only piece of legislation to clarify the personal scope of application of such special protection measures is the Reception Conditions Directive.⁸⁶ The Directive establishes that an applicant with special reception needs means ‘a vulnerable person, in accordance with Article 21, who is in need of special guarantees in order to benefit from the rights and comply with the obligations provided for in this Directive’.⁸⁷ Under Article 21, the Reception Conditions

⁸³ See, also, Brandl and Czech, who state that the system ‘allows exceptions, which open the possibility to pay attention to the special needs of vulnerable applicants’. Ulrike Brandl and Philip Czech, ‘General and Specific Vulnerability of Protection-Seekers in the EU: Is There an Adequate Response to Their Needs?’ in Francesca Ippolito and Sara Iglesias Sánchez (eds), *Protecting Vulnerable Groups: The European Human Rights Framework* (Hart 2015) 265.

⁸⁴ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98, art 3(9) and 5; Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants of international protection [2013] OJ L 180/96, arts 2(k) and 21; and Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/31, e.g., art 6 and recital 13.

⁸⁵ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98, art 3(9) and 5; Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants of international protection [2013] OJ L 180/96, arts 2(k) and 21; and Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/31, e.g., art 6 and recital 13.

⁸⁶ Ulrike Brandl and Philip Czech, ‘General and Specific Vulnerability of Protection-Seekers in the EU: Is There an Adequate Response to Their Needs?’ in Francesca Ippolito and Sara Iglesias Sánchez (eds), *Protecting Vulnerable Groups: The European Human Rights Framework* (Hart 2015) 264.

⁸⁷ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants of international protection [2013] OJ L 180/96, art 2(k).

Directive gives a non-exhaustive list of categories of applicants falling under the ‘special guarantees’ regime:

Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation, in the national law implementing this Directive.

Specific guarantees are furthermore granted to minors, unaccompanied minors, and victims of torture and violence under Articles 23–25, and under Article 11 concerning detention of vulnerable persons and applicants with special reception needs. The special guarantees are, under Article 22, to be based on an assessment of special reception needs within a reasonable time after the lodging of the asylum application.

It is noteworthy that, although not expressly using the language of resilience, through the recognition of the special guarantees required for particularly vulnerable persons to benefit from the same level of treatment as persons who are less vulnerable the Directive embraces the need for the institutions and structures to adapt to the different levels of resilience of individuals. Regrettably, Article 22(3) simultaneously effectively limits the application of the special guarantees to the groups of vulnerable persons non-exhaustively listed in Article 21,⁸⁸ hence omitting to expressly include contextual vulnerability emanating from structural and institutional failures.

The instruments of the Common European Asylum System (CEAS) also contain other references to the protection of particularly vulnerable persons. Specific guarantees for particularly vulnerable groups, such as minors, unaccompanied minors and dependent persons, are set forth under the Dublin III Regulation and the Procedures Directive.⁸⁹ The Return Directive, for its part, sets out that the special needs of vulnerable persons are to be taken into account.⁹⁰ The protection and empowerment of vulnerable migrants, such as unaccompanied minors, asylum-seekers, stateless persons and victims of trafficking, is

⁸⁸ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants of international protection [2013] OJ L 180/96, art 22(3): ‘Only vulnerable persons in accordance with Article 21 may be considered to have special reception needs and thus benefit from the specific support provided in accordance with this Directive.’

⁸⁹ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60, e.g., recital 29-30 and arts 24-25; and Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/31, e.g. arts 6 and 16 and recital 13.

⁹⁰ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98, art 14.

also set forth as a priority and a ‘cross-cutting dimension’ of all four pillars of the Global Approach to Migration and Mobility (GAMM) by the EU.⁹¹

Hence, it seems justified to say that at the level of legislation, the concept of vulnerability takes a rather prominent place in the CEAS.⁹² However, when taken to the operational policy level the EU commitment to the protection of the vulnerable appears to be considerably less developed. When it comes to addressing the vulnerabilities of irregularly entering and staying migrants, the protection approach has largely had to give way to other considerations, such as security. This aspect of the EU’s policies on vulnerability will be addressed below.

b) Securitisation and vulnerabilities

The way migration is approached in EU policy documents and in the day-to-day political rhetoric within the Union is in many regards contradictory. On the one hand, there is recognition of the need to protect the migrants and asylum-seekers and to address their vulnerabilities.⁹³ On the other hand, uncontrolled migration is viewed as a ‘threat’ and there is a strong urge to effectively manage the irregular migration flows into Europe.⁹⁴ While the protection angle has found its way into many EU migration instruments, the security perspective largely takes an upper hand when operational measures to address unwanted migration are agreed upon. This is particularly notable in the Strategic Guidelines 2015–2019, which only inherently and in passing recognise the vulnerability of protection-seekers, at the same time strongly underlining the need for measures to counteract the irregular entry of migrants into the EU area.⁹⁵ This

⁹¹ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, The Global Approach to Migration and Mobility [2011] COM(2011) 743 final, 6.

⁹² See, similarly, Ulrike Brandl and Philip Czech, ‘General and Specific Vulnerability of Protection-Seekers in the EU: Is There an Adequate Response to Their Needs?’ in Francesca Ippolito and Sara Iglesias Sánchez (eds), *Protecting Vulnerable Groups: The European Human Rights Framework* (Hart 2015) 269.

⁹³ While no reference to the vulnerability of asylum-seekers in the May 2015 Agenda on Migration is made as such, the strategy sets forth to pay ‘particular attention’ to ‘vulnerable migrants including unaccompanied minors’ in the context of support for improved access to justice and health in countries of origin and transit, improved conditions of detention for detained migrants; and alternatives to the use of detention for irregular migrants. See, Council of the European Union, ‘Council Conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019’ 10897/15 [2015] Annex, 22. See, also, European Commission, Commission Communication: A European Agenda on Migration [2015] COM(2015) 240 final, 12, in which the Commission sets forth the goal to give ‘further guidance to improve standards on reception conditions and asylum procedures [...] reinforcing protection of the fundamental rights of asylum-seekers, paying particular attention to the needs of vulnerable groups, such as children.’ See, also, 3 and 4.

⁹⁴ See, e.g., European Commission, Commission Communication: A European Agenda on Migration [2015] COM(2015) 240 final, 6-9. See, also, European Council, ‘Council Conclusions 26–27 June 2014’ [2014], 19: ‘[...] the priorities we set for the Union for the next five years are: to better manage migration in all its aspects: by addressing shortages of specific skills and attracting talent; by dealing more robustly with irregular migration, also through better cooperation with third countries, including on readmission; by protecting those in need through a strong asylum policy; with a strengthened, modern management of the Union’s external borders [...]’.

⁹⁵ European Council, ‘Council Conclusions 26–27 June 2014’ [2014], 2–3, 14 and 19.

can be seen as an expression of the *securitisation* trend in the EU's migration policies, presenting a shift towards increasing acceptance of retributive and forcible measures taken to tackle unwanted irregular migration.⁹⁶ This is manifest, for example, in the policies and legislation that impose sanctions for the facilitation of irregular migration and irregular stay within the EU.⁹⁷

The securitisation trend in the EU's migration policies has been met with severe criticism by the United Nations High Commissioner for Refugees (UNHCR) and NGOs, not the least due to the fact that the policies to securitise are prone to address migrants *en masse*, without or with reduced attention paid to the individual protection needs that the asylum-seekers may have. Summary push-backs and other forms of interception whereby migrants have been declined entry into the EU have been a major source of concern in this regard.⁹⁸ Given the collective nature of push-back operations, and the fact that border guards may lack sufficient training and competence, or procedures, in screening and identifying vulnerability,⁹⁹ such interception measures effectively hamper the right to seek asylum and to have one's protection needs

⁹⁶ For a discussion, see, e.g., European Union Agency for Fundamental Rights, *Criminalisation of Migrants in an Irregular Situation and of Persons Engaging with Them*, 2014; and Gabriella Lazaridis and Khursheed Wadia, 'Introduction' in Gabriella Lazaridis and Khursheed Wadia (eds), *The Securitisation of Migration in the EU* (Palgrave Macmillan 2015). On the securitisation of the AFSJ policies, see, e.g., Viljam Engström and Mikaela Heikkilä, *Fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice* [2014] <<http://www.fp7-frame.eu/wp-content/materiale/reports/09-Deliverable-11.1.pdf>> accessed 8 May 2015; and Mikaela Heikkilä, Maija Mustaniemi-Laakso, Suzanne Egan, Graham Finlay, Tamara Lewis, Julia Planitzer, Helmut Sax, Lisa Maria Heschl and Stefan Salomon, *Report critically assessing human rights integration in AFSJ policies* [2015] <<http://www.fp7-frame.eu/wp-content/materiale/reports/22-Deliverable-11.2.pdf>> accessed 10 May 2016. The term *securitisation* is used to describe a process by which 'an issue is defined as an existential threat and thereby lifted above the normal into the extraordinary', where 'extraordinary measures are required which go beyond the established rules and procedures'. See Jens Kremer, 'Exception, Protection and Securitization: Security Mindset in Law' in Massimo Fichera and Jens Kremer (eds), *Law and Security in Europe: Reconsidering the Security Constitution* (Intersentia 2013) 7, 19.

⁹⁷ Under Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence, OJ L 328, art 1, Member States are to 'adopt appropriate sanctions' on any person who intentionally facilitates the entry or transit of a non-EU national to or within the EU or 'for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens'. For a discussion, see, e.g., Elspeth Guild, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax, 'The 2015 Refugee Crisis in the European Union' [2015] *CEPS Policy Brief* No 332, 4-5; European Union Agency for Fundamental Rights, *Criminalisation of Migrants in an Irregular Situation and of Persons Engaging with Them* [2014]; and FRA, *Fundamental Rights of Migrants in an Irregular Situation in the European Union* [2011], 11–12. See, also, Council Directive 2001/51/EC of 10 July 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement [2001] OJ L187, imposing carrier sanctions for carrying passengers without valid travel documentation to the territory of the EU.

⁹⁸ See, e.g., OHCHR, 'Migrants Need Protection, Not Push-Backs' (18 June 2015) <<http://www.ohchr.org/EN/NewsEvents/Pages/Migrantsneedprotection.aspx>> accessed 15 January 2015.

⁹⁹ See, e.g., European Union Agency for Fundamental Rights, *Fundamental rights at airports: border checks at five international airports in the European Union* (FRA 2014) 70. Available at <http://fra.europa.eu/sites/default/files/fra-2014-third-country-nationals-airport-border-checks_en.pdf> accessed 13 February 2016. See also, FRA, *Fundamental rights at Europe's southern sea borders* (FRA 2013) 76 and 94–95. Available at <http://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13_en.pdf> accessed 15 February 2016; and FRA, *Fundamental rights at land borders: findings from selected European Union border crossing points* (FRA 2014) 7–8. Available at <http://fra.europa.eu/sites/default/files/fra-2014-third-country-nationals-land-border-checks_en.pdf> accessed 15 September 2015.

individually assessed.¹⁰⁰ Interceptions therefore risk further vulnerabilising asylum-seekers by exposing them to risks in their countries of origin. Also, where the first country of asylum refuses to readmit them, refugees may be pushed in a state of *orbit* where their protection needs often fail to be addressed.¹⁰¹ Interceptions may, in addition, divert migration flows into other possibly more perilous routes. The forcible push-backs are especially problematic for particularly vulnerable migrants such as children and the sick.¹⁰²

Likewise, concerns have been raised with regard to the safe countries of origin scheme, which enables EU Member States to apply accelerated procedures at the border or in transit zones to return migrants coming from countries that are perceived as safe.¹⁰³ Such fast-track procedures risk not only hampering procedural safeguards in assessing protection needs,¹⁰⁴ but may also veil individual vulnerabilities behind the general perceptions of safety prevailing in the countries of origin.¹⁰⁵ The situation is further complicated by the fact that the burden of proof and enhanced evidentiary requirements are placed on

¹⁰⁰ For the right to seek asylum, see General Assembly Resolution 217 A, The Universal Declaration of Human Rights, 10 December 1948, art 14(1): ‘Everyone has the right to seek and to enjoy in other countries asylum from persecution’. The right to seek asylum is interpreted as an element of the right to asylum under in Article 18 of the Charter of Fundamental Rights of the European Union. See, Charter of Fundamental Rights of the European Union [2010] OJ C83/389, art 18. See, also, Roland Bank, ‘Introduction to Article 11’, in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP 2011) 849; and Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 358–359 and 368.

¹⁰¹ See, e.g., UNHCR, *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, Executive Committee of the High Commissioner’s programme, 18th Meeting of the Standing Committee (EC/50/SC/CPR.17), 9 June 2000 <<http://www.unhcr.org/4963237411.pdf>> accessed 15 January 2016.

¹⁰² See, e.g., Human Rights Watch, ‘Turkey: Syrians Pushed Back at the Border: Closures Force Dangerous Crossings with Smugglers’ (23 November 2015) <<https://www.hrw.org/news/2015/11/23/turkey-syrians-pushed-back-border>> accessed 15 January 2016.

¹⁰³ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60, art 31(8)(b). For a discussion, see, e.g., Mikaela Heikkilä, Maija Mustaniemi-Laakso, Suzanne Egan, Graham Finlay, Tamara Lewis, Julia Planitzer, Helmut Sax, Lisa Maria Heschl and Stefan Salomon, *Report critically assessing human rights integration in AFSJ policies* [2015] <<http://www.fp7-frame.eu/wp-content/materiale/reports/22-Deliverable-11.2.pdf>> accessed 10 May 2016; Elspeth Guild and Violeta Moreno-Lax, ‘Current Challenges Regarding the International Refugee Law, with Focus on EU Policies and EU Co-operation with UNHCR’ [2013] *CEPS Paper in Liberty and Security in Europe*, No 59, 2, 14 and 16; ECRE Information Note on Directive 2013/32/EU, 36 and 40; and UNHCR, ‘UNHCR comments on the European Commission’s Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast) COM (2011) 319 final (UNHCR)’, 4.

¹⁰⁴ See, e.g., Elspeth Guild and Violeta Moreno-Lax, ‘Current Challenges Regarding the International Refugee Law, with Focus on EU Policies and EU Co-operation with UNHCR’ [2013] *CEPS Paper in Liberty and Security in Europe* No 59, 16 (referring to information drawn from UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice*, 2010).

¹⁰⁵ See, Proposal for a Regulation of the European Parliament and of the Council Establishing an EU Common List of Safe Countries of Origin for the Purposes of Directive 2013/32/EU of the European Parliament and of the Council on Common Procedures for Granting and Withdrawing International Protection, and Amending Directive 2013/32/EU, COM(2015) 452 final, 9 September 2015. See, also, e.g., Amnesty International, ‘EU: Asylum seekers relocation deal only a small step towards fixing a broken system’ <<http://www.amnesty.nl/nieuwsportaal/pers/eu-asylum-seekers-relocation-deal-only-small-step-towards-fixing-broken-system>> accessed 12 September 2015.

the asylum-seekers to counterproof the presumption of safety in their particular circumstances.¹⁰⁶ Given the specific challenges in legal proceedings and in providing required information in asylum processes that vulnerable migrants typically have,¹⁰⁷ meeting such heightened evidentiary requirements in a short timeframe may constitute a significant threshold for vulnerable migrants to have their specific protection needs taken into account.¹⁰⁸

Acceleration of procedures and shortcomings in due regard for individual protection needs and vulnerabilities are recognised as an issue also with regard to the EU hotspot mechanism designed to manage exceptional migration flows.¹⁰⁹ A hotspot is defined as an area at the external border of the EU that is confronted with disproportionate migratory pressure.¹¹⁰ Hotspots have been set up in certain locations in Greece and Italy, where the domestic authorities can receive operational support from EU agencies to, *inter alia*, swiftly register, identify and fingerprint asylum-seekers as well as to return those who are found not to be in need of protection. Support for the authorities of the frontline Member States is provided by the European Asylum Support Office (EASO), EU Border Agency (Frontex), EU Police

¹⁰⁶ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60, arts 40 and 42.

¹⁰⁷ 'Migrants typically face enormous difficulties in mounting legal challenges. This is especially so if they do not enjoy regular status, and even more so if they are detained or have been removed and thus are no longer present in the country where the challenge takes place.' See, Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015) 506. See, also, UNHCR, 'Asylum-Seekers with Special Needs' <<http://www.unhcr-centraleurope.org/en/what-we-do/caring-for-the-vulnerable/caring-for-the-vulnerable-in-asylum.html>> accessed 20 January 2016.

¹⁰⁸ See, e.g., ECRE, 'Information Note on Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)' <<http://www.ecre.org/component/content/article/41-protection-in-europe/925>> accessed 14 February 2016, 29: 'Because of their particular vulnerability or their reluctance to reveal their experiences immediately, such as in the case of victims of torture or other serious violence, having sufficient time to submit further evidence or documentation is a crucial procedural guarantee.' See, also, *ibid*, 32: '[i]n ECRE's view, asylum applications of unaccompanied children should never be examined in accelerated or border procedures as they are ill-suited to take into account their particular vulnerability and ensure that their need for special procedural guarantees can be addressed in practice'. Note, also, the findings of International Rehabilitation Council for Torture Victims (IRCT), which indicate that victims of torture are 'at risk of being processed within an accelerated procedure in most EU countries'. This places them 'at a greater risk of being returned to their country without a proper and rigorous consideration of all of the evidence in support of their claim' as the 'short time-frames involved in an accelerated procedure fail to take into account the difficulties that a [victim of crime] often faces when disclosing the fact that they have experienced torture'. Also, the shorter time-frames often 'leave little opportunity for an asylum-seeker to seek legal advice, and therefore many asylum-seekers will simply not be aware of what steps they need to take in order to present their claim supported by all relevant evidence'. See, IRCT, 'Recognising victims of torture in national asylum procedures: A comparative overview of early identification of victims and their access to medico-legal reports in asylum-receiving countries' [2013] 66–67. For a discussion, see, Elspeth Guild, 'Conflicting Identities and Securitisation in Refugee Law: Lessons from the EU' in Susan Kneebone, Dallal Stevens and Loretta Baldassar (eds), *Refugee Protection and the Role of Law: Conflicting Identities* (Routledge 2014) 164.

¹⁰⁹ Council Decision (EU) 2015/1523 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece; Council Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

¹¹⁰ European Commission, Commission Communication: Managing the refugees crisis: immediate operational, budgetary and legal measures under the European Agenda on Migration [2015] COM(2015) 490 final/2, Annex 2, 2.

Cooperation Agency (Europol) and EU Judicial Cooperation Agency (Eurojust).¹¹¹ Grave concerns have been raised over the fact that accelerated procedures are an inherent element of the hotspot approach, whereby return decisions are reportedly made on the basis of screening interviews carried out without proper regard taken for procedural safeguards.¹¹² This creates the risk that vulnerabilities become overlooked, especially where vulnerabilities are not directly apparent or remain unreported (as may be the case, for example, for sexual or gender-based violence).¹¹³ Also, where protection needs remain unattended, rejected asylum-seekers risk being pushed into an irregular and undocumented situation which further vulnerabilises them to forms of exploitation such as trafficking and labour exploitation.¹¹⁴ As presently designed, the hotspot mechanism hence contains elements that risk sustaining and enforcing vulnerabilities.

More generally, insufficient recognition of vulnerabilities has been reported to exist also in connection to return of individuals to their countries of origin. Although the Return Directive requires states to take the special needs of vulnerable persons into account when removing third- country nationals,¹¹⁵ such precautions have in some cases reportedly been inadequate.¹¹⁶ An unaccompanied minor may, for example, be returned to her or his country of origin provided ‘adequate reception facilities’ exist,¹¹⁷ with no specific criteria established concerning what constitutes adequate. As several EU Member States have chosen to return unaccompanied minors,¹¹⁸ it is regrettable that the Directive fails to impose a stricter standard in terms of assurances for the protection of the vulnerable. The situation is compounded by the often vague safeguards provided for the protection of vulnerable individuals in the readmission

¹¹¹ European Commission, ‘The Hotspot Approach to Managing Exceptional Migration Flows’, Information Paper, July 2015.

¹¹² OXFAM, ‘EU “hotspots” spread fear and doubt: One year on, the EU response to a Mediterranean tragedy leaves vulnerable people in legal limbo’, OXFAM Media Briefing, 18 April 2016 <<https://www.oxfam.org/en/research/eu-hotspots-spread-fear-and-doubt>> accessed 12 May 2016.

¹¹³ Human Rights Watch, ‘Europe’s Refugee Crisis: An Agenda for Action’ (16 November 2015) <<https://www.hrw.org/report/2015/11/16/europes-refugee-crisis/agenda-action>> accessed 12 May 2016.

¹¹⁴ See, Kadri Soova, ‘Role of Restrictive Migration Policies in Increasing the Vulnerability of Migrants to Irregularity, Exploitation and Trafficking’, PICUM Presentation at the OSCE 15th Alliance against Trafficking in Persons Conference, Vienna, 6–7 July 2015 <<http://www.osce.org/secretariat/173571?download=true>> accessed 12 May 2016, 3; OXFAM, ‘EU “hotspots” spread fear and doubt: One year on, the EU response to a Mediterranean tragedy leaves vulnerable people in legal limbo’, OXFAM Media Briefing, 18 April 2016 <<https://www.oxfam.org/en/research/eu-hotspots-spread-fear-and-doubt>> accessed 12 May 2016; and FRA, *Criminalisation of migrants in an irregular situation and of persons engaging with them* [2014] <http://fra.europa.eu/sites/default/files/fra-2014-criminalisation-of-migrants-0_en_0.pdf> accessed 12 May 2016, 6-7.

¹¹⁵ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98, art 14(1)(d).

¹¹⁶ UNHCR, ‘UNHCR Position on the Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals’ [2008].

¹¹⁷ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98, art 10(2).

¹¹⁸ European Commission, Commission Communication: On EU Return policy [2014] COM(2014) 199 final, 20.

agreements concluded with third countries, in which the focus often lies more in combatting irregular migration than on human rights protection.¹¹⁹

Children born in exile may also become vulnerable due to statelessness. Since under Syrian law only men can pass citizenship to their children — and as roughly 25% of Syrian households have been left fatherless due to the conflict — children born to Syrian women in exile may be ineligible for Syrian citizenship.¹²⁰ Given that the EU Member States do not automatically grant citizenship to children born within their territories — and have largely failed to abide by their obligations under Article 7 of the CRC to ensure that each child within their jurisdiction has the right to a nationality — a growing number of children in Europe are at risk of statelessness.¹²¹ This exposes them to marginalisation and restricts their access to their basic rights within, for example, the fields of education, health and work.¹²²

The increased convergence between immigration control and criminal law is furthermore indicative of the securitisation trend. With the growing resort to administrative detention in managing migration flows — at times implemented in conditions comparable to detention under criminal law — traits of so-called *crimmigration* are discernible in the EU's migration policies and legislation.¹²³ As asylum detention is both enabled by the CEAS¹²⁴ and commonly — at times routinely — used in many EU Member States,¹²⁵ it is

¹¹⁹ See, e.g., UN Human Rights Council, 'Report of the Special Rapporteur on the human rights of migrants, François Crépeau' (17 April 2013) A/HRC/23/46/Add.4, 9. For a discussion, see, Mikaela Heikkilä, Maija Mustaniemi-Laakso, Suzanne Egan, Graham Finlay, Tamara Lewis, Julia Planitzer, Helmut Sax, Lisa Maria Heschl and Stefan Salomon, *Report critically assessing human rights integration in AFSJ policies* [2015] <<http://www.fp7-frame.eu/wp-content/materiale/reports/22-Deliverable-11.2.pdf>> accessed 10 May 2016.

¹²⁰ UNHCR, 'I am Here, I Belong: The Urgent Need to End Childhood Statelessness' (UNHCR 2015) 23.

¹²¹ Louise Osborn and Ruby Russell, 'Refugee crisis creates "stateless generation" of children in limbo' *The Guardian* (Berlin and Antakya, 27 December 2015).

¹²² UNHCR, 'I am Here, I Belong: The Urgent Need to End Childhood Statelessness' (UNHCR 2015). For a discussion on the vulnerability of stateless persons, see, also, David Weissbrodt and Clay Collins, 'The Human Rights of Stateless Persons' in David Weissbrodt and Mary Rumsey (eds), *Vulnerable and Marginalised Groups and Human Rights* (Edward Elgar 2011) 113, in particular 132–138.

¹²³ For a discussion, see, e.g., Joanna Parkin, 'The Criminalisation of Migration in Europe: A State-of-the-Art of the Academic Literature and Research' [2013] *CEPS Paper in Liberty and Security in Europe* no 61. The Criminalisation of Migration in Europe: A State-of-The-Art of the Academic Literature and Research. *Liberty and Security in Europe Papers*, 2; Mark Provera, 'The Criminalisation of Irregular Migration in the European Union' [2015] *CEPS Paper in Liberty and Security in Europe* no 80, 3; and FRA, *Criminalisation of migrants in an irregular situation and of persons engaging with them* [2014].

¹²⁴ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/31, art 28; and Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98, arts 15-18.

¹²⁵ See, e.g., UNHCR, 'UNHCR's Position on the Detention of Asylum-Seekers in Malta' [2013] 4; Amnesty International, 'In detention in Europe' <<http://www.sos-europe-amnesty.eu/in-detention-in-europe-facts-and-figures/>> accessed 12 September 2015; and UNHCR, 'Europe's refugee emergency response update #13: 27 November – 3 December 2015' <<https://undg.org/wp-content/uploads/2015/11/12-UNHCR-Europe-Refugee-Emergency-Response.pdf>> accessed 14 February 2016. On routinely using detention of asylum-seekers, see, e.g., UNHCR, 'UNHCR calls for end to detention of asylum-seekers and refugees' (7 July 2014) <<http://www.unhcr-centraleurope.org/en/news/2014/unhcr-calls-for-end-to-detention-of-asylum-seekers-and-refugees.html>>

worth pointing to research indicating that detention not only accentuates existing vulnerabilities but is also prone to create new vulnerabilities due to social, environmental and personal factors within detention.¹²⁶ Particularly harmful consequences have been reported in this regard in connection with unaccompanied minors and other children.¹²⁷ Despite the special provisions on detention of vulnerable individuals in the CEAS and, for example, the CRC,¹²⁸ asylum detention of children and other particularly vulnerable individuals is common practice in many EU Member States.¹²⁹

E. Interpreting human and fundamental rights through the ‘vulnerability lens’: The ECtHR and CJEU approach

It has been argued above that the notion of ‘vulnerability’ can — and indeed should — be seen as a dynamic and contextual conceptual device to make the law, as well as societal structures and institutions, more responsive to factors that make individuals vulnerable to harm. It has been noted with concern that some of the recent measures that the EU and its Member States have taken in response to the arrival of migrants seem to counteract irregular migration through collective measures at the expense of scrutiny of individual circumstances. The notion of ‘vulnerability’ will be addressed below as a *factor in the interpretation* of obligations and responsibilities arising under human and fundamental rights norms.

As already discussed, addressing vulnerability is critical in terms of attaining substantive equality, that is, the equality of results through the elimination of practices and structures that maintain indirect discrimination.¹³⁰ In this sense, vulnerability can be seen as a *lens* that highlights and individualises harm inflicted on vulnerable persons. Whereas the fact that a group or an individual is found to be vulnerable does not create new human rights obligations, it ‘reinforces and specifies’ the duties of the states as

accessed 14 February 2016. See, also, UNHCR, ‘Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention’ [2012]; and UNHCR, ‘Beyond Detention: A Global Strategy to support Governments to end the detention of asylum-seekers and refugees’ [2014].

¹²⁶ JRS-Europe, ‘Becoming Vulnerable in Detention: Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union (The DEVAS Project)’ (JRS-Europe 2010) 11–12.

¹²⁷ JRS-Europe, ‘Becoming Vulnerable in Detention: Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union (The DEVAS Project)’ (JRS-Europe 2010) 13.

¹²⁸ See, e.g., Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98, art 17(1); and Convention on the Rights of the Child (CRC, adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 37(b).

¹²⁹ See, e.g., European Commission, Commission Communication: On EU Return policy [2014] COM(2014) 199 final, 19. For a discussion, see, Chapter III and Chapter IV.C.c.3.

¹³⁰ On substantive equality, see, e.g., Oddný Mjöll Arnardóttir, ‘Non-Discrimination in International and European Law: Towards Substantive Models’ (2007) 25(2) Nordisk Tidsskrift for Menneskerettigheter 140, 143–144.

regards that group or individual.¹³¹ What this reinforcement and specification of obligations entails will be outlined in greater detail below.

Before entering into this discussion it should be noted that the EU institutions — and EU Member States' authorities when they are implementing EU law — are bound by the EU Charter of Fundamental Rights. In terms of content, the Charter is similar to the European Convention on Human Rights (ECHR) and the European Social Charter.¹³² Additionally, Article 6(c) of the Treaty on European Union (TEU) sets forth that the rights as guaranteed by the ECHR are to constitute general principles of EU law.¹³³ It is also worth pointing out that Article 6(2) TEU provides for the EU's accession to the ECHR and that the EU is a signatory to the CRPD.¹³⁴ In addition, individual EU Member States are bound by their respective commitments under regional and international human rights treaties, including instruments designed for specific protection of particularly vulnerable individuals and groups.

1. Recognition of vulnerability highlights negative consequences

Often, as Peroni and Timmer point out, when looking through the vulnerability lens one sees that the effects of harm are more severe on a particularly vulnerable person than on a person that is less vulnerable, or, as one may also put it, more resilient to vulnerability.¹³⁵ In this sense, the vulnerability lens functions as a *magnifying glass* to point to the exacerbated dimension that the harm inflicted on a person takes due to the vulnerability or reduced resilience of the person in question.¹³⁶ Notably, vulnerability is

¹³¹ Ulrike Brandl and Philip Czech, 'General and Specific Vulnerability of Protection-Seekers in the EU: Is There an Adequate Response to Their Needs?' in Francesca Ippolito and Sara Iglesias Sánchez (eds), *Protecting Vulnerable Groups: The European Human Rights Framework* (Hart 2015) 253.

¹³² 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention [...], the meaning and scope of those rights shall be the same as those laid down by the [...] Convention. This provision shall not prevent Union law providing more extensive protection.' See Article 52(3) EU Charter of Fundamental Rights.

¹³³ Article 6 TEU establishes a 'tripartite interwoven system for the protection of fundamental rights in the EU'. See Hermann-Josef Blanke, 'The Protection of Fundamental Rights in Europe' in Hermann-Josef Blanke and Stelio Mangiameli (eds), *The European Union after Lisbon: Constitutional Basis, Economic Order and External Action* (Springer 2012) 159, 163. Article 6 establishes that: (1) the Charter of Fundamental Rights shall have the same legal value as the Treaties; (2) that the Union shall accede to the ECHR; and (3) that fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States 'shall constitute general principles of the Union's law'. Furthermore, secondary legislation contains instruments with human rights content. E.g., Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1.

¹³⁴ See, however, Opinion pursuant to Article 218(11) TFEU – Draft international agreement – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the draft agreement with the EU and FEU Treaties, Opinion 2/13, 18 December 2014. Also see, e.g., Steve Peers, 'The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection' [2014] *EU Law Analysis* [blog], 18 December 2014.

¹³⁵ Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11(4) *International Journal of Constitutional Law* 1056, 1079.

¹³⁶ Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11(4) *International Journal of Constitutional Law* 1056, 1079.

of relevance when assessing whether the severity of a given conduct amounts to torture or to inhuman or degrading treatment or punishment under Article 3 of the ECHR.¹³⁷ Greece's failure to take vulnerability into account was explicitly pointed to by the ECtHR in making a finding of an Article 3 violation in the *Rahimi*, *Tarakhel* and *M.S.S.* cases.

In *Rahimi*, which concerned a minor who had been held in an adult detention centre in Greece, the Court interpreted the applicant's 'extreme' vulnerability — arising from his age and personal circumstances as an unaccompanied minor — as a factor intensifying the harm caused to him through detention. Acknowledging that the length of the detention was only two days, the Court found the personal circumstances of the applicant to be such that the severe shortcomings in the detention conditions in terms of hygiene, accommodation and infrastructure amounted to degrading treatment as defined under Article 3 of the ECHR.¹³⁸ Referring to its earlier case law, the Court pointed out that the assessment of severity of ill-treatment under Article 3 is relative in essence and shall take account of different circumstances, including the context, duration and physiological and mental effects of such treatment, as well as, where relevant, the age, gender, and state of health of the victim.¹³⁹

The Court gave a comparable judgment in *M.S.S.*, where it deliberated on alleged violations of Articles 3 and 13 by Greece and Belgium. Again, recognising the fact that the detention of the applicant had lasted for brief periods, the Court held that the particularly vulnerable position of the applicant as an asylum-seeker 'accentuated' the distress arising from the conditions of detention that he had endured, which therefore constituted a violation of Article 3.¹⁴⁰ A similar approach was adopted in the *Tarakhel* case. The particularly vulnerable status of children due to their dependency and specific needs in that case led the Court to find a violation of Article 3 of the ECHR should the applicants be returned to Italy without assurance of individual guarantees of appropriate treatment.¹⁴¹

2. Recognition of vulnerability specifies obligations incumbent on states

The vulnerability of individuals should, in other words, be taken into account in assessing the suitability of institutional and other arrangements to their specific circumstances. In this sense, the vulnerability lens works to *specify*, or to provide content to, the often open-ended obligations incumbent upon states in order to achieve substantive equality. Markedly, in *M.S.S.* the ECtHR held, with regard to the inaction by

¹³⁷ Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11(4) *International Journal of Constitutional Law* 1056, 1079–1080. See also Ulrike Brandl and Philip Czech, 'General and Specific Vulnerability of Protection-Seekers in the EU: Is There an Adequate Response to Their Needs?' in Francesca Ippolito and Sara Iglesias Sánchez (eds), *Protecting Vulnerable Groups: The European Human Rights Framework* (Hart 2015) 253–262, with reference to, e.g. *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR 21 January 2011), paras 232–233.

¹³⁸ *Rahimi v Greece* App no 8687/08 (ECtHR 5 July 2011), para 86.

¹³⁹ *Rahimi v Greece* App no 8687/08 (ECtHR 5 July 2011), para 86.

¹⁴⁰ *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR 21 January 2011), paras 232–234. See, also, para 251.

¹⁴¹ *Tarakhel v Switzerland* App no 29217/12 (ECtHR 4 November 2014), para 122. See, also, paras 116–121.

Greece to attend to the basic needs of the applicant, that ‘given the particular state of insecurity and vulnerability in which asylum-seekers are known to live in Greece, the Court considers that the Greek authorities should not simply have waited for the applicant to take the initiative of turning to the police headquarters to provide for his essential needs’.¹⁴² A *positive obligation* was hence incumbent on the state to take measures in order to address the specific vulnerable situation of the applicant. This was reiterated in *Tarakhel*, where vulnerability due to asylum-seeker status was seen to give rise to an *enhanced* obligation on the state to take action. Due to lack of or reduced resilience states are, according to the Court, to take ‘appropriate measures to ensure that a child who is seeking to obtain refugee status enjoys protection and humanitarian assistance’.¹⁴³ In other words, an obligation of ‘“special protection”’ was applicable in the case of children, whether unaccompanied or accompanied by their parents.¹⁴⁴ This is visible likewise in the CJEU decision in the *MA, BT, DA* case, in which the Court held that Dublin procedures should not be prolonged ‘more than is strictly necessary’ in the case of unaccompanied minors whom it considered to constitute ‘a category of particularly vulnerable persons’.¹⁴⁵

Also, as Timmer notes, a finding of vulnerability, in this case of ‘extreme vulnerability’ arising from the compounded effect of the status of the applicant as a child and an asylum-seeker, was found by the ECtHR in *Muskhadzhiyeva and Others v Belgium* to override the status of the applicant as an ‘*étranger en séjour illégal*’, that is, an illegal migrant.¹⁴⁶ This had consequences in terms of obligations incumbent on the state. In essence, the Court held, with reference to Articles 1 and 3 of the ECHR, that the protection of the rights arising under the ECHR was to be *efficient*, especially with regard to children and to other vulnerable persons.¹⁴⁷ To this end, adequate and appropriate measures were to be taken to satisfy the positive obligations arising under Article 3 and in order to protect the children seeking asylum as specified under the CRC, in particular Article 22.¹⁴⁸ The need to adopt such special measures was also emphasised by the CJEU in the *Saciri* case, where the Court held that, where the ‘material reception conditions are provided

¹⁴² *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR 21 January 2011), paras 232–234. See, also, paras 259 and 263.

¹⁴³ *Tarakhel v Switzerland* App no 29217/12 (ECtHR 4 November 2014), para 99.

¹⁴⁴ *Tarakhel v Switzerland* App no 29217/12 (ECtHR 4 November 2014), para 119. See, also, paras 120–122.

¹⁴⁵ Case C-648-/11, *The Queen, on the application of MA, BT, DA v Secretary of State for the Home Department* [2013] CJEU 6 June 2013, para 55.

¹⁴⁶ *Muskhadzhiyeva and Others v Belgium* App no 41442/07 (ECtHR 19 January 2010), para 56. For a discussion, see, Alexandra Timmer, ‘A Quiet Revolution: Vulnerability in the European Court of Human Rights’ in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013) 161–162.

¹⁴⁷ ‘La Cour rappelle que, combinée avec l’article 3, l’obligation que l’article 1 de la Convention impose aux Hautes Parties contractantes de garantir à toute personne relevant de leur juridiction les droits et libertés consacrés par la Convention leur commande de prendre des mesures propres à empêcher que lesdites personnes ne soient soumises à des tortures ou à des peines ou traitements inhumains ou dégradants. Ces dispositions doivent permettre une protection efficace, notamment des enfants et autres personnes vulnérables et inclure des mesures raisonnables pour empêcher des mauvais traitements dont les autorités avaient ou auraient dû avoir connaissance (*Mubilanzila Mayeke et Kaniki Mitunga* précité, § 53).’ *Muskhadzhiyeva and Others v Belgium* App no 41442/07 (ECtHR 19 January 2010), para 55.

¹⁴⁸ ‘[...] obligation de protéger les enfants et d’adopter des mesures adéquates au titre des obligations positives découlant de l’article 3 de la Convention (*ibid.* § 55).’ *Muskhadzhiyeva and Others v Belgium* App no 41442/07 (ECtHR 19 January 2010), para 58. Also see paras 56 and 62.

exclusively in the form of financial allowances', such allowances shall, in the interest of family unity, enable minor children of asylum-seekers to reside with their parents.¹⁴⁹

In parallel, ECtHR case law suggests that a vulnerability assessment is one of the elements to be included in the proportionality analysis that the states have to conduct when making use of their margin of appreciation under the ECHR.¹⁵⁰ In this sense, the requirement that vulnerability is taken into account can be seen as a *procedural requirement*¹⁵¹ through which substantive equality is to be strived for.¹⁵² This procedural requirement has become so important in the ECtHR case law that it is arguably not possible for a state to pass the proportionality test where it has neglected to take individual vulnerability into account.¹⁵³

How best to balance between the consideration of particular vulnerability and other, for example, economic, considerations will depend on the facts of any given case and the level and type of vulnerability.¹⁵⁴ While no established criteria exist to that end, it appears on the basis of the case law quoted above that such a balancing exercise should be guided by the principle of substantive equality, aiming at removing institutional and other impediments for the full enjoyment of human rights by vulnerable individuals.

F. Structure of the report

Against the background set out in this Introduction, the six case studies of the report will address the conceptualisation and operationalization of the notion of 'vulnerability' in different dimensions of asylum and migration policies. Focusing on the questions of access to Europe and the protection of migrants' rights in *border controls*, Chapter II analyses how vulnerabilities are taken into account in the externalisation of EU border control. The subsequent two case studies consider the question of how the special protection needs of vulnerable groups and individuals are taken into account in the *reception*

¹⁴⁹ Case C-79/13, *Federaal agentschap voor de opvang van asielzoeker v Selver Saciri et al* [2014] CJEU 27 February 2014, para 45.

¹⁵⁰ Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11(4) *International Journal of Constitutional Law* 1056, 1079–1082, with reference to, e.g., *Yordanova and Others v Bulgaria* App no 25446/06 (ECtHR 24 April 2012), para 129.

¹⁵¹ Alexandra Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights' in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013) 164–165.

¹⁵² For a discussion, see, e.g., Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11(4) *International Journal of Constitutional Law* 1056, 1076–1077.

¹⁵³ Alexandra Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights' in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013) 164–165.

¹⁵⁴ Alexandra Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights' in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013) 165.

conditions in selected EU Member States. More specifically, Chapter III explores asylum detention in Italy's southern borders and Chapter IV considers the guardianship and accommodation of unaccompanied minors arriving in Greece. Issues of asylum *qualification* are discussed in Chapter V, with a focus on gender violence and gender-based persecution as grounds for asylum claims. The final two chapters of the study examine questions related to the *integration* of migrants with vulnerabilities. Chapter VI addresses the protection of the economic and social rights of unskilled migrant workers within the EU, and in particular in Ireland. In a similar vein, Chapter VII outlines and discusses the challenges of integration and access to basic rights faced by stateless persons in South Asia. Attention is also paid to the question of how the EU has positioned itself in its external policies in relation to the situation of stateless people in South Asia.

II. The instruments of pre-border control in the EU: A new source of vulnerability for asylum-seekers? (Author: Maria Nagore Casas)

A. Introduction

One of the most controversial issues regarding the legal protection of refugees is the determination of the exact scope of states' obligations towards them, in particular, towards those who have not yet crossed the state of destination's borders and find themselves outside the territory of that state in which they wish to seek protection. Governments, international organisations, scholars and policy-makers' views on the territorial scope of these obligations differ due, among other reasons, to the lack of clarity regarding paramount elements of the legal framework to be applied, such as the status of individuals under international law, the way in which international treaties should be interpreted or under which circumstances the obligations of states vis-à-vis individuals are engaged.¹⁵⁵ States tend to consider that their obligations to protect do not arise until the refugee has crossed their frontiers, while at the same time their involvement in extraterritorial activities aimed at preventing refugees from reaching their territories has increased significantly.

There are many cases in practice which illustrate the tension between states' obligations to protect and their deterrence activities: according to the UK government, the posting of immigration officers in a foreign airport in order to refuse leave to enter into the UK to undesired passengers is not contrary to the 1951 Refugee Convention.¹⁵⁶ The Italian government argues that systematic 'push-backs' of Libyan migrants in foreign territorial waters are lawful under the bilateral agreements signed between Italy and Libya between 2007 and 2009.¹⁵⁷ The Spanish government argues that the interception of a boat in the territorial waters of a third country does not amount to an exercise of jurisdiction.¹⁵⁸ These are just a few examples of the externalisation of border control activities by states, as well as their attempt to consider these activities lawful and respectful of their legal obligations under the international regime of protection of refugees, in particular regarding the principle of *non-refoulement*.¹⁵⁹

¹⁵⁵ María-Teresa 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' (2006) 18(2–3) *International Journal of Refugee Law* 571, 571–572.

¹⁵⁶ *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55.

¹⁵⁷ European Court of Human Rights, Grand Chamber, *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR (GC) 23 February 2012) para 92.

¹⁵⁸ Committee against Torture, *J.H.A. v Spain*, Communication no 323/2007, CAT/C/41/D323/2007, para 6.1.

¹⁵⁹ This principle is laid down in Article 33.1 of the Convention relating to the Status of Refugees, adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950 (Refugee Convention). According to this article: No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'. It is also established in some universal and regional human rights treaties either expressly such as in Article 3 of the Convention against Torture, Article 22.8 of the American

Despite this attempt by states to pretend to be in compliance with international refugee law, many commentators postulate that the increasing extraterritorial activity of states has the intention of precisely avoiding their obligations of protection once the individuals manage to cross their frontiers.¹⁶⁰ States have developed a complex system of deterrence measures, which in practice impede any contact by refugees with the territory of the receiving state. It is thereby often argued by NGOs and scholars that there is a huge gap between the rhetoric of states and their attitudes in practice.¹⁶¹ On the one hand, states are pledging their commitment to refugee law, but on the other, they are not keen to assume obligations in practice. This ‘schizophrenic attitude’ of states towards international refugee law has given rise, in the words of Gammeltoft-Hansen and Hathaway, to the ‘politics of non-entrée’ aimed at ‘ensuring that refugees shall not be allowed to arrive.’¹⁶²

In addition to ‘politics of non-entrée’, several terms have been used by scholars to refer to this phenomenon, which is subject to increasing attention by literature and media: ‘outsourcing, externalisation, offshoring or extraterritorialisation of migration management; external migration governance; remote migration policing’;¹⁶³ ‘de-territorialisation of border control’;¹⁶⁴ ‘politics of extraterritorial processing’;¹⁶⁵ ‘neo-refoulement’;¹⁶⁶ or ‘limes imperii’.¹⁶⁷ All of these terms refer to the various types of interception measures used by states against asylum-seekers and refugees, measures

Convention on Human Rights and Article 2.3 of the OAU Convention governing the specific aspects of refugee problems in Africa, or implicitly through the prohibition of torture or other cruel, inhuman or degrading treatment or punishment such as in Article 3 of the European Convention on Human Rights (ECHR) and Article 7 of the International Covenant on Civil and Political Rights (ICCPR).

¹⁶⁰ Thomas Gammeltoft-Hansen and James C. Hathaway, ‘Non-Refoulement in a World of Cooperative Deterrence’ (2015) 53 *Columbia Journal of Transnational Law* 235. Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007), 369–371; Elspeth Guild and Didier Bigo, ‘The transformation of European Border Controls’ in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010), 257; Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 166; Violeta Moreno Lax, ‘Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea’ (2011) 23(2) *International Journal of Refugee Law* 174.

¹⁶¹ Thomas Gammeltoft-Hansen and James C. Hathaway, ‘Non-Refoulement in a World of Cooperative Deterrence’ (2015) 53 *Columbia Journal of Transnational Law* 235. Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007), *Doctors Without Borders, Migrants, Refugees and Asylum Seekers: Vulnerable People at Europe’s Doorstep* (MSF 2009); CEAR (Comisión de Ayuda al Refugiado) Euskadi, *The Externalization of Borders: Migration Control and the Right to Asylum: A Framework for Advocacy* (CEAR 2012).

¹⁶² Thomas Gammeltoft-Hansen and James C. Hathaway, ‘Non-Refoulement in a World of Cooperative Deterrence’ (2015) 53 *Columbia Journal of Transnational Law* 235, 241.

¹⁶³ These terms are listed by Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 3. See also Frank McNamara, ‘Member State Responsibility for Migration Control within Third States — Externalisation revisited’ (2013) 15 *European Journal of Migration and Law* 319, 326.

¹⁶⁴ Seline Trevisanut, ‘The Principle of Non-Refoulement and the De-Territorialization of Border Control at Sea’ (2014) 27 *Leiden Journal of International Law* 661.

¹⁶⁵ Karin Fathimath Afeef, ‘The Politics of Extraterritorial Processing: Offshore Asylum Policies in Europe and the Pacific’ [2006] *Refugee Studies Centre Working Paper* no 36, 2.

¹⁶⁶ Jennifer Hyndman and Alison Mountz, ‘Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe’ (2008) 43(2) *Government and Opposition* 249.

¹⁶⁷ Alejandro del Valle Gálvez, ‘Unión Europea, Crisis de Refugiados y Limes Imperii’ (2016) 38 *Revista General de Derecho Europeo* 1.

which are usually developed by the wealthiest states, notably the United States, Australia, Canada and EU Member States.

Many factors explain state engagement in extraterritorial activities. Among them, one which has to be mentioned in order to frame the discussion is that in the post-9/11 context asylum is increasingly categorised as a 'security issue', including by the EU Member States. This has caused a shift from legal discourses based on the protection of refugees to 'more geopolitical projects based on security.'¹⁶⁸ The legal dimension of refugee protection based on the guarantees provided by international instruments has given way to a political dimension where the priority is the management of migrant flows in regions of origin and preventing asylum seekers from reaching the territories of states.¹⁶⁹ This 'securitization of asylum' is also present in the EU Schengen Acquis. According to the Council of the EU, 'The control and surveillance of borders [...] help protect our citizens from threats to their security' and 'coherent, effective common management of the external borders of the Member States of the Union will boost security' and 'serves to secure continuity in the action undertaken to combat terrorism, illegal immigration and trafficking in human beings'.¹⁷⁰

The 'near-obsession'¹⁷¹ of States with migration control contrasts with the human needs and vulnerability of asylum-seekers seeking protection and safety outside their countries of origin. The main argument of this section is that the 'politics of non-entrée' constitutes in itself another source of vulnerability for asylum-seekers. In addition to the causes of persecution in their own countries and the 'contextual' and 'compounded' vulnerability they face as explained in Section I.D above, what is contended here is that asylum seekers' vulnerability is exacerbated by some of the pre-border control instruments that will be analysed in this section. One alarming example is the direct relationship between migration control and human smuggling, which has been denounced by several authors and NGOs.¹⁷² This phenomenon has been described as 'a never-ending race between border authorities and ever more inventive human smugglers', which in practical terms implies that for each loophole closed by border authorities two new modes of unauthorised entry come up.¹⁷³ In addition, the urgency of some EU Member States to combat irregular migration has exposed refugees to serious risks by giving rise to episodes of non-rescue, disputes

¹⁶⁸ Jennifer Hyndman and Alison Mountz, 'Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe' (2008) 43(2) *Government and Opposition* 249, 251. See, also, Chapter I.D.2.b.

¹⁶⁹ Jennifer Hyndman and Alison Mountz, 'Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe' (2008) 43(2) *Government and Opposition* 249, 250–252. See also Alejandro del Valle Gálvez, 'Unión Europea, Crisis de Refugiados y Limes Imperii' (2016) 38 *Revista General de Derecho Europeo* 1, 13; and Mitsilegas Valsamis, 'Immigration Control in an Era of Globalization: Deflecting Foreigners, Weakening Citizens and Strengthening the State' (2012) 19(1) *Indiana Journal of Global Legal Studies* 3, 45–59.

¹⁷⁰ Council of the European Union, 'Plan for the management of the external borders of the Member States of the European Union' [2002] 10019/02, paras 1 and 4.

¹⁷¹ Thomas Gammeltoft-Hansen and James C. Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 *Columbia Journal of Transnational Law* 235, 236.

¹⁷² Thomas Gammeltoft-Hansen and James C. Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 *Columbia Journal of Transnational Law* 235, 237; CEAR, *The Externalization of Borders: Migration Control and the Right to Asylum: A Framework for Advocacy* (CEAR 2012), 9.

¹⁷³ Thomas Gammeltoft-Hansen and James C. Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 *Columbia Journal of Transnational Law* 235, 237.

over responsibility towards refugees and diversion of ships to third countries' ports.¹⁷⁴ The Red Cross has also noted with concern that some EU migration policy choices expose refugees to great vulnerabilities along their way to the EU and Schengen area, notably violence and human-trafficking and dangerous journeys to reach the EU's external borders.¹⁷⁵ The use by migrants of dangerous routes to Europe in the absence of regular and safer migration opportunities has indeed been considered a violation of the right to life.¹⁷⁶ The Commissioner for Human Rights of the Council of Europe identified the journey of migrants to Europe as one of the points in the migration cycle where vulnerability is greatest, and noted that one of the drivers of vulnerability is the 'excessive use of force by law enforcement officials charged with border control.'¹⁷⁷ Furthermore, it must be stressed that the most urgent need of refugees is to secure entry into a territory where they can find safety from the circumstances that led them to flee. Restrictions to this basic need may have serious consequences for refugees' protection: refugees denied entry into a country are likely to be returned to the risk of persecution in their countries of origin or to be condemned to 'perpetual orbit' in search of a state which allows them to enter.¹⁷⁸

In spite of the increasing contextual and compounded vulnerabilities of asylum seekers, these state practices pose a variety of legal issues as they challenge not only the international legal framework for the protection of refugees, notably the principle of *non-refoulement*, but also well-established human rights such as the right to freedom of movement¹⁷⁹ and the right to leave any country, including one's own country.¹⁸⁰ States that through these measures obstruct access to asylum procedures or impose barriers on the individual's right to leave any country may breach their obligations under the Refugee Convention and the human rights treaties to which they are party. In addition, although the extraterritorial application of the ECHR to these state practices will not be studied in this section, it is necessary to recall that all EU Member States are parties to this Convention and consequently they are bound by the jurisprudence of the ECtHR regarding vulnerability of asylum-seekers. It can be inferred from this jurisprudence that an asylum-seeker's vulnerability is 'inherent in his situation of asylum seeker'.¹⁸¹ This implies that every asylum-seeker must be deemed to be vulnerable, regardless of their particular

¹⁷⁴ Violeta Moreno Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23(2) International Journal of Refugee Law 174.

¹⁷⁵ Red Cross EU Office, 'Addressing the Vulnerabilities linked to Migratory Routes to the European Union', RCEU 12/2015-002 Position Paper 1.

¹⁷⁶ European Parliament, Directorate-General for External Policies, Migrants in the Mediterranean: Protecting human rights (Study by Samuel Cogolati, Nele Verlinden and Pierre Schmitt) [2015] EP/EXPO/B/DROI/2015/01, 30.

¹⁷⁷ Council of Europe, Commissioner for Human Rights, The Human rights of irregular migrants in Europe, CommDH/IssuePaper(2007)1, 3 and 8–9.

¹⁷⁸ James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005), 279.

¹⁷⁹ Universal Declaration of Human Rights (UDHR), adopted by resolution 217 A (III) of the UN General Assembly in Paris on 10 December 1948, art 13(1).

¹⁸⁰ International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, art 12(2) and UDHR, art 13(2).

¹⁸¹ *M.S.S v Belgium and Greece* App no 30696/09 (ECtHR 21 January 2011).

circumstances. They are vulnerable because of their belonging to this group¹⁸² and States should consider this inherent vulnerability when implementing their policies.

The aim of this chapter is to analyse some of these instruments of pre-border control implemented within the EU in order to (i) assess to what extent they generate or increase refugees' vulnerabilities and (ii) to discuss some of the legal problems regarding their compatibility with the international legal framework for the protection of refugees, notably with the principle of *non-refoulement* set forth in the 1951 Refugee Convention and some of the main human rights law instruments.¹⁸³ These problems will be addressed in section C below, whilst section B will provide an overview of the main instruments of pre-border control carried out by the EU and the EU Member States. Finally, section D will provide some tentative conclusions and recommendations.

B. The main EU and Member States' instruments of pre-border control

1. Background

At the EU level, extraterritorial practices to control borders have to be historically framed in the process of European integration and the abolition of internal borders to facilitate the freedom of movement of persons, capital and goods. Once an internal space without borders was created, the protection of this space against the entrance of undesired categories of persons, capital and goods became a clear priority within the EU.¹⁸⁴ As the Preamble of the Schengen Borders Code (SBC) states, 'the creation of an area in which persons may move freely is to be flanked by other measures' and 'the common policy on the crossing of external borders, as provided for by Article 62(2) of the Treaty, is such a measure.'¹⁸⁵

The need to control the external borders of the EU appeared at the very beginning of the shaping of the EU immigration and asylum policy. In particular, some authors situate the origins of the externalisation of immigration policies by the EU in the concept of 'preventive protection' introduced in 1993 by the then-UN High Commissioner for Refugees, Sadako Ogata, which was promptly adopted by the EU institutions. Ogata emphasized the 'right to remain in one's home country' over the traditional dominant discourse of the 'right to leave'. This concept served as a basis for the creation of an 'incremental and invisible policy

¹⁸² Ulrike Brandl and Philip Czech, 'General and Specific Vulnerability of Protection-Seekers in the EU: Is There an Adequate Response to Their Needs?' in Francesca Ippolito and Sara Iglesias Sánchez (eds), *Protecting Vulnerable Groups: The European Human Rights Framework* (Hart Publishing 2015) 249–251.

¹⁸³ See above footnote 160.

¹⁸⁴ María-Teresa 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' (2006) 18(2–3) *International Journal of Refugee Law* 571, 572.

¹⁸⁵ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2006] OJ L105 (consolidated version 2013), Preamble para 2.

wall around the EU'.¹⁸⁶ In the 1994 Communication on Immigration and Asylum Policies the European Commission identified three main elements of these policies: 'Taking action on migration pressure, 'Controlling migration flows' and 'Strengthening integration policies for the benefit of legal immigrants.'¹⁸⁷ The protection of refugees and other persons in need of international protection were addressed within the second area (controlling migration flows) along with admission policies and measures to fight against illegal migration. This threefold distinction between legal immigration, illegal immigration and asylum has characterised this area of European policy since its very beginning. Border control and other migration enforcement measures reflect this distinction. As stated in the 1994 Communication:

The first task in controlling migration is to formulate basic principles in order to reflect the distinction between migration pressure and other forms of migration. Admission policies will necessarily represent this distinction: they cannot be purely restrictive as they should respect international obligations and humanitarian traditions in general. Hence, controlling migration does not necessarily imply bringing it to an end: it means migration management.¹⁸⁸

However, as will be discussed below, one of the main flaws in the European immigration and asylum policy is precisely the lack of an effective distinction between these different categories in the context of the current mixed flows of migrants.¹⁸⁹

The 1994 immigration and asylum policy proposal relied on strong cooperation with the countries of origin of refugees. This external dimension of the policy, as will be discussed in greater detail below, has since been present in all the EU's policy formulation documents: the Tampere European Council of October 1999,¹⁹⁰ the 2004 Hague Programme,¹⁹¹ the 2005 Global Approach to Migration,¹⁹² the 2008 European Pact on Immigration and Asylum,¹⁹³ the 2010 Stockholm Programme,¹⁹⁴ and the new 2015 European Agenda on Migration.¹⁹⁵ An important feature of the EU's immigration and asylum policy is precisely the distinction between the internal and the external dimensions of this policy. In parallel to the system of

¹⁸⁶ Jennifer Hyndman and Alison Mountz, 'Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe' (2008) 43(2) *Government and Opposition* 249, 252 and 262.

¹⁸⁷ Commission of the European Communities, Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies [1994] COM(94) 23 final.

¹⁸⁸ Commission of the European Communities, Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies [1994] COM(94) 23 final, para 70.

¹⁸⁹ Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 165–166.

¹⁹⁰ European Parliament, Presidency Conclusions, Tampere European Council 15 and 16 October 1999.

¹⁹¹ European Council, The Hague Programme: Strengthening freedom, security and justice in the European Union [2005] OJ C53/1.

¹⁹² European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The Global Approach to Migration and Mobility [2011] COM(2011) 743 final.

¹⁹³ Council of the European Union, European Pact on Immigration and Asylum [2008] 13440/08 ASIM 72.

¹⁹⁴ European Council, The Stockholm Programme — An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1.

¹⁹⁵ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration [2015] COM(2015) 240 final.

rules which sets forth entry conditions into the EU, admissibility criteria and enforcement measures, laid down mainly in the SBC¹⁹⁶ and the Common European Asylum System, the EU has developed an external dimension of this policy which comprises, on the one hand, a set of instruments based on the remote control of the EU's external borders ('Integrated management of the external borders') and, on the other hand, those measures aimed at enhancing the capacity in third countries to 'handle migratory flows and protracted refugee situations' (External Asylum Policy).¹⁹⁷

The instruments which will be discussed in this section respond to the concept of 'Integrated Management of the External Borders'. This concept was first established by the European Commission in its 2002 Communication entitled 'Towards Integrated Management of the External Borders of the Member States of the European Union',¹⁹⁸ and subsequently adopted by the Justice and Home Affairs Council in its 'Plan for the management of the external borders of the Member States of the European Union'.¹⁹⁹ The concept refers to the establishment of a 'framework of an integrated strategy which takes progressively into account the multiplicity of aspects to the management of the external borders' of the EU.²⁰⁰ Three specific components can be identified in this strategy: (i) a common corpus of legislation, in particular the SBC; (ii) operational cooperation between EU Member States, including cooperation implemented through Frontex, and (iii) solidarity between Member States by means of the establishment of an External Borders Fund.²⁰¹ This strategy is strongly focused on ensuring security at external borders²⁰² and is also based on the idea that border controls are more effective if they are implemented across the various stages of an immigrant's travel towards the EU.²⁰³

¹⁹⁶ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2006] OJ L105/1.

¹⁹⁷ European Council, The Stockholm Programme — An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, para 6.2.3. See Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 165.

¹⁹⁸ Commission of the European Communities, Communication from the Commission to the Council and the European Parliament 'Towards Integrated Management of the External Borders of the Member States of the European Union' [2002] COM(2002) 233 final.

¹⁹⁹ Council of the European Union, 'Plan for the management of the external borders of the Member States of the European Union' [2002] 10019/02.

²⁰⁰ Commission of the European Communities, Communication from the Commission to the Council and the European Parliament 'Towards Integrated Management of the External Borders of the Member States of the European Union' [2002] COM(2002) 233 final, para 6.

²⁰¹ Council of the European Union, Council Conclusions on Integrated Border Management, 2768th Justice and Home Affairs Council meeting Brussels, 4–5 December 2006, 1.

²⁰² According to the Annex II of the 2002 Plan for the management of the external borders adopted in 2002 by the Council (Annex II), the management of external borders comprise: (i) checks and surveillance at external borders; (ii) gather, analyse and exchange any specific intelligence or general information enabling the border guard to analyse the risk that a person, object or asset constitutes for the internal security of the common area of freedom of movement, law and order or the national security of the Member States, (iii) analyse the development of the threats likely to affect the security of the external borders and (iv) anticipate the needs as regards staff and equipment to ensure security at external borders.

²⁰³ Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 172.

Four main instruments used by the EU can be identified within the concept of ‘integrated border management’: the EU Visa Regime, carrier sanctions, Immigration Liaison Officers (ILOs) and operations coordinated by Frontex.²⁰⁴ These so called ‘traditional non-entrée policies’ have given way to a ‘new generation of non-entrée policies’ based on cooperation with third countries, notably diplomatic relations and financial and technical aid.²⁰⁵ This section will focus on the instruments belonging to the EU’s concept of integrated border management.

Recently, on 15 December 2015 the European Commission adopted a new set of measures to manage Europe’s external borders, including the creation of a European Border and Coast Guard²⁰⁶ and a European travel document for the return of illegally staying third-country nationals.²⁰⁷ In addition, on 6 April 2016 the Commission adopted its Communication entitled ‘Towards a reform of the Common European Asylum System and Enhancing Legal Avenues to Europe’.²⁰⁸ In this Communication, one of the most controversial ‘new generation measures’, that is, the signing of a Joint Action Plan with Turkey in October 2015 in the current context of the Syrian refugee crisis in Europe, is deemed as a ‘legal channel of resettlement’ and a ‘mechanism to substitute irregular and dangerous migrant crossing from Turkey to the Greek islands’.²⁰⁹ Under this Agreement the EU undertakes, among other commitments, the mobilising of funds (3 billion euro) to support Turkey in coping with the challenge of the Syrian refugee crisis while Turkey undertakes, among other commitments, to ‘further strengthen the interception capacity of the Turkish Coast Guard’, ‘step up cooperation with Bulgarian and Greek authorities to prevent irregular migration across the common land borders’, and ‘pursue the progressive alignment of Turkish visa policy, legislation and administrative capacities notably vis-à-vis the countries representing an important source of illegal migration for Turkey and the EU’.²¹⁰

This Joint Action Plan was highly criticised because it ignored the conditions of poverty suffered by the over 2 million refugees that Turkey has already received, as well as Turkey’s poor human rights record and its inadequate asylum system. In fact, by the end of 2015 forced returns by Turkey of refugees and asylum-

²⁰⁴ Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 171–184.

²⁰⁵ Thomas Gammeltoft-Hansen and James C. Hathaway, ‘Non-Refoulement in a World of Cooperative Deterrence’ (2015) 53 *Columbia Journal of Transnational Law* 235, 243. These authors include also among these new generation practices the deployment of officials in foreign states, such as the European ILO, and the use of international agencies in order to intercept refugees, such as the operations coordinated by FRONTEX.

²⁰⁶ European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC [2015] COM(2015) 671 final, 2015/0310 (COD).

²⁰⁷ European Commission, Proposal for a Regulation of the European Parliament and of the Council on a European travel document for the return of illegally staying third-country nationals [2015] COM(2015) 668 final, 2015/0306 (COD).

²⁰⁸ European Commission, Communication from the Commission to the European Parliament and the Council, Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe [2016] COM(2016) 197 final.

²⁰⁹ European Commission, Communication from the Commission to the European Parliament and the Council, Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe [2016] COM(2016) 197 final, 14-15.

²¹⁰ European Commission, ‘EU-Turkey joint action plan’ [2015] MEMO/15/5860, 1–2.

seekers to Syria and Iraq were reported.²¹¹ On 16 March 2016 the members of the European Council met with the Turkish authorities in order to reconfirm their commitment to the implementation of this Joint Action Plan by means of an agreement (EU-Turkey Statement) including eight points, among them, (i) the return to Turkey of all new irregular migrants crossing from Turkey into Greek islands from 20 March 2016; (ii) the resettlement from Turkey to the EU of one Syrian for every Syrian being returned to Turkey from Greek islands, taking into account the UN Vulnerability Criteria; (iii) the acceleration of the visa liberalisation roadmap with a view to lifting the visa requirements for Turkish citizens at the latest by the end of June 2016; (iv) the speeding up of the disbursement of the 3 billion euro under the Facility for Refugees in Turkey and additional funding of 3 billion euro, and (v) the EU and Turkey's commitment to 're-energise' Turkey's accession process to the EU.²¹² This latest Statement is giving rise to widespread criticism because, among other issues, it assumes that Turkey is a safe country for refugees, involves massive expulsions of migrants, which is prohibited by Article 4(4) of the ECHR, and it may infringe the principle of *non-refoulement* and the legal guarantees that should be granted in cases of expulsion.²¹³

2. Passive and active interception

There are different classifications of instruments of pre-border control. One of them distinguishes between passive and active interception of refugees. Although there is not an internationally accepted definition of 'interception', the Executive Committee of the High Commissioner's Programme in 2000 proposed one, which is often referred to by scholars.²¹⁴ According to the proposed definition, interception comprises 'all measures applied by a State, *outside its national territory*, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination.'²¹⁵ This definition, which highlights the extraterritorial character of the interception measures, encompasses both 'physical or active measures' of interception, such as interception of boats at sea, and 'passive or administrative measures', such as the deployment of immigration control officers in foreign countries, visa requirements, carrier sanctions or financial and other assistance to origin or transit countries. The structure of this chapter will follow this distinction between passive and active measures of interception.

²¹¹ Amnesty International, *Amnesty International Report 2015/16: The State of the World's Human Rights* (Amnesty International 2016), 43.

²¹² European Council, 'EU-Turkey statement' [2016] Press Release 144/16.

²¹³ CEAR, *Lesbos, 'zona cero' del derecho de asilo* (CEAR 2016), 33. See also Red Cross, 'The EU-Turkey migration deal: a lack of empathy and humanity – Opinion of 23 Red Cross National Societies' [2016] <<http://www.redcross.eu/en/News-Events/NEWS-ROOM/The-EU-Turkey-migration-deal/>>.

²¹⁴ Violeta Moreno Lax, 'Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees' (2008) 10 *European Journal of Migration and Law* 315, 322 and 323; Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007), 371-372.

²¹⁵ Executive Committee of the High Commissioner's Programme, Standing Committee, 'Interception of Asylum Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach' [2000] EC/50/SC/CRP.17, para 10, emphasis added.

a) *Passive measures of interception*

(1) The EU Visa Regime

The EU has established a common visa policy for stays in the territories of the Member States not exceeding three months in any six-month period.²¹⁶ The Visa requirements were first established in the Convention Implementing the Schengen Agreement (CISA),²¹⁷ and subsequently governed by Article 5 of the SBC which states the general entry conditions which must be fulfilled by third-country nationals to be allowed entry into the Schengen area.²¹⁸ Council Regulation 539/2001 (Visa Requirement Regulation) lists the non-EU countries whose nationals must be in possession of a visa when crossing the external borders of the EU.²¹⁹ This is the so-called ‘black list’ of Annex I of the Visa Requirement Regulation, whereas Annex II lists the countries whose nationals are exempt from requesting a visa (‘white list’). The procedures and conditions for issuing visas are laid down in the Visa Code.²²⁰ Refugees are not afforded a special status in this Code, which only refers to ‘recognised refugees and stateless persons’ in order to stipulate that they are required to be in possession of a visa when crossing the external borders if the country in which they are resident and which has issued them with their travel documents is a third country listed in Annex I,²²¹ that is, they deserve the same treatment as nationals of the State in which they reside. In addition, as some scholars underline, the EU Visa system ‘divide[s] the world into two main categories’.²²² For countries included in the ‘white list’ control is reduced in order to promote trade and tourism, whereas a

²¹⁶ Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] L 243/1, art 1 (‘Visa Code’).

²¹⁷ The Schengen acquis – Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of Benelux Economic Union, the Federal Republic of Germany and French republic on the gradual abolition of checks at their common borders, [2000] OJ L239/19. Article 5, which states the general requirements for aliens to be granted entry into the Schengen area was repealed by Article 39.1 of the Schengen Borders Code.

²¹⁸ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2006] OJ L105/1 (consolidated version 2013).

²¹⁹ Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2001] OJ L81/1, Annex I.

²²⁰ Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L 243/1.

²²¹ Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2001] OJ L81/1.

²²² Thomas Gammeltoft-Hansen and Hans Gammeltoft-Hansen, ‘The Rights to Seek-Revisited: On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU’ (2008) 10 *European Journal of Migration and Law* 439, 448–449. For a discussion on the EU and humanitarian visa, see, Mikaela Heikkilä, Maija Mustaniemi-Laakso, Suzanne Egan, Graham Finlay, Tamara Lewis, Julia Planitzer, Helmut Sax, Lisa Maria Heschl and Stefan Salomon, *Report critically assessing human rights integration in AFSJ policies* [2015] <<http://www.fp7-frame.eu/wp-content/materiale/reports/22-Deliverable-11.2.pdf>> accessed 10 May 2016.

considerable number of ‘refugee-producing’ countries have been included in the black list, for example, Afghanistan, Iraq, Somalia and Sudan.²²³

However, in accordance with the SBC, the refusal of entry shall be ‘without prejudice to the application of special provisions concerning the rights of asylum and to international protection’.²²⁴ Thus, although the Visa Code does not grant favourable treatment to asylum seekers or refugees, implying that in principle they are to comply with the requirements on the same footing as any national of a blacklisted State, they are exempt from the visa requirement according to the SBC. The paradox then is that refugees are not exempt from holding a visa until the very moment when this requirement is enforced, that is, when it is checked whether the person complies with the entry conditions established in the SBC.²²⁵

Furthermore, this must be examined in the light of the practices of Member States and the instruments they use to implement entry conditions. What state practice shows is that the standard procedure for carriers and officials deployed in foreign airports is checking that individuals hold a visa, without any consideration of the rights of asylum seekers or refugees. Thus, standard procedures could be highly problematic if the checks are not accompanied by proper guarantees for refugees.²²⁶ Moreover, the SBC requires other entry conditions that refugees are unlikely to fulfil, notably documents in which they have to justify the purpose and conditions of the stay and that they have sufficient means of subsistence for the duration of the stay and for the return to their country of origin.²²⁷

Finally, it must be said that Member States are free to create more favourable conditions for asylum-seekers through the issuing of visas on humanitarian grounds or based on international obligations,²²⁸ as well as through the issuance of long stay visas which are subject to their domestic procedures and rules.

(2) Carrier sanctions

As explained above, the mere fact of not holding a visa does not in itself prevent access to the EU. Asylum-seekers could present themselves at the EU’s external borders and make an asylum claim that has to be examined by national authorities of the Member States, which are subject to the obligation of *non-refoulement*. However, the visa requirement has to be analysed in close connection to the EU’s carrier

²²³ Violeta Moreno Lax, ‘Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers’ Sanctions with EU Member States’ Obligations to Provide International Protection to Refugees’ (2008) 10 *European Journal of Migration and Law* 315, 324–325.

²²⁴ Schengen Borders Code, Article 13.1 which has to be read in conjunction with Article 5.4.c.

²²⁵ Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 173–174.

²²⁶ Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 173–174.

²²⁷ Schengen Borders Code, Article 5.1.c.

²²⁸ According to Article 5.4.c of the SBC, third-country nationals who do not fulfil one or more of the entry conditions may be authorised by a Member State to ‘enter its territory on humanitarian grounds, on grounds of national interest or because of international obligations.’

sanction system, which has transformed the visa requirement into a ‘precondition’ which precludes individuals from even leaving their country of origin.²²⁹

Article 26 of the CISA lays down the duty of Member States to incorporate into their national laws three kinds of obligations for carriers which bring third country nationals by air, sea or land to the external borders of the EU: (i) the obligation to assume responsibility for aliens who are refused entry into the territory of one of the Member States and to return them to the third State from which they were transported or which issued their travel documents or any other third State ‘to which they are certain to be admitted’,²³⁰ (ii) the obligation to check that aliens are in possession of the travel documents required for entry into the territory of the Member States, and (iii) the obligation to pay financial penalties in case they fail to meet their control obligations.

Article 26 CISA and the Preamble of Directive 2001/51/EC,²³¹ which complements Article 26, set forth that the application of these provisions is without prejudice to the obligations resulting from the Geneva Convention relating to the Status of Refugees. Thus, as a matter of principle, carrier sanctions regimes shall respect international refugee obligations. However, scholars have underlined some problems in practice:²³²

- The regime depends on the assessment by private carriers of whether passengers who claim asylum have a founded claim. However, frequently they lack proper expertise and training.
- Limitations of time and the expedient nature of boarding procedures make it unlikely that private carriers undertake assessments seriously.
- In order to avoid fines and return obligations, private carriers tend to rely exclusively on the examination of travel documents, without any consideration of asylum claims.
- If carrier sanctions regime should not prejudice asylum seekers and refugee rights, one possible interpretation is to consider that asylum seekers fall outside the scope of the regime. Thus, carriers would be allowed to board individuals without travel documents provided that they file an asylum claim when arriving at the EU’s external border. However, it is argued that such an

²²⁹ Thomas Gammeltoft-Hansen and Hans Gammeltoft-Hansen, ‘The Rights to Seek-Revisited: On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU’ (2008) 10 *European Journal of Migration and Law* 439, 450–451.

²³⁰ Article 26.3 establishes some exceptions in cases of land border traffic.

²³¹ Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 [2001] OJ L187/45, Preamble, para 3.

²³² Violeta Moreno Lax, ‘Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers’ Sanctions with EU Member States’ Obligations to Provide International Protection to Refugees’ (2008) 10 *European Journal of Migration and Law* 315, 326–327; Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 174–177; Thomas Gammeltoft-Hansen and Hans Gammeltoft-Hansen, ‘The Rights to Seek-Revisited: On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU’ (2008) 10 *European Journal of Migration and Law* 439, 451.

interpretation would make the carrier regime prone to abuses if every undocumented migrant claims asylum.

- There is not uniformity in implementation by Member States. Some Member States impose sanctions on carriers regardless of the involvement of refugees, some release carriers from the sanctions if individuals are admitted to asylum procedures, and others release them only if asylum seekers are granted refugee status.

Along with this potentiality of the EU's carrier sanctions systems to preclude asylum seekers from accessing EU territory, another problematic issue has been underlined insofar as this measure implies a 'privatisation of migration control' where state functions are assumed by private companies which are not directly bound by international human rights standards and usually act on economic grounds which prompt private carriers to be cautious and reject any doubtful passenger.²³³

(3) Immigration Liaison Officers (ILOs) in third countries

A third mechanism that plays an important role in preventing asylum seekers from entering the EU is the deployment of officials of the destination country in the country of origin or transit, usually at their airports. Under EU law these officials are referred to as 'Immigration Liaison Officers' (ILOs). Council Regulation 377/2004 (ILO Regulation) created a network of ILOs in order to coordinate the activities of the EU Member States' officers posted in non-EU States.²³⁴ Moreover, on 27 May 2005 seven EU Member States signed a Convention aimed at the stepping up of cross-border cooperation (the Prüm Convention), which envisaged, in compliance with the ILO Regulation, the secondment of 'document advisers' to States deemed as origin or transit countries for illegal immigration.²³⁵

According to the ILO Regulation, these officers' main functions are 'to establish and maintain contacts with the authorities of the host country with a view to contributing to the prevention and combating of

²³³ Thomas Gammeltoft-Hansen and Hans Gammeltoft-Hansen, 'The Rights to Seek-Revisited: On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU' (2008) 10 *European Journal of Migration and Law* 439, 451.

²³⁴ Council Regulation (EC) No 377/2004 of 19 February 2004 on the Creation of an Immigration Liaison Officers Network L 64/1, OJ L64/1 (ILO Regulation), amended by Regulation (EU) No 493/2011 of the European Parliament and of the Council of 5 April 2011 amending Council Regulation (EC) No 377/2004 on the Creation of an Immigration Liaison Officers Network, [2004] OJ L141/13.

²³⁵ Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration, signed in Prüm on 27 May 2005, Arts 20 and 21. Bulgaria, Estonia, Finland, Hungary, Romania, Slovakia and Slovenia are also parties to this Convention which was incorporated into EU law by Council Decision 2008/615/JHA of 23 June 2008 on the Stepping up of Cross-Border Cooperation, particularly in Combating Terrorism and Cross-Border Crime, [2008] OJ L 210/1.

illegal immigration, the return of illegal immigrants and the management of legal migration’;²³⁶ collecting and exchanging information in certain ‘concern issues’ such as flows of illegal immigrants from or transiting through the host country, the routes and modus operandi followed by them or the existence of criminal organisations involved in the smuggling of immigrants;²³⁷ and rendering assistance to the hosting authorities in ‘establishing the identity of third country nationals and in facilitating their return to their country of origin.’²³⁸

One key case dealing with the deployment of immigration officers in foreign countries is the judgment of the UK’s House of Lords in *Roma Rights*.²³⁹ The issue under appeal was the lawfulness of the procedures adopted by British immigration officers temporarily stationed at Prague Airport. The appellants, six Czech nationals of Romani ethnic origin, intended to leave the Czech Republic and enter into the UK but were refused permission to leave the country by the British immigration officers. This judgment, one of the most controversial in connection with the territorial scope of the Geneva Convention relating to the Status of Refugees, will be addressed later (see below section C.1), but it is worth mentioning here that the House of Lords found that the duty of *non-refoulement* is applicable exclusively to those refugees who have managed to enter the territory of the State. Consequently, according to the House of Lords the contracting States do not have legal duties towards refugees who find themselves outside their territories or at their frontiers.²⁴⁰

Scholars have been very critical of the role and status of these officers. The main concern is that, although according to the ILO Regulation these officers should not influence the sovereign tasks of the host countries, in practice they impede individuals from exiting the country, either directly or through ‘advice or recommendation’ to carriers or authorities in the country of origin or transit.²⁴¹ The nature of the ‘advice or recommendation’ is controversial, in particular regarding carriers, since they are receiving the advice from an official of a State, entitled to fine them if they fail to check whether individuals hold the required documentation to enter into the EU.²⁴² In addition, the ILO Regulation does not include any reference to refugee rights and the need to comply with the relevant EU law on border control and visas.²⁴³ Finally, the lack of transparency regarding the activities of these officials has been denounced,

²³⁶ ILO Regulation, art 1.

²³⁷ ILO Regulation, arts 2.1 and 2.2.

²³⁸ ILO Regulation, art 2.3.

²³⁹ *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55.

²⁴⁰ *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55, 14–16.

²⁴¹ Thomas Gammeltoft-Hansen and Hans Gammeltoft-Hansen, ‘The Rights to Seek-Revisited: On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU’ (2008) 10 *European Journal of Migration and Law* 439, 452; Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 178–179; Ruth Weinzierl and Urszula Lisson, *Border Management and Human Rights: A Study of EU Law and the Law of the Sea* (German Institute for Human Rights 2007) 27-28; Thomas Gammeltoft-Hansen and James C. Hathaway, ‘Non-Refoulement in a World of Cooperative Deterrence’ (2015) 53 *Columbia Journal of Transnational Law* 235, 253.

²⁴² Frank McNamara, ‘Member State Responsibility for Migration Control within Third States — Externalisation revisited’ (2013) 15 *European Journal of Migration and Law* 319, 330.

²⁴³ Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 179.

since no public information is provided in connection with them. The ILO Regulation envisages biannual reports to the Council and the Commission but these reports are classified.²⁴⁴

b) Active interception: interception at sea and the role of Frontex

From January to November 2015 around 950,469 refugees and migrants arrived on Europe's shores via the Mediterranean. The vast majority of them (797,372) arrived in Greece. According to UNHCR, 49% of those arriving by sea are fleeing the Syrian Arab Republic. Other countries of origin are Afghanistan (20%), Iraq (8%), Eritrea (4%), Nigeria (2%), Pakistan (2%), Somalia (2%), Sudan (1%), Gambia (1%) and Mali (1%).²⁴⁵ Over the latter part of 2015 the sea route shifted from the central Mediterranean to the Aegean Sea.²⁴⁶ In 2015 over 3,700 refugees and migrants lost their lives during this dangerous journey.²⁴⁷ The trend for 2016²⁴⁸ shows an increase in arrivals by sea: during January and February 131,724 people made the journey, a figure similar to the total number for the entire first half of 2015. In 2016, 410 refugees and migrants had died at the time of writing.²⁴⁹ These refugees and migrants often have to face high levels of violence, including sexual and gender-based violence, extortion and exploitation during their journeys.²⁵⁰ Against this backdrop, the EU has been heavily criticised for having failed to come up with a 'coherent, humane and rights-respecting response.'²⁵¹

A traditional form of non-arrival policy is the interdiction of migrants on the high seas or in the territorial waters of third countries. This is the paradigmatic example of active interception, which was explained earlier. Not only have the EU Member States been engaged in these types of practices, so has the EU itself as well, through joint operations coordinated by Frontex. The extraterritorial strategies deployed by the EU and the EU Member States to intercept refugees and migrants by sea have been divided into three main categories:

²⁴⁴ Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 179.

²⁴⁵ UNHCR, United Nations Population Fund and Women's Refugee Commission, *Initial Assessment Report: Protection Risks for Women and Girls in the European Refugee and Migrant Crisis. Greece and the former Yugoslav Republic of Macedonia* [2016], 3
<<http://data.unhcr.org/mediterranean/documents.php?page=1&view=grid&Type%5B%5D=14>>.

²⁴⁶ UNHCR, 'Refugee/Migrant Crisis in Europe, Situation Analysis — January 2016' [2016], 3
<<http://data.unhcr.org/mediterranean/documents.php?page=2&view=grid&Type%5B%5D=9>>.

²⁴⁷ Amnesty International, *Amnesty International Report 2015/16: The State of the World's Human Rights* (Amnesty International 2016), 41–42.

²⁴⁸ Data at the time of writing, March 2016.

²⁴⁹ UNHCR, 'Refugee/Migrant Crisis in Europe, Situation Analysis — March 2016' [2016], 3
<<http://data.unhcr.org/mediterranean/documents.php?page=1&view=grid&Type%5B%5D=9>>.

²⁵⁰ UNHCR, United Nations Population Fund and Women's Refugee Commission, *Initial Assessment Report: Protection Risks for Women and Girls in the European Refugee and Migrant Crisis. Greece and the former Yugoslav Republic of Macedonia* [2016], 3
<<http://data.unhcr.org/mediterranean/documents.php?page=1&view=grid&Type%5B%5D=14>>.

²⁵¹ Amnesty International, *Amnesty International Report 2015/16: The State of the World's Human Rights* (Amnesty International 2016), 41–42.

Joint operations in territorial waters of third countries: these operations are based on agreements which allow EU Member States to participate in border patrols in the territorial waters of third countries of origin of refugees and migrants. The most active countries in concluding this kind of agreements have been Spain and Italy. Although usually these agreements are not public, it appears that the way in which the joint patrols are conducted is the so called 'shiprider model'. This model involves the boarding by third countries' officials in EU Member States' vessels with the exclusive competences to decide on the boarding of vessels and the arrest of individuals on them. For example, Frontex operation Hera III, hosted by Spain, envisaged the placement of Senegalese and Mauritanian agents on EU Member States' vessels with similar competencies.²⁵²

'Push-backs' or interdiction and summary returns of migrants to third countries: in some cases these return policies are formalised in agreements with third countries where these countries undertake to accept the return of the refugees and migrants. The prominent example is the Italian push-backs of migrants to Libya and Algeria. In other cases, diversions of migrants are not formalised in agreements and attempt to prevent them from entering the territorial waters of the state or drive them back to the high seas.²⁵³

Rescue operations followed by disembarkation in a third country. The main concern regarding rescue operations is the identification of the place of disembarkation of the rescued passengers, especially in those cases where coastal states do not accept such disembarkation in their ports. International law does not lay down which state is required to allow disembarkation. As a result, there have been cases in which the dispute among States has resulted in long negotiations during which the most basic needs of the refugees and migrants are not provided for. One salient example in this regard is the *Marine I* case which involved the rescue by a Spanish vessel of 369 passengers from various Asian and African countries. Diplomatic negotiations between Spain, Senegal and Mauritania on their place of disembarkation took eight days, during which time the rescued vessel remained anchored off the Mauritanian coast. Rescue operations can also be framed in the context of sea border operations coordinated by Frontex. Another key concern regarding rescue operations is that they are used by states as a pretext to circumvent refugee and human rights law, while in fact they hide traditional border control measures.²⁵⁴

With regard to the participation of Frontex in the interception of refugees at sea, a variety of complex legal issues have been raised by scholars and NGOs, including:²⁵⁵

²⁵² Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 212–213.

²⁵³ Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 212–213. See also Maria Dolores Bollo Arocena, 'Push Back, expulsions colectivas y non refoulement: Algunas reflexiones a propósito de la sentencia dictada por la gran sala del TEDH en el caso Hirsi Jamaa y otros c. Italia' in Santiago Torres Bernárdez (coord.), *El derecho internacional en el mundo multipolar del siglo XXI: Obra homenaje al profesor Luis Ignacio Sánchez Rodríguez* (Iprolex 2013), 647; and Violeta Moreno Lax, 'Hirsi Jamaa and Others v. Italy or the Strasbourg Court versus Extraterritorial Migration Control?' (2012) 12(3) *Human Rights Law Review* 574.

²⁵⁴ Anneliese Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations by Sea' in Berdard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010), 229, 243.

²⁵⁵ See, also, Mikaela Heikkilä, Maija Mustaniemi-Laakso, Suzanne Egan, Graham Finlay, Tamara Lewis, Julia Planitzer, Helmut Sax, Lisa Maria Heschl and Stefan Salomon, *Report critically assessing human rights integration in AFSJ*

- Concerns for human rights protection in the operations coordinated by Frontex. There is a lack of clarity in connection with how the protection guarantees set out by the EU and international legal framework can be applied to these operations and how compliance with these standards can be monitored. It is also questioned whether Frontex is itself responsible for ensuring the protection of human rights during the interception measures.²⁵⁶ Furthermore, it has been stressed that it is even doubtful that Frontex can be deemed to be bound by international human rights instruments,²⁵⁷ although the Frontex Regulation states its obligation to fulfil its tasks in compliance with the EU Fundamental Rights Charter as well as the 1951 Refugee Convention.²⁵⁸ Besides, violations of human rights in areas covered by Frontex joint operations have been reported, for example, in connection with the practices of Greece, Italy, Spain and Cyprus.²⁵⁹
- Border control operations coordinated by Frontex at sea might push refugees to choose more risky routes in their travel to Europe's shores. One recent study by the Spanish Commission for Refugee Assistance (CEAR) shows that Frontex operations off the coast of the Greek island of Lesbos have blocked the northern route from Turkey to this island (9 km). As a consequence, refugees have been diverted to a more dangerous and longer route (21 km) which exposes them to great vulnerabilities.²⁶⁰

policies [2015] <<http://www.fp7-frame.eu/wp-content/materiale/reports/22-Deliverable-11.2.pdf>> accessed 10 May 2016.

²⁵⁶ Anneliese Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations by Sea' in Berdard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010), 229–230.

²⁵⁷ Thomas Gammeltoft-Hansen and James C. Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 *Columbia Journal of Transnational Law* 235, 256.

²⁵⁸ Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L349/1, Article 1.2 second paragraph, amended by Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2011] OJ L304/1. This Article states that 'the Agency shall fulfil its tasks in full compliance with the relevant Union law, including the Charter of Fundamental Rights of the European Union'. Frontex Regulation has also been amended by Regulation (EU) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers [2007] OJ L199/30 and by Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur) [2013] OJ L295/11. (FRONTEX Regulation).

²⁵⁹ Human Rights Watch, *The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece* (Human Rights Watch 2011), European Parliament, Directorate-General for External Policies, *Migrants in the Mediterranean: Protecting human rights* (Study by Samuel Cogolati, Nele Verlinden and Pierre Schmitt) [2015] EP/EXPO/B/DROI/2015/01, 31. See also Anneliese Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations by Sea' in Berdard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010), 243–244; and Violeta Moreno Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23(2) *International Journal of Refugee Law* 174, 184.

²⁶⁰ CEAR, *Lesbos, 'zona cero' del derecho de asilo* (CEAR 2016), 9.

- Two of the issues most frequently raised by scholars are the attribution of responsibilities in the framework of operations coordinated by Frontex and the identification of the real role that it plays in these kinds of operations. According to the Frontex Regulation, ‘the responsibility for the control and surveillance of external borders lies with the Member States’.²⁶¹ The role of Frontex is reduced to ‘facilitating and rendering more effective the application of existing and future Union measures relating to the management of external borders, in particular the SBC.’²⁶² However, it has been argued that Frontex’s mandate, governance structure and its practice shows a different view. Frontex insists that it is less ‘actor’ than ‘coordinator’ but it has quickly become a powerful actor with a key role in enforcing EU immigration policy and an increasingly high budget.²⁶³ Whereas Frontex has not legally been empowered to guard the EU’s external borders, its establishment and development implies a shift in the exercise of powers, which traditionally have belonged to the national sovereignty of the Member States. The absence of clarity in connection to the exact scope of Frontex’s coordinating role, and with its *modus operandi* in practice, make it extremely difficult to establish which authority should be held responsible for the protection of the individuals intercepted.²⁶⁴ In addition, the Frontex Regulation does not set out a special legal process before the CJEU for actions implementing EU law.²⁶⁵ Finally, it has been pointed out that with regard to operations implemented in the territorial waters of third countries, Frontex and EU Member States appear to consider that the responsibility for breaches of refugee and human rights law lies exclusively with those third states.²⁶⁶
- The lack of transparency regarding Frontex operations has also been highlighted. The existing evaluations and reports on Frontex operations are focused on providing figures on the number of people returned, deterred or rescued. However, there is no available data concerning, for example, their age, gender, or protection concerns. Most importantly, there is no information on the places to which they are returned or diverted, nor on their fate after the return or diversion. The information that is available does not allow either an assessment of whether the human needs of refugees and migrants are covered or whether the EU Member States involved comply with their obligations under international human rights law.²⁶⁷ In this regard, in the framework of

²⁶¹ FRONTEX Regulation, Article 1.2.

²⁶² FRONTEX Regulation, Article 1.2.

²⁶³ From €6.2 million in 2004 to more than €88 million in 2010. Human Rights Watch, *The EU’s Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece* (Human Rights Watch 2011), 11.

²⁶⁴ Anneliese Baldaccini, ‘Extraterritorial Border Controls in the EU: The Role of Frontex in Operations by Sea’ in Berdard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010), 229–230. See also Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 179–181.

²⁶⁵ Anneliese Baldaccini, ‘Extraterritorial Border Controls in the EU: The Role of Frontex in Operations by Sea’ in Berdard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010), 237.

²⁶⁶ Violeta Moreno Lax, ‘Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea’ (2011) 23(2) *International Journal of Refugee Law* 174, 200.

²⁶⁷ Anneliese Baldaccini, ‘Extraterritorial Border Controls in the EU: The Role of Frontex in Operations by Sea’ in Berdard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010), 243.

certain operations such as Hera, Frontex acknowledged that it ignored whether any asylum applications were lodged during the operation and that it does not collect this type of data.²⁶⁸

- Sea operations that are implemented in the territorial waters of third countries are usually based on bilateral agreements between EU Member States and the third country concerned. These agreements are not generally disclosed even to Frontex, despite its role in facilitating those operations. In addition, Frontex is authorised to facilitate operations under the framework or Working Agreements by means of which Frontex establishes bilateral cooperation with a third country. Some of these third countries have a poor record on protection of human rights and their treatment of refugees and migrants. Some of them, such as Libya, are not even parties to the 1951 Refugee Convention.²⁶⁹
- With regard to operations coordinated by Frontex at sea, Council Decision 2010/252/EU on Frontex Maritime Operations²⁷⁰ raises serious concerns for its failure to include any of the procedural guarantees laid down in Article 13 and Part A of the Annex V of the SBC, notably the need to substantiate the decision of refusal and the right to appeal of persons refused entry.²⁷¹ The absence of these guarantees reflects a contradictory view within the EU regarding the extraterritorial application of the Schengen border crossing regime: it is accepted that there is a legal basis which allows EU Member States to engage in coercive measures beyond their territories, but the extraterritorial application of the procedural guarantees to those measures is disregarded.²⁷² The CJEU declared it null in 2012, but the Council Decision maintains its effects until the entry into force of new rules.²⁷³

C. Compatibility of the EU's and Member States' instruments of pre-border control with the international protection of refugees and the principle of non-refoulement

As explained, the EU Member States, individually or under the umbrella of the EU's strategy on integrated border management, are increasingly undertaking interception measures, both passive and active,

²⁶⁸ Violeta Moreno Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23(2) *International Journal of Refugee Law* 174, 182.

²⁶⁹ Anneliese Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations by Sea' in Berdard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010), 251–254.

²⁷⁰ Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, [2010] OJ L111/20.

²⁷¹ Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 200–203.

²⁷² Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 200–203.

²⁷³ Case C-355/10 *European Parliament v Council of the European Union* [2012] CJEU 5 September 2012.

outside their territories and territorial seas, with the purpose of forcing refugees back to their places of origin or the territory or territorial waters of other states. These strategies result in refugees being denied any direct contact with the receiving state and, as a consequence, protection of their rights.²⁷⁴ In the light of international standards for the protection of refugees, these measures might imply an unjustified restriction on the 'right to seek asylum' as well as an infringement of the principle of *non-refoulement* laid down in Article 33 of the 1951 Refugee Convention. The key question then is to determine the territorial scope of states' obligations toward refugees, namely whether the duty of *non-refoulement* is extraterritorially applicable.

1. Extraterritorial applicability of *non-refoulement* principle

According to Article 33.1 of the Refugee Convention, 'No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'²⁷⁵ The duty of *non-refoulement* is frequently referred to by scholars as the cornerstone or centrepiece of the international refugee protection regime.²⁷⁶ Since the Refugee Convention does not guarantee a right to 'obtain' asylum, the *non-refoulement* principle constitutes the 'strongest commitment that the international community of States has been willing to make to those who are no longer able to avail themselves of the protection of their own government'.²⁷⁷

Unlike other articles of the Refugee Convention, which require refugees to be inside the territory of the receiving state in order to grant them the rights set out in the Convention,²⁷⁸ Article 33 does not contain any spatial or territorial limitation. However, nor does the Refugee Convention contain a duty of states to protect refugees' rights in the world at large.²⁷⁹ This apparent ambiguity in the determination of the territorial scope of the duty of *non-refoulement* has led some states to deny its extraterritorial applicability.

One of the most prominent cases of denial of the extraterritorial applicability of the duty of *non-refoulement* is the US Supreme Court's decision in the case *Sale v Haitian Centers Council*. This case addressed the examination of the legality of an order issued in 1981 by President Reagan in which he

²⁷⁴ James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005).

²⁷⁵ Refugee Convention, Article 33.1.

²⁷⁶ Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press 2011), 44.

²⁷⁷ Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press 2011), 44. See also UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (2007), para 5 and Kees Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia 2009), 33.

²⁷⁸ For example, arts 17-19 on gainful employment, 21 on housing and 24 on labour legislation and social security.

²⁷⁹ Thomas Gammeltoft-Hansen and James C. Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 *Columbia Journal of Transnational Law* 235, 258.

ordered the Coast Guard to intercept vessels carrying Haitians who were fleeing Haiti following the military coup which displaced the government of Jean Bertrand Aristide, and to return them to Haiti. According to the Supreme Court:

The drafters of the Convention and the parties to the Protocol [...] may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; such actions may even violate the spirit of Article 33; but a treaty cannot impose unanticipated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent. Because the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions.²⁸⁰

This case was decisive in the resolution of the *Roma Rights* case before the UK's House of Lords, which denied the application of the duty of *non-refoulement* towards those refugees who 'seek entrance into the territory' but have not yet managed to enter into the territory.²⁸¹ This case involved the deployment by the UK of immigration officers at Prague Airport in 2001, subject to an agreement signed with the Czech Republic which allowed UK officers to give or refuse leave to enter the UK to passengers at Prague airport. The British officers denied leave to six individuals of Romani ethnic origin who intended to travel to the UK. Some of the claimants declared that they intended to claim asylum on arrival to UK.²⁸² The particularity of this case was that, like other passive measures previously examined (for example, carrier sanctions and visa regimes), the claimants were intercepted before leaving the country, so they failed to meet one of the requirements for the Refugee Convention to be applicable, that is, to be 'outside the country of his nationality [...] or the country of his former habitual residence.'²⁸³ Aware of this limitation, the claimants urged the House of Lords to admit a 'purposive interpretation' of the Convention, taking into account its humanitarian objects and purpose. They argued that if they had not been effectively prevented by the UK officials from travelling to the UK they could have done so, could have applied for asylum and, in case the requisite grounds were established, asylum would have been granted.²⁸⁴ However, the House of Lords did not accept the argument on the grounds that the court's main task remains interpreting the Convention in accordance with its ordinary meaning, that is bearing in mind the 'written document to which the contracting states have committed themselves' and not 'what they might, or in an ideal world would, have agreed'.²⁸⁵

²⁸⁰ United States Supreme Court, *Sale, acting Commissioner, Immigration and Naturalization Service, et al. v Haitian Centers Council, Inc., et al.* 509 U.S. 155 (1993), 183.

²⁸¹ *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55, para 17.

²⁸² *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55, paras 1 and 4.

²⁸³ Refugee Convention Article 1.A.2.

²⁸⁴ *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55, paras 18 and 20.

²⁸⁵ *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55, para 18. The claim was, nevertheless, successful because the House of Lord considered that the pre-clearance procedure was discriminatory on racial grounds.

Despite this restrictive understanding of the territorial scope of the Refugee Convention, and in particular of the duty of *non-refoulement*, a significant number of scholars²⁸⁶ contend that the duty is applicable not only within the territory of the state and at its border, but also in relation to any refugee *subject to or within the jurisdiction of the state*. This position incorporates the interpretation of the *refoulement* prohibition within the broader framework of the extraterritorial applicability of international and regional human rights instruments, in particular regarding its understanding of the concept of jurisdiction. In the view of Hathaway, certain Convention rights, among which is the principle of *non-refoulement*, are not subject to any territorial limitation. The obligation of states to respect these rights arises wherever ‘a State exercises effective or de facto jurisdiction outside its own territory’ either by State agents themselves, by private companies hired by governments, or by officials of a transit country acting on behalf of a destination State.²⁸⁷ This opinion is also supported by Goodwin-Gill and Mc Adam, who postulate that Article 33 does not require any physical presence in the territory, but prohibits the return of refugees ‘in any manner whatsoever’ irrespective of the place where the relevant action occurs (at border posts, at transit points, in international zones, beyond the national territory of the States, etc.).²⁸⁸ These authors go further, pointing out that the principle of *non-refoulement* has crystallised into a rule of customary international law, binding on all states whether or not they are parties to the Refugee Convention. The core content of this customary rule is the ‘prohibition of return in any manner whatsoever of refugees to countries where they may face persecution’.²⁸⁹ The territorial scope of this rule is informed by this essential purpose of the prohibition, thus regulating state action ‘wherever it takes place.’²⁹⁰

This is also the view of the UNHCR in its Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the Refugee Convention, which stresses again the paramount importance of the concept of jurisdiction:

It is UNHCR’s position, therefore, that a State is bound by its obligation under Article 33(1) of the 1951 Convention not to return refugees to a risk of persecution wherever it exercises effective jurisdiction. As with *non-refoulement* obligations under international human rights law, the decisive criterion is not

²⁸⁶ However, there are also contrary opinions. See, Nehemiah Robinson, *Convention Relating to the Status of Refugees: Its History, Significance and Contents* (Institute of Jewish Affairs 1952), 29; Atle Grahl-Madsen, *Territorial Asylum* (Almqvist & Wiksell International 1980), 40; Sadruddin Aga Khan, ‘Legal Problems Relating to Refugees and Displaced Persons’, *Collected Courses of the Hague Academy of International Law* (1976) vol 149, 317–318; House of Lords, *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)* [2004] UKHL 55; US Supreme Court, *Sale acting Commissioner, Immigration and Naturalization Service, et al. v Haitian Centers Council, Inc., et al.* 509 U.S. 155 (1993).

²⁸⁷ James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005), 335–342.

²⁸⁸ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007), 246.

²⁸⁹ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007), 248.

²⁹⁰ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007), 248.

whether such persons are on the State's territory, but rather, whether they come within the effective control and authority of that State.²⁹¹

In sum, a majority of scholars today are favourable to the extraterritorial application of the duty of *non-refoulement*. However, there are significant gaps in the protective scope of Article 33 which have special relevance here. First, the duty of *non-refoulement* does not cover cases of mass influx of refugees insofar as it threatens the ability of the state to protect its national interests. But most importantly, the duty of *non-refoulement* does not limit passive measures of interception such as visa controls, carrier sanctions or ILOs, since refugees are not allowed to leave the territory of their own states. As the *Roma Rights* case shows, one compulsory requirement for refugees to be protected is that they actually leave their countries. Until and unless this requirement is met they are not entitled to the protection of Article 33.²⁹² With the aim of overcoming this second restriction, it has been argued that states must interpret treaties, including the duty of *non-refoulement* laid down in the Refugee Convention, in good faith, according to the principle of *pacta sunt servanda* as stated in Article 26 of the Vienna Convention on the Law of Treaties. This argument was rejected, though, by the House of Lords in *Roma Rights* insofar as interpreting a treaty according to its wording cannot be contrary to good faith:

But there is no want of good faith if a state interprets a treaty as meaning what it says and declines to do anything significantly greater than or different from what it agreed to do. The principle that *pacta sunt servanda* cannot require departure from what has been agreed. This is the more obviously true where a state or states very deliberately decided what they were and were not willing to undertake to do.²⁹³

2. Responses to the gaps in the protection of refugees

The above mentioned gap in the protection offered by the Refugee Convention has been referred as an 'intractable dilemma' to the extent that as long as states do not find themselves bound by a duty to allow refugees to seek asylum in other countries it is extremely difficult to find a proper response in international law to those measures of passive interception which 'imprison would-be refugees within their own states.'²⁹⁴ However, scholars have pointed out some alternative responses.

a) Article 31 of the Refugee Convention

²⁹¹ UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (2007), para 43.

²⁹² James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005), 367. See also Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007), 385.

²⁹³ *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55, para 19.

²⁹⁴ James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005), 368.

One possible answer has been found in Article 31 of the Refugee Convention. This article prohibits states from imposing penalties on those refugees that enter irregularly into their territories. This provision implies an acknowledgement that due to the circumstances that lead refugees to escape they are not usually in possession of the documentation required to enter into the country. Read in conjunction with Article 33 and the right to leave a country and seek asylum, which will be discussed below, this article upholds the recognition of the right of refugees to obtain temporary admission in the territory of a state in order to have access to refugee status determination procedures.²⁹⁵ According to the UNHCR, this is necessary in order to give effect to states' obligations under the Convention, meaning that they must at least grant asylum-seekers, access to their territories and to fair and efficient asylum procedures.²⁹⁶

However, despite the clarity of the wording of Article 31, this article has been disregarded in practice by states. Refugees who, according to this article, enter into a country without holding proper documentation frequently suffer from the so called 'imputation of double criminality', that is, they become under domestic law the 'unlawful non-citizen' who has entered irregularly and is 'aligned with crime' by national authorities and the media so that his or her claim is assumed to be illegitimate.²⁹⁷

b) The duty of non-refoulement in international and regional human rights instruments

This second alternative provides strong arguments for reinforcing the Refugee Convention's duty of *non-refoulement*. The major human rights treaties have also established *non-refoulement* obligations for States, either through explicit provisions such as Article 3 of the Convention against Torture (CAT), Article 22(8) of the American Convention on Human Rights, and Article 2(3) of the OAU Convention governing the Specific Aspects of Refugee Problems in Africa, or indirectly by means of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, such as Article 3 of the ECHR and Article 7 of the ICCPR. With regard to the scope of obligations under Article 3 ECHR and Article 7 ICCPR, as construed by the Human Rights Committee and the ECtHR, they also encompass the prohibition of exposing individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country through their extradition, expulsion or return.²⁹⁸

Unlike Article 33 of the Refugee Convention, these standards of human rights law do not require the refugee to be outside of his or her country in order to trigger the state's duty of *non-refoulement*. Thus,

²⁹⁵ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007) 384-385.

²⁹⁶ UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (2007), para 8.

²⁹⁷ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007), 384-385. See also James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005), 370-371.

²⁹⁸ In this regard, see Human Rights Committee, General Comment no 20 on Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), Forty-fourth session (1992), para 9; and *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR 23 February 2012), para 123.

ILOs in foreign airports or airline carriers who refuse embarkation to individuals at risk of persecution in the country they wish to leave could be considered a breach of the *non-refoulement* obligations of destination states, as stated in human rights instruments.²⁹⁹

In addition, international bodies in charge of interpreting these instruments have been much more prone to the applicability of the *non-refoulement* obligations of States in an extraterritorial context. One central case is the ECtHR decision in the case of *Hirsi Jamaa and Others v Italy*.³⁰⁰ The case was brought by 11 Somali nationals and 13 Eritrean nationals who were part of a group of about two hundred individuals who, departing from Libya, attempted to reach the Italian coast by boat. They were intercepted on the high seas by three ships from the Italian Revenue Police and the Coastguard, transferred to Italian military ships where their personal effects and documentation were confiscated, and returned back to Tripoli.³⁰¹ The ECtHR found that the interception of the vessels by the Italian authorities constituted an exercise of extraterritorial jurisdiction by Italy, triggering its obligations under the Convention.³⁰² In particular, the Court, although recognising the rights of States to establish their own immigration policies, considered that the removal of aliens in the context of interceptions on the high seas with the aim of preventing them from reaching the borders of the state or pushing them back to another state constituted an exercise of jurisdiction which engaged Italy's responsibility.³⁰³ The Court stressed that 'problems with managing migratory flows cannot justify having recourse to practices which are not compatible with the State's obligations under the Convention' and that treaties must be interpreted in good faith bearing in mind the object and purpose of the treaty.³⁰⁴

The Committee against Torture has also established the extraterritorial jurisdiction of states engaged in the interception of boats on the high seas. In the *Marine I* case³⁰⁵ a Spanish maritime rescue tug, in response to a distress call sent by the vessel *Marine I*, which carried 369 immigrants from various Asian and African countries, towed *Marine I* from international waters towards the Mauritanian coast. Diplomatic negotiations began between Spain, Senegal and Mauritania regarding the fate of the vessel, and an agreement was reached by Spain and Mauritania eight days after the interception, during which time the ships remained anchored off the Mauritanian coast. Following the agreement, the passengers were disembarked in Mauritania and the Spanish national police force proceeded to identify them. During the recognition procedure they declared that they were fleeing persecution in India as a result of the conflict in Kashmir. The passengers were placed in a former fish processing plant under Spanish control throughout the repatriation process.³⁰⁶ The claimants alleged a violation of Article 1 of the Convention

²⁹⁹ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007), 385–387; James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005), 368–369.

³⁰⁰ *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR 23 February 2012).

³⁰¹ *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR 23 February 2012), paras 9–11.

³⁰² *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR 23 February 2012), para 178.

³⁰³ *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR 23 February 2012), para 180.

³⁰⁴ *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR 23 February 2012), para 179.

³⁰⁵ Committee against Torture, *J.H.A. v Spain*, Communication no. 323/2007, CAT/C/41/D323/2007, (here: *Marine I* case). See Kees Wouters and Marteen Den Heijer, 'The *Marine I* Case: A Comment' (2009) 22(1) *International Journal of Refugee Law* 1.

³⁰⁶ Committee against Torture, *J.H.A. v Spain*, Communication no. 323/2007, CAT/C/41/D323/2007, paras 2.1–2.6.

against Torture on the grounds that their treatment by the Spanish authorities amounted to torture and of Article 3 because, if returned to India, they would be subjected to torture or cruel, inhuman and degrading treatment.³⁰⁷ During the complaint procedure Spain denied its jurisdiction over the passengers because the incidents took place outside Spanish territory.³⁰⁸ However, the Committee considered that Spain had *de facto* jurisdiction over the persons on board *Marine I* 'from the time the vessel was rescued and throughout the identification and repatriation process.'³⁰⁹ The exercise of extraterritorial jurisdiction of the state in cases of interception in territorial waters of a third state was also postulated by the Committee against Torture in the *Sonko* case, brought against Spain.³¹⁰

c) *The right to leave any country*

The right to leave any country including one's own is laid down in several human rights instruments, namely, Article 13(1) of the Universal Declaration of Human Rights, Article 12 ICCPR, Article 2 of Protocol 4 of the ECHR, Article 22 of the American Convention on Human Rights, and Article 12(2) of the African Charter on Human and Peoples' Rights. It is not an absolute right and the above mentioned provisions establish limitations on grounds such as national security, public order or the needs of a democratic society. However, as the Human Rights Committee has pointed out, restrictions of this right must be 'provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognized in the Covenant.' Further, they must respect the principle of proportionality, be the least intrusive instrument to achieve the desired result, and be proportionate to the interest to be protected.³¹¹ As some commentators have stressed, immigration controls that restrict an individual's rights to leave do not meet these requirements.³¹²

Nevertheless, there is no international mechanism to implement this right. Thus, there are no legal provisions which require the right to leave to be complemented by a 'duty to admit' by other States. It has been considered, then, an 'incomplete right' since there is not a correlative obligation on other States to allow entry to individuals other than their own nationals.³¹³ However, in the context of refugee protection some scholars refer to the 'right to leave to seek asylum from persecution'. In this particular

³⁰⁷ Committee against Torture, *J.H.A. v Spain*, Communication no. 323/2007, CAT/C/41/D323/2007, paras 3.1–3.3.

³⁰⁸ Committee against Torture, *J.H.A. v Spain*, Communication no. 323/2007, CAT/C/41/D323/2007, para 6.1.

³⁰⁹ Committee against Torture, *J.H.A. v Spain*, Communication no. 323/2007, CAT/C/41/D323/2007, para 8.2.

³¹⁰ Committee against Torture, *Fatou Sonko v Spain*, Communication no. 368/2008, CAT/C/47/D368/2008, para 10.3.

³¹¹ Human Rights Committee, General Comment no 27, Freedom of movement (Article 12), (1999) CCPR/C/21/Rev.1/Add.9, paras 11–18. See also Violeta Moreno Lax, 'Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees' (2008) 10 European Journal of Migration and Law 315, 351–353.

³¹² Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007), 381–382; Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 246–247.

³¹³ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007), 382–383. See also Violeta Moreno Lax, 'Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees' (2008) 10 European Journal of Migration and Law 315, 353–354.

context they contend that the right encompasses a correlative duty on other states, which consists of the prohibition of controlling the movements of persons in a manner that frustrates attempts to find effective protection.³¹⁴

3. Extraterritorial application of the Schengen Border Crossing Regime

The question at stake here is whether when EU Member States employ passive or active measures of interception of refugees the affected individuals can invoke the guarantees laid down in the EU's internal rules on border controls and asylum, notably the SBC.³¹⁵ As explained above, the SBC establishes some procedural guarantees applicable to the conduction of border controls, namely the requirement to substantiate the refusal of entry, the right to appeal against this decision, and other general rules regarding procedure and good administration that must be respected when conducting controls. The SBC also refers to the need to respect refugee rights, especially the duty of *non-refoulement*.³¹⁶

Several legal problems have been identified in the analysis of the extraterritorial application of these guarantees concerning the scope of the powers of the EU and the Member States to subject persons placed beyond their borders to coercive measures and the determination of the rights of those persons under EU law. The question is whether EU law envisages a legal basis, which allows EU Member States to engage in pre-border controls and whether guarantees for crossing the EU's external border can be triggered when the individuals are well beyond those borders. In the view of some commentators the application of the SBC exclusively at the EU external borders or in the immediate vicinity of the external border would only create an 'anomaly' regarding practices of border control implemented in other places. According to this position, the SBC is flexible enough in terms of the geographical areas in which border controls may be conducted. As a consequence, EU Member States' extraterritorial practices which do not comply with the procedural guarantees laid down in the SBC should be deemed illegal.³¹⁷

D. Conclusions and recommendations

Europe is experiencing its largest movement of refugees and migrants since World War II. The EU reaction to this enormous challenge has given rise to heavy criticism. One of the main critiques refers to the EU's and EU Member States' recourse to a complex system of extraterritorial deterrence measures and instruments which prevent refugees from having any contact with the territory of the various EU Member

³¹⁴ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007), 382–383; Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 246.

³¹⁵ Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 193–194.

³¹⁶ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2006] OJ L105 (consolidated version 2013), art 3(b).

³¹⁷ Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), 193–199.

States' territories. The implementation of this set of extraterritorial measures has to be considered as a factor that exacerbates the inherent vulnerability of asylum seekers. In addition to the causes that lead them to flee from their countries of origin, any refugee seeking protection is in a vulnerable situation, and in many cases they face compounded vulnerability when they belong to additional categories of vulnerable groups such as women, children or persons with disabilities. However, the extraterritorial instruments that have been analysed in this section fail to take into account the special protection needs of asylum seekers and may indeed increase their inherent vulnerability.

One of the main flaws of these instruments is that they are not implemented in a way that allows effective distinction between refugees and other categories of migrants. Some of them, such as the EU visa regime, are collectively implemented without any favourable treatment of asylum seekers or refugees, who are to comply with the requirement on the same footing as any national of a blacklisted state. In addition, a considerable number of 'refugee-producing' countries are included in the so-called visa black list, that is, non-EU countries whose nationals must possess a visa to cross the external borders of the EU. Furthermore, some legal instruments such as the SBC additionally require some entry conditions that refugees, because of the circumstances that lead them to flee, are unlikely to fulfil, such as documents regarding the purpose and conditions of the stay in the receiving country and evidence regarding their means of subsistence for the duration of the stay and for the return to their country.

Another problematic issue is that some of these instruments, such as carrier sanctions, imply a 'privatisation of migration control' in practice, where the control of visa and entry conditions are assumed by private companies which frequently lack the proper expertise and training to identify vulnerable passengers in need of protection. They are subject to boarding procedures that have to be urgently carried out, which make it very unlikely that carriers will undertake serious assessments. Finally, they are said to act on economic grounds that lead them to be cautious and to reject any doubtful passengers, and, more importantly, they are not directly bound by international human rights standards.

Problems in the identification of vulnerable refugees are exacerbated through the deployment in countries of origin of ILOs whose role and status is very controversial. They are not supposed to have any influence on the control tasks carried out by sovereign host countries, but in practice their 'advice or recommendation' to carriers or local authorities is crucial in order to prevent individuals from exiting the country concerned. Furthermore, no public information regarding their activities is provided, which has been the object of strong criticism.

Moreover, some of the legal instruments that create these instruments fail to consider the special vulnerabilities of refugees. In some cases they even lack any provision aimed at protecting refugee rights. In addition to the absence of any special treatment for refugees in the Visa Code, the ILO Regulation does not include any reference to refugee rights and the need to comply with the EU law on border control. Indeed, some legal instruments include sometimes apparently contradictory rules. For example, the Visa Code does not exempt refugees from the visa requirement yet the SBC includes such an exemption, so a paradox is created due to the fact that refugees are not exempt from holding a visa until the very moment when this requirement is enforced in border or boarding checks.

Finally, the panorama of interception measures at sea is not at all encouraging. The trend for 2016 shows an increase in refugees arriving in Europe by sea. Due to the circumstances in which refugees are forced to travel, their vulnerability is especially pronounced in this context. They must frequently face high levels of violence, extortion and exploitation during their journeys. Moreover, a direct relationship between the reinforcement of migration controls and the increase in human smuggling has been reported. The main concern regarding these operations at sea is that in many cases they are in direct conflict with the Refugee Convention, notably with the prohibition of the States parties to return refugees to places where they face persecution. Moreover, many concerns have been raised regarding those operations coordinated by Frontex, notably, concerns for human rights protection in these operations, problems of attribution of responsibility, and lack of transparency in Frontex activities.

In summary, what these instruments most importantly fail to do is to consider the most basic need of refugees: access to the territory of foreign states where they can find safety from the circumstances that lead them to flee. By ignoring this basic need they are also disregarding the most crucial guarantee recognised to refugees in both the Refugee Convention, to which all the EU Member States are parties, and the main international and regional human rights treaties, including the ECHR – that is, the prohibition of sending refugees back to the hands of their persecutors or the prohibition of *non-refoulement*. Denial of access to territory is therefore one of the crucial factors which makes refugees vulnerable.

Responses to these challenges must be found in legal, policy and practical scenarios. Some legal responses to the lack of protection of refugees, notably regarding the gaps in the Refugee Convention, have been pointed out in this section. Among them, international human rights law provides one of the strongest tools to protect refugees against the implementation of ‘non-entrée policies’ by states. In addition, the EU and the EU Member States should put in place legal avenues to make the enjoyment of the refugee’s right to seek asylum in the EU possible, such as the concession of humanitarian visas, the exemption of visa requirements for certain vulnerable groups, the simplification of asylum procedures and the documentation required of asylum-seekers, or the possibility of submitting asylum claims in embassies located in third countries or to officials carrying out functions extraterritorially. In the policy arena, EU Member States must find a balance between their legitimate right to control access to their territories and to combat terrorism, illegal migration and trafficking in human beings, and the international standards of protection for refugees. EU policies are so strongly focused on security issues and the fight against illegal immigration that they fail to take refugee rights into consideration. Evaluations of the impact of the policies on refugees’ rights and safety are needed to avoid the exposure of refugees to more dangerous journeys to Europe. Humanitarian actors such as the Red Cross are calling on Europe to establish search and rescue operations in the Mediterranean Sea to put an end to the increasing number of deaths at sea.³¹⁸ Finally, EU instruments of pre-border control should be implemented in practice in a manner which incorporates enough guarantees to distinguish those who are in need of international protection and their specific vulnerabilities, and should not function as barriers to the right to seek asylum. Asylum claims should be individually examined, which requires a limitation on the use of collective procedures such as

³¹⁸ Red Cross EU Office, ‘Addressing the Vulnerabilities Linked to Migratory Routes to the European Union’ RCEU 12/2015-002 Position Paper 6.

visa regimes and procedures such as carrier sanctions, which in practice involve the externalisation of examination procedures to private companies.

Unfortunately, the new package of measures proposed by the European Commission in 2016 does not seem to embrace these recommendations. It acknowledges that ‘more legal channels are needed to enable people in need of international protection to arrive in the EU in an orderly, managed, safe and dignified manner and to contribute to saving lives whilst reducing irregular migration and destroying the business model of people smugglers.’³¹⁹ However, for the Commission these ‘legal channels’ are basically the heavily criticised agreement with Turkey³²⁰ and a reform of the EU Blue Card Directive, that is, the legal framework for attracting highly skilled migrants.

³¹⁹ European Commission, Communication from the Commission to the European Parliament and the Council, Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe [2016] COM(2016) 197 final, 14.

³²⁰ See above section B.1.

III. Vulnerability and detention: A study on asylum detention in Italy (Author: Eleonora Del Gaudio)

A. Introduction and overview

1. Background

Within the broader European migration context, Italy's borders have witnessed multiple challenges in recent years. At the beginning of this century, the number of refugees and migrants arriving in Italy amounted to roughly 6,000 people. In 2013, 43,000 migrants reached the Italian territory, among which over 8,300 were minors and nearly 5,500 were women.³²¹ UNHCR statistics on the applications for international protection show a similarly increasing trend. The number of new asylum applications (63,700) registered in Italy in 2014 was the highest on record.³²² In 2015 this number has been topped, with over 83,200 asylum applications, thus providing evidence of the constant increase in the number of people seeking international protection.³²³ Gender disaggregated data show that 12% of the asylum-seekers were women, while the age breakdown shows that 9% were minors (younger than 18 years old).³²⁴

During the first five months of 2016 the number of arrivals to Italy through the Mediterranean route was not as high as in previous years. According to the International Organization for Migration (IOM), a total of 31,341 sea arrivals have been registered between 1 January and 8 May 2016.³²⁵ These figures are significantly lower when compared to the average monthly arrivals in 2014 and 2015.³²⁶ An interesting aspect of the data from this year is the almost immediate impact that the EU-Turkey deal had on the trends of sea arrivals to Italy (see Figure 2). An immediate decrease in the numbers recorded in Greece can be seen, and a proportionally equal increase is reflected in Italy's sea arrivals. This initial shift provides evidence that arrivals are not likely to stop because of the agreement with the Turkish government, but rather that new routes to reach safety and protection will be triggered.

³²¹ Council of Europe Parliamentary Assembly, 'The large-scale arrival of mixed migratory flows on Italian shores', Committee on Migration, Refugees and Displaced Persons, Rapporteur Mr Christopher Chope, United Kingdom, European Democrat Group, Doc 13531, 9 June 2014, 7.

³²² UNHCR, *Asylum Trends 2014: Levels and Trends in Industrialized Countries* [2015] 11.

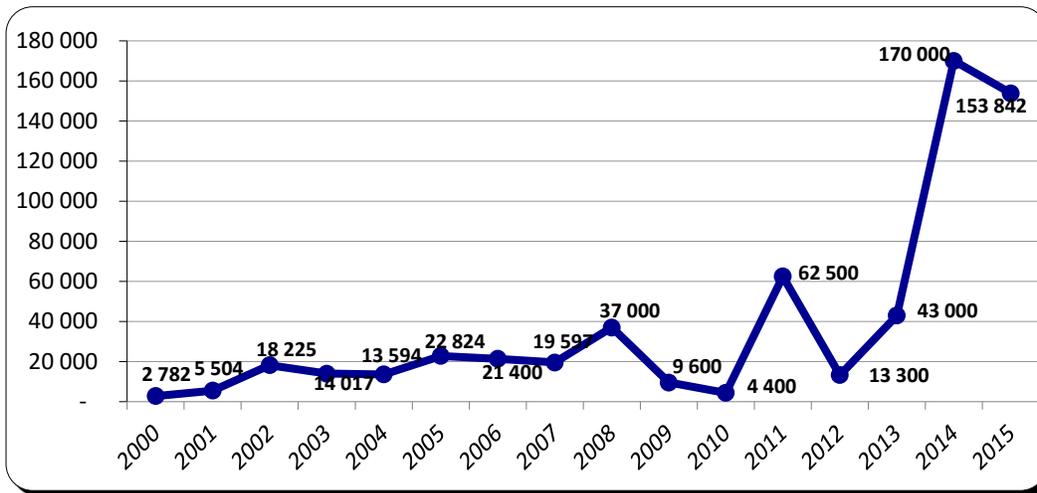
³²³ Eurostat, Asylum Quarterly Report, First time asylum applicants and first instance decisions on asylum applications: fourth quarter 2015, data extracted on 3rd March 2016, <http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report> accessed 12 March 2016.

³²⁴ Eurostat, Asylum and first time asylum applicants by citizenship, age and sex Annual aggregated data (rounded), last update 2nd March 2016, <http://ec.europa.eu/eurostat/en/web/products-datasets/-/MIGR_ASYAPPCTZA> accessed 12 March 2016.

³²⁵ IOM, Mediterranean Migrant Arrivals in 2016, Press release 10 May 2016 <<https://www.iom.int/news/mediterranean-migrant-arrivals-2016-187631-deaths-1357>> accessed 12 May 2016.

³²⁶ Based on elaboration of data from the Italian Ministry of Interior, average monthly arrivals in 2014 were 14,100; in 2015 were 12,800 and in 2016 the average figure is below 6,200.

Figure 1: Trend of Arrivals in Italy 2000 – 2015

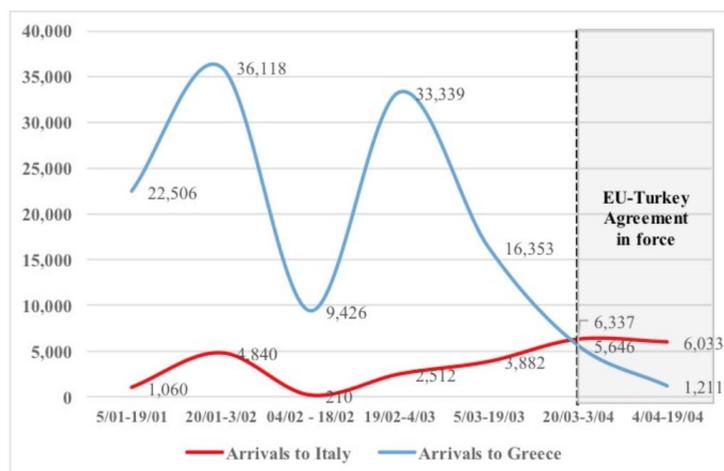


Source: Italian Ministry of Interior³²⁷

Figure 2: Arrivals at sea along the Eastern (Greece) and Central (Italy) Mediterranean routes, 5 January-19 April 2016 ³²⁸

³²⁷ Author’s graphic elaboration based on data of the Italian Ministry of Interior as reported in UNHCR, Sea Arrivals to Italy <<http://unhcr.it/risorse/statistiche/sea-arrivals-to-italy>>; and in Silja Klepp, ‘A Contested Asylum System: The European Union between Refugee Protection and Border Control in the Mediterranean Sea’ (2010) 12(1) European Journal of Migration and Law 1, 3.

³²⁸ Anna Di Bartolomeo, ‘EU Migration Crisis Actions with focus on the EU-Turkey Agreement’, Migration Policy Centre Policy Briefs 2016/4, April 2016. <http://cadmus.eui.eu/bitstream/handle/1814/40925/RSCAS_MPC_2016_04.pdf?sequence=1&isAllowed=y> accessed 12 May 2016.



Source: UNHCR (Greece), Ministry of Interior (Italy)

a) *Securitisation and detention*

In the face of the growing numbers of arrivals, the practice of detaining migrants and asylum-seekers has become an increasingly common practice in Italy and in many other EU Member States.³²⁹ Detention is seen and understood as an element of the more general trend towards securitisation of migration and asylum matters as discussed in the introduction to this report. The 1970s marked the emergence of a new and diffuse climate of fear over migration, in which anyone arriving in a state without legal authorisation, whether seeking asylum or economic opportunity, became seen as a ‘security’ threat.³³⁰ The core pattern of this trend has not changed since then. Security and control continue to underpin and justify coercive measures for managing migration. The ‘threat’ of the other, the fear of the unknown dangerous foreigner, prevails over a protective and human rights-based approach to migration. According to Cornelisse, in Europe detention has become ‘an inherent part of a policy package that has as its main aims to deter future migrants and to remove those already on national territory as rapidly and as effectively as possible’.³³¹

As outlined by Guild, detention may occur in four distinct scenarios: i) on arrival at the border, to ascertain that the grounds of lawful entry are met; ii) later, once in the country when the application for asylum is being assessed; iii) for reasons of irregular stay, generally due to an overstayed visa permit; and lastly, iv) upon removal and pending expulsion.³³² To justify the use of detention states use different sets of

³²⁹ See Odysseus Academic Network, Made Real Project, *Alternatives to Immigration Detention and Asylum Detention in the EU – Time for Implementation*, Philippe De Bruycker (ed), Alice Bloomfield, Evangelia Tsourdi and Joanna Petin (2015) 14; European Migration Network (EMN), *The Use of Detention and Alternatives to Detention in the Context of Immigration Policies*, Synthesis Report, Focussed Study 1/2014 (2014); Council of Europe, Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe following his visit to Italy from 26 to 27 May 2011, Comm DH (2011)26, Strasbourg (2011). Council of Europe, Commissioner for Human Rights, *Criminalisation of Migration in Europe: Human Rights Implications*, Issue Paper (2010).

³³⁰ Daniel Wilsher, *Immigration Detention: Law, History, Politics* (Cambridge University Press 2012) 57.

³³¹ Galina Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Martinus Nijhoff Publishers 2010) 2.

³³² Elspeth Guild, ‘A Typology of Different Types of Centres in Europe’, Report for the European Parliament:

arguments, sometimes in combination: practical considerations such as having the migrant at the disposal of the authorities for identity checks or public health screenings at arrival; criminal law related grounds such as securing public order or forced return of irregular migrants; or political arguments such as to deter any further arrivals or to protect host societies.³³³

Security has thus become the overriding narrative. As argued by Friese, the depiction of people on the move as a sudden and unexpected catastrophe, comparable to a devastating earthquake, has contributed to a siege mentality, which must then be pacified by efficient and well-calculated measures of border management. The enduring state of emergency and the discourse on the exceptional threat posed by migration supports and justifies security and exclusionary attitudes towards asylum-seekers and migrants. This leads to a convergence that allows state measures to obtain public and political legitimacy.³³⁴ Aply, the question of European integration is now to be defined as a process that is legally structured not only by alleged homogeneity, equality and inclusion, but also by increased forms of heterogeneity, inequality and exclusion.³³⁵ This appears to be particularly true when analysing the norms and policies applied to third-country nationals reaching EU borders without a regular entry permit. Those individuals are detainable and excludable through law and through its implementation in practice.

b) Vulnerability and detention

As noted above, the EU legal and policy developments on asylum and migration have been influenced by security imperatives. Specifically, in the case of detention, the negotiations of the recast Reception Conditions Directive (RCD)³³⁶ are valuable evidence of this influential role. Ripoll Servent and Trauner underline that during the discussions on the 2003 Reception Directive the European Parliament strongly opposed the possibility of detaining an asylum-seeker. During the 2013 recast this point was negotiated from a different angle – negotiations primarily revolved around the questions of length and conditions of detention, but no longer on whether this practice should be allowed at all.³³⁷ Security and control prevailed over protection in the EU's predominant blueprint on asylum.

Directorate General Internal Policies of the Union (2006), 7.

³³³ Odysseus Academic Network, Made Real Project, *Alternatives to Immigration Detention and Asylum Detention in the EU – Time for Implementation*, Philippe De Bruycker (ed), Alice Bloomfield, Evangelia Tsourdi and Joanna Petin (2015) 16. See also Galina Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Martinus Nijhoff Publishers 2010) 247; Shyla Vohra, 'Detention of Irregular Migrants and Asylum Seekers' in R. Cholewinski, R. Perruchoud and E. McDonald (eds), *International Migration Law: Developing Paradigms and Key Challenges* (T.M.C. Asser Institut 2007) 49.

³³⁴ Heidrun Friese, 'Border Economies: A Nascent Migration Industry Around Lampedusa' in Lisa Anteby-Yemini, Virginie Baby-Collin, Sylvie Mazzella, Stéphane Mourlane, Cédric Parizot, Céline Regnard and Pierre Sintès (eds), *Borders, Mobilities and Migrations: Perspectives from the Mediterranean, 19–21st Century* (Peter Lang AG 2014), 113, 126.

³³⁵ Editorial Comments, 'The Critical Turn in EU Legal Studies' (2015) 52 CMLR 881, 882.

³³⁶ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants of international protection [2013] OJ L 180/96.

³³⁷ Ariadna Ripoll Servent and Florian Trauner, 'Do supranational EU institutions make a difference? EU asylum law before and after "communitarization"' (2014) 21 Journal of European Public Policy 1142, 1150.

When addressing vulnerability in the context of asylum detention, several aspects need to be taken into account. Building upon the concept of vulnerability as outlined in the introduction to the report, multiple layers of arguments and interpretations are taken into account to set the scene of the analysis. At the outset, there is the broader concept of the ECtHR which recognises all asylum-seekers as a particularly vulnerable group.³³⁸ On the EU level, the recast RCD differentiates between asylum-seekers and vulnerable applicants and a specific set of norms addresses the needs of this category of asylum-seekers.³³⁹ An EU approach to vulnerability, therefore, seems to be emerging in the instruments of the Common European Asylum System (CEAS), most specifically in the recast RCD.³⁴⁰ Furthermore, within the reception framework another link to vulnerability is traceable: the concept of vulnerable asylum-seekers with special reception needs, hence placing on Member States an obligation to conduct an individual evaluation of the vulnerabilities of the applicant in terms of his/her special reception needs ensuring adequate support and monitoring.³⁴¹ Among these notions of vulnerability there is not one isolated conception which should prevail, rather a complementary understanding applies. Vulnerability needs to be seen and discerned in the individual case and within the specific context. It has to be addressed therein in light of a comprehensive reading and understanding of the legal and jurisprudential endeavours.

Deprivation of liberty is a serious interference with an individual's fundamental rights and Member States have to pay particular attention when vulnerable persons are concerned. In the *Z.H. v Hungary* case dealing with the detention of a disabled person, the ECtHR noted that states have an obligation to take particular measures which provide effective protection of vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.³⁴² Furthermore, the Court stated that any form of 'interference with the rights of persons belonging to particularly vulnerable groups — such as those with mental disorders — is required to be subject to strict scrutiny, and only very weighty reasons could justify any restriction'.³⁴³ Henceforth, detention can both aggravate existing individual vulnerabilities and can create and expose the individual to new ones. As such, detention may be a source of vulnerability in and of itself. The deprivation of personal liberty strongly

³³⁸ *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR 21 January 2011) para 251. For the detailed analysis on the case and the ECtHR conception of vulnerability in the asylum context see, above Chapter I.C.

³³⁹ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants of international protection [2013] OJ L 180/96, Chapter IV is titled 'Provisions for Vulnerable Persons' and comprises: General principles (Article 21), Assessment of the special reception needs of vulnerable persons (Article 22), Minors (Article 23), Unaccompanied minors (Article 24) and Victims of torture and violence (Article 25).

³⁴⁰ Joanna Pétin, 'Exploring the Role of Vulnerability in Immigration Detention' (2016) 35 *Refugee Survey Quarterly* 91, 92.

³⁴¹ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants of international protection [2013] OJ L 180/96, art 22; see also art 2(k): 'applicant with special reception needs: means a vulnerable person, in accordance with Article 21, who is in need of special guarantees in order to benefit from the rights and comply with the obligations provided for in this Directive'. On the special procedural guarantees for vulnerable persons see: Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60, art 24.

³⁴² *Z.H. v Hungary* App no 28973/11 (ECtHR 8 November 2012) para 29.

³⁴³ *Z.H. v Hungary* App no 28973/11 (ECtHR 8 November 2012) para 29. See *Alajos Kiss v Hungary* App no 38832/06 (ECtHR 20 May 2010) para 42.

affects the well-being of a person.³⁴⁴ In particular, long-term detention and unsuitable detention conditions can generate or further aggravate existing vulnerabilities.³⁴⁵ Detention measures are generally ill-suited to provide the needed protection to vulnerable persons.

Nonetheless, the practice of Member States shows that the right to seek and enjoy asylum in the EU is sometimes compromised by the routine use of detention.³⁴⁶ Despite this being a fast-growing phenomenon, asylum detention is not known in exact numerical terms.³⁴⁷ The lack of transparent and comprehensive data on asylum detention is thus significant. Research conducted in 33 countries across Europe and North America by Access Info Europe and the Global Detention Project has revealed that it is impossible to obtain a true picture of the number of migrants and asylum-seekers being held in detention because such information is often simply not available.³⁴⁸ In this survey, Italy was among the six European countries that did not respond to the requests for information in spite of follow-up requests made by those conducting the survey.³⁴⁹ This silence could be understood either as a choice of the Member State not to reveal the exact dimension of the phenomenon or may imply that a coordinated national system to collect data on asylum detention is lacking. In both scenarios, the deficiency of reliable information keeps detention within blurred boundaries. A further particularly troubling finding of the research was the lack of disaggregated data concerning the most vulnerable groups in immigration detention.³⁵⁰ Without adequate information concerning where and in what conditions particularly vulnerable persons are detained, it is impossible to evaluate whether governments are adequately addressing special needs. As long as migration control considerations prevail over protection considerations in this manner, the

³⁴⁴ See Detention Forum, Vulnerable People Working Group, 'Rethinking "Vulnerability" in Detention: A Crisis of Harm' [2015] 34–45.

³⁴⁵ UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-seekers and Alternatives to Detention* [2012] <<http://www.unhcr.org/505b10ee9.html>>; Jesuit Refugee Service (JRS) Europe, 'Becoming Vulnerable in Detention: civil society report on the detention of vulnerable asylum seekers and irregular migrants in the EU' [2010] <http://www.jrs.net/Assets/Publications/File/BecomingVulnerableDetention_June2010.pdf> (the DEVAS Project). See also Ali McGinley and Adeline Trude, 'Positive duty of care? The mental health crisis in immigration detention' [2012] <<http://www.aviddetention.org.uk/sites/default/files/images/Positive%20Duty%20of%20Care%20FINAL.pdf>>.

³⁴⁶ Helen O'Nions, *Asylum — A Right Denied: A Critical Analysis of European Asylum Policy* (Ashgate 2014), 164.

³⁴⁷ Amnesty International estimates that 600,000 men, women and children are detained in Europe every year for migration control purposes, mostly with no court decision. Amnesty International, 'In detention in Europe' <<http://www.sos-europe-amnesty.eu/in-detention-in-europe-facts-and-figures/>> accessed 12 March 2016. See also European Commission, Commission Communication: On EU Return policy [2014] COM(2014) 199 final, 18.

³⁴⁸ Access Info and Global Detention Project, *The Uncounted: Detention of Migrants and Asylum Seekers in Europe* [2015], 4.

³⁴⁹ Access Info and Global Detention Project, *The Uncounted: Detention of Migrants and Asylum Seekers in Europe* [2015], 7. The other five countries noted by the report under the 'administrative silence' are: Cyprus, Iceland, Malta, Norway, and Portugal.

³⁵⁰ Access Info and Global Detention Project, *The Uncounted: Detention of Migrants and Asylum Seekers in Europe* [2015], 19. The report notes that Eurostat, the official statistical office of Europe, is presently not gathering data on detention.

Common European Asylum System (CEAS) will be unable to provide a vulnerability-sensitive refugee protection regime.³⁵¹

2. Objectives and focus of the study

Against this backdrop, the present study examines the protection of vulnerable groups and individuals within Italy's reception system, focusing in particular on detention that takes place while the asylum claim is being processed. Migrants and asylum-seekers arriving at Italy's southern borders typically use unauthorised border crossing points and lack a permit to enter or to stay in the territory.³⁵² Hence, the risk of detention is triggered for most of the persons reaching the southern coasts of Italy and seeking international protection without entry documents. As the majority of the reception and detention centres within Italy are located at the extreme tip of the peninsula, in the regions of Sicily and Apulia, particular attention is paid to the practice of detention in this area.

The study identifies and critically discusses the ways in which vulnerability is determined and assessed throughout the asylum process at Italy's southern borders and how it is specifically addressed in the case of detention. Italy, as one of the main connecting bridges to the European continent, plays an important role in how the EU regulations and directives relating to the reception of asylum-seekers are implemented. This is why the analysis intends to test the practical implementation of the legislative provisions on detention of vulnerable persons within the fragmented and overburdened Italian reception system. Where a human rights perspective is adopted, the special needs of vulnerable persons are promptly identified, assessed and adequately addressed.

3. Structure and approach

The study has two main sections: one focusing on the EU legislation on asylum detention and one focusing on Italy's implementation of EU law in this specific field. Asylum detention of vulnerable individuals in the Italian context needs to be understood within the broader reception framework as established by the EU relevant legislation and policy on asylum and migration. Therefore, Section B outlines and discusses the current EU legislation on asylum in general and on asylum detention in particular. It provides an overview on the EU common asylum system and on the detention provisions under the recast Reception Conditions

³⁵¹ Vincent Chetail, 'The Common European Asylum System: Bric-à-Brac or System?' in Vincent Chetail, Philippe De Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Martinus Nijhoff 2015), 23.

³⁵² European Parliament, *Irregular Immigration in the EU: Facts and Figures*; Briefing April 2015 <[http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/554202/EPRS_BRI\(2015\)554202_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/554202/EPRS_BRI(2015)554202_EN.pdf)> accessed 13 March 2016.

Directive (hereafter ‘recast RCD’ or ‘Directive’).³⁵³ The specificities and the issues concerning the detention of vulnerable persons are addressed by tracing the degree of protection granted to vulnerable persons when detained as they claim international protection.

Subsequently, attention is turned to the specific situation of asylum detention in the Italian context. Section C outlines the Italian normative framework and provides an analysis of the law transposing the recast RCD. The deprivation of liberty of vulnerable persons is analysed in particular with the view to the recent high numbers of boat arrivals to Italy’s southern shores. The aim is to identify ways in which the special protection needs of vulnerable individuals are taken into account in detention cases in law and in the practical implementation of the law, and how the discretion left to Member States impacts the effective application of the provisions in the EU recast RCD. A brief snapshot of the hot spots approach in the Italian context is also provided.

The final part includes some concluding remarks and recommendations on actions at the EU and Member State levels to substantially address the special protection guarantees of particularly vulnerable individuals and in order to reflect the realisation of their fundamental rights.

B. The EU and asylum detention of vulnerable persons

1. Asylum detention of vulnerable persons: legal guarantees

a) Common European Asylum System

In 1999, the EU common asylum approach was agreed upon in Tampere.³⁵⁴ The European Council’s commitment to the Refugee Convention and international human rights standards was included among the cornerstones of the five-year programme, and heralded the aim of an open and secure Europe ‘fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity. A common approach must also be developed to ensure the integration into our societies of those third country nationals who are lawfully resident in the Union’.³⁵⁵ Yet, at the same time, there was an equivalent acknowledgement of the need to control external borders in order to prevent illegal immigration and to combat international

³⁵³ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L180/96.

³⁵⁴ European Parliament, Presidency Conclusions Tampere European Council, 15 and 16 October 1999.

³⁵⁵ European Parliament, Presidency Conclusions Tampere European Council, 15 and 16 October 1999, para 4.

crime.³⁵⁶ This same thread is traceable within the subsequent five-year plans agreed in The Hague³⁵⁷ and in Stockholm.³⁵⁸ The duality is also present in the five-year plan currently in force.³⁵⁹

The initial set of instruments for a common asylum approach constituted the first phase of the CEAS and established minimum common standards at the EU level.³⁶⁰ Following several years of negotiations, the second phase CEAS instruments are now fully enacted and the directives are to be transposed into Member States' legislation. In practice, the second phase entails that the CEAS has moved beyond the minimum standards approach to enhanced protection in the form of 'common procedures' as a result of the changing legal basis in Article 78 TFEU.³⁶¹ This turn towards common standards coincides with the binding nature of the EU Charter of Fundamental Rights, which contains an explicit right to asylum as well as the prohibition of *refoulement* under Articles 18 and 19. It is, however, important to note that Article 79 TFEU emphasises security concerns and provides that the Union shall ensure 'the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings'.³⁶² In balancing human/fundamental rights and security, the latter objective often seems to take priority. As pointed out by O'Nions, on the road to common standards, the Commission's recast proposals attempted to reaffirm the central position of the protection seeker. In the end, however, the Commission's position did not prevail, but rather it was the Council which emphasised strong border controls.³⁶³

b) Detention in the recast RCD

Of the CEAS instruments, the recast RCD, which entered into force on 20 July 2015, lays down the EU's standards for the reception of applicants for international protection. The recast RCD includes provisions on material reception conditions,³⁶⁴ documentation,³⁶⁵ rights and obligations of the asylum-seekers and

³⁵⁶ European Parliament, Presidency Conclusions Tampere European Council, 15 and 16 October 1999, para 3.

³⁵⁷ European Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union [2005] OJ C53/1, para 1.6.1.

³⁵⁸ European Council, The Stockholm Programme — An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, paras 6.1.1 and 6.1.6.

³⁵⁹ Articles 78 and 79 of the Treaty on the Functioning of the European Union (TFEU), known as the Treaty of Lisbon which entered into force on 1 December 2009. For a detailed analysis on EU policies on immigration, border checks and asylum see further Mikaela Heikkilä, Maija Mustaniemi-Laakso Suzanne Egan, Graham Finlay, Tamara Lewis, Julia Planitzer, Helmut Sax, Lisa Maria Heschl and Stefan Salomon, *Report critically assessing human rights integration in AFSJ policies* [2015], 14–102.

³⁶⁰ The measures considered to form the 'first phase' of the Common European Asylum System (CEAS) were adopted between 2000 and 2005 and include: Council Regulation (EC) No 2725/2000 of 11 December 2000; Council Regulation (EC) No 343/2003 of 18 February 2003; Council Directive 2003/9/EC of 27 January 2003; Council Directive 2004/83/EC of 29 April 2004; and Council Directive 2005/85/EC of 1 December 2005.

³⁶¹ See Steve Peers, Violeta Moreno-Law, Madeline Garlick and Elspeth Guild (eds), *EU Immigration and Asylum Law, Vol. 3: EU Asylum Law* (Brill 2015), 11–12 and 498.

³⁶² Article 79(1) TFEU.

³⁶³ Helen O'Nions, *Asylum — A Right Denied: A Critical Analysis of European Asylum Policy* (Ashgate 2014), 132.

³⁶⁴ Articles 17 and 18 recast RCD.

³⁶⁵ Article 6 recast RCD.

the Member State,³⁶⁶ employment,³⁶⁷ healthcare,³⁶⁸ education³⁶⁹ and vocational training.³⁷⁰ The Directive is the key EU legal instrument concerning the detention of protection seekers, which is a newly introduced subject of harmonisation within the CEAS. Four detailed provisions (Articles 8–11) set the common legal standards to be achieved. These provisions are cross-referenced in the recast Asylum Procedure Directive (APD)³⁷¹ and are substantially mirrored in the recast Dublin III Regulation, which newly introduces a provision for the detention of applicants who are subject to a Dublin transfer and who are considered to be at risk of absconding.³⁷²

According to Article 2(h) of the recast RCD, ‘detention’ means the confinement of an applicant by a Member State within a particular place where the applicant is deprived of his or her freedom of movement. Article 8 provides for an exhaustive list of grounds to allow for the detention of asylum-seekers and requires detention to occur only if other less coercive measures cannot be applied effectively and when it proves to be necessary on the basis of an individual assessment. Article 9 establishes the procedural guarantees that Member States have to ensure in relation to detention and Article 10 regulates in detail the detention conditions, which shall ensure full respect of the applicants’ human dignity and grant respect for their privacy.³⁷³ Distinct protection for vulnerable persons and for persons with special reception needs is guaranteed in the Directive.³⁷⁴ These legal guarantees are analysed in detail below.

c) *The recast RCD and vulnerable persons*

Several norms of the recast RCD are of specific relevance for the asylum detention of vulnerable persons. The general principle in Article 21 enshrines that Member States are under an obligation to take into account the specific situation of vulnerable persons in their national laws implementing the Directive. This

³⁶⁶ Article 20 recast RCD.

³⁶⁷ Article 15 recast RCD.

³⁶⁸ Article 19 recast RCD.

³⁶⁹ Article 14 recast RCD.

³⁷⁰ Article 16 recast RCD.

³⁷¹ Article 26, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60 (recast APD). Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98 of 24.12.2008 (Returns Directive), is not an integral part of the CEAS *stricto sensu*, but it is related to those instruments since it applies when a negative decision is given on the asylum application. The very controversial Directive regulates detention under Chapter IV – Detention for the Purpose of Removal (arts 15–18).

³⁷² Article 28, Regulation No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31 (Dublin III Regulation).

³⁷³ Article 10 and Recital 18 recast RCD.

³⁷⁴ Article 11 recast RCD.

obligation refers to the Directive as a whole and implies the need for a consistent and comprehensive approach in the implementation of norms protecting vulnerable persons.

A chapter dedicated to ‘Persons with Special Needs’ was included in the 2003 Reception Directive (part of the first phase CEAS instruments).³⁷⁵ This chapter took into consideration the particular situation of minors, unaccompanied minors, disabled people, elderly people, pregnant women and single parents with children. In the 2013 recast Directive, Article 2(k) defines the applicant with special reception needs as a vulnerable person, in accordance with Article 21, who is in need of special guarantees in order to benefit from the rights and to comply with the obligations enshrined in the Directive. The title of the chapter setting forth such special guarantees was changed to ‘Provisions for Vulnerable Persons’ and Article 21 now provides for a non-exhaustive list of vulnerable persons. New vulnerable groups are introduced to this list in addition to the ones included in the 2003 Directive: victims of human trafficking, persons with serious illnesses, persons with mental disorders, and victims of female genital mutilation.³⁷⁶

In 2007 the European Commission Green Paper noted several inadequacies in the definition and identification procedures applied by Member States with regard to particularly vulnerable asylum-seekers.³⁷⁷ The Commission further stated that addressing the needs of vulnerable persons has been identified as one of the main deficiency in the application of the 2003 Directive.³⁷⁸ This has an inherent implication that many vulnerable persons might not benefit from the special protection, and indeed risk facing further vulnerabilities if detained. A significant improvement in the Recast Directive is the newly introduced provision under Article 22 which provides for an obligation to assess whether the applicant has special reception needs and what these needs are, not only at the moment of lodging the application, but in *every moment of the procedure*. This assessment does not need to take the form of an administrative procedure and may be integrated into existing national procedures. The provision grants a substantial and continuous application of the assessment at the national level, and at the same time it allows a certain degree of flexibility on the modalities applied by Member States to this end. This level of discretion left to Member States can imply, on one side, the risk of poor and inconsistent approaches and, on the other, the possibility to adapt and enhance protection in cases of specific need on an individualised basis. Further, the same article includes the obligation for Member States to ensure support for persons with special needs throughout the asylum procedure and to provide for appropriate monitoring of their situation. This norm is seen as a positive step forward in advancing the special protection needs of particularly vulnerable groups.³⁷⁹ These provisions shall guide and substantially apply to all procedures concerning the detention of vulnerable persons.

³⁷⁵ Articles 17–20, Chapter IV RCD.

³⁷⁶ Article 21 Recast RCD.

³⁷⁷ European Commission, ‘Green Paper on the future Common European Asylum System’, COM (2007) 301 final (2007) para 3.5.1.

³⁷⁸ European Commission, ‘Green Paper on the future Common European Asylum System’, COM (2007) 301 final (2007) para 3.5.2.

³⁷⁹ See Ciara Smyth, *European Asylum Law and the Rights of the Child* (Routledge 2014) 209–233.

(1) Guarantees and challenges for vulnerable individuals

Notably, according to Article 11 of the recast RCD, EU Member States are required to undertake specific measures to protect and address the special needs of vulnerable persons when deprived of their liberty. The provision reaffirms the obligation for Member States to establish regular monitoring and adequate support taking into account their particular situation, including their health. It is important to note that a suggestion for amendment by the European Parliament recommended that persons with special needs shall not be detained unless an individual examination of their situation by a qualified and independent professional certifies that their health, including their mental health, and well-being will not significantly deteriorate as a result of the detention.³⁸⁰ This safeguard was, however, removed in the recast process and watered-down with a more general principle stating that the health of vulnerable applicants in detention 'shall be of primary concern to national authorities'.³⁸¹ Aptly, the European Council on Refugees and Exiles (ECRE), when commenting on the proposed text for the recast RCD, noted that 'the initial ambition to aim for high standards of reception conditions whilst ensuring a sufficiently high level of harmonisation has been seriously lowered'.³⁸² The identified legal 'gateways' combined with a widespread state practice to detain migrants and asylum-seekers are an element of serious concern particularly where vulnerable persons are concerned.

Article 11(2) requires that minors shall be detained only as a measure of last resort and after having established that less coercive measures cannot be effectively applied. While this is a relevant provision ensuring consistency with Article 37 of the Convention on the Rights of the Child (CRC),³⁸³ it is unfortunate that the same approach is not extended to all vulnerable persons under Article 11(1). The detention of unaccompanied minors is further limited only to exceptional circumstances and it is required that they are never detained in prison.³⁸⁴ As far as possible, unaccompanied minors shall be accommodated in institutions that take into account the needs of persons of their age.³⁸⁵ Further, education for minors can be delayed for up to three months following an application for international protection.³⁸⁶

Reflecting one of the four guiding principles of the CRC, Article 11(2) underlines that minors' best interests shall be a primary consideration for Member States. Also, an important judgment of the CJEU reiterates the primacy of the best interests of the child and the right to family unity. In the *MA, BT and DA v Secretary of State for the Home Department* joint cases the Court confirmed a substantive application of the best

³⁸⁰ Article 11(5) of the European Parliament legislative resolution of 7 May 2009 on the proposal for a directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (recast) (COM(2008)0815 – C6-0477/2008 – 2008/0244 (COD)).

³⁸¹ Article 11(1) recast RCD.

³⁸² ECRE, Comments from the European Council on Refugees and Exiles on the Amended Commission Proposal to Recast the Reception Directive (COM (2011) 320 final) [2011] 4.

³⁸³ UN Convention on the Rights of the Child (CRC, adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

³⁸⁴ Article 11(3) recast RCD.

³⁸⁵ Article 11(3) recast RCD.

³⁸⁶ Article 14(2) recast RCD.

interests principle when children are asylum applicants.³⁸⁷ Further, Article 11(2) introduces an obligation to ensure that detained minors are given the possibility to engage in leisure activities, including play and recreational activities appropriate to their age. This provision mirrors Article 31 of the CRC and represents an important improvement in the recast Directive.³⁸⁸

Similarly, Article 11(4) of the recast RCD establishes that detained families shall be provided with separate accommodation guaranteeing adequate privacy. Moreover, Article 11(5) provides for separate accommodation for female applicants. Regrettably, however, Article 11(6) allows the possibility for EU Member States to derogate from all protective provisions relating to the detention of vulnerable individuals ‘in duly justified cases and for a reasonable period which shall be as short as possible’ when the applicant is detained at a border post or in a transit zone for purposes other than an accelerated or admissibility procedure (as per Article 43 recast APD).

Another critical factor that might seriously impact vulnerable persons is the fact that the recast RCD failed to establish any specific time limit for the maximum length of detention. Article 9 specifies only that it should be ‘as short as possible’, but no criteria are set to delimit an adequate and reasonable timeframe. The recast RCD requires that the administrative procedures related to Article 8(3) are carried out with ‘due diligence’.³⁸⁹ This requirement is interpreted as requiring Member States to take, at least, ‘concrete and meaningful steps to ensure that the time needed to verify the grounds for detention is as short as possible, and that a real prospect exists that such verification can be carried out successfully in the shortest possible time’.³⁹⁰ The undetermined length of detention gives rise to a grave risk of long-term detention and may lead Member States to use such measures without adequate control, with full discretion, and possibly without applying principles of reasonableness and proportionality. This, however, would certainly not fall short of the obligations stemming from the ECHR and the EU Charter of Fundamental Rights.³⁹¹ The absence of a maximum time limit, as stated above, implies higher risk of vulnerability and it is also damaging to future integration should the detainee later on be awarded refugee status.³⁹²

A further element of concern is the possibility for Member States, as per Article 24(2) of the recast RCD, to detain minors aged 16 or over in accommodation centres for adult applicants where this is in their best interests. This approach is questionable. The provision seems ill-suited with the general approach to

³⁸⁷ Case C-648/11, *The Queen, on the application of MA, BT, DA v Secretary of State for the Home Department* [2013] CJEU 6 June 2013.

³⁸⁸ Article 31(1) CRC provides that: ‘States Parties recognise the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and in the arts’.

³⁸⁹ Article 9(1) recast RCD.

³⁹⁰ Recital 16 recast RCD.

³⁹¹ Article 5 ECHR and Article 6 of the EU Charter of Fundamental Rights protect the right to liberty and ensure that no-one is deprived of liberty in an arbitrary manner. See Council of Europe/European Court of Human Rights, Guide on Article 5 – The Right to Liberty and Security, June 2012.

³⁹² Anne Bathily, ‘Immigration detention and its impact on integration: A European approach’, King Project – EU Policy Unit Desk Research Paper 2/July 2014 <<http://king.ismu.org/wp-content/uploads/EU-Policy-Paper-n-2-rev.pdf>> accessed 16 February 2016.

detention of minors (for example, in the criminal law context) according to which consideration of alternatives to detention should prevail and where the focus is on (re)integration of the child to society.³⁹³ Reference here can be made to the 2013 European Commission proposal on procedural safeguards for children suspected or accused in criminal proceedings. The proposal underlines that:

[i]n accordance with international standards, children should be kept separately from adults in order to take into account their needs and vulnerability. When a detained child reaches the age of 18, the person should have the possibility to continue the separate detention. For that purpose, the individual circumstances of the case should be taken into account. The measures foreseen by this Directive do not require, however, the creation of separate detention facilities or prisons for children.³⁹⁴

The framework presently provided under the recast RCD seems to favour the administrative convenience in managing the reception of minors seeking asylum more than eliciting their best interests and ensuring the exceptionality of their detention.

As noted above, Article 11(1) of the recast RCD does require states to ensure proper and regular monitoring when vulnerable people are detained. Article 28 further specifies that:

(1) Member States shall, with due respect to their constitutional structure, put in place relevant mechanisms in order to ensure that appropriate guidance, monitoring and control of the level of reception conditions are established. (2) Member States shall submit relevant information to the Commission in the form set out in Annex I, by 20 July 2016 at the latest.³⁹⁵

Accordingly, Annex I outlines the reporting details. Reports from Member States shall include a thorough explanation of the different steps taken for the identification of persons with special reception needs, including the moment when a status of vulnerability is triggered. Furthermore, the states' reports shall specify how special reception needs are addressed, in particular for unaccompanied minors, victims of torture, rape or other serious forms of psychological, physical or sexual violence and victims of human trafficking.³⁹⁶ The regrettable aspect is that Annex I does not mention any form of reporting concerning detention of vulnerable individuals. The lack of a specific duty to that end is striking considering the high degree of vulnerability faced when deprivation of liberty occurs. This choice seems to allow the continuation of the administrative silence on detention practices and contributes to the invisibility of detained vulnerable persons.

As seen in this section, where vulnerable persons are detained EU Member States are under an obligation to provide adequate care, special protection and support. In spite of this, the recast RCD continues to provide the Member States with a problematic margin of appreciation in many crucial aspects. In practice, this has reinforced the securitisation approach delineated above. Hence, the recast RCD in this regard

³⁹³ Article 40 CRC.

³⁹⁴ Article 12 of the European Commission Proposal for a Directive of the European Parliament and Council on procedural safeguards for children suspected or accused in criminal proceedings, COM(2013) 822/2.

³⁹⁵ Article 28 recast RCD.

³⁹⁶ See Annex I para 1 recast RCD.

reflects the tension that often exists between protection needs of asylum-seekers and the desire of states and the Union to protect external borders.

2. Asylum detention of vulnerable persons and human rights law/fundamental rights

a) The UNHCR

Detention of asylum-seekers as a migration management tool has become a prevalent practice, including among EU Member States,³⁹⁷ even though detention in the legal instruments is framed as an exceptional measure. As detention of asylum-seekers, and especially vulnerable ones, is problematic from a human rights perspective, the issue has been addressed in many recommendations by UN organs and treaty bodies and in several judgments from both the ECtHR and the CJEU. The UNHCR spokesperson has, for example, regretted the increased use of detention in the immigration framework.³⁹⁸ The deterrence function, often claimed by governments to justify detention, has not proven to have an influence in reducing irregular migration. Regardless of any such effect, detention policies aimed at deterrence are generally unlawful under international human rights law as they are not based on an individual assessment as to the necessity to detain.³⁹⁹ In 2012, the UNHCR published new guidelines on detention of asylum-seekers in which it actively advocates for alternatives to detention, especially for vulnerable asylum-seekers.⁴⁰⁰ The guidelines further remark that in view of the hardship that it entails detention should be a measure of last resort, prescribed by national laws, and implemented only where necessary and proportionate to a legitimate purpose and in conformity with international standards.⁴⁰¹ Guideline 9 requires states to pay close attention to the special circumstances and needs of particular asylum-seekers

³⁹⁷ Medecins sans Frontieres (MSF), 'Invisible Sufferings: Prolonged and systematic detention of migrants and asylum seekers in substandard conditions in Greece', <http://www.msf.org/sites/msf.org/files/invisible_suffering.pdf> 7, accessed 13 March 2016.

³⁹⁸ UNHCR, 'UNHCR concerned at detention of asylum-seekers, releases new guidelines', Press Release, 21 September 2012 <<http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=505c33199&query=detention>> accessed 16 February 2016. See also Migreurop, 'Mapping of migrant camps: A dynamic and interactive mapping of migrant detention in Europe and beyond' <<http://en.closesthecamp.org/2014/03/03/europe-of-camps-deploys-its-web/>> accessed 16 February 2016.

³⁹⁹ UNHCR, 'Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum Seekers and Alternatives to Detention' [2012], 7.

⁴⁰⁰ UNHCR, 'Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum Seekers and Alternatives to Detention' [2012].

⁴⁰¹ UNHCR, 'Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum Seekers and Alternatives to Detention' [2012], para 2. See also UNHCR and the Office of the High Commissioner for Human Rights (OHCHR), Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions, May 2011, para 6, <<http://www.unhcr.org/refworld/docid/4e315b882.html>> accessed 13 March 2016.

such as children, pregnant women, the elderly, or persons with disabilities or experiencing trauma. The UNHCR guidelines require as a general rule that asylum-seekers with long-term physical, mental, intellectual and sensory impairments should not be detained. In addition, immigration proceedings need to be accessible to persons with disabilities, including where this is needed to facilitate their rights to freedom of movement.⁴⁰²

b) International human rights treaty monitoring bodies

The Committee on the Rights of the Child has stated that the enjoyment of rights stipulated in the CRC must be available to all children irrespective of their nationality, immigration status or statelessness.⁴⁰³ Accordingly, the Committee noted that authorities and decision-makers need to take into account the different kinds and degrees of vulnerability of each child, as each child is unique and each situation must be assessed according to the child's uniqueness.⁴⁰⁴ This requires an individualised approach and adequate professional training for the staff involved in the asylum case management whenever a child is concerned. This is especially true when minors face the risk of detention due to their migration status.

The Committee monitoring the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) has reiterated in its General Recommendation 32 the fundamental need for gender-sensitive reception systems. On detention, the Committee noted that:

[a]s a general rule, pregnant women and nursing mothers, who both have special needs, should not be detained. Where detention of women asylum seekers is unavoidable, separate facilities and materials are required to meet the specific hygiene needs of women. The use of female guards and warders should be promoted. All staff assigned to work with women detainees should receive training relating to the gender-specific needs and human rights of women [...] failure to address the specific needs of women in immigration detention and ensure the respectful treatment of detained women asylum seekers could constitute discrimination within the meaning of the Convention.⁴⁰⁵

Following its review of the EU, in October 2015 the UN Committee on the Rights of Persons with Disabilities raised concerns about the detention of refugees and migrants with disabilities, and the fact that many persons with disabilities have their legal capacity restricted, affecting their ability to make their own decisions.⁴⁰⁶ Notably, the Committee expressed concern on the fact that refugees, migrants and asylum seekers with disabilities continue to be detained within the European Union in conditions that do

⁴⁰² Guideline 9.5, UNHCR, 'Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum Seekers and Alternatives to Detention' [2012].

⁴⁰³ Committee of the Rights of the Child, General Comment No 6, 1 September 2005, para 12.

⁴⁰⁴ Committee of the Rights of the Child, General Comment No 14, 29 May 2013, para 76.

⁴⁰⁵ Committee on the Elimination of Discrimination against Women, General Recommendation No 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, CEDAW/C/GC/32, 14 November 2014, para 34.

⁴⁰⁶ Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of the European Union, CRPD/C/EU/CO/1, 2 October 2015.

not provide appropriate support and reasonable accommodation.⁴⁰⁷ The Committee recommended the European Union to issue guidelines to its agencies and Member States that restrictive detention of persons with disabilities in the context of migration and asylum seeking is not in line with the Convention.⁴⁰⁸ For persons with a mental or physical disability, special care requirements need to be identified and addressed.

c) The ECtHR and CJEU

The growth in the use of detention as a tool to control unwanted migration is mirrored in a growing body of case law on immigration detention by the ECtHR over the last few years.⁴⁰⁹ In the ECtHR cases implying a possible violation of Article 5 (right to liberty and security of the person), the Court's approach shows the prevalence of a particular understanding of territorial sovereignty which has, until now, scarcely been challenged.⁴¹⁰ The case of *Saadi v the United Kingdom* is particularly instructive to this end. The Court had recognised that the deprivation of liberty of asylum-seekers is a 'necessary adjunct' to the sovereign right of states to control aliens' entry into and residence in their territory.⁴¹¹ While human rights law limits states' right to detain, the level of protection afforded to migrants is, however, weak in this regard, which reflects an uneasy tension between the universal right to liberty and states' border control prerogatives.⁴¹²

In connection to other ECHR provisions, most notably Articles 3 and 8, the ECtHR has, however, adopted an approach that is more migrant-friendly, and which has entailed that the ECtHR in certain contexts has provided for better protection than the highest national immigration courts.⁴¹³ The case that has significantly broadened the ECtHR's notion of group vulnerability is *M.S.S. v Belgium and Greece*. In a milestone judgment, the Court noted that 'States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum seekers of the protection afforded by these conventions'.⁴¹⁴

⁴⁰⁷ Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of the European Union, CRPD/C/EU/CO/1, 2 October 2015, para 34.

⁴⁰⁸ Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of the European Union, CRPD/C/EU/CO/1, 2 October 2015, para 35.

⁴⁰⁹ Galina Cornelisse, 'Detention of Foreigners' in Elspeth Guild and Paul Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Martinus Nijhoff 2012), 207, 208.

⁴¹⁰ See notably *Saadi v the United Kingdom* App no 13229/03 (ECtHR (GC) 29 January 2008), at para 64 in which the Court had recognised that the deprivation of liberty of asylum seekers is a 'necessary adjunct' to the undeniable sovereign right of states to control aliens' entry into and residence in their territory.

⁴¹¹ *Saadi v the United Kingdom* App no 13229/03 (ECtHR (GC) 29 January 2008) para 64.

⁴¹² Samantha Velluti, *Reforming the Common European Asylum System: Legislative Developments and Judicial Activism of the European Courts* (Springer 2014), 66.

⁴¹³ Galina Cornelisse, 'Detention of Foreigners' in Elspeth Guild and Paul Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Martinus Nijhoff 2012), 207, 219.

⁴¹⁴ *M.S.S v Belgium and Greece* App no 30696/09 (ECtHR 21 January 2011), para 216.

Importantly, a more proactive and dynamic approach is emerging in the ECtHR case law where particularly vulnerable persons, such as minors, women and families, are involved in detention cases. Accordingly, the Court delivered judgments stating that the detention of children is ill-suited to their basic needs and in a number of cases has argued for alternative care arrangements respecting the best interests of the child.⁴¹⁵

In *Mahmundi and Others v Greece*,⁴¹⁶ the detention of an Afghan family, including a woman who was eight months pregnant and four minors, in the Pagani detention centre on the island of Lesbos amounted to inhuman and degrading treatment in breach of Article 3 of the ECHR. The Court held that the applicants' conditions of detention were appalling and lacked any specific attention to their particular status as minors and a pregnant woman.⁴¹⁷ Likewise, in *Aden Ahmed v Malta* the Court gave particular relevance to the particular vulnerability of the applicant due to her fragile health and personal emotional circumstances.⁴¹⁸ Also, in *Asalya v Turkey* the Court found that the detention conditions of a paraplegic and wheel-chair bound Palestinian amounted to degrading treatment.⁴¹⁹ The applicant was denied some of the minimal necessities to guarantee an adequate standard of living, such as sleeping on a bed and being able to use the toilet as often as required without having to rely on the help of strangers. His detention was not compatible with his human dignity and exacerbated the mental anguish caused by its arbitrary nature, regardless of its relatively short period.⁴²⁰

The Court's jurisprudence elicits an awareness of the particularly vulnerable situation of detained persons. Hence, in cases where people belonging to a particularly vulnerable group have been detained, the situation of particular vulnerability has triggered a violation of Articles 3, 8 and/or 5 of the ECHR.⁴²¹ With regard to detention of asylum-seekers it is of importance that the Court's case law indicates that the awareness of a vulnerable situation ought to prevail over any consideration on the migration status. The Court held in *Muskhadzhiyeva v Belgium* that the extreme vulnerability of a child takes precedence over the status of an illegal alien.⁴²²

The CJEU has also adopted important case law in this regard. In *J.N. v Staatssecretaris voor Veiligheid en Justitie*, the CJEU for the first time ruled on the detention provisions as per the recast RCD.⁴²³ The Court has reaffirmed the exceptional nature of any detention measure and has argued that 'in view of the

⁴¹⁵ *Houssein v Greece* App no 71825/11 (ECtHR 24 October 2013); *Mahmundi and Others v Greece* App no 14902/10 (ECtHR 31 July 2012); *Popov v France* Apps nos 39472/07 and 39474/07 (ECtHR 19 January 2012); *Rahimi v Greece* App no 8687/08 (ECtHR 5 April 2011); *Kanagaratnam and Others v Belgium* App no 15297/09 (ECtHR 13 December 2011); *Muskhadzhiyeva and Others v Belgium*, App no 41442/07 (ECtHR 19 January 2010); *Mubilanzila Mayeka and Kanini Mitunga v Belgium* App no 1378/03 (ECtHR 12 October 2006).

⁴¹⁶ *Mahmundi and Others v Greece* App no 14902/10 (ECtHR 31 July 2012).

⁴¹⁷ *Mahmundi and Others v Greece* App no 14902/10 (ECtHR 31 July 2012), paras 67 and 72.

⁴¹⁸ *Aden Ahmed v Malta* App no 55352/12 (ECtHR 23 July 2013), para 97.

⁴¹⁹ *Asalya v Turkey* App no 43875/09 (ECtHR 15 April 2014).

⁴²⁰ *Asalya v Turkey* App no 43875/09 (ECtHR 15 April 2014) para 53.

⁴²¹ European Court of Human Rights: Factsheet – Migrants in detention [2014] identify the detailed case law in which the lawfulness of detention, conditions of detention and length of detention have caused a violation of a Convention right.

⁴²² *Muskhadzhiyeva and Others v Belgium* App no 41442/07 (ECtHR 19 January 2010), para 56 in which the Court stated that the extreme vulnerability of children prevails the status of irregular stay in the state's territory.

⁴²³ Case C-601/15 PPU, *J.N. v Staatssecretaris voor Veiligheid en Justitie* [2016] CJEU 15 February 2016.

importance of the right to liberty enshrined in Article 6 of the Charter and the gravity of the interference with that right which detention represents, limitations on the exercise of the right must apply only in so far as is *strictly necessary*' (emphasis added).⁴²⁴ According to Peers, the judgment sends a clear signal that the CJEU is going to assert its legal authority to ensure that measures taken to deal with the refugee and migration crisis are compatible with fundamental rights, *in particular as regards asylum-seekers*. In relation to those who have not established any need to stay the Court has, however, not adopted this approach for the time being.⁴²⁵

C. Asylum detention in Italy

1. Introduction and background

The securitisation trend discussed throughout this report is strongly visible in the Italian approach to asylum detention. Ten years ago the European Parliament and the UN Human Rights Committee called upon Italy to guarantee the individual examination of asylum applications and to refrain from collective expulsions of undocumented migrants and asylum-seekers to Libya.⁴²⁶ Similarly, in 2012, the Grand Chamber of the ECtHR addressed the issue in the case of *Hirsi Jamaa and Others v Italy*.⁴²⁷ In particular, in the concurring opinion of Judge Pinto De Albuquerque it was stressed that the Italian government has a positive obligation to provide the applicants with practical and effective access to an asylum procedure in Italy.⁴²⁸ As noted by the UNHCR, in 2012 the Italian government made a pledge that its push-back policy would not be repeated and that the decision of the ECtHR would be respected, but concrete measures are yet to be adopted.⁴²⁹

Criticalities in the access to asylum protection have also been reported in the modalities of removal carried out in the Adriatic ports. 'Returns' to Greece of third-country nationals are issued without any formal proceeding and the most worrying aspect is that those *de facto* removals are executed without any written notification and without the relevant procedural guarantees attached thereto.⁴³⁰ Where the individual situation is not duly examined by the authorities there is a risk of exposing the third-country

⁴²⁴ Case C-601/15 PPU, *J.N. v Staatssecretaris voor Veiligheid en Justitie* [2016] CJEU 15 February 2016, para 56.

⁴²⁵ Steve Peers, 'Detention of asylum-seekers: the first CJEU judgment' [2016] *EU Law Analysis* [blog], 9 March 2016 <<http://eulawanalysis.blogspot.fi/2016/03/detention-of-asylum-seekers-first-cjeu.html>> accessed 19 March 2016.

⁴²⁶ UN Human Rights Committee, Concluding observations: Italy, CCPR/C/ITA/CO/5, 24 April 2006. See also the 2005 Report from the LIBE Committee Delegation on the Visit to the Temporary Holding Centre in Lampedusa, EP/LIBE PV/581203EN; European Parliament Resolution on Lampedusa, 14 April 2005, P6_TA(2005)0138.

⁴²⁷ *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR 23 February 2012). For a detailed analysis of the case see above Chapter II.C.2.b.

⁴²⁸ Also see *Sharifi and Others v Italy and Greece* App no 16643/09 (ECtHR 21 October 2014).

⁴²⁹ UNHCR, Recommendations on Important Aspects of Refugee Protection in Italy [2013] 3.

⁴³⁰ Italian Council for Refugees (Consiglio Italiano per Rifugiati, CIR), Access to protection: a human right, October 2013, 22 <http://www.epim.info/wp-content/uploads/2014/04/CIR-Access_to_protection2014.pdf> accessed 14 May 2016.

national returned to Greece to indirect refoulement.⁴³¹ On 21 October 2014, in *Sharifi and Others v Italy and Greece*,⁴³² the ECtHR condemned Italy for the ‘automatic return’ carried out by the Italian authorities in the ports of the Adriatic Sea against persons who were removed to Greece and were deprived of any procedural and substantive rights.⁴³³

A following judgment confirms that the needed redress has not been a priority for the government. The very recent case of *Khlaifia and Others v Italy*⁴³⁴ confirms the lack of implementation of effective measures. The case concerned the detention in a reception centre on Lampedusa and subsequently on ships moored in Palermo harbour, as well as the repatriation to Tunisia, of migrants who had landed on the Italian coast in 2011 during the events linked to the Arab Spring. The Court held that the applicants’ detention had been unlawful. They had not been notified of the reasons for their detention, for which there was no statutory basis, and had been unable to challenge it. The Court further considered that the applicants had suffered a collective expulsion, as their *refoulement* decisions did not refer to their personal situation — the Court held in particular that an identification procedure was insufficient to disprove collective expulsion.⁴³⁵ At the request of the Italian government, on 1 February 2016, the Grand Chamber panel of five judges decided to refer the case to the Grand Chamber.⁴³⁶ It now remains to be seen if the Court of 17 judges will reverse or confirm the reasoning applied in the Chamber’s judgment. On a positive note, it can be highlighted that according to the UNHCR, the Italian Council for Refugees (CIR) and other NGOs no push-backs have been registered in 2015.⁴³⁷

Furthermore, Italy has also concluded a large number of agreements on readmission (some 30 in total), which establish specific methods and procedures for the identification and return of irregular migrants.⁴³⁸ The agreements made with Tunisia and Egypt have raised serious concerns as they reaffirm a collective approach towards those specific nationalities. Italy has applied simplified and accelerated readmission procedures to Egyptian and Tunisian nationals, applying a 48 hours return scheme, and is currently working towards similar agreements with certain key Sub Saharan countries (Senegal, Nigeria, Ivory Coast).⁴³⁹ In the framework of the European Programme for Integration and Migration (EPIM) research activities carried out in Italy, it emerged that since the beginning of 2013 hundreds of Tunisian and Egyptian nationals have been returned to their countries of origin without having any possibility to access

⁴³¹ Italian Council for Refugees (Consiglio Italiano per Rifugiati, CIR), Access to protection: a human right, October 2013, 22 <http://www.epim.info/wp-content/uploads/2014/04/CIR-Access_to_protection2014.pdf> accessed 14 May 2016.

⁴³² *Sharifi and Others v Italy and Greece* App no 16643/09 (ECtHR 21 October 2014).

⁴³³ *Sharifi and Others v Italy and Greece* App no 16643/09 (ECtHR 21 October 2014) para 190.

⁴³⁴ *Khlaifia and Others v Italy* App no 16483/12 (ECtHR 1 September 2015).

⁴³⁵ See Press Release issued by the Registrar of the Court, ‘Unlawful detention of Tunisian migrants in degrading conditions on the island of Lampedusa in Italy pending collective expulsion’, ECHR 263 (2015), 1 September 2015.

⁴³⁶ Press Release issued by the Registrar of the Court, ‘Grand Chamber Panel’s Decisions’, ECHR 044 (2016), 2 February 2016.

⁴³⁷ AIDA, National Country Report Italy, Updated 22 December 2015 [2015] 27.

⁴³⁸ European Migration Network (EMN), *Organisation of Asylum and Migration Policies in Italy*, Factsheet updated by the Italian EMN NCP [2012] 3.

⁴³⁹ European Commission, Communication from the Commission to the European Parliament and the Council, Progress Report on the Implementation of the hotspots in Italy [2015] COM(2015) 679 final, 8.

the UNHCR and NGOs specialised in providing services to migrants, asylum-seekers, victims of torture, unaccompanied minors and victims of trafficking.⁴⁴⁰

2. Asylum detention in Italy: The legal and institutional framework

a) Human and fundamental rights

At the international level, Italy has ratified the 1951 Geneva Refugee Convention with its Law 722/1954. Italy has transposed the *acquis* on migration and asylum, notably the CEAS and its recast instruments, into national legislation.⁴⁴¹ Furthermore, Italy is party to seven of the nine core international human rights treaties and their protocols.⁴⁴² At the regional level, it is a party to the ECHR and has ratified its Additional Protocols. As a EU Member State, according to Article 51(1) of the EU Charter of Fundamental Rights, Italy has the obligation to respect the Charter when implementing EU law.

Among the fundamental principles of the Italian Constitution, Article 2 establishes the protection of human rights,⁴⁴³ while Article 10 provides that the legal status of foreigners is regulated by law in conformity with international norms and treaties. Furthermore, Article 10(3) enshrines the right to asylum of foreigners who are denied the effective exercise of democratic freedoms guaranteed by the same Constitution in their own country ‘in accordance with the requirements laid down by the law’. This provision, however, has never been implemented by the adoption of a comprehensive law regulating the right to asylum. Hence, the present legislative framework on asylum is the result of numerous bills aimed at bridging a legislative gap which failed to implement cohesively the constitutional stipulation.⁴⁴⁴

It is important to underline that Article 13 of the Italian Constitution provides that personal liberty is inviolable and that detention shall only be allowed for judicial reasons and in a lawful manner. This fundamental right is provided to everyone, citizens and foreigners alike. The Constitution also establishes the fundamental principles of equality and non-discrimination in its Article 3.

⁴⁴⁰ European Programme for Integration and Migration (EPIM), *Access to Protection: Bridges, Not Walls* [2014] 131–133.

⁴⁴¹ Asylum Information Database (AIDA), National Country Report Italy, Updated 22 December 2015 [2015] 8–11.

⁴⁴² OHCHR, Status of Ratification Interactive Dashboard: Italy <<http://indicators.ohchr.org>> accessed 12 April 2016.

⁴⁴³ Costituzione della Repubblica Italiana, Gazzetta Ufficiale della Repubblica Italiana 298, 22 December 1947. Article 2 recites: ‘[t]he Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed’ (Italian Senate Official translation).

⁴⁴⁴ Alessia Di Pascale, ‘Italy and Unauthorized Migration: Between State Sovereignty and Human Rights Obligations’ in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (Oxford University Press 2014) 279, 289.

b) Domestic legislation

Besides the constitutional guarantees and the above-mentioned international documents, the main legal instrument on migration is the Consolidated Act on dispositions concerning the immigration regulations and stranger conditions norms (Immigration Law), which is also known as *Testo Unico*. The Decree embodies the current Italian legislation on immigration.⁴⁴⁵ This act includes regulations concerning irregular migration, migrants' fundamental rights and entitlements to services at the national level in Italy.⁴⁴⁶ The Decree has been amended several times so that now the legislation is the outcome of different policies that are not always consistent with one another. The resulting patchwork increases the disharmony and incoherence of the system.⁴⁴⁷ In addition, 12 other legislative acts and 13 implementing decrees, administrative guidelines and regulations are of relevance in matters of asylum procedures, reception conditions and detention.⁴⁴⁸

According to academics and NGOs, such an inadequate and fragmented system wastes resources and provides beneficiaries with ineffective integration processes.⁴⁴⁹ Accordingly, in such a framework the international protection seeker is significantly affected by the gaps present in the reception system.

Article 2(1) of Legislative Decree 286/1998 stipulates that a non-citizen, regardless of how he/she is present at the border or in the territory of the state, shall have his/her fundamental human rights recognised, as these are provided for in domestic law, in international conventions, and in general principles of international law.

Article 14 of the same Legislative Decree is the source of law that regulates the detention for those entering or staying irregularly in the national territory. Through this norm the establishment of migration detention centres is legally enabled. Notably, on 18 August 2015, Italy adopted Legislative Decree 142 in order to transpose into its domestic law both the recast Asylum Procedures Directive⁴⁵⁰ and the recast

⁴⁴⁵ Legislative Decree No 286 of 25 July 1998, *Testo Unico delle disposizioni concernenti la disciplina della immigrazione e norme sulla condizione dello straniero*. The latest modifications were introduced with Law No 161, 30 October 2014, *Legge europea 2013 bis recante disposizioni per l'adempimento degli obblighi derivanti dall'appartenenza dell'Italia all'Unione europea*. *Gazzetta Ufficiale* 10 November 2014. Hereinafter referred to as the 'Consolidated Immigration Act' or 'Immigration Law'.

⁴⁴⁶ Nicola Delvino and Sarah Spencer, 'Irregular Migrants in Italy: Laws and Policy on Entitlements to Services', ESRC Centre on Migration, Policy and Society (COMPAS), University of Oxford, September 2014, 1, 4 <https://www.compas.ox.ac.uk/media/PR-2014-Irregular_Migrants_Italy.pdf> accessed 12 April 2016.

⁴⁴⁷ International Commission of Jurists (ICJ), *"Undocumented" Justice for Migrants in Italy: A Mission Report* [2014], 8 <<http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/10/Italy-Undocumented-justice-Publications-mission-report-2014-ENG.pdf>> accessed 12 April 2016.

⁴⁴⁸ AIDA, *National Country Report Italy*, Updated 22 December 2015 [2015] 8-11.

⁴⁴⁹ European network for technical cooperation on the application of the Dublin II Regulation, 'Italy National Report on Dublin II Regulation' (December 2012) 39 <<http://www.refworld.org/pdfid/514054492.pdf>> accessed 12 April 2016.

⁴⁵⁰ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), [2013] OJ L180/60.

Reception Conditions Directive. The legal framework under which asylum detention of vulnerable individuals is provided for in Italy entered into force on 30 September 2015.

c) The Italian reception system

There is currently no uniform reception system in Italy.⁴⁵¹ The reception centres for asylum-seekers remain characterised by a complex set up and include a number of different structures. According to the law adopted to transpose the recast RCD, the reception system shall be distinguished between first-line and second-line reception centres.⁴⁵² There are four different types of centres in the national territory serving as first-line reception centres:⁴⁵³

1. First Aid and Reception Centres (*Centri di primo soccorso e accoglienza, CPSA*), created in 2006 for the purposes of first aid and identification before persons are transferred to other centres. These types of accommodations are generally found near border zones. Presently, all four CPSAs are located in Southern Italy.⁴⁵⁴
2. Accommodation Centres (CDA), created in 1995 for general purposes of accommodation of migrants and also used for asylum-seekers.⁴⁵⁵
3. Centres for Accommodation of Asylum Seekers (CARA) were established in 2008 and replaced previous identification centres.⁴⁵⁶ CDAs and CARAs are closely related and are called upon to house irregular migrants and asylum-seekers pending, respectively, the verification of their identity/regular stay in the territory, and the outcome of the application for international protection. There are 14 centres including CDAs and CARAs, of which 11 are located in Southern Italy.⁴⁵⁷

⁴⁵¹ AIDA, National Country Report Italy, Updated 22 December 2015 [2015] 60.

⁴⁵² Article 8 Legislative Decree 142/2015. The second-line of reception is provided through the Protection System for Asylum Seekers and Refugees (SPRAR), composed by the reception services of local authorities; and the National and European Fund for Asylum Policies. SPRAR projects host beneficiaries of international protection and of national humanitarian protection as well as asylum-seekers. With regard to asylum-seekers, places in the SPRAR network are usually for vulnerable or destitute asylum-seekers whose identification procedures have been completed or who have spent 35 days in a CARA.

⁴⁵³ AIDA, National Country Report Italy, Updated 22 December 2015 [2015] 60.

⁴⁵⁴ See Italian Ministry of Interior website <<http://www.interno.gov.it/it/temi/immigrazione-e-asilo/sistema-accoglienza-sul-territorio/centri-limmigrazione>> accessed 2 April 2016. Also see, on the history of CDA, <<http://www.osservatoriomigranti.org/?cda>> accessed 2 April 2016.

⁴⁵⁵ Italian Ministry of Interior website <<http://www.interno.gov.it/it/temi/immigrazione-e-asilo/sistema-accoglienza-sul-territorio/centri-limmigrazione>> accessed 2 April 2016.

⁴⁵⁶ Introduced in 2002 under the name of identification centres and finally covered by Presidential Decree No 303/2004 and Legislative Decree No 25/2008, to which they owe their current denomination.

⁴⁵⁷ Italian Ministry of Interior website <<http://www.interno.gov.it/it/temi/immigrazione-e-asilo/sistema-accoglienza-sul-territorio/centri-limmigrazione>> accessed 2 April 2016.

4. Emergency Reception Centres (CAS), introduced in October 2013 upon the launch of the Mare Nostrum Operation⁴⁵⁸ in response to the increasing influx of sea arrivals in Italy.⁴⁵⁹

Strictly connected to the above outlined first reception system are the identification and removal centres (*Centri di identificazione ed espulsione*, CIE). They function as pre-removal detention centres and are tied directly to expulsion orders. Every migrant found without a residence permit or not recognised as an asylum-seeker is taken to a CIE, identified and deported to his/her country of origin. CIE have at best been described as being prison-like facilities, and have generated strong criticism, including several NGO campaigns promoting the definitive closure of these centres.⁴⁶⁰ The Human Rights Commission of the Senate underlines in its report that third-country nationals detained in CIEs have been deprived of ‘the possibility to carry on any kind of recreational or educational activity, living in precarious conditions from both material and human point of view’.⁴⁶¹ This same concern is reiterated in the 2016 report, in which the Commission states that no substantial changes have occurred in the detention conditions in the centres and that the lack of adequate access and monitoring is a persistent critical aspect.⁴⁶²

The CPSA, CDA, CARA and CIE are critically connected and it is argued that they play a determinant role, particularly when vulnerable individuals are concerned. Their common identification function calls for adequate scrutiny on the human rights standards applied therein. They reflect a sort of a transit zone, a form of control that substantially equates to a form of detention. It is argued that, as well as removal centres, first reception centres do qualify as a form of confinement that limits substantially the liberty of asylum-seekers and risks enhancing or generating further vulnerabilities.

3. Asylum detention of vulnerable persons: The human rights challenges

a) ‘Withholding’ as a norm

As is the case with the legislation in many other states,⁴⁶³ Italian law has carefully avoided making explicit and direct reference to the notion of detention when allowing for the deprivation of liberty of migrants

⁴⁵⁸ Italian Ministry of Defence, ‘Mare Nostrum Operation’ <<http://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx>> accessed 2 April 2016.

⁴⁵⁹ AIDA, National Country Report Italy, Updated 22 December 2015 [2015] 60. Article 11 Legislative Decree 142/2015 is now the legal source of these facilities.

⁴⁶⁰ See the campaign web site of ‘LasciateCIEntrare’ <<http://www.lasciatecientrare.it/j25/>> accessed 12 April 2016.

⁴⁶¹ Human Rights Commission of the Senate, Report on the Identification and Expulsion Centres (CIE, *Centro di identificazione ed espulsione*) in Italy, September 2014, 30.

⁴⁶² Human Rights Commission of the Senate, Report on the Identification and Expulsion Centres (CIE, *Centro di identificazione ed espulsione*) in Italy, February 2016, 29-30.

⁴⁶³ Michael Flynn, *The Hidden Costs of Human Rights: The Case of Immigration Detention*, Global Detention Project Working Paper No 7 (2013). The author notes how across the globe today one can find immigration detention centres hiding (and disclosing) their identities. The names of many of these facilities reveal contradictory official attitudes: Turkey has called its migrant detention centres ‘guesthouses’; Mexico uses ‘migratory stations’ (*estaciones migratorias*) for the temporary housing (*alojamiento temporal*) of migrants; Hungary has ‘guarded shelters’, France

and asylum-seekers. Strategically, both the law establishing immigration detention centres and the subsequent implementing regulations speak of *trattenimento* (literally: withholding) of the foreigner.⁴⁶⁴ In practice the ‘withholding’ is, however, equal to detention, and it is rare, if not almost impossible, that an asylum-seeker approaches the police or the *Questura* (Immigration Office of the Police) without being in one of the situations that under Italian law justifies the forced transfer to a reception/detention facility.⁴⁶⁵ Due to this, it is crucial to analyse the practices applied during the reception and detention of asylum-seekers and how particularly vulnerable individuals are protected.

The newly adopted legislative decree in Article 6 (titled ‘*Trattenimento*’) makes express reference to Article 14 of the Immigration Law and introduces a broader right for authorities to detain asylum-seekers. This novelty is explained as a requirement of legal consistency when transposing the EU’s recast RCD.⁴⁶⁶ According to Article 6(1), detention in the CIE shall not take place as an ordinary measure and for the sole purpose of examining the asylum application. The authorities shall use detention only in duly justified cases provided for in the same Article. Article 6(2) now establishes that applicants may be detained following an individual assessment and when the specific grounds provided in the law apply. Accordingly, the asylum applicant may be detained if he or she:⁴⁶⁷

- falls within the exclusion clauses laid down in Article 1F of the Refugee Convention;
- has been notified of an expulsion order as a danger to public order or state security,⁴⁶⁸ or as suspected of being affiliated to a mafia-related organisation, has conducted or financed terrorist activities, has cooperated in selling or smuggling weapons or habitually conducts any form of criminal activity,⁴⁶⁹ including with the intention of committing acts of terrorism;⁴⁷⁰
- may constitute a danger for public order and security. To assess such a danger, it is necessary to take into account any previous convictions, final or non-final, including the conviction adopted following the enforcement of the penalty at the request of the party pursuant to Article 444 of

has ‘centres of administrative retention’ (*centres de retention administrative*) and Italy as well has ‘welcome centres’ (*centri di accoglienza*).

⁴⁶⁴ Giuseppe Campesi, ‘Immigrant Detention and the Double Logic of Securitization in Italy’ in Michaela Ceccorulli and Nicola Labanca (eds), *The EU, Migration and the Politics of Administrative Detention* (Routledge 2014) 145, 150.

⁴⁶⁵ Jesuit Refugee Service Europe, *Detention in Europe, Italy: Country Detention Profile* [2013] <http://www.detention-in-europe.org/index.php/index.php?option=com_content&view=article&id=147&Itemid=179> accessed 16 February 2016.

⁴⁶⁶ Italian Ministry of Interior, Study Group on Reception System, ‘Report on Reception of Migrants and Refugees in Italy. Aspects, Procedures and Problems’ (15 October 2015) 25 <<http://www.focsiv.it/wp-content/uploads/2015/10/Rapporto-accoglienza-PDF.pdf>> accessed 16 February 2016.

⁴⁶⁷ Article 6(2) (a)–(d) Legislative Decree 142/2015.

⁴⁶⁸ Article 13(1) Legislative Decree 286/1998.

⁴⁶⁹ Article 13(2) Legislative Decree 286/1998.

⁴⁷⁰ Article 3(1) Legislative Decree 144/2005, as supplemented by Law 155/2005.

the Italian Criminal Procedure Code in relation to certain serious crimes,⁴⁷¹ and also to drug crimes, sexual crimes, facilitation of illegal immigration, recruiting of persons for prostitution, exploitation of prostitution and of minors to be used in illegal activities;

- presents a risk of absconding. The assessment of such risk is made on a case by case basis, when the applicant has previously and systematically provided false declarations or documents on his or her personal data in order to avoid the adoption or the enforcement of an expulsion order, or when the applicant has not complied with alternatives to detention, including the obligation to surrender a passport, stay in an assigned place of residence determined by the competent authority, or report at given times to the competent authority.⁴⁷²

In addition to the cases mentioned above, applicants placed in a CIE awaiting for the enforcement of an expulsion order pursuant to Articles 13 and 14 of Legislative Decree 286/1998 shall remain in such a facility when there are reasonable grounds to consider that the application has been submitted with the sole reason of delaying or obstructing the enforcement of the expulsion order.⁴⁷³

The maximum time limit for the detention is 12 months.⁴⁷⁴ The *Questore* (Head of the Immigration Office of the Police) orders detention if one of the above grounds of detention applies to the asylum applicant and transmits relevant documents to the competent Territorial Commission, as well the extension of detention.⁴⁷⁵ The *Questore's* order related to the detention or the extension thereof shall be issued in writing, accompanied by an explanatory statement, and shall indicate that the applicant may submit to the judge responsible for validating the order, personally or with the aid of a lawyer, statements of defence. Such an order shall be communicated to the applicant in the first language that the applicant has indicated or in a language that the applicant can reasonably understand.⁴⁷⁶

b) De facto confinement of asylum seekers

The legislative decree implementing the recast RCD clearly distinguishes between the function of the CIE and the first reception centres. CIE are prison-like facilities where the goal is clearly to deprive individuals of their right to liberty. CPSA, CDA and CARA, on the other hand, are generally viewed as locations for the collective housing of applicants. The first accommodation centres remain a more blurred reality requiring

⁴⁷¹ Article 380(1)–(2) Italian Criminal Procedure Code is cited, which refers to individuals who have participated in, among others, the following criminal activities: (a) child prostitution; (b) child pornography; (c) slavery; (d) looting and vandalism; (e) crimes against the community or the state authorities.

⁴⁷² Article 13 (5) (5.2) (13) and Article 14 Legislative Decree 286/1998.

⁴⁷³ Article 6(3) Legislative Decree 142/2015.

⁴⁷⁴ Article 6(8) Legislative Decree 142/2015.

⁴⁷⁵ Article 4(2) Presidential Decree 21/2015 Regulation on the procedures for the recognition and revocation of international protection.

⁴⁷⁶ Article 6(5) Legislative Decree 142/2015.

closer analysis in terms of their real function and the related legal protection framework for particularly vulnerable individuals.

According to the law, CARA centres are set up for asylum-seekers during the first phase of the procedure, during the identification phase, and during the completion of the asylum application. Most of the CARA are located in remote areas with few means of public transport to access the centre of the nearby city. Four of these asylum reception centres have sections that are used as secure detention centres.⁴⁷⁷ CDA usually also play the role of CARA. Both are generally very large institutions which can hold up to 1,000 people at one time, and during periods of high migratory flows have often exceeded the limits of their maximum capacities.⁴⁷⁸ The vague standards make it challenging to confidently narrow their function and aim.

The intention expressed by the law is that these structures are open facilities. CARA are not officially established as a form of detention: the law itself provides that international protection seekers are to be granted the opportunity to stay outside the centres during day time and to ask permission for temporary leave.⁴⁷⁹ Nonetheless, according to Article 13 of Legislative Decree 142/2015, the reception ends if international protection seekers leave the CARA without well-founded reasons. Despite the nature of the centres not being equivalent to detention, it may be argued that they have the elusive function of control and are *de facto* a form of deprivation of liberty. As shown in the case law of the ECtHR, the distinction is more a matter of degree and intensity rather than one of nature or substance.⁴⁸⁰ In this case, the level of isolation generated by the geographical position of the centres and the presence of police authorities patrolling the security of the centres are relevant aspects impacting on the individual's liberty.

Moreover, the imposed residence within a reception centre is made into an essential requirement to guarantee the processing of the asylum application. This logic has standardised the ambiguous use of reception centres where migrants and asylum-seekers are held at the expense of a considerable limitation on their personal freedom. As argued by Campesi:

[a]sylum seekers are in effect trapped inside the reception centre because leaving the centre would mean running the risk of compromising their application. In practical terms an unjustified exit may result in a loss of the right to ask for international protection, this either because the Asylum Commission may declare an applicant ineligible on the case record alone or because, even when applicants have been able to regularly report at the hearing for their case, their having left the premises still tends to weigh against them.⁴⁸¹

The Enhancing Vulnerable Asylum Seekers Protection (EVASP) empirical research project confirms these findings.⁴⁸² Although the law provides for free entrance and exit from CARA — called 'centres' by the staff

⁴⁷⁷ Global Detention Project, *The Detention of Asylum Seekers in the Mediterranean Region* [2015] 7.

⁴⁷⁸ Giuseppe Campesi, 'Immigrant Detention and the Double Logic of Securitization in Italy' in Michaela Ceccorulli and Nicola Labanca (eds), *The EU, Migration and the Politics of Administrative Detention* (Routledge 2014), 145, 154.

⁴⁷⁹ Article 10(2) of Legislative Decree No 142/2015.

⁴⁸⁰ *Guzzardi v Italy* App no 7367/76 (ECtHR 6 November 1980), para 93. See *Amuur v France* App no 19776/92 (ECtHR 25 June 1996), para 49. *Nolan and K. v Russia* App no 2512/04 (ECtHR 12 February 2009), para 96.

⁴⁸¹ Giuseppe Campesi, 'Humanitarian Confinement: An Ethnography of Reception Centres for Asylum Seekers at Europe's Southern Border', (2015) *International Journal of Migration and Border Studies* 398, 410.

⁴⁸² EVASP Project, 'Enhancing Vulnerable Asylum Seekers', EVASP Italian National Report [2009–2010].

and ‘camps’ by the immigrants — many beneficiaries prefer to remain inside the facility.⁴⁸³ The uncertainty of asylum procedures, lack of information and unpredictability of asylum application times and commission response times, potential appeals, and the uncertain prospects upon exit from the centre, make the individual even more fragile and dependent on the administrative procedures and services (which, moreover, the immigrant is often unaware of or is unable to autonomously take advantage of).⁴⁸⁴

In this study it is argued that those hosted in accommodation centres are *de facto* confined in many ways which can amount to a form of deprivation of liberty. The alternative is often that if they leave these ‘open’ centres the protection seekers lose their status, fall into irregularity, and can be rather easily exposed to detention and expulsion procedures. This legal contour and its most recent developments match precisely with the provisions of the recast RCD and portray the common predominance of a securitised approach to the management of migration and asylum. This blurred reality is an element of concern that, coupled with the lack of consistent and systematic monitoring processes, significantly aggravates the position of particularly vulnerable persons.

c) Substantive guarantees for vulnerable persons

Article 9 of Legislative Decree 142/2015, under paragraph 4, establishes the obligation to assess the applicant’s health conditions and determine whether the applicant belongs to a particular vulnerable group and is in need of special protection. Article 17, as per Article 21 recast RCD, outlines the same open-ended list of vulnerable groups and confers *ad hoc* protection guarantees to applicants with special protection needs. The provision ensures specialised assistance services of medical professionals and guarantees adequate psychological support. Article 17(6) provides that the assessment is granted upon arrival and continues at periodic intervals with verification by qualified personnel. Article 7(5) of the Decree requires the provision of social and health services in CIE and guarantees a periodic assessment of vulnerability requiring specific assistance.

Furthermore, Articles 18 and 19 confer specific protection requirements for the reception of minors and unaccompanied minors. Nonetheless, a certain leeway is seen under Article 9(5) which affords the possibility to temporarily limit the guarantees to access special accommodation centres in case there is a lack of available places. This is a doubtful mechanism of derogation which advances a prioritisation of administrative and management needs. The Legislative Decree also establishes that the managers of reception centres set up special accommodation services in cooperation with the local public health centres to provide adequate psychological support in order to address the special needs of asylum seekers.⁴⁸⁵ Further, the Decree provides that asylum applicants undergo a health check upon entering the first reception centres and in temporary reception structures to assess their health condition and special

⁴⁸³ EVASP Project, ‘Enhancing Vulnerable Asylum Seekers’, EVASP Italian National Report [2009–2010] 13.

⁴⁸⁴ EVASP Project, ‘Enhancing Vulnerable Asylum Seekers’, EVASP Italian National Report [2009–2010] 14.

⁴⁸⁵ Article 17(3) Legislative Decree 142/2015.

reception needs.⁴⁸⁶ The Decree has also introduced a more protective norm providing that special services addressed to vulnerable people with special needs shall be ensured in first reception centres and the Protection System for Asylum Seekers and Refugees (SPRAR) structures.⁴⁸⁷

The Italian legislation has also added, for persons belonging to a vulnerable group, particular guarantees such as: priority transfer to and dedicated places within the system of integrated reception supplied by the network for SPRAR;⁴⁸⁸ the possibility to be assisted by supporting personnel during the personal interview with the Territorial Commission, even though the legal provision does not specify which kind of personnel;⁴⁸⁹ a priority examination within the procedure for the recognition of the international protection;⁴⁹⁰ and the possibility not to be interviewed when there are sufficiently grounded reasons for the recognition of refugee status or subsidiary protection, and provided that the applicant has included in the application a certificate issued by a public health institution proving his/her impossibility to be interviewed.⁴⁹¹ Also, specialised training for the personnel of the Territorial Commission examining the application is foreseen in order to provide adequate management of special conditions of vulnerability.⁴⁹² Article 19(4) of the newly introduced law explicitly provides that unaccompanied children can never be held in CIEs or CARAs. The law is silent concerning other vulnerable individuals.

(1) Monitoring and access to detention/reception centres

Importantly, the new reform introduces, under Article 20, a control and monitoring mechanism for the management of reception centres. This represents a very welcome step towards more transparency and fills a crucial gap. Presently, the monitoring of reception conditions by the relevant authorities is generally not systematic and complaints often remain unaddressed.⁴⁹³ The International Organization for Migration and the UNHCR continue to monitor the detention conditions on the basis of their respective mandates. The UNHCR also conducts monitoring on access to asylum procedures.⁴⁹⁴ In addition, on 17 November 2014 the Chamber of Deputies established an Inquiry Commission in charge of monitoring and assessing the Italian reception system (CARA and CDA) and the detention conditions of migrants held in CIE.⁴⁹⁵ The Commission has the mandate to investigate the outsourcing mechanisms for the management of these

⁴⁸⁶ Article 9(4) and 11(1) Legislative Decree 142/2015.

⁴⁸⁷ Article 17(4) Legislative Decree 142/2015.

⁴⁸⁸ Article 9(5) Legislative Decree 142/2015.

⁴⁸⁹ Article 13(2) Legislative Decree 25/2008 as modified by Legislative Decree 142/2015.

⁴⁹⁰ Article 28(1) (b) and (c) Legislative Decree 25/2008 as modified by Legislative Decree 142/2015.

⁴⁹¹ Article 12(2) and (2-bis) Legislative Decree 25/2008 as modified by Legislative Decree 142/2015.

⁴⁹² Article 15 Legislative Decree 25/2008 as modified by Legislative Decree 142/2015.

⁴⁹³ AIDA, National Country Report Italy, Updated 22 December 2015 [2015] 65.

⁴⁹⁴ AIDA, National Country Report Italy, Updated 22 December 2015 [2015] 94.

⁴⁹⁵ Chamber of Deputies, Delibera 17 November 2014, 'Istituzione di una Commissione parlamentare di inchiesta sul sistema di accoglienza e di identificazione, nonché sulle condizioni di trattenimento dei migranti nei centri di accoglienza, nei centri di accoglienza per richiedenti asilo e nei centri di identificazione ed espulsione', published in the Official Journal, Gazzetta Ufficiale n.275 of 26 November 2014.

centres, to verify that adequate legal guarantees are provided, and in particular to detect that health care and special protection needs for particularly vulnerable persons are ensured therein.⁴⁹⁶

Furthermore, Article 7(2) of the newly introduced law ensures access to detention and reception centres, for example to UNHCR representatives, lawyers and family members of the asylum-seekers. The counter-balance on the enhanced degree of monitoring and access to the centres is seen in Article 7(3) which allows for the possibility to limit (but not to prohibit *in toto*) access to detention and reception centres for justified reasons of security and public order or for reasons related to the proper administration of the centres. On this point it is important to highlight the recent report published by the Human Rights Commission of the Senate which noted with particular concern the lack of an adequate and transparent monitoring system.⁴⁹⁷ Seemingly, the UN Special Rapporteur on the human rights of migrants has underlined the need to establish a nationwide institutional framework in which NGOs, intergovernmental organisations, journalists and lawyers can freely access and monitor the facilities.⁴⁹⁸ This is a crucial aspect in order to guarantee the transparency and adequacy of the applied practices in accordance with human rights standards.

d) (Non)Identification and (non) assessment of vulnerabilities in practice

Despite the newly introduced legal guarantees, the scenario in the Italian reception/detention practice is far from being adequate in addressing the special protection needs of vulnerable persons. As seen above, first accommodation centres are generally large buildings where high numbers of migrants and asylum applicants are accommodated and which offer basic services such as food, accommodation, clothing, basic information services including legal services, first aid and emergency treatments.⁴⁹⁹ Each centre is run by different entities that, in some cases, may have a revenue-driven focus.⁵⁰⁰ The scenario is further complicated by the lack of structural control over the influential Mafia. This lacuna has also impacted the reception system of asylum-seekers, as the Italian Mafia has found a new source of illicit profits in the funds allocated by the government to ensure adequate reception systems. According to Italian officials, criminal enterprises have come to dominate the business of lodging asylum-seekers and public corruption

⁴⁹⁶ Article 1(2)(i), Delibera 17 November 2014, 'Istituzione di una Commissione parlamentare di inchiesta sul sistema di accoglienza e di identificazione, nonché sulle condizioni di trattenimento dei migranti nei centri di accoglienza, nei centri di accoglienza per richiedenti asilo e nei centri di identificazione ed espulsione', published in the Official Journal, Gazzetta Ufficiale n.275 of 26 November 2014.

⁴⁹⁷ Human Rights Commission of the Italian Senate, Report on the Identification and Expulsion Centres (CIE, *Centro di identificazione ed espulsione*), February 2016, 29.

⁴⁹⁸ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Mission to Italy (29 September– 8 October 2012), UN doc A/HRC/23/46/Add.3, 15-16.

⁴⁹⁹ AIDA, National Country Report Italy, Updated 22 December 2015 [2015] 64.

⁵⁰⁰ In June 2015, police investigations uncovered a widespread system designed to allow a cartel of companies to win lucrative public contracts to manage reception centres for migrants and asylum-seekers. See BBC news, 'Italy arrests 44 in mafia migrant centre probe', 4 June 2015 <<http://www.bbc.com/news/world-europe-33009027>> accessed 2 April 2016.

is one of the enterprises' main sources of revenue.⁵⁰¹ This critical aspect contributed to the piecemeal organisation of the CARA. The system lacks fully effective national coordination and control. Seemingly the quality of assistance varies between facilities and sometimes fails to meet adequate standards, especially regarding the provision of legal and psycho-social assistance.⁵⁰² Identification, referral and care provided to vulnerable individuals is often inadequate due to low levels of coordination among stakeholders, as well as an inability to provide adequate legal and social support, including the necessary logistical follow-up.⁵⁰³

(1) Fragmented procedures and practices

The Italian legal framework lacks legal provisions on how, when and by whom the assessment of special reception needs for vulnerable persons should be carried out.⁵⁰⁴ The combined effect of not having a procedural mechanism to identify vulnerability in law coupled with the predominance of emergency and first-line accommodation has meant that assessment of special needs and, subsequently, tailored facilities are both highly dependent on the resources and funds of the initial accommodation centres.⁵⁰⁵ Indeed, adapted care is practically non-existent in these centres, with reports of that the CARA and CPSA are severely overcrowded, as well as documented incidents of sexual assault and a lack of legal and health care services.⁵⁰⁶ Similarly, the practice in CIE is far from guaranteeing minimum protection standards. Legal assistance and psychological support is not systematically provided and no protocol on early identification of and assistance to vulnerable persons, or on the referral system to specialised services and/or reception centres, has yet been adopted.⁵⁰⁷ The present set-up and management of the reception/detention in CIE, CARA and CPSA falls short of the guarantees required to identify, assess and protect those asylum-seekers in a particularly vulnerable situation.

In the rare cases where there is identification of vulnerability and the need for reception adapted to special needs is assessed, the considerable shortfall of reception places during the summer of 2015 has

⁵⁰¹ James Politi, 'Italy's Mafia learns to profit from the migration crisis', *Financial Times Europe* (24 July 2015) <<http://www.ft.com/intl/cms/s/0/0d0371d0-31f4-11e5-8873-775ba7c2ea3d.html#axzz3qu4Brcip>> accessed 16 February 2016.

⁵⁰² UNHCR, Recommendations on important aspects on refugee protection in Italy, July 2013, 12.

⁵⁰³ AIDA, National Country Report Italy, Updated 22 December 2015 [2015] 64. See Italian Council for Refugees (*Consiglio Italiano per Rifugiati*, CIR) et al., *Maieutics Handbook: Elaborating a common interdisciplinary working methodology (legal-psychological) to guarantee the recognition of the proper international protection status to victims of torture and violence*, December 2012.

⁵⁰⁴ AIDA, National Country Report Italy, Updated 22 December 2015 [2015] 76.

⁵⁰⁵ AIDA, *Wrong Counts and Closing Doors: the Reception of Refugees and Asylum Seekers in Europe*, March 2016, 36.

⁵⁰⁶ AIDA, *Wrong Counts and Closing Doors: the Reception of Refugees and Asylum Seekers in Europe*, March 2016, 36

⁵⁰⁷ AIDA, National Country Report Italy, Updated 22 December 2015 [2015] 91.

meant that the provision of reception tailored to specific vulnerabilities is largely non-existent.⁵⁰⁸ For example, with regard to victims of torture and extreme violence, these asylum-seekers are not identified at an early stage by police authorities. In fact, torture survivors are usually only recognised as such in a later phase thanks to NGOs providing them with legal and social assistance or during the personal interview by the determining authorities.⁵⁰⁹ Furthermore, in practice it may occur that torture victims remain in a CARA without any possibility to be transferred to a dedicated centre due to lack of availability of places in the reception centres appropriate to their needs.⁵¹⁰

According to the results of the research work conducted within the framework of the European project EVASP, it emerged that asylum procedures and reception structures in the Italian context 'contribute to increasing vulnerability in asylum-seekers, who exist in a limbo of long and tortuous legislative processes, welfarist or alarmist policies that construe them as victims or criminals, carriers of contagious diseases and damaged pasts, without a home, without a family, without work'.⁵¹¹ Similarly, the structures of the CARAs are largely inadequate to address the special reception needs of persons in a vulnerable situation. The overcrowding of reception facilities has been a main concern. Numbers provide an immediate understanding of how critical the present situation is. As of the end of June 2015, CARA hosted approximately 10,000 asylum-seekers. In this timeframe the situation of some CARAs was particularly critical. For example, the CARA of Bari, which can accommodate a maximum of 1,216 persons, hosted 1,440 asylum-seekers; the CARA of Catania Mineo, with a maximum capacity of 3,000 persons, hosted 3,422 asylum-seekers; and the CARA of Gorizia, with a maximum capacity of 138, hosted 252 asylum-seekers.⁵¹²

With the exception of unaccompanied minors, vulnerable persons may be detained in CIE, but there are no provisions concerning the legal guarantees that should be applied. When, for example, victims of torture or violence are identified in detention there is no set of agreed procedures in order to transfer them to adequate reception centres and benefit from specific medical, psychological and other treatment.⁵¹³ Moreover, resort to detention has been documented in the case of unaccompanied asylum seeking children, thus running contrary to national and regional legislation. Worrying reports have surfaced that unaccompanied children were being detained in the CPSA in Lampedusa in insalubrious and overcrowded conditions for more than 14 days.⁵¹⁴

In certain circumstances the position of vulnerable persons may be at odds with the reality faced. Quite a striking paradox became evident during the field research visit conducted by the author in Sicily. A young boy in a wheelchair had at the time of the visit been in the CPSA of Siracusa for over nine months because of the difficulties in finding a suitable structure able to adequately provide the care needed by him. The

⁵⁰⁸ AIDA, *Wrong Counts and Closing Doors: the Reception of Refugees and Asylum Seekers in Europe*, March 2016, 35.

⁵⁰⁹ AIDA, *National Country Report Italy*, Updated 22 December 2015 [2015] 30.

⁵¹⁰ AIDA, *National Country Report Italy*, Updated 22 December 2015 [2015] 76.

⁵¹¹ EVASP Project, 'Enhancing Vulnerable Asylum Seekers', *EVASP Italian National Report [2009–2010]*, 63.

⁵¹² AIDA, *National Country Report Italy*, Updated 22 December 2015 [2015] 67.

⁵¹³ AIDA, *National Country Report Italy*, Updated 22 December 2015 [2015] 90.

⁵¹⁴ AIDA, *National Country Report Italy*, Updated 22 December 2015 [2015] 79.

requirement to address his special reception needs resulted in an unduly prolonged stay in a largely inadequate context. Though this is an individual case, it highlights some critical inconsistencies of the reception system. The overall scenario in Sicily has resulted in significant tension with human rights standards and with the special protection needs of particularly vulnerable persons. From the practice witnessed during the field visit it appeared that individual vulnerabilities are not adequately identified, nor are they traced or prioritised during the registration and first reception processes. The evidence often showed that the status of vulnerability becomes an element of ordinariness, almost being a 'normal' status belonging to those protection seekers that have been victims of violence and harm in many forms.

Lack of resources and the poor availability of professional training for the personnel in charge of the reception/detention centres further add to the blurred panorama described.

(2) Human rights concerns

This overall flawed reception/detention reality has provoked strong reactions within the UN human rights framework, and some of the treaty monitoring bodies have expressed recurrent concerns on the way Italy is addressing the special reception needs of asylum-seekers and migrants. The Committee on the Rights of the Child urged the State Party to address the limited capacity and availability, overcrowding, and very poor conditions of reception centres for children, resulting in the placement of children in reception centres not intended for persons under 18.⁵¹⁵ More recently, the Committee on Economic, Social and Cultural Rights, in the concluding observations to the fifth periodic report by Italy, expressed particular concerns about limited enjoyment of the Covenant rights by migrants, asylum-seekers and refugees upon arrival in the State Party and about the insufficient number of reception centres and the substandard conditions therein.⁵¹⁶ The Committee recommended Italy to ensure that everyone in the centres has access to medical care, interpreters, adequate food, clothing and social support.⁵¹⁷

The Group of Experts on Action against Trafficking in Human Beings (GRETA) has also voiced concerns about Italy lacking a uniform system for the identification of victims of trafficking in human beings (THB) and underlined that special attention should be paid to detecting victims among unaccompanied minors, irregular migrants and asylum-seekers.⁵¹⁸ There is a risk of large numbers of victims being unidentified and lacking protection, which is further increased by the fact that public officials who come into contact

⁵¹⁵ Committee on the Rights of the Child, Concluding observations: Italy, CRC/C/ITA/CO/3–4, 31 October 2011, para 64.

⁵¹⁶ Committee on Economic, Social and Cultural Rights, Concluding observations on the fifth periodic report of Italy, E/C.12/ITA/CO/5 28 October 2015, para 18.

⁵¹⁷ Committee on Economic, Social and Cultural Rights, Concluding observations on the fifth periodic report of Italy, E/C.12/ITA/CO/5 28 October 2015, para 19.

⁵¹⁸ Group of Experts on Action against Trafficking in Human Beings (GRETA), Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Italy. First evaluation round. Adopted on 4 July 2014; Published on 22 September 2014, GRETA(2014)18, 7.

with possible victims of THB lack the necessary skills to identify them as such.⁵¹⁹ This is equally valid for the CPSA, CDA, CIE and CARA, where there is a high probability that there are victims of THB amongst the migrants but there are neither qualified personnel for their identification nor a system or procedure for the detection of victims of THB.⁵²⁰

Furthermore, an increasing number of judicial proceedings endeavour to declare Italy as unfit for Dublin returns due to the low standards of reception conditions. Following unsuccessful attempts in *Hussein and Others v the Netherlands and Italy*⁵²¹ and *Daytbegova and Magomedova v Austria*⁵²² to apply the *M.S.S.* doctrine to Italy, the ECtHR found in *Tarakhel v Switzerland* that the transfer of a family from Switzerland to Italy would amount to inhuman and degrading treatment. Notably, in the *Tarakhel* case the ECtHR had to ascertain if there were substantial grounds to believe that returning the applicants to Italy under the Dublin regulation would put the applicants at risk of treatment contrary to Article 3 of the Convention, thus constituting inhuman or degrading treatment. In view of the overall situation with regard to the reception conditions for asylum-seekers in Italy and the applicants' specific case, the Court held that:

were the applicants to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together, there would be a violation of Article 3 of the Convention.⁵²³

However, the Court ruled differently in two further cases in 2015, holding that the overall reception arrangements in Italy cannot act as a bar for all transfers there.⁵²⁴ Nevertheless, the *Tarakhel* judgment sets an important parameter to underline the fact that when particularly vulnerable groups are concerned the reception conditions offered by the Italian system are more likely incompatible with the required standards of special protection needs. Importantly, in *A.S. v Switzerland* the Court reiterated that, despite there being no violation of Articles 3 and 8 in the specific case, the data and information available on Italy raise 'serious doubts as to the capacities of the system'. Accordingly, in the Court's view, the possibility that a significant number of asylum-seekers might be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, could not be dismissed as unfounded.⁵²⁵

⁵¹⁹ GRETA, Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Italy. First evaluation round. Adopted on 4 July 2014; Published on 22 September 2014, GRETA(2014)18, para 131.

⁵²⁰ GRETA, Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Italy. First evaluation round. Adopted on 4 July 2014; Published on 22 September 2014, GRETA(2014)18, para 131.

⁵²¹ *Mohammed Hussein and Others v The Netherlands and Italy* App no 27725/10 (ECtHR Decision 2 April 2013).

⁵²² *Khalisat Daytbegova and Mariat Magomedova v Austria* App no 6198/12 (ECtHR Decision 4 June 2013).

⁵²³ *Tarakhel v Switzerland* App no 29217/12 (ECtHR (GC) 4 November 2014), para 122.

⁵²⁴ *A.M.E. v the Netherlands* App no 51428/10 (ECtHR Decision 13 January 2015); *A.S. v Switzerland* App no 39350/13 (ECtHR 30 June 2015).

⁵²⁵ *A.S. v Switzerland* App no 39350/13 (ECtHR 30 June 2015), para 36.

The Commissioner for Human Rights of the Council of Europe had already underlined the issue in the 2012 report following the visit to Italy, noting with concern that:

the high variability in the standards of reception centres in practice, which may manifest itself in, for example: a numerical shortage and a lack of adequate training of staff; overcrowding and limitations in the space available for assistance, legal advice and socialisation; physical inadequacy of the facilities and their remoteness from the community; or difficulties in accessing appropriate information.⁵²⁶

Presidential Decree 21/2015, adopted in January 2015, failed to address these concerns. Article 11 of the Decree regulates the management of the CARA in a detailed manner, yet it fails to include a provision whereby the entity managing the centres shall guarantee that the personnel employed are regularly trained for the tasks carried out. The practical exercise of the rights recognised by national and international law is subject to a high degree of uncertainty due to the complexity of the legislation and the large amount of discretionary powers left to the authorities responsible for detention centre management.

Overall, the practice in Italy reflects a worrying Europe-wide scenario in which the inoperability of mechanisms to consider special needs, as well as the heavily curtailed provision of tailored services, has led to a trivialisation of vulnerability and the normalisation of highly unsuitable environments for vulnerable persons.⁵²⁷

e) The 'hotspots approach' and detention

Italy and Greece are the first two Member States where the hotspots approach is currently being implemented. The road map plan allows for detention of asylum-seekers in closed camps. Notably, throughout the process, deprivation of liberty can occur in two distinct moments: (1) upon arrival, while the applicant's identity verification takes place; and (2) in cases where the applicant refuses to cooperate with fingerprinting.⁵²⁸ The mayor of Lampedusa expressed doubts on the adequacy of the EU's proposed solution.⁵²⁹ The approach might imply a coercive and selective mechanism which should be cautiously scrutinized and monitored.

On 9 November 2015, the National Asylum Roundtable (consisting of a number of organisations involved in safeguarding human rights) has expressed, in a letter to the Interior Minister, great concern over the

⁵²⁶ Council of Europe, Report by Nils Muiznieks, Commissioner for Human Rights of the Council of Europe, following his visit to Italy from 3 to 6 July 2012, Comm DH (2012)26, [2012] 28 para 141.

⁵²⁷ AIDA, Wrong Counts and Closing Doors: The Reception of Refugees and Asylum Seekers in Europe March 2016, 43 <http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_wrong_counts_and_closing_doors.pdf> accessed 13 May 2016.

⁵²⁸ Human Rights Watch, 'Explanatory note on the Hotspots Approach', July 2015, 12.

⁵²⁹ Euronews, 'Hotspot Approach: the answer to Europe's Migrant Crisis', 21 September 2015 <<http://www.euronews.com/2015/09/21/the-hotspot-approach-the-answer-to-europe-s-migrant-crisis/>> accessed 16 February 2016.

means applied in the implementation of the approach and over its procedures that arguably fail to reflect international and national human rights protection standards. The letter expressly notes that:

[i]n particular, the main concerns regard the initial detention of migrants, the personal safeguards during fingerprinting and photographic registration, the lack of information provided to migrants on their arrival about the possibility to request international protection, the limits of access to the asylum procedure based solely on nationality, without any personal investigations, the immediate consignment of a rejection decree and the refusal of some police stations to examine the requests for asylum that follow the rejection decrees.⁵³⁰

Amnesty International, in its annual report on Italy, expressed concerns over the fact that asylum-seekers and migrants may be subjected to arbitrary detention and forced fingerprinting in centres designated as hotspots. In Sicily, authorities issued expulsion orders to individuals upon arrival, raising concern that people ineligible for relocation may be expelled without being previously granted an opportunity to seek asylum or receive information regarding their rights.⁵³¹ Strong criticism regarding the Lampedusa hotspot has also been raised by the Human Rights Commission of the Italian Senate. In a recently published report the Commission highlights that pre-identification, access to information and registration as particularly worrying aspects of the hotspot approach in Lampedusa.⁵³² Observers in Italy denounce a chaotic situation of arbitrary distinctions between forced and voluntary migrants through questionable methods, including physical force to obtain fingerprints, administrative detention without judicial oversight, zero information, limited access to UNHCR and other organisations (which is granted only after screening interviews), lack of protection safeguards, and summary (and possibly collective) expulsions.⁵³³ Considerations on individualised assessment and identification of vulnerabilities are very far from the present day scheme as it is being implemented in practice. Rather than hotspots the EU should envisage 'humane' spots where primacy is given to fundamental rights without any form of discrimination. In December 2015, MSF Italy decided to interrupt the activities in the centre of Pozzallo (south Sicily), one

⁵³⁰ Italian Council for Refugees (CIR), News 9 November 2015 <<http://www.cir-onlus.org/en/home/1903-hotspot-approach-concerned-national-asylum-committee-has-requested-a-meeting-with-minister-alfano>> accessed 16 February 2016.

⁵³¹ Amnesty International, Amnesty International Report 2015/16 – Italy, 24 February 2016 <<https://www.amnesty.org/en/countries/europe-and-central-asia/italy/report-italy/>> accessed 19 March 2016.

⁵³² Human Rights Commission of the Italian Senate, Report on the Identification and Expulsion Centres (CIE, *Centro di identificazione ed espulsione*), February 2016 [2016]. See also ECRE Weekly Bulletin 11 March 2016 <<http://us1.campaign-archive2.com/?u=8e3ebd297b1510becc6d6d690&id=bbd3cad71e>> accessed 16 March 2016.

⁵³³ Violeta Moreno-Lax, 'Europe in Crisis: Facilitating Access to Protection, (Discarding) Offshore Processing and Mapping Alternatives for the Way Forward', December 2015 [2015] 13 <http://www.redcross.eu/en/upload/documents/2016/Europe%20in%20Crisis_Dr%20Moreno-Lax_final.pdf> accessed 12 May 2016; 'Dallo sbarco all'hotspot, all'espulsione' (Redattore Sociale, 6 November 2015) <<http://www.redattoresociale.it/Notiziario/Articolo/494075/Dallo-sbarco-all-hotspot-all-espulsione-Come-si-decide-il-destino-dei-migranti>> accessed 12 May 2016; 'Sbarchi: caos identificazioni, anche i minori a rischio espulsione' (Redattore Sociale, 13 November 2015) <<http://www.redattoresociale.it/Notiziario/Articolo/494630/Sbarchi-caos-identificazioni-anche-i-minori-a-rischio-espulsione-Gravi-violazioni>> accessed 12 May 2016; and ECRE, 'Italy: a worrying trend is developing in the "hotspots"' (ECRE Bulletin, 20 November 2015) <<http://www.ecre.org/component/content/article/70-weekly-bulletin-articles/1285-italy-a-worrying-trend-is-developing-in-the-hotspots.html>> accessed 12 May 2016.

of the two fully operational hotspots,⁵³⁴ due to the undignified and inadequate reception conditions which undermine the possibility to offer an effective response to the medical and psychological needs of vulnerable people.⁵³⁵ According to the latest report of the Asylum Information Database (AIDA), in the case of Italy and Greece, the implementation of the hotspot approach has only reinforced the risk of detention of asylum seekers and migrants, contrary to states' human rights duties to only apply detention in exceptional circumstances.⁵³⁶

This brief snapshot is based upon the initial phase of the introduced mechanism in the autumn of 2015. Yet the premises do legitimate the question of whether the hotspots are intended as a way to reiterate the normalisation of the urgency-based approach well established in the Italian 'tradition'. Further, it is undoubtedly too early to say whether the system implies a subtle 'freeze' on human rights standards of migrants and asylum-seekers, but there are substantial reasons to investigate further and understand the implied mechanisms in the approach. For the time being, there is an evident cause of concern in the progressive decrease in the quality of reception conditions in border zones, if not a descent into chaos, precisely in the areas hosting a hotspot.⁵³⁷

D. Conclusions and recommendations

Within the European Union legal framework, as well as in the specific case of Italy, the existing reception architecture is in significant tension with human rights standards. The unstable nature of reception in Europe entails heavy implications for the ability of states to identify and assess special reception and procedural needs. A tangible sign of states' failure towards vulnerable persons, including unaccompanied asylum seeking children, has been the unjustifiable use of detention and the rationalisation of detention as a form of reception.⁵³⁸ The foundations for meaningful protection of the most vulnerable groups are as yet 'under construction', at best. The substantial outcomes might be further delayed if the EU continues to promote schemes that are far from the reach of protection seekers and far from the protection regime of international human rights law. In the case study it is argued that the European and Italian reception frameworks are inadequate to protect vulnerable persons from being detained and from the adverse

⁵³⁴ European Commission, Commission Communication on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration, [2016] COM(2016) 85 final, 10.02.2016, 9.

⁵³⁵ MSF, 'Italy: MSF ends activities in Pozzallo reception centre' <<http://www.msf.org/article/italy-msf-ends-activities-pozzallo-reception-centre>> accessed 2 April 2016.

⁵³⁶ AIDA, Wrong Counts and Closing Doors: The Reception of Refugees and Asylum Seekers in Europe, March 2016, 43 <http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_wrong_counts_and_closing_doors.pdf> accessed 12 April 2016.

⁵³⁷ Violeta Moreno-Lax, 'Europe in Crisis: Facilitating Access to Protection, (Discarding) Offshore Processing and Mapping Alternatives for the Way Forward', December 2015 [2015] 1 <http://www.redcross.eu/en/upload/documents/2016/Europe%20in%20Crisis_Dr%20Moreno-Lax_final.pdf> accessed 19 March 2016.

⁵³⁸ AIDA, Wrong Counts and Closing Doors: The Reception of Refugees and Asylum Seekers in Europe, March 2016, 43 <http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_wrong_counts_and_closing_doors.pdf> accessed 12 April 2016.

effects of detention. The recent hotspots approach seems to be leading in the same direction. There is an evident need to go beyond a deterrence-based policy in which walls and fences are seen as the best way to enhance protection within the Union.

In particular, the systematic deficiencies noted in the Italian reception standards risk further aggravating the vulnerable position of persons in need of special protection. The reception system is in itself vulnerable and is not adequate to satisfactorily address and protect vulnerable persons' needs. As can be seen, the current Italian reception framework provides that, in practice, there is no specific identification mechanism in place in order to identify vulnerable asylum-seekers. Additionally, no coordinated national plan exists to define the procedures, roles and functions of public and private actors involved in the early identification, referral, assistance and care of vulnerabilities, nor for coordination of services or for an effective monitoring system.⁵³⁹ Although standards of services are planned following the national regulation on management of the centres they are insufficient and inadequate, especially for vulnerable categories of individuals.⁵⁴⁰ Moreover, the lack of coordination may impact the quality of services, thus providing a further element of disharmony. Consequently, the implied risk is that many vulnerable situations may pass unnoticed and, if identified, the level of assistance provided lacks a common and coordinated framework, relying mainly on a broad discretion left upon the officials in charge of the asylum proceedings. Inevitably the risk that vulnerable persons remain unidentified is even higher when major priority is given to fingerprinting, prompt identification and accelerated procedures. All these parameters hardly trigger the assessment required to understand and address the special reception needs. The Italian case provides acute evidence for these arguments.

The lacunae of the national reception system have been acknowledged by the government, which has discussed at length a new strategy in order to completely abandon the collective approach and to address needs of migrants and asylum-seekers in a more systematic and coherent way, particularly for vulnerable people.⁵⁴¹ Nevertheless, the actual legal construct remains anchored to an 'emergency and security' approach rather than on a structured, effective and individualised one. This system delivers the present-day Italian reception system based upon coercive rather than protective measures. It is the reflection of a scheme that makes wide use of detention as a pivotal deterrence strategy to manage the 'threat' of irregular migration. In fact, Italian legislation seems to consider asylum-seekers as dangerous people to be kept under close surveillance.⁵⁴²

The newly introduced legislative reform provides for monitoring and reporting, yet fails to discontinue the collective reception of asylum-seekers and migrants. As has already been acknowledged by the extraordinary Commission for the protection and promotion of human rights of the Senate, 'in Italy from

⁵³⁹ AIDA, National Country Report Italy, Updated 22 December 2015 [2015] 49.

⁵⁴⁰ AIDA, National Country Report Italy, Updated 22 December 2015 [2015] 65 and 91.

⁵⁴¹ Notes taken by the author during the meeting promoted by the UNHCR at the Italian Senate in Rome, 19 February 2015.

⁵⁴² Giuseppe Campesi, 'Immigrant Detention and the Double Logic of Securitization in Italy' in Michaela Ceccorulli and Nicola Labanca (eds), *The EU, Migration and the Politics of Administrative Detention* (Routledge 2014), 145, 157. See Council of Europe Parliamentary Assembly, 'The large-scale arrival of mixed migratory flows on Italian shores', Committee on Migration, Refugees and Displaced Persons, Rapporteur Mr Christopher Chope, United Kingdom, European Democrat Group, Doc 13531, 9 June 2014.

2011 a progressive deterioration of the accommodation standards for asylum-seekers has been registered, which has worsened since 2012 and 2013'.⁵⁴³ The whole system is evidence of reiterated inefficiencies that have not been fully addressed by the recently adopted law. Asylum detention in Italy is presently a fragmented patchwork which exposes individuals to further vulnerabilities and places an additional burden on those persons who are already in a particularly vulnerable situation.⁵⁴⁴

Several important actions should be promptly taken at regional as well as at Member State level. Europe should ensure *protection* first and foremost throughout the various stages of migration. The Union should provide common guidance and adopt policies reflecting its founding values through a reinforced regime of safeguards for asylum-seekers. There is an evident need to agree upon a shared strategy to allow for safe and legal means of entry, which should entail the activation of a protected-entry mechanism for those in need of protection.⁵⁴⁵ This would ensure both the respect of the relevant human rights obligations and the reliance on principled approaches to manage migration and asylum. Moreover, the reliance on safe legal entry corridors would grant protection on an individualised basis and would progressively reduce the use of detention measures to control migration. This action should be coordinated with an inclusive and clearly traceable line of institutional responsibilities together with an adequate level of resources allocation. A commonly shared political will lies behind this urgent reaction to what has until now been a scattered and securitised approach. This would prevent the prominent domino effect, which results in strengthened smuggling and trafficking exploitation networks, highly dangerous journeys and the loss of thousands of lives.

Knowledge and transparency on detention practices, when applied as measures of last resort, should be equally at the core of the EU-wide agreed approach. Data and statistics on detention should be included as part of the Eurostat responsibility framework.⁵⁴⁶ Furthermore, regular monitoring and follow-up on detention conditions and procedural protection frameworks should be mandatory. Regionally shared communication and information on best practices concerning alternatives to detention would also enable a more transparent system that applies vulnerable-sensitive measures under the wider umbrella of protection. Above all, the use of common sense and an adequate level of understanding of who is 'the

⁵⁴³ Commission for the protection and promotion of human rights of the Senate, Resolution n. 183 adopted on 28 November 2013.

⁵⁴⁴ UNHCR and the Italian Council for Refugees noted with concern that the new law provides for a partial redress as it does not introduce the required changes to the CARA. See AIDA News, 'Italy: Transposition of recast asylum directives adopted', 21 September 2015 <<http://www.asylumineurope.org/news/21-09-2015/italy-transposition-recast-asylum-directives-adopted#sthash.MrZVtjv7.dpuf>> accessed 16 February 2016.

⁵⁴⁵ See Violeta Moreno-Lax, 'Europe in Crisis: Facilitating Access to Protection, (Discarding) Offshore Processing and Mapping Alternatives for the Way Forward', December 2015 <http://www.redcross.eu/en/upload/documents/2016/Europe%20in%20Crisis_Dr%20Moreno-Lax_final.pdf> accessed 19 March 2016; FRA, *Legal entry channels to the EU for persons in need of international protection: a toolbox*, FRA Focus 02/2015; and Jesuit Refugee Service Europe, *Safe and legal channels to protection in the European Union – updated recommendations*, January 2016, <https://en.jrs.net/assets/Regions/IOR/media/files/03-02-2016_Safe%20and%20legal%20ways_reccom_updated_JRSEurope.pdf> accessed 2 April 2016.

⁵⁴⁶ Access Info and Global Detention Project, *The Uncounted: Detention of Migrants and Asylum Seekers in Europe* [2015] 19.

other', the foreigner, would be a complementarily crucial element in a scenario that is climbing the edges of a dangerous and steep fall-back.

On a national level, Italy should address the consistent implementation of EU-wide agreed strategy and should ensure the primacy of protection paradigms. Within the reception system, a shift towards individualised and rights-based approaches should be prioritised. Notably, protection of vulnerability can be achieved in four core areas: early identification, assessment and proper professional care of vulnerable persons; monitoring of detention conditions and effective procedural guarantees; training of staff managing reception centres; and adequate allocation of resources. The combined enhancement of those key elements through integrated and coherent procedural policies would significantly reduce the negative impact that detention and confinement measures inflict on those who are particularly weak and at risk of developing further vulnerabilities.

To identify and prudently assess the special protection needs of vulnerable persons, multiple-professional profiles should be involved. This would ensure adequate management of the process to determine and address vulnerability. There should be in place a shared protocol to enable a more thorough approach to screening of individuals before detention and it shall further allow the identification of vulnerability generated while in detention. Regular consultation with independent experts, including clinicians and mental health professionals, researchers and practitioners, shall be included in the standard working procedure.

In all efforts to tackle vulnerabilities as early as possible, know-how should be gathered from several research projects which have established how to determine the vulnerable condition of an individual.⁵⁴⁷ The DEVAS project is among the most in-depth research studies in this area. The report provides that within the context of detention, 'vulnerability' can be conceptualised as a series of combined circles including *personal* (internal), *social* and *environmental* (external) factors that may strengthen or weaken an individual's personal integrity'.⁵⁴⁸ Vulnerability shall be assessed over time through the implementation of flexible rather than narrowly fixed approaches. Vulnerability is not a static state of affairs, but a continuous and dynamic one requiring regular evaluation stages. Furthermore, factors of vulnerability are often cumulative: one dimension of vulnerability can increase the likelihood of the occurrence of other vulnerabilities.⁵⁴⁹ Henceforth, effective safeguards shall be in place to assess how vulnerability develops over time in both detention and reception centres to promptly identify and protect those who are being seriously harmed. The crucial role of specialised personnel shall be acknowledged and extended in order to influence the path of the asylum-seekers in vulnerable situations.

⁵⁴⁷ Report by the Detention Forum's Vulnerable People Working Group, 'Rethinking "Vulnerability" in Detention: A Crisis of Harm' [2015]; Protect-Able, Process of Recognition and Orientation of Torture Victims in European Countries to Facilitate Care and Treatment [2013]; EVASP Project, Trainers' handbook; EVASP Project, Transnational Report 2009–2010 [2010]; and Jesuit Refugee Service Europe, 'Becoming Vulnerable in Detention: Civil society report on the detention of vulnerable asylum seekers and irregular migrants in the European Union' (the DEVAS Project) [2010].

⁵⁴⁸ Jesuit Refugee Service Europe, 'Becoming Vulnerable in Detention: Civil society report on the detention of vulnerable asylum seekers and irregular migrants in the European Union' (the DEVAS Project) [2010] 90.

⁵⁴⁹ EVASP Project, Trainers' handbook; EVASP Project, Transnational Report 2009 - 2010 [2010] 6 and 20.

The progressive implementation of special protection mechanisms for particularly vulnerable individuals shall include a programmed, reliable and independent monitoring mechanism and ensure that reception and detention conditions reflect human rights standards. Concurrently, the training for personnel managing reception and detention centres shall occur on a regular basis through standardized and comprehensive protocols on the special protection needs of vulnerable persons. Adequate financial resources need to be proportionally allocated in order to allow the proper implementation of such measures.

The above blueprint at the regional and national level should contribute to upholding a protection-centred approach and enable the distancing of the EU and its Member States from the dominant culture of enforcement with the primary use of detention measures. This should ensure that vulnerable people are protected as needed through the migration process without facing deprivation of liberty as an ordinary practice. Though it will require time, a change in the political mind-set in the EU, and considerable human and financial resources, the end result has the potential to provide a better scenario than the one we are currently witnessing.

IV. Unaccompanied minors in Greece: are children's best interests being served? (Author: Sotiris Konstantis)

A. Introduction

Greece, as one of the main entry points to Europe for asylum-seekers, received 851,319 migrants or asylum-seekers irregularly entering the country during 2015.⁵⁵⁰ To illustrate the scale of the influx, between 17 October and 21 October 2015 approximately 48,000 persons in need of protection entered Greece, which means that 9,600 migrants per day arrived in Greece during that five-day period.⁵⁵¹ Though the vast majority of the migrants continue their trip through the Balkans with the aim of arriving in Central and Northern Europe, Greece is, in relative terms, one of the biggest host states for migrants.

In order to have a clearer image of Greece as a host state, the statistics on asylum-seekers should be read in conjunction with statistics on the social and economic situation in Greece and the consequences of the financial crisis. With a total population of 10,816,286⁵⁵² between 2008 and 2014 Greece has lost approximately 30% of its Gross Domestic Product (GDP), around 70 billion Euros. The unemployment rate grew from 7.8% in 2008 to 26.5% in 2014.⁵⁵³ Furthermore, 22% of the population lives at risk of poverty or social exclusion, which means that their disposable income is below 4,608 Euros.⁵⁵⁴ Even more striking is the fact that 41.9% of minors/children (0–17 years) face material deprivation.⁵⁵⁵

In 2015 a total of 321,175 children asylum-seekers entered European territory. Some 213,585 of them were under 14 years of age while the rest were aged between 14 and 17.⁵⁵⁶ According to Eurostat, the

⁵⁵⁰ International Organization for Migration (IOM), Missing Migrants Project, 'Migrant Fatalities Worldwide' <<http://missingmigrants.iom.int/>> accessed 2 January 2016.

⁵⁵¹ IOM, 'Greece Records Highest Weekly Migration Inflows in 2015 So Far' (23 October 2015) <<https://www.iom.int/news/greece-records-highest-weekly-migration-inflows-2015-so-far>> accessed 27 October 2015.

⁵⁵² Hellenic Statistical Authority, '2011 Population Census' <http://www.statistics.gr/portal/page/portal/ESYE/BUCKET/A1602/PressReleases/A1602_SAM01_DT_DC_00_2011_03_F_EN.pdf> accessed 27 October 2015.

⁵⁵³ Hellenic Statistical Authority, 'Greece in Figures' <<http://www.statistics.gr/portal/page/portal/ESYE/PAGE-greeceinfigures-qq>> accessed 27 October 2015.

⁵⁵⁴ This amount corresponds to 60% or less of the national median equivalised disposable income and constitutes the threshold below which people are considered to run the risk of poverty. See Hellenic Statistical Authority, 'Living Conditions in Greece' <http://www.statistics.gr/documents/20181/1590058/LivingConditionsInGreece_0316.pdf/e682714c-654a-414c-9c25-15f96966483f> accessed 27 October 2015.

⁵⁵⁵ Hellenic Statistical Authority, 'Living Conditions in Greece' <http://www.statistics.gr/documents/20181/1590058/LivingConditionsInGreece_0316.pdf/e682714c-654a-414c-9c25-15f96966483f> accessed 27 October 2015.

⁵⁵⁶ Eurostat, 'Statistics on Asylum and first time asylum applicants by citizenship, age and sex – Annual aggregated data (rounded)' <<http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do>> accessed 15 February 2016.

number of asylum-seekers considered to be unaccompanied minors amounted to 88,245 in total for all EU members.⁵⁵⁷ In Greece, 420 presumably unaccompanied minors have been registered as asylum-seekers.⁵⁵⁸ The reliability of the data concerning UAMs may however be questioned, as some states do not register UAMs specifically.⁵⁵⁹ Specific concern has been expressed on the reception conditions of the UAMs in Greece. In 2011, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment deplored the dysfunctional system of protection of unaccompanied minors in Greece, pointing, for example, to the lack of a reliable guardianship network in the country.⁵⁶⁰ Since then, the situation has radically changed in terms of the number of refugees arriving in the country, a fact that forced the UNHCR to warn of an imminent humanitarian crisis in Greece.⁵⁶¹

Bearing this in mind, the aim of this case study is to consider how the interests and the rights of UAMs, generally considered as a particularly vulnerable group, are protected in Greece. Taking into consideration the current conditions prevailing in Greece as a country submerged in an economic crisis, while at the same time receiving unprecedented numbers of protection-seekers, the study will address the issue of Greece's state responsibility with regard to its obligations towards the protection of this particular group of children. In particular, attention is attached to Greece's obligation to observe and respect the best interests of the child principle. The study seeks to suggest possible measures that the country could undertake to comply with the said principle so as to 'put children first' as the UN General Assembly Resolution 'A World Fit for Children' exhorts.⁵⁶²

The first part of the case study will present the main human rights and EU legal provisions with regard to the protection of UAMs and the principle of the best interests of the child (Section B). Against this background, Section C will analyse the situation of UAMs in Greece. The final part will be reserved for comments and recommendations (Section D).

⁵⁵⁷ Eurostat, 'Asylum applicants considered to be unaccompanied minors - annual data' <<http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&plugin=1&pcode=tps00194&language=en>> accessed 5 May 2016.

⁵⁵⁸ Eurostat, 'Asylum applicants considered to be unaccompanied minors - annual data' <<http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&plugin=1&pcode=tps00194&language=en>> accessed 5 May 2016.

⁵⁵⁹ UNICEF, IOM, 'IOM and UNICEF Data Brief: Migration of Children to Europe' 30 November 2015 <http://www.iom.int/sites/default/files/press_release/file/IOM-UNICEF-Data-Brief-Refugee-and-Migrant-Crisis-in-Europe30.11.15.pdf?utm_content=buffer32a66&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer> accessed 10 February 2016.

⁵⁶⁰ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, 'Mission to Greece', UN doc A/HRC/16/52/Add.4, 21 April 2011 <<http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.16.52.Add.4.pdf>> accessed 26 November 2015.

⁵⁶¹ UNHCR, 'UNHCR warns of imminent humanitarian crisis in Greece' (1 March 2016) <<http://www.unhcr.org/56d58c146.html>> accessed 3 April 2016.

⁵⁶² United Nations General Assembly Resolution, 'A World Fit for Children', UN doc A/RES/S-27/2, 11 October 2011, para 7.1.

B. Protecting unaccompanied children as a vulnerable group

1. Definition of a UAM

According to the International Convention on the Rights of the Child (CRC), ‘a child means every human being below the age of eighteen unless under the law applicable to the child, majority is attained earlier’.⁵⁶³ The same definition has been adopted by the EU. For example, in Directive 2013/33/EU of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), Article 1(d) defines a minor for the purposes of this Directive as ‘a third-country national or stateless person below 18 years’.⁵⁶⁴

When it comes to the definition of the concept of UAMs, the CRC makes a distinction between UAMs and separated minors. The first category comprises all ‘children, as defined in Article 1 of the Convention, who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so’.⁵⁶⁵ ‘[S]eparated minors’ are defined as all ‘children, as defined in article 1 of the Convention, who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives’.⁵⁶⁶

In the EU legal framework concerning asylum-seekers, Article 2(e) of the recast Reception Conditions Directive defines a UAM as:

a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States.⁵⁶⁷

A similar definition has been adopted for other relevant EU texts.⁵⁶⁸ It is notable that the EU legislation does not proceed to a distinction between separated minors and UAMs. The relatives criterion that is set

⁵⁶³ United Nations Convention on the Rights of the Child (CRC, adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 1.

⁵⁶⁴ Directive 2013/33/EU of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), OJ L 180/96, art 1(d).

⁵⁶⁵ Committee on the Rights of the Child, General Comment No 6 [2005] UN doc CRC/GC/2005/6 <<http://www.refworld.org/docid/42dd174b4.html>> accessed 22 October 2015, para 7.

⁵⁶⁶ Committee on the Rights of the Child, General Comment No 6 [2005] UN doc CRC/GC/2005/6 <<http://www.refworld.org/docid/42dd174b4.html>> accessed 22 October 2015, para 8.

⁵⁶⁷ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), [2013] OJ L 180/96, art 2(e).

⁵⁶⁸ Regulation (EU) 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), [2013] OJ L 180/31, art 2(j); Directive 2011/95/EU of the European Parliament and of the Council on standards for the qualification of third-

forth in the definition of separated children under the CRC does not seem to be taken into consideration in the EU legislation where only legally or traditionally established family ties between the minor concerned and an adult are included in the definition.

2. UAMs and vulnerability

In the EU primary law, age has been recognised as one of the determining criteria in regard to a person's vulnerability. This is clear, for example, in Article 19(2) TFEU, which calls for the undertaking by the European Council of actions combating any kind of discrimination based on a series of reasons, including age. Furthermore, the EU Charter of Fundamental Rights mentions, in its Article 21, age as one possible source of discrimination that should be prohibited. Furthermore, it makes specific allusion to the rights of certain groups including children (Article 24) and elderly people (Article 25), ensuring and enhancing the legal protection of such groups.⁵⁶⁹

The answer to the question as to why UAMs constitute a specifically vulnerable group is a multi-faceted one.⁵⁷⁰ Vulnerability can be defined as 'arising from our embodiment, which carries with it the ever-present possibility of harm, injury and misfortune from mildly adverse to catastrophically devastating events, whether accidental, intentional, or otherwise.'⁵⁷¹ In the case of UAMs, the vulnerability may be related to their past and the reasons that led them to leave their country of origin. Persecution of the child or his/her family, armed conflict, human trafficking, or the search for a better future in terms of economic and educational opportunities usually form the basis for such a decision.⁵⁷²

However, a finding of vulnerability may also be based on a feature that is seen to belong to a group of persons.⁵⁷³ According to the judgment of the European Court of Human Rights (ECtHR) in the *M.S.S.* case the mere fact of being an asylum-seeker means that the person concerned belongs to an underprivileged,

country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), [2011] OJ L 337/9, art 2(l).

⁵⁶⁹ Francesca Ippolito, '(De)Constructing Children's Vulnerability under European Law' in Francesca Ippolito and Sara Iglesias Sánchez (eds), *Protecting Vulnerable Groups: The European Human Rights Framework* (Hart 2015), 39.

⁵⁷⁰ Deborah J. Johnson, DeBrenna LaFa Agbényiga and Judith Mbula Bahemuka, 'Vulnerable Childhood in a Global Context: Embracing the Sacred Trust' in Deborah J. Johnson, DeBrenna LaFa Agbényiga and Robert K. Hitchcock (eds), *Vulnerable Children: Global Challenges in Education, Health, Well-Being, and Child Rights* (Springer 2013).

⁵⁷¹ Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law and Feminism 1, 9.

⁵⁷² Committee on the Rights of the Child, General Comment No 6 [2005] UN doc CRC/GC/2005/6 <<http://www.refworld.org/docid/42dd174b4.html>> accessed 22 October 2015, para 1.

⁵⁷³ *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR 21 January 2011), para 232. This is the argument made in Ulrike Brandl and Philip Czech, 'General and Specific Vulnerability of Protection-Seekers in the EU' in Francesca Ippolito and Sara Iglesias Sánchez (eds), *Protecting Vulnerable Groups: The European Human Rights Framework* (Hart 2015), 249.

vulnerable group.⁵⁷⁴ The adverse conditions that led children to flee their homelands constitute the first part of their hardship. Often enough, unfavourable conditions are waiting for them in the host state as well. The challenges they may deal with upon arrival in the host state may also contribute to their vulnerability. Issues of labour exploitation, physical or mental abuse and exploitation (such as denial of education or even recruitment as child soldiers) remain risks that UAMs may face.⁵⁷⁵ Sexual exploitation, child labour, gender-based violence or lack of access to administrative and legal procedures related to their status are also considered risks that unaccompanied minors encounter much more frequently than children protected by the company of an adult member of their families.⁵⁷⁶ Within this group there can be other exogenous factors contributing to multiple vulnerabilities as, for example, may be the case for UAMs with disabilities.⁵⁷⁷ These are all examples of what has been defined by Brandl and Czech as ‘compound vulnerability’,⁵⁷⁸ where initial vulnerability is aggravated by further conditions.

3. Special protection for UAMs

Special protection for UAMs is incorporated in Article 22(1) of the CRC, which reads:

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.⁵⁷⁹

Article 20 of the Convention is also of relevance. The first paragraph states that: ‘A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State’.⁵⁸⁰

⁵⁷⁴ *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR 21 January 2011), para 252.

⁵⁷⁵ Kristina Touzenis, *Unaccompanied Minors, Rights and Protection* (XL Edizioni 2006).

⁵⁷⁶ Kristina Touzenis, *Unaccompanied Minors, Rights and Protection* (XL Edizioni 2006), 2.

⁵⁷⁷ See, also, Human Rights Watch, ‘Updated submission to the Committee on the Rights of the Child on Greece’ (periodic review of Greece) [2012] <<https://www.hrw.org/news/2012/04/25/human-rights-watches-updated-submission-committee-rights-child-greece>> accessed 18 January 2016, 2–4.

⁵⁷⁸ Ulrike Brandl and Philip Czech, ‘General and Specific Vulnerability of Protection-Seekers in the EU’ in Francesca Ippolito and Sara Iglesias Sánchez (eds), *Protecting Vulnerable Groups: The European Human Rights Framework* (Hart 2015), 251.

⁵⁷⁹ United Nations Convention on the Rights of the Child (CRC, adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 22(1).

⁵⁸⁰ United Nations Convention on the Rights of the Child (CRC, adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 20(1).

In EU legislation, Article 3 of the Treaty on European Union (TEU) stipulates that ‘the Union shall promote the protection of the rights of the child’.⁵⁸¹ In addition, Article 24 of the EU Charter of Fundamental Rights stipulates in its first paragraph that: ‘Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely’. Likewise, the second paragraph puts forward that: ‘[i]n all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration’.⁵⁸² What is more, the CJEU had the occasion to highlight the importance of the protection provided to children in the judgment it delivered in case C-540/03 *European Parliament v Council of the European Union supported by Commission of the European Communities and by Federal Republic of Germany*. The Court underlined the importance of the CRC, stating that it is one ‘of the international instruments for the protection of human rights of which it takes account in applying the general principles of Community law’.⁵⁸³

At a policy-making level, the Stockholm Programme adopted by the European Council acknowledged that:

[u]naccompanied minors arriving in the Member States from third countries represent a particularly vulnerable group which requires special attention and dedicated responses, especially in the case of minors at risk. This is a challenge for Member States and raises issues of common concern. [...] A comprehensive response at Union level should combine prevention, protection and assisted return measures while taking into account the best interests of the child.⁵⁸⁴

Setting the priorities to be pursued and with special reference to children, the European Council states that the rights of children should ‘concern all Union policies’.⁵⁸⁵ With the Stockholm Programme arriving at its end, in June 2014 the European Council adopted new strategic guidelines for legislative and operational planning for the coming years within the Area of Freedom, Security and Justice (AFSJ).⁵⁸⁶ In this document, the European Council gives emphasis to ‘consistently transpose, effectively implement and consolidate the legal instruments and policy measures in place’.⁵⁸⁷ The focus is now transferred from the adoption of common standards for all EU Member States to the effective implementation of these standards. No doubt this also includes the provisions related to the protection of UAMs.

The EU has recently taken a series of measures as a follow-up to the European Agenda for Migration of May 2015, which set out the immediate, medium and long-term priorities for the EU’s migration policy.⁵⁸⁸ Action has been taken for coordination and financial support between Member States,⁵⁸⁹ between

⁵⁸¹ Article 2 TEU.

⁵⁸² Article 24 of the EU Charter of Fundamental Rights.

⁵⁸³ C-540/03, *European Parliament v Council of the European Union supported by Commission of the European Communities and by Federal Republic of Germany* [2006] CJEU ECRI-05769, para 37.

⁵⁸⁴ European Council, ‘The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens’ 2010/C 115/1, para 6.1.7.

⁵⁸⁵ European Council, ‘The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens’ 2010/C 115/1, para 2.3.2.

⁵⁸⁶ European Council ‘Council Conclusions 26–27 June 2014’ [2014].

⁵⁸⁷ European Council ‘Council Conclusions 26–27 June 2014’ [2014], para 3.

⁵⁸⁸ See for a critique of this text, below B.4.b.

⁵⁸⁹ European Commission, Commission Communication: Managing the refugee crisis: State of Play of the Priority Actions under the European Agenda on Migration Annex 8 [2015] COM(2015) 510 final.

Member States and neighbouring countries (mainly Western Balkans States and Turkey),⁵⁹⁰ relocation and resettlement plans for the benefit of Greece and Italy,⁵⁹¹ proposal of temporary suspension of Sweden's and Austria's obligations under the relocation plans,⁵⁹² creation of hotspots in Greece and Italy,⁵⁹³ activation of the Civil Protection Mechanism for four countries,⁵⁹⁴ and the EU-Turkey Agreement on irregular migration and refugee issues.⁵⁹⁵ Measures appear to have been taken in a rather disorganised way and the rapidity with which new measures are added to existent ones does not favour coordination efforts. Furthermore, in a humanitarian crisis of the scale of the current events, the need to accommodate different political views coming from diverse EU Member States renders cooperation difficult, which has meant that some of the initiatives have become dead letters.⁵⁹⁶ These circumstances, which in some cases could be characterised as chaotic, should be born in mind when discussing the current situation in Greece, especially when it comes to recommendations for better management of the crisis.

4. Best interests of the child principle

In protecting the specific rights and needs of UAMs due attention should also be paid to the principle of the best interests of the child. The fundamental international text that serves as the guidance for the implementation of the child's best interests is the CRC. The CRC stipulates in Article 3 that '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary

⁵⁹⁰ European Commission, Commission Communication: State of Play of Implementation of the Priority Actions under the European Agenda on Migration EU-Turkey Joint Action Plan – Implementation Report Annex 1 [2016] COM(2016) 85 final.

⁵⁹¹ Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248, 24 September 2015.

⁵⁹² European Commission, Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Sweden in accordance with Article 9 of Council Decision (EU) 2015/1523 and Article 9 of Council Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] COM (2015) 677 final; European Commission, Proposal for a Council Implementing Decision on the temporary suspension of the relocation of 30% of applicants allocated to Austria under Council Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2016] COM (2016) 80 final.

⁵⁹³ European Commission, Commission Communication: State of Play of Implementation of the Priority Actions under the European Agenda on Migration EU: Greece – State of Play Report Annex 2 [2016] COM(2016) 85 final; European Commission, Commission Communication: State of Play of Implementation of the Priority Actions under the European Agenda on Migration EU: Italy – State of Play Report Annex 3 [2016] COM(2016) 85 final.

⁵⁹⁴ European Commission, Commission Communication: State of Play of Implementation of the Priority Actions under the European Agenda on Migration – Accepted Member States' Support to Civil Protection Mechanism for Serbia, Slovenia, Croatia and Greece Annex 9 [2016] COM(2016) 85 final. For a detailed overview, see European Commission, 'European Agenda on Migration – Legislative Documents' 10 February 2016 <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/index_en.htm> accessed 16 February 2016.

⁵⁹⁵ European Commission, EU-Turkey Agreement: Questions and Answers [Factsheet] 19 March 2016 <http://europa.eu/rapid/press-release_MEMO-16-963_en.htm> accessed 24 March 2016.

⁵⁹⁶ European Commission, Commission Communication: State of Play of Implementation of the Priority Actions under the European Agenda on Migration [2016] COM(2016) 85 final, 11.

consideration'.⁵⁹⁷ The best interests principle (BIP) — along with the other general principles: non-discrimination,⁵⁹⁸ the right to survival and development,⁵⁹⁹ and respect for the views of the child⁶⁰⁰ — needs to be integrated into and guide the implementation of all the rights enshrined in the Convention. In light of their vulnerability and the necessity to address children's special needs, the principle of the best interests of the child forms the cornerstone of the protection of children's rights.⁶⁰¹

In the EU legal framework, the principle of the child's best interests is referred to in several legal instruments. While there is no definition of the principle in any EU legal text, Recital 9 of the Recast Reception Conditions Directive states that:

In applying this Directive, Member States should seek to ensure full compliance with the principles of the best interests of the child and of family unity, in accordance with the Charter of Fundamental Rights of the European Union, the 1989 United Nations Convention on the Rights of the Child and the European Convention for the Protection of Human Rights and Fundamental Freedoms respectively.⁶⁰²

This means that as far as this specific Directive is concerned the child's best interests principle will apply to all articles of the Directive when protection of minors is at stake.⁶⁰³ Furthermore, the content of the principle with which states should comply when implementing the CEAS legal instruments is informed by the CRC as well as by the EU Charter of Fundamental Rights and the ECHR, as it is interpreted by the ECtHR. The EU is not a signatory member of the CRC, so strictly speaking it could not be bound by its provisions. However, it recognises the seminal character of this Convention and integrates the CRC provisions in its legal arsenal for the protection of children and, especially, UAMs.

⁵⁹⁷ United Nations Convention on the Rights of the Child (CRC, adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 3.

⁵⁹⁸ Article 2 of the CRC: '1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status; 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.'

⁵⁹⁹ Article 6 of the CRC: '1. States Parties recognize that every child has the inherent right to life; 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.'

⁶⁰⁰ Article 12 of the CRC: '1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child; 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.'

⁶⁰¹ Committee on the Rights of the Child, General Comment No 5 [2003] UN doc CRC/GC/2003/5 <<http://www.refworld.org/docid/4538834f11.html>> accessed 22 March 2016, para 12.

⁶⁰² Directive 2013/33/EU of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), OJ L 180/96, Recital 9.

⁶⁰³ For an interesting discussion on the wording of the CEAS Directives and the possible meaning in matters of the BIP principle, see Ciara Mary Smyth, *The Common European Asylum System and the Rights of the Child: An Exploration of Meaning and Compliance* (Leiden University 2013) 60–67.

a) The 3D nature of the best interests principle: Legal rule, legal principle and procedural rule

The content of the child's best interests principle constitutes a legally binding rule.⁶⁰⁴ Nonetheless, the CRC does not provide us with much clarification on what this principle means or includes. The content of the principle is intentionally left open to leave space to multiple considerations on a case-by-case basis. Nevertheless, it is generally accepted that the best interests designate the overall well-being of a child and the principle should be interpreted in light of the other general principles enshrined in the Convention.⁶⁰⁵ General Comment No 14 of the UN Committee on the Rights of the Child reveals the complexity of the child's best interests principle functioning as an overarching principle and as a self-standing substantive right.

According to General Comment No 14, the child's best interests principle has three dimensions.

- First of all, the child's best interests should be considered as a substantive right to which the child is entitled. This means that he/she has the right to have his/her best interests assessed and determined by the decision makers. In the Committee's words, Article 3(1) 'creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court'.⁶⁰⁶
- The second dimension of the best interests principle lies in its interpretative force. The best interests principle is meant to affect the interpretation of other rights and legal provisions found in the CRC. It constitutes the prism through which all the rights attributed to the child as a person should be interpreted. This includes not only the positive rights enshrined in the CRC but also laws and policies adopted at a national, or in the case of the EU, supranational level.⁶⁰⁷ The child's best interests principle demands that legal conflicts are always solved with the child's best interests in mind.
- Finally, the third dimension concerns the procedural character of the best interests principle. A best interests assessment and a best interests determination should ideally precede every decision that may have an impact on the child. This, for its part, means that procedural guarantees are needed in order to secure the full enjoyment of the child's rights.⁶⁰⁸ In this sense, decisions affecting children should be justified in terms of the best interests principle.⁶⁰⁹

⁶⁰⁴ UNHCR, 'Field Handbook for the Implementation of UNHCR BID Guidelines' [2012], para 2(1).

⁶⁰⁵ UNHCR, 'Field Handbook for the Implementation of UNHCR BID Guidelines' [2012], para 2(1).

⁶⁰⁶ Committee on the Right of the Child, General Comment No 14 [2013] UN doc CRC/C/GC/14 <<http://www.refworld.org/docid/51a84b5e4.html>> accessed 19 October 2015, para 6.

⁶⁰⁷ Committee on the Right of the Child, General Comment No 14 [2013] UN doc CRC/C/GC/14 <<http://www.refworld.org/docid/51a84b5e4.html>> accessed 19 October 2015, 12.

⁶⁰⁸ See also J. Zermatten, 'The Best Interests of the Child Principle: Literal Analysis and Function' (2010) 18 International Journal of Children's Rights 483, 485.

⁶⁰⁹ Committee on the Rights of the Child, General Comment No 14 [2013] UN doc CRC/C/GC/14 <<http://www.refworld.org/docid/51a84b5e4.html>> accessed 19 October 2015, 4.

Through the CRC, states are given the role of guardians of the effective implementation of the principle and they have to control and monitor the whole spectrum of public as well as private activities that may interfere with the child's best interests and eventually undermine them.

According to General Comment No 14 there are three kinds of state obligations in this regard. First, states need primarily to ensure that the principle of the child's best interests is duly taken into account every single time that a decision potentially affecting children is taken. In this category, all possible acts or omissions by state agents are included. The second obligation charges the states with the obligation to ensure that the national legislation remains in conformity with the principles enshrined in the CRC. This obligation treats children not only as individuals but also as members of a social group with certain common features and certain specific needs that demand to be covered. The adoption of policy or legal measures should be the result of an assessment of all possible parameters; for example, budgetary measures should accommodate concerns in respect of the child's best interests principle. Finally, states have to ensure that the private sector respects the principle. Many services to children that previously were provided by the public sector are today provided by private actors. Accommodation for the UAMs in Greece, for example, may be provided by NGOs even though sometimes there is public funding for these structures.⁶¹⁰ In these cases, the decision-makers need to abide by the best interests principle to ensure that the private service providers comply with the principle of the best interests of the child.⁶¹¹

All this being said, in analysing the best interests of the child principle we should bear in mind that the principle is rather ambiguous and contested. There have been voices against its openness, describing it as 'a vehicle for the furtherance of the interests or ideologies of others, not of the interests of children'.⁶¹² It has also been criticised for enhancing an individualistic aspect of the rights of the child, reflecting mainly western values.⁶¹³ Even more critically, Smyth argues that the best interests principle may have the perverse effect that '[...] doing what is in a child's best interests is perceived to involve a lowering or softening of standards'.⁶¹⁴

The normative content of the best interests principle is the same in the various legal frameworks in which it is enshrined. This means that even though the previous analysis of the meaning of the principle occurred in the CRC context, it informs its application in the EU legal framework. The requirement for the full compliance with the principle of the best interests of the child in EU law is inherent in Article 2 of the TEU,

⁶¹⁰ Communication from the Greek authorities concerning the M.S.S. and Rahimi groups of cases against Greece (Applications No. 30696/09 and 8687/08) DH-DD(2015)1134F [2015] (in French) <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2830645&SecMode=1&DocId=2323116&Usage=2>> accessed 2 December 2015, 3–4.

⁶¹¹ Committee on the Rights of the Child, General Comment No 14 [2013] UN doc CRC/C/GC/14 <<http://www.refworld.org/docid/51a84b5e4.html>> accessed 19 October 2015, para 14.

⁶¹² John Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-determinism' (1992) 8(1) *International Journal of Law and the Family* 42, 58.

⁶¹³ Admark Moyo, 'Reconceptualising the "paramountcy principle": Beyond the individualistic construction of the best interests of the child' (2012) 12 *African Human Rights Law Journal* 142.

⁶¹⁴ Ciara Mary Smyth, *The Common European Asylum System and the Rights of the Child: An Exploration of Meaning and Compliance* (Leiden University 2013) 22.

according to which the 'Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'. Article 3(5) adds that: '[the Union] shall contribute to [...] the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter'. As seen above, the best interests of the child principle is also expressly referred to in the recitals to the Reception Conditions Directive, setting forth that in applying the directive 'Member States should seek to ensure full compliance with the best interests of the child [...]'.⁶¹⁵

b) The necessity of a BIA-BID procedure

The CRC has meant a revolutionary change in the perception of the protection that children need. Instead of a needs-based approach that deals with children as the objects of programmes, initiatives, legislative or policy measures, the drafters of the CRC considered it useful to introduce a rights-based approach, recognising children as subjects of rights. In the CRC children are considered as participants in all the actions concerning them. Nonetheless, this does not automatically lead to their participation in the unfolding of the relevant policies.

The materialisation of the rights-based approach is a two-stage process. A decision concerning a child should be the result of a careful assessment and determination of the child's interests in order for the best interests principle to be specified and implemented. General Comment No 14 on the best interests of the child issued by the UN Committee on the Rights of the Child offers useful clarification on the concepts of Best Interests Assessment (BIA) and Best Interests Determination (BID).⁶¹⁶ Further guidance for the specific situation of unaccompanied children is provided by the UNHCR Guidelines on Protecting the Best Interests of the Child, according to which the mechanisms in this regard 'may range from an assessment of which option is in the best interests of the child, to a formal process with strict procedural safeguards'.⁶¹⁷ Both procedures are to take place *before* any decision affecting the child (or children) has been made. Furthermore, in both processes all the relevant international human rights instruments should be taken into consideration.⁶¹⁸

The BIA implies a constant and continuing process of evaluating and balancing all of the interests of the child. According to General Comment No 14, '[the BIA] is a unique activity that should be undertaken in each individual case, in the light of the specific circumstances of each child or group of children or children

⁶¹⁵ Directive 2013/33/EU of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), OJ L 180/96, Recital 9.

⁶¹⁶ Committee on the Rights of the Child, General Comment No 14 [2013] UN doc CRC/C/GC/14 <<http://www.refworld.org/docid/51a84b5e4.html>> accessed 19 October 2015, paras 48–99.

⁶¹⁷ UNHCR, 'UNHCR Guidelines on Determining the Best Interests of the Child' [2008], 9.

⁶¹⁸ UNHCR, 'UNHCR Guidelines on Determining the Best Interests of the Child' [2008], 18.

in general'.⁶¹⁹ This means that all the characteristics of any given situation of the child are taken into account, including gender, physical and mental health, country of origin, and family status. The BIA should be carried out, for example, before providing temporary accommodation to an asylum-seeking unaccompanied minor.⁶²⁰ It should also be conducted prior to family tracing or family reunification.⁶²¹ In particular, in decisions concerning family reunification decision-makers should develop a clear understanding of the social and cultural background of the child and of the concept of family within the community in which the child has been raised.⁶²² To give an example, it cannot be excluded that in some societies members of the extended family participate in the rearing of children by taking up responsibilities that are attributed to parents. Taking these types of specificities into consideration assures an effective evaluation of the best interests of the child.

The BID 'describes the formal process designed to determine the child's best interests for particularly important decisions affecting the child, that require stricter procedural safeguards'.⁶²³ The UNHCR Guidelines on Determining the Best Interests of the Child mention some of the cases in which a BID is considered to be necessary. They are all important decisions that should be taken with regard to the minor in question and that have a determining impact on his/her life and his/her living conditions. These situations are the following: a) identification of durable solutions for unaccompanied and separated refugee children; b) temporary care arrangements for unaccompanied or separated children in exceptional situations;⁶²⁴ and c) possible separation of a child from his/her parents or from a person holding custody rights against the child's will.⁶²⁵

The determination of the child's best interests is never a simple procedure.⁶²⁶ General Comment No 14 offers a 'non-exhaustive' and 'non-hierarchical' list of factors that state authorities should globally and equally take into consideration as a means to the full enjoyment of the rights enshrined in the CRC.⁶²⁷ These elements can be divided into two sub-categories. The first one is the result of the adoption of the rights-based approach and is more centered on the child as a subject of rights, as an individual in need of protection. Such elements are: a) the child's views; b) the child's situation of vulnerability; c) the child's right to health; and d) the child's right to education. The second sub-category is highly conditioned by social factors, such as the family or the social environment of the child's upbringing, and includes the following elements: e) the child's identity; f) preservation of the family environment and maintaining relations; and g) care, protection and safety of the child. These factors, while focusing on the child as an

⁶¹⁹ Committee on the Rights of the Child, General Comment No 14 [2013] UN doc CRC/C/GC/14 <<http://www.refworld.org/docid/51a84b5e4.html>> accessed 19 October 2015, 12.

⁶²⁰ UNHCR, 'UNHCR Guidelines on Determining the Best Interests of the Child' [2008], 22.

⁶²¹ UNHCR, 'Field Handbook for the Implementation of UNHCR BID Guidelines' [2012], para 2.4.1.

⁶²² UNHCR, 'Field Handbook for the Implementation of UNHCR BID Guidelines' [2012], para 3.3.

⁶²³ UNCHR, 'UNHCR Guidelines on Determining the Best Interests of the Child' [2008], 22.

⁶²⁴ As exceptional situations could be considered the likelihood of exposure to exploitation, abuse, neglect or violence within care arrangement. See UNHCR, 'Field Handbook for the Implementation of UNHCR BID Guidelines' [2012] para 2.4.2.

⁶²⁵ UNHCR, 'UNHCR Guidelines on Determining the Best Interests of the Child' [2008], 23.

⁶²⁶ UNHCR, 'UNHCR Guidelines on Determining the Best Interests of the Child' [2008], 67.

⁶²⁷ Committee on the Rights of the Child, General Comment No 14 [2013] UN doc CRC/C/GC/14 <<http://www.refworld.org/docid/51a84b5e4.html>> accessed 19 October 2015, para 50.

individual, also take the influence of the social dimension of the child/individual into account and the needs he/she has to deal with as a member of a group and as a member of a society. To attain effective implementation of the BID, child participation should be ensured in compliance with the child's right to be heard in accordance with Article 12 of the CRC. To fully implement this right the decision-makers implicated in this process should have the necessary expertise to hear the child and to take the child's views into account.⁶²⁸ The child's own views should be given due weight according to the maturity of the child and his/her age.⁶²⁹

When it comes to EU law, the EU legal provisions should follow the guidelines offered by the UN Committee on the Rights of the Child. In the Dublin Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection Articles 6 and 23 respectively enunciate identically the factors to be taken into consideration in assessing and implementing the best interests principle.⁶³⁰ These are: a) family reunification possibilities; b) the minor's well-being and social development; c) safety and security considerations; and d) the views of the minor in accordance with his or her age and maturity. It should also be noted that at a secondary EU legal level, vulnerable groups are tightly linked to the 'special reception needs' concept. In Article 21 of the Recast Reception Conditions Directive, which is the first article belonging to Chapter IV dedicated to the treatment of vulnerable groups, there is no legal definition of this term. Instead, a list of socially defined groups is listed, among which UAMs are mentioned.⁶³¹

The integration of the best interests of the child principle in the EU policy and legislation framework seems ambiguous and controversial. On the one hand, as has been discussed previously, EU legal texts endorse the best interests of the child principle and make it an essential point of the CEAS as far as minors are concerned. On the other hand, however, no indication is given as to how the Member States should conduct a BIA. The European Agenda for Migration, a major policy text that shapes the EU response to migration, also remains silent on the question.⁶³² The absence of any concrete proposal of measures or policies to adopt is criticised by the European Network of Ombudspersons for Children (ENOC) in its 2016 report 'Safety and Fundamental Rights at Stake for Children on the Move'. According to the report, 'the only action specifically targeting children is placed in a footnote and focuses on a limited group of migrant

⁶²⁸ UNHCR, 'UNHCR Guidelines on Determining the Best Interests of the Child' [2008], 8.

⁶²⁹ UNHCR Executive Committee, 'Conclusion on Children at Risk no. 107' [2007], paras b, d, g. Article 12 of the CRC reads as follows: '1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.'

⁶³⁰ Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin III) and in the Directive 2013/33/EU (reception recast) OJ L180/31.

⁶³¹ Directive 2013/33/EU of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), OJ L 180/96, art 21.

⁶³² European Commission, Commission Communication: A European Agenda on Migration [2015] COM(2015) 240 final.

children entering the EU — unaccompanied and missing children'.⁶³³ However, the mere reference to UAMs does not mean anything in particular in terms of reinforced protection. The footnote in question simply promises the development of a strategy that will take the lead after the end of the EU Action Plan on Unaccompanied Minors for the period 2010–2014.⁶³⁴ As the succeeding policy document is still in the making, there currently exists no coordinated policy that would address all the aspects of life of a UAM and hence a global approach to the best interests of UAMs. In a recent communication the European Commission underlined that an effective response to the refugee crisis necessitates strengthened protection for vulnerable groups, especially for UAMs.⁶³⁵ In Annex 6 of the same Communication, the European Commission announces among other measures that: '[t]he European Asylum Support Office plans to further develop existing best practice guidance on the assessment of the best interests of the child'.⁶³⁶

All in all, on the one hand the EU seems to seek a legally coherent response towards UAMs by underlining the importance of the principle of the best interests of the child in legal texts. On a policy level, on the other hand, the principle is strikingly absent in the EU's concrete projects and solutions. It is positive, however, that the EU has recently started considering more in-depth cooperation and possible harmonisation of practices in the field of the BIA and the BID in relation to UAMs.

C. Reception conditions for UAMs in Greece

1. The Greek version of the best interest of the child principle for UAMs: Between lack of infrastructure and lack of policies

Greece signed the CRC on 26 January 1990, and ratified it by Law 2101/1992. The Convention entered into force on 11 May 1993. As an EU Member State, Greece is bound by the EU Treaties and by the EU Charter of Fundamental Rights, including the Charter's Article 18 protecting the right to asylum. The best interests principle has been enshrined in different legal texts in Greece. Concerning specifically the best interests of UAMs, the principle is enshrined in Article 19 of the Presidential Decree (PD) 220/2007 that transposes the Reception Conditions Directive into the Greek legal framework. Directive 2013/33/EC laying down standards for the reception of applicants for international protection (recast) is yet to be adopted by a

⁶³³ ENOC, 'Safety and Fundamental Rights at Stake for Children on the Move: Call for the EU and European countries to implement a child rights perspective in the reception of migrating children' [2016], 30.

⁶³⁴ European Commission, A European Agenda on migration [2015] COM(2015) 240 final, fn 28. For the Action Plan on Unaccompanied Minors for the period 2011–2014, see European Commission, Commission Communication on Action Plan on Unaccompanied Minors 2010 – 2014 [2010] COM (2010) 213 final.

⁶³⁵ European Commission, Commission Communication: State of Play of Implementation of the Priority Actions under the European Agenda on Migration [2016] COM(2016) 85 final, 4 and Annex 6.

⁶³⁶ European Commission, Commission Communication: State of Play of Implementation of the Priority Actions under the European Agenda on Migration – Ongoing actions contributing to the protection of children in migration Annex 6 [2016] COM(2016) 85 final.

national legal text.⁶³⁷ Another relevant text is PD 113/2013 transposing Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status. In Article 11(7) of this law reproducing the content of Article 17 of the aforementioned Directive, it is reiterated that: ‘The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Chapter that involve minors’.

The mere reference to the principle, however, does not guarantee its effective application. There is no provision in the Greek legal texts regulating systematic best interests assessments or the implementation of the best interests principle. The principle *per se* is taken into account by the Greek authorities or at least it is considered to be taken into account.⁶³⁸ In the lack of structuralised and systemic processes for best interests assessment and determination, the operationalisation of the principle finally depends on the decision-maker and on how informed on the implementation process of the principle he/she is.

This is reflected in the many judgments against Greece. On the national level, UAMs and children’s best interests have been the object of a judgment delivered by the Greek Council of State in 2008.⁶³⁹ That case (No 4056/2008) involved an Afghan boy who had reached Greece without his parents or any person that would be responsible for him. The Council of State based its legal reasoning on the principles enshrined in the CRC and expressly made reference to the child’s best interests.⁶⁴⁰ The UAM complained about the fact that the Greek authorities had not paid any attention to the reasons that led him to flee Afghanistan. His asylum application was based on the fact that he was a member of the Hamzara tribe and a Shiite Muslim, which put him in danger of persecution. After a series of negative decisions on his asylum application and appeals he finally appeared before the Council of State. This Court upheld his application, mentioning in its judgment the special guarantees that needed to be respected with regard to UAMs. The Court, among other things, emphasised that no representative had been appointed for the applicant. The Greek authorities were condemned for insufficient reasoning in their decisions rejecting the minor’s application.

At the European level, Greece has been specifically condemned for the treatment reserved for UAMs in the *Rahimi v Greece* case, in which the ECtHR confirmed the alarming human rights situation identified in many NGO reports,⁶⁴¹ underlining the insufficient implementation of provisions concerning the protection

⁶³⁷ Among others, see European Commission, ‘More Responsibility in Managing the Refugee Crisis: European Commission adopts 40 infringement decisions to make European Asylum System work’ [press release] 23 September 2015 <http://europa.eu/rapid/press-release_IP-15-5699_en.htm> accessed 23 November 2015.

⁶³⁸ Greek Council for Refugees (GCR), ‘Complementary Submission of the Greek Council for Refugees to the Committee of Ministers of the Council of Europe in the case of *M.S.S. v. Belgium & Greece* (Application No 30696/09)’ [2015]

<<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2762179&SecMode=1&DocId=2278024&Usage=2>> accessed 16 February 2016, 16.

⁶³⁹ Council of State No 4056/2008 [2008] <<http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/Original%20Judgment%20-%20Council%20of%20State%20-%204056-2008.pdf>> (in Greek) accessed 19 October 2015.

⁶⁴⁰ The Council of State based its judgment on arts 3 and 22 of the CRC.

⁶⁴¹ Human Rights Watch, ‘Left to Survive: Systematic Failure to Protect Unaccompanied Migrant Children in Greece’ [2008] <https://www.hrw.org/sites/default/files/reports/greece1208webwcover_0.pdf> accessed 23 November 2015.

of UAMs. In the *Rahimi* case the Greek authorities' inactivity against the specific needs of the minor led to the country's condemnation on the basis of violations of its obligations enshrined in the ECHR. The minor claimant had entered Greece illegally after fleeing Afghanistan, his country of origin. Arriving in Lesbos, he was detained and an order for expulsion was issued by the local police authorities. During the registration process he was not asked about the reasons that led him to leave his country, nor was he informed about his right to lodge an asylum application. After having been detained for two days in a detention centre under dreadful conditions, the expulsion order was issued and he was set free. Without receiving any help from the Greek authorities he managed to arrive in Athens where he lodged an asylum application.

The ECtHR in this context underlined the vulnerable situation of the claimant, which was characterised by his young age and by the fact that he found himself unaccompanied and illegally entering and staying in an unknown country.⁶⁴² According to the Court, the Greek authorities omitted taking charge of the UAM. No guardian had been appointed nor accommodation provided for him.⁶⁴³ The Court concluded that the treatment of the minor constituted a violation of Article 3 of the ECHR. In parallel, the Court emphasised that in all decisions concerning children regard has to be given to the child's best interests.⁶⁴⁴ Indeed, in this case the vulnerability of a UAM and his special needs expose the deficiencies of the Greek asylum system. While a BIA/BID procedure would be necessary before making any decision for a minor, such procedures were not followed in the case of *Rahimi*.

Greece, although bound by both the CRC and EU law, seems to have lagged behind in terms of effective integration and implementation of the best interests of the child principle in the Greek legal order. Although it is an obligation for the Greek administration under the CRC and EU law to lay down specific strategies with regard to the procedures of BIA and BID, there appears to have been no concrete action towards this direction. In November 2014 the Greek authorities published the draft of the National Action Plan for the Rights of the Child for the years 2015–2020. Unfortunately, no specific mention is made of the two procedures.⁶⁴⁵

One of the positive elements in the National Action Plan is the expressed intention to reactivate the National Observatory for the Rights of the Child that was created in 2001 by Law 2909/2001. There are also suggestions for a more holistic treatment of UAMs emphasising legislative measures that need to be taken to that end. These measures consist primarily of an evaluation of the legal status of UAMs, of appointing a legal representative throughout the asylum procedure, as well as of the further development

⁶⁴² *Rahimi v Greece* App no 8687/08 (ECtHR 5 July 2011), para 87.

⁶⁴³ *Rahimi v Greece* App no 8687/08 (ECtHR 5 July 2011), paras 87–94.

⁶⁴⁴ *Rahimi v Greece* App no 8687/08 (ECtHR 5 July 2011), paras 108–110. The child's best interests principle in the CEAS with regard to unaccompanied minors has been the object of case C-648/11 (*The Queen, on the application of MA and Others v Secretary of State for the Home Department*) as has already been mentioned. In this affair, the Court stated that '[...] although express mention of the best interest of the minor is made only in the first paragraph of Article 6 of Regulation No 343/2003, the effect of Article 24(2) of the Charter, in conjunction with Article 51(1) thereof, is that the child's best interests must also be a primary consideration in all decisions adopted by the Member States on the basis of the second paragraph of Article 6 of Regulation No 343/2003.'

⁶⁴⁵ National Action Plan for the Rights of the Child [2014] <<http://www.opengov.gr/ministryofjustice/wp-content/uploads/downloads/2014/11/DIAKAIODYNHSPAIIDI.pdf>> (in Greek) accessed 8 December 2015.

of open air accommodation facilities. It is deplorable, however, that no further action seems to have been taken to proceed with these suggestions and intentions. In the following analysis attention will be paid to two aspects of the Greek asylum system concerning the protection of UAMs: guardianship and accommodation.

2. The dysfunctional system of guardianship

As has been discussed above,⁶⁴⁶ one of the obligations that states undertake with regard to the best interests of the child principle is to ensure that the principle is taken into due account whenever a decision affecting a child is taken. In order to protect the best interests of the child, the appointment of a guardianship for the UAM seeking asylum is generally deemed necessary.⁶⁴⁷ Below, the implementation of the best interests principle in Greece with regard to the appointment of guardianship will be studied.

a) Definition of guardianship

EU law does not give a definition of guardian and uses simultaneously the term ‘legal or other representative’ or ‘special representative’ to designate the person appointed to assist the child. Within the CEAS, the term ‘guardian’ appears only in the Qualification Directive,⁶⁴⁸ while three other relevant legal texts use the term ‘representative’.⁶⁴⁹ The definition of ‘representative’ in these instruments reads as follows:

“representative” means a person or an organisation appointed by the competent bodies in order to assist and represent an unaccompanied minor in procedures provided for in this Directive with a view to ensuring the best interests of the child and exercising legal capacity for the minor where necessary. Where an organisation is appointed as a representative, it shall designate a person responsible for carrying out the duties of representative in respect of the unaccompanied minor, in accordance with this Directive [...]⁶⁵⁰

A preliminary remark needs to be made concerning the difference between the terms ‘representative’ and ‘guardianship’, the former appearing in the EU legislation and the latter in the Greek legal texts. After studying the relevant provisions of the Greek law that transpose the EU Directives, it is found that these terms are used synonymously. According to the Fundamental Rights Agency’s Handbook on Guardianship

⁶⁴⁶ See B.4.b.

⁶⁴⁷ Committee on the Rights of the Child, General Comment No 6 [2005] UN doc CRC/GC/2005/6, 12–13.

⁶⁴⁸ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9, art 31(1), (2).

⁶⁴⁹ Directive 2013/33/EU [2013] OJ L 180/96, art 2(j), art 24; Asylum Procedure Directive 2013/32/EU [2013] OJ L 180/60, art 2(n), art 25; Dublin Regulation (EU) 604/2013 [2013] OJ L 180/31, art 2(k), art 6.

⁶⁵⁰ Asylum Procedure Directive 2013/32/EU [2013] OJ L 180/60, art 2(n).

for children deprived of parental care (FRA Handbook hereafter), these terms are often used by national legislations interchangeably.⁶⁵¹ Ultimately, the functions exercised by the person appointed are decisive.⁶⁵² This being said, for the purposes of this study the definition of guardian given in the FRA Handbook will be adopted, according to which ‘the guardian is considered to be an independent person who safeguards the child’s best interests and general well-being, and to this effect complements the limited legal capacity of the child, when necessary, in the same way that parents do’.⁶⁵³

b) Tasks of the guardian

When it comes to the tasks of a guardian, the FRA Handbook provides very useful information based on General Comment No 6 on the treatment of unaccompanied or separated children outside their country of origin issued by the UN Committee on the Rights of the Child.⁶⁵⁴

In light of the General Comment, the tasks of the guardian, as described in the FRA Report, are the following:

- safeguard the child’s interests;
- promote the child’s safety and well-being;
- facilitate the child’s participation in matters affecting him or her;
- act as a link between the others and the child;
- assist in identifying a durable solution for the UAMs, acting in the child’s best interest;⁶⁵⁵
- exercise legal representation, support the child in legal procedures and ensure access to legal assistance and counselling;
- hold authorities accountable for their decisions concerning the child; and
- intervene if the welfare of the child is in danger.⁶⁵⁶

⁶⁵¹FRA, ‘Guardianship for children deprived of parental care’ [2014] <http://fra.europa.eu/sites/default/files/fra-2014-guardianship-children_en_0.pdf> accessed 14 December 2015, 14.

⁶⁵²FRA, ‘Guardianship for children deprived of parental care’ [2014] <http://fra.europa.eu/sites/default/files/fra-2014-guardianship-children_en_0.pdf> accessed 14 December 2015, 14.

⁶⁵³FRA, ‘Guardianship for children deprived of parental care’ [2014] <http://fra.europa.eu/sites/default/files/fra-2014-guardianship-children_en_0.pdf> accessed 14 December 2015, 14. The comparison between the definition given at EU level at the ‘representative’ on the one hand and the description of the mission of the guardianship on the other hand delineates the main difference between the two institutions. While the former is based on the legal representation of the child, the latter plays a more comprehensive role aiming at the general well-being of the child and, as a consequence, taking care of all the aspects of the life of the child in question.

⁶⁵⁴ Committee on the Rights of the Child, General Comment No 6 [2005] UN doc CRC/GC/2005/6, 12. General Comments issued by the CRC Committee on the Rights of the Child constitute authoritative interpretations of the treaty that give meaning to the articles included in the international instrument. Their aim is to guide states in accomplishing their obligations under the CRC. Though not legally binding, their heuristic force is undisputed. See Nisuke Ando, ‘General Comments/Observations’ [2008] MPEPIL, paras 36–40.

⁶⁵⁵ According to the UNHCR, the term ‘durable solution’ means to describe three types of solutions involving i) voluntary repatriation; ii) resettlement; or iii) local integration. See UNHCR, ‘UNHCR Guidelines on Determining the Best Interests of the Child’ [2008], 30–33.

⁶⁵⁶FRA, ‘Guardianship for children deprived of parental care’ [2014] <http://fra.europa.eu/sites/default/files/fra-2014-guardianship-children_en_0.pdf> accessed 14 December 2015, 69.

In order to accomplish these tasks in an efficient way, the guardian needs to maintain close ties with the child and take due account of his/her views 'in the most appropriate way in accordance with his/her age, development and evolving capacities'.⁶⁵⁷ The previous section outlined the seven factors that should be evaluated every time that an assessment of the best interests of the child needs to be made. These factors should also be evaluated by the guardian on a daily basis, since the duty of the guardian is to ensure the general well-being of the child.

Bearing in mind this general description of the role of the guardian within the framework of the CEAS, a guardian holds a range of responsibilities, which have been meticulously enumerated in the FRA Handbook. They consist, among others, of the duty to: 1) inform the child about his or her right to seek asylum; 2) submit an asylum application on behalf of the child or assist the child in submitting an application, if this is in the child's best interests; 3) seek the support of a qualified asylum lawyer and facilitate communication between the child and the lawyer; 4) provide/ensure emotional support during the interviews and ensure that interpretations/translations are appropriate; 5) ensure that the child's views are being heard and time is given to the child to present his/her arguments; and 6) the duty to ensure that the child is being notified of his/her right to make an appeal against a decision on his/her refugee status.⁶⁵⁸

c) Guardianship in Greece

At the national level, there are several legal texts in Greece that regulate guardianship concerning UAMs. It should be noted that provisions related to the appointment of guardianship concern not only UAM asylum-seekers but also those that do not lodge an asylum application. This being said, the first text containing provisions for guardianship is PD 220/2007 on the minimum standards for the reception of asylum-seekers in Member States. The second one is PD 141/2013 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status of refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, and finally, Presidential Decrees 114/2010 and 113/2013 on minimum standards on procedures for granting and withdrawing refugee status.⁶⁵⁹

⁶⁵⁷ See Defence for Children-ECPAT The Netherlands, 'Closing a protection gap: Core standards for guardians of separated children' [2011] <<http://www.corestandardsforguardians.eu/images/11/279.pdf>> accessed 16 November 2015.

⁶⁵⁸ FRA, 'Separated, asylum-seeking children in European Union Member States: Comparative report' [2010] <http://fra.europa.eu/sites/default/files/fra_uploads/1309-FRA-fullreport-sep-asylum-conference-2010_EN.pdf>, 104.

⁶⁵⁹ The need for two Presidential Decrees having the same object is explained by the enactment of Law 3907/2011 on the establishment of an Asylum Service and a First Reception Service, transposition into Greek legislation of Directive 2008/115/EC 'on common standards and procedures in Member States for returning illegally staying third country nationals' and other provisions GG 19/A 26 January 2011.

The definition of guardianship in the Greek laws is very brief. According to Article 1(g) of PD 220/2007 on the reception conditions, a representative is a person appointed by territorially competent Public Prosecutor for Minors. According to Article 19, in the absence of a Public Prosecutor for Minors it is the First Instance Public Prosecutor that appoints the representative; in the meantime, this role is attributed to the Prosecutor. PD 141/2013 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection does not contain any relevant definition regarding guardianship. Guardianship in Greece is also regulated by the relevant provisions in the Civil Code. Article 1592 of Law 2447/1996 provides for the appointment of a guardian for minors. In line with this provision, Article 1600 stipulates the assignment of the minor's guardianship to an institution specifically created for this reason. The possibility for such guardianship is, however, close to zero because of the fact that such institutions have never been created.

According to Article 17 of PD 220/2007 in conjunction with Article 16(3) of PD 113/2013, UAMs are defined as one of the vulnerable groups to which special treatment is reserved.⁶⁶⁰ After a UAM has lodged an asylum application either the competent national authorities, that is the First Reception Service (FRS), the Asylum Office or the Police or international institutions such as, for example, the International Organization for Migration (IOM) or an NGO, must submit a request to the Public Prosecutor demanding the appointment of a guardian.⁶⁶¹ This is one of the problematic points in the Greek guardianship system. The Public Prosecutor acting as a provisional guardian often considers that his or her only task is to appoint a permanent one.⁶⁶² It is not difficult to appreciate the inconvenience engendered by such a system, especially when the number of UAMs increases dramatically. Lack of staff and limited knowledge of the issues arising around unaccompanied minors risk downplaying the importance granted to the consideration of children's best interests.⁶⁶³ Furthermore, the lack of a centralised authority in charge of appointing a guardian aggravates the problem. This loophole deprives the Greek asylum system of a valuable source of persons endowed with the necessary knowledge and experience to undertake the important tasks a guardian needs to accomplish. The guardian should prepare and inform the minor for

⁶⁶⁰ Article 17 PD 220/2007 GG 251/A 13 November 2007; Article 16 para 3 PD 113/2013 GG 146/A 14 June 2013.

⁶⁶¹ GCR, 'Complementary Submission of the Greek Council for Refugees to the Committee of Ministers of the Council of Europe in the case of *M.S.S. v. Belgium & Greece* (Application No 30696/09)' [2015] <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2762179&SecMode=1&DocId=2278024&Usage=2>>, accessed 16 February 2016, 7.

⁶⁶² Asylum Information Database (AIDA) and GCR, 'Country Report: Greece' [2015] <<http://www.asylumineurope.org/reports/country/greece/asylum-procedure/guarantees-vulnerable-groups-asylum-seekers/age-assessment>> accessed 19 January 2016, 70.

⁶⁶³ AIDA and GCR, 'Country Report: Greece' [2015] <<http://www.asylumineurope.org/reports/country/greece/asylum-procedure/guarantees-vulnerable-groups-asylum-seekers/age-assessment>> accessed 19 January 2016, 70; European Migration Network (EMN), 'EMN Study 2014, Policies, Practices and data on unaccompanied minors in 2014, Greek Report' [2014] <http://emn.ypes.gr/images/docs/EMN_FOCUSED_STUDIES/EMN_STUDIES_2014/greece_national_report_uams_en.pdf> accessed 19 January 2015, 15; UNHCR, 'Unaccompanied minors asylum seekers in Greece' [2008] <<http://www.refworld.org/docid/48abd557d.html>> accessed 19 January 2015, 7; UNHCR, France Terre d'Asile, Save the Children and PRAKSIS, 'Protection of Children on the Move: Addressing protection needs through reception, counselling and referral and enhancing cooperation in Greece, Italy and France' [2012] <<https://www.unhcr.gr/fileadmin/Greece/General/publications/cotmUNHCR.pdf>> accessed 19 January 2016, 21.

the interview with regard to his/her asylum application.⁶⁶⁴ The person invested with this task may also attend the interview and intervene in order to facilitate it.⁶⁶⁵ They are usually social workers at state institutions or the directors of shelters where the minors in question are sent.⁶⁶⁶ This system is not functional and it seems that every Public Prosecutor follows its own practice based upon its own judgment and available sources.

It is important to note that as far as the asylum procedure is concerned, UAMs less than 14 years old need to be assisted by a guardian in order to proceed with their application. UAMs over 14 years old may deal with the asylum procedure alone.⁶⁶⁷ This means that while NGO assistance is offered to help them through the stages of their application, the failure of the Greek State to promptly assign a guardian could amount to a violation of its obligations to ensure the right of the UAMs aged under 14 to seek asylum. It should also be noted in this context that in its latest report on the evolution of the asylum system in Greece the Greek Council for Refugees (GCR) denounced the persistent failure of the authorities in this question, especially in cases of UAMs under 14 where a family reunification request had been accepted. Due to the failing guardianship system in Greece, the transfer of the UAMs to other EU Member States where the reunification had been accepted did not take place promptly.⁶⁶⁸ Reportedly, in addition, UAMs over 14 frequently attend their asylum interview without the assistance of a guardian.⁶⁶⁹ This raises serious questions concerning the process for assessing the best interests of children who are not supported by a guardian during the interview. It is essential that the right of the child to be heard and to express his/her views is respected in such situations.

The current Greek system on guardianship is not in accordance with the best interests of the child principle. The absence of institutional guardianships, the complicated system for appointing individuals as guardians, and the deficient system for providing foster families render guardianship one of the persistent black holes of the Greek asylum system. No sufficient protection can be granted to UAMs when their fundamental link with their asylum application procedure, and eventually their integration into Greek society, is at stake. This is vital as, for example, during the last months of 2015, a period during

⁶⁶⁴ Art 11 PD 113/2013 on standards and procedures for granting and withdrawing refugee status, GG/146/A 14 June 2013; Article 13, PD 220/2007 laying down minimum standards for the reception of asylum seekers in Member States GG/251/A 13 November 2007.

⁶⁶⁵ Presidential Decree 113/2013 on standards and procedures for granting and withdrawing refugee status, GG/146/A 14 June 2013, art 21.

⁶⁶⁶ EMN, 'EMN Study 2014, Policies, Practices and data on unaccompanied minors in 2014, Greek Report' [2014] <http://emn.ypes.gr/images/docs/EMN_FOCUSED_STUDIES/EMN_STUDIES_2014/greece_national_report_uams_en.pdf> accessed 11 December 2015, 16.

⁶⁶⁷ Presidential Decree 113/2013 on standards and procedures for granting and withdrawing refugee status, GG/146/A 14 June 2013, art 35(3), (4).

⁶⁶⁸ AIDA and GCR, Country Report: Greece [2015] <<http://www.asylumineurope.org/reports/country/greece/asylum-procedure/guarantees-vulnerable-groups-asylum-seekers/age-assessment>> accessed 19 January 2016, 49.

⁶⁶⁹ GCR, 'Complementary Submission of the Greek Council for Refugees to the Committee of Ministers of the Council of Europe in the case of *M.S.S. v. Belgium & Greece* (Application No 30696/09)' [2015] <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2762179&SecMode=1&DocId=2278024&Usage=2>> accessed 16 February 2016, 13.

which arrivals of migrants reached its peak, children sleeping in public parks have been noticed.⁶⁷⁰ Also, due to the Former Yugoslav Republic of Macedonia opening its borders only to Syrian, Iraqi and Afghan nationals,⁶⁷¹ a non-estimated number of UAMs remain in Greece and may possibly seek other ways to continue their way towards northern Europe.⁶⁷² Critically, recently the European Union's law enforcement Agency (Europol) announced that approximately 10,000 UAMs are missing throughout Europe. Even if this has not been confirmed, there are fears that these children may be victims of human trafficking.⁶⁷³ The European Commission notes that in some countries as many as 60% of UAMs go missing 'with a serious risk of falling prey to trafficking networks'.⁶⁷⁴

In the face of such dangers, a well-organised and functional guardianship system could prevent migrant smugglers from exploiting UAMs. In this sense, it is more than welcomed that the European Commission has proposed measures including 'training for judges and central authorities on cross-border recognition of judgments containing protective measures, including guardianship, for unaccompanied and separated children [which] will be facilitated, including via the European Judicial Network in civil and commercial matters'.⁶⁷⁵ These proposals should be considered as a priority and be implemented as soon as possible. Considering the particular vulnerability in which UAMs find themselves, the Greek State needs to ensure that all decisions concerning the minor in his or her daily life are being taken through consideration of the child's best interests. As has already been evoked, this is the meaning behind the BIA procedure which does not seem to be taken sufficiently into account by the Greek authorities. The appointment of a guardian is a substantial safeguard that is currently overlooked, which threatens the well-being of the child.

3. Accommodation: An 'invitation' to abscond?

a) Accommodation of UAMs

Another problematic aspect connected tightly with guardianship and protection of the rights of UAMs in Greece is the manner in which their accommodation is organised.⁶⁷⁶ States' obligations to offer

⁶⁷⁰ ENOC, 'Safety and Fundamental Rights at Stake for Children on the Move: Call for the EU and European countries to implement a child rights perspective in the reception of migrating children' [2016], 15.

⁶⁷¹ UNICEF, 'Regional Humanitarian Situation Report #7' [2015] <<http://reliefweb.int/sites/reliefweb.int/files/resources/UNICEF%20Europe%20Refugee%20and%20Migrant%20Crisis%20Regional%20Humanitarian%20SitRep%20No.7%2C%2011%20January%202016.pdf>> accessed 15 January 2016, 2.

⁶⁷² ENOC, 'Safety and Fundamental Rights at Stake for Children on the Move: Call for the EU and European countries to implement a child rights perspective in the reception of migrating children' [2016], 15.

⁶⁷³ Mark Townsend, '10,000 refugee children are missing, says Europol' *The Guardian* (London 30 January 2016) <<http://www.theguardian.com/world/2016/jan/30/fears-for-missing-child-refugees>> accessed 8 February 2016.

⁶⁷⁴ European Commission, Commission Communication: State of Play of Implementation of the Priority Actions under the European Agenda on Migration [2016] COM(2016) 85 final, 16.

⁶⁷⁵ European Commission, Commission Communication: State of Play of Implementation of the Priority Actions under the European Agenda on Migration – Ongoing actions contributing to the protection of children in migration Annex 6 [2016] COM(2016) 85 final, 2.

⁶⁷⁶ A preliminary remark should be advanced concerning the delimitation of the term 'accommodation'. For reasons that have exclusively to do with the length of this presentation, we will restrict ourselves only to the question of

accommodation can be found in Article 20 of the CRC. In light of this article,⁶⁷⁷ UAMs are entitled to special protection and assistance on the basis of their particularly vulnerable situation as being temporarily or permanently deprived of their family environment. In the FRA Comparative Report on Separated, Asylum-Seeking Children in the EU Member States, it is also noted that minors ‘should be placed in suitable accommodation — in principle, in a family type of environment or allowing for semi-autonomous living hosting a small number of children — based on a thorough assessment of their needs, which must be regularly reviewed’.⁶⁷⁸ According to Article 24(2) of the Reception Directive, UAMs making an application for international protection shall ‘be placed: a) with adults; b) with a foster family; c) in accommodation centres with special provisions for minors; d) in other accommodation suitable for minors’.

In the Greek legislation, PD 220/2007 provides in Article 17 (which refers to vulnerable groups in general) that competent authorities are in charge of vulnerable groups, as well as taking care of the special treatment that members of vulnerable groups need. Furthermore, Article 19 regulates the special guarantees for UAMs. According to this provision, the national authorities must ensure that the minor’s accommodation needs are met by placing him/her: a) with adult relatives; b) in accommodation centers with special provisions for minors; or c) in another type of accommodation suitable for minors. It is expressly stated in the provision that accommodation should be such that it protects the child from the risk of exploitation. Moreover, Article 32(4) of Law 3907/2011 states that UAMs are to be accommodated as far as it is possible in institutions which have personnel and facilities at their disposal that take into account the needs of persons of their age. This provision starts from the presumption that as a general rule UAMs shall be accommodated in facilities which are appropriate and suitable for their needs. At the same time, however, the provision contains the caveat ‘as far as it is possible’, which weakens the obligation to ensure special accommodation.

It should be underlined that this provision only regulates the accommodation of minors who are unaccompanied. Nonetheless, Article 18 of PD 220/2007,⁶⁷⁹ which covers minors in general, provides special accommodation options for minors that are victims of torture, armed conflicts or any kind of mistreatment and abuse. In practice, these two categories cannot be easily distinguished since the vast majority of UAMs who arrive are coming from countries plagued by armed conflicts and situations where

accommodation as structures where minors are able to stay. This being said, we do not ignore that accommodation may encompass a wider range of activities concerning minors, including nourishment, medical care, psychological support or even sport activities.

⁶⁷⁷ Article 20 of the CRC: ‘1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. 2. States Parties shall in accordance with their national laws ensure alternative care for such a child. 3. Such care could include, *inter alia*, foster placement, *kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.’

⁶⁷⁸ FRA, ‘Separated, asylum-seeking children in European Union Member States, Comparative Report’ [2010] <http://fra.europa.eu/sites/default/files/fra_uploads/1309-FRA-fullreport-sep-asylum-conference-2010_EN.pdf>, 81.

⁶⁷⁹ Article 18 PD 220/2007 GG 251/A 13 November 2007.

abuse of minors is not uncommon. Furthermore, the Greek government recently confirmed that accommodation is provided to UAMs regardless of whether they have lodged an asylum application.⁶⁸⁰

b) Practices of accommodating UAMs in Greece: lacking infrastructure

Accommodation constitutes a question where the implementation of the child's best interests is often at stake. A state needs to take a large range of aspects into account to comply with this principle. Fundamental human rights considerations such as the prohibition of deprivation of liberty for minors as well as culture and religious factors (including the type of food offered) should all be taken into consideration.⁶⁸¹

To better grasp the problems related to accommodation facilities in Greece it is necessary to examine the procedure to be followed as soon as a UAM is identified in Greece. Once a UAM is found on Greek territory, he/she should be referred to the First Reception Service. This institution, established in 2011, is charged with: a) the identification and verification of nationality of all third-country nationals arrested while entering the country; b) their registration; c) their medical examination and psycho-social support; d) informing them about their obligations and rights; and e) identifying individuals belonging to vulnerable groups. The head of the First Reception Center (FRC) is responsible for informing the competent authorities, usually the National Center for Social Solidarity (EKKA), when a UAM is identified.

It is reported, however, that lack of staff, delay in the establishment of the FRC, and budget constraints due to the current economic crisis are highly affecting the effectiveness of the new service. In 2014, the UNHCR drew attention to the fact that only one FRC was operational at the land border between Greece and Turkey.⁶⁸² Since the vast majority of migrants enter by sea, the absence of FRCs at sea borders leaves a substantial number of newly arrived migrants/UAMs without adequate protection. Furthermore, the UNHCR pointed out the inconsistencies in the practices followed by the First Reception Mobile Units in relation to the age assessment of UAMs and the establishment of family links.⁶⁸³ The GCR concurs with this opinion by describing, for instance, that age assessment can be the result of a case-by-case

⁶⁸⁰ GCR, 'Complementary Submission of the Greek Council for Refugees to the Committee of Ministers of the Council of Europe in the case of *M.S.S. v. Belgium & Greece* (Application No 30696/09)' [2014] <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2762179&SecMode=1&DocId=2278024&Usage=2>> accessed 16 February 2016, 1; European Commission, Commission Communication on Action Plan on Unaccompanied Minors 2010 – 2014 [2010] COM (2010) 213 final, 10.

⁶⁸¹ Committee on the Rights of the Child, General Comment No 6 [2005] UN doc CRC/GC/2005/6, para 40.

⁶⁸² UNHCR, 'Greece as a Country of Asylum: UNHCR Observations on the Current Situation of Asylum in Greece' [2014] <<http://www.refworld.org/docid/54cb3af34.html>> accessed 10 February 2015, 9.

⁶⁸³ UNHCR, 'Greece as a Country of Asylum: UNHCR Observations on the Current Situation of Asylum in Greece' [2014] <<http://www.refworld.org/docid/54cb3af34.html>> accessed 10 February 2015, 11.

appreciation by police officers and that UAMs who are evidently under 18 years have been registered as adults.⁶⁸⁴

A report by the GCR in late 2015 did not reveal major changes. Although an additional FRC has been opened on the island of Lesbos, the initial objective of installing eight FRCs is far from being accomplished. Furthermore, understaffing continues to undermine the effectiveness of the function of the FRCs, having a massive impact on the services that ought to be offered, especially to vulnerable persons in terms of referral accommodation activities. It is likely that many UAMs are not identified due to lack of infrastructure and staff. The GCR report also highlights the insecurity with which the operation of reception centers is surrounded. The reception centers are highly dependent on private funding, which in these times of economic crisis is very unpredictable. Furthermore, accommodation is only one of many services UAMs need. For example, access to psychological support is often very important.⁶⁸⁵

According to the data collected by EKKA, the average waiting period before a UAM was placed in an accommodation centre was 37 days in 2014⁶⁸⁶ – a considerable increase compared to 2013, where transfer to an accommodation facility on average took 25 days.⁶⁸⁷ It took the competent authorities 24 days to find the accommodation, while the rest of the waiting time, 13 days, was due to bureaucracy and the unavailability of persons who could accompany the minor to the chosen accommodation centre. It is generally either the police or NGO representatives that accompany children to the accommodation centres. Given the massive arrival of migrants in 2015, it is estimated that the waiting period has grown even longer. It is noted in a GCR report that the process of finding a special facility to host a UAM may take months.⁶⁸⁸ While waiting for accommodation to be found, children are generally either in detention or live abandoned on the streets.⁶⁸⁹

It is also noted that the scarcity of available accommodation encourages minors to remain silent about their age. In late 2011, the Greek Ombudsman in his report to the UN Committee on the Rights of the Child noted that although the number of places in reception centers for the UAMs had increased, insecurity was still overarching. This is due to the financial hardship that may lead, or has already led, centres to close or drastically cut down their availabilities.⁶⁹⁰ Four years later, the GCR reveals that the

⁶⁸⁴ GCR, 'Complementary Submission of the Greek Council for Refugees to the Committee of Ministers of the Council of Europe in the case of *M.S.S. v. Belgium & Greece* (Application No 30696/09)' [2014] <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2762179&SecMode=1&DocId=2278024&Usage=2>> accessed 16 February 2016, 5–6.

⁶⁸⁵ GCR, 'Complementary Submission of the Greek Council for Refugees to the Committee of Ministers of the Council of Europe in the case of *M.S.S. v. Belgium & Greece* (Application No 30696/09)' [2014] <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2762179&SecMode=1&DocId=2278024&Usage=2>>, accessed 16 February 2016, 7.

⁶⁸⁶ EKKA, National Report 2014 [2015] (in Greek), 54.

⁶⁸⁷ EKKA, National Report 2014 [2015] (in Greek), 54.

⁶⁸⁸ AIDA and GCR, 'Country Report: Greece' [2015] <<http://www.asylumineurope.org/reports/country/greece/asylum-procedure/guarantees-vulnerable-groups-asylum-seekers/age-assessment>> accessed 19 January 2016, 94.

⁶⁸⁹ EKKA, National Report 2014 [2015] (in Greek), 54.

⁶⁹⁰ The Greek Ombudsman, Department of Children's Rights, 'Parallel Report to the UN Committee on the Rights of the Child' [2012] <<http://www.synigoros.gr/resources/parallel-report-un--3.pdf>> accessed 19 October 2015.

situation has not drastically changed. One of the reasons that minors do not reveal their age is because they want to leave the country as soon as possible, since, as has already been shown, Greece represents for them the entrance point to the EU and Schengen area.⁶⁹¹

Some of these gaps are supposed to be filled by the newly created ‘hotspots’, where four EU agencies, the European Asylum Support Office (EASO), Frontex, Eurojust and Europol will assist ‘the frontline State to swiftly identify, register and fingerprint incoming migrants’.⁶⁹² As has been reported by ENOC, concerns have been raised about the protection of children’s rights in the hotspots.⁶⁹³ It is highly doubtful that special accommodation for the UAMs in the hotspot areas identified in Greece has been foreseen, especially considering that their construction took no more than ten days. The underlying rationale of the hotspots seems to be to serve the purposes of identification and registration for security reasons, while a more human rights-based approach is missing. Unfortunately, this has been proven recently by the tactic of Greek authorities to empty all the hotspots, according to Human Rights Watch, in order to start implementing the EU-Turkey Agreement which asks for all persons irregularly entering the country to be accommodated until they are returned to Turkey.⁶⁹⁴ However, as is being reported by the same NGO, the conditions in the military camps where all these refugees are transferred are dubious and vary from one place to the other.⁶⁹⁵ It goes without saying that fears cannot but rise with regard to the treatment of UAMs in such chaotic conditions.⁶⁹⁶ These hasty solutions cannot reassure even the most good-willed observer when it comes to the necessary safety net UAMs need to enjoy. For example, FRA noted in its report that in Chios there was no place specifically designated for unaccompanied minors. The exact same problem existed in Idomeni where unaccompanied minors had to remain in the regional police station for as long as they were waiting for their transfer to accommodation facilities.⁶⁹⁷

At the Western Balkans Leaders’ Meeting in October 2015 the participating states agreed that Greece should ‘increase reception capacity to 30,000 places by the end of the year, and to support UNHCR to provide rent subsidies and host family programmes for at least 20,000 more’.⁶⁹⁸ Furthermore, the increase

⁶⁹¹ UNHCR, ‘Unaccompanied minors asylum seekers in Greece’ [2008] <<http://www.refworld.org/docid/48abd557d.html>> accessed 19 January 2015, 23.

⁶⁹² European Commission, Commission Communication: A European Agenda on Migration [2015] COM(2015) 240 final, 6.

⁶⁹³ ENOC, ‘Safety and Fundamental Rights at Stake for Children on the Move: Call for the EU and European countries to implement a child rights perspective in the reception of migrating children’ [2016], 35.

⁶⁹⁴ Human Rights Watch, ‘Greece: Humanitarian Crisis at Athens Port’ [2016] <<https://www.hrw.org/tet/node/287989>> accessed 28 March 2016.

⁶⁹⁵ Human Rights Watch, ‘Greece: Humanitarian Crisis at Athens Port’ [2016] <<https://www.hrw.org/tet/node/287989>> accessed 28 March 2016.

⁶⁹⁶ See also FRA, ‘Thematic Focus: Children’ <<http://fra.europa.eu/en/theme/asylum-migration-borders/overviews/focus-children>> accessed 6 May 2016.

⁶⁹⁷ FRA, ‘Monthly data collection on the current migration situation in the EU — February 2016 monthly report’ [2016], 49.

⁶⁹⁸ European Commission, ‘Meeting on the Western Balkans Migration Route: Leaders Agree on 17-point plan of action’ (press release) 25 October 2015 <http://europa.eu/rapid/press-release_IP-15-5904_en.htm> accessed 25 November 2015, para 5.

in accommodation structures was stated as a condition for the success of the relocation scheme.⁶⁹⁹ In late October, Greece presented to the Committee of Ministers of the Council of Europe a paper in which the authorities elaborated on the actions undertaken in order to deal with the challenging issue of reception of the massive influx of migrants in the country. In this report, the Greek government asserted that 2,929 placements in open-air structures of first-line reception were to be provided by the end of 2015.⁷⁰⁰ Nevertheless, recent follow-up provided by the European Commission presents a considerably different situation. While from the 20,000 places under the joint programme between UNHCR and Greece 14,950 places have been found, Greece needs to continue increasing its reception facilities in order to respect its commitments under the Western Balkan Route Summit.⁷⁰¹ Regrettably, the special treatment that vulnerable groups are entitled to does not seem to be taken into account in this planning. There is, for example, no reference to accommodation facilities for UAMs. Furthermore, the total absence of any allusion to the BIA seems to confirm that the approach adopted fails to take into account the special needs of children.

c) Detention of UAMs

At the European level, Greece is among the few EU Member States to which the other EU Member States have suspended the transfer of applicants for international protection according to the Dublin Regulation system.⁷⁰² The reason for this suspension lies in the fact that states that decide to return applicants to Greece risk violating the ECHR. Greece has been condemned by the ECtHR for detention conditions that amount to a violation of Article 3 of the ECHR constituting inhuman and degrading treatment.⁷⁰³

⁶⁹⁹ European Commission, 'Meeting on the Western Balkans Migration Route: Leaders Agree on 17-point plan of action' (press release) 25 October 2015 <http://europa.eu/rapid/press-release_IP-15-5904_en.htm> accessed 25 November 2015, para 5.

⁷⁰⁰ Communication from the Greek authorities concerning the M.S.S. and Rahimi groups of cases against Greece (Applications No. 30696/09 and 8687/08) DH-DD(2015)1134F [2015] (in French) <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2830645&SecMode=1&DocId=2323116&Usage=2>> accessed 2 December 2015, 7.

⁷⁰¹ European Commission, Commission Communication: the State of Play of Implementation of the Priority Actions under the European Agenda on Migration: Greece – State of Play Report Annex 2 [2016] COM(2016) 85 final, 8–9.

⁷⁰² European Commission, Assessment of the Implementation of the Greek Action Plan on Asylum and Migration Management SWD (2014) 316 final, 6 October 2014, 3. Lately some EU members have started preventing transfers under the 604/2013 EU Regulation to Hungary. On this matter, see ECRE, 'Case Law Fact Sheet: Prevention of Dublin Transfers to Hungary' [2016] <<http://statewatch.org/news/2016/jan/eu-ecre-factsheet-dublin-transfers-to-hungary-1-16.pdf>> accessed 5 May 2016.

⁷⁰³ *M.S.S v Belgium and Greece* App no 30696/09 (ECtHR 21 January 2011), para 221. Article 3 of the ECHR reads as follows: 'Article 3. Prohibition of torture. No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

In the case of *M.S.S v Belgium and Greece* the ECtHR held that Greece had violated Article 3 ECHR prohibiting torture, inhuman or degrading treatment or punishment because of the conditions in its detention facilities and because of its failure to provide asylum-seekers with acceptable minimum living conditions.⁷⁰⁴ Greece was also found to be in violation of Article 13 on effective remedy in conjunction with Article 3 due to the persistent deficiencies of its asylum system.⁷⁰⁵ The cases C-411/10 *N.S. v Secretary of State for the Home Department* and C-493/10 *M.E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* offered the CJEU the possibility to deliver a very interesting judgment ‘transposing’ the conclusions made by the ECtHR in the *M.S.S.* case into EU law. In the case of applications by migrants filing an asylum application in the UK and Ireland after having entered the EU through Greece, the Court opposed a ‘conclusive presumption of compliance with fundamental rights regarding Member States’.⁷⁰⁶ The CJEU essentially confirmed the ruling of the ECtHR in the *M.S.S.* case, pointing out that the systemic deficiencies of the Greek asylum system could not be disregarded by other Member States in their decision on whether to transfer an applicant for international protection back to Greece.

Further, in *Rahimi*, the ECtHR found that the detention conditions and the abandonment of a minor constituted a violation of Article 3 ECHR. Based on the best interests principle, the Court considered that the deprivation of the applicant’s liberty had not been justified. The ECtHR in this context emphasised that in all decisions concerning children regard must be given to children’s best interests.⁷⁰⁷ In direct reference to the CRC, the ECtHR found that when the Greek authorities decided to detain the applicant they ignored the BIP prescribed in Article 3 of the CRC and acted contrary to Article 37 of the CRC which qualifies the detention of a child as a measure of last resort.⁷⁰⁸ By this ruling, the Court imposed its view on the proceduralisation of children’s rights.⁷⁰⁹ In this way, it reminded states that every time a decision concerning minors is made due consideration to their best interests should be given, reflecting the very essence of a BIA.

⁷⁰⁴ *M.S.S v Belgium and Greece* App no 30696/09 (ECtHR 21 January 2011).

⁷⁰⁵ Article 13 of the ECHR reads as follows: ‘Right to an effective remedy. Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.’

⁷⁰⁶ Case C-411/10 and C-493/10, *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] CJEU 21 December 2011 ECR I-13905, para 105.

⁷⁰⁷ *Rahimi v Greece* App no 8687/08 (ECtHR 5 July 2011), paras 108–110. The child’s best interests principle in the CEAS with regard to unaccompanied minors has been the object of case C-648/11 (*The Queen, on the application of MA and Others v Secretary of State for the Home Department*) as has already been mentioned. In this affair, the Court stated that ‘[...] although express mention of the best interest of the minor is made only in the first paragraph of Article 6 of Regulation No 343/2003, the effect of Article 24(2) of the Charter, in conjunction with Article 51(1) thereof, is that the child’s best interests must also be a primary consideration in all decisions adopted by the Member States on the basis of the second paragraph of Article 6 of Regulation No 343/2003.’

⁷⁰⁸ *Rahimi v Greece* App no 8687/08 (ECtHR 5 July 2011), paras 108–110.

⁷⁰⁹ Laurens Lavrysen, ‘Rahimi v. Greece and the proceduralization of children’s rights’, *Strasbourg Observers* (15 April 2011) <<http://strasbourgobservers.com/2011/04/15/rahimi-v-greece-and-the-proceduralization-of-childrens-rights/>> accessed 19 March 2016.

Furthermore, the *Rahimi* case, and the detention of UAMs in general, raises important questions concerning the accommodation of UAMs in Greece. If children are not detained the alternative is often that they live on the streets until the moment that accommodation is found. The value and importance of conducting a proper BIA in such situations is highlighted. Without any doubt, abandoning a child for some days on the streets because of the scarcity of accommodation premises and because of the absolute absence of guardianship could amount to a violation of the CRC, of the EU law provisions, as well as of the ECHR, especially Article 3. As has been invoked in the introduction of the present report, the ECtHR considered that vulnerability of a person needs to be taken into consideration when assessing the margin of appreciation a state enjoys when applying its obligations under the ECHR.⁷¹⁰ The BIA is merely the vulnerability assessment which the state in question needs to process in order to respect its obligations under the ECHR.

d) UAMs beyond the safety net

Apart from the lack of infrastructure, a considerable number of UAMs remain beyond the scope of the official safety nets. This is mainly due to two reasons. Firstly, it should be noted that the average period that the minors stay in the residences provided is only 51 days.⁷¹¹ A considerable number of minors leave their accommodation early and without notification. The reason for this is often their desire to leave Greece for another European country that is more able to provide them with decent living conditions.⁷¹²

The statistics presented in the Report before the Committee of Ministers of the Council of Europe are identical to those included in the Annual Report of EKKA.⁷¹³ Nonetheless, a slight difference between the two reports is discernible. In the Greek version of the statistics there is a template that presents the numbers of UAMs that have in effect been placed in accommodation centres and the number of those UAMs for whom accommodation had been found but who ultimately were not placed in any accommodation. The number of those UAMs that ultimately were not placed in an accommodation centre is 509 minors, which amounts to 21.8% of the total number of applications.⁷¹⁴ In a footnote, EKKA mentions that these children have not been placed for a range of reasons.⁷¹⁵ No further explanation is given as to exactly what happened to them, nor the reasons behind the failure to place them in proper

⁷¹⁰ See Chapter I.E.

⁷¹¹ EKKA, 'Statistics 2014 from the Service in charge of finding accommodation for unaccompanied minors' [2015] <http://www.ekka.org.gr/portal_docs/forceaccount/picture/23_1067.pdf> accessed 12 December 2015.

⁷¹² UNHCR, 'Greece as a Country of Asylum: UNHCR Observations on the Current Situation of Asylum in Greece' [2014] <<http://www.refworld.org/docid/54cb3af34.html>> accessed 10 February 2015, 23.

⁷¹³ EKKA, National Report 2014 [2015].

⁷¹⁴ EKKA, 'Statistics 2014 from the Service in charge of finding accommodation for unaccompanied minors' [2015] <http://www.ekka.org.gr/portal_docs/forceaccount/picture/23_1067.pdf> accessed 12 December 2015, 16.

⁷¹⁵ EKKA, 'Statistics 2014 from the Service in charge of finding accommodation for unaccompanied minors' [2015] <http://www.ekka.org.gr/portal_docs/forceaccount/picture/23_1067.pdf> accessed 12 December 2015, 16 fn 4.

accommodation. To sum up, an undefined number of UAMs remain outside the safety net that accommodation facilities provide.

The two scenarios outlined above present situations where a functional guardianship system as a part of the BIA would be necessary. Assigning a specific guardian to each UAM may contribute to the establishment of a more personal relationship. The accomplishment of the tasks included in the mission of a guardian would also be helpful for other reasons. First of all, taking into consideration the risk of trafficking to which UAMs are exposed, the existence of a sustainable network of guardians could be an important tool in preventing the phenomenon of absconding. Second, whilst some of the UAMs outside the safety nets may be approaching adulthood, this should not be seen as a factor for them not being in need of accommodation. Given the particularly vulnerable position of the UAMs, nothing excludes the possibility that a young person approaching the age of 18 is in an intense need of specific protection that the accommodation can provide. Besides, upholding this sensitive discrimination contravenes the essence of the concept of vulnerable groups of which unaccompanied minors are undoubtedly a part. In the case of UAMs, their vulnerability is being 'informed' not only by their current situation as asylum-seekers but also by the reasons and situations that led them to immigrate.⁷¹⁶

4. UAMs and the European solidarity challenge

In order to offer a nuanced understanding of Greece's approach towards UAMs, and without ignoring the structural and persistent deficiencies of the Greek asylum system, it should be admitted that Greece currently faces a massive challenge due to the constant arrival of thousands of asylum-seekers. For this reason, the EU agencies operating hotspot areas are charged with informing the asylum-seekers of the relocation scheme.⁷¹⁷ Relocation consists of the transfer from Greece and Italy of 160,000 persons who have already filed an asylum application in those two countries to other EU Member States.⁷¹⁸ However, according to the European Commission, as of 8 February 2016 only 218 people have been relocated from Greece.⁷¹⁹ This is due to multiple reasons. First of all, of the five hotspot areas that have been identified, only one was operational until mid-February 2016.⁷²⁰ By mid-March 2016 four hotspots opened in

⁷¹⁶ See also Liv Feijen, 'The Challenges of Ensuring Protection to Unaccompanied and Separated Children in Composite Flows in Europe' (2009) 27 RSQ 63.

⁷¹⁷ Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248/80, 24 September 2015.

⁷¹⁸ Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248/80, 24 September 2015, art 4.

⁷¹⁹ Commission Communication: State of Play of the Priority Actions under the European Agenda on Migration [2016] COM(2016) 85 final, 11.

⁷²⁰ B. Wesel, 'Refugee hotspots in Greece: last minute' *Deutsche Welle* (17 February 2016).

different Greek islands (Lesvos, Chios, Samos, Leros) and one was under construction.⁷²¹ The main reason, however, of the currently unsuccessful functioning of the hotspot policy is that a considerable number of states do not wish to accept further asylum-seekers into their territories.⁷²²

At the same time, the relocation schemes seem to adopt an approach that is friendlier to child rights when compared to the situation that is currently in place in Greece, although these plans are yet to be further specified. It is notable that the Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece makes explicit reference to the best interests of the child principle in its Article 6,⁷²³ and the European Commission in its Proposal for the Council Decision refers to the necessity of a BIA before the relocation takes place.⁷²⁴ However, this reference to the BIA has not been integrated into the text of the Decision, leaving one wondering whether it is the result of an omission or an intentional deletion. The BIA constitutes a procedure that demands the constant participation of multiple stakeholders, and can be time-consuming.

As for Greece, the country seems to be lagging behind in this regard. Its most recent report regarding the implementation of the CEAS indicates that the procedures regulating the transfer of UAMs under the relocation scheme are yet to be adopted.⁷²⁵ On the other hand, the other EU Member States have not pledged any places for UAMs in the relocation scheme: as far as can be ascertained, no statistics prove that UAMs were among the 569 that were relocated up to 15 March 2016, although according to the Council Decision vulnerable groups should be relocated as a priority.⁷²⁶

D. Concluding remarks and recommendations

The aim of this case study has been to explore the way in which Greece adheres to the principle of the best interests of the child with regard to UAMs, one of the most vulnerable groups of asylum-seekers. While simultaneously being a substantive rule, a procedural rule and a principle, its three-fold legal nature demands that specific procedures be followed in order for states to successfully implement it and for

⁷²¹ European Commission, Commission Communication: First Report on relocation and resettlement, [2016] COM(2016) 165 final, 2.

⁷²² European Commission, Commission Communication: State of Play of the Priority Actions under the European Agenda on Migration [2016] COM(2016) 85 final, 11.

⁷²³ Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece OJ L 248/80, 24 September 2015, art 6.

⁷²⁴ European Commission, Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary [2015] COM(2015) 451 final, 6.

⁷²⁵ European Commission, Commission Communication: the State of Play of Implementation of the Priority Actions under the European Agenda on Migration: Greece – State of Play Report Annex 2 [2016] COM(2016) 85 final, 5.

⁷²⁶ Commission Communication: State of Play of Relocation and Resettlement [2016] <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/20160316/relocation_and_resettlement_-_state_of_play_en.pdf> accessed 27 March 2016. Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248/80, 24 September 2015, para 33.

children to enjoy their rights. Nevertheless, while it is included in all the legal texts in the CEAS framework which are relevant to the status of UAMs, it seems that the BIA and BID procedures are absent for almost all European and Greek legal texts.

The case study has mainly focused on two aspects of the Greek asylum system: guardianship and accommodation. The deficits regarding both seriously undermine the quality of reception conditions in Greece, and Greek authorities have been intensely criticised for this by international organs, European bodies, and NGOs. The remarkable absence of a centralised system for appointing guardians to UAMs severely erodes the legal protection net for UAMs, leaving them susceptible to exploitation and human trafficking. Furthermore, the lack of guardians contributes to the failure of the accommodation system in the sense that many UAMs decide to abscond from the facility to which they are assigned given that their final destination is not Greece, but other EU Member States.

It should be noted that in the absence of a centralised state authority in terms of guardianship, NGOs are filling the gap. For example, the NGO Metadras, supported by European funds, created a network of guardians in places where new arrivals of migrants took place. Their tasks ranged from medical visits to completion of the administrative process that allowed for the reunification of UAMs with their families in other EU Member States.⁷²⁷ This reveals that the EU has sometimes instituted partnerships with members of the civil society. A relevant example is the funding possibilities offered to NGOs in matters of refugee and migrant issues through the Asylum, Migration and Integration Fund (AMIF).⁷²⁸ In light of the partnership in matters of protection of UAMs, questions of sustainability and accountability of these NGOs are raised. To respond to these challenges, awareness-raising regarding the NGOs' activities could help to enhance their sustainability.⁷²⁹ Finally, on the one hand partnerships between the EU and civil society can be seen as connecting European people with European bureaucracy, responding in this way to a quest for more accountability from the EU side. On the other hand, this very active participation of NGOs in the implementation of European policies asks in its turn for the accountability of these representatives of civil society.⁷³⁰

⁷²⁷ Metadras, 'Guardianship Network for Unaccompanied Minors: Results and Experiences from the World of Protection of Unaccompanied Children' (Athens 2015) <<http://www.epitropeia.org/?q=en/node/61>> (in Greek) accessed 15 February 2016.

⁷²⁸ Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC OJ L 150/168, 20 May 2014, art 3.

⁷²⁹ Wolfgang Benedek, Mary Footer, Jeffery Kenner, Maija Mustaniemi-Laakso, Reinmar Nindler, Aoife Nolan and Stuart Wallace, *Report on enhancing the contribution of EU institutions and Member States, NGOs, IFIs and Human Rights Defenders, to more effective engagement with, and monitoring of, the activities of Non-State Actors*, Work Package No. 7 – Deliverable No. 2 [2015] <<http://www.fp7-frame.eu/wp-content/materiale/reports/14-Deliverable-7.2.pdf>> accessed 22 March 2016, 128–130.

⁷³⁰ Wolfgang Benedek, Mary Footer, Jeffery Kenner, Maija Mustaniemi-Laakso, Reinmar Nindler, Aoife Nolan and Stuart Wallace, *Report on enhancing the contribution of EU institutions and Member States, NGOs, IFIs and Human Rights Defenders, to more effective engagement with, and monitoring of, the activities of Non-State Actors*, Work Package No. 7 – Deliverable No. 2 [2015] <<http://www.fp7-frame.eu/wp-content/materiale/reports/14-Deliverable-7.2.pdf>> accessed 22 March 2016, 134–136.

The discussion in the preceding sections indicates that Greece is not in compliance with its obligations relating to the protection of the best interests principle with regard to UAMs. Against this background, it is time to move to an analysis of the measures to be taken to bring Greece in line with its human rights obligations concerning the best interests of the UAMs. Based on the findings in the preceding sections, several recommendations are made: firstly, in the sense of supplementing judicial mechanisms by political accountability structures; secondly, the need to create a centralised guardianship authority is pointed out; and thirdly, ways to address the inadequacy of reception facilities will be considered.

1. Judicial mechanisms need to be supplemented by political accountability structures

In judicial proceedings against a state courts accept or reject the responsibility of the state and, where it is confirmed that a state has committed a violation of its obligations, the court pronounces the consequences of the violation.⁷³¹ At the first level, in international law the consequence of the violation of an international obligation entails state responsibility. At the second level, responsibility entails certain obligations for the state that committed the violation. The most important obligation is reparation, which can take three forms: i) restitution; ii) compensation; and iii) satisfaction.⁷³²

The triple dimension of the best interests of the child principle has been elaborated above. In the case law discussed in Section C, the principle appeared mostly as a procedural rule and a substantive right, both of which had largely been overlooked in the Greek praxis. In the *Rahimi* case, the ECtHR noted that the Greek authorities had failed to take into consideration the principle before deciding on the detention of the

⁷³¹ The EU has established a more sophisticated system for establishing responsibility. On the basis of the principle of sincere cooperation enshrined in Article 4 TEU and taking into consideration the role of the EU Commission as the guardian of the treaties, stipulated in Article 17 TEU, Articles 258 and 259 TFEU provide for an infringement procedure. The procedure starts with the letter of formal notice in which the EU Commission demands from the state in question to communicate its opinion on the situation concerning the non-compliance. After a period of political negotiations, an eventual impasse is being solved by the referral of the case from the Commission to the CJEU. The Court, in case it decides that the EU Member State has breached EU law, may decide to impose pecuniary sanctions in order to motivate the state to comply with the legislation in question. However, very few infringement procedures have reached this phase. In more than 85% of cases, compliance with the EU law is achieved during the negotiations between national and European authorities. See J.-P. Jacqué, *Droit institutionnel de l'Union européenne* (8th edn, Dalloz 2014), 726–735. On the other hand, the remedies offered by the ECtHR are more attached to the classical conception of reparation in international law. If the Court establishes a violation of the ECHR's provisions, the operational part of the Court's judgment is composed by a declaration of the breach and by the calculation of the damages caused. Article 41 of the ECHR provides for just satisfaction. This term refers to compensation imposed on the state in question in case of: i) pecuniary damage inflicted on a person; ii) non-pecuniary damage (moral damage) and iii) costs and expenses. To give an example, in one case against Greece the Court awarded 15,000 euros for moral damage and 1,000 euros for costs and expenses.

⁷³² This very general schematisation of the rules governing state responsibility can of course accept derogations based on the principle of *lex specialis*. See United Nations General Assembly, Resolution 56/83 on the Report of the Sixth Committee UN doc A/56/589 and Corr.1 on the Responsibility of States for Internationally Wrongful Acts, 12 December 2001.

applicant.⁷³³ The same approach was adopted by the CJEU in case C-648/11 *The Queen, on the application of MA and Others v Secretary of State for the Home Department*. The CJEU also emphasised that all decisions concerning children should be informed by the best interests principle.⁷³⁴ The highlighting of the procedural aspect of the principle can help the authorities in question to deal with the deficiencies of their processes and integrate the appropriate mechanisms for the BIA and BID.

The discussion on responsibility should, however, be accompanied by questions regarding the suitability of judicial proceedings and the need to complement judicial control mechanisms with non-judicial control mechanisms. Though legal security demands that Greece's responsibility for undermining the child's best interests principle be judicially established, it is submitted that political mechanisms of control may be essential to complement the process of ensuring and enhancing Greek compliance with human rights standards. The question of violation of the best interests principle goes deeper than a mere judicial statement in which a judicial body condemns a state for not respecting a certain obligation by which it is bound. To note the violation of a right and to address it through remedies in all possible forms is one thing; to address systemic deficiencies is another. A probably more suitable means to address these systemic structural problems may be found in the concept of accountability. Accountability can be defined as 'a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences'.⁷³⁵ This accountability relationship is composed of three elements: a) the obligation of the actor to inform the forum about his or her conduct; b) the possibility to interrogate the actor and to question the adequacy of the information or the legitimacy of the conduct; and c) the forum may pass judgment on the conduct of the actor.⁷³⁶ Judicial procedures, in fact, constitute the legal form of the accountability concept. Other forms that could be useful in helping Greece to respect the BIP are political accountability towards its European partners and the European and Greek electorate as well as social accountability towards interest groups such NGOs, especially the actual social group of vulnerable refugees and more specifically, UAMs. All these forms of accountability act *ex post*. Nevertheless, as Bovens notes, this *ex post* control may lead to *ex ante* policy-making.⁷³⁷ These changes into the policies that the Greek authorities adopt towards UAMs should be the scope of the political and social accountability relationships created in the aftermath of the judicial proceedings condemning Greece with regard to its asylum system.

This being said, Greece should continue to improve its system, and no preferential treatment that would undermine these obligations should be envisaged. In order to improve its asylum system there is a need

⁷³³ *Rahimi v Greece* App no 8687/08 (ECtHR 5 July 2011).

⁷³⁴ C-648/11, *The Queen, on the application of MA and Others vs Secretary of State for the Home Department* [2014] CJEU 6 June 2013 (published in the electronic Reports of Cases) <<http://curia.europa.eu/juris/liste.jsf?num=C-648/11&language=EN>> accessed 14 December 2015, 57.

⁷³⁵ Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 *European Law Journal* 447, 450.

⁷³⁶ Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 *European Law Journal* 447, 451.

⁷³⁷ Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 *European Law Journal* 447, 453.

for procedures that are flexible, that ensure control over country's performances, that enhance cooperation, and that operate in a preventive way instead of mere judicial proceedings that take place after a violation. Judicial proceedings need to be complemented with constant control and cooperation.

To begin with, the coordinating efforts including several European agencies and the synergies between EU institutions and states could constitute an interesting platform 'pulling' Greece back to compliance. Furthermore, the European Commission's proposal regarding the Reception Directive constitutes a viable suggestion considering the topic of the material improvement of the reception conditions.⁷³⁸ Legal protection through the infringement procedure can indeed be of significant help, but to attain maximum effectiveness of the European provisions there is room for non-judicial procedures that would enhance states' compliance. This has been taken into consideration by the Commission in its proposal. In this sense, the Commission insists on the importance of the monitoring process at two levels. On the Community level, the Commission, fully aware of its role as the guardian of the treaties and of EU legislation, advocates for the maintenance of the control procedure. At the national level, it urges states to adopt mechanisms that would enhance their compliance with the provisions of the Directive.⁷³⁹ Article 28 of the Reception Conditions Directive recast provides for the monitoring and control system. It is significant that the language used is of a compulsory nature ('shall') rather than exhortatory. Also, the UNHCR in its comments on the Commission's proposal for the recast Reception Directive underlines the importance of control mechanisms. According to the UNHCR, 'systematic reporting would enable the European Commission more effectively to carry out its responsibility to ensure compliance with EU law in this field'.⁷⁴⁰ Article 28 remains sufficiently general to enclose all crucial issues relevant to reception conditions like detention, material conditions and, without doubt, the implementation of the best interests principle.

In the Assessment of the Greek Action Plan on Asylum and Migration management⁷⁴¹ some interesting information is retrieved concerning the network of monitoring and cooperation that surrounds Greek efforts to achieve its compliance with the EU's legal rules. Among other information, the creation of an internal task force into the Directorate-General Home Affairs charged with assisting Greece in the establishment of a system that would respect the CEAS standards is notable. Furthermore, a more holistic approach has led to the commitment of different EU agencies, such as EASO and Frontex, to this effort. In this sense, Member States have been able to contribute in a 'food-for-thought' forum, called 'Friends of Greece' by proposing possible solutions or to identify problems or fields of cooperation. It is regrettable, however, that states are hesitating in the implementation of what has been decided at the European level, as has been seen in terms of the relocation projects and the understaffing of the hotspot areas.

⁷³⁸ European Commission, Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers [2008] COM(2008)815 final <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008PC0815&from=EN>> accessed 12 February 2016, 6.

⁷³⁹ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), [2013]OJ L 180/96, art 2(e).

⁷⁴⁰ UNHCR, 'UNHCR Comments on the European Commission's amended recast proposal for a Directive of the European Parliament and the Council laying down standards for the reception of asylum-seekers' [2011] COM(2011) 320 final <<http://www.unhcr.org/513da1cc9.pdf>> accessed 19 October 2015.

⁷⁴¹ European Commission, Assessment of the Implementation of the Greek Action Plan on Asylum and Migration Management SWD (2014) 316 final, 6 October 2014, 3.

Apart from the EU framework, Greece is being monitored through Council of Europe procedures.⁷⁴² The Council of Europe has, for example, monitored the compliance of Greece with the ECtHR's judgment in the *M.S.S.* and *Rahimi* cases. A welcome feature of these procedures is that the monitoring lies heavily on NGO reports.⁷⁴³ In this way, testimonies coming from people actively involved on a daily basis in migration issues become available to the judges and usually offer a rather well-documented description of facts that otherwise would remain inaccessible to the Court. A similar procedure is now followed by the UN Committee on the Rights of the Child, where Greece's follow-up report is expected in 2017.⁷⁴⁴ This close follow-up of Greece's human rights policies is welcome in the sense that it puts a considerable amount of political pressure on Greece to ensure better compliance with human rights standards.

Finally, a source of inspiration and a basis for cooperation among the EU and Member States on the matter of integrating the principle of the child's best interests in their policies and giving it a concrete effect should be the children's rights-based approach adopted in the Return Handbook established by the European Commission. This text intends to assist national authorities carrying out the return process. It summarises best practices and guidelines from the Member States in view of harmonising the return process and ensuring respect of safeguards.⁷⁴⁵ This document, praised by the ENOC Report for its analytical approach,⁷⁴⁶ could set an example for the unfolding of relevant policies with regard to unaccompanied minors and especially the issue of guardianship, which, as has been shown above, is an object of harmonisation efforts.⁷⁴⁷ Clearly based on a BIA and BID process, the Return Handbook demands the cooperation of all the competent authorities in order for the decision to comply with EU law and fundamental human rights.⁷⁴⁸ On the basis of this approach, the EU could develop a comprehensive action plan that would balance the security concerns expressed by several states with the necessity to protect UAMs through the generalisation of the application of a daily best interests assessment for every action concerning UAMs and, eventually, through a best interests determination in view of a durable solution for the UAMs.

⁷⁴²Council of Europe, Greece-Submissions from States, Applicants and NGOs/NHRs <http://www.coe.int/t/dghl/monitoring/execution/Themes/Add_info/GRC-MSS_en.asp> accessed 19 February 2016.

⁷⁴³ See, for example, Human Rights Watch, 'Left to Survive: Systematic Failure to Protect Unaccompanied Migrant Children in Greece' [2008] <https://www.hrw.org/sites/default/files/reports/greece1208webwcover_0.pdf> accessed 23 November 2015; NGO Partnership Portal, 'Protecting Unaccompanied Minors in Greece' (11 December 2011) <<http://www.ngonorway.org/about/item/482-protecting-unaccompanied-minors-in-greece>> accessed 5 December 2015.

⁷⁴⁴ Committee on the Rights of the Child, 'Concluding Observations: Greece' [2012] UN doc CRC/C/GRC/CO/2-3, para 77.

⁷⁴⁵ European Commission: Commission Recommendation of 1 October 2015 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return related tasks [2015] C(2015) 6250 final and Annex.

⁷⁴⁶ ENOC, 'Safety and Fundamental Rights at Stake for Children on the Move: Call for the EU and European countries to implement a child rights perspective in the reception of migrating children' [2016], 59.

⁷⁴⁷ See above Section C.

⁷⁴⁸ European Commission: Commission Recommendation of 1 October 2015 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return related tasks Annex [2015] C(2015) 6250 final, 50–54.

Nevertheless, a rather unexpected factor may impede the process of helping Greece to return to compliance with regard to its obligations. Recently, all countries that form a part of the Balkan Western Route have collectively decided to close their borders to refugees, or are at least accepting a very small quota per day.⁷⁴⁹ This results in thousands of migrants currently being stranded in Greece.⁷⁵⁰ This recent development in a country hit by the economic crisis and already numerous times judicially condemned for the systemic deficiencies of its reception conditions is not helpful towards the efforts deployed by Greece in intimate collaboration with its partners in view of respecting its commitments. Besides, as has already been mentioned, the recent agreement between the EU and Turkey is morally unacceptable when viewed in the context of the one-for-one swap rule (one irregular migrant being returned back to Turkey for one refugee resettled from Turkey to the EU) and is for the most part in violation of basic norms of EU and international law, for example, as regards the question of massive expulsions of irregular migrants back to Turkey.⁷⁵¹ What is at stake here is not only the absence of solidarity towards countries hugely affected by the refugee and migrant movements, but also an effort to pull the EU away from its humanitarian principles and its international obligations.

2. Need to design a central authority for guardianship

At a more practical level focused on Greece and with regard to guardianship, firstly, Greek authorities should proceed with the designation of a central authority responsible for guardianship in the country. Among the main tasks of this authority should be to develop standards and a code of conduct for the guardians. Particular emphasis should be given to the specific needs of the UAMs to appreciate their best interests.

Interestingly, there is already a provision in the Greek legal system for the establishment of a Judicial Social Service focused on issues of children and based on the Court of First Instance in Greece.⁷⁵² This provision is Article 49 of Law 2447/1996,⁷⁵³ and its mission is rather consultative. For example, according to Article 50 of the same law, the task of this service would be to provide assistance to the guardians, among others, whenever the latter ask for it. Although approximately 20 years have passed since the enactment of this law, and despite the fact that migration has become one of the biggest challenges for Greece in our era, this provision is yet to be activated. While the law would undoubtedly need an

⁷⁴⁹ Alison Smale, 'With EU Paralyzed, 10 Nations Try to Stem Migrant Flow', *The New York Times* (24 February 2016) <http://www.nytimes.com/2016/02/25/world/europe/refugees-migrants-austria-greece.html?_r=0> accessed 22 March 2016.

⁷⁵⁰ IOM, 'Migration Flows – Europe' <<http://migration.iom.int/europe/>> accessed 25 March 2016.

⁷⁵¹ For a clear analysis, see Steve Peers, 'The final EU/Turkey refugee deal: a legal assessment', *EU Law Analysis* (18 March 2016) <<http://eulawanalysis.blogspot.fr/2016/03/the-final-euturkey-refugee-deal-legal.html>> accessed 20 March 2016.

⁷⁵² UNHCR Office in Greece, 'Unaccompanied Minors Asylum Seekers in Greece' [2008] <<http://www.refworld.org/docid/48abd557d.html>> accessed 17 November 2015.

⁷⁵³ Law 2447/1996 on the adoption, as a code, of the draft law on 'Adoption, guardianship and foster care of minors, judicial assistance, judicial trusteeship of alien property and relating provisions substantive, procedural and transitory provision' GG 278/A 30 December 1996, art 49.

adaptation to the specific needs of the asylum-seeking UAMs, this social service could take over from the Public Prosecutor for Minors whose appointment as a provisional guardian, as seen above, is highly ineffective. It is conceivable that the notification from the Reception Services to the Public Prosecutor could be immediately communicated to the Judicial Social Service, which in an autonomous way could decide the guardian for the child. Needless to say, the establishment of a list of possible guardians would facilitate this task. Furthermore, the existence of such a service could ensure and reinforce the accountability of the guardian.

Although the suggestion in the UNHCR Office in Greece report of 2008 was that Article 64 of the same law serves as the appropriate basis for the establishment of a centralised service for guardianship,⁷⁵⁴ it is here put forward that a more centralised structure of guardianship would be important. A Central Service responsible for appointing a guardian would serve the need for rapid action and would be invested with experience in the process of evaluating children's best interests and if, ultimately, guardianship would serve his/her best interests. Training on the duties of guardians could also be included in its mission. What is more, this solution is in line with the UNHCR's Guidelines on Policies and Procedures in dealing with UAMs seeking asylum.⁷⁵⁵ In line with the suggestion concerning the harmonization of guardianship at the European level, it goes without saying that BIA and BID procedures should be developed by the Greek authorities. In this sense it is deplorable that the National Action Plan for the Rights of the Child makes no specific reference to BIA and BID.

3. Quantitative and qualitative improvement of reception facilities

When it comes to accommodation, the question of quantitative and qualitative improvement of the reception capacity of Greece is crucial. In order to improve the reception capacity, cooperation with the UNHCR should be continued. As has been shown, the UN agency has been relatively successful in finding approximately 15,000 places for accommodation under the Western Balkans Route Decision. In this framework, it should be ensured that first- and second-line reception facilities are endowed with spaces reserved for UAMs. Moreover, what is equally important is that UAMs should be surrounded by specialised staff that ensure their well-being and who could discourage them from undertaking illegal routes towards Europe where they risk being exploited by criminal networks. Furthermore, the staff at the Greek reception centres should be specially trained regarding the reception of UAMs. Transfer of

⁷⁵⁴ Law 2447/1996 on the ratification of the Law draft 'Adoption, tutelage of a minor, sponsorship of minor and judicial assistance' and incorporation into the Civil Code GG 278/A 30 December 1996, art 64. According to the translation found in the UNHCR Office in Greece, 'Unaccompanied Minors Asylum Seekers in Greece', art 64 reads as follows: 'A presidential decree, issued on a proposal by the Ministers of Justice and Health, will indicate these institutions and associations which, due to their specialized staff, will be considered appropriate to take over the guardianship of minors, according to article 1671 of the Civil Code ... [these institutions] operate under the control and supervision of the Ministry of Health'. See UNHCR Office in Greece, 'Unaccompanied Minors Asylum Seekers in Greece' [2008] <<http://www.refworld.org/docid/48abd557d.html>> accessed 17 November 2015, 56.

⁷⁵⁵ UNHCR, 'Guidelines on Policies and Procedures in dealing with unaccompanied children seeking asylum' [1997] <<http://www.unhcr.org/3d4f91cf4.pdf>> accessed 24 November 2015, para 5.7.

knowledge from different European countries could be envisaged through, for example, the organisation of workshops. Finally, Greece should make use of the funding offered by the EU and should ensure that specialised staff will take care of UAMs in the new infrastructure recently created.

The possibility of foster families could also be envisaged for UAMs. Already provided for by the recast EU Reception Conditions Directive, this method would provide a more appropriate solution for UAMs. Nevertheless, this possibility has not been elaborated by Greece. It would not be unconceivable, however, to propose that the duty to find a foster family form part of the competencies of the suggested central service endowed with appointing a guardian for the minor. In this way, the unicity of the system of protection for the UAMs would be guaranteed.

Overall, the wish that Greece complies with its international and European obligations is grounded in two reasons. The first reason concerns the respect of the fundamental rights of people forced to leave their homelands, in search of a secure future. The second reason is related to the necessity of establishing serious institutional machinery based on clear legal obligations that would propagate legal certainty and would restore trust between national and supra-national structures and civil society.

V. Gender violence and gender-based persecution against women as grounds for asylum claims (Author: Dolores Morondo)

A. Gender and asylum

1. Introducing gender perspectives in asylum law and policy

According to Eurostat, asylum applicants in Europe are mostly young or middle-aged men,⁷⁵⁶ yet women and girls make up half of the world's refugee population.⁷⁵⁷ Presently in Europe there are increasing numbers of women and children reported among those crossing what has been described as the 'most dangerous frontier' in the world.⁷⁵⁸ In January 2016, women accounted for half of those entering Europe, an increase from just one third in 2015.⁷⁵⁹ From this perspective, it is problematic that historically international conventions and national asylum policies have tended to overlook the specific position of female asylum-seekers and the gendered nature of refugee situations. Asylum has largely been seen through the lens of the male, and asylum systems have developed to respond to male experiences.⁷⁶⁰

The centrepiece of international refugee protection is the 1951 Convention Relating to the Status of Refugees ('Refugee Convention') and its 1967 Protocol. In its Article 1 A(2), the Convention defines a refugee as 'a person who, owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinions, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.' Since the 1980s there has been a growing recognition that, notwithstanding the broad terms of this definition, women were not being adequately protected by the Convention.⁷⁶¹

⁷⁵⁶ For the period 2008–2015 women accounted for less than one third of asylum applications. Men between 18 and 65 years made 3 out of 4 asylum claims. See EUROSTAT Asylum Statistics <<http://appsso.eurostat.ec.europa.eu/nui/show.do>>.

⁷⁵⁷ UNHCR, 'Women: Particular challenges and risks' <<http://www.unhcr.org/pages/49c3646c1d9.html>>.

⁷⁵⁸ The Mediterranean Sea is the most deadly border in the world: seventy-six per cent of the migrants who have died or gone missing this year have done so in the Mediterranean Sea. In 2015, the figure was 69.6% and in 2014 65.4%. International Organization for Migration (IOM), Missing Migrants Project, 'Latest Global Figures' <<http://missingmigrants.iom.int/latest-global-figures>>.

⁷⁵⁹ Women's Refugee Commission, *No Safety for Refugee Women on the European Route: Report from the Balkans* [2016] <<https://www.womensrefugeecommission.org/gbv/resources/1265-balkans-2016>>. Reports have also noted a rise in the numbers of women fleeing in particularly aggravated circumstances, such as single women travelling alone or with children, adolescent girls, pregnant and breastfeeding women, etc. See United Nations Refugee Agency, United Nations Population Fund and Women's Refugee Commission, *Initial Assessment Report: Protection Risks for Women and Girls in the European Refugee and Migrant Crisis* [2015], 3.

⁷⁶⁰ European Parliament, Committee on Women's Rights and Gender Equality, Draft Report on the situation of women refugees and asylum seekers in the EU (2015/0000(INI), 16 November 2015, Rapporteur Mary Honeyball.

⁷⁶¹ Karen Musalo and Stephen Knight, 'Asylum for Victims of Gender Violence: An Overview of the Law, and an Analysis of 45 Unpublished Decisions' (2003) *Immigration Briefings* 1. Besides reports by international organisations, there is a growing field of scholarly research regarding gender and asylum. See, for example, Melanie Randall, 'Particularized social groups and categorical imperatives in refugee law: State failures to recognize gender and the legal reception of gender persecution claims in Canada, the United Kingdom, and the United States' (2015) 23(4)

The European Parliament was the first international body to acknowledge the need for a gender-sensitive interpretation of the Refugee Convention in a resolution adopted on 13 April 1984,⁷⁶² stating that women in certain countries ‘who face harsh or inhuman treatment because they are considered to have transgressed the social mores of the society in which they live’ can be considered ‘as belonging to a “particular social group”’ within the meaning of the definition of a refugee in the Refugee Convention, and called upon the states to interpret the Convention in that sense.

The introduction of a gender perspective in the work of the UNHCR, following the proclamation of 1976-1985 as the UN Decade for Women, led to an enhanced focus on the problems facing refugee women. This gender perspective has evolved over time and it is possible to distinguish at least three phases.⁷⁶³ Until 1980, refugee protection was assumed to work in a gender neutral manner. Most programmes during this era did not differentiate between the needs of men and women. By 1980, the UNHCR recognised that to receive fair and equal treatment special measures must be adopted to accommodate the ‘special needs’ of women.⁷⁶⁴ The aim was not to single women out, but rather field officers were asked to mainstream women’s needs. Hence, the primary aim with identifying refugee women’s special needs was not the development of special projects for them, but rather ‘to ensure that projects for the general population address the special needs of women and children adequately and appropriately’.⁷⁶⁵ In the second phase, which took place in the early 1990s, the focus moved from addressing the needs of women to gender relations and the different socio-economic roles of men and women. A central issue became the implications of gender roles on the implementation of refugee protection projects.⁷⁶⁶ During this period the UNHCR started to recommend that countries also develop their own guidelines to address gender-related issues in asylum claims.⁷⁶⁷ By 1998, the UNHCR had developed a Strategy for Mainstreaming Gender Equality into the UNHCR’s Protection Programmes.⁷⁶⁸ This Strategy helped the UNHCR to move away from analysing the different experiences of men and women, instead undertaking

American University Journal of Gender, Social Policy & the Law 529, 529–571; Karen Musalo, ‘Personal Violence, Public Matter: Evolving Standards in Gender-Based Asylum Law’ (2014) Harvard International Review 45; Efrat Abel, Catherine Dauvergne, and Jenni Millbank (eds), *Gender in Refugee Law: From the Margins to the Centre* (Routledge 2014); Helen Bailot, Sharon Cowan and Vanessa Munro, ‘“Hearing the Right Gaps”: Enabling and Responding to Disclosures of Sexual Violence within the UK Asylum Process’, Edinburgh School of Law Research Paper Series no 36 [2013]; Siobhán Mullally, ‘Migration, Gender, and the Limits of Rights’ in Ruth Rubio-Marín (ed.), *Migration and Human Rights*, Collected Courses of the Academy of European Law (OUP 2013) 145; Alice Edwards, ‘Transitioning Gender: Feminist engagement with international refugee law and policy 1950–2010’ (2010) 29(2) Refugee Survey Quarterly 21; Lisa Frydman and Kim Thuy Seelinger, ‘Kasinga’s Protection Undermined? Recent developments in Female Genital Cutting Jurisprudence’ (2008) 18 Bender’s Immigration Bulletin 1073.

⁷⁶² European Parliament Resolution of 13 April 1984 on the application of the Geneva Convention relating to the status of refugees, [1984] OJ C127, 14/5/1984, 137.

⁷⁶³ UNHCR, ‘From 1975 to 2013: UNHCR’s Gender Equality Chronology’ [2013] <<http://www.refworld.org/docid/53a2a5f54.html>>.

⁷⁶⁴ UNHCR, ‘From 1975 to 2013: UNHCR’s Gender Equality Chronology’ [2013], 3.

⁷⁶⁵ UNHCR, ‘From 1975 to 2013: UNHCR’s Gender Equality Chronology’ [2013], 3.

⁷⁶⁶ This was largely the result of global developments in the field of women’s rights, which led to gender mainstreaming becoming what has been described as a ‘globally recognised strategy for achieving gender equality’. UNHCR, ‘From 1975 to 2013: UNHCR’s Gender Equality Chronology’ [2013], 4.

⁷⁶⁷ Canada was the first country to follow this guidance in 1993, and the United States issued its own gender recommendations in 1995.

⁷⁶⁸ UNHCR, ‘From 1975 to 2013: UNHCR’s Gender Equality Chronology’ [2013], 4.

specific programming aimed at redressing gender-based discrimination. In 2002, this approach led to the publication of two important sets of guidelines: one on gender-related persecution⁷⁶⁹ and another on membership of a particular social group.⁷⁷⁰ The introduction of a gender-sensitive approach to assessing the design and implementation of asylum procedures showed the many ways in which asylum systems failed to understand and adequately address women's experiences of persecution.

The UNHCR⁷⁷¹ and the Committee on the Elimination of Discrimination against Women⁷⁷² have given detailed recommendations on different aspects of the refugee process where gender makes a difference and where gender-sensitiveness could improve asylum procedures so that they are more responsive to women's needs and claims. These guidelines and recommendations, as well as numerous studies and reports,⁷⁷³ highlight different issues which could be gathered around three questions: a) gender bias in the assessments of women's claims to asylum; b) women's needs and conditions in transit situations and reception places; and c) gender-based persecution and the determination of refugee status.

Concerning gender bias in the assessment of women's claims, there is a tendency to consider women's and girls' claims only in relation to the claims of their husbands/fathers or other male family members.

⁷⁶⁹ UNHCR, Guidelines on International Protection No 1: Gender-related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/01, 7 May 2002.

⁷⁷⁰ UNHCR, Guidelines on International Protection No 2: Membership of a particular social group within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/02, 7 May 2002.

⁷⁷¹ Besides the Guidelines on gender-related persecution, UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1 [1979, reed. January 1992]; UNHCR, *Handbook for the Protection of Women and Girls* [2008]; UNHCR, *Improving asylum procedures: Comparative analysis and recommendations for law and practice: Key Gender Related Findings and Recommendations* [2010].

⁷⁷² Committee on the Elimination of Discrimination against Women, 'A Call for Gender Equality for Refugees and Stateless Persons', Statement on the Anniversaries of the 1951 Convention Relating to the Status of Refugees and the 1961 Convention on the Reduction of Statelessness, 19 October 2011; Committee on the Elimination of Discrimination against Women, General recommendation No 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, CEDAW/C/GC/32, 14 November 2014.

⁷⁷³ For example, Hana Cheikh Ali, Christel Querton and Elodie Soulard, 'Gender related asylum claims in Europe: A comparative analysis of law, policies and practice focusing on women in nine EU Member States', Study commissioned by the European Parliament [2012]; Gabor Gyulai, *Información sobre el país de origen en el procedimiento de asilo: La calidad como requisito legal en la UE* (Comité Helsinki de Hungría 2011); Amnesty International End FGM Campaign, ILGA-Europe and the European Women's Lobby, *En-Gendering the European Asylum Support Office*, February 2011; ILGA-Europe Policy paper on the recast of the EU Asylum Procedure and Reception Directives, July 2011; Asylum Aid, *Unsustainable: The quality of initial decision-making in women's asylum claims* [2011]; CEAR, CIR and FTDA, *Exchange for Change: Guide for an effective protection of refugee victims of gender-related persecution in Europe* [2010]; Human Rights Watch, *Fast-tracked unfairness: Detention and denial of women asylum seekers in the UK* [2010]; Y. Ertürk, *15 years of the United Nations Special Rapporteur on Violence against Women, Its causes and Consequences* (United Nations 2009); Heaven Crawley and Trine Lester, 'Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe', UNHCR, [2004]; Radhika Coomaraswamy, *Integration of the human rights of women and the gender perspective, violence against women*, UN doc. E/CN.4/2000/68, 29 February 2000.

Women have difficulties in accessing individual asylum procedures, even where they have experienced the same form of persecution as their male relatives.⁷⁷⁴

A draft report of the Women's Committee of the European Parliament has recently repeated other concerns about the practical challenges faced by women applying for asylum.⁷⁷⁵ The report notes that women and men are differently equipped to meet the requirements of asylum procedures. Women, for example, are less likely to have evidence to corroborate a claim due to a variety of factors including their economic, social and political status in their country of origin, as well as the nature of the persecution they have experienced. For this reason, oral testimony tends to play a more significant role in women's asylum claims, making credibility assessments a key issue in their applications.⁷⁷⁶ Furthermore, women and girls may be reluctant or slow to disclose details of the persecution or the trauma they have suffered, especially if they face male interviewers or interpreters or when other family members are present.⁷⁷⁷ The situation of women is worsened by a general culture of disbelief where the credibility of victims is often questioned.⁷⁷⁸ Decision-makers are seldom trained to understand the complexity of the recollection of histories of harm and trauma, thus placing a high burden on refugee applicants who, because of the nature of the harm inflicted and its social stigma, might have very limited documentary evidence.⁷⁷⁹ It is also likely that women will be more affected than men by factors such as a lack of adequate information, language difficulties, or a lack of familiarity and confidence in engaging with public authorities.⁷⁸⁰

In relation to women's needs in reception centres and transit situations, recommendations include measures to develop gender-sensitive reception procedures and support services for female asylum-seekers, such as appropriate accommodation for pregnant and lactating women and families with children, sex segregated accommodation and toilet facilities, lockable rooms and adequate lighting, guard protection (including female guards), provision of information to women and girls on gender-based

⁷⁷⁴ Hana Cheikh Ali, Christel Querton and Elodie Soulard, 'Gender related asylum claims in Europe: A comparative analysis of law, policies and practice focusing on women in nine EU Member States', Study commissioned by the European Parliament [2012].

⁷⁷⁵ European Parliament, Committee on Women's Rights and Gender Equality, Draft Report on the situation of women refugees and asylum seekers in the EU (2015/0000(INI), 16 November 2015, Rapporteur Mary Honeyball.

⁷⁷⁶ Hana Cheikh Ali, Christel Querton and Elodie Soulard, 'Gender related asylum claims in Europe: A comparative analysis of law, policies and practice focusing on women in nine EU Member States', Study commissioned by the European Parliament [2012].

⁷⁷⁷ Hana Cheikh Ali, Christel Querton and Elodie Soulard, 'Gender related asylum claims in Europe: A comparative analysis of law, policies and practice focusing on women in nine EU Member States', Study commissioned by the European Parliament [2012].

⁷⁷⁸ Hana Cheikh Ali, Christel Querton and Elodie Soulard, 'Gender related asylum claims in Europe: A comparative analysis of law, policies and practice focusing on women in nine EU Member States', Study commissioned by the European Parliament [2012]. See also, Sharon Pickering, 'Gender Persecution: A response to the UNHCR Guidelines' in *Stemming the Tide or Keeping the Balance: The Role of the Judiciary* (International Association of Refugee Law Judges 2002).

⁷⁷⁹ Hana Cheikh Ali, Christel Querton and Elodie Soulard, 'Gender related asylum claims in Europe: A comparative analysis of law, policies and practice focusing on women in nine EU Member States', Study commissioned by the European Parliament [2012].

⁷⁸⁰ UNHCR, *Handbook for the Protection of Women and Girls* [2008]; UNHCR, *Improving asylum procedures: Comparative analysis and recommendations for law and practice: Key Gender Related Findings and Recommendations* [2010].

violence and available assistance services, and services such as crisis counselling and medical care for survivors of sexual violence.⁷⁸¹ Many of these recommendations are a response to the growing awareness of and concern with the vulnerability of women and girls to sexual and gender-based violence in situations of displacement and humanitarian intervention, including in refugee camps and along transit routes. The Inter-Agency Standing Committee (IASC) has produced guidelines regarding gender violence in humanitarian settings and a handbook, both of which are viewed as landmark steps for this serious problem.⁷⁸²

The remainder of this study is primarily dedicated to the third set of issues, namely, gender-based persecution and gender-based violence against women as grounds for claiming asylum and the challenges that women claiming asylum on those grounds might experience in the procedure for the determination of their refugee status. For reasons of space, the case study will not address all forms of gender-based asylum claims,⁷⁸³ and will focus only on gender-based violence against women and girls.

2. Sexual and gender-based violence and gender persecution

Women and girls might experience both persecution because of gender and persecution which takes a gendered form. As expressed by Baroness Hale in the UK House of Lords judgment in *Fornah*: ‘The world has woken up to the fact that women as a sex may be persecuted in ways which are different from the ways in which men are persecuted and that they may be persecuted because of the inferior status accorded to their gender in their home society.’⁷⁸⁴ Hence, women may be persecuted because they are women, or they may be persecuted on other grounds (their religion or political opinion or minority membership) in a way which is different from the way in which their male co-religionists or relatives are persecuted, for example, through the use of sexual violence against them or through conjugal slavery.

The term ‘persecution’ plays a fundamental role in the definition of a refugee in the 1951 Convention. According to the Convention, a refugee is someone who flees due to a ‘well-founded fear of persecution’.

⁷⁸¹ UNHCR, Guidelines on International Protection No 1: Gender-related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/01, 7 May 2002.

⁷⁸² The Inter-Agency Standing Committee (IASC) is the most important mechanism for inter-agency coordination of humanitarian assistance involving both UN and non-UN humanitarian partners. It was established in June 1992 in response to United Nations General Assembly Resolution 46/182 on the strengthening of humanitarian assistance. Inter-Agency Standing Committee, *Guidelines for Gender-based Violence Interventions in Humanitarian Settings: Focusing on Prevention of and Response to Sexual Violence in Emergencies* [2005]; Inter-Agency Standing Committee (IASC), *Gender Handbook in Humanitarian Action* [2006].

⁷⁸³ There is growing research and literature on the topic of gender orientation and gender identity in asylum contexts. For example, see Mary Kapron and Nicole LaViolette, ‘Refugee Claims Based on Sexual Orientation and Gender Identity: An Annotated Bibliography’ Ottawa Faculty of Law Working Paper No 2014-15 [2014].

⁷⁸⁴ *Secretary of State for the Home Department (Respondent) v K (FC) (Appellant) and Fornah (Appellant) v Secretary of State for the Home Department (Respondent)*, United Kingdom House of Lords, October 2006, para 86.

Nevertheless, the Convention does not provide a definition of persecution. It has been argued that this absence was intentional and aimed to render the refugee definition flexible:

The term “persecution” has nowhere been defined and this was probably deliberate. It seems as if the drafters have wanted to introduce a flexible concept which might be applied to circumstances as they might arise; in other words, that they capitulated before the inventiveness of humanity to think up new ways of persecuting fellow men.⁷⁸⁵

Others, however, see the high indeterminacy of the concept as a problematic source of political and judiciary discretion, and even of arbitrariness.⁷⁸⁶ An unjustified impression is created that ‘there is a clear definition of a refugee and an efficient procedure which enables us to identify a real refugee’.⁷⁸⁷

The recognition that sexual and gender-based violence can fall under the definition of persecution in refugee law is part of a wider development resulting from the struggle of feminist and women’s groups to obtain recognition of women’s rights in international law and, in particular, the recognition of violence against women as a form of human rights violation.⁷⁸⁸

The UNHCR Guidelines on gender-related persecution begin by acknowledging that the term ‘gender-related persecution’ does not have a legal meaning *per se*. It is used to ‘encompass the range of different claims in which gender is a relevant consideration in the determination of refugee status’.⁷⁸⁹

Among the relevant scholarship, as well as in policy documents, there are a variety of expressions to refer to the phenomenon of gender-related persecution, as well as various classifications. The first distinction, which has already been mentioned, is that persecution might be based on gender or it might take a gendered form. Hence, firstly there are forms of harm that are inflicted because of gender. These cases include not only forms of harm inflicted on women based on repressive social and legal norms and discriminatory legislation, but also those inflicted on other gendered groups, such as homosexuals and transsexuals, on the basis of their sexual and gender identities.⁷⁹⁰ The forms of harm inflicted because of gender need not themselves be gendered. Women may, for example, be barred from accessing labour or livelihood, and homosexuals may be sentenced to death due to their sexual identity. In other cases the

⁷⁸⁵ Atle Grahl-Madsen, *The Status of Refugees in International Law*, vol I (A. W. Sijthoff 1966), 193.

⁷⁸⁶ Jane Freedman, *Gendering the International Asylum and Refugee Debate* (Palgrave Macmillan 2015).

⁷⁸⁷ Valluy has in fact spoken of a ‘judicial fiction of asylum’. Jérôme Valluy, ‘La fiction juridique de l’asile’ (2004) *Plein Droit* No 63.

⁷⁸⁸ Siobhán Mullally, ‘Migration, Gender, and the Limits of Rights’ in Ruth Rubio-Marín (ed.), *Migration and Human Rights*, Collected Courses of the Academy of European Law (OUP 2013) 145; Alice Edwards, ‘Transitioning Gender: Feminist engagement with international refugee law and policy 1950–2010’ (2010) 29(2) *Refugee Survey Quarterly* 21.

⁷⁸⁹ UNHCR, Guidelines on International Protection No 1: Gender-related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/01, 7 May 2002, 2.

⁷⁹⁰ In a comprehensive understanding of gender men in general, who unlike women or homosexuals are not normally gendered, can be constructed as such, *in specific circumstances*, to demean and humiliate them: for example, soldiers or prisoners who are raped or subjected to sexual forms of humiliation, as happened in the case of the detainees in Abu Ghraib prison during the Second Iraq War. See Sandesh Sivakumaran, ‘Sexual violence against men in armed conflict’ (2007) 18(2) *European Journal of International Law* 253.

inflicted harm is, however, gendered. For example, women and girls may be victimised through rape and other forms of sexual violence, or through forced marriages or female genital mutilation. Such gendered harm might be inflicted both because of gender and in cases of persecution for other reasons, that is, girls might be targeted for conjugal slavery by guerrilla groups or armies in conflicts, or political dissidents might be raped as a form of, or as a part of, torture. Some gendered forms of harm are specific to women, such as female genital mutilation (FGM) and forced abortion/pregnancies, whereas others might be inflicted on both men and women (rape, forced marriages, and trafficking for sexual exploitation).

According to the UNHCR Guidelines, gender-related claims typically encompass acts of sexual violence, family/domestic violence, coerced family planning, female genital mutilation, punishment for transgression of social mores, and trafficking. The Guidelines also include discrimination against women or lesbian, gay, transgender, bisexual and intersex persons (LGTBI) as a form of potential persecution, although they state that “mere” discrimination’ might not be sufficient to amount to persecution. A pattern of discrimination which, on cumulative grounds, leads to consequences of a substantially prejudicial nature, or a pattern of discrimination in state protection of certain individuals from certain types of harm, might give the right to international protection.⁷⁹¹

3. Specific challenges regarding gender-based persecution in asylum claims

As noted above, because gender-based refugee claims differ from traditional asylum claims they have historically faced significant challenges. In this regard, Musalo and Knight have argued that the barriers to the recognition of gender as a basis for persecution have been related to three separate factors.⁷⁹² Firstly, gender is not one of the grounds of persecution expressly listed in the refugee definition provided in the 1951 Refugee Convention. Even when gender violence is severe enough to be considered as amounting to persecution, there is still another requirement in the determination of refugee status: the actual or feared persecution must be ‘for reasons of race, religion, nationality, membership of a particular social group or political opinion’, that is, there are a number of established grounds that qualify the persecution as giving access to refugee protection. Gender is not included among those listed grounds. Therefore, even when adjudicators find that there are persecutory acts they may deny protection for reason of the lack of nexus to one of the grounds. Due to this some authors have favoured the inclusion of gender as an additional ground of persecution in Article 1(A) 2.⁷⁹³ This would emphasise that gender persecution and gender violence are as serious as other forms of persecution and promote the visibility of the

⁷⁹¹ UNHCR, Guidelines on International Protection No 1: Gender-related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/01, 7 May 2002, 4.

⁷⁹² Karen Musalo and Stephen Knight, ‘Asylum for Victims of Gender Violence: An Overview of the Law, and an Analysis of 45 Unpublished Decisions’ (2003) Immigration Briefings 1.

⁷⁹³ Jane Freedman, *Gendering the International Asylum and Refugee Debate* (Palgrave Macmillan 2007); Heaven Crawley, *Refugees and Gender: Law and Process* (Jordans 2001); Natalie Oswin, ‘Rights Spaces: An Exploration of Feminist Approaches to Refugee Law’ (2001) 3(3) *International Feminist Journal of Politics* 347; Doreen Indra, ‘Gender: A Key Dimension of the Refugee Experience’ (1987) 6(3) *Refugee* 3.

phenomenon, which is currently underreported.⁷⁹⁴ The UNHCR has, however, maintained that the definition in the 1951 Refugee Convention covers gender persecution if ‘properly interpreted’ (that is, gender-sensitively), and that there is therefore no need to add a new ground.⁷⁹⁵ Research, however, indicates that this standpoint is problematic when taking into account the rejection rate of applications for asylum made by women victims of gender-related persecution.⁷⁹⁶ While both the European Parliament and the UNHCR have supported the interpretation of Article 1(A)2 to include both women who are victims of persecution because of their gender and women who face persecution for violating social norms, this is not a generally accepted position among national legislators and judges.⁷⁹⁷

A second challenge in the recognition of gender-related protection claims relates to the types of harm inflicted. Some of these, such as female genital mutilation and oppressive social norms, are often regarded as cultural norms and obligations rather than as forms of persecution. The traditional understanding of a divide between what is public and what is private plays a fundamental role, as do the gendered role distributions that place men in the public-political sphere and women in the private-domestic sphere.⁷⁹⁸

Thirdly, in many cases involving gender-related harms the agent persecuting is not the state or government but a non-state actor such as the applicant’s husband, father, or the community of which the applicant is a member.⁷⁹⁹ Harm perpetrated by non-state actors amounts to persecution when the state is unable or unwilling to prevent such harm or protect the claimant because of discriminatory

⁷⁹⁴ In Europe, only Belgium has statistical data on gender-related asylum claims. The lack of statistics is considered an important barrier for assessing the phenomenon and designing mechanisms to tackle it. In fact, the first recommendation made to the European Commission by the Position Paper of the UNHCR is to monitor the implementation of the European Union Asylum *acquis* to ‘address the gap in data collection and knowledge on gender-based violence in EU asylum reception systems’. UNHCR, Position Paper on Violence against women and girls in the European Union and persons of concern to UNHCR, PC.DEL/824/14, 9 July 2014, 5. See also Hana Cheikh Ali, Christel Querton and Elodie Soulard, ‘Gender related asylum claims in Europe: A comparative analysis of law, policies and practice focusing on women in nine EU Member States’, Study commissioned by the European Parliament [2012].

⁷⁹⁵ UNHCR, Guidelines on International Protection No 1: Gender-related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/01, 7 May 2002, 3. Contrarily, although it also commends a gender perspective when applying all five grounds, General Recommendation no 32 of the Committee on the Elimination of Discrimination against Women encourages states to ‘further introduce other grounds of persecution, namely sex and/or gender, into national legislation and policies relating to refugees and asylum seekers’. Committee on the Elimination of Discrimination against Women, General Recommendation No 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, CEDAW/C/GC/32, 14 November 2014.

⁷⁹⁶ Jane Freedman, *Gendering the International Asylum and Refugee Debate* (Palgrave Macmillan 2015).

⁷⁹⁷ Jane Freedman, *Gendering the international Asylum and Refugee Debate* (Palgrave Macmillan 2015); Hana Cheikh Ali, Christel Querton and Elodie Soulard, ‘Gender related asylum claims in Europe: A comparative analysis of law, policies and practice focusing on women in nine EU Member States’, Study commissioned by the European Parliament [2012].

⁷⁹⁸ The public/private divide has for a long time been the object of feminist movements’ contestation in many other spheres precisely because it renders the power men exercise over women a private, family, or personal matter rather than a political one.

⁷⁹⁹ Jane Freedman, *Gendering the international Asylum and Refugee Debate* (Palgrave Macmillan 2015), 83.

governmental policies or practices.⁸⁰⁰ Although many countries recognise those fleeing persecution by non-state actors where the government cannot or will not control these actors as refugees, this recognition has been slow to come.⁸⁰¹ Furthermore, the fact that the persecutor may be a family or community member leads adjudicators to characterise the persecution as ‘personal’ in nature, rather than political.

Part of the existing scholarship sees these challenges as resulting from a traditional elaboration of the definition of persecution in terms of the violation of individual rights. This limitation causes asylum systems to ‘offer only limited redress in cases where there is pervasive and structural denial of rights, such as those cases where rights are denied because of pervasive and structural gender inequalities.’⁸⁰²

A final issue in relation to gender-related persecution refers to the notion of ‘safe countries’. This criticism has been raised by the European Parliament in relation to the proposed Regulation to establish an EU common list of safe countries. The application of this notion of ‘safe countries’ of origin raises important questions about the situation of women applying for asylum in the EU:

If adopted, the Commission must ensure these changes take full account of the situation of women, LGBTI persons and other vulnerable groups, providing for specific derogations where necessary. No country can be deemed truly “safe” for women and girls when gender-based violence is a global and endemic problem.⁸⁰³

The Parliament calls on the Commission to acknowledge this problem and to apply gender-differentiation to any new rules. A similar precaution should apply to another argument by receiving states, which sometimes advance that women fleeing from gender-related persecution (that is, FGM or forced marriage) have the option of internal flight. According to this argument a person is not at risk of persecution by non-state actors if he or she is relocated to a safe place within the state of origin.⁸⁰⁴

B. The normative framework

The Refugee Convention and its 1967 Protocol are generally considered the centrepiece of refugee law systems. However, since the focus of this report is the EU’s AFSJ we must give some consideration to the specificity of the EU’s normative framework. The EU is not *per se* a party to either the Refugee Convention

⁸⁰⁰ UNHCR, Guidelines on International Protection No 1: Gender-related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/01, 7 May 2002, 5.

⁸⁰¹ Hana Cheikh Ali, Christel Querton and Elodie Soulard, ‘Gender related asylum claims in Europe: A comparative analysis of law, policies and practice focusing on women in nine EU Member States’, Study commissioned by the European Parliament [2012].

⁸⁰² Jane Freedman, *Gendering the International Asylum and Refugee Debate* (Palgrave Macmillan 2015).

⁸⁰³ European Parliament, Committee on Women’s Rights and Gender Equality, Report on the situation of women refugees and asylum seekers in the EU (2015/2325(INI)), 10 February 2016, Rapporteur Mary Honeyball.

⁸⁰⁴ Committee on the Elimination of Discrimination against Women, General Recommendation No 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, CEDAW/C/GC/32, 14 November 2014, para 28.

or to the other treaties which can complement the gender perspective of asylum law, such as CEDAW; nor is the EU a party to the European regional system, the ECHR, or to the 2011 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention). Nevertheless, two aspects should be born in mind. Firstly, although the EU is not a party to most human rights treaties its Member States are, and therefore these states have international legal obligations arising both from general public international law and from the European regional system. Secondly, the EU has legal personality and is, therefore, the subject of rights and obligations arising from international law.⁸⁰⁵ The CJEU has established that this is particularly the case for certain norms stemming from customary international law and from international treaties which are binding on the Member States but to which the EU is not a party.⁸⁰⁶ Moreover, the TFEU requires the Union to frame a common policy on asylum, subsidiary protection and temporary protection.⁸⁰⁷ The European Common Asylum Policy must be in accordance with the Refugee Convention and ensure compliance with the principle of *non-refoulement*.⁸⁰⁸

1. General public international law

As has already been seen, the international legal framework governing asylum contains no specific provisions for gender-related asylum claims, be they concerning gender-persecution or gendered forms of persecution. In this regard, it has often been held that the definition of a refugee in international law is gender neutral⁸⁰⁹ and that, even if it does not explicitly refer to gender differences, gendered forms of persecution or gender-discrimination, the Refugee Convention must be interpreted in accordance with the general prohibition of discrimination between women and men. In this sense, one can argue that, for example, Article 14(1) of the Universal Declaration of Human Rights, which states that ‘everyone has the right to seek and to enjoy in other countries asylum from persecution’, must be read together with the general anti-discrimination clause in Article 2 which includes sex as a prohibited ground of discrimination.⁸¹⁰

It has also been argued that, even if the Refugee Convention and its Protocol do not include sex or gender among the prohibited grounds of persecution, this should not be seen as decisive. European States have

⁸⁰⁵ Article 47 TEU establishes the legal personality of the Union. Consolidated Version of the Treaty on the European Union [2010] OJ C83/01.

⁸⁰⁶ See, for example, Case C-286/90 *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp* [1992] ECR I-6019, para 9; Case C-162/96 A. *Racke GmbH & Co. v Hauptzollamt Mainz* [1998] ECR I-03655, para 46.

⁸⁰⁷ Article 67(2) TFEU.

⁸⁰⁸ Article 78 TFEU.

⁸⁰⁹ UNHCR, Guidelines on International Protection No 1: Gender-related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/01, 7 May 2002.

⁸¹⁰ Article 2 UDHR: ‘Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.’

also ratified other treaties, such as the ICCPR and CEDAW, which should guide these states in their interpretation of the Refugee Convention.⁸¹¹

Nevertheless, as was noted in the first section, an increasing awareness of the male bias of asylum law and procedures has gained ground. Thus, as early as the 1980s the UNHCR Executive Committee (ExCom) began to produce a series of documents on gender-based claims in order to promote a 'gender-sensitive' interpretation of the Refugee Convention. The ExCom documents are not legally binding, and their aim is limited to providing guidance in the interpretation of the Convention and recommendations regarding asylum procedures. The ExCom recommendations range over a wide number of gender-related issues.⁸¹² One of the earliest, in 1985, introduced the possibility that states 'in the exercise of their sovereignty, [...] adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a "particular social group" within the meaning of Article 1 A(2) of the 1951 United Nations Refugee Convention.'⁸¹³ The Executive Committee later called upon the High Commissioner to support the States Parties in developing and implementing criteria and guidelines on responses to persecution specifically aimed at women⁸¹⁴ and in recognising as refugees women whose claims to refugee status are based upon a well-founded fear of persecution for reasons enumerated in the Refugee Convention, 'including persecution through sexual violence or other gender-related persecution.'⁸¹⁵

Besides the ExCom conclusions and recommendations, the UNHCR has produced a number of policy documents and guidelines, as well as a handbook on refugee women. As can be observed in the ExCom documents, these policies and guidelines address various issues regarding refugee women, and since the 2000s sexual violence has stood out as a main concern. In relation to sexual violence, the guidelines address both asylum claims based on gender persecution and, more generally, sexual violence and exploitation that may take place, for example, in refugee camps, situations of displacement, on refugee routes, and during armed conflicts.

The UNHCR's Guidelines on International Protection, Gender-Related Persecution of May 2002 are intended to provide guidance to staff, legal practitioners, decision-makers and the judiciary carrying out refugee status determination procedures. The document has been said to have a 'discomfort with gender'⁸¹⁶ that would explain the introduction of the bizarre disclaimer in point 4: 'Adopting a gender-sensitive interpretation of the 1951 Convention does not mean that all women are automatically entitled

⁸¹¹ *Secretary of State for the Home Department (Respondent) v K (FC) (Appellant) and Fornah (Appellant) v Secretary of State for the Home Department (Respondent)*, United Kingdom House of Lords, October 2006, para 86.

⁸¹² These documents reflect the growing concern for the protection of refugee women and girls from sexual violence and trafficking.

⁸¹³ UNHCR, Executive Committee Conclusions no 39 (XXXVI), Refugee Women and International Protection [1985].

⁸¹⁴ UNHCR, Executive Committee Conclusions no 77 (XLVI) [1995].

⁸¹⁵ UNHCR, Executive Committee Conclusions no 77 (XLVI) [1995]; UNHCR, Executive Committee Conclusions no 79 (XLVII) [1996].

⁸¹⁶ Sharon Pickering, 'Gender Persecution: A response to the UNHCR Guidelines' in *Stemming the Tide or Keeping the Balance: The Role of the Judiciary* (International Association of Refugee Law Judges 2002), 348.

to refugee status.⁸¹⁷ The text examines both the qualification criteria, that is, the well-founded fear of persecution, the causal link, and the convention grounds, as well as procedural issues.⁸¹⁸ Under persecution the Guidelines identify laws that are persecutory in and of themselves, but also practices which might be prohibited by law but tolerated in practice, or that the State cannot stop effectively. According to the guidelines, trafficking for the purposes of forced prostitution or sexual exploitation, disproportionately severe punishments and methods of implementation of justifiable laws or policies, and patterns of discrimination that lead to consequences of substantially prejudicial nature, might amount to persecution.⁸¹⁹

Also, the UNHCR's Guidelines on International Protection due to membership of a particular social group,⁸²⁰ based on religion claims,⁸²¹ and on the application of the refugee definition to victims of trafficking and persons at risk of being trafficked⁸²² reflect gender concerns in both substance and in procedures.

Besides consideration within the UNHCR, gender-related issues in asylum have been addressed in connection with CEDAW. In 2011, the Committee on the Elimination of Discrimination against Women called on States Parties 'to recognise gender related forms of persecution and to interpret the "membership of a particular social group" ground of the 1951 Convention to apply to women'.⁸²³ In 2014, the Committee issued its General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, in which it further elaborates on the gender perspective in the interpretation of the Convention's grounds for determining refugee status. The Committee noted that:

⁸¹⁷ UNHCR, Guidelines on International Protection No 1: Gender-related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/01, 7 May 2002, 2.

⁸¹⁸ Although the procedural issues of gender-related asylum claims are not the main focus of this case study, it must be noted that the Guidelines do not tackle the most damaging question for women's asylum claims in cases of sexual and gender-related violence: the credibility assessment. See Sharon Pickering, 'Gender Persecution: A response to the UNHCR Guidelines' in *Stemming the Tide or Keeping the Balance: The Role of the Judiciary* (International Association of Refugee Law Judges 2002), 355 ff.

⁸¹⁹ UNHCR, Guidelines on International Protection No 1: Gender-related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/01, 7 May 2002, 3–4.

⁸²⁰ UNHCR, Guidelines on International Protection No 2: Membership of a particular social group within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/02, 7 May 2002.

⁸²¹ UNHCR, Guidelines on International Protection No 6: Religion-based refugee claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, HCR/GIP/04/06, 28 April 2004, particularly paras 24, 28 and 30.

⁸²² UNHCR, Guidelines on International Protection No 7: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked, HCR/GIP/06/07, 7 April 2006.

⁸²³ Committee on the Elimination of Discrimination against Women, 'A Call for Gender Equality for Refugees and Stateless Persons', Statement on the Anniversaries of the 1951 Convention Relating to the Status of Refugees and the 1961 Convention on the Reduction of Statelessness, 19 October 2011.

women's claims to asylum are regularly classified under the "social group" ground in the definition of a refugee, which may reinforce the stereotyped notions of women and dependent victims. [...] Gender stereotyping affects the right of women to a fair and just asylum process and the asylum authorities must take precautions not to create standards that are based on preconceived notions of gender-based violence and persecution.⁸²⁴

2. The Council of Europe and the Istanbul Convention

Within the Council of Europe (CoE) many important regional human rights instruments have been adopted, of which the ECHR is the most central. Since the early 1990s, the Steering Committee for Equality between Women and Men (CDEG) of the CoE has undertaken a series of initiatives to promote the protection of women against violence. Also, some instruments that directly address refugee women have been adopted. Most notably, in 1998, the CoE called upon all Member States to eliminate gender discrimination among refugees and adapt the treatment of women refugees to their specific situation and requirements.⁸²⁵ The most important instrument in this regard is the Istanbul Convention. Thirteen EU Member States have ratified the Convention, and a further 12 Member States have signed it but have not yet ratified it.⁸²⁶ The European Commission expects more signatures and ratifications over the coming months, and in March 2016 it proposed that the EU accede to the Istanbul Convention.⁸²⁷

Articles 60 and 61 of the Convention are dedicated to asylum. The Convention requires States Parties to interpret the Refugee Convention in a gender-sensitive way and to provide gender-sensitive reception conditions, support services and asylum procedures. More specifically, Article 60(1) of the Istanbul Convention calls upon the States Parties to 'take the necessary legislative and other measures to ensure that gender-based violence against women may be recognized as a form of persecution within the meaning of article 1, A (2), of the 1951 Convention relating to the Status of Refugee and as a form of serious harm giving rise to complementary/subsidiary protection.' The explanatory report to the Convention criticises the 'gender blindness' of asylum law, which has prevented asylum systems from grasping 'why and how' women experience persecution.⁸²⁸ The CoE considers that Article 60(1)

⁸²⁴ Committee on the Elimination of Discrimination against Women, General Recommendation No 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, CEDAW/C/GC/32, 14 November 2014.

⁸²⁵ Council of Europe Parliamentary Assembly, Recommendation 1374 on the Situation of Refugee Women in Europe, 20 May 1998, para 5.

⁸²⁶ Member States that have ratified are Austria, Belgium, Denmark, Finland, France, Italy, Malta, Netherlands, Poland, Portugal, Slovenia, Spain, and Sweden. Member States that have signed but not yet ratified are Bulgaria, Czech Republic, Croatia, Cyprus, Estonia, Germany, Greece, Hungary, Ireland, Lithuania, Luxembourg, Romania, Slovakia, and United Kingdom. Latvia has not signed the Convention.

⁸²⁷ European Commission, Proposal for a Council Decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence, [2016] COM(2016) 109 final, and Proposal for a Council decision on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence, COM(2016) 111 final, 4 March 2016.

⁸²⁸ Council of Europe, Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence [2011].

consecrates what is already a practice, but that it has the added value of including the obligation of States Parties to recognise that gender-specific violence may amount to persecution and that gender-based violence may constitute serious harm giving the right to international protection, not necessarily under the Refugee Convention but under other international and regional standards such as the ECHR and the EU instruments.⁸²⁹

Article 60(2) requires the States Parties to ensure a gender-sensitive interpretation of each of the Convention grounds for refugee status and to ensure that when there is persecution the applicants shall be granted refugee status. The explanatory report clarifies that '[e]nsuring a gender-sensitive interpretation implies recognising and understanding how gender can have an impact on the reasons behind the type of persecution or harm suffered.'⁸³⁰ The CoE has been concerned that gender-based violence is often seen to fall within the ground of 'membership of a particular social group', and other grounds are taken less into account in relation to gender-related claims. Persecution on grounds of race or nationality, in the examples given in the explanatory report, may present specific forms when directed against women, for example in sexual violence and control of reproduction in cases of racial and ethnic cleansing. Also, persecution on the grounds of religion and on the grounds of political opinion, as already mentioned, might be applicable if interpreted in a gender-sensitive manner to the cases where women suffer serious harm for not conforming to religious norms or for opposing traditional gender roles or harmful cultural practices.

Article 60(3) of the Istanbul Convention contains several additional obligations. It calls upon the States Parties to take all the necessary legislative or other measures to develop gender-sensitive reception procedures and support services for asylum-seekers. In the explanatory report, examples of gender-sensitive reception procedures include the early identification of victims of violence, support services for violence survivors such as crisis counselling and medical care, separate accommodation and toilet facilities, lockable rooms and adequate lighting.⁸³¹ Furthermore, this provision demands that States Parties develop and implement gender guidelines as an essential reference point for relevant actors to understand how to carry out their duties in a gender-sensitive manner. Equally important procedures governing refugee status determination should be revised to improve gender bias. For example, the opportunity for women to have a personal interview separately and without the presence of family members, the opportunity for women to raise independent needs for protection leading to a separate application, the elaboration of gender guidelines on the adjudication of asylum claims, gender-sensitive interviews with trained interviewers, and the possibility of having interviewers and interpreters of the same sex as the applicant.

Nevertheless, it must be noted that the case law of the ECtHR is ambivalent towards gender perspectives on the interpretation of persecution, and does not seem particularly prone to support obligations such as

⁸²⁹ Council of Europe, Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence [2011].

⁸³⁰ Council of Europe, Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence [2011].

⁸³¹ Council of Europe, Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence [2011].

those stemming from Article 60(1) of the Istanbul Convention. Such obligations expand the protection that might be afforded to victims of gender-based violence, adding to the possibilities under the Refugee Convention those which establish the obligation to ensure that gender-based violence may be recognised as a form of serious harm giving rise to international protection under regional standards such as the ECHR. In fact, whereas its case law consistently defines forms of gender persecution such as FGM, trafficking or forced marriage as serious violations of human rights, many women whose claims on those grounds had not been recognised by Member States and were to be expelled back to their countries have been met with inadmissibility decisions in Strasbourg based on the possibilities of ‘internal flight’, that is, to find protection in another part of their country of origin.⁸³²

3. The EU

The EU asylum normative framework and policy is based on Articles 67(2) and 78 of the TFEU and on Article 18 of the EU Fundamental Rights Charter. As mentioned earlier, the TFEU establishes that adopted measures must be in accordance with the Refugee Convention.⁸³³ In a similar manner to the general public international law framework, the EU’s recognition of the right to asylum does not specifically mention gender as a possible persecutory ground.⁸³⁴ Certainly, as was argued concerning general international law instruments, European provisions are also to be read in conjunction with other articles in the treaties or in the EU Fundamental Rights Charter establishing prohibitions of discrimination, such as Article 23 of the EU Fundamental Rights Charter which addresses discrimination between women and men.

The stated objective in developing the CEAS was to harmonise asylum procedures in the Member States by establishing a common understanding of who qualifies as a beneficiary of international protection and the content of the protection granted. It is beyond the aim of this case study to assess whether this harmonisation has been obtained in general. In relation to the more limited case of gender persecution against women, existing instruments of the CEAS are considered weak in terms of recognising both gender persecution and gendered forms of persecution⁸³⁵ and have not managed to curb remarkable differences in Member States’ authorities’ interpretation and assessment of gender-related asylum claims. The recast Asylum Directives have nonetheless improved gender-related issues as compared to the original set of Directives. References to gender can be found in the Qualifications Directive,⁸³⁶ in the Reception

⁸³² For example, the Court has declared inadmissible cases regarding female genital mutilation, such as *Collins and Akaziebie v Sweden* (ECtHR 8 March 2007); *Izevbekhai et al. v Ireland* (ECtHR 17 May 2011); *Omeredo v Austria* (ECtHR 20 September 2011) or cases regarding trafficking or the risk of re-trafficking such as *V.F. v France*, (ECtHR 29 November 2011); *Idemugia v France* (ECtHR 27 March 2012) and *F.A. v the United Kingdom* (ECtHR 10 September 2013).

⁸³³ Article 78 TFEU.

⁸³⁴ Article 78(1) TFEU and article 18 of the EU Charter of Fundamental Rights.

⁸³⁵ Hana Cheikh Ali, Christel Querton and Elodie Soulard, ‘Gender related asylum claims in Europe: A comparative analysis of law, policies and practice focusing on women in nine EU Member States’, Study commissioned by the European Parliament [2012], 18.

⁸³⁶ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform

Conditions Directive,⁸³⁷ and in the Procedures Directive.⁸³⁸ Also, the 2011 Directive on preventing and combating trafficking in human beings⁸³⁹ must be noted, because according to the UNHCR women and girls account for 80% of the victims of human trafficking.

In general, the asylum-related directives show a concern both for the specific needs of survivors of sexual and gender-related violence and for the heightened risk of women and girl refugees to be subjected to sexual and gender-based violence in transit situations or reception centres.⁸⁴⁰ These two issues are strongly signalled by references to 'vulnerability'. For example, Chapter IV of the Reception Conditions Directive is entitled 'Provisions for vulnerable persons', and as a general principle makes it obligatory for Member States to 'take into account the specific situation of vulnerable persons'⁸⁴¹ when transposing the Directive and to make an assessment of the special reception needs of vulnerable applicants.⁸⁴² Article 21 of the Directive contains a non-exhaustive list of vulnerable persons: minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders, and persons who have been subjected to torture, rape, or other serious forms of psychological, physical or sexual violence, such as victims of FGM. Article 18 requires the state to take into account gender- and age-specific needs and the situation of vulnerable persons in deciding accommodation arrangements in reception centres. Also, the Asylum Procedures Directive contains provisions recognising the special procedural guarantees that might be needed for, among others, survivors of rape and other forms of psychological, physical or sexual violence.⁸⁴³ One such guarantee is established in Article 11(3) which allows for separate decisions to be issued when a single decision covering one applicant and all dependants would disclose particular circumstances of, for example, gender-based persecution that could jeopardise the interests of the applicant. Finally, the Qualification Directive, in relation to the content of international protection, directs the Member States to take into account, as a general rule, 'the specific situation of vulnerable persons such as [...] victims of trafficking [...] and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.'⁸⁴⁴

In relation to the specific question of this case study, that is, the determination of refugee status, the Recast Qualification Directive addresses some of the perceived shortcomings of its predecessor, but the

status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 (Qualification Directive).

⁸³⁷ Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L180/96 (Reception Conditions Directive).

⁸³⁸ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60 (Procedures Directive).

⁸³⁹ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

⁸⁴⁰ Reception Conditions Directive, Article 18(4): Member States shall take appropriate measures to prevent assault and gender-based violence, including sexual assault and harassment, within the premises and accommodation centres.

⁸⁴¹ Reception Conditions Directive, Article 21.

⁸⁴² Reception Conditions Directive, Article 22(1).

⁸⁴³ Asylum Procedures Directive, Recital 29.

⁸⁴⁴ Qualification Directive, Article 20.

recast process lost the opportunity to introduce some suggestions made by international organisations⁸⁴⁵ which would have provided a consistent gender-perspective to EU asylum law and made national authorities' decisions on gender-related asylum claims more coherent across the Union. For example, the Recast Directive has failed to add a specific reference to equality between women and men (Article 23 of the EU Fundamental Rights Charter) among the articles of the Charter introduced in Recital 16 which the Directive should promote and should be implemented accordingly.⁸⁴⁶ It has also disregarded the suggestion to introduce a specific recital on women, along the lines of Recital 18 in relation to the 'best interest of the child', which would 'permit a more comprehensive consideration of the situation of women claiming asylum and better fulfil the obligations with regard to gender equality and the human rights of women (under EU and international law)'.

EU asylum law already recognises that acts of sexual violence, discriminatory measures or measures that are implemented in a discriminatory manner, prosecution or punishment which is disproportionate or discriminatory, denial of judicial redress resulting in disproportionate or discriminatory punishment, and acts of a gender-specific or child-specific nature qualify as acts of persecution.⁸⁴⁷ The Recast Directive has introduced amendments in relation to the reasons for persecution, the causal link between acts of persecution and reasons for persecution, and the notion of protection. In relation to the reasons for persecution, the Directive has introduced an explicit reference to gender in Article 10(1)(d) concerning the interpretation of 'particular social group': 'gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group'. In the Recital it was explained that gender-related issues might arise from legal traditions or customs, and genital mutilation, forced sterilisation or forced abortions were presented as examples.⁸⁴⁸ International organisations had suggested, in accordance with the UNHCR Guidelines and the recommendation by the Committee on the Elimination of Discrimination against Women, that the gender perspective should reach the other Convention grounds. In particular, a suggestion was made to complete the instruction on the interpretation of 'political opinion' in Article 10(1)(e) with the sentence 'The concept of political opinion should also be interpreted to encompass transgression of gendered social norms or laws'.⁸⁴⁹

The Directive has also clarified and improved the idea of the causal link between persecution and the reasons for persecution. Both in Recital 29 and in Article 9(3) it has been established that the connection

⁸⁴⁵ European Women's Lobby (EWL), Asylum Aid and ILGA Europe, Proposal for amendments on the 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 national or stateless persons as beneficiaries of the international protection and the content of the protection granted (recast), 15 September 2010 <http://www.asylumaid.org.uk/wp-content/uploads/2013/02/EWL_Asylum_Aid_ILGA_Europe_amendments_qualification_directive_15092010_EN_final.pdf>.

⁸⁴⁶ Recital 16 has introduced the specific reference to Articles 1, 7, 11, 14, 15, 16, 18, 21, 24, 34 and 35 of the Charter.

⁸⁴⁷ Qualification Directive, Article 9(2).

⁸⁴⁸ Qualification Directive, Recital 30.

⁸⁴⁹ European Women's Lobby (EWL), Asylum Aid and ILGA Europe, Proposal for amendments on the 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 national or stateless persons as beneficiaries of the international protection and the content of the protection granted (recast), 15 September 2010.

must be between the reasons and either the act of persecution *or the absence of protection against such acts*. This might help victims of domestic violence claiming asylum, for example, because it is easier to demonstrate that the lack of protection is based on discriminatory laws or attitudes within the law-enforcing system than to establish the causal nexus in the husband's actions.⁸⁵⁰

Regarding this notion of protection, the Directive has introduced two changes. First, it has controversially maintained from the previous version that international organisations and other non-state actors can be actors of protection, but it has added the requirements that 'they are willing and able to offer protection in accordance to paragraph 2',⁸⁵¹ and that '[p]rotection against persecution or serious harm must be effective and of a non-temporary nature'.⁸⁵² The Commission has been called on to eliminate non-state actors from protection actors, arguing that they are not accountable under human rights mechanisms and that the protection they offer might be limited in duration and scope (or even expose women to risks of exploitation).⁸⁵³ Doubt has arisen on the impact of the new requirements for protection to be effective when the old notion of protection has been made to follow as an explanation of what is effective and non-temporary protection, thus leaving the elements that made the earlier definition of protection unclear and not particularly demanding in the text: protection will 'generally' be deemed effective and non-temporary if 'reasonable steps' are taken by actors of protection to prevent the persecution or the suffering of serious harm, for example, if there is a legal system for prosecuting those acts and the applicant has access to it.⁸⁵⁴ Fears have also been expressed that national authorities use restrictive interpretations, in particular regarding whether or not the victim of the persecution could expect any protection from their state, thus dismissing the well-founded fear of persecution.⁸⁵⁵

Secondly, the Directive has also amended the notion of 'internal protection'. Since this notion has had a disparate impact on women making gender-related persecution asylum claims,⁸⁵⁶ its improvement was considered necessary to make EU law compliant with non-discrimination obligations. Member States may determine that an applicant is not in need of international protection if there is the possibility of protection in a part of the country of origin. The 2004 Directive established that this possibility only existed

⁸⁵⁰ European Women's Lobby (EWL), Asylum Aid and ILGA Europe, Proposal for amendments on the 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 national or stateless persons as beneficiaries of the international protection and the content of the protection granted (recast), 15 September 2010.

⁸⁵¹ Qualification Directive, Article 7(1).

⁸⁵² Qualification Directive, Article 7(2).

⁸⁵³ European Women's Lobby, Asylum Aid and ILGA Europe, Proposal for amendments on the 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 national or stateless persons as beneficiaries of the international protection and the content of the protection granted (recast), 15 September 2010.

⁸⁵⁴ Qualification Directive, Article 7(2).

⁸⁵⁵ Hana Cheikh Ali, Christel Querton and Elodie Soulard, 'Gender related asylum claims in Europe: A comparative analysis of law, policies and practice focusing on women in nine EU Member States', Study commissioned by the European Parliament [2012].

⁸⁵⁶ See above note 833. Also European Women's Lobby, Asylum Aid and ILGA Europe, Proposal for amendments on the 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 national or stateless persons as beneficiaries of the international protection and the content of the protection granted (recast), 15 September 2010.

if ‘in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country’.⁸⁵⁷ The Recast Directive has introduced some requirements to this possibility: that the applicant can safely and legally travel to and gain admittance to that part of the country, that she can reasonably be expected to settle, and not just stay, there, and that in deciding whether there is no risk of persecution or harm in that part of the country the Member States obtain precise and up-dated information from relevant sources, such as the UNHCR and the EASO.⁸⁵⁸

An important issue regarding gender-related persecution is addressed in the directive establishing minimum standards on the rights, support and protection of victims of crime.⁸⁵⁹ Article 25(1) of the Directive requires the training of all officials likely to come into contact with victims of gender-based violence, including asylum staff in reception centres as well as decision-makers and interviewers. Besides training, staff making decisions on asylum claims may avail themselves of experts on a number of issues, including gender issues.⁸⁶⁰ The UNHCR has advised the European Asylum Support Office (EASO) on its proposed training module on gender and sexual orientation and on gender mainstreaming in existing modules. In particular, it has emphasised the importance of enhancing the gender-sensitive nature of country of origin information.⁸⁶¹

C. Assessments regarding coherence and vulnerability

Assessments regarding coherence and vulnerability constitute the focus of this report and a main objective of the FRAME project. In the particular case of asylum claims based on gender persecution and gender violence, the results are worrying as regards several aspects. There have been several significant advances regarding the understanding of violence against women as a serious form of human rights violation, and there is a growing acknowledgement of victims of gender violence as being deserving of state and international protection. Growing attention in international law and human rights law towards the plight of sexual and gender-based violence has also produced effects in relation to asylum and refugee protection. There are an increasing number of moments of the asylum-seeking process, both in relation to conditions and procedures, where Member States are required by international and EU norms to take gender into account. However, there is a range of limitations and pending issues.

⁸⁵⁷ 2004 Qualification Directive, Article 8(1).

⁸⁵⁸ Qualification Directive, Article 8.

⁸⁵⁹ Directive 2012/95/EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (Directive on the rights of victims of crime), 25 October 2012.

⁸⁶⁰ Asylum Procedures Directive, Article 10(3).

⁸⁶¹ UNHCR, Position Paper on Violence against women and girls in the European Union and persons of concern to UNHCR, PC.DEL/824/14, 9 July 2014, 6.

1. Coherence issues

Since 1999, the EU has been working to create the CEAS and harmonise EU asylum legislation. However, as highlighted in a recent draft report published by the European Parliament,⁸⁶² there is not such harmonisation in gender-related asylum claims: law, policy and practice in Member States continue to vary significantly, and there is a noticeable gap in the protection given to women seeking asylum in the EU.

A study commissioned by the European Parliament in 2012 found that there are vast and worrying disparities in the way different EU States handle gender-related asylum claims, as a result of which, 'women are not guaranteed anything close to consistent, gender-sensitive treatment when they seek protection in Europe.'⁸⁶³ The study points out several sources for the lack of consistency. Firstly, there are no EU-wide guidelines, despite the importance of such guidelines if harmonised gender-sensitive asylum systems and procedures are to be achieved across Europe. The UNHCR 2002 Guidelines are not followed, not even by the Qualification Directive, as has been seen. Many EU Member States have adopted their own gender guidelines, but research has concluded that their effectiveness has been partial and uneven, since they are not always binding.⁸⁶⁴ Several EU Member States have not yet signed and ratified the Istanbul Convention, which explicitly requires States Parties to interpret the Refugee Convention grounds in a gender-sensitive way and to provide gender-sensitive reception conditions, support services and asylum procedures. The Recast Directive has lost an opportunity to give strong guidelines to the Member States as to what kinds of harm constitute gender-related persecution, putting an end to existing differences among national asylum authorities' practices.⁸⁶⁵ Secondly, although EU Member States have a legal and binding obligation to collect and publish gender-disaggregated data in relation to asylum statistics, only Belgium, Sweden and the UK comply with this obligation.⁸⁶⁶ Without accurate and reliable statistic data on gender-persecution and gender-based violence asylum claims it is very difficult to assess the phenomenon and the response that is being made by European asylum systems, and it is similarly difficult to identify shortcomings regarding the latter or to make recommendations for improvement.

⁸⁶² European Parliament, Committee on Women's Rights and Gender Equality, Draft Report on the situation of women refugees and asylum seekers in the EU (2015/0000(INI)), 16 November 2015, Rapporteur Mary Honeyball.

⁸⁶³ Hana Cheikh Ali, Christel Querton and Elodie Soulard, 'Gender related asylum claims in Europe: A comparative analysis of law, policies and practice focusing on women in nine EU Member States', Study commissioned by the European Parliament [2012].

⁸⁶⁴ Hana Cheikh Ali, Christel Querton and Elodie Soulard, 'Gender related asylum claims in Europe: A comparative analysis of law, policies and practice focusing on women in nine EU Member States', Study commissioned by the European Parliament [2012].

⁸⁶⁵ Hana Cheikh Ali, Christel Querton and Elodie Soulard, 'Gender related asylum claims in Europe: A comparative analysis of law, policies and practice focusing on women in nine EU Member States', Study commissioned by the European Parliament [2012].

⁸⁶⁶ Hana Cheikh Ali, Christel Querton and Elodie Soulard, 'Gender related asylum claims in Europe: A comparative analysis of law, policies and practice focusing on women in nine EU Member States', Study commissioned by the European Parliament [2012].

As a result, progress is considered to remain piecemeal and rather arbitrary, depending to a great extent on national asylum authorities and the discretionary power they enjoy.⁸⁶⁷ Differences in the protection afforded to asylum applicants making gender-persecution claims are also attributed to the views and capacity to influence of NGOs and associations supporting asylum-seekers.⁸⁶⁸ This is considered insufficient to overcome the gender bias that is still present in asylum law and process which has been discussed above. Incoherence among national asylum authorities' decisions regarding gender persecution and gender-based violence claims does not only pose a problem to the objective of the CEAS and to the effective functioning of the Dublin system (that is, if there are disparities regarding the approach to gender-related asylum claims, asylum seeking victims of gender persecution will try to lodge their claims where they might be met with less gender biases and prejudice) – more importantly for the present discussion, it renders victims of gender persecution vulnerable in many ways. Incoherent decisions mean that some states, or all of them in relation to different gender-related issues, do not hold a gender perspective on asylum claims; such a perspective can ensure that women's applications are treated in a fair manner, free from discrimination. As has been discussed at length in the Introduction (Chapter I), vulnerable persons become so when they lose, fail to acquire or are deprived of assets (social, institutional, etc.) on which their resilience to risks and harm is built. For victims of gender persecution, asylum and refugee status is one of those assets: it serves exactly the purpose of protecting them from continuing danger and exposure to risk. When asylum systems fail to understand and protect gender persecution victims because they fail to adopt a gender perspective which they are called upon to use they render these women and girls vulnerable.

2. Vulnerability

Supporting the idea raised in the Introduction that the notion of vulnerability under the EU legal system is not yet matured, one of the most worrying findings in the assessment of the EU asylum system in relation to gender persecution cases is that international and EU normative frameworks do not seem to notice the differentiated perspectives on vulnerability. As has been seen, vulnerability language is systematically associated with the identification of special needs and the provision of specific protection measures. The 'group-based' characterisation of vulnerability seems mitigated because all the references in the Directives refer to vulnerable *persons*; however, this is due to the intention to emphasise the individual character of asylum claims assessments. In fact, the UNHCR 2002 Guidelines felt it incumbent upon them to clarify that the introduction of 'gender' among the characteristics to be taken into account

⁸⁶⁷ Hana Cheikh Ali, Christel Querton and Elodie Soulard, 'Gender related asylum claims in Europe: A comparative analysis of law, policies and practice focusing on women in nine EU Member States', Study commissioned by the European Parliament [2012].

⁸⁶⁸ Jane Freedman, *Gendering the international Asylum and Refugee Debate* (Palgrave Macmillan 2015), 77.

did not mean that all women were entitled to claim asylum.⁸⁶⁹ It would appear that beyond this specificity of asylum-related language the approach to vulnerable persons in the EU asylum *acquis* fits with group-based approaches to vulnerability very well. Persons from vulnerable groups have special needs and need special protections which set them apart from ‘normal’ procedures and conditions. In the case of women victims of sexual or gender-related violence this approach is identified as ‘gender-sensitive’. Analysing the introduction of gender-sensitive approaches, Pickering comments that:

[s]ensitivity suggests a need for compassion, for kindness [...]. While sensitivity is to be commended, perhaps even encouraged, women are not being turned away at borders, or having their cases rejected by primary decision-makers because decision-makers are simply insensitive. They are turned away because, in particular, initial decision-makers have been inaccurate and discriminatory in their decisions and have located themselves, their government and the woman applicant at a far distance from human rights.⁸⁷⁰

Restricting vulnerability to ‘special needs’ assessments shifts the focus away from the ways in which decision-making processes (including racialised stereotypes about what constitutes ‘true’ gender persecution⁸⁷¹) are gender-biased or discriminatory. It is not being argued here that those assessments and specifications in the procedures are useless or wrong. In fact, as was explained in the Introduction, one of the persisting advantages of the notion of vulnerability is that of directing attention to where it is most needed. Yet these vulnerability assessments should be placed within a wider structural approach to vulnerability that allows for consideration of the ways in which asylum systems contribute to the vulnerabilisation of those women by denying them the resource of international protection.

Current language on gender-related issues and vulnerability of women victims of gender-based violence ‘should alert us to what seems to be [an] ongoing discomfort with gender’.⁸⁷² The reluctance of the European institutions to take on board suggestions regarding the inclusion of gender equality or a more comprehensive gender-perspective in the interpretation of the established grounds aims at containing gender to specific moments, thus individualising and minimising its relevance. This tendency to understand gender violence as ‘exceptional’, an individual occurrence rather than the result of one of the most powerful systems of social hierarchies, has long been studied in other areas of gender violence.⁸⁷³ The main impact is precisely the vulnerabilisation of victims because the problem of gender-based

⁸⁶⁹ UNHCR, Guidelines on International Protection No 1: Gender-related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/01, 7 May 2002.

⁸⁷⁰ Sharon Pickering, ‘Gender Persecution: A response to the UNHCR Guidelines’ in *Stemming the Tide or Keeping the Balance: The Role of the Judiciary* (International Association of Refugee Law Judges 2002).

⁸⁷¹ Sharon Pickering, ‘Gender Persecution: A response to the UNHCR Guidelines’ in *Stemming the Tide or Keeping the Balance: The Role of the Judiciary* (International Association of Refugee Law Judges 2002).

⁸⁷² Sharon Pickering, ‘Gender Persecution: A response to the UNHCR Guidelines’ in *Stemming the Tide or Keeping the Balance: The Role of the Judiciary* (International Association of Refugee Law Judges 2002).

⁸⁷³ ‘Exceptionalism’ in international law responses to gender violence. See, Alice Edwards, ‘Violence against Women as Sex Discrimination: Judging the Jurisprudence of the United Nations Human Rights Treaty Bodies’ (2008) 18 *Texas Journal of Women, Gender, and the Law* 101.

violence is contained through denying its existence as a structural problem.⁸⁷⁴ The concept of vulnerability as developed in the Introduction leads, on the contrary, to a shift in attention to the institutional and social context and to those institutions and structures that should be responsive to different degrees of vulnerability.

As regards issues where vulnerability language is pervasive, the problem of a superficial analysis of what it is that renders refugee women and girls vulnerable remains. The problem on which international organisations and institutions are more ready to speak in terms of vulnerability is that of sexual and gender-based violence against refugee women and girls in transit situations or reception places. The draft report of the European Parliament observed that '[t]he increasing numbers of women who do flee are vulnerable at all stages of their journeys; in countries of origin, transit and destination. As well as being a key driver behind women's decisions to flee, gender-based violence is a common feature throughout journeys to and within the EU.'⁸⁷⁵ Also, the UNHCR has highlighted that '[f]orced displacement and exile bring about changes in gender roles that may lead to new and/or renewed domestic violence in refugee families, and those women and girls whose legal status depends on that of their spouses or fathers/guardians find themselves in a situation of greater vulnerability when facing violence in the family.'⁸⁷⁶ Assessments of vulnerability in these terms require state asylum systems to introduce mechanisms which are important both for victims and for preventing (further) victimisation, such as early detection training, victim support services, or special accommodation needs. However, interviews with victims reveal that many women will endure anything in order to continue their journey, to escape and find a safe place for themselves and their children, and to avoid secondary victimisation (becoming socially marginalised or further persecuted because they have been raped or have engaged in exchange sex with smugglers, for example).⁸⁷⁷ In all of these cases victims might 'contribute' to their own vulnerability because protection systems are putting the burden of protection on the shoulders of victims and not on the system. The conditions in which refugee women and girls must gain access to international protection (through dangerous channels, illegal procedures, criminal networks, and arbitrary and incoherent asylum determination systems) diminish their ability to seek protection from sexual and gender-based violence. Asylum systems offer some 'special protection' mechanisms for individual vulnerable women victims of sexual violence but, at the same time, the European asylum policy contributes greatly to the creation of the conditions for their arrival and within Europe which make them less resilient and less endowed with real access to 'normal' protection mechanisms.

⁸⁷⁴ The denial of the problem has many sides to it, from disparities and absences in the list of types of harm that might entail gender persecution to credibility problems in women's claims assessments or ignoring personal risks in favour of official 'safe country' lists.

⁸⁷⁵ European Parliament, Committee on Women's Rights and Gender Equality Draft Report on the situation of women refugees and asylum seekers in the EU (2015/0000(INI)), 16 November 2015, Rapporteur Mary Honeyball.

⁸⁷⁶ UNHCR, Position Paper on Violence against women and girls in the European Union and persons of concern to UNHCR, PC.DEL/824/14, 9 July 2014.

⁸⁷⁷ Women's Refugee Commission, *No Safety for Refugee Women on the European Route: Report from the Balkans* [2016] <<https://www.womensrefugeecommission.org/gbv/resources/1265-balkans-2016>>.

VI. Economic and social rights and integration: The case of low-paid third-country migrant workers in Ireland (Author: Graham Finlay)

A. Introduction

Unskilled and low-paid third-country national migrant workers are a neglected vulnerable group. This is for a number of reasons, not least the conflicting understandings of integration between the EU's official pronouncements and the policies of member states, including Ireland. But it may also be because low-paid third-country workers may not fit easily into what might be described as 'identity-based' understandings of vulnerable groups. Although many of the persons of concern may be vulnerable because they are women, dependents and children of migrant workers or simply because they are migrant workers, much of their vulnerability is the result of the policies and structures that lead them to be low-paid, not least their segregation in industries that are characterised by low pay and risk of exploitation. Accordingly, particular employment-based measures will be required to prevent discrimination and to promote individuals' agency, as will be seen in the policy recommendations that conclude this case study. More generally, in this case study, we examine how a neglect of unskilled and/or low-paid migrant workers' social and economic rights hampers their integration and suggest what a human and fundamental rights-based policy would look like.

1. Low-paid third-country migrant workers in Ireland

It is difficult to identify the number of unskilled third-country migrant workers in Ireland. Nationals of countries outside the European Economic Area (non-EEA nationals) tend to be concentrated in particular industries characterised by low pay, including hospitality, retail, health-related services (excluding nursing, which has a significant number of third-country nationals who are not low paid, but also do not earn enough to qualify for an EU 'Blue Card' or the former Irish 'Green Card') and domestic labour.⁸⁷⁸ In Ireland and in the Organisation for Economic Cooperation and Development (OECD) as a whole, migrants are often overqualified for the jobs they do.⁸⁷⁹ For this reason, recognition of their qualifications will be an important aspect of integration and is a potential candidate for an economic and social right, if only as a product of non-discrimination. In what follows, I focus on low-paid workers rather than 'unskilled'

⁸⁷⁸ Migrant Rights Centre Ireland, 'All Work and Low Pay: The Experience of Migrants Working in Ireland' [2015] <<http://www.mrci.ie/wp-content/uploads/2015/11/MRCI-All-Work-and-Low-Pay.pdf>> accessed 15 February 2016, 2.

⁸⁷⁹ Migrant Rights Centre Ireland, 'All Work and Low Pay: The Experience of Migrants Working in Ireland' [2015] <<http://www.mrci.ie/wp-content/uploads/2015/11/MRCI-All-Work-and-Low-Pay.pdf>> accessed 15 February 2016, 2.

workers, because, as will be explained below, low-pay is the most important factor in their integration or lack of it.

Although it is difficult to identify low-paid migrant third-country workers, there are some indications of the numbers of low-paid third-country nationals working legally in Ireland and current trends regarding the size of this group. Work permit holders, who typically work in unskilled/poorly paid work, have declined dramatically during Ireland's economic crisis, from 7,271 in 2010 (two years into the crisis) to 3,863 in 2013, the latest year for which statistics are available.⁸⁸⁰ The number of non-EU nationals migrating to Ireland has increased dramatically with Ireland's recovery, however, with approximately 4,700 more in 2013 than in 2012.⁸⁸¹ There were 20,461 'live' residence permissions held by non-EEA nationals for 'work-related reasons' in 2012, a number that includes highly-skilled workers, but excludes students and dependent family members of migrant workers with work permits.⁸⁸² There are a small number of people who have received some form of protection status, with 1,963 'live' residence permissions based on 'protection-related reasons' at the end of 2012.⁸⁸³ Finally, it has been estimated that the number of irregular migrants in Ireland is between 20,000 and 26,000.⁸⁸⁴ For all these reasons, we will primarily examine the role that social and economic rights play in the integration or non-integration of low-paid migrant workers by categories of status rather than in terms of numbers and outcomes. In many cases, this is because complete data is not available. For example, migrant-specific data is not provided in the Low Pay Commission's recent report on the minimum wage.⁸⁸⁵

2. Low-paid workers in Ireland as members of vulnerable groups

Using the conception of vulnerability developed in this report, low-paid migrant workers in Ireland are a vulnerable group in themselves and members of other vulnerable groups. They are particularly likely to have their human rights violated, unprotected or unfulfilled, to experience discrimination or to suffer from

⁸⁸⁰ The Integration Centre, 'Annual Monitoring Report on Integration 2013' [2014] <<http://www.integrationcentre.ie/getattachment/44e6237a-4a01-4234-99fe-b2d82ecedfe7/Annual-Monitoring-Report-On-Integration-2013.aspx>> accessed 16 February 2016, 9.

⁸⁸¹ The Integration Centre, 'Annual Monitoring Report on Integration 2013' [2014] <<http://www.integrationcentre.ie/getattachment/44e6237a-4a01-4234-99fe-b2d82ecedfe7/Annual-Monitoring-Report-On-Integration-2013.aspx>> accessed 16 February 2016, 6.

⁸⁸² The Integration Centre, 'Annual Monitoring Report on Integration 2013' [2014] <<http://www.integrationcentre.ie/getattachment/44e6237a-4a01-4234-99fe-b2d82ecedfe7/Annual-Monitoring-Report-On-Integration-2013.aspx>> accessed 16 February 2016, 9.

⁸⁸³ The Integration Centre, 'Annual Monitoring Report on Integration 2013' [2014] <<http://www.integrationcentre.ie/getattachment/44e6237a-4a01-4234-99fe-b2d82ecedfe7/Annual-Monitoring-Report-On-Integration-2013.aspx>> accessed 16 February 2016, 11.

⁸⁸⁴ Migrant Rights Centre Ireland, 'Ireland is Home: An analysis of the current situation of undocumented migrants in Ireland' [2014] <http://www.mrci.ie/wp-content/uploads/2014/11/MRCI_policy-paper_FINAL.pdf> accessed 16 February 2016, 1.

⁸⁸⁵ Low Pay Commission, 'Recommendations for the Minimum Wage' [2015] <<http://www.lowpaycommission.ie/publications/national-minimum-wage-/recommendations-of-the-low-pay-commission-for-the-national-minimum-wage-2015-.pdf>> accessed 12 March 2016, 31, note 17.

poverty, marginalisation or social exclusion. Low-paid migrant workers or their family members have been identified as members of vulnerable groups by a number of treaty bodies in their reports on Ireland or by Irish stakeholders in their submissions to treaty bodies. So the UN Committee on Economic, Social and Cultural Rights heard from stakeholders that asylum seekers in direct provision constituted a vulnerable group because they were denied their 'independent means of subsistence'.⁸⁸⁶ This included the effects of deskilling from the long time spent in the direct provision system and the resulting inability to enter the job market.⁸⁸⁷ This clearly has an impact on the integration of asylum seekers who have been given some form of protection. Another group 'expressed concern' over the rights of 'undocumented workers'.⁸⁸⁸ 'Undocumented' here means any migrant without regular or legal status. Many of them may have once been legally resident in Ireland but have fallen into irregular status for a variety of reasons, including Irish employment policies, some of which have been reformed (see below).

When it came to unemployment, migrants were one of the groups identified as suffering the most from unemployment and the resulting disadvantage.⁸⁸⁹ In particular, one stakeholder identified the threat that new employment legislation posed to 'migrant workers in low paid employment' and called for a system which would allow migrants with work permits to freely change employers.⁸⁹⁰ The effects of the Habitual Residence Condition for social benefits on migrant workers was also noted, especially the threat that it might lead individuals to remain in exploitive conditions through lack of access to social supports.⁸⁹¹

⁸⁸⁶ Committee on Economic, Social and Cultural Rights, Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: Ireland, E/C.12/IRL/3, 8 November 2013, 119, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fIRL%2f3&Lang=en> accessed 26 February 2016.

⁸⁸⁷ Committee on Economic, Social and Cultural Rights, Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: Ireland, E/C.12/IRL/3, 8 November 2013, 121, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fIRL%2f3&Lang=en> accessed 26 February 2016.

⁸⁸⁸ Committee on Economic, Social and Cultural Rights, Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: Ireland, E/C.12/IRL/3, 8 November 2013, 119, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fIRL%2f3&Lang=en> accessed 26 February 2016.

⁸⁸⁹ Committee on Economic, Social and Cultural Rights, Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: Ireland, E/C.12/IRL/3, 8 November 2013, 121, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fIRL%2f3&Lang=en> accessed 26 February 2016.

⁸⁹⁰ At the time, employees were tied to employers for the duration of the work permit. In recent reforms, discussed below, this has been reduced to one year. Committee on Economic, Social and Cultural Rights, Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: Ireland, E/C.12/IRL/3, 8 November 2013, 121, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fIRL%2f3&Lang=en> accessed 26 February 2016.

⁸⁹¹ Committee on Economic, Social and Cultural Rights, Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: Ireland, E/C.12/IRL/3, 8 November 2013, 122, 125,

Migrant women are especially vulnerable because they often experience multiple discriminations and are disproportionately in lower-paid employment.⁸⁹² Access to education and the high fees paid by non-EU migrants for third level education was a concern for asylum-seekers, work permit holders and irregular migrants.⁸⁹³

In the Committee on the Elimination of Discrimination against Women's latest report on Ireland, unfortunately from 2003, the Committee notes that the National Anti-Poverty Strategy identifies migrants as particularly vulnerable to poverty.⁸⁹⁴ The Committee's 'Concluding Comments' of 2005 also conclude that migrant women are a vulnerable group and is especially concerned that these vulnerable women are 'at high risk of poverty and social exclusion'.⁸⁹⁵ The Committee was 'particularly concerned at the barriers faced by those vulnerable groups in relation to access to education, employment, health care and other social services.'⁸⁹⁶ Further,

The Committee recommends that the State party closely monitor the situation of poverty and social exclusion of women in the most vulnerable groups and implement effective measures and training programmes that will allow them fully to enjoy the benefits of the State party's prosperity. The Committee also recommends that a gender impact analysis of all social and economic policies and anti-poverty measures be conducted regularly.⁸⁹⁷

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fIRL%2f3&Lang=en> accessed 26 February 2016.

⁸⁹² Committee on Economic, Social and Cultural Rights, Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: Ireland, E/C.12/IRL/3, 8 November 2013, 126,

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fIRL%2f3&Lang=en> accessed 26 February 2016.

⁸⁹³ Committee on Economic, Social and Cultural Rights, Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: Ireland, E/C.12/IRL/3, 8 November 2013, 129–130,

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fIRL%2f3&Lang=en> accessed 26 February 2016.

⁸⁹⁴ Committee on the Elimination of Discrimination against Women, Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women: Ireland, 10 June 2003, 16,

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fIRL%2f4-5&Lang=en> accessed 26 February 2016.

⁸⁹⁵ Committee on the Elimination of Discrimination against Women, Concluding comments: Ireland. 33rd Session, CEDAW/C/IRL/CO/4–5, 5–22 July 2005, 6
<<http://www.un.org/womenwatch/daw/cedaw/cedaw33/conclude/ireland/0545060E.pdf>> accessed 30 June 2011.

⁸⁹⁶ Committee on the Elimination of Discrimination against Women, Concluding comments: Ireland. 33rd Session, CEDAW/C/IRL/CO/4–5, 5–22 July 2005, 6
<<http://www.un.org/womenwatch/daw/cedaw/cedaw33/conclude/ireland/0545060E.pdf>> accessed 30 June 2011.

⁸⁹⁷ Committee on the Elimination of Discrimination against Women, Concluding comments: Ireland. 33rd Session, CEDAW/C/IRL/CO/4–5, 5–22 July 2005, 6
<<http://www.un.org/womenwatch/daw/cedaw/cedaw33/conclude/ireland/0545060E.pdf>> accessed 30 June 2011.

Of the various groups of migrant workers, the Committee was specifically concerned ‘about the precarious situation of migrant domestic workers, the vast majority of whom are women, who are excluded from the protection against discrimination extended to employees under the Equality Act, 2004.’⁸⁹⁸

The report of the Committee on the Elimination of Racial Discrimination also identified migrant workers as a vulnerable group in Ireland and noted the difficulty of measuring outcomes – also noted above – due to the lack of data and the ‘multi-dimensional nature of poverty and social exclusion’.⁸⁹⁹ In their identification of migrants as a vulnerable group, they note the ‘multiple discriminations experienced by these groups’.⁹⁰⁰ Among a variety of observations made by migrants’ rights groups, many concerned the limited mobility allowed under the work permit system, which might leave workers vulnerable to exploitation and lead to them falling into irregular status.⁹⁰¹ Migrant groups also explicitly addressed the importance of social integration to the enjoyment of economic and social rights by migrant workers, noting the shifting of funding from the Minister for Integration to local authorities, which might hinder the creation of ethnic organisations and the limited opportunities to learn English, which in turn might limit access to citizenship.⁹⁰² An inability to speak English hampers participation in the labour market and access to higher paid employment, while barriers to citizenship discourage migrant workers from participating in trade unions or civil society.

What is striking about the vulnerable groups identified by treaty bodies and Concluding Comments concerning third-country workers in Ireland is that they combine membership of the vulnerable groups usually identified in such documents with the fact of low pay. Being low-paid encompasses more people than members of these identity-based groups and needs to be addressed by active policies for labour market integration that allow migrant workers access to higher paid employment. All of the above reports from treaty bodies base their criticisms and recommendations on Ireland’s stated commitments to integration and inclusion or their absence. It is to Ireland’s conception of integration and its

⁸⁹⁸ Committee on the Elimination of Discrimination against Women, Concluding comments: Ireland. 33rd Session, CEDAW/C/IRL/CO/4–5, 5–22 July 2005, 6–7 <<http://www.un.org:/womenwatch/daw/cedaw/cedaw33/conclude/ireland/0545060E.pdf>> accessed 30 June 2011. This has been improved somewhat by Ireland’s ratification of the International Labour Organisation’s Convention 189 on Domestic Workers.

⁸⁹⁹ Committee on the Elimination of Racial Discrimination, Reports submitted by States parties under article 9 of the Convention: Ireland, CERD/C/IRL/3–4, 23 September 2010, 36 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fIRL%2f3-4&Lang=en> accessed 26 February 2016.

⁹⁰⁰ Committee on the Elimination of Racial Discrimination, Reports submitted by States parties under article 9 of the Convention: Ireland, CERD/C/IRL/3–4, 23 September 2010, 79 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fIRL%2f3-4&Lang=en> accessed 26 February 2016.

⁹⁰¹ Committee on the Elimination of Racial Discrimination, Reports submitted by States parties under article 9 of the Convention: Ireland, CERD/C/IRL/3–4, 23 September 2010, 81 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fIRL%2f3-4&Lang=en> accessed 26 February 2016.

⁹⁰² Committee on the Elimination of Racial Discrimination, Reports submitted by States parties under article 9 of the Convention: Ireland, CERD/C/IRL/3–4, 23 September 2010, 80–81 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fIRL%2f3-4&Lang=en> accessed 26 February 2016.

implementation to which we turn next and its situation in the EU's commitments to and discourse surrounding integration.

B. Integration

1. Generally on integration

'Integration' takes on many meanings and has been the subject of a variety of policy approaches. To some extent, it is the opposite of vulnerability, suggesting the absence of certain forms of marginalisation and exclusion. The successful integration of migrants – in various forms – promotes resilience as migrant workers can satisfy their economic and social rights in the labour market and can rely on the institutions of society in the face of threats to their well-being. In this section, I examine the contested notion of integration, focusing on labour market integration, and relate it to human rights, including the notion of integration developed by the ECtHR and in the international human rights system. I then examine the role of economic and social rights in integration more generally and describe the contradictory European policy context in which Ireland's approach to the integration of low-paid migrant workers operates.

Although in societies shaped by mass settler immigration, like the United States of America or Australia, 'integration' was long assumed to be 'assimilation', in contemporary theory integration is often opposed to assimilation. As Rainer Bauböck notes, 'integration [...] is generally defined as a two-way process of interaction between given institutions of a society and those who gain access that will also result in changing the institutional framework and the modes of societal cohesion.'⁹⁰³ In what follows, we will focus on labour market integration, but social and even political integration will also be discussed as they are promoted or hindered by labour market integration. Although the above understanding of integration holds out a vision of society in which migrants' rights are acknowledged and they take an active role in the reciprocal process of integration, in practice this often does not occur, especially for vulnerable groups like low paid workers and their families. Perhaps informed by the idea that they are simply 'guest workers' or by the desirability of 'circular migration' as emphasized in the EU's Global Approach to Migration and Mobility (GAMM), many low skilled workers are not expected to integrate and are, in the case of irregular migrants, vulnerable to deportation and to denial of their social and economic rights.⁹⁰⁴ Such

⁹⁰³ Rainer Bauböck, 'Introduction' in Rainer Bauböck (ed), *Migration and Citizenship: legal status, rights and political participation*, IMISCOE Report Series (Amsterdam University Press 2006), 11 <<http://www.imiscoe.org/publications/library/4-imiscoe-reports-series/65-migration-and-citizenship/>> accessed 1 March 2016.

⁹⁰⁴ Rainer Bauböck, 'Introduction', in Rainer Bauböck (ed), *Migration and Citizenship: legal status, rights and political participation*, IMISCOE Report Series (Amsterdam University Press 2006), 9 <<http://www.imiscoe.org/publications/library/4-imiscoe-reports-series/65-migration-and-citizenship/>> accessed 1 March 2016. For 'circular migration' in the GAMM, see European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The Global Approach to Migration and Mobility [2011] COM(2011) 743 final, 24 <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0743&from=EN>> accessed 29 March 2016.

understandings may, indeed, inform and colour the notion of integration itself. As Leonard F.M. Besselink argues in relation to the situation in the Netherlands, social ‘integration measures’, such as those proposed and in some cases adopted by the Dutch government – involving tests of knowledge of the Dutch language and Dutch culture – are potentially violations of the human rights norm of non-discrimination, but also, worse still, are repressive.⁹⁰⁵ As Besselink says, this ‘is a shift away from seeing integration as a positive social measure towards a shift to mainly repressive immigration measures.’⁹⁰⁶ Although Besselink is discussing measures involving social integration, measures that lead to discrimination and repression in the area of economic and labour market integration may well have the same character.

As Clíodhna Murphy has argued in a series of publications, there is an understanding of integration emerging from the jurisprudence of the ECtHR and from within the international human rights system. In decisions regarding deportation and family reunification, integration is, for example, often taken into account. Murphy notes that using ‘integration’ in the context of deportation ‘does not give rise to a distinct legal category’ of persons – such as ‘integrated persons or workers’ – compared with other immigrants.⁹⁰⁷ The ECtHR has adopted a clear understanding of how integration should figure in decisions surrounding deportation in the *Boultif v Switzerland* and *Üner v The Netherlands* decisions. In *Boultif*, the ECtHR identified ‘the duration of the individual’s stay, his or her family situation and difficulties that would be faced by the spouse in the country of origin’ as relevant to whether an individual could be deported without violating Article 8 (respect for family life).⁹⁰⁸ In *Üner*, the Court added a particular concern for the ‘best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is likely to be expelled’ and ‘the solidity of social, cultural and family ties with the host country’.⁹⁰⁹ In the case of *Üner*, this included labour market integration and labour market integration was also considered in *Kaya v Germany* (in that it was absent) and *Slivenko v Latvia*.⁹¹⁰ This should not be over-emphasised however. Murphy notes that the marginalisation of migrants means that they are more likely to be unemployed and

⁹⁰⁵ Leonard F.M. Besselink, ‘Unequal Citizenship: Integration Measures and Equality’ in Sergio Carrera (ed), *The Nexus between Immigration, Integration and Citizenship in the EU* (Centre for European Policy Studies CEPS 2006), 16 <<https://www.ceps.eu/system/files/book/1322.pdf>> accessed 2 March 2016.

⁹⁰⁶ Leonard F.M. Besselink, ‘Unequal Citizenship: Integration Measures and Equality’ in Sergio Carrera (ed), *The Nexus between Immigration, Integration and Citizenship in the EU* (CEPS 2006), 18 <<https://www.ceps.eu/system/files/book/1322.pdf>> accessed 2 March 2016.

⁹⁰⁷ Clíodhna Murphy, ‘The Concept of Integration in the Jurisprudence of the European Court of Human Rights’ (2010) 12(1) *European Journal of Migration and Law* 23, 24.

⁹⁰⁸ Clíodhna Murphy, ‘The Concept of Integration in the Jurisprudence of the European Court of Human Rights’ (2010) 12(1) *European Journal of Migration and Law* 23, 27. *Boultif v Switzerland* App no 54273/00 (ECtHR 2 August 2001).

⁹⁰⁹ Clíodhna Murphy, ‘The Concept of Integration in the Jurisprudence of the European Court of Human Rights’ (2010) 12(1) *European Journal of Migration and Law* 23, 28. *Üner v The Netherlands* App no 46410/99 (ECtHR 18 October 2006).

⁹¹⁰ Clíodhna Murphy, ‘The Concept of Integration in the Jurisprudence of the European Court of Human Rights’ (2010) 12(1) *European Journal of Migration and Law* 23, 33. *Kaya v Germany* App no 31753/02 (ECtHR 28 June 2007 and *Slivenko v Latvia* App no 48321/99 (ECtHR 9 October 2003).

that the absence of integration into the labour market carried much more weight in the Court's decision than 'positive engagement in the labour market'.⁹¹¹

Murphy also argues that a 'human rights-based paradigm of integration' is emerging in the UN human rights system. Although she is quick to admit that this is not as developed as in the jurisprudence of the ECtHR, she finds in the concluding observations of some of the treaty bodies, including the Human Rights Committee, the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Racial Discrimination an emerging human-rights based notion of integration.⁹¹² She notes that although the Committee on Economic, Social and Cultural Rights 'consistently refers to discrimination suffered by immigrants and members of ethnic minorities in the fields of housing, employment, health care and education', its references to 'integration' are fewer but still present. This includes integration into the labour market, referred to in the Committee's concluding observations on Switzerland in 1998, for example.⁹¹³ She notes that the Committee on the Elimination of Racial Discrimination has emphasised the 'two-way nature of the integration process' and that Committee has made much more extensive reference to integration in its concluding observations, including labour market integration, as in, for example, its observations on the social and economic rights of the Roma in Poland and in its concluding observations on Ireland, discussed above.⁹¹⁴ As Murphy notes, the Committee has asserted in its concluding observations that the existence of a policy in a state is not enough: 'effective measures to facilitate the integration of minority groups' must be 'put into place'.⁹¹⁵ This is particularly problematic in the case of Ireland where, as we will see, while the statement of national policies is relatively positive – if not current – the implementation of the policy is weak.

Integration as a 'two-way process' is also the starting-point for the EU approach to integration, including the Common Basic Principles for Integration, which form the basis of the 'A Common Agenda for Integration – A Framework for the Integration of Third-Country Nationals in the European Union'.⁹¹⁶ The First Common Basic Principle states: 'Integration is a dynamic, two-way process of mutual accommodation

⁹¹¹ Clíodhna Murphy, 'The Concept of Integration in the Jurisprudence of the European Court of Human Rights' (2010) 12(1) *European Journal of Migration and Law* 23, 34.

⁹¹² Clíodhna Murphy, 'Towards a human rights-based paradigm of integration? The contribution of international human rights law' (2013) *European Human Rights Law Review* 166, 167.

⁹¹³ Committee on Economic, Social and Cultural Rights, Concluding observations on Switzerland, UN doc E/C.12/1998/SR.39, 26 November 1998, para 7.

⁹¹⁴ Clíodhna Murphy, 'Towards a human rights-based paradigm of integration? The contribution of international human rights law' (2013) *European Human Rights Law Review* 166, 176–177 and note 65, 179, citing Committee on the Elimination of Racial Discrimination, Concluding observations on Poland, UN doc CERD/C/POL/CO/19, 14 September 2009, para 4.

⁹¹⁵ Clíodhna Murphy, 'Towards a human rights-based paradigm of integration? The contribution of international human rights law' (2013) *European Human Rights Law Review* 166, 175.

⁹¹⁶ European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, A Common Agenda for Integration Framework for the Integration of Third-Country Nationals in the European Union [2005] COM(2005) 389 final, 5, <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0389&from=EN>> accessed 4 March 2016.

by all immigrants and residents of Member States'.⁹¹⁷ The Third Common Basic Principle states: 'Employment is a key part of the integration process and is central to the participation of immigrants, to the contributions immigrants make to the host society, and to making such contributions visible'.⁹¹⁸ The Agenda emphasises that the EU should monitor labour market integration in the Member States, encourage them to develop policies to promote labour market integration and monitor 'the application of the Directives concerning discrimination in employment and on third-country nationals who are long-term residents'.⁹¹⁹ For their part, the Member States are to develop 'innovative approaches to prevent labour market discrimination' and to promote training, recognition of qualifications and awareness by employers of both anti-discrimination and the possibility of recruiting migrants, especially migrant women.⁹²⁰

In 2011, a further agenda was adopted for the integration of third-country nationals, building on the Common Agenda, but also recognising new challenges. The 'European Agenda for the Integration of Third Country Nationals' admitted that the changed context meant that not all 'integration measures have been successful in meeting their objectives' and emphasised that 'Integration policies also require the will and commitment of migrants to be part of the society that receives them'.⁹²¹ This rhetorical weakening of the commitment to the 'two way' nature of integration by putting a renewed emphasis on the role migrants must play is accompanied by a renewed interest, on the part of the EU, in circular migration and the role that countries of origin might play to facilitate it.⁹²² But the latest agenda is remarkable for identifying

⁹¹⁷ European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, A Common Agenda for Integration Framework for the Integration of Third-Country Nationals in the European Union [2005] COM(2005) 389 final, 5 <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0389&from=EN>> accessed 4 March 2016.

⁹¹⁸ European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, A Common Agenda for Integration Framework for the Integration of Third-Country Nationals in the European Union [2005] COM(2005) 389 final, 6 <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0389&from=EN>> accessed 4 March 2016.

⁹¹⁹ European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, A Common Agenda for Integration Framework for the Integration of Third-Country Nationals in the European Union [2005] COM(2005) 389 final, 6 <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0389&from=EN>> accessed 4 March 2016.

⁹²⁰ European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, A Common Agenda for Integration Framework for the Integration of Third-Country Nationals in the European Union [2005] COM(2005) 389 final, 6 <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0389&from=EN>> accessed 4 March 2016.

⁹²¹ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, European Agenda for the Integration of Third-Country Nationals {SEC(2011) 957 final} [2011] COM(2011) 455 final, 2 <http://ec.europa.eu/dgs/home-affairs/news/intro/docs/110720/1_en_act_part1_v10.pdf> accessed 30 March 2016.

⁹²² European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, European Agenda for the Integration of Third-Country Nationals {SEC(2011) 957 final} [2011] COM(2011) 455 final, 10–11

labour market integration as one of the new challenges for the EU and its Member States. The first item on the agenda is ‘The socio-economic contribution of migrants’ and the high unemployment rates among migrants, especially women, and their tendency to be overqualified for their jobs is highlighted.⁹²³ Although it notes that the EU can only play a ‘supporting’ role in migrant integration – as confirmed in article 79.4 of the TFEU – it calls for a number of actions to support labour market integration.⁹²⁴ These include ‘provision of language courses’, better knowledge of migrant qualifications and ability to compare them, programmes to promote greater awareness among migrants of available jobs and ‘introduction programmes’ to ‘support migrants’ entry into employment’, training for teachers on ‘managing diversity’, ‘better living conditions’ for migrants and better use of EU funding, like the ‘European Fund for the Integration of Third-Country Nationals and the European Refugee Fund’.⁹²⁵ The agenda also specifically identifies recipients of protection as a concern and urges Member States to pay ‘special attention to specific needs of vulnerable groups of migrants.’⁹²⁶ Thus the EU’s agenda contains a strong commitment to positive action to integrate migrants into the labour market, with a particular emphasis on vulnerable groups.

The Common Approach was called for in the European Council’s Tampere Programme (‘Towards an Area of Freedom, Security and Justice’) and ‘greater coordination of national integration policies and EU initiatives’ was called for in the European Council’s Hague Programme (‘The Hague Programme: strengthening freedom, security and justice in the European Union’).⁹²⁷ Finally, the European Council’s Stockholm Programme (‘The Stockholm Programme – An open and secure Europe serving and protecting citizens’) states: ‘Vigorous integration policies that guarantee the rights of migrants must also be put in

<http://ec.europa.eu/dgs/home-affairs/news/intro/docs/110720/1_en_act_part1_v10.pdf> accessed 30 March 2016.

⁹²³ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, European Agenda for the Integration of Third-Country Nationals {SEC(2011) 957 final} [2011] COM(2011) 455 final, 4–5 <http://ec.europa.eu/dgs/home-affairs/news/intro/docs/110720/1_en_act_part1_v10.pdf> accessed 30 March 2016.

⁹²⁴ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, European Agenda for the Integration of Third-Country Nationals {SEC(2011) 957 final} [2011] COM(2011) 455 final, 3 <http://ec.europa.eu/dgs/home-affairs/news/intro/docs/110720/1_en_act_part1_v10.pdf> accessed 30 March 2016.

⁹²⁵ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, European Agenda for the Integration of Third-Country Nationals {SEC(2011) 957 final} [2011] COM(2011) 455 final, 4–7 <http://ec.europa.eu/dgs/home-affairs/news/intro/docs/110720/1_en_act_part1_v10.pdf> accessed 30 March 2016.

⁹²⁶ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, European Agenda for the Integration of Third-Country Nationals {SEC(2011) 957 final} [2011] COM(2011) 455 final, 5–7 <http://ec.europa.eu/dgs/home-affairs/news/intro/docs/110720/1_en_act_part1_v10.pdf> accessed 30 March 2016.

⁹²⁷ See Council of the European Union, Presidency Conclusions, Tampere European Council, 15–16 October 1999, 16 October 1999 <<http://www.refworld.org/docid/3ef2d2264.html>> accessed 30 March 2016 and European Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 13 December 2004, [2005] OJ C 53/01, 53/4 <<http://www.refworld.org/docid/41e6a854c.html>> accessed 30 March 2016.

place.⁹²⁸ The relevant Council Directives seem to require ‘a secure residence right, the right to family reunification, equal access to employment and education, and free movement within the EU’⁹²⁹ More recently, the Single Permit Directive cites the Stockholm Programme’s call for a ‘more vigorous integration policy’ and requires that ‘All third-country nationals who are legally residing and working in Member States should enjoy at least a common set of rights based on equal treatment with the nationals of their respective host Member State, irrespective of the initial purpose of or basis for admission.’⁹³⁰ This includes all third-country nationals who ‘have been given access to the labour market of that Member State’.⁹³¹ This includes equal treatment in terms of free movement, working conditions, freedom of association, education and vocational training, recognition of professional qualifications, and ‘branches of social security’.⁹³² The most recent European Council Conclusions setting out the post-Stockholm programme agenda, however, weaken the commitment to a ‘vigorous integration policy’ focused on the rights of migrants, with one reference to integration in which migrants are viewed as either threats to ‘social cohesion’ or factors of production. Thus, with regard to integration: ‘The Union should also support Member States’ efforts to pursue active integration policies which foster social cohesion and economic

⁹²⁸ European Council, The Stockholm Programme — An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, para 6.1.4.

⁹²⁹ Kees Groenendijk, ‘Integration Policy and Community Law’ in Sergio Carrera (ed), *The Nexus between Immigration, Integration and Citizenship in the EU* (CEPS 2006), 8 <<https://www.ceps.eu/system/files/book/1322.pdf>> accessed 2 March 2016. Groenendijk cites Council Directive 2003/109 of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L16/44, 23.1.2004, Council Directive 2003/86 of 22 September 2003 on the right to family reunification, OJ L251/12, 3.10.2003, and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states, OJ L229/35, 30.4.2004. The European Migration Network notes that Ireland is not bound by the first two directives and its compliance with the ‘free movement’ directive had to change its legislation: ‘In order to comply with the Directive, Ireland brought into force the European Communities (Free Movement of Persons) Regulations 2006 (S.I. No. 226 of 2006), which was in turn replaced by the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656 of 2006). These were amended in turn by the European Communities (Free Movement of Persons) (Amendment) Regulations 2008.’ European Migration Network, ‘Legislation’ <http://emn.ie/cat_search_detail.jsp?clog=4&itemID=213&item_name> accessed 17 March 2016. For Ireland not being bound by the first two directives, see European Migration Network, ‘Legislation’ <http://emn.ie/cat_search_detail.jsp?clog=4&itemID=212&item_name> and ‘Legislation’ <http://emn.ie/cat_search_detail.jsp?clog=4&itemID=211&item_name> both accessed 17 March 2016.

⁹³⁰ Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2011] OJ L343/1. Ireland is not bound by this directive. See Yves Pascouau and Sheila McLoughlin, ‘EU Single Permit Directive: A small step forward in EU migration policy’, European Policy Centre, Policy Brief, 24 January 2012, 2 <http://www.epc.eu/documents/uploads/pub_1398_eu_single_permit_directive.pdf> accessed 17 March 2016.

⁹³¹ Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2011] OJ L343/2.

⁹³² Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2011] OJ L343/7.

dynamism.⁹³³ This one reference might be contrasted to the document's extensive discussion of 'irregular migration'.⁹³⁴

These directives are the result of the EU gaining competence in the area of migration under the Treaty of Amsterdam.⁹³⁵ The Lisbon Treaty, however, confirmed that Member State competence 'to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed' was not affected.⁹³⁶ Because the Member States retain the competence to admit workers to their labour market, these rights are not prominent in the EU's integration policy. The emphasis of the EU's integration policy documents is well summed up by Kees Groenendijk as involving 'handbooks, lists of good practices, integration websites [and] National Contact Points'.⁹³⁷ The list of actions under the Common Basic Principles is indicative and not exhaustive and it leaves the Member States to set priorities and select the actions as well as the way in which they are to be carried out within the context of their own national situations and traditions.⁹³⁸ As has been noticed by many commentators, the competence left to the Member States and the latitude given in policy response has led to a significant failure in terms of integration policy and even the use of integration policy as a 'repressive' and anti-migrant tool. This, in turn, leads to gaps in the real enjoyment of rights for migrant workers.⁹³⁹ Ireland is no exception to this trend. Indeed, Ireland has a particularly free hand in its migration policy, as it is not bound by any of these EU directives associated with the AFSJ – including those concerning long term residents, family reunification and the single permit – only the 'free movement' directive.⁹⁴⁰ Important for our policy recommendations in this case study, however, is the attitude towards these directives expressed by a previous government in the context of immigration reform:

While Ireland is not bound by these directives, its position is to participate as fully as possible consistent with the maintenance of the Common Travel Area with the UK. It is possible that at some point in the future

⁹³³ European Council, 'Council Conclusions 26–27 June 2014' [2014].

⁹³⁴ European Council, 'Council Conclusions 26–27 June 2014' [2014].

⁹³⁵ European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, A Common Agenda for Integration Framework for the Integration of Third-Country Nationals in the European Union [2005] COM(2005) 389 final, 12 <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0389&from=EN>> accessed 4 March 2016.

⁹³⁶ Article 79 TFEU, cited in Sergio Carrera, Elspeth Guild and Katharina Eisele (eds), *Rethinking the Attractiveness of EU Immigration Policies* (CEPS 2014).

⁹³⁷ Kees Groenendijk, 'Integration Policy and Community Law' in Sergio Carrera (ed), *The Nexus between Immigration, Integration and Citizenship in the EU* (CEPS 2006), 8 <<https://www.ceps.eu/system/files/book/1322.pdf>> accessed 2 March 2016.

⁹³⁸ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, A Common Agenda for Integration Framework for the Integration of Third-Country Nationals in the European Union [2005] COM(2005) 389 final, 4 <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0389&from=EN>> accessed 4 March 2016.

⁹³⁹ For example, Roderick Parkes, 'Immigrant Integration meets European Integration', EU-Consent Working Paper FG 1 2008/06 March 2008 <http://www.swp-berlin.org/fileadmin/contents/products/arbeitspapiere/Immigrant_Update2_KS.pdf> accessed 8 March 2016.

⁹⁴⁰ Department of Justice, Equality and Law Reform, 'Immigration and Residence in Ireland: Outline Policy Proposals for an Immigration and Residence Bill', 10 <<http://www.inis.gov.ie/en/inis/discussion.pdf/files/discussion.pdf>> accessed 30 March 2016.

Ireland and the UK will become fully involved in the immigration area of the EU acquis. The preparation of Irish legislation should therefore endeavour to ensure that, as far as possible, such legislation is in accord with EU legislation and that we benefit from the collective European experience in developing and implementing such legislation.

Carrying through on this commitment would involve recognition of the important rights granted legal migrants by the relevant EU directives.

2. Ireland's integration policy and its absence

Ireland experienced a considerable inflow of migrant labour during its long economic boom, which ended in the dramatic crash of 2008. Many of these were EU migrants from accession countries or Irish people returning to work, but there were also many non-EEA citizens.⁹⁴¹ These ranged from the highly skilled to the low skilled. An important source of migrant labour was those on student visas, who were allowed to work up to twenty hours a week.⁹⁴² In practice, many worked much longer hours and much of this labour was low-paid. Although Ireland initially engaged with the EU's call for a vigorous integration policy in the Member States, the policy was eroded by the high level of arbitrariness that characterised access to the labour market, family reunification, social services and citizenship. Ireland's integration policy saw further erosion as the institutions and policies in place disappeared under austerity. The National Action Plan Against Racism ended in 2008 and, although the relevant National Contact Point claims that 'sectoral plans' arising from it are being implemented, it has not been replaced with a new Action Plan.⁹⁴³ The National Consultative Committee on Racism and Interculturalism was closed in January 2009 and the Irish Equality Commission was merged, amid steep budget cuts, with the Irish Human Rights Commission to form the Irish Human Rights and Equality Commission.⁹⁴⁴ The office of the Minister of State for Integration was abolished in 2011. Reporting on the state of integration in Ireland has also lapsed, with the latest Annual Monitoring Report on Integration being from 2013.⁹⁴⁵ The Department of Education and Skills published an Intercultural Education Strategy for 2010–2015, but the latest discussion of implementing the strategy is from 2011.⁹⁴⁶ There is a migration strategy – which laudably avoids focusing on 'repressive'

⁹⁴¹ Overall data can be found at European Migration Network, 'Population and Migration Estimates' <<http://emn.ie/emn/statistics>> accessed 30 March 2016.

⁹⁴² Pobal, 'Facts about Migrant Workers in Ireland' [2010], 2 <<https://www.pobal.ie/Publications/Documents/Facts%20about%20Migrant%20Workers%20in%20Ireland%20-%20MRCI%20-%202010.pdf>> accessed 30 March 2016.

⁹⁴³ Office for the Promotion of Migrant Integration, 'The National Action Plan Against Racism (NPAR) 2005–2008' <<http://www.integration.ie/website/omi/omiwebv6.nsf/page/Racism-npar-en>> accessed 7 March 2016.

⁹⁴⁴ <<http://enarireland.org/tag/national-consultative-committee-on-racism-and-interculturalism/>> accessed 7 March 2016.

⁹⁴⁵ The latest Annual Monitoring Report on Integration can be found at <<http://www.integrationcentre.ie/getattachment/44e6237a-4a01-4234-99fe-b2d82ecedfe7/Annual-Monitoring-Report-On-Integration-2013.aspx>> accessed 7 March 2016.

⁹⁴⁶ Office for the Promotion of Integration, 'Intercultural Education Strategy' <<http://www.integration.ie/website/omi/omiwebv6.nsf/page/infoformigrants-education-interculturalstrategy-en>> accessed 7 March 2016.

forms of cultural integration and acknowledges that integration is a 'two-way process'⁹⁴⁷ – that will extend to 2016, but the implementation has been lost with the loss of the institutions that underpinned it and with the failure of successive governments to pass a new Immigration, Residence and Protection Bill. The National Contact Point for Integration, the Office for the Promotion of Migrant Integration has, quite recently, begun to develop a new integration strategy, led by the 'newly reconstituted Cross Departmental Group on Integration' whose work is 'ongoing'.⁹⁴⁸ The National Action Plan for Social Inclusion (2007–2016) includes Goal 12: 'Integration of Migrants', which focuses on language supports in schools and improved public transport. In reality, those language supports have been cut.⁹⁴⁹ The result is that the government's integration strategy – which was never well-connected to the policies surrounding labour market integration – has effectively lapsed into, in the words of the Migrant Integration Policy Index (MIPEX), ad hoc measures and special projects.

The result is, according to the MIPEX survey of Ireland's immigration and integration policies, that Ireland ranks below all Western countries except Austria and Switzerland in terms of outcomes for migrants.⁹⁵⁰ Ireland fared particularly badly in terms of social and economic rights and labour market mobility.⁹⁵¹ In many areas involving social and economic rights, like access to education and training, recognition of qualifications (recently improved), access to social supports, family reunification, ability of family members to work and employment, Ireland was found to be particularly poor in terms of migrants' outcomes. Unemployment, the greatest risk to migrants' well-being in a country which does not allow non-EU migrants to access social benefits due to the Habitual Residence Condition (see below) was a problem, particularly for non-EU migrants with low education. Women with low education experienced a markedly disproportionate level of unemployment. Thus, within the vulnerable group of low-paid workers, women with low education appear particularly vulnerable and face multiple barriers to the labour market, based on gender and lack of skills. While Ireland's dynamic and flexible labour market means that migrants who are still in Ireland after ten years largely experience employment and labour market integration outcomes similar to Ireland-born workers, this does not seem to be the result of Ireland's policies, programmes or supports. More detail of the causes of this low rating of Ireland's

⁹⁴⁷ Clíodhna Murphy, 'Interculturalism and Immigration Reform? Integration Policy in Ireland', Human Rights in Ireland, 7 July 2015 <<http://humanrights.ie/international-lawinternational-human-rights/interculturalism-and-immigration-reform-integration-policy-in-ireland/>> accessed 7 March 2016.

⁹⁴⁸ Minister of State at the Department of Justice and Equality (Deputy Aodhán Ó Riordáin) in response to a Parliamentary Question from Deputy Thomas P. Broughan, 25 November 2015 <<http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2015112500090?opendocument#WRSO1700>>.

⁹⁴⁹ National Action Plan for Social Inclusion 2007–2016, The Stationery Office, February 2007 <<http://www.socialinclusion.ie/documents/NAPinclusionReportPDF.pdf>> accessed 7 March 2007. For the cuts, see Clíodhna Murphy, 'Interculturalism and Immigration Reform? Integration Policy in Ireland', Human Rights in Ireland, 7 July 2015 <<http://humanrights.ie/international-lawinternational-human-rights/interculturalism-and-immigration-reform-integration-policy-in-ireland/>> accessed 7 March 2016.

⁹⁵⁰ Migrant Integration Policy Index (MIPEX) <<http://www.mipex.eu/ireland>> accessed 7 March 2016, cited in Clíodhna Murphy, 'Interculturalism and Immigration Reform? Integration Policy in Ireland', Human Rights in Ireland, 7 July 2015 <<http://humanrights.ie/international-lawinternational-human-rights/interculturalism-and-immigration-reform-integration-policy-in-ireland/>> accessed 7 March 2016.

⁹⁵¹ Migrant Integration Policy Index, 'Ireland, 2014' <<http://www.mipex.eu/ireland>> accessed 10 April 2016.

integration performance is found in the description of access to social and economic rights of our three categories of low-skilled or at least low-paid migrant workers, discussed below.

C. Access to social and economic rights and the three categories of low-paid migrant workers

1. Legally resident low-paid workers

Like many EU Member States, and the EU itself, Ireland operates a ‘sectoral’ labour immigration policy rather than a ‘horizontal’ approach that has a common regulatory framework for all migrant workers. This approach accords ‘different rights, standards and conditions for entry and stay to different groups’.⁹⁵² Like the EU, Ireland has a special programme for highly-skilled migrant workers, which provides workers with a Critical Skills Employment Permit. This requires the worker to have an income of at least 60,000 euro (although many professions are excluded) or have an income of 30,000 euro and to be employed in one of the relatively few professions on the Highly Skilled Occupations List.⁹⁵³ Low paid and low-skilled workers from outside the EEA are, of course, excluded from availing of these permits, which have easier routes to long term residency and family reunification, including spousal and dependents’ ability to apply for dependent/partner/spouse employment permits, and no labour market test to see if an EEA worker wants the job.⁹⁵⁴

Non-EEA low-skilled workers will, for the most part, need a General Employment Permit, as long as they are not in a list of excluded occupations, which is quite extensive and includes most managers, clerks or administrative workers and care workers outside the home.⁹⁵⁵ As the Migrant Rights Council of Ireland notes, the exclusion of many low and middle paid occupations from being eligible for a work permit restricts the entry of many workers to the country, to the labour market and encourages employers to

⁹⁵² On the nature of this, and criticism by the European Parliament of this approach at EU level, see Sergio Carrera, Anaïs Faure Atger, Elspeth Guild and Dora Kostakopoulou, ‘Labour Immigration Policy in the EU: A Renewed Agenda for Europe 2020’ [2011] CEPS Policy Brief no 240, 4 <https://www.ceps.eu/system/files/book/2011/04/PB%20No%20240%20Carrera_et_al_on_EU_Labour_Policy_edited.pdf> accessed 11 March 2016.

⁹⁵³ Citizens Information Board, ‘Overview of employment permits’ <http://www.citizensinformation.ie/en/employment/migrant_workers/employment_permits/overview_employment_permits.html> accessed 11 March 2016.

⁹⁵⁴ Migrant Rights Centre Ireland, ‘Information on new Employment Permits (Amendment) Act 2014’ <<http://www.mrci.ie/wp-content/uploads/2012/10/Information-on-new-Employment-Permits.pdf>> accessed 11 March 2016.

⁹⁵⁵ Department of Jobs, Enterprise and Innovation, ‘Ineligible Categories of Employment’ <<https://www.djei.ie/en/What-We-Do/Jobs-Workplace-and-Skills/Employment-Permits/Employment-Permit-Eligibility/Ineligible-Categories-of-Employment/>> accessed 11 March 2016.

look for irregular workers to fill these jobs, especially the lowest paid in the care and hospitality sectors.⁹⁵⁶ The permit is initially for two years and can be renewed for three further years, after which the worker can apply for long term residency.⁹⁵⁷ The labour market test is to be applied before hiring a general employment permit holder in most cases, but with the exceptions of when the worker has been unemployed for less than six months or is a carer in a private home.⁹⁵⁸ General Employment Permit holders are tied to their employer for the first twelve months of the permit – a significant improvement over previous legislation, which tied the worker to the employer throughout the duration of the permit – but a new application for a General Employment Permit must be made.⁹⁵⁹ If a worker is being exploited, they can, in theory, change employer before twelve months have elapsed, if they show evidence that they have reported their situation to one of the Workplace Relations Bodies.⁹⁶⁰ Spouses, partners and dependents must apply for their own Employment Permits.⁹⁶¹ There are other categories of Employment Permits, the most relevant to the workers discussed here being the Contract for Services Employment Permit, for workers employed by a foreign contractor.⁹⁶² This has been the site of significant exploitation in the past, including the payment of wages far below the Irish minimum wage.

The recent reform of the employment permits system includes welcome changes to some of the employment practices that led to exploitation and to legal workers falling into irregular status. As even a description of the General Employment Permits suggests, low paid workers still suffer from being tied to their employer and the barriers to family reunification posed by the need for spouses/partners/dependents to have their own General Employment Permit. General Employment Permits are expensive for low paid workers, costing 1,000 euro for initial two year permits and 500 euro for permits less than six months and 1,500 euro for permits lasting up to three years and 750 euro for six

⁹⁵⁶ Migrant Rights Centre Ireland, 'All Work and Low Pay: The Experience of Migrants Working in Ireland' [2015], 2–3 <<http://www.mrci.ie/wp-content/uploads/2015/11/MRCI-All-Work-and-Low-Pay.pdf>> accessed 15 February 2016.

⁹⁵⁷ Department of Jobs, Enterprise and Innovation, 'General Employment Permit' <<https://www.djei.ie/en/What-We-Do/Jobs-Workplace-and-Skills/Employment-Permits/Permit-Types/General-Employment-Permit/>> accessed 11 March 2016.

⁹⁵⁸ Migrant Rights Centre Ireland, 'Information on new Employment Permits (Amendment) Act 2014' <<http://www.mrci.ie/wp-content/uploads/2012/10/Information-on-new-Employment-Permits.pdf>> accessed 11 March 2016.

⁹⁵⁹ Department of Jobs, Enterprise and Innovation, 'Ineligible Categories of Employment' <<https://www.djei.ie/en/What-We-Do/Jobs-Workplace-and-Skills/Employment-Permits/Employment-Permit-Eligibility/Ineligible-Categories-of-Employment/>> accessed 11 March 2016.

⁹⁶⁰ Migrant Rights Centre Ireland, 'All Work and Low Pay: The Experience of Migrants Working in Ireland' [2015], 2 <<http://www.mrci.ie/wp-content/uploads/2015/11/MRCI-All-Work-and-Low-Pay.pdf>> accessed 15 February 2016.

⁹⁶¹ Department of Jobs, Enterprise and Innovation, 'Ineligible Categories of Employment' <<https://www.djei.ie/en/What-We-Do/Jobs-Workplace-and-Skills/Employment-Permits/Employment-Permit-Eligibility/Ineligible-Categories-of-Employment/>> accessed 11 March 2016.

⁹⁶² Department of Jobs, Enterprise and Innovation, 'Contract for Services Employment Permit' <<https://www.djei.ie/en/What-We-Do/Jobs-Workplace-and-Skills/Employment-Permits/Permit-Types/Contract-for-Services-Employment-Permit/>> accessed 11 March 2016.

months or less.⁹⁶³ There are also other costs, such as registering with the Garda National Immigration Bureau (GNIB) (300 euro).⁹⁶⁴

In general, poverty is one of the biggest threats to legally present migrant workers' enjoyment of their social and economic rights and the fear of worse conditions is the greatest factor in their being exploited. This is produced and compounded by many of the conditions of migration and a failure to integrate migrants into society or into the labour market on an equal basis. In a situation where migrants are still tied to employers – even if not as long as before and with better protection in cases of exploitation – workers may still continue to work in exploitive conditions, often due to threats of the removal or non-renewal of the employment permit.⁹⁶⁵ This is because they are either unaware of their rights and ability to seek remediation due to their limited English skills or the real alternatives to their present condition are worse, due to weak enforcement (see below).⁹⁶⁶ The Migrant Rights Centre Ireland (MRCI) notes that many migrant workers 'have incurred huge debts to secure work in Ireland', are concentrated in sectors like domestic services or agriculture where their accommodation is tied to their employment, 'have fewer resources and support structures, such as family and a safety net' and 'have limited options for decent pay and conditions in their home country' should they return.⁹⁶⁷ Indeed, their lack of family to assist them in Ireland may compound their poverty as many are remitting money to dependents in other countries – up to 72% in one study.⁹⁶⁸ Their poverty, low pay and lack of supports leave them no alternative but to remain in exploitive conditions and their poverty is a violation of their social and economic rights in itself.

When they are in work, the inability of non-EEA workers to meet their needs in the labour market and their vulnerability to exploitation stems from a lack of enforcement. The legal framework is insufficient: Ireland criminalises slavery, servitude and forced labour only in the context of trafficking and is not bound by the Employer Sanctions Directive, which criminalises exploitive working conditions.⁹⁶⁹ Making a

⁹⁶³ Department of Jobs, Enterprise and Innovation, 'Fees for Employment Permits' <<https://www.djei.ie/en/What-We-Do/Jobs-Workplace-and-Skills/Employment-Permits/Fees/>> accessed 11 March 2016.

⁹⁶⁴ Irish Naturalisation and Immigration Service, 'Registration', <<http://www.inis.gov.ie/en/INIS/Pages/WP07000031>> accessed 11 March 2016.

⁹⁶⁵ Migrant Rights Centre Ireland, 'Ending the Race to the Bottom: Changing the Balance for Migrant Workers in Ireland' [2010], 2 <http://www.mrci.ie/wp-content/uploads/2012/11/Ending-the-Race-to-the-Bottom_Changing-the-Balance-for-Migrant-Workers-in-Ireland.pdf> accessed 12 March 2016.

⁹⁶⁶ Migrant Rights Centre Ireland, 'Ending the Race to the Bottom: Changing the Balance for Migrant Workers in Ireland' [2010], 2 <http://www.mrci.ie/wp-content/uploads/2012/11/Ending-the-Race-to-the-Bottom_Changing-the-Balance-for-Migrant-Workers-in-Ireland.pdf> accessed 12 March 2016.

⁹⁶⁷ Migrant Rights Centre Ireland, 'Ending the Race to the Bottom: Changing the Balance for Migrant Workers in Ireland' [2010], 2 <http://www.mrci.ie/wp-content/uploads/2012/11/Ending-the-Race-to-the-Bottom_Changing-the-Balance-for-Migrant-Workers-in-Ireland.pdf> accessed 12 March 2016.

⁹⁶⁸ Migrant Rights Centre Ireland, 'Realising Integration: Migrant Workers Undertaking Essential Low-Paid Labour in Dublin City' [2007], 24 <http://www.mrci.ie/wp-content/uploads/2012/10/Realising-Integration_Migrant-Workers-Undertaking-Essential-Low-Paid-Work-in-Dublin-City.pdf> accessed 16 March 2016.

⁹⁶⁹ FRA, 'Severe labour exploitation: workers moving within or into the European Union' [2015], Annex III, 9, <http://fra.europa.eu/sites/default/files/fra-2015-severe-labour-exploitation-annexes_en.pdf> accessed 11 March 2016. FRA, 'Severe labour exploitation: workers moving within or into the European Union' [2015], 34–35 <http://fra.europa.eu/sites/default/files/fra-2015-severe-labour-exploitation_en.pdf> accessed 11 March 2016.

complaint to the Workplace Relations Bodies is expensive.⁹⁷⁰ If a complaint is successful, there are no penalties for companies that withhold wages from workers and companies avoid paying the withheld wages by reincorporating or simply refusing to pay.⁹⁷¹ There is evidence of widespread violation of employment law in certain sectors when inspections are carried out. In the hotel and hospitality sectors and in the domestic cleaning sectors, the National Employment Rights Authority (NERA) found breaches in 73% of catering, 75% of hotels and 85% of contract cleaning services.⁹⁷² Although only some of the workers in these sectors are non-EEA nationals, they show much higher than average populations of non-EEA workers.⁹⁷³ NERA has begun to publish the names of employers who have been sanctioned by courts after an inspection and most of these are from the catering industry.⁹⁷⁴

Even when migrant workers are working – and especially if they are unable to work – access to social benefits is poor. Many migrants do not receive ‘sick pay’ and they are often blocked from seeking compensation through the Department of Social Protection.⁹⁷⁵ The high costs of health care and accommodation leave many migrants no choice but to work overtime, take on second jobs and put off going to the doctor because of the expense.⁹⁷⁶ Unless they have a passport stamp that allows them to stay for five years or they have been, in terms of ‘reckonable residence’, resident in Ireland for five years, migrant workers cannot avail of medical cards or housing assistance to meet these costs.⁹⁷⁷ Time spent in study or training – despite students being an important category of non-EEA labour – does not count towards ‘reckonable residence’.⁹⁷⁸ More generally, whether working and seeking, for example, child benefit (a significant support for dependent children) or not working, having lost their job or suffering an

⁹⁷⁰ Migrant Rights Centre Ireland, ‘All Work and Low Pay: The Experience of Migrants Working in Ireland’ [2015], 2 <<http://www.mrci.ie/wp-content/uploads/2015/11/MRCI-All-Work-and-Low-Pay.pdf>> accessed 15 February 2016.

⁹⁷¹ Migrant Rights Centre Ireland, ‘All Work and Low Pay: The Experience of Migrants Working in Ireland’ [2015], 2–3 <<http://www.mrci.ie/wp-content/uploads/2015/11/MRCI-All-Work-and-Low-Pay.pdf>> accessed 15 February 2016. FRA, ‘Severe labour exploitation: workers moving within or into the European Union’ [2015], 81 <http://fra.europa.eu/sites/default/files/fra-2015-severe-labour-exploitation_en.pdf> accessed 11 March 2016.

⁹⁷² Migrant Rights Centre Ireland, ‘Ending the Race to the Bottom: Changing the Balance for Migrant Workers in Ireland’ [2010], 1 <http://www.mrci.ie/wp-content/uploads/2012/11/Ending-the-Race-to-the-Bottom_Changing-the-Balance-for-Migrant-Workers-in-Ireland.pdf> accessed 12 March 2016.

⁹⁷³ Migrant Rights Centre Ireland, ‘Ending the Race to the Bottom: Changing the Balance for Migrant Workers in Ireland’ [2010], 2 <http://www.mrci.ie/wp-content/uploads/2012/11/Ending-the-Race-to-the-Bottom_Changing-the-Balance-for-Migrant-Workers-in-Ireland.pdf> accessed 12 March 2016.

⁹⁷⁴ FRA, ‘Severe labour exploitation: workers moving within or into the European Union’ [2015], 60–61 <http://fra.europa.eu/sites/default/files/fra-2015-severe-labour-exploitation_en.pdf> accessed 11 March 2016.

⁹⁷⁵ Migrant Rights Centre Ireland, ‘Realising Integration: Migrant Workers Undertaking Essential Low-Paid Labour in Dublin City’ [2007], 27 <http://www.mrci.ie/wp-content/uploads/2012/10/Realising-Integration_Migrant-Workers-Undertaking-Essential-Low-Paid-Work-in-Dublin-City.pdf> accessed 16 March 2016.

⁹⁷⁶ Migrant Rights Centre Ireland, ‘Realising Integration: Migrant Workers Undertaking Essential Low-Paid Labour in Dublin City’ [2007], 28 <http://www.mrci.ie/wp-content/uploads/2012/10/Realising-Integration_Migrant-Workers-Undertaking-Essential-Low-Paid-Work-in-Dublin-City.pdf> accessed 16 March 2016.

⁹⁷⁷ For housing, see Department of the Environment, Community and Local Government, Housing Circular 41/2012: ‘Access to social housing supports for non-Irish nationals’ [2012], 3 <<http://www.environ.ie/sites/default/files/migrated-files/en/Publications/DevelopmentandHousing/Housing/FileDownload,29412,en.pdf>> accessed 16 March 2016.

⁹⁷⁸ Department of the Environment, Community and Local Government, Housing Circular 41/2012: ‘Access to social housing supports for non-Irish nationals’ [2012], 11 <<http://www.environ.ie/sites/default/files/migrated-files/en/Publications/DevelopmentandHousing/Housing/FileDownload,29412,en.pdf>> accessed 16 March 2016.

injury and seeking Job Seeker's Allowance or other social supports, migrant workers are unlikely to meet the 'centre of interest test' of the Habitual Residence Condition for most social supports.⁹⁷⁹ As the integration NGO Pobal notes,

There have been numerous examples of workers finding themselves homeless and without food, despite having made significant social insurance contributions. For workers on a work permit it is particularly difficult to pass the centre of interest test, i.e. ability to show that you intend to remain and have reason to remain in the country' given the limited term of the work permit and the identification of work permit holders as temporary workers.⁹⁸⁰

Thus, both the laws and policies surrounding General Employment Permits and the conception of migrant workers as temporary and labour migration as 'circular' lead to migrant workers in Ireland losing access to crucial social supports.

Finally, education and training is only available in a limited way for non-EEA migrant workers and their dependents. Dependent children have access to primary and secondary education for free, except the children of non-EEA students, who must attend a fee-paying school.⁹⁸¹ Non-EEA migrant workers and their dependents pay non-EEA third level fees. As noted above, recognition of qualifications is a serious problem for non-EEA migrant workers and many are overqualified for their low paid work. MIPEX found that the procedures that provide recognition of non-EU qualifications 'remain complex and uneven' despite recent improvements, like the establishment of Quality and Qualifications Ireland as a 'one-stop-shop', because the process remained 'long and costly'.⁹⁸² In general, access to training is 'comparatively low' and migrants cannot access training on an equal basis.⁹⁸³

2. Refugees and persons with international protection status

While in the asylum system, seekers of asylum are not deemed 'resident' in the country for purposes of social protections. If they cannot support themselves, they are placed in 'direct provision', where they

⁹⁷⁹ Pobal, 'An exploration of local strategies for the integration of migrant workers and their families' [2006] <<http://mrci.ie/wp-content/uploads/2012/10/Pobal-Report-Local-Strategies-for-Integration-of-Migrant-Workers.pdf>> accessed 11 March 2016.

⁹⁸⁰ Pobal, 'An exploration of local strategies for the integration of migrant workers and their families' [2006], <<http://mrci.ie/wp-content/uploads/2012/10/Pobal-Report-Local-Strategies-for-Integration-of-Migrant-Workers.pdf>> accessed 11 March 2016.

⁹⁸¹ Irish Naturalisation and Immigration Service, 'New Immigration Regime for Full Time non-EEA Students' [2011], 2 <<http://www.inis.gov.ie/en/INIS/Transitional%20Arrangements%20regarding%20the%20placement%20in%20schools%20of%20non-EEA%20Children%20not%20accompanied%20by%20parents%20and%20of%20children%20.pdf/Files/Transitional%20Arrangements%20regarding%20the%20placement%20in%20schools%20of%20non-EEA%20Children%20not%20accompanied%20by%20parents%20and%20of%20children%20.pdf>> accessed 16 March 2016.

⁹⁸² Migrant Integration Policy Index, 'Ireland, 2014' <<http://www.mipex.eu/ireland>> accessed 10 April 2016.

⁹⁸³ Migrant Integration Policy Index, 'Ireland, 2014' <<http://www.mipex.eu/ireland>> accessed 10 April 2016.

receive accommodation and food and a very small amount of income support, currently 19.10 euro per adult per week and 9.60 euro per child per week, unchanged since the system was put in place in 2000.⁹⁸⁴ Dependents are able to access primary and secondary education, but adults and their dependents pay third level fees at the non-EEA rate. These fees still apply for years after leaving direct provision, as time spent in the system does not count towards residence.⁹⁸⁵ People in the asylum system are excluded from programmes promoting social inclusion.⁹⁸⁶ Adults in direct provision have no access to Irish training programmes ‘beyond relatively low level courses in English and IT’ and are not allowed to work.⁹⁸⁷ Ireland is not bound by the Recast Reception Directive and is, along with Lithuania, one of two states that deny asylum-seekers access to work. Unable to legally work, some people in the asylum system engage in irregular work, with the accompanying danger of exploitation.⁹⁸⁸ As the Irish Refugee Council notes, this increases the vulnerability of ‘already vulnerable people’.⁹⁸⁹ Persons who have been granted refugee status or other forms of international protection, as a result, often experience significant de-skilling, on top of the deprivation resulting from the poor conditions in direct provision and lack of income due to the low level of support. The high price of accommodation in Ireland means that some successful applicants for refugee status or protection cannot leave the direct provision centres, because they lack the necessary identification documents and/or they cannot afford accommodation in the private rental market and the long waiting lists for social housing.⁹⁹⁰ Aside from a limited pilot project in Dublin, Employment for People in Immigrant Communities (EPIC), programmes for helping refugees and protected persons access services and integrate into the community and labour market are not generally available.⁹⁹¹ Many of these exclusions and deprivations are due to the way that seekers after asylum and protection are conceived up to the point they are given refugee or protection status: as persons present in the country illegally.

⁹⁸⁴ Reception and Integration Agency, ‘Direct Provision’ <http://www.ria.gov.ie/en/RIA/Pages/Direct_Provision_FAQs> accessed 16 March 2016.

⁹⁸⁵ Sue Conlan et al., ‘Counting the Cost: Barriers to Employment after Direct Provision’ (Irish Refugee Council 2014), 34 <http://www.irishrefugeecouncil.ie/wp-content/uploads/2014/05/counting-the-cost_Final-Draft.pdf> accessed 16 March 2016.

⁹⁸⁶ Sue Conlan et al., ‘Counting the Cost: Barriers to Employment after Direct Provision’ (Irish Refugee Council 2014), 38 <http://www.irishrefugeecouncil.ie/wp-content/uploads/2014/05/counting-the-cost_Final-Draft.pdf> accessed 16 March 2016.

⁹⁸⁷ Sue Conlan et al., ‘Counting the Cost: Barriers to Employment after Direct Provision’ (Irish Refugee Council 2014), 16 <http://www.irishrefugeecouncil.ie/wp-content/uploads/2014/05/counting-the-cost_Final-Draft.pdf> accessed 16 March 2016.

⁹⁸⁸ Sue Conlan et al., ‘Counting the Cost: Barriers to Employment after Direct Provision’ (Irish Refugee Council 2014), 20 <http://www.irishrefugeecouncil.ie/wp-content/uploads/2014/05/counting-the-cost_Final-Draft.pdf> accessed 16 March 2016.

⁹⁸⁹ Sue Conlan et al., ‘Counting the Cost: Barriers to Employment after Direct Provision’ (Irish Refugee Council 2014), 20 <http://www.irishrefugeecouncil.ie/wp-content/uploads/2014/05/counting-the-cost_Final-Draft.pdf> accessed 16 March 2016.

⁹⁹⁰ Sue Conlan et al., ‘Counting the Cost: Barriers to Employment after Direct Provision’ (Irish Refugee Council 2014), 16 <http://www.irishrefugeecouncil.ie/wp-content/uploads/2014/05/counting-the-cost_Final-Draft.pdf> accessed 16 March 2016.

⁹⁹¹ Sue Conlan et al., ‘Counting the Cost: Barriers to Employment after Direct Provision’ (Irish Refugee Council 2014), 29 <http://www.irishrefugeecouncil.ie/wp-content/uploads/2014/05/counting-the-cost_Final-Draft.pdf> accessed 16 March 2016.

This carries with it the assumption that they are trying to circumvent other ways of legally accessing the labour market and prevents social or economic integration.⁹⁹²

3. Irregular migrants

As in Europe generally, most irregular migrants in Ireland seem to be individuals who entered Ireland legally and then fell into irregular status.⁹⁹³ The MRCI estimates that there are between 20,000 and 26,000 irregular migrants in Ireland.⁹⁹⁴ The 'huge majority' of them are working, 'typically (though not always) in lower-paid work'.⁹⁹⁵ They are concentrated in the same sectors that characterise other low paid workers: restaurant and catering, domestic work and cleaning and maintenance.⁹⁹⁶ They 'are unable to claim any benefits whatsoever from the Irish state, regardless of whether they are contributing tax or [Pay Related Social Insurance]'.⁹⁹⁷ Because they are afraid of being detected by the state and deported, they try to avoid accessing health services, even in the case of emergencies and serious illness.⁹⁹⁸ They are vulnerable to severe labour exploitation and, because Ireland is not bound by the Employer Sanctions Directive, the employment of irregular migrants in exploitative conditions is not criminalised.⁹⁹⁹ This makes exploitation more likely and increases the likelihood that employers will avoid paying any compensation owed, even under the recent reforms.¹⁰⁰⁰

⁹⁹² Sue Conlan et al., 'Counting the Cost: Barriers to Employment after Direct Provision' (Irish Refugee Council 2014), 39 <http://www.irishrefugeecouncil.ie/wp-content/uploads/2014/05/counting-the-cost_Final-Draft.pdf> accessed 16 March 2016.

⁹⁹³ Migrant Rights Centre Ireland, 'Ireland is Home: An analysis of the current situation of undocumented migrants in Ireland' [2014], 1 <http://www.mrci.ie/wp-content/uploads/2014/11/MRCI_policy-paper_FINAL.pdf> accessed 16 March 2016.

⁹⁹⁴ Migrant Rights Centre Ireland, 'Ireland is Home: An analysis of the current situation of undocumented migrants in Ireland' [2014], 1 <http://www.mrci.ie/wp-content/uploads/2014/11/MRCI_policy-paper_FINAL.pdf> accessed 16 March 2016.

⁹⁹⁵ Migrant Rights Centre Ireland, 'Ireland is Home: An analysis of the current situation of undocumented migrants in Ireland' [2014], 4 <http://www.mrci.ie/wp-content/uploads/2014/11/MRCI_policy-paper_FINAL.pdf> accessed 16 March 2016.

⁹⁹⁶ Migrant Rights Centre Ireland, 'Ireland is Home: An analysis of the current situation of undocumented migrants in Ireland' [2014], 4 <http://www.mrci.ie/wp-content/uploads/2014/11/MRCI_policy-paper_FINAL.pdf> accessed 16 March 2016.

⁹⁹⁷ Migrant Rights Centre Ireland, 'Ireland is Home: An analysis of the current situation of undocumented migrants in Ireland' [2014], 5 <http://www.mrci.ie/wp-content/uploads/2014/11/MRCI_policy-paper_FINAL.pdf> accessed 16 March 2016.

⁹⁹⁸ Migrant Rights Centre Ireland, 'Ireland is Home: An analysis of the current situation of undocumented migrants in Ireland' [2014], 5 <http://www.mrci.ie/wp-content/uploads/2014/11/MRCI_policy-paper_FINAL.pdf> accessed 16 March 2016.

⁹⁹⁹ FRA, 'Severe labour exploitation: workers moving within or into the European Union' [2015], 18, 35 <http://fra.europa.eu/sites/default/files/fra-2015-severe-labour-exploitation_en.pdf> accessed 11 March 2016.

¹⁰⁰⁰ FRA, 'Severe labour exploitation: workers moving within or into the European Union' [2015], 81 <http://fra.europa.eu/sites/default/files/fra-2015-severe-labour-exploitation_en.pdf> accessed 11 March 2016.

D. A human rights-based policy for low paid non-EEA migrant workers in Ireland

Although there are difficulties exactly establishing outcomes for non-EEA migrant workers, based on lack of data or difficulties of measuring outcomes, it is clear that existing Irish policies – despite recent improvements – certainly risk bad outcomes, including the risk of exploitation and the non-protection of economic and social rights for these vulnerable groups. The failure to implement Ireland’s existing policy and a lack of enforcement of Ireland’s existing laws – which themselves leave even legally resident workers in a precarious position – make non-EEA low-paid migrant workers especially vulnerable to discrimination in the labour market, exploitation and to an inability to meet their basic needs. Vulnerable groups within this vulnerable group, like women and minorities, are especially vulnerable and experience multiple forms of discrimination. But a concern for vulnerable groups is not enough. An individual may have particular characteristics that make them particularly vulnerable to having their rights violated. Many of these will arise from the individual’s personal route to living and working in Ireland.¹⁰⁰¹ A rights compliant approach involves a mix of honouring previous commitments to human rights, including equality and non-discrimination, making new commitments and changing the public discourse in Ireland surrounding non-EEA workers. These commitments and discourse need to be reflected in policy. In what follows, I first describe these general changes and then make concrete suggestions for changes regarding the policies governing different groups of non-EEA workers.

To begin with, Ireland should honour its existing commitments. These commitments include the equality and non-discrimination aspects of the Free Movement Directive,¹⁰⁰² but especially the fundamental rights of the Charter of Fundamental Rights of the European Union. These include the right to human dignity, against slavery, servitude or forced labour, education, non-discrimination, workers’ rights to consultation, collective bargaining, placement services and fair and just working conditions.¹⁰⁰³ It should uphold its obligations to prevent exploitation under the International Labour Organisation Conventions 29 and 182, which Ireland has ratified. It should enforce ILO Convention 189 on domestic workers, a particularly vulnerable group.¹⁰⁰⁴ It should also honour its obligations under the main international human rights

¹⁰⁰¹ In a particularly notorious case, a man from Pakistan began work in 2013 with a valid work permit, but his employer confiscated his passport, did not renew the work permit and exploited the worker. Although the Labour Court found in favour of the victim, the High Court overturned the ruling on the basis that contracts with non-EEA nationals are illegal in the absence of a valid permit. The new legislation corrects this situation. See Fundamental Rights Agency (FRA), ‘Severe labour exploitation: workers moving within or into the European Union’ [2015] <http://fra.europa.eu/sites/default/files/fra-2015-severe-labour-exploitation_en.pdf> accessed 11 March 2016. The man was a chef employed by his cousin’s restaurant. Mary Carolan, ‘Award to migrant quashed over illegal job status’, *Irish Times*, 1 September 2012.

¹⁰⁰² Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states [2004] OJ L229/35.

¹⁰⁰³ Charter of Fundamental Rights of the European Union [2010] OJ C83/389, arts 1, 5, 14, 21 and 27–31.

¹⁰⁰⁴ Domestic work is identified as ‘the major area for severe labour exploitation’. FRA, ‘Severe labour exploitation: workers moving within or into the European Union’ [2015], 48 <http://fra.europa.eu/sites/default/files/fra-2015-severe-labour-exploitation_en.pdf> accessed 11 March 2016.

conventions, especially those where the treaty bodies have expressed a particular concern for vulnerable workers in Ireland.

Ireland should, however, also make new commitments. As the government itself noted, it should amend its legislation to conform to the equality and non-discrimination norms of the EU directives governing migration, even if it is not bound by them. This includes the Recast Reception Directive and the Employer Sanctions Directive. At an international level, it should ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. It should also ratify the relevant International Labour Organisation conventions, including those governing migrant workers, 97 and 143. These would form the legal basis for Ireland conforming to the norms of equality, non-discrimination and human rights. As Carrera and Formisano argue, concurring with Holzmann and Münz, these require that 'both temporary and permanent migrants, as well as their families, should benefit from social protection and have access to services provided by educational and health care institutions in the receiving society on the basis of similar rights and equal treatment.'¹⁰⁰⁵ Access to education and health care on an equal basis empowers individual workers in terms of exercising all their rights, but enables them, in particular, to enter and seek better-paid employment in the labour market.

Promoting EU and human rights norms involves a commitment to changing the discourse in Ireland surrounding non-EEA migrant workers. Current discourse surrounding legally resident migrant workers treats them as essentially temporary and treats asylum seekers as 'illegally present' in Ireland. As we have seen this discourse leaves them vulnerable to violations of their social and economic rights and limits or even excludes them from social and economic integration. Ireland should, in conformity with the recommendations of the Committee on the Elimination of Racial Discrimination, actively try to discourage social and labour market exclusion by national origin, and to encourage migrant workers' participation in civil society, trade unions and policy-making. Employers, in particular, should be made aware of existing standards of non-discrimination and human rights and should be encouraged to promote non-discrimination and labour market integration through their own practices and those of their sub-contractors.¹⁰⁰⁶ Although *Migration Nation* contained a conception of integration as a two way process and emphasised equality and non-discrimination in the workplace, this document dates from 2008 and many of the institutions that would have supported it have been dismantled. Ireland needs a new Integration strategy, and it is to be hoped that the current review of Ireland's integration strategy will live up to these norms and implement the necessary structures and reforms.¹⁰⁰⁷

¹⁰⁰⁵ Sergio Carrera and Marco Formisano, 'An EU Approach to Labour Migration: What is the Added Value and the Way Ahead?', [2005] CEPS Working Document no 232, 9–10 <<https://www.ceps.eu/system/files/book/1272.pdf>> accessed 17 March 2016. They cite R. Holzmann and R. Münz, Challenges and Opportunities of International Migration for the EU, its Member States, Neighbouring Countries and Regions: A Policy Note, Institute for Futures Studies, 2nd Stockholm Workshop on Global Mobility Regimes, Stockholm, 11-12 June, Intellecta Stralins, 2004, p. 42.

¹⁰⁰⁶ See TUC Commission on Vulnerable Employment, *Hard Work, Hidden Lives*, 5 <http://www.vulnerableworkers.org.uk/files/CoVE_full_report.pdf> accessed 11 May 2016.

¹⁰⁰⁷ See Office for the Promotion of Migrant Integration, 'Review of Integration Strategy – Update (Feb 2016)' <<http://www.integration.ie/website/omi/omiwebv6.nsf/page/NewIntegrationStrategy-en>> accessed 17 March 2016.

E. Recommendations

1. Legally resident low-paid workers

Although recent reforms to the General Employment Permit system are welcome, much more could still be done to promote work permit holders' integration into the Irish labour market on an equal basis. One way is to open up many more professions to employment on a work permit basis than at present, so that non-EEA workers can come to Ireland as part of the safe and legal immigration avenues called for by the Special Rapporteur on Migration.¹⁰⁰⁸ This would discourage employers from employing workers with an irregular status and improve the ability to work of workers who have lost their job, by giving them more legal options. The right to work for spouses/partner/dependents afforded to workers with a Critical Skills Employment Permit should be extended to all work permit holders. This would allow greater supports for families of legally resident workers. Family reunification, which is currently a highly arbitrary process, should be placed on a transparent and principled basis. Time spent in study or training, or in direct provision, should be deemed 'reckonable residence' for the purposes of long term residency and social supports. Costs of applying for permits, renewing permits and registration with the GNIB should be reduced from their current high levels. Similarly, the procedures for lodging a complaint with the Workplace Relations Bodies and for the recognition of qualifications should be streamlined and made less costly. The Habitual Residence Condition should be scrapped for the purposes of determining who qualifies for social supports and a more transparent and non-discriminatory system should be put in its place. The current test is highly arbitrary. It depends on a Social Welfare Decision officer's determination of the worker's 'centre of interest' in a way that disadvantages all workers of non-Irish origin.¹⁰⁰⁹ Low-paid workers and their dependents should have access to social supports, education and training and government employment on the same basis as EEA citizens, as happens with higher paid employment. Finally, the government should develop more programmes specifically targeted at labour market integration for non-EEA migrant workers in accord with EU policy, along the lines of the pilot EPIC programme.

These positive steps would greatly improve non-EEA workers' material situation, which is the greatest threat to their rights and well-being. But beyond these reforms, greater enforcement and stronger sanctions against employers would encourage a better functioning and fairer labour market for all workers, non-EEA and EEA alike. Migrant workers should be encouraged, with materials in their native

¹⁰⁰⁸ Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 'Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants', A/HRC/29/36, 8 May 2015, 21.

¹⁰⁰⁹ See Bridget Anderson, Isabel Shutes and Sarah Walker, 'Report on the rights and obligations of citizens and non-citizens in selected countries', FP7 Programme bEUcitizen, Work Package 10 [2014], 40–41, <<http://beucitizen.eu/wp-content/uploads/D10.1-Report-on-the-rights-and-obligations-of-citizens-and-non-citizens-in-selected-countries.pdf>> accessed 30 March 2016.

language where possible, to avail of the rights provided by the new reforms to Irish employment legislation and to participate in unions and civil society.

2. Refugees and persons with international protection status

The greatest benefit to refugees and protected persons would be the abolition of the direct provision system and its replacement with a system that respected asylum-seekers' rights, autonomy and allowed them to work. Seekers of asylum and protection should no longer be viewed as 'illegally present' but should be viewed as 'resident' for the purposes of social protections, which should be provided as part of this reformed asylum system. Asylum-seekers should have access to education and training and third level education on the same basis as EEA nationals. Successful applicants for protection would then also gain the social supports necessary for them to live and work successfully outside the direct provision system. Still, special programmes directed at the specific needs of this vulnerable group, along the lines of the EPIC pilot project, should be developed country wide. These should include help securing the documents necessary to participation in the labour market.

3. Irregular migrants

The new reforms are welcome, as they allow a remedy for exploitation for workers in irregular status if they have become irregular through the actions of their employer. It does not, however, provide a path to regularisation, or address the situation of other irregular migrants. The MRCI has developed a regularisation scheme, in accord with best practice and the practices of other EU Member States, that addresses the situation of long term irregular migrants.¹⁰¹⁰ It is based on residence within the state for four years (three for individuals with children), has a two year probationary period and excludes individuals with a 'serious criminal conviction'.¹⁰¹¹ As the MRCI argues, this would be cheaper than deportation, promote integration and promote the employment and social and economic rights of this particularly vulnerable group.¹⁰¹²

¹⁰¹⁰ Migrant Rights Centre Ireland, 'Introducing a regularisation in Ireland: Concerns, considerations and rationale' [2015], 1 <<http://www.mrci.ie/wp-content/uploads/2014/11/Regularisation-recommendation-and-rationale.pdf>> accessed 17 March 2016.

¹⁰¹¹ Migrant Rights Centre Ireland, 'Introducing a regularisation in Ireland: Concerns, considerations and rationale' [2015], 4 <<http://www.mrci.ie/wp-content/uploads/2014/11/Regularisation-recommendation-and-rationale.pdf>> accessed 17 March 2016.

¹⁰¹² Migrant Rights Centre Ireland, 'Introducing a regularisation in Ireland: Concerns, considerations and rationale' [2015], 5 <<http://www.mrci.ie/wp-content/uploads/2014/11/Regularisation-recommendation-and-rationale.pdf>> accessed 17 March 2016.

F. Final conclusion

Among EU Member States, Ireland is a particularly open and flexible labour market which is capable of integrating a large number of non-EEA labour migrants over time as a result of this openness and flexibility.¹⁰¹³ This process is slow, however – MIPEX sees it occurring after ten years – partly as a result of a lack of positive programmes to promote worker integration. Under the current policies, the process predictably involves many of these workers and their dependents experiencing poverty and exploitation as a result of Ireland’s unequal and discriminatory provision of access to social supports, education and training and remedies for unfair working conditions. This vulnerability to the violation of their economic and social rights is often combined with multiple discriminations and, alarmingly frequently, exploitation. Addressing these violations of human rights and inequalities and fully vindicating non-EEA workers’ rights would lead to a great improvement in outcomes for many workers and their agency, and ultimately tremendous benefits to all workers and the country as a whole, from the development of a fair and well-regulated labour immigration system that harnesses the potential of all workers in Ireland.

¹⁰¹³ Migrant Integration Policy Index, 'Ireland, 2014' <<http://www.mipex.eu/ireland>> accessed 10 April 2016.

VII. Unrecognised vulnerability? Migration and statelessness in South Asia, with a special focus on the Indian treatment of intra-Asian refugee flows (Author: Venkatachala G. Hegde)

A. Introduction

1. Existence of stateless persons within South Asia

The precise figures for the total numbers of refugees and stateless persons in South Asia, as in any other part of the globe, are difficult to obtain.¹⁰¹⁴ The numbers vary, but can be regarded as substantial in relation to their overall population for some South Asian countries like Bhutan and Bangladesh. In this region, refugees and stateless persons are often confined to certain pockets and locales where groups of migrants live. This problem should be attributed to the configuration and closely inter-woven historical and cultural affinity among South Asian countries.¹⁰¹⁵ According to an overview of the South Asian region with regard to the existence of refugees and stateless persons by the UNHCR more than 200,000 refugees and asylum-seekers of various origins live in India, nearly 40,000 refugees and asylum-seekers live in Nepal, and nearly 2,400 refugees and asylum-seekers, 10,000 returnees, and 30,000 internally displaced persons (IDPs) live in Sri Lanka.¹⁰¹⁶

2. Main reasons for their existence

In the South Asian context, India has land borders with Bangladesh, Bhutan, China, Myanmar, Nepal and Pakistan. A small stretch of sea separates India and Sri Lanka. For a long time, people within South Asia have been moving across the borders for social and economic reasons, sharing a largely common ethnic identity.¹⁰¹⁷ The migration flows have given rise to issues relating to citizenship and nationality on account

¹⁰¹⁴ The precise figures of the refugees and stateless persons do not appear in any of the official reports of the South Asian States, although many of them have allowed and accommodated a huge number of such vulnerable populations to stay on their soil by providing all the necessary basic protections. The Annual Report of the Ministry of Home Affairs, Government of India, for example, while referring to issues relating to citizenship and related issues, does not mention anything about the problem of 'refugees' or 'statelessness'. See UNHCR, 'South Asia' <<http://www.unhcr.org/51b1d640a.html>> accessed 9 April 2016.

¹⁰¹⁵ South Asia comprises eight nations, namely, Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka.

¹⁰¹⁶ UNHCR overview generally, see UNHCR, 'Populations of concern to UNHCR' <<http://www.unhcr.org/564da0e3b.html>> accessed 9 April 2016.

¹⁰¹⁷ The Charter of the South Asian Association for Regional Cooperation (SAARC) in its Preamble refers to the 'common cultural ties' among South Asian countries. The impact partition on the daily lives of the people was slow in the making. It has been pointed out that, when a 4,000 km international border cut through Bengal and Assam and created sudden havoc in the labour, land and produce markets, those living in these parts devised ways to continue their old neighbourly relations and created new ones. See Papiya Ghosh, *Partition and the South Asian*

of the shrinking economic and social space in certain communities. These issues of citizenship and nationality will be considered in this case study through examples from the South Asian context.¹⁰¹⁸ For example, as regards people moving between Bhutan and Nepal, a certain section of the Nepali population living within the fringes of Bhutan's borders has become a potential subject of statelessness on account of the operation of nationality laws; a similar problem faces the Bhutanese population living in Nepal. Similarly, a section of the Bengali population living in the border area of India-Bangladesh in several enclaves, despite being there for several generations, is in need of protection and is threatened by statelessness. However, this issue between India and Bangladesh has been resolved through the adoption of long-pending land and boundary agreement.¹⁰¹⁹

India and Pakistan, which are closely connected due to their long joint land boundaries as well as their common past, do not formally acknowledge the existence of refugees and stateless from the other country.¹⁰²⁰ Large masses have moved between these two countries since the 1940s. The vulnerability of, for example, refugees and stateless persons is due to the non-acknowledgment of the migration phenomenon not addressed through specific measures.¹⁰²¹ Rather, the domestic courts of both countries continue to deal with some specific issues relating to the status of persons, property and other related issues. Likewise, numerous individuals have moved between India and China over the years.¹⁰²² There are, for example, already third and fourth generation Tibetan refugees living in India.¹⁰²³ Also in this case the

Diaspora: Extending the Subcontinent (Routledge 2007); William van Schendel, 'Stateless in South Asia: The Making of the India-Bangladesh Enclaves' (2002) 61(1) *The Journal of Asian Studies* 115; Ranbir Samaddar, *The Marginal Nation: Transborder Migration from Bangladesh to West Bengal* (Sage Publications 1999).

¹⁰¹⁸ Citizenship is a legal term and is regulated through laws. Nationality is a broader term and applies to all those who identify themselves as belonging to a common ethnic identity. In the South Asian context India, Pakistan and Bangladesh which were one country at one point of time continue to face this challenge of nationality.

¹⁰¹⁹ The revised Land Boundary Agreement between India and Bangladesh was adopted on 7 May 2015.

¹⁰²⁰ See 'Refugees from Pakistan seek Indian nationality', *The Tribune*, 16 February 2016 <<http://www.tribuneindia.com/news/jalandhar/refugees-from-pakistan-seek-indian-nationality/196883.html>> accessed 8 April 2016; Bharti Jain, 'Minority Refugees from Pakistan and Bangladesh can stay back in India even after visa expiry', *The Times of India*, 16 February 2016 <<http://timesofindia.indiatimes.com/India/Minority-refugees-from-Pakistan-and-Bangladesh-can-stay-back-in-India-even-after-visa-expiry/articleshow/48860702.cms>> accessed 8 April 2016; Dan McDougall, 'The forgotten refugees who wait for justice after 60 years', *The Guardian*, 5 August 2007 <<http://www.theguardian.com/world/2007/aug/05/india.theobserver>> accessed 9 April 2016; Poulomi Banerjee, 'Falling short: How India treats those seeking refuge', *Hindustan Times*, 14 September 2015 <<http://www.hindustantimes.com/india/falling-short-how-india-treats-those-seeking-refuge/story-Y96NXag08KXzaNjkOND5M.html>> accessed 9 April 2016; Interview with Antonio Guterres, United Nations High Commissioner for Refugees, *The Hindu*, 4 January 2013 <<http://www.thehindu.com/opinion/interview/indias-refugee-policy-is-an-example-for-the-rest-of-the-world-to-follow/article4269430.ece>> accessed 9 April 2016.

¹⁰²¹ According to one estimate partition switched the home lands of nearly 12 million people in South Asia by starting a massive migration of minorities in opposite directions. This happened before the backdrop of one million deaths. See Papiya Ghosh, *Partition and the South Asian Diaspora: Extending the Subcontinent* (Routledge 2007), 14; also see Urvashi Butalia, *The Other Side of Silence: Voices from the Partition of India* (Viking 1998).

¹⁰²² Annie Gowen, 'China's crackdown slows Tibetan refugee crossings to freedom in India', *The Washington Post*, 19 October 2014 <https://www.washingtonpost.com/world/asia_pacific/china-crackdown-slows-tibet-refugee-crossings-to-freedom-in-india/2014/10/18/d40fb39f-6860-4145-8761-dac00653f01b_story.html> accessed 9 April 2016.

¹⁰²³ Advaita Kala, 'India's Tibetan refugees are leaving their homeland behind ... but have they found new one?', *Daily Mail*, 16 February 2015 <<http://www.dailymail.co.uk/indiahome/indianews/article-2954748/India-s-Tibetan->

issue of refugees and statelessness is a problem that is not formally acknowledged.¹⁰²⁴ The situation between Sri Lanka and India is slightly different as both countries have not only acknowledged the existence of refugees and stateless persons but have also made efforts to mitigate the situation.¹⁰²⁵ It should be noted that the political relationships between South Asian neighbours also play a crucial role in resolving some of these legally intricate issues.¹⁰²⁶

3. Aim of this case study

The present study seeks to examine the existence and status of stateless persons as a vulnerable group within South Asia, and also aims to examine the context and causes for the existence of this vulnerable group in the region, with a specific focus on India.¹⁰²⁷ The study will also examine the approach of the South Asian states towards adopting appropriate legal and policy frameworks for the protection of

refugees-leaving-homeland-new-one.html> and Resource Information Center, 'India: Information on Tibetan refugees and settlements', 30 May 2003 <<http://www.refworld.org/docid/3f51f90821.html>> accessed 7 April 2016.¹⁰²⁴ The Annual Report 2014–15 of the Ministry of Home Affairs, Government of India, refers to Sri Lankan refugees and the steps taken to repatriate or rehabilitate them. It notes and recognises that the refugee and statelessness situation between India and Sri Lanka existed during 1983 and 2012 at various stages. The report does not, however, refer to other refugee or statelessness situations that exist within India. See Government of India, Ministry of Home Affairs, Annual Report 2014–15 <[http://mha.nic.in/sites/upload_files/mha/files/AR\(E\)1415.pdf](http://mha.nic.in/sites/upload_files/mha/files/AR(E)1415.pdf)> accessed 8 April 2016.

¹⁰²⁵ For a general account on refugee situation within South Asia with specific focus on Sri Lanka, Nepal and India see UNHCR, 'South Asia: 2015 UNHCR sub-regional operations profile — South Asia' <<http://www.unhcr.org/pages/49e45b156.html>> accessed 7 April 2016; also see Arun Janardhanan, 'Explained: The Sri Lankan Refugee Question', *The Indian Express*, 31 January 2015 <<http://indianexpress.com/article/india/india-others/explained-the-sri-lankan-refugee-question/>> accessed 9 April 2016; Annie Gowen, 'Children of Sri Lankan refugees born in India uncertain about future', *The Washington Post*, 21 February 2015 <https://www.washingtonpost.com/world/asia_pacific/children-of-sri-lankan-refugees-born-in-india-uncertain-about-future/2015/02/21/d1e425ec-abc3-11e4-8876-460b1144cbc1_story.html> accessed 8 April 2016.

¹⁰²⁶ Rani Singh, 'Fears for Nepal's "invisible" Tibetan refugees', *BBC News*, 27 April 2015 <<http://www.bbc.com/news/world-asia-32476346>> accessed 8 April 2016; Amnesty International, *Deadly Journeys: The Refugee and Trafficking Crisis in Southeast Asia* [2015] <http://www.amnesty.org.au/images/uploads/about/Amnesty_Report_2015_The_Refugee_and_Trafficking_Crisis_in_Southeast_Asia.pdf> accessed 8 April 2016; UNHCR, 'UNHCR calls for safer alternatives for deadly Bay of Bengal voyages', 23 February 2016 <<http://www.unhcr.org/56cc51c76.html>> accessed 9 April 2016; Austin Ramzy, 'China and India are sitting out refugee crisis', *The New York Times*, 28 June 2015 <http://www.nytimes.com/2015/06/29/world/asia/china-and-india-are-sitting-out-refugee-crisis.html?_r=0> accessed 8 April 2016; also see Human Rights Watch, 'Southeast Asia: Put Rights at Center of Boat People Summit' <<https://www.hrw.org/news/2015/05/27/southeast-asia-put-rights-center-boat-people-summit>> accessed 9 April 2016.

¹⁰²⁷ The concept used in South Asia with regard to vulnerability is 'marginalised populations'. This term is used in a much broader context than 'vulnerable' to include populations that have been subjected to caste and other similar discriminations. 'Caste' in the South Asian context is a hierarchy created within the population. There are four categories, starting from highest category (termed as *brahmins* who undertake priestly and related jobs) followed by *kshatriyas* (who are warring groups), *shudras* (working in the field and other jobs) and lastly *dalits*. This categorisation, despite having existed for a very long time, is not recognised by the Indian Constitution and legal framework.

stateless persons as a vulnerable group, and will focus on some selected case studies of stateless persons within South Asia. The response of the EU to these groups of vulnerable populations within South Asia will also form part of this study. The study will conclude by outlining possible future challenges, conclusions and recommendations.

B. Stateless persons as a vulnerable group

Individuals are stateless when no state, including their host state, accepts them as citizens. By virtue of this non-recognition, they are placed in a vulnerable position. Due to their lack of citizenship, stateless persons are deprived of some of the most basic human rights. The Universal Declaration of Human Rights, in its Article 15, provides that 'everyone has the right to a nationality' and that 'no one shall be arbitrarily deprived of his nationality'.¹⁰²⁸ Several international human rights conventions have subsequently reiterated this position in specific contexts.¹⁰²⁹ Despite this, groups of stateless persons who live in their host countries in a nearly secluded condition are denied their residence rights, travel documents, and a host of basic needs that would make their lives comfortable. It will be difficult for them to access any employment, education, property ownership or participation in the political life of the country where they are living.¹⁰³⁰

Statelessness may have different causes: political upheaval, racial and ethnic discrimination, and differences in laws between countries, including laws relating to marriage and birth registration, expulsion of a people from a territory, nationality based on descent, abandonment, and lack of means to register children. However, in South Asia, statelessness usually occurs when governments arbitrarily change their citizenship laws and introduce severe restrictions to retaining, acquiring or re-acquiring citizenship.

The primary reason for the cautious approach adopted by states, including South Asian states, should, however, be attributed to their own restrictive policy-oriented domestic legal regimes relating to nationality issues. Asian states, including South Asian states, generally adopt a rigid legal approach to questions of nationality. They emphasise the 'sovereign right of States to establish laws governing the acquisition, renunciation or loss of nationality'.¹⁰³¹ They are furthermore not entirely prepared to take up the obligations towards foreigners created by international conventions, in particular as regards providing non-citizens with access to their national courts, which is an area of concern for stateless persons. Further, states regard migration issues as putting pressure on their existing resources. In some instances, the changing profile of local and border demography on account of migration also has a direct link to

¹⁰²⁸ Universal Declaration of Human Rights, adopted 10 December 1948, General Assembly Resolution 217 A (III), UN GAOR, 3rd Session (Resolution, Pt.1).

¹⁰²⁹ Two of them are most important, namely, Convention Relating to the Status of Stateless Persons, 1954 and the Convention on the Reduction of Statelessness, 1961, for the text and status of the Conventions, see UNHCR, 'UN Conventions on Statelessness' <<http://www.unhcr.org/pages/4a2535c3d.html>>

¹⁰³⁰ United Nations, *Guidance Note of the Secretary-General: The United Nations and Statelessness* [2011].

¹⁰³¹ See Report of the Asian-African Legal Consultative Organization's (AALCO) Forty-fifth Session, New Delhi, 2006 <<http://www.refworld.org/publisher,AALCO,,,44eaddc54,0.html>> accessed 7 April 2016.

complicated political issues. As a result, the granting of citizenship and the treatment of foreigners and stateless people is a question that is more or less only regulated by domestic law in South Asia, or at least, this is the way South Asian States see it.

C. India and the legal treatment of statelessness

This study has so far considered migration flows and the creation of statelessness in South Asia. The study will now turn its attention towards India and how that country has addressed the vulnerabilities created by the denial of citizenship and refugee status.

Since 1971, with the changes in the territorial configuration in the eastern part of India and the consequent migration taking place for economic reasons, citizenship issues and the potential for the creation of refugees and statelessness have increased. It is alleged that thousands of migrants from neighbouring countries fled into the northeastern parts of India and continued to pour in throughout the 1980s looking for a better and more secure life. This was also facilitated through the common ethnic and social identity existing in those areas. In 1985 the Indian Government, after protracted negotiations, granted citizenship rights to all settlers from the former East Pakistan who had come to Assam before 1971. As noted by one scholar: 'In one stroke thousands of migrants became Indian citizens. But thousands of others, who had arrived after 1971, remained illegal.'¹⁰³²

1. India's North-East Provinces

The Illegal Migrants (Determination by Tribunal) ('IMDT Act') of 1983 was enacted by the Indian Government, ostensibly to facilitate the detection and deportation of illegal migrants.¹⁰³³ As foreigners in the rest of the country were covered under the provisions of the 1946 Foreigners Act, the IMDT Act was specifically and exclusively applicable to foreigners in Assam, and under the Act tribunals were established to determine whether or not a person was an illegal migrant. According to this Act, an illegal immigrant was a person who (a) entered India on or after 25 March 1971; (b) was a foreigner; and (c) entered India without being in possession of a valid passport or other travel documents or any other legal authority. Clauses 4 and 9 of the IMDT Act provided that those who came before 25 March 1971 would not come under the purview of the Act as the issue of such cases 'has been left for negotiations'. Nevertheless, even in the case of post-1971 migrants the procedures were kept deliberately cumbersome.

¹⁰³² V. Venkatesan, 'Partisan Citizenship' (2003) 20(2) *Frontline*.

¹⁰³³ As the Preamble of the IMDT Act states, 'The influx of foreigners who illegally migrated into India across the borders of the sensitive eastern and north eastern regions of the country and remained in the country [and] pose [...] a threat to the integrity and security of the said regions [...] after taking into account the need for their speedy detection the need for protection of genuine citizens of India and the interests of the general public [...]'.
'

While Section 9 of the Foreigners Act provided that the onus of proving citizenship status rested on the person accused of being a non-citizen, the IMDT Act contained no such provision, and in effect its provisions accorded greater protection to anyone accused of being a foreigner by placing the burden of proof on the prosecution to establish that he or she is not a citizen of India. In *Sarbananda Sonawal v Union of India*,¹⁰³⁴ the petitioner claimed that the IMDT Act had actually ended up protecting illegal migrants and was unconstitutional as it discriminated against a class of citizens of India, making it impossible for citizens resident in India to secure the detention and deportation of foreigners from India.¹⁰³⁵

The Supreme Court, by holding IMDT Act as unconstitutional in 2005, appeared to have removed the anomaly of having two anti-immigration acts existing in the country. The Supreme Court found that the provisions of the Foreigners Act, 1946, specifically those relating to 'burden of proof' in Section 9 of the Act, to be more workable than the procedures established under the IMDT Act. It concurred with the petitioner that it would be possible for the immigrants to evade the procedural requirements established under the tribunals set up within Assam. The Court also concurred with the question raised by the petitioner as to why there should be a separate tribunal for Assam to determine the issue of nationality. It found the Foreigners Act, 1946, sufficient to address these issues. The Court declared the IMDT Act unconstitutional on the ground that it violated Article 355 of the Indian Constitution, which, among other things, provides that, 'It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the Government of every state is carried out in accordance with the provisions of the Constitution. The Court, while agreeing with the petitioner, linked the presence of a large number of economic migrants in some areas to what could be termed as 'external aggression'.¹⁰³⁶

2. Amendments to Indian citizenship laws and the impact on vulnerable groups

In the host of amendments carried out to the Citizenship Act¹⁰³⁷ efforts were made to deal with the issue of migrants and other related issues. The substantive contents of these amendments can be placed into

¹⁰³⁴ *Sarbananda Sonawal v Union of India*, All India Reporter (AIR), SC (2005) at 2935.

¹⁰³⁵ 'Under the IMDT Act, the Assam Police had expelled only 1,491 illegal migrants to Bangladesh from 1986 to 2000.' Suhas Chakma, 'The Issue of Illegal Migrants', *The Pioneer*, 2 May 2003.

¹⁰³⁶ A three-member bench comprising Chief Justice R.C. Lahoti, Justice G.P. Mathur and Justice P.K. Subramanyam struck down the IMDT Act as unconstitutional and also noted that although enquiries were initiated in 3,10,759 cases under the IMDT Act, only 10,015 persons were declared illegal immigrants and only 1,481 illegal immigrants were physically expelled up to 30 April 2000. On the contrary, in West Bengal, where the Foreigner's Act was applicable, 4,89,046 persons were deported between 1983 and November 1998, which was a lesser period. Thus, the Bench directed the constitution of fresh tribunals under Foreigner (Tribunals) Order, 1964.

¹⁰³⁷ The Indian Citizenship Act, 1955 regulates the acquisition and determination of citizenship and has been amended through the Citizenship (Amendment) Act, 1986 and followed by 1992, 2003, 2005 and in 2015.

four categories for the purpose of closer scrutiny, and also to see whether these changes create statelessness. The categories are the following:

- In order to give effect to the Assam Accord, which was finalized in 1986 between the Government of India and the All Assam Students Union, Section 6A was introduced which, among other things, reinforced the emphasis on ethnicity as well as birth and descent.
- Section 3 of the 1955 Citizenship Act, as amended in 1986, 1992 and 2003, provides that every person born in India on or after 26 January 1950 but before 1 July 1987, irrespective of the nationality of his parents, was to be regarded as a citizen of India by birth.
- Persons born after 1 July 1987 but before 3 December 2004 are considered citizens of India by birth if either of their parents were a citizen of India at the time of their birth.
- Persons born after 3 December 2004 are considered citizens of India by birth if both the parents are citizens of India or one of the parents is a citizen of India and other is not an illegal migrant¹⁰³⁸ at the time of his birth.

Change in the Indian law in 2003 by inserting the phrase ‘illegal migrant’ and regarding it as one of the reasons for not granting citizenship would be potential arena for creation of statelessness. In other words, children born out of wedlock to an Indian citizen and an ‘illegal migrant’ would *ipso facto* become stateless. The problem would become even more complex were neighbouring countries such as Bangladesh, Bhutan and Nepal, invoking the principle of *jus soli*,¹⁰³⁹ to refuse to admit these persons as their own citizens.

3. India-Pakistan borders

Certain provisions within the Indian Constitution have been regarded as giving rise to statelessness, for example, Article 370 of the Indian Constitution. This article gives special status to Jammu and Kashmir and prevents any non-state resident from either owning property or obtaining citizenship rights in the states of Jammu and Kashmir. Thus, those families who migrated from West Pakistan during the 1947 partition and settled in Jammu and Kashmir have been stateless and bereft of citizenship rights for years, while others who settled in other parts of the country had access to gaining citizenship.¹⁰⁴⁰ Some 20,000 Hindu

¹⁰³⁸ An ‘illegal migrant’ as defined in section 2(1)(b) of the Citizenship Act is a foreigner who entered India (i) without valid passport or other prescribed travel documents; or with a valid passport or other prescribed travel documents but remains in India beyond the permitted period of stay.

¹⁰³⁹ Under international law *jus soli* and *jus sanguinis* are two principles that relate to acquisition of nationality. *Jus soli* connotes acquisition of nationality by birth. *Jus sanguinis*, on the other hand, connotes acquisition of nationality by blood relationship.

¹⁰⁴⁰ The area of Kashmir has been at the center of a territorial dispute between India and Pakistan since the two nations gained their independence in 1947. Under the partition plan provided by the Indian Independence Act of 1947, Kashmir was free to accede to India or Pakistan. The Maharaja, Hari Singh, wanted to stay independent but

families from Pakistan who went to the Indian side after the partition riots are still stateless. Over one hundred thousand Punjabi refugees fled to Jammu and Kashmir from the neighbouring Sialkot district of Punjab province (now in Pakistan) in 1947 during the partition, and until now have not been granted citizenship. The descendents of these stateless people continue to be denied the right to nationality. India has authorized the district magistrate of Jaisalmer, as per its Citizenship Act, to grant Indian citizenship to Pakistanis who have been living in the border district for at least five years.¹⁰⁴¹

4. Sri Lankan Tamils

There are also instances where stateless people have citizenship rights conferred on them when countries undertake amendments to their citizenship laws. The Sri Lankan position was that whoever was not a Sri Lankan citizen, referring predominantly to Tamils in its territory, was an Indian citizen. India did not accept this position. Instead, India established its own qualifications for citizenship as contained in Articles 5 and 8 of the Indian Constitution of 1950, and was prepared to accept only those who qualified under its constitutional provisions. These provisions made it difficult for Indians resident outside India to qualify for Indian citizenship, which was made even more difficult by the enactment of a separate citizenship law by the Government of India in 1955. Nor did the High Commissioner for India in Sri Lanka show any ready willingness to accommodate Indians in Sri Lanka who applied for Indian passports.¹⁰⁴² The net result was the creation of a third category, the 'Stateless'. These were the Indian Tamils who did not qualify to be either Sri Lankan or Indian citizens. India's lapses were even more serious in that Articles 5 and 8 of the Indian Constitution became barriers for the Indian nationals in Sri Lanka to revert back to their original nationality. India's municipal laws resulted in her own nationals being deprived of 'special privileges' and their claim to the Government of India's special protection that had existed during the colonial period.¹⁰⁴³ India made it difficult both constitutionally and administratively for Indian nationals in Sri Lanka to qualify for Indian citizenship. It was in its own self-interest to discourage such trends.

India had agreed to provide citizenship and repatriate 600,000 Hill Tamils under a series of bilateral agreements between India and Sri Lanka in 1964 and 1974. A total of 506,000 people applied for Indian citizenship but the process of granting Indian citizenship was very slow, and in 1982, 86,000 applications for citizenship to the Indian High Commission were still pending. A further 90,000 people who had been issued with Indian passports were still remaining in Sri Lanka. In 2007, the Sri Lankan Cabinet approved amendments to relevant sections of the Grant of Citizenship to Stateless Persons Act No 39 of 1988 and the Grant of Citizenship to Persons of Indian Origin Act No 35 of 2003. The Grant of Citizenship to Stateless

eventually decided to accede to India, signing over key powers to the Indian Government in return for military aid. In addition to the rival claims of Delhi and Islamabad to the territory, there has been a growing and often violent separatist movement against Indian rule in Kashmir since 1989.

¹⁰⁴¹ It should be noted that under the Citizenship Rules, District Collector is the nodal agency for receiving all applications and scrutinising them for the further action necessary to grant citizenship.

¹⁰⁴² A. J. Wilson, *Politics in Sri Lanka, 1947-73* (Macmillan 1974), 32.

¹⁰⁴³ The special privileges included their free entry to India without any visa or related regulations.

Persons (Special Provisions) (Amendment) Act, 2009 benefitted a large number of Sri Lankans of Indian origin now living in Tamil Nadu refugee camps.¹⁰⁴⁴

5. Chakmas

India's Citizenship (Amendment) Act 2003 was passed by the Indian Parliament on 22 December 2003 and came into force after receiving the assent of the President of India on 7 January 2004. This amendment meant that children born to an Indian parent in India with one foreign 'illegal' parent will not receive citizenship, increasing the risk of statelessness.

The Chakmas and Hajongs from the Chittagong Hill Tracts of then East Pakistan (now Bangladesh) migrated to India and were settled in Arunachal Pradesh. Children of these migrants have not been granted the right to nationality. Now numbering some 65,000, many Chakmas have the right to citizenship and to vote, but the government has denied them access to the social, economic, and political rights to which they are entitled. Nearly 35,000 of these Chakmas were given valid migration certificates that indicated legal entry into India and the willingness of the government to accept the Chakmas as future citizens, much like migrants from Pakistan following Partition. Nearly 1,000 members of the Hajong tribe, a Hindu group from the Mymensingh district of Bangladesh, were also settled in these areas and granted migration certificates. In the more than 30 years since their resettlement, the Chakmas and Hajongs have built villages, developed the land granted to them, and established strong ties to the region. Additionally, they have become integrated into the social fabric of the state of Arunachal Pradesh. They have voted in state elections and paid state taxes on their land. Many of these Chakmas and Hajongs, who now number about 65,000 persons, were born in India and know no other home. It is against this background that their claims for Indian citizenship are to be considered.

There can be no question that the Chakmas and Hajongs are of Indian origin and have been residing in Arunachal Pradesh for more than 30 years. Under the Indira-Mujib Agreement of 1972, it was determined that India, not Bangladesh, would be responsible for all migrants who entered India before 25 March 1971. Furthermore, the Central Government has often asserted that the Chakmas and Hajongs have a legitimate claim to Indian citizenship.¹⁰⁴⁵

¹⁰⁴⁴ As per estimates, approximately 80,000 Sri Lankans fled to India as refugees in the wake of the July 1983 disturbances and the continuing ethnic conflict. Of them, 28,500 are Sri Lankans of Indian origin (kith and kin of plantation workers) and do not have citizenship rights due to lacunae in the 2003 legislation. Also see Rebecca Wolozin, 'Citizenship Issues and Issuing Citizenship: A Case Study of Sri Lanka's Citizenship Laws in a Global Context', (2014) 16(1) Asian-Pacific Law & Policy Journal [, 1.

¹⁰⁴⁵ Samudra Gupta Kashyap, 'Why Chakmas and Hajongs are India's nowhere people', *The Indian Express*, 2 October 2015 <<http://indianexpress.com/article/explained/why-chakmas-and-hajongs-are-indias-nowhere-people/>> accessed 8 April 2016; 'Grant citizenship rights to Chakmas, Hajongs in Arunachal, says SC', *Business Standard*, 17 September 2015 <http://www.business-standard.com/article/news-ians/grant-citizenship-rights-to-chakmas-hajongs-in-arunachal-says-sc-115091701089_1.html> accessed 8 April 2016. The Government of Arunachal Pradesh, however, does not accept this view and it has a different view from the Government of India, see 'Arunachal Pradesh

Further, a very large proportion of these refugees would have been born in India and, therefore, would be automatically entitled to the grant of citizenship. But of even greater significance is the Supreme Court ruling in *National Human Rights Commission v State of Arunachal Pradesh*, a case which warrants close scrutiny.¹⁰⁴⁶ The case arose in response to allegations of human rights abuses suffered by the Chakmas and Hajongs at the hands of the State Government of Arunachal Pradesh in collaboration with private entities such as the All Arunachal Pradesh Students Union (AAPSU). In September and October of 1994 the Committee for Citizenship Rights of the Chakmas of Arunachal Pradesh (CCRCAP) made numerous appeals to the National Human Rights Commission (NHRC), alleging human rights abuses and imminent threats to the lives and property of the Chakmas and Hajongs. Upon inquiry, the NHRC determined that the Arunachal State Government was acting in concert with the All Arunachal Pradesh Students Union to issue 'quit notices' with a view to intimidating the Chakmas and Hajongs and expelling them from the state. In view of the State Government's dilatory statements and inadequate responses to the inquiries and directions of the NHRC, the matter was brought before the Supreme Court.

The Supreme Court, in its orders on 17 September 2015 and subsequently on 17 December 2015 regarding the completion of three months period to grant citizenship to Chakmas in response to a petition by the Committee for Citizenship Rights of the Chakmas (CCRC) of Arunachal Pradesh, directed the Government of India and the Government of Arunachal Pradesh to complete the process of granting citizenship to about 7,000 Chakmas and Hajongs within three months.¹⁰⁴⁷ This case which was earlier decided in 1996 by the Supreme Court wherein it had directed the State Government of Arunachal Pradesh to 'ensure that the Chakmas and Hajongs situated in its territory are not ousted by any coercive action, not in accordance with law.'¹⁰⁴⁸ In its final order, after concluding that there was indeed an imminent threat to the lives and property of the Chakmas and Hajongs (an issue which will be dealt with below), the Supreme Court distinguished the case from that of *State of Arunachal Pradesh v Khudiram Chakma*. In *State of Arunachal Pradesh v Khudiram Chakma* the Supreme Court ruled in favour of the State Government in a dispute over land rights between the state and 57 Chakma families.¹⁰⁴⁹

The question of the Chakmas' citizenship was a salient feature of this dispute because only citizens were permitted to purchase land in protected areas under the Foreigners Order of 1948. As Arunachal Pradesh was declared a protected area under the Government of India Act 1935, the Chakma families' acquisition of lands outside the Chakma Allotment Areas would be valid only if they were found to be citizens of India. Under the Assam Accord, codified in section 6-A of the Citizenship Act, the Chakmas were found to be non-citizens as they were not ordinarily resident in Assam, but rather in Arunachal Pradesh. In the

seeks review of SC order on granting citizenship to Chakma, Hajong refugees', *The Times of India*, 27 October 2015 <<http://timesofindia.indiatimes.com/india/Arunachal-Pradesh-seeks-review-of-SC-order-on-granting-citizenship-to-Chakma-Hajong-refugees/articleshow/49545801.cms>> accessed 8 April 2016.

¹⁰⁴⁶ *National Human Rights Commission v State of Arunachal Pradesh*, All India Reporter (AIR), Supreme Court (SC) (1996) 1234; Supreme Court Cases (SCC) (1996) (1) 742.

¹⁰⁴⁷ See Sangeeta Barooah Pisharoty, 'Chakmas Issue Roils Arunachal as Supreme Court Decrees End to Their Statelessness', *The Wire*, 17 December 2015 <<http://thewire.in/2015/12/17/chakma-issue-roils-arunachal-as-supreme-court-decrees-end-to-their-statelessness-17017/>> accessed 8 April 2016.

¹⁰⁴⁸ *National Human Rights Commission v State of Arunachal Pradesh*, AIR (1996) SC 1234.

¹⁰⁴⁹ *State of Arunachal Pradesh v Khudiram Chakma*, AIR (1994) SC 1461 and also see SCC (1994) Supl. (1) 615 JT 1993 (3) 541.

*National Human Rights Commission v State of Arunachal Pradesh*¹⁰⁵⁰ the Supreme Court stated that the question of citizenship by registration under Section 5(1)(a) of the Act was based upon considerations which were 'entirely different' from those operative in *State of Arunachal Pradesh v Khudiram Chakma*.¹⁰⁵¹ While the terms of the Assam Accord limited its application to a small number of persons, section 5(1)(a) was found to be a provision with general application.¹⁰⁵² As the Chakmas and Hajongs clearly met the requirements of the Act, the Court affirmed their right to apply for citizenship under Section 5(1)(a) of the Indian Citizenship Act 1955 and ordered the State Government to take steps to facilitate their registration.

The Citizenship Rules of 1956 define the process by which an individual may become a citizen of India under Section 5(1)(a) of the Indian Citizenship Act, 1955. The Rules describe the form that any citizenship application must take as well as creating the office of the District Magistrate, who is responsible for collecting and transmitting citizenship applications to the Central Government. Rule 8 reads, in its entirety: 'The authority to register a person as a citizen of India under these rules shall be the Central Government.' In *Shamin Bano v Union of India*¹⁰⁵³ the High Court of Rajasthan indicated that questions of citizenship are the exclusive domain of the Central Government and that no other body, not even the Court itself, could constitutionally interfere with the Government's determinations in this area. Reiterating this position and clarifying the role of the District Magistrate in *National Human Rights Commission v State of Arunachal Pradesh*, the Supreme Court stated:

On a conjoint reading of Rules 8 and 9 it becomes clear that the Collector has merely to receive the application and forward it to the Central Government. It is only the authority constituted under Rule 8 which is empowered to register a person as a citizen of India. It follows that only that authority can refuse to entertain an application made under Section 5 of the Act.¹⁰⁵⁴

This explanation was necessary because of the dilatory behaviour of the State Government of Arunachal Pradesh. The District Collector (DC) was refusing to forward the citizenship applications of the Chakmas and Hajongs to the Central Government for a judgment. According to the State Government the DC had the power to make initial determinations as to the merits of a citizenship application. Further, these

¹⁰⁵⁰ *National Human Rights Commission v State of Arunachal Pradesh*, AIR (1996) SC 1243 or SCC (1996) (1) 742.

¹⁰⁵¹ *State of Arunachal Pradesh v Khudiram Chakma*, AIR (1994) SC 1461 or SCC (1994) Supl. (1) 615 JT 1993 (3) 541.

¹⁰⁵² The Assam Accord was signed between the Government of India and the State of Assam along with All Assam Students Union (AASU) and All Assam Sangram Parishad (AASP) on 15 August 1985 to end the six years of agitation against immigrants. This Accord provided for the identification of illegal immigrants and their deportation. This Accord is still being invoked; for an account on its effectiveness see '30 years later, Assam Accord back in focus (News Analysis)', *Business Standard*, 15 August 2015 <http://www.business-standard.com/article/news-ians/30-years-later-assam-accord-back-in-focus-news-analysis-115081500709_1.html> accessed 9 April 2016.

¹⁰⁵³ *Shamin Bano v Union of India*, AIR 1980 Rajasthan 98. In this case an Indian Muslim woman married a Pakistani in Mecca, Saudi Arabia. She returned to India along with her husband and four children. While she held an Indian passport, the husband and four children held Pakistani passports. Later, her husband divorced her and went back to Pakistan. After the completion of their stay in India the four children of the woman who had a Pakistani passport were to be deported from India. Their continued stay in India would have made them stateless. The High Court of Rajasthan held that it would be in the domain of the Government of India to decide the case of the four children taking into account their plight as they were aged between six months and four years. This issue was finally resolved by the Government of India by granting them Indian citizenship.

¹⁰⁵⁴ *National Human Rights Commission v State of Arunachal Pradesh*, AIR (1996) SC 1234 or SCC (1996) (1) 742.

determinations had already been made: 'It is submitted that the applications, if any, made in this regard have already been disposed of after necessary enquiry. There is no application pending before the DC.'¹⁰⁵⁵ The Supreme Court noted that this position was in direct contradiction to the stance taken by the State before the NHRC in 1995. The Court then proceeded to instruct the State Government and the DC to forward the citizenship applications of the Chakmas and Hajongs, as was required by the Act.

Despite this clear and unambiguous ruling of the Supreme Court, the Chakmas and Hajongs could not apply for their citizenship due to fear created by the State Government of Arunachal Pradesh and the All Arunachal Pradesh Students Union. The Chakmas and Hajongs submitted their applications directly to the Central Government in February 1997. The Union Home Ministry forwarded the citizenship applications to the District Collectors for necessary verification. Since 1997 the State Government continues to defy the Supreme Court, the Central Government, and the rule of law. For this reason, the Chakmas and Hajongs continue to be denied the citizenship rights and constitutional protections that they so desperately need and justly deserve. After more than 30 years of statelessness, the Chakmas and Hajongs of Arunachal Pradesh remain a people without a country. In 2015, the Indian Supreme Court has again directed the government of Centre and Arunachal Pradesh to grant citizenship to the Chakmas and Hajongs, which hopefully means that they will no longer be stateless.¹⁰⁵⁶

D. The impact of nationality laws on the creation of statelessness in South Asia

Some traditional causes, such as the breakup and creation of new states and the political tensions of war and inter-communal violence leading to the movement of populations, often create situations of statelessness. When India and Pakistan became two separate countries in 1947 they had to deal with this problem, as vast population groups crossed the new borders. In some cases entire families fled, leaving behind their property and socio-cultural affinities. That the issue of citizenship is so crucial for both India and Pakistan can be understood from the fact that Part II of the Indian Constitution, in Articles 5 and 6, lays down the basic and unalterable parameters for acceptance of any person as a citizen. Article 5 provides the usual basic tenet that anyone who has been domiciled in the territory of India, or born in India, or whose parents are born India, would be regarded as Indian citizen in the normal course. Article 6, on the other hand, is more specific, and provides that 'a person who has migrated to the territory of

¹⁰⁵⁵ *National Human Rights Commission v State of Arunachal Pradesh*, AIR (1996) SC 1234 or SCC (1996) (1) 742.

¹⁰⁵⁶ Chakmarights, 'ACHR: Not the Chakmas/Hajongs but other non-tribals pose bigger threat to indigenous peoples of Arunachal Pradesh', 26 November 2015 <<https://chakmarights.wordpress.com/2015/>> accessed 13 May 2016. Also see South Asia Human Rights Documentation Centre (SAHRDC), 'The Stateless Chakmas and Hajongs of the Indian State of Arunachal Pradesh' <http://www.hrdc.net/sahrhc/resources/stateless_chakmas.htm>.

India from the territory now included in Pakistan shall be deemed to be a citizen of India at the commencement of this Constitution' if the person has migrated before 19 July 1948. If the person has not migrated before 19 July 1948 he or she must register him or herself before a designated authority and be subject to such other conditions as may be specified.¹⁰⁵⁷

The net and combined effect of these laws and regulations relating to Indian citizenship in the aftermath of the partition of the Indian sub-continent was that those who could manage to cross over to the Indian side by the stipulated date had no problem in claiming citizenship. Those who could not arrive within this specified date had to meet a long procedural requirement of registration and had to prove that they had entered India with a view to settle down within the country. This process of law resulted in the creation of a large number of stateless persons on either side of borders of India and Pakistan.

The porous borders that exist among some of the South Asian countries also contribute to the creation of statelessness. Traditionally, between India, Nepal and Bhutan borders have been open and people can move without any formal procedures or checks. Even between India and Bangladesh, borders are porous and people move with a certain ease. A similar situation exists between northern Sri Lanka and the Indian state of Tamil Nadu. The movement and presence of large undocumented population groups from neighbouring countries can pose legal and socio-economic tensions. It can, for example, occur that when children are born in their mother's country, for example, India, they are denied Indian nationality because a woman cannot transmit nationality on account of her husband's status or on account of his inability to prove his status.¹⁰⁵⁸ Denial of citizenship to large categories of people who have no say in the matter means that these people are denied a broad range of civil, political, economic, social and cultural rights, which more often than not causes them to flee to safer havens in neighbouring states, as took place in the case of Bhutanese¹⁰⁵⁹ and Nepalese.¹⁰⁶⁰

The presence of stateless persons on the Nepalese side of the Nepal-Bhutan border is a telling example of the peculiar statelessness problem that exists in South Asia. Bhutan has been undertaking a gradual shift from complete monarchy to an elected body of representatives through the adoption of a new

¹⁰⁵⁷ The Indian Citizenship Act was brought into force in 1955, laying down the conditions for acquisition of Indian citizenship. This enactment has been amended from time to time, once in 1987 and again in 2003. Pursuant to this enactment Citizenship Rules to implement the procedural aspects of determination, assessment and conferment of citizenship were also outlined.

¹⁰⁵⁸ Section 3 of the Indian Citizenship Act, 1955 pursuant to an amendment in 2003 provides that in order to get citizenship by birth one of the parents should not be an illegal migrant at the time of his or her birth. The Citizenship Act, 1955 <http://mha1.nic.in/pdfs/ic_act55.pdf> accessed 7 April 2016.

¹⁰⁵⁹ Human Rights Watch, 'Stateless Refugee Children from Bhutan Living in Nepal: Testimony of Bill Frelick to a Joint Briefing for the Congressional Children's Caucus and the Congressional Human Rights Caucus on the Status of Stateless Children', 14 February 2007 <<https://www.hrw.org/news/2007/02/14/stateless-refugee-children-bhutan-living-nepal>> accessed 8 April 2016.

¹⁰⁶⁰ Gopal Sharma, 'Nepali single mothers say law change would make children stateless', *Reuters*, 8 January 2015 <<http://www.reuters.com/article/us-nepal-citizenship-idUSKBN0KH19620150108>> accessed 7 April 2016. Also see Thomas Latschan, 'Stateless in Nepal - How a patriarchal system denies citizenship to millions', *Deutsche Welle*, 29 January 2015 <<http://www.dw.com/en/stateless-in-nepal-how-a-patriarchal-system-denies-citizenship-to-millions/a-18223750>> accessed 8 April 2016.

constitution,¹⁰⁶¹ in the context of which it has created and revised voters' lists and undertaken mock polls.¹⁰⁶² It was in this context that Bhutan expelled more than 100,000 Bhutanese of ethnic Nepali origin and stripped them of their citizenship in the early 1990s.¹⁰⁶³ These stateless Bhutanese living in Nepal have been refused citizenship in Nepal, and as they are systematically obstructed from returning to Bhutan they now live in camps administered by the UNHCR. According to one study, on account of this the Bhutanese official estimates of the country's total population have come down drastically.¹⁰⁶⁴

Apart from the Nepalese stateless persons who are of Bhutanese origin, Nepal also hosts thousands of Tibetan refugees who do not enjoy any formal legal status or rights in Nepal, and are divided into two classes: (a) those who entered Nepal before 1989 and their children, and (b) new arrivals with no right to remain in Nepal.¹⁰⁶⁵ Ironically, while Nepal's Citizenship Act makes many Tibetan refugees theoretically eligible for citizenship, the Nepalese authorities have often interpreted the Act in a manner that results in denials of Nepalese citizenship. For example, the authorities claim that the Tibetans have never given up their prior citizenship and that they should demonstrate that they have made or can make a substantial contribution to science, philosophy, art, literature, and world peace.¹⁰⁶⁶

Another state in South Asia that has restrictive citizenship laws is Burma.¹⁰⁶⁷ The Citizenship Act of 1982 in Burma (later changed to Myanmar) excluded hundreds of thousands of members of Burmese minorities

¹⁰⁶¹ See Government of Bhutan website <www.bhutan.gov.bt>. The nationality law of Bhutan is linked to many ethnic factors. It also requires loyalty to monarchy, ownership of land, coupled with about ten years of service. The recent amendments now require at least 20 years of Government service; Nepalese nationality law of 2006 emanates from its constitutional requirements. See Part II of the 2006 Nepali Constitution (Articles 8, 9 and 10). It follows both *jus soli* and *jus sanguinis* principles in granting citizenships. Also see 'A Guide to the Constitution of the Kingdom of Bhutan' <<http://www.judiciary.gov.bt/html/education/high%20court%20book.pdf>> accessed 9 April 2016.

¹⁰⁶² Sanjoy Majumder, 'Bhutan holds fake national poll', *BBC News*, 21 April 2007 <http://news.bbc.co.uk/2/hi/south_asia/6578421.stm> accessed 9 April 2016. For elections that have been held and related laws and regulations, see Election Commission of Bhutan, 'Acts' <http://www.election-bhutan.org.bt/?page_id=31> accessed 9 April 2016.

¹⁰⁶³ Amnesty International, *Bhutan: Nationality, Expulsion, Statelessness and the Right to Return* [2008]; Human Rights Watch, 'Bhutan's ethnic cleansing', 1 February 2008 <<https://www.hrw.org/news/2008/02/01/bhutans-ethnic-cleansing>> accessed 9 April 2016.

¹⁰⁶⁴ Shiva K. Dhungana, 'Third Country Resettlement and the Bhutanese Refugee Crisis: A Critical Reflection' <<http://www.mcrg.ac.in/rw%20files/RW35/2.Shiva.pdf>> accessed 15 April 2016. See UNHCR, 'Resettlement of Bhutanese refugees surpasses 100,000 mark', 19 November 2015 <<http://www.unhcr.org/564dded46.html>>. Also see UNHCR, Nepal Fact Sheet, January 2016 <<http://www.unhcr.org/50001f3c9.html>> accessed 9 April 2016.

¹⁰⁶⁵ According to Article 4(1) of the Nepal Citizenship Act, 2063 (2006) (1) Any person born before 2016, Chaitra, Bikram Sambat (i.e., 13 April 1990 A.D.) within the territory of Nepal and having domiciled permanently in Nepal shall be deemed a citizen of Nepal by birth. See Nepal Citizenship Act 2063 (2006) <<http://www.refworld.org/pdfid/4bbca97e2.pdf>>. See UNHCR, *2006 Global Trends* [2007]. According to this study revised in July 2007 Government of Nepal had estimated a dramatic increase in number of stateless persons which increased from 400,000 to 3.4 million.

¹⁰⁶⁶ Rani Singh, 'Fears for Nepal's "invisible" Tibetan refugees', *BBC News*, 27 April 2015 <<http://www.bbc.com/news/world-asia-32476346>> accessed 9 April 2016. Also see Human Rights Watch, 'Nepal: Increased Pressure from China Threatens Tibetans', 1 April 2014 <<https://www.hrw.org/news/2014/04/01/nepal-increased-pressure-china-threatens-tibetans>>.

¹⁰⁶⁷ Burma (or Myanmar) is not part of the South Asian Association for Regional Cooperation (SAARC). It is part of Association of South East Asian Nations (ASEAN). However, the impact of Burmese law and regulations relating to citizenship and nationality affects several South Asian nations such as Bangladesh and India.

from citizenship, for example, the Rohingya Muslims.¹⁰⁶⁸ Later in the 1990s, more than 250,000 Rohingya Muslims were denied citizenship; UNHCR intervention in the 1990s provided them with temporary registration cards. According to one report they continued to be subject to forced labour, relocation, rape and plunder, allegedly by the Burmese military Junta, resulting in many of them fleeing as refugees to the neighbouring state of Bangladesh.¹⁰⁶⁹ In Burma there are also thousands of Persons of Indian Origin (PIOs) who neither belong to India nor Burma but have been living in Burma for over four generations. Their numbers are estimated to range between 500,000 and 2,500,000 and they cannot claim Burmese citizenship as they lack the necessary citizenship documents required by the 1982 Burmese Citizenship Law.¹⁰⁷⁰

Another South Asian country with numerous stateless people from neighbouring states is Bangladesh. The most significant group in this regard are the Biharis who have lived in camps in Bangladesh for nearly three decades, stripped of their citizenship and property for having sided with Western Pakistan during the East Pakistani struggle for independence in 1971.¹⁰⁷¹ Bangladesh also hosts thousands of stateless Rohingya Muslims, some who live in camps and some elsewhere.¹⁰⁷² These Rohingyas fled from the Arakan province of neighbouring Burma when the 1974 Emergency Immigration Act took stripped them of their Burmese nationality. Interestingly, there are also around 200,000 people living in Indian enclaves along the Bangladesh border with no voting rights because of a dispute between India and Bangladesh over carrying out a census there. This issue has been resolved recently with the conclusion and adoption of Land and Boundary Agreement between India and Bangladesh.¹⁰⁷³

¹⁰⁶⁸ Human Rights Watch, 'Burma: Ensure Freedoms for All in Arakan State: Lifting of State of Emergency Should End Restrictions on Rohingya', 24 March 2016 <<https://www.hrw.org/news/2016/03/29/burma-ensure-freedoms-all-arakan-state>> accessed 9 April 2016. Also see Refugees International, *Myanmar: Act Immediately to Protect Displaced People's Rights* [2014] <<http://www.refugeesinternational.org/reports/2015/10/14/myanmar-act-immediately-to-protect-displaced-peoples-rights>> accessed 8 April 2016. Also see Human Rights Watch, 'Burma' <<https://www.hrw.org/world-report/2016/country-chapters/burma>> accessed 8 April 2016.

¹⁰⁶⁹ Human Rights Watch, 'Burma/Bangladesh, Burmese Refugees in Bangladesh: Still no Durable Solution', Human Rights Watch Report, May 2000, Vol 12, No 3 (C).

¹⁰⁷⁰ The International Observatory on Statelessness, 'Burma/Myanmar' <<http://www.nationalityforall.org/burma-myanmar>> accessed 8 April 2016.

¹⁰⁷¹ UNHCR, 'How a Bangladesh Court Ruling Changed the Lives of more than 300,000 Stateless People', 23 February 2015 <<http://www.unhcr.org/54ec22869.html>> accessed 9 April 2016. See 'Citizenship for Bihari refugees', *BBC News*, 19 May 2008 <http://news.bbc.co.uk/2/hi/south_asia/7407757.stm> accessed 9 April 2016. Also see Namati, Council of Minorities, 'Citizenship Rights of Urdu-Speaking Bangladeshis' <<https://namati.org/resources/citizenship-rights-of-urdu-speaking-bangladeshis/>> accessed 9 April 2016.

¹⁰⁷² 'Bangladesh plans to move Rohingya refugees to island in the south', *The Guardian*, 28 May 2015 <<http://www.theguardian.com/world/2015/may/28/bangladesh-plans-to-move-rohingya-refugees-to-island-in-the-south>>.

¹⁰⁷³ For the text and note on the Land and Boundary Agreement, Ministry of External Affairs, Government of India, see <http://www.mea.gov.in/Uploads/PublicationDocs/24529_LBA_MEA_Booklet_final.pdf> accessed 10 April 2016; Willem Van Schendel, 'Stateless in South Asia: The Making of the India-Bangladesh Enclaves' (2002) 61(1) *The Journal of Asian Studies* 115 <http://www.mcrg.ac.in/statelessness/further_readings/stateless%20in%20south%20asia.pdf> accessed 9 April 2016; Anbarasan Ethirajan, 'Stateless misery on India-Bangladesh border', *BBC News*, 5 September 2011 <<http://www.bbc.com/news/world-south-asia-14715825>> accessed 9 April 2016. See Library of Congress, Global Legal Monitor, 'Bangladesh; India: Decades-Long Border Dispute Resolved Through Implementation of Land Swap

Finally, India has a large number of Chakmas, Hajongs, Kashmiris and Punjabis living on its territory who are deprived of the right to nationality.¹⁰⁷⁴ The State of Arunachal Pradesh has many Chakmas and Hajongs who migrated from the Chittagong Hill Tracts of the erstwhile East Pakistan to India. Though many Chakmas have been allowed to vote, they have been systematically denied access to most of the social, economic and political rights to which they are entitled, and children of these migrants are not granted the right to citizenship.¹⁰⁷⁵ Thousands of Hindu families from Pakistan who moved to the Indian side after the 1947 partition riots remain stateless. However, India has reportedly amended its Citizenship Act of 1955 and Citizen Rule of 1965 authorising the district magistrate of the Jaisalmer in Rajasthan to grant Indian citizenship to Pakistanis who have been living in the border district for last five years.¹⁰⁷⁶

Under Indian law Kashmiris are entitled to the same rights as citizens, yet the conflict in the Kashmir Valley has forced thousands to flee and there are more than a million internally displaced Kashmiri Pundits living on Indian soil, deprived of their rights to citizenship. Further, more than one hundred thousand Punjabi refugees who fled to the Jammu and Kashmir from the neighbouring Sialkot district in the erstwhile West Pakistan during the 1947 partition have still not been granted Indian citizenship, and their descendents continue to live as refugees and stateless people.¹⁰⁷⁷

It is estimated that approximately 100,000 Tibetans are living in India as refugees in three different camps — one in Dharmashala in the State of Himachal Pradesh in Northern India close to the Nepalese border, and other two camps which are located in the State of Karnataka in South India. Tibetans are essentially treated as refugees in India and their cases are considered by the Government of India's Ministry of Home Affairs in consultation with the local Tibetan Administration for the issuance of resident permits. Tibetans in India are normally dealt with under the Foreigners Act 1947. There is a constant migration of Tibetans from Tibet to India and vice versa. The Chinese Government, according to available information, does not treat these returnees as citizens. Their status remains uncertain.¹⁰⁷⁸

Agreement', 11 August 2015 <<http://www.loc.gov/law/foreign-news/article/bangladesh-india-decades-long-border-dispute-resolved-through-implementation-of-land-swap-agreement/>> accessed 10 April 2016; 'Enclaves swapped in landmark India-Bangladesh border deal', *BBC News*, 31 July 2015 <<http://www.bbc.com/news/world-asia-india-33733911>> accessed 10 April 2016.

¹⁰⁷⁴ See for the Indian case, The International Observatory on Statelessness, 'India' <<http://www.nationalityforall.org/india>> accessed 10 April 2016. Also see Charlotte-Anne Malischewski, 'Where the Exception is the Norm: The Production of Statelessness in India' (2014) 2(8) International Human Rights Internship Working Paper Series, McGill Centre for Human Rights and Pluralism, Faculty of Law, McGill University <https://www.mcgill.ca/humanrights/files/humanrights/ihri_wps_v2n8-charlotte-anne_malischewski.pdf> accessed 10 April 2016.

¹⁰⁷⁵ Executive summary of the Report on 'The State of Being Stateless: A Case Study of the Chakmas of Arunachal Pradesh' <<http://www.mcrg.ac.in/Statelessness.pdf>> accessed 15 April 2016.

¹⁰⁷⁶ See Amit Anand Choudhary, 'Grant citizenship to Chakma refugees within 3 months: Supreme Court', *The Times of India*, 18 September 2015 <<http://timesofindia.indiatimes.com/india/Grant-citizenship-to-Chakma-refugees-within-3-months-Supreme-Court/articleshow/49015645.cms>> accessed 10 April 2016.

¹⁰⁷⁷ The International Observatory on Statelessness, 'Kashmir' <<http://www.nationalityforall.org/kashmir>> accessed 13 May 2016.

¹⁰⁷⁸ For the status and plight of Tibetans on some of these issues, specifically from the point of view of statelessness, see generally Julia Meredith Hess, 'Statelessness and the State: Tibetans, Citizenship and Nationalist Activism in a Transnational World' (2006) 44(1) *International Migration* 79.

Finally, as regards Sri Lanka, the Ceylon 1948 Citizenship Act stripped citizenship from all the Estate Tamils who had been living in Sri Lanka since they had been brought there from India during the British colonial period to work in the tea plantations. From 1954, under various agreements between both India and Sri Lanka,¹⁰⁷⁹ some of them applied for Indian citizenship and some for Sri Lankan citizenship. By the 1980s many of those who had applied for Indian citizenship had been repatriated to India, while many others stayed in Sri Lanka of their own volition. When, in 1998, Sri Lanka enacted legislation granting citizenship to all up country Tamils problems persisted for those whose parents or grandparents had applied for Indian citizenship but were never repatriated to India. Being officially included on an application for Indian citizenship, they were denied Sri Lankan citizenship despite being born in Sri Lanka.

However, in October 2003 a bill was passed by the Sri Lankan Parliament that provided for the granting of citizenship to all persons of Indian origin who had lived in Sri Lanka since 30 October 1964, as well as to their descendants.¹⁰⁸⁰ Though it granted citizenship to many there were still numerous stateless persons left on the island. In June 2007 the Parliament of Sri Lanka unanimously approved a law which conclusively solved this problem.¹⁰⁸¹ Sri Lanka is also home to many stateless people of Chinese origin who fled persecution and civil strife in China and sought refuge in the island nation in the 1930s. None of these Chinese people could claim citizenship because Sri Lanka's citizenship laws demand that a grandparent must be born in Sri Lanka in order to claim citizenship. These Chinese Sri Lankans have been given travel Identity Certificates (ICs), however these have limited use.

E. The non-applicability of the international treaty framework in South Asia

South Asian countries are not parties to the 1951 Refugee Convention or to the 1954 Convention relating to the Status of Stateless Persons.¹⁰⁸² There is also no formal regional arrangement to deal with the refugee and stateless persons issue. Nevertheless, South Asian countries are host to millions of refugees and migrants. In some cases, for example regarding Tibetans and Afghans, refugees and migrants have been staying in the country of their arrival for more than three or four decades. The unwillingness of South Asian countries to adhere to the conventions has been explained with the argument that some of the provisions in the 1951 Refugee Convention, in particular the definition of the term 'refugees', do not

¹⁰⁷⁹ Reference should be made to several agreements concluded between Indian and Sri Lankan Prime Ministers since 1948 to resolve the problems of Hill Tamils. For a detailed account on this issue see UNHCR, 'Sri Lanka: 2015 UNHCR subregional operations profile — South Asia' <<http://www.unhcr.org/pages/49e4878e6.html>> accessed 14 April 2016.

¹⁰⁸⁰ Citizenship (Amendment) Act, No 16 of 2003 of Sri Lanka <[http://www.documents.gov.lk/Acts/2003/Citizenship%20\(Amendment\)%20\(Act%2016\)/H%2016820%20\(E\)%20Citizent.pdf](http://www.documents.gov.lk/Acts/2003/Citizenship%20(Amendment)%20(Act%2016)/H%2016820%20(E)%20Citizent.pdf)> accessed 10 April 2016.

¹⁰⁸¹ Grant of Citizenship to Persons of Indian Origin (Amendment) Act, No 6 of 2009 <<http://www.refworld.org/pdfid/4c516c5b9.pdf>> accessed 10 April 2016.

¹⁰⁸² Though they are not parties to these conventions, Bangladesh, India and Pakistan are members of the Executive Committee of the UNHCR, which is the highest decision-making body of the UNHCR.

reflect current realities.¹⁰⁸³ Some South Asian countries further think that they, as developing societies with very limited resources, might not be able to fulfil obligations created by the Refugee Convention if they were to become parties.¹⁰⁸⁴

The primary reason for the cautious approach adopted by the South Asian states can be attributed to their own restrictive policy-oriented domestic legal regimes relating to nationality issues. Asian states, including South Asian states, generally adopt a rigid legal approach to nationality questions. The South Asian states hence generally emphasise the 'sovereign right of States to establish laws governing the acquisition, renunciation or loss of nationality'.¹⁰⁸⁵ They are furthermore not entirely prepared to take up the obligations towards foreigners created by international conventions, in particular allowing access to their national courts to non-citizens. In addition to this, states regard migration issues as putting pressure on their existing resources. In some instances, the changing profile of local and border demography on account of migration also has a direct link to complicated political issues. As a result, the granting of citizenship and the treatment of foreigners and stateless people is a question that is primarily only regulated by domestic law in South Asia – or at least this is the way South Asian states see it.

F. EU responses and challenges to deal with statelessness issues within South Asia

There are several contexts in which the responses of the EU towards the issue of statelessness within the South Asian region need to be addressed. Human rights remain one of the basic pillars of its engagement, even within the South Asian context. Although the EU has addressed several of the key human rights issues within the region there is no specific reference to the plight of the stateless persons as vulnerable groups within its agenda. It is noted that a study initiated by the Policy Department of the Directorate-General for External Policies seeks to address the human rights impact of statelessness in the EU's external

¹⁰⁸³ The Permanent Representative of India to the United Nations, while addressing the UNHCR Executive Committee in its 48th Session in 1997, stated that the Refugee Convention adopted in the prevailing European context in the aftermath of the Second World War had lost its relevance now and had failed to address the new refugee realities. The Indian Permanent Representative stated: 'International Refugee Law is in a state of flux and it is evident that many of the provisions of this Convention, particularly those which provide for individualized status determination and social security have little relevance to the circumstances of developing countries today who are mainly confronted with mass and mixed inflows. Moreover, signing the Convention is unlikely to improve in any manner the actual protection which has always been enjoyed and continues to be enjoyed by refugees in India.' The Indian position and the relevant situation with regard to this has not changed substantially to the present day, although India and other South Asian countries allow UNHCR to continue to function within their borders. There is increasing support for and response to the proposals made by the regional South Asian office of the UNHCR.

¹⁰⁸⁴ Views expressed by Justice Nasim Hussain Shah in 'Pakistan Country Update', Fourth Informal Consultation on Refugee and Migratory Movement in South Asia, Dhaka, November 1997.

¹⁰⁸⁵ See Report of the Asian-African Legal Consultative Organization's (AALCO) Forty-fifth Session, New Delhi, 2006 <<http://www.refworld.org/publisher,AALCO,,,44eaddc54,0.html>> accessed 7 April 2016.

policies.¹⁰⁸⁶ This study, alongside others, has a specific reference and a case study in relation to Myanmar on the issue of statelessness of the Rohingya community.

The EU recognises statelessness as a significant human rights challenge and that it has a serious and lasting impact on the enjoyment of human rights.¹⁰⁸⁷ This is the basic premise within which the EU seeks to address the phenomenon of statelessness. The issue of statelessness within the South Asian region is addressed by the EU as part of its external action on human rights.

The human rights implications of statelessness within South Asia are no different from the consequences of statelessness in other regions, as statelessness there is linked to gender or racial discrimination, neglect or lack of children rights, marginalisation of minority groups, and larger macro-issues such as the breakdown of the rule of law. Statelessness also results in violations of socio-economic and civil and political rights, interference with the right to family life, and results in restrictions regarding free movement, in arbitrary detention, and even in persecution. All of these are basic human rights issues and need to be addressed as part of the broader EU agenda on human rights.

In so doing, the EU should first consider how it seeks to increase its engagement within South Asia on the issue of statelessness. Normative guidance to some of the South Asian countries in dealing with the creation of their nationality or citizenship laws could be taken up as one of the options. However, while addressing these issues within the South Asian region the EU also needs to bring in coherence with its own internal and external policies towards statelessness, asylum, migration and integration policy. This is particularly so in the present context of the surging Syrian refugee crisis and the EU's proposed response.

To begin with, there are number of ways in which the recognition of stateless persons as a vulnerable group in South Asia could be made a clearer matter of EU concern. A soft approach would be to begin by extending a broader study on issues of statelessness and to engage with the countries of South Asia in a dialogue to address some of the complicated internal nationality issues. It is to be noted that the EU has observer status with the South Asian Association for Regional Cooperation (SAARC) and it attends all its summit and inter-ministerial meetings in that capacity. In that capacity as an observer the EU could raise the statelessness issue as part of its dialogue process. It could also consider collaborating with key UN and other regional agencies to bring in a coherent legal and policy framework to deal with the statelessness issue. There is also a suggestion that it could use its political and financial tools to bring in changes in the statelessness measures within the region, keeping in view its own influence in the region.

Considering the complexities of the South Asian region, it is suggested that the EU should adopt a country-specific approach to deal with the issue of statelessness. India, for example as examined in this study, is a dominant and influential player in the region. Its impact on the other countries of the region is inevitable and the region-specific solutions must take these factors into account. The EU could encourage and facilitate bilateral approaches among the South Asian countries to solve the problem of statelessness,

¹⁰⁸⁶ Laura Van Waas, *Addressing the Human Rights Impact of Statelessness in the EU's External Action* (EU Directorate-General for External Policies 2014).

¹⁰⁸⁷ Laura Van Waas, *Addressing the Human Rights Impact of Statelessness in the EU's External Action* (EU Directorate-General for External Policies 2014).

which would be extremely useful. As was stated in the above-mentioned EU study on statelessness, three factors – tools, training and reporting – could be employed as a useful strategy. In addition to this, institutional monitoring is also crucial in addressing some of these issues. The evolution of an exclusive and definitive policy for the South Asian region as a long-term strategy to deal with statelessness (as a component of human rights) should be considered. Some of the immediate policy options that are available are to engage in human rights dialogue, a process which the EU is using with India, and to put pressure on governments to adhere to the basic standards and obligations of the human rights treaties to which South Asian countries are parties.

In the recently concluded 13th Summit between the EU and India on 30 March 2016 a Joint Statement to give new momentum to the bilateral relationship endorsing the EU-India Agenda for Action 2020 as a common roadmap was adopted. The areas of cooperation included such areas as foreign aid and security policy, trade and investment, people-to-people contact, and migration. The summit endorsed the establishment of the Common Agenda on Migration and Mobility (CAMM). The CAMM seeks to address following four pillars in a balanced manner: better organised regular migration and the fostering of well-managed mobility; prevention of irregular migration and trafficking in human beings; maximising the development impact of migration and mobility; and the promotion of international protection.¹⁰⁸⁸

This Summit envisaged holding dialogue to exchange information on legislation, policies and best practices and explore possibilities for concrete cooperation, to make policy recommendations, and to develop actions in priority areas. The Joint Summit in its Clause 6 (i) decided to collect and exchange ‘available statistics and information on the situation of third country nationals and stateless persons in need of international protection’.¹⁰⁸⁹ Further to this, the Summit agreed to cooperate with international organisations such as the UNHCR and relevant agencies subject to their respective international obligations.

This 13th Summit and its Joint Declaration is a good starting point for concerted action between the EU and India, as well as for engagement with South Asia in general. While there are some similarities between the refugee situations in South Asia and the EU (for example, boat refugees and economic challenges in addressing the problems), there are, however, significant differences between the two areas. This needs to be further assessed and the EU needs to bring in, as mentioned above, coherence within its internal and external policies while dealing with the problem of statelessness.

¹⁰⁸⁸ President of the European Commission Jean-Claude Juncker and the President of the European Council, Donald Tusk attended the Summit. The Indian Prime Minister Narendra Modi also attended the meeting along with the Minister for Commerce and Industry Nirmala Sitharaman. European Commission, ‘EU-India Summit – leaders agree on a joint statement’, 31 March 2016 <http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/2016/20160331_1_en.htm>, accessed 13 May 2016.

¹⁰⁸⁹ European Commission, ‘EU-India Summit – leaders agree on a joint statement’, 31 March 2016 <http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/2016/20160331_1_en.htm>, accessed 13 May 2016. The issues relating to migration and mobility are part of EU-India Dialogue and Summit process for last several years. The Preamble to the 13th Summit highlights some of these earlier dialogue initiatives taken between them.

G. Conclusions

The causes of the prevalence of migration and statelessness in South Asia emerge from two specific factors, namely, populations with common bonds spread across borders, and movement of these ethnically and linguistically related populations who migrate for economic reasons. In many cases the people on the move are not aware of their exact status in the receiving state, and they are not always aware of the legal implications that arise from a long duration of stay in another country. Statelessness is often an unintended consequence of migration that has taken place long time ago and that continues to this day. There are, however, variations in how different South Asian states have reacted to and addressed unauthorised migration.

As noted in this study, stateless people belong to the most vulnerable population groups in societies. They lack many rights granted to citizens, and even where they do have some rights they, as vulnerable persons, are not always themselves able to claim them and to act in a manner that serves their own interests. The example of India shows that these amendments in reality affect the most vulnerable sections of the Indian polity who perhaps have no idea about the relevant citizenship laws. Measures should also be adopted which make it possible for vulnerable people to participate in the decision-making concerning issues that impact on them. The person who would be affected by these amendments should receive an adequate chance to represent their case.

Measures should be adopted to diminish statelessness and the vulnerability following from it. When such measures are adopted, it is important to consider the background of the phenomenon. Migration for economic reasons is something which takes place on a continuing basis in the region. This kind of migration has been taking place for several centuries. This fact should be recognised when constructing citizenship laws. Unfortunately, demographic and ethnic concerns appear to override some of these proposed changes, particularly in certain border areas.

A difference between the refugee and migration situation within South Asia and the EU is the fact that while most EU Member States are states parties to many central treaties, there are a number of treaties that South Asian states have not ratified. Measures should be adopted to improve both the treaty-based and domestic law-based protection of vulnerable migrants, refugees and stateless persons. India continues to operate under its antiquated Foreigners Act 1946, a legacy of British influence which places the burden of proving one's own citizenship identity on the alleged stateless person. It can be observed that Indian Courts have responded positively to developments in statelessness and refugee issues, taking into account the constitutional mandate which, among other things, seeks to protect the life and liberty of all persons. But is this enough? While considering the fact that India and other South Asian countries are parties to all major human rights instruments, and also considering their concerns with regard to nationality issues, an initiative should be undertaken to deal with this entire issue of nationality and statelessness in a regional arrangement. This arrangement at the South Asian level can have a non-binding yet persuasive effect on the construction of a new nationality law. This study notes that for the past decade the majority of the South Asian states have been in the process of constructing or amending their nationality laws. As noted above, the accepted norms of international law require that nationality laws

should be constructed in such a way that their intended effects are not felt in other countries. At least through such an arrangement South Asian states will take the effect of nationality laws on their neighbours into account.

VIII. Concluding remarks: From proclaiming acknowledgement of vulnerability to de facto vulnerability-sensitive practices? (Authors: Mikaela Heikkilä and Maija Mustaniemi-Laakso)

In this research report, the notion of vulnerability and the ensuing obligations to mitigate vulnerability have been addressed in the context of EU policies on border controls, asylum and migration. Through a selection of case studies, the report has identified a number of critical challenges in recognising and addressing vulnerability. These findings are condensed below to point to a set of cross-cutting trends and concerns with regard to the integration of the notion of vulnerability in the EU's policies. General recommendations are offered on the basis of these findings to suggest conceptual and operational improvements in taking account of vulnerabilities in the refugee entry, reception, qualification and integration processes within the Union.

A. Understanding and addressing sources of vulnerability

1. Understanding vulnerability as a dynamic and multi-dimensional human quality

In this report, vulnerability has been portrayed as a universal human quality which is created, accentuated or alleviated through external societal, institutional and other arrangements. While all humans are vulnerable, some individuals may be particularly vulnerable as they may lack access to assets and resources or otherwise face specific challenges in enjoying their human rights.

Based on Fineman's conceptualisation of vulnerability, the report argues that by recognising the different and dynamic levels of resilience that individuals possess societal and institutional structures can mitigate vulnerability. So as to mitigate vulnerability and to achieve substantive equality between individuals with different levels of resilience, states have positive obligations to remove impediments for the enjoyment of human rights. This is in line with Fineman's thesis about a responsive state which contributes to the resilience of individuals by providing assets and by removing obstacles for the enjoyment of rights.¹⁰⁹⁰

¹⁰⁹⁰ See, e.g., Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale Journal of Law and Feminism* 1, ; and Martha Albertson Fineman and Anna Grear, 'Introduction: Vulnerability as Heuristic — An Invitation to Future Exploration' in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013) 24-26.

2. Identifying institutional and structural sources of vulnerability for migrants and asylum-seekers

To be able to effectively address vulnerability, identifying and analysing sources of vulnerability is key.¹⁰⁹¹ ‘What makes someone vulnerable?’ should be the guiding question in this regard. In addressing this question, attention should be focussed not only on group-based and individual characteristics of human beings (such as gender identity, ethnicity, age or health), but also on external factors (such as structures of dependence, or legal, social, cultural and religious status within a society).¹⁰⁹²

In moving beyond the mere group-based understanding of vulnerability, this report has outlined and examined several examples of how contextual factors, such as institutional structures and legislation, can contribute to creating and aggravating the vulnerability of migrants and asylum-seekers. The role played by legislation in the creation of vulnerability is, for example, amply evident in relation to the politics of non-entrée, taking forms such as the carrier sanctions scheme and the penalisation of facilitation of entry. Coupled with the lack of legal migration avenues to the EU, such legislative measures effectively push asylum-seekers and other migrants into the hands of smugglers and to perilous routes of irregular migration. Legal categorisations, as found in the safe countries of origin scheme, may also sustain or enhance vulnerability where they fail to take account of the fact that people are differently resilient to vulnerabilities and harm. In this report, the idea of safe countries has been questioned, for example, with regard to sexual minorities who may face persecution in countries generally deemed as safe. Furthermore, it has been pointed out that different forms of gender-based violence take place in all countries in the world, which on a general plane makes the legal characterisation of certain countries as being *a priori* safe for *everyone* problematic.

Structurally embedded sources of vulnerability were also identified in relation to South Asia, where citizenship laws are considered to contribute to the creation of statelessness and, subsequently, vulnerability through the denial of access to economic, social and cultural rights, as well as participatory rights. Likewise, the practice of – as well as the EU and national legal frameworks enabling – asylum detention was seen not only to fall short of accommodating vulnerabilities, but also to constitute a source of vulnerability in and of itself. The same was found to be true regarding the practices of accommodating UAMs in Greece in circumstances that fail to ensure their best interests. Further, in the case study on low-paid workers in Ireland, legislation was identified as a factor hindering integration. As irregular migrants are not allowed to work legally in Ireland, they are pushed to irregular – and often exploitative – work which increases their vulnerability by exposing them to poverty and marginalisation. Given the low pay and the fact that few social services are available to them, irregular migrants are prone to remain in exploitative working conditions.

¹⁰⁹¹ OHCHR, Manual on Human Rights Monitoring, revised edition, Chapter 8 <<http://www.ohchr.org/Documents/Publications/Chapter08-44pp.pdf>> accessed 15 April 2016, 18.

¹⁰⁹² OHCHR, Manual on Human Rights Monitoring, revised edition, Chapter 8 <<http://www.ohchr.org/Documents/Publications/Chapter08-44pp.pdf>> accessed 15 April 2016, 18.

3. Creating and maintaining societal structures that mitigate vulnerability and build resilience

The fact that vulnerability is often created and aggravated through contextual factors, such as societal structures and legislation, entails that it can be mitigated through societal and legislative reforms. As noted in the case studies in this report, tailoring societal structures and policies in a way that ensures that they are sensitive and responsive to the needs and rights of differently resilient individuals is a key step towards substantive equality.

This was highlighted, for example, in connection with the integration of low-paid migrant workers in Ireland. Structural impediments that largely keep migrant workers in low-paid professions were identified as an important source of their vulnerability. As employment is held to be crucial for the integration process and in building the migrants' resilience, innovative approaches need to be designed to recruit migrants –through, for example, opening up more professions to employment on a work permit basis –to prevent labour market discrimination and to promote training and recognition of qualifications. Employers could also increasingly be encouraged to promote non-discrimination and human rights. For this to happen it is necessary to assess and adjust the rhetoric around migrant workers – a shift in approach is needed from seeing legally resident migrant workers and asylum-seekers as temporary and clandestine to instead recognising them as residents who should be allowed access to the labour market, education and other basic social services. Parallel findings hold true for the situation in India, where political and ethnic tension has not allowed for a comprehensive revision of the country's citizenship legislation. To ensure stateless persons living in India access to basic rights and to address statelessness as a source of vulnerability, legislative reforms to remove structures that sustain vulnerability and inequality are needed. The need to focus on individual protection needs is something that the EU could more clearly bring up in its external relations. It is suggested, for example, that the EU through its human rights dialogues with the states in South Asia could more markedly advocate human rights-based revisions of nationality laws and facilitate the regional cooperation on the issue of statelessness.

The need to install structures that acknowledge that persons are differently resilient was furthermore emphasised in the case studies considering reception conditions and pre-border control measures. The analysis on asylum detention at the southern borders of Italy identified setting up of a system for the early identification of vulnerabilities as a priority. Structural shortcomings were also identified with regard to the pre-border management tools and instruments, which largely fail to take into account special protection needs both at the level of policy-setting and policy implementation. As the denial of the right to seek asylum is a fundamental source of vulnerability for refugees, the need for structures and guarantees for identification of vulnerabilities and protection of needs is urgent with regard to the pre-border control measures and gender-based persecution analysed in this report.

In setting up structures that respond to vulnerability, attention should also be given to the question of which authorities and/or entities are the ones dealing with vulnerable groups and individuals. This was

emphasised, for example, in the two case studies discussing reception conditions. In order to mitigate the vulnerability of UAMs in Greece it was, for example, suggested that the country should as a priority set up a system for functional guardianship and investigate arrangements such as foster family schemes to prevent further vulnerabilisation of UAMs through the conditions and risks they face in reception facilities or where they remain beyond the official safety nets. In a similar vein, the analysis of asylum detention at the southern borders of Italy noted that, in order to mitigate the negative effects of detention and confinement on particularly vulnerable persons, proper professional care of vulnerable persons in detention facilities should be ensured. Given the fundamental importance of early identification of vulnerable individuals for preventing their further vulnerabilisation, concern can also be expressed over the fact that security-driven actors – such as border guards, Frontex and the police – are those primarily involved in the control of irregular migration.¹⁰⁹³

B. The adoption of a more coherent approach to vulnerability

Much of the human/fundamental rights criticism directed at the EU's migration and border control policies relates to issues of incoherence.¹⁰⁹⁴ Drawing from the case studies in this report, attention will be briefly directed at three such issues: a) incongruence between human rights undertakings and praxis; b) incoherence between different EU policy fields; and c) lacking coherence between how different EU Member States act in relation to individuals with vulnerabilities.

1. Lack of congruence between human rights undertakings and praxis

The lack of coherence between what on paper should be the accepted common policies (the 'official EU approach') and the implementation, or non-implementation, of the common policies in practice is an obvious and often-criticised problem for the EU's policies on asylum and migration. It has, for example, been pointed out that the Union in its internal policies does not always uphold the same level of human rights standards that it 'preaches' abroad or requires its external partners to abide by (internal-external incoherence).¹⁰⁹⁵ EU action is therefore sometimes characterised by a discrepancy between how the

¹⁰⁹³ Sergio Carrera and Leonhard den Hertog, 'Whose Mare? Rule of Law Challenges in the Field of European Border Surveillance in the Mediterranean' [2015] *CEPS Paper in Liberty and Security in Europe* No. 79, 20-21.

¹⁰⁹⁴ On different forms of incoherence, see further, e.g., Mikaela Heikkilä, Maija Mustaniemi-Laakso, Suzanne Egan, Graham Finlay, Tamara Lewis, Julia Planitzer, Helmut Sax, Lisa Maria Heschl and Stefan Salomon, *Report critically assessing human rights integration in AFSJ policies* [2015] <<http://www.fp7-frame.eu/wp-content/materiale/reports/22-Deliverable-11.2.pdf>> accessed 10 May 2016.

¹⁰⁹⁵ Cf. Sarah Wolff, 'The Rule of Law in the Area of Freedom, Security and Justice: Monitoring at Home What the European Union Preaches Abroad (2013) 5(1) *The Hague Journal on the Rule of Law* 119. Sometimes the opposite is true – in other words, the Union expects a level of human rights protection by its partners that is lower than the one required within the Union. This is the case, for example, for agreements that the EU concludes with third states regarding readmission that largely fail to pay due regard to the special protection needs of vulnerable individuals

Union proclaims to act in the field of human rights and its *de facto* action. In relation to migration control the Union, for example, often emphasises its commitment to human rights, but in practice the focus appears to be on ‘keeping problems out and the external border closed’.¹⁰⁹⁶ It may therefore be argued that the Union suffers from an ‘identity crisis’, where the Union’s own perception of the degree to which it abides by human rights does not concur with the views of human rights monitoring bodies, NGOs and academics.¹⁰⁹⁷ Examples of such situations are not difficult to find in the current refugee situation, in relation to which the EU and its Member States have repeatedly – and in several regards widely – been criticised for not respecting human rights obligations, including the protection of vulnerable individuals.

In this report such concerns were articulated, for example, with regard to the hotspots created in the Greek islands where international human rights obligations in relation to upholding safeguards to ensure the best interest of the child have largely had to give way to other interests. The lack of congruence between human rights undertakings and praxis has also been discussed, among other areas, in relation to the Union’s policies of non-entrée and insufficient protection measures towards detained asylum-seekers in Italy. In this regard, it is noted specifically that the EU hotspots approach contributes to the worrying trend towards a standardisation of detention as a tool in managing asylum and migration. Another important example of this incoherence problem is provided by the recent EU-Turkey Agreement signed on 18 March 2016, which has largely been considered to contradict basic provisions of refugee and human rights law. The agreement aims at ‘end[ing] the irregular migration from Turkey to the EU’ and provides that ‘all new irregular migrants crossing from Turkey to the Greek islands as of 20 March 2016 will be returned to Turkey’.¹⁰⁹⁸ While both the EU and Turkey assert that the agreement is in full accordance with international law, and whereas the agreement provides that due account is to be paid to international refugee law and ‘to the situation of vulnerable groups, in particular unaccompanied minors’,¹⁰⁹⁹ the first returns of migrants that have taken place already indicate that the now created system has severe human rights deficiencies.¹¹⁰⁰ It should be recollected that different forms of fast procedures, including accelerated returns, are difficult, if not impossible, to carry out in a truly vulnerability-sensitive manner.¹¹⁰¹

upon readmission. See further Mikaela Heikkilä, Maija Mustaniemi-Laakso, Suzanne Egan, Graham Finlay, Tamara Lewis, Julia Planitzer, Helmut Sax, Lisa Maria Heschl and Stefan Salomon, *Report critically assessing human rights integration in AFSJ policies* [2015] <<http://www.fp7-frame.eu/wp-content/materiale/reports/22-Deliverable-11.2.pdf>> accessed 10 May 2016.

¹⁰⁹⁶ Florian Trauner, ‘The Internal-External Security Nexus: More Coherence under Lisbon?’ [2011] *European Union Institute for Security Studies Occasional Paper*, No 89, 21.

¹⁰⁹⁷ Cf. the discussion about the relationship between international criminal law and human rights, Darryl Robinson, ‘The Identity Crisis of International Criminal Law’ [2008] 21(4) *Leiden Journal of International Law* 925.

¹⁰⁹⁸ European Commission, ‘EU-Turkey Agreement: Questions and Answers’, 19 March 2016 <http://europa.eu/rapid/press-release_MEMO-16-963_en.htm> accessed 14 April 2016.

¹⁰⁹⁹ European Commission, ‘EU-Turkey Agreement: Questions and Answers’, 19 March 2016 <http://europa.eu/rapid/press-release_MEMO-16-963_en.htm> accessed 14 April 2016.

¹¹⁰⁰ Human Rights Watch, ‘Dispatches: Start of Dodgy EU-Turkey Migrant Deal’, 5 April 2016 <<https://www.hrw.org/news/2016/04/05/dispatches-start-dodgy-eu-turkey-migrant-deal>> accessed 14 April 2016.

¹¹⁰¹ Cf. ‘The EU and its Member States should enhance understanding of the dynamics that render some migrant groups more vulnerable, and of the particular risks that these groups face, adapting their policies and procedures accordingly. This requires limiting the use of accelerated procedures at borders to ensure that all migrants benefit

2. Policy incoherence: Securitisation should not trump individual assessment of protection needs

The above discussed discrepancy between undertakings and practice often relates to the fact that conflicting logics direct EU action. The EU's migration and border control policies aim to adhere to a *human rights-based* logic, but at the same time the policy field is very *security-oriented*. As the case studies in this report indicate, security considerations often take the upper hand in designing and implementing policies at the operational and policy level at the expense of the protection of human rights and the consideration of vulnerabilities of individuals.

This dichotomy is visible in how the 'unwanted' irregularly arriving migrants are met with policies of non-entrée with no proper assessment of individual vulnerabilities and protection needs. Such prioritising of state interests at the expense of the protection of the most fundamental rights of refugees should be clearly questioned, and it should be recognised that states cannot close their eyes to their human rights obligations when they exercise their sovereign rights to control their borders. At a minimum, with a view to a more coherent application and integration of the human rights framework in the EU's asylum and migration policies, sufficient safeguards should be instituted to guarantee that the most fundamental and non-derogable human rights of individuals, such as the principle of *non-refoulement*, are not trumped by other interests.

A similar clash between policy values can be identified between the Union's policies on integration (aiming at *inclusion*) and reception and social policy measures that in many regards seemingly aim at *exclusion* and deterrence. Irregular migration is hence not only fought at the borders, but also internally within the Member States. As noted by Broeders: 'The gradual realisation that borders alone cannot halt irregular migration has led to a widening of the scope of immigration policy. [...] States are now trying to shut the doors to the welfare state as well as to work, housing, education and other institutions of society. Access to public services has become an instrument of migration policy.'¹¹⁰² The situation for low-paid migrants in Ireland is highly indicative of this unwillingness to extend access to social rights to third-country nationals who do not belong to the group of high-skilled workers. A certain unwillingness to provide irregular migrants with the economic and social rights they are entitled to was also identified in the case study on the reception conditions for UAMs in Greece. The deterrent aim of detention of asylum-seekers in Southern Italy was also brought up. These exclusive policy measures adopted to address irregular migration make it difficult to build up resilience through sustainable structures for integration and inclusion.

Finally, incoherent policy objectives are also found between the Union's migration and development policies. In relation to internal-external policy coherence, it is problematic that, while addressing root

from a humane, individualised treatment which allows for a comprehensive assessment of their vulnerabilities and needs, as soon as they reach the EU.' Red Cross EU, Addressing the Vulnerabilities Linked to Migratory Routes to the European Union, Position Paper, 9 December 2015.

¹¹⁰² Dennis Broeders, *Breaking Down Anonymity: Digital Surveillance of Irregular Migrants in Germany and the Netherlands* (Amsterdam University Press 2009), 14-15.

causes of irregular migration is identified as one of the key priorities in the EU's migration management agenda,¹¹⁰³ the levels of development cooperation funds in many EU states are decreasing, in some cases radically so. Moreover, further reductions have been suggested in relation to countries that do not cooperate in the readmission of refugees.¹¹⁰⁴ Given that some of the most vulnerable individuals are those who, for one reason or another, stay or are left behind in countries where they face persecution (for example, individuals with disabilities generally face higher physical thresholds for migration), such reductions in funds can have serious consequences for persons with vulnerabilities outside the Union.¹¹⁰⁵ In a coherent policy on vulnerability, the external vulnerability effects of policies are also taken into account.

3. Coherence between the actions of the different EU Member States

The discretion left to Member States in implementing EU legislation in the area of asylum and migration has also led to issues of consistency in terms of human rights protection, such as access to asylum.¹¹⁰⁶ For example, worrying disparities are found in the way the different EU States handle gender-related asylum claims.¹¹⁰⁷ This leeway of action may result in significant inter-personal incoherence: the protection applications may be treated in different ways depending on the Member State in which the person applies for protection. The study on the low-paid migrant workers in Ireland notes further that many of the important goals of the *European Agenda for the Integration of Third-Country Nationals* (2011) remain at the level of rhetoric due to the discretion left for EU Member States in terms of application.¹¹⁰⁸

To ensure a more coherent approach, the adoption of a more outspoken policy on human rights assessments in cases involving vulnerable individuals should be considered. In this regard, it should be

¹¹⁰³ E.g., European Commission, A European Agenda on Migration, COM(2015) 240 final, 13 May 2015.

¹¹⁰⁴ See, e.g., Sandra Lavenex and Rahel Kunz, 'The Migration-Development Nexus in EU External Relations' in Maurizio Carbone (ed), *Policy Coherence and EU Development Policy* (Routledge 2009), 114 ff.

¹¹⁰⁵ UNHCR, 'People with Disabilities: Largely Invisible or Forgotten' <<http://www.unhcr.org/pages/4a0c310c6.html>> accessed 15 April 2016 ('People with disabilities [...] risk being left behind when those around them flee and may face difficulties accessing family tracing programmes.')

¹¹⁰⁶ See further Mikaela Heikkilä, Maija Mustaniemi-Laakso, Suzanne Egan, Graham Finlay, Tamara Lewis, Julia Planitzer, Helmut Sax, Lisa Maria Heschl and Stefan Salomon, *Report critically assessing human rights integration in AFSJ policies* [2015] <<http://www.fp7-frame.eu/wp-content/materiale/reports/22-Deliverable-11.2.pdf>> accessed 10 May 2016.

¹¹⁰⁷ Hana Cheikh Ali, Christel Querton and Elodie Soulard, 'Gender Related Asylum Claims in Europe: A Comparative Analysis of Law, Policies and Practice Focusing on Women in Nine EU Member States', Study commissioned by the European Parliament [2012].

¹¹⁰⁸ TFEU Article 79(4): 'European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States.'

noted that ‘achieving greater convergence in the EU asylum system’ is a goal identified in the recent Commission Communication on reforming the CEAS.¹¹⁰⁹

C. Adopting a ‘vulnerability lens’ to state obligations

1. Recognising vulnerability as a factor that specifies state obligations

In the introduction to this report, it has been argued that the concept of vulnerability should function as a catalyst for action: the finding of vulnerability gives rise to positive obligations to ensure substantive equality. To embrace this approach to vulnerability, it should be realised that while human rights by definition belong to everyone, in practice they are not accessible to all without active measures of positive discrimination. The adoption of an obligations-based view on addressing equality and vulnerability is vital to ensure that addressing vulnerabilities is not dependent on the goodwill and awareness of individual officials.

To operationalise such an approach to addressing vulnerability it has been suggested that the notion of vulnerability should function as a lens to understanding states’ obligations with regard to individuals, specifying and individualising the measures that need to be undertaken in order for the vulnerable individuals to be able to enjoy their rights. This requires, as noted in the case studies, acknowledging that the assessment of protection needs of inherently differently resilient individuals is to be done on an individual level, not through collective measures addressing groups of individuals *en masse*.¹¹¹⁰ The agency of the vulnerable individual should be highlighted in such assessments, providing asylum-seekers and migrants with a meaningful and efficient possibility to inform authorities about their vulnerability and its sources, as well as to be involved in decisions and measures affecting them.

A holistic view of human and refugee rights needs to be adopted in this regard in order to take account of the different elements of protection under the specific treaties geared for the protection of vulnerable individuals. For example, in recognising gender-based violence as a form of persecution, an inclusive interpretation of international refugee law must be adopted to embrace the specific protective elements of CEDAW. The same applies for the CRC which, as discussed in this report with regard to the UAMs in Greece, provides tools to understand and operationalise a scheme that responds to the vulnerability of migrant and refugee children. That the European Commission has integrated the BIA-BID approach in its Return Handbook was welcomed as a positive development in this regard. Nevertheless, as the case study on UAMs in Greece indicates, the practical implementation of this approach is still often unsatisfactory. Accentuated efforts are therefore needed to ensure the *de facto* implementation of the approach. Multi-

¹¹⁰⁹ European Commission, Communication from the Commission to the European Parliament and the Council towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe, COM(2016) 197 final, 6 April 2016.

¹¹¹⁰ See further Mikaela Heikkilä and Majja Mustaniemi-Laakso, ‘Seeing the Individual in the Midst of Large-Scale Phenomena: Some Remarks on the European Approach to the Refugee Situation’, [2016] *European Yearbook of Human Rights*, 187.

party coordination between public and private actors, civil society, as well as the legal and administrative mechanisms, is key in this regard.

2. Assessing and monitoring vulnerability and vulnerability responsiveness

When legislation or policies are adopted within the Union it is therefore central that proposals are scrutinised through a vulnerability lens. This is important, on the one hand, to ensure that the vulnerability effects of the suggested legislative measures and policies are duly taken into account and addressed, and, on the other hand, to ensure that positive measures for substantive equality are included in such proposals.

Presently, under EU guidelines, a ‘wide range of possible impacts should be reviewed’ when EU instruments are adopted, including the social and fundamental rights impacts of the proposals.¹¹¹¹ Implications of specific initiatives are to be assessed according to the guidelines, for instance, with regard to ‘youth, elderly, genders, immigrants, people suffering from discrimination or physical disadvantages [...]’.¹¹¹² The impact on vulnerable *groups* is thus a factor that can, and sometimes should, be considered in impact assessments within the EU. This being said, the more *contextual* vulnerability effects should also be assessed. Some social and economic effects (including effects on employment and social protection) are considered in impact assessments,¹¹¹³ but the adopted instruments and policies indicate that mitigating vulnerability is not a major concern in EU policy-making. It is suggested, therefore, that the adoption of special vulnerability impact assessments should be considered to make vulnerability and the attention to differently resilient individuals a more central goal for the EU’s policies on migration and asylum.

What is striking in this regard is that the EU’s response to the current migration situation is distinctively *reactive*. As noted in the case study on UAMs in Greece, the rapidity with which new policies are launched does not favour the coordination and assessment of the effects of previous and planned measures. Where sufficient time is not reserved to duly assess the effects of policies and legislation on vulnerable individuals the reliance on *ad hoc* solutions, rather than proactive long-term policies, risks creating structures and policies that sustain, enhance or create vulnerability.

Thus, that factors that aggravate and create vulnerability are taken into account when legal instruments and policies are adopted is important. This alone is, however, not enough. Monitoring of the vulnerability effects and vulnerability responsiveness of such instruments and policies is equally indispensable. From

¹¹¹¹ European Commission, Commission Staff Working Document, Better Regulation Guidelines, SWD(2015) 111 final, 19 May 2015, 25.

¹¹¹² European Commission, Better Regulation “Toolbox”, Tool # 16, 97 <http://ec.europa.eu/smart-regulation/guidelines/docs/br_toolbox_en.pdf> accessed 15 April 2016.

¹¹¹³ European Commission, Better Regulation “Toolbox”, Tool # 16, 99-100 <http://ec.europa.eu/smart-regulation/guidelines/docs/br_toolbox_en.pdf> accessed 15 April 2016.

the point of view of vulnerable migrants it is, for example, positive that FRA has started to published monthly regular overviews of migration-related fundamental rights concerns,¹¹¹⁴ sometimes through thematic issues on, for example, child protection and access to healthcare in connection to migration.¹¹¹⁵ Also, as the analyses in this report indicate, the supervision of human/fundamental rights by the ECtHR and CJEU has played an important role in developing practices in a more vulnerability-sensitive direction. To ensure a coherent approach to vulnerability responsiveness, enhanced attention should be paid to effective monitoring.

3. Awareness raising and training for vulnerability responsiveness

For a more conscious response to the vulnerabilities of differently resilient persons, sufficient information and knowledge about vulnerabilities and different alternatives for building up resilience are essential. The importance of high-quality and multidimensional research on vulnerability and its causes is decisive in this regard. This is pointed to in the findings of this report, which indicates that exact statistics and information about certain phenomena are lacking. For example, in relation to the phenomena of low-paid migrant workers in Ireland, stateless persons in India, and the number and conditions of detainees in asylum detention, more information and better statistics would be needed to ensure adequate responses to vulnerability. It is further noted that measures to address migration are often based on male experiences of migration, leaving the special challenges faced by female migrants unaddressed. To be able to meaningfully identify and address such special needs and challenges, knowledge about sources and elements of vulnerability is crucial.

It is also important to sensitise and build the capacity of authorities and units dealing with migration and asylum about vulnerabilities and resilience. This has been increasingly recognised by the EU, as seen, for example, in the appointment of officers and/or units with a fundamental rights focus in more security-oriented entities. The institution of a Frontex fundamental rights officer¹¹¹⁶ and a consultative forum¹¹¹⁷ are important examples in this regard. Frontex has also begun to organise fundamental rights training for groups such as border guards.¹¹¹⁸ Several guides/toolboxes related to migration control have also recently been adopted by the EASO. As an example, one may note that the EASO, together with Frontex, has developed practical tools which aim to assist first-contact officials working at the borders and detention facilities (such as border and coast guards, police, and immigration authorities) in identifying individuals

¹¹¹⁴ FRA, 'Regular Overviews of Migration-Related Fundamental Rights Concerns' <<http://fra.europa.eu/en/theme/asylum-migration-borders/overviews>> accessed 15 April 2016.

¹¹¹⁵ FRA, 'Thematic Focus: Children (February 2016)' <<http://fra.europa.eu/en/theme/asylum-migration-borders/overviews/focus-children>> accessed 15 April 2016.

¹¹¹⁶ Frontex, 'Management Board Designates Fundamental Rights Officer', 27 September 2012, <<http://frontex.europa.eu/news/management-board-designates-fundamental-rights-officer-8IK8lm>> accessed 15 April 2016.

¹¹¹⁷ Frontex, 'General Information' <<http://frontex.europa.eu/partners/consultative-forum/general-information/>> accessed 15 April 2016.

¹¹¹⁸ Frontex, 'Specialised Training' <<http://frontex.europa.eu/training/specialised-training/>> accessed 15 April 2016.

with international protection needs.¹¹¹⁹ The EASO has also launched a web-based tool that can be used by anyone who is in contact with applicants for international protection to facilitate the identification of persons with special needs.¹¹²⁰ In addition, the EASO has produced practical guides for personal asylum interviews in which the treatment of vulnerable applicants with special procedural needs is paid considerable attention.¹¹²¹ It is recommended that such awareness-raising tools are made a visible and institutionalised part of migration management and asylum processes in order to contribute to ensuring an increasingly 'protection-sensitive migration management' approach by the EU.¹¹²²

D. The need to take responsibility for addressing vulnerability

1. Beyond borders does not mean beyond obligations

In this report, it has been pointed out that measures to combat irregular migration into the EU have recently taken forms that are difficult to reconcile with the Union's and its Member States' human and fundamental rights obligations. Some of these measures, such as interceptions, which have severe consequences in terms of protecting vulnerable individuals, seem to be carried out under an understanding that such obligations have no, or decreased, effect when operations are carried out on the high seas or within the territory of another state.¹¹²³ As outlined in the case study on pre-border migration control measures, the EU and its Member States should recognise that the principle of *non-refoulement* in fact applies beyond the borders of a state where the state holds effective control and authority over an individual. In human rights jurisprudence and doctrine it has been increasingly stressed that the human rights obligations of states do not stop at borders, but remain in force whenever a state exercises control over a territory, an individual, or a set of facts affecting an individual, regardless of whether that individual

¹¹¹⁹ EASO, *Judicial Trainer's Guidance Note, Article 15(C) Qualification Directive (2011/95/EU): A Judicial Analysis* [2015] <<https://easo.europa.eu/wp-content/uploads/Article-15cQualification-Directive-Judicial-Trainers-Guidance-Note.pdf>> accessed 15 April 2016. Also see, e.g., EASO, *Access to the Asylum Procedure: Practical Tools for First-Contact Officials* <<https://easo.europa.eu/wp-content/uploads/PR06-AtP-launch.pdf>> accessed 15 April 2016, and <<https://easo.europa.eu/accesstoprocedure/>> accessed 15 April 2016.

¹¹²⁰ EASO, 'EASO Launches Tool for Identification of Persons with Special Needs (IPSN Tool)', Press Release, 27 January 2016, <https://easo.europa.eu/wp-content/uploads/PRESS-RELEASE_03-EASO-IPSN-tool.pdf> accessed 15 April 2016.

¹¹²¹ EASO, *EASO Practical Guide: Personal interview* [2014] <<https://easo.europa.eu/wp-content/uploads/EASO-Practical-Guide-Personal-Interview-EN.pdf>> accessed 15 April 2016.

¹¹²² EASO, 'EU-Funded Protection-Sensitive Migration Management Programme Launched in Belgrade', 10 March 2016 <<https://easo.europa.eu/wp-content/uploads/INFOPOINT-EU-Funded-Protection-Sensitive-Migration-Management-Programme-launched-in-Belgrade.pdf>> accessed 15 April 2016.

¹¹²³ For a discussion, see, e.g., Andreas Fischer-Lescano, Tillman Löhr and Timo Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' [2009] *International Journal of Refugee Law* 256; Elspeth Guild and Violeta Moreno-Lax, 'Current Challenges regarding the International Refugee Law, with Focus on EU Policies and EU Co-operation with UNHCR' [2013] *CEPS Paper in Liberty and Security in Europe* No 59, 10, and Violeta Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' [2011] *International Journal of Refugee Law* 174, 200.

resides within or beyond the territory of the state.¹¹²⁴ This applies equally to the EU Fundamental Rights Charter, which is understood to apply extraterritorially where the EU and its Member States implement Union law beyond the territory of the Union.¹¹²⁵

In other words, the scope of application of the obligations is not seen to be governed by the territorial jurisdiction of the state, but by the jurisdiction it exercises over a given state of affairs with implications on the protection of human rights. With an explicit focus on border surveillance and migration control, this was acknowledged by the ECtHR in the *Hirsi Jamaa* case, in which the Court recognised the obligation of the respondent state to assess the personal circumstances and vulnerability of asylum-seekers on the high seas.¹¹²⁶ As such, states cannot evade their human rights obligations vis-à-vis vulnerable individuals within their effective jurisdiction when they operate beyond their territory.¹¹²⁷

This is also relevant in relation to the operationalisation of EU migration policies through Frontex, of which the accountability deficit has been noted with concern in the case study on pre-border controls.¹¹²⁸ It should be admitted that, whereas the chains of accountability between third states, Frontex, the EU and the EU Member States are unclear, states cannot evade their human rights obligations where they are facilitating or supporting the conduct of other actors. This is notably of importance in regard to working arrangements adopted between Frontex and third states, through which countries of origin and transit are encouraged to prevent irregular migration to the EU.¹¹²⁹ Concern has been expressed over the fact that the planned European Border and Coast Guard Agency will inherit many of these deficits.¹¹³⁰

2. Responsibility for addressing vulnerability cannot be outsourced to private actors

¹¹²⁴ See, e.g., Malcolm Langford, Wouter Vandenhoele, Martin Scheinin and Willem van Genugten (eds), *Global Justice, State Duties: The Extra-Territorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013).

¹¹²⁵ See, e.g., Violeta Moreno-Lax and Cathryn Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model' in Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward (eds), *The EU Charter of Fundamental Rights* (Hart Publishing 2014) 1657.

¹¹²⁶ *Hirsi Jamaa and Others v Italy*, App No 27765/09 (ECtHR 23 February 2012), paras 71-75, 177 and 202.

¹¹²⁷ For a discussion on the extraterritorial applicability of human rights law and the principle of *non-refoulement*, see, e.g., Andreas Fischer-Lescano, Tillmann Löhr and Timo Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' [2009] *International Journal of Refugee Law* 256.

¹¹²⁸ See further, e.g., Melanie Fink, 'Salami Slicing Human Rights Accountability: How the European Border and Coast Guard Agency May Inherit Frontex' Genetic Defect', *EJIL Talk!* [blog], 10 March 2016, <<http://www.ejiltalk.org/salami-slicing-human-rights-accountability-how-the-european-border-and-coast-guard-agency-may-inherit-frontex-genetic-defect/>> accessed 15 April 2016.

¹¹²⁹ For a discussion, see, Mikaela Heikkilä, Maija Mustaniemi-Laakso, Suzanne Egan, Graham Finlay, Tamara Lewis, Julia Planitzer, Helmut Sax, Lisa Maria Heschl and Stefan Salomon, *Report critically assessing human rights integration in AFSJ policies* [2015] <<http://www.fp7-frame.eu/wp-content/materiale/reports/22-Deliverable-11.2.pdf>> accessed 10 May 2016.

¹¹³⁰ Melanie Fink, 'Salami Slicing Human Rights Accountability: How the European Border and Coast Guard Agency May Inherit Frontex' Genetic Defect', *EJIL Talk!* [blog], 10 March 2016 <<http://www.ejiltalk.org/salami-slicing-human-rights-accountability-how-the-european-border-and-coast-guard-agency-may-inherit-frontex-genetic-defect/>> accessed 15 April 2016.

It is also important to recognise that, while a lot of important work in the areas of asylum/migration management is carried out by the civil society and private companies, human rights obligations and responsibilities cannot be circumvented through the outsourcing of activities to private actors. As was noted in the case study on pre-border controls, the outsourcing of border control to private actors, which for example has taken place through the system of carrier sanctions, is problematic: firstly, because privatisation of state functions, such as the protection of human rights at the borders, creates an accountability gap in terms of human rights protection as private actors are not bound by human rights obligations;¹¹³¹ and secondly, given that the ability to recognise and take account of vulnerability is, to a high degree, a matter of training and know-how, it is problematic that private actors often lack the proper expertise and training to identify vulnerable individuals and individuals in need of special protection. Such problems are, as discussed in the case study on asylum detention in Italy, exacerbated by the fact that often no proper coordination exists to define and monitor the procedures, roles and functions of public and private actors in relation to one another and to vulnerable individuals. Privatisation of reception facilities and services may also entail a shift towards a revenue-driven focus, as noted in this report with regard to Italy.

It is furthermore important to ensure that the responsibility for ensuring or gaining access to human rights is not disproportionately shifted onto the shoulders of the refugees and migrants themselves. This is something that should be taken into account, for example, in relation to the integration process, in which migrants in general are expected to play an active role. In some regards the ‘two-way process’ of integration referred to in the case study on low-paid migrant workers in Ireland has ‘progressively shifted towards a policy where migrants have been asked to carry the biggest part of the burden of integration requirements’, for example, in terms of language requirements.¹¹³² Due account in such requirements should therefore be taken of states’ obligations to accommodate different vulnerabilities of individuals in order not to create disproportionate hurdles for integration and in order to facilitate the integration process of differently resilient individuals.

E. An urgent call for enhanced cooperation and solidarity to alleviate the plight of vulnerable individuals

1. Political will to change course from a policy of non-entrée and exclusion towards a policy of access and inclusion

¹¹³¹ For discussion, see, Nicolas David, Mary Dowell-Jones, Mary Footer, Jeffrey Kenner, Maija Mustaniemi-Laakso, Aoife Nolan and Petr Pribyla, *Report on the positive and negative human rights impacts of non-state actors*, Work Package No 7 — Deliverable No 7.1 [2014] <<http://www.fp7-frame.eu/wp-content/materiale/reports/04-Deliverable-7.1.pdf>>.

¹¹³² *Migration and Integration: Common Challenges and Responses from Europe and Asia*, Wilhelm Hofmeister et al. (eds) (Konrad-Adenauer Stiftung and European Union 2014), 217.

It has been noted above that the policy of non-entrée adopted by the EU and its Member States exposes migrants to factors that create and aggravate vulnerabilities. Especially for particularly vulnerable migrants, the creation of more safe and legal avenues to the Union would be of pivotal importance. So far the political will to this end has, however, not been present. The possibility to grant humanitarian visas exists,¹¹³³ but this has not been at the core of the EU policies on asylum, which have instead focused on developing more effective measures for border controls, return and readmission.

The Union is plagued by what has been called an ‘access crisis’,¹¹³⁴ and significant changes in the political climate need to take place to move from a migration policy founded on security thinking to a truly human rights-based policy that acknowledges the protection needs of migrants and refugees. The access crisis is a reflection of a policy of exclusion in which a clear distinction is made between ‘us’ and the ‘others’, and ‘ins’ and ‘outs’.¹¹³⁵ This lack of solidarity with ‘the others’ is also visible in the internal migration control measures of the EU Member States. Solidarity is reserved for national citizens and legally residing migrants, whereas ‘outsiders’ are excluded from the benefits of the welfare state.¹¹³⁶ This often contributes to their marginalisation and vulnerabilisation, as was noted above with regard to the stateless persons in India and the low-paid migrant workers in Ireland. The status of ‘stateless’ or of an irregular migrant, coupled with the resulting difficulties to meet legal and documentary requirements to access key institutions of the welfare state (such as employment in the formal sector as well as access to housing and health care), effectively contribute to a strategy of exclusion.¹¹³⁷ To prevent further marginalisation and vulnerabilisation, solidarity to support inclusion and integration through access to basic social rights for all is of vital importance.

2. Addressing vulnerability in a union based on solidarity

The EU’s migration policy is also characterised by a significant solidarity deficit between the EU Member States. This has, as seen in the case studies in this report, consequences in terms of how individuals with different vulnerabilities are met. The analyses on UAMs in Greece and on asylum detention in Italy indicate that front-line migration states are struggling to ensure conditions and treatment in line with the requirements of international human rights and refugee law for the high numbers of migrants entering

¹¹³³ See further, e.g., Ulla Iben Jensen, *Humanitarian Visas: Option or Obligation?*, Study to the LIBE Committee [2014].

¹¹³⁴ ECRE, ‘Red Cross: Offshore Processing Inadequate to Solve “Access Crisis”’, 12 February 2016, <<http://www.ecre.org/component/content/article/70-weekly-bulletin-articles/1377-red-cross-offshore-processing-inadequate-to-solve-access-crisis-.html>> accessed 15 April 2016.

¹¹³⁵ Dennis Broeders, *Breaking Down Anonymity: Digital Surveillance of Irregular Migrants in Germany and the Netherlands* (Amsterdam University Press 2009), 40.

¹¹³⁶ For a discussion, see Dennis Broeders, *Breaking Down Anonymity: Digital Surveillance of Irregular Migrants in Germany and the Netherlands* (Amsterdam University Press 2009), 40.

¹¹³⁷ Dennis Broeders, *Breaking Down Anonymity: Digital Surveillance of Irregular Migrants in Germany and the Netherlands* (Amsterdam University Press 2009), 43.

irregularly. To ensure proper treatment of migrants, the case studies assert that the stepping up of cooperation is a necessity. A similar finding is made with regard to the situation of the stateless persons within South Asia. Given the geopolitical feature of the phenomenon of statelessness in the area, cooperative structures between the states in the area for burden sharing and coordination are found to be of vital importance in terms of addressing statelessness as a source of vulnerability.

The need for increased solidarity and better cooperation is clearly recognised in several EU policy documents.¹¹³⁸ The creation of a fairer system for determining which EU Member State is responsible for examining asylum claims is, for example, a central element in the relocation scheme adopted in the autumn of 2015, as well as of the recently published Commission communication on reforming the CEAS.¹¹³⁹ While in terms of Dublin transfers states have a *positive obligation* to assure guarantees of appropriate treatment upon transfer, and a *negative obligation* to refrain from transferring a vulnerable individual where such guarantees do not exist,¹¹⁴⁰ the reverse should be acknowledged in the case of relocations. EU States should recognise the fact that the rights of vulnerable individuals are largely not met in the frontline refugee-receiving states. The relocation process is essential to address the situation of particularly vulnerable individuals. Concern must therefore be expressed over the fact that the relocation scheme has got off to a very slow start, with only a small fraction of the relocations having taken place.¹¹⁴¹ Besides procedural hurdles, an important reason for this, as noted in the case study on the UAMs in Greece, has been the fact that other EU states have been reluctant to alleviate the burdens of frontline states.

This gives rise to the question of whether Member States are only inclined to cooperate and put the solidarity clauses in the EU *acquis*¹¹⁴² into practice where this serves their self-interests.¹¹⁴³ A migration policy which in reality takes into account protection needs and vulnerability requires that the EU and its Member States move beyond measures based on exchange and reciprocity towards measures based on solidarity and recognising their undertakings under international human rights and refugee law.¹¹⁴⁴

¹¹³⁸ E.g., European Commission, A European Agenda on Migration, COM(2015) 240 final, 13 May 2015.

¹¹³⁹ European Commission, Communication from the Commission to the European Parliament and the Council: Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe, COM(2016) 197 final, 6 April 2016, 7-8.

¹¹⁴⁰ The ECtHR and CJEU jurisprudence indicates that attention should be given to vulnerabilities in decisions concerning transfers of asylum-seekers. See, e.g., Case C-648/11, *The Queen, on the application of MA, BT, DA v Secretary of State for the Home Department* [2013] CJEU 6 June 2013, paras 42-66; *Tarakhel v Switzerland* App no 29217/12 (ECtHR 4 November 2014), para 122.

¹¹⁴¹ Member States' Support to Emergency Relocation Mechanism, Communicated as of 14 April 2016 <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_relocation_en.pdf> accessed 15 April 2016; and Jon Henley, 'EU Refugee Relocation Scheme Is Inadequate and Will Continue to Fail', *The Guardian*, 4 March 2016 <<http://www.theguardian.com/world/2016/mar/04/eu-refugee-relocation-scheme-inadequate-will-continue-to-fail>> accessed 15 April 2016.

¹¹⁴² TFEU, Art 67.

¹¹⁴³ The Turkey agreement is to a great extent based on reciprocity.

¹¹⁴⁴ For a discussion, see, e.g., Thomas Faist, 'The Crucial Meso-Level' in Marco Martiniello and Jan Rath (eds), *Selected Studies in International Migration and Immigration Incorporation* (Amsterdam University Press 2010), 74-75.

Bibliography

A. Legal and policy instruments

1. Treaties

1930 ILO Convention (no 29) concerning Forced or Compulsory Labour (adopted 28 June 1930, entered into force 1 May 1932) 39 UNTS 55

1949 ILO Convention (no 97) concerning Migration for Employment (Revised 1949) (adopted 1 July 1949, entered into force 22 January 1952) 120 UNTS 71

1950 Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) CETS no 5

1951 Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137

1954 Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117

1961 Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175

1965 International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD)

1966 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

1966 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR)

1967 Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267

1969 American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 144

1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45

1975 ILO Convention (no 143) concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (adopted 24 June 1975, entered into force 9 December 1978) 1120 UNTS 323

1979 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW)

1981 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217

1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT)

1989 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC)

1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 93

1992 Treaty on European Union, signed at Maastricht on 7 February 1992, [1992] OJ C 191/1

1997 Treaty of Amsterdam, Protocol Integrating the Schengen Acquis into the Framework of the European Union [1997] OJ C 340/93

1999 ILO Convention (no 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (adopted 17 June 1999, entered into force 19 November 2000) 2133 UNTS 163

2000 The Schengen acquis – Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of Benelux Economic Union, the Federal Republic of Germany and French republic on the gradual abolition of checks at their common borders [2000] OJ L239/19

2005 Schengen III Prüm Convention (the Treaty between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration), Prüm [2005]

2006 Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD)

2007 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (adopted 13 December 2007, entered into force 1 July 2010) [2007] OJ C306

2007 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on the Functioning of the European Union - Protocols - Annexes - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 [2012] OJ C326/1

2011 ILO Convention (no 189) concerning Decent Work for Domestic Workers (adopted 16 June 2011, entered into force 5 September 2013) UNTS no 51379

2011 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (adopted 11 May 2011, entered into force 1 August 2014) CETS no 210

2. Regulations

Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [2000] OJ L316/1

Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2001] OJ L81/1

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 [2003] OJ L50/1

Council Regulation (EC) No 377/2004 of 19 February 2004 on the Creation of an Immigration Liaison Officers Network L 64/1, OJ L64/1 (ILO Regulation), amended by Regulation (EU) No 493/2011 of the European Parliament and of the Council of 5 April 2011 amending Council Regulation (EC) No 377/2004 on the Creation of an Immigration Liaison Officers Network, [2004] OJ L141/13

Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L349/1

Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2006] OJ L105 (consolidated version 2013)

Regulation (EU) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers [2004] OJ L199/30

Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] L243/1

Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2011] OJ L304/1

Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice [2013] OJ L180/1

Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/31

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

Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC [2014] OJ L 150/168

3. Directives

Council Directive 2001/51/EC of 10 July 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 [2001] OJ L187/45

Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence [2002] OJ L328/17

Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers laying down minimum standards for the reception of asylum seekers [2003] OJ L31/18

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12

Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2004] OJ L16/44

Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states [2004] OJ L229/35

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 L304/12

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 L326/13

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98

Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9

Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2011] OJ L343/1

Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1

Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60

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

4. Decisions

Council Decision 2008/615/JHA of 23 June 2008 on the Stepping up of Cross-Border Cooperation, particularly in Combating Terrorism and Cross-Border Crime [2008] OJ L210/1

Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2010] OJ L111/20

Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece [2015] OJ L239/146

Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L248/80

5. European Council documents

European Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union [2005] OJ C53/1

European Council, The Stockholm Programme — An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1

European Council, 'Council Conclusions 26-27 June 2014' [2014]

6. Council documents

Council of the European Union, 'Plan for the management of the external borders of the Member States of the European Union' [2002] 10019/02

Council of the European Union, European Pact on Immigration and Asylum [2008] 13440/08 ASIM 72

Council of the European Union, Human Rights and Democracy: EU Strategic Framework and EU Action Plan [2012] 11855/12

Council of the European Union, Council Conclusions on Integrated Border Management, 2768th Justice and Home Affairs Council meeting Brussels, 4–5 December 2006

Council of the European Union, Council Conclusions on a rights-based approach to development cooperation, encompassing all human rights, 19 April 2014

Council of the European Union, Council Conclusions on the Action Plan on Human Rights and Democracy 2015–2019 [2015] 10897/15

7. Commission documents (COM and SEC documents)

a) Commission communications (including Commission strategies and action plans)

Commission of the European Communities, Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies [1994] COM(94) 23 final

Commission of the European Communities, Communication from the Commission to the Council and the European Parliament 'Towards Integrated Management of the External Borders of the Member States of the European Union' [2002] COM(2002) 233 final

European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: A Common Agenda for Integration Framework for the Integration of Third-Country Nationals in the European Union [2005] COM(2005) 389 final

European Commission, Commission Communication on Action Plan on Unaccompanied Minors 2010–2014 [2010] COM(2010) 213 final

European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, European Agenda for the Integration of Third-Country Nationals {SEC(2011) 957 final} [2011] COM(2011) 455 final

European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The Global Approach to Migration and Mobility [2011] COM(2011) 743 final

European Commission, Commission Communication: On EU Return policy [2014] COM(2014) 199 final

European Commission, Commission Communication: A European Agenda on Migration [2015] COM(2015) 240 final

European Commission, Commission Communication: Managing the refugees crisis: immediate operational, budgetary and legal measures under the European Agenda on Migration [2015] COM(2015) 490 final/2

European Commission, Commission Communication: Managing the refugee crisis: State of Play of the Priority Actions under the European Agenda on Migration Annex 8 [2015] COM(2015) 510 final

European Commission, Communication from the Commission to the European Parliament and the Council, Progress Report on the Implementation of the hotspots in Italy [2015] COM(2015) 679 final

European Commission, Commission Communication on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration [2016] COM(2016) 85 final

European Commission, Commission Communication: First Report on relocation and resettlement [2016] COM(2016) 165 final

European Commission, Communication from the Commission to the European Parliament and the Council towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe, Brussels [2016] COM(2016) 197 final

b) Commission proposals

European Commission, Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers [2008] COM (2008) 815 final

European Commission, Proposal for a Directive of the European Parliament and Council on procedural safeguards for children suspected or accused in criminal proceedings [2013] COM(2013) 822 final

European Commission, Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary [2015] COM(2015) 451 final

Proposal for a Regulation of the European Parliament and of the Council Establishing an EU Common List of Safe Countries of Origin for the Purposes of Directive 2013/32/EU of the European Parliament and of the Council on Common Procedures for Granting and Withdrawing International Protection, and Amending Directive 2013/32/EU [2015] COM(2015) 452 final

European Commission, Proposal for a Regulation of the European Parliament and of the Council on a European travel document for the return of illegally staying third-country nationals [2015] COM(2015) 668 final, 2015/0306 (COD)

European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC [2015] COM(2015) 671 final, 2015/0310 (COD)

European Commission, Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Sweden in accordance with Article 9 of Council Decision (EU) 2015/1523 and Article 9 of Council Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] COM (2015) 677 final

European Commission, Proposal for a Council Implementing Decision on the temporary suspension of the relocation of 30% of applicants allocated to Austria under Council Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2016] COM (2016) 80 final

European Commission, Proposal for a Council Decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence [2016] COM(2016) 109 final

Proposal for a Council decision on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence [2016] COM(2016) 111 final

c) Commission staff working documents

European Commission, Staff working document, Tool-Box for a Rights-Based Approach, Encompassing all Human Rights for EU Development Cooperation [2014] SWD (2014) 152 final

European Commission, Staff working document, Assessment of the Implementation of the Greek Action Plan on Asylum and Migration Management [2014] SWD (2014) 316 final

European Commission, Staff working document, Better Regulation Guidelines, SWD (2015) 111 final

d) Commission action plans, agendas, guidelines, opinions and recommendations

European Commission, Green Paper on the future Common European Asylum System [2007] COM (2007) 301 final

European Commission, Commission Recommendation of 1 October 2015 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return related tasks [2015] C (2015) 6250 final and Annex

European Commission, 'EU-Turkey joint action plan' [2015] MEMO/15/5860

8. European Parliament documents

European Parliament, Presidency Conclusions, Tampere European Council, 15 and 16 October 1999

European Parliament Resolution of 13 April 1984 on the application of the Geneva Convention relating to the status of refugees, [1984] OJ C127, 14/5/1984

European Parliament Resolution on Lampedusa, 14 April 2005, P6_TA(2005)0138

European Parliament legislative resolution of 7 May 2009 on the proposal for a directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (recast) COM(2008)0815

9. Other instruments adopted by EU institutions or bodies

Charter of Fundamental Rights of the European Union [2010] OJ C83/389

10. Decisions, recommendations and resolutions adopted by other international organisations

e) Council of Europe

Council of Europe Parliamentary Assembly, Recommendation 1374 on the Situation of Refugee Women in Europe, 20 May 1998

f) United Nations

General Assembly documents (UN doc A)

United Nations General Assembly Resolution 217 A (III), Universal Declaration of Human Rights, adopted 10 December 1948, UN GAOR, 3rd Session (Resolution, Pt.1)

United Nations General Assembly, Resolution 56/83 on the Report of the Sixth Committee UN doc A/56/589 and Corr.1 on the Responsibility of States for Internationally Wrongful Acts, 12 December 2001

United Nations General Assembly Resolution, 'A World Fit for Children', UN doc A/RES/S-27/2, 11 October 2011

Other UN docs

Committee against Torture, *J.H.A. v Spain*, Communication no 323/2007, CAT/C/41/D323/2007

Committee against Torture, *Fatou Sonko v Spain*, Communication no. 368/2008, CAT/C/47/D368/2008

Committee on Economic, Social and Cultural Rights, Concluding observations on the fifth periodic report of Italy, E/C.12/ITA/CO/5, 28 October 2015

Committee on Economic, Social and Cultural Rights, Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: Ireland, E/C.12/IRL/3, 8 November 2013

Committee on the Elimination of Discrimination against Women, Concluding comments: Ireland, 33rd Session, CEDAW/C/IRL/CO/4–5, 5–22 July 2005

Committee on the Elimination of Discrimination against Women, Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women: Ireland, 10 June 2003

Committee on the Elimination of Discrimination against Women, General recommendation no 25 on temporary special measures, 30th session (2004), HRI/GEN/1/Rev.7

Committee on the Elimination of Discrimination against Women, General Recommendation no 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, CEDAW/C/GC/32, 14 November 2014

Committee on the Elimination of Racial Discrimination, Concluding observations on Poland, CERD/C/POL/CO/19, 14 September 2009

Committee on the Elimination of Racial Discrimination, Reports submitted by States parties under article 9 of the Convention: Ireland, CERD/C/IRL/3–4, 23 September 2010

Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of the European Union, CRPD/C/EU/CO/1, 2 October 2015

Committee on the Rights of the Child, Concluding observations: Greece, CRC/C/GRC/CO/2–3, 13 August 2012

Committee on the Rights of the Child, Concluding observations: Italy, CRC/C/ITA/CO/3–4, 31 October 2011

Committee on the Right of the Child, General Comment no 5 on general measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6) CRC/GC/2003/5, 27 November 2003

Committee on the Rights of the Child, General Comment no 6 on treatment of unaccompanied and separated children outside their country of origin, CRC/GC/2005/6, 1 September 2005

Committee on the Right of the Child, General Comment no 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14, 29 May 2013

Committee on the Rights of the Child, General Guidelines regarding the form and content of initial reports to be submitted by States Parties under Article 44, Paragraph 1(a), of the Convention, CRC/C/5, 30 October 1991

Economic and Social Council, Commission on Human Rights, Radhika Coomaraswamy, Integration of the human rights of women and the gender perspective, violence against women, UN doc E/CN.4/2000/68, 29 February 2000

Human Rights Committee, Concluding observations: Italy, CCPR/C/ITA/CO/5, 24 April 2006

Human Rights Committee, General Comment no 20 on Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), Forty-fourth session (1992)

Human Rights Committee, General Comment no 27, Freedom of movement (Article 12), CCPR/C/21/Rev.1/Add.9 (1999)

Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Mission to Greece, A/HRC/23/46/Add.4, 17 April 2013

Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Mission to Italy (29 September– 8 October 2012), A/HRC/23/46/Add.3, 30 April 2013

Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants, A/HRC/29/36, 8 May 2015

Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Mission to Greece, A/HRC/16/52/Add.4, 21 April 2011

UNHCR

UNHCR and the Office of the High Commissioner for Human Rights (OHCHR), Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions, May 2011

UNHCR, Executive Committee of the High Commissioner's Programme, Standing Committee, 'Interception of Asylum Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach' [2000] EC/50/SC/CRP.17

UNHCR, Executive Committee Conclusions no 39 (XXXVI), Refugee Women and International Protection [1985]

UNHCR Executive Committee Conclusions no 77 (XLVI) [1995]

UNHCR Executive Committee Conclusions no 79 (XLVII) [1996]

UNHCR, Executive Committee, 'Conclusion on Children at Risk no. 107' [2007]

UNHCR, Guidelines on International Protection No 1: Gender-related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/01, 7 May 2002

UNHCR, Guidelines on International Protection No 2: Membership of a particular social group within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/02, 7 May 2002

UNHCR, Guidelines on International Protection No 6: Religion-based refugee claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, HCR/GIP/04/06, 28 April 2004

UNHCR, Guidelines on International Protection No 7: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked, HCR/GIP/06/07, 7 April 2006

UNHCR, Guidelines on Policies and Procedures in dealing with unaccompanied children seeking asylum [1997] <<http://www.unhcr.org/3d4f91cf4.pdf>>

UNHCR, Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach, Executive Committee of the High Commissioner's programme, 18th Meeting of the Standing Committee (EC/50/SC/CPR.17), 9 June 2000 <<http://www.unhcr.org/4963237411.pdf>>

UNHCR, Position Paper on Violence against women and girls in the European Union and persons of concern to UNHCR, PC.DEL/824/14, 9 July 2014

UNHCR, Recommendations on Important Aspects of Refugee Protection in Italy [2013]

B. Case-law

1. CJEU case law

Case C-286/90 Anklagemyndigheden v Peter Michael Poulsen and Diva NavigationCorp [1992] ECR I-6019

Case C-162/96 A. Racke GmbH & Co. v Hauptzollamt Mainz [1998] ECR I-03655

Case C-540/03, European Parliament v Council of the European Union supported by Commission of the European Communities and by Federal Republic of Germany [2006] CJEU ECR I-05769

Case C-355/10 European Parliament v Council of the European Union [2012] CJEU 5 September 2012

Case C-411/10 and C-493/10, N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform [2011] CJEU ECR I-13905

Case C-648/11, The Queen, on the application of MA, BT, DA v Secretary of State for the Home Department [2013] CJEU 6 June 2013

Case C-79/13, Federaal agentschap voor de opvang van asielzoeker v Selver Saciri et al [2014] CJEU 27 February 2014

Case C-601/15 PPU, J.N. v Staatssecretaris voor Veiligheid en Justitie [2016] CJEU 15 February 2016

Opinion pursuant to Article 218(11) TFEU – Draft international agreement – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms - Compatibility of the draft agreement with the EU and FEU Treaties, Opinion 2/13, [2014] CJEU 18 December 2014

2. ECtHR case law

Aden Ahmed v Malta App no 55352/12 (ECtHR 23 July 2013)

Alajos Kiss v Hungary App no 38832/06 (ECtHR 20 May 2010)

A.M.E. v the Netherlands App no 51428/10 (ECtHR Decision 13 January 2015)

Amuur v France App no 19776/92 (ECtHR 25 June 1996)

A.S. v Switzerland App no 39350/13 (ECtHR 30 June 2015)

Asalya v Turkey App no 43875/09 (ECtHR 15 April 2014)

Boutif v Switzerland App no 54273/00 (ECtHR 2 August 2001)

Collins and Akaziebie v Sweden App no 23944/05 (ECtHR 8 March 2007)

F.A. v the United Kingdom App no 20658/11 (ECtHR 10 September 2013)

Guzzardi v Italy App no 7367/76 (ECtHR 6 November 1980)

Hirsi Jamaa and Others v Italy App no 27765/09 (ECtHR 23 February 2012)

Houssein v Greece App no 71825/11 (ECtHR 24 October 2013)

Idemugia v France App no 4125/11 (ECtHR 27 March 2012)

Izevbekhai and Others v Ireland App no 43408/08 (ECtHR 17 May 2011)

Kanagaratnam and Others v Belgium App no 15297/09 (ECtHR 13 December 2011)

Kaya v Germany App no 31753/02 (ECtHR 28 June 2007)

Khalisat Daytbegova and Mariat Magomedova v Austria App no 6198/12 (ECtHR Decision 4 June 2013)

Khlaifia and Others v Italy App no 16483/12 (ECtHR 1 September 2015)

Mahmundi and Others v Greece App no 14902/10 (ECtHR 31 July 2012)

Mohammed Hussein and Others v The Netherlands and Italy App no 27725/10 (ECtHR Decision 2 April 2013)

M.S.S. v Belgium and Greece App no 30696/09 (ECtHR 21 January 2011)

Mubilanzila Mayeka and Kanini Mitunga v Belgium App no 1378/03 (ECtHR 12 October 2006)

Muskhadzhiyeva and Others v Belgium App no 41442/07 (ECtHR 19 January 2010)

Nolan and K. v Russia App no 2512/04 (ECtHR 12 February 2009)

Omeredo v Austria App no 8969/10 (ECtHR 20 September 2011)

Popov v France Apps nos 39472/07 and 39474/07 (ECtHR 19 January 2012)

Rahimi v Greece App no 8687/08 (ECtHR 5 April 2011)

Saadi v the United Kingdom App no 13229/03 (ECtHR (GC) 29 January 2008)

Sharifi and Others v Italy and Greece App no 16643/09 (ECtHR 21 October 2014)

Slivenko v Latvia App no 48321/99 (ECtHR 9 October 2003)

Tarakhel v Switzerland App no 29217/12 (ECtHR 4 November 2014)

Üner v The Netherlands App no 46410/99 (ECtHR 18 October 2006)

V.F. v France App no 7196/10 (ECtHR 29 November 2011)

Yordanova and Others v Bulgaria App no 25446/06 (ECtHR 24 April 2012)

Z.H. v Hungary App no 28973/11 (ECtHR 8 November 2012)

3. Other case law

National Human Rights Commission v State of Arunachal Pradesh, All India Reporter (AIR), Supreme Court (SC) (1996) 1234; Supreme Court Cases (SCC) (1996) (1) 742

Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants), [2004] UKHL 55

Sale, acting Commissioner, Immigration and Naturalization Service, et al. v. Haitian Centers Council, Inc., et al. 509 U.S. 155 (1993)

Sarbananda Sonawal v Union of India, All India Reporter (AIR), SC (2005) at 2935

Secretary of State for the Home Department (Respondent) v K (FC) (Appellant) and Fornah (Appellant) v Secretary of State for the Home Department (Respondent), United Kingdom House of Lords, October 2006

Shamin Bano v Union of India, AIR 1980 Rajasthan 98

State of Arunachal Pradesh v Khudiram Chakma, AIR (1994) SC 1461 and also see SCC (1994) Supl. (1) 615 JT 1993 (3) 541

C. Literature

1. Books

Abel, E., Dauvergne, C. and Millbank, J. (eds), *Gender in Refugee Law: From the Margins to the Centre* (Routledge 2014)

Albertson Fineman, M. and Gear, A. (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013)

Broeders, D., *Breaking Down Anonymity: Digital Surveillance of Irregular Migrants in Germany and the Netherlands* (Amsterdam University Press 2009)

Butalia, U., *The Other Side of Silence: Voices from the Partition of India* (Viking 1998)

Carrera, S., Guild, E. and Eisele, K. (eds), *Rethinking the Attractiveness of EU Immigration Policies* (Centre for European Policy Studies 2014)

Cornelisse, G., *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Martinus Nijhoff Publishers 2010)

Crawley, H., *Refugees and Gender: Law and Process* (Jordans 2001)

- Dembour, M.-B., *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015)
- den Heijer, M., *Europe and Extraterritorial Asylum* (Hart Publishing 2012)
- Freedman, J., *Gendering the International Asylum and Refugee Debate* (Palgrave Macmillan 2015)
- Gammeltoft-Hansen, T., *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press 2011)
- Ghosh, P., *Partition and the South Asian Diaspora: Extending the Subcontinent* (Routledge 2007)
- Goodwin-Gill, G. S. and McAdam, J., *The Refugee in International Law* (3rd edn, OUP 2007)
- Grahl-Madsen, A., *The Status of Refugees in International Law*, vol I (A. W. Sijthoff 1966)
- Grahl-Madsen, A., *Territorial Asylum* (Almqvist & Wiksell International 1980)
- Hathaway, J. C., *The Rights of Refugees under International Law* (Cambridge University Press 2005)
- Henrard, K., *Minority Protection in Post-Apartheid South Africa: Human Rights, Minority Rights and Self-Determination* (Praeger 2002)
- Ippolito, F. and Iglesias Sánchez, S. (eds), *Protecting Vulnerable Groups: The European Human Rights Framework* (Hart 2015)
- Kabeer, N., *Reversed Realities: Gender Hierarchies in Development Thought* (Verso 1994)
- Katsui, H., Ranta, E. M., Yeshanew, S. A., Musila, G. M., Mustaniemi-Laakso, M. and Sarelin, A., *Reducing Inequalities: A Human Rights-based Approach in Finland's Development Cooperation with Special Focus on Gender and Disability — A Case Study on Ethiopia and Kenya* (Åbo Akademi University Institute for Human Rights 2014)
- Langford, M., Vandenhole, W., Scheinin, M. and van Genugten, W. (eds), *Global Justice, State Duties: The Extra-Territorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013)
- Migration and Integration: Common Challenges and Responses from Europe and Asia*, Wilhelm Hofmeister et al. (eds) (Konrad-Adenauer Stiftung and European Union 2014)
- O'Nions, H., *Asylum — A Right Denied: A Critical Analysis of European Asylum Policy* (Ashgate 2014)
- Peers, S., Moreno-Lax, V., Garlick, M., and Guild, E., (eds), *EU Immigration and Asylum Law, Vol. 3: EU Asylum Law* (Brill 2015)
- Robinson, N., *Convention Relating to the Status of Refugees: Its History, Significance and Contents* (Institute of Jewish Affairs 1952)

Samaddar, R., *The Marginal Nation: Transborder Migration from Bangladesh to West Bengal* (Sage Publications 1999)

Smyth, C. M., *The Common European Asylum System and the Rights of the Child: An Exploration of Meaning and Compliance* (Leiden University 2013)

Smyth, C., *European Asylum Law and the Rights of the Child* (Routledge 2014)

Touzenis, K., *Unaccompanied Minors, Rights and Protection* (XL Edizioni 2006)

Velluti, S., *Reforming the Common European Asylum System: Legislative Developments and Judicial Activism of the European Courts* (Springer 2014)

Wilsher, D., *Immigration Detention: Law, History, Politics* (Cambridge University Press 2012)

Wilson, A. J., *Politics in Sri Lanka, 1947–73* (Macmillan 1974)

Wouters, K., *International Legal Standards for the Protection from Refoulement* (Intersentia 2009)

2. Book chapters

Albertson Fineman, M., 'Equality, Autonomy, and the Vulnerable Subject in Law and Politics' in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013)

Albertson Fineman, M. and Grear, A., 'Introduction: Vulnerability as Heuristic – An Invitation to Future Exploration' in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013)

Baldaccini, A., 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations by Sea' in Berdard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010)

Bank, R., 'Introduction to Article 11' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP 2011)

Bauböck, R., 'Introduction' in Rainer Bauböck (ed), *Migration and Citizenship: Legal Status, Rights and Political Participation*, IMISCOE Report Series (Amsterdam University Press 2006) <<http://www.imiscoe.org/publications/library/4-imiscoe-reports-series/65-migration-and-citizenship/>>

Besselink, L. F. M., 'Unequal Citizenship: Integration Measures and Equality' in Sergio Carrera (ed), *The Nexus between Immigration, Integration and Citizenship in the EU* (Centre for European Policy Studies 2006) <<https://www.ceps.eu/system/files/book/1322.pdf>>

Blanke, H.-J., 'The Protection of Fundamental Rights in Europe' in Hermann-Josef Blanke and Stelio Mangiameli (eds), *The European Union after Lisbon: Constitutional Basis, Economic Order and External Action* (Springer 2012)

Bollo Arocena, M. D., 'Push Back, expulsions colectivas y non refoulement: Algunas reflexiones a propósito de la sentencia dictada por la gran sala del TEDH en el caso Hirsi Jamaa y otros c. Italia' in Santiago Torres Bernárdez (coord.), *El derecho internacional en el mundo multipolar del siglo XXI: Obra homenaje al profesor Luis Ignacio Sánchez Rodríguez* (Iprolex 2013)

Brandl, U. and Czech, P., 'General and Specific Vulnerability of Protection-Seekers in the EU: Is There an Adequate Response to Their Needs?' in Francesca Ippolito and Sara Iglesias Sánchez (eds), *Protecting Vulnerable Groups: The European Human Rights Framework* (Hart 2015)

Byrnes, A., 'Article 1' in M. A. Freeman, C. Chinkin and B. Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (OUP 2012)

Campesi, G., 'Immigrant Detention and the Double Logic of Securitization in Italy' in Michaela Ceccorulli and Nicola Labanca (eds), *The EU, Migration and the Politics of Administrative Detention* (Routledge 2014)

Chetail, V., 'The Common European Asylum System: Bric-à-Brac or System?' in Vincent Chetail, Philippe De Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Martinus Nijhoff 2015)

Cholewinski, R., 'The Human and Labor Rights of Migrants: Visions or Equality' in David Weissbrodt and Mary Rumsey (eds), *Vulnerable and Marginalised Groups and Human Rights* (Edward Elgar 2011)

Cornelisse, G., 'Detention of Foreigners' in Elspeth Guild and Paul Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Martinus Nijhoff 2012)

Di Pascale, A., 'Italy and Unauthorized Migration: Between State Sovereignty and Human Rights Obligations' in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (OUP 2014)

Faist, T., 'The Crucial Meso-Level' in Marco Martiniello and Jan Rath (eds), *Selected Studies in International Migration and Immigration Incorporation* (Amsterdam University Press 2010)

Friese, H., 'Border Economies: A Nascent Migration Industry Around Lampedusa' in Lisa Anteby-Yemini, Virginie Baby-Collin, Sylvie Mazzella, Stéphane Mourlane, Cédric Parizot, Céline Regnard and Pierre Sintès (eds), *Borders, Mobilities and Migrations: Perspectives from the Mediterranean, 19–21st Century* (Peter Lang AG 2014)

Groenendijk, K., 'Integration Policy and Community Law' in Sergio Carrera (ed), *The Nexus between Immigration, Integration and Citizenship in the EU* (Centre for European Policy Studies 2006)

Guild, E., 'Conflicting Identities and Securitisation in Refugee Law: Lessons from the EU' in Susan Kneebone, Dallal Stevens and Loretta Baldassar (eds), *Refugee Protection and the Role of Law: Conflicting Identities* (Routledge 2014)

Guild, E. and Bigo, D., 'The transformation of European Border Controls' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010)

Ippolito, F., '(De)Constructing Children's Vulnerability under European Law' in Francesca Ippolito and Sara Iglesias Sánchez (eds), *Protecting Vulnerable Groups: The European Human Rights Framework* (Hart 2015)

Ippolito, F. and Iglesias Sánchez, S., 'Introduction' in Francesca Ippolito and Sara Iglesias Sánchez (eds), *Protecting Vulnerable Groups: The European Human Rights Framework* (Hart 2015)

Johnson, D. J., LaFa Agbényiga, D. and Mbula Bahemuka, J., 'Vulnerable Childhood in a Global Context: Embracing the Sacred Trust' in Deborah J. Johnson, DeBrenna LaFa Agbényiga and Robert K. Hitchcock (eds), *Vulnerable Children: Global Challenges in Education, Health, Well-Being, and Child Rights* (Springer 2013)

Kremer, J., 'Exception, Protection and Securitization: Security Mindset in Law' in Massimo Fichera and Jens Kremer (eds), *Law and Security in Europe: Reconsidering the Security Constitution* (Intersentia 2013)

Kumpuvuori, J. and Scheinin, M., 'Treating the Different Ones Differently' in Jukka Kumpuvuori and Martin Scheinin (eds), *The United Nations Convention on the Rights of Persons with Disabilities: Multidisciplinary Perspectives* (Center for Human Rights of Persons with Disabilities VIKE 2009)

Lavenex, S. and Kunz, R., 'The Migration-Development Nexus in EU External Relations' in Maurizio Carbone (ed), *Policy Coherence and EU Development Policy* (Routledge 2009)

Lazaridis, G. and Wadia, K., 'Introduction' in Gabriella Lazaridis and Khursheed Wadia (eds), *The Securitisation of Migration in the EU* (Palgrave 2015)

Moreno-Lax, V. and Costello, C., 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model' in Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward (eds), *The EU Charter of Fundamental Rights* (Hart Publishing 2014)

Mullally, S., 'Migration, Gender, and the Limits of Rights' in Ruth Rubio-Marín (ed), *Migration and Human Rights*, Collected Courses of the Academy of European Law (OUP 2013)

Pickering, S., 'Gender Persecution: A response to the UNHCR Guidelines' in *Stemming the Tide or Keeping the Balance: The Role of the Judiciary* (International Association of Refugee Law Judges 2002)

Timmer, A., 'A Quiet Revolution: Vulnerability in the European Court of Human Rights' in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013)

Verhellen, E., 'Changes in the Images of the Child' in Michael Freeman and Philip Veerman (eds), *The Ideologies of Children's Rights* (Martinus Nijhoff 1992)

Vohra, S., 'Detention of Irregular Migrants and Asylum Seekers' in R. Cholewinski, R. Perruchoud and E. McDonald (eds), *International Migration Law: Developing Paradigms and Key Challenges* (T.M.C. Asser Institut 2007)

Weissbrodt, D. and Collins, C., 'The Human Rights of Stateless Persons' in David Weissbrodt and Mary Rumsey (eds), *Vulnerable and Marginalised Groups and Human Rights* (Edward Elgar 2011)

3. Journal and yearbook articles

Aga Khan, S., 'Legal Problems Relating to Refugees and Displaced Persons', *Collected Courses of the Hague Academy of International Law* (1976) vol 149

Albertson Fineman, M., 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale Journal of Law and Feminism* 1

Ando, N., 'General Comments/Observations' [2008] MPEPIL

Arnardóttir, O. M., 'Non-Discrimination in International and European Law: Towards Substantive Models' (2007) 25(2) *Nordisk Tidsskrift for Menneskerettigheter* 140

Bovens, M., 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 *European Law Journal* 447

Campesi, G., 'Humanitarian Confinement: An Ethnography of Reception Centres for Asylum Seekers at Europe's Southern Border' (2015) *International Journal of Migration and Border Studies* 398

Chapman, A. R. and Carbonetti, B., 'Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights' (2011) 33(3) *Human Rights Quarterly* 682

del Valle Gálvez, A., 'Unión Europea, Crisis de Refugiados y Limes Imperii' (2016) 38 *Revista General de Derecho Europeo* 1

Di Quirico, R., 'Italy and the Global Economic Crisis' (2010) 2(2) *Bulletin of Italian Politics* 3

Editorial Comments, 'The Critical Turn in EU Legal Studies' (2015) 52 *CMLR* 881

Edwards, A., 'Transitioning Gender: Feminist engagement with international refugee law and policy 1950–2010' (2010) 29(2) *Refugee Survey Quarterly* 21

Edwards, A., 'Violence against Women as Sex Discrimination: Judging the Jurisprudence of the United Nations Human Rights Treaty Bodies' (2008) 18 *Texas Journal of Women, Gender, and the Law* 101

- Eekelaar, J., 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-determinism' (1992) 8(1) *International Journal of Law and the Family* 42
- Feijen, L., 'The Challenges of Ensuring Protection to Unaccompanied and Separated Children in Composite Flows in Europe' (2009) 27 *RSQ* 63
- Fischer-Lescano, A., Löhr, T. and Tohidipur, T., 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' [2009] *International Journal of Refugee Law* 256
- Frydman, L. and Seelinger, K. T., 'Kasinga's Protection Undermined? Recent developments in Female Genital Cutting Jurisprudence' (2008) 18 *Bender's Immigration Bulletin* 1073
- Gammeltoft-Hansen, T. and Gammeltoft-Hansen, H., 'The Rights to Seek-Revisited: On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU' (2008) 10 *European Journal of Migration and Law* 439
- Gammeltoft-Hansen, T. and Hathaway, J. C., 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 *Columbia Journal of Transnational Law* 235
- Gil Bazo, M-T., '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' (2006) 18(2-3) *International Journal of Refugee Law* 571
- Heikkilä, M. and Mustaniemi-Laakso, M., 'Seeing the Individual in the Midst of Large-Scale Phenomena: Some Remarks on the European Approach to the Refugee Situation' [2016] *European Yearbook of Human Rights* 187
- Hess, J. M., 'Statelessness and the State: Tibetans, Citizenship and Nationalist Activism in a Transnational World' (2006) 44(1) *International Migration* 79
- Hyndman, J. and Mountz, A., 'Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe' (2008) 43(2) *Government and Opposition* 249
- Indra, D., 'Gender: A Key Dimension of the Refugee Experience' (1987) 6(3) *Refugee* 3
- Klepp, S., 'A Contested Asylum System: The European Union between Refugee Protection and Border Control in the Mediterranean Sea' (2010) 12(1) *European Journal of Migration and Law* 1
- McNamara, F., 'Member State Responsibility for Migration Control within Third States — Externalisation revisited' (2013) 15 *European Journal of Migration and Law* 319
- Moreno Lax, V., 'Hirsi Jamaa and Others v. Italy or the Strasbourg Court versus Extraterritorial Migration Control?' (2012) 12(3) *Human Rights Law Review* 574
- Moreno Lax, V., 'Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees' (2008) 10 *European Journal of Migration and Law* 315

- Moreno Lax, V., 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23(2) *International Journal of Refugee Law* 174
- Moyo, A., 'Reconceptualising the "paramountcy principle": Beyond the individualistic construction of the best interests of the child' (2012) 12 *African Human Rights Law Journal* 142
- Murphy, C., 'The Concept of Integration in the Jurisprudence of the European Court of Human Rights' (2010) 12(1) *European Journal of Migration and Law* 23
- Murphy, C., 'Towards a human rights-based paradigm of integration? The contribution of international human rights law' (2013) *European Human Rights Law Review* 166
- Musalo, K., 'Personal Violence, Public Matter: Evolving Standards in Gender-Based Asylum Law' (2014) *Harvard International Review* 45
- Organization for Economic Co-operation and Development (OECD), 'Is this humanitarian migration crisis different?', *Migration Policy Debates* no 7, September 2015 <<http://www.oecd.org/migration/Is-this-refugee-crisis-different.pdf>>
- Oswin, N., 'Rights Spaces: An Exploration of Feminist Approaches to Refugee Law' (2001) 3(3) *International Feminist Journal of Politics* 347
- Peroni, L. and Timmer, A., 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11(4) *International Journal of Constitutional Law* 1056
- Pétin, J., 'Exploring the Role of Vulnerability in Immigration Detention' (2016) 35 *Refugee Survey Quarterly* 91
- Randall, M., 'Particularized social groups and categorical imperatives in refugee law: State failures to recognize gender and the legal reception of gender persecution claims in Canada, The United Kingdom, and the United States' (2015) 23(4) *American University Journal of Gender, Social Policy & the Law* 529
- Ripoll Servent, A. and Trauner, F., 'Do supranational EU institutions make a difference? EU asylum law before and after "communitarization"' (2014) 21 *Journal of European Public Policy* 1142
- Robinson, D., 'The Identity Crisis of International Criminal Law' [2008] 21(4) *Leiden Journal of International Law* 925
- Sivakumaran, S., 'Sexual violence against men in armed conflict' (2007) 18(2) *European Journal of International Law* 253
- Trevisanut, S., 'The Principle of Non-Refoulement and the De-Territorialization of Border Control at Sea' (2014) 27 *Leiden Journal of International Law* 661
- Valluy, J., 'La fiction juridique de l'asile' (2004) *Plein Droit* No 63

Valsamis, M., 'Immigration Control in an Era of Globalization: Deflecting Foreigners, Weakening Citizens and Strengthening the State' (2012) 19(1) *Indiana Journal of Global Legal Studies* 3

van Schendel, W., 'Stateless in South Asia: The Making of the India-Bangladesh Enclaves' (2002) 61(1) *The Journal of Asian Studies* 115

Venkatesan, V., 'Partisan Citizenship' (2003) 20(2) *Frontline*

Wegerstad, L. and Selberg, N., 'Interview with Professor Martha Albertson Fineman' in (2011) 34 *Retfaerd* 4

Wolff, S., 'The Rule of Law in the Area of Freedom, Security and Justice: Monitoring at Home What the European Union Preaches Abroad' (2013) 5(1) *The Hague Journal on the Rule of Law* 119

Wolozin, R., 'Citizenship Issues and Issuing Citizenship: A Case Study of Sri Lanka's Citizenship Laws in a Global Context' (2014) 16(1) *Asian-Pacific Law & Policy Journal* 1

Wouters, K. and Den Heijer, M., 'The *Marine I* Case: A Comment' (2009) 22(1) *International Journal of Refugee Law* 1

Zermatten, J., 'The Best Interests of the Child Principle: Literal Analysis and Function' (2010) 18 *International Journal of Children's Rights* 483

4. Handbooks, reports and opinions

a) Handbooks, reports and opinions by EU bodies

European Asylum Support Office (EASO), Access to the Asylum Procedure: Practical Tools for First-Contact Officials <<https://easo.europa.eu/accesstoprocedure/>>

European Asylum Support Office (EASO), *EASO Practical Guide: Personal interview* [2014] <<https://easo.europa.eu/wp-content/uploads/EASO-Practical-Guide-Personal-Interview-EN.pdf>>

European Asylum Support Office (EASO), *Judicial Trainer's Guidance Note, Article 15(C) Qualification Directive (2011/95/EU): A Judicial Analysis* [2015] <<https://easo.europa.eu/wp-content/uploads/Article-15cQualification-Directive-Judicial-Trainers-Guidance-Note.pdf>>

European Commission, 'A Common European Asylum System' [2014]

European Commission, Better Regulation "Toolbox", Tool # 16; Identification/screening of impacts <http://ec.europa.eu/smart-regulation/guidelines/docs/br_toolbox_en.pdf>

European Commission, 'The Hotspot Approach to Managing Exceptional Migration Flows', Information Paper, July 2015

FRA, Criminalisation of migrants in an irregular situation and of persons engaging with them [2014]

FRA, *Fundamental rights at airports: border checks at five international airports in the European Union* [2014] <http://fra.europa.eu/sites/default/files/fra-2014-third-country-nationals-airport-border-checks_en.pdf>

FRA, *Fundamental rights at Europe's southern sea borders* [2013] <http://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13_en.pdf>

FRA, *Fundamental rights at land borders: findings from selected European Union border crossing points* [2014] <http://fra.europa.eu/sites/default/files/fra-2014-third-country-nationals-land-border-checks_en.pdf>

FRA, Fundamental rights of migrants in an irregular situation in the European Union [2011]

FRA, *Guardianship for children deprived of parental care* [2014] <http://fra.europa.eu/sites/default/files/fra-2014-guardianship-children_en_0.pdf>

FRA, Legal entry channels to the EU for persons in need of international protection: a toolbox [2015], FRA Focus 02/2015

FRA, Monthly data collection on the current migration situation in the EU — February 2016 monthly report [2016]

FRA, *Separated, asylum-seeking children in European Union Member States: Comparative report* [2010] <http://fra.europa.eu/sites/default/files/fra_uploads/1309-FRA-fullreport-sep-asylum-conference-2010_EN.pdf>

FRA, *Severe labour exploitation: workers moving within or into the European Union* [2015] <http://fra.europa.eu/sites/default/files/fra-2015-severe-labour-exploitation_en.pdf>

b) Reports and briefing papers to the European Parliament and its committees

Ali, H. C., Querton, C. and Soulard, E., 'Gender Related Asylum Claims in Europe: A Comparative Analysis of Law, Policies and Practice Focusing on Women in Nine EU Member States', Study commissioned by the European Parliament [2012]

European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Report from the LIBE Committee Delegation on the Visit to the Temporary Holding Centre in Lampedusa, EP/LIBE PV/581203EN, 19 September 2005

European Parliament, Committee on Women's Rights and Gender Equality, Draft Report on the situation of women refugees and asylum seekers in the EU (2015/0000(INI)), 16 November 2015, Rapporteur Mary Honeyball

European Parliament, Committee on Women's Rights and Gender Equality, Report on the situation of women refugees and asylum seekers in the EU (2015/2325(INI)), 10 February 2016, Rapporteur Mary Honeyball

European Parliament, Directorate-General for External Policies, Migrants in the Mediterranean: Protecting human rights, Study by Samuel Cogolati, Nele Verlinden and Pierre Schmitt [2015] EP/EXPO/B/DROI/2015/01

Guild, E., 'A Typology of Different Types of Centres in Europe', Report for the European Parliament, Directorate-General Internal Policies of the Union [2006]

Iben Jensen, U., *Humanitarian Visas: Option or Obligation?*, Study for the Committee on Civil Liberties, Justice and Home Affairs [2014]

Van Waas, L., *Addressing the Human Rights Impact of Statelessness in the EU's External Action* (EU Directorate-General for External Policies 2014)

c) Other reports, opinions and papers

Abrisketa, J., Churruca, C., de la Cruz, C., García, L., Márquez, C., Morondo, D., Nagore, M., Sosa, L. and Timmer, A., *Report on the assessment of consistency in the prioritisation of human rights throughout EU policies* [2015] <<http://www.fp7-frame.eu/wp-content/uploads/2015/08/FRAME-Deliverable-12.2-Submitted-30-July-2015.pdf>>

Access Info and Global Detention Project, *The Uncounted: Detention of Migrants and Asylum Seekers in Europe* [2015]

Afeef, K. F., 'The Politics of Extraterritorial Processing: Offshore Asylum Policies in Europe and the Pacific' [2006] Refugee Studies Centre Working Paper no 36

Amnesty International, *Amnesty International Report 2015/16: The State of the World's Human Rights* (Amnesty International 2016)

Amnesty International, Amnesty International Report 2015/16 – Italy, 24 February 2016 <<https://www.amnesty.org/en/countries/europe-and-central-asia/italy/report-italy/>>

Amnesty International, Bhutan: Nationality, Expulsion, Statelessness and the Right to Return [2008]

Amnesty International, *Deadly Journeys: The Refugee and Trafficking Crisis in Southeast Asia* [2015] <http://www.amnesty.org.au/images/uploads/about/Amnesty_Report_2015_The_Refugee_and_Trafficking_Crisis_in_Southeast_Asia.pdf>

Amnesty International End FGM Campaign, ILGA-Europe and the European Women’s Lobby, ‘Engendering the European Asylum Support Office’ [2011]

Anderson, B., Shutes, I. and Walker, S., ‘Report on the rights and obligations of citizens and non-citizens in selected countries’ [2014], FP7 Programme bEUcitizen, Work Package 10 <<http://beucitizen.eu/wp-content/uploads/D10.1-Report-on-the-rights-and-obligations-of-citizens-and-non-citizens-in-selected-countries.pdf>>

Asian-African Legal Consultative Organization’s (AALCO), Report of the Forty-fifth Session, New Delhi, 2006 <<http://www.refworld.org/publisher,AALCO,,,44eaddc54,0.html>>

Asylum Aid, Unsustainable: The quality of initial decision-making in women’s asylum claims [2011]

Asylum Information Database (AIDA), National Country Report Italy, Updated 22 December 2015 [2015]

Asylum Information Database (AIDA), Wrong Counts and Closing Doors: the Reception of Refugees and Asylum Seekers in Europe, March 2016

Asylum Information Database (AIDA) and GCR, ‘Country Report: Greece’ [2015] <<http://www.asylumineurope.org/reports/country/greece/asylum-procedure/guarantees-vulnerable-groups-asylum-seekers/age-assessment>>

Bailot, H., Cowan, S. and Munro, V., ‘“Hearing the Right Gaps”: Enabling and Responding to Disclosures of Sexual Violence within the UK Asylum Process’, Edinburgh School of Law Research Paper Series no 36 [2013]

Bathily, A., ‘Immigration detention and its impact on integration: A European approach’, King Project – EU Policy Unit Desk Research Paper 2/July 2014 <<http://king.ismu.org/wp-content/uploads/EU-Policy-Paper-n-2-rev.pdf>>

Benedek, W., Footer, M., Kenner, J., Mustaniemi-Laakso, M., Nindler, R., Nolan, A. and Wallace, S., Report on enhancing the contribution of EU institutions and Member States, NGOs, IFIs and Human Rights Defenders, to more effective engagement with, and monitoring of, the activities of Non-State Actors, Work Package No. 7 – Deliverable No 2 [2015] <<http://www.fp7-frame.eu/wp-content/materiale/reports/14-Deliverable-7.2.pdf>>

Carrera, S. and den Hertog, L., 'Whose Mare? Rule of Law Challenges in the Field of European Border Surveillance in the Mediterranean' [2015] *CEPS Paper in Liberty and Security in Europe* no 79

Carrera, S. and Formisano, M., 'An EU Approach to Labour Migration: What is the Added Value and the Way Ahead?' [2005] *CEPS Working Document* no 232
<<https://www.ceps.eu/system/files/book/1272.pdf>>

Carrera, S., Faure Atger, A., Guild, E. and Kostakopoulou, D., 'Labour Immigration Policy in the EU: A Renewed Agenda for Europe 2020' [2011] *CEPS Policy Brief* no 240

Churrua Muguruza, C., Gómez Isa, F., García San José, D., Fernández Sánchez, P. A., Márquez Carrasco, C., Muñoz Nogal, E., Nagore Casas, M. and Timmer, A., *Report mapping legal and policy instruments of the EU for human rights and democracy support* [2014] <<http://www.fp7-frame.eu/wp-content/materiale/reports/05-Deliverable-12.1.pdf>>

Comisión de Ayuda al Refugiado (CEAR) Euskadi, *The Externalization of Borders: Migration Control and the Right to Asylum: A Framework for Advocacy*' (CEAR 2012)

Comisión de Ayuda al Refugiado (CEAR), *Lesbos, 'zona cero' del derecho de asilo* (CEAR 2016)

Comisión de Ayuda al Refugiado (CEAR), Consiglio Italiano per i Rifugiati (CIR) and France terre d'asile (FTDA), *Exchange for Change: Guide for an effective protection of refugee victims of gender-related persecution in Europe* [2010]

Conlan S., et al., 'Counting the Cost: Barriers to Employment after Direct Provision' (Irish Refugee Council 2014) <http://www.irishrefugeecouncil.ie/wp-content/uploads/2014/05/counting-the-cost_Final-Draft.pdf>

Council of Europe, Commissioner for Human Rights, *Criminalisation of Migration in Europe: Human Rights Implications, Issue Paper* (2010)

Council of Europe, Commissioner for Human Rights, *The Human rights of irregular migrants in Europe, CommDH/IssuePaper(2007)1*

Council of Europe, European Court of Human Rights, *Guide on Article 5 – The Right to Liberty and Security* (June 2012)

Council of Europe Parliamentary Assembly, 'The large-scale arrival of mixed migratory flows on Italian shores', Committee on Migration, Refugees and Displaced Persons, Rapporteur Mr Christopher Chope, United Kingdom, European Democrat Group, Doc 13531, 9 June 2014

Council of Europe, Report by Nils Muiznieks, Commissioner for Human Rights of the Council of Europe, following his visit to Italy from 3 to 6 July 2012, Comm DH (2012)26

Council of Europe, Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe following his visit to Italy from 26 to 27 May 2011, Comm DH (2011)26

Crawley, H. and Lester, T., 'Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe', UNHCR [2004]

David, N., Dowell-Jones, M., Footer, M., Kenner, J., Mustaniemi-Laakso, M., Nolan, A. and Pribyla, P., *Report on the positive and negative human rights impacts of non-state actors*, Work Package No 7 — Deliverable No 7.1 [2014] <<http://www.fp7-frame.eu/wp-content/materiale/reports/04-Deliverable-7.1.pdf>>

Defence for Children-ECPAT The Netherlands, 'Closing a protection gap: Core standards for guardians of separated children' [2011] <<http://www.corestandardsforguardians.eu/images/11/279.pdf>>

Delvino, N. and Spencer, S., 'Irregular Migrants in Italy: Laws and Policy on Entitlements to Services', ESRC Centre on Migration, Policy and Society (COMPAS), University of Oxford, September 2014

Department of Justice, Equality and Law Reform (Ireland), 'Immigration and Residence in Ireland: Outline Policy Proposals for an Immigration and Residence Bill' <<http://www.inis.gov.ie/en/inis/discussion.pdf/files/discussion.pdf>>

Detention Forum, Vulnerable People Working Group, 'Rethinking "Vulnerability" in Detention: A Crisis of Harm' [2015]

D'Hollander, D., Marx, A. and Wouters, J., 'Integrating Human Rights in EU Development Cooperation Policy: Achievements and Challenges', FRAME Working Paper no 134 (April 2014) <<http://www.fp7-frame.eu/wp-content/materiale/w-papers/WP134-DHollander-Marx-Woutersx.pdf>>

Dhungana, S. K., 'Third Country Resettlement and the Bhutanese Refugee Crisis: A Critical Reflection', Refugee Watch, June 2010 <<http://www.mcrg.ac.in/rw%20files/RW35/2.Shiva.pdf>>

Di Bartolomeo, A., 'EU Migration Crisis Actions with focus on the EU-Turkey Agreement', Migration Policy Centre Policy Briefs 2016/4, April 2016

Doctors Without Borders, *Migrants, Refugees and Asylum Seekers: Vulnerable People at Europe's Doorstep* (MSF 2009)

ECRE, 'Case Law Fact Sheet: Prevention of Dublin Transfers to Hungary' [2016] <<http://statewatch.org/news/2016/jan/eu-ecre-factsheet-dublin-transfers-to-hungary-1-16.pdf>>

ECRE, Comments from the European Council on Refugees and Exiles on the Amended Commission Proposal to Recast the Reception Directive (COM (2011) 320 final) [2011]

ECRE, Information Note on Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2014] <<http://www.ecre.org/component/content/article/41-protection-in-europe/925>>

Engström, V. and Heikkilä, M., *Fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice* [2014] <<http://www.fp7-frame.eu/wp-content/materiale/reports/09-Deliverable-11.1.pdf>>

Enhancing Vulnerable Asylum Seekers (EVASP) Project, EVASP Italian National Report [2009–2010]

Enhancing Vulnerable Asylum Seekers (EVASP) Project, Trainers' handbook

Enhancing Vulnerable Asylum Seekers (EVASP) Project, Transnational Report 2009–2010 [2010]

EKKA, National Report 2014 [2015] (in Greek)

ENOC, 'Safety and Fundamental Rights at Stake for Children on the Move: Call for the EU and European countries to implement a child rights perspective in the reception of migrating children' [2016]

Ertürk, Y., 15 years of the United Nations Special Rapporteur on Violence against Women, Its Causes and Consequences (United Nations 2009)

European Migration Network (EMN), 'EMN Study 2014, Policies, Practices and data on unaccompanied minors in 2014, Greek Report' [2014] <http://emn.ypes.gr/images/docs/EMN_FOCUSED_STUDIES/EMN_STUDIES_2014/greece_national_report_uams_en.pdf>

European Migration Network (EMN), *Organisation of Asylum and Migration Policies in Italy*, Factsheet updated by the Italian EMN NCP [2012]

European Migration Network (EMN), The Use of Detention and Alternatives to Detention in the Context of Immigration Policies, Synthesis Report, Focussed Study 1/2014 [2014]

European network for technical cooperation on the application of the Dublin II Regulation, 'Italy National Report on Dublin II Regulation' (December 2012)

European Programme for Integration and Migration (EPIM), *Access to Protection: Bridges, Not Walls* [2014]

Flynn, M., The Hidden Costs of Human Rights: The Case of Immigration Detention, Global Detention Project Working Paper no 7 (2013)

Global Detention Project, The Detention of Asylum Seekers in the Mediterranean Region [2015]

Government of India, Ministry of Home Affairs, Annual Report 2014–15 <[http://mha.nic.in/sites/upload_files/mha/files/AR\(E\)1415.pdf](http://mha.nic.in/sites/upload_files/mha/files/AR(E)1415.pdf)>

Greek Ombudsman, Department of Children's Rights, 'Parallel Report to the UN Committee on the Rights of the Child' [2012] <<http://www.synigoros.gr/resources/parallel-report-un--3.pdf>>

Group of Experts on Action against Trafficking in Human Beings (GRETA), Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Italy. First evaluation round. Adopted on 4 July 2014; Published on 22 September 2014, GRETA(2014)18

Guild, E. and Moreno-Lax, V., 'Current Challenges Regarding the International Refugee Law, with Focus on EU Policies and EU Co-operation with UNHCR' [2013] *CEPS Paper in Liberty and Security in Europe* no 59

Guild, E., Costello, C., Garlick, M. and Moreno-Lax, V., 'The 2015 Refugee Crisis in the European Union' [2015] *CEPS Policy Brief* no 332

Gyulai, G., Información sobre el país de origen en el procedimiento de asilo: La calidad como requisito legal en la UE (Comité Helsinki de Hungría 2011)

Heikkilä, M., Mustaniemi-Laakso, M., Egan, S., Finlay, G., Lewis, T., Planitzer, J., Sax, H., Heschl, L. M. and Salomon, S., *Report critically assessing human rights integration in AFSJ policies* [2015]

Hellenic Statistical Authority, 'Living Conditions in Greece' <http://www.statistics.gr/documents/20181/1590058/LivingConditionsInGreece_0316.pdf/e682714c-654a-414c-9c25-15f96966483f>

Human Rights Commission of the Italian Senate, Report on the Identification and Expulsion Centres (CIE, *Centro di identificazione ed espulsione*) in Italy, September 2014

Human Rights Commission of the Italian Senate, Report on the Identification and Expulsion Centres (CIE, *Centro di identificazione ed espulsione*) in Italy, February 2016

Human Rights Watch, 'Bhutan's ethnic cleansing', 1 February 2008 <<https://www.hrw.org/news/2008/02/01/bhutans-ethnic-cleansing>>

Human Rights Watch, 'Burma' <<https://www.hrw.org/world-report/2016/country-chapters/burma>>

Human Rights Watch, 'Burma: Ensure Freedoms for All in Arakan State: Lifting of State of Emergency Should End Restrictions on Rohingya', 24 March 2016 <<https://www.hrw.org/news/2016/03/29/burma-ensure-freedoms-all-arakan-state>>

Human Rights Watch, 'Burma/Bangladesh, Burmese Refugees in Bangladesh: Still no Durable Solution', Human Rights Watch Report, May 2000, Vol 12, No 3 (C)

Human Rights Watch, 'Dispatches: Start of Dodgy EU-Turkey Migrant Deal', 5 April 2016 <<https://www.hrw.org/news/2016/04/05/dispatches-start-dodgy-eu-turkey-migrant-deal>>

Human Rights Watch, 'Europe's Refugee Crisis: An Agenda for Action', 16 November 2015 <<https://www.hrw.org/report/2015/11/16/europes-refugee-crisis/agenda-action>>

Human Rights Watch, The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece (Human Rights Watch 2011)

Human Rights Watch, 'Explanatory note on the Hotspots Approach', July 2015

Human Rights Watch, Fast-tracked unfairness: Detention and denial of women asylum seekers in the UK [2010]

Human Rights Watch, 'Greece: Humanitarian Crisis at Athens Port' [2016] <<https://www.hrw.org/tet/node/287989>>

Human Rights Watch, 'Left to Survive: Systematic Failure to Protect Unaccompanied Migrant Children in Greece' [2008] <https://www.hrw.org/sites/default/files/reports/greece1208webwcover_0.pdf>

Human Rights Watch, 'Nepal: Increased Pressure from China Threatens Tibetans', 1 April 2014 <<https://www.hrw.org/news/2014/04/01/nepal-increased-pressure-china-threatens-tibetans>>

Human Rights Watch, 'Southeast Asia: Put Rights at Center of Boat People Summit' <<https://www.hrw.org/news/2015/05/27/southeast-asia-put-rights-center-boat-people-summit>>

Human Rights Watch, 'Stateless Refugee Children from Bhutan Living in Nepal: Testimony of Bill Frelick to a Joint Briefing for the Congressional Children's Caucus and the Congressional Human Rights Caucus on the Status of Stateless Children', 14 February 2007 <<https://www.hrw.org/news/2007/02/14/stateless-refugee-children-bhutan-living-nepal>>

Human Rights Watch, 'Turkey: Syrians Pushed Back at the Border: Closures Force Dangerous Crossings with Smugglers' (23 November 2015) <<https://www.hrw.org/news/2015/11/23/turkey-syrians-pushed-back-border>>

Human Rights Watch, 'Updated submission to the Committee on the Rights of the Child on Greece' (periodic review of Greece) [2012] <<https://www.hrw.org/news/2012/04/25/human-rights-watches-updated-submission-committee-rights-child-greece>>

Human Rights Watch, *World Report 2016: Events of 2015* <https://www.hrw.org/sites/default/files/world_report_download/wr2016_web.pdf>

ILGA-Europe, 'Policy paper on the recast of the EU Asylum Procedure and Reception Directives', July 2011

Integration Centre, 'Annual Monitoring Report on Integration 2013' [2014] <<http://www.integrationcentre.ie/getattachment/44e6237a-4a01-4234-99fe-b2d82ecedfe7/Annual-Monitoring-Report-On-Integration-2013.aspx>>

Inter-Agency Standing Committee (IASC), *Gender Handbook in Humanitarian Action* [2006]

Inter-Agency Standing Committee (IASC), *Guidelines for Gender-based Violence Interventions in Humanitarian Settings: Focusing on Prevention of and Response to Sexual Violence in Emergencies* [2005]

International Commission of Jurists (ICJ), "Undocumented" Justice for Migrants in Italy: A Mission Report [2014]

International Observatory on Statelessness, 'Burma/Myanmar' <<http://www.nationalityforall.org/burma-myanmar>>

International Observatory on Statelessness, 'India' <<http://www.nationalityforall.org/india>>

International Observatory on Statelessness, 'Kashmir' <<http://www.nationalityforall.org/kashmir>>

Irish Naturalisation and Immigration Service, 'New Immigration Regime for Full Time non-EEA Students' [2011]

<<http://www.inis.gov.ie/en/INIS/Transitional%20Arrangements%20regarding%20the%20placement%20in%20schools%20of%20non-EEA%20Children%20not%20accompanied%20by%20parents%20and%20of%20children%20.pdf/Files/Transitional%20Arrangements%20regarding%20the%20placement%20in%20schools%20of%20non-EEA%20Children%20not%20accompanied%20by%20parents%20and%20of%20children%20.pdf>>

Italian Council for Refugees (*Consiglio Italiano per Rifugiati*, CIR), Access to protection: a human right, October 2013

Italian Council for Refugees (*Consiglio Italiano per Rifugiati*, CIR) et al., Maieutics Handbook: Elaborating a common interdisciplinary working methodology (legal-psychological) to guarantee the recognition of the proper international protection status to victims of torture and violence, December 2012.

Italian Ministry of Interior, Study Group on Reception System, 'Report on Reception of Migrants and Refugees in Italy. Aspects, Procedures and Problems' [2015] <<http://www.focsiv.it/wp-content/uploads/2015/10/Rapporto-accoglienza-PDF.pdf>>

Jesuit Refugee Service (JRS) Europe, 'Becoming Vulnerable in Detention: civil society report on the detention of vulnerable asylum seekers and irregular migrants in the EU' [2010] <http://www.jrs.net/Assets/Publications/File/BecomingVulnerableDetention_June2010.pdf> (the DEVAS Project)

Jesuit Refugee Service (JRS) Europe, Safe and legal channels to protection in the European Union – updated recommendations, January 2016 <https://en.jrs.net/assets/Regions/IOR/media/files/03-02-2016_Safe%20and%20legal%20ways_reccom_updated_JRSEurope.pdf>

Kapron, M. and LaViolette, N., 'Refugee Claims Based on Sexual Orientation and Gender Identity: An Annotated Bibliography', Ottawa Faculty of Law Working Paper No 2014–15 [2014]

Library of Congress, Global Legal Monitor, 'Bangladesh; India: Decades-Long Border Dispute Resolved Through Implementation of Land Swap Agreement', 11 August 2015 <<http://www.loc.gov/law/foreign-news/article/bangladesh-india-decades-long-border-dispute-resolved-through-implementation-of-land-swap-agreement/>>

Low Pay Commission, 'Recommendations for the Minimum Wage' [2015] <<http://www.lowpaycommission.ie/publications/national-minimum-wage-/recommendations-of-the-low-pay-commission-for-the-national-minimum-wage-2015-.pdf>>

Malischewski, C-A. 'Where the Exception is the Norm: The Production of Statelessness in India' (2014) 2(8) International Human Rights Internship Working Paper Series, McGill Centre for Human Rights and Pluralism, Faculty of Law, McGill University <https://www.mcgill.ca/humanrights/files/humanrights/ihuri_wps_v2n8-charlotte-anne_malischewski.pdf>

McGinley, A. and Trude, A., 'Positive duty of care? The mental health crisis in immigration detention' [2012] <<http://www.aviddetention.org.uk/sites/default/files/images/Positive%20Duty%20of%20Care%20FINAL.pdf>>

Medecins sans Frontieres (MSF), 'Invisible Sufferings: Prolonged and systematic detention of migrants and asylum seekers in substandard conditions in Greece' [2013] <http://www.msf.org/sites/msf.org/files/invisible_suffering.pdf>

Migrant Rights Centre Ireland, 'All Work and Low Pay: The Experience of Migrants Working in Ireland' [2015] <<http://www.mrci.ie/wp-content/uploads/2015/11/MRCI-All-Work-and-Low-Pay.pdf>>

Migrant Rights Centre Ireland, 'Ending the Race to the Bottom: Changing the Balance for Migrant Workers in Ireland' [2010] <http://www.mrci.ie/wp-content/uploads/2012/11/Ending-the-Race-to-the-Bottom_Changing-the-Balance-for-Migrant-Workers-in-Ireland.pdf>

Migrant Rights Centre Ireland, 'Introducing a regularisation in Ireland: Concerns, considerations and rationale' [2015] <<http://www.mrci.ie/wp-content/uploads/2014/11/Regularisation-recommendation-and-rationale.pdf>>

Migrant Rights Centre Ireland, 'Ireland is Home: An analysis of the current situation of undocumented migrants in Ireland', November 2014 <http://www.mrci.ie/wp-content/uploads/2014/11/MRCI_policy-paper_FINAL.pdf>

Migrant Rights Centre Ireland, 'Realising Integration: Migrant Workers Undertaking Essential Low-Paid Labour in Dublin City' [2007] <http://www.mrci.ie/wp-content/uploads/2012/10/Realising-Integration_Migrant-Workers-Undertaking-Essential-Low-Paid-Work-in-Dublin-City.pdf>

Moreno-Lax, V., 'Europe in Crisis: Facilitating Access to Protection, (Discarding) Offshore Processing and Mapping Alternatives for the Way Forward', December 2015 <http://www.redcross.eu/en/upload/documents/2016/Europe%20in%20Crisis_Dr%20Moreno-Lax_final.pdf>

Namati, Council of Minorities, 'Citizenship Rights of Urdu-Speaking Bangladeshis' [2015] <<https://namati.org/resources/citizenship-rights-of-urdu-speaking-bangladeshis/>>

Odysseus Academic Network, Made Real Project, *Alternatives to Immigration Detention and Asylum Detention in the EU – Time for Implementation*, Philippe De Bruycker (ed), Alice Bloomfield, Evangelia Tsourdi and Joanna Petin (2015)

Office for the Promotion of Migrant Integration (Ireland), 'Intercultural Education Strategy' <<http://www.integration.ie/website/omi/omiwebv6.nsf/page/infoformigrants-education-interculturalstrategy-en>>

Office for the Promotion of Migrant Integration (Ireland), 'The National Action Plan Against Racism (NPAR) 2005–2008' <<http://www.integration.ie/website/omi/omiwebv6.nsf/page/Racism-npar-en>>

Office of the High Commissioner for Human Rights (OHCHR), Manual on Human Rights Monitoring, revised edition, Chapter 8 <<http://www.ohchr.org/Documents/Publications/Chapter08-44pp.pdf>>

Office of the High Commissioner for Human Rights (OHCHR), 'Migrants Need Protection, Not Push-Backs' (18 June 2015) <<http://www.ohchr.org/EN/NewsEvents/Pages/Migrantsneedprotection.aspx>>

OXFAM, 'EU "hotspots" spread fear and doubt: One year on, the EU response to a Mediterranean tragedy leaves vulnerable people in legal limbo', OXFAM Media Briefing, 18 April 2016 <<https://www.oxfam.org/en/research/eu-hotspots-spread-fear-and-doubt>>

Parkes, R., 'Immigrant Integration meets European Integration', EU-Consent Working Paper FG 1 2008/06 March 2008 <http://www.swp-berlin.org/fileadmin/contents/products/arbeitspapiere/Immigrant_Update2_KS.pdf>

Parkin, J., 'The Criminalisation of Migration in Europe: A State-of-The-Art of the Academic Literature and Research' [2013] *CEPS Paper in Liberty and Security in Europe* no 61

Pascouau, Y. and McLoughlin, S., 'EU Single Permit Directive: A small step forward in EU migration policy', European Policy Centre, Policy Brief, 24 January 2012 <http://www.epc.eu/documents/uploads/pub_1398_eu_single_permit_directive.pdf>

Pobal, 'An exploration of local strategies for the integration of migrant workers and their families' [2006] <<http://mrci.ie/wp-content/uploads/2012/10/Pobal-Report-Local-Strategies-for-Integration-of-Migrant-Workers.pdf>>

Pobal, 'Facts about Migrant Workers in Ireland' [2010] <<https://www.pobal.ie/Publications/Documents/Facts%20about%20Migrant%20Workers%20in%20Ireland%20-%20MRCI%20-%202010.pdf>>

Protect–Able, Process of Recognition and Orientation of Torture Victims in European Countries to Facilitate Care and Treatment [2013]

Provera, M., 'The Criminalisation of Irregular Migration in the European Union' [2015] *CEPS Paper in Liberty and Security in Europe* no 80

Red Cross EU Office, 'Addressing the Vulnerabilities Linked to Migratory Routes to the European Union', RCEU 12/2015-002 Position Paper, 9 December 2015

Refugees International, *Myanmar: Act Immediately to Protect Displaced People's Rights* [2014] <<http://www.refugeesinternational.org/reports/2015/10/14/myanmar-act-immediately-to-protect-displaced-peoples-rights>>

Resource Information Center, 'India: Information on Tibetan refugees and settlements', 30 May 2003 <<http://www.refworld.org/docid/3f51f90821.html>>

Soova, K., 'Role of Restrictive Migration Policies in Increasing the Vulnerability of Migrants to Irregularity, Exploitation and Trafficking', PICUM Presentation at the OSCE 15th Alliance against Trafficking in Persons Conference, Vienna, 6–7 July 2015 <<http://www.osce.org/secretariat/173571?download=true>>

South Asia Human Rights Documentation Centre (SAHRDC), 'The Stateless Chakmas and Hajongs of the Indian State of Arunachal Pradesh' <http://www.hrhc.net/sahrhc/resources/stateless_chakmas.htm>

Timmer, A. (with the collaboration of J. Goldschmidt, A. Buyse and A. Mihr), *Concepts of human rights, democracy, and the rule of law: a literature review* [2013] <<http://www.fp7-frame.eu/wp-content/materiale/reports/01-Deliverable-3.1.pdf>>

Timmer, A., Majtényi, B., Häusler, K. and Salát, O., The EU's conceptualisation and operationalisation of the concepts of human rights, democracy and rule of law [2014] <<http://www.fp7-frame.eu/wp-content/materiale/reports/10-Deliverable-3.2.pdf>>

Trauner, F., 'The Internal-External Security Nexus: More Coherence under Lisbon?' [2011] *European Union Institute for Security Studies Occasional Paper* no 89

Trades Union Congress (TUC) Commission on Vulnerable Employment, *Hard Work, Hidden Lives* <http://www.vulnerableworkers.org.uk/files/CoVE_full_report.pdf>

UNHCR, 2006 Global Trends [2007]

UNHCR, Asylum trends 2014: Levels and trends in industrialized countries [2015]

UNHCR, Beyond detention: A global strategy to support governments to end the detention of asylum-seekers and refugees [2014]

UNHCR, Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention [2012] <<http://www.unhcr.org/505b10ee9.html>>

UNHCR, 'Europe's refugee emergency response update #13: 27 November – 3 December 2015' <<https://undg.org/wp-content/uploads/2015/11/12-UNHCR-Europe-Refugee-Emergency-Response.pdf>>

UNHCR, Field Handbook for the Implementation of UNHCR BID Guidelines [2012]

UNHCR, 'From 1975 to 2013: UNHCR's Gender Equality Chronology' [2013] <<http://www.refworld.org/docid/53a2a5f54.html>>

UNHCR, Greece as a Country of Asylum: UNHCR Observations on the Current Situation of Asylum in Greece [2014] <<http://www.refworld.org/docid/54cb3af34.html>>

UNHCR, Handbook for the Protection of Women and Girls [2008]

UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1 [1979, reed. January 1992]

UNHCR, 'How a Bangladesh Court Ruling Changed the Lives of more than 300,000 Stateless People', 23 February 2015 <<http://www.unhcr.org/54ec22869.html>>

UNHCR, I am Here, I Belong: The Urgent Need to End Childhood Statelessness [2015]

UNHCR, Improving asylum procedures: Comparative analysis and recommendations for law and practice: Key Gender Related Findings and Recommendations [2010]

UNHCR, Nepal Fact Sheet, January 2016 <<http://www.unhcr.org/50001f3c9.html>>

UNHCR, 'Refugee/Migrant Crisis in Europe, Situation Analysis — January 2016' [2016] <<http://data.unhcr.org/mediterranean/documents.php?page=2&view=grid&Type%5B%5D=9>>

UNHCR, 'Resettlement of Bhutanese refugees surpasses 100,000 mark', 19 November 2015 <<http://www.unhcr.org/564dded46.html>>

UNHCR, 'South Asia' <<http://www.unhcr.org/51b1d640a.html>>

UNHCR, 'UNHCR calls for end to detention of asylum-seekers and refugees', 7 July 2014 <<http://www.unhcr-centraleurope.org/en/news/2014/unhcr-calls-for-end-to-detention-of-asylum-seekers-and-refugees.html>>

UNHCR, 'UNHCR calls for safer alternatives for deadly Bay of Bengal voyages', 23 February 2016 <<http://www.unhcr.org/56cc51c76.html>>

UNHCR, UNHCR comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast) COM (2011) 319 final (UNHCR) [2012]

UNHCR, UNHCR comments on the European Commission's amended recast proposal for a Directive of the European Parliament and the Council laying down standards for the reception of asylum-seekers [2011] COM(2011) 320 final [2012] <<http://www.unhcr.org/513da1cc9.pdf>>

UNHCR, UNHCR Guidelines on Determining the Best Interests of the Child [2008]

UNHCR, 'UNHCR Position on the Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals' [2008]

UNHCR, UNHCR's Position on the Detention of Asylum-Seekers in Malta [2013]

UNHCR, 'UNHCR warns of imminent humanitarian crisis in Greece', 1 March 2016
<<http://www.unhcr.org/56d58c146.html>>

UNHCR, France Terre d'Asile, Save the Children and PRAKSIS, Protection of children on the move: Addressing protection needs through reception, counselling and referral and enhancing cooperation in Greece, Italy and France [2012]
<<https://www.unhcr.gr/fileadmin/Greece/General/publications/cotmUNHCR.pdf>>

UNHCR, United Nations Population Fund and Women's Refugee Commission, Initial Assessment Report: Protection Risks for Women and Girls in the European Refugee and Migrant Crisis. Greece and the former Yugoslav Republic of Macedonia [2016]
<<http://data.unhcr.org/mediterranean/documents.php?page=1&view=grid&Type%5B%5D=14>>

UNHCR Office in Greece, *Unaccompanied Minors Asylum Seekers in Greece* [2008]
<<http://www.refworld.org/docid/48abd557d.html>>

UNICEF, 'Regional Humanitarian Situation Report #7' [2015]
<<http://reliefweb.int/sites/reliefweb.int/files/resources/UNICEF%20Europe%20Refugee%20and%20Migrant%20Crisis%20Regional%20Humanitarian%20SitRep%20No.7%2C%2011%20January%202016.pdf>>

United Nations, Guidance Note of the Secretary-General: The United Nations and Statelessness [2011]

United Nations Development Group (UNDG), 'Statement on a Common Understanding of a Human Rights-Based Approach to Development Cooperation', UN Interagency Workshop on a Human Rights-Based approach in the Context of UN Reform, Stamford, 2003

United Nations Development Programme (UNDP), Human Development Report 2014: Sustaining Human Progress: Reducing Vulnerabilities and Building Resilience (UNDP 2014)

United Nations Refugee Agency, United Nations Population Fund and Women's Refugee Commission, Initial Assessment Report: Protection Risks for Women and Girls in the European Refugee and Migrant Crisis [2015]

Weinzierl, R. and Lisson, U., Border Management and Human Rights: A Study of EU Law and the Law of the Sea (German Institute for Human Rights 2007)

Women's Refugee Commission, *No Safety for Refugee Women on the European Route: Report from the Balkans* [2016] <<https://www.womensrefugeecommission.org/gbv/resources/1265-balkans-2016>>

D. Other sources

1. Internet pages

Amnesty International, 'In detention in Europe' <<http://www.sos-europe-amnesty.eu/in-detention-in-europe-facts-and-figures/>>

BBC News, 'Citizenship for Bihari refugees', 19 May 2008 <http://news.bbc.co.uk/2/hi/south_asia/7407757.stm>

BBC News, 'Enclaves swapped in landmark India-Bangladesh border deal', 31 July 2015 <<http://www.bbc.com/news/world-asia-india-33733911>>

BBC News, 'Italy arrests 44 in mafia migrant centre probe', 4 June 2015 <<http://www.bbc.com/news/world-europe-33009027>>

Calcutta Research Group <www.crg.org>

Citizens Information Board, 'Overview of employment permits' <http://www.citizensinformation.ie/en/employment/migrant_workers/employment_permits/overview_employment_permits.html>

Council of Europe, Greece — Submissions from States, Applicants and NGOs/NHRs <http://www.coe.int/t/dghl/monitoring/execution/Themes/Add_info/GRC-MSS_en.asp>

Department of Jobs, Enterprise and Innovation (Ireland), 'Contract for Services Employment Permit' <<https://www.djei.ie/en/What-We-Do/Jobs-Workplace-and-Skills/Employment-Permits/Permit-Types/Contract-for-Services-Employment-Permit/>>

Department of Jobs, Enterprise and Innovation (Ireland), 'Fees for Employment Permits' <<https://www.djei.ie/en/What-We-Do/Jobs-Workplace-and-Skills/Employment-Permits/Fees/>>

Department of Jobs, Enterprise and Innovation (Ireland), 'General Employment Permit' <<https://www.djei.ie/en/What-We-Do/Jobs-Workplace-and-Skills/Employment-Permits/Permit-Types/General-Employment-Permit/>>

Department of Jobs, Enterprise and Innovation (Ireland), 'Ineligible Categories of Employment' <<https://www.djei.ie/en/What-We-Do/Jobs-Workplace-and-Skills/Employment-Permits/Employment-Permit-Eligibility/Ineligible-Categories-of-Employment/>>

Election Commission of Bhutan, 'Acts' <http://www.election-bhutan.org.bt/?page_id=31>

Ethirajan, A., 'Stateless misery on India-Bangladesh border', *BBC News*, 5 September 2011 <<http://www.bbc.com/news/world-south-asia-14715825>>

Euronews, 'Hotspot Approach: the answer to Europe's Migrant Crisis', 21 September 2015 <<http://www.euronews.com/2015/09/21/the-hotspot-approach-the-answer-to-europe-s-migrant-crisis/>>

European Commission, 'European Agenda on Migration – Legislative Documents' 10 February 2016 <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/index_en.htm>

European Commission, Humanitarian Aid and Civil Protection, The Refugee Crisis, <http://ec.europa.eu/echo/refugee-crisis_en>

European Commission, Relocation and Resettlement – State of Play [2016] <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/20160316/relocation_and_resettlement_-_state_of_play_en.pdf>

European Migration Network, 'Legislation' <http://emn.ie/cat_search_detail.jsp?clog=4&itemID=213&item_name>

European Migration Network, 'Population and Migration Estimates' <<http://emn.ie/emn/statistics>>

Eurostat, Asylum and first time asylum applicants by citizenship, age and sex Annual aggregated data (rounded), last update 2nd March 2016, <http://ec.europa.eu/eurostat/en/web/products-datasets/-/MIGR_ASYAPPCTZA>

Eurostat, Asylum applicants considered to be unaccompanied minors – annual data, persons <<http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tps00194&plugin=1>>

Eurostat, Asylum Quarterly Report, First time asylum applicants and first instance decisions on asylum applications: fourth quarter 2015, data extracted on 3rd March 2016, <http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report>

Eurostat, Asylum Statistics <<http://appsso.eurostat.ec.europa.eu/nui/show.do>>

Eurostat, 'Statistics on Asylum and first time asylum applicants by citizenship, age and sex – Annual aggregated data (rounded)' <<http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do>>

Focus Economics, Italy Economy Overview <<http://www.focus-economics.com/countries/italy>>

FRA, 'Regular overviews of migration-related fundamental rights concerns' <<http://fra.europa.eu/en/theme/asylum-migration-borders/overviews>>

FRA, 'Thematic Focus: Children (February 2016)' <<http://fra.europa.eu/en/theme/asylum-migration-borders/overviews/focus-children>>

Frontex, 'General Information' <<http://frontex.europa.eu/partners/consultative-forum/general-information/>>

Frontex, 'Specialised Training' <<http://frontex.europa.eu/training/specialised-training/>>

Government of Bhutan website <www.bhutan.gov.bt>

Hellenic Statistical Authority, '2011 Population Census' <http://www.statistics.gr/portal/page/portal/ESYE/BUCKET/A1602/PressReleases/A1602_SAM01_DT_DC_00_2011_03_F_EN.pdf>

Hellenic Statistical Authority, 'Greece in Figures' <<http://www.statistics.gr/portal/page/portal/ESYE/PAGE-greeceinfigures-qq>>

International Organization for Migration (IOM), 'Migration Flows – Europe' <<http://migration.iom.int/europe/>>

International Organization for Migration (IOM), Missing Migrants Project, 'Latest Global Figures' <<http://missingmigrants.iom.int/latest-global-figures>>

International Organization for Migration (IOM), Missing Migrants Project, 'Mediterranean Migrant Arrivals in 2016: 164,752; Deaths: 531' (Missing Migrants Project, 29 March 2016) <<http://missingmigrants.iom.int/mediterranean-migrant-arrivals-2016-164752-deaths-531>>

International Organization for Migration (IOM), Missing Migrants Project, 'Migrant Fatalities Worldwide' <<http://missingmigrants.iom.int/>>

Irish Naturalisation and Immigration Service, 'Registration' <<http://www.inis.gov.ie/en/INIS/Pages/WP07000031>>

Italian Council for Refugees (CIR), News 9 November 2015 <<http://www.cir-onlus.org/en/home/1903-hotspot-approach-concerned-national-asylum-committee-has-requested-a-meeting-with-minister-alfano>>

Italian Ministry of Defence, 'Mare Nostrum Operation' <<http://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx>>

Italian Ministry of Interior, Centri per l'immigrazione <<http://www.interno.gov.it/it/temi/immigrazione-e-asilo/sistema-accoglienza-sul-territorio/centri-limmigrazione>>

Jesuit Refugee Service (JRS) Europe, Detention in Europe, Italy: Country Detention Profile [2013] <http://www.detention-in-europe.org/index.php/index.php?option=com_content&view=article&id=147&Itemid=179>

LasciateCIEntrare, campaign website <<http://www.lasciatecientrare.it/j25/>>

Majumder, S., 'Bhutan holds fake national poll', *BBC News*, 21 April 2007 <http://news.bbc.co.uk/2/hi/south_asia/6578421.stm>

Metadrasi, 'Guardianship Network for Unaccompanied Minors: Results and Experiences from the World of Protection of Unaccompanied Children' (Athens 2015) <<http://www.epitropeia.org/?q=en/node/61>>

Migrant Integration Policy Index <<http://www.mipex.eu/ireland>>

Migreurop, 'Mapping of migrant camps: A dynamic and interactive mapping of migrant detention in Europe and beyond' <<http://en.closethecamps.org/2014/03/03/europe-of-camps-deploys-its-web/>>

NGO Partnership Portal, 'Protecting Unaccompanied Minors in Greece', 11 December 2011 <<http://www.ngonorway.org/about/item/482-protecting-unaccompanied-minors-in-greece>>

Observatorio Detenzione Accoglienza Migranti Puglia <<http://www.osservatoriomigranti.org/?cda>>

Office for the Promotion of Migrant Integration, 'Review of Integration Strategy – Update (Feb 2016)' <<http://www.integration.ie/website/omi/omiwebv6.nsf/page/NewIntegrationStrategy-en>>

Office of the High Commissioner for Human Rights (OHCHR), Status on Ratification Interactive Dashboard: Italy <<http://indicators.ohchr.org/>>

Reception and Integration Agency, 'Direct Provision' <http://www.ria.gov.ie/en/RIA/Pages/Direct_Provision_FAQs>

Singh, R., 'Fears for Nepal's "invisible" Tibetan refugees', *BBC News*, 27 April 2015 <<http://www.bbc.com/news/world-asia-32476346>>

UNHCR, Asylum-Seekers with Special Needs <<http://www.unhcr-centraleurope.org/en/what-we-do/caring-for-the-vulnerable/caring-for-the-vulnerable-in-asylum.html>>

UNHCR, Caring for the Vulnerable <<http://www.unhcr-centraleurope.org/en/what-we-do/caring-for-the-vulnerable.html>>

UNHCR, 'People with Disabilities: Largely Invisible or Forgotten' <<http://www.unhcr.org/pages/4a0c310c6.html>>

UNHCR, 'Populations of concern to UNHCR' <<http://www.unhcr.org/564da0e3b.html>>

UNHCR, Refugees/Migrants Emergency Response Mediterranean <<http://data.unhcr.org/mediterranean/regional.php>>

UNHCR, Sea Arrivals to Italy <<http://unhcr.it/risorse/statistiche/sea-arrivals-to-italy>>

UNHCR, 'South Asia: 2015 UNHCR subregional operations profile — South Asia' <<http://www.unhcr.org/pages/49e45b156.html>>

UNHCR, 'Sri Lanka: 2015 UNHCR subregional operations profile — South Asia' <<http://www.unhcr.org/pages/49e4878e6.html>>

UNHCR, 'UN Conventions on Statelessness' <<http://www.unhcr.org/pages/4a2535c3d.html>>

UNHCR, 'Women: Particular challenges and risks' <<http://www.unhcr.org/pages/49c3646c1d9.html>>

2. Press releases, speeches and statements

AIDA News, 'Italy: Transposition of recast asylum directives adopted', 21 September 2015 <<http://www.asylumineurope.org/news/21-09-2015/italy-transposition-recast-asylum-directives-adopted#sthash.MrZVtjv7.dpuf>>

Amnesty International, 'EU: Asylum seekers relocation deal only a small step towards fixing a broken system', 20 July 2015 <<http://www.amnesty.nl/nieuwsporaal/pers/eu-asylum-seekers-relocation-deal-only-small-step-towards-fixing-broken-system>>

Chakmarights, 'ACHR: Not the Chakmas/Hajongs but other non-tribals pose bigger threat to indigenous peoples of Arunachal Pradesh', 26 November 2015 <<https://chakmarights.wordpress.com/2015/>>

Committee on the Elimination of Discrimination against Women, 'A Call for Gender Equality for Refugees and Stateless Persons', Statement on the Anniversaries of the 1951 Convention Relating to the Status of Refugees and the 1961 Convention on the Reduction of Statelessness, 19 October 2011

European Asylum Support Office (EASO), 'EASO launches Practical Tools for First-Contact Officials on Access to the Asylum procedure', Press Release, PR 06/2016, 2 March 2016 <<https://easo.europa.eu/wp-content/uploads/PR06-AtP-launch.pdf>>

European Asylum Support Office (EASO), 'EASO launches tool for identification of persons with special needs (IPSN Tool)', Press Release, PR 03/2016, 27 January 2016 <https://easo.europa.eu/wp-content/uploads/PRESS-RELEASE_03-EASO-IPSN-tool.pdf>

European Asylum Support Office (EASO), 'EU-funded Protection-Sensitive Migration Management Programme launched in Belgrade', Inforpoint, 10 March 2016 <<https://easo.europa.eu/wp-content/uploads/INFOPOINT-EU-Funded-Protection-Sensitive-Migration-Management-Programme-launched-in-Belgrade.pdf>>

European Commission, 'EU-India Summit — leaders agree on a joint statement', 31 March 2016 <http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/2016/20160331_1_en.htm>

European Commission, Fact Sheet, EU-Turkey Agreement: Questions and Answers, 19 March 2016 <http://europa.eu/rapid/press-release_MEMO-16-963_en.htm>

European Commission, 'Meeting on the Western Balkans Migration Route: Leaders Agree on 17-point plan of action', Press Release, 25 October 2015 <http://europa.eu/rapid/press-release_IP-15-5904_en.htm>

European Commission, 'More Responsibility in Managing the Refugee Crisis: European Commission adopts 40 infringement decisions to make European Asylum System work', Press Release, 23 September 2015 <http://europa.eu/rapid/press-release_IP-15-5699_en.htm>

European Council, 'EU-Turkey statement' [2016] Press Release 144/16

European Council on Refugees and Exiles (ECRE), 'Italy: a worrying trend is developing in the "hotspots"', ECRE Bulletin, 20 November 2015

European Council on Refugees and Exiles (ECRE), 'Red Cross: Offshore Processing Inadequate to Solve "Access Crisis"', 12 February 2016 <<http://www.ecre.org/component/content/article/70-weekly-bulletin-articles/1377-red-cross-offshore-processing-inadequate-to-solve-access-crisis-.html>>

European Court of Human Rights: Factsheet – Migrants in detention [2014]

Frontex, 'Management Board Designates Fundamental Rights Officer', 27 September 2012 <<http://frontex.europa.eu/news/management-board-designates-fundamental-rights-officer-8IK8lm>>

International Organization for Migration (IOM), 'Greece Records Highest Weekly Migration Inflows in 2015 So Far', 23 October 2015 <<https://www.iom.int/news/greece-records-highest-weekly-migration-inflows-2015-so-far>>

International Organization for Migration (IOM), 'Mediterranean Migrant Arrivals in 2016', Press release 10 May 2016 <<https://www.iom.int/news/mediterranean-migrant-arrivals-2016-187631-deaths-1357>>

Medecins sans Frontiers (MSF), 'Italy: MSF ends activities in Pozzallo reception centre' <<http://www.msf.org/article/italy-msf-ends-activities-pozzallo-reception-centre>>

Minister of State at the Department of Justice and Equality (Deputy Aodhán Ó Ríordáin) in response to a Parliamentary Question from Deputy Thomas P. Broughan, 25 November 2015 <<http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2015112500090?opendocument#WRS01700>>

Red Cross, 'The EU-Turkey migration deal: a lack of empathy and humanity – Opinion of 23 Red Cross National Societies' [2016] <<http://www.redcross.eu/en/News-Events/NEWS-ROOM/The-EU-Turkey-migration-deal/>>

Registrar of the European Court of Human Rights, 'Unlawful detention of Tunisian migrants in degrading conditions on the island of Lampedusa in Italy pending collective expulsion', Press Release, ECHR 263 (2015), 1 September 2015

Registrar of the European Court of Human Rights, 'Grand Chamber Panel's Decision', Press Release, ECHR 044 (2016), 2 February 2016

UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (2007)

UNHCR, UNHCR concerned at detention of asylum-seekers, releases new guidelines, Press Release, 21 September 2012 <<http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=505c33199&query=detention>>

UNICEF and IOM, 'IOM and UNICEF Data Brief: Migration of Children to Europe', 30 November 2015 <http://www.iom.int/sites/default/files/press_release/file/IOM-UNICEF-Data-Brief-Refugee-and-Migrant-Crisis-in-Europe30.11.15.pdf?utm_content=buffer32a66&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer>

Views expressed by Justice Nasim Hussain Shah in 'Pakistan Country Update', Fourth Informal Consultation on Refugee and Migratory Movement in South Asia, Dhaka, November 1997

3. Blog entries

Albertson Fineman, M., 'Fineman on Vulnerability and Law' *New Legal Realism Conversations* [blog], 30 November 2015 <<https://newlegalrealism.wordpress.com/2015/11/30/fineman-on-vulnerability-and-law/>>

Burri, T., 'Pomfr: Reviewing protecting vulnerable groups – What about Hector Salamanca and Donald Gately?' *European Law Blog* [blog], 7 January 2016 <<http://europeanlawblog.eu/?p=3061>>

Fink, M., 'Salami Slicing Human Rights Accountability: How the European Border and Coast Guard Agency May Inherit Frontex' Genetic Defect', *EJIL Talk!* [blog], 10 March 2016 <<http://www.ejiltalk.org/salami-slicing-human-rights-accountability-how-the-european-border-and-coast-guard-agency-may-inherit-frontex-genetic-defect/>>

Lavrysen, L., 'Rahimi v. Greece and the proceduralization of children's rights' *Strasbourg Observers*, 15 April 2011 <<http://strasbourgobservers.com/2011/04/15/rahimi-v-greece-and-the-proceduralization-of-childrens-rights/>>

Murphy, C., 'Interculturalism and Immigration Reform? Integration Policy in Ireland', *Human Rights in Ireland*, 7 July 2015 <<http://humanrights.ie/international-lawinternational-human-rights/interculturalism-and-immigration-reform-integration-policy-in-ireland/>>

Peers, S., 'The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection' [2014] *EU Law Analysis* [blog], 18 December 2014

Peers, S., 'Detention of asylum-seekers: the first CJEU judgment' [2016] *EU Law Analysis* [blog], 9 March 2016 <<http://eulawanalysis.blogspot.fi/2016/03/detention-of-asylum-seekers-first-cjeu.html>>

Peers, S., 'The final EU/Turkey refugee deal: a legal assessment' [2016] *EU Law Analysis* [blog], 18 March 2016 <<http://eulawanalysis.blogspot.fr/2016/03/the-final-euturkey-refugee-deal-legal.html>>

4. Newspaper articles

'30 years later, Assam Accord back in focus (News Analysis)', *Business Standard*, 15 August 2015 <http://www.business-standard.com/article/news-ians/30-years-later-assam-accord-back-in-focus-news-analysis-115081500709_1.html>

'Arunachal Pradesh seeks review of SC order on granting citizenship to Chakma, Hajong refugees', *The Times of India*, 27 October 2015 <<http://timesofindia.indiatimes.com/india/Arunachal-Pradesh-seeks-review-of-SC-order-on-granting-citizenship-to-Chakma-Hajong-refugees/articleshow/49545801.cms>>

Banerjee, P., 'Falling short: How India treats those seeking refuge', *Hindustan Times*, 14 September 2015 <<http://www.hindustantimes.com/india/falling-short-how-india-treats-those-seeking-refuge/story-Y96NXag08KXxzaNjkOND5M.html>>

'Bangladesh plans to move Rohingya refugees to island in the south', *The Guardian*, 28 May 2015 <<http://www.theguardian.com/world/2015/may/28/bangladesh-plans-to-move-rohingya-refugees-to-island-in-the-south>>

Carolan, M., 'Award to migrant quashed over illegal job status', *Irish Times* (1 September 2012)

Chakma, S., 'The Issue of Illegal Migrants', *The Pioneer*, 2 May 2003

Choudhary, A. A., 'Grant citizenship to Chakma refugees within 3 months: Supreme Court', *The Times of India*, 18 September 2015 <<http://timesofindia.indiatimes.com/india/Grant-citizenship-to-Chakma-refugees-within-3-months-Supreme-Court/articleshow/49015645.cms>>

'Dallo sbarco all'hotspot, all'espulsione', *Redattore Sociale*, 6 November 2015 <<http://www.redattoresociale.it/Notiziario/Articolo/494075/Dallo-sbarco-all-hotspot-all-espulsione-Come-si-decide-il-destino-dei-migranti>>

Gowen, A., 'Children of Sri Lankan refugees born in India uncertain about future', *The Washington Post*, 21 February 2015 <https://www.washingtonpost.com/world/asia_pacific/children-of-sri-lankan-refugees-born-in-india-uncertain-about-future/2015/02/21/d1e425ec-abc3-11e4-8876-460b1144cbc1_story.html>

Gowen, A., 'China's crackdown slows Tibetan refugee crossings to freedom in India', *The Washington Post*, 19 October 2014 <https://www.washingtonpost.com/world/asia_pacific/china-crackdown-slows-tibet-refugee-crossings-to-freedom-in-india/2014/10/18/d40fb39f-6860-4145-8761-dac00653f01b_story.html>

'Grant citizenship rights to Chakmas, Hajongs in Arunachal, says SC', *Business Standard*, 17 September 2015 <http://www.business-standard.com/article/news-ians/grant-citizenship-rights-to-chakmas-hajongs-in-arunachal-says-sc-115091701089_1.html>

Henley, J., 'EU Refugee Relocation Scheme Is Inadequate and Will Continue to Fail', *The Guardian*, 4 March 2016 <<http://www.theguardian.com/world/2016/mar/04/eu-refugee-relocation-scheme-inadequate-will-continue-to-fail> accessed>

Interview with Antonio Guterres, United Nations High Commissioner for Refugees, *The Hindu*, 4 January 2013 <<http://www.thehindu.com/opinion/interview/indias-refugee-policy-is-an-example-for-the-rest-of-the-world-to-follow/article4269430.ece>>

Jain, B., 'Minority Refugees from Pakistan and Bangladesh can stay back in India even after visa expiry', *The Times of India*, 16 February 2016 <<http://timesofindia.indiatimes.com/India/Minority-refugees-from-Pakistan-and-Bangladesh-can-stay-back-in-India-even-after-visa-expiry/articleshow/48860702.cms>>

Janardhanan, A., 'Explained: The Sri Lankan Refugee Question', *The Indian Express*, 31 January 2015 <<http://indianexpress.com/article/india/india-others/explained-the-sri-lankan-refugee-question/>>

Kala, A., 'India's Tibetan refugees are leaving their homeland behind ... but have they found new one?', *Daily Mail*, 16 February 2015 <<http://www.dailymail.co.uk/indiahome/indianews/article-2954748/India-s-Tibetan-refugees-leaving-homeland-new-one.html>>

Kashyap, S. G., 'Why Chakmas and Hajongs are India's nowhere people', *The Indian Express*, 2 October 2015 <<http://indianexpress.com/article/explained/why-chakmas-and-hajongs-are-indias-nowhere-people/>>

Latschan, T., 'Stateless in Nepal — How a patriarchal system denies citizenship to millions', *Deutsche Welle*, 29 January 2015 <<http://www.dw.com/en/stateless-in-nepal-how-a-patriarchal-system-denies-citizenship-to-millions/a-18223750>>

McDougall, D., 'The forgotten refugees who wait for justice after 60 years', *The Guardian*, 5 August 2007 <<http://www.theguardian.com/world/2007/aug/05/india.theobserver>>

Osborn, L. and Russell, R., 'Refugee crisis creates "stateless generation" of children in limbo', *The Guardian*, Berlin and Antakya, 27 December 2015

Pisharoty, S. B., 'Chakmas Issue Roils Arunachal as Supreme Court Decrees End to Their Statelessness', *The Wire*, 17 December 2015 <<http://thewire.in/2015/12/17/chakma-issue-roils-arunachal-as-supreme-court-decrees-end-to-their-statelessness-17017/>>

Politi, J., 'Italy's Mafia learns to profit from the migration crisis', *Financial Times Europe*, 24 July 2015 <<http://www.ft.com/intl/cms/s/0/0d0371d0-31f4-11e5-8873-775ba7c2ea3d.html#axzz3qu4Brclp>>

Ramzy, A., 'China and India are sitting out refugee crisis', *The New York Times*, 28 June 2015
<http://www.nytimes.com/2015/06/29/world/asia/china-and-india-are-sitting-out-refugee-crisis.html?_r=0>

'Refugees from Pakistan seek Indian nationality', *The Tribune*, 16 February 2016
<<http://www.tribuneindia.com/news/jalandhar/refugees-from-pakistan-seek-indian-nationality/196883.html>>

'Sbarchi: caos identificazioni, anche i minori a rischio espulsione', *Redattore Sociale* 13 November 2015
<<http://www.redattoresociale.it/Notiziario/Articolo/494630/Sbarchi-caos-identificazioni-anche-i-minori-a-rischio-espulsione-Gravi-violazioni>>

Sharma, G., 'Nepali single mothers say law change would make children stateless', *Reuters*, 8 January 2015
<<http://www.reuters.com/article/us-nepal-citizenship-idUSKBN0KH19620150108>>

Smale, A., 'With EU Paralyzed, 10 Nations Try to Stem Migrant Flow', *The New York Times*, 24 February 2016
<http://www.nytimes.com/2016/02/25/world/europe/refugees-migrants-austria-greece.html?_r=0>

Townsend, M., '10,000 refugee children are missing, says Europol' *The Guardian*, London, 30 January 2016
<<http://www.theguardian.com/world/2016/jan/30/fears-for-missing-child-refugees>>

Wesel, B., 'Refugee hotspots in Greece: last minute' *Deutsche Welle*, 17 February 2016

5. Other

Council of Europe, Committee of Ministers, Communication from the Greek authorities concerning the M.S.S. and Rahimi groups of cases against Greece (Applications No. 30696/09 and 8687/08) DH-DD(2015)1134F [2015]
<<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2830645&SecMode=1&DocId=2323116&Usage=2>>

Council of Europe, Committee of Ministers, Greek Council for Refugees (GCR), Complementary Submission of the Greek Council for Refugees to the Committee of Ministers of the Council of Europe in the case of *M.S.S. v. Belgium & Greece* (Application No 30696/09) DH-DD(2015)606 [2015]
<<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2762179&SecMode=1&DocId=2278024&Usage=2>>

Council of Europe, Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence [2011]

Department of the Environment, Community and Local Government (Ireland), Housing Circular 41/2012: 'Access to social housing supports for non-Irish nationals' [2012]

<<http://www.environ.ie/sites/default/files/migrated-files/en/Publications/DevelopmentandHousing/Housing/FileDownload,29412,en.pdf>>

EKKA, 'Statistics 2014 from the Service in charge of finding accommodation for unaccompanied minors' [2015] <http://www.ekka.org.gr/portal_docs/forceaccount/picture/23_1067.pdf>

European Parliament, Irregular Immigration in the EU: Facts and Figures; Briefing April 2015 <[http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/554202/EPRS_BRI\(2015\)554202_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/554202/EPRS_BRI(2015)554202_EN.pdf)>

European Women's Lobby (EWL), Asylum Aid and ILGA Europe, Proposal for amendments on the 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 national or stateless persons as beneficiaries of the international protection and the content of the protection granted (recast), 15 September 2010 <http://www.asylumaid.org.uk/wp-content/uploads/2013/02/EWL_Asylum_Aid_ILGA_Europe_amendments_qualification_directive_15092010_EN_final.pdf>

Government of India, Ministry of External Affairs, 'India and Bangladesh Land Boundary Agreement' <http://www.mea.gov.in/Uploads/PublicationDocs/24529_LBA_MEA_Booklet_final.pdf>

'A Guide to the Constitution of the Kingdom of Bhutan' <<http://www.judiciary.gov.bt/html/education/high%20court%20book.pdf>>

Member States' Support to Emergency Relocation Mechanism, Communicated as of 14 April 2016 <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_relocation_en.pdf>

Migrant Rights Centre Ireland, 'Information on new Employment Permits (Amendment) Act 2014' <<http://www.mrci.ie/wp-content/uploads/2012/10/Information-on-new-Employment-Permits.pdf>>

Ministry of Justice (Greece), National Action Plan for the Rights of the Children [2014] <<http://www.opengov.gr/ministryofjustice/wp-content/uploads/downloads/2014/11/DIAKAIODYNHSPAIDI.pdf>> (in Greek)

National Action Plan for Social Inclusion 2007–2016, The Stationery Office (Ireland), February 2007 <<http://www.socialinclusion.ie/documents/NAPinclusionReportPDF.pdf>>