



European Institute of Public Administration
Institut européen d'administration publique

**The European Asylum System
and Minimum Standards:
'Suggestions for practice and policy'**

Dr Katerina-Marina Kyrieri and Aniel Pahladsingh

Staff Working Paper
June 2010

The European Asylum System and Minimum Standards: 'Suggestions for practice and policy'

By Dr Katerina - Marina Kyrieri*
and Aniel Pahladsingh *

* Lecturer for Unit III, "European Policies", European Institute of Public Administration, Project leader of seminars in the field of migration, visas and asylum.

* Legal Officer in the Research Department of the Dutch Council of State and deputy judge at the district court of Rotterdam.

Table of contents

Introduction

1. International policy background

2. EU refugee protection and the CEAS

- 2.1. The Commission's contribution on asylum
- 2.2. The EP's role in proposing asylum legislation
- 2.3. The role of the ECJ

3. Strengthening the minimum standards in asylum procedures

3.1. The Asylum Procedures Directive (2005/85/EC)

- 3.1.1. Access to the procedure – Article 6 Directive 2005/85/EC
- 3.1.2. Personal interview – Article 12
- 3.1.3. Requirements for a personal interview – Article 13
- 3.1.4. Free legal assistance – Article 15
- 3.1.5. Detention – Article 18
- 3.1.6. Accelerated procedure – Article 23
- 3.1.7. Appeal procedure – Article 39

3.2. Directive 2004/83/EC

- 3.2.1. Assessment of evidence: Article 4(5) Directive 2004/83/EC
- 3.2.2. Serious harm in situations of international and/or internal armed conflict: Article 15c Directive
- 3.2.3. Article 1F Geneva Convention: Article 12 Directive 2004/83/EC
- 3.2.4. Access to integration: Article 33
- 3.2.5. Policy recommendations for one status

3.3. Dublin Regulation No 343/2003

- 3.3.1. The Petrosian case
- 3.3.2. The situation in Greece

4. Summarising good practices

Conclusions

Introduction

Even though the phenomenon of refugees has changed over the course of recent decades, asylum remains an important issue for states all over the world. Whilst two-thirds of refugees live in developing countries, Western countries arguably have a special obligation due to their own value orientation. Thus, a common asylum policy looms large for the European Union (EU) for at least two reasons. Firstly, it has to ensure the maintenance of human rights within its territory and achieve common standards to avoid secondary refugee movements. Secondly, as the EU's internal borders are increasingly disappearing, an adequate management of external borders becomes a common priority but requires burden-sharing among the Member States (MS).

In the first instance, the EU has drawn up various directives which oblige Member States to adopt minimum standards in the area of asylum. National policies and practices should be in line with those standards so as to promote the second phase of a Common European Asylum System (CEAS). The authors aim to seek suggestions on how Member States' practices and policies can strengthen the CEAS by complying and rising above the minimum standards and thus improving the protection of human rights for asylum seekers. Whilst seeking better practices and policies the authors use examples from the current situation in the Netherlands and Greece.

The paper is divided into four sections. The first section provides some background information on the international legislation which can be seen as a framework of the EU policies. The second looks into the need for European refugee protection and focuses on the concept of the CEAS. It introduces the main legislative instruments in the asylum process and discusses future possibilities. The third section examines examples of Dutch policies and practices in relation to the minimum standards instruments. In this framework, 'good' and 'less good' practices as well as problems with the application of the EU minimum standards will be highlighted. Additionally, the influence of human rights will be examined, thus demonstrating that the jurisprudence of the European Court of Human Rights (ECtHR) is also important for asylum seekers' policies and practices. The last section of the paper provides some policy recommendations and gives a summary of practices which may apply in asylum cases.

1. International policy background

As asylum policy, as well as refugee protection, does not belong to the EU's original policy dossiers, their emergence and design have to be evaluated within the context of previously existing international legislation. In fact, as will be seen in the subsequent paragraph, the implementation of and adherence to international legislation serves as an EU policy objective.

The single most important piece of international law on the protection of refugees is the Geneva Convention, namely the United Nations Convention on the Status of Refugees. Its current version entered into force in 1951. The Convention ensures that nobody is sent back to persecution and maintains the principle that no one should be returned to a country where his/her life or freedom is at stake.

According to Article 1A(2) of the Geneva Convention, the term refugee is applied to

*“a person who owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his(/her) nationality and is unable or, owing to such fear, is unwilling to avail himself/herself of the protection of his(/her) country; or who, not having a nationality and being outside the country of his/her former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”.*¹

Another important principle is the non-expulsion of refugees, often known as the *non-refoulement principle*. It is in fact the key principle of international refugee law. The legal basis is found in Article 33 of the Geneva Convention which includes the obligation of States to provide international protection to those who need it. It reads as follows:

“No contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his/her life or freedom would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion”.

This principle also encompasses such acts as torture and other brutal, inhumane and degrading treatment or punishment as a basis for *non-refoulement* obligations.

¹ Article 1 of the 1951 UN Convention relating to the status of refugees as amended by the 1967 Protocol.

In addition to the Geneva Convention, the European Convention on Human Rights (ECHR) also plays a considerable role in EU asylum policies. Not only do EU and State policies have to be in line with this treaty, but also individuals who seek protection can directly rely on it. Articles 3 (prohibits torture, and inhuman or degrading treatment or punishment), 5 (the right to liberty and security of person) and 13 ECHR (the right for an effective remedy before national authorities for violations of rights under the Convention) among others appear to be of special relevance within the field of asylum. As will be seen throughout the paper, the European Court on Human Rights (ECtHR) has already made some relevant judgements.

2. EU refugee protection and the CEAS

The EU only began to deal with the issue of refugee protection and migration in the 1990s when the flow of persons seeking international protection in the EU was large enough for Member States to decide to find common solutions. In 1990, some countries made agreements in the Treaty of Dublin about the allocation of applications for asylum to a specific country to the exclusion of others. The Treaty of Dublin was an arrangement outside the European Union. The Maastricht Treaty (1993) was the first to formally promote asylum as an issue of common interest for the EU (third pillar). Some years later the Amsterdam Treaty (1999) provided for a common asylum system where asylum became part of title IV EC Treaty (first pillar). The latest relevant treaty reforms resulted from the Lisbon Treaty and will be elaborated upon throughout this paper.

The Amsterdam Treaty as well as the subsequent European Council in Tampere (October 1999)² called for the creation of a Common European Asylum System (CEAS) as a part of an Area of Freedom, Security and Justice. It was intended to establish an area of single protection for refugees and should be based on the full and inclusive application of the previously mentioned Geneva Convention and the common humanitarian values shared by all Member States. More specifically, the CEAS was intended to be built in two phases. The goal pursued in the first phase was to harmonise the Member States' legal frameworks on the basis of common minimum standards. The goal in the second stage should be to achieve both a higher common standard of protection, including better equality of protection across the EU, and a higher degree of intra-EU solidarity which should not be at the expense of support, notably in the form of resettlement, for third countries.

² Council of the European Union, Presidency Conclusions, *Tampere European Council, 15-16 October 1999*, 16 October 1999, available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00200-rl.en9.htm.

As concerns the first goal, the treaty as well as the Council conclusions specified an initial set of standards and measures which had to be adopted by May 2004. In order to do so, the Council clearly spelt out the respective responsibilities of both Member States and the EU institutions, in particular for the Commission and itself. The elements of the first legislative phase, which can be regarded as the first stage of the CEAS, are now in place and will be elaborated upon in the next paragraph. However, there has always been the intention that in the longer term the rules should lead to a common asylum procedure and a uniform status throughout the EU.

Based on the objectives laid down in the Amsterdam Treaty, the Council adopted four legislative instruments. The first one is called the Dublin Regulation (343/2003/EC)³ and specifies which State is responsible for the examination of an asylum application. The Dublin Regulation replaces the Treaty of Dublin which was agreed outside of the European Union between some Member States and follows the same structure. The second one is the Reception Conditions Directive (2003/9/EC)⁴. In broad terms, this directive guarantees minimum standards for the reception of asylum seekers. In 2004, the Council adopted the Qualification Directive (2004/83/EC)⁵ which classifies and defines different groups of people seeking protection. Finally, the Asylum Procedures Directives (2005/85/EC)⁶ entered into force in 2005. This directive sets out minimum procedural standards. More detailed information on these legislative measures will be presented in the sub-section on national practices. In general, the adoption of these measures can be seen as the first phase in the development of a Common European Asylum System.

Due to Member States' wide margin of discretion as well as the complex nature and scale of people seeking protection, the abovementioned measures have not sufficed to achieve the objectives as laid down in the introduction. Instead, examples of 'good' and 'less good' practices reflect the existing inequality of protection of asylum seekers across the EU. Therefore, there is a call to establish the second phase of the CEAS. This call has been embodied in The Hague Programme (adopted in November 2004) and has also been confirmed by the Lisbon Treaty⁷ and the European Pact on Immigration and Asylum.⁸

³ 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, OJ L 50/1.

⁴ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31/18.

⁵ 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, OJ L 304/12.

⁶ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326/13.

⁷ European Union, *Treaty of Lisbon Amending the Treaty of the European Union and the Treaty Establishing the European Community*, 13 December 2007, OJ 2007/C 306/01.

To illustrate, this is especially relevant when taking into consideration that in 2008 240,000 asylum applications were made in the European Union.⁹

During this second phase of the CEAS the EU will have to achieve:

- a) a common procedure,
- b) a uniform status for protected persons,
- c) more practical cooperation between Member States' administrations and,
- d) increased support to third countries hosting a large number of refugees.

However, a concrete strategy still has to be drawn up. The European institutions have made suggestions for this purpose.

The goals of the second phase of CEAS are ambitious, but in practice there are obstacles to achieving the goals as mentioned under points a), b) and d). The reason is that asylum is a politically sensitive subject for Member States and is linked to international problems outside the European Union, whereas the EU has to display some unity in handling international problems of this nature. It is also important that the European Court of Justice (ECJ) plays a key role in these developments by explaining the asylum provisions which will improve a common procedure in the Member States. In the last few years we have seen that Member States are more sensitive to the subject of asylum and are willing to reinforce their practical cooperation so as to achieve the ambitious goals of the second phase of the CEAS.

2.1. The Commission's contribution on asylum

In its Communication on "Strengthened Practical Cooperation in the area of asylum",¹⁰ the Commission presents its vision on how Member States should further cooperate on asylum so as to establish a fully harmonised EU system. The Communication in particular sets out a working programme for operational cooperation among the Member States, which should lead to improvements in the efficiency and the quality of their asylum systems.

Additionally, in its Green Paper, the Commission launched a broad debate on the future architecture of the Common European Asylum System (CEAS).¹¹ The Green Paper presents a broad range of issues that will have to be addressed during the second phase. In fact, it identifies four main areas where further action is necessary and these form its four main chapters:

⁸ Council of the European Union, *European Pact on Immigration and Asylum*, 24 September 2008, 13440/08, p. 11.

⁹ European Commission, COM(2009) 262/4, p. 26.

¹⁰ European Commission, COM(2006) 67 final.

¹¹ European Commission, COM(2007) 301.

- 1) legislative instruments;
- 2) implementation/accompanying measures;
- 3) solidarity and burden sharing, and
- 4) the external dimension of asylum.

Issues and suggestions which were made by a wide range of stakeholders during the consultation process formed the basis for the Commission's Policy Plan on Asylum.¹² Building on the existing and future legal framework, this policy plan defines a road-map for the years ahead and lists the measures that the Commission intends to propose in order to complete the second phase of the CEAS. Yet, the entry into force of the Lisbon Treaty modifies the legal framework in asylum policy.¹³ The new legal basis will have an impact on the time-frame for presenting the proposals outlined in the Policy Plan. This will mean that the deadline for completing the second phase of the CEAS might have to be rescheduled, possibly for 2012.

At present, the Commission has mapped out its key priorities in asylum policy over the next five years (2010-2014) in its Communication, entitled: "*An area of freedom, security and justice serving the citizen: Wider freedom in a safer environment*".¹⁴ This became the basis of the Stockholm Programme which was adopted by the Swedish Presidency in December 2009.

The Stockholm Programme urges the EU to build a fair and efficient common asylum system, which could serve as a model to the rest of the world. Given the current huge disparities in the quality of national asylum systems, this will require:

- 1) solidarity between Member States and non-member countries,
- 2) better cooperation with third countries,
- 3) integration measures for asylum seekers who do not obtain refugee status or subsidiary/supplementary protection,
- 4) systematic evaluation and monitoring of asylum mechanisms,
- 5) joint processing of asylum applications in and outside the EU, and
- 6) extension of regional protection programmes in partnership with the United Nations High Commissioner for Refugees (UNHCR) and the countries concerned.

¹² European Commission, COM(2008) 360.

¹³ The Policy Plan will therefore be implemented under two different legal frameworks: the existing Treaty provisions and those of the TFEU.

¹⁴ European Commission, COM(2009) 262.

2.2. The EP's role in proposing asylum legislation

The European Parliament has also approved a series of proposals revising the current asylum rules. On top of that, it introduced a solidarity clause in order to assist those Member States which claim to be overburdened by asylum seeker demands.

The first legislative proposal which was approved by the European Parliament refers to the right of asylum seekers to adequate reception conditions.¹⁵ The Commission proposal lays down standards that must be guaranteed in terms of housing, food, clothing, health care, financial benefits, free movement and access to work. It also includes provisions for the protection of vulnerable people, such as minors, unaccompanied minors, pregnant women and victims of torture and violence.

The second proposal¹⁶ in the asylum package aims to improve the application and enhance the efficiency of the Dublin Regulation 2003.¹⁷ In particular, it intends to guarantee higher standards of protection for individuals and strengthen the reception capacity of many national asylum systems which have particular pressures placed upon them. It lays down deadlines to make the procedure for determining State responsibility more efficient and faster. It also includes provisions guaranteeing that the needs of all those applying for international protection are covered and sufficient legal guarantees are laid down such as the right to appeal against transfer decisions, including the right to legal aid, representation and family reunification. It also reaffirms the principle that nobody shall be placed in detention because he/she applies for international protection, enabling him/her simultaneously to suspend voluntarily any transfer back to the first Member State of application.

The third proposal seeks to improve the system for comparing asylum seekers' fingerprint data, known as Eurodac.¹⁸ The Dublin system could not work without a system for identifying foreign nationals who have already submitted an asylum application in another Member State. The proposal in the asylum

¹⁵ 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-C6-0477/2008/0244 (COD)).

¹⁶ European Parliament legislative resolution of 7 May 2009 on the proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (COM(2008)-0820-C6-0474/2008-2008/0423(COD)).

¹⁷ 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, OJ L 50/1.

¹⁸ 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 (hereinafter referred to as 'the Eurodac Regulation'), OJ L 316/1).

package upgrades the system's functionality, clarifies the different stages of its operation and lays down rules on data protection.¹⁹

Lastly, a proposal has been adopted regarding the creation of a European Asylum Support Office (EASO) which will be funded under the European Refugee Fund²⁰ and will be situated in Malta. The office will provide expert assistance to help implement EU asylum policy and will strengthen cooperation between the Member States, particularly for those subject to great migratory pressures. It will promote the exchange of good practices and minimise the disparities between recognition rates in different countries. The office will also provide training programmes on asylum for national civil servants. It will put into place an early warning system that enables both MS and the Commission to anticipate large-scale influxes of applicants for international protection. It will also implement the future system of mandatory solidarity for reallocating beneficiaries of international protection. But in order for the EASO to be effective, it is crucial that such an agency is well-resourced and strongly founded on principles of democratic accountability and transparency. To this end, there needs to be full participation and cooperation with the UNHCR, relevant NGOs and other independent asylum experts within the EASO structures.

2.3. The role of the ECJ

The ECJ has a key role to play in the field of asylum. Its rulings on interpretation of the framework legislation contribute to uniform interpretations of the agreed texts. This has an influence on the policies and practices in the Member States. However, the ECJ can only rule if national courts take action. In EU law, cooperation between national courts and the ECJ is ensured through what is known as the preliminary ruling procedure as established in Article 267 TFEU.²¹

Within this procedure, national courts and tribunals can refer questions on the interpretation of European legislation to the ECJ. Subsequent rulings by the ECJ

¹⁹ European Parliament legislative resolution of 7 May 2009 on the proposal for a regulation of the European Parliament and of the Council concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EC) No (.../...) [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) (COM(2008) 0825-C6-0475/2008-2008/0242 (COD)) P6_TA(2009) 0378.

²⁰ European Parliament legislative resolution of 7 May 2009 on the proposal for a regulation of the European Parliament and of the Council establishing a European Asylum Support Office, COM(2009)0066-C6-0071/2009-2009/0027 (COD)). The percentage of funds allocated to the ERF for Community actions, currently 10%, will be reduced to 4% per year from 2010, and the remainder will be available under heading 3A of the financial framework for allocation to the new Office under the annual budgetary procedure, as a contribution towards its funding. It has already been agreed that EASO will have an annual €50 million budget and a staff of 100 people.

²¹ Before the Lisbon Treaty: Article 234 EC.

are binding for all Member States. Before the entry into force of the Lisbon Treaty, however, only national courts and tribunals of last instance were allowed to refer cases to the ECJ (previous Article 68 (1) EC) in the field of Title IV, “Visas, asylum, immigration and other policies related to free movement of persons”. Arguably this limitation was motivated by concerns about the courts’ case load and the fact that the preliminary ruling procedure could have delayed or stopped the national judicial proceedings.²² In that respect, we would like to mention the case of *Elgafaji* (see paragraph 3.4.2) in which the Dutch Council of State called for a preliminary ruling procedure and several national judicial proceedings were stopped.

With the Lisbon Treaty this limitation is now no longer in place and any national court or tribunal can refer questions. However, it is important to note that courts of last instance are even obliged to refer questions as long as a decision on a point of Community law is necessary for delivering its judgement. Courts are exempted from this obligation if “previous decisions of the Court already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the question at issue are not strictly identical” (*acte éclairé*).²³ Another exception applies if the highest court concerned is of the opinion that “the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt about as to the manner in which the question raised is to be resolved” (*acte clair*).²⁴ The court’s information memo assists national courts by providing practical information even though it is not binding in any way.²⁵

Since 1 March 2008 an urgent preliminary ruling procedure has also been applicable to references concerning the area of freedom, security and justice.²⁶ There is also a reference in the Lisbon Treaty²⁷ where the ECJ has to act with the minimum delay if a question referred for a preliminary ruling is raised in a case pending before any court or tribunal of a Member State with regard to a person in custody.

It is good practice for all national courts (including the highest ones) to have an active role in referring a preliminary ruling. The role of the ECJ will be essential in the development of European asylum. In six cases, one of which is mentioned below, the highest national courts have asked for a preliminary ruling²⁸ but the

²² European Commission, COM 2006(346), p. 8

²³ See *supra* note 21, para.14

²⁴ *Ibid.*, para. 16

²⁵ The information note is available at: <http://curia.europa.eu>. 2009/C 297/01

²⁶ PB L 24 of 29 January 2008, p. 39-43: Article 23 bis Statute and Article 104 bis Rules of Procedure of the Court of Justice.

²⁷ Article 267 TFEU.

²⁸ First Case: *Elgafaji*, reference made by the Dutch Court about Article 15 (c) of Directive 2004/83/EC, C-465/07; Second case: *Petrosian*, reference made by the Swedish court about Article 20 (1) (d) of Regulation No

ECJ has already decided in four cases.²⁹ Furthermore, it is interesting to note that the European Commission has the power to initiate infringement proceedings in cases where Member States fail to fulfil an obligation such as they fail to notify, transpose or implement the mentioned directives.³⁰ We believe that it necessary that the European Commission is active to initiate infringement procedures against Member States who have failed to fulfil their obligations. This can improve the development of policies and practices in the Member States in the asylum area.

3. Strengthening minimum standards in asylum procedures

As mentioned above, the problem with the existing legislation is that Member States have a wide margin of discretion because the legislation merely obliges Member States to adhere to minimum standards. As a result, the success of policies is highly dependent on Member States' policy implementation. In this section, further information on the previously introduced EU policies will be presented and there will be a discussion on corresponding examples of good Dutch policies and practices as well as some other examples of practices which can be regarded above the minimum standards. Additionally, the role of the European Court of Justice will be examined.

This analysis will serve to examine further the impact and potential of the current EU framework as well as the need to put into place the second phase of the CEAS. Creating a single asylum space will ensure that European citizens have confidence in a system that offers protection to those who require it and deals fairly and efficiently with those without protection requirements. In the subsequent sections, EU legislation and relevant national practices will be discussed and evaluated one by one.

Since civil servants first and foremost face difficulties with the implementation of the Asylum Procedures and Qualifications Directives, this paper will deal first with the national practices and policies related to the Reception Conditions Directive (2003/9/EC). Nevertheless, as it is one of the relevant harmonising legal instruments, it should be noted at least that it guarantees minimum standards for the reception of asylum seekers, including housing, education and health. Ensuring a high level of harmonisation with regard to reception

343/2003, C-19/08; Third case: *Aydin Salahadin* and others, reference made by the German court about Article 11 of Directive 11 (1) (e), Cases C-175/08-C-179/08; Fourth case: *Bolbol*, reference made by the Hungarian court about Article 12 of Directive 2004/83/EC, case 31/09, Fifth case: *B* (C-57/09) and *D* (C-101/09) reference made by the German court about Article 12(2)(b) and (c) of Directive 2004/83/EC and sixth case: *Gataev* (C-105/10 PPU) about the relationship between the provisions of Directive 2005/85/EC and the provisions of Decision 2002/584/JHA (European arrest warrant).

²⁹ ECJ, 17 February 2009 in the case of *Elgafaji*; ECJ, 29 January 2009 in the case of *Petrosian*; ECJ 2 March 2010 in the cases of *Salahadin* and others; ECJ 17 June 2010 in the case of *Bolbol*.

³⁰ Article 258 TFEU.

conditions of asylum seekers is crucial if secondary movements are to be avoided. However, according to the information already available on the implementation of this Directive in practice, the wide margin of discretion left to Member States by several key provisions of this directive results in negating the desired harmonisation effect.

As the Netherlands will be taken as the main country of reference, it should be noted beforehand that the main legal framework document in the field of migration and asylum in the Netherlands, is the Aliens Act 2000 (*Vreemdelingenwet 2000 (Vw 2000)*) which has been in force since 2001. It stipulates the conditions for foreign nationals to enter the Netherlands, the issue of residence permits and removals, for both the asylum and non-asylum (immigration) categories. The act is extended to various types of secondary legislation; the most important is the Aliens Act implementation guidelines 2000 (*Vreemdelingencirculaire 2000 (Vc 2000)*).³¹

3.1. The Asylum Procedures Directive (2005/85/EC)³²

In general, this directive is intended to ensure that throughout the EU, all procedures at first instance are subject to the same minimum standards. Both accelerated and regular procedures provide the same safeguards for applicants (for example, the right to be invited to a personal interview) as well as the basic principles and guarantees relating to interpretation and access to legal aid. The directive also introduces the obligation for all Member States to ensure an ‘effective remedy before a court or tribunal’ and such judicial scrutiny goes well beyond the abovementioned standards. Furthermore the directive has provisions on border procedures and inadmissible applications. This directive allows a large degree of flexibility in many areas and allows the Member States a wide margin of discretion. In the following section, we will highlight a number of the main features of this directive.

3.1.1. Access to the procedure- Article 6 Directive 2005/85/EC

An application can be made in person and/or at a designated place. In Article 6 (2) of Directive 2005/85/EC, it states that a person has the right to make an application. In practice it is very important that a police officer (especially the border police) recognises that a person wants to make an asylum application. From that perspective, there is the problem that a person who wants to make an asylum application does not often speak the language or they do not mention the words ‘asylum’ during their interview with the police officer. Therefore, the

³¹ There are also operating instructions which are in principle made public. Access to the instructions may be restricted on grounds laid down by Act of Parliament.

³² Proposal of the European Commission to change this Directive, COM(2009) 554.

authorities need to develop means for recognising an asylum application such as screening interviews, statement of evidence form, attendance of specialist lawyers and the provision of courses for the most commonly used languages by asylum seekers.

3.1.2. Personal interview- Article 12

When the asylum application is made in the Netherlands the person has two interviews. This is in line with Article 12 of the directive. During the first hearing at the reception centre, the asylum seeker is interviewed about their identity, nationality and their travel route. In the second hearing, also at the reception centre, the asylum seeker is asked about the reason(s) for applying for asylum. Reports are written on both hearings. The asylum seeker has the opportunity to make corrections and additional comments on the reports. It is essential to mention that before the hearing the asylum seeker is informed that the interviews will be handled confidentially and that he/she is obliged to state all the relevant facts. At the end of both hearings, the asylum seeker is asked whether they feel that they had the opportunity to state all the details and whether they wish to provide any supplementary information.

In practice, the difficulties encountered in the Netherlands are usually with regard to the personal interview of vulnerable persons such as women, minors, and people with medical and psychological problems. These groups are vulnerable because some of them might have experienced (sexual) violence or other traumatic experiences of torture in their country of origin or during their journey. The authorities devise appropriate interview techniques and provide common guidelines for interviewing those persons.

3.1.3. Requirements for a personal interview- Article 13

The quality of the interview conducted with the asylum seeker is very important because it can better safeguard his/her procedural rights and avoid situations of *refoulement*. A good practice is to train and educate the interviewer adequately. Furthermore, an interpreter should be able to ensure there is appropriate communication with the asylum seeker. In this context, the judgment of the Dutch Council of State of 18 March 2005 should be mentioned.³³ The interpreter in this case did not understand the dialect which the asylum seeker was speaking. The Dutch Immigration and Naturalisation Service (IND) delivered its judgement on the basis of the translation made by the interpreter. The Council of State quashed the decision of the IND because it considered that the communication between the interpreter and the asylum seeker was not

³³ Dutch Council of State, 18 March 2005, JV 2005/188, LJN: AT2570.

appropriate. It is crucial that at all instances the interpreter is able to ensure that there is appropriate communication. If this is not the case, the interpreter has to mention that they are not able to understand the language spoken by the asylum seeker, whereby the immigration authorities have to make firm agreements with the interpreter in advance.

3.1.4. Free legal assistance -Article 15

The asylum seeker is entitled to legal assistance and representation. Article 15 (3) (a) stipulates that “Member States may provide in their national legislation that free legal assistance and/or representation is granted only for procedures before a court or tribunal in accordance with Chapter V” (on appeals procedures). It will not be granted for any onward appeals or reviews provided for under national law, including a rehearing of an appeal following an onward appeal or review.

Furthermore, Article 15 (3) (d) 2005/85/EC states that Member States may provide for this in their national legislation “only if the appeal or review is likely to succeed”. Although, in general, if such a provision is allowed it should not result in asylum seekers or their legal assistants being deterred from appealing against a contentious decision by the Ministry. That could be the case where the appeal was lodged on reasonable grounds, but it was nevertheless rejected. If a Member State applies this rule in its national legislation, it should allow in practice for the recovery of free legal aid for cases in which the appeal never had any reasonable chance of success (e.g. in relation to unfounded and manifestly unfounded applications).

In the Netherlands an asylum seeker lacking sufficient resources has the opportunity to obtain free legal assistance in the first instance and in the procedures before the courts. The Dutch rule can be seen as a good practice because the asylum seeker has the opportunity to obtain free legal assistance during the procedure. However, taking into consideration that in the Netherlands there has already been some criticism about the quality of lawyers and legal representatives in the field of the asylum law, it is important to ensure that the quality of the free legal assistance is good. To improve the quality of the lawyers and legal representatives at a higher level, it is advisable to provide some training on asylum law, including international developments and to organise some form of peer review.

3.1.5. Detention - Article 18

“Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum”.³⁴ Where an applicant for asylum is held in detention, Member States shall ensure that there is a possibility of speedy judicial review”. Also, Article 5 of the ECHR (the right to liberty and security) fully applies to the detention of asylum seekers or irregular immigrants.³⁵ Furthermore, Article 6 of the Charter of Fundamental Rights will also apply, with the exceptions of the UK, Poland and the Czech Republic.³⁶ The rights in Article 6 of the Charter are the rights guaranteed by Article 5 of the ECHR, and in accordance with Article 52(3) of the Charter. They have the same meaning and scope. Consequently, the limitations which may legitimately be imposed on them may not exceed those permitted by the ECHR, in the wording of Article 5 of the ECHR. Article 52 paragraph 3 of the Charter is intended to ensure the necessary consistency between the Charter and the ECHR by establishing the rule that, in so far as the rights in the present Charter also correspond to the rights guaranteed by the ECHR, the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the ECHR. This means in particular that the legislator, in laying down limitations to those rights, must comply with the same standards as are fixed by the detailed limitation arrangements laid down in the ECHR. These are thus made applicable for the rights covered by this paragraph, without thereby adversely affecting the autonomy of Union law and that of the ECJ. We believe that in the near future questions will arise about the Charter and the relation between the Charter and the ECHR. In that respect, when these questions arise in the context of a national dispute, the national courts should actively refer to the ECJ, according to the preliminary procedure. The ECJ then plays a key role in the development of the Charter and human rights. When the European Union accedes to the ECHR, the ECHR will be the final instance that will have to provide an explanation on human rights.

Every year several thousand irregular migrants and asylum seekers are detained in the Netherlands.³⁷ Asylum seekers arriving by plane are routinely subjected to

³⁴ The detention may only occur exceptionally, for the shortest possible time and only for the following reasons: a) to verify the identity of the refugee, b) to determine the elements on which the claim to refugee status is based, c) to deal with situations where refugees have destroyed their travel and/or identity documents or have used fraudulent documents, and d) to protect national security or public order.

³⁵ 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. The ECJ has recently decided in its judgment of 30 November 2009, *case Said Shamilovich Kadzoev (Huchbarov)*, C-357/09 using the Urgent Preliminary Procedure (PPU) that only the Directives 2003/9/EC and 2005/85 are applicable for asylum seekers who have already applied for asylum and not the Directive 2008/115/EC for returning illegally-staying third-country nationals.

³⁶ Protocol No. 30 annexed to the TFEU on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom; Conclusions of the European Council of 29 and 30 October 2009 state that Protocol No. 30 will also apply to the Czech Republic (Doc 15265/09 Conclusion 2).

³⁷ Each year some 20,000 irregular migrants and asylum-seekers are detained in the Netherlands, where the use and duration of detention and other restrictive measures is increasing. According to government figures, around 4,500 irregular migrants and asylum seekers were subject to administrative detention in the first half of 2008.

border detention during and immediately following the accelerated asylum determination procedure at the Schiphol Application Centre. If further investigations are deemed necessary beyond the 48-hour accelerated procedure and in certain other circumstances (e.g. when objections are raised and appeals have to be judged), asylum seekers may face continuous border detention. In contrast to Greece, where the maximum time limit for detention is up to three months and every detainee is provided with some information leaflets regarding rights in the Netherlands although it is subject to periodical control by a judge, there is no maximum term to hold an alien in detention.³⁸

Additionally, due to international criticism from migrant NGOs dealing with immigration and the European Committee for the Prevention of Torture (CPT) on the unacceptable conditions of the detention boats in terms of living and hygiene standards, the Dutch State Secretary of Justice has decided to no longer use them. If the conditions in a detention centre or on a boat do not meet the standards, this cannot be seen as a good practice and will not be in line with the ECHR and Fundamental Rights. In this context, good initiatives involving national border authorities, UNHCR and NGOs working together to ensure compliance with human rights standards at the borders and detention centres are warmly welcomed. For example, tripartite border monitoring agreements which provide UNHCR and NGOs partners' permission to visit border areas and detention centres are already in place in Hungary, Slovenia, Slovakia and Romania.³⁹

A further remark relates to the position of minor asylum seekers in detention. In Dutch practice, unaccompanied minor asylum seekers were detained in detention centres. Amnesty International as well as the Commissioner of Human Rights criticised this practice because of a lack of sufficient reasoning for detention.⁴⁰ The Dutch authorities have carried out an evaluation of the new Asylum Law 2000 and have concluded that this practice should stop.⁴¹ They have also announced their intention to improve medical care in detention

Report by the Commissioner for Human Rights, Mr Thomas Hammarberg, on his visit to the Netherlands; 21-25 September 2008; For the attention of the Committee of Ministers and the Parliamentary Assembly; Strasbourg, 11 March 2009. Amnesty International Reports, "The Netherlands: The detention of irregular migrants and asylum seekers", 27 June 2008 and 21 July 2009.

³⁸ In Articles 15 (5) and (6) of the return Directive 2008/115/EC, however, it is suggested that there will be a maximum term of six months and in specific cases of up to eighteen months detention. The Dutch authorities have already informed the Commissioner for Human Rights that with the implementation of the EU-return Directive (2008/115/EC), generally alien detention will be limited to six months, with a maximum stay of up to 18 months under specific circumstances.

³⁹ European Council on Refugees and Exiles, Memorandum to the Swedish Presidency, "Putting protection back at the heart of EU asylum policy", June 2009, p. 3.

⁴⁰ Report by the Commissioner for Human Rights, Mr Thomas Hammarberg, on his visit to the Netherlands; 21-25 September 2008 for the attention of the Committee of Ministers and the Parliamentary Assembly; Strasbourg, 11 March 2009.

⁴¹ *State Secretary of Justice*, 29 January 2008, TK 2007-2008, 29344, no 66.

centres. The detention of unaccompanied minor asylum seekers will be restricted to situations where detention is absolutely necessary and in the best interests of the child. In this example, the pressure exerted by international organisations on respecting human rights have led to the adoption of a best practice.

3.1.6. Accelerated procedure- Article 23

The possibility of implementing the accelerated procedure is mentioned in Article 23 (3) of Directive 2005/85/EC. In Article 23 (4), 15 examples are described in points (a-o).

In the Netherlands, the current asylum procedure begins with an initial assessment of the asylum request in an application centre⁴² run by the IND. A maximum of 48 (procedural) working hours are allotted in order to carry out this assessment, known as the “48-hour accelerated procedure”. These 48 hours are spread across a number of working days, amounting to around five working days.⁴³

When the IND decides that the nature of the case does not allow for a decision to be made within the 48 working hours, the procedure continues in the reception centre, known as the “general” procedure. In principle the IND is required to take a decision within six months. If the IND concludes that the asylum seeker meets the conditions for an asylum residence permit, a temporary residence permit is first granted. After five years the asylum seeker may apply for a permanent asylum permit. In approximately 40% of asylum applications, a decision is handed down within the accelerated procedure.⁴⁴ The Dutch authorities have always claimed that they will not lay down specific criteria determining which cases can be examined under the accelerated procedure. Moreover, they have publicly announced that they are keen to use the accelerated procedure on a regular basis to obtain a faster and more effective asylum procedure. In the view of the Dutch authorities the accelerated procedure, including the appeal, has been well-used so far.

However, numerous stakeholders such as the UNHCR, NGOs and bodies of the Council of Europe⁴⁵ have criticised the current accelerated procedure mainly due

⁴² Schiphol (arriving by air or sea) and Ter Apel and Zevenaar (arriving by land).

⁴³ The assessment is carried out in 8 steps; 1) reporting, 2) registration, 3) the initial interview, 4) the initial assessment, 5) the detailed interview, 6) the report and intended decision, 7) the response of the asylum seeker to the intended decision, 8) the decision in the application centre, residence or departure.

⁴⁴ Report of the European Commissioner on Human Rights of 13 March 2009 (Mr Thomas Hammarberg on his visit to the Netherlands 21-25, September 2008), p. 13; the 3rd report of ECRI (European Commission against Racism and Intolerance) of 28 June 2007 mentioned that in 2006 42% of all asylum applications were examined in the accelerated procedure.

⁴⁵ Commissioner on Human Rights and ECRI.

to a lack of safeguards and an excessively short length. The 48-hour accelerated procedure is seen as not providing sufficient safeguards and creating excessive time pressure. It entails a potential risk of unjustified expulsion or *refoulement* and has a detrimental effect on vulnerable groups such as women who do not immediately inform the authorities that they have been subjected to violence or sexual persecution.

When asylum cases are examined in the accelerated procedure this can have an effect on the quality of the decision and the quality of the procedure. The reason is that everything is examined with too much speed. During this procedure the asylum seeker has the opportunity to receive legal assistance. But the time for this is rather short and consequently the majority of the decisions are quashed by the courts, in contrast to cases where the general procedure applies. The reason for the courts quashing these decisions is that the decisions are not sufficiently motivated. In June 2008 the Ministry of Justice, in a letter to parliament, proposed changes to the current procedure. According to the Ministry, the reform aims towards a more effective asylum procedure and return policy. Its objective is to extend the current 48-hour accelerated procedure (five working days) to eight days and to process more asylum claims within this period. A rest and preparation period is introduced so as to be used for registration, medical examination and informing the applicant by the Dutch Refugee Council and legal aid providers.

Consequently, national authorities have to balance all possible positive and negative effects when examining cases in the accelerated procedure. A fast procedure is certainly suitable for clear-cut cases, such as manifestly unfounded or well-founded claims, but it can be detrimental to all other cases and is clearly unsuitable for vulnerable persons such as victims of violence and unaccompanied children.

3.1.7. Appeal procedure - Article 39

With regard to the right to appeal, the courts in the Netherlands do not make an assessment on the merits, but only examine points of law. The courts will assess the facts briefly whereas the question as to whether a person is a refugee or needs subsidiary protection will be examined fully. In the Netherlands there is a discussion on whether the marginal judicial review in the Dutch asylum procedure is in line with Articles 3 (prohibition of torture and other forms of ill-treatment) and 13 of the Convention (the right to an effective remedy). In Dutch literature some conclude that the limited standard of judicial review applied by Dutch courts does not meet the minimum of effectiveness and violates Article

13 of the Convention.⁴⁶ The Council of State has given a number of reasons why the limited judicial review in Dutch asylum law is in line with Article 13 of the Convention. An example is the judgment of 11 December 2003:⁴⁷

"In the judgments against the United Kingdom,⁴⁸ the question whether there is an effective remedy if the national judge does not form his own opinion on the credibility of the asylum seeker's application but limits himself to a review of the administration's assessment has also been discussed. The ECtHR has considered, in short, that a remedy is effective, if the stated violation of Article 3 of the ECHR can be dealt with in front of a judge who can quash the challenged decision on the grounds that the decision could not have been reasonably taken in the first place. The fact that the review takes place against a background of criteria which are applicable when assessing the legality or lawfulness of administrative decisions is insufficient to maintain that this standard is ineffective."

In principle limited judicial review does not necessarily violate Article 13 of the ECHR. The ECtHR has accepted a limited judicial review which appears to be less marginal than the marginal judicial review in the Netherlands.⁴⁹ In those cases the judge was allowed to come to other conclusions about the plausibility of the stated fear or risk.⁵⁰

The current limitations to the introduction of further evidence will be eased in due course. Consequently, the courts will be allowed to consider new circumstances and policy changes at the appeal stage. At the same time, the IND will consider the new circumstances proposed at the appeal stage using their own initiative and verify if these could lead to another outcome.

It is interesting to note that appeals in the Netherlands under this procedure do not have a suspensive effect and therefore applicants are not allowed to wait for the outcome of their procedures. Instead, they must leave the country. The applicant can certainly apply to a district court for an injunction to prevent expulsion. If this is the case, the IND will not remove the person during the injunction.

⁴⁶ Essakili, Marginal judicial review in the Dutch asylum procedure, Faculty of Law Amsterdam, June 2005; Spijkerboer en Vermeulen, Vluchtelingenrecht, Nijmegen, 2005, p. 295-296.

⁴⁷ Council of State, 11 December 2003, JV 2004/52, LJN: AO2132.

⁴⁸ *D. v. The United Kingdom*, application no. 30246/96; *Hilal v. The United Kingdom*, application no. 45276/99; *Bensaid v. The United Kingdom*, application no. 44599/98.

⁴⁹ For example, *Vilvarajah and others v. The United Kingdom*, application no.13163/87; 13164/87; 13165/87; 13447/87; 13448/87; *Hilal v. The United Kingdom*, application no. 45276/99.

⁵⁰ Essakili, Marginal judicial review in the Dutch asylum procedure, Faculty of Law Amsterdam, June 2005, p. 61.

UNHCR has consistently suggested that the suspensive effect of asylum appeals is a critical safeguard to ensure respect for the principle of *non-refoulement*.⁵¹ Such a safeguard can be considered a best practice following the jurisprudence of the ECtHR in case *Abdolkhani v. Turkey*.⁵²

Furthermore, it has been claimed that the judicial review in the Netherlands is not in line with Article 13 of the ECHR (the right to an effective remedy). In essence, there are a number of Dutch cases pending before the ECtHR where asylum seekers complain that the Dutch system is not in line with Article 13, in combination with Article 3 of the ECHR.⁵³ In their view, the courts should also review the facts fully. When seen from this perspective, it is important to consider possible jurisprudence of the ECtHR as it might be the case that it decides that there is a violation of Article 13, thus leading to an adjustment in the (Dutch) jurisprudence and policy.

3.2. Directive 2004/83/EC

Based on the Geneva Convention, the Qualifications Directive (2004/83/EC)⁵⁴ contains a clear set of criteria for qualifying either for refugee or subsidiary protection *status* and sets out what rights are attached to each *status*. Significantly, the directive also introduces a harmonised regime for subsidiary protection in the EU for those persons who fall outside the scope of the Geneva Convention but who nevertheless still need international protection, such as victims of generalised violence or civil war. This is increasingly important as the number of persons in need of this type of protection is growing both in Member States and on a worldwide scale.

Despite the efforts to harmonise national rules, the UNHCR study entitled '*Asylum in the European Union, a study of the implementation of the Qualification Directive*',⁵⁵ demonstrates that Member States still tend to have different interpretations on important subjects such as actors of persecution of serious harm (Article 6), actors of protection (Article 7), serious harm in general (Article 15) and serious harm in situations of international and/or internal armed conflict (Article 15(c)). As the interpretation determines a protection seekers' status it especially raises human rights concerns.

⁵¹ UNHCR Comments on the plans of the Government of the Netherlands for "a more careful and faster" asylum procedure, UNHCR Regional Representation Brussels, September 2008.

⁵² ECtHR 22 September 2009 *Abdolkhani v. Turkey*, application no. 30471/08, p. 116.

⁵³ For example, *Mir Ifsahani v. The Netherlands*, application no. 31252/03; *Saraian v. The Netherlands*, application no. 20816/05; *M.E. v. The Netherlands*, application no. 21258/03. These cases are struck out by the Court because the asylum seekers were granted a residence permit as part of a general scheme.

⁵⁴ Proposal of the European Commission to change this Directive, COM(2009) 551.

⁵⁵ This study was published on 1st November 2007 and it can be found on www.unhcr.org.

The UNHCR has called for a quality check within the EU, for guidelines to be developed and decision makers to be trained. In this respect, there needs to be a reference to the European Asylum Support Office.⁵⁶ From now on this agency will not have decision-making powers. It will engage in supporting activities that serve as incentives to practical cooperation on asylum such as recommendations, referral to scientific authorities, networking and pooling of good practices, evaluations of the application and implementation of rules. The following examples illustrate how major concepts are to be understood.

3.2.1. Assessment of the evidence: Article 4 (5) Directive 2004/83/EC

The asylum decisions made by the IND are partly based on the information given by the Dutch Ministry of Foreign Affairs, already contained in the official country reports (*ambtsberichten*). The NGO Refugee Council and the national ombudsman, however, have often questioned their accuracy as for example the use of country of origin information varies greatly in the EU.⁵⁷ It is good practice for national authorities always to draft their own reports and use those of NGOs. The decision makers should be required to obtain and treat legally relevant, objective, up to date and transparent country of origin information.

In the Netherlands, the policy rules appear to be stricter than what could be characterised as an example of less good practice in relation to assessing applications for international protection (Article 4 (5) of Directive 2004/83/EC). In such cases, an asylum application can be considered credible if it contains no gaps, vagueness, or inconsistencies in relevant details; the asylum account must have to be “positively convincing”. The decision of the administrative body contains the facts as well as the legal review which is made in the individual case. If the authority rejects an application for international protection, it has to justify itself to the asylum seeker, and this assessment procedure can be considered good practice.

3.2.2. Serious harm in situations of international and/or internal armed conflict: Article 15 (c)

There was a dispute before the Dutch Council of State between Mr Elgafaji and the Dutch State Secretary for Justice concerning a refusal to grant an asylum residence permit.⁵⁸ The dispute focused on the interpretation of Article 15 (c) of Directive 2004/83/EC. The Council of State decided to make a reference to a preliminary ruling as regards the interpretation of Article 15(c) of Directive 2004/83/EC, in conjunction with Article 2(e) of that directive.

⁵⁶ European Commission, COM 2009 (66).

⁵⁷ Such inaccuracies are well stated in the Dutch National Ombudsman report published on 27 September 2007.

⁵⁸ *Elgafaji v State Secretary of Justice*, Case C-465/07, European Court of Justice, 17 February 2009.

The referring court asked, in essence, whether Article 15(c) of the directive, in conjunction with Article 2(e) thereof, should be interpreted to mean that the existence of “a serious and individual threat” to a civilian’s life or person’s eligibility for subsidiary protection depends on providing evidence that they are specifically targeted by reason of factors particular to their circumstances. If this is not the case, the referring court asks to know the criterion upon which the existence of such a threat could be established.

If a substantial number of cases pending before national courts cannot be resolved without a decision by the ECJ, national courts should inform the ECJ of this state of affairs, as it may well prompt the court to grant priority to cases, where possible. This practice of a national court can be defined as a good practice. In the Netherlands, there were more than 100 cases pending before courts and many cases were stopped at the IND.

On 12 October 2007 the Dutch Council of State made a reference for a preliminary ruling asking for an interpretation of the provision.

The order for reference was accompanied by a request that the case should be granted priority, for the following reasons:

Firstly, there were 65 cases pending in which the directive was a key issue and the Dutch Council of State expected this number to increase substantially due to upcoming requests for preliminary rulings. Secondly, the Dutch Council of State stressed the uncertainty of the alien in question remaining there until the issue was resolved.

On 19 November 2007, the Dutch Council of State was informed by the ECJ that it would grant the case ‘priority’. In the meantime, a large number of Member States submitted written observations. Over a year later, (17 February 2009), the ECJ announced its decision.

The ECJ concluded that the existence of a serious and individual threat to a civilian’s life or person’s eligibility for subsidiary protection is not subject to the condition that the applicant adduces evidence that they are specifically targeted by reason of factors particular to their personal circumstances.⁵⁹ The existence

⁵⁹ *Ibid.*, para. 43: "Article 15(c) of the Directive, in conjunction with Article 2(e) thereof, must be interpreted as meaning that the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances; the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place – assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred – reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat."

of such a threat can *exceptionally* be considered to be established where the degree of indiscriminate violence characterising the armed conflict is very high “that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat.”⁶⁰

It is worth noting that the ECJ clarified in its ruling that the interpretation of Article 15(c) of the directive, in conjunction with Article 2(e) thereof, is fully compatible with the ECHR⁶¹ as well as the case law (*N.A. v. the United Kingdom*, paragraphs 115 to 117)⁶² developed by the ECtHR with regard to Article 3 of the ECHR (prohibition of torture and other forms of ill-treatment).

The ECtHR declared that, “from the foregoing survey of its case law, it follows that the court has never excluded the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention. Nevertheless, the court would adopt such an approach only in the most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return.⁶³ Exceptionally, however, in cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court has considered that “the protection of Article 3 of the Convention enters into play when the applicant establishes that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned...”⁶⁴ In determining whether it should or should not insist on further special distinguishing features, it followed that the court may take account of the general situation of violence in the country. It considered that it is appropriate to do so if the general situation means that it is more likely that the authorities (or any persons or group of persons considered dangerous) will systematically ill-treat the group in question.

In this case, the court concluded that the expulsion of the asylum seeker to Sri Lanka would constitute a violation of Article 3 of the ECHR. The court found that there were substantial grounds for finding that the applicant would attract the attention of the Sri Lankan authorities in their efforts to combat the Tigers. The court took into account the climate of general violence in Sri Lanka and

⁶⁰ *Idem*.

⁶¹ *Ibid.*, para. 28: “... Article 15(c) of the Directive is a provision, the content of which is different from that of Article 3 of the ECHR, and the interpretation of which must, therefore, be carried out independently, although with due regard for fundamental rights, as they are guaranteed under the ECHR. ”.

⁶² *N.A. v. UK*, application. no. 25904/07, ECtHR 17 July 2008.

⁶³ *Ibid.*, para. 115.

⁶⁴ *Ibid.*, para. 116.

other factors present in the applicant's case. In the light of its estimation that those who would attract the attention of the authorities in their efforts to combat the Tigers ran a real risk of being systematically exposed to torture and ill-treatment, it acknowledged that there was a real risk that the authorities at Colombo airport would be able to obtain the records relating to the applicant's detention. Consequently, it was likely that he would be detained and strip-searched which would in turn lead to the discovery of his scars.

It appears, therefore, that a national court has to take into consideration the parallel developments in both Luxembourg and Strasbourg. In that respect, the case *F.H. v. Sweden* is a good example as this is the first case that deals with the provision of an asylum and residence permit to an Iraqi national who had left the country due to his fear of Saddam Hussein and his regime.⁶⁵ In this case, the court concluded "that substantial grounds for believing that the applicant would be exposed to a real risk of being killed or subjected to treatment contrary to Arts. 2 or 3 of the Convention if deported to Iraq, have not been shown in the present case".⁶⁶

The case is another example in which the influence of case law concerning human rights, especially that of the ECHR, is important. It demonstrates that in order to formulate policies on human rights and lay down good practices, national, local and judicial authorities as well as all the other stakeholders involved in the field of asylum should be familiar with and adhere to the case law of the ECtHR. This can be achieved by coordinating policies and providing permanent training for decision makers and policy makers.

3.2.3. Article 1F Geneva Convention- Article 12

(a) Status

Article 12 (2) of Directive 2004/83/EC states that "a third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that". The grounds of Article 12 (2) of Directive 2004/83/EC are similar to the exclusion clauses (Article 1 F) of the 1951 Convention relating to the status of refugees. The main issue, in practice, is how Member States interpret Article 1 F of the convention. With regard to the Netherlands, the authorities refer in their policy to the Rome Statute of the International Criminal Court. This policy can be seen as good practice because no provision in this statute relating to individual criminal responsibility shall affect the responsibility

⁶⁵ *F.H. v. Sweden*, application 32621/06, ECtHR 20 January 2009.

⁶⁶ *Ibid.*, para. 105.

of the States under international law.⁶⁷ A practice that is not quite as good is a Member State only making a reference to its national criminal code.

(b) Expulsion

Another issue relates to situations where persons excluded from refugee status cannot be deported due to a risk of violating international human rights instruments, particularly Article 3 of the ECHR. It should be mentioned that the Netherlands decided in six cases in 2009 to remove persons to Afghanistan. The Netherlands assumed that these six expulsions would not violate Article 3 of the ECHR. All of them made a complaint to the ECtHR claiming that their expulsion to Afghanistan would lead to a violation of Article 3 of the ECHR. This is another example in which human rights are highly influential.

The question, however, remains in relation to those who are excluded from refugee status and cannot be deported due to a risk of violation of Article 3 of the ECHR.⁶⁸ One solution would be to grant them a form of legal status. A second option is tolerance but without granting any rights or status. The second option is much preferred in Dutch policy and practice as these persons are considered to be a threat to public order and to the international legal order. In Dutch jurisprudence we can observe that when a person cannot be expelled because Article 3 of the ECHR will be violated, the State Secretary of Justice is obliged to justify in the asylum decision whether Article 3 of the ECHR is safeguarded against expulsion.⁶⁹ In this situation there are three conditions to be fulfilled:

- 1- the asylum seeker has been in such a position "*for several years*" that they cannot be expelled and there are no prospects of the situation changing over the long term;
- 2- the asylum seeker has made it plausible that they have made a special effort to leave to another country than their country of origin;
- 3- the asylum seeker is furthermore in a special position in the Netherlands.

If the asylum seeker has fulfilled these three cumulative conditions, the State Secretary is in a position to grant the asylum seeker a permit. In Dutch jurisprudence it is not clear when the asylum seeker has fulfilled the first condition "*for several years*".⁷⁰ The Advisory Commission on Alien Cases advised the State Secretary of Justice that a period of ten years was enough to

⁶⁷ Article 25 (4) of the Rome Statute of the ICC.

⁶⁸ According to information provided by the Dutch government this concerns a group of 40 persons out of 350.

⁶⁹ ABRvS 2 June 2004, 200308845/1, JB 2004,278, LJN: AP2043.

⁷⁰ ABRvS 18 July 2007, 200703247/1, LJN: BB1057: a period of four years was not sufficient enough to fulfil the condition "for several years".

meet the condition "for several years".⁷¹ The question arises as to how this issue will develop in the Netherlands and if such a policy rule is reasonable.

(c) Position of family members

Another political debate concerns the position of family members of persons found to be excluded from refugee status as a result of Article 1F of the Geneva Convention. Although the Return Directive does not forbid the automatic expulsion of family members of non-refugees, family members in the Netherlands have their claims considered on an individual basis. Family members who have an independent reason for asylum can be granted a residence permit. Family members who do not have an independent reason for asylum, because their asylum is related to a person who is excluded from refugee status as a result of Article 1F of the Geneva Convention will not be granted a residence permit and may be expelled. In June 2008, the Dutch government explained its new policy which is related to family members who do not have an independent reason for asylum. It announced that it would remain firm on not issuing a residence permit for suspected war criminals but would seek a solution for family members who do not have an independent reason for asylum. Therefore, after a period of 10 years, an asylum request could be well considered for family members of persons not being granted refugee status. The question is whether such a policy rule is reasonable.

3.2.4. Access to integration facilities: Article 33

With regard to integration, Article 33 affirms that, “in order to facilitate the integration of refugees into society, Member States shall make provision for integration programmes which they consider to be appropriate or create pre-conditions which guarantee access to such programmes”. Recognised refugees often lack effective opportunities to realise and enjoy economic and social rights. Thus, further efforts are needed to develop and apply methodologies and tools which could guide, monitor and evaluate the implementation of integration policies and action plans as they affect refugees.⁷²

Where it is considered appropriate by Member States, beneficiaries of subsidiary protection status shall also be granted access to integration programmes.

Although in this article there is no obligation for Member States to grant access to integration programmes for persons who have been granted subsidiary

⁷¹ ACVZ report May 2008, Artikel 1F Vluchtelingenverdrag in het Nederlands vreemdelingenbeleid, www.acvz.com.

⁷² UNHCR and the Migration Policy Group currently collaborate in order to develop an evaluation tool for refugee integration in the Member States of Central Europe, which is expected to be presented in 2010.

protection, it is desirable to do so as States impose far-reaching limits on employment rights and withhold integration support. Practical cooperation, information exchange, development of evaluation tools and mutual recognition of positive asylum decisions, coupled with broader entitlements for beneficiaries of international protection to move and reside within the EU could actually facilitate their integration.

3.2.5. Policy recommendations for one *status*

In the Hague Programme (2004-2009), there is a call for uniform protection. Moreover, within the Commission's Green Paper on the CEAS,⁷³ it is suggested that one single uniform status, i.e. a protection status comprising a uniform set of rights should be granted to both refugees and persons enjoying subsidiary protection. Such a status would bring some benefits, such as discouraging applicants from appealing decisions granting subsidiary protection in order to obtain refugee status.

In the Netherlands there is one uniform status for refugees and persons eligible for subsidiary protection.⁷⁴ The rights and benefits are the same for both. Furthermore, a person who is granted asylum on national grounds (e.g. humanitarian or categorical grounds) will receive the same rights and benefits as refugees and subsidiary protected persons, thus paving the way for some good practices.

3.3. Dublin Regulation No 343/2003/EC⁷⁵

The Dublin System (Dublin and EURODAC Regulations) was not devised as a burden-sharing instrument but rather as a tool which prevents multiple demands. Its primary objective is to establish quickly which Member State is responsible for the examination of an asylum application made within EU territory, on the basis of fair and objective criteria, and to prevent secondary movements between Member States. Eurodac is an EU-wide electronic system for the identification of asylum seekers. As the 2007 evaluation report has shown, the Dublin System has to a large extent achieved these objectives, though questions remain regarding its effectiveness as a means of reducing secondary movements.⁷⁶

The Member States agree under the Dublin Regulation to:

- examine effectively the application of any alien, for which they are responsible in accordance with a set of (hierarchical) criteria;

⁷³ See *supra* note 2, p. 5.

⁷⁴ Article 29 of the Aliens Act 2000.

⁷⁵ See *supra* note 3.

⁷⁶ Report from the Commission to the European Parliament and the Council on the Evaluation of the Dublin system, COM(2007) 299 final, 6.6.2007, pp. 8, 13.

- attribute responsibility for examining an asylum application to the Member State which played the most important part in the applicant's entry or residence in the Union (exceptions apply);
- the responsible Member State will take charge of the applicant throughout this period and take back an applicant who is illegally in another Member State.

Concerning the Dublin Regulation, two important issues can be highlighted which raise serious concerns. First, it is important to determine which Member State is responsible for the asylum seeker. Although there are criteria for the responsibility of the Member States, problems have arisen when explaining such a responsibility as can be seen from the Petrosian Case.

Second, when an asylum seeker is sent back to another Member State that is responsible for them, it is important to consider the minimum standards on asylum. In essence, there are serious doubts as to whether the law and practice in Greece, in particular, are aligned with the minimum standards as regards the reception conditions and asylum procedures. In several cases, both in the Netherlands and in other Member States asylum seekers have complained that they cannot be sent back to Greece, as Community legislation on asylum procedures is not respected and the high risk of expulsion will lead to a violation of Article 3 of the ECHR as will be later suggested.

3.3.1. The Petrosian case

The *Petrosian* case is an example where the national court made a reference for a preliminary ruling because the actual wording of the provision was not clear. In this case, eight other EU Member States⁷⁷ made an intervention. In short, it was not evident to the national court whether the period for implementation of the transfer began from the time of the provisional judicial decision suspending the implementation of the transfer procedure, or only *from the time of the judicial decision ruling on the merits of that procedure*.

In its question, the national court asked the ECJ to provide a ruling on the interpretation of Articles 20(1)(d) and 20(2) of Regulation No 343/2003. In particular, the court wanted to know whether within the context of a procedure to transfer an asylum seeker, the legislation of the requesting Member State provided for a suspensive effect of an appeal. This would mean that the period for implementing the transfer would run from the time of the judicial decision that had ruled on the merits of the procedure and not from the time of the provisional judicial decision suspending the implementation of the transfer procedure.

⁷⁷ Czech Republic, Greece, Hungary, Austria, Poland, Finland, Norway and the Netherlands.

The ECJ decided that Article 20(1)(d) and Article 20(2) of Regulation No 343/2003 were to be interpreted to mean that, where the legislation of the requesting Member State provided for a suspensive effect of an appeal, the period for implementing the transfer began from the time of the judicial decision that had ruled on the merits of the procedure and which no longer prevented the implementation of the transfer. This finding is conditioned by two other sets of considerations, namely, that judicial protection is guaranteed by a Member State and that the principle of procedural autonomy of the Member States should be respected.

In conclusion, the ECJ played a key role by ruling on the interpretation of Article 20 of the Dublin Regulation, thus, leading to uniform interpretation of the agreed texts.

3.3.2. The situation in Greece

In theory, Member States are allowed to return asylum seekers to the Member State through which they first travelled when arriving in Europe. However, this right is limited in the event that transferring the asylum seeker would endanger a violation of Article 3 of the ECHR. In the Netherlands there are ongoing discussions as to whether an asylum seeker can be removed to, for example, Greece. In 2008, Greece only granted asylum to 379 people out of nearly 20,000 requests; one of the lowest acceptance rates in the EU.⁷⁸

Member States are obliged to review an asylum application in the light of the Geneva Convention, Article 3 of the ECHR and Article 21 of Directive 2004/83/EC which prohibits torture and other forms of ill treatment. If there are concrete indications that a Member State does not review the asylum application following the principles of the Geneva Convention, Article 3 of the ECHR and Article 21 of Directive 2004/83/EC, then the Netherlands will not remove the asylum seeker to that Member State.⁷⁹

The jurisprudence of the ECtHR is also important on this issue, thus showing that developments in the EU should be combined with the jurisprudence of this court. It is worth mentioning the case *K.R.S. against United Kingdom*⁸⁰ where the ECtHR concluded that the UK would not be breaching its obligations under Article 3 of the convention by removing the applicant to Greece. In this case an asylum seeker with Iranian nationality arrived in the UK and claimed asylum. It was discovered that the applicant had travelled through Greece before arriving in the UK. An asylum application was made in Greece so that the State had to

⁷⁸ Kathimerini, AFP, AP – 18/07/09.

⁷⁹ Article 3(2) Regulation No 343/2003/EC.

⁸⁰ ECtHR 2 December 2008, *K.R.S. v. UK*, application no. 32733/08.

assume responsibility based on the Dublin Regulation. Consequently, Greece accepted responsibility. The ECtHR noted that the applicant was Iranian. Following evidence, it was demonstrated that Greece does not currently remove people to Iran. In the ECtHR's opinion, therefore, there was no real risk that the applicant would be removed to Iran. Furthermore, the ECtHR noted that the UK Government's agent from the Greek "Dublin Unit" confirmed that asylum applicants in Greece have a right to appeal against any expulsion decision as well as to seek interim measures under Rule 39 of the court. Nevertheless, there are several cases pending before the ECtHR in which an interim measure based on Rule 39⁸¹ is granted to the applicant.

A discussion that stems from Dutch jurisprudence and is taken up by many commentators concerns the question of whether or not there are concrete indications that a return of asylum seekers to Greece is a contravention of their human rights, and in particular Article 3 of the ECHR. In this discussion, it is necessary to follow the actions taken by the European Commission against Greece⁸² as well as the recommendations made by the UNHCR.⁸³ If there is no such concrete indication, the Dutch Council of State will consider that expulsion to Greece is possible.⁸⁴ It must be recalled that transfer is optional and not mandatory. Article 3(2) of the Dublin Regulation provides for a "sovereignty clause", which allows a State to maintain responsibility for an asylum claim, even if an individual could be transferred elsewhere under the regulation.

At the same time, Greece is concerned about improving immigration and asylum systems, in full compliance with the EU and Council of Europe human rights standards. As the number of asylum applications has been increasing over the last four years (see table below), the constant and intensive commitment of the Greek State in securing the protection of asylum seekers has become all the more necessary.

⁸¹ Rule 39 of the ECtHR declares that even if asylum is refused and all legal rights are exhausted, there is still the possibility to seek redress from the European Court of Human Rights".

⁸² Case *C-476/04 Commission v. Greece* on failing to comply with Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons; Case *C-72/06 Commission v. Greece* on failing to comply with Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers; Case *C-220/08 Commission v. Greece* on failing to comply with 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.

⁸³ On 15 April 2008, UNHCR stressed the persistence in Greece of structural shortcomings in the asylum procedure as a result of which 'asylum seekers continue to remain effectively in limbo, unable to exercise their rights, for prolonged periods of time'. UNCHR Position on the *Return of Asylum seekers to Greece under the "Dublin Regulation"*, p. 7, available at: www.unhcr.org/country/grc.html.

⁸⁴ Council of State, 4 December 2007, 200704910/1.

Table 1 Europe in asylum figures: First instance decisions by outcome

	Total decisions	Total positive decisions	Refugee Status	Subsidiary protection	Humanitarian reasons	Rejected
EU 27	53,935	15,580	6,995	6,470	2,115	38,355
Belgium	:	685	585	100	-----	:
Bulgaria	150	60	10	50	-----	:
Czech Rep.	:	:	:	:	:	:
Denmark	:	:	:	:	:	:
Germany	6,900	2,780	2,375	110	295	4,120
Estonia	0	0	0	0	0	0
Ireland	945	190	25	5	165	755
<i>Greece</i>	<i>5,265</i>	<i>55</i>	<i>10</i>	<i>40</i>	<i>5</i>	<i>5,210</i>
Spain	1,145	85	50	30	0	1,060
France	8,385	1,190	935	255	-----	7,195
Italy	7,120	2,385	485	1,515	380	4,735
Cyprus	1,250	245	10	220	10	1,010
Latvia	0	0	0	0	0	0
Lithuania	35	5	0	5	-----	30
Luxembourg	80	15	15	0	0	0
Hungary	565	105	80	10	15	460
Malta	685	365	15	350	5	315
Netherlands	3,850	1,725	160	655	910	2,125
Austria	1,620	870	450	305	115	755
Poland	1,560	845	30	800	20	715
Portugal	40	20	0	20	----	20
Romania	105	30	10	5	15	75
Slovenia	35	0	0	0	0	30
Slovakia	125	85	5	75	10	40
Finland	825	260	15	220	25	565
Sweden	5,380	1,565	390	1,050	130	3,815
UK	7,185	2,015	1,340	660	20	5,170
Iceland	:	:	:	:	:	:
Norway	3,075	1,285	515	470	295	1,795
Switzerland	2,700	1,295	590	700	----	1,405
Liechtenstein	10	0	0	----	0	10

Source: Eurostat Data in focus – 39/2009 (Population and social conditions)

There have been some positive developments in Greek refugee legislation⁸⁵ and more concerted actions are to be taken towards developing the existing asylum system. Some additional positive steps include the creation of a Committee of Experts on Asylum under the auspices of the Ministry of Citizen Protection, the publication of an information leaflet for asylum seekers in various languages and the establishment of a country of origin information unit. Dialogue between

⁸⁵ Presidential Decree (P.D.) No. 81/2009 (Official Gazette A'99, 30.6.2009) modifying the Presidential Decrees 90, 96/2008 amended P.D. 61/99 regarding the application of Directive 2005/85/EC concerning asylum procedures and Directive 2004/83/EC concerning the qualification of refugee or subsidiary protection; The Presidential Decree 96/2008 was enacted with retroactive applicability because the European Commission had required Greece (and other EU Member States) to transpose Council Directive 2004/83/EC of April 29, 2004 on the minimum standards for the qualification for refugee status by October 10, 2006 and had taken Greece before the ECJ for its failure to do so (Case C-220/08 *Commission v. Greece*). P.D. 167/2008 transposed Directive 2003/86/EC on family reunification; P.D. 220/2007 transposed Directive 2003/9/EC concerning the reception of asylum seekers.

the government and the political parties, initiatives taken by the municipalities as well as discussions with the UNHCR, migrant organisations and refugees are essential for the planning and implementation of special measures for asylum seekers and recognised refugees.

However, asylum seekers in Greece have been found to be unable to have the lawfulness of their detention reviewed by the Greek courts while being held with a view to expulsion. This has been seen in a recent case *S.D. v. Greece*.⁸⁶ By invoking Article 3 of the ECHR (prohibition of inhuman or degrading treatment), S.D., a Turkish national, complained about the conditions in which he was detained for two months in Soufli and Petrou Rali holding facility centres for foreigners, without having any physical exercise, contact with the outside world or medical care. Moreover, on the basis of Article 5, paragraphs 1 and 4, he also complained that he had been detained whilst he was an asylum seeker. Additionally, the administrative court had refused to examine the lawfulness of his detention. The court proclaimed that in Greece, people, who like S.D. could not be expelled pending a decision about their asylum application, but who wished to challenge the lawfulness of their detention found themselves in a legal vacuum.

In addition, Dublin transferees are also exposed to the same difficulties as they cannot be distinguished from other asylum seekers based on their documentation, and are thus exposed to the risk of removal. They are exposed to the same long waiting periods before a decision is made on their asylum claim. When the new procedures entered into force (July 2009), the transferee was released after maximum 24 hours with the obligation to appear before the asylum department in Athens within three days and request an asylum interview. This requirement prevents Dublin transferees, like other asylum applicants, from accessing asylum procedures, and therefore registering their claims in a short period of time, or at all. If a negative decision has been issued prior to or during the individual's absence from Greece, the Dublin transferee will be served with a deportation order, without access to the asylum procedure.

In the light of this situation, UNHCR continues to advise national governments not to return asylum seekers to Greece under the Dublin Regulation. It also encourages them to use Article 3 (2) of the regulation, thus allowing States to examine an asylum application even if such an examination is not their responsibility and to examine Article 15 with regard to unification of extended family members within the EU.⁸⁷

⁸⁶ *S. D. v. Greece*, application no. 53541/07, judgement released by the ECtHR on 11.06.2209, [not yet officially published].

⁸⁷ Office of the United Nations High Commissioner for Refugees (UNHCR), "Observations on Greece as a country of asylum", December 2009, p. 21.

Furthermore, along the lines of establishing a coherent, comprehensive and adequately resourced action plan on asylum, the UNHCR office in Greece has made some recommendations to Greece regarding key protection areas. These include among others:

1. Abolition of any deterrent measures and practices that jeopardise access to the asylum procedure, such as the practice of administrative detention for a longer period of time for aliens who submit asylum applications, (the example of *S.D. v. Greece*), which is applied at certain entry points,
2. Reception conditions at the borders which allow for the identification of all those wishing to apply for asylum and their separation from the remaining categories of aliens,
3. Stronger cooperation with third countries which have no diplomatic representation in Greece (e.g. Afghanistan, Sudan, Mauritania, Somalia etc.) so as to identify asylum seekers better. Such cooperation must be in addition to, and not a substitute for facilitating access to protection within the EU,
4. Right to be informed about their rights and the asylum procedure, with the assistance of interpreters and access to free legal aid so as to prevent situations where Iraqi asylum seekers are effectively unable to appeal negative decisions,
5. Sufficient human resources and continuous training of the competent authorities at the entry points for substantial improvement of the quality of the interviews of asylum seekers (the same observations with regard to the situation in the Netherlands are also applicable here),
6. Fast, fair and efficient processes that reduce the waiting period (2 months to 4 years) for a decision and ensure in-depth examination of an asylum application, with sufficient justification in case of a refusal,
7. Possibilities to apply ‘fast-track’ (accelerated) procedures, only exceptionally as provided by law *so as to avoid the same shortcomings which are raised within the Dutch asylum system*,
8. Particular need for an increase in places intended for the hosting of minors that apply for asylum with creation of new, suitable facilities.

4. Summarising good practices

In an effort to promote an effective CEAS, the following section is a summary of many of the suggestions made for all stakeholders involved in asylum. As can be seen, good practices can be grouped in different categories according to specific actors.

a) Administrators:

- 1- The authorities should develop training programmes for (police, law enforcement) officers in order to recognise a request for an asylum application during an interview. Giving instructions and guidelines to (police) officers in the format of a handbook could also help them in practice.
- 2- The authorities should develop appropriate interviewing techniques and provide common guidelines for vulnerable groups.
- 3- Immigration authorities should make firm agreements with interpreters.
- 4- The authorities should be careful whilst examining cases in the accelerated procedure. A fast procedure is certainly suitable for clear-cut cases, such as manifestly unfounded or well-founded claims, but it can be detrimental to all other cases and it is clearly unsuitable for vulnerable groups such as victims of violence and unaccompanied children.
- 5- The authorities should always use their own reports in combination with reports of NGOs. The decision makers should be required to obtain and treat legally relevant, objective, up to date and transparent country of origin information.
- 6- The decision of the administrative body should contain both the facts and the legal review which is made in the individual case.
- 7- Detention during the asylum procedure should always be used as a last resort, for the shortest possible period, and should be regularly and individually reviewed to ensure that its application is lawful, necessary and proportionate.
- 8- Detention of unaccompanied minor asylum seekers should be restricted to situations where detention is absolutely necessary and in the best interest of the child.
- 9- To better interpret Article 1F of the Geneva Convention national authorities should refer to the Rome Statute of the ICC which upholds standards of international law.

b) Courts:

10- All national courts have an active role whilst referring a preliminary ruling. They should for instance make reference to a preliminary ruling in case the actual wording of the provision is not clear.

11- If the asylum seeker is in detention and the national court wants to make a reference for a preliminary ruling, it should ask the ECJ to use the PPU procedure.

12- If a substantial number of cases pending before national courts depend on the ECJ's decision in order to be resolved, national courts should inform the ECJ of this fact, as it may well prompt the court to grant priority to any such a case, where possible.

13- Suspensive effect of asylum appeals is a critical safeguard to ensure that the principle of *non-refoulement* is respected.

c) Policy Makers:

14- A policy maker should not only follow the developments in the EU concerning this subject but also the developments in the jurisprudence of the ECtHR as well as the observations and recommendations of the UNHCR.

15- An asylum seeker, who lacks sufficient resources, should have the opportunity to receive free legal assistance in the first instance and in the procedures before the courts.

16- *Non-detention of asylum seekers* should be firmly established in domestic law and strictly applied. In cases where asylum seekers remain in detention they should always be informed promptly, in a language they can reasonably understand, of the reasons for their arrest and detention.

17- Member States should grant access to integration programmes for persons who have been granted subsidiary protection.

18- One uniform status for refugees and subsidiary protection is preferable. The rights and benefits should be the same for these groups.

Conclusions

Each nation State is responsible for the control of its borders and safeguarding the rights of its citizens, by checking the identity and the intentions of those who enter its territory irregularly. The conditions of reception and detention of irregular third country nationals should always comply with the full respect of human rights, and human dignity in general. Nevertheless, the common minimum standards for asylum, as agreed upon so far at the EU level, leave a wide margin of discretion to the Member States as to their application. The abovementioned examples of ‘good’ and ‘less good’ practices actually reflect the existing inequality of protection of asylum seekers across the EU. The two-fold aim of improving quality and consistency in a common procedure and guaranteeing respect for human rights through a uniform status should underpin the Stockholm Programme, thereby fulfilling the Pact’s commitment to offer “a higher degree of protection”⁸⁸ in a “Europe of asylum”.⁸⁹

At different points this paper has proposed some structured ways of collecting information on asylum decision-making. This, in addition to the thoughtfulness of all the actors involved may assist Member States to manage their asylum processes more effectively. A systematic assessment of asylum procedures and decisions would enable a timely diagnosis of problems, yield more information, include suggestions for solutions and allow the development of effective measures. It would ensure better accountability, recognition of systems which achieve good results and facilitate harmonisation at EU level on the basis of good practices.

Furthermore, the ECJ (and the ECtHR) is expected to play a major part in ensuring the uniform application of asylum instruments, in particular in clarifying diverging interpretations of certain standards for instance if national courts make preliminary rulings. The ECJ will in essence exercise influence over human rights (including the Charter) and establish cases of best practices for asylum on the grounds that there is cooperation with the ECtHR and alignment with its human rights jurisprudence. Competition or even conflict can only imply higher exposure for each court to the resistance of public and private actors to apply EU and human rights law.

⁸⁸ See *supra* note 8, p. 11.

⁸⁹ *Idem.*, pp. 4, 11.

