Law Reform Proposals for the Protection of the Right to Seek Refugee Status in the European Community

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Abstract

In recent years, the Member States of the European Community (EC) have acknowledged the need for greater cooperation in the field of asylum as they recognised the extra-territorial impact of their laws and policies on asylum. The recognition of the European dimension of asylum matters reached its height with their "communautarisation" by the Treaty of Amsterdam of 2 October 1997 which inserted a Title IV on visas, asylum, immigration and other policies related to free movement of persons.

It follows that provisions on the right to seek refugee status within the meaning of the UN Convention relating to the Status of Refugees now fall within the scope of EC law. Thus, issues arise as to the standards to be set at EC level. In that respect, serious concern has been raised with regard to the protection of the right to seek refugee status within the EC in the light of the restrictive policies developed at both national and European level. It is argued that significant changes in the developing common asylum policy are needed if compliance with international refugee law is to be achieved and the right to seek refugee status safeguarded within the EC.

With this in mind, this thesis makes a number of law reform proposals with a view to preserving the right to seek refugee status, thus setting comprehensive minimum standards designed to ensure compliance with international refugee law. To that end, current EU and EC measures regarding the right to seek refugee status as well as Member States' (France and the United Kingdom) laws and practices are measured against the requirements of international refugee law with a view to identifying their strengths and failings. Whilst a pragmatic approach is recommended in legislating on the right to seek refugee status at EC level, pragmatism shall not prevail over compliance with international refugee law and the latter remains the fundamental requirement. This means that the need to protect the right to seek refugee status within the EC may be balanced out with the Member

States' views on the matter so long as adherence to international refugee law is ensured.

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Chapter I

Introduction

In the aftermath of the horrors of the second world war, a shell-shocked international community realised that it had a duty to prevent the violation of human rights and protect individuals' rights as human beings. To that end, a number of organisations were created and conventions adopted. On 10 December 1948, the General Assembly of the United Nations (UN) adopted the Universal Declaration on Human Rights[1]. In 1951, the United Nations High Commissioner for Refugees (UNHCR) was established by the General Assembly of the UN in order to provide "international protection" and seek "permanent solutions for the problem of refugees."[2] The creation of UNHCR was followed by the adoption on 25 July 1951 of the UN Convention relating to the Status of Refugees[3], referred to as the 1951 Convention. The same year, the European Convention on Human Rights and Fundamental Freedoms (ECHR)[4] was adopted under the auspices of the Council of Europe[5]. In 1957, the European Economic Community was established. Whilst its original activities were confined to the economic sphere, its aspirations, as expressed in the Preamble to the Treaty of Rome, were more ambitions. It stated that its signatories were "[d]etermined to lay the foundations of an ever closer union among the peoples of Europe" and "[r]esolved by thus pooling their resources to preserve and strengthen peace and liberty(...)" The EC institutions were soon to declare their commitment to the protection and promotion of human rights. This

[1] Resolution 217 A(III) of 10 December 1948.

[2] UNGA Resolution 428(V) of 14 December 1950. UNHCR succeeded the International Refugee Organisation (IRO) created in 1946 (18 UNTS 3).

[3] 189 UNTS 150.

[4] The ECHR was adopted on 4 November 1950 (*ETS*, No. 5).

[5] The Council of Europe was created in 1949.

commitment is, *inter alia,* expressed in Article 6 of the Treaty on European Union (TEU) as amended by the Treaty of Amsterdam; Article 6(1) reads that "[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States."

However, this thesis argues that the EC and its Member States are in danger of distancing themselves from that humanitarian vision[6]. In recent years, the climate towards those seeking international protection within the EU[7] has become hostile and the EU has little by little raised the walls of its fortress. While Member State nationals were granted more and more rights as EC nationals and EU citizens[8], third country nationals were increasingly excluded. Stricter controls at external borders were presented as the necessary counterpart of the creation of an area without internal borders. In other words, access to the EU territory was rendered more difficult for third country nationals. With strict immigration laws and policies in force in the Member States[9], this hostile attitude towards third country nationals wishing to enter the EU was primarily felt by those who sought international protection.

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[6] This concern was expressed within the wider framework of the Council of Europe in a report of the Committee on Migration, Refugees and Demography (Doc. 8598, *Restrictions on asylum in the Member States of the Council of Europe and the European Union*, report of the Committee on Migration, Refugees and Demography, Council of Europe, Parliamentary Assembly, 21 December 1999).

[7] Reference to both the EC and the EU is intended to reflect the nature of the framework. Hence, where reference is made to laws and policies developed within the Community framework, the term EC is used whilst the term EU is used in relation to the intergovernmental framework.

[8] Article 2 of the TEU as amended by the Treaty of Amsterdam, third indent.

[9] Due to the economic recession in the mid-70s, the immigration policies of western European countries became increasingly restrictive.

In that context, asylum became an increasingly sensitive issue which has, in the recent years, occupied a predominant place in the political agenda of the EU and its Member States. Whilst originally perceived as a purely national matter, the Member States realised that their policies and laws on asylum had an impact beyond national borders and that cooperation in that area was necessary if the Member States were to attain their objectives. The recognition of the European dimension of asylum matters resulted in their "communautarisation" by the Treaty of Amsterdam of 2 October 1997[10]. This "communautarisation" took the form of a new Title IV on visas, asylum, immigration and other policies related to free movement of persons introduced in the Treaty establishing the European Community (TEC)[11].

Asylum has been the object of heated debates and growing concern at both national and European level. A general trend towards increasingly restrictive asylum policies can be identified from an examination of national and EU measures. People in need of international protection have become "unwanted guests". This hostility towards those in search of a safe haven questions the Member States' commitment to that humanitarian awareness developed in the wake of the second world war in a world where the need for international protection remains acute. More specifically, there are serious doubts as to the compatibility of some EU and national measures with the UN Convention relating to the Status of Refugees which is legally binding upon the Member States. These concerns have prompted the choice of topic for this thesis.

It is argued here that a right to seek refugee status may be inferred from international refugee law and that this right is currently under threat. With this in mind, the aim of this work is to determine the standards that EC law must meet in order to meet international refugee law standards and thus preserve the right in

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[10] OJ C 340/173, 10/11/1997.

[11] The issues regarding the framework for a common asylum policy are examined in chapter II on the EC: a more suitable framework.

question. This is achieved by analysing and measuring the relevant EU measures[12] against international standards with a view to identifying and redressing inconsistencies and deficiencies. It is argued that it is necessary for the EC to adopt a comprehensive approach if it is to fully safeguard the right to seek refugee status. This is reflected in the scope of the research. Four areas of concern have been identified. These relate to the interpretation of the 1951 Convention definition of the term refugee, access to asylum procedures, the establishment of fair and effective procedures and, finally, asylum seekers' status pending determination of their asylum claims. The objective is to secure the compliance of the measures regulating these areas, inherent in the right to seek refugee status, with international standards. In that respect, it is argued that the EC offers a more suitable framework than intergovernmental cooperation. The view taken is that a piecemeal approach would allow breaches of international refugee law to persist and could undermine the positive impact of EC measures in line with international requirements. For instance, the establishment of fair and effective procedures would seriously be jeopardised by national measures restricting asylum seekers' access to these procedures; EC measures securing access would be required[13].

International protection is an extremely complex concept which covers a variety of situations and types of protection. Therefore, it is important to stress that this piece of research is confined to issues regarding the right to seek refugee status within the meaning of Article 1(A)(2) of the 1951 Convention. Other forms of protection as well as the status of recognised refugees within the EC are not examined[14]. This introduction will define the scope of this research as well as the chosen approach. It will also tackle methodological issues and give a survey of the literature before

[12] To date, most of the asylum measures have been adopted within the EU framework; however, with the "communautarisation" of asylum matters, future developments will take place within the EC.

[13] These particular issues are examined in chapter IV on access to substantive asylum procedures and chapter V on fair and effective procedures.

[14] As a result the loss of refugee status is not considered.

determining what are the standards set by international refugee law that EC law must meet.

1. The scope of the research

The focus is on those seeking refugee status within the meaning of Article 1(A)(2) of the 1951 Convention, referred to as asylum seekers[15]; Article 1(A)(2) reads:

"For the purposes of the present Convention, the term "refugee" shall apply to any 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 nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

This definition forms the basis for international refugee law and the standards that it sets are legally binding upon all the Member States as parties to the 1951 Convention. It follows that the EC cannot afford to disregard the Convention definition without the EC endorsing and facilitating breaches of international law.

This focus on the right to seek refugee status within the EC has a number of implications.

Firstly, it means that the position of individuals in need of international protection, but who do not apply for refugee status within the meaning of the 1951 Convention, is not examined. It follows that issues regarding *de facto* refugee and temporary protection are not examined. *De facto* refugees may be defined as "persons who are refugees in a broader sense than that allowed for by the Refugee Convention, but

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[15] They may also be referred to as asylum claimants or applicants for asylum.

who cannot be returned to their country of origin for humanitarian reasons."[16] The concept of *de facto* refugees covers individuals who are in need of international protection, but do not fall within the scope of the Convention definition of the term refugee or have not applied for refugee status. This concept also covers unsuccessful asylum seekers who cannot be returned to their country of origin[17]. The concept of *de facto* refugee is often associated with the concept of temporary protection[18]. These two concepts took a new dimension in the EU with the events in Bosnia and Kosovo. The Member States considered, in general, that those fleeing these events were not entitled to refugee status and protection within the EC was granted on a temporary basis[19]. Whilst it is recognised that refugee status may not have been appropriate in all cases, a quasi-systematic rejection of the claims lodged by individuals who fled these conflicts was not justified. UNHCR agreed that those who sought refugee status on the ground that their place of residence was threatened by war fell outside the scope of the Convention definition. However, UNHCR stressed that a great number of conflicts occurred in a political context which could lead to serious human rights violations against members of particular ethnic or religious groups[20]. According to UNHCR, a situation of internal armed

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[16] Johan Cels, "Responses to European States to de facto refugees" in Loescher and Monahan, *Refugees and International Relations* (Clarendon Press, Oxford, 1990) at p.187.

[17] Issues regarding unsuccessful asylum seekers are not examined as the rejection of their claim means that they loose their status of asylum seeker and thus fall outside the scope of the 1951 Convention.

[18] See, for instance, Karoline Kerber, "Temporary protection: an assessment of the harmonisation policies of the European Union Member States", IJRL Vol. 9 No. 3 (1997) 453-471 and Sophie Albert, *Les Réfugiés Bosniaques en Europe* (Cedin-Paris I, Perspectives Internationales, Monchrestien, Paris, 1995) in particular at p.152-166.

[19] Many of those fleeing these conflicts stayed in refugee camps located close to the borders with neighbouring countries.

[20] UNHCR, Information Note relating to Article 1 of the Geneva Convention (Paragraph 9).

conflict did not justify the use of torture, arbitrary punishment and indiscriminate bombings against certain groups of the population. Such acts could fall within the scope of the 1951 Convention. Hence, when determining an asylum claim, it is vital that the specific circumstances of the case are subject to close examination including an evaluation of the conflict. Secondly, cases where protection is granted outside the EC territory are not considered. This implies, for instance, that issues relating to people who find themselves in refugee camps are not addressed. Finally, the status of recognised refugees within the EC falls outside the scope of this thesis.

This focus on the right to seek refugee status within the meaning of the 1951 Convention is justified by the fact that, to date, this status constitutes the most effective form of protection, particularly when compared to temporary protection. This does not mean that other forms of international protection must be disregarded: different types of protection may address different types of situations and thus different needs. In cases of mass influx of refugees, the individual approach that characterises the Convention may not always be adequate. Indeed, asylum claims are examined on an individual basis and supposes individuals being able to reach a country where they can apply for refugee status.

However, refugee status remains an essential component of international protection as the need for protection on a more permanent basis outside the country of origin is unlikely to disappear. With this in mind, temporary protection, for instance, should not be used to justify curtailments to the right to seek refugee status and thus legitimise restrictive asylum policies in breach of international refugee law.

In determining the standards that EC law must meet in order to preserve the right to seek refugee status, it is argued that pragmatism constitutes the most appropriate approach. However, the latter must apply within the limits of compliance with international refugee law.

2. A pragmatic approach

As already stressed, the purpose of this thesis is to ensure that the right to seek refugee status is fully implemented within the EC. In recent years, asylum seekers have faced increasing hostility which manifested itself through the adoption of increasingly restrictive measures on asylum at European and national level.

It is argued that two elements need to be taken into consideration in establishing EC standards regarding the right to seek refugee status, namely the need to comply with international refugee law, but also the need to acknowledge Member States' views on the matter. Reference to the Member States' positions considering their restrictive nature may, at first glance, appear paradoxical. However, the view taken is that totally ignoring the Member States' views on the grant of refugee status would be detrimental to asylum seekers' rights as the Member States retain an input in the EC decision-making process through the Council. This means that compromises may have to be found if the right to seek refugee status is to be preserved within the EC. In other words, a pragmatic approach is needed.

Pragmatism, however, should not jeopardise compliance with international refugee law. It follows that Member States' views should only be taken into account provided that they allow consistency with international standards. For instance, it is argued that the loss of asylum seekers' right to lodge multiple applications in the EC may be tolerated provided that access to fair and effective asylum procedures is guaranteed irrespective of the Member State responsible for determining the asylum claim[21].

This pragmatic approach is commended as a way of avoiding the temptation to make proposals that may be seen as going beyond the requirements of international refugee law. This statement may be illustrated with regard to the flight from

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[21] These particular issues are examined in chapter IV on access to substantive asylum procedures and in chapter V on fair and effective procedures

extreme poverty. Poverty as a ground for a well-founded fear of persecution entitling people to refugee status is a highly controversial issue. The introduction of such a ground could be justified in cases where poverty is caused by political decisions resulting in individuals being discriminated against and condemned to a state of total destitution. However, a proposal for an enlargement of the Convention definition of the term refugee to cover these cases would be with no doubt rejected by the Member States. Such a proposal would clash with the Member States' efforts to keep a strict distinction between asylum seekers and economic migrants. For the thirty years that followed the adoption of the 1951 Convention, that distinction did not raise any serious difficulties as immigration channels were still open. However, with these channels hardly available, the Member States revived the distinction in question on the ground that economic migrants were abusing asylum procedures in order to enter the EC territory. Traditionally, UNHCR and other organisations involved with the protection of asylum seekers and refugees had little to say about this distinction between asylum seekers and economic migrants fearing that any dilution of this distinction could have an adverse impact on people in need of international protection[22]. However, they have reviewed their position and recognised that in certain circumstances this distinction could be blurred[23]. The reasons for leaving the country of origin may be founded on both socio-economic and political reasons. As already suggested, poverty may be the result of discrimination on the ground of religion or ethnicity. Moreover, mixed migrations are a source of further difficulties. In some countries, population movements may have different causes. Individuals may flee the country concerned owing to a well-founded fear of persecution within the meaning of Article 1(A)(2) of the 1951 Convention while others may decide to leave for economic-related reasons[24].

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[22] UNHCR, *The State of the World's Refugees: in Search of Solutions* (Oxford University Press, 1995) at p. 196.

[23] An analysis of the distinction between asylum seekers and economic migrants falls outside the scope of this thesis. However, this could constitute the basis for further study.

[24] This is for instance the case in China.

Extreme care in assessing asylum claims is therefore required. Member States should not assume that countries that traditionally produce large numbers of economic migrants cannot produce asylum-seekers.

It is important to stress that although compromises may be required with a view to protecting the right to seek refugee status, this should not be at the detriment of asylum seekers' rights. In other words, breaches of international refugee law should not be tolerated in the name of pragmatism. In the course of this study, it became apparent that significant changes in the developing common asylum policy would be necessary if the right to seek refugee status is to be preserved within the EC.

3. Methodology issues

The purpose of this work is to design standards to be satisfied by EC law with a view to securing the exercise of the right to seek refugee status within the EC. It is thus a proposal for law reform. A comprehensive approach at EC level is recommended. To that end, EC and EU as well as national initiatives have been measured against the standards established by international refugee law. The research is therefore essentially based upon an analysis of the relevant laws, proposals and case-law.

The current sources of EC and EU law on asylum are scattered across a complex area of measures. The principal measures are:

- the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities of 15 June 1990, referred to as the Dublin Convention[25];

[25] OJ 254/1 1997.

- the Resolution on a harmonised approach to questions concerning host third countries adopted by the Ministers of the Member States of the European Communities at their meetings in London on 30 November to 1 December 1992[26];

- the Resolution on manifestly unfounded applications for asylum adopted by the Ministers of the Member States of the European Communities at their meetings in London on 30 November to 1 December 1992[27];

- Conclusions on countries in which there is generally no serious risk of persecution adopted by the Ministers of the Member States of the European Communities at their meetings in London on 30 November to 1 December 1992[28];

- the Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures[29];

- the Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term "refugee" in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees[30]; and

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[26] Referred to in European Parliament, Asylum in the European Union: "the safe country of origin principle", People's Europe Series, November 1996, Annex II, at p. 33-37 (not published in the Official Journal).

[27] *Ibid.*, Annex I, at p. 26-32 (not published in the Official Journal).

[28] *Ibid.*, Annex III, at p. 38-41 (not published in the Official Journal).

[29] OJ C 274/13, 19/09/1996.

[30] OJ L 63/2 1996, 13/03/1996.

- Title IV of the TEC on visas, asylum, immigration and other policies related to free movement of persons, in particular Article 63, inserted by the Treaty of Amsterdam of 2 October 1997[31].

These measures not only differ in their nature, they also vary in their legal effect. Whilst the Dublin Convention and Article 63 are legally binding upon the Member States, the other measures are not. This absence of binding effect has affected their ability to achieve effective harmonisation. Moreover, this situation is aggravated by the fact that there are inconsistencies between the EU and EC instruments concerning the right to seek refugee status; these are discussed in the course of the thesis.

What is proposed in this thesis is to measure the provisions concerning the right to seek refugee status which have been adopted within the EU and EC frameworks against the standards set by international refugee law. The purpose of this comparison is to identify the strengths and failings of these provisions and make the recommendations for law reform necessary to protect the right to seek refugee status within the EC in line with international standards.

The primary source of international refugee law is the 1951 Convention, and in particular Article 1(A)(2) on the definition of the term refugee and Article 33 on the principle of *non-refoulement*. The existence of a right to seek refugee status is inferred from Article 1(A)(2)[32]. However, the principle of *non-refoulement* also plays a fundamental role in the protection against persecution[33]. UNHCR documentation is also highly relevant as the Convention needs to be read in the light of UNHCR's interpretations and recommendations if the Convention is to meet today's needs for refugee protection. For instance, UNHCR recommends that

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[31] See *supra* n. 10.

[32] See section 5.2 of the present chapter.

[33] The relevance of Article 33 of the 1951 Convention is examined in section 5.3 of this chapter.

"membership of a particular social group", one of the Convention grounds, is interpreted as covering gender-based persecution[34]. These sources are used to determine the standards against which EU measures are measured. It is argued that the standards in question must be met by EC law. European material is mainly comprised of measures adopted by the EU which relate to the right to seek refugee status.

However, attention was also paid to measures and practices developed in two Member States, i.e. the UK and France. This is justified for a number of reasons. Firstly, measures adopted at EU and national level influence each other. The impact of national measures on the right to seek refugee status within the EC cannot be ignored. Secondly, since EU measures are not comprehensive on the matter, it was necessary to turn to national laws and practices. For instance, issues relating to substantive asylum procedures have been hardly tackled by the EU. Thirdly, some issues could only be measured against international standards following an examination of Member States' laws, case-law and practices. This is, for example, the case with regard to issues arising from the interpretation of "membership of a particular social group" in relation to gender-based persecution[35]. Fourthly, the use of UK and French material is also justified by the fact that there are some clear differences in the laws and policies of the Member States[36]. This demonstrates that, despite the existence of some common EU standards, there are still discrepancies, thus laying bare the failure of existing EU provisions. It also shows that an harmonisation in line with international refugee law is not only in the interest of asylum seekers, but may also be beneficial to the Member States. Indeed, the Member States with more generous provisions may argue that this situation makes them more "attractive" to asylum seekers. For instance, the UK could argue that the fact that it endorses a wider interpretation of the term "refugee" than France makes

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[34] See chapter III on the need for an up to date interpretation of the term "refugee".

[35] *Ibid.*

[36] See in particular chapter III on the need for an up to date interpretation of the term "refugee".

it a more appealing option for asylum seekers. In that context, the UK could benefit from an harmonised and legally binding interpretation of the term "refugee". Finally, the focus on these two Member States was justified by practical considerations. The author had access to both French and UK material. This type of consideration explains why Germany was not considered despite the fact that that Member State deals with considerable numbers of asylum claims[37].

Another source of information was found in the Canadian case-law of the interpretation of "membership of a particular social group". The use of this case-law was considered relevant as it demonstrated that that 1951 Convention ground could be interpreted in a manner allowing the Convention to address gender-based persecution[38]. The relevance of the Canadian case-law is reinforced by the fact that Canada deals with non-negligible numbers of asylum claims[39].

It is important to stress that, although UK, French and Canadian material was used, this thesis as such is not a comparative one. French and UK material was used as evidence of the need for effective harmonisation. The purpose behind the examination of national material was to show how failure to comply with international refugee law could affect the right to seek refugee status. However, it also aimed at demonstrating that compliance could be achieved, this is particularly

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[37] Between 1984 and 1993, around 50% of the asylum applications submitted in Europe were lodged in Germany (see http://www.unhcr.ch/refworld/pub/state/95/box5_3.htm). This situation persisted from 1994 to 1996(see *Current Issues of UK Asylum Law and Policy*, Frances Nicholson and Patrick Twomey (Eds.)(Ashgate, Aldershot, 1998) Table 2.1, at p. 40). Whilst Germany is still the Member State which deals with the greater numbers of asylum claims, it is now closely followed by the UK. In 1998, Germany received 27.3% of the applications lodged in Europe and 22.1% in 1999 while the UK received 16.2% in 1998 and 20.8% in 1999 (see http://www.unhcr.ch/statis/0001euro/fig2.htm).

[38] See chapter III on the need for an up to date interpretation of the term "refugee".

[39] In 1998, 23.840 persons requested refugee status in Canada; 22.580 in 1997; 26.120 in 1996; and 26.070 in 1995 (see http://www.unhcr.ch/world/amer/canada.htm).

the case with regard to the Canadian case-law on non-State persecution[40] and women as a particular social group[41].

Finally, attention was also paid to the views and recommendations emanating from NGOs which are actively involved in the protection of asylum seekers' rights. NGOs such as Amnesty International were the first ones to raise the alarm at the EU and Member States' "change of heart".

In recent years, asylum has become a priority on the agenda of the EU and its Member States. This resulted in proposals and laws affecting directly or indirectly the right to seek refugee status. For instance, while this research was being carried out, the UK adopted two Acts on Immigration and Asylum[42] which both affected the right to seek refugee status. With the "communautarisation" of asylum matters, EC measures on asylum are now expected. Whilst its fast-moving nature made the chosen topic a particularly interesting and relevant one, it was also a source of difficulties. In that respect, the challenge was to keep up with developments and incorporate them where necessary.

4. Summary of literature survey

As already stressed, the purpose of this thesis is to make recommendations for law reform with a view to preserving the right to seek refugee status within the EC. It follows that this thesis is mainly based upon an analysis of the relevant international, European and, to a certain extent, national legal provisions. However, the literature written on the subject was of valuable assistance in measuring European measures against the standards set by international refugee law.

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[40] See chapter III on the need for an up to date interpretation of the term "refugee" section 1.2.

[41] *Ibid.*, section 2.2.2(i).

[42] The Immigration and Asylum Act 1996 and the Immigration and Asylum Act 1999.

There is an abundant literature on asylum and refugee matters. However, an important part of this literature does not directly concern the right to seek refugee status. For instance, a significant part of this literature deals with specific issues arising from mass influxes of refugees and thus focuses on other forms of protection than that offered by refugee status within the meaning of the 1951 Convention. The relevance of the available literature was assessed on the basis of its contribution to a thorough and critical analysis of the right to seek refugee status in the specific context of the EC.

In the course of this research, it became evident that the emergence of an asylum policy common to the Member States prompted the development of literature on the subject. This was particularly the case with the adoption of the Dublin Convention and, the Treaty on European Union in particular. Indeed, the latter brought asylum matters within the EU framework by their insertion into the Justice and Home Affairs (JHA) Pillar, also known as the third pillar. As to the literature regarding the subsequent "communautarisation" of asylum matters operated by the Treaty of Amsterdam, it is still in its early stages[43].

Whilst institutional and substantive issues are closely connected, the literature relating to the development of a common asylum policy tends not to envisage these matters in relation to each other[44]. Hence, the focus is either on institutional issues[45]

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[43] However, on this issue see Steve Peers, *EU Justice and Home Affairs Law* (European Law Series, Pearson Education, Harlow 2000)

[44] However, a more comprehensive approach may be found, for example, in Steve Peers (*supra* n. 43), and in Michael Petersen, "Refugee protection issues in Europe", in *New Forms of Discrimination*, Linos-Alexandre Sicilianos (éd.) (Editions A. Pedone, Paris, 1995).

[45] See, for instance, Walter Van Gerven, "Towards a coherent constitutional system within the European Union", EPL Vol. 2, Issue 1 (1996) 81-101; Richard McMahon, "Maastricht's Third Pillar: load-bearing or purely decorative", LIEI (1995/1) 51-64; Muller-Graff, "The legal bases of the Third Pillar and its position in the framework of the Union Treaty", 31 CMLRev. (1994) 493-510; and Peers (*supra* n. 43).

or on substantive aspects[46]. Moreover, the former are usually part of a larger debate on European institutional law[47] and do not necessarily specifically address the issues arising from asylum matters in that respect. While it is accepted that a comprehensive approach is not always feasible[48], the selected issue(s) should be put in context. This means that their close connection with other questions arising from the right to seek refugee status within the EC should be stressed.

With regard to substantive issues, commentators such as Guild[49], Shah[50] and Joly[51] have expressed concern about the impact of the measures jointly adopted by the

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[46] See, for example, on the interpretation of the term "refugee", Nadine Finch and Jane Coker, "Does the Refugee Convention protect women or is it blind to issues of gender", Immigration and Nationality Law and Practice, Vol. 10 No. 3 (1996) 83-85 and Todd Stewart Schenk, "A proposal to improve the treatment of women in asylum law: adding a "gender" category to the international definition of "refugee", Global Legal Studies Journal II (1995) http://www.law.indiana.edu/glsj/vol2/schenk.html; on asylum procedures, Pieter Boeles and Ashley Terlouw, "Minimum guarantees for asylum procedures", IJRL Vol. 9 No. 3 (1997) 472-491 and Pieter Boeles, "Effective legal remedies for asylum seekers according to the Convention of Geneva 1951", NILR, XLIII (1996) 291-319; and on the safe third country principle, Prakash Shah, "Refugees and safe third countries: United Kingdom, European and international aspects", EPL, Vol. 1 Issue 2 (1995) 259-288.

[47] See *supra* n. 45 and Peers (*supra* n. 43).

[48] For instance, a journal article cannot be expected to thoroughly examine the right to seek refugee status within the EC.

[49] Elspeth Guild, "Towards an European asylum policy: developments in the European Community", Immigration and Nationality Law and Practice, Vol. 7 No. 3 (1993) 88-92.

[50] See *supra* n. 46.

[51] Danièle Joly, Lynette Kelly and Clive Nettleton, *Refugees in Europe: The Hostile Agenda*, Minority Rights Group international, 1997.

Member States on asylum seekers' rights[52]. Particular attention seems to have been paid to the Resolution on host third countries and the Resolution on manifestly unfounded applications for asylum and on the related concepts of safe third country and fast-track procedures[53]. Another issue that seems to have come under close scrutiny is that relating to the scope of the definition of the term "refugee" enshrined in the 1951 Convention[54].

Whilst the risk of inconsistency with international refugee law appears to have been identified in the literature, the approach remains piecemeal in most cases. In other words, the different issues arising from the right to seek refugee status in the light of European developments tend to be examined individually. Hence, the interaction between the different European measures on asylum and their combined impact on the right to seek refugee status within the EC is not efficiently demonstrated. In that respect, one may say that there is a lack of literature adopting a global approach.

Moreover, it is important to note that a comparative approach is frequently adopted[55]. This means that the literature concerned does not so much focus on the

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[52] See also, for instance, Petersen, *supra* n. 44. Concern was also raised with regard to national developments; see, for example, Dallal Stevens, "The Asylum and Immigration Act 1996: erosion of the right to seek asylum", Vol. 61 MLR (1998) 207-222 and Colin Harvey, "Excluding refugees?", New Law Journal, November 3 (1995), at p. 1630.

[53] See, for instance, Shah (*supra* n. 46), Guild (*supra* n. 49) and Roel Fernhout, "Status determination and the safe third country principle", in *Europe and Refugees: a Challenge? L'Europe et les Réfugiés: un Défi?*, Edited by Jean-Ives Carlier et Dirk Vanheule (Eds.) (Kluwer Law International, The Hague/ London/ Boston, 1997) at p. 187.

[54] See, for example, Isabelle Daoust and Kristina Folkelius, "Developments - UNHCR Symposium on gender-based persecution, IJRL Vol. 8 No. 1/2 (1996) 161-183, Finch and Coker (*supra* n. 46) and Schenk (*ibid.*).

[55] See, for instance, *Who Is a Refugee? A Comparative Case Law Study*, Jean-Ives Carlier, Dirk Vanheule, Klaus Hullmann and Carlos Peña Galiano (Eds.) (Kluwer Law International, The

provisions adopted at European level, but on the asylum laws and policies of the Member States. Comparative literature was useful as European and national measures concerning the right to seek refugee status influence each other. Furthermore, as already noted, as the current European provisions on asylum are not comprehensive, an analysis of national provisions was necessary in some instances.

In the late 1990s, it appears that the literature concerning the right to seek refugee status within the EC became less abundant. The emphasis seems to have been put on the study of other forms of protection than that offered through refugee status within the meaning of the 1951 Convention. This shift was, to a considerable extent, prompted by the factual context, and in particular the crisis in former Yugoslavia. Whilst the importance of these other forms of protection is recognised, refugee status remains a crucial form of international protection.

However, with the entry into force of the Treaty of Amsterdam, which provides for the adoption of a number of provisions regarding the right to seek refugee status within the EC, this topic will probably become the object of a more significant literature.

A final and fundamental issue needs to be addressed in this introduction. It is argued that the protection of the right to seek refugee status within the EC requires the latter to adopt comprehensive standards in line with those set by international refugee law. It is therefore essential to determine what are these international standards.

Hague/ London/ Boston, 1997) and Immigration Law Practitioners' Association, *A Guide to Asylum Law and Practice in the European Union*, Compiled by G. Gare, ILPA, December 1995.

5. International standards

The instrument central to the protection of refugees is the 1951 Convention. The Convention is analysed specifically in relation to the right to seek refugee status. It follows that the provisions that concern the status of recognised refugees and the loss of refugee status fall outside the scope of this thesis. The provisions that are considered are primarily Article 1(A)(2) on the definition of the term "refugee" and Article 33 on the principle of *non-refoulement*. These two Articles are fundamental to asylum seekers' rights and it is argued that these provisions form the standards that EC law must satisfy. However, in order to fully grasp the extent of the obligations encompassed in Articles 1(A)(2) and 33, the latter must be read in the light of the UNHCR's interpretations. Indeed, UNHCR's guidelines are indispensable if the 1951 Convention is to be adapted to today's needs for international protection. This is particularly the case with regard to the definition of refugee[56].

The next section focuses on Article 1(A)(2) of the 1951 Convention and how, it is argued, it gives rise to a right to seek refugee status. Then, the principle of *non-refoulement* is examined as its implementation is crucial to the protection of asylum seekers' rights.

5.1. Article 1(A)(2) of the 1951 Convention: the right to seek refugee status

It is argued that a right to seek refugee status may be inferred from Article 1(A)(2) of the Convention which defines who is eligible for refugee status.

5.1.1. The definition of the term refugee

Article 1(A)(2) of the 1951 Convention defines a refugee as an individual who is outside his or her country of origin or residence, where he or she is stateless, and is

[56] See chapter III on the need for an up to date interpretation of the term "refugee".

unable or unwilling to avail himself or herself of the protection of that country or to return there owing to a well-founded fear of persecution by reason of race, religion, nationality, membership of a particular social group or political opinion.

The Convention definition was originally confined to events that had occurred before 1 January 1951. However, it was acknowledged that this temporal limitation would prevent the Convention from addressing new refugee situations arising after that date. This limitation was removed by the Protocol relating to the Status of Refugees of 1967[57]. The 1951 Convention allowed a further limitation on ratification. States were offered the option to limit the scope of the Convention to events in Europe (Article 1(B)(1)). However, this limitation does not apply to the Member States. Indeed, both the 1951 Convention and the 1967 Protocol have been ratified by the fifteen Member States. These two instruments are therefore legally binding upon the Member States.

The purpose of this research is not to analyse the Convention definition, but to ensure that EC law secures compliance with international standards; this implies ensuring the correct implementation of the Convention definition throughout the EC. It is argued that a full implementation of that definition requires taking into consideration the position of UNHCR. Over the years, UNHCR has been concerned with recommending interpretations of the term refugee which address new refugee situations in line with the spirit and purpose of the 1951 Convention. Two main issues have been identified in that respect, namely non-State persecution and gender-based persecution[58].

While an in depth analysis and discussion of the Convention definition is not the purpose of this research, an understanding of who is a refugee under Article 1(A)(2) remains necessary. The four elements of the definition are therefore considered.

[57] Article 2(1) of the Protocol relating to the Status of Refugees (606 UNTS 267).

[58] See chapter III on the need for an up to date interpretation of the term "refugee".

(i) The asylum seeker's presence outside his or her country of origin

In order to be eligible for refugee status, an individual must, *inter alia*, be outside his or her country of origin. Indeed, as noticed by Goodwin-Gill, "(...) the fact of having fled, having crossed an international frontier, is an intrinsic part of the quality of refugee, understood in its ordinary sense."[59] It follows from Article 1(A)(2) that the expression country of origin refers to the State of nationality or the State of residence where asylum seekers are stateless.

(ii) Inability or unwillingness to avail oneself of the protection of the country of origin or to return there

The inability or unwillingness to request one's country of origin for protection or return to the country in question is the rationale for the availability of international protection, which may take the form of refugee status. Indeed, international protection is construed as a substitute for national protection, i.e. protection emanating from the country of origin.

This element of the Convention definition has been and remains contentious as it has been subject to restrictive interpretations where an individual has a well-founded fear of persecution owing to the activities of non-State agents. In such circumstances, some States, including some Member States, have interpreted that element of the Convention definition as excluding cases where the country of origin is unable to provide effective protection. This position, which is contested by UNHCR, has been justified on the ground that the Convention definition only refers to State persecution. It is argued that this interpretation of the Convention definition is inconsistent with the wording, spirit and object of the Convention[60].

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[59] Guy S. Goodwin-Gill, *The Refugee in International Law* (Clarendon Press, Oxford, 1996) (2nd ed) at p.40.

[60] See chapter III on the need for an up to date interpretation of the term "refugee".

(iii) A well-founded fear of persecution

The term persecution is not defined in the 1951 Convention or in any other international instrument. However, as observed by Plender, "[t]he persecution that the refugee fears consists primarily in a serious disadvantage, including jeopardy to life, physical integrity or liberty"[61]. Plender's statement is inferred from Articles 31[62]

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[61] Richard Plender, *International Migration Law* (Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1988) (2nd ed) at p.417.

[62]Article 31 on "refugees unlawfully in the country of refuge" reads:

"1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow refugees a reasonable period and all the necessary facilities to obtain admission in another country."

Article 31 of the 1951 Convention is considered in relation to document requirements imposed on asylum seekers (see chapter IV on access to substantive asylum procedures).

Article 32. on "expulsion" reads:

"1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before a competent authority or a person or persons specially designated by the competent authority.

to 33 of the 1951 Convention which contemplate threats to life or freedom. This can be regarded as referring to the heart of the term persecution. However, as suggested by Plender, "(...) any other serious disadvantage will constitute persecution when it gives rise to intolerable psychological pressure"[63]. It follows that the determination of what amounts to persecution remains very much a question of degree that must be addressed on a case-by-case basis.

There seems to be a consensus that the core-meaning of persecution for the purpose of the 1951 Convention includes threat to life, freedom or physical integrity. However difficulties arise when attempting to determine what is persecution in the broader sense. As noted by Goodwin-Gill, (...) [a] comprehensive analysis requires the general notion of persecution to be related to developments within the broad field of human rights"[64]. In that respect, particular attention should be paid to the rights that have an absolute character and cannot therefore be subject to derogations[65]. These rights include the right to life to the extent that individuals are protected against "arbitrary" deprivation[66], the right to be protected against torture,

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3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary."

Article 32 is not examined in this thesis as it concerns recognised refugees.

Article 33 is examined in section 5.3. of the present chapter.

[63] Richard Plender, see *supra* n. 61.

[64] Guy S. Goodwin-Gill, *supra* n. 59, at p. 67.

[65] See, for instance, Article 15(2) of the ECHR; Article 4 of the Covenant on Civil and Political Rights and Article 27 of the American Convention of Human Rights.

[66] See, for example, Article 6 of the Covenant on Civil and Political Rights and Article 2 of the ECHR.

or cruel or inhuman treatment[67], the right not to be subjected to slavery or servitude[68], the right not to be subjected to retroactive criminal penalties[69] and the right to freedom of thought, conscience and religion[70]. It is interesting to note that that this right is not construed as an absolute right for the purpose of the ECHR (Article 9). In addition to these absolute rights, there are a number of rights that cannot be ignored "... in view of the frequent close connection between persecution and personal freedom"[71]. These rights include the right to liberty and security of the person which covers arbitrary arrest and detention[72], the right to freedom from arbitrary interference in private home and family life[73]. As stressed by Goodwin-Gill, "[r]ecognition of these rights is essential to the maintenance of the integrity and inherent human dignity of the individual. Persecution within the Convention thus comprehends measures, taken on the basis of one or more of the stated grounds, which threaten deprivation or liberty; torture or cruel, inhuman, or degrading treatment; subjection to slavery or servitude; non-recognition as a person (particularly where the consequences of such non-recognition impinge directly on an individual's life, liberty, livelihood, security, or integrity); and oppression,

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[67] See, for example, Article 7 of the Covenant on Civil and Political Rights and Article 3 of the ECHR.

[68] See, for example, Article 8 of the Covenant on Civil and Political Rights and Article 4(1) of the ECHR

[69] See, for instance, Article 15 of the Covenant on Civil and Political Rights and Article 7 of the ECHR.

[70] Article 18 of the Covenant on Civil and Political Rights.

[71] Guy S. Goodwin-Gill, *supra* n. 59, at p. 69.

[72] See, for instance, Article 9 of the Covenant on Civil and Political Rights and Article 5 of the ECHR.

[73] See, for example, Article 17 of the Covenant on Civil and Political Rights and Article 8 of the ECHR.

discrimination or harassment of a person in his or her private, home, or family life"[74].

One may infer from the fundamental character of these rights that violations of the rights in question combined with the State of origin's inability to provide protection may amount to persecution for the purpose of the 1951 Convention. Hence, "[a]ssessments must be made from case to case by taking account, on the one hand, of the notion of individual integrity and human dignity and, on the other hand, of the manner and degree to which they stand to be injured"[75]. It follows from Article 1(A)(2) of the 1951 Convention that asylum claimants must demonstrate a well-founded fear of persecution.

The Ad Hoc Committee on Statelessness and Related Problems stated in a Draft Report of 15 February 1950 that the words "well-founded fear" implied that the person applying for refugee status had to give a "plausible account" of the reasons why he or she feared persecution[76]. According to the final report, the expression well-founded fear of persecution meant that the individual seeking refugee status had been exposed to persecution or had good reason to fear persecution[77].

The assessment of the existence of a well-founded fear of persecution within the meaning of Article 1(A)(2) requires an examination of both objective and subjective elements. According to the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, the determination of the refugee status will "(...) primarily require an evaluation of the applicant's statement rather than a judgement

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[74] Guy S. Goodwin-Gill, *supra* n. 59, at p.69.

[75] *Ibid.*

[76] UN DOC. E/AC 32/L38 (1950) E/1658, reprinted in UN-YBK (1950) 569.

[77] E/1618) - E/AC 32/5.

of the situation prevailing in his own country of origin".[78] This means that, in determining whether there is a well-founded fear of persecution, particular attention must be given to the circumstances specific to the case. Focusing on the situation in the State of origin could result in individuals being denied refugee status on the ground that the situation in their country of origin appears satisfactory on the whole. However, a State may only be safe for certain groups of individuals[79]. Thus, objective elements cannot prevail where assessing the existence of a well-founded fear of persecution.

Finally, in order to be eligible for refugee status, asylum seekers must demonstrate that their well-founded fear of persecution is based on a Convention ground.

(iv) The Convention grounds

The 1951 Convention mentions five grounds for persecution, namely race, religion, nationality, membership of a particular social group and political opinion. An asylum claim may be founded on one or more Convention grounds.

An overview of the different Convention grounds is given; however, the purpose is not to analyse and discuss these grounds. They are considered in relation to the need for EC law to comply with Article 1(A)(2) of the 1951 Convention with a view to securing the right to seek refugee status within the EC territory. To that end, it is vital that the Convention definition is not subject to restrictive interpretations inconsistent with the spirit and purpose of the Convention, which is to provide refugee status to those in need of international protection within the

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[78] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1, reedited, Geneva, January 1992.

[79] See chapter V on fair and effective procedures.

meaning of its provisions. This is particularly important if the Convention is not to become an anachronism[80].

• **Race**

Where considering race as a ground for persecution within the meaning of the 1951 Convention, one has to look at the 1965 Convention on the Elimination of All Forms of Racial Discrimination; Article 1 reads:

"(...) [T]he term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

However, whilst the international community has condemned on a large number of occasions discrimination on racial grounds, whether such practices constitute persecution is a more contentious issue. In *Ali v. Secretary of State*, the racial discrimination likely to be faced by Kenyan citizens of Asian origin was not considered to amount to persecution within the meaning of the 1951 Convention. The applicants claimed they did not wish to be returned to their country of origin because they feared political and racial persecution as a result of the State's "africanisation" policy"[81]. It is not sufficient for asylum seekers to establish that they are discriminated against owing to their race, they must also demonstrate that racial discrimination in their particular case amounts to persecution. In other words, racial discrimination is not a synonym for persecution by reason of race, although they may overlap and thus fall within the scope of Article 1(A)(2) of the 1951

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[80] See chapter III on the need for an up to date interpretation of the term "refugee".

[81] *Ali v. Secretary of State* [1987] Imm AR 126.

Convention. Racial discrimination is likely to amount to persecution where rights fundamental to human dignity are violated [82].

• **Religion**

A number of international instruments guarantee the right to freedom of religion. Pursuant to Article 18 of the 1966 Covenant on Civil and Political Rights and Article 18 of the Universal Declaration of Human Rights, everyone shall have the right to freedom of thought, conscience, and religion, which shall include the freedom to have or adopt a religion or belief of choice and the freedom to manifest such religion or belief. This right is also protected by the ECHR (Article 9)[83].

The right to freedom of religion also implies that no one shall be subject to coercion which would impair that freedom or be forced to embrace a religion or belief. The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, adopted in 1981, indicates the interests to be protected[84]. As in the case of racial discrimination, asylum seekers who allege that they have a well-founded fear of persecution owing to their religion must demonstrate that the infringement to their right to freedom of religion amounts to persecution[85]. For instance, the French Commission des Recours des Réfugiés

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[82] See this chapter, section 5.1.1(iii).

[83] However, within the framework of the ECHR, a distinction was made between the freedom to practice a religious belief and the right to proselytise. In *Kokkinakis v. Greece*, the European Court of Human Rights distinguished between "bearing Christian witness and improper proselytism" (paragraph 48), which could, for instance, consist in "offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need ... [or] the use of violence or brainwashing" (paragraph 49).(*Kokkinakis v Greece*, judgment of 25 May 1993, Series A No. 260-A, p.19).

[84] Declaration adopted without vote by the General Assembly of the United Nations (UNGA res. 36/ 55 of 25 Nov. 1981).

(CRR)[86] held in *Nahmany* that the applicants, Jews who had become Christians, had good reasons to fear persecution in their country of origin, Israel, owing to their religion[87]. Indeed, Jews who had converted to Christianity faced serious discrimination.

• **Nationality**

As observed by Goodwin-Gill, "[t]he reference to persecution for reasons of *nationality* is somewhat odd, given the absurdity of a State persecuting its own nationals on account of their membership of the body politic. Those who possess the nationality of another State will, in normal circumstances, be entitled to its protection and so fall outside the refugee definition"[88]. However, the concept of nationality within the meaning of the 1951 Convention is usually interpreted in a broader sense. As a result, the term nationality includes origins and membership of a particular ethnic, religious, cultural, and linguistic minority. It is interesting to note that Article 27 of the 1966 Covenant on Civil and Political Rights declares that "[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language". However, as noted by Goodwin-Gill, "[i]t is not necessary that those persecuted should constitute a minority in their own country, oligarchies traditionally tend to resort to oppression"[89]. Asylum

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[85] See this chapter, section 5.1.1(iii).

[86] See chapter III on the need for an up to date interpretation of the term "refugee", section 1.1.

[87] CRR, 30 July 1982, *Nahmany* referred to in Frederic Tiberghien, *La Protection des Refugiés en France* (Collection Droit Public Positif, Presses Universitaires d'Aix-Marseille, Economica, Paris, 1988) (2nd ed) at p.338.

[88] Guy S. Goodwin-Gill, see *supra* n. 59, at p. 45.

[89] *Ibid.*, at p. 45-46.

seekers relying on that Convention ground will have to establish that the treatment that they are exposed to owing to their nationality amounts to persecution[90]. As observed by Grahl-Madsen, persecution on the ground of nationality also includes persecution by reason of lack of nationality, namely statelessness[91].

• Membership of a particular social group

Membership of a particular social group as a ground for persecution raises a number of definitional issues. This Convention ground is characterised by its "vagueness" that allows it to cover a wider range of refugee situations than the other Convention grounds. In the absence of a Convention definition, the onus was on UNHCR and on the States party to the 1951 Convention to state more precisely the scope of membership of a particular social group. It is argued that the 1951 Convention must be read in the light of UNHCR's guidelines and that the latter must be regarded as being part of the standards set by international refugee law. The States should therefore be under the obligation to follow the guidelines provided by UNHCR. With regard to membership of a particular social group, the latter allows that Convention ground to cover new refugee situations, and in particular gender-based and non-State persecution. Compliance with the positions advocated by UNHCR is therefore crucial to the preservation of both the object and spirit of the 1951 Convention. It is unfortunate that restrictive national policies on asylum have resulted in the scope of that Convention ground being construed narrowly. It is argued that EC law should secure that membership of a particular social group is interpreted in a purposive manner[92].

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[90] See this chapter, section 5.1.1(iii).

[91] Grahl-Madsen, *The Status of Refugees in International Law* (Vol. 1, Sijthoff, Leyden, 1966) at p. 219.

[92] See chapter III on the need for an up to date interpretation of the term "refugee".

• **Political opinion**

The right to freedom of opinion and expression is embodied in a number of international instruments. For instance, Article 19 of the Universal Declaration of Human Rights reads that "everyone has the right to freedom and expression; the right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." This right is also protected by the 1966 Covenant on Civil and Political Rights (Article19(1) and (2)[93]) and, at a regional level, by the European Convention on Human Rights[94]. Article 10(1) of the European Convention on Human Rights reads that "everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers (...)"

Traditionally, a refugee is seen as someone who has a well-founded fear of being persecuted by the State authorities owing to his or her political opinion or/and involvement. However, persecution by reason of political opinion, as well as persecution owing to other grounds, must not be confined to State persecution as it may well emanate from non-State agents[95].

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[93] Article 19(1) and (2) of the 1966 Covenant on Civil and Political Rights reads:

"1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

[94] *Handyside v. United Kingdom*, European Court of Human Rights, judgment of 7 December 1976, Series A No. 24; *Sunday Times v. United Kingdom*, European Court of Human Rights, judgment of 26 April 1979, Series A No. 30; *Arrowsmith v. United Kingdom* (7050/75) European Commission on Human Rights, 12 October 1978, 19 Decisions and Reports 5.

[95] The issues raised by non-State persecution are examined in chapter III on the need for an up to date interpretation of the term "refugee".

Goodwin-Gill considers that if "political opinions have been expressed, and if the applicant or others similarly placed have suffered or been threatened with repressive measures, then a well-founded fear may be made out. Problems arise, however, in assessing the value of the "political act", particularly if the act itself stands more or less alone, unaccompanied by evident or overt expressions of opinion."[96] The latter part of this statement is another illustration of the fact that assessment for the purpose of refugee status under the 1951 Convention must take place on a case-by-case basis.

Where an individual falls within the scope of Article 1(A)(2) of the 1951 Convention, he or she is entitled to refugee status. It is argued that this provision gives rise to a right to seek refugee status.

5.2. The right to seek refugee status

It is argued that a right to seek refugee status can be inferred from Article 1(A)(2) of the 1951 Convention. In that respect, refugee status must be distinguished from issues arising from the concept of asylum and the absence of a right to asylum.

5.2.1. The absence of a right to asylum

As noted by Goodwin-Gill, "[t]he term "asylum" and the expression "right of asylum" have lost much of their pristine simplicity. With the growth of nation States and the corresponding development of notions of territorial jurisdiction and supremacy, the institution of asylum has been subject to a radical change"[97].

Before the development of the concept of the modern State, asylum was regarded as a religious institution, which has now disappeared. Religious asylum was practised by Jews, Greeks and Romans, but it is the Catholic Church that turned asylum into a universal institution. From the sixteenth century, the concepts of

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[96] Guy S. Goodwin-Gill, *supra* n. 59, at p.49.

[97] *Ibid.*, at p. 101.

sovereignty and the modern State resulted in the development of a new form of asylum, which is known as territorial asylum. It is based on the sovereignty of the State. A number of national constitutions expressly mention the right to territorial asylum. However, the right of asylum is not guaranteed in the sense of a legal obligation endorsed by the State.

Asylum was defined by the Institute of International Law at its 1950 Bath Session as the protection which a State grants under the control of its organs on its territory or in some other place to a person who comes to seek it[98]. Hence, the protection granted by a State to a non-national of a foreign country lies at the heart of the institution of asylum.

The institution of asylum, as modelled by the concepts of nation State and sovereignty was and is still regarded as belonging to the exclusive competence, or "*domaine réservé*", of the State. Therefore, right of asylum and international protection were originally perceived as the same institution whose grant depended upon the discretionary power of the head of the State. In 1949, Morgenstern based the competence of States to grant asylum on "the undisputed rule of international law that every State ha[d] exclusive control on the individuals in its territory, including all matters relating to exclusion, admission, expulsion and protection against the exercise of jurisdiction by other States"[99].

Asylum, understood as referring to territorial asylum, and international protection are now regarded as two different concepts. Therefore, the protection granted through territorial asylum must not be confused with that gained through refugee status within the meaning of the 1951 Convention. International protection is a creation of international law, which finds its root in the provisions of the 1951

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[98] Encyclopaedia Universalis, Corpus 3, 1995, at p. 200.

[99] Morgenstern, "The Right to Asylum", 26 BYIL (1949) 327 referred to in Guy S. Goodwin-Gill, *supra* n. 59, at p. 102.

Convention, whereas asylum remains the prerogative of the State[100]. Thus, whilst States are not under the obligation to grant asylum[101], those which are parties to the 1951 Convention are obliged to grant refugee status to individuals who fall within the scope of the Convention definition of the term "refugee" enshrined in Article 1(A)(2). It follows from this Article and the obligation that it imposes on States that individuals who fall within its scope are entitled to seek refugee status. Hence, a right to seek refugee status may be inferred from Article 1(A)(2) of the 1951 Convention.

5.2.2. The existence of a right to seek refugee status

Under Article 1(A)(2) of the 1951 Convention, those who are outside their country of origin and are unable or unwilling to avail themselves of the protection of that State or to return there owing to a well-founded fear of persecution based on a Convention ground are refugees for the purpose of the Convention. In other words, those who satisfy the requirements of Article 1(A)(2) are entitled to refugee status. By becoming party to the Convention, the States concerned have endorsed the obligation to grant refugee status to individuals who are eligible under the Convention definition.

In order for a State to be able to determine whether an individual is entitled to refugee status, that State must examine his or her application. This supposes, in the first instance, that the applicant, i.e. the asylum seeker, is given the opportunity to lodge his or her claim. If this opportunity is denied or restricted, individuals who would otherwise fall within the scope of Article 1(A)(2) will be deprived from a protection, i.e. refugee status, they were entitled to. Hence, it is argued that compliance with Article 1(A)(2) generates a number of obligations to be imposed

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[100] See, for instance, Sophie Albert, *supra* n. 18, particularly at p. 53.

[101] There have been a number of unsuccessful attempts to impose on States an obligation to grant asylum to those in need. The history of international instruments dealing with asylum illustrates the States' reluctance to be bound by such an obligation.

on States party to the 1951 Convention, and these include all the Member States. The above mentioned obligations, inherent in Article 1(A)(2), are designed to secure its effectiveness[102]. Indeed, if access to fair and effective asylum procedures is not secured, States will not be in a position to fulfil their obligations under the Convention as they will have failed to determine whether an individual is eligible for refugee status. The fact that the 1951 Convention does not cover procedural issues, and thus leave them to the States' discretion, does not mean that they can undermine their obligations under the Convention by limiting its applicability in practice.

It is argued that the obligations imposed on States inherent in Article 1(A)(2) and to the spirit and purpose of the 1951 Convention as a whole create a right to seek refugee status. The obligation to ensure access to adequate asylum procedures in order to determine whether individuals are entitled to refugee status implies that there is a right to seek refugee status. Such a right can therefore be inferred from Article 1(A)(2). With this in mind, it is argued that any national or regional measure which, directly or indirectly, jeopardises that right is in breach of the 1951 Convention, and thus inconsistent with the standards set by international refugee law. In that respect, the initiatives of the EU and its Member States have been a source of growing disquiet that must, it is argued, be addressed by EC law[103].

Another element central to the safeguard of the right to seek refugee status is the principle of *non-refoulement*. The view taken is that this right cannot be adequately implemented in the absence of full compliance with the principle in question.

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[102] See chapter III on the need for an up to date interpretation of the term "refugee".
It is also necessary to secure that the treatment reserved to asylum seekers pending determination does not undermine their right to see refugee status (see chapter VI on asylum seekers' status pending determination).

[103] The inconsistencies of these measures with international standards are evidenced in the subsequent chapters.

5.3. The principle of *non-refoulement*

The principle *of non-refoulement* prohibits States from returning individuals to a country where their life or freedom may be endangered. This principle is enshrined in Article 33(1) of the 1951 Convention which reads:

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

Article 33(2) further states that:

"The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger for the community of that country."

The principle of *non-refoulement* is also stated in other international instruments such as the OAU Convention on refugees (Article II(3)), the American Convention on Human Rights (Article 22(8))[104] and the Declaration on Territorial Asylum (Article 3(1))[105].

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[104] Article 22(8) of the American Convention on Human Rights reads:

"In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions."

[105] Resolution 2312 (XXII).
Article 3(1) of the Declaration on Territorial Asylum reads:

It is not contended that the principle of *non-refoulement* has legal authority as treaty law and is therefore legally binding upon the signatories of the 1951 Convention. However, scholars and UNHCR regard the principle of *non-refoulement* as a rule of customary law[106] and not only as a treaty provision. In the opinion of UNHCR, the principle of *non-refoulement* has become an imperative norm of international law which has been universally recognised on many occasions[107]. UNHCR had previously observed that this fundamental humanitarian principle, expressed in a number of universal and regional instruments, is generally accepted by States[108].

"No person referred to in Article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution."

However, the Declaration provides for exceptions.

Article 3(2) reads:

"Exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population , as in the case of mass influx of persons."

And Article 3(3) adds:

"Should a State decide in any case that exception to the principle stated in paragraph 1 of this article would be justified, it shall consider the possibility of granting to the person concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State."

[106] Richard Plender, see *supra* n. 61, at p. 427.

[107] Conclusion n. 6 (XXVIII), adopted in 1977.

[108] See Report A/ 40/ 12, n. 23.

The customary nature of the principle of *non-refoulement* is still open to discussion. Some argue that the fact that this principle is not always implemented by States demonstrates that it is not a rule of customary law. However, as noted by Marx, "[s]imply citing cases in which this principle has not been respected by some States is not sufficient evidence that there is no consistent and uniform practice among States with regard to the principle of *non-refoulement*"[109]. As stressed by the International Court of Justice, "if a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than weaken the rule"[110]. Moreover, the element of *opinio juris* must be given greater credence. During the debates of the UN General Assembly, no State has ever overtly contested the binding nature of the principle of *non-refoulement*; this statement includes those who are not party to the 1951 Convention. Finally, where UNHCR had to intervene because States had returned people in need of international protection to their country of origin in breach of the principle of *non-refoulement*, the States concerned never argued that they had a right to compel these people to return. The existence of the principle of *non-refoulement* in itself was not challenged. The issue at stake was not related to the recognition of the principle, but to its implementation. This shows that States recognise that they are bound by the principle of *non-refoulement*, although their practices may not be consistent with their legal obligation. It follows that the principle of *non-refoulement* must be implemented by all the States as a rule of customary law[111].

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[109] Marx, Reinhard, "Refugee Protection at Risk?", in *New Forms of Discrimination*, Linos-Alexander Sicilianos (éd.) (Editions A. Pedone, Paris, 1995) at p. 186.

[110] Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. USA*), merits, judgment of 27 June 1986, ICJ Reports 1986, para. 186.

[111] Marx, Reinhard, see *supra* n. 109, at p. 187.

The principle of *non-refoulement* constitutes the very basis of the protection offered to those in need of refuge because their State of origin failed them in that respect. This is reflected in its legal authority. It follows that that principle covers those who have fled their country of origin with a view to seeking refugee status. In other words, asylum seekers must enjoy the benefit of the protection that confers the principle of *non-refoulement*. Hence, they must not be returned to a country where their life or freedom may be threatened.

This imperative need to comply with the principle of *non-refoulement* in relation to asylum seekers took on a new dimension with measures adopted by the EU and its Member States in the field of asylum. Indeed, the Member States have been eager to transfer responsibility for examining asylum claims to other Member States or, preferably, to third countries[112]. It is argued that compliance with the principle of *non-refoulement* is an essential pre-requirement to any transfer of responsibility[113]. If transfers were to be carried out in breach of the principle of *non-refoulement*, the right to seek refugee status would be seriously undermined as such practice would amount to deny these individuals the possibility to exercise the right in question. It follows that any measure to be adopted and implemented within the EC must be strictly consistent with the principle of *non-refoulement*.

6. Outline of the chapters

It is argued that international refugee law recognises the existence of a right to seek refugee status which arises from Article 1(A)(2) of the 1951 Convention and the obligations imposed on States inherent in that provision. In considering the Convention provisions, it is vital to take into consideration the guidelines of UNHCR as these are essential to the purposive interpretation of the Convention.

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[112] See chapter IV on access to substantive asylum procedures.

[113] *Ibid.*

This is particularly apparent with regard to the definition of the term refugee[114]. Moreover, as individuals who may be in need of international protection, asylum seekers fall within the scope of the principle of *non-refoulement* which prohibits their removal to a country where their life or freedom could be at risk. As a rule of customary law which is also enshrined in the 1951 Convention, the principle of *non-refoulement* is legally binding upon the Member States.

It is argued that the measures to be adopted by the EC in relation to asylum seekers must comply with the provisions of the 1951 Convention as interpreted by UNHCR, including the principle of *non-refoulement*. These requirements constitute the international standards against which EU and national measures are measured in order to identify inconsistencies and deficiencies. The latter must be addressed by the EC in line with international standards if the right to seek refugee status is to be safeguarded within the EC. A number of issues have been identified, in addition to that of the framework, which reflect the need for a comprehensive approach.

Chapter II focuses on the framework for a common asylum policy which fully recognises the right to seek refugee status. The view taken is that the EC offers a more suitable framework than intergovernmental cooperation and that the "communautarisation" operated by the Treaty of Amsterdam offers an opportunity to redress the "wrongs" committed by the EU and its Member States. It is argued that the characteristics inherent in the intergovernmental framework, i.e. the use of the unanimity rule, the absence of legal binding effect, the role left to the Commission and the lack of parliamentary and judicial control, prevents it from offering an adequate framework. Whilst the "communautarisation" operated by the Treaty of Amsterdam is to be welcome, it suffers from a number of drawbacks which lie with the existence of a possibility for the Member States to opt out from Title IV and the provisions regarding the ECJ's jurisdiction and the decision-making process.

[114] See chapter III on the need for an up to date interpretation of the term "refugee".

For the right to seek refugee status to be preserved within the EC, it is argued that four areas must be addressed. Firstly, Article 1(A)(2) of the 1951 Convention must be interpreted and applied in a purposive manner in order to allow the Convention definition to cover new refugee situations, i.e. non-State persecution and gender-based persecution. Secondly, it is vital that access to asylum procedures is secured. Thirdly, asylum claims must be determined following asylum procedures that satisfy international standards; these are referred to as fair and effective procedures. Finally, the right to seek refugee status must not be undermined by asylum seekers' status pending determination.

Chapter III deals with the need to secure that the interpretation of the term "refugee" addresses the needs of today's asylum seekers. In that respect, two main issues have been identified, namely the need to recognise non-State and gender-based persecution. With regard to non-State persecution, it is argued that, since the Convention definition does not impose requirements as to the identity of the perpetrator, eligibility for refugee status must not be contingent on State involvement in cases of non-State persecution. As to gender-based persecution, the view taken is that asylum seekers who have a well-founded fear of persecution owing to their gender must have access to refugee status. It is recommended that this can be achieved through a purposive interpretation of the Convention ground "membership of a particular social group" that must be enshrined in EC law.

The purpose of chapter IV is to set standards designed to secure asylum seekers' access to substantive asylum procedures. With this in mind, two types of issues have been identified, i.e. those regarding asylum seekers' access to the EC territory and those directly concerning their access to substantive asylum procedures in the Member States. The first category of issues relate to documentation requirements imposed on asylum seekers and carrier sanctions. It is argued that these measures must be abolished as they ignore asylum seekers' specific circumstances and hinder the right to seek refugee status. The second category concerns the transfers of responsibility carried out by Member States whereby they decline responsibility for determining applications for asylum on the ground that another State should

endorse responsibility. It is argued that compliance with international refugee law is contingent on these transfers satisfying a safety test to be laid down in EC law.

Chapter V aims at ensuring that substantive asylum procedures in the Member States are consistent with international refugee law. To this end, it is argued that EC law must set minimum standards applicable to asylum proceeding in their entirety, i.e. from the time the application for asylum is submitted to the final decision on the application.

Finally, the purpose of chapter VI is to ensure that the right to seek refugee status within the EC is not undermined by asylum seekers' poor living conditions pending determination of their application for asylum. To that end, it is argued that EC law must set minimum standards designed to secure that asylum seekers enjoy decent living conditions throughout asylum proceedings. The issue of asylum seekers' detention is also examined. In that respect, the view taken is that detention must be construed as an exceptional measure. With this in mind, it is argued that EC law must thoroughly regulate the use of detention in relation to asylum seekers with a view to securing that detention is always justified and does not affect the rights of those detained.

Chapter II

The EC: A More Suitable Framework

The development of an asylum policy in line with international refugee law at European level is contingent upon adherence to international standards. Hence, the issues at stake are essentially of a substantive nature and relate to the right to seek refugee status.[1]. However, instrumental to the completion of this goal is the choice of legal framework. This issue must be addressed in the light of the objective being pursued. The contemplated frameworks must therefore be assessed on the basis of their ability to facilitate the adoption and implementation of measures consistent with the right to seek refugee status.

In the 1980s, the Member States started to realise that asylum issues could no longer be confined to national boundaries and that cooperation in that area had become necessary[2]. With the adoption of the Single European Act (SEA) in 1986, the Member States realised that the creation of an internal market by 1992 would require greater cooperation in the field of Justice and Home Affairs (JHA), and in particular in asylum and immigration matters. JHA had previously developed and become more structured and covered civil and commercial issues as well as anti-terrorism and policing matters.[3]

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[1] As already stressed in the introduction, the thesis only focuses on the right to seek refugee status.

[2] Intergovernmental cooperation involving third country nationals was not limited to asylum, it was extended to other areas such as immigration.

[3] From 1976, the Member State ministers responsible for anti-terrorism and policing issues as well as their civil servants began to meet on a more regular basis; the latter were referred to as the "Trevi Group".
On JHA cooperation, see Steve Peers, *EU Justice and Home Affairs Law* (European Law Series, Pearson Education, Harlow, 2000) in particular at p. 9-10.

However, while aware of this need to cooperate, the Member States intended to retain complete control over their asylum policies. This resulted in the Member States opting, in the first instance, for intergovernmental cooperation as opposed to the integrated form of cooperation that the EC framework offered. Originally on an ad hoc basis, intergovernmental cooperation in the field of asylum was institutionalised in the TEU (Title VI). However, with national asylum policies becoming increasingly interdependent, it became apparent for most Member States[4] that intergovernmental cooperation had reached its limits and that a change of framework was required. This step was taken with the conclusion of the Treaty of Amsterdam on 2 October 1997 which transferred competence to the EC in the field of asylum (Title IV of the TEC).

It is argued that the EC, because of its characteristics, constitutes a more suitable framework for developing an asylum policy in compliance with international standards. The transfer of competence operated by the Treaty of Amsterdam was therefore welcome. However, this "communautarisation" as currently construed, undermines the potential of the EC as a framework.

With this in mind, the purpose of this chapter is to discuss both types of legal framework and consider the "communautarisation" achieved by the Treaty of Amsterdam and the changes that are required to maximise the efficiency of the EC framework. Efficiency also requires us to determine through which type of legal instrument is harmonisation to be achieved.

1. Intergovernmental cooperation: a "*mal nécessaire*"

The Member States originally considered that intergovernmental cooperation was the most appropriate framework for asylum and they decided to institutionalise that

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[4] The use of the term "some" is intended to reflect the fact that three Member States (i.e. the UK, Ireland and Denmark) have excluded themselves from the scope of the "communautarisation" operated by the Treaty of Amsterdam.

form of cooperation. Whilst the Commission and the European Parliament took the view that "communautarisation" was the logical outcome of the cooperation developed in the field of asylum in the late 80s[5], the Member States were reluctant to take that step.

The Member States' position on framework issues was dictated by the correlation made between national sovereignty and asylum, including the right to seek refugee status. The Member States traditionally regarded matters concerning third country nationals as being inherent in State's sovereignty and therefore as belonging to their "*domaine réservé*". Hence, they wanted to retain complete control over the entry, stay and removal of third country nationals and any proposed transfer of competence in these areas would be seen as a threat to their national sovereignty.

The Member States' recognition of the need for greater cooperation combined with their persistent hostility towards "communautarisation" resulted in an institutionalisation of intergovernmental cooperation in the field of asylum. The Treaty on European Union (TEU), signed on 7 February 1992, contained a Title, i.e. Title VI, on provisions on cooperation in the field of Justice and Home Affairs, known as the third pillar.

In such a context, intergovernmental cooperation appeared as an unavoidable stage in the development of an asylum policy common to the Member States. However, it is argued that this form of cooperation does not constitute a suitable basis for the development of a comprehensive asylum policy in line with international refugee law. The challenge was therefore to make it a transitional framework as opposed to a permanent one[6]. An overview of what was achieved prior to the

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[5] See Commission Opinion of 21 October 1990 on the proposal for an amendment of the Treaty establishing the European Economic Community with a view to political union, COM (90) final 12.

[6] This issue is discussed in section 2 of this chapter.

"communautarisation" of asylum matters is given, before discussing the inadequacy of the intergovernmental framework.

1.1. Intergovernmental cooperation prior to the TEU

In the late 1980s, the Member States began to cooperate on immigration-related issues including asylum and refugee matters[7]. As already observed, cooperation in the field of asylum was prompted by the adoption of the SEA. The view taken by the Member States was that the creation of an area without internal borders required them to jointly focus on control at the EC external borders and thus deal with issues regarding third country nationals' access to the EC. This meant that cooperation in the field of asylum was now on the agenda of the Member States. Discussions were based on the Palma Document which listed the measures necessary to achieve free movement of persons within the EC before 1993[8]. Ad hoc arrangements for intergovernmental cooperation were made under the UK Presidency of the Community in 1986. The bases for a common asylum policy were laid down by the "Working Group on Immigration" which dealt with asylum, controls at external borders and visa matters. This Working Group drafted, *inter alia*, the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities of 15 June 1990[9], referred to as the Dublin Convention. Mention should also be made of two resolutions on asylum adopted by EC immigration ministers at their meetings in London on 30 November and 1 December 1992, namely the Resolution on

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[7] See David O'Keeffe, "The free movement of persons and the Single Market", 18 ELR (1992) 3-19, at p. 11-12.

[8] Report of the House of Lords Select Committee on the European Communities, *1992: Border Control of People*, Appendix 5, Session 1988-89, 22nd Report (H.L. Paper 90).

[9] OJ C 254/1 1997. The provisions of the Dublin Convention and their impact on asylum seekers' rights are examined in chapter IV on access to substantive asylum procedures.

manifestly unfounded applications for asylum[10] and the Resolution on a harmonised approach to questions concerning host third countries[11]. These resolutions constituted a first step towards harmonisation.

Intergovernmental cooperation also developed outside the purview of the EC with the adoption of the Schengen Agreement of 14 June 1985 as well as the Convention applying the Schengen Agreement of 14 June 1985 between the governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the gradual abolition of checks at their common borders of 19 June 1990, referred to as the Convention applying the Schengen Agreement. This Agreement was joined by Italy in November 1990, Spain and Portugal in June 1991 and Greece in November 1992. Chapter 7 of the Convention applying the Schengen Agreement contained provisions equivalent to those of the Dublin Convention. Both Conventions aimed at allocating responsibility for examining asylum claims as well as removing asylum seekers' right to lodge multiple applications. Officials argued that the loss of the right to submit more than one asylum claim within the EC (or within the Schengen area) would be compensated by the fact that examination was now secured[12]. Although the Schengen Conventions were not negotiated under the

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[10] Resolution on manifestly unfounded applications for asylum adopted by the Ministers of the Member States of the European Communities at their meetings in London on 30 November to 1 December 1992, in European Parliament, Asylum in the European Union: the "safe country of origin principle", People's Europe Series, November 1996, Annex I, at p. 26-32.

[11] Resolution on a harmonised approach to questions concerning host third countries adopted by the Ministers of the Member States of the European Communities at their meetings in London on 30 November to 1 December 1992, in European Parliament, Asylum in the European Union: the "safe country of origin principle", People's Europe Series, November 1996, Annex II at p. 33-37.

[12] However, the view taken is that, in the absence of harmonised substantive asylum procedures meeting international standards regarding refugee protection, the loss of the right to lodge multiple applications for asylum undermines the right to seek refugee status. This issue is examined in chapter IV on access to substantive asylum procedures.

auspices of the EC, they were considered part of the ad hoc intergovernmental cooperation. Their drafters always expressed the view that these Conventions should be regarded as a model of what could be achieved at EC level, without prejudice to the objectives and initiatives of the Community. The final clauses of the Convention applying the Schengen Agreement (Article 134) made it clear that the provisions of the Convention would apply only insofar as they were compatible with Community law. Furthermore, Article 142 of the Convention read:

"1. When Conventions are concluded between the Member States of the European Communities with a view to the completion of an area without internal frontiers, the Contracting Parties shall agree on the conditions under which the provisions of the present Convention are to be replaced or amended in the light of the corresponding provisions of such Conventions.

The Contracting Parties shall, to that end, take account of the fact that the provisions of this Convention may provide for more extensive co-operation than that resulting from the provisions of the said Conventions.

Provisions which are in breach of those agreed between the Member States of the European Communities shall in any case be adapted.

2. Amendments to this Convention deemed necessary by the Contracting Parties shall be subject to ratification, acceptance and approval. The provision contained in Article 141(3) shall apply, it being understood that the amendments will not enter into force before the said Conventions between the Member States of the European Communities come into force."

Since the Dublin Convention was concluded between the Member States, its provisions could not be affected by those of a Convention concluded outside the EC framework, namely the Convention applying the Schengen Agreement. To that end, the Schengen States agreed the Protocol on the consequences of the Dublin Agreement coming into effect for some regulations of the Schengen Supplementary

Agreement of 26 April 1994, referred to as the Bonn Protocol. This Protocol provided that, with the entry into force of the Dublin Convention[13], Chapter 7 of the Convention applying the Schengen Agreement, which dealt with asylum, would no longer apply (Article 1).

With the development of JHA cooperation, which included asylum matters, the Member States felt that a more structured framework was now required. However, anxious to retain full control over developments in JHA matters, the Member States decided to keep JHA within the intergovernmental framework. This explains why the next stage in the cooperation process did not consist in a "communautarisation" of the areas concerned, but in an institutionalisation of intergovernmental cooperation which was achieved by the TEU. This institutionalisation did not bring any change of direction in the developing common policy on asylum. From the beginning, the harmonisation process in the field of asylum mainly focused on means to cut down the numbers of individuals seeking refugee status within the EC and at its borders[14].

1.2. The TEU: the institutionalisation of intergovernmental cooperation

The TEU, which entered into force on 1 November 1993, created, in the Commission's view, "new opportunities for the development of policies relating to immigration and asylum, as it [brought] in the single framework of the Treaty aspects (...) of Justice and Home Affairs (Title VI)"[15]. The Commission stressed that this move was prompted by the need to develop a comprehensive approach in

[13] The Dublin Convention (see *supra* n. 9) entered into force on 1 September 1997 for the twelve original signatories, on 1 October 1997 for Austria and Sweden and on 1 January 1998 for Finland.

[14] These issues are examined in chapters III to VI.

[15] Communication from the Commission to the Council and European Parliament on Immigration and Asylum policies, COM (94) 23 final, 23/02/1994, p. 5, point 16.

various areas, including asylum[16]. The purpose of Title VI of the TEU was to render intergovernmental cooperation compulsory in certain fields, referred to as areas of "common interest"[17] including asylum (Art. K 1(1)).

Although the nature of the legal framework remained the same, institutionalisation brought a new perspective on intergovernmental cooperation. As observed by the Commission, "[to] some extent, this formal commitment consolidate[d] and codifie[d] a co-operation which was already happening through more ad hoc machinery to deal with questions agreed to require a joined rather than dispersed response. The move from ad hoc intergovernmental cooperation, theoretically reversible at any time, to a Treaty commitment to cooperate on a permanent basis nevertheless constituted a considerable political signal both to public opinion in Member States and to the outside world"[18]. In that respect, an institutionalised intergovernmental cooperation in the field of asylum appeared as a "*mal nécessaire*" if "communautarisation" was to eventually occur. However, most Member States, unlike the Commission, still perceived intergovernmental cooperation as a means to preserve their competence over asylum matters and not as a means to prepare a future "communautarisation". This view was expressed by the Reflection Group on the 1996 Intergovernmental Conference[19]. Although it was recognised that the challenges of the JHA pillar had not met the results[20], the

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[16] *Ibid.*

[17] See Muller-Graff, "The legal bases of the Third Pillar and its position in the framework of the Union Treaty", 31 CMLRev. (1994) 493-510.

[18] Commission Communication, see *supra* n. 15, p. 5, point 17; see also David O'Keeffe, "The emergence of a European Immigration Policy", 20 ELR (1995) 20-36, at p. 25.

[19] The Reflection Group was largely composed of Member State representatives. It was established by the Corfu European Council of June 1994 to prepare for the 1996 intergovernmental Conference (see Bull. EC. 6-1994, I. 25).

position was that the existence of distinct pillars remained justified by the need to acknowledge that asylum matters were closely related to national sovereignty. Hence, what was proposed was not a change of framework, but practical improvements with a view to strengthening cooperation[21].

Institutionalised intergovernmental cooperation in essence allowed the Member States to retain control over asylum matters. This was reinforced by the application of the principle of subsidiarity. Its main features, namely unanimity and the place reserved to the European Parliament and the Court of Justice as well as the lack of binding effect, are also regarded as the weaknesses of the intergovernmental framework and are therefore examined in the next section. It follows that the current focus is on the principle of subsidiarity and the rationale behind its incorporation in the third pillar in relation to areas covering asylum.

Article 3(2)(b) of the TEU provided that the Council could "adopt joint action in so far as the objectives of the Union [could] be attained better by joint action than by the Member State acting individually on account of the scale or effects of the action envisaged; it [could] decide that measures implementing joint action [were] to be adopted by a qualified majority."[22] This provision implicitly referred to the principle of subsidiarity as it suggested that the EU would only intervene where a common action would prove to be more efficient than an exclusively national one. The principle of subsidiarity was enshrined in Article 3b of the TEU that read, *inter alia*, that "[i]n areas which [did] not fall within its exclusive competence, the Community [should] take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action [could not] be sufficiently achieved by the Member States and [could] therefore, by reason of the scale or effects of the

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[20] 1996 Intergovernmental Conference (IGC' 96), Reflection Group Report and other References for Documentary Purposes, General Secretariat of the Council of the European Union, Brussels, 1995, at p. 49, point 46.

[21] *Ibid.*, at p. 51, point 50.

[22] Emphasis added.

proposed action, be better achieved by the Community." However, the Treaty did not give any definition. The principle of subsidiarity was described as being "possibly the most contentious abstract noun to have entered European policy since 1789."[23] The complex nature of the principle of subsidiarity was aggravated by differences in the Member States' and institutions' interpretation of the principle. It was unanimously presented as a means to develop a Union closer to its citizens[24]. However, the views of the Commission and the European Parliament on the one hand and those of the Council on the other hand did diverge on other issues. In the opinion of both the Commission and the European Parliament, the principle of subsidiarity was also intended to strengthen the legitimacy of the EU whereas the Council, which shared the Member States' opinion in that respect, considered that subsidiarity was a means to limit the effects of the expansion of the Community's competencies. The latter viewed the principle of subsidiarity as a necessary counterpart to the growing competencies of the Community, particularly with the entry into force of the SEA and the TEU. The SEA marked a turning point in the development of the Community as it expanded its competencies to new areas[25],

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[23] *Making Sense of Subsidiarity* - London Centre for Economic Policy, Research Annual report 1993; referred to in Gráinne de Búrca, "The quest for legitimacy in the European Union", Vol. 59 MLR (1996) 359-376, at p. 366.

[24] In that respect, the principle of subsidiarity, as enshrined in Article 3b, should be considered together with Article A of the TEU that provided that "[t]his Treaty [the TEU] mark[ed] a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen."
On subsidiarity as a means to bring the Union closer to its citizens, see, for instance, 1996 Intergovernmental Conference (IGC' 96), Reflection Group Report and other References for Documentary Purposes, see *supra* n. 20, at p. 21.

[25] The SEA essentially aimed at:
1) the strengthening of the Community's competence in the area of social policy (Articles 118A and 118 B E(E)C;
2) the economic and social cohesion (Articles 130A to 130E E(E)C);
3) the research and technological development (Articles 130F to 130Q EEC, now Articles 130F to 130P EC).

changed the voting system in broadening the scope of qualified majority to all matters relating to the achievement of the internal market[26] and reinforced the role of the European Parliament[27]. The Community's competencies were further enlarged by the TEU[28] and the use of qualified majority voting extended to a number of new competencies[29].

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[26] The efficiency of the qualified majority voting-system was secured by a change in Article 5 of the Rules of Procedure of the Council (20 July 1987, OJ, L 291, 15/10/1987). Article 5(1) now reads:

"The Council shall vote on the initiative of its president.

The President shall, furthermore, be required to open voting proceedings on the invitation of a member of the Council or of the Commission, provided that a majority of the Council's members so decides."

The purpose of this change in the Rules of procedure of the Council was to end the practice resulting from the "Luxembourg compromise", according to which "[w]here, in the case of decisions which may be taken by majority vote on a proposal of the Commission, very important interests of one or more partners are at stake, the Members of the Council will endeavour, within a reasonable time, to reach solutions which can be adopted by all the Members of the Council while respecting their mutual interests and those of the Community, in accordance with article 2 of the Treaty. With regard to the preceding paragraph, the French delegation considers that where very important interests are at stake the discussion must be continued until unanimous agreement is reached..." (EEC Bull. 1966, No.3, 5-11, at p. 9).

[27] See the cooperation procedure with the European Parliament introduced in Article 149(2) of the EEC Treaty that became article 189c of the TEC. This procedure is now enshrined in Article 252 of the TEC.

[28] The TEU essentially extended the competences of the Community to:

1) citizenship of the Union (Articles 8 to 8e TEU);

2) common visa policy (Article 100c TEU);

3) economic and monetary policy (Articles 102a to 109m TEU);

4) education (Article 126 TEU);

5) culture (Article 128 TEU);

6) public health (Article 129 TEU);

7) consumer protection (Article 129a TEU);

8) trans-European networks (Articles 129b to 129d TEU);

9) industry (Article 130 TEU);

Although the principle of subsidiarity was referred to in the TEC, it also applied in the context of the EU. Indeed, Article B of Title I of the TEU read that "[t]he objectives of the Union [should] be achieved as provided in this treaty and in accordance with the conditions and the timetable set out therein while respecting the principle of subsidiarity as defined in Article 3b of the treaty establishing the European Community". However, it resulted from Article L of the TEU that the principle of subsidiarity would not be justiciable at Union level as this provision excluded, in principle, the competence of the ECJ in relation to the third pillar[30]. The debate on the role of subsidiarity within the EC was also relevant in the context

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10) development cooperation (Articles 130u to 130y TEU);

11) strengthening of Community competence in the area of social policy by means of the Protocol on Social Policy, which has the same legal authority as the Treaty itself (Article 239 TEU) and the Agreement on Social Policy Concluded Between the Member States of the European Community with the Exception of the United Kingdom of Great Britain and Northern Ireland, referred to in the Protocol.

Besides, the scope of Community competences as originally decided or added by the SEA have been defined in more detail and extended. See Article 127 (new Article 150) of the TEC as amended by the TEU on vocational training, Articles 130a to 130e (new Articles 158 to 162, economic and social cohesion, Articles 130f to 130p (new Articles 163 to 173) with exceptions (see *infra* n.29), on research and technological development and Articles 130r to 130t (new Articles 174 to 176) and on environment with an exception (see *infra* n. 29).

[29] However, unanimity was still required with regard to culture (Article 128(5) (new Article 151(5)), despite the powers of "codecision" of the European Parliament), industry (Article 130(3)) (new Article 157(3)), economic and social cohesion with respect to certain decisions (Article 130b(3) (new Article 159) and 130d (new Article 161)) and certain aspects of the environment policy (Article 130s(2) (new Article 175(2)).

[30] On the justiciability of the principle of subsidiarity, see, for instance, A.G. Toth, "Is subsidiarity justiciable?", 19 ELR "1994" 268-285; Koen Lenaerts and Patrick van Ypersele, "Le principe de subsidiarité et son context; étude de l'article 3b du traîté CE", Cahiers de Droit Européen, Nos 1-2 (1994) 3-85 and José Palacio González, "The principle of subsidiarity: a guide for lawyers with a particular Community orientation", 20 ELR (1995) 355-370.

This absence of judicial control that characterised the intergovernmental framework is considered as one of its main pitfalls. This issue is discussed in section 1.3 of the present chapter.

of the EU. In that respect, reference to the principle of subsidiarity, even implicit in the TEU (Article K.3(2)(b)), could be seen as a Member States' reaction to the expansion of the third pillar and a means to assert national control over the matters covered by that pillar, which of course included asylum.

Intergovernmental cooperation in its final form, i.e. the institutionalised form, appeared as a compromise between the Member States' need to closely cooperate in the field of asylum and their reluctance to transfer competence to the EC. However, it is argued that the features of institutionalised intergovernmental cooperation made it an unsuitable framework for the development of a common policy on asylum compatible with international refugee law; hence, it should retain a transitional nature. In other words, it should be construed as a step towards "communautarisation".

1.3. The weaknesses of the intergovernmental framework

It is acknowledged that the institutionalisation of intergovernmental cooperation constituted a significant step significant step as it formally recognised the need for cooperation in the field of asylum.

Cooperation was necessary as Member State asylum policies and laws had an impact beyond national borders and were likely to have consequences for other Member States, even more so with the dismantling of internal borders. For instance, many asylum seekers decided to seek refugee status in Germany, which already dealt with high numbers of asylum claims[31], because of the introduction of increasingly restrictive provisions in other Member States. The asylum seekers' preference also found its origin in the traditionally liberal nature of German asylum law which had been reinforced by the restrictive reforms taking place elsewhere in

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[31] Between 1984 and 1993, around 3,5 million asylum applications were submitted in Europe and nearly half of that number were lodged in Germany
(see http://www.unhcr.ch/refworld/pub/state/95/box5_3.htm).

the EC. With a view to making its asylum system less attractive and thus reducing the numbers of asylum seekers, Germany adopted more stringent provisions on asylum[32] which were more consistent with the restrictive trend developing across the EC. The German example showed that asylum could no longer be regarded as a purely national matter as national laws and policies were interdependent. In other words, they influenced each other and could not be devised without taking on board developments in other Member States. This resulted in a progressive *de facto* harmonisation. In that context, cooperation in the field of asylum was unavoidable. Hence, the issue at stake did not lie with the existence of a need for cooperation, but with the form that that cooperation should take.

With this in mind, it is argued that, despite its institutionalisation, intergovernmental cooperation remained an unsuitable framework if the right to seek refugee status were to be preserved within the EC. Indeed, the view taken is that intergovernmental cooperation has failed asylum seekers in that respect. This inability of intergovernmental cooperation finds its roots in its characteristics as a framework which prevented the EU from distancing itself from the restrictive trends developing in most Member States. Indeed, because of its specific features, the developing common policy on asylum could only reflect the Member States' political will. Thus, this section focuses on the unanimity rule, the lack of binding effect, the Commission's role and the absence of parliamentary and judicial control that characterise institutionalised intergovernmental cooperation.

1.3.1. The unanimity rule

The decision-making process within the intergovernmental framework, as organised by the TEU, was governed by the unanimity rule. Article K.4, *inter alia*, read that

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[32] Article 16 of the German constitution provided that "the politically persecuted enjoy the right to asylum." For many years, anyone who arrived at the German border and requested asylum there had to be admitted to the German territory and allowed to apply for refugee status. Article 16 was repealed in 1996.

"[t]he Council [should] act unanimously, except on matters of procedure and in cases where Article K.3 provide[d] for other voting rules." This may be the case with regard to measures implementing joint actions (Article K.3(2)(b)) and those implementing conventions concluded by the Member States in the field of Justice and Home Affairs (Article K.3(2)(c)). Unanimity had the disadvantage of slowing down the decision-making process as a consensus amongst Member States had be found; if the Member States failed to agree the whole process was aborted. This unanimity requirement, meant, as observed by McMahon, that "[a] more likely scenario [was] that any measures that [did] get adopted [would], as a result of compromises, operate at the level of the lowest common denominator already applying in the Member States, meaning that progress in these areas [would] be incremental rather than dynamic"[33]. This was particularly worrying in the field of asylum as it defeated the need to comply with international refugee law and set standards in accordance with them. In that context, intergovernmental cooperation could be seen as having facilitated the erosion of asylum seekers' rights throughout the EU. However, one should bear in mind that the asylum policy developing at EU level found its origin in national policies.

1.3.2. Absence of legal binding effect

One of the main features of intergovernmental cooperation was the lack of binding effect of most measures adopted within that framework. This was for instance the case of the Resolutions on host third countries[34] and on manifestly unfounded applications for asylum[35] as well as the Conclusions on countries in which there is generally no serious risk of persecution[36]. The only type of instrument that has

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[33] Richard McMahon, "Maastricht's Third Pillar: load-bearing or purely decorative", LIEI 1995/1, 51-64, at p. 62.

[34] See *supra* n. 11.

[35] See *supra* n. 10.

binding effect are Conventions concluded between the Member States; this is the case of the Dublin Convention.

It is argued that asylum measures adopted within the intergovernmental framework have had an adverse effect on the right to seek refugee status. In that context, one could argue that the absence of binding effect was to the asylum seekers' advantage as Member States retained the right to have more liberal national laws. However, such an argument ignores the interdependent nature of the Member States' asylum policies which contributed to the development of a restrictive trend at European level. Thus, the progressive *de facto* harmonisation that took place was not conducive to the introduction or maintenance of laws and practices that would be much more liberal that those of other Member States. This is inconsistent with the need to preserve the right to seek refugee status in line with international refugee law. An absence of legal binding effect combined with a common political will hostile to asylum seekers prevented harmonisation from embracing international standards.

Another weakness of the intergovernmental framework lay with the role left to the EC institutions and the detrimental impact of this situation on the democratic nature of the third pillar and the intergovernmental framework in general.

1.3.3. The role of the Commission

The EU framework distinguished itself from the EC framework in that the former only fully involved the Council because of its intergovernmental nature. Although the Commission was involved in the decision-making process, its role, and thus its imput, in the development of the third pillar remained limited.

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[36] Conclusions on countries in which there is generally no serious risk of persecution adopted by the Ministers of the Member States of the European Communities at their meetings in London on 30 November to 1 December 1992, in European Parliament, Asylum in the European Union: the "safe country of origin principle", People's Europe Series, November 1996, Annex III, at p. 38-41.

Article K.3 distinguished between the areas covered by Title VI in relation to the right of initiative. With respect to areas mentioned in Article K.1(1) to (6)[37], which included asylum (Article K.1(1)), the Commission and the Member States shared the right of initiative while this right exclusively lay with the Member States with regard to the areas mentioned in Article K.1 (7) to (9)[38]. The Commission would be excluded with regard to matters that were considered too sensitive to allow its involvement. In the field of asylum, however, the Member States did not object to sharing their right of initiative with the Commission. This could be seen as another acknowledgement of the increasing interdependence of the Member States' asylum policies.

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[37] These areas listed in Article K. 1(1) to (9) of Title VI of the TEU comprised:

"1. asylum policy;

2. rules governing the crossing by persons of the external borders or the Member States and the exercise of controls thereon;

3. immigration policy and policy regarding nationals of third countries:

(a) conditions of entry and movement by nationals of third countries on the territory of Member States;

(b) conditions of residence by national of third countries on the territory of Member States, including family reunion and access to employment;

(c) combating unauthorised immigration, residence and work by nationals of third countries on the territory of Member States;

4. combating drug addiction in so far as this is not covered by 7 to 9;

5. combating fraud on an international scale in so far as this is not covered by 7 to 9;

6. judicial cooperation in civil matters."

[38] The areas mentioned in Article K.1 (7) to (9) of Title VI of the TEU comprised:

"(7) judicial cooperation in criminal matters;

(8) customs cooperation;

(9) police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of custom cooperation, in connection with the organisation of a Union-wide system for exchanging information within a European Police Office (Europol)."

Article K.4 of the TEU provided for a Co-ordinating Committee to be set up and Article K.4(2) specified that the Commission should be "fully associated" with the work of the Committee. Moreover, the Commission, through its President, took part in the sessions of the European Council. The Commission observed in its Communication that "Title VI la[id] down clear rules and procedures for co-operation in [the] areas [referred to in Article K.1], spelling out the respective roles of the Member States, the Commission and the European Parliament (...)"[39]. It is argued that the Commission's statement was open to criticism as the TEU failed to define the words "fully associated" and to provide the means to secure this association.

Although the Commission could express its views on asylum matters and attempt to implement them through its right of initiative, its role and influence remained limited. This was unfortunate as the Commission's views on asylum matters had traditionally been more liberal than those of the Council and thus the Member States. For instance, the Commission opposed a suggestion from the Austrian Presidency to move from an asylum system based on the individuals' right to protection to one where, at its discretion, a State could offer protection to a person or a group at risk. The Commission stressed the importance of the individual's right to seek refugee status which found its very basis in the 1951 Convention[40].

Institutionalised intergovernmental cooperation also meant a lack of parliamentary and judicial control that contributed to the "democratic deficit" of the EU.

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[39] Commission Communication, *see supra* n. 15, at p. 6, point 18.

[40] See the European Commission's Memo 98/55 of 15 July 1998 on the Implementation of the Amsterdam Treaty in Immigration and Asylum referred to in the Immigration Law Practitioners' Association, European Update: September 1998, at p.7-8.
The Commission's position constituted strong support for the "communautarisation" of asylum matters.

1.3.4. The lack of parliamentary and judicial control

The European Parliament had no weight in the decision-making process within the EU. As to the ECJ, its jurisdiction was in principle excluded.

The role of the European Parliament, determined in Article K.6, was even more restricted than that of the Commission. The Parliament had the right to be regularly informed by the Presidency and the Commission of discussions in the areas covered by Title VI. It should also be consulted by the Presidency on the principal aspects of activities in the areas referred to in that Title; the Presidency should ensure that the views of the European Parliament were duly taken into consideration. However, as in the case of the Commission, the TEU failed to provide the European Parliament with the means to assert its role. The European Parliament could also ask questions to the Council and make recommendations. Finally, each year the Parliament should hold a debate on the progress made in the implementation of the areas covered by Title VI.

Article K.6, and the in the intergovernmental framework in general, confined the role of the European Parliament to a consultative one. Thus, its imput in the EU asylum policy was quite limited in practice and very much depended upon the goodwill of the Member States. Although the interest and involvement of the European Parliament in asylum matters should not be undermined, its influence was seriously curtailed. This very limited role conferred upon the Parliament partly explained the fact that the framework established by the EU failed to meet democratic requirements. Another reason was to be found in the quasi-exclusion of the ECJ.

The modest involvement of the European Parliament and the quasi-exclusion of the ECJ inherent in the intergovernmental framework raised questions as to its compatibility with democratic requirements. As observed by Van Gerven, "[d]emocracy stands for a vision on the distribution of public powers or competencies which regards the will of the citizens, as expressed through general

elections, as the only device that is able to legitimate sovereignty. The representatives so elected constitute the parliament which, because of its direct legitimation, is the most autonomous of public bodies and, as such, authorised to lay down general legislation"[41]. The most important device to guarantee that a political system is democratic is the principle of separation of powers between the legislative and the executive, in which the judiciary takes part as ultimate protector of the rule of law and of the rights of individuals against the authorities and amongst themselves. The purpose of this principle is to prevent abuses of power in the exercise of power at the expense of the citizens as well as non-citizens. In western political systems, the power of the state is legitimated through the democratic process.

On that basis, the legitimacy of the EU was increasingly questioned on the ground that the traditional structures of the democratic state were missing. The EU, although it had many of the powers of a State, lacked the political structure or mode of governance that characterised a State. On the other hand, the EU could easily be distinguished from a typical intergovernmental organisation. It had legislative and regulatory powers, and many of its laws had a direct impact on the Member States' legal systems. As observed by De Burca, "[s]ome of the unelected law-making bodies, such as the Commission and the Court of Justice, ha[d] little or no democratic legitimacy and they [were] only weakly accountable in other ways, such as in the giving of reasons for their decisions"[42]. So long as the competencies of the Community remained confined to the economic sphere, legitimacy was not central to debates. However, with the rapid expansion of the competencies of the Community, its legitimacy started to be increasingly questioned. This "legitimacy crisis" reached its peak with the entry into force of the TEU.

Intergovernmental cooperation was characterised by secrecy and thus a lack of public discussion and transparency. For instance, the way the Schengen negotiations

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[41] *Ibid.*, at p. 90.

[42] Gráinne de Búrca, *supra* n. 23, at p. 352.

were carried out was highly criticised because of the failure to inform national parliaments. Another example could be found in the Draft Convention on the Crossing of External Borders which remained secret until its signing. This lack of transparency meant that parliamentary and thus public debate was made more difficult. Prior to the entry into force of the TEU, the rules prepared by the Ad Hoc Group on Immigration did not involve prior public discussion and parliamentary debate in the European and national parliaments on the basis of published drafts. Several Member States were opposed to public discussion either at European level or national level. As far as the content of the rules prepared by the Ad Hoc Group on Immigration was concerned, the main source of information to the public consisted in press communiqués. As for the Council, it did not seem inclined to change its practices in order to render the decision-making process more transparent. The Commission was critical of the fact that most of the Council's debates were still held behind closed doors. The lack of transparency that characterised intergovernmental cooperation was particularly obvious in the field of Justice and Home Affairs. However, the Commission made no radical proposal to significantly remedy the transparency problem. The Council was also criticised by the European parliament which considered that its involvement in the negotiation process would make that process more transparent and therefore more democratic. The Council argued that, to a certain extent, it had addressed criticism by amending its own rules with a view to achieving a higher degree of openness and improving access to information. The contribution of the European Parliament, although insufficient to remedy the transparency deficit, remained the most significant[43]. Within the intergovernmental framework, public information was mainly confined to a few public relations efforts. A greater involvement of the European Parliament

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[43] The Committee on Institutional Affairs of the European Parliament organised public hearings in Brussels in late 1995 and early 1996, in which organisations could participate in the debate and state "what it was citizens expected from the Europe of tomorrow". However, this initiative of the European Parliament, although in the right direction, remained quite superficial since the parliamentary hearings were not advertised or publicised in the national media of the Member States, but only in the Official Journal (OJ 1995 C 199, 3/8/1995). Besides, would-be participants were asked to submit an application to the Parliament as representatives of an organisation.

would have allowed for a more transparent decision-making process by providing a forum for public debate and thus parliamentary control.

Another factor that affected democracy in relation to intergovernmental cooperation lay with the absence of judicial control. With regard to asylum matters, paragraph 3 of Article K.3(2)(c) of the TEU made judicial control the exception. The ECJ could only have jurisdiction over Conventions concluded between the Member States provided that the latter expressly conferred jurisdiction upon the Court. However, the ECJ was never given such jurisdiction under Article K.3(2)(c). This meant that the measures adopted on the basis of the third pillar always enjoyed immunity from judicial control. In that context, if judicial control were to take place, it had to emanate either from national courts or the European Court of Human Rights and be exercised on implementing national measures. However, the existence of potential outside control did not compensate for the lack of judicial control within the intergovernmental framework.

The very nature of the intergovernmental framework and its "*raison d'être*" did exclude, as by principle, judicial control emanating from the ECJ. Although the ECJ was not totally absent from the third pillar, its scope for intervention was strictly controlled and defined. Indeed, as already mentioned, paragraph 3 of Article K.3(2)(c), provided that the Conventions adopted by the Member States would give jurisdiction to the ECJ to interpret their provisions and rule on any dispute regarding their application. This quasi-absence of judicial control, which was confirmed in Article L(b)[44], did contribute to the democratic deficit of the third pillar. Judicial control could occur, but would have to come from outside the Union. As observed by Van Gerven, "(...) although the ECJ ha[d] [almost] no jurisdiction under the second and third pillar, the requirement of efficient judicial protection

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[44] Article L(b) of the TEU read:

"The provisions of the Treaty establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community concerning the powers of the Court of Justice of the European Communities and the exercise of those powers shall apply only to (...) the third paragraph of Article K.3(2)(c)."

which [was] in principle enshrined in Article 6 and 13 ECHR, applie[d] also there, which mean[t] that action by the Member States, individually or acting jointly in the European Council, remain[ed] subject to judicial review on the part of the Human Rights Court and of the Member States' national courts (...); such review [was] crucial when it [came] to protecting the fundamental rights of non-EU citizens in "matters of common interest" referred to in Article K.1 TEU, amongst which the asylum policy and the immigration policy and policy regarding nationals of third countries (...)"[45] This statement stressed the crucial importance of judicial control for the protection of individuals' fundamental rights. This absence of judicial control within the EU had also been detrimental to the effectiveness of the measures adopted under the third pillar as the ECJ could not secure a common interpretation and correct implementation.

It is argued that intergovernmental cooperation has unfortunately encouraged and legitimised highly questionable practices which have undermined the right to seek refugee status. Cooperation between the Member States became necessary because of the interdependent nature of their asylum policies which resulted in a *de facto* harmonisation. However, owing to its very characteristics, intergovernmental cooperation was unable to ensure that the common asylum policy was developing in line with international refugee law.

2. The "communautarisation" of asylum matters

The view taken is that the first pillar, namely the EC, constitutes a more suitable framework for the development of a comprehensive policy on asylum than intergovernmental cooperation. The purpose of this section is therefore to demonstrate why the EC is considered a more appropriate framework and assess the "communautarisation" operated by the Treaty of Amsterdam in the light of the potential offered by the EC.

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[45] Walter Van Gerven, "Towards a coherent Constitutional system within the European Union", EPL Vol. 2, Issue 1 (1996) 81-101, at p. 88-89.

2.1. The EC: a suitable framework

Issues relating to the choice of framework for an asylum policy common to the Member States must be understood in the light of the need to establish standards in line with international refugee law. In that respect, it is argued that compliance is more likely to be achieved within the EC framework than through intergovernmental cooperation.

The measures adopted within the intergovernmental framework were symptomatic of a restrictive approach to asylum matters the objective of which was to cut down the numbers of asylum seekers within the EC[46]. These measures were, and still are, a serious source of disquiet as they often fail to comply with international refugee law. In that context, it is tempting to "blame" international cooperation for this "change of heart" and argue that asylum should have remained a national matter if asylum seekers' rights were to be preserved. This position also suggests that given the choice between the EU and the EC frameworks, the former would constitute a lesser "*mal*" as the measures adopted usually lack legal binding effect[47]. It is argued that this line of reasoning ignores an important fact, i.e. the interdependence of the Member States' asylum policy and its impact on law reform in that area. Indeed, as already noted, the asylum policy of a Member State is likely to have an effect on that of other Member States. Thus, in devising their asylum policy, the Member States take into consideration developments taking place elsewhere in the Community. This has resulted in a de *facto* harmonisation in the field of asylum that preceded formal intergovernmental cooperation in that area. In that context, the development of a common approach to asylum matters very much appears to be an unavoidable move. As already suggested, the challenge is, therefore, to secure that

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[46] The restrictive nature of the measures adopted at EU level is discussed in the next chapters.

[47] See section 1.3.2 of the present chapter.

the measures collectively adopted by the Member States satisfy international standards regarding refugee protection.

Considering that the development of a common approach to asylum issues was inevitable and that the intergovernmental framework has failed to secure the adoption of measures in line with international refugee law, it is argued that the EC constitutes a more appropriate framework.

Unlike the intergovernmental framework, the EC had, and still has, the potential to secure the preparation, adoption and implementation of measures consistent with international standards regarding refugee protection while offering a more effective and democratic environment. However, a transfer of competence to the EC in the field of asylum will not in itself secure observance of international refugee law. This means that the adoption of measures satisfying international standards remains the critical point. If the Community were to adopt measures that undermine the right to seek refugee status, the measures in question would still be binding upon the Member States and what is regarded as a strength of the EC framework would become a threat to asylum seekers' rights. In that respect, intergovernmental cooperation could, in theory, be considered a better framework as it lacks provisions on binding effect. However, recent developments in the EU asylum policy shows that this absence of binding effect has not prevented a deterioration of the standards in many Member States. This imperative need to comply with international refugee law explains why this thesis puts the emphasis on substantive issues regarding the right to seek refugee status.

Does "communautarisation" entail a risk that could be fatal to the right to seek refugee status? Intergovernmental cooperation has, to date, failed to secure compliance with international refugee law. It is argued that breaches of the law in question should no longer be tolerated for both legal and humanitarian reasons. If the EC were to set up standards in line with international requirements regarding refugee protection, it would then have the means to ensure compliance with the standards in question. This is one of the main advantages of the EC framework over

intergovernmental cooperation. However, will the Community take such a step and to a certain extent oppose the views currently expressed by most Member States? It is argued that the involvement of the Commission and the European Parliament in the decision-making process would facilitate the negotiation and adoption of instruments in line with international refugee law as these two institutions have traditionally taken positions compatible with international standards and have criticised the Member States and the Council in that respect. It is acknowledged that Member States' views cannot be disregarded and that some degree of compromise may be required. However, compromise must not mean that violations of international refugee law can be incorporated into EC law and thus endorsed by the EC! On the contrary, the EC, which has always presented itself as an advanced legal order when compared to the international framework, should compensate for the deficiencies of the latter and secure that, at least within its territory, international standards are met. This does not mean that the idea of compromise is excluded: it is not. However, compromises can only take place within the limits of compliance with international refugee law. For instance, the Member States could still carry out transfers of responsibility so long as an adequate examination of the asylum claims concerned by another State is guaranteed[48].

The EC's potential to facilitate the adoption and secure the implementation of measures in line with international refugee law lies with its decision-making process, the binding nature of EC law and the fact that it provides for judicial control.

A "communautarisation" of asylum matters would mean that the Commission would play a key role in the decision-making process and that the European Parliament could be properly involved. The Commission, which has expressed concern about the asylum measures adopted within the EU framework, could have a positive

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[48] A transfer of responsibility consists in an asylum seeker being removed from the territory of the State where he or she intended to submit his or her claim on the ground that another State is accountable for considering the claim in question. Transfers of responsibility are examined in chapter IV on access to substantive asylum procedures.

imput by making proposals which would protect asylum seekers' rights and aim at introducing standards compatible with international refugee law. The Commission supports the view that the EC constitutes a more suitable framework than the EU for addressing asylum matters. By reason of its very nature and composition, the Commission is not subject to the control and influence of the Member States. If the Commission were to make proposals that are incompatible with the right to seek refugee status, this would seriously affect the legitimacy of the Community as a whole. Indeed, such an attitude would mean that the Commission would encourage and endorse violations of legally binding obligations while disregarding human rights issues. If such proposals were to become law, all the EC institutions as well as its Member States would become accomplices. The implications of such a position would go beyond the sphere of asylum and seriously question the legitimacy of the EC.

Another advantage of the EC framework would lie with the role conferred upon the European Parliament. Indeed, its role in the EC decision-making process has been reinforced securing a higher degree of public debate. Initially confined to a consultative role, the European Parliament gradually became, with the introduction of new procedures, more involved[49]. The involvement of the Parliament would address one of the weaknesses of the intergovernmental framework, namely the absence of parliamentary debate and control. Moreover, as observed by O'Keeffe, "(...) the involvement of the European Parliament would be a powerful lobby for the

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[49] As a non-elected body, the original European Parliament had few powers and its role in the decision-making process was limited to an advisory one. However, with the introduction of direct elections, the European parliament played an increasingly important part in that process. The requirement for consultation and cooperation with the Parliament, and thus its influence, were strengthened by the introduction of conciliation procedures in 1977 (Joint Declaration of the European Parliament, the Council and the Commission, OJ C89/1, 22/4/1975) and the cooperation procedures introduced by the SEA. The role of the European Parliament was further consolidated with the introduction of a right of co-decision with the Council in certain areas (Article 251[ex Article 189b]).

rights of third country nationals"[50]. On several occasions, the Parliament has expressed concern about the developments taking place within the intergovernmental framework in the field of asylum. It was reported that "the European Parliament ha[d] been extremely concerned with the intergovernmental character of the cooperation by Member States on migration and asylum policies in the past. It would have preferred that those policies be dealt with through communautarian procedures (...)"[51] This view was shared by the Commission.

An essential component of a democratic system and thus a necessary complement to parliamentary control is to be found in the existence of judicial control. Judicial control is indispensable to secure that the law is correctly applied. Thus, it is not enough to secure that the measures adopted are in line with international refugee law, it is essential to ensure their correct implementation. This would require jurisdiction being given to the ECJ, which is a feature of the EC legal system. In that respect, "communautarisation" appears as a necessary move. The ECJ would be in a position to exercise its jurisdiction with a view to ensuring the correct interpretation and implementation of asylum measures in the interest of both the EC and asylum seekers. Indeed, the establishment of standards in line with international ones would be a pointless exercise if these could be undermined by national restrictive interpretations and defective implementation.

It is acknowledged that the EC has suffered from a democratic deficit and still does to a certain extent. However, the EC nonetheless provides a more suitable framework than the EU even if there is still room for improvement.

The EC would also constitute a more effective framework in that it allows for a quicker decision-making process and ensures legal binding effect. This explains why

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[50] David O'Keeffe, *see supra* n. 18, at p. 35.

[51] See *supra* n.15, Annex III, paragraph 16.

observance of international refugee law by EC measures adopted in that field is so critical to the preservation of the right to seek refugee status.

A "communautarisation" of asylum matters could mean a speedier decision-making process as qualified majority could apply instead of unanimity that characterises the decision-making process at EU level. The use of qualified majority would also decrease the need for compromises inherent in the unanimity rule, that too often result in lowering standards. It has been argued that the use of qualified majority would not necessarily mean a total exclusion of the unanimity rule from the decision-making process. According to McMahon, qualified majority "(...) would not apparently have prejudiced a Member State from invoking the Luxembourg Accords[52], thereby requiring unanimous agreement or the qualified majority voting compromise on the most recent enlargement, where appropriate."[53] However, this statement is open to criticism as the Rules of Procedure of the Council have been amended in order to limit the use of the practice resulting from the Luxembourg Accords[54]. Besides, the Council Decision of 29 March 1994[55] concerning the taking of decisions by qualified majority by the Council as amended by the Council Decision of 1 January 1995[56] provides that "if Members of the Council representing a total of 23 to [25] votes indicate their intention to oppose the adoption by the Council of a Decision by qualified majority, the council will do all in its power to reach, within a reasonable time and without prejudicing obligatory time-limits laid down by the Treaties and by secondary law, such as in Article 189b [new Article 251]and 189c [new Article 252] of the Treaty establishing the European

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[52] See *supra* n. 26.

[53] Richard McMahon, *see supra*, n. 33, at p. 62.

[54] See *supra* n. 26.

[55] OJ 1994 C 105/1.

[56] OJ 1995 C 1/1.

Community, a satisfactory solution that could be adopted by at least [65] votes. During this period, and always respecting the Rules of Procedure of the Council, the President undertakes, with the assistance of the Commission, any initiative necessary to facilitate a wider basis of agreement in the Council. The Members of the Council lend him their assistance". However, this search for a "wider basis of agreement" should not result in compromises that could compromise compliance with international refugee law. It is argued that qualified majority would be in the interest of asylum seekers as there is an urgent need to set up adequate standards across the EC. In that respect, although unanimity may not be totally excluded, the EC offers a better framework than intergovernmental cooperation as the latter is governed by the unanimity rule.

The preference given to the EC framework over intergovernmental cooperation also lies with the outcome of the EC decision-making process. Indeed, unlike most measures adopted under the third pillar, the measures adopted within the former framework, because of the very nature of the EC legal system, are binding upon the Member States. As already stressed, this makes the EC a more suitable framework provided that the standards to be set are consistent with international requirements regarding refugee protection. If the EC were to adopt measures incompatible with the requirements in question, the right to seek refugee status would be seriously undermined as legal action against such measures would be extremely limited because of the supremacy of EC law and the weaknesses of international law, including international refugee law, when it comes to enforcement. So long as no breaches of EC law are committed, remedies could not be found within the EC legal system and would have to come from outside. Action before the institutions of the ECHR could be taken against the Member States if they implemented EC measures in breach of their obligations under the ECHR. In that respect, proceedings before the European Court of Human Rights could assist in the enforcement of international refugee law. However, this would be limited to cases where breaches of international refugee law also entail a violation of the ECHR. This could be the case where a Member declines responsibility for examining an asylum claim and removes the applicant to a third country in breach of the principle of *non-*

refoulement, a principle central to international refugee law, but also in breach of Article 3 of the ECHR that prohibits torture and inhuman or degrading treatment or punishment.

It is argued that the EC has the potential to offer a more effective framework which could enable the development of an asylum policy consistent with international refugee law. However, has the Treaty of Amsterdam met the hopes it raised in transferring competence to the EC in the field of asylum?

2.2. The "communautarisation" operated by the Treaty of Amsterdam

The third pillar contained "passerelles" to "communautarisation" which were finally used by the drafters of the Treaty of Amsterdam. The Treaty of Amsterdam incorporated a new title in the TEC, i.e. Title IV on visas, asylum, immigration and other policies related to free movement of persons. However, it is argued that the "communautarisation" operated by the Treaty of Amsterdam is not satisfactory as Title IV under uses the potential of the EC as a framework for an asylum policy in line with international requirements.

2.2.1. The "passerelles" towards "communautarisation"

Although the TEU institutionalised intergovernmental cooperation, "communautarisation" remained an option. Indeed, "passerelles" to "communautarisation" were present in the third pillar. The main "passerelle" was to be found in Article K.9, although Article K.3(2)(c) could be seen as a sign of the potentially transitional nature of the intergovernmental framework[57].

Article K.9 read that "[t]he Council acting unanimously on the initiative of the Commission or a Member State, may decide to apply Article 100c of the Treaty establishing the European Community to take action in areas referred to in Article

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[57] David O'Keeffe, see *supra* n. 18, at p. 25.

K.1(1) to (6), and at the same time determine the relevant voting conditions relating to it. It shall recommend the Member States to adopt the decision with their respective constitutional requirements". Article K.9, therefore, enabled transfers of competence to the EC in a number of areas, including asylum. In the Declaration on Asylum attached to the TEU, the Council was required to consider by the end of 1993 the possibility of applying Article K.9. Although in favour of "communautarisation", the Commission submitted a report on this issue in November 1993 where it expressed the view shared with the European Parliament that it was too early for such a step and that this question should be re-examined at a later stage[58]. The issue of "communautarisation" was raised again in the context of the 1996 Intergovernmental Conference[59] and finally became part of the Member States' agenda with the negotiation of the Treaty of Amsterdam. Title IV of the TEC finds its origin in a proposal of the Irish Presidency made in its General Outline for a Draft Revision of the Treaties drawn up for the "Dublin II" European Council, as part of the intergovernmental Conference negotiations[60]. The Irish proposals suggested the introduction of a new Title on the free movement of persons, asylum and immigration. Although the Irish Presidency left open the question relating to the framework, it expressed the view that "it would provide the most coherent basis for effective action" if the new Title was incorporated in the first pillar and not in the third pillar of the TEU[61]. It is interesting to note that, although Title IV of the TEC finds its origin in an Irish proposal, Ireland decided to opt out from Title IV when incorporated into the Treaty of Amsterdam[62]. It is believed that the attitude of the

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[58] See *supra* n. 8, at p. 15, point 19.

[59] See *supra* n. 20.

[60] Referred to in JUSTICE, Position Paper, "The jurisdiction of the European Court of Justice in respect of asylum and immigration matters", Human Rights and the EU Intergovernmental Conference 1996-97 (May 1997), at p. 1.

[61] *Ibid.*

Irish Government was prompted by the existence of a common passenger area with the UK. The proposals of the Irish Presidency were refined by the Dutch presidency at the beginning of 1997 in that the areas covered by the proposed new Title should be dealt with in conjunction with issues relating to external border controls and the prevention and combat of crime with a view to securing an area of freedom, justice and security[63]. The Dutch proposal is typical of the intergovernmental approach which tended, for instance, to primarily apprehend asylum matters as border control issues. However, one may affirm that the change of framework amounted to a recognition that the European dimension of asylum matters now prevailed over their national dimension and that a cohesive approach was required. The insertion of Article K.9 in the TEU indicated that the Member States already suspected that the interdependent nature of their asylum policies would call for more intensive cooperation and, in that respect, Article K.9 can be regarded as reflecting the transitional nature of the intergovernmental framework.

Another "passerelle" could, to a certain extent, be found in Article K.3(2)(c) of the TEU which granted, at the discretion of the Member States, jurisdiction to the ECJ over conventions concluded by Member States in the areas referred to in Article K.1 (1) to (9) which included asylum. This provision, in making allowance for a possible intervention of the ECJ, could be seen as an indicator that a transfer of competence to the EC in the field of asylum and other areas was not totally excluded. However, this opportunity to involve the ECJ never materialised.

The Treaty of Amsterdam, in transferring to the EC matters that were initially part of the third pillar shifted the balance in favour of the former by reducing the scope for purely intergovernmental cooperation. However, it is argued that this "communautarisation" suffers from a number of weaknesses that could affect the right to seek refugee status.

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[62] See this chapter, section 2.2.2, on the consequences of the Protocol on the Position of the United Kingdom and Ireland

[63] See *supra* n. 60.

2.2.2. An unsatisfactory "communautarisation"

The EC can be considered the most suitable framework for the development of an EC policy on asylum in line with international refugee law provided that its full potential is fully exploited. In that respect, it is argued that Title IV of the TEC does not meet the challenges that this change of framework entails.

The weaknesses suffered by the "communautarisation" of asylum matters is the direct result of a complex structure created by the right to opt out from Title IV, which, *inter alia*, undermines the role of the ECJ. Moreover, it also lies with the choices made by the drafters of the Treaty in relation to the scope of the ECJ's jurisdiction and the decision-making process

The UK and Ireland decided not to take part in the adoption of Title IV [ex Title IIIa] of the TEC. Their position was enshrined in the Protocol on the Position of the United Kingdom and Ireland (Article 1). The same attitude was adopted by Denmark (Article 1 of the Protocol on the position of Denmark). These Protocols mean that measures adopted under Title IV are not binding upon these Member States; the same applies to the decisions of the ECJ regarding this Title (Article 2 of the Protocol on the position of the United Kingdom and Ireland and Article 2 of the Protocol on the Position of Denmark). However, the UK and Ireland may decide to be involved in the adoption of a particular measure; for that purpose, they need to notify the President of the Council within three months of the presentation to the Council of a proposal or initiative (Article 3). They may also accept any measure adopted under Title IV (Article 4). Moreover Ireland, but not the UK, may decide to fully apply the TEC and thus get out of the Protocol. This may indicate a greater hostility on the part of the UK towards "communautarisation". As to Denmark, it may decide to no longer avail itself of all or part of the Protocol (Article 7). With regard to asylum, the fact that these three Member States have chosen and been allowed to exclude themselves from Title IV means that, unless they decide otherwise, they will not take part in the development of an EC asylum policy. As far

as they are concerned, asylum remains a matter for intergovernmental cooperation. This lack of uniformity in the legal framework is inconsistent with the need for a global and comprehensive approach to asylum matters in line with international refugee law as EC measures in that field will not extend to the EC territory in its entirety. This may affect the efficiency of EC measures on asylum. For instance, measures adopted by the UK will have an impact elsewhere in the EC. Likewise, EC measures will affect the situation in the UK, Ireland and Denmark. Moreover, considering that the development of an EC asylum policy meeting international standards will require to depart from the restrictive trends developed within the intergovernmental framework[64], any discrepancy between EC measures and measures adopted by these three Member States may engender conflicting situations[65]. If these Member States oppose this change of direction, conflicts may arise between their position and that of the EC. Such conflicts could lead to tensions amongst Member States and between the Member States and the EC institutions and could even lead to institutional crises. It is argued that, if these Member States were to advocate more restrictive approaches to asylum matters, their views should not result in the EC lowering its standards with a view to avoiding conflicting positions as this would be detrimental to the right to seek refugee status. It is argued that these protocols have the potential to harm the development and implementation of an EC asylum policy compatible with international refugee law while creating problems for the EC. Moreover, if these three Member States were to develop asylum policies inconsistent with that of the EC, they may well face difficulties in implementing their laws and policies. Indeed, these Member States will not be in a position to ignore the impact of EC asylum law on their national provisions as they will remain interdependent. It is therefore

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[64] The measures adopted within the intergovernmental framework and the need for changes are examined in the next chapters.

[65] This statement would not be relevant if the UK, Ireland and Denmark were to adopt superior standards than those established at EC level. Although they may appear unrealistic in the current restrictive context, such national initiatives should be encouraged.

hoped that these Member States will renounce to their right to opt-out from Title IV.

Granting jurisdiction to the ECJ in the field of asylum would mean an increase in the work load of the ECJ. In a Note of 19 February 1997, the Netherlands Presidency proposed four options with a view to addressing the concern about overburdening the Court[66].

The first option consisted in limiting the numbers of requests for preliminary ruling by making them optional or by only allowing courts of last instance to make such requests. The first branch of this first option proposed by the Netherlands Presidency would have implied that requests for preliminary rulings would have ceased to be compulsory for courts of last resort as they were already optional for lower courts.

A second option was to allow the ECJ to filter requests for preliminary ruling by allowing the President or a chamber to decide on the admissibility of such requests. In JUSTICE's opinion, this option was the most promising as it did not affect the scope of the Court's jurisdiction and thus did not undermine judicial control. However, the Treaty should specify the conditions of the filtering; in any case should the President or a chamber refuse to deal with a request if the latter raised a principle of general public importance[67].

According to the third option, the ECJ could proceed speedily if granted the power to decide to sit in chamber, whenever it deems it appropriate, to rule on a request for preliminary ruling or to use an interim-relief type accelerated procedure[68].

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[66] See *supra* n. 60, at p. 6. The proposals were designed to address the practical consequences of an extension of the jurisdiction of the ECJ over asylum as well as immigration matters.

[67] *Ibid.*, at p. 7.

JUSTICE rightly considered that the third option was not really viable[69]. Indeed, the ECJ had already the power to sit in chamber unless a Member State or an EC institution, which had submitted written observations, required the matter to be dealt with in plenary session. Since the Member States and the institutions have made little use of this right, the possibility to sit in chamber would not significantly contribute to reduce the workload of the Court. As to the use of an interim-relief type accelerated procedure, although it may shorten the whole procedure, it is judged inadequate as, if applied to all cases involving asylum and immigration, it could affect the quality of the decisions of the ECJ. This could not be compensated by savings of time. Furthermore, if this type of accelerated procedure was only use with regard to selected cases, the saving of time would be marginal.

The fourth proposal made by the Netherlands Presidency consisted in allowing the ECJ to rule where national law conflicted with EC law on a specific point. This new procedure was designed to replace the procedure of Article 234 in relation to asylum and immigration matters. However, the assistance provided to national courts under this new procedure would not be as thorough as the one provided under Article 234. For instance, what about cases where EC measures raise

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[68] This type of accelerated procedure already exists (Article 83 of the Rules of Procedures of the Court of Justice); however, it was established for entirely different purposes. Article 83 of the Rules of Procedures of the Court of Justice concerns applications to suspend the operation of any measure adopted by an institution under Article 242 of the TEC. Pursuant to Article 242, although actions brought before the ECJ do not have suspensory effect, the Court may allow suspension if it considers that it is required by the circumstances. The procedure laid down in Article 83 is characterised by shorter periods for written submissions (Article 84). Then, the President decides on the application or refers it to the ECJ (Article 85); in the latter case, the Court must postpone all other cases and, after hearing the Advocate General, give a decision (Article 85).

Rules of Procedure of the Court of Justice of the European Communities of 19 June 1991, OJ L 176/7, 4/07/1991, and OJ L 383, 9/02/992 (corrigenda), with amendments published in OJ L 44/61, 28/02/1995, and in OJ L 103/1, 19/04/1997, and L 351, 23/12/1997 (corrigenda). Consolidated text reproduced in OJ C 65, 6/03/1999.

[69] See *supra* n. 60, at p. 8.

questions of interpretation that have not yet been dealt with by the ECJ? Although there may not be a conflict with national law, the assistance of the ECJ is still required. Moreover, the wording of this proposal may appear inconsistent with the fundamental principle of supremacy of EC law which, in any case, requires national courts to disregard national law which is in contradiction with EC law.

A further option, contemplated by the Dublin II Outline, was to transfer the references under Article 234 to the Court of First Instance (CFI) on a case-by-case basis[70]. However, this would only shift the problem from one court to the other as the CFI is already overburdened. In that respect, as mentioned above, allowing the ECJ to filter requests for preliminary appeared to be the best option so long as the filtering criteria would not result in the exclusion of cases raising issues of principle. It is argued that any solution that carried the risk of undermining the scope and quality of the control exercised by the ECJ, should have been disregarded. This suggests that the jurisdiction of the ECJ should not be truncated as there is no justification for asylum or any other measures being subject to a lesser degree of judicial control. Moreover, a weaker judicial control would be inconsistent with the need to satisfy democratic requirements within the EC.

The option implemented by the Treaty of Amsterdam was the third one (second branch). Indeed, pursuant to Article 68(1) of the TEC, "Article 234[71] shall apply

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[70] *Ibid.*, at p. 9.

[71] Article 234 of the TEC reads:

"The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Treaty;

(b) the validity and interpretation of acts of the institutions of the Community and of the ECB;

(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

to this Title [Title IV] under the following circumstances: where a question on the interpretation of this Title or on the validity or interpretation of acts of the institutions of the Community based on this Title is raised in a case pending before a national court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon." It is argued that Article 68 significantly curtails the scope of Article 234 as no mention is made of national courts against whose decisions there is a judicial remedy. It appears that these courts have lost their right to request a preliminary ruling from the ECJ. Although this restriction could contribute to ease the burden of the ECJ, it would prevent important points of principle arising before such courts from being dealt with at that stage and would thus require the case to be brought to the court of last resort before assistance may be solicited from the ECJ through Article 234. Under Article 68, courts against whose decisions there is no judicial remedy are obliged to request a preliminary ruling from the ECJ if they consider that a decision of the ECJ on the question being raised is necessary to enable them to give judgment. Although the wording of Article 68 differs in that respect from that of Article 234, it is suggested that the former refers to the case-law developed by the ECJ with regard to Article 234(3) which specifies the limits of the obligation imposed on courts of last resort[72].

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice."

[72] In *CILFIT Srl v Ministro della Sanità* ((Case 283/81) [1982] ECR 3415), on a reference from the Italian Supreme Court concerning the mandatory jurisdiction of national courts under Article 177(3) (new Article 234(3)), the ECJ held: "it followed from the relationship between Article 177(2) and (3) that the courts and tribunals referred to in Article 177(3) have the same discretion as any other court or tribunal to ascertain whether a decision on a question of Community law is necessary to enable them to give judgment."

It follows from the guidelines given by the Court of Justice that there is no need to refer if:

"(a) the question of EC law is irrelevant; or

(b) the position has already been interpreted by the Court of Justice, even though the questions at issue are not strictly identical; or

Finally, the extension of the jurisdiction of the ECJ over asylum raises an issue specific to that field regarding the involvement of UNHCR. It follows from Article 35 of the 1951 Convention that the Contracting States, which include all Member States, undertake, *inter alia*, to facilitate UNHCR's duty of supervising the application of the Convention provisions. It is argued that a possible involvement of UNHCR where cases brought before the ECJ under Article 234 raise asylum issues would facilitate the maintenance of standards in line with international refugee law provided, of course, that UNHCR's opinions are duly taken into account. However, an intervention of UNHCR would require an amendment of Article 37 of the ECJ's Statute[73] which currently restricts the participation of UNHCR to cases where it is a party to the proceedings; this is rarely the case.

(c) the correct application is so obvious as to leave no scope for reasonable doubt. This matter must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise, and the risk of divergences in judicial decisions within the Community."

Criteria (b) and (c) can be regarded as applying the doctrine of *acte clair* according to which a question will not be referred to the competent court where the meaning of a provision is considered clear. This doctrine was introduced by the French Conseil d'Etat with a view to minimising its obligation to refer treaties to the government for interpretation. If the provision was found to be an *acte clair*, the French Supreme Administrative Court would not refer the matter to the executive.

[73] Article 37 of the ECJ's Statute reads:

"Member States and institutions of the Community may intervene in cases before the Court.

The same right shall be open to any other person establishing an interest in the result of any case submitted to the Court, save in cases between Member States, between institutions of the Community or between Member States and institutions of the Community.

Without prejudice to the preceding paragraph, the States, other than the Member States, which are parties to the Agreement on the European Economic Area, and also the EFTA Surveillance Authority referred to in that Agreement, may intervene in cases before the Court where one of the fields of application of that Agreement is concerned.

The provisions regarding the decision-making process in the context of Title IV may be considered as falling short of what could have been achieved within the EC framework. Indeed, Article 67(1) provides that within five years of the entry into force of the Treaty of Amsterdam, the Council must act unanimously on a proposal emanating from the Commission or a Member State after having consulted the European Parliament[74]. Thus, the unanimity rule, which governs the decision-making process within the intergovernmental framework, remains and the Parliament is confined to a consultative role. However, this impression of under achievement must be moderated in the light of the transitional nature of Article 67(1). After this period of five years, the Council, after having consulted the European Parliament, acting unanimously, may decide to bring Title IV or part of it under the scope of the co-decision procedure (Article 251) which would, in principle, be governed by qualified-majority voting[75]. This would have the advantage of fully associating the Parliament in the decision-making process as it would enjoy a right of codecision with the Council. A greater involvement of the European Parliament would be in the interest of a more democratic system as well as in the interest of asylum seekers as the Parliament had traditionally expressed concern for the protection of their rights. It is hoped that the unanimity requirement

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An application to intervene shall be limited to supporting the form of order sought by one of the parties."

Protocol on the Statute of the Court of Justice, signed at Brussels on 17 April 1957, as last amended by Article 19 of the Act of Accession 1994 (OJ C 241/25, 29/08/1994) and by the Council Decisions of 22 December 1994 (OJ L 379/1, 31/12/1994) and 6 June 1995 (OJ L 131/33, 15/06/1995).

[74] However, the Irish Presidency's proposal as redefined by the Netherlands Presidency initially provided for a shorter transitional period, i.e. three years (see *supra* n. 60).

[75] It is interesting to note that the generalisation of qualified- majority was on the agenda of the Intergovernmental Conference which took place in Portugal in June 2000. This initiative found its origin in a French and German proposal. However, this proposal faces strong hostility, in particular from the UK and the Scandinavian States (Henri de Bresson et Arnaud Leparmentier, "France et Allemagne tentent de ressouder leur union à Rambouillet", Le Monde, 20 May 2000).

will not prevent nor unnecessarily delay the use of the co-decision procedure in the field of asylum.

A further drawback of the decision-making process as designed by the Treaty of Amsterdam lies with the fact that Title IV does not provide for consultations with UNHCR with a view to securing adherence to international refugee law. Indeed, if its views are not take into consideration, compliance is unlikely to be achieved.

3. The type of legal instrument

The effectiveness of EC provisions on the right to seek refugee is contingent on their compliance with international refugee law. However, a successful harmonisation in this field also depends on the chosen instrument. In that respect, three options may be contemplated, namely regulations, directives or a convention between the Member States.

The suitability of these legal instruments must be assessed in the light of the ambitions of EC law in relation to the right to seek refugee status. In that respect, it is argued that EC law should aim at harmonising the provisions on the right to seek refugee status in line with international refugee law. Moreover, considering the urgent need for such harmonisation, practical considerations such as time constrains must be taken into consideration.

With this in mind, it is argued that Directives constitute the most suitable type of legal instrument, although the adoption of a Convention can be contemplated. As to Regulations, there are considered the less appropriate instruments in that respect..

3.1. Regulations: an inappropriate type of instrument

Article 249 of the TEC defines Regulations as instruments having general application, binding in their entirety and directly applicable in all Member States.

The purpose of the direct application of regulations is to avoid the need for Member States to incorporate Regulation provisions into their legal order[76]. In other words, Regulations do not require enactment into national law. Moreover, any re-enactment of a Regulation is considered a breach of EC law[77].

Considering their characteristics, Regulations are primarily regarded as instruments of uniformity[78]. As already stressed, our purpose is to harmonise provisions on the right to seek refugee status in line with international refugee law. Hence, uniformity is not the objective. It is argued that the latter would constitute an unrealistic goal likely to face the opposition of many Member States. Moreover, achieving uniformity in this field, whilst complying with international requirements, would turn out to be an extremely arduous and lengthy process inconsistent with the urgent need for reform.

Whilst harmonisation requires EC law to set standards designed to ensure compliance with international refugee law, the Member States may enjoy some discretion in the implementation of EC provisions on the right to seek refugee status. It is argued that such an approach would allow for the protection of the right to seek refugee status while making allowance for Member States' "sensitivity". In other words, this approach would address the need for pragmatism. In that context,

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[76] See, for instance, T. A. Winter, "Direct applicability and direct effects", 9 CMLRev (1972) 425-438.

[77] Case 34/73 *Variola v Italian Finance Administration* [1973] ECR 981. However, it is recognised that some Regulations may require national implementation or national ancillary legislation (case 31/78 *Bussone v Italian Ministry for Agriculture* [1978] ECR 2429 and case 272/83 *Italy* [1985] ECR 1057).

[78] However, Regulations have been used as coordinating instruments in some instances. This was, for example, the case in the field of free movement of workers where Regulations were adopted with a view to coordinating the Member States' systems (see, for instance, Regulation 1612/68 of 15 October 1968 on freedom of movement for workers within the Community as amended by Regulation 32/76 (OJ 1968 L 257/2).

Directives appear to be the most suitable type of instrument, although the conclusion of a convention could be envisaged.

3.2. Directives: the most suitable type of instrument

Pursuant to Article 249 of the TEC, Directives "shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."

Directives have become the main instruments of harmonisation in EC law. Unlike Regulations, they were not conceived to achieve uniformity. However, in practice, Directives vary greatly as to the margin of manoeuvre left to the Member States with regard to means of implementation. This flexibility is actually regarded as a considerable advantage as the degree of discretion granted to the Member States can be moderated in order to address the specificity of the various provisions on the right to seek refugee status. The adoption of more than one Directive is suggested as, it is argued, all the issues arising from the right to seek refugee status could not be efficiently addressed in a single Directive.

Whilst Directives are considered the most suitable type of instrument, two pitfalls have to be avoided if they are to be effective instruments. Firstly, it is important that the time granted to Member States for implementation is not inconsistent with the urgent need for reform. With this in mind, it is argued that Directives concerning the various aspects of the right to seek refugee status should be implemented within one year of their adoption; in any case should the time for implementation exceed two years. One must bear in mind that the legal binding nature of international refugee law preceded the "communautarisation" of asylum matters and that the adoption of EC provisions on that field should not require drastic changes in the laws and practices of those Member States which have complied with their international obligations. Secondly, it is vital that the Directives covering the various aspects of the right to seek refugee status complement each other. This means that these Directives must be drafted in relation to one another with a view

to adopting a comprehensive legislation on the right to seek refugee status. As stressed in the course of the thesis, the preservation of the right to seek refugee status necessitates a global approach. This also implies that the time that may elapse between the adoption of the different directives must be extremely short.

Directives are presented as the most appropriate legal instruments. However, a convention could be concluded between the Member States, although this option suffers a number of drawbacks.

3.3. A convention

An option that could be contemplated is the conclusion of a convention on the right to seek refugee status between the Member States. Unlike Regulations and Directives, conventions are not typical EC law instruments, but classical instruments of international law.

Whilst a convention would have the advantage of being able to cover all aspects of the right to seek refugee status, it has two important pitfalls.

Firstly, the process that goes from the negotiation of a convention to its entry into force is generally a lengthy one. When States party to a convention agree to its provisions and thus to its signing, implementation is not yet secured. Indeed, the convention needs to be ratified by national parliaments. The coming into force of a convention may be seriously delayed by a slow ratification process, depriving the convention from any legal authority and thus effectiveness in the meantime. It is argued that, considering the urgent need to adopt comprehensive EC provisions on the right to seek refugee status, such a risk cannot be taken.

Another feature inherent in conventions, that constitutes their second pitfall, lies with the possibility for States party to conventions to make reservations. Reservations give States the opportunity to reject some of the convention provisions. Reservations are defined in the Vienna Convention on the Law of

Treaties of 1969. Article 2(1)(d) reads that a reservation is an "(...) unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." It is argued that any reservation to the provisions of an EC convention on the right to seek refugee would entail the risk of undermining the right in question and should; the right to make reservations should therefore be excluded.

Whilst the difficulties arising from reservations may be overcome, the risk of a lengthy process remains. In that context, it is argued that Directives constitute the most appropriate type of legal instrument.

4. Conclusion

It is not contested that the Treaty of Amsterdam by granting the EC competence over asylum matters constitutes a considerable achievement as the EC is considered a more suitable framework. However, this positive statement must be moderated in the light of the Protocol on the position of the UK and Ireland and the Protocol on the position of Denmark. Indeed, these three Member States were allowed to opt out from Title IV. This means that the "communautarisation" operated by the Treaty of Amsterdam can be regarded as partial as it does not extend to the entire territory of the EC and leaves room for intergovernmental cooperation in the field of asylum. This concession made to the UK, Ireland and Denmark may have been the "price" of "communautarisation" and thus may have been unavoidable when negotiating the Treaty of Amsterdam and the transfer of competence to the EC. However, this "flexibility", if maintained, is likely to have a detrimental effect on the EC, the Member States and asylum seekers. The UK, Ireland, and Denmark are therefore urged to "opt-in". As already stressed, a "successful communautarisation" is conditional upon strict compliance with international refugee law. Moreover, the decision-making process and the jurisdiction conferred upon the ECJ as a result of the "communautarisation are not considered satisfactory.

Improvements in the legal framework, although essential, will not in themselves ensure compliance with international refugee law. In that respect, it is critical to the protection of the right to seek refugee status that the EC does not simply endorse the measures adopted within the intergovernmental framework. The emphasis is therefore on the standards that the EC must satisfy in relation to the right to seek refugee status.

Chapter III

The Need for an Up to Date Interpretation of the Term "Refugee"

The definition of the term refugee is laid down in Article 1(A)(2) of the 1951 Convention and constitutes the common ground for granting refugee status.

Article 1(A)(2) reads:

"For the purposes of the present Convention, the term "refugee" shall apply to any 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 nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

This definition is the result of the refugee situation existing at the time of the drafting of the 1951 Convention. This means that a number of issues that arise from the current refugee situation world-wide are not directly tackled by the Convention. This is the case with regard to non-State persecution and gender-based persecution. However, the purpose of the Convention has remained the same, i.e. to provide international protection through refugee status to those individuals failed by their State in that respect.

However, with the development of increasingly restrictive asylum policies and laws, there has been a reluctance to interpret the Convention definition in a purposive sense allowing the definition to take on board changes that have taken place in the refugee situation.

Two main issues have been identified in that respect. Firstly, increasing numbers of asylum claims have been lodged by people who have fled persecution non-State persecution. Because persecution was originally perceived as mainly emanating from the State, some Member States have taken the view that non-State persecution *per se* falls outside the scope of the Convention definition. It is argued that this position has no legal foundation as the Convention does not impose any requirements as to the identity of the perpetrator and is inconsistent with the object of the 1951 Convention. Secondly, many women have claimed refugee status owing to gender-based persecution. Since the Convention does not mention gender as a ground for a well-founded fear of persecution, it has been difficult for these women to fit within the Convention definition and be granted refugee status. The view taken is that gender-based persecution may be covered by the Convention provided that membership of a particular social group is adequately interpreted.

It is argued that it is essential to the preservation of the right to seek refugee status that EC law interprets the definition of the term refugee in a manner consistent with the spirit and purpose of the 1951 Convention in order to address today's needs for international protection.

Finally, one shall also consider the attitude of the EC towards asylum claims lodged by Member State nationals within the EC. To date, the Protocol on asylum for nationals of Member States of the European Union considerably restricts EC nationals' right to seek refugee status within the EC.

1. Non-State persecution

The drafters of the 1951 Convention had very much in mind the "traditional" asylum seeker, namely an individual, generally male, fleeing persecution by the authorities of his country of origin[1]. Therefore, the Convention initially essentially applied to cases of State persecution. This limited scope was very much the

[1] The drafters of the 1951 Convention had mainly in mind political opponents to communist regimes seeking refuge in western democracies.

consequence of the refugee situation at the time the Convention was drafted and not the result of a deliberate restrictive interpretation of the term refugee. Hence, no serious difficulties were raised so long as individuals fitted the "classic asylum seeker profile". However, changes in the refugee situation world-wide brought a new dimension to this issues. Indeed, increasing numbers of people have fled persecution emanating from non-State agents[2].

The 1951 Convention does not impose any requirements as to the identity of the perpetrator. In other words, the Convention provisions does not confine its application to cases of State persecution. The history of the Convention drafting and the *travaux préparatoires* are also silent on this issue[3]. The purpose of the Convention has always been to confer refugee status upon those who have a well-founded fear of persecution and cannot avail themselves of the protection of the country of their nationality or residence where people are stateless[4]. The Convention does not discriminate against those who are persecuted by non-State agents so long as they fall within the scope of Article 1(A)(2). As already noted, the fact that many recognised refugees were fleeing State persecution was circumstantial and did not reflect an intention to systematically exclude non-State persecution and impose an implicit requirement as to the identity of the perpetrator.

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[2] This is for instance the case of a significant number of Algerian nationals who fled persecution emanating from extremist religious groups, such as the Salvation Islamic Front (*Front Islamique du Salut*).

[3] Chaloka Beyani, "Introduction to the Refugee Convention, the Travaux Préparatoires analysed with
a commentary by Dr. Paul Weis", in Paul Weis, *with a Commentary by Dr. Paul Weis*, Cambridge, International Documents Series, vol. 7 (1995).

[4] Future references to the State of nationality are understood as embodying the State of residence for stateless asylum seekers.

Unfortunately, there has been a temptation to rely upon past cases to justify the exclusion of those persecuted by non-State agents from the scope of the refugee definition. Considering the restrictive nature of the asylum polices developed at national and European level, the fact that many Member States and the EU did endorse this restrictive and discriminatory approach to the concept of refugee comes as no surprise. As observed by Colville, "[t]he welcome rapidly wore thin, and the restrictive interpretation, which excluded all those persecuted by a non-State agent, was one way of cutting down the numbers"[5]. In this hostile context, State persecution became in many cases a condition for granting refugee status. Such a requirement had an adverse effect on those fleeing civil wars or events seriously disturbing public order as such situations often entail persecution emanating from non-State entities. Nationals of former Yugoslavia and Algeria, for instance, felt the full impact of this hostile approach.

It is argued that the exclusion of non-State persecution from the Convention scope has no legal basis as this restriction is not enshrined in the Convention provisions. Moreover, this interpretation defeats the spirit and purpose of the Convention which is to grant refugee status to those who have a well-founded fear of persecution based on a Convention ground. With this in mind, the view taken is that EC law should address this issue by expressly recognising non-State persecution in order to prevent further exclusions. This position finds its justification in the wording of the Convention and in the adverse consequences of restrictive interpretations on refugee protection as illustrated, for instance, by the French case-law.

1.1. Persecution confined to State persecution: the French example

State persecution as a prerequisite to a successful asylum claim finds its origin in restrictive interpretations of the term refugee designed to cut down the numbers of

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[5] Rupert Colville, "Persecution complex", Asylum and Protection, http://www.unhcr.ch/issues/asylum/rm10104.htm.

recognised refugees. In France, the *Commission des Recours des Réfugiés* (CRR)[6] inferred from Article 1(A)(2) and 1(C)(1)[7] of the 1951 Convention that persecution that has not been perpetrated by State agents fell outside the scope of the Convention. The French case-law is examined in order to demonstrate the inconsistency of any restriction to State persecution with the Member States' obligations under the 1951 Convention. The French case-law is considered relevant as the exclusion of non-State persecution remains central to the case-law of the French competent bodies and representative of the impact of such a position on asylum seekers' rights as France deals with a significant proportion of the asylum seekers within the EC. It follows from the case-law of the CCR and the Conseil d'Etat that asylum claims based on non-State persecution will be rejected unless the applicant demonstrates that the State was an accomplice[8]. This requirement has been construed as encompassing cases where the State has voluntarily encouraged or tolerated persecution[9]. These limits imposed on the concept of persecution have resulted in asylum seekers being refused refugee status despite a well-founded fear of persecution based on a Convention ground in the absence of State involvement. The relevance of the French case-law is also explained by the fact that the Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty of European Union on the harmonized application of the definition of the term "refugee" in Article 1 of the Geneva Convention of 28 July 1951 relating to

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[6] The *Commission des Recours des Réfugiés* (CRR) is competent for hearing appeals against decisions of the *Office Français de Protection des Réfugiés et Apatrides* (OFPRA).

[7] Article 1(C)(1) of the 1951 Convention reads that "[t]he Convention shall cease to apply to any person falling under the terms of section A if [h]e has voluntarily re-availed himself of the protection of the country of his nationality."

[8] CRR, 1 February 1977, *Zaoude*, referred to in Frederic Tiberghien, *La Protection des Refugiés en France* (Collection Droit Public Positif, Presses Universitaires d'Aix-Marseille, Economica, Paris, 1988) (2nd ed) at p. 393.

[9] Conseil d'Etat, 27 May 1983, *Dankha*, *ibid*, at p. 247.

the status of refugee[10], referred to as the Joint Position on the definition of the term refugee, endorses views on non-State persecution similar to those upheld in France[11].

1.1.1. The concepts of persecution tolerated or encouraged by State authorities: the *Dankha* ruling

As already mentioned, the CRR has inferred from Articles 1(A)(2) and 1(C)(1) of the 1951 Convention that persecution committed by non-state entities falls outside the scope of the Convention. In *Zaoude*[12], the CRR decided that, although there was a serious level of insecurity in the applicant's country of origin, the alleged acts could not be regarded as amounting to persecution in the sense of Article 1(A)(2) of the 1951 Convention since they had not been committed by public authorities. This statement was amended in *Dankha*[13] where the Conseil d'Etat declared that persecutions voluntarily tolerated or encouraged by State authorities should also be taken into consideration. However, in *Redouane*[14], although the CRR applied the *Dankha* test, the Commission held that the Convention provisions made refugee

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[10] OJ L 63/2, 13/03/1996.

[11] This issue is examined in section 1.2 of the present chapter.

[12] CRR, 1 February 1977, *Zaoude*, *supra* n. 8. The applicant argued that the degree of insecurity in his country of origin constituted an obstacle to his return. Although the CRR acknowledged the high level of insecurity, it declared that the alleged persecutions could not be considered persecutions within the meaning of Article 1(A)(2) of the 1951 Convention since they had not been committed by public authorities.

[13] Conseil d'Etat, 27 May 1983, *Dankha*, *supra* n. 9.

[14] CRR, 11 April 1995, *Redouane*, in *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés*, Centre d'Information Contentieuse, 1995, at p. 66.

status contingent, *inter alia,* upon the existence of persecution or fear of persecution emanating from the State authorities. The CRR construed the concept of State authorities as comprising the government in power[15], public and administrative authorities[16] as well as local authorities[17]. This concept also includes the military and the police. It follows that individuals who are persecuted or fear to be persecuted by political parties which are in the opposition[18], groups fighting in the context of a civil war[19], or individuals who have committed criminal acts[20] or are members of terrorist or extremist groups[21] will not, in principle, be eligible for refugee status. For their application to be successful, they will have to prove, *inter alia,* that the State has voluntarily tolerated or encouraged the alleged acts of persecution. The decision of the CRR in *Dankha*[22] was based on the former decision in *Duman*[23] where the CRR introduced the concepts of "accommodating passivity" ("*passivité complaisante*") and "passive behaviour" ("*comportement*

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[15] See, for instance, CRR, 2 March 1956, *Pritsch*, in Tiberghien, *supra* n. 8, at p.392 and CRR, 26 June 1956, *Gueron*, *ibid,* at p. 219 and 392.

[16] See, for instance, CRR, 25 July 1956, *Yarhi*, *ibid.*, at p. 392.

[17] See, for example, CRR, 1 June 1994, *Slepcik* in *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés*, Centre d'Information Contentieuse, 1994, at p. 59.

[18] CRR, 21 May 1981, *Thambiaiah*, in Tiberghien, *supra* n. 8, at p. 393.

[19] CRR, 13 July 1976, *Nadjarian*, *ibid.*, at p. 355 and 393.

[20] CRR, 25 April 1978, *Brown*, *ibid.*, at p. 393 and CRR, 21 October 1986, *Shanmugalingam*, *ibid.*, at p. 343 and 393.

[21] CRR, 6 January 1986, *Parekh*, *ibid*, at p. 393.

[22] See *supra* n. 9.

[23] CRR, 3 April 1979, *Duman*, in Tiberghien, *supra* n. 8, at p. 394.

passif") of the State authorities. This decision concerned organised and systematic ill-treatment inflicted by the local population. Tiberghien, on the basis of *Duman*, rejected the view that persecution was confined to State persecution. In his opinion, the ruling in *Duman* introduced exceptions that allowed non-State persecution to be taken into consideration under certain circumstances. However, it is argued that this line of reasoning disregards the fact that applicants still have to establish that the State adopted a certain conduct. This is even more so with the decision in *Dankha*[24] that overruled *Duman* and requires persecution to have been voluntarily tolerated or encouraged by the State. These two decisions may have, to a certain extent, moved from the concept of active State persecution. However, they still require the persecution to emanate from the State, although indirectly.

In *Dankha*[25], the Conseil d'Etat expressed the view that the 1951 Convention did not require persecution to be directly committed by State authorities. The CRR had rejected the asylum claim on the ground that the applicant had failed to establish that persecution was attributable to official authorities. The CRR applied its former case-law on the agent of persecution and ignored the changes introduced in *Duman.* The applicant challenged the decision of the CCR before the Conseil d'Etat and argued that the CRR had made an error on a point of law in rejecting his application on the sole ground that persecution had not been perpetrated by official authorities.

In his conclusions, the *Commissaire du Gouvernement* expressed the view that the 1951 Convention did not confine refugee status to people being persecuted by official authorities of the country of nationality. In his opinion, the Convention only required applicants to show that they had a well-founded fear of persecution on a Convention ground and that they could not avail themselves of the protection of the State of their nationality. Hence, the *Commissaire du Gouvernement* proposed to

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[24] See *supra* n. 9.

[25] *Ibid.*

take into consideration, in addition to persecution inflicted by State authorities, persecution exercised by individuals where it was voluntarily encouraged or tolerated by public authorities, thus preventing the person in question from availing himself or herself of the protection of his country of nationality.

It is argued that there is a contradiction in the *Commissaire du Gouvernement*'s position. He recognises that once the existence of a well-founded fear of persecution is established, what needs to be determined is whether the individual concerned can avail himself or herself of the protection of the State. However, the *Commissaire du Gouvernement* reduces the State's failure to provide protection to cases where the alleged acts have been voluntarily tolerated or encouraged by the State. As shown in subsequent decisions, the ruling in *Dhanka* does not cover cases where the State is unable to protect nationals in need as the involvement of the State is still required[26].

The decision in *Dankha* constitutes an improvement as it no longer makes refugee status contingent upon direct State persecution and thus allow refugee status to be granted to individuals who were previously excluded from its scope. Indeed, it is not unusual for some States to organise or voluntarily allow the formation of groups, which, with a varying degree of police or army forces' involvement, persecute opponents[27]. However, it is important to note that the idea of persecution voluntarily encouraged by the State is very close to that of direct State persecution and that they may overlap to a considerable extent. This is reflected in the

[26] In that respect, the position adopted by English courts differs significantly from that of the French courts. Where a well-founded fear of persecution is established, the State's inability to provide protection will suffice (see the decision of the Court of Appeal of 2 December 1999, *Milan Horvath v Secretary of State for the Home Department* (LTL 2/12/99 and TLR 8/12/99) confirmed by the House of Lords in a decision of 6 July 2000 ((2000) 3 WLR 379). The English position also differs from that agreed on by the Member States in the Joint Position. The latter is examined in section 1.2.

[27] On this issue, see Tiberghien, *supra* n. 8, at p. 95.

subsequent case-law; indeed, to date, the cases decided by the CRR and the Conseil d'Etat are essentially founded on the concept of persecution tolerated by the State. In France, non-State persecution *per se* is not acknowledged for the purpose of refugee status as State involvement must be established. It is argued that the French position resulting from the *Dankha* ruling is inconsistent with the provisions of the 1951 Convention as the latter do not require persecution to have been voluntarily tolerated or encouraged by the State where it emanates from non-State entities. The only requirement enshrined in the Convention is that applicants must have been unwilling or unable, owing to their well-founded fear of persecution to avail themselves of the protection of the State of their nationality[28].

The Conseil d'Etat confirmed the *Dankha* approach in a number of cases[29]. It follows from the decision of the Conseil d'Etat in *Dankha* that, in cases of non-State persecution, the OFPRA and the CRR have to establish whether the authorities of

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[28] Article 1(A)(2) of the 1951 Convention.

[29] See, for instance, Conseil d'Etat, 22 November 1996, *Mme Messara*, in *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés*, Centre d'Information contentieuse, 1996, at p. 29-30; Conseil d'Etat, 22 November 1996, *M. Messara*, *ibid.*; Conseil d'Etat, 19 June 1996, *Medjebeur*, *ibid.*, at p. 26; Conseil d'Etat, 22 March 1996, *Geevaratnam*, *ibid.* at p. 18; Conseil d'Etat, 31 January 1996, *Abib*, *ibid.*, at p. 14; Conseil d'Etat, 13 December 1996, *Lahcene*, *ibid.*, at p. 30-31; CRR, 12 March 1996, *Seddiki*, *ibid.*, at p. 51-52; CRR, 11 October 1996, *Wagih Wasily Atta*, *ibid.*, at p. 60-61; CRR, 29 November 1996, *Bajramov*, *ibid.*, at p. 65-66; CRR, 29 November 1996, *Asanoski*, *ibid.*, at p. 64-65; CRR, 19 September 1996, *Gaidys*, *ibid.*, at p. 94; CRR, 24 July 1996, *Sall*, *ibid.*, at p. 95; CRR, 27 February 1996, *Cabrena Serna*, *ibid.*, at p. 95; CRR, 2 May 1996, *Bettahar*, *ibid.*, at p. 96 and CRR, 1 October 1996, *Boucif*, *ibid*, at p. 96; CRR, 23 May 1997, *Khali Reda* in *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés*, Centre d'Information contentieuse, 1997, at p. 50; CRR, 29 July 1998, *Diop*, in *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés*, Centre d'Information contentieuse, 1998, at p.50-51; Conseil d'Etat, 12 October 1998, *Henni*, in *ibid.*, at p. 51; Conseil d'Etat, 28 October 1998, *Ameur*, in *ibid*, at p. 52 and CRR, 8 June 1998, *Basraoui*, in *ibid.*

the country of nationality have voluntarily encouraged or tolerated persecution so that the individual seeking refugee status is unable or unwilling to avail himself or herself of the protection of the country in question. Failure to examine this point of law may be brought to the Conseil d'Etat as *juge de cassation*. In *Jgartua Amondarain*[30], a Spanish national claimed that he had been persecuted by groups tolerated by the Spanish government. The CRR rejected his application on the ground that he had failed to establish the existence of ill-treatment and serious threats emanating from public authorities. The Conseil d'Etat declared that, in omitting to verify whether these acts were voluntarily tolerated or encouraged by the Spanish authorities, the CRR did not answer the applicant's argument in a satisfactory manner[31].

It results from the CRR's case-law that applicants have faced great difficulty in establishing that persecution had been voluntarily tolerated or encouraged by the State. As observed in the chapter on fair and effective procedures, asylum seekers are confronted with a number of difficulties inherent in their situation when attempting to gather evidence in support of their claim[32]. The French case-law indicates that evidence of persecution voluntarily tolerated or encouraged by the State often fails to satisfy the competent authorities. Between 1983 and 1987, the CRR only recognised the existence of persecution voluntarily encouraged or tolerated by the State in two cases. In the first case, the involvement of the police could not be questioned in the face of the evidence provided[33]. In the second case,

[30] Conseil d'Etat, 27 July 1987, *Igartua Amondarain*, in Tiberghien, *supra* n. 8, at p. 396.

[31] See also, for instance, Conseil d'Etat, 6 June 1984, *Urtiaga Martinez, ibid.*, at p. 361 and 395

[32] See chapter V on fair and effective procedures.

[33] CRR, 26 January 1984, *Sabbar*, in Tiberghien, *supra* n. 8, at p.394.

no attempt by the authorities to disarm the group responsible for persecuting the applicant could be established[34].

The increase subsequent to 1987 in the number of successful claims before the CRR is attributable to an increase in the number of applications for asylum involving acts committed by non-State entities. For instance, in *Patanjan*[35], the Lithuanian authorities voluntarily tolerated xenophobic acts perpetrated by the population. The police was the passive witness of the applicant's lynching and subsequently refused to carry him to hospital despite the seriousness of his injuries. In *Karroubi*[36], the applicant, an Algerian national, was harassed and threatened by members of an Islamic group because he was a communist militant married to a national of the former Soviet Union. The police formally refused to register his complaint. While he was attempting to have his complaint registered, he was actually insulted and physically assaulted by the police forces[37]. In *Isaak*, the Sudanese authorities

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[34] CRR, 31 August 1984, *Misquita*, in *ibid.*, at p. 337 and 394.

[35] CRR, 25 October 1994, *Patanjan*, in *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés*, Centre d'Information contentieuse, 1994, at p. 83 and 111.

[36] CRR, 28 February 1995, *Karroubi*, in *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés*, Centre d'Information contentieuse, 1995, at p. 103.

[37] Can also be mentioned the decision in *Lopez Wilches* where the applicant, a Colombian national, was, on several occasions, threatened by para-governmental militias because of her father's political involvement with opposition parties. Her father was staying in France where he was granted refugee status (CRR, 10 February 1995, *Lopez Wilches*, in *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés*, Centre d'Information contentieuse, 1995, at p. 102). In *Bouchoueva*, an Armenian national was persecuted owing to her Russian origin. She and her mother were forced to sale their flat at an extremely low price. They were threatened by members of militias. They were also refused identification documents by the Armenian Consulate in Moscow while being considered Armenian by Russian authorities (CRR, 30 June 1995, *Bouchoueva, ibid.*, at p. 80 and

voluntarily tolerated and even encouraged persecutions directed against a Sudanese national, converted to the Christian religion, by both the authorities and members of Islamic groups[38]. It is argued that these cases may be regarded as involving direct State persecution and indicates a restrictive approach to the concepts of voluntarily tolerated and encouraged persecution by the State. This view is supported by the fact that voluntary tolerance or encouragement by the State authorities has only been established in a minority of cases[39]. For instance, in *M'Zerighe*, the CRR concluded that the State authorities had voluntarily tolerated the treatment inflicted on the applicant. The claimant, a national of Mauritania, was, because, of his social origins, subjected to slavery[40].

The restrictive manner in which the French competent bodies have interpreted the concepts of persecution voluntarily tolerated and encouraged by the State was further evidenced in the way the CRR further elaborated the concepts in question. The CRR ruled that it had to be satisfied that the individual claiming non-State persecution had been refused the protection promised by the State authorities[41] or

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105). See also CRR, 20 June 1995, *Mehdi, ibid.*, at p. 104; CRR, 12 December 1995, *Diaf, ibid.*, at p. 104; CRR, 30 May 1995, *Mokhtari, ibid.*, at p. 103 and CRR, 12 December 1995, *Hamitouche épouse Diaf, ibid.*, at p. 105.

[38] CRR, 5 October 1994, *Isaak*, in *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés*, Centre d'information Contentieuse, 1994, at p. 110.

[39] Between 1994 and 1998, out of the 57 cases reported in the *Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés* where persecution voluntarily tolerated or encouraged by State authorities was alleged, only 21 were successful.

[40] CRR, 30 June 1995, *M'Zerighe*, *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés*, Centre d'information Contentieuse, 1995, at p. 102.

[41] CRR, 5 May 1995, *Benarmas, ibid.*, at p. 47.

that the applicant had really solicited State protection[42] and that he or she had been refused such protection in a systematic manner[43]. However refugee status can be granted to an individual who did not expressly ask for protection where the competent body is satisfied that such a request would have been systematically rejected, rendering any call for protection a vain exercise[44]. The CRR also examines the general behaviour of the State authorities towards the applicant[45].

It is argued that, to date, non-State persecution is not recognised for refugee purposes in France. Indeed, applicants have to establish the direct or indirect involvement of the State. As currently construed, the concepts of persecution voluntarily tolerated or encouraged by the State prevent those whose State is unable, but not necessarily unwilling, to provide protection from obtaining refugee status. This is a source of discrimination that undermines refugee protection by breaching Article 1(A)(2) of the 1951 Convention and disregarding the purpose and spirit of the latter. As already noted, the restrictive approach developed by the CRR and the Conseil d'Etat prevents individuals persecuted by non-State agents who fail to establish State involvement from being granted refugee status.

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[42] See, for example, CRR, 10 November 1993, *Soto Huamani*, in *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés*, Centre d'information Contentieuse, 1993, at p. 57.

[43] See, for instance the decision in *Gaidys*, *supra* n. 29.

[44] CRR, 25 February 1994, *Naas*, in *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés*, Centre d'information Contentieuse, 1995, at p. 47 and CRR, 25 February 1994, *Ameur*, *ibid.*, at p. 48.

[45] CRR, 17 February 1995, *Meziane*, in *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés*, Centre d'information Contentieuse, 1995, at p. 39.

1.1.2. The consequences of the *Dankha* ruling

The concepts of persecution voluntarily tolerated or encouraged by the State means that those persecuted by non-State agents must establish that the State authorities are involved. Thus, where the State is simply unable to provide the required protection asylum seekers will be refused refugee status while they would have been granted this status had they been the victims of State persecution. The same applies to those who were not in a position to prove State involvement. It is a well established facts that asylum seekers encounter specific difficulties in that respect.

It is argued that the *Dankha* ruling denies refugee status to people who are in need of international protection and are entitled to it under the provisions of the 1951 Convention. Indeed, as already stressed, the Convention does not impose any requirements as to the identity of the perpetrator.

In order to demonstrate the adverse effect of the *Dankha* ruling on refugee protection, the case-law regarding Algerian nationals is discussed. This case-law is considered particularly relevant as the vast majority of Algerian nationals who have claimed refugee status in France in recent years, as well as in other countries, have alleged non-State persecution. Therefore, decisions on their asylum claims are representative of the consequences of the *Dankha* ruling on the personal scope of refugee status as construed in France.

Owing to the situation in Algeria, the OFPRA, the CRR and, in last resort, the Conseil d'Etat have dealt with a significant number of claims lodged by Algerian nationals alleging persecution by extremist Islamic groups. France has only granted refugee status in a handful of cases where the Algerian authorities were considered unwilling to provide protection[46]. For instance, in *Mehdi*[47], the applicant was a

[46] Germany has only granted refugee status to Algerian nationals who have been victim of state persecution. Switzerland has not recognised any Algerian claims at all (see Rupert Colville, *supra* n. 5).

nurse working in a State hospital in Algiers. She refused to take part in religious rituals organised within the hospital premises and to dress according to Islamic groups' requirements. As a result, she was subjected to serious threats, including threats to take her life, emanating from Islamic militants. She tried in vain to obtain protection from the hospital authorities and then from the police. The police refused to intervene and register her complaint. Considering the police's refusal to grant her any form of protection, the CRR concluded that the authorities had voluntarily tolerated the acts in question.

In *Ali Bouaouina*[48], the applicant suffered an extremely violent assault carried out by Islamic militants during which her friend had his throat slit. The authorities deliberately refused to protect her and convinced her not to lodge a complaint. Being unable to leave Algeria, she had to hide at one of her friend's house. Her fears of being persecuted by Islamic militants increased as she witnessed the murder of a French national working for the French Consulate in Algiers. She left Algeria the day after the murder. The CRR concluded that, in these specific circumstances, the Algerian authorities had voluntarily tolerated the persecution in question.

In *Khoudi*[49], the applicant was excluded from a national institute owing to his actions in favour of the Berber culture and his involvement in the creation of a free student committee. He subsequently joined an opposition party and became the General Secretary of a cultural association. He was assaulted by members of the Salvation Islamic Front. The Salvation Islamic Front had won the local elections and dissolved his association, but he subsequently created another one. Islamic militants threatened him with death and attempted to put the association's library on

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[47] See *supra* n. 37.

[48] CRR, 1 February 1996, *Ali Bouaouina*, in *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés*, Centre d'information Contentieuse, 1996, at p. 93.

[49] CRR, 15 October 1996, *Khoudi*, *ibid.*, at p. 94.

fire. He tried to complain to the police, but the police expressly refused to assist him and reproached him for his political and cultural activities. The applicant fled Algeria following the murder of two members of the association. The CRR granted him refugee status as it considered that the authorities had voluntarily tolerated the acts perpetrated by the Islamic militants[50].

In *Diaf*[51], the Algerian police denied the applicant the right to lodge a complaint against an Imam who singled him out on several occasions as a threat to Islamic rules. The applicant was subsequently assaulted by Islamic militants. Once again the police refused to register his complaint. The CRR declared that the police's behaviour amounted to voluntary tolerance. It is argued that, in cases where voluntary tolerance is established on the ground that the refusal of protection is such that it excludes any search for the persecutors by state authorities, the authorities' behaviour goes beyond voluntary tolerance.

In *Terahi*[52], the applicant, an Algerian national, was, owing to his Christian convictions, increasingly threatened by Islamic militants who sentenced him to death. He asked the authorities for protection, but they refused to grant him any. This refusal excluded any search for the perpetrators by the authorities. The CRR concluded that, considering the circumstances, voluntary tolerance was established. Besides, the CRR noted that the applicant's sister and brother in law had both been granted refugee status for similar reasons[53].

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[50] See CRR, 31 January 1996, *Khaldoun*, *ibid.*, at p. 93.

[51] See *supra* n. 37.

[52] CRR, 25 February 1994, *Terahi*, in *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés*, Centre d'information Contentieuse, 1994, at p. 46.

[53] See also the CRR's decision in *Slepcik* (*supra* n. 17); CRR, 1 June 1994, *Gaborova épouse Slepcik* in *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du*

It is also interesting to observe that, in some other cases, the CRR agreed that the nature of the links that the applicant and his or her family had with France rendered him or her unable to ask the Algerian authorities for protection. In *Dikous*[54], several members of the applicant's family had served in the French army, including her father. He left for France with his wife and minor daughter. He was reintegrated in the French nationality. The applicant herself was an active supporter of Algerian women's liberation and emancipation. For this reason, she was threatened and harassed. Due to her family's past, she was unable to ask the Algerian authorities for protection. The CRR came to the conclusion that voluntary tolerance was established. The circumstances in *Mokhtari*[55] were quite similar. The applicant's family was known for having supported the French presence in Algeria. His father was executed in 1958 because he was a member of the back-up French forces (*forces supplétives de l'armée française - Harki*). The applicant himself was a French teacher known for his cultural action in favour of the French language. In 1992 he became the target of Islamic militants. He lodged a complaint with the police who refused him any kind of protection following consultations with higher authorities. Such an attitude was declared to amount to voluntary tolerance. In *Elkebir*[56], although the CRR did not expressly base its conclusions on the links the applicant had with France, the latter may have been of some relevance in the appraisal of the facts. The applicant was an Algerian national who came in France in 1973 aged two with her family. She was therefore educated in France. In 1985, her parents decided to go back to Algeria. She carried on her studies in a French secondary school in Oran but had to give them up owing to the arabisation of

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Conseil d'Etat et de la Commission des Recours des Réfugiés, Centre d'information Contentieuse, 1994, at p. 59 and CRR, 18 March 1994, *Oukolova* in *ibid.*, at p. 50.

[54] CRR, 4 May 1994, *Dikous*, in *ibid.*, at p. 111.

[55] See *supra* n. 37.

[56] CRR, 22 July 1994, *Elkebir*, *ibid.*, at p. 66.

teaching programmes. The applicant had hardly any knowledge of Arabic. However, she found clerical work in the town where her parents lived. She was the victim of repeated threats and violence by Islamic militants because of her work and her refusal, despite pressure, to abide by Islamic rules. Following a particularly violent aggression, she felt that she had no choice but to resign and leave Algeria. The CRR concluded that the local authorities' deliberate refusal to take action despite their knowledge of the facts amounted to voluntarily tolerance[57]. In *Khaldoun*[58], the CRR expressly recognised that the authorities' attitude went beyond voluntary tolerance or encouragement. Indeed, the CRR held that the applicant's fear of persecution by Islamic extremists was founded as well as his fear to see the authorities deliberately refuse him protection because of his personal political opinions and his father's action in favour of an opposition party. The applicant was a musician who had been threatened by Islamic militants and wounded by a bullet because of the lyrics of his songs that criticised the fundamentalist theories on women's status in force since the adoption of the new family code. He was, therefore, perceived as an opponent to the Islamic fundamentalist groups, but also to the Algerian government. He left Algeria after a second murder attempt. Soon after his arrival in France, one of the members of his band was murdered. Willing to go back to his country, he had to change his plans when he found out that his father, who had been harassed by Islamic militants for many years, had been arrested by the authorities owing to his political action in favour of an opposition leader. Since the applicant's departure, two Algerian singers - one being a close friend - and his producer had been murdered by Islamic extremists.

In all these cases, applicants succeeded in proving State involvement by showing that the State authorities had voluntarily tolerated acts amounting to persecution.

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[57] In a similar case, the CRR denied refugee status to a woman who, like the applicant in *Elkebir* (*supra* n. 56), refused to abide by the rules imposed by Islamic groups on women. However, unlike Ms Elkebir, the applicant did not have any specific link with France: she was teaching Arabic and the Koran.

[58] See *supra* n. 50.

Moreover, it is argued that, although these decisions were based on the concept of persecution voluntarily tolerated by the State, the State authorities' attitude may be considered as indicating a more active involvement. From 1994 to 1998, the CRR granted refugee status to a small number of Algerian nationals alleging persecution by Islamic militants[59]. In most cases, the Algerian authorities' behaviour could be regarded as going beyond encouragement or voluntary tolerance. In many cases, asylum seekers were unable to prove State involvement and were therefore refused refugee status on this sole ground[60].

In a number of unsuccessful cases, although the CRR recognised the existence of persecution, it refused to grant refugee status on the ground that the state's inability to offer its nationals effective protection did not amount to encouragement or voluntary tolerance. This has been confirmed by the Conseil d'Etat[61]. In *Sahnoun*[62],

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[59] See, for example, the CRR's decision in *Dikous*, *supra* n. 54; CRR, 28 February 1995, *Karroubi*, see *supra* n. 36; CRR, 30 May 1995, *Mokhtari*, see *supra* n. 37; CRR, 20 June 1995, *Mehdi*, *ibid.*; CRR, 12 December 1995, *Diaf*, *ibid.*; CRR, 12 December 1995, *Hamitouche épouse Diaf*, *ibid.*; the CRR's decision in *Terahi*, *supra* n. 52; the CRR's decision in *Elkebir*, *supra* n. 56; the CRR's decision in *Khaldoun*, *supra* n. 50; the CRR's decision in *Ali Bouaouina*, *supra* n. 48; CRR, 6 October 1997, *Bouziani*, in *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés*, Centre d'information Contentieuse, 1997, at p. 48 and CRR, 13 February 1998, *Djabouabdellah*, in *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés*, Centre d'information Contentieuse, 1998, at p. 53.

[60] See *supra* n. 39 for figures.

[61] See, for instance, Conseil d'Etat, 22 November 1996, *M. Messara*, *supra* n. 29 and Conseil d'Etat, 22 November 1996, *Mme Messara*, *ibid.*

[62] CRR, 13 July 1994, *Sahnoun*, in *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés*, Centre d'information Contentieuse, 1994, at p. 114.

although the protection granted by the Algerian authorities was not considered sufficiently effective, the CRR refused to consider that there was voluntary tolerance[63]. It is argued that the notion of voluntary tolerance is interpreted in an excessively restrictive manner that seriously undermines refugee protection. The expression "voluntarily tolerated" is actually quite revealing. Indeed, the term "tolerated" could have been used on its own without any further specification. It appears that the Conseil d'Etat was unwilling to see situations where the State authorities are no longer in control to fall within the scope of the 1951 Convention. Such an approach goes against the object of the international system of refugee protection. Refugee status acts as a substitute for deficient or non-existent protection on the part of the State of nationality. Therefore, the implicit distinction between "voluntary tolerance" and "involuntary tolerance" is not justified and is a source of discrimination between individuals being in comparable situations with regard to the persecution being alleged. The view taken is that for the concept of State tolerance to be compatible with the 1951 Convention, it must cover cases where the State is unable to provide protection regardless of the causes its failure.

The adverse effects of the concepts of persecution voluntarily tolerated or encouraged are aggravated by the fact that asylum seekers must show that they have requested State protection and have been refused protection. Furthermore, in some cases applicants were required to establish that protection had been denied on a systematic basis.

In *Naas*[64], the applicant, an English teacher of Algerian nationality, alleged persecution owing to his conversion to Catholicism. He was harassed by members

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[63] See also CRR, 13 December 1994, *Rizi*, in *ibid.*, at p. 117; CRR, 30 June 1995, *Zekri*, in *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés*, Centre d'information Contentieuse, Année 1995, at p. 109; CRR, 12 September 1995, *Benahmed*, in *ibid.*, at p. 109; CRR, 11 April 1995, *Redouane*, *supra* n. 14 and CRR, 22 May 1995, *Saidi*, in *ibid.*, at p. 110.

[64] See *supra* n. 44.

of his family, ostracised at work, confronted by the hostility of some of his pupils and under the surveillance of two individuals dressed in plain-clothes. Following his involvement in meetings of the Oran Evangelic group, the police compiled a file on him. He asked to be transferred to Oran University to study English. He was then assaulted twice by Islamic militants. He did not lodge a complaint as he feared that it would only make things worse. Following the town elections in 1990, he had no choice but to worship clandestinely. He was on several occasions insulted by youths of his neighbourhood. For the purpose of his University dissertation, he met up with the Rabbi of Oran and was subject to police surveillance as a result. From 1992, he received anonymous threats on the phone; he was accused of being pro-Zionist. Individuals he identified as being Islamic militants attempted to run him over. Having received a letter threatening him with death he decided to leave Algeria. He believed that he was unable to obtain protection from the Algerian authorities. Firstly, the CRR considered that the fact that the applicant was the object of a file and was under the surveillance of the authorities could not in itself amount to persecution in the sense of the 1951 Convention. Secondly, the CRR considered that the alleged acts of persecution could not be regarded as encouraged or voluntarily tolerated by the Algerian State authorities. In this respect, the CRR declared that the above mentioned circumstances did not justify the fact that the applicant did not approach the authorities for protection. In the CRR's opinion, the applicant had failed to establish that requests for protection would have been in vain[65].

[65] See also the CRR's decision in *Ameur*, *supra* n. 44. The applicant, an Algerian national became a Christian. He was identified by the police as being acquainted with Christian groups. He was brutalised and threatened by members of his family who discovered his religious conversion as well as despised by his work colleagues. He approached the Bishop of Oran about his conversion to Catholicism. The ceremony was postponed owing to the general situation in Algeria. He received an anonymous letter threatening him with death. He then decided to leave his country. With regard to the notions of State authorities' encouragement and voluntary tolerance, the CRR adopted the same reasoning as in *Naas* (see *supra* n. 44).

In a few decisions[66], including the decision in *Naas*[67], failure to solicit State protection was held against applicants without the CRR having explored the reasons for the applicants' attitude. It is argued that such an approach is inconsistent with Article 1(A)(2) of the 1951 Convention which expressly refers to the asylum claimant's unwillingness to avail himself or herself of the protection of his or her country of nationality. It appears that the only circumstances in which the CRR recognised the applicant's incapacity to ask the State authorities for protection concerned Algerian nationals having close links with France[68]. In these cases, the applicants were regarded as unable to ask protection as opposed to unwilling.

In some instances, the burden of proof imposed on asylum seekers was aggravated by the fact that the CRR required State protection to have been refused on a systematic basis. In *Redouane*[69], the CRR concluded that the Algerian authorities' incapacity to protect the applicant in an effective manner could not, in the absence of a systematic refusal to provide protection, be regarded as amounting to voluntary tolerance. This additional requirement constitutes a further violation of the 1951 Convention. Firstly, it lacks legal basis. It is a concept unknown to the 1951 Convention. Secondly, it is a source of unfairness and discrimination since it introduces distinctions based on the "periodicity" of the states' refusals to grant protection. Fortunately, the notion of "systematic refusal" only appears in a handful

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[66] See, for instance, CRR, 19 June 1995, *Sellami*, in *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés*, Centre d'information Contentieuse, 1995, at p. 111 and CRR, 26 July 1995, *Mme D*, in *ibid.*

[67] See *supra* n. 44.

[68] See, for instance, the CRR's decision in *Dikous*, *supra* n. 54 and CRR, 30 May 1995, *Mokhtari*, *supra* n. 37.

[69] See *supra* n. 14.

of CRR's[70] decisions and does not seem to have been endorsed by the Conseil d'Etat.

The requirements imposed by the French case-law regarding the identity of the perpetrator of persecution are in breach of the 1951 Convention as the latter does not require persecution to emanate directly or indirectly from State authorities. According to Article 1(A)(2) of the Convention, asylum seekers, in addition to establish a well-founded fear of persecution based on one or more Convention grounds, asylum seekers only need to show that they are unwilling or unable, owing to that fear, to avail themselves of the protection of the State of their nationality. By requiring individuals alleging non-State persecution to demonstrate that the persecution in question has been voluntarily tolerated or encouraged by the State, the French case-law unnecessarily and illegally restricts access to refugee status. The view taken, based on Article 1(A)(2) of the 1951 Convention, is that the identity of the perpetrator is irrelevant and that individuals persecuted by non-State entities should enjoy the same degree of protection as those persecuted by State agents. This position must be expressly endorsed by EC law.

1.2. The identity of the perpetrator: an irrelevant factor

For EC law to be in line with international refugee law, its provisions must be consistent with the Convention definition of the term refugee. To ensure compliance, EC law must expressly mention that people who fear persecution emanating from non-State agents fall within the scope of the Convention provided that they satisfy the requirements of Article 1(A)(2). The express inclusion of non-State persecution within the definition of refugee at EC level is designed to prevent the development of restrictive concepts and interpretations detrimental to refugee

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[70] Owing to the difficulties concerning access to the OFPRA's decisions, it is not possible to say whether or not the OFPRA uses the notion of "systematic refusal". However, since the relevant decisions of the CRR and the Conseil d'Etat are available, the comments made on the French case-law are reliable.

protection as those developed in France. Compliance with the 1951 Convention in that respect requires EC law to depart from the position agreed in the Joint Position on the definition of the term refugee.

However, before analysing the Joint Position, it is useful to examine the Canadian case-law resulting from the decision in *Ward*[71]. The criteria for determining the relevance of the Canadian case-law are both quantitative and qualitative. Canada is a very large country that deals with a considerable number of applications for asylum. It is an important factor to take into consideration when contemplating the transfer of some of the Canadian solutions to the European scene. In terms of quality, the Canadian case-law on non-state persecution has proved to comply with the 1951 Convention as it fully embraces non-State persecution.

In *Ward,* the Supreme Court of Canada took the view that "[s]tate complicity in persecution [was] not a prerequisite to a valid refugee claim under the definition. Thus, the definition extend[ed] to situations in which the state is not an accomplice in persecution, but is unable to protect its citizens (...)".

In *Ward,* the applicant was born in Northern Ireland. He joined the Irish National Liberation Army (INLA) as a volunteer. Asked to execute hostages, he refused and helped them to escape. The police let slip to an INLA member that one of its members had assisted the hostages in their escape. The INLA suspected Ward who was tortured as a result. He escaped and sought police protection. The police charged him for his part in the hostage incident. His wife and children were taken hostage by the INLA. He was sentenced to three years in jail. Towards the end of his sentence, Ward sought the assistance of the prison chaplain. The latter, with the help of the police, obtained a Republic of Ireland passport for Ward and airline tickets to Canada where he applied for refugee status. The Immigration Appeal Board concluded that the definition of the term refugee did not necessarily

[71] See *Attorney-General of Canada and Ward, United Nations Commissioner for Refugees and al., Interveners*, 30 June 1993 [1993] 2 SCR 689 (Supreme Court of Canada).

contemplate State complicity, the State's inability to ensure effective protection being sufficient[72]. Unlike the Board and subsequently the Supreme Court, the Federal Court of Appeal decided that State complicity was a necessary prerequisite[73]. Urie J.A. based his reasoning on the meaning he attributed to the terms "unable" and "unwilling" contained in Article 1(A)(2) of the 1951 Convention; he made the following comments:

"If a claimant is unwilling to avail himself of the protection of his country of nationality, it is implicit from that fact that his unwillingness stems from his belief that the State and its authorities, cannot protect him from those he fears will persecute him. That inability may arise because the state and its authorities are either themselves the direct persecutors of the feared acts of persecution, assist actively those who do them or simply turn a blind eye to the activities which the claimant fears. While there may well be other manifestations of it, these possibilities clearly demonstrate that for the claimant to be unwilling to avail himself of the protection of his country of nationality, to provide the foundation for a claim to be a refugee he must establish that the state cannot protect him from the persecution he fears arising, in this case, from his former membership in the INLA, i.e. he must establish that what he fears is in fact persecution as that term is statutorily and jurisprudentially understood. On that basis the involvement of the state is a sine qua non where unwillingness to avail himself of the protection is the fact."

According to Urie J.A. the Board had confused the determination of persecution and effective protection. These are two distinct issues: once persecution within the meaning of Article 1(A)(2) of the 1951 Convention is established, the availability of State protection must be determined. The identity of the persecutor should be taken into consideration where examining whether the applicant has a well-founded fear of persecution within the meaning of the Convention. Moreover, the applicant's

[72] Immigration Appeal Board (*Ward*) [1988] 9 Imm. L.R. (2d) 48.

[73] *Attorney General v. Ward* [1990] 2 FC 667 (Federal Court of Appeal).

unwillingness to approach the State authorities in order to obtain protection may not only be motivated by a fear of persecution. Asylum seekers may be aware of the fact that the State is unable to offer them the protection that they need. They may also fear reprisals if those persecuting them hear of their request for protection.

The Supreme Court took the same view as the Board and rejected State complicity as a necessary prerequisite to a successful asylum claim. It is interesting to note that the Supreme Court started by recalling the rationale underlying the international refugee protection regime. This international regime is construed as a substitute for national protection and should apply where the State fails to provide its nationals with the needed protection regardless of the reasons for the State's incapacity to fulfil its duties.

In *Ward,* the Attorney General's legal reasoning differed from that of the Supreme Court, although it achieved the same result. Indeed, while arguing that State complicity was a necessary prerequisite to a valid refugee claim, the Attorney General conceded that the state's inability to protect its nationals amounted to sufficient State complicity within the meaning of the 1951 Convention. It is argued that, although it allowed protection, the Attorney General's reasoning was not satisfactory as it stretched the meaning of the term complicity. Moreover, the use of the notion of complicity in that context appeared unnecessary as it followed from the interpretation advocated by the Attorney General that the State's failure to protect its nationals should amount to complicity for the purpose of refugee status. The position adopted by the Supreme Court of Canada in that respect is considered preferable.

Although similar in its consequences, the Supreme Court's reasoning was different from that of the Attorney General as it was based on the irrelevance of State complicity. In the Court's opinion, its position was supported by the history of the concept of refugee endorsed by academics[74] and reflected in a growing number of

[74] See, for, instance, Guy S. Goodwin-Gill, *The Refugee in International Law* (Clarendon Press, Oxford, 1983) at p. 71-72, referred to in *Ward*, see *supra* n. 71.

Canadian decisions. In *Rajudeen*[75], the Federal Court of Appeal seemed to consider that a State's inability to protect its nationals was a subset of State complicity. The Federal Court of Appeal's conception of state complicity is similar to the Attorney-General's in *Ward*[76]. The reference to *Rajudeen* in support of its decision on State complicity demonstrated that the main concern of the Supreme Court was to prevent any systematic exclusion from the protection offered by refugee status of individuals whose country of origin was unable to offer effective protection. The Supreme Court of Canada came to the conclusion that "(...) persecution under the Convention include[d] situations where the state [was] not in strictness an accomplice to the persecution, but [was] simply unable to protect its citizens". The United States case-law, referred to in *Ward*, takes the view that a well-founded fear of persecution owing to the actions of non-governmental agents where the State cannot or will not protect the applicant should fall within the scope of the refugee definition. In *McMullen*[77], the Court of Appeal declared that likelihood of persecution should be interpreted as including "(...) [p]ersecution by the government or by a group which the government is unable to control". This principle was confirmed in a number of decisions[78].

The position of the Canadian Supreme Court finds support in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status. Indeed, Paragraph 65 of the UNHCR Handbook reads:

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[75] *Rajudeen v. Minister of Employment and Immigration* [1984] 55 NR 129.

[76] *Surujpal v. Minister of Employment and Immigration* [1985] 60 NR 73 and *Zalzali v. Canada (Minister of Employment and Immigration)* [1991] 126 NR 126.

[77] *McMullen v. Immigration and Naturalization Service*, 658 F2d. 1312 (9th Cir. 1981) at p.1315.

[78] See *Artiaga Turcios v. Immigration and Naturalization Service*, 829 F2d. 720 (9th Cir. 1987), at p. 723; *Artega v. Immigration and Naturalization Service*, 836 F2d. 1227 (9th Cir. 1988) at p. 1231 and *Estrada-Posadas v. Immigratin and Naturalization Service*, 924 F. 2d. 916 (9th Cir. 1991) at p. 919.

"Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable factions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection."

UNHCR clearly extends the scope of refugee status to cases where the State is unable to protect its nationals. Where persecution is established, the critical issue is to determine whether effective State protection is available and not whether persecution emanates from State authorities or has been "voluntarily" or "knowingly" tolerated by them. This pressing need to provide international protection to those who face non-State persecution in accordance with Article 1(A)(2) of the 1951 Convention was reiterated in an UNHCR information Note of March 1995 addressed to the EU Member States. UNHCR stressed that "[p]ersecution that d[id] not involve state complicity [was] still, nonetheless, persecution". The Note reminded the Member States the need to interpret the Convention in good faith according to the same "spirit of generosity which ha[d] characterised its drafting". It also stressed that the 1951 Convention was a treaty in the sense of the Vienna Convention on the Law of Treaties and, therefore, should be interpreted in good faith and in the light of its object and purpose. Moreover, as noted by the Supreme Court of Canada in *Ward*[79], "[t]he international community was meant to be a forum of second resort for the persecuted, a surrogate, approachable upon failure of local protection. The rationale upon which international refugee law rests is not simply the need to give shelter to those

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[79] *Attorney-General of Canada and Ward, United Nations Commissioner for Refugees and al., Interveners, supra* n. 71 at p. 739.

persecuted by the state but, more widely, to provide refuge to those whose home state cannot or does not afford them protection from persecution." In *Ward,* reference was also made to humanitarian tradition as an element to be taken into consideration in answering the questions addressed to the Court. As a member of the international community committed to the protection of human rights whose Member States are all signatories of the 1951 Convention, the EC has a moral and legal duty to offer protection to those in need according to the Convention provisions. This includes protection from non-State protection where the national State is unable to offer effective protection. With this in mind, it is argued that EC law should expressly provide that the identity of the perpetrator is an irrelevant factor when determining whether an asylum seeker falls within the scope of Article 1(A)(2) of the 1951 Convention.

It is argued that the EU approach to the concept of refugee status has been a source of serious concern which needs to be addressed and redressed by EC law.

The Joint Position on the definition of the term refugee agreed by the Member States reflects the restrictive nature of the asylum policy developed in the EU and many of its Member States. Indeed, the Joint Position narrows down the personal scope of the term refugee by restricting access to refugee status in cases of non-State persecution. In that respect, the Joint Position appears to endorse the French position. Indeed, Section 5(2) on persecution by third parties provides that "[p]ersecution by third parties will be considered to fall within the scope of the Geneva Convention where it is based on one of the grounds in Article 1 (A)(2) of that Convention, is individual in nature and is encouraged or permitted by the authorities (...)." Section 5(2) further provides that "[w]here the official authorities fail to act, such persecution should give rise to individual examination of each application for refugee status, in accordance with national judicial practice, in the light in particular of whether or not the failure to act was deliberate" Section 5(2) excludes failures to protect which are not deliberate as they will not be considered as being "encouraged" or "permitted" by the State authorities. Section 5(2) subsequently states that "[t]he persons concerned may be eligible in any event for

appropriate forms of protection under national law." This "safety-net" is not judged sufficient as there is no indication as to the availability, nature and effectiveness of national alternate modes of protection[80].

As in the French case-law, refugee status in cases of non-State persecution is conditional on the applicant proving State complicity which is construed in a twofold manner. Both the French case-law and the Joint Position refer to persecution "tolerated" by the State. However, they differ in that French decisions refer to persecution "voluntarily tolerated" by the State while the Joint Position refers to "permitted" persecution. However, the differences in the terminology must not be artificially emphasised. The view taken is that both expressions cover similar circumstances. Persecution voluntarily tolerated by the State authorities can be regarded as actually permitted by the State authorities. Most importantly, both expressions result in denying refugee status to those whose State is unable, but not necessarily unwilling, to offer them protection. One may inferred from the wording of the Joint Position in relation to non-State persecution that it must have been influenced by the French case-law which served the restrictive nature of the EU asylum policy.

It is argued that Section 5(2) of the Joint Position is inconsistent with Article 1(A)(2) of the 1951 Convention. Reference to the UNHCR Handbook in the Joint Position did not prevent the Member States from disregarding its recommendations. The UNHCR Handbook suffers from a lack of binding effect. However, binding effect in itself would not have secured compliance. Indeed, although the 1951

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[80] There has been a tendency to develop other "forms of protection" in lieu of refugee status. which are often based on the concept of temporary protection and do not offer the guarantees of full refugee status. These statuses distinguish between different categories of refugees with regard to the duration of the protection granted, the rights attached to the statuses and the procedures to obtain protection. (See on this issue Christopher Hem, "Protection temporaire et définition complémentaire du réfugié", France Terre d'Asile, La Lettre, Le Droit d'Asile au regard de la Crise Yougoslave - Protection Temporaire et Statut de Réfugié, 23ème Assemblée Générale de France Terre d'Asile, 15 May 1993, lettre N. 87 -September 1993, at p. 10-15).

Convention is legally binding upon the Member States, interpretations and practices incompatible with its provisions have been adopted throughout the EC[81].

It is argued that EC law should put an end to interpretations of the term refugee incompatible with the Convention definition which jeopardise access to international protection in cases of non-State persecution. Article 63(1)(c) of Title IV on visas, asylum, immigration and other policies related to free movement of persons which provides for the adoption of minimum standards with respect to the qualification of nationals of third countries as refugees could constitute the legal basis for the adoption of EC provisions compatible with the 1951 Convention in that respect. If the EC were to endorse the position on non-State protection enshrined in the Joint Position, the EC would condone violations of an international instrument legally binding upon its Member States. EC law should clearly state that the identity of the perpetrator should not be taken into consideration when determining whether an asylum seeker is entitled to refugee statues. So long as the applicant demonstrates that he or she has a well-founded fear of persecution, he or she should not be required to establish some degree of State involvement. In that respect, one could refer to the English case-law which, once persecution has been established, refers to the State's inability or unwillingness to protect[82].

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[81] These inconsistencies are examined in the course of the thesis.

[82] See the decision of the Court of Appeal of 2 December 1999, in *Milan Horvath v Secretary of State for the Home Department*, *supra* n. 26. The appellant was unsuccessful in that case because it was the State's inability to offer protection which had turned acts committed by non-State agents into acts of persecution. In the Tribunal's opinion confirmed by the Court of Appeal, ill-treatment by non-State agents, in this case skinheads, alone was not persecution. This decision was confirmed by the House of Lords in a decision of 6 July 2000 (*supra* n. 26). The House of lords stressed that two distinct tests had to be satisfied. Firstly, the applicant had to prove that the ill-treatment amounted to persecution and, secondly, that State protection was unavailable, the country of origin being unable or unwilling to provide the protection in question. The House of Lord emphasised the fact that the obligation to afford refugee status arose only if the applicants' country of origin was unable or unwilling to fulfil the duty it owed to its nationals in relation to protection.

An EC legislation in line with international refugee law commands an endorsement of the concept of refugee as defined in the 1951 Convention and an acknowledgement of the changes that have taken place in the refugee population. With regard to non-State persecution, this can be achieved by "simply" implementing the Convention definition as Article 1(A)(2) does not impose any requirements as to the identity of the perpetrator. There is no legal ground for limiting entitlement to refugee status in cases of non-State persecution. However, the situation is more complex with regard to gender-based persecution as the 1951 Convention does not expressly refer to this type of persecution.

2. Gender-based persecution

The focus on gender-based persecution is not the result of an arbitrary choice, but is dictated by the current refugee situation world-wide. It is argued that disregarding gender issues while examining asylum seeker matters would be an unacceptable omission considering the high proportion of female refugees and the specificity of the persecution they are fleeing. Refugee women and their dependants constitute approximately 80% of the world refugee population[83]. The vast majority of these women[84] are to be found in refugee camps and are often referred to as displaced people. Only a small percentage of these women will actually apply for refugee status in the EU territory, mainly because of insurmountable difficulties in leaving their country of origin and reaching the territory of the EU. Besides they might not be willing to leave their home State.

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[83] Isabelle Daoust and Kristina Folkelius, "Developments - UNHCR Symposium on gender-based persecution", IJRL, Vol. 8 No. 1/2 (1996) 181-183, at p. 180.

[84] The great majority of displaced people are young girls, elderly widows, single mothers and children. The husbands and fathers are often dead or taken prisoner or drafted as combatants (Women, UNHCR Issues, http: //www.unhcr.ch/ issues/ women/ women htm).

The traditional assumption that the typical refugee is a male political dissident has resulted in little recognition being given to gender issues in asylum matters. As observed by Wallace, "[t]he relative immobility of women is reflected in the essential male interpretation of the 1951 Convention and the 1967 Protocol, as they have been applied on the experiences of men."[85] The case-law is mainly based upon male refugees' experiences and female-specific experiences, such as genital mutilation and stoning have been routinely ignored by asylum laws. The specificity of the persecution endured by women was formally acknowledged in Conclusion No. 73 of the UNHCR Executive Committee which recommends that States should develop "appropriate guidelines on women asylum-seekers, in recognition of the fact that women often experience persecution differently from refugee men"[86]. Besides, UNHCR has prepared *Guidelines on the Protection of Refugee Women*[87] aimed at identifying the specific protection issues relating to female refugees.

Women alleging gender-based persecution are too often denied refugee status on the ground that this type of persecution falls outside the scope of the 1951 Convention. Indeed, the Convention grounds for refugee status do not comprise gender. However, the Canadian case-law demonstrates that gender-based persecution may be covered by the Convention definition through membership of a particular social group. Indeed, flexible by nature, this Convention ground has the potential to cover situations that could not be foreseen at the time of the Convention was drafted. However, this potential may be undermined through restrictive interpretations as shown by the French case-law.

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[85] Rebecca M. Wallace, "Considerations for asylum officers adjudicating asylum claims from women: American guidelines", Immigration and Nationality Law and Practice, Vol. 9 No. 4 (1995), 116-120, at p. 116.

[86] Referred to in Isabelle Daoust and Kristina Folkelius, *supra* n. 83, at p.180.

[87] Executive Committee of the High Commissioner's Programme, Sub-Committee of the Whole on International Protection, *Information Note on UNHCR's Guidelines on the Protection of Refugee Women*, EC/SCP/67, 22 July 1991.

The purpose of this section is to identify the specific problems raised by gender-based persecution and to determine to what extent the Convention definition may extend to this type of persecution through membership of a particular social group. It is argued that EC law should ensure that women having a well-founded fear of persecution, who cannot avail themselves of the protection of their State of nationality, are entitled to refugee status.

2.1. Identification of the problems raised by gender-based persecution as a ground for refugee status

Like any male asylum seeker, women may base their claim for refugee status on any of the Convention grounds. However, where alleging gender-based persecution, women face two types of obstacles. Firstly, there is a certain reluctance to recognise that, in certain circumstances, gender-based violence may amount to persecution for the purpose of refugee status. Secondly, women fleeing gender-based persecution do not easily fit within the scope of the 1951 Convention as the Convention grounds do not include gender. In the absence of a gender category, "membership of a particular social group" is the sole ground upon which women alleging gender-based persecution can rely to seek refugee status.

Women who have suffered gender-based violence in the hands of State representatives or members of the military have encountered tremendous difficulties in obtaining protection from their State of nationality. Women also face hurdles in their quest for State protection where violence against women is socially accepted and regarded as the norm.

In a number of countries, where sexual and physical assaults are committed by members of the military or other State representatives, it is difficult or impossible for the victim to report any assault to the authorities, sue her aggressor(s) and thus obtain State protection. For instance, as reported by Amnesty International, sexual assault by members of the military are widespread in Peru; however, there are no

published convictions of the crimes in question. This will come as no surprise as officials of the Peruvian Government have said that these crimes could not be avoided and were actually "natural" where soldiers were stationed in rural areas[88]. Furthermore, women's position in these circumstances may be aggravated by the social and cultural context. For instance, where a husband's victim learns about his wife's rape, he may repudiate or kill her to avoid the shame and cultural stigma attached to rape[89]. The State may tolerate such acts as being part of social, cultural or religious traditions. Women's difficulties in seeking State protection are not confined to cases where the aggressor is related to the State. Gender-based violence, and in particular domestic violence, may be socially acceptable. In such cases, the State may tolerate or be unable to effectively protect women. In the worse cases, the State will encourage gender-based violence where women are deemed to have transgressed social norms[90]. It is not enough for a State to officially proclaim that violence against women will not be tolerated and pass laws designated to protect them. The system of protection provided by the State has to be effective. Unfortunately governments often fail to adopt and enforce such laws, tolerating and passively encouraging and therefore legitimising the abuse of women. Bunch has identified four reasons for governments' failure to enforce laws protecting women: 1) sexual discrimination is seen as trivial; 2) the abuse of women is seen as a cultural, private, or individual issue; 3) women's rights are not seen as human rights; and 4) the problems are seen as too pervasive to be confronted[91].

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[88] Amnesty International, "Women in the front line: violations against women", 5 (1990).

[89] Susan F. Martin, Refugee Women 16 (1992) referred to in Todd Stewart Schenk, " A proposal to improve the treatment of women in asylum law: adding a "gender" category to the international definition of "refugee", Global Legal Studies Journal II (1995) http://www.law.indiana.edu/glsj/vol2/schenk.html

[90] This is for instance the case in Afghanistan under the Taliban regime.

[91] Charlotte Bunch, "Women's Rights as Human Rights: Towards a Revision of Human Rights", 12 Human Rights Quarterly [1990] 486, at p. 488; referred to in Todd Stewart Schenk, *supra* n. 89.

It is argued that where the State fails to protect women against gender-based violence, that violence may amount to persecution. Indeed, as already noted, persecution and fear of persecution, on the one hand, and the absence of effective State protection, on the other hand, are interrelated for the purpose of refugee status. Moreover, the way gender-based violence manifests itself may fall within the meaning of persecution which covers deprivation of life or physical freedom as well as restrictions[92].

In the absence of State protection, some women have sought international protection with little success. In that respect, women face a double hurdle. Firstly, gender-based violence tends to be conceived as private acts and thus falls outside the meaning of persecution. Secondly, even where women succeed in overcoming the first obstacle, they may still be refused refugee status on the ground that the Convention does not include gender as a ground for persecution.

Violent acts against women owing to their gender are generally perceived as private random acts of violence. Indeed, gender-based violence is generally regarded as resulting from private actions committed by individuals for personal motives. Thus, the violence in question is not considered as involving the State. This means that a connection cannot be established between gender-based violence and the State's failure to provide adequate protection. Thus, acts of gender-based violence are excluded from the scope of the 1951 Convention as they do not fall within the meaning of persecution. Indeed, persecution supposes a State's failure to provide effective protection. For instance, on the basis of its purely private nature, domestic violence or rape are often perceived as being outside the scope of the protection offered by the 1951 Convention. However, it is argued that gender-based violence may lose its private nature where the State plays an active or passive part in its occurrence. For instance, the rapes and sexual assaults inflicted upon Bosnian women by members of the Serbian military with the assent and encouragement of

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[92] See the introduction, chapter I.

the Serbian authorities cannot be regarded solely as private acts. Whilst it is recognised that States cannot totally eradicate gender-based violence, they must provide adequate protection. Therefore, gender-based violence must not be systematically excluded from the scope of persecution for the purpose of refugee status.

It is argued that due consideration should be given to the political and social context, the main concern being the availability of effective protection provided within the State concerned for women in need. While women may be exposed to the same type of violence[93], their position regarding Convention protection should differ considerably depending upon the availability and effectiveness of State protection. This reasoning should apply to any kind of physical or sexual abuse that is gender-related. In countries where women are traditionally regarded as holding an inferior position in society, acts of violence against them are usually common place and accepted by the majority of the population. Women are still exposed to inhumane or degrading treatment and even torture. The imposition of extremely strict social norms whose transgression is heavily punished and can result in them facing death. In Algeria, the life of women who refuse to comply with dress codes and behaviours imposed by groups of fundamentalist Muslims is at risk. In Pakistan, a woman accused of adultery can be stoned to death[94].

Where women are successful in establishing the existence of well-founded fear of persecution, they are confronted by a further obstacle. For someone to be granted refugee status, he or she must demonstrate that her well-founded fear of persecution is based on at least one of the Convention grounds; as already observed, gender is not one of these grounds.

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[93] This for instance the case with regard to domestic violence.

[94] *See R. v Immigration Appeal Tribunal and the Secretary of State, ex parte Syeda Khatoon Shah* [1996] LTL 26/10/1996 and The Guardian, 26 October 1996, at p. 5.

In the absence of a gender category, female asylum seekers who allege that they have a well-founded fear of persecution owing to their gender will have to establish that they belong to a particular social group[95]. An argument against the recognition of gender-based persecution as a self-standing ground for the purpose of refugee status lies with the fact that asylum legislation should be gender neutral. This means that asylum seekers should be treated equally under the law irrespective of their gender. However, this view ignores the fact that female asylum seekers may often experience situations that differ from that of men's. The principles of equality and non-discrimination can only apply where individuals are in the same situation. The neutral character of asylum procedures may be detrimental to women refugees' interests since they do not take into account their special needs. As reported by Daoust and Folkelius, "[f]eminist commentators argue that in order to achieve substantive equality one must move beyond formal legalism and adopt policies that will make a practical difference for groups which have been traditionally subjected to discriminatory measures."[96]

If EC law is to fully comply with international standards, it must secure that women fleeing persecution owing to their gender who cannot avail themselves of the protection of their State of nationality are entitled to refugee status. While the addition of a gender category to the Convention definition may appear as being the most direct and thus the most effective method, one must acknowledge the fact that it is likely to be an "unpopular" move amongst Member States. However, the Member States' expected opposition to the introduction of a sixth ground, i.e. gender, cannot justify the EC "turning its back" on these women. Hence, if refugee status cannot be secured through the introduction of an additional ground, the Convention definition of the term refugee must be construed in a manner that allows protection from gender-based persecution. The only ground that may be used for

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[95] This issue is examined in section 2.2. of the chapter.

[96] See, for example, Greatbatch, J., "The gender difference: feminist critiques of refugee discourse", IJRL (1989) 525, referred to in Daoust and Folkelius, *supra* n. 83, at p. 183.

that purpose is "membership of a particular social group" It is argued that EC law must ensure that this ground is interpreted as to cover gender-based persecution.

2.2. Women as members of a particular social group

In the absence of a gender category in Article 1(A)(2) of the 1951 Convention, the protection of women victims of gender-based persecution depends upon the way the concept of particular social group is construed. As already observed, unlike the other Convention grounds, membership of a particular social group is characterised by its generality and, therefore, its potential to embrace a greater number of situations. However, its general nature also constitutes its main disadvantage. The case-law on the concept of membership of a particular social group is not consistent and various interpretations have been adopted.

The ability of membership of a particular social group to cover a wider range of situations is contingent upon the way it is construed. The English case-law on the concept of particular social group is examined to that end. It is argued that this Convention ground has the potential to cover gender-based persecution provided that it is not interpreted in an excessively restrictive manner and that this extension of the scope of refugee status is in line with the spirit and purpose of the 1951 Convention. In that respect, the Canadian case-law provides a good illustration of the propensity of membership of a particular social group to cover needs for international protection that may not have been foreseen at the time the Convention was drafted, in this instance gender-based persecution. The English case-law seems to move towards that direction. However, the flexibility of that Convention ground which allows it to extend refugee status to new situations, such as gender-based persecution, is also its main weakness as shown in the French case-law on women as a particular social group. Hence, if women are to be protected against gender-based protection, it is imperative that restrictive interpretations of membership of a particular social group are prevented. It is argued that with the "communautarisation" of asylum matters, this has become an issue for EC law.

2.2.1. Membership of a particular social group: a flexible concept

The 1951 Convention does not give any guidelines as to what is meant by membership of a particular social group. This issue is therefore left to the States' discretion. This situation has two main disadvantages both detrimental to refugee protection. Firstly, in the absence of any binding instrument advocating an interpretation in line with the needs of today's asylum seekers[97], restrictive interpretations of the words particular social group may significantly reduce the scope of the Convention definition of the term refugee. Secondly, where there is no authoritative ruling on the matter, national courts will often resort to various tests in order to determine whether an individual can be considered a member of a particular social group, thus undermining legal certainty. As argued in section 3, these issues must be addressed by EC law.

English courts were, for the first time, confronted with definitional issues arising from the concept of membership of a particular social group, and to be more precise the words "particular social group", in *Otchere*[98]. The adjudicator came to the conclusion that the claimant, owing to his former membership of the Military Intelligence Unit, was facing a greater risk than average of being re-arrested and persecuted if returned to his country of origin. As regards the Convention grounds for persecution, the adjudicator held that persecution for reasons of race, religion or nationality were to be discarded, leaving two possible grounds i.e. membership of a particular social group or political opinion. Having closely examined the matter, the adjudicator declared that membership of a particular social group was the only appropriate ground for persecution. It is interesting to note that the adjudicator stressed the difficulties that he encountered in determining the appropriate ground

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[97] For instance, the needs of women who have a well-founded fear of persecution owing to their gender.

[98] *Secretary of State for the Home Department v Patrick Kwame Otchere and the UNHCR* [1988] Imm AR 21.

for persecution in that case. He expressly referred to the UNHCR Handbook on Procedures and Criteria for Determining Refugees Status which reads:

"77. A "particular social group" normally comprises persons of similar background, habits or social status. A claim to fear of persecution under this heading may frequently overlap with the claim to fear of persecution on other grounds, i.e. race, religion or nationality.

78. Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the government or because the outlook, antecedents or economic activity of its members, or the very existence of a social group as such, is held to be an obstacle to the government's policies.

79. Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be sufficient ground to fear persecution."

On the basis of the evidence put before him, including an Amnesty International letter, the adjudicator came to the conclusion that the claimant was a member of a particular social group, i.e. the Military Intelligence in the Ghanaian army and had a well-founded fear of persecution owing to this membership.

The Home Office appealed, *inter alia,* on the ground that membership of the Military Intelligence Unit of the Ghanaian Army did not constitute a social group in the sense of the 1951 Convention. Referring also to paragraphs 77, 78 and 79 of the UNHCR's Handbook, the Home Secretary argued that the individuals comprised in paragraph 77 did not include members of a "professional" or "occupational" group. Therefore, members of the Military Intelligence could not constitute a particular social group for the purpose of the 1951 Convention. This interpretation was contested by Miss Kahn who represented UNHCR and expressed its views on the question. According to UNHCR, "(...) the phrase "particular social group" had been

added to the Convention in 1951 and had been deliberately left vague so that it could be a "catch-all" provision which could be interpreted by countries as necessary to fit any particular case."[99] Reference was made by Miss Khan to the US decision in *Acosta*[100] as useful persuasive value; in that decision, the Board of Immigration Appeals in the United States held:

"We interpret the phrase "persecution on account of membership in a particular social group" to mean persecution that is directed toward an individual who is a member of a group of persons all of who share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, colour, or kinship ties, or in some circumstances it might be shared past experience such as former military leadership or land ownership. The particular kind of characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the characteristic that defines the group, it must be one that the members of the group cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."

According to UNHCR, a number of criteria must be taken into consideration where determining the existence of a particular social group:

"1. The group must be distinct as an identity within the broader society and definable by characteristics shared by its members.

2. Common characteristics or uniting factors could be various - ethnic, cultural or linguistic, or educational; they could include family background, economic activity, shared experiences, or shared values, outlook or aspirations.

3. The attitude of other members of society to the group."[101]

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[99] See the decision in *Otchere*, *supra* n. 98.

[100] *Re Acosta-Solorzano*, Int. Dec. 2986, 1 March 1985.

In *Otchere*, although the appellant (the Secretary of State for the Home Department) advocated a more restrictive interpretation of the concept of "particular social group" than the respondent and the UNHCR, they all agree that the characteristics of a particular social group should exist independently of persecution. However, the characteristics in question must play a significant role in the persecution. The persecution must be feared or exist on account of the characteristics. According to the Tribunal, it would not be helpful to define the words "particular social group" in too much detail as the phrase had deliberately been left "vague"[102]. The respondent was granted twelve months leave. The Tribunal recognised that there was a real possibility for the respondent to be persecuted if returned to Ghana and that his fear was well-founded. However, the tribunal managed to avoid the definitional issues raised in this case. The only definitional element present in *Otchere* is the exclusion of persecution as a characteristic of a particular social group; this is not a contentious issue. The emphasis on the "vague" nature of the terms "particular social group" is consistent with the purpose of that Convention ground which is to cover a wider range of situations that may not have been foreseen at the time the Convention was drafted However, the decision in *Otchere* could not secure the adequacy of future interpretations of the phrase "particular social group" as it did not give any guidelines in that respect and, in any case, did not constitute an authoritative ruling. Subsequent case-law on this issue was characterised by its lack of consistency.

This absence of consistency is particularly obvious in the case-law regarding homosexuals as a potential particular social group. In *Shewaish*[103], an Iranian national raised the question of his homosexuality only when applying for leave to appeal to the Tribunal and the point was dismissed in a sentence. In *Binbasi*[104], the

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[101] See *Otchere*, *supra* n. 98.

[102] *Ibid.*

[103] IAT *Shewaish* [1988].

applicant argued that homosexuals could constitute a particular social group in the sense of Article 1A(2) of the 1951 Convention. To support his view, he mentioned paragraph 77 of the UNHCR Handbook and the decision in *Otchere* where the Tribunal was told in the course of arguments that some jurisdictions had widely construed the concept of "particular social group"[105]. The decision in *Acosta* was cited as an example of such broad interpretations. In the applicant's view, homosexuals formed a particular social group as defined in *Acosta*. In paragraph 9 of his affidavit, the applicant affirmed that "[w]e [i.e. the homosexual community] are a social group; we have certain sexual and physical characteristics which we cannot change, we live together in a sexual relationship, unlike other men, we share our finances and domestic arrangements and plan our futures like married couples, we congregate socially at places where other homosexuals are to be found, we recognise and find comfort in socialising with each other, and we are identified by society at large as a group, to which epithets can be attached by way of identification, some of which such as Gay, are neutral, others, such as Queer or Poof are derogatory."[106] The respondent, i.e. the Secretary of State for the Home Department, disagreed with the appellant's conception of the notion of "particular social group". In his opinion, the only common characteristic of homosexuals as a group was their sexual preference which, if it was at all revealed, was normally only revealed in private and concluded that "[a] group [could not] be a social group if its only common characteristic [was] so concealed."[107] Although the Secretary of State recognised that such a narrow approach may exclude individuals victim of oppression in their country of origin, it was submitted that any wider interpretation would be detrimental to the effectiveness of that Convention ground. Commenting on references to jurisdictions having applied broader interpretations, in particular

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[104] *R v Secretary of State for the Home Department ex parte Zia Mehmet Binbasi* [1989] Imm AR 595.

[105] See, for instance, the Canadian decision in *Ward*, *supra* n. 71.

[106] See *supra* n. 98.

[107] *Ibid.*

the US decision in *Acosta*, the Secretary of State made it clear that there was no reason to adopt the same approach. The Secretary of State added that if the drafters of the 1951 Convention "(...) had intended anyone who had a well-founded fear of being persecuted to be able to claim the status of a refugee, they could easily have said so."[108] This statement contradicts the view expressed by UNHCR that advocates a liberal interpretation consistent with international standards regarding refugee protection.

It is argued that the Secretary of State's interpretation deprived that ground of its "catch-all" nature and thus undermined its ability to extend the scope of refugee status. Moreover, the argument based on the intention of the Convention drafters is rather weak as there is no element in the Convention itself or in the *travaux préparatoires* supporting a narrow interpretation of the phrase "particular social group". As noted in *Otchere*, the expression "particular social group" was intended to be "vague"[109]. Because of its "vagueness", the concept of membership of a particular social group is flexible enough to cover grounds for persecution that were not contemplated by the drafters of the Convention. In *Binbasi*[110], the judge did not rule on definitional issues as he considered that it was unnecessary for the Secretary of State to decide whether homosexuals constituted a particular social group for the purpose of Article 1(A)(2) of the 1951 Convention. In his opinion, there was clearly no discrimination against homosexuals who were not active in Cyprus. In his view, the recognition of the existence of a well-founded fear of persecution owing to homosexuality in Cyprus would require the relevant particular social group to be restricted to active homosexuals.

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[108] *Ibid.*

[109] *Ibid.*

[110] See *supra* n. 104.

In *Golchin*[111], the definitional issues arising from the concept of "particular social group" were for the first time expressly tackled. Unfortunately, the Immigration Appeal Tribunal (IAT) opted for a rather narrow test in deciding whether homosexuals constituted a particular social group. The Tribunal stated that "[t]here should be some historical element in a social group which predetermines membership of it "capable of affiliating succeeding generations": it is not enough, in our view for association to arise by way of inclination. Nor has the Tribunal held in *Ahari* can a social group be created merely by identifying the distinguishing characteristics of a set."[112] This definition is particularly restrictive as it tends to confine particular social groups to racial, political or religious groups and overlap with other Convention grounds, thus curtailing its effectiveness. Considering the nature of the test applied in *Golchin*, it is not surprising that the IAT concluded that homosexuals did not constitute a particular social group within the meaning of Article 1(A)(2) of the 1951 Convention.

A broader test[113] was applied with respect to homosexuals in *Vraciu*, a case decided in November 1994[114]. However, broader views were expressed earlier regarding

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[111] IAT *Golchin* 7623 [1991].

[112] IAT *Ahari* 7333 [1990]. An appeal was lodged by an Iranian doctor forced to work in contravention of medical ethics. The Tribunal, Chairman Mr Maddison decided that in this particular case the relevant social group should be "Iranian trained medical practitioners working in Iran whose duties were incompatible with the principles of the Tokyo Convention". As a result of the narrow test applied, the tribunal considered that this was stretching the concept of social group too far and referred to the decision in *Otchere* (*supra* n. 98) as a support for its more restrictive approach.

[113] Since 1992, Canada recognises homosexuals as constituting a particular social group of refugee status purposes (see Todd Thomas Schenk, *supra* n. 89, at p. 28, referring to Jacqueline Bhabba and Geoffrey Coll eds., *Asylum Law & Practice in Europe and North America: A Comparative Analysis by Leading Experts*, 1992).

other categories of individuals[115]. In *Vraciu*, the claimant alleged that he had a well-founded fear of persecution in his country of origin, Romania, owing to his homosexuality. The IAT referred to the decision of the US Board of Immigration Appeals in *Acosta*[116] in which the terms "membership of a particular social group" were said to be read *eiusdem generis* with the other four categories. Hence, the general character of the words membership of a particular social group as opposed to the specificity of the other Convention grounds should be acknowledged when interpreting that Convention ground. Referring to the English case-law on the issue of homosexuals as a particular social group, the IAT considered that the reasoning in *Golchin* that, in its opinion, consisted in equating a social group with a minority group sharing historical and cultural characteristics was wrong. Referring to the test in *Acosta*, the IAT emphasised that an "immutable characteristic [could not] be within the Convention scope unless the persecution flew from "membership" of the group because of that immutable characteristic. It remains for the applicant to show both the persecution and the link"[117]. Applying this reasoning in *Vraciu*, the IAT concluded that homosexuals, at least in Romania, could be regarded as constituting a "particular social group" in the sense of Article 1A(2) of the 1951 Convention.

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[114] IAT *Vraciu* (11559) [1994], commented in Nicholas Bamforth, "Protected Social Groups, the Refugee Convention and judicial review: the *Vraciu* case", Public Law Review (1995) 382-385.

[115] For instance, in *Samiullah* (IAT (9339) [1992]), the Immigration Appeal Tribunal held that "social group must identify and unite a common characteristic of the members which they share for reasons connected with history, geography, language, religion and so on. Of particular importance is the answer to the question whether other people consider these people to be a member of a social group". On this basis, the appellant, a member of an association of medical students representing Punjabi Muslims settled in Sind, succeeded. In *Duarte* (IAT (10113) [1993]), although it concluded that the appellant was not a member of a social group, the Tribunal contemplated a wider test than in *Ahari* (*supra* n. 112) and *Golchin* (*supra* n. 111). The Tribunal considered that a social group is "usually, but not exclusively one identified by ethnic, linguistic, religious, or cultural characteristics, which constitutes a minority within a particular society and are regarded with hostility by government or the majority of the population on those grounds".

[116] See *supra* n. 100.

The Tribunal considered that homosexuality amounted to an "immutable characteristic" and that homosexuals could be regarded as a particular social group on that basis, and that the appellant had successfully established the link between his membership of that group and his fear of persecution.

While the decision in *Vraciu* is to be welcome in its attempt to broaden the concept of "membership of a particular social group", the use of the notion of "immutable characteristic", as observed by Bamforth[118], is a source of concern. The notion of "immutable characteristic" itself raises a number of definitional but also sociological and philosophical questions that can prove to be troublesome regarding certain categories of people[119]. For instance, if the "immutable characteristic" test is to be applied on a systematic basis, homosexuals will only be regarded as a particular social group if homosexuality is considered an immutable characteristic.

The broader approach adopted in *Vraciu* was soon to be questioned[120]. In a case decided the day after, a Tribunal constituted differently from the one in *Vraciu* took the view that *Golchin* had been wrongly decided and that homosexuals did not form a particular social group for the purpose of Article 1(A)(2) of the 1951 Convention. These cases illustrate the difficulties in defining what are the criteria that a group of people must meet in order to be considered a particular social group. The only non-contentious element lies with the fact that persecution is not an identifying factor.

The English case-law on homosexuals as a particular social group provides a good example of the pitfalls inherent in that Convention ground in the absence of an

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[117] Bamforth, see *supra* n. 114, at p. 384.

[118] *Ibid.*

[119] For instance, problems could appear with respect to sexual orientation. Can homosexuality be considered an "immutable characteristic"? This question raises issues that go far beyond the scope of asylum.

[120] IAT *Jacques* (11580) [1994].

authoritative ruling or binding guidelines. However, whilst a comprehensive definition of the expression "particular social group" would strengthen legal certainty, it could result in the Convention ground being interpreted in a rigid manner which could stifle its propensity to adapt the Convention definition of the term refugee to new situations.

The English case-law shows that membership of a particular social group, depending upon its interpretation, may be used as a basis for granting refugee status to individuals who fear persecution on grounds that were not envisaged at the time of the conclusion of the 1951 Convention. This is the case with regard to gender-based persecution.

2.2.2. Women as a particular social group

The reluctance expressed by most Member States to recognise that women victims of gender-based persecution may constitute a particular social group for the purpose of refugee status has no legal foundation. There is nothing in the 1951 Convention and the *travaux préparatoires* precluding such interpretation. On the contrary, it is in line with the "catch-all"[121] nature of the phrase particular social group and the spirit and object of the 1951 Convention. As stressed by Sedley J. in *Shah*[122], "[u]nless it is seen as a living thing, accepted by civilised countries for a humanitarian end which is constant in motive but mutable in form, the Convention will eventually become an anachronism". This approach to the 1951 Convention is likely to be welcome by UNHCR who pleads for an interpretation of the Convention consistent with the changes that take place in the refugee situation world-wide. UNHCR, *inter alia*, has urged the States parties to the 1951 Convention to take into consideration and answer female refugees' specific needs.

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[121] See for example the view expressed by the UNHCR's representative in *Otchere* (*supra* n. 98).

[122] *R. v Immigration Appeal Tribunal and the Secretary of State, ex parte Syeda Khatoon Shah*, see *supra* n. 94.

In UNHCR's opinion, women exposed to gender-based persecution may form a particular social group and, therefore, be eligible for refugee status[123]. A similar view was expressed by the European Parliament in a Resolution on the application of the Geneva convention relating to the status of refugees of 13 April 1984; the European Parliament:

"1. Note[d] with concern the situation of women in certain countries who face harsh or inhuman treatment because they are considered to have transgressed social mores of the society in which they live;
2. Consider[ed] that women in this situation can be considered as belonging to a "particular social group" within the meaning of the definition of refugee figuring in Article I of the 1951 United Nations Convention relating to the status of refugees;
3. Call[ed] upon States to apply the 1951 United Nations Convention relating to the status of refugees and the 1967 Protocol relating to the status of refugees in this sense(...)"[124]

The European Parliament's resolution is quite remarkable as it embraced a position that met international standards at a time where issues relating to women refugees were not paid the attention that they are now given. Unfortunately, the European Parliament's resolution had no impact on the asylum policy to be developed within the EU. As in the case of UNHCR conclusions and recommendations, the influence of such a resolution was considerably minimised by its lack of binding effect and, therefore, left to political will.

There is still a certain reluctance to recognise that women fleeing persecution owing to their gender may constitute a particular social group as illustrated by the French case-law on the matter. However, as demonstrated by the Canadian case-law, and to a lesser extent, the English case-law, gender-based persecution may be covered

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[123] See UNHCR Guidelines on the Protection of Refugee Women, *supra* n. 87, paragraph 54.

[124] OJ 1984 C 127/137.

by membership of a particular social group, thus adequately extending the scope of the Convention definition of the term refugee.

(i) The Canadian position on women as a particular social group

To a large extent Canadian courts have adopted a more liberal and updated approach to the 1951 Convention consistent with international requirements. References to Canadian cases in Member States' court decisions are not unusual; they are usually made in support of broader interpretations of the 1951 Convention.

The leading Canadian case on the concept of particular social group is *Canada v. Ward*[125] where La Forest J. identified three possible categories of particular social group:

"(1) groups defined by an innate or unchangeable characteristic;
(2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association;
(3) groups associated by former voluntary status, unalterable due to its historical permanence."

Where considering the first category of particular social group, the Supreme Court of Canada referred to individuals fearing persecution on grounds such as gender, linguistic background and sexual orientation. However, the Supreme Court of Canada did not wait for the ruling in *Ward* to hold that gender *per se* could be the identifying factor of a particular social group and recognise the existence of gender related groups for refugee status purposes. In *Mayers v. Canada*[126], the Canadian Federal Court of Appeal reached the conclusion that a woman from Trinidad

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[125] *Canada v. Ward*, see *supra* n. 71.

[126] *MEI v. Canada* [1993] 1 FC. 154 (Federal Court). This decision was referred to in *Canada v. Ward.*, see *supra* n. 71.

subject to spousal abuse was a member of a particular social group within the meaning of Article 1 (A) (2) of the 1951 Convention. Mahoney J.A. applied the test proposed by the counsel for the applicant according to which:

"(...) a particular social group means: (1) a natural or non-natural group of persons with (2) similar shared background, habits, social status, political outlook, education, values, aspirations, history, economic activity or interests contrary to those of the prevailing government, and (3) sharing basic, innate, unalterable characteristics, consciousness and solidarity, or (4) sharing a temporary but voluntarily status, with the purpose of their association being so fundamental to their human dignity that they should not be required to alter it."[127]

This decision constituted an important step in the improvement of female refugees' protection as it expressed the view that domestic violence could amount to persecution in the sense of the 1951 Convention and could therefore result in the grant of refugee status. As already observed, domestic violence is one of the most controversial issues with respect to gender-based persecution since it is still frequently analysed as a private act falling outside the scope of the 1951 Convention. In *Cheung v. Canada*[128], the Federal Court of Appeal held that Chinese women exposed to China's one-child family policy constituted a particular social group. Linden J.A. stated:

"It is clear that women in China who have one child and are faced with forced sterilization satisfy enough of the above criteria to be considered a particular social group. These people comprise a group sharing similar social status and hold a similar interest which is not held by their government. They have certain basic characteristics in common. All the people coming within this group are united or identified by a purpose which is so fundamental to their human dignity that they

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[127] See also *W. (Z.D.) (Re)* [1993] CRDD No. 3 (QL) where a woman from Zimbabwe exposed to spousal persecution was granted refugee status.

[128] *Cheung v. Canada* [1993] 2 FC. 314.

should not be required to alter it on the basis that interference with a woman's reproductive liberty is a basic right ranking high in our scale of values."

Were also identified as a particular social group: divorced Somali women whose rights as a parent and right to personal security are not upheld under the jurisdiction of the Sharia law[129]; Somali females who are minors and are, on that ground, exposed to genital mutilation[130]; and single women living in a Muslim country without the protection of a male relative[131].

The Canadian jurisprudence demonstrates that the concept of particular social group has the potential to provide protection to female refugees fearing gender-related persecution. However, women as such are too broad a category to constitute a particular social group. The degree of protection offered by membership of a particular social group is contingent upon the courts' interpretations. In the absence of a well-established case-law consistent with the spirit and purpose of the 1951 Convention, the fate of female asylum seekers facing persecution by reason of their gender remains uncertain as illustrated by French and

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[129] *B. (P.V.) (Re)* [1993] CRDD No. 12 (QL), referred to in Jean-Ives Carlier, Dirk Vanheule, Klaus Hullmann and Carlos Peña Galiano(Eds), *Who is a Refugee? A Comparative Case Law Study* (Kluwer Law International, The Hague/London/Boston, 1997) at p. 209.

[130] *B. (P.V.) (Re),* [1994] CRDD No. 12 (QL), referred to in Jean-Ives Carlier, Dirk Vanheule, Klaus Hullmann and Carlos Peña (Eds), *ibid.*

[131] *Incirciyan v. Canada* (10 August 1987), No. M87-1541X 9 Imm, referred to in Jean-Ives Carlier, Dirk Vanheule, Klaus Hullmann and Carlos Peña (Eds), *ibid.* This case was decided by the precursor to the Refugee Division, the Immigration Appeal Board. It is interesting to note that the Immigration Appeal Board has also recognised gender-related social groups involving males (see, for example, *Nalliah v. Canada* (20 October 1987) No. M84 -1642 (Imm. App. Bd) involving young Tamils; *Cruz v. Canada* (26 June 1986) No. V83 - 6807 (Imm. App. Bd) concerning young El Salvadorian males; *Escato v. Canada* (29 July 1987) No. T87 - 9024X (Imm. App. Bd) concerning young men of eligible age for military duty; cases referred to in Jean-Ives Carlier, Dirk Vanheule, Klaus Hullmann and Carlos Peña (Eds), *ibid.*

UK decisions on the matter, although the latter is progressively moving towards recognition of gender-based persecution.

(ii) Women as a particular social group in the English case-law

Practitioners in the UK have sought to claim refugee status on behalf of their female clients as members of a particular social group presenting gender as a central identifying factor. They have not claimed that gender alone created a particular social group, nor has a country like Canada. However, gender is seen as playing a central role in locating the asylum seeker in a particular social group. This resulted in the identification of sub-groups such as those identified in the Canadian case-law which could be regarded as a particular social group for the purpose of refugee status.

To date, gender-based persecution for the purpose of refugee status is still received with reluctance although the decision in *Shah*[132] seems to have open the way to more liberal interpretations of the concept of particular social group in relation to gender-based persecution.

In *Nareeka Hutchinson v. Immigration Officer*[133], the applicant applied for refugee status owing to persecution she suffered in Jamaica as a female dependent of a Yardie who had been killed by a rival Yardie gang. The special adjudicator came to the conclusion that she was a member of a particular social group comprised of vulnerable young women at risk of persecution as female dependants of Yardies in a culture where such female dependants were often the target of retaliatory acts by rival gangs. Progressively the courts recognised that women fleeing persecution

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[132] *R. v Immigration Appeal Tribunal and the Secretary of State, ex parte Syeda Khatoon Shah*, see *supra* n. 94.

[133] *Nareeka Hutchinson v. Immigration Officer*, Gatwick (HX/ 71192/ 94), referred to in Nadine Finch and Jane Coker, "Does the Refugee Convention protect women or is it blind to issues of gender", Immigration and Nationality Law and Practice, Vol.10 No. 3 (1996) 83-85, at p. 84-85.

owing to their gender could be entitled to refugee status through membership of a particular social group. However, in practice, women still faced serious difficulties in establishing their membership of such a group. In *R v. Secretary of State for the Home Department, ex parte Miatta Shark*[134], although refugee status was refused, interesting comments were made by Turner J on the position of women who feared rape or gender specific violence in relation to refugee status . These issues had been rarely examined in UK cases; Turner J stated:

"I have no difficulties with the concept that if there was systematic rape as part of an envisaged policy of an organisation or group within the country, that included rape as one of its activities, such would be capable of amounting to a Convention reason".[135] Unfortunately, his approach to gender-based persecution remained on a conceptual level as he agreed with the Secretary of State's reasoning in that instance.

In rejecting the application for exceptional leave to remain, the Secretary of State considered that the claimant had failed to establish that she was persecuted owing to her membership of a particular social group constituted by women[136] or women without relatives. In the Secretary of State's opinion, "(...) it appear[ed] that she might [have been] caught up in the general unrest like other civilians(...) While there may be incidents of gender-specific crimes committed against women because they are women(...) it [was] not accepted that these [were] more than isolated incidents

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[134] *R v. Secretary of State for the Home Department, ex parte Miatta Sharka,* 1 November 1995, referred to in Immigration and Nationality Law and Practice, Quarterly Legal Update, Vol. 10 No. 3 (1996) at p. 103.

[135] Turner J's remark is also interesting in relation to the nature of the perpetrator. He does not seem to make any distinction between governmental and non-governmental agents and chose to use the terms "organisation" or "group" that are neutral.

[136] As already noted, women as a particular social group is too broad a category for the purpose of Article 1(A)(2) of the 1951 Convention.

against the background of more general violence." The Secretary of State refused to consider that the violence that the applicant had experienced significantly differed from that inflicted upon other civilians. The Secretary of State admitted the existence of gender specific crimes, but considered them as being isolated and incidental to the general climate of violence. Hence, women in Sierra Leone who faced persecution owing to their gender did not constitute a particular social group in the Secretary of State's view. The Secretary of State's argument is contradictory as it recognises the specificity of gender-based violence, but refuses to differentiate this type of violence from others with a view to granting refugee status. It is argued that this view marginalises gender-related violence and is likely to deprive female asylum seekers from the international protection they may need. Despite the liberal approach he took in his comment, Turner J allowed the Secretary of State's reasoning. He ruled that "[c]onsideration was given (...) to gender specific violence, not only as who committed it but also against whom, and there was certainly material available , if not material that was strongly in favour of the proposition, that there was no reason to fear gender specific violence or rape if the applicant were to return to Freetown".

Until the decision in *Shah*[137], the recognition of gender-based persecution in the context of Article 1(A)(2) of the 1951 Convention remained purely hypothetical. To date, this case remains the most interesting and satisfying on the matter. The applicant, a national from Pakistan, was a battered wife. She had been brought up partly in the UK, but had been forced by her family to return to Pakistan at the age of 17 to marry. She and her husband had six children, all of whom were being brought up by her husband's extended family. Her husband, after years of violence, had driven her out of the family home. On arrival in the UK, she found out that she was pregnant. She gave birth and according to the special adjudicator credibly feared that, if returned to Pakistan, she would be accused by her husband of

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[137] *R. v Immigration Appeal Tribunal and the Secretary of State, ex parte Syeda Khatoon Shah*, *supra* n. 94.

conceiving the child adulterously, exposing herself to the Sharia law which prescribed stoning to death as the punishment for adultery. Moreover, if returned to Pakistan she would have nowhere to go but her husband's house. The special adjudicator held that "[she was] satisfied that she has been persecuted and that there [was] a reasonable expectation that she would be persecuted by her husband in the future if she were to return to him."

The key of the special adjudicator's reasoning lay with the meaning of particular social group. The counsel for the applicant argued that she belonged to "a definable group, namely women who had suffered domestic violence in Pakistan". This was not accepted by the special adjudicator who firstly stressed the absence of any definition of the terms particular social group and then affirmed that women who suffered domestic violence could not fall within the scope of the 1951 Convention. The special adjudicator in order to illustrate its conclusion drew a parallel with groups formed of divorcees or people having a criminal record[138]. The special adjudicator's approach to the notion of particular social group was quite simplistic since she did not explain why, according to her, domestic violence fell automatically outside the scope of the Convention. It is assumed that women who suffered domestic violence were regarding as constituting too broad a category. Before the IAT, the particular social group the applicant claimed she belonged to was recast as "women who [were] perceived to have transgressed Islamic mores." However, since in the course of argument, it became apparent that this group could also be considered too wide, the relevant social group was refined as embodying "women rejected by their husbands on the ground of alleged adultery" and further circumscribed by its location, i.e. Pakistani society. It is interesting to note that ordinarily an applicant for judicial review cannot alter the issues upon which the decision was challenged. However, the Tribunal made an exception on the basis of

[138] The special adjudicator said: "It appears to me that there is no accepted definition of social group and it is no more possible for a woman who has suffered domestic violence to bring herself within the meaning of social group in the Convention than it is for anyone who has been divorced to say that he or she is a member of a social group for the purposes of [the] Convention or, indeed, for anyone who has a criminal record to be able to say similarly."

the nature of asylum matters. Sedley J. decided that "(...) in the area of asylum law, potentially involving as it always does the right to life, the court ought not in my view to be difficult or rigid provided a sensible endeavour is being made to crystallise in serviceable form the legal issue (...) What matters is that proper consideration should be given to the question whether the applicant's case as accepted by the Special Adjudicator is capable of founding a claim for asylum, and Ms Webber's final formulation has enabled Mr Shaw to advance helpful and cogent submissions on an undoubtedly difficult question." This case illustrates the difficulties, acknowledged by Sedley J., in determining the appropriate particular social group.

The court reiterated the four principles regarding the interpretation of the expression social group mentioned in *Savchenkov*[139]:

"(1) The Convention does not entitle a person to asylum whenever he fears persecution if returned to his own country. Had the Convention so intended, it could and would have said so. Instead, asylum was confined to those who could show a well-founded fear of persecution on one of or number of specific grounds, set out in Article 1(A) (2).

(2) To give the phrase "membership of a particular social group" too broad an interpretation would conflict with the object identified in (1).

(3) The other "Convention reasons" (race, religion, nationality and political opinion) reflect a civil or political status. "Membership of a particular social group" should be interpreted *ejusdem generis*.

(4) The concept of "particular social group" must have been intended to apply to social groups which exist independently of persecution. Otherwise the limited scope

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[139] *Secretary of State for the Home Department v Sergei Vasilyevich Savchenkov* [1996] Imm AR 29.

of the Convention would be defeated: there would be a social group, and so a right of asylum, whenever a number of persons fear persecution for a reason common to them."

The court stressed the "(...) obvious dangers in attempting any kind of lexicographical definition of the expression "particular social group." Sedley J. considered that Mr Shaw was right in saying that "(...) the applicability of the phrase [was] essentially a question of fact in every case, but one which [was] bounded by law", one of these boundaries being the exclusion of persecution as an identifying factor of a particular social group. In *Savchenkov*[140], the Court of Appeal held that "membership of a particular social group involve[d] the idea of a group of people who [could] demonstrate cohesiveness and homogeneity". The Court added that "the group must be one which exist[ed] and [could] be identified independently of the risk of persecution upon which the applicant relie[d]." Referring to the characteristics of a particular social group as defined in *Ward*[141] and to the counsel's agreed parameters in *Savchenkov*, Sedley J. considered that these should not be regarded as definitive.

On appeal, it was held that the appellant was not a member of a particular social group as this expression involved "(...) a number of people being joined together in a group with some degree of cohesiveness, co-operation or interdependence"[142]. This test was close to the test established in *Savchenkov*[143]. The House of lords

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[140] *Ibid.*

[141] See *supra* n. 71.

[142] *R v (1) Immigration Appeal Tribunal (2) Secretary of State for the Home Department (applicants), ex parte Syeda Khatoon Shah (respondent)): (1) Shahana Sadiq Islam (2) Jahanzab Islam (3) Orangzeb Islam (applicants) v Secretary of state for the Home Department (respondent),* LTL 23/07/1997 and (1998) 1 WLR 74.
The appeal lodged against the QBD decision in *Shah* was heard together with another appeal.

[143] See *supra* n. 139.

granted an application for leave to appeal in this case on 26 January 1998. The House of Lords stressed that the woman's position in Pakistani society was low and that domestic violence against women was common place. While this situation in itself could not justify a claim for refugee status, the Pakistani State's failure to protect women meant that they may be in need of international protection. It was stressed that there was no English legal authority pursuant to which cohesiveness[144] was critical to the existence of a particular social group[145]. Furthermore, it was observed that the adoption of such a restrictive interpretation of the phrase particular social group was not consistent with the principle that a treaty must be construed in the light of its purpose. In that respect, the purpose of the 1951 Convention is to offer international protection to those individuals whose State has failed to provide them with effective protection. Referring to the test used in the US decision in *Acosta*[146], the House of Lords considered that Pakistani women could be regarded as a social group as they shared a "common immutable characteristic": they were discriminated against as a group and were not protected by their State of nationality. The House of Lords held that the women concerned could be regarded as belonging to an even narrower group, i.e. women who were suspected of

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[144] *Islam v Secretary of State for the Home Department: R v Immigration Appeal Tribunal & Anor, ex parte Shah* (conjoined appeals) [1999] 2 WLR 1015.

[145] The non-critical nature of cohesiveness had already been stressed in the Court of Appeal decision of 23 July 1997. It was also acknowledged in the Court of Appeal's decision in *Ouanes v Secretary of State for the Home Department* [1998] 2 WLR 218). The latter case concerned an Algerian midwife who had a well-founded fear to be persecuted by fundamentalists who opposed her duties because they involved providing advice on contraception. The Algerian authorities were unable to protect her. In that case, the Court of Appeal considered that, although the expression "particular social group" did not ordinarily cover groups of people who were solely linked by their work, an exception should be made in that case. The applicant was therefore regarded as a member of a particular social group. As stressed by the Court, this flexibility was allowed by the fact that the phrase particular social group should be interpreted *ejusdem generis*.

[146] See *supra* n. 100.

adultery. It was stressed that the existence of this group was independent from that of persecution. The appeal was allowed on this narrower ground.

The position adopted by the House of Lords demonstrates that the concept of membership of a particular social group has the potential to extend the scope of the Convention definition of the term refugee to women fleeing persecution by reason of their gender. As suggested by the House of Lords, such an approach is inferred from the purpose of the 1951 Convention. However, this potential may be undermined by restrictive interpretations of the words particular social group. Had the House of Lords followed the dissenting opinion of Lord Millett, the appeals would have been dismissed on the ground that the women in question were persecuted because they were thought to have transgressed social mores and not because they were women. In Lord Millett' s opinion, persecution in these cases was not gender-based. Moreover, he took the view that the group was defined by persecution[147]. In this context, the challenge is to secure the application of interpretations or tests in line with the object and spirit of the 1951 Convention. It is argued that with the "communautarisation" of asylum matters, this issue must be addressed by EC law[148].

(iii) Women as a particular social group in the French case-law

The French case-law on the concept of particular social group is not very abundant although it has become more precise in recent years. It is very much a case-by-case approach. It is argued that to date the French case-law on membership of a particular social group does not address the issue of gender-based persecution in a satisfactory manner.

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[147] See *supra* n. 144.

[148] See section 2.3. of the chapter.

Comments on the concept of particular social group in French cases are usually quite brief and generally limited to a simple statement acknowledging the existence or absence of such a group. For example in *Ourbih*[149], the CRR held that the fact that the applicant, an Algerian national, was a transsexual who was, as a result, put on the fringe of Algerian society did not allow him to be regarded as a member of a particular social group in the sense of Article 1(A)(2) of the 1951 Convention[150]. Likewise, in *Guerroumi*[151], the CRR said without any further comment that the threats faced by an Algerian soldier in the exercise of its profession did not make him a member of a particular social group[152].

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[149] CRR, 7 July 1995, *Ourbih*, in *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés*, Centre d'information Contentieuse, 1995, at p. 52.

[150] Contrast with the CRR's decision in *O.* where the CRR changed its position on transsexuals in Algeria and took the view that they were exposed to persecution emanating from large segments of the Community which were deliberately tolerated by the State (15 May 1998, in *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés*, Centre d'information Contentieuse, 1998, at p. 37).

[151] CRR, 15 October 1996, *Guerroumi*, in *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés*, Centre d'information Contentieuse, 1996, at p. 80. See also, for example, CRR, 16 October 1996, *Benkhanouche*, in *ibid.*, at p. 81, where the CRR held that the applicant, an Algerian national, could not be regarded as a member of a particular social group owing to his attachment to French culture and his involvement with Jehovah's witnesses in France.

[152] See also CRR, 22 January 1996, *Hamisovic*, in *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés*, Centre d'information Contentieuse, 1995, at p. 83. A national from former Yugoslavia sought refugee status in order to flee persecution owing to his alleged membership of a social group constituted by Muslim individuals of Rom origin in Sandjak, a region seriously troubled. The CRR agreed on his membership to such group but considered that the membership in question as well as the situation in the applicant's region did not suffice to justify the establish the existence of personal persecution if returned to his country of origin. The CRR in its decision did not appear to give away any arguments in support of its twofold affirmation.

One of the rare definitional elements is to be found in a statement of the OFPRA before the CRR in which it declared that membership of a particular social group was taken into consideration where persecution was founded on the common characteristics of the group being considered[153]. This interpretation of the phrase particular social group is close to that adopted in the US decision in *Acosta*[154] which referred to a "common immutable characteristic". Another definitional element can be inferred from the decision in *Marandi*[155] where the CRR stated that the sole fact of having a behaviour that did not conform to current practices did not amount to membership of a particular social group within the meaning of the 1951 Convention. A further definitional element may be found in *Ayoubi* where the CRR suggested that membership of a particular social group required membership to be confined to a group of sufficiently identifiable individuals ("*appartenance à un ensemble de personnes circonscrit et suffisamment identifiable*")[156].

A number of Algerian policemen - or members of other security forces - have lodged asylum claims in France owing to persecution or fear of persecution by Islamic militants. Although membership of a particular social group was not an issue in the cases mentioned at the end of this footnote, it is interesting to note the stance that the CRR decided to take regarding the individuals in question (and their dependants). The CRR considered that, whatever the seriousness of the difficulties they had encountered, the fact that they occurred in the context of their profession make the acts in question unable to amount to persecution within the meaning of article 1 (A) (2) of the 1951 Convention and, thus, denied refugee status. See, for instance, CRR, 12 March 1996, *Seddiki*, *supra* n. 29; CRR, 25 October 1996, *Bey Osman*, in *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés*, Centre d'information Contentieuse, 1996, at p. 61-62 and CRR, 25 October 1996, *Benafia épouse Bey Osman,* in *ibid.*, at p. 62.

[153] See, for instance, the CRR's decision in *O.*, *supra* n. 150.

[154] See *supra* n. 100.

[155] CRR, 26 February 1987, *Marandi*, referred to in Tiberghien, see *supra* n. 8, at p. 317.

The French case-law does not provide any proper guidelines as to what should be regarded as a particular social group for the purpose of the 1951 Convention. It is argued that a more rigorous approach would improve legal certainty and allow more effective appeals on points of law or fact arising from the concept of membership of a particular social group as well as clarify the position of the CRR. In that respect, the difference between French cases and Canadian cases as well as English cases, but to a lesser extent, is striking. One may argue that the approach of the CRR reflects the nature of the powers granted to judges under French law. They may have the power to interpret the law, by they cannot "make the law" in the same way as their common law counterparts. However, French judges play nonetheless a crucial part in the implementation and interpretation of the law with a view to adapting it to the current needs of society. With respect to the notion of particular social group, it is argued that the CRR does not fully exercise its powers of interpretation. This statement is reinforced by the vagueness of its approach. It is believed that the absence of guidelines regarding the words particular social group is more the reflect of a desire to apply the concept of particular social group on a purely case-by-case basis than the produce of limited powers.

The French case-law on gender-based persecution is not abundant. This is due to the fact that the CRR and the Conseil d'Etat as well as the OFPRA do not generally address claims of persecution owing to gender through the concept of membership of a particular social group. The existence of gender-related persecution may be acknowledged and result in the grant of the refugee status, but not on the basis of that Convention ground.

One rare reference to women as a particular social group is to be found in a statement of the OFPRA where the Office recalled situations where women may be regarded as being members of a particular social group. The OFPRA stated that

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[156] CRR, *Ayoubi*, 23 November 1998, in *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés*, Centre d'information Contentieuse, 1998, at p. 38.

women who "combat[ed] serious discrimination preventing the exercise of fundamental rights or experience[d] such injustice that it place[d] them in a situation of fear that justifie[d] their refusal to ask their national authorities for protection."[157] The terms "serious discrimination" have been construed in rather restrictive manner that is reflected in the use of the concept of "*mesures d'application générale*" (measures of general application).

Three main categories of women appear to have been seeking refugee status in France owing to gender-based persecution: women subjected to the Chinese birth-control policy, women facing excision and women who refuse to abide by and sometimes actively oppose the rules governing women's status in the society they live in. The French case-law reflects the CRR's reluctance to overtly, if at all, use membership of particular social group to cover gender-based persecution. This is evidenced in the case-law developed by the CRR in that area. In order to understand how this reluctance manifests itself, one shall consider the treatment reserved to women who fled persecution owing to their gender. To that end, one shall focus on three forms of alleged gender-based persecution: cases where applicants were subjected to China's birth-control policy, cases where women faced excision in their country of nationality and cases where women actively or passively challenged women's status in their country of nationality.

Unlike Canadian decisions on that issue, the CRR's decisions concerning China's birth-control policy are not based on the notion of particular social group, but decided by reference to the notion of "*mesures d'application générale*". The CRR[158] as well as the Conseil d'Etat[159] held that the existence of a birth-control

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[157] See *supra* n. 129, at p.413.

[158] See CRR, 19 April 1994, *Wu*, in *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés*, Centre d'information Contentieuse, 1994, at p. 57 and CRR, 21 May 1996, *Jin épouse Chen*, in *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés*, Centre d'information Contentieuse, 1996, at p. 88.

policy in China was not in itself sufficient to justify the grant of refugee status in the absence of a personal persecution or fear of persecution[160] based on a Convention ground. Both jurisdictions considered that China's birth-control policy applied to all and thus was not discriminatory[161]. Hence, it could not constitute an acceptable basis for refugee status in the absence of personal persecution or fear of such persecution. This reasoning seems to disregard the fact that, as a Chinese woman, the claimant would have to personally obey the policy in question and suffer the consequences of any breach. Reference to the notion of "*mesure d'application générale*" is not confined to cases involving China's birth-control policy. For instance, in *Elkebir*[162], the CRR firstly noted that the provisions of the Algerian provisions on women's status applied to all women without distinction and then stated that the fact that some women intended to challenge the provisions in question did not, on this sole ground, make them the members of a particular social group in the sense of article 1(A)(2) of the 1951 Convention[163]. The use of the notion of *mesure d'application générale*" implicitly suggest a very narrow interpretation of the phrase particular social group that will require the groups in question to be narrowly defined if they are to be successful under that Convention ground. This reluctance to use membership of a particular social group as the means

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[159] See Conseil d'Etat, 29 December 1993, *Cheng*, in *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés*, Centre d'information Contentieuse, 1993, at p. 20 and Conseil d'Etat, 9 January 1994, *Gao Bo*, in *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés*, Centre d'information Contentieuse, 1994, at p. 11.

[160] In *Gao Bo* (*supra* n. 159), the Conseil d'Etat only referred to the absence of personal fears.

[161] See, for example, *Wu* and *Jin épouse Chen*, *supra* n. 158.

[162] See *supra* n. 56.

[163] In *Elkebir* (*ibid.*), the applicant was granted refugee status, but not as a member of a particular social group.

to extend refugee status to women fleeing gender-based persecution was further evidenced in cases where that Convention ground was simply declared inapplicable. In *Wu*, the applicant alleged that she had been forced to have an abortion and a sterilisation as part of the Chinese birth-control policy. In *Jin épouse Chen*, the asylum seeker was in charge of the women service in Wenzhou; she mainly dealt with birth-control issues. She was sanctioned for having informed her employer of her wish to have a second child. In both cases, the CRR noted that the applicants did not allege persecution based on a Convention reason and, thus, refused them refugee status.

Women have also been forced to leave their country of origin and claim refugee status due to women's condition in society. In the case of a woman who fled Mali in order to escape family pressure to be subjected to excision and discrimination against non-excised women[164], the CRR considered that non-excised women could constitute a particular social group within the meaning of Article 1(A)(2) of the 1951 Convention if society values of the State itself socially excluded those who did not abide by the prevailing social mores. In the CRR's opinion, if non-excised women were subject to discriminatory measures, as opposed to measures of general application, which were organised, encouraged or tolerated by the State, they could claim membership of a socially-defined group. However, the CRR did not explicitly say that the applicant was a member of a particular social group within the meaning of Article 1(A)(2) of the Convention. Indeed, although the CRR did grant refugee status in that case, it did not found its decision on any of the Convention grounds, nor did it disclose its legal reasoning. Shank and Peña Galiano inferred from that decision that "... there [was] reason to consider that [the CRR] had implicitly decided that women who refuse[d] to submit to excision belong[ed] to a social group."[165] The use of the phrase "membership of a socially-defined group" supports

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[164] See *supra* n. 129, at p. 413.

[165] *Ibid.* The quotation was originally in French.

the view taken by Shank and Peña Galiano[166]. However, it is unfortunate that the CRR did not expressly base its decision on the concept of membership of a particular social group instead of making use of a close phrase. This is quite typical of the case-law which lacks in consistency and clarity. Moreover, in a similar case[167], the CRR addressed the issues raised by excision without referring to the expression "membership of a socially-defined group" or to the Convention grounds. Firstly, the CRR held that excision was a mutilation of the woman's body. Furthermore, where required, accepted or voluntary tolerated by public authorities, excision could amount to persecution of those women who intended to escape that mutilation. The CRR considered that the fact that excision was not punished under national law amounted to voluntary tolerance by the State authorities. However, the CRR confined its reasoning to cases where families required female children upon whom they had legal authority to undergo excision and to women whose family no longer exerted legal rights upon them who had been personally exposed to excision and denied protection by the State. In that particular case, the CRR said that it was not established that the applicant had been personally threatened with forced excision and that the alleged threat was the real cause of her leaving and fearing to return to her country of origin. Finally, the CRR noted that the applicant failed to ask her national authorities for protection. This last requirement appears to be inconsistent with the CRR's previous comment on State's voluntary tolerance in the absence of laws sanctioning excision. If this practice is not illegal, there is no point in attempting to seek State protection.

Another category of women who claimed that they had a well-founded fear of persecution owing to their gender consists of women who disagree with women's status within society in their country of nationality. A number of cases concerned

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[166] *Ibid.*

[167] CRR, 19 July 1995, *Soumahoro*, in *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés*, Centre d'information Contentieuse, 1995, at p. 81.

Algerian women who opposed Algerian laws on women's status[168] as well as extremist Islamic groups' views on the matter. In most cases, the Algerian authorities failed to provide them with effective protection. It follows from the available case-law that neither the CRR nor the Conseil d'Etat have yet admitted that women who challenged their status in society as women may be regarded as members of a particular social group. The main obstacle lies with the fact that measures regulating women's status are considered of general application and thus of a non-discriminatory nature. Moreover, another obstacle may be inferred from *Marandi* where the CRR held that the adoption of a behaviour that did not conform with prevailing mores did not amount to membership of a particular social group.[169] These two obstacles defeated the applicant's claim in *Sarahoui*[170]. The applicant, an Algerian woman, alleged that following her mother's death, she had to go to France and stay with relatives. She was harassed and ill-treated by them. An order to be escorted back to the border was issued against the applicant. As a result she was arrested and put under house arrest. She claimed that she was a member of a particular social group constituted by occidentalised Muslim women and that she feared persecution in Algeria because of this membership. Besides, as a single mother of two children, she feared to be ostracised by the local population. The CRR, firstly, observed that the ill-treatments that she suffered in the hands of her relatives in France were not relevant for the purpose of refugee status. Secondly, the Commission noted that Algerian laws on women's status applied to all female nationals without distinction. The CRR considered that the fact that some women intended to contest its provisions did not allow them to be regarded, on this sole

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[168] See, for instance, the CRR's decision in *Elkebir*, *supra* n. 54 and CRR, 8 February 1995, *Sarahoui*, in *Commission des Recours des Réfugiés, Contentieux des Réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des Recours des Réfugiés*, Centre d'information Contentieuse, 1995, at p. 83.

[169] See *supra* n. 155.

[170] See *supra* n. 168.

ground, as members of a particular social group within the meaning of Article 1(A)(2) of the 1951 Convention.

The fate of women seeking refugee status owing to gender-based persecution remains uncertain. To date, the case-law relating to membership of a particular social group, including cases concerning gender-based persecution, remains fragmentary and cases are very much decided on case-by-case basis. However, the French case-law indicates a reluctance to recognise gender-based persecution.

Membership of a particular social group has the potential to offer women fleeing gender-based persecution the protection they need provided that that Convention ground is interpreted in line with the spirit and purpose of the 1951 Convention. However, this potential may be undermined by restrictive interpretations. It is therefore argued that, in the absence of a gender category, EC law should ensure that the expression particular social group covers gender-based persecution and that national interpretations do not undermine the degree of protection that may be offered. However, another solution would be to add a gender category to the Convention definition within the framework of EC law.

2.3. Gender-based persecution under EC law

Access to refugee status by women who have been persecuted owing to their gender has been in some instances difficult because of their inability to fit the traditional asylum seeker's profile. To date, protection has been granted through membership of a particular social group. However, the efficiency of the protection conferred through that Convention ground depends upon the way the expression particular social group is construed. Protection from gender-based persecution may be achieved through the addition of a gender category to the Convention definition of the term refugee. However, the latter method is likely to face strong opposition from most Member States. It is argued that pragmatism requires us to take into consideration this foreseeable resistance.

Since the adoption of the 1951 Convention, the fate of refugee women has been a source of growing concern and it is now widely accepted that gender-based persecution is widespread. Some scholars argue that this situation calls for an amendment of the Convention definition of refugee if this instrument is not to become an anachronism[171]. It is argued that the introduction of an extra ground in the Convention definition would amount to a formal recognition of gender-based persecution and the need to provide international protection while securing and thus strengthening protection. Whilst it is recognised that an amendment of the Convention in that respect would constitute a considerable achievement, it is argued that it is not the most effective solution in the short and medium term. Indeed, an amendment of the 1951 Convention is likely to be a lengthy process which cannot address the pressing need for international protection. It is argued that the EC framework has the capacity to address this situation more rapidly. It is argued that if EC law is to meet international standards regarding refugee protection, it must recognise the existence of gender-based persecution and legislate accordingly. In that respect, it is argued that the required extension of the definition of refugee can be achieved using two methods. Firstly, a gender category could be added to the definition of the term refugee for the purpose of EC law. Secondly, membership of a particular social group could be interpreted in a way that secures the coverage of persecution owing to gender.

It is argued that an enlargement of the definition of refugee through the insertion in EC law of a supplementary ground would bring gender on an equal footing with the other recognised grounds for a well-founded fear of persecution. As already stressed, such an amendment would address the need to construe the 1951 Convention in a purposive sense. An enlargement of the definition of refugee is indispensable if gender-based persecution is to be recognised for the purpose of refugee status. Thus, the issue at stake is not the enlargement itself, but the means by which it is to be achieved.

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[171] Todd Stewart Schenk, *supra* n. 89, at p. 35.

The most obvious and direct manner to achieve this result would be to add an extra category for the purpose of EC law. However, the major drawback of this solution is the opposition that it would face. In the current political climate, it is unlikely that the Member States would support a measure that they would perceive as a trigger for "even" more asylum claims[172]. Whilst pragmatism requires us to take into consideration the Member States' views, this should not be done at the expense of asylum seekers. Thus, a compromise has to be found between the Member States' likely position and the need to extend the protection conferred by refugee status to gender-based persecution. It is argued that the compromise lies with securing that gender-based persecution falls within the scope of membership of a particular social group. This finds support in the UNHCR Guidelines on the Protection of Refugee Women[173]. In that respect, the position that emerged from the Joint Position of 4 March 1996 on the harmonized application of the definition of the term "refugee" in Article 1 of the 1951 Convention[174] is a source of concern as the Joint Position is silent on gender issues. It is vital that the EC departs from that overt indifference and legislate on the matter with a view to securing adequate protection through membership of a particular social group. Article 63(1)(c) on minimum standards with respect to the qualification of nationals of third countries as refugees could be used as the legal basis for the adoption of the required measures.

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[172] It is interesting to note that the adoption of Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution in Canada has not significantly increased the numbers of claims based upon gender-based persecution; they only account for one per cent of the total of asylum claims in Canada (see Isabelle Daoust and Kristina Folkelius, *supra* n. 83, at p. 181). This is not a reflection on the importance of gender-based persecution. This figure is mainly attributable to the fact that many women in need of international protection have difficulties in reaching a State where they can seek refugee status.

[173] See *supra* n. 87.

[174] See *supra* n. 10.

As shown in the previous sections, membership of a particular social group has the potential to cover gender-based persecution provided that that Convention ground is interpreted adequately, i.e. in a purposive manner. However, in addition to recognising that gender-based persecution falls within the scope of the 1951 Convention, it is vital that EC law recognises the irrelevance of the identity of the perpetrator as women may be persecuted by non-State agents. As already stressed, the only factor that should be taken into consideration in that respect is the State's failure to provide its nationals with effective protection

With this in mind it is argued that EC law should expressly state that women who have a well-founded fear of persecution owing to their gender should be regarded by the Member States as members of a particular social group for the purpose of refugee status. However, this legal obligation imposed on Member States would remain of limited effect in the absence of guidelines regarding the interpretation of the phrase particular social group. Indeed, restrictive national interpretations could seriously undermine the extent to which membership of a particular social group could cover gender-based persecution.

In that respect, EC law should endorse the recommendation of UNHCR according to which women who fear harsh or inhumane treatment because of having transgressed their society's laws or customs regarding the status of women should be regarded as forming a particular social group[175]. However, while it is recognised that most cases of gender-based persecution involve transgressions of social mores, EC law should not confine persecution owing to gender to this type of circumstances as this type of persecution may arise in other circumstances. The systematic rapes of Bosnian women during the conflict in former Yugoslavia shows that gender-based person goes beyond non-compliance with social mores.

As already observed, membership of a particular social group has the potential to cover a wider range of situations and thus to adapt the 1951 Convention to the

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[175] *Ibid.*, paragraph 54.

changes that take place in the refugee situation world-wide. It is critical to its effectiveness that EC law preserves its flexibility. This commands the adoption of a number of legally binding guidelines regarding the way the expression particular social group shall be interpreted.

It is important to recognise that membership of a particular social group is a self-standing ground. Thus, it must not be construed by reference to the other Convention grounds. As stressed by Sedley J. in *Shah*[176], that Convention ground must be interpreted *ejusdem generis*. This means that particular social groups for the purpose of Article 1(A)(2) of the 1951 Convention should not be exclusively defined by criteria that relate to race, political opinion, religion or nationality, thus confining the Convention definition to the traditional, however outdated, asylum seekers' profile. One may take the view that the best way to secure that membership of a particular social group retains its flexibility and thus its propensity to adapt the Convention definition to new needs for international protection would be to give a definition of what is intended by the phrase particular social group. However, it is argued that this is likely to result in a rigid approach to that Convention ground that would be inconsistent with its flexible nature. As agreed by Sedley J in *Shah*[177], determining the existence of a particular social group is mainly a question of fact. Attempting to define what is a particular social group once for all could well prevent any enlargement of the scope of the Convention definition. In securing that gender-based persecution is covered by membership of a particular social group, EC law should not take the risk of excluding other groups that may need international protection at some point.

With this in mind, it is argued that, while EC law must secure that women seeking protection from gender-based persecution can obtain refugee status through membership of a particular social group, it must also protect the ability of that

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[176] See *supra* n. 144.

[177] *Ibid.*

Convention ground to update the Convention definition of the term refugee. Hence, in addition to stressing that gender-based persecution must be covered, EC law should specify that the expression particular social group has to be interpreted in a purposive sense in line with the flexible nature of that Convention ground.

3. Refugee status for EC nationals

A Protocol on asylum for nationals of Member States of the European Union was annexed to the TEC by the Treaty of Amsterdam. Its sole Article seriously limits EC nationals' right to seek refugee status within the EC. The principle, which is not absolute, is that such claims should not be taken into consideration or should be declared inadmissible. This principle only knows a few exceptions. This restriction on EC nationals' right to seek refugee status within the EC was legitimised in the light of the presumed safety of the Member States.

It is argued that this Protocol is in breach of the right to seek refugee status and is therefore inconsistent with international refugee law. It is unlikely that many EC nationals will seek refugee status in another Member State. Thus, the reason for adopting this Protocol does not lie with a fear of a massive increase in the numbers of asylum claims. As observed by Peers, this Protocol is "an extradition measure in disguise"[178]. It was designed to prevent Basque nationalists whom Spain wanted to try for terrorist acts from lodging an asylum claim in Belgium[179]. However, the potential effect of the Protocol goes beyond this particular case as the restriction imposed on the right to seek refugee status within the EC is drafted in general terms. The fact that the Member States are regarded as safe countries that do not in general "produce" asylum seekers does not justify this breach of the right to seek

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[178] Steve Peers, *EU Justice and Home Affairs Law* (European Law Series, Pearson education, Harlow, 2000) at p.129.

[179] *Ibid.*

refugee status. Moreover, the impact of the restriction contained in the Protocol must be considered in the light of the future enlargement of the EC membership.

One can take the view that this violation of the right to seek refugee status is only apparent because of the exceptions mentioned in the sole Article of the Protocol. Asylum claims will be considered:

"(a) if the Member State of which the applicant is a national proceeds after the entry into force of the Treaty of Amsterdam, availing itself of the provisions of Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR], to take measures derogating in its territory from its obligations under that Convention[[180]];
(b) if the procedure referred to in Article F.1(1) of the Treaty on European Union[[181]] has been initiated and until the Council takes a decision in respect thereof;

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[180] Article 15 of the ECHR reads:
"1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4(paragraph 1) and 7 shall be made under this provision.
(3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."

[181] Article F.1(1), now Article 7(1), of the TEU reads:
"The Council, meeting in the composition of the Heads of State or Government and acting by unanimity on a proposal by one third of the Member States or by the Commission after obtaining the assent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6(1)."

(c) if the Council, acting on the basis of Article F.1(1) of the Treaty of European Union, has determined, in respect of the Member State which the applicant is a national, the existence of a serious and persistent breach by that Member state of principles mentioned in Article F.1(1);
(d) if a Member State should so decide unilaterally in respect of the application of a national of another Member State; in that case the Council shall be immediately informed; the application shall be dealt with on the basis of the presumption that it is manifestly unfounded without affecting in any way, whatever the cases may be, the decision-making power of the Member State."

These exceptions undermine the restrictions imposed on the EC nationals' right to claim refugee status within the EC and thus minimise the effects of the violation of the right to seek refugee status. However, the inconsistency with international refugee law remains as it is inherent in the principle laid down in the sole Article of the Protocol. The fact that the principle enshrined in the Protocol amounts to a breach of the right to seek refugee status combined with the fact that this principle is likely to be affected by exceptions calls for a repeal of the Protocol.

4. Conclusion

The effectiveness of the 1951 Convention lies with its capacity to confer refugee status to those in need. The Convention definition of the term refugee must be interpreted in the light of its spirit and purpose. This means that interpretations of the Convention definition must take into consideration changes in the refugee situation such as the emergence of non-State persecution and gender-based persecution. It is argued that, if EC law is to develop an asylum policy in line with international refugee law, the EC must interpret the term refugee in a manner consistent with the object of the 1951 Convention. With this in mind, EC law must specify that persecution is not confined to State persecution. Moreover, it is essential that membership of a particular social group is interpreted as to cover

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The principles in question are liberty, democracy, respect for human rights and fundamental freedoms and the rule of law.

gender-based persecution. It is also important that that Convention ground retains its flexible nature. Finally, it is argued that the Protocol on asylum for nationals of Member States of the European Union should be repealed.

Chapter IV

Access to Substantive Asylum Procedures

In recent years, the Member States have developed methods that allow them to decline responsibility with regard to increasing numbers of asylum claims. Such practices have gained strength through their incorporation into various EC and EU measures[1]. They result in asylum seekers being removed to another State prior to substantive examination on the ground that responsibility for considering their claim lies with that other State. These practices will be referred to as transfers of responsibility. The terminology used is intended to reflect and emphasise the Member States' restrictive approach to the handling of applications for asylum.

It would, however, be misleading to believe that transfers of responsibility are the sole mechanisms used by the Member States to minimise their collective and individual responsibility towards asylum claims. The Member States' attitudes must also be assessed in the light of European as well as national legislation on access to the EC. Indeed, these transfers of responsibility suppose, in the first place, that asylum seekers have successfully reached "Fortress Europe". The Member States have "addressed" this issue by placing hurdles on asylum seekers' access to the EU territory; these consist of strict travel document requirements and carrier sanctions. These measures exacerbate the effects of the restrictions imposed on access to asylum procedures. Access does not guarantee substantive examination as the Member States may decline responsibility and remove the asylum seeker concerned to another State. Candidates for refugee status are thus confronted with a double set of hurdles. Both types of restrictions, although not officially presented as having

[1] See, for instance, the Resolution on a harmonised approach to questions concerning host third countries adopted by the Ministers of the Member States of the European Communities at their meetings in London on November to 1 December 1992, in European Parliament, Asylum in the European Union: the "safe country of origin principle", People's Europe Series, November 1996, Annex II, at p. 33-37.

that purpose, contribute to the erosion of Member States' responsibility towards asylum seekers and cannot therefore be considered individually.

The transfers of responsibility organised by the Member States are of two kinds. As already suggested, the expression "transfer of responsibility" implies that the asylum seeker is removed by the State with which he or she intended to lodge his or her claim to another State prior to substantive examination of his or her application.

The first type of transfers will be referred to as "internal transfers" as they are confined to the EC territory. These transfers are organised by the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities of 15 June 1990[2], referred to as the Dublin Convention. According to the Convention, each asylum claim submitted in the EC or at its borders must be considered by a single Member State. The second type of transfers consists in removing an asylum seeker to a third country, i.e. a non-Member State, which is considered accountable for the examination of his or her asylum claim; these transfers will be referred to as "external transfers". These external transfers rest upon the application of the safe third country principle as well as readmission agreements concluded with third countries.

Before examining the direct restrictions imposed on access to asylum procedures through transfers of responsibility, it is important to consider the impact of the restrictions imposed on asylum seekers' access to the EC territory.

1. Restricted access to the EC territory

The Member States found in the restrictions imposed on asylum seekers' access to the EU effective tools to deter and prevent the submission of asylum claims. Indeed, access to asylum procedures supposes access to the territory - or at least the

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[2] OJ C 254/1 1997.

borders - of the targeted Member State. The Member States justified these restrictions in the usual manner; they were presented as means to protect genuine applicants' interests from abuses emanating from increasing numbers of "bogus" asylum seekers. This line of reasoning resulted in the imposition of document requirements on asylum seekers combined with carrier sanctions. The latter measures are designed to sanction carriers' failure to ensure that their passengers are adequately documented.

1.1. Document requirements

Controls at the external borders of the EC were perceived as the necessary counterpart to the dismantling of internal borders[3]. While checks were progressively removed at internal frontiers and free movement established, controls at external borders were reinforced, greatly affecting accessibility to the Community territory for third-country nationals, including people seeking refugee status.

Tighter controls at the external borders of the EC resulted in the imposition of increasing travel document requirements on third country nationals wishing to enter the EC. Officially, these measures were justified by the need to prevent third country nationals in an irregular position from taking advantage of the abolition of internal borders. In other words, these measures were designed to combat illegal immigration within the EC, but they also aimed at preventing a "massive influx" of "bogus" asylum seekers. This is how officials at national and European level attempted to legitimise the fact that the provisions on documentation did not acknowledge the specificity of asylum seekers' circumstances.

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[3] Concern that controls at external borders would not be exercised efficiently was one of the main motives for some Member States (i.e., the UK and Ireland) remaining outside the Schengen agreements. This concern was also at the origin of the French suspension of the implementation of the Agreement and the late entry into force of the Agreement for Italy.

However, it is argued that these document requirements were devised as a means to cut down the numbers of asylum seekers applying within the EC or at its borders. Moreover, a distinction between "genuine" and "bogus" asylum claims at this stage is not feasible as the merits of the claim have not yet been examined. Indeed, it is argued that, even in the case of unsuccessful applicants, the term "bogus" is far from being adequate. Many applicants are refused refugee status because their claim is not based on one of the 1951 Convention grounds. However, this does not mean that their search for international protection is not legitimate. The same reasoning applies to those who fled economic harshness. Too often media and governments make a parallel between "economic migrants" and "abuse" which is seriously prejudicial to asylum seekers as well as migrants as it conveys a very negative image of the individuals concerned. This hostile climate is aggravated by the use of negative language which creates and fosters irrational fears and prejudices and fails to reflect the complexity of the situation. For instance, the Preamble to the Resolution on manifestly unfounded applications for asylum refers to the "(...) rising number of applicants for asylum in the Member States who are not in genuine need of protection (...)"[4]. EC and national officials heavily rely upon the distinction they make between "genuine" and "bogus" asylum seekers to justify the adoption of increasingly restrictive measures affecting people seeking protection. As already suggested, this line of argument has been used and abused with a view to legitimising the travel document requirements imposed on asylum seekers.

In a Council Regulation of 12 March 1999, the Council of the European Union determined the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States[5]. It is alarming, however not

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[4] Resolution on manifestly unfounded applications for asylum adopted by the Ministers of the Member States of the European Communities at their meetings in London on 30 November to 1 December 1992, in European Parliament, Asylum in the European Union: the "safe country of origin principle", People's Europe Series, November 1996, Annex I, at p. 26-32.

surprising, to note that the Council Regulation is totally silent on the issue of asylum seekers. The Regulation only provides that the Member States shall be responsible for determining visa requirements for stateless persons and recognised refugees (Article 2). The Regulation provides for three types of exemption from visa requirements none of which applies to asylum seekers[6]. Article 1 of the Regulation provides that "[n]ationals of third countries on the common list in the Annex shall be required to be in possession of visas when crossing the external borders of the Member States". Article 5 reads:

"For the purposes of this Regulation, "visa" shall mean an authorisation given or a decision taken by a Member State which is required for entry into the territory with a view to:
- an intended stay in that Member State or in several Member States of no more than three months;
- transit through the territory of that Member State or several Member States, except for transit through the international zone of airports and transfers between airports in a Member State."

It results from the combined effect of Articles 1 and 5 that asylum seekers who are nationals of third countries listed in the Annex to the Regulation must be in possession of the required visa. The list mentions 111 States and territorial entities, including the EC main "providers" of asylum seekers.

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[5] Council Regulation (EC) No. 574/1999 of 12 March 1999 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States, OJ L 072/2, 18/03/1999.

[6] *Ibid.*, Article 5 reads:
"A Member State may exempt from visa requirements:
- civilian air and sea crew;
- flight crew and attendants on emergency or rescue flights and other helpers in the event of disaster or accident;
- holders of diplomatic passports, official duty passports and other official passports."

The importance attached to documentation requirements, even in the case of asylum seekers, is reflected in the criteria laid down in the Dublin Convention with a view to determining the Member State responsible for considering a given asylum claim. Most of these criteria establish a connection between responsibility for an asylum seeker's presence in the EC and responsibility for handling his or her claim. Article 5 of the Dublin Convention expressly refers to the issue of visas[7].

It is argued that failing to acknowledge the specificity of asylum seekers' circumstances constitutes a threat to the right to seek refugee status as travel document requirements may prevent individuals in need of international protection from having access to the EC and thus from submitting their application for asylum. International standards recognise that people in need of international protection are often in no position to obtain the adequate documentation to leave their country of origin. They may be in hiding from their government and thus must leave clandestinely. Sometimes, the situation is too urgent for them to go through the required administrative formalities. In other cases, the functions of the State may have broken down rendering the issue of documents impossible. The need for international protection has not decreased with the imposition of such requirements. On the contrary, it appears that these requirements have forced people to increasingly resort to false documents and other illegal practices. This has created a vicious circle that has an adverse effect on the right to seek refugee status and creates problems for the Member States[8].

The use of inadequate documents is often regarded as evidence that the asylum seeker is attempting to abuse asylum procedures. According to Paragraph 9(a) of

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[7] The criteria set out in the Dublin Convention in order to determine the Member State accountable for examining a given asylum claim are discussed in Section 2.1.1(i) of the present chapter.

[8] The problems that the imposition of stringent documentation requirements on asylum seekers have created for the Member States are examined in relation to the internal transfers organised by the Dublin Convention in Section 2.1.2.

the Resolution on manifestly unfounded applications for asylum, applications based on false identity or forged or counterfeit documents, where the asylum seeker has maintained they were genuine, are considered a deliberate deception or abuse of asylum procedures and thus justify the claim being channelled to accelerated procedures. In practice, asylum claimants are very reluctant to admit that they have used forged documents as they fear the consequences that such "confession" may have on the outcome of their application. The possession of invalid documents, if any, seems to create a presumption that the asylum seekers concerned are not genuine; this presumption can be very difficult to rebut. There is a tendency to hold entry or attempted entry in irregular conditions against asylum seekers; as a result they will often be referred to as "bogus asylum seekers" and face thorough questioning on their reasons for not having valid documents. Does this mean that to be considered genuine, asylum seekers need to be appropriately documented? This appears to be totally inconsistent with the reality of asylum seekers' situation. Assimilation with other categories of third country nationals means that they are subject to the same treatment and may be removed from the territory of the Member State concerned without being given the chance to exercise their right to seek refugee status . In the worse cases, this could mean being returned to their country of origin. This of course would constitute a blatant violation of the 1951 Convention.

It is argued that measures on travel document requirements imposed on third country nationals should take into consideration the specificity of asylum seekers' circumstances. It seems that Member States fear that, in differentiating between asylum seekers and other categories of third country nationals, they will encourage abusive claims from those who wish to bypass document requirements with a view to entering the EC territory. However, a compromise could be reached between the Member States' position and asylum seekers' rights. Where an individual expresses his or her intention to apply for refugee status, failure to comply with these requirements should not be held against him or her. Thus, the practice consisting in equating possession of inadequate documents, if any, with abuse of asylum

procedures should disappear. This would also require a drastic change of attitude on the part of decision-makers and immigration officers.

A regime reflecting the specificity of asylum seekers' circumstances would also be to the Member States' advantage. The imposition of strict travel document requirements on asylum seekers has actually played against them. The need for international protection remains the same and people are not being deterred from fleeing their country of origin because of these requirements. These measures have boosted the use of forged documents as asylum seekers have become more aware of the need to travel documented. This has rendered the implementation of the Dublin Convention extremely laborious as the Convention criteria suppose that the Member States are able to determine the exact itinerary of asylum seekers with a view to determining the Member State responsible for considering their asylum claim[9].

The detrimental impact of travel document requirements on the right to seek refugee status has been worsen by the imposition of carrier sanctions.

1.2. Carrier sanctions

The imposition of carrier sanctions together with travel document requirements leaves no doubt as to the intention of EC and national officials. These two sets of measures were conceived as weapons designed to reduce the numbers of asylum seekers within the EC by restricting access to its external borders.

Carrier sanctions consist in holding liable those transporting undocumented or inadequately documented passengers. Carrier sanctions and travel document requirements supplement each other with a view to obstructing asylum seekers'

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[9] The detrimental impact of the imposition of strict travel document requirements on asylum seekers on the functioning of the Dublin Convention is examined in Section 2.1.2(i).

entry into the EC both directly by imposing the said requirements and indirectly by deterring their transport.

Carrier liability has been imposed at both European and national level. Carrier sanctions were given an "European dimension" in the Convention applying the Schengen Agreement of 14 June 1985 between the governments of the States of the Benelux Economic Union, the Republic of Germany and the French Republic, on the gradual abolition of checks at their common borders of 19 June 1990[10]; this Convention is referred to as the Convention applying the Schengen Agreement. Although the United Kingdom and Ireland refused to become party to the Schengen Conventions, both States did introduce carrier sanctions in their domestic legislation. Carriers' liability is directed at two types of individuals: regular carriers, but also those who deliberately smuggle illegal third country nationals. It is suggested that, while the combat against illegal trafficking is justified, carrier sanctions[11] against regular carriers are inconsistent with the right to seek refugee status.

The Convention applying the Schengen Agreement provides for carriers' liability and sanctions for those who smuggle third country nationals into the Schengen area.

Pursuant to Article 26(1)(b), carriers by air, sea or land, are expected to act as immigration officers as they are under the obligation to take all the measures necessary to secure that their passengers are appropriately documented and held responsible for passengers who find themselves in an irregular situation (Article 26(1)(a)). Responsibility is construed as meaning that carriers have to return the individuals concerned "(...) to the third State from which he was transported, to the Third State which issued the travel document on which he travelled or to any other

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[10] Both Conventions were subsequently signed by Italy, Spain, Portugal, Greece, Denmark, Austria, Finland and Sweden.

[11] Unless mentioned otherwise, the words "carrier sanctions" and "carriers' liability" refer to regular carriers.

Third State to which he is guaranteed entry" (Article 26(1)(a)). Furthermore, Article 26(3) imposes fines on carriers who transport third country nationals who do not satisfy documentation requirements. These fines are designed to ensure that carriers comply with their new duties.

As already stressed, the concept of carriers' liability was also introduced at national level. In that respect, the position adopted within the Schengen framework was endorsed by Member States which refused to sign the Convention in question[12]. For instance, in the UK, Part II of the Immigration and Asylum Act 1999 exclusively deals with carriers' liability and contains a provision similar to Article 26 of the Convention applying the Schengen Agreement. Indeed, Section 40 of the Act imposes charges on carriers for transporting passengers who are not adequately documented. Section 40(1) reads that "[t]his section applies if a person requiring leave to enter the United Kingdom arrives in the United Kingdom by ship, aircraft, road passenger vehicle or train, on being required to do so by an immigration officer, fails to produce_

(a) a valid passport with photograph or some other document satisfactorily establishing his identity and nationality or citizenship; and

(b) if he requires a visa, a valid visa of the required kind."

Failure to produce the required documents will result in carriers being fined for transporting inappropriately documented passengers. Indeed, Section 40(2) provides that "[t]he Secretary of State may charge the owner of the ship, aircraft or vehicle or the train operator, in respect of that person, the sum of £2,000 or such sums as may be prescribed."

It is argued that carriers' liability places an additional hurdle on asylum seekers' journey to safety which undermines their right to apply for refugee access by restricting access to countries of refuge. It is well established that the vast majority of asylum seekers are in no position to satisfy documentation requirements.

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[12] The UK and Ireland.

Besides undermining refugee protection, carriers' liability also creates problems for carriers if they want to avoid fines. Carriers' employees are now expected to act as immigration police officers. For instance, if they suspect that potential passengers are in possession of forged documents, carriers' staff may refuse boarding. This may have extremely serious consequences where the individuals concerned intended to flee their country of origin with a view to seeking refugee status. They may be required to make decisions that will endanger the life of others. In practice, carriers' liability may result in carriers' staff singling out "suspicious" passengers on the basis of discriminatory criteria such as race. Resort to such discriminatory practices is aggravated by the fact that carriers' employees are not qualified to carry out such controls. They are not immigration officers and are not familiar with asylum issues. However, even if carriers' staff was aware of asylum seekers' rights, it does not seem that they could act upon them and thus accept to carry inadequately documented asylum seekers. Indeed, carriers cannot escape liability on the ground that the inappropriately documented passengers intended to seek refugee status in the country of destination. This is the position adopted in the Immigration and Asylum Act 1999 as well as in the Convention applying the Schengen Agreement. Unlike the 1999 Act, the Convention subjects provisions on carriers' liability to compliance with the 1951 Convention (Articles 26(1) and (2)). However, States' practices show that formal reference to the Convention does in itself secure its correct application. Moreover, the view taken is that there is an inherent contradiction between the right to seek refugee status and carriers' liability in relation to asylum seekers.

Carriers' liability also embraces measures against those who take advantage of others' distress by smuggling them - or promising to smuggle them - in a safe country in return for remuneration. Both the Convention applying the Schengen Agreement and the Immigration and Asylum Act 1999 contain provisions against such individuals. Article 27(1) of the Convention reads that "[t]he Contracting Parties undertake to impose appropriate penalties on any person who, for the purpose of gain, assists or tries to assist an alien to enter or reside within the

territory of one of the Contracting Parties contrary to the laws of that Contracting Party on the entry and residence of aliens." As in the 1999 Act, Section 32(2) provides that "[t]he person (or persons) responsible for a clandestine entrant is (or are together) liable to _

(a) a penalty of the prescribed amount in respect of the clandestine entrant; and

(b) an additional penalty of that amount in respect of each person who was concealed with the clandestine entrant in the same transporter."

Section 32(1)(c) provides that a person is considered a "clandestine entrant" if "he arrives in the United Kingdom on a ship or aircraft, having embarked

(i) concealed in a vehicle; and

(ii) at a time when the ship or aircraft was outside the United Kingdom,

and claims, or indicates that he intends to seek, asylum in the United Kingdom or evades, or attempts to evade , immigration control."

These provisions are to be welcome if they remain directed at trafficking networks. Thus, they should not target and impose sanctions on asylum seekers. In other words, the fact that individuals resort to such illegal practices in order to reach safety and seek refugee status should not be held against them. In the current climate, those who enter or try to enter a Member State (or a Schengen State) clandestinely are portrayed as "bogus" asylum seekers and treated as such; this means, for instance, being channelled to fast-track procedures. Such an attitude shows the Member States' reluctance to take on board the specificity of asylum seekers' circumstances, in this context their inability to obtain the required documentation. As already stressed, it is unreasonable to expect refugees to satisfy requirements regarding documentation. Because they ignore this situation, carrier sanctions have the effect of preventing individuals at risk from reaching safety and applying for refugee status.

Under Article 31 of the 1951 Convention, it is illegal to prosecute asylum seekers who enter or attempt to enter the country concerned illegally. Article 31(1), "[t]he

Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence." In its Guidelines on applicable criteria and standards relating to the detention of asylum seekers[13], UNHCR stresses that "Article 31 exempts asylum seekers who came directly from a country of persecution from being punished on account of their illegal entry or presence, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence"[14]. The expression "coming directly" inserted in Article 31 covers situations where asylum seekers have entered the country in which they intend to seek refugee status directly from the country of origin. However, it also embraces cases where asylum seekers came from another country where the their safety could not be assured or transited through a country for a short period of time without having applied for refugee status or received asylum there[15]. UNHCR stresses that, considering asylum seekers' specific circumstances, no strict time-limit should be imposed in relation to the words "coming directly", nor can a time-limit be mechanically applied in relation to the expression "without delay"[16]. UNHCR also specifies that the words "good cause" require to take into consideration the circumstances under which asylum seekers have fled. Thus, the latter expression can only be construed on an individual basis.

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[13] *UNHCR' s Guidelines on applicable criteria and standards relating to the detention of asylum seekers*, Geneva, 10 February 1999.

[14] *Ibid.*, Paragraph 2.

[15] *Ibid.*, Paragraph 4.

[16] *Ibid.*

Breaches of Article 31 of the UN Convention were evidenced by the High Court in the United Kingdom. In a judgment of 29 July 1999, the High Court ruled that the Government had acted in breach of the 1951 Convention through its practice of prosecuting and imprisoning asylum seekers who enter the UK on false documents[17]. This test case was brought on behalf of three asylum seekers, but will have an impact on many more. Refugee organisations estimate that between 500 and 1000 asylum seekers have been prosecuted each year for using false documents since the increase in prosecutions in 1994. Most have been arrested on arrival and brought before magistrates the next day. Duty advisors have typically advised them to plead guilty because there was no defence and they would get a shorter jail sentence. Lord Justice Simon Brown sitting with Mr Justice Newman strongly criticised the Home Secretary, Jack Straw, and the Crown Prosecution Service for disregarding the UK's obligations under the 1951 Convention. The High Court held that "[i]t is hoped that these challenges will mark a turning point in the Crown's approach to the prosecution of refugees for travelling on false passports" and added that "Article 31 must henceforth be honoured."[18] The Court stressed that the travel requirements imposed on asylum seekers combined with carriers' liability "ha[ve] made it well nigh impossible for refugees to travel to countries of refuge without false documents" and that prosecutions should therefore be restricted to cases where the offence, i.e. travelling on false documents, was "manifestly unrelated to a genuine quest for asylum"[19]. However, there is a risk that the Government and the Crown Prosecution Service will carry on prosecuting inadequately documented asylum seekers on the ground that they are not "genuine" asylum seekers, but "bogus" asylum seekers.

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[17] The judgment of the High Court of 29 July 1999 was referred to in the Council of Europe, Report of the Committee on Migration, Refugees and Demography, Parliamentary Assembly, on *Restrictions on Asylum in the Member States of the Council of Europe and the European Union*, Doc. 8598, 21 December 1999 and in Clare Dyer, "Asylum seekers wrongly jailed", The Guardian, 30 July 1999, at p. 8.

[18] The Guardian, *ibid.*

Besides contravening the 1951 Convention, carriers' liability, and indirectly documentation requirements for asylum seekers, are also incompatible with provisions of the Chicago Convention on International Civil Aviation of 7 December 1944[20]. Indeed, Note 2 of Annex 9 to the Chicago Convention provides:

"Nothing in this provision [Provision 3.36] or in Note 1[21] is to be construed so as to allow the return of a person seeking asylum in the territory of a Contracting State, to a country where his life or freedom would be threatened on account of his

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[19] *Ibid.*

[20] On the issue of carrier sanctions, see Amnesty International, *No Flights to Safety, Carrier Sanctions, Airline Employees and the Rights of Refugees*, Report, ACT 34/21/97, November 1997.

[21] Provision 3.36 of the Chicago Convention on International Civil Aviation reads:
"Each Contracting State shall ensure that a person found inadmissible is transferred back into the custody of the operator(s) who shall be responsible for prompt removal to:

- the point where the person commenced his journey;
- to any other place where the person is admissible.

Note.- The public authorities shall without delay inform the operator(s) when a person is found inadmissible and consult the operator(s) regarding the possibilities of departure."

Provision 3.36.1 says:
"Contracting States shall accept for examination a person being returned from his point of disembarkation after having been found inadmissible if this person previously stayed in their territory before embarkation, other than in direct transit. Contracting States shall not return such a person to the country where he was earlier found to be admissible.

Note 1.- This provision is not intended to prevent public authorities from further examining a returned inadmissible person to determine his eventual acceptability in the State or make arrangements for his transfer, removal or deportation to a State of which he is a national or where he is otherwise acceptable. Where a person who has been found to be inadmissible has lost or destroyed his travel document, a Contracting State will accept instead a document attesting to the circumstances of embarkation and arrival issued by the public authorities of the Contracting State where the person was found to be inadmissible."

race, religion, nationality, membership of a particular social group or political opinion."

It is argued that a strict application of carriers' liability is in many instances incompatible with the right to seek refugee status as well as a violation of the Chicago Convention on International Civil Aviation.

Concerned about the impact of carrier sanctions on asylum seekers' rights, Amnesty International recommends that airline employees should adopt a certain attitude in reaction to these extra duties imposed on them. Although, Amnesty International's recommendation only concerns airlines' liability, it is argued that the scope of the suggested attitude should extend to other carriers; while carrier sanctions greatly affect airlines, they also apply to other types of carrier. With a view to minimising the detrimental effects of carrier liability on refugee protection, Amnesty International advocates that:

"- Airline staff should remember that refugees should not be treated like criminals. Often they are very vulnerable and need assistance.
- If airline employees are asked by their company to check travel papers, they should explain that they are not qualified to do this, and that they do not wish to perform these duties.
- If the company demands that airline employees detain a passenger on board, they should insist that an immigration officer meets the aircraft on landing. Airline staff should inform the passenger that this request has been made, and that this will provide them with an opportunity to claim asylum.
- If such incident occurs, airline employees should inform their trade union representative[22] as soon as possible and also pass the information to a local

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[22] It has been the policy of the International Transport Workers' Federation (ITF) since 1992 that civil aviation workers should not be required to act as immigration officers. This position was expressed in the Resolution concerning the improper involvement of aviation employees by their

Amnesty group or other organization concerned with the welfare of refugees, who will try to ensure that the rights of any refugee are respected."[23]

The absence of provisions making allowance for asylum seekers' circumstances in both the measures on travel document requirements and carriers" liability is the reflection of and consequence of hostile asylum policies. The combined effect of these measures is to restrict asylum seekers' access to the EC and thus to asylum procedures there. Thus, these measures cannot be isolated and must be seen as part of wider plan to drastically cut down the numbers of asylum seekers in the EC. With this in mind, the Member States have elaborated other methods designed to limit access to asylum procedures within the EC; these are referred to as transfers of responsibility.

2. Transfers of responsibility

Transfers of responsibility raise the question of their compatibility with the right to seek refugee status[24]. It is argued that this right calls for a literal interpretation of the words "transfer of responsibility". This means that where a State refuses to endorse responsibility for the examination of an asylum claim, responsibility should be assumed by another State. This is to prevent the right to seek refugee status being undermined by such practices.

The position adopted towards transfers of responsibility rests upon a pragmatic approach to the Member States' obligations in the field of asylum. It is argued that totally disregarding their views and practices would actually be detrimental to asylum seekers as such an attitude would impede positive legislative changes.

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employers in violations of the rights of refugees and asylum seekers adopted by the ITF in 1992 (see *supra* n. 20).

[23] See *supra* n. 20.

[24] See the introduction, chapter I.

However, pragmatism does not mean that the Member States are given a blanket cover. The challenge is therefore to find an acceptable compromise between transfers of responsibly and the Member States' obligations in the light of the right to seek refugee status. As already suggested, such transfers must be contingent on the identification of a State willing to endorse responsibility for the asylum claim concerned; indeed, such practices must not result in asylum seekers being deprived of their right to seek refugee status.

This issue should be addressed with extreme care and diligence as the very foundation of the right to seek refugee status has been under attack within the EU forum. Indeed, in its Draft Strategy Paper on Immigration and Asylum Policy of 1 July 1998, the Austrian Presidency suggested a worrying shift from an asylum system based on the right of the individual to protection to one where, at its discretion, the State may offer protection to a person or group at risk[25]. Reassuringly, in its Memo 98/55 on the Implementation of the Amsterdam treaty of 15 July 1998, the Commission took the opposite view and stressed the importance of the 1951 Convention as the basis for the right of the individual to seek international protection[26].

As already mentioned, there are two types of transfers of responsibility, namely internal and external transfers. The purpose of the following sections is to examine how these may be reconciled with the right to seek refugee status. It is argued that

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[25] See The Austrian Presidency's Draft Strategy Paper on Immigration and Asylum Policy of 1 July 1998 referred in the Immigration Law Practitioners' Association, European Update: September 1998, at p.5.

[26] See the European Commission's Memo 98/55 of 15 July 1998 on the Implementation of the Amsterdam Treaty in Immigration and Asylum, *ibid.*, at p. 7-8.
The Commission's supported the "communautarisation" of asylum matters (see chapter II on the EC: a more suitable framework).

this necessitates the establishment of a "safety test" consistent with international refugee law.

2.1. Internal transfers of responsibility: the Dublin Convention

The adoption of the Dublin Convention was prompted by the approach of the 31 December 1992 deadline for the abolition of border controls on individuals travelling within the EU territory provided for in Article 7A of the TEC. The Convention was perceived as a necessary countermeasure.

The Convention was designed to establish a common framework for determining which is the Member State accountable for the examination of a given asylum claim. To this end, the Convention sets out criteria designed to identify that Member State. Where an asylum claim fails to initially reach the Member State held responsible under the Convention criteria, the Member State wrongly solicited will, in principle, pass on the claim to the former State.

The transfers organised by the Dublin Convention were not a novelty. Chapter 7 of the Schengen Agreement of 19 June 1990 on the responsibility for the processing of applications for asylum contained similar provisions. Furthermore, in many cases Member States had concluded readmission agreements between themselves according to which asylum seekers could be sent back to another Member State if they had passed through that State on their way to the Member State in which they intended to apply for refugee status. However, with the entry into force of the Dublin Convention on 1 September 1997[27], readmission agreements between Member States ceased to apply. As to the coexistence of the Dublin Convention and the Schengen Agreement, it is clear that, as a Convention concluded between the Member States, the effect of the former could not be undermined by an instrument negotiated outside the EC framework[28]. To this end was adopted the Protocol on

[27] The Dublin Convention entered in force on 1 October 1997 for Austria, Finland and Sweden, OJ L 194/1, 20/06/1998.

the consequences of the Dublin Agreement coming into effect for some regulations of the Schengen Supplementary Agreement of 26 April 1994, referred to as the Bonn Protocol. The Bonn Protocol clarifies the conditions under which, as the result of its entry into force, the Dublin Convention replaces the provisions of the Schengen Agreement on asylum[29]. The focus is therefore on the system established by the Dublin Convention.

The Dublin Convention was branded by its drafters as an instrument designed to prevent the situation of refugees in orbit by allocating responsibility for the examination of asylum claims lodged within the EC or at its borders to a specific Member State. The system established by the Dublin Convention was supposed to

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[28] The Bonn Protocol was adopted on the basis of Article 142 of the Schengen Agreement. The Protocol was designed to conciliate the provisions of the said Agreement with those of conventions concluded between the Member States in relation to the completion of an area without internal frontiers. Article 142 of the Schengen Agreement reads:

"1. When Conventions are concluded between the Member States of the European Communities with a view to the completion of an area without internal frontiers, the Contracting Parties shall agree on the conditions under which the provisions of the present Convention are to be replaced or amended in the light of the corresponding provisions of such Conventions.

The Contracting Parties shall, to that end, take account of the fact that the provisions of this Convention may provide for more extensive co-operation than that resulting from the provisions of the said Conventions.

Provisions which are in breach of those agreed between the Member States of the European Communities shall in any case be adapted in any circumstances.

2. Amendments to this Convention deemed necessary by the Contracting Parties shall be subject to ratification, acceptance or approval. The provision contained in Article 141(3) shall apply, it being understood that the amendments will not enter into force before the said Conventions between the Member States of the European Communities come into force."

[29] The prevalence of the Dublin Convention over the asylum chapter of the Schengen Agreement can be welcome in the sense that asylum issues will not be directly affected by the troublesome incorporation of the Schengen acquis into the EU (see the Protocol to the Treaty of Amsterdam integrating the Schengen acquis into the framework of the European Union).

prevent situations where asylum seekers are successively referred from Member State to Member Sate without any of them accepting to endorse responsibility. The Convention also aimed at dissuading successive or concurrent applications submitted by the same individual in more than one Member State.

The purpose of this section is to assess the impact of the mechanisms established by the Dublin Convention on refugee protection. Doubts have been raised as to its compliance with international standards regarding refugee protection. Under the pretext of securing examination, the drafters of the Dublin Convention have actually deprived asylum seekers from the right to lodge multiple applications. In their opinion, this loss is largely compensated by the certainty that their claim will be considered. However, in the absence of a comprehensive harmonisation of asylum procedures in line with international refugee law, the Dublin Convention is believed to have a detrimental effect on the right to seek refugee status as it makes access to substantive asylum procedures more difficult.

Before addressing issues regarding the effectiveness, legality and appropriateness of the Dublin Convention, it is necessary to describe the system that it sets up.

2.1.1. The Dublin Convention system

The system established by the Dublin Convention rests upon the principle that asylum claims lodged within the EC or at its borders must be considered by a single Member State. This principle is enunciated in Article 3(1) and (2); it reads:

"1. Member States undertake to examine the application of any alien who applies at the border or in their territory to any one of them for asylum.

2. That application shall be examined by a single Member State, which shall be determined in accordance with the criteria defined in [the Dublin Convention]. The criteria set out in Articles 4 to 8 shall apply in the order in which they appear."

The Convention enumerates a number of criteria designed to identify the Member State held responsible. The Member State in question shall undertake this duty in accordance with both the Dublin Convention and its own national law. Indeed, the purpose of the Convention is confined to allocating responsibility within the EC; the Convention does not establish common asylum procedures. Asylum claims are therefore determined pursuant to the national law of the Member State held responsible.

However, the principle enshrined in the Dublin Convention is not absolute as an asylum claim may be examined by another Member State than the one designated by the Convention criteria. Firstly, the Convention contains an "opt-out" option that entitles Member States to examine applications for asylum although it is not incumbent upon them to determine the claims in question under the Convention criteria (Articles 3(4)) and 9). Secondly, Member States retain the right to send asylum seekers to a third country pursuant to their national laws (Article 3(5)).

(i) The criteria for determining the responsible Member State

The criteria listed in Articles 4 to 8 are not alternative criteria, but must be applied in the order set out in the Dublin Convention (Article 3(2)). Although the first criterion is based on the asylum seeker's personal links with a particular Member State, provided that the individual concerned so agrees (Article 4), the Convention establishes a strong connection between Member States' individual responsibility for asylum seekers' presence in the EC and their accountability for examining their claims (Article 5 to 7).

Unlike the other Convention criteria, the criterion laid down in Article 4 rests upon asylum seekers' personal circumstances and not upon border control considerations. Under Article 4, where a member of the asylum seeker's family has been granted refugee status by a Member State and is a legal resident of that State, the Member State in question is accountable for considering his or her application for asylum (Article 4(1)). A family member is defined as a spouse, an unmarried child who is a

minor under the age of eighteen or his or her father or mother where the asylum seeker is himself or herself an unmarried child who is a minor under the age of eighteen (Article 4(2)). Article 4 is obviously based on the concept of family reunion and is therefore welcome. The implementation of this criterion contributes to the protection of the right to family life, a right that the Member States, as signatories of the ECHR[30] *inter alia*, are bound to enforce regardless of the nationality or status of those involved. However, one must bear in mind the limits of this criterion as most asylum seekers fall within the scope of the other criteria.

As already mentioned, the Convention criteria are, with the exception of the first criterion, based on the strong correlation made between responsibility for dealing with an asylum claim and the circumstances of the applicant's entry into the EC territory. Responsibility is construed as a consequence of the issue of official documents by Member States to asylum seekers or as a repercussion of the Member States' failure to prevent their illegal entry into the EC.

In principle, where an asylum seeker has a valid resident permit (Article 5(1)) or a valid visa (Article 5(2)), the State that issued the document in question is responsible for examining the asylum claim. However, there are several exceptions to this principle. Where the grant of the visa necessitated the written authorisation of another Member State, this State must process the claim (Article 5(2)(a)). Where the asylum seeker lodged his or her claim with a Member State while being issued a transit visa by another one, the latter State is held responsible (Article 5(2)(b)).

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[30] Article 8 of the ECHR protects the right to respect for private and family life; it reads:
"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Finally, where the application was submitted in the Member State that issued the transit visa after securing in consultation with the State of destination that the asylum claimant met the conditions of entry into its territory, the latter State is responsible (Article 5(2)(c)). Specific rules exist to deal with individuals having more than one valid document issued by different Member States (Article 5(3))[31]. In cases where the asylum seeker has one or more recently expired visas (less than six months previously) or residence permits (less than two years previously), the rules relating to valid documents apply so long as the asylum seeker has not left the territory of the Member State (Article 5(4), first Paragraph). Where the documents are long expired (more than two years for residence permits and more than six months for visas), the application for asylum shall be processed in the Member State where it was initially introduced (Article 5(4), 2nd Paragraph).

Generally accountable for the determination of asylum claims lodged by people in possession of documents issued by them, the Member States face also responsibility in the event of deficient border checks. Where it can be proved that an asylum seeker has irregularly crossed the external border of a Member State, that Member

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[31] Article 5(3) of the Dublin Convention reads:

"3. Where the applicant for asylum is in possession of more than one valid resident permit or visa issued by different Member States, the responsibility for examining the application for asylum shall be assumed by the Member States in the following order:

(a) the State which issued the residence permit conferring the right to the longest period of residency or, where the periods of validity of all the permits are identical, the State which issued the residence permit having the latest expiry date;

(b) the State which issued the visa having the latest expiry date where the various visas are of the same type;

(c) where visas are of different kinds, the State which issued the visa having the longest period of validity, or where the periods of validity are identical, the State which issued the visa having the latest expiry date. This provision shall not apply where the applicant is in possession of one or more transit visas, issued on presentation of an entry visa for another Member State. In that case, that Member State shall be responsible."

State is under the obligation to consider his or her application (Article 6, Paragraph 1). However, if the applicant has been living in the Member State with which his or her claim was introduced at least six months before applying, responsibility is incumbent upon the latter State (Article 6, Paragraph 2).

Article 7 provides for various exceptions to the principle according to which Member States are accountable for examining applications lodged by individuals whose entry into the EU falls under their control. Of particular relevance is the exception relating to asylum claimants' presence in transit zones of Member States' airports. Under Article 7(2), pending the coming into force of an agreement between the Member States on arrangements for crossing external borders, responsibility for controlling entry cannot be inferred from the fact that a Member State has allowed an asylum seeker to go through its transit zone without a visa as long as the applicant does not leave that zone. However, where the asylum claim is actually made in a Member State's airport while the applicant is in transit, the Member State concerned is held responsible for its examination (Article 7(3))[32].

Following the entry into force of the Dublin Convention, the Council of the European Union adopted a Text on the means of proof in the framework of the Dublin Convention[33]. The object of this instrument was to give examples of proof to be used with a view to implementing the Dublin Convention. Concern was expressed regarding recourse to excessive proof requirements that would delay the

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[32] Article 7(1) provides another exception to the connection established between responsibility for border control and responsibility for examining an asylum claim; it reads:
"1. The responsibility for examining an application for asylum shall be incumbent upon the Member State responsible for controlling the entry into the territory of the Member States, except where, after legally entering a Member State in which the need for him or her to have a visa for entry is waived, the alien lodged his or her application for asylum in another Member State in which the need for him or her to have a visa for entry into the territory is also waived. In this case, the latter State shall be responsible for examining the application for asylum."

[33] Text adopted by the European Council 20 June 1994 on the means of proof in the framework of the Dublin Convention, OJ C 274/35, 19/09/96.

identification of the Member State held responsible. This was considered incompatible with the celerity required under the Convention system and seen as entailing the risk of creating a new category of refugees in orbit. With this in mind, the text recommends that "[r]esponsibility for processing an asylum application should in principle be determined on the basis of as few requirements of proof as possible."[34] The text suggests that the Member States should be prepared to assume responsibility on the basis of indicative evidence (Paragraph I). In order to provide guidelines to the Member States, two lists of possible means of proof are annexed to the Text, subject to revision (Paragraph II). List A sets out the means of probative evidence[35]. Unlike List A, List B is not exhaustive and contains indicative evidence the probative value of which is to be evaluated on a case-by-case basis[36]. Subsequently, the Supervisory Committee established under Article 18 of the Dublin Convention adopted Decision Number 1/97 of 9 September 1997 concerning provisions for the implementation of the Convention[37]. The Decision aims, *inter alia*, at assisting Member States in the collection of evidence to determine the State responsible (Chapter IV). The Decision includes an Annex III List A - Means of proof in seven areas: evidence that a family member has refugee status in one Member State, evidence that the applicant has a valid resident permit, evidence regarding valid visas, illegal entry, departure from a Member State, evidence of residence in a Member State and regard to the time of the application. In List B is found the "indicative evidence" as regards the topics and includes for example as evidence of illegal entry hotel bills, entry cards for public or private institutions in the Member States and appointment cards for doctors or dentists.

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[34] *Ibid.*, Paragraph I.

[35] *Ibid.*, Annex to Annex III.2.

[36] *Ibid.*

[37] Decision Number 1/97 of 9 September 1997 of the Committee set up by Article 18 of the Dublin Convention of 15 June 1990, concerning provisions for the implementation of the Convention, OJ L 281/1, 14/10/1997.

Finally, where none of the Convention criteria can be applied, responsibility lies with the first Member State with which the application for asylum was lodged (Article 8).

(ii) Exceptions to the principle set out in the Dublin Convention

There are exceptions to the rule according to which the Member State designated by the Convention criteria shall examine the asylum claim. A Member State may decide to assume responsibility although it is not bound to do so under the Convention criteria. A Member State may also in line with the Convention and its national law send an asylum seeker to a third country.

Article 3(4) offers the Member States the possibility to consider an asylum claim even where the Convention criteria point at another Member State, provided that the applicant agrees. The effect of this "opt out" clause is to transfer the asylum claim to the State which wishes to examine it. The right to depart from the Convention system is confirmed by Article 9 which, unlike Article 3(4), mentions the reasons why a Member State may decide to process a particular asylum claim; Article 9 reads:

"Any Member State, even when it is not responsible under the criteria laid out in the Convention, based in particular on family or cultural grounds, examine an application for asylum at the request of another Member State, provided that the applicant so desires (...)"

The Convention does not limit the exercise of the right to "opt-out". This "openness" of the Dublin Convention is welcome since this "opt-out" clause has the potential to serve asylum seekers' interests. This idea is reinforced in a twofold manner. Firstly, the implementation of the "opt-out" clause in both Articles 3(4) and (9) is subject to the asylum claimant's agreement. Secondly, Article 9 stresses the significance of "family" and "cultural grounds" in relation to the State's endorsement of responsibility. This provision can be regarded as echoing the first

criterion of the Convention (Article 4) although the scope of the latter is strictly limited. The latter infers Member States' responsibility from the fact that they have granted refugee status to asylum seekers' relatives who are now legally residing in their territory. It is suggested that asylum seekers' personal circumstances should not be dismissed when tackling asylum issues. This "opt-out" clause is therefore seen as a provision that may correct the potential negative effects of criteria essentially based on the Member States' respective obligations regarding control at the EC external borders. This idea is reinforced by the fact that the applicant's consent is required for the "opt-out" clause to operate. The reasons for limiting the scope of Article 4 lie with the fact that its implementation will generally generate responsibility. Article 4 and Article 9 differ in their consequences on the extent of the responsibility assumed: the former imposes an obligation to examine the claims falling within its scope whereas the latter allows the States to consider claims at their discretion. The Member States would have been reluctant to see their responsibility inferred from broadly defined links existing between themselves and asylum claimants.

Unlike the first exception to the Dublin Convention system, the second one is believed to have the potential to undermine the right to seek refugee status.

Article 3(5) of the Dublin Convention authorises the Member States to remove asylum seekers to a third country in accordance with their national legislation. This provision very much appears as a concession granted to the Member States and the EC as a whole. It is argued that Article 3(5) is likely to be inconsistent with one of the main objectives pursued by the drafters of the Dublin Convention. Indeed, in the Preamble to the Convention, it is expressly stated that the Convention is designed, *inter alia*, to secure the determination of asylum claims lodged within the EC or at its borders by a Member State, thus reducing the number of refugees in orbit. This persistence of the Member States' right to send asylum seekers to third countries prior to an examination amounts to an implicit recognition of the precedence of external transfers over internal ones. This assertion is confirmed in the Resolution on a harmonised approach to questions concerning host third countries referred to

as the Resolution on host third countries[38]. The Resolution leaves no doubt as to the prioritised application of the host third country principle as it provides that it shall precede any kind of substantive determination of the asylum claim concerned (Paragraph 1(a)). In other words, the Resolution establishes a hierarchy between the safe third country principle and the Convention mechanism to the advantage of the former (Paragraph 3). It follows from Paragraph 3(a) of the Resolution that it is for the Member State where the asylum claim is lodged to decide on the application of the safe third country principle. Although a Member State may not decline its responsibility on the ground that the requesting Member State should have removed the applicant to a third country (Paragraph 3(b)), the former retains the right to carry out such removal itself under its national laws (Paragraph 3(c)); this provision constitutes a formal endorsement of Article 3(5) of the Dublin Convention. The potential limits to the implementation of the host third country principle inserted in Paragraph 3(b) are thus undermined by Paragraph 3(c).

The combined effect of the Dublin Convention and the Resolution on host third countries gives priority to external transfers over internal transfers of competence. This comes as no surprise considering the Member States' determination to cut down the numbers of asylum seekers knocking at the door of the EC.

2.1.2. The Dublin Convention: a failure

Originally regarded as the first essential step towards harmonisation, the Dublin Convention soon started to face attacks emanating from those concerned about its impact on refugee protection, but also from those who initiated its conclusion. The Convention aimed at securing the examination of asylum claims lodged within the EU or at its borders by a single Member State. This principle was elaborated in the context of the achievement of an area without internal frontiers and was designed to ensure the consistency of EU and EC measures on asylum with this particular objective. The Convention was presented by its drafters as a "refugee-friendly"

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[38] Resolution on a harmonised approach to questions concerning host third countries, *supra* n. 1.

instrument the aim of which was to offer certainty to asylum claimants as to the determination of their claims avoiding successive referrals and thus agonising delays. Its purpose was also to contribute to shortening the decision-making process.

Has the Dublin Convention kept its promises and brought effectiveness by organising the allocation of asylum claims between Member States while protecting asylum seekers' best interests?

It is argued that not only does the Convention fail to provide the Member States with an effective system for the distribution of asylum claims amongst themselves, it also undermines the right to seek refugee status.

(i) The Dublin Convention: a defective system...

The system established by the Dublin Convention aimed at identifying and transferring asylum claims to the Member States held responsible for their examination "as quickly as possible". However, soon after its entry into force, it became evident that the Member States were facing serious problems when trying to implement the Convention. Two main difficulties were identified and soon acknowledged by the Member States themselves. Determining the Member State responsible under the Convention criteria had proven to be an arduous task and, as a result, the Member States felt unable to meet the strict time-limits of the Convention.

The problems faced by the Member States in applying the Dublin Convention are inherent in the Convention itself, but are also caused by inconsistencies in the asylum policy developed within the intergovernmental framework. As already observed, the Convention criteria are mainly based on the Member States' responsibility for external border checks. To some extent, responsibility under the Dublin Convention can be perceived as a sanction for letting asylum seekers into the EC either voluntarily or involuntarily. As already mentioned, the conclusion of the

Convention was followed by measures designed to intensify documentation requirements and impose carrier sanctions[39]. These restrictive measures contributed to cutting down the numbers of asylum applicants within the EC by rendering access to its territory increasingly difficult. The specificity of asylum seekers' situation was dismissed. Indeed, people seeking refugee status are often unable to approach the competent authorities in order to obtain the required documents and, since the need for international protection remains, some will resort to forged documents or will travel undocumented. As a result, the Member States started to face an increase in the numbers of undocumented or inappropriately documented asylum seekers. The Member States misjudged the "expected deterrent" effects of these requirements on asylum seekers' determination to find refuge; this should have been foreseen by the Member States. The requirements in question had another serious and worrying "side-effect". They boosted the development of illegal networks "specialised" in smuggling asylum seekers into the EC.

In these circumstances, the Member States faced growing difficulties in applying the criteria laid down in the Dublin Convention. Indeed, these criteria are mainly based on the assumption that asylum seekers' route into the EC can be easily tracked. The imposition of excessively strict travel document requirements drives asylum seekers to resort to illegal means in order to reach the EC territory. This makes it very difficult for Member States to determine the asylum seekers' itinerary with a view to applying the Convention criteria, unless the first criterion applies. The system set up by the Convention works where asylum seekers are "caught" attempting to cross an external frontier. Once they have crossed internal borders, determining their route becomes increasingly complex. Where there is no clear evidence of their itinerary, there is no clear evidence of responsibility under the Convention criteria. If Member State authorities cannot apply the various criteria, the Convention system is inoperative and asylum claims are examined by the Member State with which they were initially lodged (Article 8) unless an external transfer is carried out.

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[39] The problems raised by documentation requirements imposed on asylum seekers and carrier sanctions are discussed in section 1 of the present chapter.

There is no doubt that Article 8 was supposed to be used as a last resort. To a considerable extent, the difficulties faced by the Member States in implementing the Dublin Convention are the result of their eagerness to restrict asylum seekers' access to their territory. Initially regarded as a key instrument of the EU asylum policy, the Dublin Convention remains to date of limited use. Only 2 to 3% of the applications for asylum lodged within the EC result in requests for a transfer of responsibility under the Convention provisions[40].

The Member States' increasing difficulties in identifying asylum seekers from their documents prompted discussions in 1994 on the adoption of a Convention designed to help to address this problem. The Eurodac Draft Convention was designed to create a data-bank of the fingerprints of all asylum seekers at the external borders of the EC with a view to detecting concurrent or successive applications for asylum; this data-bank was to be called "Eurodac". The Council reached an agreement in December 1998, but decided that the text of the Convention should be adopted as an EC measure after the entry into force of the Treaty of Amsterdam [41]. However, Eurodac will be ineffective in cases of illegal entry; this major drawback has been acknowledged by the Member States themselves. The Member States' attempt to improve the implementation of the Dublin Convention by introducing a deficient system is quite "pathetic"[42]. The Member States appear to be "in denial"; they seem

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[40] See the Immigration Law Practitioners' Association, European Update: June 1998, at p. 1.

[41] See the Immigration Law Practitioners' Association, European Update: March 1998, at p. 2-3. See also Community preparatory acts, Document 500PC0100, Amended proposal for a Council Regulation concerning the establishment of "Eurodac" for the comparison of the fingerprints of applicants for asylum and certain other third-country nationals to facilitate the implementation of the Dublin Convention and Amendments 599PC0260, Document delivered on 03/04/2000. On the decision to adopt the text of the Eurodac Draft Convention in the form of an EC measure after the entry into force of the Treaty of Amsterdam, see JHA Council Press Release, 3-4 December 1998.

[42] Besides, the cost of operating the Eurodac Convention and that of the technical measures necessary to its implementation are still uncertain. Moreover, in addition to the controversy it creates as an accessory to the Dublin Convention, the Eurodac Convention is now at the centre of

unable or unwilling to admit that the strong document requirements imposed on asylum seekers not only have a detrimental effect on those seeking refugee status in the EC, but also jeopardise the achievement of some of the primary objectives of the EU and now EC asylum policy. It is argued that a relaxation of documentation requirements currently imposed on asylum seekers would facilitate the operation of the Dublin Convention by reducing to a certain extent the numbers of undocumented applicants.

It is suggested that, in distributing asylum claims amongst Member States, greater use of the principle of solidarity[43] should be made as a means to assist Member States which may face important numbers of asylum claims. Article 63(2)(b) of the EC Treaty as amended by the Treaty of Amsterdam refers implicitly to the principle in question. Indeed, this article provides that, within five years of the entry into force of the Treaty of Amsterdam, measures "promoting a balance of efforts between Member States in receiving and bearing the consequences of receiving refugees and displaced persons" should be adopted. Although this provision is to be welcome, it is argued that its scope has been unnecessarily limited as it does not seem to apply to asylum seekers. However, in a proposal for a Council decision creating a European Refugee Fund[44], the target groups are defined as comprising persons applying for refugee status, but only where appropriate[45]. Asylum seekers

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another quarrel regarding a possible extension of its scope to illegal immigrants (see the Austrian Presidency's Draft Paper on Immigration and Asylum Policy, see *supra* n. 25, at p. 13).

[43] The principle of solidarity, previously referred to as the burden sharing principle, has been and remains a cause of disruption following strong opposition from France and the UK and remains a controversial issue. This is why the principle of solidarity has not been thoroughly incorporated into the TEC by the Treaty of Amsterdam.

[44] Community preparatory acts, Document 599PC0686, proposal for a Council Decision creating a European Refugee Fund, 1999.

[45] *Ibid.*, Article 1. The target groups also include persons who have been granted refugee status within the meaning of the 1951 Convention as well as displaced persons, defined as third country

do not therefore appear to be a priority in that respect. It is argued that the principle of solidarity should extend to issues relating to asylum seekers. However, this requires a change of attitude on the part of the Member States. Indeed, they should give up their individualistic approach to the Dublin Convention that consists of solely perceiving it as a means to transfer responsibility to another Member State. Using the wording of Article 63(2)(b) with regard to asylum seekers, the allocation of asylum seekers amongst Member States should take place on the basis of a "balance of efforts between Member States in receiving and bearing the consequences of receiving" asylum seekers.

The Member States also struggle to meet the Convention time-limits primarily because of the difficulties they face in identifying the Member State responsible. The ambition of the Dublin Convention was to set up a system characterised by its celerity. With this in mind, the different steps of the process are subject to strict time-limits sanctioned in terms of responsibility. A Member State which considers that an asylum claim lodged with it comes under the responsibility of another Member State should contact that State as quickly as possible and in any case within six months following the date of the introduction of the claim. Failure to meet the six months deadline will result in the requesting State being held responsible (Article 11(1)). The requested Member State must come up with a decision on the request within three months; failure to give an answer within this time-limit will amount to an acceptance of the transfer of responsibility (Article 11(4)). The transfer itself must take place within a month of the acceptance by the requested Member State or within a month of the conclusion of any proceedings initiated by the asylum seeker challenging the decision to transfer his or her claim (Article 11(5)). The cumulative effect of the time-limits set by the Dublin Convention means that the whole process of transferring an application for asylum to the Member State held responsible under the Convention criteria may take up to ten months. A ten-month delay may not in itself appear "unreasonable", but it must be remembered that, at that stage, no decision has yet been taken on the outcome of

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nationals or stateless persons benefiting from temporary protection arrangements in a Member State.

the asylum claim. It is a well-established fact that, even before the entry into force of the Dublin Convention, national competent authorities already felt overloaded and faced shortages of resources. The system established thus appears to be more of an additional burden than a helpful rationalising instrument.

Besides creating problems for Member States, the Dublin Convention undermines refugee protection.

(ii) ... detrimental to refugee protection

The Dublin Convention was also presented as an instrument designed to serve asylum seekers' best interests. In contributing to the reduction of the numbers of refugees in orbit, the Convention was considered to address the needs of both the Member States and asylum seekers. With respect to the latter, the purpose of the Convention was to guarantee that their claim would be examined by one Member State. However, the manner in which the Dublin Convention operates is not only problematic for the Member States, it also seriously threatens refugee protection. It is argued that the legal safeguards necessary to secure the compliance of the Convention with international refugee law have not yet been provided. In their absence, the Convention system undermines the right to seek refugee status in the EC. The Dublin Convention fails to guarantee the substantive examination of the claims lodged at the borders or within the EC. Moreover, it also removes asylum seekers' right to lodge multiple applications in the absence of compensatory measures counteracting the effects of this loss. The pitfalls of the system lie with the Convention itself but also with the weaknesses of the asylum policy developed at European level.

One of the purposes of the Dublin Convention was to secure examination by a single Member State. As already stressed in Section 2.1.1(ii), the Convention provisions give priority to external transfers over internal transfers as Member States are entitled to remove asylum seekers to a third country according to their national laws (Article 3(5)).

Moreover, the Dublin Convention deprives asylum seekers from their right to lodge multiple applications for asylum without offering compensatory measures. It is argued that, for this loss to be compatible with international refugee law, it is vital that asylum seekers are guaranteed access to satisfactory asylum procedures regardless of the State responsible for examining their claim. This requires the adoption of harmonised procedures or, at least, the introduction of minimum procedural standards with a view to securing compliance with international refugee law throughout the EC. Indeed, before the coming into force of the Dublin Convention, the disparities between national procedures could, to a certain extent, be compensated by the fact that individuals could seek refugee status in more than one Member State. The need for minimum procedural standards was formally acknowledged in the communiqué following the Justice and Home Affairs Ministers' meeting chaired by the UK Presidency on the 28 and 29 May 1998[46]. However, to date, the Member States have mainly concentrated on the harmonisation of fast-track procedures. In 1995, the Member States adopted the Resolution on minimum guarantees for asylum procedures[47]. However, the measure is incomplete, unsatisfactory in terms of refugee protection and lacks legal authority. The new Title IV on visas, asylum, immigration and other policies related to free movement of persons of the TEC can offer a more reliable basis for the adoption of such standards[48]. Article 63(1)(d) EC provides for the adoption within a period of five years of minimum procedural standards in the Member States for granting or withdrawing refugee status in accordance with the 1951 Convention and its Protocol.

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[46] See, *supra* n. 25, at p. 1.

[47] Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures, OJ C 274/13, 19/09/1996.

[48] The potential impact of the provisions introduced by the Amsterdam Treaty on asylum procedures are further examined in chapter V on fair and effective procedures.

Another major pitfall of the internal transfers organised by the Dublin Convention made worse by the loss of the right to submit multiple applications is that the safety of the Member State where the asylum seeker is to be removed is assumed without the necessary checks being carried out[49].

The compliance of the Dublin Convention with international refugee law also supposes a harmonised interpretation of the term refugee. The Council agreed on a definition in the Joint Position on the harmonised application of the definition of the term "refugee" in Article 1 of the Geneva Convention of 28 July 1851 relating to the status of refugees[50]. Unfortunately, the content of the "Joint Position" is not always consistent with international standards[51].

It is argued that, if the system established by the Convention is to remain, drastic changes are needed in order to turn the Convention into an effective and fair instrument. Suggestions have gone as far proposing its abandonment. However, the current official position is not that radical; it stresses the urgent need to significantly improve its implementation. Improving the operation of the Dublin Convention has been part of the successive EU Presidencies[52] and was on the agenda of the Austrian

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[49] This issue is examined in greater detail later in section 3 of the present chapter.

[50] Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term "refugee" in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees, OJ L 63/2, 13/03/1996.

[51] See chapter III on the need for up to date interpretation of the term "refugee".

[52] The improvement of the system established by the Dublin Convention was part of the working Programme of the UK Presidency (January-June 1998) known as the 46 Point Plan. The 46 Point Plan was adopted following the Kurdish refugee "crisis". In January 1998, a fairly small number of Iraqi and Turkish Kurds reached Italy; their arrival prompted a very strong and rather disproportionate reaction from the Member States.

Presidency in July 1998. The Member States' attachment to criteria and mechanisms designed to identify the Member State responsible for considering an asylum claim is expressed in Article 63(1)(a) EC; under this Article, such measures must be adopted within five years. It is argued that the wording of Article 63(1)(a) is flexible enough to allow changes and amendments to the current system. The suspension of the adoption of a Convention parallel to the Dublin Convention[53], although it was temporarily envisaged[54], is regarded as a very wise move; indeed, there is no point in extending a defective system beyond the external frontiers of the EC. A significant improvement of the Convention requires changes in the system itself; but a more global approach is also needed. This system must be understood in the light of a comprehensive asylum policy in line with international refugee law. A partial harmonisation of asylum matters will only produce partial and thus unsatisfactory results often detrimental to the right to seek refugee status. It is argued that the EC offers a more appropriate framework for the adoption of a comprehensive EC legislation on the right to seek refugee status[55]. Measures should be adopted on the basis of Article 63(1)(a) EC with a view to replacing or, at least, amending and supplementing the Dublin Convention.

Although the Member States were anxious to set up rules designed to allocate responsibility amongst themselves, their primary objective appeared to be the removal of asylum seekers to third countries before substantive examination.

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[53] A Draft Convention parallel to the Dublin Convention was agreed on 15 June 1990, for the text see *Key Texts on Justice and Home Affairs in the European Union, Volume 1 (1976-1993) From Trevi to Maastricht*, a Statewatch publication edited by Tony Bunyan, London, 1997, at p. 55-60.

[54] However, a parallel agreement to the Dublin Convention was again envisaged following the Kurdish refugee "crisis" that prompted the adoption of a 46 Point Plan (see *supra* n. 41, at p. 3).

[55] See chapter II on the EC: a more suitable framework.

2.2. External transfers of responsibility: removals to third countries prior to substantive consideration

Asylum seekers' removals to third countries prior to the substantive examination of their application for asylum had become common practice in a number of Member States and was formally introduced in the EU asylum policy through the Resolution on host third countries[56]. Like internal transfers of responsibility, external transfers raised the issue of their compliance with international refugee law.

External transfers of responsibility can constitute a real threat to refugee protection in the absence of adequate safeguards. They may well jeopardise the fundamental right to seek refugee status in denying asylum claimants access to substantive procedures and expose them to further persecution. Indeed, in extreme cases, external transfers have resulted in asylum seekers being returned to their country of origin without being given the opportunity to submit their claim. Besides, when taking place in unsuitable circumstances, removals to third States are likely to generate further refugees in orbit and thus contribute to the expansion of "buffer zones". Finally, removals to third countries may also weaken refugee protection because of the increased pressure imposed on the EC neighbouring States regardless of their capacity to cope with the EC "unwanted guests"[57]. These countries may not have the legal systems and structures necessary to deal with growing numbers of asylum seekers. In reaction to these new arrivals, these countries have started to tighten their asylum laws and resort to external transfers themselves. This shows that the asylum policy elaborated in the EU, and now the EC, and its Member States has an impact beyond their borders.

Most external transfers of responsibility take place through the implementation of the safe third country principle. However, removals to third countries can also be

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[56] See *supra* n. 1.

[57] This is for instance the case of Eastern and central European countries, particularly when they have signed a readmission agreement (see this chapter, section 2.2.2.).

carried out pursuant to readmission agreements between the Member States and third countries. This section will concentrate on the drawbacks of external transfers as currently carried out by Member States.

2.2.1. The safe third country principle

The safe third country principle is construed as an umbrella concept which embraces a number of practices. Disagreements as to the exact meaning and content of the safe third country principle are evidenced in the lack of consistency in the terminology used. Often presented as similar, the various expressions relating to the safe third county principle may differ significantly in their consequences for asylum seekers. In that respect, the concept of host third country introduced in the Resolution adopted by the EC Immigration Ministers[58] must be distinguished from the concept of first country of asylum developed by UNHCR. These issues are examined later in the section.

Considering its importance in some national asylum policies and its role in cutting down the numbers of asylum seekers within the EC, the Member States felt the need to harmonise their approaches to the principle of safe third country. With this in mind, they adopted the Resolution on host third countries[59].

Unfortunately, the Resolution appears as a failure on two accounts: firstly, it fails to achieve harmonisation and, secondly, it lacks adequate criteria and safeguards. Considerable divergences between the Member States' practices persist. Some Member States make little or no use of the safe third country principle while others rely upon it heavily. Finally, other Member States have opted for an intermediate approach. Moreover, the content of the Resolution fails to supply the necessary basis for substantive harmonisation. Indeed, the Resolution does not say much

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[58] See *supra* n. 1.

[59] *Ibid.*

about what amounts to a safe third country besides stating that it must provide effective guarantees against *refoulement*.

The object of the Resolution on host third countries was to give a common definition, interpretation and application of the concept of "host third country" and devise the procedural bases for its implementation.

It is argued that the principle of safe third country, as construed by the Resolution, unlike the concept of first country of asylum, is not consistent with international standards. Indeed, whereas the latter supposes that protection is secured in the third country, the Resolution allows external transfers on a much broader basis. Transfers may take place, *inter alia*, where asylum seekers have had an opportunity at the border or within the territory of the third country to make contact with its authorities in order to seek protection there (Paragraph 2(c)). Transfers may also occur where there is clear evidence of the asylum seeker's admissibility to a third country (Paragraph 2(c)). This is particularly worrying with regard to asylum seekers in transit who may be regarded as having had such an opportunity where, in practice, they were unable to approach the competent authorities. In this respect, there are great divergences between the Member States[60]. Some Member States attach no or little consequence to transit through a third country; this is, for instance, the case of Belgium, Spain, Portugal, The Netherlands and Finland. Other Member States, on the contrary, generally consider that transit through a third State means that asylum seekers have had the opportunity to seek refugee status there. This is the case of France, Germany, the United Kingdom and Austria. A connection between the numbers of asylum claims lodged with a Member State and the treatment reserved to asylum seekers in transit can be established; indeed, it appears that Member States dealing with high numbers of asylum claims tend to

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[60] On the divergences existing between the Member States' approaches to asylum seekers in transit and their impact on refugee protection, see Steve Peers, *Mind the Gap! Ineffective Member State Implementation of European Union Asylum Measures*, Immigration Law Practitioners' Association, May 1998, at p. 17-20.

construe transit as entailing an opportunity to apply for refugee status. This means that, in the Member States concerned, passengers in transit in search of protection are, in principle, expected to seek protection in the country of transit regardless of the length of their stay in the transit zone. It is argued that, in extreme cases, such an attitude seriously undermines the right to seek refugee status by depriving individuals of their right to claim asylum. A number of factors need to be taken into consideration in order to assess the existence of an opportunity to submit a claim. Firstly, attention must be paid to the duration of asylum seekers' stay in the transit zone. Mere transit is sometimes deemed sufficient despite asylum seekers' inability to make contact with competent authorities. Indeed, this supposes that asylum seekers know that they are expected to lodge their asylum claim in the country of transit. It is therefore important that they are told that that country is the one responsible for examining their case; they should be given the information in a language they understand[61].

The Resolution on host third countries also refers to clear evidence of asylum seekers' admissibility to a third country (Paragraph 2(c)); but the Resolution does not give any further explanation. However, one may distinguish this situation from cases where protection has been granted and cases where there had been an opportunity to make contact with the competent authorities with a view to seeking refugee status. It is argued that the issue of admissibility constitutes an unnecessary source of complexity and concern. The view taken is that admissibility cannot stand alone, but should be regarded as inherent in the grant of protection or in the existence of an effective opportunity to seek refugee status.

The main pitfall that external transfers of responsibility must absolutely avoid is to deprive individuals from their right to seek refugee status. As argued in section 3, consistency with international standards is contingent on transfers, both internal and external, passing a safety test.

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[61] These issues are examined in greater detail in chapter V on fair and effective procedures.

It follows from the combined effect of the Resolution on host third countries and the Resolution on manifestly unfounded applications for asylum that the application of the concept of host third country is exclusive of any substantive examination of asylum claims. Pursuant to Paragraph 1(b) of the former Resolution[62], where an asylum claim falls within the scope of the Resolution on host third countries, the claim in question is, in principle, considered manifestly unfounded and thus channelled to a fast-track procedure. This mechanism is described in Paragraph 1 of the Resolution on host third country that reads:

"1. The Resolution on manifestly unfounded applications for asylum, adopted by Ministers meeting in London of 30 November - 1 December 1992, refers to in Paragraph 1(b) to the concept of host third country. The following principles should form the procedural basis for applying the concept of host third country:

(a) The formal identification of a host third country in principle precedes the substantive examination of the application for asylum and its justification.

(b) The principle of the host third country is to be applied to all applicants for asylum, irrespective of whether or not they may be regarded as refugees.

(c) Thus, if there is a host third country, the application for refugee status may not be examined and asylum applicants may be sent to that country.

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[62] Resolution on manifestly unfounded applications, see *supra* n. 4.

Paragraph 1 (b) of the Resolution on manifestly unfounded applications for asylum reads:
"Furthermore, without prejudice to the Dublin Convention, an application for asylum may not be subject to determination by a Member State of refugee status under the terms of the Geneva Convention on the Status of Refugees when it falls within the provisions of the Resolution on host third countries adopted by Immigration Ministers meetings in London on 30 November and 1 December 1992."

(d) If the asylum applicant cannot in practice be sent to a host third country, the provisions of the Dublin Convention will apply.

(e) Any Member State retains the right, for humanitarian reasons, not to remove the asylum applicant to a host third country.

Cases falling within this concept may be considered under the accelerated procedures provided for in the aforementioned Resolution."

Member States have been eager to adopt measures on so called fast-track procedures with a view to securing and strengthening the role played by such procedures. Unfortunately, these procedures have been a constant source of disquiet as they undermine the right to seek refugee status. In that respect, the current degree of differentiation operated between fast-track and substantive procedures is unacceptable in the light of international refugee law[63].

To date, asylum seekers' removals to third countries prior to substantive examination following the principle of safe third country principle remain a very serious source of concern. This is due to unsatisfactory policies, legislation and practices at EC and national level; the current situation calls for urgent changes.

Concern has also been raised with regard to external transfers resulting from the implementation of readmission agreements.

2.2.2. Readmission agreements

Asylum seekers' removals to third countries prior to the consideration of their asylum claim may also occur as a result of the implementation of readmission agreements. The main purpose of these agreements is to secure the readmission of

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[63] These issues are examined in greater depth in chapter V on fair effective procedures.

foreigners who find themselves in an irregular situation in a State into the territory of the country held responsible for their illegal presence. As already mentioned, with the entry into force of the Dublin Convention, the readmission agreements concluded between the Member States became obsolete. Nowadays, readmission agreements take the form of bilateral agreements signed between Member States and third countries in which asylum seekers originate or through which they have transited. In that respect, the Council of the European Union adopted the Recommendation of 30 November 1994 concerning a specimen bilateral readmission agreement between a Member State and a third country, referred to as the Recommendation on a specimen bilateral readmission agreement[64] and the Recommendation of 24 July 1995 on the guiding principles to be followed in drawing up protocols on the implementation of readmission agreements, referred to as the Recommendation on guiding principles[65].

The primary object of readmission agreements is to confront Contracting Parties with their responsibility for the illegal entry and residence of foreigners on the territory of the other Contracting Party. These agreements are not confined to the return of the Contracting Parties' nationals. The wording of the Recommendation places both Contracting Parties on an equal footing in terms of obligations. However, this formal equality is misleading; indeed, equality does not exist with regard to migration flows. Where Member States and certain third countries, such as Poland, are concerned, migration flows are very much a one way movement originating in the third countries and moving towards the Member States. Hence, in such cases, the requesting Contracting Party is generally a Member State and the requested Contracting Party a third country. Readmission agreements may therefore impose very stringent obligations on some third countries. It is not surprising that the preamble to the Recommendation in question exclusively refers to the Council's

[64] Council Recommendation of 30 November 1994 concerning a specimen bilateral readmission agreement between a Member State and a third country, OJ C 274/20, 19/09/96.

[65] Council Recommendation of 24 July 1995 on the guiding principles to be followed in drawing up protocols on the implementation of readmission agreements, OJ C 274/25, 19/09/96.

determination to fight unauthorised immigration to the Member States. The difficulties that some third parties may face in implementing readmission agreements are not acknowledged.

Readmission agreements are not asylum instruments *per se*, but tools designed to "(...) combat unauthorised immigration to the Member States" as stressed in the preamble to the Recommendation on a specimen bilateral readmission agreement. The Recommendation provides for the readmission of three categories of aliens. Firstly, each Contracting Party commits itself to readmit its own nationals at the request of the other Contracting Party where they do not or not longer fulfil the conditions for entry or residence on the territory of the latter State (Article 1)[66]. Secondly, each Contracting Party undertakes to readmit third country nationals who do not or no longer meet the conditions for entry or residence on the territory of the other Contracting Party where the persons in question have accessed the said

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[66] Article 1 of the Council Recommendation concerning a specimen bilateral readmission agreement between a Member State and a third country (see *supra* n. 64) reads:

"Readmission of own nationals 1. Each Contracting Party shall readmit at the request of the other Contracting Party and without any formality persons who do not, or who no longer, fulfil the conditions in force for entry or residence on the territory of the requesting Contracting Party provided that it is proved or may be validly assumed that they possess the nationality of the requested Contracting Party. The same shall apply to persons who have been deprived from the nationality of the requested Contracting Party since entering the territory of the requesting Contracting Party without at least having been promised naturalization by the requesting Contracting Party.

2. Upon application by the requesting Contracting Party, the requested Contracting Party shall without delay issue the persons to be readmitted with the travel documents required for their repatriation.

3. The requesting Contracting Party shall readmit such persons again under the same conditions if checks reveal that they were not in possession of the nationality of the requested Contracting Party when they departed from the territory of the requesting Contracting Party. This shall not apply if the readmission obligation is based on the fact that the requested Contracting Party deprived the person in question of its nationality after that person had entered the territory of the requesting Contracting Party without that person at least having been promised naturalization by the requesting Contracting Party."

territory via the external frontier of the former State (Article 2(1)). The notion of external frontier is understood as referring to the first border that has been crossed which is not a frontier common to the Contracting Parties (Article 2(2)). The readmission obligation does not apply where the individuals concerned have been issued a valid residence permit by the requesting Contracting Party before or after their entry on its territory (Article 2(3)). Finally, the Contracting Parties agree to readmit the third country nationals whose entry they are responsible for; namely the persons who were granted a valid visa or residence permit by the requested Contracting Party while not or no longer fulfilling the conditions for entry or residence on the territory of the requesting contracting Party (Article 3(1))[67]. However, this provision does not apply with regard to transit visas (Article 3(3)).

The Recommendation on a specimen bilateral readmission agreement imposes very strict time-limits on the requested Contracting Party. The latter is under the obligation to respond to readmission requests without delay, and in any case within a maximum of 15 days (Article 5(1)). The requested Contracting Party must also take charge without delay of the individuals whose readmission has been agreed. This time-limit may be extended upon application by the requesting Contracting Party in order to deal with legal or practical obstacles (Article 5(2)). The strict time-limits to be met by the requested Contracting Party contrast with the "life span" of the readmission obligation. Indeed, pursuant to Article 6, the requesting Contracting party has one year to submit an application for readmission from the time it noted the illegal entry or residence of the person concerned on its territory. There is no mention of a time-limit regarding the duration of the individual's stay on the territory of the requesting Contracting State after which the readmission obligation would lapse. This obviously serves the objectives of the Member States as requesting Contracting Parties. The introduction of time-limits relating to the length of the illegal stay would have seriously undermined the effect of readmission agreements in the sense that such time-limits would have seriously reduced the

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[67] Article 3(2) provides that "[i]f both Contracting Parties issued a visa or a residence permit, responsibility shall reside with the Contracting Party whose visa or residence permit expires last."

numbers of persons who could be readmitted. The Member States' determination to obtain prompt readmissions is also apparent in the Recommendation on guiding principles. Paragraph I(1) *in fine* of the Recommendation expressly stresses that "[t]he need for simplicity and speed should be the prime concern." To this end, the Recommendation provides for two types of return/readmission procedures: a simplified procedure Paragraph I(2) and a normal procedure I(3). Despite the use of the term "normal", the Recommendation seems actually to give its preference to the simplified procedure. Unlike the personal scope of the latter procedure, the personal scope of the normal procedure is defined in a negative manner. Indeed, "[t]his procedure is applicable where a person cannot be returned or readmitted under the simplified procedure" (Paragraph I(3), first sentence). The Recommendation expressly specifies that the individuals apprehended in a border area will be returned/readmitted under the simplified procedure (Paragraph I(2), first sentence). The simplified procedure is to take place within very short time-limits. Although the Recommendation does not set any time-limits as such, it refers to the time-limit agreed in some readmission agreements, i.e. a maximum of forty-eight hours (Paragraph I(2), third sentence). At to the time-limits regarding the normal procedure, the Recommendation refers to the fifteen days time-limit set by Article 5(1) of the Recommendation on a specimen bilateral readmission agreement. Where a simplified procedure is applicable, the formalities are reduced to a minimum; there is no writing requirement[68], the sole formality requirement imposed on Contracting Parties in the context of a normal procedure (Paragraph I(3))[69].

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[68] Paragraph I(2), fourth sentence, of the Recommendation on guiding principles (see *supra* n. 65) provides:

"Formalities for the return of a person should be simplified in the case of this procedure. Notification of the return would be given in any form (by telephone, fax, telex or orally) and it would be carried out directly by the local border authorities."

[69] Paragraph I(3), second sentence, of the Recommendation on guiding principles reads:

"The readmission request should be made and the answer given in writing (...)"

It is argued that the Recommendation on a specimen bilateral readmission agreement may have a detrimental effect on the right to seek refugee status both directly and indirectly: directly in the sense that asylum seekers may be subject to readmission decisions inconsistent with international refugee law and indirectly in the sense that the overall impact of readmission agreements on certain third countries seems to be ignored.

Although the Recommendation on a specimen bilateral readmission agreement does not specifically target asylum seekers, some of its provisions have a direct impact on them. Asylum seekers may in certain circumstances be the object of readmission requests. This statement has become even more accurate with the increase in documentation requirements imposed on asylum seekers. Asylum seekers are often unable to obtain the required travel documents and, therefore, put themselves in an irregular position. The possession of a valid residence permit issued by the Requesting Contracting Party renders its demand for readmission void. However, the definition of the term residence permit for the purpose of Articles 2(3) and 3 of the Recommendation on a specimen bilateral readmission agreement expressly excludes temporary permissions to reside on the territory of one of the Contracting Parties in connection with the processing of an asylum application (Article 4). Therefore, a Contracting Party, in practice, a third country, may be requested to readmit an asylum claimant in case of irregular entry or residence via its external frontier on the territory of the other Party to the agreement despite the issue by the latter State of a temporary authorisation to reside there. Likewise asylum seekers who were issued a valid visa or residence permit by the requested Contracting Party cannot rely upon a temporary permission to reside in order to prevent the readmission.

The fact that the Recommendation does not contain provisions that exclusively apply to asylum seekers is typical of the Member States' failure to acknowledge the specificity of asylum seekers' circumstances. The only positive concession to the preservation of the right to seek refugee status is limited to a formal recall of the States' obligations under the 1951 Convention (Article 11(1)). As already stressed,

this is not sufficient to ensure compliance with the Convention provisions. The impact of the Recommendation articles on people seeking refugee status reflects the EU's restrictive approach to asylum matters. Asylum seekers' best interests are not taken into consideration, nor are those of third countries party to such agreements. With respect to asylum seekers, readmission agreements are, in many instances, just another method for the Member States to discharge themselves from this unwanted "burden".

In order to secure compliance with international refugee law, it is argued that readmission agreements should only be concluded with third countries which obey international refugee law and respect human rights principles at large. Unfortunately, to date, the Member States' political determination to cut down the numbers of asylum seekers and combat illegal immigration largely prevails over refugee protection and human rights considerations. Moreover, since the Member States tend to assume the safety of the third countries party to readmission agreements, they are to channel asylum claims submitted by nationals of these countries to fast-track procedures. This illustrates the importance of securing the availability of procedures meeting international standards[70]. The Recommendation on a specimen bilateral readmission agreement offers no safeguard to asylum seekers in particular and readmitted persons in general. The Recommendation only recalls the Contracting Parties' obligations under the 1951 Convention and other instruments relating to the rights of non-nationals (Article 11)[71]. However, such declarations do not in themselves guarantee States' effective commitment. In its Preamble, the Council specified that the specimen readmission agreement was to be

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[70] See chapter V on fair and effective procedures

[71] The other instruments referred to in the Recommendation concerning a specimen bilateral agreement between a Member State and a third country (see *supra* n. 64) are:
- the ECHR;
- international conventions on extradition and transit;
- international conventions on asylum, in particular the Dublin Convention; and
- international conventions and agreements on the readmission of foreign nationals.

used with flexibility by the Member States and that it could be adapted to the particular needs of the Contracting Parties. It is argued that readmission agreements should comprehend detailed provisions designed to protect the rights of asylum seekers and other categories of foreigners. Another source of disquiet is the silence of the Recommendation on the possibility for the people concerned to dispute the decision regarding their readmission.

There is no mention in the two Recommendations concerning readmission agreements of the difficulties that some third countries may face in readmitting increasing numbers of foreigners who have entered or resided illegally in a Member State. They may lack the necessary structures and financial resources to cope with the situation. It is argued that the flexibility that the Recommendation allows in order to adapt the agreement to the needs of the Contracting Parties should be used to take into consideration the difficulties that third countries may have. For instance, the problems that they may encounter in controlling their external frontiers, as expected under the Recommendation, should be acknowledged. As already observed, the asylum and immigration policy of the EU (and now the EC) and its Member States do have an impact on the policy of neighbouring third countries, in particular Central and Eastern European countries. In March 1991, a protocol of readmission was signed with Poland and other neighbouring States while other readmission agreements were still in preparation. One may wonder why third countries accept such constraining readmission obligations. At their meeting in Birmingham in early 1998, the EU interior ministry officials made it clear that, in order for accession negotiations to be open with Central European countries, they would have to do more to secure their Eastern borders. In Warsaw, the EU Single Market Commissioner, Mario Monti, told Polish officials that Poland's chances to become an EU Member States partly depended upon how well Polish authorities could police their borders. Eastern and Central European Countries' acceptance of inequitable readmission agreements is dictated by their political aspiration to eventually join the EU. The changes in the Polish border control policy are typical in this respect. For 35 years, Poland had a very liberal attitude regarding free movement on its Eastern border. However, Poland's desire to become a Member

State prompted drastic changes. In the Polish Government's view, tightening controls at its Eastern frontier would boost its chances to join the EU. It is interesting to note that electronic passport-reading equipment was installed at the Polish eastern frontier with the help of EU funds. Under pressure from Brussels and Germany, many aspiring Member States are restraining free passage and imposing increasingly restrictive visa requirements and bureaucratic obstacles[72]. Poland's reaction is not unique: similar trends in the border control and visa policies have been for instance observed in the Czech Republic and Slovenia[73]. This shows that the asylum policy of the EU, and now the EC, has an impact on refugee protection beyond its frontiers; this reinforces the need for comprehensive legislation on the right to seek refugee status in line with international refugee law.

It is argued that external transfers of responsibility irrespective of their origin as well as internal transfers should be conditional on them a passing a safety with a view to preserving the right to seek refugee status.

3. An imperative pre-requirement: the "safety test"

The purpose of this section is to devise the conditions of compliance of external as well as internal transfers of responsibility with international refugee law and the changes needed in order to achieve this goal. It is argued that, since it is a *sine qua non* condition to any transfer of responsibility, safety should be assessed in the same way irrespective of the identity of the State concerned. Thus, where an asylum seeker is to be removed to a Member State, that Member State should be subject to the same safety test as a non-Member State.

As already mentioned, the compliance of transfers of responsibility with international refugee law is seriously questioned; this is an issue central to their

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[72] Ian Traynor, "Fortress Europe shuts window to the East", The Guardian, 9 February 1998, at p. 10.

[73] *Ibid.*

upholding. It is therefore vital that these practices are subject to strict conditions and close monitoring.

With this in mind, it is argued that transfers of responsibility must not be construed as tools allowing the Member States to disregard their obligations under international refugee law. This means that Member States which want to carry out such transfers must verify prior to removal whether the asylum seeker's rights will be fully enforced by the Sate where he or she is to be sent; if this cannot be secured, the transfer must not take place.

This safety test supposes that safety criteria are devised and safeguards provided.

3.1. Safety criteria

It is argued that safety is contingent on compliance with three fundamental requirements: compliance with the 1951 Convention and other relevant instruments (such as the ECHR), comprehensive protection against *refoulement*, and existence and access to asylum procedures meeting international standards.

In order to assist them in assessing safety, the Member States adopted the Conclusions on countries in which there is generally no serious risk of persecution; these are referred to as the Conclusions[74]. According to the Conclusions (Paragraphs 4 and 5), in assessing safety, the Member States may take into consideration a number of factors: previous numbers of refugees and recognition rates, observance of human rights, the existence of democratic institutions, stability, and assessments of the risk of persecution emanating from a wide range of sources.

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[74] Conclusions on countries in which there is generally no serious risk of persecution adopted by the Ministers of the Member States of the European Communities at their meetings in London on 30 November to 1 December 1992, in European Parliament, Asylum in the European Union: the "safe country of origin principle", People's Europe Series, November 1996, Annex III at p. 33-37.

These include UNHCR, diplomatic missions, international and non-governmental organisations as well as press reports.

The Conclusions suffer from a number of drawbacks owing to their scope, i.e. the States that may be assessed, and to the safety criteria laid down. The latter will be examined in the course of this section. The Conclusions are intended to apply to third countries, not Member States. This reflects the strong safety presumption enjoyed by the Member States; the dangers of such a strong presumption are highlighted in this section.

Although the proposed test differs from the one suggested in the Conclusions, some of the chosen criteria embrace elements referred to in the Conclusions. However, the positive aspects of the Conclusions are undermined by their lack of binding effect.

In determining whether a State complies with the 1951 Convention, it is not sufficient for Member States wishing to carry out transfers to confine their investigations to formal adherence. In other words, Member States must check whether the practices of the contemplated States of destination satisfy the Convention requirements. Moreover, the human rights record of these States must also be taken into consideration; this means evaluating the States' practices in that respect. The protection of individuals' rights as asylum seekers cannot be dissociated from the protection of their human rights. Human rights are actually mentioned in the Conclusions (Paragraph 4(b)). The Conclusions rightly regard States' readiness to allow monitoring by NGOs of their human rights observance as an indicator of their commitment to the protection of human rights. It is argued that removing asylum seekers to countries where their safety cannot be ensured would amount to a violation of Article 3 of the ECHR. Indeed, Article 3 requires the signatory parties, which include all the Member States, to protect individuals who find themselves within their jurisdiction against torture, inhuman or degrading treatment or punishment. It is interesting to note that the Resolution on host third countries mentions that "[t]he asylum applicant must not be exposed to torture or

inhuman or degrading treatment in the third country" (Paragraph 2(b)), although the Resolution does not expressly refer to the ECHR.

The importance of human rights standards was also stressed in the Recommendation establishing guidelines on the application of the safe third country concept adopted by the Committee of Ministers of the Council of Europe[75]. Paragraph 1 of the Recommendation, third countries must comply with human rights standards understood as entailing the prohibition of torture, inhuman or degrading treatment. In other words, commitment to human rights implies, *inter alia*, compliance with Article 3 of the ECHR. It is argued that, as suggested by Paragraph 1 of the Recommendation of the Committee of Ministers of the Council of Europe, human rights records should be measured against the standards set by the ECHR, even if the third countries concerned are not signatories to the Convention.

Unlike the Conclusions (Paragraph 2(c)), the proposed safety test does not present the existence of democratic institutions as an autonomous criterion. However, this does not mean that this factor is discarded. On the contrary, it is argued that it is vital to look at this issue when assessing States' commitment to human rights. This element will also be taken on board when determining whether satisfactory asylum procedures are available.

The Conclusions also refer to previous numbers of refugees and recognition rates as an element to be taken into account when determining whether a country is safe. The view taken is that such figures must be handled with extreme caution. It is not contested that high figures will suggest a serious risk of persecution and other human rights violations. However, there is a high risk that lower figures will be interpreted as establishing a strong safety presumption. Considering Member States' restrictive approaches and practices when it comes to considering asylum claims, giving too much credit to these figures could lead to erroneous safety assessments.

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[75] Recommendation No. R (97) and explanatory memorandum adopted by the Committee of Ministers of the Council of Europe on 25 November 1997, Council of Europe, Legal Issues.

The second element of this safety test relates to the principle of *non-refoulement*. This principle is enshrined in the 1951 Convention (Article 33). So why making this principle an autonomous element of the safety test? This is intended to emphasise the importance of the principle of *non-refoulement* which is actually reflected in its legal status. Indeed, UNHCR and many scholars consider that this principle constitutes a customary rule of international law[76]. Thus, this principle can be regarded as binding on countries which may not have signed the 1951 Convention.

Observance of the principle of *non-refoulement* is the main criterion to be met by third countries according to the Resolution on host third countries. Besides being recalled in the Preamble to the Resolution, the imperative need to protect asylum seekers from *refoulement* is reiterated in Paragraph 2(a) and (d) as well as in Paragraph 2 *in fine*. However, the principle is not part of the factors mentioned in the Conclusions with a view to assessing safety.

It is argued that, for protection against *refoulement* to be effective, the principle must be fully observed by both the Member State intending to carry out the removal and the State where the asylum seeker is to be sent. Such a requirement may be inferred from Paragraph 2(d) of the Resolution on host third countries; it reads that "[t]he asylum applicant must be afforded effective protection in the host third country against *refoulement*, within the meaning of the Geneva Convention." However, this provision has not prevented Member States from enforcing practices inconsistent with the principle of *non-refoulement*. For instance, concern was raised with regard to practices in force in France and Belgium. It was not the safety in France and Belgium that was a source of disquiet, but the fact that these countries had removed asylum seekers to third countries in breach of the principle of *non-refoulement*. The 1996 Immigration and Asylum Act allowed immigration authorities to expel immediately people claiming asylum at ports of entry to the "safe third country" through which they had arrived. In the five months before the

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[76] See the introduction, chapter I.

entry into force of the 1996 Act, appeal adjudicators allowed 60 of 62 claimants to remain in the UK. Their decision was based on evidence that immigration officers both in France and Belgium were sending asylum seekers back to their country of origin without giving them the opportunity to lodge their claim to remain. Judge Davis Pearl declared that "[i]t ha[d] been a matter of growing disquiet among the adjudicators this year that in individual cases, France and Belgium [were] unsafe countries for asylum seekers to be returned to. As a result, there ha[d] been a tendency to refer more cases to the Home Office with a recommendation that the full asylum claim be heard here"[77].

The asylum rules introduced in the 1996 Act were challenged in the test case *R v Secretary of State for the Home Department and another, ex parte Canbolat*[78]. The applicant, a Turkish citizen of Kurdish origin, travelled through France to the UK. She arrived at Waterloo Station from Paris and claimed refugee status there. She had travelled overland from Osmaniye in south-western Turkey, but did not know which countries other than France she had visited. The day following her arrival in the UK, the Secretary of State issued a certificate pursuant to Section 2(2) of the 1996 Act[79] ordering her to return to France, a safe country where she would be able

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[77] For instance, in early 1996, France was caught trying to remove to Pakistan an asylum applicant Mohamed Iqbal. He had been returned to France from the UK for his asylum claim to be heard there. Only the intervention of a French lawyer prevented his being sent back to his country of origin where he claimed he faced persecution (see James Hardy and Ian Henry, "Judges challenge new immigration rules", Electronic Telegraph, http://www/telegraph.co.uk, 29 September 1996).

[78] *R v Secretary of State for the Home Department and another, ex parte Canbolat*, 14 February 1997, The Times, 24 February 1997 confirmed by the Court of Appeal (Civil Division) [1997] 1 WLR 1569.

[79] Pursuant to Section 2(2) of the 1996 Act, in order for the Home Secretary to certify that a third country is safe, the said country has to meet three conditions; "(2) [t]he conditions are (...)
(a) that the person is not a national or citizen of the country or territory to which he is to be sent;
(b) that his life and liberty would not be threatened in that country or territory by reason of his race, religion, nationality, membership of a particular social group, or political opinion; and

to submit her asylum claim in line with the requirements of the 1951 Convention. As a result, she was refused leave to enter into the UK and was served a removal order to France with no possibility to lodge an appeal against that decision from within the UK[80]. Section 2(3) of the 1996 Act removes the asylum seekers' right to bring or pursue an appeal from within the UK where they are returned to countries considered safe; in that respect, Section 2(3) expressly refers to the Member States as safe countries. The applicant challenged this new rule and argued that France could not be regarded as a safe country because of the risk of being returned to her country of origin or another State without her case being adequately examined by the French authorities. The Council for the applicant accused the then Home Secretary, Michael Howard, of acting "unreasonably and unlawfully" in certifying that France was a safe third country and failing to properly consider evidence that it was not the case. The concern raised with regard to France and other Member States did not relate to a risk of persecution within their territory, but to unsatisfactory practices resulting in asylum seekers being sent to their country of origin or a third country without having had the opportunity to exercise their rights. In other words, the disquiet so created regarded compliance with the principle of *non-refoulement*. In a decision of 14 February 1997, two High Court Judges ruled that the Home Secretary was entitled to return the applicant to France[81]. Lord Bingham, the Lord Chief Justice, sitting with Mr Justice Moses took the view that Michael Howard had not acted irrationally and unlawfully in declaring that France constituted a safe third country. The High Court's decision later confirmed by the Court of Appeal[82] was welcome relief for the Government as an important number of asylum seekers arrived from France. A different ruling would have affected hundred of pending cases in which the safety of France, but also Belgium, Italy, The

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(c) that the government of that country or territory would not send him to another country or territory otherwise than in accordance with the Convention."

[80] Issues relating to the right of appeal are discussed in chapter V on fair and effective procedures.

[81] See *supra* n. 78.

[82] *Ibid.*

Netherlands and Germany was challenged[83]. The French authorities' practices were held to conform to UK law and international standards regarding refugee protection. It was decided that the inability of France to comply with Section 2(2)(c) of the 1996 Act could not be inferred from a handful of ill-practices. The Court of Appeal considered that a reference to the *Iqbal* case was not in itself sufficient to support the view that France was not a safe third country[84]. Ali Iqbal had travelled via France to the UK where the Secretary of State certified that his claim was unfounded on the ground that France was a safe third country. When he returned to France, his appeal having been dismissed, officials at the Paris Prefecture misapplied the procedures so that his application for asylum was ignored. A removal order was served, apparently in the absence of an interpreter, and attempts were made to forcibly place him in a plane. However, the captain of the plane refused to take responsibility for his presence on board. As a result of the press publicity given to his case, Mr Iqbal finally succeeded in lodging his asylum claim with the French authorities. The Court of Appeal conceded that "[t]his was obviously a serious departure from proper standards but [that] it ha[d] to be seen in the context of France having to deal with more than 20,000 asylum applications in each of the last 10 years. Furthermore, account ha[d] to be taken of the fact that the proportion of successful applications [was] higher in France than in any other Member State"[85]. It was stressed that no State was able to provide an infallible system politically and that French practices were usually satisfactory. However, the safety of some Member States was again challenged before English courts. This time the Court of Appeal in a judgment of 23 July 1999[86] ruled that the Home Secretary had acted unlawfully in ordering the return of two asylum seekers to

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[83] Terence Shaw, "Judges back Howard over "safe" asylum", Electronic Telegraph, http://wwww.telegraph.co.uk, 15 February 1997.

[84] See *supra* n. 77.

[85] *Ibid.*

[86] The judgement of the Court of Appeal is referred to in the Council of Europe, Doc. 8598 of 21 December 1999, see *supra* n. 17.

Germany and France in the absence of a substantive examination of their claim. France and Germany had already rejected their applications on the ground that they were based on fear of persecution by non-State agents. These Member States, unlike the UK, do not recognise non-State persecution as a ground for granting refugee status[87]. For this reason, the Court of Appeal concluded that France and Germany could not be regarded as "safe third countries".

These cases involving Member States show that safety should never be taken for granted even in the case of Member States. There is a strong tendency to consider that Member States not only constitute safe countries of origin, but also safe third countries[88]. Assessing the safety of another Member State may be regarded as a potentially charged exercise. However, if the Member States comply with international standards, standards that should be those of the EC as a whole, there is no reason why assessing their safety should be a source of embarrassment or tension.

Finally, for a State to be considered safe, adequate and accessible asylum procedures must exist. The term adequate refers to procedures satisfying

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[87] The issue of non-State persecution is examined in chapter III on the need for an up to date interpretation of the term "refugee".

[88] For instance, the Protocol on Asylum for Nationals of Member States of the European Union declares that the Member States shall be regarded as constituting safe countries of origin. As a result asylum claims emanating from EC nationals shall only be examined by Member States in exceptional circumstances (sole Article). This *quasi*-exclusion is discussed in chapter III on the need for an up to date interpretation of the term "refugee".
It is also interesting to note that the Dublin Convention does not cover claims submitted by EC nationals as the Convention provisions only apply to claims lodged by aliens defined as persons other than nationals of a Member State (Article 1(a)).
The assumption that the Member States constitute safe countries is also enshrined in domestic law. For instance, as already mentioned, Section 2(3) of the Immigration and Asylum Act 1996 expressly states that the Member States are safe countries.

international standards[89]. However, it is argued that the existence of adequate procedures does not in itself ensure that substantive examination of the asylum claim will take place. Access to such procedures is a critical issue and has been a growing source of concern, in particular with regard to asylum seekers in transit[90]. The Resolution on host third countries specifies, *inter alia*, that "[i]t must be the case that the asylum applicant has already been granted protection in the third country or has had an opportunity, at the border or within the territory of the third country, to make contact with that country's authorities in order to seek their protection, before approaching the Member State in which he is applying for asylum, or that there is clear evidence of his admissibility to a third country" (Paragraph 2(c)). The concepts of "effective opportunity" and "clear evidence of admissibility" are particularly worrying in the case of asylum seekers in transit.

The right to seek refugee status supposes that asylum seekers are in a position to approach the competent authorities and that they are informed of the procedure to be followed in a language they understand[91]. As already stressed, some Member States will expect asylum seekers in transit to apply for asylum in the country of transit regardless of the length of their stay in the transit zone. It is argued that, in certain cases, such attitudes seriously undermine refugee protection by depriving individuals of their right to claim refugee status. A number of factors need to be taken into consideration in order to assess the existence of an opportunity to submit a claim. Firstly, attention must be paid to the duration of the asylum seeker's stay in the transit zone. Mere transit is sometimes deemed sufficient to conclude that the asylum seeker could have applied in the country of transit regardless of issues of time and knowledge. Indeed, for an asylum seeker to be able to submit his or her claim in the country of transit, he or she must have the time to do so. Furthermore,

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[89] The reader is referred to chapter V on fair and effective procedures.

[90] The expression "asylum seekers in transit" essentially refers to asylum seekers who find themselves in airport transit zones.

[91] These issues are examined in chapter V on fair and effective procedures.

he or she must also be aware of the fact that he or she is expected to apply in that country. Considering the little knowledge, if any, that asylum applicants have of asylum procedures in addition to the stress generated by the situation, it is suggested that the information should be conveyed to potential asylum seekers, in a language they understand, if an effective opportunity to seek protection is to exist[92].

Paragraph 2(c) of the Resolution on host third countries also refers to the concept of clear evidence of the asylum seeker's admissibility to a third country as an alternative to the grant of protection in a third State or the opportunity to make contact with the authorities of a third State in order to seek protection. As in the case of an "opportunity to make contact", the Resolution does not give any indication as to the meaning of the words "evidence of admissibility". It results from the wording that the concept of evidence of admissibility must be distinguished from the concepts of protection and opportunity to make contact. This is most unfortunate as, it is argued, the issue of admissibility should be envisaged together with the issues of protection and opportunity to seek such protection. Indeed, the grant of refugee status in a State supposes that the asylum seeker has been admitted into the territory of that State. Likewise, the existence of an opportunity to make contact with the competent authorities suggests that the applicant will not be compelled to leave that territory before fully exercising his or her right to seek refugee status.

The view taken is that transfers of responsibility should be contingent on the contemplated country of destination, whether it is a Member State or a third country, satisfying the three safety criteria. However, compliance with these criteria does not in itself suffice, adequate safeguards must also be provided if safety is to be ensured

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[92] *Ibid.*

3.2. The safeguards

As removing States, the Member States must be held accountable for the transfers they may carry out. This has a number of consequences on the way safety criteria must be applied. Firstly, it is crucial for safety to be appraised on an individual basis. Indeed, safety is not an objective concept and must be appraised in the light of the asylum seeker's personal circumstances. Secondly, the individuals concerned should be given the opportunity to challenge the alleged safety of the State of destination. Thirdly, as an essential prerequisite to any transfer, the removing Member State should contact the authorities of the State of destination with a view to securing its consent to the transfer. Finally, it is imperative that the necessary checks are carried out prior to removal.

It is argued that the reliability of the safety test is contingent, *inter alia*, on the assessment taking place on an individual basis. The level of safety offered by a State may vary in function of the asylum seeker's background; factors such as ethnicity, gender or area of origin may considerably influence the degree of safety. In other words, a country safe for one applicant may be unsafe for another. Thus, in order to minimise the risk of erroneous assessments, asylum seekers' personal circumstances need to be taken into consideration. This issue has become a serious source of concern with the development of so-called lists of safe third countries established by some Member State governments. As currently construed and used, these lists are considered to be a threat to the right to seek refugee status; indeed, they establish a strong safety presumption, not always founded[93], that asylum seekers will often find difficult to rebut. Such lists constitute additional hurdles for asylum claimants. The disquiet created by such practices is aggravated in the context of deficient safety tests. The criteria used to determine whether a State is safe are often unclear, insufficient and sometimes inappropriate; the whole process often lacks

[93] Countries with questionable human rights records such as India, Kenya and Pakistan have appeared on safe third country lists. See Amnesty International's position reported in European Parliament, Asylum in the European Union: the "safe country of origin principle", People's Europe Series, November 1996, at p. 22.

transparency. The completion of such lists tends to give a rigid view of the situation in the listed third countries which is incompatible with the critical need for accurate information and thus regular updates. Safety for removal purposes is a subjective concept that cannot be the object of a final assessment. The UK Government's Immigration and Asylum White Paper called "Fairer, Faster and Firmer: A Modern Approach to Immigration and Asylum" proposed the abolition of the "white list of designated countries" with the entry into force of the Immigration and Asylum Act 1999. Now that the Act is in force, it is hoped that the current Government will keep its promise. It is argued that, when appraising safety, Member States should give greater credit to the sources of information that international organisations such as UNHCR and NGOs. The importance of these sources was actually acknowledged in the Conclusions on countries in which there is generally no serious risk of persecution (Paragraph 5). Moreover, in determining whether a State is safe for an individual for removal purposes, particular attention must be paid to the issue of stability. This implies that for a country to be considered safe, the safety in question must present a certain degree of permanence. This requirement was recognised in the Conclusions as being an element of the assessment of the existence of a risk of persecution (Paragraph 4(d)). However, the potential positive impact of the Conclusions is undermined by their lack of binding effect.

Another essential safeguard lies with the possibility for asylum seekers to contest the alleged safety of the envisaged country of destination. This is particularly vital where unsatisfactory safety tests are applied and asylum claimants confronted with strong safety presumptions. Devising an infallible system is not a feasible task; however, the margin of error may be minimised through the introduction of a right of appeal. It is argued that the very nature of asylum and human rights at large should always be acknowledged and legally reflected in the rights and safeguards granted. It is suggested that, for the right to challenge decisions on safety to be effective, this right must be exercisable from within and have suspensive effect[94].

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[94] The reasons calling for a right of appeal from within with suspensive effect in the context of transfers of responsibility are the same as those requiring its existence in the context of substantive

A further safeguard requires the Member States that wish to operate transfers of responsibility to secure the consent of the contemplated State of destination. In that respect, the Resolution on minimum guarantees on asylum procedures[95], provides that safe third countries must be informed, where necessary, when receiving an asylum applicant returned from a Member State that his or her claim has not been examined in substance[96]. Although this provision constitutes a step in the right direction, it suffers from two major drawbacks. Firstly, its potential positive effect is undermined by its lack of binding effect. This explains why some Member States may not inform the country of destination that they have carried out a transfer of responsibility and have therefore not examined the asylum claim in substance. For instance, in France, the authorities will not normally inform the country of destination of the formal reasons for removing the individual[97]. In the UK, NGOs have reported that, contrary to the Government's affirmations, asylum seekers are not given a formal statement specifying that the merits of their application for asylum have not been examined[98]. The second drawback of the provision lies with the fact that it does not go far enough. Indeed, it is argued that it is not sufficient to inform the country of destination of the transfer of responsibility. For transfers to be compatible with the right to seek refugee status, it is vital that the removing Member State secures the consent of the latter. In this context, the concept of consent is construed as encompassing the country of destination's accord to consider the asylum claim is substance. In other words, consent is understood as meaning that the country concerned accepts to endorse responsibility for examining the asylum claim being transferred. Where transfers take place in the absence of the

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asylum procedures, the reader is therefore referred to chapter V on fair and effective procedures where these issues are examined in depth.

[95] See *supra* n. 46.

[96] *Ibid.*, Paragraph 22.

[97] See *supra* n. 60, at p. 16.

[98] *Ibid.*

required consent, the right to seek refugee status is seriously undermined as there is no guarantee that the application for asylum will be considered by the country of destination. The requirement regarding consent is necessitated by the need to secure that transfers are consistent with the right to seek refugee status.

Finally, although it may appear obvious, it is important to stress that all these checks must occur prior to removal. Checks *a posteriori* would be more difficult to carry out and thus would not allow an effective protection of asylum seekers' rights. Furthermore, in many instances, removing Member States would not be in a position to remedy violations of the rights in question. This could mean individuals being subject to treatment contravening the provisions of the 1951 Convention. Member States cannot effectively protect asylum seekers' rights and thus fulfil their obligations under international refugee law from afar.

4. Conclusion

Restrictions on access to the EC territory and asylum procedures form part of a network of measures designed to cut down the numbers of asylum seekers in the EC. The first type of restrictions results from the imposition of documentation requirements on asylum seekers combined with carrier sanctions. It is argued that, as currently construed, these measures are incompatible with international refugee law as they ignore a fundamental fact: by definition, asylum seekers are not in a position to satisfy the requirements in question. Thus, a drastic change of direction is urgently needed in order to finally address the reality of asylum seekers' situation. This is essential to the survival of the right to seek refugee status.

As to the second type of measures, restrictions on access to asylum procedures through transfers of responsibility, political pragmatism commands to acknowledge their existence; however, not at any price. In any case, should such practices jeopardise refugee protection by eroding asylum seekers' rights and putting unfair pressure on third countries. Hence, if the right to seek refugee status is to be preserved, the sole acceptable compromise lies with the establishment of legal

safeguards. The aim is to secure that the fundamental principles of international refugee law are not being impaired. In that respect, it is important that the measures adopted under Title IV do not simply endorse those elaborated within the intergovernmental framework. As already stressed, the measures adopted in the field of asylum within the EU, and now the EC, are interconnected and have a combined effect on refugee protection. Their impact and their compliance with international refugee law must therefore be assessed globally; any attempt to isolate them from each other would result in distorted appraisals. With this in mind, it is crucial, *inter alia*, to establish harmonised asylum procedures meeting international requirements.

Law Reform Proposals for the Protection of the Right to Seek Refugee Status in the European Community

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Chapter V

Fair and Effective Procedures

The existence and access to adequate asylum procedures, defined as fair and effective procedures, are fundamental to the protection of the right to seek refugee status; indeed, they are the sole medium through which refugee status may be acquired. Although the 1951 Convention does not deal with procedural issues, it is vital that States signatories to the Convention have procedures consistent with the provisions of the Convention[1]. The purpose of this chapter is therefore to determine what are the minimum requirements that Member States' asylum procedures must satisfy in order to be compatible with the right to seek refugee status. In that respect, recent developments in the asylum policy of the European Union and its Member States are a source of disquiet.

The restrictive nature of the objectives pursued by the Member States in the field of asylum induced dramatic changes in the procedures applicable to the determination of asylum claims. The identification of "bogus" asylum seekers became a priority which prompted the introduction and increasing use of accelerated procedures referred to as fast-track procedures. They were presented as tools designed to deter abusive asylum claims and therefore relieve the competent authorities from an unnecessary burden and allow them to concentrate on genuine applications. This type of procedure was formally introduced at EU level with the adoption of the Resolution on manifestly unfounded applications for asylum[2]. However, fast-track procedures were part of a wider plan which was to cut down the numbers of asylum

[1] This is stressed in the UNHCR Handbook on procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1, reedited, Geneva, January 1992.

[2] Resolution on manifestly unfounded applications for asylum adopted by the EC Ministers for immigration at their meetings in London on 30 November and 1 December 1992, European Parliament, asylum in the European Union: the "Safe Country of Origin principle", People' Europe Series, November 1996, Annex I, at p. 26-32.

claims lodged within the EU and at its borders. This explained why issues relating to substantive asylum procedures were not a priority on the agenda of the EU. However, with the conclusion of the Dublin Convention, the Member States realised that issues relating to substantive procedures could no longer be excluded from the move towards harmonisation; this cognisance led to the adoption of the Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures,[3] referred to as the Resolution on minimum guarantees. The Member States acknowledged that the principle set out in the Dublin Convention according to which asylum claims must be examined by a single Member State demanded a certain degree of harmonisation of asylum procedures. In the Preamble to the Resolution on minimum guarantees, the Member States declared that they were "[c]onvinced that this [the Dublin Convention] require[d] decisions on asylum applications to be taken on the basis of equivalent procedures in all Member States and common procedural guarantees to be adopted for asylum seekers to that end (...)" Moreover, with the Dublin Convention removing asylum seekers' right to lodge simultaneous or consecutive asylum claims in various Member States, the need for harmonised procedures meeting international requirements became even more urgent. The purpose of the Resolution was to secure the availability and access to fair and efficient asylum procedures irrespective of the identity of the Member State held responsible under the criteria set out in the Dublin Convention. This acknowledgement of the consequences of the adoption of the Dublin Convention in terms of procedural requirements constituted a step in the right direction. Unfortunately, the Resolution failed to fulfil the hopes it raised. The Resolution on minimum guarantees suffers from two major weaknesses caused by its content and its lack of legal authority. Firstly, although the Resolution contains principles important to the preservation of asylum seekers' rights, its positive effect is considerably undermined by its non-binding nature. Indeed, non-binding guarantees cannot constitute adequate guarantees, especially where human rights-related issues are at stake. Secondly, the Resolution undermines refugee protection

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[3] Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures, OJ C 274/13, 19/09/1996.

in providing for significant derogations to fundamental procedural guarantees in the case of manifestly unfounded applications and claims made at the border. For instance, where an asylum claim falls within the scope of the Resolution on manifestly unfounded applications for asylum, the minimum procedural guarantees granted are seriously curtailed. This is a major drawback considering the large numbers of applications for asylum being channelled to fast-track procedures.

To date, the EU and its Member States have failed to provide the necessary compensatory measures to the system established by the Dublin Convention. This generates inequalities amongst asylum seekers with regard to access to adequate procedures. The "communautarisation" operated by the Treaty of Amsterdam covers procedural aspects. Indeed, Article 63(1)(d) EC provides that "minimum standards on procedures for granting or withdrawing refugee status" in line with the 1951 Convention and the 1967 Protocol are to be adopted within a period a five years of the entry into force of the Treaty of Amsterdam, which took place on 1 May 1999. This provision prompted the Commission's working document of 3 March 1999, called "Towards common standards on asylum procedures"[4], referred to as the Commission's working document. This document was intended to launch a debate on asylum procedures within the Council and the European Parliament which would result in a final proposal from the Commission for a Community legal instrument on asylum procedures after the entry into force of the Treaty of Amsterdam. In the Commission's view, there were two possible general approaches to such an instrument[5]. The first approach would consist in establishing a certain level of harmonisation in order to achieve "a certain level of procedural safeguards and guarantees" allowing Member States to retain some degree of flexibility in the implementing measures (Paragraph 9(a)). The second approach would require the Member States to adopt exactly the same procedures, so that full harmonisation

[4] European Commission, working document, "Towards common standards on asylum procedures", Brussels, 3 March 1999, SEC 1999.

[5] See *supra*, Paragraph 9.

could be achieved (Paragraph 9(b)). In the Commission's opinion, the first approach would be more suitable in the near future. However, in the longer term, the merits of common procedures could be considered. It is argued that the first approach is satisfactory provided that the standards set are strictly in line with international refugee law and that the flexibility allowed does not affect compliance with the standards in question. With this in mind, it is argued that the provisions of the contemplated instrument should be drafted with extreme care in order to prevent any interpretation or implementation detrimental to refugee protection. Moreover, the view taken is that the notion of flexibility should be primarily construed in the interest of asylum seekers and Member States should, therefore, only be allowed to go beyond the set level. In the short term, the proposed approach can be described as an intermediate approach mainly designed to retain flexibility within boundaries compatible with the requirements of international refugee law. In its working document, the Commission refers to existing soft law, and in particular the Resolution on minimum guarantees and the Resolution on manifestly unfounded applications for asylum[6] as well as the Resolution on a harmonised approach to questions concerning host third countries[7]. The Commission views these instruments as the first steps towards common minimum standards on asylum procedures. This could be regarded as a source of concern considering the inconsistencies with international refugee law contained in these measures. However, this comment must be tempered in the light of the Commission's affirmation that the TEC as amended by the Treaty of Amsterdam must "(...) enshrine the basic principle that Community legislation on asylum must be compatible with key international refugee and human rights instruments."[8] Most

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[6] See *supra* n. 2.

[7] Resolution on a harmonised approach to questions concerning host third countries asylum adopted by the EC Ministers for immigration at their meetings in London on 30 November and 1 December 1992, European Parliament, asylum in the European Union: the "Safe Country of Origin principle", People' Europe Series, November 1996, Annex II, at p. 33-37.

[8] See *supra* n. 4, Paragraph 6.

importantly, the Commission considers that some of the principles and concepts laid down in the above mentioned instruments may be a cause for reconsideration and suggests that some of the exceptions and derogations that weaken these instruments should be removed[9]. It is interesting to note the gap between the Commission's position and the position adopted by the Austrian Presidency. In its Draft Strategy Paper on Immigration and Asylum Policy of 1 July 1998, the Austrian Presidency suggested a worrying shift from an asylum system based on the right of the individual to protection to one where at its discretion the State may offer protection to a person or group at risk[10]. This strong divergence was already apparent in the Commission's Memo 98/55 on the Implementation of the Amsterdam treaty of 15 July 1998 where the Commission stressed the importance of the 1951 Convention as the basis for the right of the individual to seek international protection[11].

The aim of this chapter is to determine the minimum standards that asylum procedures must meet in order to achieve consistency with international refugee law; these standards cover asylum proceedings in their entirety. It is important that the measures to be adopted on the basis of Title IV do not simply endorse those elaborated within the intergovernmental framework as their compliance with international standards is questioned. In that respect, Declaration 49 to the Treaty of Amsterdam stresses the importance of the Resolution on host third countries and the Resolution on minimum guarantees. However, it also declares that "the question of abuse of asylum procedures and appropriate rapid procedures to dispense with manifestly unfounded applications for asylum should be further examined with a

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[9] *Ibid.*, Paragraph 10.

[10] The Austrian Presidency's Draft Strategy Paper on Immigration and Asylum Policy of 1 July 1998 referred in the Immigration Law Practitioners' Association, European Update: September 1998, at p. 5.

[11] See the European Commission's Memo 98/55 of 15 July 1998 on the Implementation of the Amsterdam Treaty in Immigration and Asylum referred to in *ibid.*, at p. 7-8.

view to introducing new improvements in order to accelerate these procedures."[12] It is argued that, while avoiding unnecessary delays is in the interest of both asylum seekers and Member States, it should not be achieved at the detriment of fairness. Moreover, although some degree of differentiation may be tolerated between substantive and fast-track procedures, the current curtailments in the procedural rights and guarantees granted to applicants channelled to the latter type of procedures cannot be justified. In establishing the standards to be met by asylum procedures, particular attention is paid to the Resolution on minimum guarantees as it is currently the sole harmonised EU measure on procedural aspects. The content of the Resolution is measured against the requirements of international refugee law in order to determine the necessary changes and amendments.

For the purpose of this chapter, asylum proceedings have been divided into three main stages: submission, determination and review or appeal of the initial decision. However, before examining the rights and guarantees to be offered to asylum claimants throughout the proceedings, particular attention is paid to the concept of manifestly unfounded applications for asylum and to the characteristics of fast track procedures.

1. Manifestly unfounded claims: a "catch-all" concept?

The Member States have been eager to distinguish and oppose two types of asylum seekers: those who deserve protection, i.e. genuine asylum seekers and those who abuse asylum procedures with a view to entering the EC, i.e. "bogus" asylum seekers. This resulted in the adoption of the Resolution on manifestly unfounded applications for asylum which was designed to combat misuses of asylum procedures. However, it is argued that this Resolution was mainly designed as a means to reduce the numbers of asylum claims. The concept of manifestly unfounded applications for asylum is a source of concern on two accounts. Firstly, it is construed in a very broad manner. Secondly, claims considered manifestly

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[12] See Steve Peers, *EU Justice and Home Affairs Law* (European Law Series, Pearson Education, Harlow, 2000) at p. 128.

unfounded are channelled to fast-track procedures which are subject to much lower standards.

1.1. The concept of manifestly unfounded applications for asylum

The Member States defined the concept of manifestly unfounded application for asylum in a specific Resolution, i.e. the Resolution on manifestly unfounded applications for asylum[13]. This shows that identifying such claims had become a matter of general concern across the EU. According to the Resolution, applications may be considered unfounded on three accounts: firstly, where "there is clearly no substance to the applicant's claim to fear persecution in his own country", secondly, where "the claim is based on deliberate deception or is an abuse of asylum procedures" (Paragraph 1(a)) and, finally, where the claim falls within the scope of the Resolution on host third country (Paragraph 1(b)).

1.1.1. "No substance to claim to fear persecution"

Paragraph 6 of the Resolution envisages three situations where the Member States may consider that there is "no substance to claim fear of persecution". Firstly, where asylum claims fall outside the scope of the 1951 Convention, namely where the claim is not based on one of the five grounds listed in Article 1(A)(2) of the Convention (Paragraph 6(a)); these are race, religion, nationality, membership of a particular social group and political opinion. The resolution mentions "the search for a job or better living conditions" (Paragraph 6(a)). This reflects the Member States' firm intention to maintain a clear distinction between asylum seekers and economic migrants and the rejection of any overlap between these two categories of third country nationals[14]. Considering the Member States' restrictive approach to asylum matters, it is unlikely that they would grant refugee status to individuals who

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[13] See *supra* n. 2.

[14] See the introduction, chapter I.

fall outside the scope of the Convention definition of the term refugee. Thus, the challenge is to make sure that the definition in question addresses the needs of today's asylum seekers and is properly implemented by the Member States[15]. However, pragmatism requires us to acknowledge the fact that the Member States will oppose economic circumstances being taken into consideration.

An application for asylum will also fall within the scope of Paragraph 6 where "the application is totally lacking in substance" (Paragraph 6(b)). This refers to cases where "the applicant provides no indications that he [or she] would be exposed to fear of persecution" or where "his [or her] story contains no circumstantial or personal detail." Finally, a claim to fear persecution will be considered as not being substantiated where "the application is manifestly lacking in any credibility". This means that the asylum seekers' "story is inconsistent, contradictory or fundamentally improbable." These two grounds raise concern in the light of the procedures applicable to claims declared manifestly unfounded. Indeed, to make sure that an application for asylum falls within the scope of Paragraph 6(b) or (c) of the Resolution, a thorough interview should take place, in particular in relation to the latter sub-Paragraph. For instance, there may be various reasons why an asylum claimant's story may at first appear inconsistent; this may, for example, be caused by stress or language barriers. It is therefore important that procedures, regardless of their nature, address these difficulties[16]. In that respect, fast-track procedures have been a source of disquiet as celerity tends to prevail over fairness to the detriment of asylum seekers' rights.

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[15] See chapter III on the need for an up to date interpretation of the term "refugee".

[16] The standards to be met by procedures, both substantive and accelerated, are examined in the subsequent sections.

1.1.2. Deliberate deception or abuse of asylum procedures

The main justification for the introduction of fast-tack procedures was the alleged need to deter and impose sanctions on abuses of asylum proceedings. The Member States argued that asylum procedures were increasingly taken over by individuals who did not have a genuine case. In that context, the fact that Paragraph 9 of the Resolution presents "deliberate deception or abuse of asylum procedures" as a ground for declaring an application for asylum manifestly unfounded comes as no surprise.

Paragraph 9(a) and (c) concerns failure to comply with documentation requirements. Pursuant to Paragraph 9(a), an application will be considered manifestly unfounded if the applicant based his or her claim "on a false identity or on forged or counterfeit documents which he [or she] has maintained are genuine when questioned about them" in the absence of a reasonable explanation. An asylum claim will also be considered without substance, in the absence of a reasonable explanation, if the asylum seeker has "in bad faith destroyed, damaged or disposed of any passport, other document or ticket relevant to his [or her] claim, either in order to establish a false identity for the purpose of his [or her] asylum application or to make the consideration of his [or her] application] more difficult" (Paragraph 9(c)). These provisions, it is argued, have the potential to undermine the right to seek refugee status by preventing substantive examination. Indeed, for these provisions to be compatible with the right to seek refugee status, it is vital that asylum seekers' general inability to comply with documentation requirements is acknowledged[17]. Hence, the interpretation given to the words "without reasonable explanation" are critical. The view taken is that they should be construed in a manner that address the specificity of asylum seekers' circumstances. Moreover, competent authorities should make it clear to asylum seekers that the difficulties they face in relation to documentation are recognised and thus not detrimental to the outcome of their claim. If applicants fear that failure to satisfy these

[17] This issue is examined in chapter IV on access to substantive asylum procedures.

requirements will be held against them, they are likely to be reluctant to admit that they have, for instance, travelled on a forged passport. In the current context, the Resolution is a source of disquiet as many Member States have been keen to subject asylum seekers to the same documentation requirements as other categories of third nationals as it contributes to reduce the numbers of asylum claims. It is therefore crucial that EC law adapts the provisions on documentation requirements for non-EC nationals to the needs and difficulties of those seeking refugee status[18].

Paragraph 9 also reflects the Member States' attachment to the principle enshrined in the Dublin Convention and its main consequence for asylum seekers, namely the loss of the right to lodge multiple applications within the EC[19]. Indeed, where an asylum claimant "deliberately fail[s] to reveal that he [or she] has previously lodged an application in one or more countries, particularly when false identities are used", his or her application will be held manifestly unfounded (Paragraph 9(d)). It is interesting to note that the wording of Paragraph 9(d) seems to go beyond the restriction resulting from the Dublin Convention. Indeed, this sub-Paragraph does not specify that the countries in question must be Member States. Furthermore, under Paragraph 9(g), if an asylum seeker had his or her claim rejected by a country which provided procedural guarantees in line with the 1951 Convention, his or claim will be considered manifestly unfounded. In practice, the combined effect of sub-Paragraphs 9(d) and (g) may mean that the loss of the right to lodge multiple applications goes beyond the borders of the EC. It is true that sub-Paragraph 9(d) only applies to cases where the asylum seeker has deliberately failed to admit that he or she has applied for refugee status elsewhere. Thus, where he or she admits that he or she has lodged one or more applications, his or her claim should not be regarded as manifestly unfounded. However, the exact scope of this provision very much depends upon the interpretation given to the word "deliberately". What if an asylum seeker is not asked whether he or she has applied elsewhere and this fact is

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[18] *Ibid.*

[19] *Ibid.*

subsequently discovered? Will the claim be held manifestly unfounded on the ground that the applicant has "deliberately" withheld this piece of information? Sub-Paragraph 9(g) also raises concern with regard to what may happen in practice. A claim will only be considered manifestly unfounded if the asylum seeker had his or her claim rejected by another country following proceedings consistent with the provisions of the 1951 Convention. To this end, Sub-Paragraph 9(g) provides that "contacts between Member States and third countries would, when necessary, be made through UNHCR". This constitutes an adequate safeguard provided that the Member State which is about to declare a claim manifestly unfounded verifies that the claim in question has already been examined in compliance with international standards. In that respect, the Member States should be under the same obligations as those applying to transfers of responsibility[20]. The involvement of UNHCR is welcome as the Member States' interpretation of what is a procedure satisfying international standards may differ from that of UNHCR. However, the positive impact of the provision is seriously tempered by the fact that contacts are established at the Member States' discretion; indeed, they shall take place "where necessary".

An asylum claim may also be considered manifestly unfounded where the asylum seeker has "flagrantly failed to comply with substantive obligations imposed by national rules relating to asylum procedures" (Paragraph 9(f)). It is argued that this provision is acceptable provided that asylum seekers are given thorough information about the procedure to be followed[21]. Paragraph 9(e) concerns cases where the asylum seeker had the opportunity to lodge his or her claim at an earlier stage and finally submitted one for the sole purpose of forestalling an impending expulsion measure. What this provision seems to ignore is that a late submission does not necessarily mean that the claim falls outside the scope of the 1951 Convention. Finally, Paragraph 9(b) deals with situations where the asylum claimant has

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[20] *Ibid.*

[21] This issue is examined in section 2.2. of the present chapter.

"deliberately made false representations about his [or her] claim, either orally or in writing, after applying for asylum." This provision constitutes a reminder and a sanction designed to reinforce asylum seekers' obligation to tell the truth.

Paragraph 10 contains a general safeguard in that it expressly stresses that, although Paragraph 9 refers to behaviours indicating bad faith, none of the factors listed in that Paragraph may in itself outweigh a well-founded fear of persecution. However, the safeguard provided by paragraph 10 is seriously undermined by Member States' practices in the context of unsatisfactory fast-track procedures. As currently construed, these procedures may not allow for a determination of the asylum claim consistent with the right to seek refugee status. If an applicant falls within the scope of Paragraph 9, in most cases he or she will automatically be channelled to a fast-track procedure.

1.1.3. Applicability of the Resolution on host third countries

Paragraph 1(b) of the Resolution on manifestly unfounded applications for asylum provides that claims which fall within the scope of the Resolution on host third countries will be considered manifestly unfounded. This provision complements and strengthens the Resolution on host third countries as Paragraph 1(a) of the latter resolution reads that "the formal identification of a host third country in principle precedes the substantive examination of the application for asylum and its justification." The combined effect of both Resolutions shows the Member States' attachment to external transfers of responsibility[22].

It follows from the provisions of the Resolution on manifestly unfounded applications for asylum that the Member States intended the concept of manifestly unfounded asylum claims to be construed in a very broad manner. Moreover, its

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[22] Transfers of responsibility and the problems they raise with regard to their compatibility with the right to seek refugee status are examined in chapter IV on access to substantive asylum procedures.

scope is susceptible of extension through national interpretation. There is no doubt that this Resolution was the produce of restrictive asylum policies. In order to prevent the concept in question from having an adverse effect on the right to seek refugee status, it is critical that so called fast-track procedures are consistent with international refugee law. This is why it is argued that, although some degree of differentiation may be tolerated between substantive and fast-track procedures, the latter must nonetheless meet certain minimum standards dictated by the need to preserve the right to seek refugee status. To date, however, fast-track procedures are characterised by their low standards.

1.2. The characteristics of fast-track procedures

The characteristics of fast-track procedures must be understood in the light of the purpose that they serve. As already mentioned, in the Member States' opinion, these procedures were needed to address the problems created by a constant rise in the numbers of "bogus" asylum claims. To a certain extent, fast-track procedures were construed as sanctions and this is reflected in their main features, namely their celerity and truncated procedural safeguards.

The terminology used in the Resolution on manifestly unfounded applications for asylum, i.e. "accelerated procedures", clearly indicates what is their objective. The rationale for their introduction was that asylum claims deemed manifestly unfounded should be dealt within a shorter period of time. To that end, the Resolution provides that "Member States will aim to reach initial decision on applications which fall within the terms of Paragraph 1 as soon as possible and at the latest within one month and to complete any appeal or review procedures as soon as possible" (Paragraph 2).

Accelerated procedures were officially justified by the fact that manifestly unfounded claims did not require full examination at every level of the procedure and could be rejected very quickly on objective grounds, namely those laid down in the Resolution (Paragraph 1). However, the Resolution does not specify the type of

examination that is required. Indeed, the Resolution expressly provides that "[a]ppeal or any review procedures [could] be more simplified than those generally available in the case of other rejected asylum applications" (Paragraph 2).This provision has resulted in the introduction or maintenance in certain Member States of truncated rights of appeal for those claims channelled to fast-track procedures. As observed by Peers, "[i]f there is no effective appeal, the asylum seeker will only have had one opportunity to state his or her case and will not be able to refute any objectionable finding of the authorities. If there is no right to remain during the appeal, then there is a risk of "*refoulement*" to an unsafe country or to a third State which will itself return the applicant to an unsafe country."[23] It is argued that a lack of "full determination" combined with a restricted right of appeal is likely to entail the risk of letting a considerable number of errors go "unnoticed". This is particularly worrying considering the broad nature of the scope and interpretations given to the concept of manifestly unfounded application for asylum. There is a high risk that asylum seekers are unjustifiably denied access to substantive asylum procedures.

It is argued that the procedural safeguards laid down in the Resolution are insufficient to counterbalance the pitfalls of fast-track procedures as currently construed. Pursuant to Paragraph 4 of the Resolution, decisions to reject asylum claims on the ground that they are manifestly unfounded must be taken by "a competent authority at the appropriate level fully qualified in asylum or refugee matters." Moreover, the asylum seeker "should be given the opportunity for a personal interview with a qualified official empowered under national law before any national decision is taken" (Paragraph 4). However, in practice, the purpose of these safeguards may be defeated by the provisions of the Resolution itself and by its lack of binding effect. Indeed, the resolution fails to explain how these safeguards fit in the context of a "[non-]full examination at every level of [a]

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[23] Steve Peers, *Mind the Gap!, Ineffective Member State Implementation of European Union Asylum Measures*, Report prepared for the Immigration Law Practitioners' Association and the Refugee Council, May 1998, at p. 10.

procedure (...) under which applications may be rejected very quickly on objective grounds", i.e. the grounds laid down in the Resolution. These safeguards are also undermined by the lack of binding effect of the Resolution which may result in Member States introducing or maintaining fast-track procedures without providing the safeguards in question[24].

The legitimisation of the need for fast-track procedures specially designed to deal with "non-deserving" asylum claims in the context of restrictive asylum policies has resulted in a serious decline of procedural standards which affect great numbers of asylum seekers. In that respect, these procedures may constitute a threat to the right to seek refugee status. Thus, if pragmatism requires acknowledgement of their existence, it is important that certain minimum standards are maintained. With this in mind, it is argued that, while some degree of differentiation may be tolerated between fast-track and substantive procedures, this should not be at the detriment of asylum seekers rights. This is why both types of procedures are examined within the same chapter.

2. Submission

The conditions in which applications for asylum are lodged have a determining impact on their outcome. When asylum seekers are not in a position to adequately lodge their claim, the right to seek refugee status is threatened. Hence, in order to secure the fairness and efficiency of asylum procedures, a number of procedural rights and guarantees must be granted to asylum seekers from the very start of the proceedings.

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[24] For instance, in the *Ali Iqbal* case, officials at the Paris Prefecture misapplied the procedures so that his application for asylum was ignored. A removal order was served, apparently in the absence of an interpreter, and attempts were made to forcibly place him on a plane. See James Hardy and Ian Henry, "Judges challenge new immigration rules", Electronic Telegraph, http://www/telegraph.co.uk, 29 September 1996). This case is examined in chapter IV on access to substantive asylum procedures.

2.1. The right to have one's claim lodged with a competent officer as quickly as possible

Fairness and effective asylum procedures firstly require asylum claimants to be able to submit their applications with a competent official regardless of the circumstances of their submission. Moreover, unnecessary delays in the introduction of asylum claims must be avoided in the interest of both applicants and competent authorities.

2.1.1. Competent officers

The intervention of competent officers at this early stage of the proceedings is critical as they are responsible for receiving asylum seekers' statements. These statements are crucial since they constitute the basis for the assessment of asylum claims. With this in mind, it is vital that these statements are taken by individuals who are adequately qualified.

It is argued that officers held competent to receive asylum claims within or at the borders of the EC must be fully qualified. This supposes them having received adequate training in the field of asylum. The training in question should cover both procedural and substantive issues. This requirement is generally only requested from authorities which examine claims in the first instance or on appeal. However, it must be stressed that the authorities which take applicants' initial statements and those that will subsequently determine the claims may not be the same. It is, therefore, argued that competence requirements must not be limited to the latter authorities. In this respect, the Resolution on minimum guarantees either lacks clarity or, more seriously, omits to mention an essential guarantee. Indeed, Paragraph 4 of the Resolution reads that "[a]sylum applications will be examined by an authority fully qualified in the field of asylum and refugee matters (...)." This may be sufficient where asylum claims are lodged with the authorities responsible for determining them; however, the Resolution itself recognises that this is not always the case. Paragraph 7 provides that "[t]he authorities responsible for border controls and the local authorities with which asylum applications are lodged must receive clear and

detailed instructions so that the applications, together with all other information available, can be forwarded without delay to the competent authority for examination." The Resolution does not appear to impose competence requirements upon the authorities with which asylum claims are lodged. This is particularly worrying with respect to asylum claims submitted at the border. Indeed, these applications are usually lodged with immigration or border police officers who often lack the necessary training. A further source of disquiet is found in Paragraph 25 of the Resolution which allows, *inter alia*, for exceptions to Paragraph 7 where the host third country principle is applicable according to the Resolution on host third countries[25]. This means that where the safe third country principle applies to a claim which has been submitted to border control authorities, the latter may not be in possession of the necessary information and nonetheless decide on the external transfer themselves. This situation very much reflects the reality of the treatment currently reserved to applications considered manifestly unfounded. It is argued that in order to ensure, as much as possible, that a claim is legitimately held manifestly unfounded, it is vital that decisions are taken by competent officers. There is no justification for lesser standards in that respect.

Whatever their official title, local authorities or border control authorities, the authorities involved in the submission of asylum claims should be properly qualified. Adequate training should therefore be provided to the authorities concerned. This requirement should be the object of a specific provision in EC law. With this in mind, one can refer to the Odysseus programme[26]. One of the purposes of this Joint Action is to establish a framework for training, information and exchange activities with a view to improving the effectiveness of cooperation between the Member States in the areas of asylum, immigration and crossing of external borders. Article 3 of the joint Action defines training measures as the "(...) organisation of practical

[25] See *supra* n. 7.

[26] Joint Action of 19 March 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, introducing a programme of training, exchanges and cooperation in the field of asylum, immigration and crossing of external borders (Odysseus-programme), OJ L 99/2, 31/03/1998.

training courses focusing on theoretical and practical knowledge (...)" Article 4 provides that "[i]n the field of training, the Odysseus programme shall focus on: training for instructors; specialist training, in particular advanced course for decision-makers, officials responsible for preparing administrative decisions, judges and courses designed for those in charge of training; [and] the exchange of information and expertise between national authorities." The relevance of such training would obviously depend on its content. Provided that the training in question is in line with international refugee law, it could be of valuable assistance in bringing competent officers' qualifications in line with these requirements.

The required training should obviously cover substantive and procedural asylum law; however, it should not be confined to these issues. Considering the importance of asylum seekers' statements when submitting their claim, it is essential for officers in charge to have the necessary interviewing skills in order to be able to address asylum seekers' specific needs and difficulties. Experience shows that asylum applicants are usually under extreme stress and intense psychological fatigue. Stating the reasons why they are seeking refugee status often proves to be an extremely demanding and distressing exercise. Asylum claimants will have to recall painful events and share them with a complete stranger. There may be a certain reluctance in evoking certain facts. Applicants may fear that certain facts will have an adverse impact on the outcome of their claim and that it is better to remain vague or simply pass over them. This is for instance the case where asylum seekers have used forged documentation. They may also feel that certain facts are too personal or traumatic to be spontaneously mentioned. This is for example the case of many women who have suffered sexual persecution[27]. Moreover, as noted in the UNHCR Handbook, "[a] person who, because of his [or her] experiences, was in fear of the authorities in his [or her] country may still feel apprehensive vis-à-vis any authority. He [or she] may be afraid to speak freely and give a full and accurate account of his

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[27] Refugee Women Legal's Group, *Gender Guidelines for the Determination of Asylum Claims in the UK*, July 1998, in particular at p. 19-20.

[or her] case."[28] In such circumstances, the competent officers must assist asylum seekers in giving comprehensive and consistent statements as any inconsistency in their story will usually be held against them. Applicants' duty to tell the truth does not undermine the authorities' role in trying to obtain coherent statements. They must therefore acquire the skills necessary to establish adequate and effective communication between them and asylum claimants.

This competence requirement does not solely serve the interests of asylum claimants, but also those of the Member States. Designed to contribute to the fairness of asylum procedures, this requirement also aims at setting up a more efficient system. Where applicants' statements are received by officers who are not adequately qualified, the risk of statements being taken improperly is higher. Such statements are more likely to lead to unsatisfactory decisions and thus be the object of procedural challenges.

2.1.2. The right to have one's claim lodged as early as possible

As already observed, individuals intending to claim refugee status are generally under extreme stress. Hence, imposing unnecessary delays only adds to their distress even more so with the deterioration of their living conditions pending determination.[29]

Asylum applicants are not the only ones who would benefit from shorter delays. The Member States have a legitimate interest in quicker asylum proceedings. However, this legitimate interest does not justify the current situation where fairness is often sacrificed to speed. Moreover, besides undermining asylum seekers' rights, this trend also affects the whole decision-making system as it results in more lengthy proceedings. Indeed, where the time needed to correctly receive asylum claims has been shortened for reasons of expediency, the time "saved" is likely to be lost when

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[28] See *supra* n. 1, Paragraph 198.

[29] See chapter VI on asylum seekers' status pending determination.

examining the case in the first instance and on appeal. In that respect, the Resolution on minimum guarantees reads that "[a]n asylum seeker must have an effective opportunity to lodge his [or her] asylum application as early as possible" (Paragraph 10). However, the Resolution fails to secure the existence of such an opportunity as it lacks binding authority and does not further elaborate on this point.

It is argued that, for asylum seekers to be able to lodge their claims as early as possible, their contact with competent authorities must be facilitated. It is important that asylum claimants are given information to that end. Thus, the first authorities that they encounter should be able to inform them and direct them to the competent authorities, if they are not competent themselves. Expressing one's intention to seek refugee status is not always as straightforward as it may appear; for instance, language barriers may interfere. It is argued that such difficulties must be overcome; this may, for instance, require the services of an interpreter. Although submission may be delayed as a result, addressing these difficulties is an essential step towards fair and effective proceedings. The words "as soon as possible" must be construed in the context of the right to seek refugee status and must not be seen a goal in themselves. The right to introduce one's claim as early as possible is, therefore, contingent on the availability of satisfactory procedures, i.e. procedures consistent with international refugee law.

2.2. Guidance as to the procedure to be followed

When asylum seekers are about to submit their asylum claims, they usually enter an unknown territory. In most cases, they are ignorant of the procedure and are therefore unaware of their rights and obligations. Hence, it is essential that individuals seeking refugee status are given relevant and comprehensive information before proceedings are initiated. This is formally acknowledged in UNHCR Handbook on Procedures and Criteria for the Determination of Refugee Status[30]

and the Resolution on minimum guarantees provides that asylum seekers must be informed about the procedure in a language they understand (Paragraph 15). However, in order to secure that the information is comprehensive, guidelines as to its content must be given.

The information in question should firstly, but not only, focus on asylum seekers' rights and obligations. Where unaware of their rights, asylum claimants are in no position to invoke them and allege eventual breaches. Likewise, where left ignorant of their obligations, they are not capable of properly complying with them. Both situations are detrimental to the fairness of asylum procedures and may well undermine their effectiveness. The provision of information should not be confined to the first stages, i.e. submission and first instance determination, but cover the whole proceedings. This means that asylum seekers should be made aware of their right to challenge the first instance decision and informed of the conditions under which such a right may be exercised. As suggested above, information should not be restricted to procedural issues, but should also concern asylum seekers' status pending determination[31]. They should therefore be made aware, *inter alia*, of their rights in terms of housing and access to health care.

Finally, it is argued that the right to be informed should be granted to all asylum seekers in a non-discriminatory manner. It follows that this right should be conferred upon those whose claims have been channelled to fast-track procedures. This means, for instance, that where an applicant falls within the scope of the safe third country principle, he or she should receive full information on the procedure to be applied and, in particular, be made aware of his or her right to contest the safety of the contemplated safe third country[32].

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[30] Paragraph 192(ii) of the UNHCR Handbook on Procedures and Criteria for the Determination of Refugee Status reads that "[t]he applicant should receive the necessary guidance as to the procedure to be followed" (see *supra* n. 1).

[31] These issues are examined in chapter VI on asylum seekers' status pending determination.

[32] See chapter IV on access to substantive asylum procedures.

To secure that asylum claims are lodged in suitable conditions, it is essential that the necessary facilities are available.

2.3. Availability of the necessary facilities

For asylum claimants to apply for refugee status in satisfactory conditions, they must be provided with various facilities; these include the services of an independent interpreter, the presence of a representative and the opportunity to contact a UNHCR representative.

Fairness at this early stage of asylum proceedings is contingent on the availability of these facilities. Hence, it is argued that they should be provided to all asylum seekers, including those whose applications are considered manifestly unfounded or lodged at the border.

2.3.1. The services of a independent competent interpreter

For asylum seekers to be able to properly lodge their claims, it is indispensable to remove language barriers. Where claimants do not have sufficient command of the language used, the services of an interpreter must be made available to them. Resort to an interpreter can only be considered superfluous where applicants feel confident to express themselves in the language of the proceedings. The UNHCR handbook specifies that applicants should be entitled to the services of a competent interpreter[33].

Being able to express oneself and make oneself understood is absolutely crucial to the fairness and effectiveness of the proceedings[34]. The Resolution on minimum

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[33] See *supra* n. 1, Paragraph 192(iv).

[34] See, for instance, Fiona Lindsley, *Best Practice Guide to the Preparation of Asylum Applications from Arrival to First Substantive Decision*, ILPA, London, May 1994.

guarantees mentions asylum seekers' right to an interpreter. Paragraph 15 states that "they [asylum seekers] must be given the services of an interpreter, whenever necessary, for submitting their case to the authorities concerned." Paragraph 15 also provides that interpreters must be paid for out of public funds, but limits its "generosity" to cases where the interpreter is called upon by the authorities. Moreover, although this paragraph construes the right to an interpreter in rather broad terms, the task of assessing the need for an interpreter essentially lies with the competent authorities. This may be a source of disquiet where Member States' practices are inconsistent with international requirements. With this in mind, it is argued that EC law must lay down asylum seekers' right to an interpreter in sufficient detail to prevent it from being undermined by national practices.

The independent interpreters' main role during asylum interviews is to ensure that official interpreters translate properly. Independent interpreters may also act as witnesses; disquiet has been caused by some official interpreters' attitude as there have been allegations of political and cultural bias and of official interpreters crossing the boundaries of their duties by actually "running" the interview.[35] There have also been cases where official interpreters belonged to an ethnic group who had been or was still in conflict with the asylum seekers' own group creating tensions between them detrimental to the fairness and effectiveness of interviews or, in the worse instances, resulting in interpreters behaving unethically.

Independence with regard to interpreters means that they are independent from the authorities dealing with asylum claims and from the Government at large as well as from asylum claimants. It is preferable for psychological, practical and legal reasons that interpreters are not applicants' friends or family members as it may, for instance, be extremely difficult for claimants to evoke painful experiences in front of someone they emotionally relate to.[36] One could take the view that the presence of a

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[35] These concerns have been raised with respect to certain practices in the UK, *ibid.*, at p. 52.

[36] *Ibid.* at p. 53.

relative or a friend could be a source of comfort. However, there are other reasons for preferring totally independent interpreters. It is in asylum seekers' best interests that interpreters are qualified. Indeed, besides having the required language skills, interpreters involved in asylum proceedings must have some knowledge of procedural and substantive asylum law as well as awareness of asylum claimants' specific circumstances. Moreover, the role of family members as interpreters would be extremely limited as they would not be allowed to attend formal interviews. Family may assist applicants, in particular with every day struggles, but they cannot be regarded as a substitute for independent interpreters.

The Immigration Law Practitioners' Association (ILPA) defined the role of independent interpreters in the light of the lack of checks carried out on official interpreters. The ILPA stressed in the UK context that "[o]fficial interpreters [were] not examined in their competence in either English or the foreign language being translated. Nor [were] they vetted for political or cultural bias."[37] In the light of these facts, the ILPA identified a number of issues to look out for:

"- failure to translate the interviewing officer's questions or the clients' replies fully and accurately;
- the official interpreter asking questions instead of the immigration officer, commenting on answers given or otherwise interfering in the interview;
- lack of knowledge of the political or cultural position in the country in question resulting in an inability to translate properly. This is common with interpreters who are non-nationals or who have not lived in their country for a long time;
- aggression to the client."[38]

The presence of an independent interpreter at the screening interviews, i.e. the interviews taking place where applicants are submitting their asylum claim, is

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[37] *Ibid.* at p. 57.

[38] *Ibid.*

designed to prevent language barriers becoming detrimental to asylum seekers' rights.

2.3.2. The right to a representative

Asylum seekers' right to a representative at screening interviews is considered an essential procedural guarantee. His or her presence is mainly designed to contribute to the fairness of the interview. Any reluctance or opposition emanating from the authorities in this respect would create a presumption of unfairness upon which asylum seekers could rely on appeal. The presence of a representative is thus in the interest of both parties.

The presence of a representative is construed as a means to strengthen asylum seekers' position during interviews. Applicants may not have the confidence to assert their rights during interviews when they feel that they are being disregarded. The situation is even worse where they have been left unaware of their rights. Awareness can, to a certain extent, be achieved by providing them with relevant information regarding proceedings that must include their rights as asylum claimants.[39] However, their knowledge is unlikely to match that of the officers conducting interviews. Moreover, it is extremely difficult for asylum claimants to establish that the officer who received their statement failed to properly perform his or her duties. For instance, inconsistencies in applicants' statements may be the result of officers' inability or unwillingness to establish adequate communication[40]. There may be a risk that these inconsistencies may be construed as evidence of a lack of accuracy in the applicant's story. It is for asylum claimants to prove that these inconsistencies are only apparent and that they could have been avoided had the initial interview been carried out properly. It is argued that the most effective way to overcome these unavoidable inequalities between interviewing officers and

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[39] See section 2.2. of the present chapter.

[40] See Fiona Lindsley, *supra* n. 34, at p. 54.

applicants consists in entitling asylum seekers to the presence of a representative. As observed by Lindsley, the presence of a representative "(...) at the least (...) ensures that an independent record is kept of the interview. At best, it enables an applicant to put over his (...) story properly and completely, thus facilitating a full examination to take place (...)"[41]

For their role to be effective, representatives must take a comprehensive and timed record of everything that is said and done. They should also take down any interruptions that may occur in the course of the interview whatever their cause. Representatives should therefore record any breaks for refreshment, any communication problems, any disputes over the meaning of the asylum seeker's statement and the way it has been resolved as well as their own interventions. Representatives should also report in writing anything in the officers' attitude that they consider unethical; these can go from obvious signs of boredom to open hostility.

It is argued that representatives should also play a more active role in the interview and intervene where necessary. For instance, applicants may need one or more breaks, particularly in the case of lengthy interviews; however, this can go against the wishes of "bored" officers who want to speed up the interview. In such cases, representatives should be firm and insist on applicants having their breaks. Besides taking record of any unacceptable attitude, asylum seekers' representatives should let officers know that they are unhappy with their behaviour and that a change of attitude is required. One should bear in mind that recalling painful events is a stressful and potentially traumatic exercise that is exhausting both physically and morally. With this in mind, any behaviour adding to the stress inherent in such interviews must be avoided. Moreover, any attitude preventing the applicant from stating his or her story fully and properly should be drawn to the officer's attention in order to allow immediate rectification and should, in any case, be reported.

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[41] *Ibid.*, at p. 52.

It is argued that asylum seekers' representatives attending interviews should be familiar with procedural issues in order to be able to detect any irregularities in the way the interview is conducted. Moreover, some experience in dealing with people seeking refugee status is highly desirable as it would allow greater awareness of applicants' needs during interviews. Representatives do not necessarily need to be lawyers, individuals involved with asylum seekers and refugees may constitute suitable candidates.

Paragraph 13 of the Resolution on minimum guarantees provides, *inter alia*, that "in accordance with the rules of the Member State concerned, they [asylum seekers] may call in a legal adviser or other counsellor to assist them during the procedure." It is argued that this paragraph is to be welcome as it recognises the need for a representative. However, it is unsatisfactory in that it leaves the right to a representative within the realm of national law. It is argued that this issue should be inserted in EC law pursuant to the guidelines laid down above.

The importance attached to the presence of a representative during interviews should be reflected in the way it is funded. With this in mind, its is argued that representatives should be paid for out of public funds considering the state of destitution of most asylum seekers. To date, asylum seekers, in most Member States, have no choice but to rely on the voluntary sector in order to benefit from the assistance of a representative.

Another essential safeguard lies with the possibility offered to applicants to contact a UNHCR representative.

2.3.3. The opportunity to contact a UNHCR representative

The intervention of UNHCR at this early stage of the asylum proceedings is construed as an additional means to secure that asylum claims are lodged in satisfactory conditions. The right to contact a UNHCR representative is mentioned

in the UNHCR Handbook[42]. The degree of cooperation with UNHCR that a State is willing to accept is a good indicator of its commitment to international refugee law. Restrictions imposed on applicants' right to contact a UNHCR representative raise doubts as to the compliance of the procedure with international standards. It is extremely difficult for UNHCR representatives to identify breaches of international refugee law and induce the necessary changes when access to asylum claimants is confined to strict boundaries. In such circumstances, the relationship established with the authorities is one of confrontation and not one of cooperation.

Contact with a UNHCR representative can be of great assistance to asylum seekers who need further information or have doubts as to the observance of their rights. However, contact does not in itself constitute a sufficient safeguard. Due consideration has to be given to UNHCR representatives' observations. At this stage of the procedure, cooperation with UNHCR should include the right for UNHCR representatives to attend screening interviews.

At first glance, the Resolution on minimum guarantees appears to adopt a rather liberal attitude towards UNHCR representatives' intervention. However, subtle limits are laid down. Paragraph 13 of the Resolution provides for reciprocal communication between asylum seekers and UNHCR representatives at all stages of the procedure. It specifies, *inter alia*, that UNHCR representatives must be informed of the course of the procedure. This duty of information thus covers the submission of the claim itself. However, the Resolution on minimum guarantees does not go as far as expressly opening screening interviews to UNHCR representatives; it is assumed that this possibility is left to the laws of the Member States. Hence, in the absence of an EC legislation allowing UNHCR representatives' presence at screening interviews, practices and thus standards will vary from Member State to Member State. The same statement applies to the possibility offered to asylum seekers to contact other refugee organisations. In that respect, the most important limit brought to the positive effect of the Resolution

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[42] See *supra* n. 1, Paragraph 192(iv).

provision lies with the insertion of a discrete "precaution". Indeed, Paragraph 13 expressly mentions that "[t]he opportunity for an asylum seeker to communicate with the UNHCR and other refugee organizations need not necessarily prevent implementation of a decision[43]." The wording is confusing and ambiguous and is open to multiple interpretations. This clumsy provision seems to reflect the dilemma faced by the drafters of the Resolution. It seems that they felt obliged to involve UNHCR representatives, but remained reluctant to fully cooperate with them. This resulted in the issue being left to national laws and thus to the Member States' discretion. Considering the current restrictive nature of asylum practices in most Member States, the influence of UNHCR representatives is likely to be limited. There is no guarantee that their observations will be taken into consideration at this or at any other stage of the procedure. This is a deficiency that EC law should remedy.

It is argued that for cooperation with UNHCR to be effective, it must take place at two levels: firstly, at a macro level, this involves cooperation between UNHCR, the EC and its Member States towards the adoption and implementation of asylum measures; secondly, at a micro level, this implies developing cooperation with national authorities competent for receiving applications for asylum. These two facets of cooperation with UNHCR are complementary.

The next stage in the proceedings consists in the examination of the asylum claim itself.

3. First instance determination

Determination is a critical step in the proceedings as it determines - subject to appeal - the outcome of the asylum claim. It is therefore vital to secure its consistency with the right to seek refugee status. With this in mind, it is essential to devise a system that minimises the risk of error. This is of course in the interest of

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[43] Emphasis added.

applicants, but also in that of the Member States as efficient first instance determination means less appeal and thus shorter proceedings.

For first instance proceedings to be fair and effective, a number of conditions have to be satisfied. Firstly, decision-makers must be competent. Secondly, all the necessary facilities must be made available to asylum claimants. Finally, the decision-making process itself must be consistent with the right to seek refugee status.

3.1. Competent first instance decision-makers

Assurance that asylum claims are determined in line with international refugee law lies, in the first place, with the existence of competent authorities for determining applications. With this in mind, any EC legislation should set out harmonised requirements to be met by first instance decision-makers.

The notion of competent decision-makers has three implications. Firstly, first instance decision-makers must be fully qualified in the sense that they must have a comprehensive knowledge of asylum law including international refugee law. Secondly, they must be independent in order to allow for an objective and impartial decision-making process. This means that their decisions should not be dictated by Government's positions. Finally, they should be clearly identified and preferably be single central authorities[44]; in that respect Paragraph 192(iii) of the UNHCR Handbook provides that "[t]here should be a clearly identified authority - wherever possible a single central authority- with responsibility for examining requests for refugee status and taking a decision in the first instance."[45] The existence of a central authority would secure the adoption of a more consistent body of decisions

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[44] Guy S. Goodwin-Gill, *The Refugee in International Law* (Clarendon Press, Oxford, 1996) (2nd ed) at p. 327.

[45] See *supra* n. 1.

which could be relied upon by applicants, thus strengthening the principle of legal certainty. Dealing with a central authority would also facilitate compliance with the set standards

3.1.1. Fully qualified decision-makers

First instance decision-makers must have a thorough and updated knowledge of asylum law and refugee matters at large. In this respect, Paragraph 4 of the Resolution on minimum guarantees mentions, *inter alia*, that "[a]sylum applications will be examined by an authority fully qualified in the field of asylum and refugee matters." Moreover, Paragraph 6 specifies that:

"The authorities responsible for the examination of the asylum application must be fully qualified in the field of asylum and refugee matters. To this effect, they must:
- have at their disposal specialized personnel with the necessary knowledge and experience in the field of asylum and refugee matters, who have an understanding of an applicant's particular situation, (...),
- have the right to ask advice, whenever necessary, from experts on particular issues, e.g. a medical issue or an issue of a cultural nature."

With this in mind, training organised within the framework of the Odysseus programme could be of valuable assistance with a view to improving the qualifications of first instance decision-makers. The potential usefulness of the Odysseus programme is examined in relation to the qualifications required from officers with whom asylum claims are lodged; the comments made are considered to be relevant to first instance decision-makers' qualifications[46].

Knowledge of asylum law is understood as comprising international refugee law in addition to EC and national law; this includes both substantive and procedural aspects. This requirement is viewed as a means to strengthen and promote

[46] See this chapter, section 2.1.1.

international standards regarding refugee protection. Moreover, it is argued that expertise in human rights is also necessary for two reasons. Firstly, asylum and refugee matters have a strong human rights content which cannot be ignored. Incidentally, requiring in depth knowledge of human rights law would pre-empt debates on subsidiary protection. The concept of subsidiary protection relates to other forms of protection than the one offered by refugee status under the 1951 Convention; one may mention the protection granted under the provisions of the ECHR. This issue, which is being examined by the Council and the European Parliament, is raised by the Commission in its working document.[47] The idea is that asylum procedures could cover not only protection under the 1951 Convention, but also protection inferred from other international instruments. In the Commission's opinion, a single procedure would have the advantage of preventing multiple proceedings; this view is supported by organisations involved with asylum seekers[48]. Moreover, Article 63(2)(a) of the TEC as amended by the Treaty of Amsterdam provides for the adoption of minimum standards for complementary/subsidiary protection for persons in need of international protection. It is argued that the concept of subsidiary protection could have a positive impact on the level of protection conferred upon those in need; however, it should not be construed as a substitute for protection under the 1951 Convention and therefore be potentially detrimental to refugee protection. With this in mind, extreme care should be paid to the terminology being used. In that respect, it would be wise to abandon the term subsidiary and refer exclusively to the notion of complementary protection. Protection under the 1951 Convention, in other words refugee status, must be granted where individuals fall within the scope of Article 1(A)(2) of the Convention. The Commission in its working document does not specify which are these other instruments. It is argued that the primary instrument to be taken into consideration is the ECHR as it is binding upon all the Member States. Article 3 of

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[47] See *supra* n. 4, Paragraph 11.

[48] JUSTICE, Immigration Law Practitioners' Association (ILPA) and Asylum Rights Campaign (ARC), *Providing protection, Towards Fair and Effective Asylum Procedures*, London, July 1997, at p. 52.

the ECHR is considered of particular relevance with respect to those in need of international protection as it prohibits torture, inhuman treatment, degrading treatment or punishment[49]; this prohibition is reinforced by the fact that no derogation to Article 3 pursuant to Article 15(1)[50] is permitted (Article 15 (2)[51]. Moreover, it is important to stress that protection based upon the ECHR benefits any individual who finds himself or herself in the territory of a Convention signatory regardless of his or her nationality[52]. However, as acknowledged by the Commission in its working document[53], the difficulties inherent in the existence of a single procedure should not be disregarded.

3.1.2. Independent decision-makers

The notion of independence is construed as a means to secure objective and impartial decisions. It is argued that these authorities must be independent from the

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[49] In *Chahal*, the European Court of Human Rights held that those facing a violation of the prohibition laid down in Article 3 of the ECHR required independent judicial scrutiny of this risk (*Chahal v. United Kingdom*, European Court of Human Rights, judgment of 25 October 1996, Series A No. 22).

[50] Article 15(1) of the ECHR reads:
"In time of war or other public emergency threatening the life of the nation any High Contracting party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

[51] Article 15(2) reads:
"No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (Paragraph 1), and 7 shall be made under this provision."

[52] Article 1 of the ECHR reads:
"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention."

[53] See *supra* n. 4, Paragraph 11.

Member States' governments. Cases must be decided by applying asylum law to the facts and must not be dictated by governmental positions on asylum matters.

To date, there are two main models of primary decision-making process in the Member States. The first model consists in conferring decision-making powers upon bodies which are independent from the government whereas, in the second model, decisions are made within government departments[54]. The UK system, for instance, falls within the second category; decisions on asylum claims are made by officials in the Asylum Division of the Immigration Directorate of the Home Office. In France, on the other hand, applications for asylum are decided by an independent body established by statute, namely the *Office Français de Protection des Réfugiés et Apatrides* (OFPRA)[55]. The first model is considered more likely to secure independence. However, this statement is not always verified in practice. For instance, OFPRA's interpretations of the criteria laid down in Article 1 of the 1951 Convention are not more liberal than those of the UK Asylum Division and very much reflect the positions expressed by the French Government. For example, the OFPRA is still reluctant to recognise persecution perpetrated by non-governmental entities[56]. This demonstrates that the existence of a body independent from the government by its status does not in itself guarantee a decision-making process independent from government's influences and consistent with international refugee law.

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[54] This, for instance, the case in Germany and The Netherlands.

[55] The OFPRA was established by the *Loi N°52-893* of 25 July 1952 *portant création d'un Office Français de Protection des Réfugiés et Apatrides* amended by the *Loi N°93-1027* of 24 August 1993, the *Loi N°93-1417* of 30 December 1993 and the *Loi N° 98-349* of 11 May 1998 *relative à l'entrée et au séjour des étrangers en France et au droit d'asile, Journal Officiel de la République Française* of 12 May 1998.

[56] See chapter III on the need for an up to date interpretation of the term "refugee".

It is argued that the objective of EC law in that respect is not so much to define the exact nature of the body responsible for initially deciding asylum claims, but to ensure that its members are independent and have the required qualifications.

3.1.3. Clearly identified decision-makers

Besides being independent and having a fully qualified personnel, first instance decision-makers must be clearly identified. This is indispensable to the transparency and effectiveness of the procedure. It is argued that this could be better achieved by granting competence to bodies which would exclusively deal with asylum cases. With this in mind, it is argued that no distinction should be made between substantive claims and manifestly unfounded applications as well as those lodged at the border. A service specialised in dealing with the former type of claims could be created within this single body, but should not result in a breaking up of responsibility. There are several advantages to a single authority. Firstly, it would facilitate consistency within the decision-making process. If more than one body is responsible for examining applications, the risk of irreconcilable decisions and interpretations is much higher. Moreover, consistency would render decisions on asylum claims more predictable in accordance with the principle of legal certainty. Consistency would also allow for the development of a "case-law" that would be of valuable help in the preparation of asylum cases. Any EC legislation should stress the need for consistency in the initial decision-making process. Thirdly, it is easier to monitor the activities of a single body. In other words, infringements of international refugee law would be more likely to be identified and hopefully rectified. Finally, the existence of a unique authority would render proceedings more accessible to asylum seekers in reducing structural complexity, at least at this stage of the proceedings.

The Member States' authorities accountable for determining asylum claims must also provide applicants with the facilities necessary to the fairness and effectiveness of the first instance decision-making process.

3.2. Availability of the necessary facilities

As in the case of the submission of asylum claims, the appropriateness of the initial decision-making process is also contingent on the availability of certain facilities. However, these facilities must be distinguished in the sense that, while the services of an independent interpreter and the need to contact a UNHCR representative where necessary remain, asylum seekers' right to a representative - it is argued - gives way to the right to a lawyer; the emphasis is, therefore, on the latter.

3.2.1. Access to a lawyer: the right to informed legal advice

The fairness and effectiveness of the decision-making process suppose asylum seekers having access to informed advice. In order to maintain quality standards, such advice should ideally be provided by lawyers specialised in asylum and immigration issues, although advice could also be given to a certain extent by non-legally qualified individuals. However, it is argued that essentially or purely legal issues should be dealt with or, at least, checked by members of the legal profession. While the role of legally and non-legally qualified advisers should be complementary, primary importance should be given to the former.

Asylum claimants need the lawyer's knowledge and experience of asylum law. Considering the significance of lawyers' role in asylum proceedings, it is important to control their professionalism. Asylum seekers, who are often particularly vulnerable clients, have in some instances been the victims of unscrupulous lawyers. In February 1999, in the UK, fifty solicitors' firms dealing with asylum claims were being investigated by the Legal Aid Board. The investigations were prompted by evidence of catalogues of errors committed by lawyers detrimental to asylum seekers that may have resulted in some of them being returned to their country of origin[57]. In its Immigration and Asylum White Paper called "Fairer, Faster and Firmer: A Modern Approach to immigration and Asylum"[58], the UK Government

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[57] Channel 4 News, 15 February 1999.

stressed that it was committed to control unscrupulous immigration advisers[59]. However, while it expressed its intention to introduce statutory regulations requiring non-legally qualified advisers to register with a regulatory body, the Government appeared to be much more hesitant with respect to lawyers[60]. Indeed, Paragraph 7.22 of the White Paper reads that "(...) [t]he Government is considering the extent to which members of the legal profession should be subject to regulation in respect of advice of this kind and will announce its intentions as soon as possible (...)". However, the Immigration and Asylum Act 1999, in its part V on immigration advisers and immigration service providers, suggest that advisers need to be legally qualified although it does not expressly say so. Section 84(1) prohibits non-qualified persons from providing immigration advice or immigration services; section 84(2) defines the notion of "qualified person"[61]. Moreover, the new Act provides for an

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[58] *Fairer, Faster and Firmer: A Modern Approach to Immigration and Asylum*, presented to Parliament by The Secretary of State for the Home Department by Command of Her Majesty, Stationary Office, 27 July 1998, Cm 4018.

[59] *Ibid.*, Paragraphs. 7.20 and 7.21.

[60] *Ibid.*, Paragraph. 7.22.

[61] Section 84(2) of the 1999 Act reads:

"A person is a qualified person if-

(a) he is registered with the Commissioner or is employed by, or works under the supervision of, such a person;

(b) he is a member or employee of a body which is a registered person, or works under the supervision of such a member or employee;

(c) he is authorised by a designated professional body to practise as a member of the profession whose members are regulated by that body, or works under the supervision of such a person;

(d) he is registered with, or authorised by, a person in another EEA State responsible for regulating the provision in that EEA State of advice or services corresponding to immigration advice or immigration services or would be required to be so registered or authorised were he not exempt from such a requirement;

(e) he is authorised by a body regulating the legal profession, or any branch of it, in another EEA State to practise as a member of that profession or branch; or

Immigration Services Commissioner, referred to as the Commissioner (section 83(1)). The Commissioner's general duty is "(...) to promote good practice by those who provide immigration advice or immigration services" (section 83(2))[62]. Furthermore, the organisations regarded as designated professional bodies pursuant to the 1999 Act are exclusively bodies closely involved with the legal profession[63]. These provisions of the 1999 Act can be interpreted as reflecting and strengthening the importance of informed legal advice for asylum claimants. It is argued that lawyers specialised in asylum and immigration law are the most qualified to provide advice and services. With this in mind, EC law should acknowledge asylum seekers' right to informed legal advice and thus guarantee its provision. Moreover, to further secure this right, EC law should impose on the Member States the obligation to regulate the activities of immigration advisers, including lawyers.

In other words, whatever the source, advice must be informed. Quality raises the question of the qualifications of those providing such advice. It is argued that competence in asylum law constitutes an essential requirement and cannot be overlooked. Ideally advice to asylum seekers should emanate from lawyers having expertise in asylum law. However, where advice is not provided by lawyers,

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(f) he is employed by a person who falls within Paragraph (d) or (e) or works under the supervision of such a person or of an employee of such a person."

[62] Section 83(2) of the 1999 Act provides that the "[t]he Commissioner is to be appointed by the Secretary of State after consulting the Lord Chancellor and the Scottish Ministers."

[63] Section 86(1) of the 1999 Act reads:

"Designated professional body" means_

(a) The Law Society;

(b) The Law Society of Scotland;

(c) The Law Society of Northern Ireland;

(d) The Institute of Legal Executives;

(e) The General Council of the Bar;

(f) The Faculty of Advocates; or

(g) The General Council of the Bar of Northern Ireland."

equivalent quality should nonetheless be secured. To an extent, expertise in asylum law should prevail over requirements regarding legal qualifications. In other words, given the choice between a lawyer with no expertise in asylum law and a consultant adequately specialised in that area, the latter is considered to constitute a more suitable source of advice. The fact that legal advice is being provided by qualified lawyers does not in itself guarantee high quality; this stresses the importance of a tight scrutiny of firms advising asylum claimants.

The setting up of a system of control is not intended to reflect general defiance towards asylum and immigration lawyers, but to sanction the few whose actions are detrimental to asylum seekers as well as to the profession as a whole. The Member States could be given some discretion in choosing the means of control. This control implies that the Member States must secure adequate funding. For instance, the provisions of the UK Government's white paper stated that "(...) [i]t is envisaged that any regulatory scheme will be self-financing with costs being met from registration fee income."[64] Such a system is acceptable provided that it generates sufficient funding; if it fails to do so, governments should intervene and provide the necessary funding. In any case, resort to non-public funds should not reflect the Member States' reluctance to secure adequate control of asylum and immigration advisers.

Access to informed legal advice does not solely raise quality issues; the advice in question must also satisfy quantity standards. It is argued that quality cannot be achieved without simultaneously addressing the issue of quantity. Meeting acceptable standards with regard to quantity suppose that quality advice is offered to those in need: any discrimination in the provision of advice would be inconsistent with the requirements of international refugee law. The problem is that someone has to "pay the bill" generated by the provision of advice. The Member States have not gone as far as expressly denying asylum seekers' the right to informed legal advice; however, what most of them have done is to gradually withdraw public funding by restricting access to legal aid. Considering the financial hardship faced by most

[64] See *supra* n. 58.

asylum seekers, limiting access to legal aid generally amounts to deprive them of their right to informed advice. With this in mind, it is argued that it is hypocritical of the Member States to stress their commitment to refugee protection while cutting down access to legal aid and thus undermining the protection in question. Hence, it is crucial to secure that appropriate sources of funding exist in order to adequately satisfy the demand for legal aid; it is argued that this responsibility should be endorsed by the Member States.

In determining the Member States' obligations in this respect, EC law should take into consideration the pressure faced by the Member States in rationalising and controlling the overall level of public funding allocated to the provision of informed legal advice. However, this legitimate goal should not be used as a pretext for cutting down asylum claimants' right to advice. The view taken is that EC law should define the nature of the Member States' obligations with regard to legal advice and corresponding funding without however imposing a specific model with respect to the latter. This would require drastic reforms in many Member States and would probably delay implementation; the Member States would "simply" be required to introduce the changes and amendments necessary to meet EC law standards. When regulating and deciding on the grant of legal aid, the Member States should overcome the fact that they provide funding while being a party in asylum cases. Moreover, although financial responsibility should be endorsed by the Member States, it is argued that EC law should provide for support mechanisms pursuant to the principle of solidarity[65] where Member States are facing difficulties in fulfilling their obligations

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Nothing in the 1999 Act appears to contradict the Government's white paper on that point (see schedules 5 and 6 to the Act).

[65] See, for instance, the Commission's Working document, *supra* n. 4, Paragraph 8.

3.2.2. The services of an independent competent interpreter

Fairness and effectiveness require compensation for any language problem that may jeopardise asylum applicants' rights. Therefore, the services of an independent interpreter must be made available throughout the procedure whenever necessary.

In that respect, the wording of the Resolution on minimum guarantees is a source of disquiet as it opens the path to national restrictive interpretations of the right to an interpreter. Paragraph 13 provides, *inter alia*, that "they [asylum seekers] must be given the services of an interpreter, whenever, necessary, for submitting their case to the authorities concerned (...)" These words should not be construed as excluding the right to an interpreter at later stages of the procedure- i.e. once the claim has been lodged - leaving it to the discretion of national provisions. Hence, the view taken is that asylum seekers' right to an independent interpreter at every stage of the proceedings should be expressly inserted in EC law[66].

3.2.3. The opportunity to contact a UNHCR representative

The possibility to contact a UNHCR representative is considered a means to monitor the compliance of asylum procedures with international standards, but can also be a source of valuable assistance and expertise provided that the Member States and their authorities are willing to cooperate.

It is argued that UNHCR representatives' involvement could bring a much needed change to the current climate. Practices in many Member States, often prompted by the recent developments in the EU asylum policy, have exacerbated the antagonistic nature of the positions of those involved with asylum seekers. Decision-makers' views increasingly appear irreconcilable with those expressed by asylum claimants

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[66] It is understood that independent interpreters must satisfy the same standards irrespective of the procedural stage; the reader is therefore referred to section 2.3.1 of this chapter for a description of these standards.

and their representatives. Dialogue has given way to systematic opposition. The concern does not so much lie with the existence of divergent opinions, but in the absence of adequate fora where productive exchanges can take place. At national level, asylum issues are generally highly sensitive and the views of an often mis-informed public opinion play a significant role. This is, for instance, the case in the UK where tabloids have long taken the habit of alarming public opinion by twisting public perceptions of asylum seekers and refugees and thus fostering "cruel myths"[67]. This kind of reports constitute a favourable ground for the introduction of restrictive asylum legislation. In such a context, the real issue, namely the need for protection, does not seem to occupy the place it deserves in parliamentary debates. In the UK, the disquiet created by the adoption of the 1999 Act was mainly expressed outside Parliament. The opposition to the new Act took, *inter alia*, the form of demonstrations by organisations involved with asylum seekers and human rights. However, one may note that the Government's drastic proposals to curtail support for asylum seekers faced Labour back benchers' strong opposition. However, no proper dialogue seems to have taken place between the Government and the organisations concerned with asylum seekers' rights. This confrontational atmosphere is felt in the decision-making process itself.

The involvement of UNHCR in the decision-making process through its representatives would be a means to reconcile the positions adopted by decision-makers and those representing asylum applicants. UNHCR representatives' intervention could infer positive changes in the "decision-making culture" which very much appears as a "battleground"[68]. With the "communautarisation" of asylum

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[67] Nick Hardwick, "Cruel Myths", The Guardian, Society, 17 February 1999, at p. 6-7. The article mentions some tabloid headlines on asylum seekers and refugees covering many decades:
- "We Are Being Swamped by Crimewaves of Migrants", The Sun, 1998;
- "So-called Refugees - Disgraceful Scenes", Daily Mail, 1900;
- "Refugee Flood Looks to Set New High", Daily Mail, 1998;
- "German Jews Pouring into This Country", Daily Mail, 1938.

[68] See *supra* n. 48, at p. 12.

matters, it is argued that UNHCR should be involved in the decision-making process[69].

As stressed in JUSTICE's asylum research project, "[f]ailure to engage with non-governmental agencies and individuals weakens the system enormously. First, it reinforces the adversarial model: contact occurs only in the context of contesting a case, or criticising proposals or laws. Second, it fails to make use of a valuable source of expertise (..)"[70].

Another element central to the existence of suitable procedures relates to the adoption of the first instance decision.

3.3. The adoption of first instance decisions

The adoption of first instance decisions comprehends two crucial steps: the first one relates to the gathering of information and the second one to its examination in view of the adoption of a decision. It is vital that the process leading to decisions on asylum claims is consistent with the right to seek refugee status.

3.3.1. The gathering of information

The information collated in order to decide an asylum claim has a twofold nature: it consists of information provided by the applicant himself or herself as well as information on his or her country of origin. These two types of information must supplement each other in order to allow a comprehensive assessment.

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[69] See chapter II on the EC: a more suitable framework.

[70] On this issue, see, *inter alia*, *supra* n. 48, at p. 12.

(i) Information provided by asylum seekers

The information provided by asylum seekers plays a determining role in the assessment of their claims. This information must concern the reasons why they are applying for refugee status and asylum seekers have a duty to tell the truth[71]. As noted in the UNHCR Handbook, "[t]he relevant facts of the individual case will have to be furnished in the first place by the applicant. It will then be up to the person charged with determining his [or her status] to assess the validity of any evidence and the credibility of the applicant's statements" (Paragraph 195). Applicants have a duty to assist the examiner in establishing the full facts of their case[72].

Although the information provided by asylum claimants are essential and constitute the very basis for the examination of their application, it is important that the information in question is supplemented by information on their country of origin. This information is designed to help examiners having a better understanding of asylum seekers' personal circumstances.

(ii) Country information

Information on asylum seekers' countries of origin is designed to supplement the information that they have provided on their particular case.

Information on countries of origin (and third countries in general) must not be confined to the present situation or recent past as such limitations could jeopardise the assessment and fail to provide grounds for reasonable predictions. One must bear in mind that determining the risk of persecution also involves taking into

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[71] See *supra* n. 1, Paragraph 205(i).

[72] *Ibid.*, Paragraph 205(i).

consideration future risks. It is not sufficient to say that there is currently no risk of persecution in the country of origin; safety must be assessed in the longer term. In other words, the safety of countries of origin must present a strong degree of permanence in the light of the asylum seeker's personal circumstances. This means that safety must present a certain degree of stability and any foreseeable risk of dramatic changes must be taken into account. As already observed, information on countries of origin must be as accurate and comprehensive as possible although it is accepted that a "full picture" cannot be realistically expected as it would require the availability of perfectly up to date and comprehensive information; information on certain countries may be scarce.

Various sources of information are available to national decision-makers who must determine their respective reliability. Information, for instance, may emanate from governmental departments of the Member States or third countries[73] as well as from NGOs involved with asylum seekers and human rights at large[74]. Of particular assistance is UNHCR Centre for Documentation on Refugees (CDR). The availability of diverse sources of information has both advantages and disadvantages. They may complement each other allowing a more comprehensive and accurate understanding of the situation in the country concerned. This diversity may also be a means of evaluating their veracity; corroboration may be a strong indicator of exactness. With this in mind, one can refer to Paragraph 6 of the Resolution on minimum guarantees which provides, *inter alia*, that the authorities responsible for examining asylum claims must "(...) have access to precise and up to date information from various sources, including information from the UNHCR, concerning the situation prevailing in the countries of origin of asylum seekers and in transit countries"[75]. However, diversity also renders accuracy more difficult to determine and decision-makers should, therefore, be helped in that respect. It is

[73] In particular the United States and Canada.

[74] For instance, Amnesty international.

[75] Information on transit countries is used where the asylum seeker's removal to a third country is contemplated.

argued that they should not be left with the task of having to assess the veracity of the information available to them as there is a high risk of divergences across the EU and within the Member States.

Hence, the setting up of an information centre common to the Member States is highly recommended. This system could centralise data on third countries and be a forum for exchanges of information. Accuracy controls could be exercised within this system facilitating access to relevant information. Moreover, the time formerly spent by national authorities on the collection of relevant information could be invested in the decision-making process itself to the benefit of all parties involved.

However, since no system is infallible, the accurate and comprehensive nature of the information so provided must be open to challenge by the Member States as well as by asylum applicants in the course of asylum proceedings. Moreover, controls of this information system could be inferred from cooperation with other centres of information and, in particular, the CDR.

The gravity attached to first instance decisions on asylum claims means that information on countries of origin must satisfy certain requirements. This means that information must meet the same standards regardless of the circumstances; no differentiation must take place between substantive claims and those declared manifestly unfounded or lodged at the border.

Reliable information on asylum seekers countries of origin is indispensable to the understanding of their personal circumstances and is therefore crucial to the decision-making process. However, as already observed, this background information is not perfect and cannot, in any manner, be considered a substitute for the information provided by claimants.

The gathering of information constitutes the first step in the decision-making process; the second one concerns the examination of the claim itself based on the information provided.

3.3.2. Examination of the information

The second step in the first instance decision-making process consists in assessing whether, considering the gathered information, asylum claims fall within the scope of Article 1(A)(2) of the 1951 Convention. In other words, decision-makers must determine whether applicants have a well-founded fear of persecution in the sense of the Convention. To this end, asylum claimants' narratives as well as the background information on their country of origin must be examined in the light of the criteria laid down in Article 1(A)(2).

Determining whether individuals are entitled to refugee status under the 1951 Convention raises the issue of the definition of the term refugee. This definition is laid down in Article 1(A)(2) of the 1951 Convention. However, the personal scope of the convention definition has been the object of numerous debates. It is argued that the Convention definition as interpreted by most Member States no longer corresponds to the needs of today's refugee situation[76]. With this in mind, the incorporation in EC law of amendments to the Convention definition corresponding to more a more up to date interpretation is recommended[77].

Determining whether an individual has a well-founded fear of persecution raises a number of issues, i.e. the exact scope of this requirement as well as questions relating to the burden and standard of proof.

(i) A well-founded fear of persecution

Candidates for refugee status must demonstrate that they have a well-founded fear of persecution based on at least one of the five criteria laid down in Article 1(A)(2)

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[76] See chapter III on the need for an up to date interpretation of the term "refugee".

[77] *Ibid.*

of the 1951 Convention; these criteria are race, religion, nationality, membership of a particular social group or political opinion[78]. This requirement is reiterated in the Joint Position on an harmonised definition of the term refugee[79].

The purpose of refugee status as laid down in the 1951 Convention is to protect those falling within its scope against persecution in their country of origin. What needs to be established is the risk of persecution in the future, thus not a past or present risk of persecution. The objective is to grant effective protection to those in need; that is why the protection conferred through refugee status pre-empts persecution as much as possible. In that respect, Paragraph 3 of the Joint Position may appear to state the obvious in so far as it provides that "[t]he fact that an individual, prior to his departure from his country of origin, was not subject to persecution or directly threatened with persecution does not per se mean that he cannot in asylum proceedings claim a well-founded fear of persecution." Requiring persecution as a pre-requirement to eligibility to refugee status would seriously undermine the very essence of the notion of protection. In assessing the credibility of asylum claims, evidence of past persecution will have a considerable weight in the outcome of the claims; however, it cannot be considered a prerequisite. Where a person claiming refugee status has already been a victim of persecution, asylum proceedings must be construed and applied as a means to prevent any further ill-treatment. However, for the risk of persecution to be taken into consideration, it must present a personal character.

The risk of persecution alleged by applicants must also be personal in the sense that asylum seekers must be identifiable targets. Thus, they must establish that they are likely to be exposed to persecution if returned to their country of origin. Hence,

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[78] *Ibid.*

[79] Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term "refugee" in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugee, OJ L 63/2, 13/03/1996, paragraph 15.

they cannot base their applications for refugee status on the existence of a general risk of persecution. The past, present and foreseen political climate in the country of origin is taken into consideration and is indispensable to an informed decision-making process[80]. However, it does not in itself suffice to found asylum claims within the meaning of Article 1(A)(2) of the 1951 Convention. This requirement of a personal risk has been interpreted by most Member States in an excessively restrictive manner. For instance, it has been used as a tool to keep gender-based persecution outside the scope of the 1951 Convention[81].

This requirement is also part of the distinction existing between individuals seeking refugee status as defined in the 1951 Convention and those referred to as displaced people or individuals who are caught in events generating mass flows of people in need of international protection. This was the case of those fleeing Bosnia in the early 90s and more recently Kosovo[82]. As explained in the introduction, the issues specific to mass influx of refugees are not addressed[83].

It is argued that, for the purpose of granting refugee status, the existence of a personal risk of persecution is a legitimate requirement and can, therefore, be mentioned in an EC legislation on asylum. However, this requirement should not be misused in order restrict the personal scope of the definition of the term refugee and limit its practical application. A valuable safeguard against restrictive interpretations of the term refugee lies with the adoption and implementation of a definition

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[80] See this chapter, section 3.3.1(ii).

[81] On gender-based persecution, see chapter III on the need for an up to date interpretation of the term "refugee".

[82] In mid-April 1999, UNHCR estimated that less than a quarter of the Kosovan ethnic Albanian population was left in Kosovo, Radio 4 News, 15 April 1999.

[83] See the introduction, chapter I.

consistent with international standards. This once again stresses the importance of a global approach to asylum matters.

(ii) Burden and standard of proof

The issues regarding the burden and standard of proof cannot be dissociated in the sense that the principle governing the former dictates the rules applying to the latter.

The rule is that the burden of proof is on asylum claimants; this rule is formally acknowledged in the UNHCR Handbook[84]. It is for applicants to establish that they have a well-founded fear of persecution within the meaning Article 1(A)(2) of the 1951 Convention[85]. The difficulties inherent in this task have been exacerbated by restrictive interpretations of the Convention definition of the term "refugee" reflecting the development of hostile policies.

Although the principle relating to the burden of proof is not in itself questioned[86], its implementation - it is argued - should take into consideration the particular

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[84] Paragraph 196 of the UNHCR Handbook (see *supra* n. 1) reads, *inter alia*, that "[i]t is a general principle that the burden of proof lies on the person submitting a claim."

[85] As already mentioned, a well-founded fear of persecution must be based on, at least, one of the Convention criteria; this is expressly mentioned in the Joint Position on the harmonized definition of the term refugee (see *supra* n. 79).

[86] However, the principle according to which the burden of proof is on the applicant should not be applied in an absolute manner. This principle must lighten in the case of mentally disturbed asylum claimants. In such cases, information may have to emanate from other individuals, for example friends or relatives. Moreover, if the mentally disturbed asylum seeker is part of a group, his or her case may be assessed on the basis of that of the members of the group. If they do qualify for refugee status, he or she will be eligible in the same manner (see *supra* n. 1, Paragraph 210).

Flexibility should also be introduced in relation to unaccompanied minors. They have not reach the maturity necessary to establish a fear of persecution in the same way as adults. This means, for

vulnerability of asylum seekers. This has usually been acknowledged by national courts which have held that there should be a low threshold of proof. In the UK leading case in *Sivakumaram,* Lord Keith of Kinkel suggested that the standard of proof should be one of "reasonable degree of likelihood"[87]. Pursuant to the Joint Position on the definition of the term refugee, once applicants' credibility has been sufficiently established, no further confirmation of the facts should be required from them and they should be given the benefit of the doubt[88]. However, the positive impact of this statement is undermined by its wording. Indeed, paragraph 3 of the Joint Position does not give any guideline regarding the interpretation of the expression "sufficiently established credibility". Mention of what may constitute evidence of a risk of persecution remains too vague to amount to guidelines common to the Member States. Moreover, paragraph 3 provides that, where there are "good reasons", detailed confirmation of the alleged acts may be requested; this may well facilitate the application of excessively demanding standards of proof.

Asylum claimants are confronted with various hurdles where trying to prove their case. Firstly, they are faced with practical difficulties often inherent in their situation of asylum seekers; these difficulties mainly regard the provision of evidence. In many instances, asylum claimants are not in a position to provide concrete elements of proof in support of their claim such as written documents, nor can they resort to witnesses. Considering the difficulties faced by asylum claimants in providing evidence, "(...) while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts [must be] shared by the applicant and the examiner (...)"[89]. UNHCR recommends that the requirement of evidence should

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instance, that the circumstances of the parents and other relatives, including their situation in the unaccompanied minor's country of origin, must be taken into consideration. Therefore, a liberal application of the benefit of the doubt may be required in cases involving unaccompanied minors (see UNHCR Handbook, *supra* n. 1, Paragraphs 213-219).

[87] *R v Secretary of State for the Home Department, ex parte Sivakumaram* [1988] AC 958.

[88] See *supra* n. 79, Paragraph 3.

not be applied too strictly[90]. For these reasons, it is crucial to avoid formalism with regard to evidence requirements. In that respect, one can refer to paragraph 5 *in fine* of the Resolution on minimum guarantees which reads that "[r]ecognition of refugee status is not dependent on the production of any particular formal evidence." However, the positive impact of this provision is undermined by the fact that it is laid down in a soft law instrument. Secondly, as already mentioned, asylum seekers are the victims of restrictive concepts and interpretations that affect their chances to be considered refugees within the meaning of the 1951 Convention[91]. Finally, applicants' personal circumstances make any account of their reasons for fleeing their country of origin and fearing persecution if returned an extremely painful experience; this may generate hesitations and inconsistencies in the claimants' narratives that may be detrimental to their credibility. It is argued that the standard of proof required from asylum applicants should take into consideration these difficulties inherent in their situation. Asylum seekers cannot be expected to establish with certainty that they will be exposed to persecution if returned to their country of origin. No Member State has raised its standard of proof to such an inaccessible and thus unacceptable level; but practices based on restrictive laws, interpretations and attitudes may result in asylum claimants facing excessively demanding standards of proof.

With this in mind, the notion of "reasonable degree of likelihood" appears to constitute an acceptable standard of proof. However, its consistency with international refugee law is contingent on the context within which this standard of proof is construed and applied. An essential pre-requirement to the adoption and implementation of a satisfactory standard of proof consists in the existence of a legislation meeting international requirements. This issue is closely connected to issues relating to the scope and interpretation of the concept of refugee. Restrictive

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[89] See *supra* n. 1, Paragraph 196.

[90] *Ibid.*, Paragraph 197.

[91] See chapter III on the need for an up to date interpretation of the term "refugee".

and outdated interpretations prevent acceptable rules on standard of proof from producing their intended effect. This is another illustration of the closely interconnected nature of the different elements of asylum law and policies and the need for a global approach. It is argued that applicants should also be given the benefit of the doubt as they are not in a position to prove every part of their story. If such a requirement were imposed on asylum seekers, most of them would be unsuccessful[92]. However, as stressed by UNHCR, "[t]he benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter the generally known facts"[93].

Bearing these factors in mind, it is argued that EC law should tackle the issue of standard of proof. In that respect, the concept of "reasonable degree of likelihood" is considered a suitable standard. To date, the standard of proof applied in asylum cases varies among the Member States. For instance, in the UK, the standard of proof is that of real likelihood. That test was established in *R v. Secretary of State for the Home Department, ex parte Sivakumaran*[94]. The House of Lords approved the words of Lord Diplock regarding the standard of proof as expressed in *Fernandez v. Government of Singapore*[95]. In that case, Lord Diplock suggested that the requisite degree of likelihood could be indicated by expressions such as "a reasonable chance", "substantial grounds for thinking", or "serious possibility"[96]. In

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[92] This is formally acknowledged in the UNHCR Handbook, see *supra* n. 1, Paragraph 203.

[93] *Ibid.*, Paragraph 204.

[94] See *supra* n. 87.

[95] *Fernandez v. Government of Singapore* [1971] 2 ALL ER 691.

[96] See Ian A. Macdonald and Nicholas J. Blake, *Macdonald's Immigration Law and Practice* (Butterworths, London/Dublin/Edinburgh, 1995) (4th ed) at p. 381.

France, the case-law does not allow the identification of a test systematically applicable to asylum cases. Competent bodies must be satisfied that the evidence provided is reliable; the evidence must have "*valeur probante*"[97]. The applicant's arguments must also be assessed with a view to determining whether the alleged facts can justify a well-founded fear of persecution[98]. The fact that standards of proof vary in the EC means that asylum claims are likely to be assessed differently in the Member States. These divergences are intensified by disparities existing in the interpretation of the term refugee. This is acknowledged in the Commission's Working document where this question is presented as "(...)one of the most important procedural issues"[99]. In the Commission's opinion, the adoption of a common standard of proof is indispensable to the completion of one of the main objectives of the Treaty of Amsterdam, namely equivalent treatment of asylum claims throughout the EC. The Commission also expresses concern regarding the effects of these disparities on the distribution of asylum claims among the Member States. In the Commission's view, they entail the risk that a greater proportion of asylum seekers will seek refugee status in the Member States having the less demanding standards of proof; this relates to a certain extent to the notion of "burden sharing" now referred as "solidarity"[100]. The Commission's conclusions can be pushed further by raising the issue of "*de facto* harmonisation". The increasing restrictive nature of the legislation introduced in some Member States has inferred similar developments in the Member States which traditionally had liberal asylum laws. This resulted in certain areas of asylum law being *de facto* harmonised, but at the lowest level. A comprehensive EC legislation on asylum is seen as the most

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[97] CRR, 15 June 1982, *Nokabo*, referred to in Tiberghien, *La Protection des Réfugiés en France* (Collection Droit Public Positif, Presses Universitaires d'Aix Marseilles, Economica, Paris, 1988) (2nd ed) at p. 244.

[98] Conseil d'Etat, 26 February 1986, *Sita*, referred to in *ibid.*, at p. 435.

[99] See *supra* n. 4, Paragraph 20.

[100] See, for instance, *ibid*, Paragraph 8.

effective way to secure that harmonisation takes place at a level consistent with international refugee law. For these reasons, a common standard of proof is considered an indispensable element of this legislation. Mention of the need for a common standard of proof in the Commission's Working document is a step in the right direction; however, the Commission remained silent on the substance of this standard and simply noted that "(...) the standard of proof [was] a difficult issue related to Member States' individual legal systems, and [that] it would be necessary to proceed with caution in this area."[101] It is hoped that this will not have a restrictive impact on the content of the contemplated measures. It is argued that the standard of proof to be applied across the Member States should reflect asylum seekers' circumstances. In other words, the standard in question must take on board the fact that asylum seekers may face serious difficulties in gathering evidence. To that end, one should turn to the UNHCR Guidelines for assistance. Indeed, Paragraph 42 provides that "(...) [i]n general, the applicant's fear should be considered well-founded if he [or she] can establish, to a reasonable degree, that his [or her] continued stay in his [or her] country of origin has become intolerable to him [or her] for the reasons stated in the definition, or would for the same reasons be intolerable if he [or she] returned there."

A satisfactory first instance decision-making process also requires other requirements to be satisfied.

3.4. Additional requirements

The adequacy of first instance determination is also contingent on the observance of other requirements. Asylum claimants should systematically be entitled to a decision in writing and first instance proceedings must have suspensive effect.

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[101] *Ibid.*

3.4.1. Right to a decision in writing

It is argued that all asylum applicants should be entitled to a written decision. This right is understood as being absolute and any alteration to this right is therefore considered unacceptable. Moreover, decisions on asylum claims should precisely mention the reasons for granting or refusing refugee status.

The absolute character of the right to a decision in writing prohibits exceptions. Hence, the fact that a claim has been held manifestly unfounded or lodged at the border does not justify the application of less demanding rules. In that respect, the relevant provisions of the Resolution on minimum guarantees are detrimental to the effectiveness and fairness of the proceedings. Indeed, paragraph 25 of the Resolution introduced a significant derogation to the already restricted right to a decision in writing laid down in paragraph 15. Paragraph 25 provides that, where claims are lodged at the border, negative decisions and the reasons for these refusals as well as any possibility to appeal may be only communicated to applicants orally; decisions will only be confirmed in writing upon request. The Resolution fails to furnish any justification for such a derogation. It seems to have been prompted by the nature of the treatment reserved to applications submitted at the border in EU and many national measures. However, it is argued that an EC legislation on asylum - as an instrument designed to rectify inconsistencies with international refugee law - should not permit this kind of derogation. This demanding approach is founded on the potential importance attached to the possession of a decision in writing, particularly in relation to appeals. The right to a decision in writing should also exist irrespective of the outcome of the application for asylum. In other words, both positive and negative decisions should be confirmed in writing.

For the right to a decision in writing to amount to an adequate guarantee, the reasons for the decision must be clearly and precisely stated. This is essential to the existence of satisfactory proceedings. In particular, unsuccessful asylum seekers need to know why their application has been rejected if they are to lodge an effective appeal. For negative decisions to be contested in a constructive manner,

appellants must have knowledge of the reasons behind the outcome of their claim. Mention of these reasons is indispensable in determining the weaknesses of claimants' applications in the decision makers' opinion with regard to their credibility and the weight attached to the information relating to their country of origin. Decisions should expressly mention the availability of a right of appeal. This is designed to secure that applicants are aware of their right to lodge an appeal; this is particularly important where the competent authorities have failed to give claimants comprehensive information on the procedure[102].

3.4.2. Suspensive effect

The view taken is that applicants must be entitled to remain in the territory of the country accountable for examining their claims pending determination. If claimants are removed to a third country[103] - a removal to their country of origin would constitute a flagrant violation of the principle of *non-refoulement* - while a decision is being taken on their application, the issue relating to the enforcement of positive decisions would be threatened. Depriving first instance proceedings from suspensive effect would seriously undermine the fairness and effectiveness of asylum proceedings. Indeed, the implementation of positive decisions - decisions recognising the need for international protection - would be hazardous and highly complex to the detriment of recognised refugees as their return to the country of refuge would have to be organised. Failure to secure their return would amount to deny asylum applicants the benefit of their newly gained refugee status and would thus constitute a blatant violation of the 1951 Convention.

The suspensive effect of the first instance decision-making process is actually recognised in the 1995 Resolution. Paragraph 12 of the Resolution on minimum

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[102] See this chapter, section 2.2.

[103] The notion of third country in this context is understood as referring to a safe third country; indeed, removal to a third country which would not meet safety criteria would in itself constitute an intolerable infringement of the principle of *non-refoulement*.

guarantees provides that "[a]s long as the asylum application has not been decided on, the general principle applies that the applicant is allowed to remain in the territory of the State in which his application has been lodged or is being examined." Moreover, paragraph 17 of the Resolution on minimum guarantees provides, *inter alia*, that no expulsion measure must be carried out while deciding whether an application for asylum is manifestly unfounded. This principle should therefore apply to claims considered manifestly unfounded as well as to those lodged at the border. Unfortunately, some Member States have adopted a restrictive approach to suspensive effect. For instance, asylum claimants may be removed from the UK where the Secretary of State has issued a certificate under section 11 or section 12 of the 1999 Act (section 72(2))[104]. UNHCR recommends that proceedings pending initial decisions should have suspensive effect and that applicants should therefore be entitled to remain in the country where their claim is being examined[105]. In UNHCR's opinion, suspensive effect should only be denied in cases where the claim is "clearly abusive"[106]. However, considering the difficulties in asserting beyond doubt that an asylum claim is "clearly abusive" and the hostile practices developed in some Member States, it is argued that suspensive effect should be construed as an absolute principle. It is therefore recommended that, in that respect, EC law should go beyond UNHCR's recommendations.

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[104] Section 11 of the 1999 Act deals with cases where the asylum claim falls within the scope of arrangements between Member States which command the applicant's removal from the UK. Section 12 of the 1999 Act concerns removal of asylum seekers in circumstances that are not considered under section 11. The issue of a certificate under either section results in the asylum claimants' removal to a "safe third country" (which can be a Member State) unless the certificate has been set aside on an appeal under section 65 or 71 or otherwise ceases to have effect (section 72(1)).

[105] See UNHCR Handbook, *supra* n. 1, Paragraph 192(iv).

[106] *Ibid.*

Another fundamental safeguard lies with the grant of a right of appeal to asylum claimants.

4. Challenge of first instance decisions

The right of appeal is central to the existence of satisfactory asylum proceedings[107]; this right has two main functions. Firstly, appeal procedures are a rectifying mechanism designed to minimise the number of errors committed in assessing applications for asylum by offering the opportunity to reconsider points of law and facts and overturn the decision where necessary. Secondly, appeal procedures must also be construed as mechanisms intended to secure a correct and consistent application of asylum law.

Appeal procedures cannot be dissociated from the first instance decision-making process as their effectiveness very much depends upon that of the latter. An efficient initial decision-making process constitutes the necessary foundations for an efficient appeal system. Decisions based on unclear reasoning are more difficult to analyse and appraise; this renders the review mechanism more intricate. Moreover, a deficient initial decision-making process is more likely to produce decisions that will be contested, generating greater numbers of appeals. This results in overloaded appeal systems causing increased delays detrimental to the effectiveness of the whole procedure.

Despite its fundamental character, the right of appeal in the context of asylum procedures has been subject to persistent attacks. Curtailments - if not removals - of the right to appeal were concomitant to the development of fast-track procedures. The reasons behind the use of such procedures were also seen by most Member States as means to justify limitations to the right of appeal. These limitations go from the imposition of unworkable time-limits to the removal of an

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[107] On this issue see, *supra* n. 48, Chapter 5 "The determination system: appeals and review", at p. 49-59.

in-country right of appeal. It is argued that these restrictions threaten the right to seek refugee status and are therefore incompatible with international refugee law.

For appeal procedures to be appropriate, i.e. in line with international refugee law, a number of elements must be present. Firstly, appellate bodies must meet certain requirements; secondly, entitlement to a non-truncated right of appeal must be ensured; and finally the facilities necessary to an effective appeal must be provided.

4.1. Competent appellate bodies

Asylum claimants, it is argued, must be granted the right to have their cases reviewed on their merits by independent courts specialised in asylum cases the members of which are adequately qualified. Moreover, these courts must be granted suitable jurisdiction, i.e. jurisdiction to reconsider facts as well as points of law.

4.1.1. Independent specialised courts

The notion of independence is understood as meaning that the bodies held responsible for hearing appeals against decisions on asylum claims must be independent from first instance decision-makers as well as from the government. This is an essential requirement if appellate procedures are to fulfil their two main functions, namely providing an opportunity to review the facts of the case and secure a correct and consistent application of the law. If these bodies were deprived of this independence, their margin of manoeuvre would be hindered by the influence of both first instance decision-makers and governments. In that respect, the principles set out in the Resolution on minimum guarantees appear to be satisfactory. Pursuant to Paragraph 8, the competent body must give an independent ruling under the conditions laid down in Paragraph 4. This paragraph requires, *inter alia*, decisions to be taken independently "(...) in the sense that all asylum applications will be examined and decided upon individually, objectively and impartially." However, the Resolution on minimum guarantees does not define

these terms; the real test, therefore, lies with the interpretation and implementation of these provisions by the Member States. Considering the persistent attempts to truncate the right of appeal, present in the Resolution itself[108], this is not reassuring and the situation calls for more specific provisions to be included in EC law.

Since the bodies responsible for dealing with appeals must provide the procedural safeguards that characterise any court of law, these bodies must be courts of law. With this in mind, it is argued that the wording of the Resolution on minimum guarantees adds unnecessary confusion. Paragraph 8 reads that "[i]n the case of a negative decision, provision must be made for an appeal to a court or a review authority (...)". However, paragraph 19 allows a derogation to the principle laid down in paragraph 8 as it permits the Member States to exclude the possibility of an appeal to a court or a review authority where decisions holding claims manifestly unfounded have been confirmed by an "independent body", i.e. a body independent from the examining authority. The Resolution fails to define the notions of "review authority" and "independent body". Two questions spring immediately to mind: to what extent does an "independent body" or a "review authority" differ from a court and would any kind of difference be tolerable? The second question is closely related to the issue regarding access to appellate procedures and is therefore further examined in section 4.2. With respect to the first question, it is argued that compliance with international refugee law requires appeals to be heard by courts. Hence, a "review authority" - as well as an "independent body" - must be subject to the same requirements as a court which renders resort to these concepts superfluous and, more importantly, confusing. Moreover, the lack of definition in the Resolution means that these concepts are left to the Member States' interpretation. Considering the restrictive developments in legislation on appeal procedures, the terminology used by the drafters of the Resolution on minimum guarantees is considered a source of disquiet as it

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[108] The Resolution on minimum guarantees (see *supra* n. 3) provides for exceptions to the right of appeal enshrined in Paragraph 8 with respect to manifestly unfounded asylum claims (Paragraph 19).

constitutes a favourable ground for restrictive interpretations likely to be detrimental to an adequate enforcement of the right of appeal.

The essential requirement regarding the nature of appellate bodies is that they must be courts of law. Moreover, it is argued that the specificity of asylum issues requires jurisdiction to be given to specialised courts. Such courts are also needed for practical reasons; the importance of the workload generated by asylum appeals in most Member States must be addressed if appeal systems are to be effective. In the UK, jurisdiction over asylum appeals is conferred upon adjudicators, the Immigration Appeal Tribunal and the Court of Appeal (the Court of Session in Scotland)[109]. Adjudicators and the Immigration Appeal Tribunal may, to a certain extent, be considered specialised jurisdiction as they "solely" deal with immigration and asylum issues. However, the extent of their competences remains burdensome and causes their resources to be over stretched. This situation has contributed to the development of an important backlog[110]. In France, jurisdiction has been granted to the *Commission des recours des réfugiés* (CRR), a specialised appellate body. The CRR was established by the *loi* n° 52-893 of 25 July 1952 concerning the *Office français de protection des réfugiés et apatrides* (OFPRA)[111], the first instance decision-maker. A further appeal may be lodged with the Conseil d'Etat, but only on points of law. Unlike the CRR, the Conseil d'Etat is not a specialised Court; as the supreme administrative court, the Conseil d'Etat deals with the matters falling within the scope of administrative jurisdiction. In that respect, the French system appears to provide a more adequate system as there is an appellate body whose jurisdiction is confined to asylum cases.

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[109] See Part V on appeals and Schedule 4 on appeals to the 1999 Act.

[110] See, for instance, JUSTICE, *supra* n. 48, at p. 12 and 15.

[111] See *supra* n. 55.

4.1.2. Jurisdiction to reconsider initial decisions on asylum

In order for appeal systems to fulfil their functions, i.e. review facts and ensure a correct and consistent application of the law, appellate bodies must be given jurisdiction allowing them to reconsider facts as well as points of law. Appellate bodies must be in a position to overturn decisions taken by first instance decision-makers. Despite its obvious character, this requirement should expressly be inserted in EC law in order to prevent any attempts to truncate the jurisdiction of appellate bodies.

The CRR is an administrative court *de plein contentieux*; this means that the CRR has jurisdiction to reconsider facts as well as points of law. Adjudicators and the Immigration Appeal Tribunal in the UK enjoy the same kind of jurisdiction. Such a jurisdiction is essential as the *raison d'être* of an appeal system lies with the fact that a totally reliable first instance decision-making process cannot exist. In the UK, appeal procedures are also in the hands of judicial bodies[112]. A first instance decision-making process consistent with the requirements of international refugee law may minimise errors in the appraisal of asylum claims. However, the risk of error cannot be completely eliminated and its particular dramatic dimension in the case of asylum seekers cannot be ignored; for this reason, one cannot afford deficient appeal systems.

The existence of competent appellate bodies is also contingent on the quality of its personnel. Their members must, therefore, be adequately qualified.

4.1.3. Adequately qualified personnel

Members of appellate bodies must be legally qualified; however, this requirement must be more specific in the sense that they must be specialised in asylum and

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[112] See Schedule 2 on the Immigration Appeal Tribunal and Schedule 3 on adjudicators of the 1999 Act.

human rights issues. To date, specialisation in these fields has not been considered a pre-requirement to access to these positions. In the UK, adjudicators are not required to be specialised in asylum and human rights law. In most cases, in depth knowledge is, for its main part, acquired through experience. The requirement regarding prior expertise in asylum and human rights law must not be understood as undermining the benefit of experience. It is intended to take into consideration the complexity of asylum law and refugee matters at large. It is argued that this required expertise should be supplemented by regular training designed to address the fast-moving nature of asylum law and the changes in the refugee situation, changes that the courts should take into account. With this in mind, training organised within the Odysseus programme[113] could also benefit the members of appellate bodies provided that this training is consistent with international refugee law. It is argued that these qualification requirements also apply to the members of any further appellate bodies in the case of multi-tier appeal systems[114]. The reader is referred to the comments made with regard to the training of officers competent to receive asylum claims[115].

With this in mind, it is argued that EC law should embody the necessary requirements regarding qualification and training. The Resolution on minimum

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[113] See *supra* n. 26.

[114] For instance, with respect to the Immigration Appeal Tribunal,
Paragraph 11 of Schedule 2 provides:
"A person is legally qualified for the purposes of this Schedule if -
(a) he has a 7 year general qualification, within the meaning of section 71 of the Courts and Legal Services Act 1990;
(b) he is an advocate or solicitor in Scotland of at least 7 years' standing; or
(c) he is a member of the Bar of Northern Ireland of at least 7 years' standing."

It is unfortunate that no specific knowledge in asylum as well as relevant experience in that field is required.

[115] See this chapter, section 2.1.1.

guarantees is silent on the issue; it only mentions the need for fully qualified personnel in the field of asylum and refugee matters with respect to authorities competent for deciding asylum claims in the first instance (paragraph 4).

The effectiveness of appellate systems is also contingent on the existence of a consistent case-law.

4.1.4. A consistent case-law

The view taken is that the efficiency of appeal systems is closely linked to the existence of a consistent case-law. This case-law must be construed as a source of interpretative and implementing guidelines on which decision-making bodies and applicants can rely upon for the benefit of legal certainty. The lack of adequate case-law is detrimental to the interests of both decision-makers and asylum claimants. The development of an adequate case-law can only be achieved through effective first instance and appeal decision-making processes. Where assessing the effectiveness of the decision-making system, the latter must be considered in its entirety. As already noted, first instance decisions which are not based on a satisfactory reasoning are more likely to be challenged, adding to the caseload of appellate bodies. Moreover, the poorer the quality of initial decisions, the more difficult it is to appropriately review them. The absence of a reliable case-law does not only affect appeal decision-makers, it also has repercussions on first instance decision-makers who will have no adequate case-law to turn to.

The objective is therefore to ensure that appellate bodies are in a position to develop and rely upon an adequate case-law. It is argued that this can be achieved through the setting up of an appropriate appeal structure supported by access to updated background information.

The adequacy of appeal procedures raise, *inter alia*, the question of their structures. In that respect, the basic choice lies between a multi-tier or a one-tier system where cases can be re-examined on their merits, without prejudice to the

power of higher courts to rule on points of law. Multi-tier appeal systems appear to be the most common models; it is, for instance, the case in France and the UK. In the UK, unsuccessful applicants may apply to an adjudicator[116]. A further appeal to the Immigration Appeal Tribunal (IAT) may be available, except where the appeal falls within the scope of section 72 of the 1999 Act which applies where a certificate has been issued under section 11 or section 12 of the same Act[117]. This means, for instance, that an asylum seeker who is about to be removed to another Member State on the basis of the Dublin Convention will not be entitled to appeal to the IAT against the adjudicator's decision. Finally, leave to appeal to the Court of Appeal or the Court of Session may be granted by the IAT[118]. The former system was largely laid down in the Asylum and Immigration Appeals Act 1993, referred to as the 1993 Act, which created an unified asylum appeals system. The 1993 Act provided for special adjudicators to hear all asylum appeals. Unsuccessful applicants could seek leave for further appeal by the IAT The IAT was faced with considerable numbers of appeals; around half of the unsuccessful appeals lodged with special adjudicators were subsequently brought to the IAT. In 1995 and 1996, the IAT found that one in ten asylum cases had been wrongly decided[119]. In 1996, 550 of the cases in question were remitted to a special adjudicator for reconsideration[120]. This situation generated a considerable increase in the caseload of the Tribunal and questioned the quality of the decision-making by special adjudicators as well as by first instance decision-makers. This increase in the workload of the Immigration Appeal Tribunal was partially blamed on special adjudicators' insufficient qualifications - they would rarely have the needed

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[116] Schedule 4 on Appeals (Part I on procedure) of the 1999 Act.

[117] See *supra* n. 104.

[118] Paragraph 7 of Schedule 4 to the 1999 Act.
Leave to apply for judicial review may also be obtained.

[119] See *supra* n. 48, at p. 51.

background in asylum law and human rights - and on the fact that they lacked the necessary resources. The same reproaches were made with regard to first instance decision-makers. It is therefore essential that adjudicators, under the 1999 Act, have the required qualifications. It is unfortunate that comprehensive knowledge of asylum law and experience in that field are not amongst the qualification requirements laid down in Schedule 3 to the 1999 Act[121]. However, lower instances were not the only ones responsible for the IAT being overburdened with applications for leave to appeal. As noticed in the JUSTICE's report[122], the IAT bore its share of responsibility. The Tribunal had failed to set up a clear and consistent case-law upon which first instance appellate bodies could rely. To date, the IAT lacks the status which would allow it to produce authoritative precedents and the 1999 Act has not changed the status of the Tribunal in that respect despite what was suggested in the Government white paper[123].

In France, appeals against the OFPRA, the first instance decision-maker, are heard by the CRR which has jurisdiction to reconsider first instance decisions on their

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[120] *Ibid.*, *Home Office statistics*, 1996, table 8.3.

[121] Paragraph 2 of Schedule 3 on adjudicators of the 1999 Act reads:
"A person is qualified for appointment as an adjudicator only if_
(a) he has a 7 year general qualification, within the meaning of section 71 of the Courts and Legal Services Act 1990;
(b) he is an advocate or solicitor in Scotland of at least 7 years' standing;
(c) he is a member of the Bar of Northern Ireland or solicitor of the Supreme Court of Northern Ireland of at least 7 years' standing; or
(d) he has such legal and other experience as appears to the Lord Chancellor to make him suited for appointment as an adjudicator."

[122] See *supra* n. 48, at p. 51.

[123] In its white paper called Fairer, Faster and Firmer_ a modern approach to immigration and asylum (see *supra* n. 57), the Government suggested that the IAT could become a court of record with the ability to create binding precedents (point 7.18). However, the status of the IAT has not been changed in that respect.

merits[124]. Appeals against the decisions of the CRR may be brought to the Conseil d'Etat, the supreme administrative court, on points of law material to the case. The CRR is a collegial body which includes an *assesseur* who represents UNHCR. UNHCR is also represented in the *Sections réunies* of the CCR which are responsible for ruling on important points of law and ensuring the consistency of the case-law. It is argued that EC law should require the presence of a UNHCR representative at the appeal process as an additional means to ensure compliance with international refugee law. In doing so, the *Sections réunies* of the CCR are assisted by an information centre which was created within the CRR in 1992, the *Centre d'information contentieuse*. For each case brought before the *Sections réunies*, the *Centre d'information contentieuse* produces a working document mentioning the points of law to be decided and the relevant case-law as well as a working document recording the decision that has been taken. The duties of the *Centre d'information contentieuse* also include the elaboration of a yearly case report[125]. Moreover, it also acts as an internal and external adviser. The CRR appears to be more likely to produce a consistent case-law. However, this must be tempered by the fact that certain questions relating to asylum law remain grey areas. In these areas, the decisions of the CRR lack clarity, affecting the consistency of its case-law[126].

With this in mind, it is argued that the key concepts upon which asylum law rests should be clearly defined in EC law and should be supported in every Member

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[124] The jurisdiction of the CRR to reconsider OPFRA's decisions on their merits - jurisdiction of *plein contentieux* - was expressly recognised by the Conseil d'Etat (Conseil d'Etat, 8 January 1982, *Aldana Barreña*, in Tiberghien, *supra* n. 97, at p. 242).

[125] The yearly case reports of the CRR also includes the most relevant decisions of the Conseil d'Etat on asylum matters. The reports in question are called *Contentieux des réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des recours des réfugiés.*

[126] This is for instance the case with regard to women who allege gender-based persecution (see chapter III on the need for an up to date interpretation of the term "refugee").

State by appeal structures allowing for the development of a consistent case-law in line with international refugee law. In its working document[127], the Commission expressed the view that the Member States should retain a certain degree of latitude in determining the structure of the appeal system. As a concrete example of the approach it would adopt, the Commission specified that it would not require the Member States to introduce or maintain a multi-tier appeal system on the ground that it would demand changes that go beyond the scope of asylum law. In the Commission's opinion, "[t]he starting point of the proposal will, however, be that provided the necessary safeguards are in place to ensure a good standard of decision making by asylum determination bodies, a single appeal or review of the substance of the decision will normally be sufficient (without prejudice to the power of higher courts to rule on points of law)."[128] It is argued that the Commission is right in stressing that the establishment of an effective decision-making system is contingent on the existence of the necessary safeguards. With this in mind, the view taken is that an EC instrument on asylum procedures should mention the structural requirements for adequate national appeal systems. This does not necessarily mean setting up an harmonised appeal system. However, it is argued that, in the longer term, such a system could be envisaged; but, in the meantime, priority should be given to the introduction of the conditions necessary to the existence of effective and fair appeal systems, including the conditions for a clear case-law in line with international refugee law.

EC provisions on appeal procedures should be without prejudice to the power of the Member States' highest courts to rule on points of law[129]. However, as any national court, the highest courts would be under the obligation to correctly implement EC law and thus the provisions in question. This stresses the importance of the adoption of provisions in line with international refugee law in the context of

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[127] See *supra* n. 4, Paragraph 16.

[128] *Ibid.*

[129] This idea was expressed by the Commission in its working paper, *ibid.*, Paragraph 16.

a legally binding framework, namely the Community legal order. One should not undermine the role that highest national courts can play in promoting interpretations consistent with international refugee law. With this in mind, one can refer to the decision in *ex parte Shah* where the House of Lords ruled that Pakistani women who had been falsely accused of adultery in their country of origin and forced to leave their homes by their husbands could be considered a particular social group within the meaning of Article 1(A)(2) of the 1951 Convention[130]. Provided that they fully endorse international requirements regarding international refugee law, highest national courts can play a fundamental role in the interpretation and implementation of asylum law, thus contributing to the development of a reliable case-law. However, the intervention of the highest courts should not be the symptom and the product of deficient appeal systems. Judicial review should not be construed as the substitute for an effective asylum appeal system. In other words, resort to judicial review should not be driven by applicants' distrust in the appeal system. If the highest courts are to play a positive role in the promotion of refugee protection, they must be able to rely upon an effective and fair decision-making process at first instance and appeal levels.

The development of a consistent case-law in line with international refugee law requires, in addition to adequate appeal structures, access to reliable background information; this includes information on applicants' countries of origin as well as information on third countries considered safe in order to prevent any infringement of the principle of *non-refoulement*. The importance of reliable background information has already been stressed with respect to first instance decision-making[131]. In order to allow appellate bodies to reconsider the cases brought before them on their merits, it is important to secure their access to adequate background information. With this in mind, it is argued that appellate bodies should be assisted

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[130] *Islam v Secretary of State for the Home Department: R v Immigration Appeal Tribunal & Another, ex parte Shah (conjoined appeals)* [1999] 2 WLR 1015.

[131] See this present chapter, subsection 3.3.1(ii).

by information services. This is for instance the case of the CRR that comprehends such services known as the *services de documentation et d'études*. Their role is to collect information on applicants' countries of origin and produce punctual and general studies as well as news reviews. In that respect, as already suggested, the setting up of an information system common to the Member States would be of valuable assistance to decision-makers[132].

Besides depending on the existence of adequate appellate bodies, the fairness and effectiveness of the appeal system are also contingent on the existence of a non-truncated right of appeal and appropriate procedural safeguards.

4.2. A non-truncated right of appeal

One of the main "victims" of the restrictive approaches to asylum matters within the EU is the right of appeal. Determined to accelerate asylum procedures, the Member States have introduced fast-track procedures. One of their principal and most regrettable features consists in a curtailment of the right of appeal. This right is absolutely essential to the preservation of asylum seekers' rights. Considering its fundamental character, it is argued that most of the limitations brought to the right of appeal by the Member States are inconsistent with international refugee law as they seriously undermine the right to seek refugee status. With this in mind, the view taken is that all asylum applicants - irrespective of the type of procedure being applied - must be entitled to a non-truncated right of appeal. This means that they must be granted an in-country right of appeal which operates within reasonable and practical time-limits and has suspensive effect.

4.2.1. An in-country right of appeal

It is argued that where an in-country right of appeal is denied, the fairness and effectiveness of appeal systems are seriously undermined. Lodging an appeal from

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[132] *Ibid.*

abroad renders the whole procedure hazardous and more complex. The Member State in which the appeal is to be introduced must keep track of the applicant and verify that he or she is given the opportunity to lodge his or her appeal from the third country. In any case, should the Member State concerned retain full responsibility for the appeal even where it is lodged from abroad. Moreover, successful appeals would render the asylum seekers' removal to a third country rather pointless. Exercising a right of appeal from abroad exacerbates the complexity inherent in asylum procedures for claimants, but is also a source of unnecessary complication for the competent appellate bodies. In this respect, it is tempting to suggest that the withdrawal of an in-country right of appeal in certain cases reflects governments' hopes that it may deter potential appellants from pursuing asylum proceedings any further. Furthermore, it is probably construed as a means to secure asylum seekers' removal from the territory of the Member States competent to hear their claims[133].

This hostility expressed towards a right of appeal from abroad does not only lie with the practical difficulties it entails, but also in the rationale behind it. A right of appeal exercisable from abroad made its appearance in the context of the development of increasingly restrictive asylum policies across the EU. An in-country right of appeal is usually denied where applications for asylum are deemed to be manifestly unfounded. The removal of such a right has been used as a device to shorten asylum procedures. For instance, in the UK, before the adoption of the Asylum and Immigration Appeals Act 1993, certain categories of asylum seekers were denied an in-country right of appeal[134]. The decision to grant an in-country right of appeal to all asylum claimants was therefore more than welcome by those concerned with refugee protection. Unfortunately, the 1996 Act reintroduced

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[133] The Member States have faced - and are still facing - tremendous difficulties in removing unsuccessful asylum seekers from their territory.

[134] Applicants who entered the UK through a port, without entry clearance, and who were refused refugee status or exceptional leave to remain, had no right of appeal before being returned to the originating country (Immigration Act 1971 s 13(3)).

limitations to in-country rights of appeal in the case of applicants coming from third countries certified to be safe under section 2(2). Pursuant to this section, the Secretary of State may certify that a third country is safe if the following conditions are satisfied:

"(a) (...) the person [the asylum seeker] is not a national of the country or territory to which he is to be sent;
(b) (...) his life and liberty would not be threatened in that country or territory by reason of his race, religion, nationality, membership of a particular social group, or political opinion; and
(c) (...) the government of that country or territory would not send him to another country or territory otherwise than in accordance with the [1951] Convention."

Section 2(3) of the 1996 Act specifies that this "(...) applies to any country or territory which is or forms part of a Member State, or is designated for the purposes of this subsection in an order made by the Secretary of State by statutory instrument."

This withdrawal of a general in-country right of appeal, which is maintained in the 1999 Act[135], three years after its introduction, partially finds its origin in the exasperation manifested by the Home Office with regard to the handling of safe third country cases. In the period following the adoption of the 1993 Act, most cases channelled to fast-track procedures on the ground that they were manifestly unfounded were safe third country cases. Under the regime established by the 1993 Act, these unsuccessful applicants enjoyed a right of appeal to a special adjudicator from within the UK, the special adjudicators' task being to appraise the safety of the contemplated third country. Although special adjudicators could allow appeals where they disagree with the Secretary of State's views on safety, the most common practice consisted in referring these cases to the Secretary of State for

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[135] Section 72(2) provides that "[a] person who has been, or is to be, sent to a member State or to a country designated under section 12(1)(b) is not, while in the United Kingdom, entitled to appeal."

reconsideration, a possibility that was removed under the 1996 Act[136]. Michael Howard, clearly "irritated" by this practice, suggested that, in the cases referred to the Home Office for reconsideration, the asylum seekers concerned "could no doubt have been removed to a third country had their claims been dealt with promptly"[137]. However, Howard's statement proved not to be quite accurate.

As stressed in relation to the principle of safe third country[138], no State can be regarded as one hundred per cent secure even where it enjoys a strong safety presumption. This issue has been raised before the UK authorities with respect to asylum seekers' removals to France and Belgium[139] as safe countries. Hence, entitlement to in-county right of appeal remains necessary regardless of the circumstances.

It is argued that depriving certain categories of asylum seekers from an in-country right of appeal constitutes an unacceptable curtailment of the right of appeal and may well amount to deny them a fundamental procedural guarantee. Fast-track

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[136] Section 3(1)(a) of the Asylum and Immigration Act 1996 read:
"Where a certificate has been issued under section 2(1) above in respect of any person -
(a) that person may appeal against the certificate to a special adjudicator on the ground that any of the conditions mentioned in section 2(2) above was not fulfilled when the certificate was issued, or has since ceased to be fulfilled; but
(b) unless and until the certificate is set aside on such an appeal, he shall not be entitled to bring or pursue any appeal under -
(i) Part II of the 1971 Act (appeals: general); or
(ii) section 8 of the 1993 Act (appeals to special adjudicator on [1951] Convention grounds), as respects matters arising before his removal from the United Kingdom."

[137] HC Deb vol 286 col 705 11 December 1995.

[138] See chapter IV on access to substantive asylum procedures.

[139] *Ibid.*, in particular, *R. v Secretary of State for the Home Department, ex parte Canbolat*, 14 February 1997, the Times, 24 February 1997, confirmed by the Court of [1997] 1 WLR 1569.

procedures may be maintained but not at the detriment of the right of appeal. An in-country right of appeal should therefore be granted to all asylum seekers irrespective of the type of procedure being applied; some degree of differentiation may be tolerated, but not at such a crucial level. With this in mind, the view taken is that EC law should expressly provide for an absolute in-country right of appeal.

4.2.2. Suspensive effect

Another feature essential to an adequate right of appeal is suspensive effect. This requirement is seen as a necessary complement to an in-country right of appeal; not only should asylum seekers be entitled to a right of appeal from within, they should also be allowed to remain within the territory of the competent Member State pending appeal proceedings. In that respect, the UNHCR Handbook expressly states that appellants should be entitled to remain in the country while an appeal is being examined[140].

Granting a right of appeal with no suspensive effect would compromise its effectiveness in the same way as denying an in-country right of appeal would, although at a slightly later stage. As observed with regard to appeals lodged from abroad, "premature" removals complicate appeal proceedings unnecessarily and are generally symptomatic of hostile attitudes towards asylum seekers.

In the UK, where asylum seekers may be removed to safe third countries, suspensive effect is denied. As mentioned in section 3.5.2., suspensive effect is withdrawn at an early stage in safe third country cases, i.e. from the time the application for asylum is introduced[141]. French law knows the same kind of restriction where applicants are permitted entry in a safe third country. However, French law further extends derogations to the principle of suspensive effect and

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[140] See *supra* n. 1, Paragraph 192(vii).

[141] Asylum and Immigration Act 1996, section 2(1).

provides for substantial exceptions to the right to stay pending an appeal; suspensive effect is disallowed in another three situations:

- where the rules laid down in the Dublin Convention (and previously the Schengen Agreement) transfer responsibility for processing the asylum claim to another Member State;
- where an applicant is a serious threat to public order;
- where an applicant was deliberately deceitful, abused asylum procedures or made an application in order to forestall expulsion.

Except in cases where the Dublin Convention applies, applicants may ask an ordinary administrative court to exercise its discretion and allow suspensive effect[142]. However, in safe third country cases, this right is limited in practice because, by the time a decision to appeal is taken, applicants have been removed from the French territory.

The Resolution on minimum guarantees recognises the principle of suspensive effect with respect to appeals (Paragraph 17); however, the Resolution does not construe this principle as an absolute rule[143] and therefore permits alterations. To be more precise, the Resolution acknowledges the derogations permitted under national law; this is typical of an instrument negotiated within the intergovernmental framework. Paragraph 17 of the Resolution allows for national derogations to apply provided that appellants are granted the right to ask for leave to remain within the territory of the Member State concerned due to the particular circumstances of their case. Such a right is, for instance, granted to asylum claimants under French law; however, as observed above, this right fails to constitute an adequate safeguard in practice. The second derogation to the

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[142] However, the appeal itself is examined by the CRR.

[143] Paragraph 17 of the Resolution on minimum guarantees reads (see *supra* n. 3), *inter alia*, that "[u]ntil a decision has been taken on the appeal, the general principle will apply that the asylum seeker may remain in the territory of the Member State concerned (...)"

principle of suspensive effect concerns claims considered manifestly unfounded. Paragraph 24 of the Resolution allows for national exceptions to apply with respect to manifestly unfounded claims provided that "(...) the decision on the refusal of admission is taken by a ministry or comparable central authority and that additional sufficient safeguards (for example, prior examination of by another central authority) ensure the correctness of the decision." However, it is argued that no system can guarantee that no error will be made in assessing claims; this includes determining whether an application is manifestly unfounded. In these circumstances, the right of appeal remains vital and anything likely to undermine its effectiveness must, therefore, be avoided. Finally, Paragraph 25 of the Resolution on minimum guarantees endorses national derogations where the principle of host third country - as laid down in the Resolution on host third country[144] - applies. This third derogation is also a source of disquiet as the safety of a third countries - including Member States - may be misjudged and an effective right of appeal is therefore required.

Suspensive effect is essential to the existence of an effective right of appeal. As already observed, deciding whether a case is manifestly unfounded must take place in the context of procedures providing all the necessary safeguards. It is argued that the principle of suspensive effect must be incorporated in EC law and construed as an absolute principle; hence, no derogations must be permitted.

Another element essential to satisfactory appeal procedures regards the application of reasonable time-limits.

4.2.3. Reasonable time-limits

Time-limits for submitting and examining appeals must be determined in terms of effectiveness and fairness; the term reasonable is intended to reflect this idea. With this in mind, it is argued that time-limits regarding submission must allow

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[144] See *supra* n. 7.

applicants to lodge their appeal in appropriate conditions while contributing to the efficiency of the whole proceedings. As to the time-limits regarding examination, they must permit fair determination in line with international refugee law.

In recent years, the Member States' firm intent to accelerate asylum procedures have resulted in the introduction and increasing use of fast-track procedures which are, *inter alia*, characterised by tight time-limits. This "speed" element is also present in substantive procedures. The concern expressed does not mean that this objective is illegitimate in itself. On the contrary, faster procedures are also in asylum seekers' interest. They have not much to gain in spending months, sometimes years, waiting for a decision on their appeal. Some may suggest that asylum claimants actually benefit from lengthy proceedings in that it gives them the opportunity to remain longer within the territory of the Member States responsible for examining their claim, thus delaying an eventual expulsion. This position is weakened by the fact that it assumes that suspensive effect is systematically granted and thus ignores various practices resulting in claimants being removed before a final decision is taken (for instance in safe third country cases[145]). More importantly, the increasingly harsh nature of the conditions in which candidates for refugee status are kept pending determination seriously questions the accuracy of this position[146].

The view taken is that these time-limits must be the result of a balance between the need to shorten asylum procedures and the need to secure the existence of a fair right of appeal. In other words, the introduction of excessively stringent time-limits must not undermine claimants' right of appeal. In the UK, the 1996 Asylum Appeals (Procedure) Rules impose extremely strict time-limits: the appeal papers must be filled within two days under certain conditions (primarily when the

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[145] See this chapter, previous section.

[146] These issues are examined in the next chapter, chapter VI on asylum seekers' status pending determination.

applicant is in custody) or seven days where the conditions do not apply; the case must be dealt with within a further ten days[147] and substantive appeals are supposed to be heard within forty-two days[148]. However, in practice, these deadlines are not met and both applicants' representatives and appellate bodies have stressed that these time-limits set out unrealistic targets[149].

The issue of time-limits has also been contemplated at European level, but in vague terms only. It was firstly envisaged in Paragraph 3 of the Resolution on manifestly unfounded asylum claims[150]; Paragraph 3 provides, *inter alia*, that any appeal or review procedures must be completed as soon as possible. The question of time-limits is also raised in the Commission's working document (Paragraph 18) in relation to the Member States' expressed intention to further speed up procedures[151]. However, the input of the Commission in that respect is confined to suggesting that time-limits covering the various stages of asylum procedures could be laid down in EC law. It is argued that EC law should tackle the issue of the time-limits applicable to appeal proceedings in a manner consistent with the right to seek refugee status.

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[147] The Asylum Appeals (Procedure) Rules 1996, r 5(2) and r 9(2).
Paragraph 3 of Schedule 4 to the 1999 Act entitles the Lord Chancellor to make rules of procedures regarding appeals; new rules have not yet been adopted.

[148] *Ibid.*, r 9(1).

[149] For instance, within 6 months of the entry into force of the 1996 Asylum Appeals (Procedure) Rules, appeals at the fast-tracking centre at Lambeth were waiting six weeks for a hearing, not ten days and substantive appeals at the Hatton Centre took 15 months to be heard, not 42 days (see JUSTICE, *supra* n. 48, at p. 55).

[150] See *supra* n. 2.

[151] See *supra* n. 4.

Time-limits need to present certain features if they are to address both appellants and appellate decision-makers' interests. Avoiding unnecessarily lengthy appeal proceedings is a legitimate goal, but it must not result in the imposition of unrealistic time-limits. Indeed, such time-limits generate their own pitfalls; they may be detrimental to the introduction of the appeal itself as well as to the quality of the hearings and decisions. Hence, in examining issues arising from appeal time-limits, one should bear in mind that time-limits regarding the submission of appeals must not render the exercise of the right of appeal more difficult or even impossible. Moreover, it must allow for sufficient time to prepare the case. One may refer to Paragraph 16 of the Resolution on minimum guarantees[152] which provides that "[t]he asylum seeker must be given an adequate period of time within which to appeal and to prepare his [or her] case when requesting review of the decision (...)" However, the positive effect of this provision is altered by the fact that the Resolution lacks binding authority. As to time-limits regarding examination, they must not be curtailed at the expense of quality. Deadlines regarding the time allocated for considering appeals must not detrimentally affect the decision-making.

EC law should expressly specify that time-limits must be consistent with international refugee law. In order to secure correct national implementation while addressing the need for flexibility, EC law should not impose rigid time-limits. An option consists in establishing minima and maxima regarding time-limits applicable to the submission, preparation and determination of appeals susceptible of amendments where needed. The question of time-limits is practical by nature and thus must be tackled in a concrete manner. The differentiation made between fast-track and substantive procedures and the particular emphasis on faster proceedings is acceptable provided that it is not at the detriment of asylum seekers' rights.

It is accepted that appeal proceedings must be fair as well as speedy. However, completion of the second objective is strictly subordinate to the former. In other

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[152] See *supra* n. 3.

words, the measures designed to accelerate appeals - including time-limits - cannot jeopardise their fairness. With this in mind, time-limits must be realistic as well as flexible. Flexibility[153] is construed as a means to address the practical difficulties of certain cases; rigid time-limits are likely to impair the right of appeal and be detrimental to the quality of the decision-making process by imposing unrealistic demands on appellate bodies.

Fairness and efficiency are also contingent on certain facilities being made available to appellants in the course of appeal procedures

4.3. An appeal process providing for the necessary facilities

As in previous procedural stages, fairness and effectiveness are contingent, *inter alia*, on the availability of certain facilities: these include the services of an independent competent interpreter where necessary, the possibility to contact a UNHCR representative, access to informed legal advice as well as legal representation at appeal hearings. The latter is the only issue specific to appeal proceedings and is therefore the focus of this section. The other facilities, which must be secured throughout the procedure, are examined in relation to the submission and first-instance consideration of asylum claims; hence, the reader is referred to the corresponding sections[154].

With respect to legal representation, the aim is to secure that appellants are adequately represented during appeal proceedings. Appellants must be represented by qualified lawyers. Thus, the debate exclusively focuses on the qualifications required from lawyers representing asylum seekers. As in the case of legal advice,

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[153] The introduction of an element of flexibility was contemplated by the Commission in its Working document, see *supra* n. 4, Paragraph 18.

[154] The right to an independent competent interpreter (sections 2.3.1. and 3.2.2.); the possibility to make contact with a UNHCR representative (sections 2.3.3. and 3.2.3.) and access to legal advice (section 3.2.1).

it is argued that, in order to meet adequate standards, specialisation in asylum law is indispensable; this should be expressly mentioned in EC law.

Moreover, one must bear in mind that problems created by poor representation can be exacerbated by the way hearings are conducted. In an adversarial system[155], appellants appear to be in a more vulnerable position; this situation renders the need for adequate representation even more critical. In inquisitorial systems[156], as opposed to adversarial ones, decisions[157] are reviewed by judges who test claims and conduct active investigations themselves in addition to hearing arguments from the parties. The view taken is that the imposition of a wholly inquisitorial model when it comes to asylum cases would require drastic reforms in some Member States and therefore is not regarded as constituting a realistic solution in the short and medium term. However, some inquisitorial elements could be introduced without inducing a profound change in the nature of the system[158]. For instance, appellate decision-makers could guide arguments in a constructive manner by indicating particularly relevant areas[159], thus avoiding key issues being disregarded or overlooked; this would of course require decision-makers to be given sufficient time to properly prepare hearings[160]. However, the introduction of inquisitorial elements should not be used as means to justify poor legal representation, but should be regarded as a valuable aid.

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[155] This is for instance the case in the UK.

[156] Inquisitorial models prevail in civil law systems; this is for instance the case in France.

[157] These include decisions on asylum cases.

[158] See on this issue JUSTICE, *supra* n. 48, with regard to proposals for law reform in the United Kingdom, at p. 57.

[159] *Ibid.*

[160] Pre-hearing preparation would of course be facilitated by quality decision-making in the first instance.

The introduction and maintenance of quality legal representation call for the establishment of strict control mechanisms at national level. The efficiency of such mechanisms should be reinforced by the adoption of EC provisions imposing certain requirements and setting out guidelines consistent with the right to seek refugee status.

As in the case of legal advice, quality in itself does not suffice; it must be supplemented by quantity. This means that legal representation must be made available to all asylum appellants; any discrimination in the grant of legal representation would considerably alter the fairness and effectiveness of appeal proceedings. Hence, this requirement raises the question of legal aid and its availability to appellants. The view taken is that legal representation must be granted to those in need and adequate funding provided. The issues raised are similar to those discussed with respect to the availability of legal aid in the context of first-instance determination; the reader is therefore referred to the relevant section[161]. With regard to legal aid, a balance must be struck between asylum seekers' right to legal representation - and legal advice - and the need to rationalise and control public funding. This issue should be addressed by EC law in the light of the need to protect the right to seek refugee status. Moreover, a safety net should be set up in order to address the difficulties that some Member States may face in financing legal aid; this could be the case where a Member State is confronted with particularly high numbers of asylum claims.

Finally, it should be stressed that quality and quantity considerations in relation to legal representation - as in the case of legal advice - should not vary with the type of procedure being applied. In other words, the application of fast-track procedures should not mean truncated rights for those whose claims have been channelled to these procedures. It is argued that this would amount to discrimination inconsistent with the right to seek refugee status

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[161] See this chapter, section 3.2.1.

5. Conclusion

Asylum procedures are central to refugee protection as they are the medium through which refuge status is granted. Hence, securing the fairness and efficiency of asylum procedures is vital to refugee protection. In that respect, a global approach is recommended as the different procedural stages are closely connected. In other words, asylum proceedings must be construed as a whole with a view to ensuring compliance with international refugee law.

Considering the importance of asylum procedures, particular vigilance is required when it comes to differentiation. Differentiation is understood as referring to the increasing exemptions and derogations brought to fundamental procedural rights and guarantees, particularly with regard to fast-track procedures. It is argued that pragmatism requires us to acknowledge the Member States' attachment to this kind of procedure and therefore tolerate a certain degree of differentiation. However, a balance must be found between the interests of the Member States and those of asylum seekers, the bottom line being that, whatever their characteristics, asylum procedures must comply with international refugee law. Therefore, it is argued that EC law should secure that the level of differentiation remains within the boundaries consistent with international refugee law.

The existence of EC provisions on the availability and access to appropriate asylum procedures is essential to the protection of the right to seek refugee throughout the EC. With this in mind, it is hoped that the EC, through the transfer of competence achieved by the Treaty of Amsterdam, will succeed where intergovernmental cooperation has failed.

Chapter VI

Asylum Seekers' Status Pending Determination

Under international refugee law, individuals have a right to seek refugee status and host States are responsible for the enforcement of this fundamental right[1]. To that end, the latter are under the obligation to establish adequate asylum procedures[2]. However, it would be wrong to solely consider asylum seekers as applicants and thus only acknowledge their procedural rights. This raises the issue of asylum seekers' status pending decisions on their claims.

It is argued that failing to provide asylum claimants with the support they need would substantially undermine the right to seek refugee status. It follows that the provision of adequate support should be embodied in the right to seek refugee status and States should, therefore, be under the obligation to assist asylum seekers in meeting their most basic needs. Such an obligation should be expressly imposed on Member States.

Unfortunately, the restrictive nature of the asylum policies developed in most Members States has had an adverse impact on the level of support granted to asylum seekers. For instance, benefits have been withdrawn or seriously curtailed and housing facilities reduced to an absolute minimum.

An additional source of disquiet with regard to asylum seekers' status pending determination is the use - and abuse - of detention; increasing numbers of asylum seekers are being detained while awaiting decisions on their claims. Such practices are the product and symptom of hostile policies towards asylum seekers. Privation of liberty is an extreme sanction which should only occur where strictly justified; there is no ground for derogating from this fundamental principle when it comes to

[1] See the introduction, chapter I.

[2] See chapter V on fair and effective asylum procedures.

asylum claimants. In any case should they be branded as "presumed or potential criminals"! Hence, asylum seekers' detention must be construed as an exceptional measure subject to strict criteria and conditions designed to secure its lawfulness.

Questions regarding asylum seekers' status pending proceedings were very much left outside the scope of intergovernmental cooperation. However, with the "communautarisation" of asylum matters, these issues should be tackled at EC level; this could be achieved through Article 63(1)(b) of the TEC on minimum standards on the reception of asylum seekers in the Member States[3]. The purpose of this chapter is therefore to determine the Member States' obligations with regard to support for asylum seekers and detention in order to secure compliance with international refugee law.

1. Support for asylum seekers

The view taken is that support for asylum seekers must be governed by the following principle: every asylum seeker who finds himself or herself in need is entitled to adequate support at all levels of the proceedings. As suggested above, this principle finds its origin in the very essence of the right to seek refugee status. It would be totally inconsistent with the right to seek refugee status to allow individuals to apply while "sentencing" them to a destitute life pending examination of their claim. Accountability for the processing of asylum claims must be construed as entailing the obligation to provide applicants with appropriate support. In other words, the right to seek refugee status implies the States' obligation to supply adequate support.

[3] New Title IV on visas, asylum, immigration and other policies related to free movement of persons inserted in the TEC by the Treaty of Amsterdam.

1.1. The right to adequate support: a State's responsibility

The view taken is that Member States should be under the obligation to provide asylum seekers with adequate support pending proceedings as the right to adequate support cannot be disassociated from the right to seek refugee status.

It is incumbent on the State responsible for examining the asylum claim to provide the asylum seeker with adequate support throughout the procedure. This implies that appellants should not be discriminated against in that respect and should be entitled to support on the same basis as first instance asylum claimants. This requirement finds its essence in the fundamental nature of the right of appeal[4]. Restricting support for those challenging decisions on their application for asylum would undermine the right of appeal and thus the right to seek refugee status. To date, where asylum law denies a right of appeal from within or with suspensive effect[5], this means, in practice, that the asylum seekers concerned will not be entitled to further support; in such cases, the State's responsibility for providing support is confined to first instance proceedings.

Support for asylum seekers must also be envisaged in the context of transfers of responsibility[6]. These transfers are not immediate mechanisms and there may be some time before the State held responsible for considering the asylum claim is identified and the subsequent transfer carried out. Does this mean that the Member State which intends to remove the asylum seeker has no obligation in terms of support towards that individual? It is argued that a positive answer would be detrimental to those asylum seekers awaiting removal. Hence, although the obligation to provide adequate support for asylum seekers lies, in principle, with the State accountable for determining the asylum claim, this rule should be applied with

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[4] See chapter V on fair and effective procedures.

[5] *Ibid.* The view taken is that appeals should be lodged from within and have suspensive effect.

[6] See chapter IV on access to substantive asylum procedures.

some flexibility in order to address the issues arising from transfers of responsibility in relation to support. This implies that, pending removal, the Member State accountable for the transfer should provide these asylum seekers with adequate support.

It is accepted that, in imposing an obligation to provide adequate support for asylum seekers, one should not disregard the financial difficulties that some Member States may face. This can particularly be the case where Member States are confronted with higher numbers of asylum seekers than their counterparts; this can be an exceptional or constant[7] phenomenon. Cooperation between the Member States with regard to support for asylum seekers should therefore be encouraged on the basis of the principle of solidarity; the latter is mentioned in Article 63(2)(b) of the TEC[8]. Providing assistance to those in need must be construed as a Member States' collective responsibility and not reduced to an individual one. Therefore, the principle of solidarity should also apply to measures on minimum standards on the reception of asylum seekers to be adopted on the basis of Article 63(1)(b) of the TEC.

Adequate support means that the support in question must allow asylum seekers to satisfy their basic needs pending proceedings. Member states are therefore under the obligation to provide this particularly vulnerable group with appropriate shelter and other essential living needs such as food and clothing as well as access to health care and education when needed[9].

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[7] For instance, countries such as the UK, France and Germany have traditionally been faced with greater numbers of asylum seekers than, for example, Ireland, Portugal or Spain.

[8] Article 63(2)(b) of the TEC (see *supra* n. 3) provides for the adoption of measures on refugees and displaced persons "promoting a balance of efforts between Member States in receiving and bearing the consequences of receiving (...) [the persons in question]."

[9] Asylum seekers' needs are examined in this chapter, section 1.2.2.

The fact that States are responsible for providing asylum seekers with adequate support does not mean that support may not be supplied by other entities. In practice, many Member States have relied upon local authorities, charitable organisations and the private sector. However, even where assistance emanates from entities other than national authorities, responsibility should remain with the State. This means that States should ensure that these entities are in a position to provide the required support. In the UK, for instance, local authorities dealing with greater numbers of asylum seekers have complained that they were struggling to satisfy the demand for accommodation[10]. In such cases, States should be under the obligation to assist them or substitute their direct help in order to meet asylum seekers' needs. The fact that responsibility in relation to support is endorsed by the State implies that the State should address the specific problems faced by other entities in their capacity of providers of support for asylum seekers. For instance, charitable organisations often suffer from limited resources. For this reason, they should be adequately sponsored and assisted by the State, and should not, in any case, be seen as substitutes for State support. Unfortunately, curtailments in State support for asylum seekers in certain Member States have resulted in *de facto* shifts of responsibility from the State to charitable organisations and local authorities without taking into consideration their "coping capacities"[11]. As to the private sector, it is not tailored to suit asylum seekers' specific needs and thus cannot be considered a substitute for State intervention[12]. This sector is governed by market

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[10] This is for instance the case of Kent and London Boroughs which look after the majority of asylum seekers (see Diane Taylor, "Councils hit by U-turn over asylum seekers", in Refugees in Britain: special report, 5 March 2000, http://www.newsunlimited.co.uk/Refugees_in_Britain/Story/0,2763,143456,00.html).

[11] This is for instance the case, to a certain extent, in the UK.

[12] For instance, in the UK, serious alterations in asylum seekers' rights with regard to housing (essentially since the introduction of the Asylum and Immigration Act 1996, c. 49, referred to as the 1996 Act) resulted in charitable organisations having to take over in trying to find suitable accommodation.

rules and thus supposes asylum seekers having the financial means necessary to enter that market. For instance, accommodation in the private sector implies that asylum claimants can afford rent. In these circumstances, the private sector can only be an option where asylum seekers have or are given the means by the State to access it.

There are great divergences between Member States' practices with regard to support for asylum seekers. However, a general trend towards more limited access induced by the adoption of increasingly restrictive asylum laws may be identified. For instance, in the UK, the 1996 Act introduced restrictions on the asylum seekers' entitlement to social security benefits while failing to make up for the deficit so created. The then Secretary of State for Social Security, Peter Lilley, declared in his address to the Conservative Party in October 1995 that "Britain should be a safe haven, not a soft touch."[13] The adoption of the 1999 Act was the object of heated debates[14] and many hostile headlines[15]. The Member States' responsibility in that area is undermined by the lack of supranational mechanisms capable of securing its enforcement. It is argued that asylum seekers' right to adequate support is inherent in the right to seek refugee status and should therefore be secured at EC level. As already suggested, such provision could be adopted on the basis of Article 63(1)(b) of the TEC on minimum standards on the reception of asylum seekers in the Member States. This Article was interpreted by the Commission of the European Communities as covering "(...) such matters as accommodation, means of subsistence, health care, education, employment and access to the labour market for

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[13] "Lilley to curb benefits to asylum seekers", the Independent, 12 October 1995.

[14] For instance, the Government faced rebellion from labour back benchers over curtailments of asylum seekers' benefits, in particular incapacity benefits (BBC Radio 4 news, 9 February 1999, at 6 p.m.).

[15] See, for instance, "We hate you", in Refugees in Britain: special report, The Guardian, 20 March 2000, http://www.newsunlimited.co.uk/Refugees_in_Britain/Story/0,2763,148752,00.html

asylum seekers."[16] Issues critical to the existence of adequate support regard the means to provide support as well as its scope, i.e. the needs that it addresses.

1.2. Methods for providing support

The methods used to provide support must be chosen in the light of the Member States' duties in that respect. There are two main ways of providing assistance to asylum seekers that may be combined. Asylum seekers may be given the means to support themselves or support may be directly secured by the State. Where assistance is directly provided by the State, another issue arises, namely the forms that State support may take. State assistance may be provided in cash or in kind. However, these two systems are not incompatible. Hybrid systems are perfectly conceivable and exist in a number of Member States. Considering the state of destitution of many asylum seekers, direct State support will be predominant.

1.2.1. Providing asylum seekers with the means to support themselves

Providing asylum seekers with the means to support themselves supposes that they have a source of income that allows them to satisfy their needs. This will usually suggest the existence of a paid activity and will imply that they are entitled to work. Indeed, it is unlikely that most candidates for refugee status will arrive in the host countries with the means to sustain themselves pending asylum proceedings.

This method suffers from a major drawback: asylum seekers are generally denied access to the labour market, at least in the first months of their stay. These restrictions are generally justified on the ground that their status of asylum claimants is uncertain and temporary. Under French law, for example, asylum seekers do not, in principle, enjoy the right to work[17]; this right is reserved to those who have come

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[16] European Commission, Commission working document: Towards common standards on asylum procedures, Brussels, 3 March 1999, SEC (1999), paragraph 5(3).

to France with the prior agreement of the French authorities[18]. In the UK, asylum seekers may be granted a "permission to work" where they have been awaiting a decision on their claim for at least six months. This "permission to work" gives them the possibility to apply for any job available and not only for a specific position. However, it must be stressed that this "permission" does not amount to a right to work; it is, indeed, granted by the Home Office on a discretionary basis. According to NGOs assisting refugees, some asylum seekers have experienced difficulties in obtaining the required permission[19].

Providing means of support through work presents the advantage of giving asylum-claimants more control over their own lives. However, access to employment raises a number of difficulties with respect to asylum seekers. Asylum seekers' precarious status may arise suspicion among potential employers; if only staying for a short while, they may not constitute the ideal work force. Potential employers may also be discouraged by administrative complications and delays in obtaining work permits when it comes to employ asylum seekers. Moreover, language barriers and the fact that their qualifications and work experience may not be recognised in the receiving States may prevent asylum seekers from taking up employment [20]. The question of a right to work for asylum seekers must be tackled in the light of both their temporary and uncertain status and the advantages of work as a means of support. On the one hand, because of their status, granting asylum seekers access to

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[17] *Circulaire Ministérielle* of 26 September 1991, *Journal Officiel de la République Française* of 27 September 1991, at p. 12606. The Government suggested that, since proceedings before the OPFRA had been speeded up, asylum seekers' need to find work was less crucial.

[18] This concerns asylum seekers who have been admitted to the French territory with a long-term visa and, in particular, nationals from south-east Asia States who have come to France following specially organised procedures.

[19] In certain circumstances, this permission to work can be given before six months for compassionate or humanitarian reasons at the discretion of the Home Office.

[20] These difficulties are also faced by recognised refugees, although worsen in the case of asylum seekers because of the uncertainty of their status.

the labour market may be rather problematic and denying them access can therefore be justified to a certain extent. On the other hand, the positive effects of work cannot be ignored: work can constitute a direct means of subsistence that can play an important part in helping asylum seekers regaining some sense of "normality". Asylum seekers' rights with regard to work must be determined with these facts in mind and a fair balance needs to be struck. While it is accepted that a restricted right to work may be tolerated where asylum claims are decided in a relatively short period of time, these should be lifted in cases of lengthy proceedings. With this in mind, it is argued that where procedures exceed three to six months, asylum seekers should be entitled to enter the labour market[21]. Indeed, beyond this period of time, an applicant's stay looses some of its temporary nature. The right to work should be construed as a way to facilitate asylum seekers' integration in cases of prolonged stay in receiving countries. It is recognised that work may not be available and asylum claimants may not meet the necessary requirements; this, however, should not be used to justify unnecessary restrictions to asylum seekers' access to the labour market.

Access to work must not be disregarded as a route to provide support for asylum seekers; however, while its promotion is encouraged, its limits must also be acknowledged. Giving asylum seekers the means to satisfy their basic needs themselves cannot, therefore, be considered the primary medium of support. In this context, direct State support remains fundamental to asylum claimants' welfare.

1.2.2. The various forms of direct State support

As observed above, the vast majority of asylum seekers are in no position to satisfy their essential living needs and are therefore dependent upon States for receiving

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[21] A three month delay was proposed by the UK Refugee Council, (Refugee Council, *Costings (...) for granting permission to work to asylum seekers after three months instead of six*, February 1997, referred to in JUSTICE, Immigration Law Practitioners' Association (ILPA) and Asylum Rights Campaign (ARC), *Providing Protection, Towards Fair and Effective Asylum Procedures*, London, July 1997, at p. 66).

assistance. This raises the issue of the forms that direct State support may take. In determining the most suitable forms of support, it is important to take into consideration the specificity of asylum seekers' essential needs. The view taken is that the Member States may retain the power to lay out the structure of their support system and decide on the most appropriate forms of support provided that asylum seekers' needs are satisfied.

There are two main forms of State support: support may be supplied by means of entitlements to various benefits or it may be provided in kind (for instance, by offering food, clothing or accommodation). It is argued that, in deciding on the form, Member States must take into account a number of factors; these include the nature of the need being addressed, the impact of the contemplated form of support on asylum seekers' dignity as well as cost-effectiveness. It is argued that a fair balance must be found between asylum seekers' interests and States' resources. However, it is essential that decent living standards for asylum seekers are maintained throughout the EC. Thus, where a Member State is not capable of supplying the required level of support, the principle of solidarity should apply in order to enable the Member State concerned to fulfil its obligations.

(i) Accommodation

As already stressed, most asylum seekers arrive in the receiving country destitute and are thus unable to provide shelter for themselves. Hence, they are entirely dependent upon the State for accommodation.

While the Member States may decide on the methods and forms to be used in order to supply accommodation to asylum claimants, they remain answerable for the adequacy of the accommodation offered. They are, therefore, under the obligation to introduce safeguards designed to secure adequate accommodation. The different types of accommodation available must be assessed in the light of asylum seekers' specific needs.

State support with respect to accommodation may take two forms: States may directly provide asylum seekers with shelter or entitle them to benefits designed to cover rent. There are various forms of accommodation. Asylum seekers may be sent to reception centres; however, places in these centres are generally granted on a temporary basis and alternate forms of shelter need to be found. The latter can take the form of State-funded hostels, bed and breakfast or private flats. Resort to these forms of accommodation mean that they are either subsidised or contracted out by the State or that asylum seekers are entitled to benefits meeting the costs of rent.

The Member States must ensure that the chosen form of accommodation is adequate. This means that, besides securing asylum seekers with accommodation, the States are accountable for maintaining quality standards. The extent of the Member States' obligations in relation to accommodation has a number of consequences. Firstly, although the Member States may rely upon local authorities, the private sector or charitable organisations, they remain responsible for securing accommodation. Most Member States have opted for a combined system. In many Member States, local authorities play a major role in the provision of accommodation to asylum seekers[22]. For instance, in the UK, local authorities are responsible for providing shelter for asylum seekers. However, as already stressed, responsibility ultimately lies with the Member State authorities when it comes to finding accommodation and ensuring its adequacy. With this in mind, it is argued that the Member States should be under the obligation to carry out quality controls.

In order to be adequate, accommodation must address and thus be adapted to asylum seekers' specific needs. Besides offering decent living conditions, the chosen accommodation must not affect asylum proceedings and other aspects of support for asylum seekers. This means, for instance, that the location of the accommodation must not hinder access to information, legal advice, competent bodies or health care. Moreover, it is important that accommodation constitutes an

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[22] This does not mean that the role played by charitable organisations is underestimated. Unfortunately, the extent of their intervention is often affected by their limited means.

environment as reassuring as possible, especially with respect to newcomers, those who have no contacts whatsoever in the host country and members of particularly vulnerable groups (for instance, women with children and unaccompanied minors). In the longer term, it is critical that accommodation does not hinder their integration - or at least their adaptation - to their new environment by alienating them from the local community. This requirement concerns those whose stay in the receiving country can no longer be regarded as transitory; this should be the case where their presence exceeds three to six months. It is essential that asylum seekers are not overly dispersed in order to avoid any kind of discrimination based on location. It is recognised that the numbers of asylum seekers within a Member State vary greatly from region to region. Therefore, those areas that receive greater numbers of asylum claimants may face serious difficulties in providing accommodation. In such cases, dispersal is often presented as the solution. However, dispersal must not be achieved at the detriment of asylum seekers' rights; this means that access to asylum services must always be secured[23]. The suitability of the various types of accommodation must be assessed on the basis of the notion of adequate accommodation.

Most Member States have reception centres designed to accommodate newly arrived asylum seekers. These reception centres may occupy a great variety of premises; they may be specially built premises[24], but also old hospitals, hostels or

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[23] In that respect, the Audit Commission heavily criticised the UK Government's plan to disperse asylum seekers across the UK. Over 85% of asylum seekers are concentrated in London and the south-east England, and officials are eager to send them to other areas to help spread the task of caring for them. However, according to the Commission' report, many local authorities are not prepared and the money allocated to help them fund asylum services will not cover all costs. Councillor Tony Harris, the association chair's declared that "[t]he Audit Commission ha[d] highlighted the need for adequate support services if we [i.e. the UK Government] [were] to succeed in dispersing asylum seekers and easing the pressures on the capital." ("Refugee dispersal plans attacked", BBC News, UK Politics, 1 June 2000, http://news.bbc.co.uk/).

even unused barracks[25]. Opinions are divided on the use of reception centres. Those in favour of this mode of accommodation stress that it considerably reduces the risk of isolation, facilitates access to the necessary facilities, allows for regular medical checks and is relatively cheaper. On the other hand, it has been argued that reception centres cut off asylum seekers from society by creating an artificial environment that is not necessarily welcoming[26]. The view taken is that, at least in the short-term, reception centres constitute a suitable environment for newly arrived asylum claimants. Since they are specially designed to house asylum seekers, access to information and required services may be offered *in situ* or, at least, within easy reach. For instance, information on asylum proceedings or language training may be provided within the premises of reception centres. Moreover, being with people who find themselves in a similar situation may provide moral support and attenuate the effects of isolation. The claim that reception centres deprive asylum seekers from any chance of integration can only be sustained with respect to lengthy stays. As already observed, most asylum seekers have no contacts in the receiving country and often do not speak the language. With this in mind, it is argued that reception centres may be an useful transitional phase. Being confined to a bed and breakfast or a private flat with limited means of communication - if any - can be an extremely stressful experience[27]. Furthermore, reception centres may constitute most suitable

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[24] In France, for instance, asylum seekers may be housed in special centres called "*Centres d'accueil pour demandeurs d'asile*" (CADA). However, in June 1996, there were only 51 CADAs with a total capacity of 3111 beds; this was obviously insufficient.

[25] In September 1998, plans suggested by Brent Council in North West London to house hundreds of refugees from former Yugoslavia in tents across London parks were being studied by the UK Home Office. Fortunately, the Home Office denounced them as being unacceptable, see Polly Newton, "Refugee camps in parks are rejected", Electronic Telegraph, http://www.telegraph.co.uk, 21 September 1998.

[26] For instance, in a Spanish reception centre, one group of asylum seekers had to be removed when Laotian and Vietnamese were housed in the same premises (Danièle Joly, Lynette Kelly and Clive Nettleton, *Refugees in Europe: The Hostile Agenda*, Minority Rights Group International, 1997, at p. 32).

places for particularly vulnerable groups, such as women and children. Another advantage of reception centres is their cost; they are relatively cheap compared to other modes of accommodation such as rented housing.

However, reception centres have a limited housing capacity that usually does no match the overall need for shelter. Therefore, it is essential to secure the existence of alternate forms of accommodation. Moreover, in the longer term, it is important to facilitate asylum seekers' adaptation to their new environment. Reception centres may not constitute the most suitable form of accommodation in that respect. It is essential that the other forms of accommodation do not aggravate asylum seekers' isolation.

It is argued that asylum seekers' accommodation should present a certain degree of stability. This is important to help them adapt to their new surroundings. Moreover, frequent changes of address may affect access to various services. For instance, they may complicate the task of legal advisers and representatives who may encounter difficulties in keeping track of their clients' moves. This may also be potentially detrimental to asylum seekers' rights as it may, for instance, prevent regular contacts with their advisers and representatives. It is also important that these other forms of accommodation do not result in asylum seekers' isolation. There has been a tendency in many Member States to move asylum claimants away from city centres to isolated areas. This was, for instance, a trend among London boroughs that was halted by a decision of the High Court. Seven individuals challenged the decision of the London borough of Newham to send them to Eastbourne, East Sussex. Their counsel perfectly illustrated the impact of such policies on asylum seekers by stressing that "there were "compelling psychological and spiritual reasons" why those who had been tortured and ill-treated in the countries from which they had fled should remain in London, where they had the support of ethnic communities, medical advisers and religious groups."[28] Newham council claimed

[27] Moreover, one must bear in mind that the local population is not always welcoming.

that it did not have sufficient accommodation for all the asylum seekers as under the law they could not offer bare rooms without food, toiletries and laundry facilities. However, Mr Justice Moses ruled that the Council had misinterpreted the law and that the other services could be provided outside that accommodation[29]. What is essential is that asylum seekers are given adequate access to the necessary services and facilities; these do not necessarily need to be provided *in situ* so long as they are easily accessible.

It is argued that asylum seekers' right to adequate accommodation should be secured in EC law, the bottom line being that accommodation, whatever its form, should provide decent living conditions and allow access to asylum services. It is accepted that Member States may face difficulties in fully fulfilling their obligations in relation to accommodation. This is why the principle of solidarity should apply and EC funded financial assistance be made available[30]. Moreover, it is argued that the adoption of fair and effective asylum procedures could contribute to ease the current accommodation crisis. For instance, improving the first instance decision-making process would reduce the need for appeals and thus shorten asylum proceedings. In that context, a number of asylum seekers would need accommodation for a shorter period of time[31].

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[28] "Asylum seekers won London lodging right", Electronic Telegraph, http://www.telegraph.co.uk, 13 December 1997.

[29] High Court, decision of 12 December 1997, TLR 26/12/1997.

[30] The assistance referred to is essentially of a financial nature as dispersing asylum seekers within the EC is not regarded as a viable solution since it would complicate asylum proceedings and generate problems of its own.

[31] However, it is acknowledged that the needs for accommodation of successful applicants would still have to be addressed as well as those of unsuccessful applicants who have been allowed to remain. However, these issues fall outside the scope of the thesis.

In addition to accommodation, it is crucial that asylum seekers' other essential everyday needs are satisfied. Access to health care and education is considered as it raises specific issues.

(ii) Asylum seekers' other essential needs

Asylum seekers' right to support means that they are able to meet everyday life needs. Thus, besides accommodation, support must also address needs such as food and clothing. Moreover, it is crucial that asylum claimants are given the means to exercise their rights and obligations. They must, for instance, be in a position to contact their legal advisers and representatives or attend court hearings whenever necessary. As already stressed, asylum seekers' access to employment is extremely limited. Thus, most asylum seekers are not in a position to meet living needs through this route. It follows that support must emanate from the State.

State support may take the form of entitlements to benefits or be supplied in kind. In deciding on the most suitable option, Member States must take into consideration the nature of the needs being addressed, the impact of their choice on asylum seeker' welfare and dignity as well as its cost-effectiveness.

Withdrawals of benefits from asylum claimants have resulted in an increasing reliance upon support in kind. For instance, in the UK, assistance in kind has been increasingly promoted. The system established by the 1999 Act heavily relies upon the use of vouchers. Indeed, it follows from Paragraph 10 of the Asylum Support Regulations 2000 that the essential needs of asylum seekers may be expected to be provided weekly in the form of vouchers redeemable for goods, services and cash[32]. This measure has been criticised by the Refugee Council and Legal Aid in that it would force asylum seekers to live in a cashless society, relying on food parcels and

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[32] The Asylum Support Regulations 2000, Statutory instrument 2000 No. 704. These regulations were adopted by the Secretary of State in exercise of his powers under sections 94, 95, 97, 114, 166 and 167 of and Schedule 8 to the Immigration and Asylum Act 1999.

vouchers[33]. It is argued that the manner in which support is provided should contribute to giving asylum seekers' life some degree of "normality"; in any case, should it undermine their dignity. A balance must therefore be struck between assistance in kind and support through payments if asylum seekers are to retain some control over their life. Denying them access to cash has the effect of "branding" asylum claimants as "assisted" individuals. Besides undermining their dignity, this may also exacerbate hostile attitudes from the local population. One must bear in mind that asylum seekers are not always welcome and that purchasing food by means of vouchers, for example, may attract attention as well as constitute a constant reminder of their status of asylum seeker. Moreover, being in possession of a minimum amount of money is indispensable when it comes to satisfying needs as basic as making a phone call or paying a bus or train fare. Of course, asylum seekers could be given phone cards as well as transport tickets, but this would amount to depriving their life from any semblance of "normality"! Moreover, it has been argued in the context of the UK that the cheapest and most effective way of providing support is through entitlement to social security payments[34].

While an EC instrument may not to go as far as setting up a common system for asylum seekers' support, the discretion that Member States may enjoy in this area must not be exercised at the detriment of asylum seekers' best interests. It is recommended that wholly or predominantly cash systems should, in principle, be encouraged. In that respect, it is encouraging to note that Portugal, which was presiding the Council until the end of June 2000, was pushing a proposal for a directive which would outlaw schemes which replace benefits by vouchers[35].

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[33] The charity Oxfam said that it would boycott the voucher scheme and that other major retailers should do the same ("Asylum vouchers spark protests", BBC News, UK Politics, 3 April 2000, http://news.bbc.co.uk/).

[34] See *supra* n. 21, at p. 66.

[35] "EU threat to British asylum crackdown", The Sunday Times, 28 May 2000.

Another essential component of asylum seekers' welfare lies with access to health care.

(iii) Access to adequate health care

Access to health care is a fundamental element of support for asylum seekers. Member States must therefore ensure that asylum seekers have access to appropriate health care from the time they arrive in the country concerned[36]. It is often the case that newly arrived asylum seekers do not ask about health care, unless very ill; their priorities go to the submission of their asylum claim, accommodation and financial matters. However, it is essential that asylum claimants are promptly made aware of their rights with regard to health care. However, although comprehensive, this information should not be overwhelming.

Moreover, many asylum seekers are concerned that ill-health may adversely affect the outcome of their asylum claim. For this reason, they may be reluctant to see a doctor for fear of the impact of his or her diagnosis on their application. Hence, it should be made clear to asylum seekers that health authorities are distinct from those dealing with their asylum claim and that the latter have no right to request information on their health or access to their medical record. However, confidentiality does not apply to medical records used as evidence of torture or physical or mental ill-treatment in support of an application for asylum. This should be the only case where medical evidence is taken into consideration in determining an asylum claim; this should expressly be enshrined in EC law. Reluctance to see a doctor may also be caused by the necessity to resort to an interpreter and the effect of his or her involvement on confidentiality. In order to address this legitimate concern, interpreters should be legally bound by a confidentiality clause.

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[36] See David Jobbins, "Health screening for newly-arrived asylum seekers and their access to NHS provision", in *Current Issues of UK Asylum Law and Policy*, Frances Nicholson and Patrick Twomey (eds)(Ashgate, Aldershot, 1998) at p. 263-281.

Adequate health care is contingent on compliance with quantity and quality standards; this means that access to comprehensive health care by those in need must be secured. Asylum seekers' access to health care may be problematic for a number of reasons that need to be addressed by the Member States. Firstly, as already stressed, most asylum seekers arrive destitute and are not in a position to pay for consultation and treatment. This can only be overcome by granting them access to national health services free of charge or by giving them the means to afford it. The first option is considered to be more cost-effective as it minimises administrative "paper-work". The second option implies that asylum seekers are entitled to payments covering health costs. However, it is unlikely that these entitlements will allow full payment and the remaining part of the bill will have to be directly covered by the State; State direct financial assistance is thus unavoidable. Moreover, it is argued that free access to national health services does not entail the stigma that other forms of direct support, such as vouchers, may have. The decision belongs to the Member States and may be dictated by their health services and social security systems; this discretion is, however, strictly confined to their obligation to guarantee access to appropriate health care. Another potential threat to the adequate health care lies with the traditional mobility of asylum seekers that may render their localisation more difficult; this may undermine effective medical follow-up. This constitutes an additional argument in favour of more permanent types of accommodation for asylum seekers. It is accepted that changes of address will remain unavoidable; however, they must be limited as much as possible and must not affect access to health care. For instance, health authorities should be given the means to keep up-dated records. A final obstacle to access to health care finds its origin in language barriers. Many asylum seekers can only communicate with health personnel through an interpreter. Denying them the services of an interpreter where necessary would seriously impede access to health care as well as undermine its quality. For health care to be adequate, it must address asylum seekers' needs in their entirety. It is therefore essential that in addition to regular health care[37], specialised care is provided; indeed, many asylum claimants have

experienced traumas that may have scarred them psychologically as well as physically. Treatment by specialists, such as psychologists and psychiatrists experienced in dealing with victims of torture, may be required. Moreover, the needs specific to certain categories of asylum seekers must be addressed. For example, the vast majority of Muslim women will only consent to examination by female doctors.

Another issue raised by support for asylum seekers relates to access to education.

(iv) Education

Asylum seekers' status pending proceedings is by definition temporary and there is no certainty as to whether they will settle in the State responsible for examining their application. Thus, since education is mainly construed as a key component to successful integration, its access has been seriously curtailed in the case of asylum seekers. Moreover, asylum seekers' needs in that respect may vary with their circumstances and the duration of their stay in the receiving State. Children's specific needs must be taken into consideration. The notion of education is understood as embodying language training, school attendance as well as access to higher education and vocational courses.

A good command of the language of the State of residence is crucial to successful integration. Poor or non-existent language skills will constitute a considerable obstacle to this process and will therefore aggravate isolation. However, entitlement to language training and education is usually limited because of asylum seekers' temporary status and, in many cases, presence. Addressing these issues is often considered premature. It is argued that a distinction should be made between language training and access to education at large. The view taken is that asylum seekers should benefit from language tuition as early as possible. This would help them manage everyday life and facilitate the integration of successful applicants.

[37] Regular health care refers to the care that may be required by any individual regardless of his or her circumstances.

With regard to access to education, i.e. access to courses, restrictions could be tolerated where asylum seekers' stay remains brief. It is argued that where asylum seekers' stay exceeds three to six months, steps towards integration should be taken. Denying them access to education would constitute a terrible waste of time with respect to successful claimants while contributing to keep asylum seekers away from mainstream society. In other words, Member States' responsibilities with regard to asylum seekers' access to education should expand with the duration of asylum claimants' stay within their territory. This should constitute an incentive towards the adoption of fair and effective asylum procedures as such procedures could contribute to shorten proceedings[38].

The needs of children should be specifically addressed. It is important that their living conditions are "normalised" as much as possible and a crucial element of this "normalisation" is school attendance. Moreover, schooling is vital to an eventual successful integration. The required standards in that respect could find their legal basis, *inter alia*, in the UN Convention on the Rights of the Child, which has been ratified by all the Member States[39]. The Convention prohibits any form of discrimination in the implementation of children's rights, including discrimination based on status[40]. This provision could therefore be interpreted as applying to children whose parents are asylum seekers or who are asylum seekers themselves. This interpretation of the Convention is reinforced by Article 22 that deals, *inter alia*, with the rights of children seeking refugee status; it provides that they shall "(...) receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in (...) the Convention and in other international human

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[38] See chapter V on fair and effective procedures.

[39] UNGA Doc A/RES/44/25 (12 December 1989). To date, only two States are not party to the UN Convention on the Rights of the Child: the United States (which have only signed the Convention) and Somalia (which has not signed the Convention).

[40] Article 2(1) of the UN Convention on the Rights of the Child.

rights or humanitarian instruments to which the said States are Parties."[41] Moreover, the Convention expressly recognises the children's right to education (Article 28). Hence, one could rely upon the Convention provisions in order to set out acceptable standards with regard to children asylum seekers' education (as well as other rights).

Ideally, children who are asylum seekers themselves or whose parents are seeking asylum status should attend special classes designed to address their specific needs. Such classes should, in the first instance, provide language support; indeed, language is the key to education and thus successful integration. Depriving these children from schooling for extended periods of time cannot be justified by the potentially temporary nature of their presence in the State concerned. In France, for instance, school is free and attendance compulsory from the ages of six to sixteen for all children living there and foreign children attend the same schools as French children. Special "adaptation classes" for the children of migrants, refugees and asylum seekers are sometimes specially organised within schools by the Ministry of education. In the UK, school is also free and compulsory (between the ages of five to sixteen) and children of asylum seekers are entitled to attend schools within the State education sector and schools have the duty to accept them. However, there is no provision for the reception of children who do not speak English within special classes. It is argued that such classes are necessary to overcome language barriers and allow these children access to education. However, it is accepted that the Member states may not be capable of providing this support throughout their territory. This demonstrates the importance of asylum seekers' localisation. As already stressed, asylum seekers, including children, must not be housed in areas compromising access to the facilities they need.

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[41] It is understood that the particular vulnerability of children whose parent(s) are asylum seekers or who are seeking refugee status themselves should not only be addressed with regard to education, but in every aspect, including housing, clothing and nutrition (see, for instance Article 27 of the UN Convention on the Rights of the Child).

Support is an essential element to the right to seek refugee status and is designed to secure that asylum seekers are living in decent conditions pending the outcome of their claim. The Member States are therefore responsible for providing adequate support for asylum seekers. With this in mind, common minimum standards regarding asylum seekers' status pending proceedings should be adopted with a view to guaranteeing that support is consistent with the right to seek refugee status. These standards could be adopted on the basis of Article 63(1)(b) of the TEC on minimum standards on the reception of asylum seekers in the Member States. These standards should also tackle the issue of asylum seekers' detention, one of the main threats to asylum seekers' welfare.

2. Detention: an exceptional measure

The legality of asylum seekers' detention must be envisaged in the light of international refugee law and human rights treaties[42]. International standards regarding the detention of asylum seekers find their main roots in European and international human rights law which prohibits arbitrary detention (as well as arrest)[43]; the 1951 Convention also offers protection against detention, although to a limited extent, through Article 31. However, it is important to note that UNHCR has now adopted Guidelines on applicable criteria and standards relating to the detention of asylum seekers[44], referred to as UNHCR's Guidelines on asylum

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[42] *Ibid.*

[43] Of particular relevance in the European context is the ECHR (in particular, Article 9(1)). The special attention paid to the ECHR is intended to reflect its particular significance in the EC context: the ECHR is legally binding upon the Member States and its correct implementation secured by adequate machinery (i.e. the European Commission and the Court of Human Rights). Can also be mentioned the UN International Covenant on Civil and Political Rights , referred to as the ICCPR (in particular, article 9(1)).

[44] *UNHCR's Guidelines on applicable criteria and standards relating to the detention of asylum seekers*, Geneva, 10 February 1999.

seekers' detention. UNHCR stresses that detention must be construed as an exceptional measure. This is reflected in the consideration given by UNHCR to alternatives to detention[45].

It is argued that detention should be considered the exception and therefore be subject to clear criteria and conditions; there should be a presumption that asylum seekers should not be detained. This was the principle endorsed by the Executive Committee of UNHCR; in Conclusion 44, it declared that "(...) in view of the hardship which it involves, detention should normally be avoided."[46] The principle in question is reiterated in the UNHCR's Guidelines on asylum seekers' detention[47]. The 1951 Convention was of little help in reaching this conclusion; the issue relating to the detention of asylum seekers is not directly considered in the Convention. Article 31 concerns refugees' illegal entry or presence in the country of refuge[48] and

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[45] *Ibid.* Guideline 4.

[46] Executive Committee Conclusion No. 44 (XXXVII)-1986, para. (b) (see Guy S. Goodwin-Gill, *The Refugee in International Refugee Law* (Clarendon Press, Oxford, 1996) (2nd ed) at p. 491). The detention of asylum seekers - as well as refugees - was initially examined by the Executive Committee at its 37th session in 1986. The debates in the Sub-Committee of the Whole on International Protection showed great divergences between the States which were concerned with confining detention within the limits of an exception and those that intended to use it as a means to control movement and entry. The Sub-Committee failed to reach an agreement and the matter was transferred to a working group. The position finally adopted by the working group and endorsed by the Executive Committee was very much the result of a comprise (see Goodwin-Gill, *supra*, at p. 249-250).

[47] *Supra* n. 44, Guideline 3.

[48] Article 31 of the 1951 Convention reads:

"1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

its provision for non-penalisation is of limited application since it only applies to those who have come directly from a country where they fear persecution in the sense of Article 1 of the Convention. Although Article 31 was specifically referred to in the Executive Committee's conclusion on the detention of refugees and asylum seekers[49], the main reasons for limiting the use of detention are found in the very nature of this sanction[50] and its effects on those being detained.

Detention constitutes an extreme sanction. Hence, resorting to detention on a frequent basis with respect to asylum seekers would entail the risk of assimilating them to "criminals" and, thus, contributing to fostering prejudiced clichés, besides undermining their human rights as well as their rights as asylum seekers. If the right to seek refugee status is to be preserved and human rights respected, the treatment reserved to asylum seekers pending decisions on their claims for refugee status should be consistent with international refugee law. Detention should also be contingent upon the existence of adequate safeguards and appropriate facilities. These requirements are designed to prevent arbitrariness and poor conditions of detention and secure consistency with international standards. With this in mind, it is argued that detention must always be justified and should only occur in exceptional cases, where it is indispensable and the sole solution available. This requires the adoption of criteria and conditions for detention accompanied by adequate safeguards and facilities taking into account the specificity of asylum

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2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country."

On Article 31 of the 1951 Convention, see also Chapter IV on access to substantive asylum procedures.

[49] See *supra* n. 46.

[50] *Ibid.*

seekers' circumstances. However, it is argued that before considering detention, it is necessary to determine whether an alternative may be envisaged.

2.1. Alternatives to detention

The exceptional nature of detention in relation to asylum seekers must also be reflected in the availability of alternatives. In many cases, the objective pursued by detention is to provide States with some control over the whereabouts of asylum seekers. As observed by UNHCR[51], this can be achieved by other means than detention which have the advantage of allowing asylum seekers basic freedom of movement. It is argued that, as a pre-requirement to detention, alternatives should be considered. This supposes that such alternatives exist in the first place and are duly considered by authorities competent to take decisions on detention.

UNHCR in its Guidelines on asylum seekers' detention gives examples of possible alternatives to detention; these are reporting requirements, residency requirements, provision of a guarantor, release on bail or open centres. It follows that asylum seekers could be required to report to the authorities on a regular basis or to live at a specific address within a particular administrative region until they are given a final decision on their application for refugee status. Asylum seekers could also be required to provide a guarantor who would be accountable for ensuring their attendance at any official appointment. Asylum seekers' failure to attend would result in a penalty imposed on their guarantor. Bail could constitute another alternative. However, asylum seekers must be made aware of this possibility and its amount must remain within reasonable limits. In other words, as noted by UNHCR, "(...) the amount set must not be so high as to be prohibitive."[52] Finally UNHCR suggests that asylum seekers could stay out of detention so long as they reside at specific collective accommodation that they would be allowed to leave during

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[51] See *supra* n. 44.

[52] *Ibid.*

stipulated times. UNHCR stresses that these alternatives do not constitute an exhaustive list and that States could contemplate other alternatives to detention.

As already stressed, for alternatives to detention to be effective, they must be made available to asylum seekers. This means that they must exist, be considered and used in practice. It is argued that this issue should be tackled by EC law with a view to securing that such alternatives are made available to asylum seekers in the Member States with a view to preventing unnecessary detention. It is argued that EC law should take on board the UNHCR's guidelines in that respect and require Member States to provide effective alternatives. It is important that the range of alternatives available in a Member State addresses asylum seekers' circumstances in their specificity. For example, a system where the only alternative available would be bail or the provision of a guarantor could well condemn significant numbers of asylum seekers to detention as they may not be able to afford bail or find a guarantor. The guiding principle in establishing alternatives to detention is that the latter must remain exceptional in relation to asylum seekers. National authorities should bear this principle in mind when devising means to retain some control over asylum seekers' movements. In other words, these alternatives should constitute the rule and detention the exception.

2.2. Criteria and conditions for detention

The premise is that detention is an exceptional measure the use of which must be confined to rigorously pre-determined cases. Furthermore, where held justified, detention should take place in circumstances satisfying international standards. This requires the adoption and implementation of strict criteria and conditions. Moreover, it is argued that these criteria and conditions should be widely published in order to allow transparency.

2.2.1. Criteria for justified detention

The purpose of these criteria is to secure that decisions on detention are always justified by determining precisely the cases where this sanction may be imposed on asylum seekers. It is argued that this issue should not be left to the Member States' discretion in order to prevent abuses. Moreover, in order to prevent discrepancies between the Member States' practices and secure the protection of asylum seekers' rights throughout the EC, these criteria should be laid down in EC law.

The view taken is that people applying for refugee status are presumed to have been granted temporary admission to remain in the host country or bail; presumption could only be rebutted where there are factors indicating that detention may be necessary. It is understood that bail sureties should be proportionate to asylum seekers' resources and should not be construed as punitive measures. As already stressed, detention is understood as an exceptional measure the application of which must be confined to well-defined cases. With this in mind, it is argued, that EC law should mention the cases where detention may be justified. In that respect, it is encouraging to note that Portugal is pushing for the adoption of a directive that would outlaw asylum seekers' incarceration[53].

It is argued that the main scope for detention concerns cases where the implementation of decisions regarding asylum seekers' removal would be jeopardised by their behaviour. This supposes the existence of strong and objective reasons for believing that asylum seekers would abscond or fail to comply with decisions on deportation. In the latter case, detention could be envisaged where asylum seeker's removal is imminent; this would equally apply to removals to another country of asylum or removals following unsuccessful asylum claims. In such cases, the criteria for justified detention should take into consideration the imminence of the removal as well as asylum seekers' attitudes. French law does not

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[53] According to this Portuguese proposal, voucher-based schemes should also be outlawed, see *supra* n. 35.

appear to be totally satisfactory in that respect. Out of the four cases in which detention may be allowed, only one refers to the asylum claimant's attitude, i.e. where an asylum seeker eligible for detention under one of the other cases has failed to comply with a removal order within seven days of the termination of the initial detention[54]. With regard to the need for an imminent removal, the ECHR and the case-law of the European Court of Human Rights are of particular relevance. In *Chahal v the United Kingdom*[55], the Court recalled, with respect to an asylum seeker's detention in view of his removal from the UK, that any deprivation of liberty under Article 5(1)(f)[56] of the ECHR was only justified so long as deportation

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[54] Article 32 *bis* of the *Ordonnance N° 45-2658* of 2 November 1945 *relative aux conditions d'entrée et de séjour en France des étrangers, Journal Officiel de la République Française* of 4 November of 1945 (as amended by subsequent *lois*) allows the detention of asylum seekers in the following three cases:

- the asylum seeker must be hander over to the authorities of another Member State competent for examining his or her claim, but cannot leave the French territory immediately;
- the asylum seeker is subject to a deportation order, but cannot leave the French territory immediately; and
- the asylum seeker must be escorted to the border, but cannot leave the French territory immediately.

[55] *Chahal v the United Kingdom*, European Court of Human Rights, judgement (Grand Chamber) of 25 October 1996, Reports of Judgements and Decisions, 1996-V, N° 22, at p. 1831.

[56] Article 5(1) of the ECHR reads:

"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision of his lawful detention for the purpose of bringing him before the competent legal authority;

proceedings were in progress. Therefore, where proceedings were not carried out with due diligence, detention was no longer permissible under Article 5(1)(f)[57].

Detention for our purpose must be distinguished from cases where an asylum seeker is detained because he or she is considered a danger to the public or has been charged with or convicted of an offence punishable by imprisonment.

It is argued that, where the competent authorities consider that detention is justified, they should be under the obligation to provide the asylum seeker concerned with written reasons. For instance, under French law, asylum seekers' detention is subject to a written and motivated decision emanating from the State representative in the *département* concerned[58]. This requirement is particularly important with regard to asylum seekers' right to challenge decisions concerning their detention[59].

Unfortunately, practices in many Member States show that detention occurs on a much larger scale. Besides being used as a dissuasive measure the prospect of which may deter potential asylum seekers from lodging their claim with the States

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(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons unsound of mind, alcoholics or drug addicts, or vagrants;
(f) the lawful arrest and detention of a person to prevent his effecting an unauthorized entry into the country of a person against whom action is being taken with a view to deportation or extradition."

[57] See *supra* n. 55, paragraph 113.
The Court of Human Rights referred to *Quinn v. France*, judgment of 22 March 1995, Series A No. 311, paragraph 48 and *Kolompar v. Belgium*, judgment of 24 September 1992, Series A No. 235-C, paragraph 36.

[58] See, for instance, Article 35 *bis* of the *Ordonnance* of 2 November 1945 (*supra* n. 54) which requires decisions on detention ("rétention administrative") to give written reasons; a similar requirement exists with regard to confinement to waiting zones (Article 35 *quater* (II)), *ibid.*

[59] See this chapter *infra*, section 2.2.2(iv).

concerned, there has been a tendency to use detention in response to mass-influx arrivals of asylum seekers. However, it has been observed that when the authorities decide to detain another group of asylum seekers, they suddenly consider it safe to release those previously detained on a group basis. Establishing a connection between large arrivals of asylum seekers and detention result in abusive practices. The threat of detention should not be used by national authorities as a means to dissuade potential candidates to refugee status. In that respect, the Bishop of Oxford, Rt. Rev. Richard Harries, declared that "all European governments used it [detention] to frighten people away from seeking sanctuary (...)" and referred to detention as "a morally repugnant" tactic used by governments to stop people seeking safety within their boundaries."[60] An abusive usage of detention tends to present asylum seekers as criminals and thus fosters prejudices. Hence, besides undermining asylum seekers' rights, abusive detentions are likely to exacerbate and legitimise hostile attitudes towards them.

Considering its gravity, detention must be construed as a measure of last resort and be strictly proportionate to the aim it pursues. Hence, where an asylum seeker is considered for detention, the competent authorities should, as a prerequisite to any decision on his or her detention, consider whether there is an alternative solution. For instance, the asylum seeker in question could be subject to strict reporting conditions with detention as a sanction for failure to comply with these requirements. Such caution when it comes to asylum seekers' detention is intended to reflect the seriousness of a decision entailing detention. In the worse cases, detention has resulted in hunger strikes and suicide attempts[61]. One must bear in mind that asylum seekers may not be fit to cope with detention.

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[60] Victoria Combe, "Bishop hits out at asylum detention", Electronic Telegraph, http://www.telegraph.co.uk, 21 February 1997.

[61] In early January 1997, five detained asylum seekers as well as a Nigerian pastor started a hunger strike at Rochester Prison, Kent. They were soon followed by another ten inmates; by the end of the month, the hunger strike had involved 48 of the 180 asylum seekers detained at Rochester

With this in mind, it is argued that particularly vulnerable persons should not be detained even where the conditions of detention satisfy international standards[62]. It is argued that the exclusion of detention should be absolute in the case of children. This principle is emphasised in UNHCR's Guidelines on asylum seekers' detention with special reference to the Convention on the Rights of the Child[63]. Asylum support groups in the UK have expressed deep concern with regard to the detention of children who arrived on their own[64]. In most cases, they had entered the UK with

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Prison (Philip Johnston, "Pressure mounts over hunger strike, Electronic Telegraph, http://www.telegraph.co.uk, 31 January 1997).

[62] See *supra* n. 21, at p. 65.

[63] See *supra* n. 44, Guideline 6. UNHCR founds the exclusion of detention in relation to minors on the Convention on the Rights of Minors and, in particular, on the following Articles:

"Article 2 which requires that States take all measures appropriate to ensure that children are protected from all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians or family members;

Article 3 which provides that in any action taken by State Parties concerning children, the best interests of the child shall be a primary consideration;

Article 9 which grants children the right not to be separated from their parents against their will;

Article 22 which requires that States take appropriate measures to ensure that minors who are seeking refugee status or who are recognised refugees, whether accompanied or not, receive appropriate protection and assistance; and

Article 37 by which States Parties are required to ensure that the detention of minors shall be used only as a measure of last resort and for the shortest appropriate period of time."

[64] For instance, a thirteen-years old Nigerian who arrived in the United Kingdom with forged documents indicating that she was twenty-one was sent to detention; she was finally allowed to stay with a foster family. This experience was highly traumatic and added to the suffering

forged documents indicating that they were over eighteen years of age. Immigration authorities have argued that they were not always in a position to realise that they were dealing with minors. However, it has been stressed that the risk of detaining children on the basis of fake documents could be considerably minimised by consulting paediatricians. It is argued that asylum seekers who are minors should enjoy the same level of protection as any other children in the territory of the Member State concerned. Furthermore, concern for children's welfare requires States not to detain accompanying adults in order to avoid any further distress. Moreover, as recommended by UNHCR[65], the detention of unaccompanied elderly persons, torture or trauma victims and persons with mental or physical disability should, in principle, be avoided as they constitute particularly vulnerable groups. In any case, their detention should be conditional upon certification by a qualified medical practitioner that detention will not adversely affect their health and well-being. In many instances, this will amount to prohibit detention. Furthermore, the needs of a another vulnerable group, namely women and in particular those who arrive unaccompanied, must be addressed. This has a number of implications in relation to detention as stressed by UNHCR[66]. Detained female asylum seekers should be accommodated separately from male asylum seekers. The detention of nursing mothers or female asylum seekers in their final months of pregnancy should be avoided.

It is argued that EC law should endorse the principle that detention is an exceptional measure that should always be justified. To that end, EC law should provide an exhaustive list of the circumstances under which detention may be authorised as well as the cases where it should never be allowed. This issue could be tackled under Article 63(1)(b) of the TEC on minimum standards on the reception of asylum seekers in Member States.

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undergone in her country of origin, both of her parents had been killed in Nigeria (BBC Radio 4 News, 6 July 1999).

[65] See, *supra* n. 44, Guideline 7.

[66] *Ibid.*, Guideline 8.

As already stressed, detention constitutes a severe sanction that must be subject to strict requirements if abuses are to be avoided or at least minimised. Thus, determining the cases where detention may take place does not suffice in itself, it is also indispensable to guarantee that the conditions of detention are satisfactory by means of appropriate safeguards and facilities.

2.2.2. Conditions for detention

The conditions in question aim at securing the lawfulness of decisions regarding detention. They constitute a safety-net designed to prevent arbitrariness throughout the detention process, i.e. from the time detention is decided to its term. Ensuring the legality of the initial decision does not suffice in itself, the legitimacy of detention must be maintained throughout its duration and therefore be subject to regular controls. These must be complemented by the asylum seekers' right to challenge decisions on their detention.

The conditions of asylum seekers' detention comprise the existence of and compliance with an adequate legal basis, the imposition of time-limits and the establishment of regular judicial supervision.

(i) An adequate legal basis

As already mentioned, international and European human rights law prohibits arbitrary detention (or arrest) and impose certain requirements to that end; the first requirement regards the existence of a legal basis. The contemplated detention must find its foundation in domestic law and comply with it. In that respect, Article 9(1) of the UN International Covenant on Civil and Political Rights (ICCPR) provides, *inter alia*, that "[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." ; Article 5(1) of the ECHR contains a similar provision[67]. In *Chahal*[68], the European Court of Human

[67] See *supra* n. 56.

Rights stressed that the notion of "lawfulness" with regard to detention included the question of adherence to the "procedure prescribed by law". The ECHR (Art. 5(1)(f)) referred essentially to the obligation to observe substantive and procedural rules of national law. However, as noted by the Court, "lawfulness" is also contingent upon compliance with Article 5 of the ECHR itself, the purpose of which is to protect individuals from arbitrariness[69]. It follows that privation of liberty cannot take place in the absence of a domestic legal provision authorising it; it is understood that the provision in question must be in line with human rights law and more specifically with Article 5(1) of the ECHR[70].

With the "communautarisation" of asylum matters, the legal basis for asylum claimants' detention should be defined and incorporated in EC law.

(ii) Time-limited detention

The imposition of tight and strictly controlled time-limits is designed to facilitate the regular review of the legality of detention. These time-limits aim at preventing detention from being unnecessarily extended, the main fear being indefinite detention.

The lawfulness of detention is contingent upon its being justified. In any case must this principle be undermined by means of derogations. This was expressly recalled by the UN Human Rights Committee in the context of an individual petition brought against Australia[71]. The case concerned an asylum seeker who had been

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[68] See *supra* n. 55, paragraph 118.

[69] *Ibid.*

[70] See *supra* n. 56.

detained in Australia for four years; the UN Human Rights Committee found that this detention was in breach of Article 9(1) of the International Covenant on Civil and Political Rights[72]. The Committee expressed the view that "detention should not continue beyond the period for which that State can provide justification[73] (...). [T]he fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual (...) which may justify detention for a limited period. Without such factors detention may be considered arbitrary, even if entry was illegal."[74] A similar requirement can be inferred from Article 5(1)(f) of the ECHR pursuant to which an individual's detention can only be justified in view of his or her deportation or extradition. In *Chahal*[75], the applicant was an Indian national who had been legally residing in the UK. Regarded as a danger to public security, he was served with a notice of intention to deport and was detained to that end. Because of his political and religious activities, he claimed that he had a well-founded fear of persecution if returned to his country of origin. Following lengthy and complex proceedings[76], his case was finally brought to the institutions of the

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[71] *A v Australia*, views of the UN Human Rights Committee, Communication 560/1993, referred to in *Providing Protection, Towards Fair and Effective Asylum Procedures*, see *supra* n. 21, at p. 64.

[72] Article 9(1) of the ICCPR provides:

"1. Everyone has the right to liberty and security of person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

[73] Emphasis added.

[74] *A v Australia*, see *supra* n. 71, paragraph 9(4).

[75] See *supra* n. 55.

[76] The applicant, Mr Chahal, entered the UK illegally in 1971 in search of employment; however, his situation had been regularised and he had been granted indefinite leave to remain. In 1984, he went to Punjab to visit relatives and attended the meetings of a Sikh group that had engaged in a political campaign for an independent homeland which resulted in violent conflicts with the Indian authorities. The applicant was arrested by the Punjab police and kept in custody for twenty-

one days, during which time he was regularly subjected to ill-treatment. He was then released without charge. On his return to the UK, Mr Chahal engaged in political and religious activities and supported a group who advocated violent methods in pursuance of the separatist campaign; the leader of this group in the UK, Jasbir Singh Rode, was subsequently expelled. In October 1985, the applicant was detained under the Prevention of Terrorism (Temporary Provisions) Act ("PTA") on suspicion of involvement in a conspiracy to assassinate the then Prime Minister, Rajiv Gandhi, during an official visit in the UK. He was released without charge. In March 1986, Mr Chahal was charged with assault and affray following disturbances at the East Ham gurdwara in London. During the course of his trial, there was a disturbance at the Belvedere gurdwara. Mr Chahal was acquitted of the charges resulting from the Belvedere disturbance. In 1990, the Home Secretary, Douglas Hurd, decided that the applicant should be deported because his presence in the UK was unconducive to the public good for reasons of national security and other reasons of a political nature, i.e. the international fight against terrorism. He was detained for deportation purposes pursuant to paragraph 2(2) of Schedule III of the Immigration Act 1971 (pursuant to this provision, a person may be detained under the authority of the Secretary of State after service upon him of a notice of intention to deport and pending the making of a deportation order.) Mr Chahal then submitted an application for asylum on the ground that if returned to India he would have a well-founded fear of persecution within the meaning of the 1951 Convention. The Home Secretary rejected his claim in 1991 and Mr Chahal's solicitors informed the Home Secretary of their client's intention to apply for judicial review of this refusal. However, they would wait until the advisory panel had considered the national security case against their client (because of the national security elements of Mr Chahal's case, there was no right of appeal against the deportation order and his case was subject to an non-statutory advisory procedure set out in paragraph 157 of the Statement of Changes in Immigration Rules (House of Commons Paper 251 of 1990). In July 1991, the Home Secretary signed an order for Mr Chahal's deportation. Leave to apply for judicial review of the asylum refusal was granted by the High Court. The asylum refusal was quashed in 1991 and remitted to the Home Secretary. In 1992, the Home Secretary rejected once again Mr Chahal's application for asylum and informed the applicant that he had no intention to withdraw the deportation proceedings. Mr Chahal was then granted leave to apply for judicial review of the decision to maintain the refusal of asylum. Meanwhile the Court of appeal quashed the applicant's convictions of assault and affray on the ground that the applicant's appearance in court in handcuffs had been seriously prejudicial to him. The Home Secretary reviewed his case in the light of this new development, but considered that it was still right to deport him. In 1993, Mr Chahal unsuccessfully applied to the High Court for judicial review; his appeal was subsequently dismissed. He decided to bring his case to the Institutions of the ECHR. Following the report of the European Commission of Human Rights, he applied for temporary release pending the decision of the European Court of Human Rights, by way of habeas corpus and judicial review (Habeas Corpus Act 1679, Habeas Corpus Act 1816, section 1 and the

ECHR on the ground that his detention and planned deportation were in breach of the ECHR. At the time of the judgement of the European Court of Human Rights, i.e. end of October 1996, Mr Chahal was still in detention; he had been detained for over six years. One of the issues to be addressed by the Court was whether the applicant's prolonged detention was justified all along and thus in line with Article 5(1) of the ECHR. The applicant argued that his detention had ceased to conform with Article 5(1) because of its excessive duration. The Commission of Human Rights agreed, considering that the proceedings had not been pursued with the required diligence. The UK Government asserted that the various proceedings initiated by Mr Chahal[77] had been dealt with as expeditiously as possible. The Court of Human Rights recalled that the sole requirement entailed in Article 5(1)(f) with regard to detention was that it should only be used in view to deportation. Having considered the time taken for the various decisions[78] and the seriousness and complexity of Mr Chahal's case[79], the European Court of Human Rights came to the conclusion that "(...) none of the periods complained of [could] be regarded as excessive, taken either individually or in combination. Accordingly, there [was] no violation of [Article 5(1)(f)] of the [ECHR] on account of the diligence, or lack of it, with which the domestic procedures were conducted."[80] However, this conclusion was not unanimously adopted and some of the judges gave a dissenting opinion on that issue. Judge De Meyer expressed the view that a period of detention of over six years was clearly excessive. He considered that "[t]he considerations of an extremely serious and weighty nature referred to in paragraph 117 of the judgement [could] be enough to explain the length of the deportation proceedings.

Administration of Justice Act 1960, section 14(2) pursuant to which only one application for habeas corpus on the same grounds may be made by an individual in detention, unless fresh evidence is adduced in support); his application was refused and he remained detained.

[77] See *supra* n. 55.

[78] *Ibid.*, paragraphs 115 to 116.

[79] *Ibid.*, paragraph 117.

They [could] not, however, justify the length of the detention, any more than the complexity of criminal proceedings was enough to justify the length of pre-trial detention." [81] Judge Petiti considered that there had been "a clear and serious violation" of Article 5(1)[82]. With regard to the duration of detention, he took the view that Article 5(1)(f) of the ECHR should be construed "(...) as containing a safeguard as to the duration of the detention authorised, since the purpose of Article 5 as a whole [was] to protect the individual from arbitrariness."[83] The Court's interpretation of Article 5(1)(f) is to be welcome as it imposes limits on the use of detention; it must take place in view of diligent deportation proceedings. However, the conclusion reached by the Court in the applicant's case is not considered satisfactory as it may open the path to lengthy detentions. With this in mind, it is argued that the dissenting judges have construed Article 5(1)(f) in a manner much more consistent with the imperative need to keep detention within tolerable time-limits.

Moreover, as an additional safeguard, detention should initially be permitted for a short period of time only, any prolongation having to be authorised following judicial control. In that respect, the present UK system is considered a serious source of disquiet as it allows for indefinite detention of, *inter alia*, any asylum seeker who may be removed from the UK or anyone who is not granted admission to the UK or is liable to deportation or removal[84]. The UNHCR inspector who visited Campsfield House (Oxfordshire), one of the biggest detention centres in the

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[80] *Ibid.*

[81] *Ibid.*

[82] *Ibid.*

[83] *Ibid.*

[84] Section 140 of the 1999 Act which amended Paragraph 16 of Schedule 2 to the 1971 Immigration Act.

UK, said that "Britain ha[d] more people in detention for longer periods of time than any other European Country."[85] French law, unlike UK legislation, provides for time-limits. Pursuant to Article 35 *bis* of the *Ordonnance* n° 45-2658 of 2 November 1945[86], an asylum seeker may be detained ("*rétention administrative*"), where necessary, during the time strictly necessary to his or her departure from the French territory. Detention exceeding forty-eight hours is subject to judicial authorisation and time-limits. Asylum seekers' confinement to waiting zones ("*zones d'attente*") is also subject to time-limits. The waiting zone regime is applicable to asylum seekers who have arrived by air, sea or rail and have been refused entry or are about to enter the French territory. The procedures applicable are regulated by Article 12 of the *Décret* of 27 May 1982 and by Article 35 *quater* of the *Ordonnance* n° 45-2658 of 2 November 1945 concerning waiting zones in ports and airports[87]. Pursuant to Article 35 *quater* (II) of the *Ordonnance*, an asylum seeker cannot be maintained in a waiting zone for more than forty-eight hours; however, detention can be renewed for another forty-eight hours. Beyond this time-limit, asylum seekers' detention in waiting zones must be authorised by the president of the *tribunal de grande instance* or a judge delegated by him or her[88], this extension cannot exceed eight days. The administrative authority has to explain to the judge the reasons why the individual concerned has not yet been admitted into the French territory and thus justify its request for extension. The administrative authority must also provide the judge with information regarding the time deemed necessary to allow the asylum seeker out of the waiting zone. The president of the *tribunal de grande instance* (or his or her delegate) may refuse to authorise a prorogation if there is no ground to believe that the asylum claim is manifestly unfounded. Exceptionally, the administrative authority may be granted

[85] Lucy Patton, "Conditions for asylum seekers: "utter shambles", The Guardian, 6 March 1998, at p. 4.

[86] See *supra* n. 54.

[87] *Ibid.* Article 35 *quater* was introduced by the *Loi* of 6 July 1992

[88] *Ibid.*, Article 35 *quater* (III).

another eight days extension subject to the same conditions[89]. In any case, can an asylum seeker be confined to a waiting zone for more than twenty days. However, those concerned with asylum seekers' protection considered that the judicial supervision organised by the *Ordonnance* was tardy and limited[90].

Time-limits are essential in preventing abuses and arbitrariness. Issues relating to the duration of detention should not be left to the discretion of administrative authorities. Detention should always be subject to time-limits prescribed by law. As already stressed, detention should be authorised for a very short time initially (forty-eight hours is the recommended time-limit); this is designed to compensate for the absence of immediate judicial control. Moreover, the total duration of detention should be kept within reasonable limits. Another fundamental condition to the lawfulness of detention is the existence of regular and effective judicial supervision.

(iii) Regular judicial supervision

The lawfulness of detention is conditional on its being justified. However, it is not sufficient to secure that detention is justified at the time of the initial decision; detention must remain justified throughout its duration; this is designed to ensure that any prolongation remains legal and thus legitimate. With this in mind, it is indispensable that decisions on detention are subject to regular judicial control from an early stage. In that respect, UNHCR recommends that decisions on asylum seekers' detention shall be subject to an automatic review by a judicial or administrative body independent from the authorities who decide on their detention followed by regular periodic reviews[91]. These requirements are designed to prevent

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[89] *Ibid.*

[90] Between July 1992 and July 1993, only 10,5% of the administrative procedures were subject to judicial supervision (see Dominique Turpin, "Immigrés et réfugiés: des réformes juridiques à la réalité du terrain, Chroniques de l'activité de la Commission Nationale Consultative des Droits de l'Homme", Les Petites Affiches, 30 Novembre 1994, N° 143, 13-19, at p. 17).

abuses in the use of extra-judicial detention, the principle pitfall being the risk of unlimited detention. However, it is argued that a further safeguard against unlimited detention would consist in subjecting initial detention to a strict period of time, i.e. forty-eight hours as previously suggested. It is understood that any prolongation should be subject to judicial control with a view to assess the necessity for the continuance of detention.

Regular judicial control is an international requirement that must be enshrined in domestic law[92] and, with the "communautarisation" of asylum matters", in EC law. The UN Human Rights Committee stressed that "court review of the lawfulness of detention (...) is not limited to the mere compliance with domestic law (...)"[93] The need for judicial supervision is based on international and European human rights law. In that respect, the ICCPR (Article 9(4) and the ECHR (Article 5(4) contain very similar provisions[94]; Article 5(4) of the ECHR reads:

"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."[95]

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[91] See *supra* n. 44, Guideline 5(iii).

[92] In *Chahal*, the European Court of Human Rights expressly noted that a detained person was entitled to a review of his or her detention not only in the light of the requirements of domestic law, but also in the light of those embodied in the ECHR (see *supra* n. 55, paragraph 127).

[93] See *supra* n. 46, paragraph 9(5).

[94] Article 9(4) of the ICCPR and Article 5(4) of the ECHR are also considered the legal basis for individuals' right to challenge decisions on their detention.

[95] Article 9(4) of the ICCPR provides:
"Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

Providing for regular judicial control does not suffice in itself, a key issue is the extent of the supervision carried out by courts. In order to secure effective control, it is important that courts are given the means to assess whether detention is justified and the power to order release when necessary. What is decisive is the scope and effects of judicial control[96]. In the *Chahal* case[97], the European Court of Human Rights had to appraise the lawfulness of the applicant's detention in the light of the various proceedings brought by or against Mr Chahal. With respect to Article 5(4)[98], the Court focused on the proceedings brought against the applicant on grounds of national security. Mr Chahal argued that he was denied the opportunity to have the lawfulness of his detention decided by a national court; he argued that "(...) the reliance placed on national security grounds as a justification for his detention pending deportation prevented the domestic courts from considering whether it was lawful and appropriate (...)"[99] The Court first observed that States' obligations under Article 5(4) did vary with the type of deprivation of liberty. However, the Court stressed that "[t]he review allowed for should in any case be wide enough to bear on those conditions which are essential for the "lawful"

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[96] *Ibid.*

[97] See *supra* n. 55.

[98] Unlike the Court, the European Commission of Human Rights considered that it was more appropriate to consider the applicant's complaint under Article 13 of the ECHR (see *supra* n. 55, paragraph 125).

Article 13 reads:
"Everyone whose rights and freedoms as set forth in this Convention [the ECHR] are violated shall have an effective remedy before the national authority notwithstanding that the violation has been committed by persons acting in an official authority."

However, the European Court of Human Rights took the view that since Article 5(4) provided a *lex specialis* in relation to the more general requirement of Article 13, Mr Chahal's complaint should be first examined in the light of Article 5(4) (*ibid.*, paragraph 126).

[99] *Ibid.*, paragraph 124.

detention of a person according to Article 5(1)"[100]. Hence, the Court considered that the issue at stake was whether adequate proceedings to challenge the lawfulness of the applicant's detention before national courts were available. The Court accepted that the use of confidential material could be unavoidable in cases involving national security. However, the Court stressed that this did not mean that national authorities were entitled not to provide effective judicial control whenever they asserted that a case raised questions of national security and terrorism[101]. The Court observed that where national security was at stake, UK courts were not in a position to review whether Mr Chahal's detention was justified on national security grounds. Moreover, the Court considered that the degree of control over the procedure before the advisory panel was not sufficient[102]: Mr Chahal was not entitled to legal representation, he was only given an outline of the grounds for the notice of intention to deport, the panel had no power of decision and its advice to the Home Secretary was not binding nor disclosed[103]. The Court took the view that neither the proceedings for habeas corpus nor for judicial review of the decision to

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[100] *Ibid.*, paragraph 127.

[101] *Ibid.*, paragraph 131.

The Court specified that it attached significance to the fact that, as pointed out by the intervenors (Amnesty International, Liberty, the AIRE Centre and JCWI), there are forms of effective judicial control even where national security or terrorism issues are at stake (*ibid.*); the intervenors expressly referred to the Canadian system with respect to Article 13 of the ECHR (paragraph 144). Under the Canadian Immigration Act 1976 (as amended by the Immigration Act 1988) a Federal Court judge holds an in camera hearing of all the evidence. The applicant is provided with a statement summarising as far as possible the case against him or her; he or she has the right to be represented and to call evidence. The required confidentiality is addressed by requiring security material to be examined in the absence of the applicant and his or her representative. However, their place is then taken by a security-cleared counsel instructed by the court; he or she cross-examines the witnesses and generally assists the court in testing the strength of the State's case.

[102] *Ibid.*

[103] *Ibid.*, paragraph 130.

detain the applicant before the national courts[104], nor the procedure before the advisory panel satisfied the requirements of Article 5(4) of the ECHR and concluded that there had been a violation of that Article. The Court also concluded that there had been a breach of Article 13 that guarantees the general right to an effective remedy before a national authority[105].

Under French law[106], where an asylum seeker has been detained for more than forty-eight hours, the president of the *tribunal de grande instance* or a magistrate delegated by him or her must be informed. He or she must issue an *ordonnance* if a prorogation is requested after having heard the State representative, if present, and the asylum seeker assisted by his or her representative. The asylum seeker may be kept in detention for the period of time strictly necessary to the hearing and issuing of the *ordonnance*. The *ordonnance* may extend detention for a maximum of five days from the day it has been adopted and can be renewed for another five days in exceptional cases by means of a new *ordonnance*[107]. An appeal may be brought against the *ordonnance*; however, it has no suspensive effect. The decision must be taken within forty-eight hours[108]. The French system would be acceptable provided that the time-limits were strictly adhered to and suspensive effect granted; this is not currently the case.

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[104] *Ibid.*

[105] *Ibid.*

[106] See *supra* n. 54, Article 32 *bis*.

[107] An asylum seeker may be detained for another five days where he or she presents a particularly serious threat to public order or where it is impossible to carry out a removal order. This is the case where the asylum seeker has lost or destroyed his or her travel documents, where he or she has falsified his or her identity and, finally, where he or she refuses to comply with the removal order (*ibid.*).

[108] *Ibid.*

Judicial control is a vital safeguard against arbitrariness and indefinite extra-judicial detention. Judicial supervision should take place on a regular basis. It is accepted that the initial decision relating to an asylum seeker's detention may be of an administrative nature; however, judicial control must take place within brief delays; forty-eight hours is the recommended period of time. This promptitude is designed to provide effective control, rectify any wrongful decision and allow immediate release where necessary. Moreover, any prolongation of detention should be subject to judicial authorisation and only permitted for a limited period of time. These requirements are construed as forming an absolute principle; any alterations are considered unacceptable. However, judicial control of detention must not be seen as a substitute for asylum seekers' right to challenge decisions regarding their detention.

(iv) Asylum seekers' right to challenge decisions regarding their detention

As already observed, detention constitutes an extreme sanction and it is therefore essential to give asylum seekers the right to challenge decisions regarding their detention. This right constitutes a vital legal safeguard and is formally acknowledged in the UNHCR's Guidelines on asylum seekers' detention[109].

In order to prevent - or at least minimise arbitrariness -, it is fundamental that detained asylum seekers are given the power to instigate control of the lawfulness of their detention. This can only be achieved by granting them the right to contest the legality of their detention before a court. Any attempt to withdraw or alter this right would amount to an unacceptable denial of justice totally incompatible with human rights law. In that respect, one may refer to the provisions of the ICCPR and the ECHR; Article 9(4) of the ICCPR[110] and Article 5(4) and 13 of the ECHR have

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[109] See *supra* n. 44, Guideline 5(iv).

[110] See *supra* n. 95.

been interpreted as conferring detained individuals the right to challenge these decisions.

The UN Human Rights Committee upheld the right to challenge detention before a court with decision-making powers with a view to ensuring compliance with Article 9 of the ICCPR or any other relevant provisions of the Covenant. The UN Committee stressed the prevalence of these international standards over domestic provisions[111]. However, the precedence of such standards is more effectively secured within the framework of the ECHR. Considering the prevalence of these instruments over national law, the right to challenge decisions on detention should be incorporated in EC law.

Furthermore, one must ensure that the conditions in which asylum seekers are kept are consistent with international refugee law and human rights at large. This requires the existence of adequate facilities.

2.3. Access to adequate facilities

Appropriate conditions of detention are regarded as the necessary complement to lawful detention; poor conditions of detention would question the compliance of otherwise justified detention with international standards. It is essential to bear in mind that detained asylum seekers must not be assimilated to convicted criminals. Hence, they should never be detained in prisons. Besides contributing to foster prejudices against asylum seekers, such practices would result in subjecting them to a distressing and totally unnecessary treatment. UNHCR recommends that the use of prison should be avoided[112]. Where separate detention facilities are not used, asylum seekers should not be accommodated with convicted criminals and prisoners

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[111] See *supra* n. 46, paragraph 9(5).

[112] See *supra* n. 44, Guideline 10(iii).

on remand[113]. However, it is argued that prisons should only be used on an exceptional and temporary basis and that detained asylum seekers should be accommodated in specialised detention centres.

The fundamental distinction between detention and imprisonment must be reflected in the regime applicable to asylum seekers' detention. Asylum seekers can only be detained in establishments specifically set up for that purpose; they should not be kept in prisons[114]. Moreover, these establishments must provide the facilities necessary to the preservation of asylum seekers' rights.

2.3.1. Specialised detention centres

The specificity of asylum seekers' circumstances must be reflected in the regime reserved to those detained; this should be materialised in the creation of centres specially conceived to receive asylum seekers. It is argued that these establishments as well as the way that they are run should be the object of special provisions legally binding upon the Member States.

The most disconcerting - and most revealing - aspect of Member States' practices regarding detention is the use of prisons as "suitable" detention centres for asylum seekers. It is argued that such practices violate asylum seekers' human rights since their presence in these institutions cannot be legally justified: they are not charged with, nor are they convicted of any breach of the law sanctioned under domestic law by imprisonment[115]. In that respect, French law expressly specifies that asylum

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[113] *Ibid.*

[114] Imprisonment can only be justified where asylum seekers have been charged with, or convicted of, breaches of the law that carry such a sanction.

[115] This section, i.e. section 2 of the present chapter, does not deal with asylum seekers who may have been charged with or convicted of an offence.

seekers shall not be detained in premises under the control of the prison authorities ("*administration pénitentiaire*")[116].

As already mentioned, it is the Member States' responsibility to secure that asylum seekers are detained - provided that such sanction is justified - in adequate centres addressing their needs. Thus, besides being answerable for the creation of special centres, Member States must be answerable for the way they are run. This raises the issue of contracted out detention centres.

It is argued that States can only enter into contract with another party for the running of such centres provided that these centres are strictly subject to the same requirements as those under direct State control. The fact that a detention centre is contracted out should not entail the risk of lower standards.

In that respect, one can refer to the controversy created by the report on Campsfield Detention Centre in the UK. In early 1998, inspections were carried out by the Chief Inspector of Prisons, David Ramsbotham, at that centre. The report strongly criticised the way Group 4 had been running the centre. Campsfield Detention Centre had been contracted out to Group 4, a private company. The Home Office Minister, Mike O'Brien, announced changes, but, at the same time, congratulated the security firm Group 4 for doing "a good job in difficult circumstances in a very large centre where there had been two riots in the past four years" [117]. In August 1997, asylum seekers rioted because they believed that Group 4 had strangled and murdered two detainees. The rumour that triggered the riots were disclosed at the opening of the trial at Oxford Crown Court of nine West African asylum seekers. They were all charged with offences which carried penalties of up to ten years imprisonment[118]. The case was expected to last nine months and collapsed after

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[116] See *supra* n. 54, article 35 *bis*.

[117] Alan Travis, "Group 4 clings to its asylum role", The Guardian, 17 April 1998, at p. 5.

three; the prosecution conceded defeat after it was unable to clearly establish the identity of the rioters[119]. Moreover, videotape evidence from thirty-two cameras in the detention centre repeatedly contradicted evidence given by witnesses[120]. Six accused remained in prison although they had been acquitted of violent disorder at Campsfield Detention Centre as well as three others against whom charges were dropped after committal[121]. Despite the problems experienced with privately run detention centres, Mike O'Brien declared that the additional detention centres that the Government intended to build in order to address the substantial increase in the numbers of asylum seekers (and illegal entrants) being held in Britain should be run privately.[122]. He also said that centres were to lose their status as "secure hostels" and a new regime of sanctions and incentives was to be introduced in order to control disruptive detainees[123]. These statements indicated an alarming shift towards a more systematic detention of asylum seekers and a more "prison-like" regime. Part VIII of the 1999 Act specifically deals with detention centres and contains

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[118] Alan Travis, "Asylum seekers' riot set off by rumours of killings", The Guardian, 4 June 1998, at p. 9.

[119] The case against one of the defendants, aged seventeen, was dropped after only one week as he was too mentally ill to stand trial. Three of the defendants walked free; two of them had already been granted refugee status and the five others were taken back to detention while their claim for asylum was being considered (Alan Travis, "Rioting case against asylum seekers falls apart", The Guardian, 18 June 1998, at p. 7).

[120] For instance, a Group 4 officer, who claimed he had been concussed after one of the defendants had thrown solvent over him, was shown on one of the videos walking in good health and in a dry shirt five minutes after the alleged incident (*ibid.*).

[121] Louise Christian, Rosetta Offondry, Martin Penrose and Philip Turpin (solicitors for the six asylum seekers), "Letter: Fair play for the Campsfield Six", The Guardian, 29 June 1998, at p. 17.

[122] The plans to build more private detention centres were also designed to receive illegal immigrants; this is an indicator of the assimilation of asylum seekers with other categories of non-nationals who find themselves in an irregular situation.

[123] See *supra* n. 117.

provisions relating to the running of these centres[124] as well as the custody and movement of detainees[125]. With respect to the former, the 1999 Act subjects the possibility to contract out detention centres to certain conditions[126]. In particular, it requires the appointment by the Secretary of State of a contract monitor for every contracted out centre[127]. The main duties of the monitor consist in reviewing the running of the centre and reporting to the Secretary of State as well as in investigating and reporting to the Secretary of State any allegations against a person carrying out custodial functions[128]. Moreover, the Secretary of State is granted the power to take a number of initiatives where the contractor fails to control the centre in an efficient manner, or where individuals' safety is at stake or property at risk[129]. However, it is argued that the provisions of the 1999 Act concerning detention centres do not give due consideration to the rights of detained asylum seekers; nothing is said about the rights and safeguards available to detained asylum seekers. These provisions essentially deal with detainee custody officers' functions and discipline at detention centres[130] and thus very much describe a "prison-like" regime. It is obvious that these measures were proposed in order to address situations as those that arose at Campsfield detention centre. Consequently, the drafters of the then Bill essentially reasoned in terms of discipline and effective control, not in terms of refugee protection and human rights. The 1999 Act only specifies that

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[124] Sections 148 to 153 of the 1999 Act.

[125] Sections 154 to 156 of the 1999 Act.

[126] Section 149.

[127] Section 149(4).

[128] Section 149(7)(a) and (b).

[129] Section 151(1)(a) and (b).

[130] Sections 154 to 156 and - Schedule 11 on detainee custody officers and Schedule 12 on discipline etc at detention centres (Detainee custody officers).

detention centre rules are to be adopted by the Secretary of State; these must make provision, *inter alia*, on safety, care and activities[131]. It is accepted that discipline issues constitute important matters that must be addressed in the interest of all parties; however, this does not mean that the rights and specific needs of detained asylum claimants should be neglected[132]. Hence, the regime enforced in detention centres must be construed in the light of asylum seekers' rights and needs. While discipline and order issues cannot be ignored, this regime must be consistent with international refugee law and human rights. This requires the introduction of adequate standards with regard to every aspect of the running of detention centres. Firstly, it is crucial that custodial officers are adequately qualified. This requires them having received special training. It should be made clear that they are not dealing with "criminals", but a particularly vulnerable group. This must be taken into consideration in the description and fulfilment of custodial officers' duties. Where detention centres accommodate female asylum seekers, the use of female staff is recommended "(...) in order to respect cultural values and improve the physical protection of women."[133] In his report on Campsfield Detention Centre, the Chief Inspector of Prisons observed that "Group 4 [the firm responsible for the running of the centre] ha[d] been put in an impossible situation. They [did] not know what rights and responsibilities they ha[d] in dealing with [these]detainees."[134] Secondly, complain procedures should be set out allowing detainees to bring up any matter of concern and secure that their rights are being respected. With this in mind,

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[131] Section 153(2). However, these rules must also deal with issues regarding the discipline and control of detained persons. Such rules have not yet been adopted.

[132] It is important to note that the provisions of the 1999 Act were not designed to specifically apply to asylum seekers. This is symptomatic of a trend that consists in assimilating asylum seekers with other categories of non-nationals, thus disregarding the specificity of their situation and needs.

[133] See *supra* n. 44, Guideline 8.

[134] See *supra* n. 117.

it is crucial that those defending asylum seekers have unrestricted access to the premises of detention centres as detainees are more likely to report to them any treatment they may consider in breach of their rights. They can therefore act as an important medium between detainees and competent authorities. Finally, regular inspections, including on the spot inspections, should take place. Inspections should be performed by States' representatives[135] since State authorities should be ultimately responsible for running detention centres. However, inspections should also be carried out by organisations concerned with asylum seekers' rights, including UNHCR[136]. The latter should be granted unlimited access to detention centres; this means the right to visit any detainee and inspect any part of the centres. However, these inspections can only have a positive impact provided that their findings are taken on board by those responsible; inspections must be more than a simple formality.

In order for detained asylum seekers' rights to be thoroughly observed, a number of facilities must be made available to them within or from the premises of detention centres.

2.3.2. Facilities available from and within detention centres

It is crucial that the effectiveness and fairness of asylum procedures is maintained in relation to detained asylum seekers. It is argued that detention centres must therefore be run in a manner that allows the protection of the rights in question. It is also essential to maintain access to adequate health care.

[135] The 1999 Act provides for the appointment of visiting committees for each detention centre (section 152).

[136] Can also be mentioned refugee councils and Amnesty International.

(i) The maintenance of asylum seekers' rights

It is argued that detention shall not interfere with the rights granted to asylum seekers with a view to securing the compliance of asylum procedures with the requirements of international refugee law[137]. For instance, detained asylum seekers must remain entitled to the services of an interpreter and must retain their right to legal informed advice. In that respect, the Group Asylum Watch described Campsfield Detention Centre as " an institution permanently on a knife edge, with a catalogue of abuses, including denial of access to legal advice and representation"[138]; these observations were consistent with the damming conclusions of the Chief Inspector of Prisons' report on Campsfield Detention Centre[139].

Provision must be made for asylum seekers' right to communicate with their advisers and representatives[140]. This requires facilities that spread from detainees' access to a phone whenever necessary, advisers and representatives' unrestricted access to detention centres and detainees' right to leave their custodial environment when required by the proceedings.

Another right that shall not be undermined concerns the possibility to contact a UNHCR representative. It is argued that the rights of detained asylum seekers would be further secured by allowing them to contact UNHCR representatives or other asylum concerned organisations as advocated by UNHCR[141]. It is important

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[137] See chapter V on fair and effective procedures.

[138] See *supra* n. 117.

[139] *Ibid.*

[140] Pursuant to Article 35 *quater* (III) of the *Ordonnance* of 1945 (see *supra* n. 54), those detained in waiting zones may communicate with their adviser or any other person of their choice.

[141] See *supra* n. 44, Guideline 5(v).

that asylum seekers are in a position to play an active part in the protection of their rights. Moreover, this right to initiate contact would also be of valuable assistance to UNHCR and other organisations as it could attract their attention to the problems faced by asylum seekers in certain detention centres.

(ii) Access to adequate health care

A facility central to asylum seekers' welfare is access to adequate health care[142]. It is essential that those detained are not discriminated against in that respect. As stressed by UNHCR, "[detained] asylum seekers should have the opportunity to receive appropriate medical treatment, and psychological counselling where appropriate"[143]. In any case should detention interfere with the provision of adequate health care[144]. This means that where such care cannot be provided *in situ*, it should be provided outside detention centres. Moreover, where asylum seekers' health is seriously affected by detention, the latter should cease.

Appropriate health care is not only indispensable to the well-being of detainees considered individually, it is also necessary to the welfare of detained asylum seekers as a group. In that respect, the report of the Chief Inspector of Prisons on Campsfield Detention Centre said that detainees thought to have communicable diseases should be "required to submit to treatment and care necessary for the health and well-being of the detained population."[145]

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[142] The right to access to a doctor is, for instance, expressly provided for in French law (see *supra* n. 54, Article 35 *bis*).

[143] See *supra* n. 44, Guideline 10(v).

[144] The notion of adequate health care in relation to asylum seekers is examined in more details in section 1.2.2(iii) of this chapter.

[145] News in brief, "Medicals for immigrants", The Guardian, 18 April 1998, at p. 8.

It is accepted that medical resources *in situ* could vary with the size of detention centres. For instance, the larger centres could have in-house psychologist(s) whereas smaller ones would only have visiting psychologists. It is accepted that detention centres cannot offer full health care. This stresses the importance attached to the need for adequately trained personnel; they must, for instance, be capable of identifying situations where asylum seekers must be referred to more competent "hands"[146].

Furthermore, considering the extreme anguish faced by most asylum seekers, the isolation created by this custodial regime must be confined to what is strictly necessary. Thus, contacts between detainees as well as visits from friends and relatives should not be unnecessarily restricted. This is specifically acknowledged in UNHCR's guidelines on asylum seekers' detention[147].

The exceptional nature of detention means that detention centres do not constitute a normal nor adequate environment for asylum seekers. With this in mind, it is argued EC law should regulate the use of detention in relation to asylum seekers in order to protect their rights in that respect.

3. Conclusion

Asylum seekers' status pending determination must be understood in the light of their right to seek refugee status. It is argued that this right entails the right to adequate support throughout asylum proceedings. In that context, if the EC is to protect the right to seek refugee status, the question of support for asylum seekers must be addressed. This implies establishing minimum standards consistent with the right to seek refugee status in order to halt and prevent national practices

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[146] For instance, the personnel in question should be capable of detecting alarming signs in detained asylum seekers' behaviour and take adequate measures in order to minimise the risk of suicide attempts.

[147] See *supra* n. 44, Guideline 10(iv).

undermining this right. These standards aim at ensuring that asylum claimants enjoy decent living conditions even where subject to an exceptional regime such as detention.

Chapter VII
Conclusions

The EC faces a challenge crucial to asylum seekers' protection within, but also beyond its borders. The challenge in question relates to the safeguard of the right to seek refugee status within its territory. In recent years, growing hostility towards asylum seekers has developed and manifested itself through the development of increasingly restrictive asylum policies at both European and national level. It is argued that these have resulted in breaches of international refugee law to the detriment of asylum seekers' rights. As noted in the introduction, the primary source of international refugee law is the 1951 Convention as interpreted by UNHCR. It is argued that Article 1(A)(2) of the Convention gives rise to a right to seek refugee status.

In that respect, a number of inconsistencies and deficiencies have been identified that need to be addressed by the EC if it is to take up the challenge. The view taken is that this task requires a comprehensive approach. As evidenced throughout the chapters, the issues at stake, which are inherent in the right to seek refugee status, are inter-connected. In that context, a fragmentary approach is not appropriate and would inevitably weaken asylum seekers' rights. A number of recommendations are made with a view to securing the right to seek refugee status in line with international refugee law.

Whilst pragmatism commands us to disregard proposals that may be seen as going beyond the standards set by international refugee law, significant changes in the developing common asylum policy are unavoidable if the right to seek refugee status is to be protected within the EC. With this in mind, the proposals made in this thesis aim at establishing the minimum standards designed to secure compliance with international refugee law.

While this work focuses on the right to seek refugee status, it is recognised that international protection is not confined to asylum seekers' rights. Issues regarding the fate of unsuccessful applicants and the status of those who have been granted refugee status arise. Moreover, the protection conferred through refugee status is not the sole form of international protection.

1. Summary conclusions

Recent EU and national initiatives in the field of asylum indicate that their main objective is to cut down the numbers of asylum claims lodged within the EC or at its borders. As a result, instead of being shaped around the idea of protection, the relevant measures were devised as deterrent tools directed at those intending to apply for refugee status within the EC.

A number of inconsistencies with international refugee law have been identified. With this in mind, it is argued that the "communautarisation" of asylum matters operated by the Treaty of Amsterdam constitutes an opportunity to shift the emphasis back upon protection. It is argued that these inconsistencies constitute a threat to the right to seek refugee status. They undermine asylum seekers' rights while curtailing Member States' obligations towards asylum seekers. It is for the EC, it is argued, to redress any incompatibility with international standards. Indeed, as observed in the introduction, all the Members States are party to the 1951 Convention and are therefore legally bound by its provisions. For the EC to disregard the Convention provisions would be to endorse breaches of international law. It is argued that, if the right to seek refugee status is to be preserved within the EC, a number of provisions need to be inserted in EC law.

1.1. The identified sources of concern

Different areas of concern have been identified; they relate to the interpretation of the Convention definition of the term refugee, access to asylum procedures within

the EC, the procedures themselves and, finally, asylum seekers' status pending the determination of their asylum claims.

The definition of the term refugee is to be found in Article 1(A)(2) of the 1951 Convention. A refugee is described as someone who is outside his or her country of origin and cannot avail himself or herself to the protection of that State or return there owing to a well-founded fear of persecution by reason of race, religion, nationality, membership of a particular social group or political opinion. This definition very much reflects the traditional profile of the refugee as perceived at the time the Convention was drafted. However, changes in refugee situations challenge this image of the asylum seeker. Restrictive asylum policies have resulted in narrow interpretations of the Convention definition which hold on to that traditional profile. In that respect, two issues have been identified, i.e. non-State persecution and gender-based persecution.

At the time the Convention was adopted, most asylum seekers were fleeing State persecution, namely persecution emanating from State authorities. However, in recent years, increasing numbers of individuals have been exposed to non-State persecution, i.e. persecution inflicted by non-State agents. Some States, such as France, used that traditional image of the asylum seeker, which was the result of circumstances, to confine the scope of the Convention definition, and thus the benefit of refugee status, to cases involving State persecution. An approach very similar to that of the French competent bodies was adopted in the Joint Position on the definition of the term refugee[1]. However, the Convention definition does not impose any requirements as to the identity of the perpetrator, nor do the *travaux préparatoires* indicate the existence of an implicit requirement. Moreover, the exclusion of non-State persecution, besides being inconsistent with the wording of Article 1(A)(2) of the Convention, is also incompatible with its object and spirit. If the interpretations of the Convention definition do not keep up with the needs of today's asylum seekers, the Convention could well become an anachronism. The EC is therefore urged to secure that the Convention definition of the term refugee is

[1] OJ L 63/2, 13/03/1996.

interpreted as including non-State persecution. Provisions to that end could be adopted on the basis of Article 63(1)(c) of the TEC.

Narrow interpretations of the Convention definition also created difficulties for asylum seekers having a well-founded fear of persecution owing to their gender as the Convention grounds do not include the latter. However, it is argued that the Convention definition can nonetheless address gender-based persecution through membership of a particular social group. The Canadian case-law on that question provides a good example. Membership of a particular social group distinguishes itself from the other grounds by its "vagueness" and its ability to cover refugee situations that may not have been contemplated by the drafters of the 1951 Convention. With this in mind, it is argued that EC law should specify that membership of a particular social group is to encompass gender-based persecution as well as secure that the "catch-all" nature of that Convention ground is retained. Another way to address gender-based persecution would be to add an additional ground, namely gender, to the original Convention grounds. However, this option would be opposed by most Member States. In that context, it is argued that entitlement to refugee status by reason of gender-based persecution is best secured though membership of a particular social group, at least in the short and medium term.

Another area of concern relates to asylum seekers' access to asylum procedures. Eager to reduce the numbers of asylum seekers "knocking at the door" of the EC, the Member States have developed means to prevent asylum claimants exercising their right to seek refugee status. Firstly, Member States made access to the EC territory more difficult for asylum seekers by requiring them to satisfy the same documentation requirements as any other categories of third-country nationals. By restricting asylum seekers' access to the EC, the Member States have also restricted asylum seekers' right to seek refugee status. In imposing these document requirements, the Member States have disregarded the specificity of asylum seekers' circumstances and voluntarily overlooked the fact that those in need of international protection are the less likely to meet such requirements. The

detrimental effects of document requirements are worsen by the introduction of carrier sanctions. It is imperative that EC provisions on travel document requirements for third-country nationals acknowledges the fact that these are inappropriate in so far as asylum claimants are concerned. Another factor that contributed to restrict asylum seekers' access to asylum procedures was found in practices referred to as transfers of responsibility. The Member States developed practices consisting in transferring responsibility for examining asylum claims to other States, preferably third countries. Two types of transfers have been identified in that respect. Firstly, internal transfers of responsibility which are organised by the Dublin Convention[2] and according to which asylum claims shall be examined by a single Member State. However, the Dublin Convention will only apply where responsibility cannot be transferred to a third country pursuant to the safe third country principle enshrined in the Resolution on host third countries[3]. It is argued that such transfers can only be consistent with the right to seek refugee status provided that examination by the State held accountable is secured.

A further source of concern lies with the existence of fair and effective asylum procedures, i.e. procedures which allow asylum seekers to properly exercise their right to seek refugee status. It is argued that compliance with international refugee law must be secured at every stage of the proceedings, i.e. from the submission of the asylum claim to its final outcome. In establishing the standards to be met by asylum procedures, one has to take into consideration asylum seekers' specific needs and circumstances.

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[2] OJ C 254/1 1997.

[3] Resolution on a harmonised approach to questions concerning host third countries adopted by the Ministers of the Member States of the European Communities at their meetings in London on 30 November to 1 December 1992, referred to in European Parliament, Asylum in the European Union: "the safe country of origin principle", People's Europe Series, November 1996, Annex II, at p. 33-37 (not published in the Official Journal).

Finally, for asylum seekers to be able to fully exercise their right to seek refugee status, they must enjoy decent living conditions. Restrictive asylum policies have resulted in the adoption of deterrent measures designed, *inter alia*, to make asylum seekers' life uncomfortable pending the determination of their asylum claim. Once again, asylum seekers' specific needs and circumstances should be taken into account. Most asylum seekers arrive in the contemplated State of refuge in a state of destitution and considerable distress. They are therefore dependent upon that State to fulfil their essential living needs while awaiting a decision on their case. The provision of decent living conditions pending determination is seen as an obligation inherent in the existence of a right to seek refugee status that the EC and its Member State must enforce.

1.2. A comprehensive and pragmatic approach

It is argued that, if the EC is to safeguard the right to seek refugee status within its territory, it is vital that all the identified sources of concern are addressed. In other words, there is an imperative need for a comprehensive approach. Indeed, all these areas are inherent in the right to seek refugee status and cannot be dissociated. They must be seen as the core elements of the right to seek refugee status. A fragmentary approach would not allow full compliance with international refugee law and thus the preservation of the right in question. Indeed, the right to seek refugee status supposes that asylum seekers have access to asylum procedures. However, access would be meaningless if the procedures in question would not guarantee that their asylum claims are properly examined. Likewise the existence of fair and effective procedures would be undermined if the term refugee was interpreted in a manner conducive to the exclusion of people who would otherwise be entitled to refugee status. The positive impact of such procedures would also be compromised if access was unduly restricted. Finally, access to adequate asylum procedures combined with an appropriate interpretation of the term refugee cannot secure the implementation of the right to seek refugee status if they are accompanied by deterrent measures rendering asylum seekers' living conditions pending determination even more difficult. The interrelated nature of all these issues explain why the research does

not concentrate on a single aspect and recommends an EC comprehensive approach. In that respect, it is argued that the EC offers a more suitable framework than intergovernmental cooperation as it has the ability to impose binding standards in line with international standards upon the Member States regarding the right to seek refugee status. With the "communautarisation" of asylum matters which resulted in the introduction in the TEC of a Title IV on visas, asylum, immigration and other policies related to free movement of persons, the EC has now the power to take up the challenge.

However, the preservation of the right to seek refugee status within the EC also commands, it is argued, the adoption of a pragmatic approach. In the context of this research, pragmatism refers to the need to give some consideration to the Member States' points of view. Indeed, the Member States are involved in the EC decision-making process through the Council. Thus, totally ignoring the Member States' positions could have an adverse effect on asylum seekers' rights. In that context, a number of compromises may have to be made, the bottom line being consistency with international refugee law. This pragmatic approach has had a number of implications on the proposals made in the course of this work. Firstly, it explains why the addition of a gender category to the definition of refugee for the purpose of EC law has not been recommended, at least in the short and medium term. Indeed, most Member States would be likely to perceive such an amendment as entailing a risk of high rises in the numbers of asylum claims. It is argued that the definition of the term refugee may remain unamended provided that protection from gender-based persecution is secured in EC law though an appropriate interpretation of membership of a particular social group; this is where the compromise lies. Likewise, transfers of responsibility, both internal and external, may be maintained provided that examination of the asylum claim by the State held responsible is guaranteed. Furthermore, pragmatism explains that proposals that may appear to go beyond the requirements of international law are not made. This explains why poverty, although it can be seen as amounting to persecution in the sense of the 1951 Convention under certain circumstances, is not presented as a potential ground for a well-founded fear of persecution entitling individuals to refugee status.

Indeed, considering the Member States' zeal to maintain a strict distinction between asylum seekers and economic migrants, it is unlikely that such a proposal would be "popular" amongst the Member States.

Despite the adoption of a pragmatic approach and thus the existence of room for compromises, it is acknowledged that many of the proposals made may still face the opposition of some Member States. However, it is argued that this cannot be avoided and should not be avoided at the expense of asylum seekers' rights. A change of direction in the asylum policy is indispensable if the right to seek refugee status is to be protected within the EC. If the EC were to act otherwise, it could be accused of endorsing and facilitating breaches of international law as the 1951 Convention is binding upon all the Member States. Moreover, it is important to stress that the standards that EC law must satisfy with regard to the right to seek refugee status are construed as the minimum standards necessary to secure compliance with international standards. In that context, the Member States are allowed and encouraged to go beyond these standards if they wish to further improve asylum seekers' rights.

1.3. Recommendations for law reform

The need to protect the right to seek refugee status within the EC in line with international refugee law prompts a number of recommendations for law reform. As stressed in chapter II, Directives are the recommended type of legal instrument. With this in mind, the adoption of five Directives on the right to seek refugee status is strongly recommended. It is imperative that these Directives are construed as part of a single jigsaw as a global and consistent approach is crucial to the preservation of the right to seek refugee status within the EC. Any omission would jeopardise the chances of a successful law reform.

The proposed Directives are:

- a Directive on an up to date interpretation of the term "refugee";

- a Directive on asylum seekers' access to the EC territory;

- a Directive on transfers of responsibility for determining applications for asylum;

- a Directive on fair and effective asylum procedures; and

- a Directive on asylum seekers' status pending determination.

1.3.1. A Directive on an up to date interpretation of the term "refugee"

Considering the need to interpret and implement the definition of the term "refugee" enshrined in Article 1(A)(2) of the 1951 Convention in line with its spirit and object, the adoption of a Directive on an up to date interpretation of the term "refugee" is proposed.

This Directive aims at ensuring:

- the recognition of non-State persecution;

- the recognition of gender-based persecution through membership of particular social group;

- the correct interpretation of membership of a particular social group; and

- the abolition of current restrictions on Member States' nationals' right to seek refugee status within the EC.

A Directive on an up to date interpretation of the term "refugee" may be adopted on the basis of Article 63(1)(c) of the TEC on minimum standards with respect to the qualification of national of third countries as refugees.

(i) The recognition of non-State persecution

The Member States must take all the measures necessary to ensure that Article 1(A)(2) of the 1951 Convention which defines the term "refugee" is interpreted as including non-State persecution. This provision finds its justification in the fact that Article 1(A)(2) of the 1951 Convention does not impose requirements as to the identity of the perpetrator and thus does not confine its scope to State persecution.

It follows that asylum seekers who have a well-founded fear of persecution based on one or more Convention grounds, are unable or unwilling to avail themselves of the protection of their country of nationality or residence, if they are stateless, and are outside that country, are eligible for refugee status in a Member State, irrespective of the identity of the perpetrator.

With this in mind, it is necessary that the Member States review the position expressed in the Joint Position of 4 March 1996 on the harmonized application of the term "refugee" in Article 1 of the Geneva Convention of 28 July 1951. Indeed, Section 5(2) of the Joint Position reads, *inter alia*, that "[p]ersecution by third parties will be considered to fall within the scope of the Geneva Convention where it is based on one of the grounds in Article 1(A)(2) of the Convention, (...) [and] is encouraged or permitted by the authorities (...)."[4]

It follows from the correct interpretation of the Convention definition of the term "refugee" that State involvement does not have to be established in cases of non-State persecution.

[4] See *supra* n. 1.

(ii) The recognition of gender-based persecution through membership of a particular social group

The Member States must take all the measures necessary to ensure that refugee status is available to asylum seekers who have a well-founded fear of persecution owing to their gender, are unable or unwilling to avail themselves of the protection of their country of nationality or residence and are outside that country.

With this in mind, the Member States must take all the measures necessary to ensure that the Convention ground "membership of a particular social group" is interpreted as covering gender-based persecution. To that end, it is vital that that Convention ground remains a self-standing ground as recommended in section 1.3.1(iii).

Whilst the introduction of a gender category in the definition of the term refugee for the purpose of EC law is not envisaged at this stage, this option may be considered in the future.

(iii) The correct interpretation of membership of a particular social group

The Member States must take all the measures necessary to ensure that the Convention ground "membership of a particular social group" retains its self-standing nature in line with the spirit and object of the 1951 Convention and thus international refugee law.

This means that the Member States shall not interpret the words "membership of a particular social group" by reference to other Convention grounds, namely race, religion, nationality and political opinion.

Moreover, the Member State shall interpret the words "membership of a particular social group" with a view to ensuring that the Convention definition of the term

"refugee" remains up to date and thus addresses the needs of today's asylum seekers.

A definition of what amounts to a particular social group for the purpose of refugee status has not been given as it may limit the scope of that Convention ground as future needs for refugee status may not always be foreseeable.

(iv) The abolition of current restrictions on Member State nationals' right to seek refugee status within the EC

The Protocol on asylum for nationals of Member States of the European Union annexed to the TEC which restricts Member State nationals' right to seek refugee status within the EU shall be repealed.

In the light of the proposed repeal of the Protocol on asylum for nationals of Member States of the European Union, an amendment of Article 63(1)(c) of the TEC with a view to including Member States' nationals is recommended.

1.3.2. A Directive on asylum seekers' access to the EC territory

Considering the need to comply with international refugee law, and in particular Article 31 of the 1951 Convention, and the need to facilitate and improve the implementation of the Dublin Convention, a Directive on asylum seekers' access to the EC territory is proposed.

This Directive aims at securing that the EC territory is accessible to those who intend to seek refugee status there. This is without prejudice of the Member States' right to carry out subsequent transfers of responsibility in line with the provisions of the proposed Directive on transfers of responsibility.

The proposed Directive provides for the abolition of both sanctions imposed on asylum-seekers for non-compliance with documentation requirements and carrier sanctions.

This Directive may be adopted on the basis of Article 62(2) of the TEC on measures on the crossing of the external borders of the Member States.

(i) The abolition of sanctions imposed on asylum seekers for non-compliance with documentation requirements

EC provisions on control at external borders and on documentation requirements for third country nationals who intend to cross these borders must make allowance for asylum seekers' specific circumstances. The words "specific circumstances" in this context refer to the asylum seekers' frequent inability to obtain the required documentation.

It follows that the EC measures on the crossing of external borders, to be adopted on the basis of Article 62(2) of the TEC, must take into consideration asylum seekers' specific circumstances. As to the existing measures, they must be interpreted, amended or repealed to that end.

The Member States must abstain from imposing sanctions on asylum seekers who have failed to satisfy documentation requirements.

It must be made clear to asylum seekers that failure to comply with documentation requirements will not be held against them.

(ii) The abolition of carrier sanctions

Sanctions imposed on carriers for transporting undocumented or inadequately documented passengers shall be removed as they may endanger the right to seek refugee status.

However, this provision does not cover offences committed by those who smuggle third country nationals, including asylum seekers, into the EC.

1.3.3. A Directive on transfers of responsibility

In order to secure that the transfers of responsibility, both internal and external, carried out by Member States are consistent with international refugee law, and thus with the right to seek refugee status, the adoption of a Directive on transfers of responsibility is recommended.

The legal basis for this Directive is twofold. Firstly, the provisions on internal transfers of responsibility, which only involve Member States, may be adopted on the basis of Article 63(1)(a) of the TEC on criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States. Secondly, the provisions on external transfers, in the absence of a specific Treaty provision on external transfers of responsibility or an amendment of Article 63(1)(a) which currently only deals with internal transfers, may be adopted on the basis of Article 63(1)(d) of the TEC on minimum standards on procedures in Member States for granting or withdrawing refugee status.

For the purpose of this Directive, the expression "internal transfers of responsibility" refers to mechanisms established by the Dublin Convention whereby a Member State transfers responsibility for determining an application for asylum to another Member State on the ground that the latter is responsible.

For the purpose of this directive, the expression "external transfers of responsibility" refers to cases where a Member State declines responsibility for determining an application for asylum on the ground that a third country is responsible following the application of the third country principle or the implementation of a readmission agreement.

In order to secure compliance with international refugee law, the Member States shall take all the measures necessary to ensure that internal and external transfers of responsibility satisfy a safety test.

For the purpose of this Directive, safety is contingent upon a number of criteria and safeguards.

(i) Safety criteria

Internal and external transfers of responsibility must satisfy three safety criteria, namely compliance with the 1951 Convention and other relevant instruments, protection against *refoulement* and the existence of and access to adequate asylum procedures.

• Compliance with the 1951 Convention and other relevant instruments

The Member State which intends to carry out a transfer of responsibility is under the obligation to verify whether the State of destination, i.e. the State where the asylum seeker may be removed, complies with the provisions of the 1951 Convention and other relevant instruments. This requires the Member State concerned to assess the human rights record of the country of destination.

• Protection against *refoulement*

The Member State which intends to carry out a transfer of responsibility must ensure its compliance with the principle of *non-refoulement*.

Compliance with the principle of *non-refoulement* must be secured at two levels. Firstly, the Member State concerned must verify whether the asylum seeker's removal to the country of destination is consistent with the principle of *non-refoulement*. Secondly, the Member State must also verify whether the laws and

practices of the country of destination are compatible with the principle of *non-refoulement*. This is designed to prevent the asylum seeker being further removed in breach of the principle of *non-refoulement*.

- **Access to fair and effective asylum procedures**

The Member State which intends to carry out a transfer of responsibility is under the obligation to verify whether the asylum seeker will have access to fair and effective asylum procedures in the country of destination.

The terms "fair and effective procedures" must be understood in the light of the provisions of the proposed Directive on fair and effective procedures.

(ii) Legal safeguards

The Member State which intends to carry out a transfer of responsibility must ensure the availability of the following safeguards.

- **Individual assessment**

The Member State concerned must assess the safety of the contemplated country of destination on an individual basis in the light of the asylum seeker's circumstances.

Safety must present a certain degree of stability for the asylum seeker concerned and must be based upon up to date information. In that respect, information gathered by international organisations, such as UNHCR, would be of great assistance.

It follows that lists of safe countries, that may exist in certain Member States, must be abolished. These lists tend to give a rigid view of the situation in the listed countries which is inconsistent with the need for an individual assessment based upon up to date information.

- **The necessary consent of the authorities of the country of destination**

The authorities of the Member State which intends to carry out a transfer of responsibility must contact those of the contemplated country of destination with a view to securing their consent.

- **The need for *a priori* checks**

The Member State which intends to operate a transfer of responsibility is under the obligation to carry out all the necessary checks prior to the asylum seeker's eventual removal to the country of destination.

- **The right to challenge the decision regarding the transfer of responsibility**

Asylum seekers who may be subject to a transfer of responsibility must be entitled to challenge the decision in question. This right must be with suspensive effect and exercisable from within.

1.3.4. A Directive on fair and effective asylum procedures

Considering the need to protect the right to seek refugee status, and in particular the need to counterbalance the loss of asylum seekers' right to lodge multiple applications for asylum within the EC following the entry into force of the Dublin Convention and the existence of fast-track procedures designed to proceed applications for asylum deemed manifestly unfounded, the adoption of a Directive on fair and effective asylum procedures is recommended.

This Directive aims at ensuring that the concept of manifestly unfounded application for asylum is interpreted in a manner consistent with international refugee law and that substantive asylum procedures in the Member States comply with the requirements of international refugee law.

The procedural standards set in this Directive apply to both substantive and fast-track procedures.

(i) The concept of manifestly unfounded application for asylum

For the right to seek refugee status to be fully protected, it is vital that the concept of manifestly unfounded application for asylum is interpreted in a manner consistent with international refugee law. It follows that the Member States are under the obligation to interpret and apply the concept of manifestly unfounded application for asylum in a manner consistent with the provisions of the proposed Directives.

To assist the Member States in this task, the concept of manifestly unfounded application for asylum, as defined in the Resolution on manifestly unfounded applications for asylum, must be further specified.

The words "reasonable explanation" contained in Paragraphs 9(a) and (c) of the Resolution on manifestly unfounded applications for asylum, which apply to asylum seekers who did not satisfy documentation requirements, must be interpreted in the light of the provisions of the proposed Directive on asylum seekers' access to the EC territory; in particular, it must be made clear to asylum seekers that failure to comply with documentation requirements will not be held against them.

Paragraph 9(d) of the Resolution on manifestly unfounded applications for asylum according to which an application for asylum will be considered manifestly unfounded where the asylum seeker "deliberately fails to reveal that he [or she] has previously lodged an application in one or more countries, particularly when false identities [have been] used" must be interpreted in the light of the provisions of the proposed Directive on fair and effective asylum procedures. This means that, for an application to be considered manifestly unfounded under Paragraph 9(d), the asylum procedures of the country(ies) concerned must satisfy the standards regarding fair and effective procedures.

Paragraph 9(g), according to which an application for asylum is considered manifestly unfounded where the asylum seeker had his or her application for asylum rejected by a country which provided procedural guarantees in line with the 1951 Convention, must be read in the light of the standards set in this Directive regarding fair and effective asylum procedures.

(ii) The submission of the application for asylum

The Member States must take all the measures necessary to ensure:

- the right to have one's application for asylum lodged with a competent officer as quickly as possible;

- the provision of guidance as to the procedure to be followed; and

- the availability of the necessary facilities.

• **The right to have one's application for asylum lodged with a competent officer as quickly as possible**

To qualify as competent, Member States' officers must receive adequate training with a view to acquiring a comprehensive knowledge of substantive and procedural asylum law.

The words "as quickly as possible" must be interpreted in the light of the right to seek refugee status. Hence, celerity must not be seen as a goal *per se* to the detriment of the right to seek refugee status.

• **Guidance as to the procedure to be followed**

Guidance as to the procedure to be followed must be provided to asylum seekers. This supposes the provision of comprehensive information. The latter must cover asylum seekers' rights and obligations throughout the proceedings, including appeal proceedings. The information conveyed to asylum seekers must also concern their status pending the determination of their application for asylum. Guidance must be provided in a language that they understand.

• **The necessary facilities**

These necessary facilities include the right to an independent competent interpreter and a representative as well as the right to contact a UNHCR representative.

The right to an independent competent interpreter

Where an asylum seeker believes that he or she has not sufficient command of the official language of the Member State responsible for determining his or her application for asylum, he or she is entitled to the services of an independent competent interpreter.

To qualify as independent, the interpreter must be independent from the authorities dealing with the application for asylum, the Government at large as well as from the asylum seeker himself or herself.

To qualify as competent, besides having the required language skills, the interpreter must have some knowledge of substantive and procedural asylum law as well as be aware of asylum seekers' specific circumstances.

The interpreter's role main role during screening interviews is to ensure that official interpreters translate properly. They may also act as witnesses during these interviews.

Considering the state of destitution of most asylum seekers, interpreters must be paid for out of public fund.

The right to a representative

Asylum seekers are entitled to the presence of a representative at screening interviews.

The representative must take a comprehensive record of everything that is said and done during the interview.

The representative must also intervene where necessary with a view to securing the fairness of the screening interview.

Representatives must be aware of procedural issues in order to be able to detect any irregularities during the interview. Moreover, experience in dealing with asylum seekers is highly desirable as it allows greater awareness of asylum seekers' needs during interviews.

Considering the state of destitution of most asylum seekers, representatives must be paid for out of public fund.

The opportunity to contact a UNHCR representative

Asylum seekers must be given the opportunity to contact a UNHCR representative.

With a view to securing greater cooperation with UNHCR, its representatives shall be entitled to attend screening interviews.

(iii) First instance determination

The Member States must take all the measures necessary to ensure:

- the determination of applications for asylum by competent first instance decision-makers;

- the availability of the necessary facilities;

- a satisfactory decision-making process; and

- compliance with a number of additional requirements.

• **The determination of applications for asylum by competent first instance decision-makers**

To qualify as competent, first instance decision-makers must be fully qualified, independent and clearly identified.

To be considered fully qualified, first instance decision-makers must have a comprehensive knowledge of substantive and procedural asylum law complemented by expertise in human rights law. Training must be provided to that end.

To be considered independent, they must be independent from the Government.

• **The necessary facilities**

Asylum seekers shall have access to a lawyer. They are also entitled to the services of an independent competent interpreter and must be given the opportunity `to contact a UNHCR representative.

Asylum seekers are entitled to have access to a lawyer as they have a right to informed legal advice.

Whilst advice may, in certain circumstances, emanate from non-lawyers, purely legal issues should be dealt with or, at least, checked by members of the legal profession.

Advice, whatever its source, must be informed. This means that those who give advice to asylum seekers must have expertise in asylum law.

It is incumbent upon the Member States to secure the quality of the advice provided to asylum seekers.

To that end, the Member States are responsible for establishing mechanisms that are designed to control the competence and integrity of providers of advice to asylum seekers. Particular attention must be paid to the establishment of adequate controls within the legal profession.

Considering the state of destitution of most asylum seekers, the provision of informed legal advice must be paid for out of public funds.

Asylum seekers are entitled to the services of an independent competent interpreter throughout first instance proceedings. This is designed to secure that any language barriers are overcome.

The terms "independent" and "competent" are defined in section 1.3.4(ii).

Asylum seekers must be given the opportunity to contact a UNHCR representative.

This involvement of UNHCR is seen as a means to secure greater cooperation with that organisation.

• **A satisfactory decision-making process**

In order to contribute to the adoption of first instance decisions consistent with international refugee law, a number of steps shall be taken.

An information centre common to the Member States shall be created. This centre is designed to centralise data on asylum seekers' countries of origin and facilitate the availability of up to date information to first instance decision-makers. In that respect, information provided by organisations involved with asylum seekers, such as UNHCR, would be of great assistance. The existence of such a centre will also facilitate exchanges of information between Member States.

First instance decision-makers must construe the words "well-founded fear of persecution" in the light of the provisions of the proposed Directive on an up to date interpretation of the term "refugee".

Evidence of persecution shall not be considered a prerequisite to eligibility to refugee status. However, the risk of persecution must present a personal character in the sense that the asylum seeker must be an identifiable target in his or her country of origin.

Whilst the burden of proof lies with the asylum seeker, the standard of proof must take on board the practical difficulties that asylum seekers face in providing evidence. It follows that the standard of proof shall be that of "reasonable degree of likelihood".

• **Additional requirements**

With a view to securing compliance with international refugee law, asylum seekers are entitled to a decision in writing. Moreover, first instance proceedings must have suspensive effect.

Asylum seekers' right to a decision in writing is absolute; derogations are therefore prohibited.

This right exists irrespective of the outcome of the application for asylum.

The reasons for the decision must be clearly and precisely stated.

Suspensive effect shall be construed as an absolute principle. It follows that derogations are not allowed.

(iv) Challenge of first instance decisions

Asylum seekers shall be granted a right of appeal. In order to secure that this right of appeal is consistent with the requirements of international refugee law, the Member States shall take all the measures necessary to ensure:

- the existence of competent appellate bodies;

- the existence of a non-truncated right of appeal; and

- the provision of the necessary facilities.

• **Competent appellate bodies**

To qualify as competent, appellate bodies must be specialised independent courts. They must have jurisdiction to reconsider first instance decisions. Their personnel must be adequately qualified. Finally, they must be in a position to provide a consistent case-law.

To be considered independent, appellate bodies must be independent from first instance decision-makers and from the Government.

Appellate bodies must be courts of law which must be specialised in asylum matters.

Appellate must have jurisdiction to reconsider first instance decisions. Hence, they must have jurisdiction to reconsider facts as well as points of law.

To be considered adequately qualified, members of appellate bodies must be legally qualified and must have expert knowledge of asylum and human rights law. This expertise must be supplemented by regular training designed to ensure up to date knowledge.

Appellate bodies must be in a position to develop a consistent case-law. This requires the existence of adequate appeal structures. Whilst a particular model is not imposed on the Member States for the time being, the adequacy of the chosen structures will be assessed in the light of their ability to provide a consistent case-law in line with international refugee law.

Moreover, in order to facilitate their task, appellate bodies shall be assisted by information services. The latter are designed to further secure access to up to date information on asylum seekers' countries of origin. Moreover, appellate bodies may also have access to the data centralised at the proposed information centre.

- **A non-truncated right of appeal**

Asylum seekers must be granted an in-country right of appeal. This is construed as an absolute right; derogations shall not be tolerated.

This right of appeal must have suspensive effect. This is construed as an absolute principle; derogations are not permitted.

The submission and examination of appeals must take place within reasonable time-limits. These time-limits must be the result of a balance between the need to shorten

asylum procedures and the need to secure the effectiveness of the right of appeal in line with international refugee law.

It follows that time-limits for the submission of an appeal must allow the asylum seeker to fully prepare his or her case while avoiding unnecessary delays.

Time-limits for the examination of an appeal must allow for an adequate review of the first instance decision while avoiding unnecessary delays.

The adoption of rigid time-limits is not recommended as a certain degree of flexibility may be necessary. With this in mind, maximum time-limits shall be established in EC law. Whilst these time-limits must be realistic, they must allow for the exercise of the right of appeal in line with international refugee law.

A certain degree of differentiation between substantive and fast-track asylum procedures may be acceptable with regard to time-limits within the boundaries of compliance with international refugee law.

- **The necessary facilities**

Asylum seekers are entitled to the services of an independent competent interpreter. This is designed to secure that any language barriers are overcome.

The terms "independent" and "competent" are defined in section 1.3.4(ii).

Asylum seekers must be granted the opportunity to contact a UNHCR representative.

This involvement of UNHCR is construed as a means to further secure cooperation with UNHCR.

Asylum seekers are entitled to legal representation.

Asylum seekers must be represented by qualified lawyers with expert knowledge in asylum law.

In that respect, the Member States must comply with the provisions on asylum seekers' access to a lawyer in relation to qualifications, control and funding laid down in section 1.3.4(iii).

The proposed Directive imposes a number of obligations on the Member States. However, it is recognised that the extent of these obligations vary with the numbers of applications for asylum a Member State will consider. Hence, where a Member State faces difficulties in fulfilling its obligations owing to high numbers of applications for asylum, the principle of solidarity shall apply. This means that assistance shall be provided to that State by the EC and the other Member States in order to help that State comply with its obligations. Whilst the main form of assistance shall be financial, other forms of assistance may be contemplated depending upon the nature of the difficulties faced by the Member State concerned.

1.3.5. A Directive on asylum seekers' status pending determination

Considering the state of destitution of most asylum seekers, the need to preserve the right to seek refugee status in line with international refugee law requires the Member States to secure asylum seekers with decent living conditions. A Directive on asylum seekers' status pending determination is proposed to that end.

This Directive aims at securing that asylum seekers receive adequate support and that detention remains an exceptional measure.

This Directive may be adopted on the basis of Article 63(1)(b) on minimum standards on the reception of asylum seekers in Member States.

(i) Support for asylum seekers

Asylum seekers are entitled to adequate support pending determination. Hence, the Member States shall take all the measures necessary to ensure the implementation of that right.

- **The responsibility for providing adequate support to asylum seekers**

The responsibility for providing adequate support to asylum seekers lies, in principle, with the Member State responsible for examining the application for asylum.

However, where a Member State intends to carry out a transfer of responsibility, it shall remain responsible for providing support until the asylum seeker concerned is removed.

The terms "adequate support" are defined as referring to the satisfaction of asylum seekers' basic needs understood as comprising accommodation, food, clothing, health care and education.

- **Methods for the provision of adequate support**

Two main ways of providing support have been identified: providing asylum seekers with the means to support themselves or resorting to direct State support.

Providing asylum seekers with the means to support themselves supposes that they have a source of income that allows them to satisfy their needs. Considering the state of destitution of most asylum seekers, work would be the only source of income available to them in that context.

However, considering the restrictions imposed on asylum seekers' right to work in most Member States and the difficulties arising from their status of asylum seeker in

that respect, providing asylum seekers with the means to support themselves cannot be considered the principal way to provide adequate support.

It follows that adequate support for asylum seekers must be provided directly by the State unless it is established that the asylum seeker has the means to support himself or herself. In that respect, the asylum seeker's access to the labour market of the Member State responsible for determining his or her application for asylum shall not be unnecessarily restricted, particularly in the case of a lengthy stay.

Direct State support may be supplied by entitlements to benefits or be provided in kind.

In deciding on the form that direct State shall take, the Member States shall take the following elements into consideration:

- the nature of the need being addressed;

- the impact of the contemplated form of direct State support on asylum seekers; and

- cost-effectiveness.

• **Accommodation**

The Member States shall be responsible for providing asylum seekers with adequate accommodation pending determination.

It follows that, although the Member States may rely upon local authorities, the private sector and charitable organisations for finding accommodation, the Member States remain ultimately responsible for securing asylum seekers with adequate accommodation.

To be considered adequate, accommodation must offer decent living conditions and a reassuring environment while avoiding to affect the course of the proceedings and the provision of support. This means that the location of the accommodation shall not interfere with asylum seekers' rights and well-being.

Asylum seekers' accommodation must present a certain degree of stability and successive changes of accommodation must therefore be avoided.

- **Other essential needs**

The Member States shall ensure that asylum seekers are able to satisfy everyday life needs such as food and clothing.

The needs in question shall be satisfied through wholly or predominantly cash systems. It follows that vouchers shall not be given *in lieu* of benefits. This aims at protecting asylum seekers' dignity and facilitating their everyday life.

- **Access to adequate health care**

The Member States shall be responsible for providing asylum seekers with adequate health care.

Asylum seekers shall be promptly made aware of their rights in terms of health care.

It shall be made clear to asylum seekers that health authorities are distinct from those dealing with their applications for asylum and that the latter cannot request information on their health or access their medical record.

However, medical confidentiality shall not apply to medical records used as evidence of torture or physical ill-treatment in support of applications for asylum.

The services of an interpreter may be necessary. However, in such cases, interpreters shall be bound by a confidentiality clause.

Considering the state of destitution of most asylum seekers, the Member States shall support the cost of health care.

Asylum seekers' specific needs in terms of health care shall be satisfied.

- **Education**

Member States shall be responsible for providing asylum seekers with language tuitions as early as possible. This is designed to help asylum seekers manage everyday life and facilitate the integration of successful applicants.

Language tuitions shall not be provided where:

- the asylum seeker is fluent in the language of the Member State responsible for determining his or her application for asylum;

- the asylum seeker will be removed to a another State pursuant to a transfer of responsibility. However, this exception only applies where the transfer take place within prompt delays.

Where asylum seeker's stay exceeds three to six months in the Member State concerned, access to education shall go beyond the provision of language tuitions. It follows that the asylum seeker shall have access to the Member State' education system.

Children's needs in terms of education shall be specifically addressed.

Children whose parents are asylum seekers or who are asylum seekers themselves shall be enrolled in school on the same basis as children who are resident of the

Member State concerned. Where necessary, these children shall attend special classes designed to address their specific needs.

It is critical that the location of their accommodation does not hinder children's right to education in the Member State concerned.

(ii) Asylum seekers' detention: an exceptional measure

Detention shall be construed as an exceptional measure. Hence, there shall be a presumption that asylum seekers shall not be detained.

Moreover, before considering detention, the Member States must consider whether there is an alternative.

Detention must be contingent upon certain criteria and conditions. Adequate safeguards and facilities must also be provided.

- **Alternatives to detention**

In most cases, detention is used as a means to retain some control over asylum seekers' whereabouts. Hence, before considering detention, the Member States shall consider whether such control may be achieved by other means. This is construed as a prerequisite to any decision to detain an asylum seeker.

Alternatives to detention may include:

- reporting requirements;

- the provision of a guarantor;

- release on bail; or

- the creation of open centres.

The Member States shall ensure that alternatives to detention are made available to asylum seekers. This means that alternatives to detention must exist in the Member States and be considered as well as used in practice.

The range of alternatives to detention available in a Member State shall be sufficiently wide to address the specificity of asylum seekers' circumstances. This is designed to secure the availability of alternatives to detention in practice.

• **The criteria for justified detention**

Detention shall only occur where there are strong and objective reasons for believing that an asylum seeker will abscond or fail to comply with a decision relating to his or her removal from the territory of the Member State where he or she is detained.

In the latter case, detention can only be contemplated where the asylum seeker's removal is imminent.

Where detention is considered justified, the asylum seeker must be provided with written reasons.

Minors as well as adults accompanying them shall not be detained.

The detention of unaccompanied elderly persons, torture or trauma victims and persons with mental or physical disability shall, in principle, be avoided. Where it is considered justified, detention shall be contingent upon certification by a qualified medical practitioner that detention will not adversely affect their health and well-being.

The same rules apply to nursing mothers and female asylum seekers in their final months of pregnancy.

Detained female asylum seekers shall be accommodated separately from male asylum seekers.

- **The conditions for detention**

A decision to detain an asylum seeker shall rest upon an adequate legal basis. This basis is to be found in the provisions of this proposed Directive.

Asylum seekers shall not initially be detained for a period exceeding forty-eight hours.

The total duration of detention shall be kept within reasonable time-limits.

- **Regular judicial supervision**

In order to ensure that detention remains justified, any extension of the detention time beyond forty-eight hours is subject to judicial control.

Judicial control must take place on a regular basis with a view to securing the legitimacy of asylum seekers' detention.

For judicial control to be effective, courts must have the means to assess whether detention is justified and the power to order asylum seekers' release where detention is no longer justified.

- **The right to challenge decisions on detention**

Asylum seekers shall be entitled to challenge the decision to detain them or prolong their detention before a court of law.

(iii) Access to the necessary facilities

Appropriate conditions of detention shall be secured. With this in mind, asylum seekers shall only be detained in specialised detention centres. They shall not be detained in prisons. Moreover, these centres must allow for the provision of the necessary facilities.

- **Specialised detention centres**

The Member States shall ensure that asylum seekers are detained in specially designed detention centres. This may require the Member States having to build such centres.

In the meantime, the Member States shall ensure that asylum seekers are not accommodated with convicted criminals or prisoners on remand.

The Member States shall be answerable for the way centres are run. This remains the case where the running of detention centres is contracted out.

It follows that Member States are responsible for ensuring that custodial officers are adequately qualified. This requires them having received special training in order to be able to deal with asylum seekers. It must be made clear to them that they are not dealing with criminals, but a particularly vulnerable group of persons. This must be reflected in the description of custodial officers' duties.

Complaint procedures shall be established with a view to ensuring the good running of these centres.

Asylum seekers' representatives shall have unrestricted access to these centres.

Regular inspections, including on the spot inspections, shall be carried out by States' representatives as well as representatives of organisations concerned with asylum seekers, such as UNHCR.

The Member States are under the obligation to act upon inspection reports.

UNHCR representatives shall be granted unrestricted access to the centres.

• **Facilities available within and from detention centres**

Detention shall not interfere with asylum seekers' rights laid down in the proposed Directive on fair and effective procedures.

The provision of adequate health care shall be secured.

It follows that where such care cannot be provided *in situ*, arrangements shall be made for its provision outside detention centres. It is recognised that the extent of the care available within the premises of detention centres may vary with their size.

Where it is established that detention seriously affects asylum seeker's health, detention shall cease.

The isolation inherent in this custodial regime shall be confined to what is strictly necessary to the good running of detention centres. It follows that contacts between asylum seekers as well as contacts with friends and relatives shall not be unnecessarily restricted.

This Directive imposes a number of obligations on the Member States. However, it is recognised that the extent of these obligations vary with the numbers of applications for asylum a Member State will consider. Hence, where a Member State faces difficulties in fulfilling its obligations owing to high numbers of applications for asylum, the principle of solidarity shall apply. This means that

assistance shall be provided to that State by the EC and the other Member States in order to help that State comply with its obligations. Whilst the main form of assistance shall be financial, other forms of assistance may be contemplated depending upon the nature of the difficulties faced by the Member State concerned.

These recommendations for law reform are designed to address the need for a global approach with a view to preserving the right to seek refugee status. With this in mind, the proposed Directives establish minimum standards which aim at ensuring compliance with international refugee law.

The Member States shall be allowed to maintain or introduce national laws that go beyond the standards established by the proposed Directives.

2. Further issues

The fact that this thesis focuses on the right to seek refugee status explains that a number of issues have not been examined. Some of these issues are closely related to the right to seek refugee status while other concern international protection at large.

2.1. Further issues arising from the right to seek refugee status

This research concentrates on the right to seek refugee status. It follows that the fate of unsuccessful applicants and the status of recognised refugees are not considered as they can no longer be regarded as asylum seekers for the purpose of the 1951 Convention.

2.1.1. Unsuccessful asylum seekers

Asylum seekers whose claims for asylum have been definitely rejected loose their status of asylum seekers and may found themselves in an irregular situation in the Member State where they sought refugee status. These people will usually be asked

to leave the territory of that State. In that respect, they are in a position similar to that of other categories of third country nationals whose presence is illegal.

However, the removal of unsuccessful of asylum seekers cannot take place at any price and international refugee law remains relevant. Indeed, the principle of *non-refoulement* remains applicable. This means that Member States cannot remove unsuccessful applicants from their territory in contravention of that fundamental principle. It follows that unsuccessful applicants shall not be sent to a country where their life or freedom may be endangered. This may prevent Member State authorities from returning individuals whose applications for refugee status have been dismissed to their country of origin. Where a State of destination which allows compliance with the principle of *non-refoulement* cannot be identified, the State which determined the asylum claim should allow the individual concerned to remain within its territory. Proceeding to removals in such circumstances would amount to a breach of international refugee law. Removals at a later stage are not necessarily excluded, but they remain contingent upon compliance with the principle of *non-refoulement*. It is argued that EC law could further secure the implementation of that principle by specifying that the removal of unsuccessful applicants is subject to observance of the principle of *non-refoulement*. Moreover, it would be necessary to consider the position of those who cannot be removed from the territory of the Member State which rejected their asylum claim.

2.1.2. The status of recognised refugees

Focus on the right to seek refugee status also explains the fact that the status of recognised refugees is not discussed. It is argued that once refugee status is granted, it is vital to secure the integration of the individuals concerned to their new environment. In that respect, their rights and obligations should be determined on the basis of the relevant provisions of the 1951 Convention which deal with juridical status, gainful employment, welfare and administrative measures[5]. The Convention

organises the status of recognised refugees on a non-discriminatory basis. This means that the latter shall not be treated in a less favourable manner than "aliens generally in the same circumstances"[6] or that they must be accorded the same treatment as nationals[7]. Transferred to the EC context, these Convention requirements imply that recognised refugees shall not be treated less favourably that third country nationals legally present in the EC territory and shall, in certain circumstances, be entitled to the same rights as EC nationals.

The status of recognised refugees cannot be left outside the scope of an EC policy on asylum and should be tackled in relation to issues regarding third country nationals. However, the specificity of those who fled persecution should still be taken into consideration. This may necessitate the adoption of measures specifically designed to address the needs of this particularly vulnerable group. In that respect, one may mention a proposal of the Commission for a Council decision establishing a Community action programme to promote the integration of refugees[8]. This proposal targets those who have been granted refugee status within the meaning of the 1951 Convention, but also those who have been granted protection on an individual basis according to Member States' international obligations or on

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[5] See, in particular, Chapter II of the 1951 Convention on juridical status, Chapter III on gainful employment, Chapter IV on welfare and Chapter V on administrative measures.

[6] Article 6 of the 1951 Convention defines the term "in the same circumstances" as "(...) impl[ying] that any requirements (including requirements as to the length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling."

[7] See, for instance, Article 14 of the 1951 Convention on artistic rights and industrial property, Article 16 on access to courts, Article 20 on rationing, Article 22(1) on public elementary education or Article 24(1) which deals with certain aspects of labour legislation and social security.

[8] Proposal for a Council Decision establishing a Community programme to promote the integration of refugees, (1999/C 36/11) COM(1998) 731 final - 98/0356 (CNS).

humanitarian grounds (Article 2). The purpose of this programme is to "(...) contribute to the effective integration into and the participation in society of refugees in the Member States (...)" (Article 1).

The research focuses on those who seek international protection through refugee status within the meaning of the 1951 Convention. However, it is acknowledged that refugee status does not constitute the sole form of international protection.

2.2. Further issues relating to international protection

International protection may take different forms and is therefore not confined to refugee status. As observed by UNHCR, "[t]he Convention is not a panacea for all the problems of displacement"[9]. The need for international protection is a highly complex issue which covers a variety of situations that may require different responses. In that respect, on can refer to the specific issues raised by mass-influx of individuals seeking international protection. As noted by UNHCR, "[w]hile the Convention could be applicable to large scale influxes, just as to individual arrivals, in practice States have found it too difficult or onerous to adhere to its provisions when faced with sudden mass arrivals."[10] This was, for instance, the case for Member States with regard to people fleeing Kosovo. Such situations have resulted in the development of other forms of protection. Individuals may find refuge in refugee camps situated close to the borders with their country of origin. However, such camps often suffer from shortages of resources and cannot fully address the need for protection in cases of mass-influxes of refugees. This is where the concept of temporary protection intervenes. Resort to temporary protection has been intensified in Europe with the crisis in Bosnia followed by that in Kosovo. In that

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[9] Conference organised by the Portuguese Presidency of the Council, with the support of the European Commission, 15-16 June 2000, Lisbon, Presentation by Erika Feller, Director, Department of International Protection UNHCR, referred to in http://www.unhcr.ch/issues/asylum/lisbon.htm

[10] *Ibid.*

respect, the Member States expressed the view that, although there was a need for international protection, the vast majority of individuals concerned did fall outside the scope of the 1951 Convention. Moreover, they stressed that the Convention was not designed to deal with cases of mass-influxes. It is argued that, while the need for temporary protection is not contested, it should not be used as a substitute for refugee status where the latter is applicable, i.e. where individuals fall within the scope of the Convention definition of the term refugee. Indeed, there has been a temptation for some Member States to grant temporary protection in lieu of refugee status in the context of increasingly restrictive asylum policies at both European and national level. Indeed, the extent of the rights that temporary protection confers are much more limited than those granted by refugee status. However, the necessity to address the need for international protection of those who are not eligible for refugee status calls for common action at EC level[11]. The required measures could be adopted on the basis of Article 63(2)(a) of Title IV of the TEC according to which measures regarding the establishment of "minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection" shall be adopted within five years of the entry into force of the Treaty of Amsterdam.

International protection, whatever its form, is solicited when "it is too late". Indeed, the need for international protection is created where individuals have no choice but to turn to the international community for assistance. International protection, including refugee status, is not a tool of prevention as it does not tackle the root causes for the need for international protection. There has been an increasing focus on means to prevent or, at least, detect at an early stage the needs for international protection, particularly with a view to avoiding States facing "sudden" migration

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[11] See, for instance, Karoline Kerber, "Temporary protection: an assessment of the harmonisation policies of the European Union Member States", IJRL, Vol.9 No.3 (1997) 453-471.

flows unprepared[12]. However, while prevention is an important avenue that needs to be further explored, the need for international protection will remain.

Today, Europe, and most specifically the EC, are at a crossroads. Europe was seen as the land of asylum, the place where the 1951 Convention was adopted. However, it is now a place where the right to seek refugee status is threatened. In that context, the EC and its Member States are urged to operate a change of direction in their asylum policy and secure asylum seekers' rights in line with international standards. The influence of the EC policy on asylum must not be undermined; it is not confined to its territory, but expands beyond its external borders. This is particularly apparent with regard to aspiring Member States. If the EC and its Member States carry on lowering their standards, there is a risk that other countries will follow. Furthermore, this export of restrictive asylum policies will create further problems as those turned down at the door of Fortress Europe will be seeking refuge status elsewhere since the need for international protection will not disappear. At a time where the adoption of a Charter of fundamental rights to the benefit of EU citizens is being discussed[13], the time has come for the EC and its Member States to endorse their responsibilities towards asylum seekers.

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[12] See, for instance, Geoff Gilbert, "The best "early warning" is prevention: refugee flows and European responses", IJRL, Vol.9 No.2 (1997) 207-227.

[13] Henri de Bresson et Arnaud Leparmentier, "France et Allemagne tentent de ressouder leur union à Rambouillet", Le Monde, 20 May 2000

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