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THE FRAGMENTATION OF RECEPTION CONDITIONS FOR ASYLUM SEEKERS IN THE EUROPEAN UNION: PROTECTING FUNDAMENTAL RIGHTS OR PREVENTING LONG-TERM INTEGRATION?

Janine Silga*

SUMMARY: I. Introduction. – II. Facts and Figures on the “crisis”: “Refugee Crisis” or “Reception Crisis”? – III. The ambivalent policy objective of the Reception Conditions Directive. – III.1. The protection of fundamental rights. – III.2. Migration management objectives. – IV. The creation of a fragmented status for asylum seekers. – IV.1 Reception conditions in Directive 2013/33/EU. – IV.1.1. The definition of “reception conditions” in Directive 2013/33/EU. – IV.1.2. Scope of application. – IV.2. Overview of the rights provided by the Reception Conditions Directive. – IV.2.1. Procedural rights. – IV.2.2. Substantive rights. – IV.2.2.1 Material reception conditions. – IV.2.2.2. Access to the labour market: Fostering socio-economic integration or further weakening asylum? – IV.2.2.3. Reduction and withdrawal of reception conditions. – V. The reception conditions of asylum seekers in the EU Member States: Examples of national practices. – V.1. The reception of asylum seekers in France: The challenge of housing. – V.2. The reception of asylum seekers in Italy: A reception system driven by emergency. – V.3. Deterring asylum seekers by curtailing their socio-economic rights in Sweden. – VI. Conclusion: Dismantling asylum to rationalise migration?

I. Introduction

With the high number of asylum seekers reaching the European Union (EU) in 2015/2016, the question of their reception and integration in their host societies has become more crucial.¹ According to a report of the European Council on Refugees and Exiles (ECRE)² in 2016, “[t]he year 2015 has been marked as a turning point in Europe’s

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¹ For critical insights into the social integration of asylum seekers in EU law, read E. PISTOIA, *Social Integration of Refugees and Asylum Seekers through the Exercise of Socio-Economic Rights in European Union Law*, in *European Papers*, 2018, n. 3 (issue 2), pp. 781-807, at pp. 804-806.

² AIDA (Asylum Information Database), *Wrong Counts and Closing Doors – The Reception of Refugees and Asylum Seekers in Europe*, ECRE, March 2016.

struggle to find adequate responses to the predicament of refugees. The unprecedented number of refugees and migrants arriving irregularly to the continent via the Mediterranean Sea, surpassing one million, and the piecemeal reactive, often irrational, response of Member States, led to coining the phrase “refugee crisis” as one of the most critical test for the EU and its broader region.”³

Attracting considerable attention, asylum seekers and refugees have been sometimes portrayed as a “burden” on the Member States’ public finances, if not “economic migrants” in disguise, thus triggering a “reception crisis” in the EU. This situation has been a real test for the EU reception system. Indeed, the reception of asylum seekers still varies widely between the EU Member States and results in an uneven access to socio-economic rights. While officially recognised refugees are entitled to a wide range of socio-economic rights⁴ as provided by the 1951 Convention relating to the Status of Refugees⁵ (hereafter the “Geneva Convention”), the situation is far less clear for asylum seekers.⁶ Indeed, given their inherent precarious legal situation, their rights are more contingent and largely depend on the national socio-economic situation of the receiving State. International human rights law provides for some safeguards for the most basic rights on the basis of non-discrimination, as well as a non-derogable protection from inhuman and degrading treatment.⁷ In this regard, the European Court of Human Rights (ECtHR) gives additional guarantees to asylum seekers in the EU context, such as in the *MSS v Greece and Belgium*⁸ or *Tarakhel v Switzerland*⁹ judgments that both concerned the “Dublin” system.¹⁰ In this respect, the discrepancy in the reception conditions of

³ *Ibid.*, p. 8.

⁴ R. CHOLEWINSKI, *Economic and Social Rights of Refugees and Asylum Seekers in Europe*, in *Georgetown Immigration Law Journal*, 1999-2000, n. 14, pp. 709-755, at pp. 710-712. Such rights include: the right to wage-earning employment (article 17), the right to self-employment (article 18), housing (article 21), public education (article 22) and social security (article 24).

⁵ Convention relating to the Status of Refugees. Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950.

⁶ L. Slingenberg defines asylum seekers as being “in a state of legal limbo.” L. SLINGENBERG, *The Reception of Asylum Seekers under International Law – Between Sovereignty and Equality*, Hart, 2016, p. 1. For further discussion on the extent to which the Geneva Convention also applies to asylum seekers, see point III.1, below.

⁷ For an earlier analysis, read: R. CHOLEWINSKI, *op. cit.* See also, European Council on Refugees and Exiles, *Reception and Detention Conditions of Applicants for International Protection in Light of the Charter of Fundamental Rights of the European Union*, January 2015, available at: http://www.ecre.org/wp-content/uploads/2016/07/ECRE-Reception-and-detention-conditions-for-applicants-for-international-protection-in-light-of-the-Charter-of-Fundamental-Rights-of-the-EU_January-2015.pdf (31.03.2018)

⁸ European Court of Human Rights, Grand Chamber, judgment of 21 January 2011, application no. 30696/09, *M.S.S. v. Belgium and Greece*. For a comment on this key judgment, read: V. MORENO-LAX, *Dismantling the Dublin System: M.S.S. v. Belgium and Greece*, in *European Journal of Migration and Law*, 2012, n. 14, pp. 1-31.

⁹ European Court of Human Rights, Grand Chamber, judgment of 4 November 2014, application no. 29217/12, *Tarakhel v. Switzerland*. Since then, see: European Court of Human Rights, judgment of 3 November 2015, application no. 21459/14, *J.A. and Others v. the Netherlands*.

¹⁰ Regulation (EU) no 604/2013 of the European Parliament and of the Council, *establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, of 26 June 2013, OJ L 180, of 29 June 2013, pp. 31-59.

asylum seekers has been especially problematic for the determination of the Member State responsible for examining an asylum claim under the so-called “Dublin” regulation, which lays down criteria for determining the Member State responsible for examining an asylum claim in the EU.

In the EU context, the Reception Conditions Directive is the legal instrument that provides the standard for reception conditions throughout the EU, insofar as it aims at harmonising such conditions of asylum seekers in all EU Member States. The first Reception Conditions Directive adopted on 27 January 2003¹¹ laid down minimum standards for the reception of asylum seekers as part of the newly established Common European Asylum System (CEAS). Unable to live up to the expectations that it would lead to harmonised standards for receiving asylum seekers in all Member States, the Reception Conditions Directive was entirely revised and a new instrument was adopted on 26 June 2013 (to be transposed by 20 July 2015).¹² One of the proclaimed objectives of the new directive is to “ensure equal treatment of applicants throughout the Union”,¹³ which highlights an intention to go beyond minimum standards and genuinely harmonise reception conditions throughout the EU. This objective is also emphasised in article 3(1) of the Directive, which provides that it “shall apply to all third-country nationals and stateless persons who make an application for international protection on the territory (...) of the Member States.”¹⁴ In reality, this principle stems from the *CIMADE and GISTI* case of 2012.¹⁵ In this case, the Court of Justice of the European Union (CJEU) had clearly stated that the first Reception Conditions Directive “provides for only one category of asylum seekers, comprising all third-country nationals or stateless persons who make an application for asylum”.¹⁶ At the time, the Court was clearly drawing this principle from the purpose of the Directive itself, which was to ensure the respect for the fundamental rights of asylum seekers. As it clarified: “the directive aims in particular to ensure full respect for human dignity.”¹⁷

With the view to ensure a better protection of fundamental rights, the current Reception Conditions Directive not only clarifies its scope of application (as it applies to all applicants for international protection) and some important concepts, such as detention.

¹¹ Council Directive 2003/9/EC, *laying down minimum standards for the reception of asylum seekers*, of 27 January 2003, in OJ L 31, 6.2.2003, pp. 18–25.

¹² Directive 2013/33/EU of the European Parliament and of the Council, *laying down standards for the reception of applicants for international protection* (recast), of 26 June 2013, in OJ L 180, 29 June 2013, pp. 96–116. For a critical overview of this Directive, read, among others: E. SAULNIER-CASSIA, *La directive 2013/33/UE: la réforme de l’“accueil” des “personnes demandant la protection internationale” dans un Etat membre de l’Union européenne*, in *Revue trimestrielle de droit européen*, 2016, p. 43.

¹³ Recital 8 of Directive 2013/33/EU of the European Parliament and of the Council, *laying down standards for the reception of applicants for international protection*, cit.

¹⁴ This provision highlights the particularly inclusive nature of the new Reception Conditions Directive since it also applies to applicant to subsidiary protection, unlike its predecessor.

¹⁵ Court of Justice, judgment of 21 September 2012, case C-179/11, *Cimade and Groupe d’information et de soutien des immigrés (GISTI) v. Ministre de l’Intérieur, de l’Outre-mer, des Collectivités territoriales et de l’Immigration*.

¹⁶ *Ibid.*, par. 40.

¹⁷ *Ibid.*, par. 42.

It also takes better into account the vulnerability of some categories of asylum seekers¹⁸ including: minors, unaccompanied minors and victims of torture and violence. While being a laudable objective, a closer look at the Directive and national practices of the Member States stemming from it shows that no such equal treatment between all applicants for international protection actually exists. This discrepancy is not only caused by the incorrect transposition of the Directive¹⁹ but by this instrument itself, which distinguishes between different categories of asylum seekers, depending on the stage of the procedure or the type of claim (for instance, claims under the “Dublin” procedure, subsequent claims, claims made in detention) and gives a leeway to Member States to further distinguish between categories of asylum seekers.

The absence of a unified status for asylum seekers in the EU for the purpose of determining their reception conditions may be explained by the fact that the Reception Conditions Directive is based on two potentially conflicting policy objectives that lie at its basis, namely, the protection of fundamental rights and migration management objectives. Indeed, while the Directive aims to ensure an equal access to fundamental rights for all asylum seekers, on the one hand, such harmonisation should also lead to a reduction of secondary movements, on the other hand. As this paper will argue, the attempt to balance these two policy objectives results in the creation of a variable – if not hierarchical – access to rights, which, in turn, undermines the achievement of the equal treatment of all applicants for international protection.

I hypothesise that such distinctions between types of asylum seekers reveal the underlying motivation not to create a stable legal status that could enable their long-term integration, thus encouraging more people to seek refuge to this EU.²⁰ It may seem paradoxical to mention “integration” regarding asylum seekers whose legal status and socio-economic condition is inherently uncertain and precarious. However, given the

¹⁸ Articles 21 to 25 of Directive 2013/33/EU of the European Parliament and of the Council, *laying down standards for the reception of applicants for international protection*, cit.

¹⁹ Formerly Council Directive 2003/9/EC, *laying down minimum standards for the reception of asylum seekers*, cit., now Directive 2013/33/EU of the European Parliament and of the Council, *laying down standards for the reception of applicants for international protection*, cit. For an assessment of the implementation of Directive 2003/9, see: P. De BRUYCKER, L. DE BAUCHE, *Directive 2003/09 on Reception Conditions Synthesis Report, Study on the “Conformity Checking of the Transposition by Member States of 10 EC Directives in the Sector of Asylum and Immigration*, 2007. See also Report of the European Parliament on the implementation in the European Union of Directive 2003/9/EC *laying down minimum standards for the reception of asylum seekers and refugees: visits by the Committee on Civil Liberties 2005-2008* (2008/2235(INI)), A6-0024/2009, 27.01.2009.

²⁰ As the Commission clearly states: “Further harmonising the treatment of asylum seekers across the EU is critical, not only to ensure that this treatment is humane, but also to reduce incentives to move to Europe and to other Member States within Europe.” Communication from the Commission to the European Parliament and the Council, *Toward a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*, of 6 April 2016, COM(2016) 197 final, at p. 11. More extensively, read the proposal for a Directive of the European Parliament and of the Council, *laying down standards for the reception of applicants for international protection (recast)*, of 13 July 2016, COM(2016) 465. For critical comments on this proposal and more generally on the shortcomings of the CEAS, read: V. CHETAIL, *Looking Beyond the Rhetoric of the Refugee Crisis: The Reform of the Common European Asylum System*, in *European Journal of Human Rights*, 2016 (issue 5), pp. 584-602. On the proposal read especially pp. 598-600.

duration of the asylum procedure and the often distressing situation they have to face,²¹ it is essential to give greater consideration to socio-economic integration of asylum seekers as a key aspect of a more resilient long-term EU asylum policy.

This paper will look both at the situation in the EU and in three different Member States, namely, France, Italy and Sweden. In this latter respect, this paper does not intend to present the situation in these three Member States comprehensively or to compare them. Rather, this article sets out to illustrate the lack of harmonisation of reception conditions of asylum seekers in the EU in a more tangible way. In this sense, this article focuses on some of the most pressing issues faced by each of these three Member States under the current European reception regime. The choice of these three countries lies in the fact that they were among the five destination countries in the EU to receive the highest number of first time asylum applicants in the fourth quarter of 2015, together with Germany and Austria.²² While Germany has already received significant attention,²³ it might be interesting to examine – albeit briefly – the situation in other Member States. Indeed, while Sweden has a long tradition of receiving refugees²⁴, a sudden tightening of reception conditions has been recently observed. Italy, on the other hand, has been facing a lot of “pressure” on its reception system, culminating with the *Tarakhel* judgment of the ECtHR in 2014 that shed light on the difficulty of the Italian reception system to protect asylum seekers and refugees’ fundamental human rights²⁵. The current reform of the Italian reception system, initiated by Legislative Decree 142/2015 transposing the Reception Conditions Directive,²⁶ attempted to address this issue but it still shows some shortcomings. In particular, the fact that the system is essentially driven by emergency²⁷

²¹ Article 31(5) of Directive 2013/32/EU provides that: “In any event, Member States shall conclude the examination procedure within a maximum time limit of 21 months from the lodging of the application.” The new proposal for a regulation establishing a common procedure for international protection sets the maximum time limit to examine asylum claims to 15 months (article 34(5), Proposal for a Regulation of the European Parliament and of the Council, *establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU*, of 13 July 2016, COM(2016) 467.

²² As Eurostat reports, “The highest number of first time asylum applicants in the fourth quarter of 2015 was registered in Germany (with over 162 500 applicants), or 38% of total applicants in the EU Member States, followed by Sweden (87 900 or 21%), Austria (30 800 or 7%) and Italy and France (both with over 23 500 or 6% each). These 5 Member States together account for more than 75% of all first time applicants in EU-28.” Eurostat, 2015. As regards Hungary, it is interesting to note that it “...[h]as recorded decrease of 27 000 asylum applicants in the fourth quarter of 2015.”

²³ For instance, see: F. WEBER, *Labour Market Access for Asylum Seekers and Refugees under the Common European Asylum System*, in *European Journal of Migration and Law*, 2016, n.18, pp. 34-64 (taking Germany as an implementation example).

²⁴ H.E. ANDERSSON, S. NILSSON, *Asylum Seekers and Undocumented Migrants’ Increased Social Rights in Sweden*, in *International Migration*, 2009, n. 49 (issue 4), pp. 167-188.

²⁵ European Court of Human Rights, *Tarakhel v. Switzerland*, cit.

²⁶ Decreto legislativo, 18 agosto 2015, n. 142, *Attuazione della direttiva 2013/33/UE recante norme relative all'accoglienza dei richiedenti protezione internazionale, nonché della direttiva 2013/32/UE, recante procedure comuni ai fini del riconoscimento e della revoca dello status di protezione internazionale*. (15G00158) (GU Serie Generale n. 214 del 15-09-2015).

²⁷ On this point, read among others: C. MARCHETTI, *Rifugiati e migranti forzati in Italia. Il pendolo tra “emergenza” e “sistema”*, in *Revista Interdisciplinar da Mobilidade Humana*, 2014, n. 43, pp. 53-70 and E. ZANIBONI, *No Room for You Here? The Past and the Future of the Asylum Seekers’ Receptions*

has led to an extensive resort to detention as a way for “receiving” asylum seekers. Last, the French case is interesting in that despite the constant portrayal of France as a welcoming country for refugees, its reception system shows intrinsic flaws and incoherencies affecting asylum seekers, especially as regards their accommodation.

II. Facts and Figures on the “crisis”: “Refugee Crisis” or “Reception Crisis”?

Before moving to exposing the legal framework of reception, it seems relevant to highlight a few facts relating to the so-called “refugee crisis” as they may give more precise hints as to the nature of the “crisis” that the EU is facing. This terminology revealing an urge for concrete political action acquired a considerable significance in the aftermath of a deadly shipwreck on 19 April 2015 in which more than 750 hundred people were reported to have drowned in their attempt to cross the Mediterranean sea to reach the European coast²⁸. Following this tragic event, the European Council held a Special Meeting on 23 April 2015²⁹ and released a statement in which it particularly “look[ed] forward to the Communication on a European Agenda for Migration, in order to develop a more systemic and geographically comprehensive approach to migration.³⁰” This statement was followed by a resolution from the European Parliament on 29 April 2015 in which it also “[called] on the Commission to develop and come up with an ambitious European agenda on migration, which takes into account all aspects of migration.³¹” On 13 May 2015, the Commission issued its “European Agenda on Migration”³², in which it laid down a set of measures intended to put an end to “human misery³³”. This political reaction from the EU institutions expresses a sense of emergency in view of the increasing arrival of people, a large number of which needed international protection. It is undeniable that asylum – and more largely migration – has been recently and increasingly coined as matter requiring urgent action. However, this European crisis should be also put within a broader context both statistically and geographically.

According to ECRE, EU Member States and Schengen Associated States received altogether 1 392 619 asylum claims in 2015, more than doubling the number of applications registered in 2014, namely, 662 165.³⁴ The IMF also reports that asylum

Conditions in Italy, in *Freedom, Security and Justice: European Legal Studies*, 2018, n. 2, pp. 80-103 (see especially pp. 87-88).

²⁸ F. PASTORE, G. HENRY, *Explaining the Crisis of the European Migration and Asylum Regime*, in *The International Spectator*, 2016, n. 51(issue 1), pp. 44-57, at p. 53.

²⁹ F. PASTORE and G. HENRY have described this meeting as being “appallingly unfruitful”. *Ibid.*

³⁰ Special meeting of the European Council, 23 April 2015 – Statement, Press release 204/15, point 5.

³¹ European Parliament resolution of 29 April 2015 on the latest tragedies in the Mediterranean and EU migration and asylum policies (2015/2660(RSP)), P8_TA(2015)0176, point 19.

³² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A European Agenda on Migration*, of 13 May 2015, COM(2015) 240 final.

³³ *Ibid.*, p. 2.

³⁴ AIDA ECRE Report, cit. Eurostat reports the number of first time applicant to be 1.26 million in 2015 in all 28 EU Member States. Eurostat, *Asylum Statistics* (data extracted on 13 March 2017), available at:

applications registered in the EU in 2015 surpassed the previous peak reached after the fall of the Berlin Wall and during the conflicts in the former Yugoslavia.³⁵ At that time, asylum applications in the EU peaked at 670 000 in 1992 and remained at such a high level during 1990-1993. The number of refugees from the former Yugoslavia reached 1.4 Million in 1996 and decreased thereafter with many refugees going back to their home countries after the return of stability. The crisis in Kosovo in 1999 also led to a new surge in asylum applications above 400 000 yearly. Before the current surge, the number of refugees living in Europe was well below the levels of the 1990s as it amounted to only 11% of refugees globally.

In March 2016, Eurostat³⁶ reported that in the fourth quarter of 2015, the number of first time asylum applicants rose by more than 130% compared with the fourth quarter of 2014, representing 426 000 for the whole EU. In decreasing order, Syrians, Afghanis and Iraqis formed the overwhelming majority of first applicants. Of the 145 000 Syrians applying for asylum during the last quarter of 2015, 60% of the applications were registered in Germany (86 300) and nearly 20% in Sweden (25 500). Of the 79 300 Iraqis seeking asylum for the first time in the EU during the same time period, 75% applied in only 3 Member States, namely, Sweden (31 400), Germany (14 600) and Austria (12 400). Most asylum seekers in seven EU Member States were from Syria.³⁷

Since 2017, however, the number of asylum seekers applying for international protection in the EU (650000) has almost dropped by half compared with the figures mentioned earlier.³⁸ In 2017, Italy (with 20% of the number of first time asylum seekers in the EU) and France (with 14%), are still among the main EU countries of arrival, behind Germany (31%). By contrast to the situation in the EU, Turkey has hosted one of the largest number of refugees in the World. In particular, Turkey has received about 2 Million Syrian refugees since the beginning of the crisis in 2011, which accounts for 47% of the total Syrian refugees' inflows and 2.5% of Turkish population.³⁹ In its 2017 report on forced displacement, the UNHCR stated that Turkey has been hosting the largest number of refugees worldwide (3.5 million people) for the fourth consecutive year.⁴⁰ Similarly, the IMF reports that already by the end of 2014, while refugees counted for

<http://www.statewatch.org/news/2017/mar/eu-eurostat-2016-asylum-applications-statistics-explained-13-3-17.pdf> (05.10.2018).

³⁵ S. AIYAR, B. BARBKU, N. BATTINI, *The Refugee Surge: Economic Challenges*, International Monetary Fund (IMF), 2016, p. 8.

³⁶ Eurostat, *Asylum Quarterly Report* (data extracted on 3rd March 2016). Available at: <https://ec.europa.eu/eurostat/documents/6049358/7005580/Asylum+quarterly+report+-+Q4+2015.pdf/7c7307b1-a816-439b-a7d9-2d15e6e22e82> (12.11.2018).

³⁷ *Ibid.* Those States are: Cyprus, Denmark, Germany, Greece, the Netherlands, Romania and Spain. By contract, in Italy it was Nigerian citizens (5575 applications), in France it was Sudanese citizens (2250 applications) and in Sweden Afghanis (31420). But both in France and in Sweden the second largest group of asylum seekers was made of Syrian nationals.

³⁸ Eurostat: *Asylum Statistics* (data extracted on 16 March 2018). Available at: https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics (12.11.2018).

³⁹ S. AIYAR, B. BARBKU, N. BATTINI, *op. cit.*

⁴⁰ UNHCR, *Global Trends – Forced Displacement in 2017*, p. 3. Available at: <http://www.unhcr.org/5b27be547.pdf> (05.10.2018).

14.8 per 1000 inhabitants in Sweden, they accounted for 232 per 1000 inhabitants in Lebanon and 87 per 1000 inhabitants in Jordan.⁴¹ According to the 2017 UNHCR report, out of the eight States that host the largest number of refugees, only one EU Member State, namely Germany, has received 970,400 refugees.⁴² This figure is still below Uganda and Pakistan, which both host 1.4 million refugees.⁴³

Regarding the number of asylum seekers more specifically, the same report highlights that by the end of 2017, 3.1 million asylum seekers were awaiting a decision on their asylum claim and about half of them were in developing countries.⁴⁴ More precisely, the UNHCR reports that in 2017, 1.7 million first asylum claims were made in 162 countries or territories.⁴⁵ The United States were the largest recipient of asylum claims lodged in 2017 (331,700), followed by Germany (198,300) and Italy (126,500).⁴⁶ The UNHCR further exposes that eight out of the sixteen main countries for new asylum seekers have been EU Member States from 2008 to 2017.⁴⁷ While one should be cautious in interpreting these numbers, the apparent contrast between the low number of refugees hosted in the EU and the higher number of asylum seekers received might be explained by different factors. The latter might range from a lower recognition rate to an undersuse of resettlement mechanisms aiming at increasing global solidarity towards countries hosting the highest number of refugees worldwide. Either way, the figures mentioned above unambiguously show that the EU has not been the only part of the world to have received a higher number of asylum seekers as a result of the “refugee crisis” and that it still is not. In this respect, the United Nations Secretary-General António Guterres has called for a “[s]tronger solidarity with refugee-hosting countries in the global South.”⁴⁸

When comparing the numbers of refugees and asylum seekers hosted in different parts of the world with the same numbers in the EU as briefly outlined above, such figures point out that the “refugee crisis” the EU is now facing is more a crisis of its reception system rather than a crisis relating to a sharp and incontrollable increase of arrivals of people in absolute terms. Among the deficiencies of the EU reception system, the issue of solidarity and the lack of adequate system for allocating asylum seekers fairly through the “Dublin” system has already been widely commented by scholars.⁴⁹ The objective of the following sections, will be instead to show the deficiencies that are inherent to the EU reception framework itself as it has been designed by the Reception Conditions Directive.

⁴¹ S. AIYAR, B. BARBKU, N. BATTINI, *op. cit.*

⁴² UNHCR, *Global Trends – Forced Displacement in 2017*, *op. cit.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*, p. 2.

⁴⁵ *Ibid.*, p. 39.

⁴⁶ This compares to 93,000 first-time asylum claims lodged in France in 2017 making this country the fifth largest recipient of asylum claims. In comparison, there were 57,000 asylum claims lodged in Greece in 2017 making this country the fourth largest recipient of asylum claims in the EU. *Ibid.*, p. 41

⁴⁷ In decreasing order of importance of the number of asylum seekers received in 2017: Germany, Italy, France, Greece, United Kingdom, Austria, Sweden and Belgium. *Ibid.*

⁴⁸ *Ibid.*, p. 13.

⁴⁹ Read among others: J. VESTED HANSEN, *Reception Conditions as Human Rights: Pan-European Standard or Systemic Deficiencies?*, in V. CHETAIL, P. DE BRUYCKER, F. MAIANI (eds.), *Reforming the Common European Asylum System – The New European Refugee Law*, Brill Nijhoff, 2016, pp. 317-352.

In particular, we will attempt to show that while EU reception standards may be higher than anywhere else, those standards do not apply in the same way to all applicants for international protection.

III. The ambivalent policy objective of the Reception Conditions Directive

III. 1. The protection of fundamental rights

As mentioned earlier, one of the essential objectives of the Reception Directive is to ensure a “dignified standard of living and comparable living conditions in all Member States”.⁵⁰ More generally, recital 35 of the Directive clearly states that this instrument “respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.” The same recital specifies that “ (...) in particular, this Directive seeks to ensure full respect of human dignity (...)”.⁵¹ In this latter respect, article 17(2) of the Directive clearly states that reception conditions shall provide “an adequate standard of living” to applicants for international protection, “which guarantees their subsistence and protects their physical and mental health.”

The need to protect the fundamental rights of asylum seekers has been especially highlighted by the ECtHR⁵² in relation to the functioning of the “Dublin” system.⁵³ Relying on the absolute prohibition of torture or inhuman or degrading treatment set in article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the ECtHR has developed an important case-law specifically aiming at protecting the fundamental rights of asylum seekers in the EU context. The most well-known of these cases is *MSS v Greece and Belgium*.⁵⁴ In this case, the ECtHR particularly stressed the inherent vulnerability of the applicant as an asylum

⁵⁰ Recital 11 of Directive 2013/33/EU of the European Parliament and of the Council, *laying down standards for the reception of applicants for international protection*, cit.

⁵¹ Recital 35 of Directive 2013/33/EU of the European Parliament and of the Council, *laying down standards for the reception of applicants for international protection*, cit.

⁵² For a more detailed overview of the case-law of the ECtHR in connection with the protection of the fundamental rights of asylum seekers, read: L. SLINGENBERG, op. cit., pp. 284-352. In relation to article 3, read especially: pp. 287-311.

⁵³ Among these cases, see especially: European Court of Human Rights, judgment of 6 June 2013, application no. 2283/12, *Mohammed v. Austria* and European Court of Human Rights, judgment of 21 October 2014, application no. 16643/09, *Sharifi and Others v. Italy and Greece*.

⁵⁴ European Court of Human Rights, Grand Chamber, *M.S.S.*, cit.

seeker.⁵⁵ In response to the ruling of the ECtHR, in *N.S.*,⁵⁶ the CJEU stated that: “Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the ‘Member State responsible’ within the meaning of (...) [the Dublin Regulation] where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.”

More recently, in its *Saciri*⁵⁷ case of 2014, the Court clarified that whenever a Member State chooses to grant an asylum seeker material reception conditions in the form of financial allowances, the latter should be sufficient to ensure a dignified standard of living and be adequate for their health, as well as be capable of ensuring their subsistence.⁵⁸ E. Tsourdi connects the requirement to respect the human dignity of asylum seekers to the reference of the Reception Directive to article 1 of the Charter of Fundamental Rights. In this respect, she puts forward that the full respect for human dignity “(...) entails broader obligations than the prohibition of torture, inhuman and degrading treatment.”⁵⁹

While it is clear that both EU and international law in this respect clearly aim to ensure a dignified treatment of asylum seekers, the specific content of the rights stemming from such treatment is rather unclear in terms of positive obligations of the States. With regard to international law especially, the extent to which the Geneva Convention itself applies to asylum seekers is quite obscure. In this respect, it has been argued that this Convention applies to asylum seekers insofar as the refugee status is declaratory.⁶⁰ Indeed, a closer look at the Geneva Convention shows a distinction between refugees who are “present”, those who are “lawfully present” and those who are “lawfully staying” in the territory of a State. As the UNHCR admits, the Convention “(...) does not explicitly mention asylum seekers.”⁶¹ However, as it further adds, “there is nothing in the 1951 Convention, which

⁵⁵ *Ibid.*, par. 233, 251 and 263. In paragraph 251, the ECtHR stated that it: “(...) attaches considerable importance to the applicant’s status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection (...)” In the same paragraph, the ECtHR also noted “(...) the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the Reception Conditions Directive.” In this sense, see also, European Court of Human Rights, judgment of 7 July 2015, application no. 60125/11, *V.M. and Others v. Belgium*, par. 153.

⁵⁶ Court of Justice, Grand Chamber, judgment of 21 December 2011, *N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, joined cases C-411/10 and C-493/10, par. 106.

⁵⁷ Court of Justice, judgment of 27 February 2014, *Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and Others*, case C-79/13, par. 40-42.

⁵⁸ For a more detailed account of this case, see point IV.2.2.1 *infra*.

⁵⁹ E. TSOURDI, *EU Reception Conditions: A Dignified Standard of Living for Asylum Seekers?*, in V. CHETAIL, P. DE BRUYCKER, F. MAIANI (eds.), *Reforming the Common European Asylum System – The New European Refugee Law*, op. cit., pp. 271-316, at p. 301.

⁶⁰ *Ibid.*, p. 271.

⁶¹ UNHCR, *Reception Standards for Asylum Seekers*, Geneva, July 2000, at p. 5. Available at: <http://www.unhcr.org/protection/operations/43662ddb2/reception-standards-asylum-seekers-european-union.html> (12/11/2018).

says that its provisions only apply to formally recognised refugees.”⁶² In this sense, provisions of the Geneva Convention apply before the formal recognition of the refugee status. This is especially the case for the provision of *non-refoulement* laid down in article 33 of the Geneva Convention or article 31, which – among others – prohibits States from imposing penalties on refugees on account of their illegal entry or presence.⁶³ Therefore, as the UNHCR puts it : “[T]he benefits provided under the various provisions of the 1951 Convention have different levels of applicability depending on the nature of the refugee's sojourn or residence in the country.”⁶⁴ Based on this distinction, some provisions corresponding to the most fundamental rights will apply to all refugees –including asylum seekers – regardless of their residence status. Among others, this is the case of article 3 (non-discrimination), article 13 (acquisition of property) or article 33 (*non-refoulement*) of the Geneva Convention. As to refugees who are simply “present” in the territory of a State, in accordance with the Geneva Convention, they are entitled to some basic rights regardless of the regularity of their residence status. Such rights include, among others: the freedom to be practising one’s own religion (article 4), education (article 22) and access to documentation (article 27). In addition to the rights already mentioned, the UNHCR highlights a further distinction made by the Geneva Convention between refugees “lawfully in the country” and those who are “lawfully *staying* in the country”.⁶⁵ Following this distinction, the former category of refugees (to which some asylum seekers may also belong) will be able to benefit from the right to self-employment (article 18), freedom of movement (article 26) and protection against expulsion (article 32). As to the latter category who are “lawfully staying” in the country of a State Party, and which may correspond to recognised refugees, namely refugees, they will be able to enjoy all the rights mentioned earlier including more generous benefits, such as the right of association (article 15), the right to employment (article 17), the right to practise a liberal profession (article 19), access to housing under the same conditions as nationals (article 21), public relief (article 23), equal treatment with nationals regarding labour legislation and social security (article 24) and the right to be issued travel documents (article 28). Although the Geneva Convention does not formally exclude asylum seekers from its scope, it remains ambiguous and incomplete as to the substance of the rights they may enjoy compared with formally recognised refugees.⁶⁶

⁶² *Ibid.* On this point, read also: Conclusions no. 82 of the Executive Committee which clearly underline “the obligation to treat asylum seekers and refugees in accordance with applicable human rights and refugee law standards as set out in relevant international instruments (...)” Executive Committee of the High Commissioner’s Programme, *Safeguarding Asylum*, No. 82 (XLVIII) – 1997 Executive Committee 48th session, 17 October 1997 (contained in United Nations General Assembly Document No. 12A (A/52/12/Add.1)).

⁶³ In this respect, article 31(1) of the Geneva Convention adds that such prohibition is only indicated “provided (...) [refugees] present themselves without delay to the authorities and show good cause for their illegal entry or presence.”

⁶⁴ UNHCR, *Reception Standards for Asylum Seekers*, op. cit.

⁶⁵ *Ibid.*

⁶⁶ For a critical appraisal of the personal scope of the Geneva Convention, read: V. CHETAIL, *Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human*

In this sense, through its universal reach, international human rights law has been particularly helpful in supplementing the regime established by the Geneva Convention as regards the treatment and rights of asylum seekers. This is particularly the case of the two 1966 International Covenants, respectively on Civil and political Rights and on Economic, Social and Cultural rights, the 1989 Convention on the Rights of the Child and within the European context, the ECHR. The contribution of human rights law to the protection of asylum seekers has been especially underlined by legal scholars.⁶⁷ As V. Chetail observes, “[t]he interaction between human rights law and refugee law is extremely dense. As a result of gradual normative process, they have become so intimately interdependent and imbricated that it is now virtually impossible to separate one from the other.”⁶⁸ The impact of human rights law on the personal scope of international protection may be especially highlighted insofar as –unlike the Geneva Convention – there is no ambiguity as to whether it applies to asylum seekers.⁶⁹ In this respect, one can only agree with V. Chetail’s view according to whom “[t]he most promising avenue for enhancing refugee protection through human rights law relies on the principle of non-discrimination (...)”,⁷⁰ which is much more fully fledged in international human rights law than in article 3 of the Geneva Convention.

III. 2. Migration management objectives

While the Reception Directive clearly aims to the protection of asylum seekers’ fundamental rights, the harmonisation of reception conditions is also intended to limit “secondary movements”, i.e., the movement of an asylum seekers from one Member State to the other. Although the “Dublin” system is the main instrument to achieve this objective, ensuring equal treatment or rather making sure that all applicants for international protection will be granted the same socio-economic rights all throughout the EU is also envisioned by the Directive itself as another way to reach this goal. This is patent in recital 12 of the Reception Directive, whereby: “The harmonisation of conditions for the reception of applicants should help to limit the secondary movements of applicants influenced by the variety of conditions for their reception.”⁷¹

Just as with the “Dublin” system, the underlying motive for limiting secondary movements within the EU is actually to ensure a “fair sharing of responsibility”,⁷² since

Rights Law, in R. RUBIO MARÍN (ed.), *Human Rights and Immigration*, Oxford University Press, 2014, pp. 19-72, at pp. 41-44.

⁶⁷ Read among others: CHOLEWINSKI, op. cit., p. 712; V. CHETAİL, *Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law*, in R. RUBIO MARÍN (ed.), *Human Rights and Immigration*, Oxford University Press, 2014, pp. 19-72; E. TSOURDI, op. cit., p. 272.

⁶⁸ V. CHETAİL, *Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law*, op. cit., p. 68.

⁶⁹ *Ibid.*, p. 69.

⁷⁰ *Ibid.*, p. 48.

⁷¹ Directive 2013/33/EU of the European Parliament and of the Council, *laying down standards for the reception of applicants for international protection*, cit.

⁷² Recital of Directive 2013/33/EU of the European Parliament and of the Council, *laying down standards for the reception of applicants for international protection*, cit.

this policy “should be governed by the principle of solidarity”,⁷³ the latter being even a provision of EU primary law.⁷⁴ While it is unquestionable that solidarity should be at the heart of the CEAS, it is difficult to imagine how the Reception Directive might concretely achieve equal socio-economic conditions for asylum seekers in all Member States, especially if some are doomed to be disproportionately affected due to their geographical position.

IV. The creation of a fragmented status for asylum seekers

IV.1. Reception conditions in Directive 2013/33/EU

IV.1.1. The definition of “reception conditions” in Directive 2013/33/EU

The directive simply defines the “reception conditions” as “the full set of measures that Member States grant to applicants in accordance with [...it].”⁷⁵ As ECRE rightly points out, “[t]he very notion of ‘reception’ is clouded by conceptual uncertainty”. Indeed, as it goes on to observe “[i]n the current context European countries and EU institutions have too readily conceptualised reception in quantitative terms focusing on numbers of places as a benchmark for fulfilling their obligations towards refugees and asylum seekers. This approach runs the risk of sidestepping qualitative aspects at the heart of the concept of reception (...).”⁷⁶ In particular, it is worth highlighting that the notion of rights, let alone fundamental rights, is absent from the definition of reception conditions. This is all the more surprising as reception conditions cover a wide range of entitlements that may be qualified as rights by international human rights law instruments.

IV.1.2. Scope of application

According to article 3(1) of the Reception Conditions Directive, reception conditions as provided by this instrument are granted to “all third-country nationals and stateless persons who make an application for international protection on the territory, including at the border, in the territorial waters or in the transit zones of a Member State” and they shall be ensured “... as long as they are allowed to remain on the territory as applicants...”.⁷⁷ Although this provision appears particularly inclusive with respect to different categories of asylum seekers⁷⁸, its formulation is unclear in two main respects.

⁷³ *Ibid.*

⁷⁴ Article 80 TFEU.

⁷⁵ Article 2 (f) of Directive 2013/33/EU of the European Parliament and of the Council, *laying down standards for the reception of applicants for international protection*, cit.

⁷⁶ AIDA (Asylum Information Database), *Wrong Counts and Closing Doors – The Reception of Refugees and Asylum Seekers in Europe*, op. cit.

⁷⁷ Article 3(1) of Directive 2013/33/EU of the European Parliament and of the Council, *laying down standards for the reception of applicants for international protection*, cit.

⁷⁸ In this respect, it is worth highlighting the inclusion of applicants for subsidiary protection in the scope of the new Reception Directive, unlike former Council Directive 2003/9/EC. The only exclusions explicitly mentioned by the Directive itself concern third-country nationals requesting diplomatic and territorial

First, this article clearly mentions the fact that the Directive applies to all third-country nationals who *make* an application for international protection on the territory of the Member States. It is important to note the considerable confusion that evolves around the notion of “making” an asylum claim.⁷⁹ As the Court rightly highlighted in *Mengestab*: “...[D]irective 2013/33 uses [the terms ‘lodging’ and ‘making’ an application for international protection] in a variable manner in the various language versions ...” of some of its articles.⁸⁰ Even though this might not seem an important point, such a distinction is crucial to identify with precision when an asylum seeker may start enjoying the rights stemming from the Reception Conditions Directive. The Commission proposal for a new Regulation establishing a common procedure for international protection that should the current “Procedures Directive”⁸¹ clarifies the difference between making⁸², registering⁸³ and lodging⁸⁴ an application for international protection and makes access to reception conditions available as soon as an application for international protection has been made. Article 25(1) of the Proposal for a Regulation establishing a common procedure for international protection defines the act of “making an application for international protection” as the fact for “a third-country national or stateless person (...) [to express] a wish for international protection to officials of the determining authority or other authorities (...).”

Under the current regime, the situation seems slightly more predictable as regards material reception conditions, since article 17(1) of the Reception Directive clearly states that “Member States shall ensure that material reception conditions are available to applicants when they make their application for international protection.” This might be an indication that applicants are entitled to material reception conditions as soon as they officially express their will to apply for international protection.

The requirement that reception conditions only apply to applicants who are allowed to remain on the territory of the Member States also makes the situation of applicants at the borders or in transit zone of a Member State particularly uncertain. In this respect, in accordance with article 6(2) of the Reception Directive, Member States “... may exclude application of this Article when the applicant is in detention and during the examination

asylum, meaning that such requests are made outside the EU territory (article 3(2) of the Reception Directive, and third-country nationals falling within the scope of Council Directive 2001/55/EC on temporary protection (article 3(3) of the Reception Directive). The latter exclusion is rather hypothetical given that Directive 2001/55/EC was never applied. It is also worth mentioning the option given to Member States to include different types of protection granted on the basis of national law into the scope of the Reception Conditions Directive (article 3(4)) of the Reception Directive.

⁷⁹ On this point, see: L. SLINGENBERG, *op. cit.*, pp. 46-48.

⁸⁰ Court of Justice, judgment of 26 July 2017, *Mengestab*, C 670/16, par. 100. In this case, the Court mentioned especially articles 6(1), 14(2) and 17(1) of the Reception Directive.

⁸¹ Directive 2013/32/EU of the European Parliament and of the Council, *on common procedures for granting and withdrawing international protection (recast)*, of 26 June 2013, OJ L 180, 29 June 2013, pp. 60-95.

⁸² Article 25 of the proposal for a Regulation of the European Parliament and of the Council, *establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU*, *cit.*

⁸³ *Ibid.*, Article 27.

⁸⁴ *Ibid.*, Article 28.

of an application for international protection made at the border or within the context of a procedure to decide on the right of the applicant to enter the territory of a Member State (...).⁸⁵

More concretely, Member States have to make sure that “within three days (...), the applicant is provided with a document issued in his or her own name certifying his or her status as an applicant or testifying that he or she is allowed to stay on the territory of the Member State while his or her application is pending or being examined.”⁸⁶ In practice, the need to be formally allowed to remain on the territory of a Member States may prevent some categories of asylum seekers from having access to several important socio-economic rights, especially: access to adapted housing facilities, financial allowances and the right to work. This is especially the case for detained asylum seekers who are not allowed to remain on the territory or when an asylum seeker has submitted more than one subsequent claim.⁸⁷ For instance, in the French context, asylum seekers whose claim has been held inadmissible by the national asylum authority may lose their right to be allowed to remain on the French territory. This is notably the case when an asylum claim has been made only to delay or frustrate the enforcement of a return decision or in the case of a second subsequent claim.⁸⁸

In a recent case,⁸⁹ the CJEU has interpreted the concept of “being authorised to remain in a Member State” as including the situation of an applicant for international protection whose application has been rejected and against whom a return decision has been adopted as a result of this rejection. In this case, the CJEU makes a distinction between being authorised to remain in a Member State as an applicant for international protection and “staying illegally” as a result of being issued a return decision, the two not being mutually exclusive. Albeit it is rather puzzling, such distinction allows, nonetheless, for the application of reception conditions to applicants in this situation on the grounds that they are allowed to remain on the territory of a Member State regardless of the fact that they are “staying illegally” because a return decision has been adopted against them. As the Court clearly puts it: “(...) [P]ending the outcome of an appeal against the rejection of his application for international protection at first instance by the determining authority, the person concerned must, in principle, be entitled to benefit from the rights arising under Directive 2003/9. Article 3(1) of that directive makes its application conditional only on the existence of an authorisation to remain on the territory as an applicant and, therefore,

⁸⁵ In accordance with article 6(2) of Directive 2013/33/EU, Member States “... may exclude application of this Article when the applicant is in detention and during the examination of an application for international protection made at the border or within the context of a procedure to decide on the right of the applicant to enter the territory of a Member State....” Directive 2013/33/EU of the European Parliament and of the Council, *laying down standards for the reception of applicants for international protection*, cit.

⁸⁶ Article 6(1) of Directive 2013/33/EU of the European Parliament and of the Council, *laying down standards for the reception of applicants for international protection*, cit.

⁸⁷ Article 20(1)(c) of Directive 2013/33/EU of the European Parliament and of the Council, *laying down standards for the reception of applicants for international protection*, cit. In the French context: Article L. 741-1 and L. 743-2 (5°) of the Code on the Entry and Residence of Foreigners and the Right to Asylum (CESEDA)

⁸⁸ Article L. 743-2 4° and 5° CESEDA.

⁸⁹ Court of Justice, Grand Chamber, judgment of 19 June 2018, *Sadikou Gnandi v État belge*, C-181/16.

does not exclude the directive's application in the case where the person concerned has such an authorisation and is staying illegally, within the meaning of Directive 2008/115. In that regard, it is apparent from Article 2(c) of Directive 2003/9 that the person concerned is to retain his status as an applicant for international protection, within the meaning of that directive, until a final decision is adopted in relation to his application (...)."⁹⁰

The Reception Conditions Directive explicitly excludes from its scope of application request for diplomatic or territorial asylum submitted to representations of Member States.⁹¹ It does not apply either when the Temporary Protection Directive⁹² applies.⁹³

However, Member States may choose to include within the scope of the Reception Conditions Directive⁹⁴, applicants for types of protection that do not emanate from the so-called "Qualification Directive",⁹⁵ such as beneficiaries of humanitarian protection.

IV.2. Overview of the rights provided by the Reception Conditions Directive

IV.2.1. Procedural rights

The Reception Conditions Directive provides essentially for two main procedural rights: the right to information and the right to receive a documentation.

Regarding information, article 5(1) of the Reception Conditions Directive sets out that Member States shall inform asylum seekers of "at least" any the established benefits and the obligations with which they have to comply in relation with reception conditions. Such information should be given "within a reasonable time" that should not exceed 15 days after they have lodged their application for international protection. The same article specifies that Member States must ensure that applicants are given information "on organisation or groups of persons" that provide legal assistance and organisations that "might be able to help or inform them concerning the available reception conditions, including health care." Besides, according to article 5(2) of the Reception Directive, the information provided shall be provided in the written form and "in the language that the applicant understands or is reasonably supposed to understand."

⁹⁰ *Ibid.*, par. 63.

⁹¹ Article 3(2) of Directive 2013/33/EU of the European Parliament and of the Council, *laying down standards for the reception of applicants for international protection*, cit.

⁹² Council Directive 2001/55/EC, *on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*, of 20 July 2001, OJ L 212, 7 August 2001, pp. 12-23.

⁹³ Article 3(3) of Directive 2013/33/EU of the European Parliament and of the Council, *laying down standards for the reception of applicants for international protection*, cit.

⁹⁴ Article 3(4) of Directive 2013/33/EU of the European Parliament and of the Council, *laying down standards for the reception of applicants for international protection*, cit.

⁹⁵ Directive 2011/95/EU of the European Parliament and of the Council, *on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, of 13 December 2011 OJ L 337, 20 December 2011, pp. 9-26.

As to the right to documentation, the Directive specifies that Member States shall provide asylum seekers with a document in their own name and “certifying his or her status as an applicant or testifying that he or she is allowed to stay on the territory of the Member State while his or her application is pending or being examined.”⁹⁶ While it is questionable, some Member States have interpreted the right to be allowed to remain on the territory as the fact of being documented, which may incur issues as to the starting point for being granted adequate reception conditions, such as in the French case.⁹⁷ Even if it may appear logical, such an approach may considerably undermine the fundamental rights of applicants for international protection, since they would not be eligible for reception conditions –especially material reception conditions – prior to their being documented and they may be assimilated to being in an irregular situation. This interpretation of the Directive would also be in disagreement with article 31 of the 1951 Geneva Convention, which prohibits imposing sanctions on asylum seekers who arrive irregularly in a country to seek asylum.

Article 9(1) of the “Procedures Directive” further specifies the limitation of the right to be documented during the asylum procedure. Its article 9(1) clearly states that: “That right to remain shall not constitute an entitlement to a residence permit.”

IV.2.2. Substantive rights

IV.2.2.1. Material reception conditions

Article 20(5) of the Reception Directive maintains that: “Member States shall under all circumstances ensure access to health care (...) and shall ensure a dignified standard of living for all applicants...” without further defining such standard.

Regarding the material reception conditions of asylum seekers, the Reception Directive defines them as encompassing: “housing, food and clothing provided in kind, or as financial allowances or in vouchers, or a combination of the three, and a daily expenses allowance.”⁹⁸

Asylum seekers also enjoy necessary healthcare, namely, “at least, emergency care and essential treatment of illnesses and of serious mental disorders.”⁹⁹ As regards education, it is only compulsory for minors under “similar” conditions with nationals (either minor children of asylum applicants or minor applicants themselves).¹⁰⁰ However, nothing is said about higher education or the right to education of young adults.

⁹⁶ Article 6(1) of Directive 2013/33/EU of the European Parliament and of the Council, *laying down standards for the reception of applicants for international protection*, cit.

⁹⁷ For a critical perspective on the French approach, read : G. LE STRAT, *Le contenu de la réforme: le droit au maintien sur le territoire*, in *Revue trimestrielle de droit européen*, 2016, p. 55.

⁹⁸ Article 2(g) of Directive 2013/33/EU of the European Parliament and of the Council, *laying down standards for the reception of applicants for international protection*, cit.

⁹⁹ Article 19 of Directive 2013/33/EU of the European Parliament and of the Council, *laying down standards for the reception of applicants for international protection*, cit.

¹⁰⁰ Article 14 of Directive 2013/33/EU of the European Parliament and of the Council, *laying down standards for the reception of applicants for international protection*, cit.

In *Saciri*, the CJEU has given more precisions on the meaning and extent of material reception conditions. In particular, concerning the choice of Member States to grant material reception conditions in the form of financial allowances, the Court has stated in this case: "...[W]here a Member State has opted to grant the material reception conditions in the form of financial allowances or vouchers (...), those allowances must be provided from the time the application for asylum is made (...). That Member State must ensure that the total amount of the financial allowances covering the material reception conditions is sufficient to ensure a dignified standard of living and adequate for the health of applicants and capable of ensuring their subsistence, enabling them in particular to find housing, having regard, if necessary, to the preservation of the interests of persons having specific needs (...). [T]he amount of those allowances must be sufficient to enable minor children to be housed with their parents, so that the family unity of the asylum seekers may be maintained."¹⁰¹ In the same case, the Court stresses that the "(...) saturation of the reception networks (...) [is not] a justification for any derogation from meeting (...) [the minimum] standards [for the reception of asylum seekers (...)]"¹⁰² provided in EU law. It is also worth recalling that the Court had already specified in the *CIMADE and GISTI* case that reception conditions also apply to asylum seekers subjected to the Dublin procedure during the procedure of taking back or taking charge.¹⁰³

The Directive partially restates the conclusion reached by the Court in *Saciri* in its article 17(5). However, this provision also specifies that Member States may grant less favourable treatment to applications of international protection than to their own nationals, especially when material support is partially granted in kind or where the level of such material support provided in the form of financial allowances or vouchers, applied for nationals, aim to ensure a standard of living higher than that prescribed for applicants under this Directive.

IV.2.2.2. Access to the labour market: Fostering socio-economic integration or weakening asylum?

The Reception Conditions Directive has insisted on making the rules on access to the labour market for asylum seekers more transparent with a view to strengthening their economic self-sufficiency.¹⁰⁴

¹⁰¹ Court of Justice, *Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and Others*, cit., par. 46. See in comparison article 17(5) of Directive 2013/33/EU of the European Parliament and of the Council, *laying down standards for the reception of applicants for international protection*, cit.: "Where Member States provide material reception conditions in the form of financial allowances or vouchers, the amount thereof shall be determined on the basis of the level(s) established by the Member State concerned either by law or by the practice to ensure adequate standards of living for nationals. Member States may grant less favourable treatment to applicants compared with nationals in this respect, in particular where material support is partially provided in kind or where those level(s), applied for nationals, aim to ensure a standard of living higher than that prescribed for applicants under this Directive."

¹⁰² Court of Justice, *Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and Others*, cit., par. 50.

¹⁰³ C-179/11, 27 September 2012.

¹⁰⁴ Recital 23: "In order to promote the self-sufficiency of applicants and to limit wide discrepancies between Member States, it is essential to provide clear rules on the applicants' access to the labour market."

According to article 15(1): “Member States shall ensure that applicants have access to the labour market no later than 9 months from the date when the application for international protection was lodged if a first instance decision by the competent authority has not been taken and the delay cannot be attributed to the applicant.” As to the conditions for access to the labour market of the Member States, article 15(2) first indent further specifies that: “Member States shall decide the conditions for granting access to the labour for the applicant, in accordance with their national law, while ensuring that applicants have effective access to the labour market”. While the requirement to make access to the labour market effective appears quite promising, the second indent of article 15(2) indicates nonetheless that: “For reasons of labour market policies, Member States may give priority to Union citizens and nationals of States parties to the Agreement on the European Economic Area, and to legally resident third-country nationals.” More protective, however, article 15(3) prevents Member States from withdrawing labour market access during appeals procedures, “where an appeal against a negative decision in a regular procedure has suspensive effect (...)”. As for vocational training, article 16 provides that: “Member States may allow applicants access to vocational training irrespective of whether they have access to the labour market.”

Because these provisions are rather vague and leave considerable discretion to Member States regarding the conditions for access to the labour market, there has been significant variation in Member States’ practises in this respect. For instance, in France asylum seekers are allowed to work after 9 months after the beginning of the procedure if such delay is not cannot be attributed to them (article L 744-11 CESEDA). However, asylum seekers must comply with the labour market test just as any other migrants. Moreover, asylum seekers may only benefit from vocational training if they are allowed to work. In Italy, on the other hand, article 22 of the 142/2015 Legislative Decree allows asylum seekers to work two months after the initiation of the asylum procedure without needing to comply with a labour market test. Asylum seekers who are part of the SPRAR can also benefit from vocational training activities. Finally, in Sweden, asylum seekers may be exempted from obtaining a work permit if they are able to establish their identity through original documents or authorised copies. Generally, asylum seekers cannot work in areas that require certified skills such as in the health care sector, so in practice their choice is limited to the unskilled sector.¹⁰⁵ If they have worked for at least six months before receiving a final negative decision, asylum seekers will be able to switch for a residence permit on the basis of work.

For a presentation of the right to work of asylum seekers in selected Member States including France, Italy and Sweden, see: E. M. POPTCHEVA, A. STUHLIK, *Work and Social Welfare for Asylum Seekers and Refugees – Selected EU Member States*, European Parliamentary Research Service (EPRS), December 2015.

¹⁰⁵ AIDA country report: Sweden, December 2015, p. 44. Read also: M. VALENTA, K. THORSHAUG, *Restrictions on the Right to Work for Asylum-Seekers: The Case of the Scandinavian Countries, Great Britain and the Netherlands*, in *International Journal on Minority and Group Rights*, 2013, n. 20, pp. 459-482.

The proposal of the Commission for a new Reception Directive sets out more relaxed conditions for asylum seekers to have access to the labour market of their Member State of application. They shall be allowed to work no later than 6 months after lodging their claim.¹⁰⁶ The proposal also states that: “For reasons of labour market policies, Member States may give verify whether a vacancy could be filled by nationals of the Member State concerned or by other Union citizens, or by third-country nationals lawfully residing in that Member State.”¹⁰⁷ Asylum seekers shall enjoy equal treatment with nationals (with some limitations) with regard to working conditions, freedom of association, education (and vocational training), recognition of diplomas and social security affiliation. What may seem to be a very much welcome change is actually more similar to a “double-edged sword”. Indeed, the directive also clearly points out that “...[t]he right to equal treatment shall not give rise to a right to reside...” when an applicant loses their right to remain after a negative decision has been adopted. In other words, the Directive does not explicitly allow for acquiring residence rights as a worker, although the asylum seeker has been working and paying taxes as any other worker.

IV.2.2.3. Reduction and withdrawal of reception conditions

Article 20 of Directive 2013/33 lays down several hypotheses where material reception conditions can be reduced and/or withdrawn. They may be withdrawn when the applicant for international protection: abandons his place of residence without permission¹⁰⁸, or does not comply with the reporting duties or with requests to provide information or to appear for personal interviews concerning the asylum procedure, or when he applicant has lodged a subsequent application. Material reception conditions may be reduced when the asylum seeker has not lodged an asylum claim “as soon as reasonably practicable after arrival in that Member State”. They may also be reduced or withdrawn when an asylum seeker has concealed financial resources, thus “unduly benefit[ting] from material reception conditions”.

In the Italian context, only withdrawal is provided for by the Legislative Decree 142/15 and not reduction. This raises questions as to the conformity of the Italian legislative transposition with the Reception Directive.¹⁰⁹

V. The reception conditions of asylum seekers in the EU Member States: Examples of national practices

¹⁰⁶ Proposal for a Directive of the European Parliament and of the Council *laying down standards for the reception of applicants for international protection (recast)*, op. cit., article 15.

¹⁰⁷ Article 15(2) of the Proposal for a Directive of the European Parliament and of the Council *laying down standards for the reception of applicants for international protection (recast)*, op. cit.

¹⁰⁸ See for instance, in the French context: *Conseil d'Etat*, 7 April 2017, no. 409327.

¹⁰⁹ D. BELLUCIO, *La revoca dell'accoglienza dei richiedenti asilo, 2017, Associazione per gli Studi Giuridici sull'Immigrazione*, available at: <https://www.asgi.it/wp-content/uploads/2017/07/scheda-pratica-revoca-accoglienza.pdf> (15/06/2018).

V.1. The reception of asylum seekers in France: The challenge of housing

In France, the Code on the Entry and Residence of Foreigners and the Right to Asylum (CESEDA) provides that the registration of asylum claim should take place within 3 days after the request to the competent administrative authority (“single desk” or *guichet unique* – article L 741-1 CESEDA). This may take up to 10 days in case of high level of asylum claims. Once registered the asylum seekers receives an asylum claim certification (*attestation de demande d’asile*), which constitutes a provisional residence permit for a duration that is not specified by law and which can be renewed during all the asylum procedure (article L 743-1 CESEDA). Being granted this certification guarantees access to full reception conditions, including material reception conditions.

Nothing is provided for the reception conditions of asylum seekers prior to the registration of their application, which can be highly problematic for access to basic socio-economic rights if such registration is delayed. Indeed, it is necessary to request the registration through the Orientation Platforms for Asylum Seekers (*Plateformes d’accueil des demandeurs d’asile*), which arrange for an appointment to register the asylum claim with the administrative authority. Such orientation platforms are specialised non-governmental organisations that provide legal and administrative support to asylum seekers and take care of the pre-reception phase. Making registration of asylum claims conditional upon a pre-reception phase may considerably slow down the registration process, especially when the orientation platforms are overburdened. On 21 April 2016, a group of non-governmental organisations (NGOs) have released a public statement that strongly denounced this practice in that it considerably prolongs the precarious legal and socio-economic situations of asylum seekers in Paris. In this city where the orientation platforms often do not have sufficient capacities to ensure pre-reception swiftly, the administrative authority (*Préfet de Police*) had set up a system of appointment quotas. This authority has been condemned no less than 135 times over a period of two weeks by the Administrative Tribunal.¹¹⁰

Once registered, asylum seekers can benefit from national reception system (*dispositif national d’accueil*), which takes care of their material reception (articles L 744-1 *et seq.*). According to the national reception, the offer made to individual asylum seekers is adapted to their specific needs (including their vulnerability) and such needs are assessed during an interview with the relevant authority. Accommodation is offered in adapted reception centres (Reception centre for asylum seekers – *Centre d’accueil de demandeurs d’asile*) and only if the asylum seeker accepts such offer (principle of “guided orientation” – *orientation directive*), will they receive further social and financial assistance.¹¹¹

¹¹⁰ Le Collectif Asile en Ile-de-France, *Le préfet de police condamné à plus de 135 reprises pour violation du droit d’asile*, 21 April 2016, available at : <http://www.gisti.org/spip.php?article5336> (31.03.2018).

¹¹¹ On the principle of *orientation directive* and its impact on access to reception conditions for asylum seekers in France, see especially: S. SLAMA, *De la défaillance systémique à la « policarisation » des conditions d’accueil des demandeurs d’asile en France*, in *Revue des Droits de l’Homme*, 2018, n. 14, pp. 1-25, at pp. 13-16.

Further material reception and especially a daily financial allowance is conditioned by the acceptance of the accommodation offer, knowing that the latter may not necessarily be convenient for asylum seekers (geographical isolation, privacy).

In France, only a minority of asylum seekers have concretely access to an accommodation adapted to their needs.¹¹² Some categories, such as asylum seekers under the Dublin procedure are simply excluded.¹¹³ Other asylum seekers may even not be allowed to enjoy material reception conditions altogether. This is the case of asylum seekers who submit a subsequent claim or when asylum seekers make a delayed claim.¹¹⁴ This explains why a large proportion of asylum seekers usually use the emergency housing system for asylum seekers or the general emergency housing system. They may even become homeless as a result of the lack of available accommodation facilities.

In the French legal framework, access to housing for asylum seekers has been considered the corollary to the constitutional right to claim asylum.¹¹⁵ Despite that, the right to housing has been undermined during the three phases of the asylum process, because French authorities were unable to cope with the upsurge of new applicants in the national asylum system. In this respect, the French higher administrative court, *Conseil d'Etat*, has been quite complacent with the inability of the administration to provide all applicants for international protection with decent and long-term housing facilities. This has been especially true for the phase prior to registration of the asylum claim. For example, in a case of April 2017, the *Conseil d'Etat* has stated that there was no violation of the right for asylum seekers to housing in the case of a delayed registration of asylum claims depriving a family of asylum seekers with one sick child of any housing solution for several months.¹¹⁶ During the examination of the asylum claim, the *Conseil d'Etat* has equally ruled – even prior to the “crisis” – that there was no violation of this right when the reception system is “under pressure” leading a family of asylum seekers to live under tents.¹¹⁷ If the situation might be difficult for asylum seekers prior to and during the examination of their asylum claims, it is even more critical for asylum seekers whose claim has been rejected. In this sense, there has been an increasingly hardening of the conditions for them to be granted housing, even emergency housing. For example, in three cases of 2017, the *Conseil d'Etat* stated that there was no violation of the right to housing for asylum seekers whose claim has been rejected, including families with minor children.¹¹⁸

¹¹² For critical comments on this point, read: T. RIBEMONT, *Décourager les demandeurs d'asile? Quand les conditions d'accueil en France se veulent plus “directives”*. *Analyse du droit à l'hébergement dans la loi du 29 juillet 2015*, in *Revue des Droits de l'Homme*, 2017, n. 13, pp. 1-10.

¹¹³ Article L 348-1 Code de l'Action Sociale et des Famille (CASF).

¹¹⁴ Article L. 744-8 (3°) CESEDA.

¹¹⁵ Conseil d'Etat, 17 September 2009, application no. 331950 ('*Salah*').

¹¹⁶ Conseil d'Etat, 21 April 2017, application no. 409806.

¹¹⁷ Conseil d'Etat, 3 October 2013, no. 372391 ('*Gjutaj*').

¹¹⁸ Conseil d'Etat, 21 April 2017, applications nos. 405164 and 405165. Conseil d'Etat, 20 April 2017, applications no. 409797.

In a case of May 2018, the ECtHR seems to have approved the approach of the *Conseil d'Etat* approach and of the French administration's practices regarding the reception of applicants for international protection.¹¹⁹

V.2. The reception of asylum seekers in Italy: A reception system driven by emergency

In Italy, unlike France, there is a distinction between first-line reception (prior to the registration of the asylum application) and second-line reception (once the asylum procedure has started).¹²⁰ Because many asylum seekers reach Italy by sea, an initial reception phase will usually occur in situation of emergency in the CPSA (First Aid and Reception Centres – *Centri di primo soccorso e accoglienza*). Despite being quite indefinite in nature, emergency reception has actually tended to become the rule.¹²¹

First-line reception¹²² is provided in specific reception centres, called CPA (First Reception Centres – *Centri di Prima Accoglienza*) including the former CARA (Centre for the reception of asylum seekers – *Centri di accoglienza per richiedenti di asilo*). Accommodation in first-reception centres should last only for the time necessary for the identification of asylum seekers and the registration of their applications. The material reception conditions in the first reception centres are not well-defined, which may lead to discrepancies in the reception of asylum seekers.

Once the formalities have been carried out, the asylum seekers are transferred to the second-line reception system, namely, the SPRAR (System for the Protection of Asylum Seekers and Refugees – *Sistema di protezione per richiedenti asilo e rifugiati*) which will take care of the material reception of asylum seekers and provide them with social and administrative support including the payment of a financial allowance.¹²³ In case of higher inflows of asylum seekers, the latter may be received temporarily in the CAS (Emergency reception centres – *Centri di accoglienza straordinaria*), while waiting for second-line reception facilities to be available.¹²⁴

¹¹⁹ European Court of Human Rights, judgment of 24 May 2018, *N.T.P. and Others v France*, application no. 68862/13.

¹²⁰ For a more in-depth analysis of the Italian reception system as modified by the d.lgs 142/15, read: N. MORANDI, G. SCHIAVONE, *Analisi delle norme in materia di accoglienza dei richiedenti protezione internazionale alla luce dell'entrata in vigore del d.lgs. n.142/2015*, in *Diritto, Immigrazione e Cittadinanza*, 2015, n. 17 (issue 3-4), pp. 84-116. For a general overview of the current Italian reception system, read also: P. BENI, *Relazione sul Sistema di protezione e di accoglienza dei richiedenti asilo*, approved on 20 December 2017 by the *Commissione parlamentare di inchiesta sul sistema di accoglienza, di identificazione ed espulsione, nonché sulle condizioni di trattenimento dei migrant e sulle risorse pubbliche impregnate*, Doc. XXII-bis, n. 21, especially pp. 62-65.

¹²¹ For a detailed analysis, see: M. BORRACCETTI, *La Prima Assistenza ai Migranti in Arrivo tra Diritti Fondamentali e Zone Franche*, in *Diritto, Immigrazione e Cittadinanza*, 2014, n.16 (issue 2), pp. 13-33.

¹²² Article 9 and 10 of dlgs 142/2015, cit.

¹²³ Articles 14 and 15 of dlgs 142/2015, cit. On the functioning of the SPRAR, see: S. PENASA, *L'accoglienza dei richiedenti asilo: Sistema unico o mondi paralleli?*, in *Diritto, Immigrazione e Cittadinanza*, 2017 (issue 1), pp. 1-25.

¹²⁴ Article 11 of dlgs 142/2015, cit.

Upon the registration of their application, asylum seekers receive a residence permit valid for 6 months and renewable until the end of the asylum procedure.

While in theory, first reception should only last for the time necessary to take care of the primary formalities, in practice, it has been observed that asylum seekers are never transferred to SPRAR and remain in CPA (formerly CARA) for the whole duration of their asylum procedure. This situation has been worsened by the “hotspots approach”,¹²⁵ which is actually similar to the functioning of Italian emergency reception structures, such as the CPSA that has been raising important criticisms as highlighted by the *Khlaifia*¹²⁶ decision of the ECtHR.

The issue of detention has been particularly sensitive in the Italian context prior to the adoption of the Legislative Decree no.142/2015 for the transposition of the new Reception Directive.¹²⁷ Indeed, the former legal framework for the reception of asylum seekers made an undue distinction between “regular” and “irregular” asylum seekers who had claimed asylum while being in an irregular situation, thus justifying their detention. This was in clear contradiction with article 31 of the Geneva Convention. “Importing” the substance of this international provision to the EU asylum regime, article 8 (1) of the Reception Directive clearly prohibits such a practice by stating that: “Member States shall not hold a person in detention for the sole reason that he or she is an applicant (...).”

The current Italian legal framework does not anymore allow for such a distinction between “regular” and “irregular” asylum seekers. However, asylum seekers may still be detained within the limits of the Reception Conditions Directive.

In the framework of the Reception Conditions Directive, detention of asylum seekers¹²⁸ is only possible on limited grounds: 1) the need to check the identity or the nationality of the applicant; 2) when there is a risk that the applicant will abscond; 3) to decide if the applicant may be allowed to enter the territory (in the case of an application made at the border); 4) when there are reasonable grounds to believe that the application

¹²⁵ For an in-depth analysis of this issue, read: G. CAMPESE, *Seeking Asylum in Times of Crisis: Reception, Confinement, and Detention at Europe's Southern Borders*, in *Refugee Survey Quarterly*, 2018, n.37, pp. 77-70. On the “hotspots approach” in Italy, read especially, pp. 59 to 64 of this article. For other critical perspectives on the “hotspots approach”, see among others: M. PICHOU, *Reception or Detention Centres? The Detention of Migrants and the EU “Hotspot” Approach in Light of the European Convention on Human Rights*, in *Critical Quarterly for Legislation and Law*, 2016, n. 99 (issue 2), pp. 114-131 and C. RODIER, *Le faux semblant des hotspots*, in *La Revue des Droits de l'Homme*, 2017, n. 13, pp. 1-22.

¹²⁶ European Court of Human Rights, Grand Chamber, judgment of 15 December 2016, application no.16483/12, *Khlaifia and others v. Italy*. For critical comments on this judgment, see: D. VENTURI, *The Grand Chamber's Ruling in Khlaifia and Others v Italy: One Step Forward, One Step Back?*, in *Strasbourg Observers*, 10 January 2017, available at: <https://strasbourgothers.com/2017/01/10/the-grand-chambers-ruling-in-khlaifia-and-others-v-italy-one-step-forward-one-step-back/> (12/11/2018). Read also: A. ZÖLLS, *La gestion européenne des flux migratoires mixtes à l'épreuve de la Convention européenne des droits de l'homme*, in *Revue critique de droit international privé*, 2017, p.389.

¹²⁷ For an in-depth analysis, read: F. V. VIRZÌ, *La logica dell'accoglienza: Commento al d.lgs n. 142/2015*, in *Diritto, Immigrazione e Cittadinanza*, 2015, n.17 (issue 3-4), pp. 117-141.

¹²⁸ Article 8 of Directive 2013/33/EU of the European Parliament and of the Council, *laying down standards for the reception of applicants for international protection*, cit.

is only made with a view to delay the enforcement of a return decision 5) to protect national security or public order and 6) in the framework of a Dublin procedure.¹²⁹

As a ground for detention, the protection of national security or public order has been especially examined by the CJEU in the *J. N.* case.¹³⁰ In the latter, the CJEU has clearly stated that : “...[P]lacing or keeping an applicant in detention under point (e) of the first subparagraph of Article 8(3) of Directive 2013/33 is, in view of the requirement of necessity, justified on the ground of a threat to national security or public order only if the applicant’s individual conduct represents a genuine, present and sufficiently serious threat, affecting a fundamental interest of society or the internal or external security of the Member State concerned (...).”¹³¹ In view of the current political context related to the terrorist attacks on the European territory, Member States might increasingly resort to detention on this ground.

Regarding the conditions of detention, the Reception Directive provides that asylum seekers should only be detained in specialised detention facilities, although it may also occur in specific quarters of prisons.¹³² In addition, asylum seekers shall have access to open-air spaces.¹³³ The Reception Directive also provides specific conditions of detentions for vulnerable asylum seekers, including minors.¹³⁴

Despite its intention to limit detention practices of asylum seekers, several NGOs have highlighted the issue of quasi-systematic detention in the so-called “hotspots”.¹³⁵ The “hotspot” approach has been introduced by the Commission in its 2015 Agenda on Migration¹³⁶ drawn up at the height of the crisis and whereby “...[t]he European Asylum Support Office, Frontex and Europol will work on the ground with frontline Member States to swiftly identify, register and fingerprint incoming migrants.” The question of forced fingerprinting has raised particular concerns, especially in view of the fact that in

¹²⁹ For a detailed analysis of this new legal framework, read: G. SAVIO, *La Nuova Disciplina del Trattenimento dei Richiedenti Asilo Diritto*, in *Diritto, Immigrazione e Cittadinanza*, 2015, n.17 (issue 3-4), pp. 142-161.

¹³⁰ Court of Justice, Grand Chamber, judgment of 15 February 2016, case C-601/15 PPU, *J.N. v Staatssecretaris voor Veiligheid en Justitie*. In this case, the CJEU referred to its previous case: Court of Justice, judgment of 11 June 2015, case C-554/13, *Z. Zh v Staatssecretaries voor Veiligheid en Justitie and I.O. v Staatssecretaries voor Veiligheid en Justitie* (joined). For critical comments on this case, read: F.-X. MILLET, *L’arrêt J.N.: entre lecture autonome et lecture systématique des motifs de rétention des demandeurs d’asile*, in *Revue des Affaires Européennes – Law European Affairs*, 2016, n. 60 (issue 1), pp. 113-120.

¹³¹ Court of Justice, Grand Chamber, *J.N. v Staatssecretaris voor Veiligheid en Justitie*, cit., par. 67.

¹³² Article 10(1) of Directive 2013/33/EU of the European Parliament and of the Council, *laying down standards for the reception of applicants for international protection*, cit.

¹³³ Article 10(2) of Directive 2013/33/EU of the European Parliament and of the Council, *laying down standards for the reception of applicants for international protection*, cit.

¹³⁴ Article 11(2) and (3) of Directive 2013/33/EU of the European Parliament and of the Council, *laying down standards for the reception of applicants for international protection*, cit.

¹³⁵ See for instance : *Groupe d’information et de soutien des immigrés (GISTI), Accord-UE-Turquie, La grande imposture – Rapport de mission dans les hotspots grecs de Lesbos et Chios*, July 2016, available at : <http://www.gisti.org/spip.php?article5454> (31/03/2018). See also, the ruling of the recent ruling of the ECtHR on hotspots: European Court of Human Rights, judgment of 25 January 2018, application no. 22696/16, *J.R. and Others v. Greece*.

¹³⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A European Agenda on Migration*, cit.

the Italian context, “hotspots” were lacking a legal basis until the adoption of article 17 of Decree-Law 13/2017 (converted in Law no.46 of 13 April 2017).¹³⁷

In addition to the issue of detention of asylum seekers under the “hotspots approach”, the current political context may actually worsen their reception conditions.¹³⁸

V.3. Deterring asylum seekers by curtailing their socio-economic rights in Sweden

Sweden has long been presented as a model for its generous reception of asylum seekers and refugees. Such reception is based on the 1994 Law on Reception of Asylum Seekers and Others (LMA).¹³⁹ Indeed, while both Italy and France had to transpose the 2013 Reception Conditions Directive, no transposition was planned for Sweden as the Swedish reception system was deemed in line with the standards set out in the Reception Conditions Directive.

The Migration Agency is the only authority responsible for registering an asylum application in Sweden. If a person seeks asylum at an airport or port, they are referred to the Migration Agency. When they lack resources, asylum seekers are hosted by the Migration Agency in specific accommodation centres or in private accommodation. In both cases, they are entitled to receive financial allowances.

Despite being considered a model for its treatment of asylum seekers, the Swedish asylum system has also been criticised for its treatment of asylum seekers, especially those in detention¹⁴⁰ or for its lack of socio-economic integration of immigrants in general.¹⁴¹ Lately, the LMA has been amended to introduce changes to the reception conditions of asylum seekers¹⁴². Such modifications entered into force from 1 June 2016

¹³⁷ Decreto-Legge 17 febbraio 2017, n. 13, *Disposizioni urgenti per l'accelerazione dei procedimenti in materia di protezione internazionale, nonché per il contrasto dell'immigrazione illegale*. (17G00026) (GU Serie Generale n. 40 del 17-02-2017). For a more in-depth analysis of this legislation, read: C. LEONE, *La Disciplina negli Hotspot nel Nuovo art. 10 Ter del D.lgs. 286/98: Un'Occasione Mancata*, in *Diritto, Immigrazione e Cittadinanza*, 2017, n. 2, pp. 1-24.

¹³⁸ In this respect, see: Decreto-Legge 4 ottobre 2018, n. 113. *Disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica, nonché misure per la funzionalità del Ministero dell'interno e l'organizzazione e il funzionamento dell'Agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata*. (18G00140) (GU Serie Generale n. 231 del 04-10-2018). Prior to the adoption of the *Decreto-Legge*, the current Minister of Home Affairs had adopted an administrative directive on the reception of asylum seekers, which had triggered much criticism from the civil society in that it appeared to perpetuate the “emergency” logic of the Italian reception system:

Servizi di accoglienza per i richiedenti asilo. Direttiva., of 23 July 2018. Available at: http://www.interno.gov.it/sites/default/files/servizi_accoglienza_richiedenti_asilo_direttiva.pdf (14/11/2018).

¹³⁹ 1994:137 (*Lagen om mottagande av asylsökande*). Supplemented by Ordinance on the Act on Reception of Asylum Seekers 1994:361 (*Förordning om lagen om mottagande av asylsökande* 1994:361).

¹⁴⁰ S. KHOSRAVI, *Sweden: Detention and Deportation of Asylum Seekers*, in *Race and Class*, 2009, n. 50 (issue 4), pp. 38-56.

¹⁴¹ A. WIESBROCK, *The Integration of Immigrants in Sweden: A Model for the European Union?*, in *International Migration*, 2011, n. 49 (issue 4), pp. 48-66.

¹⁴² See: <https://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/Frequently-asked-questions-/About-limitations-in-the-reception-of-asylum-seekers-act-LMA.html> (31.03.2018).

onwards and according to the new provisions, asylum seekers whose request for entering the territory has been rejected or whose expulsion order entered into force lose their right to assistance (i.e., material reception conditions). This also applies to asylum seekers when the deadline for their voluntary return following an expulsion order has expired.

Sweden has also introduced temporary changes to its legislation that make the situation of refugees more precarious. In particular, they will only be granted a three-year residence permit/13 months for beneficiary of subsidiary protection. In addition, the reform will allow for a restriction of family reunification for refugees especially when they do not have the necessary resources. The objective of the reform was clearly to deter asylum seekers from claiming asylum in Sweden by reducing the perceived incentives to do so.¹⁴³

It is interesting to note that the new proposal of the European Commission to revise the so-called “Qualification Directive” also provides that refugees and beneficiaries of subsidiary protection will only be granted residence permits for a duration of respectively three and one year renewable¹⁴⁴. Although it has not yet adopted, such provision would be extremely restrictive in the view of current Member States’ practices¹⁴⁵.

VI. Conclusion: Dismantling asylum to rationalise migration?

This paper has attempted to show how the distinction between different categories of asylum seekers established in the Reception Conditions Directive may prevent them from enjoying the same reception conditions throughout the EU and so, despite its stated objective to treat equally all applicants for international protection. In this respect, the current evolution of the CEAS seems to reveal a progressive demise of the traditional protection-oriented asylum regime. In this sense, this paper shares the opinion of I. Schoultz, according to whom there is “...[a] general occurrence in Europe, where asylum seekers and others applying for residence permits are treated as fraudulent or even as criminals who constitute a security threat (...), quite in contrast to the traditional perception of the human, generous and exceptional welfare state in the global north.”¹⁴⁶

For an overview of the Swedish asylum reception system in light of these recent changes, see: B. PARUSEL, *Sweden’s Asylum Procedures*, Bertelsmann Stiftung, 2016. In this respect, this author stresses that while “[t]hese measures (...) have presumably produced a sense of relief in the population and among state and local agencies, particularly as they contributed to a sharp reduction in the number of asylum seekers (...), Sweden must now also reconcile itself to no longer serving as an asylum-policy exemplar and model of moral (...) [behaviour].” At p. 21.

¹⁴³ AIDA country report: Sweden, December 2015, p. 9. On the consequences of the amendments to the LMA for access to reception conditions, read also the updated report (March 2018), at p. 51.

¹⁴⁴ Article 26 (1)(a) of Proposal for a regulation on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted (...), COM(2016) 466, 13.07.2016.

¹⁴⁵ For instance, in France refugees are granted a 10-year residence permit, while in Italy, both refugees and beneficiaries of subsidiary protection are granted a 5-year residence permit.

¹⁴⁶ I. SCHOULTZ, *Seeking Asylum and Residence Permits in Sweden: Denial, Acknowledgement and Bureaucratic Legitimacy*, in *Critical Criminology*, 2014, n. 22, pp. 219-235, at p. 233.

It appears that in its attempt to strike a balance between the protection of fundamental rights of asylum seekers and migration management objectives, the EU reception system is currently tilting towards the latter.

In view of the above, the following concluding points may be put forward: First, reception conditions appear to be increasingly envisioned as “pull factors” and used as a way to deter asylum seekers from seeking protection in the EU.¹⁴⁷

Second, one may actually wonder whether the current trends reveal an objective to “rationalise” migration while dismantling asylum. Indeed, the new proposed instruments that are intended to “revitalise” the CEAS¹⁴⁸ – including the proposed Reception Conditions Directive – seem to confirm the general tendency to assimilate international protection to other migration statuses in several respects. First of all, the residence conditions of refugees are made inherently unstable (regular revisions of status are foreseen). Secondly, stronger obligations for asylum seekers are provided, including by making their access to their socio-economic rights conditional upon their compliance with EU asylum rules and in particular the Dublin system. For instance, article 17a (1) of the Proposal for a new Reception Conditions Directive unambiguously states that: “An applicant shall not be entitled to the reception conditions set out in [...this Directive] in any Member State in which he or she is required to be present in accordance with (...) [the Dublin Regulation].”¹⁴⁹ Besides, article 19 of the same proposal provides that material reception conditions may – when they are granted in the form of financial allowances and vouchers – be replaced by material reception conditions in kind when an applicant for international protection has not complied with the Dublin regulation. For the same reason, their daily allowance may also be reduced or withdrawn. It is quite fortunate in this regard that in its Report¹⁵⁰ on the Proposal for a new Reception Conditions Directive, the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament has deleted article 17(a). Moreover, while not excluding the possibility to replace, reduce or withdraw material reception conditions of applicants who fail to abide by “Dublin” rules, the same Report does not make these applicants the main focus of article 19 of that proposal. Thirdly, the examination procedure for international protection depends less on individual circumstances as required by the system of the 1951 Geneva Convention, than to rely on “objective” factors, through the use of notions such as “safe country of origin”, “safe third country”, or through the increasing reliance on “country of origin information” or the “externalisation” of asylum examination, among others. Last, the possibility to “switch” from a refugee status to another migration status

¹⁴⁷ Proposal for a Directive of the European Parliament and of the Council, *laying down standards for the reception of applicants for international protection (recast)*. cit., p. 1.

¹⁴⁸ For more general comments in this sense, read: V. CHETAIL, *Looking Beyond the Rhetoric of the Refugee Crisis: The Reform of the Common European Asylum System*, op. cit.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Report on the proposal for a directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)*, (COM(2016)0465 – C8-0323/2016 – 2016/0222(COD)), A8-0186/2017, of 10 May 2017.

(especially as a worker) is easier, thus further depriving the refugee status of its specificity.

ABSTRACT. This article investigates the unequal treatment of asylum seekers across the European Union (EU). In particular, this article explores the way in which Directive 2013/33/EU (the “Reception Conditions Directive”) itself allows for the creation of different categories of asylum seekers who enjoy variable reception conditions as a result. This runs counter the stated objective of the Reception Conditions Directive to harmonise reception conditions in the EU. The fragmented treatment of asylum seekers has become more acute with the current “refugee crisis”, which has highlighted the deficiencies inherent in the reception system created by the Reception Conditions Directive. This article hypothesises that this is caused by the underlying double objective of the EU reception system, namely, to protect the fundamental rights of asylum seekers, while preventing secondary movements within the EU. Examining both the situation at the EU level and in three EU Member States, the article shows the particular challenges of the EU reception system grappling with its seemingly irreconcilable double objective. In the end, the article concludes by pointing out the risk of dismantling asylum by giving in to migration management objectives in the current context.

KEYWORDS: asylum seekers – reception conditions – Directive 2013/33/EU – “refugee crisis” – fundamental rights.