Response to the European Commission's Green Paper on the future of the Common European Asylum System – COM (2007) 301 final

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Executive Summary

As the European Union is at a crossroads in the shaping of its Common European Asylum System, Amnesty International welcomes the consultation process launched by the Commission. It is indeed necessary for the EU to reflect on the progress made so far while at the same time trying to develop a vision for the future of the CEAS.

The Hague Programme has determined an ambitious programme. Evaluation of first phase instruments should be concluded in 2007 while second phase instruments and measures should be submitted to the Council and the European Parliament with a view to their adoption before the end of 2010. As such deadline may turn out to be unrealistic in practice, it should not be an excuse to aim low.

A high level of protection based on well-established international law and human rights standards is the only option for the European Union as it tries to develop a common policy. The EU Reform Treaty may provide for a more solid basis to develop a common approach at a high level than the existing minimum standards as laid down in the Amsterdam Treaty. In this respect the level of ambition as expressed by the Commission may not match the objectives and political will in the Council to take concrete steps towards common standards.

However, whatever approach is taken, it is clear that the existing minimum standards need to be upgraded in many respects in order to meet at least standards embodied in international refugee and human rights law. In order for the EU to be able to develop a common approach with regard to international protection, it should ensure that EU law itself is fully compatible with international human rights standards. Given the "export value" of the CEAS, its foundations should be firmly grounded in human rights law so as to avoid any downgrading of the international protection regime. In Amnesty International's view this means that in particular the Asylum Procedures Directive and the Qualification Directive need to be reviewed in this perspective in the second phase of harmonisation, while efforts are needed to level out differences in reception conditions for asylum seekers between the Member States.

In particular the use of the various procedural devices that can effectively prevent access to a fair assessment of the substance of asylum claims need to be reassessed and abandoned where necessary. At the same time, current restrictive interpretations of refugee and human rights law embodied in the Qualification Directive need to be addressed as well in the second phase of harmonisation. They include *inter alia* :

- the refugee definition as well as the definition of the grounds for subsidiary protection
- the concepts of *réfugié sur place* and internal protection
- actors of protection
- exclusion and cessation clauses
- the safe third country, European safe third country and safe country of origin concepts
- accelerated and admissibility procedures and border procedures

Amnesty International believes that these and other flaws in the existing EU asylum acquis should be remedied in light of the creation of a common asylum procedure. A single procedure in which all protection grounds are assessed is to be preferred and is in the best interest of those in need of international protection provided that essential procedural safeguards apply. As there is no objective reason why refugees and beneficiaries of subsidiary protection should have different rights and benefits, a uniform status for all beneficiaries of international protection throughout the EU is the preferable option within the CEAS. As a matter of principle asylum seekers should not be detained within the CEAS except in the most exceptional circumstances as prescribed by international and regional law and

standards. Detention of vulnerable groups such as unaccompanied children and traumatised asylum seekers must be excluded.

The success or failure of the CEAS will ultimately depend on whether or not persons in need of international protection will have equivalent chances of receiving protection throughout the European Union. Today this is a remote unaccomplished dream as the example of the diverging approaches in the Member States towards Iraqi asylum applications shows. Seen from that perspective, the Dublin system is inherently unfair and should be thoroughly reviewed. A system of allocating exclusive responsibility for examining asylum applcations in the context of the EU is acceptable only after a harmonised system of protection is installed. Amendments to the Dublin Regulation are needed in the short term to take duly into account the existing divergences between Member States as regards protection granted and reception conditions. Access to an effective remedy in practice in the Member States against transfer decisions in application of the Dublin Regulation is of particular importance in that respect. Intra-EU resettlement with the full consent of both the individual concerned and the resettling Member State can be an additional tool of burden and responsibility-sharing. Financial and technical assistance of those Member States facing proportionately high numbers of asylum seekers could be increased.

Practical cooperation between the Member States in the field of asylum should primarily focus on the pooling of resources in the field of country of origin information, fact-finding missions and technical support of Member States facing particular pressures. A transparent and accountable European Asylum Support Office could be useful to coordinate activities of asylum authorities while it could also have a supporting and coordinating role as regards resettlement.

The external dimension of the CEAS should not turn into the externalisation of the EU Member States' obligations under international law to offer protection to those in need. The impact of the EU's policies in the fight against irregular migration on access to protection should be carefully assessed and measures developed to identify those in need of international protection in mixed migration flows. Such initiatives should be developed in close collaboration with UNHCR and should in particular focus on training of border guards and developing systems of referral. In addition a common policy on resettlement should be developed. Such a policy should acknowledge the role resettlement can play both as a durable solution and in emergency situations.

I. Introduction.

Amnesty International welcomes the publication of the Green Paper on the future of the Common European Asylum System (hereafter CEAS) and in particular the consultation process it organises with all relevant stakeholders, including non-governmental organisations active in the field. Amnesty International believes that the input of non-governmental organisations in shaping the second phase of harmonisation of the CEAS is indeed vital as they are well placed to gauge the practical impact of EU legislation and policy on the lives and fate of asylum seekers and refugees.

Amnesty International's contribution to the Green Paper on the future of the CEAS will mainly focus on the need to bring the current and future framework of the EU's asylum policy in line with international refugee and human rights standards and the role the EU can play in enhancing the international protection regime. The aim of this document is not to reply exhaustively to all of the 35 questions put forward, but to present Amnesty International's views on certain aspects of the future CEAS.

Before entering into an in-depth discussion of the four chapters in the green paper, it is important to make some preliminary remarks with regard to the evaluation of the first phase instruments and the objective of the future CEAS.

The need for proper and continued evaluation of implementation of the EU asylum acquis

Reference is made in the introduction to the Green Paper to the need for evaluation of the legal instruments related to asylum policy that have been adopted during the first phase of establishing a CEAS. From a policy perspective it is indeed crucial not only to monitor the implementation and transposition of the first phase instruments adopted in this field as indicated both in the Hague Programme and the Action Plan implementing the Hague Programme, but also, based on this exercise, to evaluate the impact of these instruments in practice. This implies that an evaluation process should not be limited to verifying whether or not the legislative instruments adopted by the EU have been timely and correctly implemented in national law by the Member States. As the legislative instruments concerned touch upon fundamental human rights laid down in international agreements adopted outside the EU framework, such an evaluation process can not be complete if it does not take into consideration the compatibility of the relevant EU instruments with the international legal framework relating to refugees.

Evaluation of the first stage instruments in the field of asylum is currently underway. However, it is clear that for the two core instruments in the field of asylum, the evaluation will be non-existent or at best incomplete. The deadline for transposition of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted[1] (hereafter the Qualification Directive) expired only on 10 October 2006. Today, only a few Member States have implemented the Qualification Directive into their national legislation, while those that have adopted legislation implementing the directive will necessarily have only limited experience with its impact in practice. As regards the other core instrument, the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in the Member States for granting and withdrawing refugee status[2] (hereafter the Asylum Procedures Directive), the deadline for transposition by the Member States has not even expired yet.

Yet, the Commission's intention is to adopt a policy plan in the first quarter of 2008 in which it will set out all the measures that it will adopt to construct the CEAS along with a timeframe.

[1] *OJ* 2004 L304/12.
[2] *OJ* 2005 L326/13.

It seems clear from this that the evaluation of the first stage instruments can not have a meaningful role in the preparation of the policy plan and thus the shaping of the future of the CEAS. The undervalued position of evaluation in the current process of creating the CEAS by 2010 contrasts sharply with the assurances in the Hague Programme precisely on this point[3].

This does not imply that the lack of proper evaluation should prevent the European Union from preparing the next steps in the ongoing process. There are indeed a number of serious flaws in the current EU system that need to be addressed sooner rather than later. However, the EU would be deceiving itself if it considers the ongoing evaluation process as being sufficient and exclusively setting the agenda for the second phase of harmonisation. As it must be acknowledged that the current situation has been caused by delays both in adoption and implementation of the first stage instruments, it should not prevent the Union from addressing particular problems that may come to light after completing the limited evaluation that is supposed to feed into the preparation of the forthcoming policy plan of the Commission.

A high common standard of protection

According to the Commission the goals in the second stage should be twofold :(1) achieve a higher common standard of protection and greater equality in protection across the EU; and (2) ensure a higher degree of solidarity between EU Member States. Amnesty International has consistently criticised certain aspects of the EU asylum instruments as falling below existing international human rights standards. In as much as these goals implicitly acknowledge the fact that the current standards are not sufficient and that protection across the EU is diverging while solidarity between EU Member States leaves a lot to be desired, Amnesty International fully agrees with this aim. However, whether it is sufficient enough to aim at a higher common standard of protection and greater equality in protection when dealing with asylum seekers and refugees remains questionable.

The way in which the goals have been articulated might therefore benefit from more precise wording. In Amnesty International's view the objective for the EU in the second stage of the CEAS should not merely be to achieve a higher common standard of protection. Given current weaknesses it would be easy to achieve a higher common standard in a number of areas related to the CEAS as for instance in the field of standards for reception conditions or asylum procedures. What is at stake is the need to develop a common system to achieve indeed a high common standard that is at least fully compatible with international refugee and human rights law and to achieve a common European asylum space where international protection is granted to those in need of it, regardless of the Member State where the asylum application has been lodged. The CEAS is in many ways still an experiment trying to establish a common approach at the regional level based on international treaties that have a much wider geographical scope. Such a process is necessarily complicated in an area that is also highly politically sensitive but this should not allow the Union to adopt a purely pragmatic approach in setting the objectives to be achieved.

The need for improving the quality of the whole system, both in terms of enhancing the conditions under which asylum seekers in the EU can effectively present and pursue their claims as well as the capacity of all stakeholders to perform their respective tasks in the asylum process, is rightly emphasised. As the CEAS will eventually be shaped in the day to day practice of the authorities dealing with asylum applications in the Member States, the implementation of the common standards adopted at the EU level by the asylum authorities, lawyers and judges alike is key. However, while to a certain extent increased practical cooperation between asylum authorities can indeed be one of the useful instruments in achieving high common standards for the assessment of asylum applications in the EU, it can

[3] As regards the second phase of the CEAS, the Hague Programme clearly states that "it will be based on the full and inclusive application of the Geneva Convention on Refugees and other relevant Treaties, and be built on a thorough and complete evaluation of the legal instruments that have been adopted in the first phase"

never be seen as an alternative for amending existing EU legislation where such legislation is in breach of international refugee and human rights law.

II. Legislative Instruments

The EU asylum acquis as adopted during the first stage of the CEAS has been criticised by many experts, NGOs and international organisations, including the UNHCR. In particular the Asylum Procedures Directive and the Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers[4] (hereafter the Reception Conditions Directive) have been the subject of severe criticism as they do not provide asylum seekers with sufficient guarantees as regards qualitative reception conditions and the way asylum applications need to be assessed in the Member States. Moreover, from an EU perspective, the added value of these directives could be seriously questioned. In particular the Asylum Procedures Directive and the Reception Conditions Directive leave such a high degree of discretion to the Member States in the implementation of the minimum standards adopted as to make harmonisation illusory.

In addition, the Amsterdam Treaty has considerably restricted the competences of the Court of Justice in shaping Community law in the field of asylum (and other areas covered by Title IV of the EC Treaty). The rule that only the highest national courts can refer questions on interpretation of the relevant provisions in Title IV TEC or questions on the interpretation or validity of the first phase instruments in the field of asylum, has effectively prevented the Court from playing its institutional role. As the harmonisation of EU asylum law progresses, the current limitations on the role of the European Court of Justice are less and less justifiable within the future CEAS. In particular as fundamental human rights are at stake, the normal guarantees with regard to judicial protection as well as uniform application and interpretation of Community law in this field should apply as soon as possible. The Commission has already proposed to lift current limitations contained in Article 68 TEC with regard to the competences of the Court of Justice in this field. The EU Reform Treaty provides for this solution also. However, as its future is unpredictable, it would be important for the future of the CEAS and the essential role the Court of Justice can play in its development and the implementation of the first phase instruments, to delete the current limitations in Article 68 TEC as soon as possible.

As these instruments turned out almost exclusively to serve the purpose of preserving the existing national systems and concepts rather than harmonising or approximating the different approaches in the Member States, there is a need to thoroughly review these instruments and rewrite them in view of the objective of creating a level playing field in the EU aimed at ensuring a high level of protection. At the same time serious problems exist with regard to the Qualification Directive and the Dublin II Regulation which need to be addressed at the legislative level as well. Here too, substantial amendments to the existing EU legislation to ensure compliance with the international protection regime are required. The many problematic aspects of the Dublin system have been documented extensively both by the Commission, UNHCR and ECRE. This issue will be briefly be addressed in the section dealing with solidarity and burden-sharing.

2.1. Processing of asylum applications

Question 4 : The design of a mandatory single procedure

Questions 1 to 5 of the Green Paper all relate to the model according to which asylum applications should be processed in the future CEAS. The Commission assumes that the future common asylum procedure will be a single procedure for assessing applications for refugee status and for subsidiary protection. Therefore this question will be dealt with first.

[4] *OJ* 2003 L 31/18.

Amnesty International in principle agrees that applications for international protection should be assessed in a single procedure. This is in general in the interest of both the asylum seeker and the asylum authorities. Asylum seekers can not be expected to determine what protection grounds are applicable to their case and should not be forced to choose one or the other procedure. At the same time it is much more cost and resource-effective to determine all protection needs in one procedure by the same authority rather than to organise subsequent procedures implicating different authorities. Centralisation of all protection procedures with one competent authority also bears the advantage that the interviewers and decision-makers are well-trained in international human rights law and international refugee law. Comparative legal studies have pointed out that where there are two separate procedures, claims for subsidiary protection are usually processed through discretionary procedures, which are lacking efficient procedural safeguards, and final decisions are usually left at the discretion of administrative authorities often dependent on the ministry of interior. A single procedure therefore helps to ensure equality between claimants. Centralised authorities are also usually better equipped regarding information on the situation in the country of origin and develop expertise with regard to the use of such information in the context of asylum claims.

The potential risk of undermining the value of the 1951 Convention relating to the Status of Refugees (hereafter 1951 Refugee Convention) by the generalised use of a single procedure needs to be taken into account, in particular pending the creation of a uniform status for refugees and beneficiaries of subsidiary protection within the CEAS. Such a risk could be neutralised by introducing a predetermined sequence of examination of the protection grounds to be considered in the single procedure. Hence, the single procedure should be premised on the principle that first protection needs under the 1951 Refugee Convention must be examined and only if it is established that the asylum seeker does not qualify under the refugee definition subsidiary protection grounds should be examined[5]. The single procedure should honour this principle also as procedural guarantee. One way of doing this would be to impose the obligation upon the asylum authorities to clearly motivate in their decisions why the applicant is considered not to be eligible for refugee status. At the same time it should always be possible for the applicant to challenge the refusal of refugee status before the appeal body even when he or she had obtained the status of beneficiary of subsidiary protection.

Within a single procedure the grounds for subsidiary protection should be adjusted to better reflect Member States' existing and evolving obligations under international human rights law. Currently, grounds for subsidiary proctection are limited to violations of the right to life, freedom from torture and inhuman and degrading treatment in their country of origin and indiscriminate violence in situations of armed conflict. However, other situations exist where individuals are non-removable on human rights grounds, such as the right to family life and private life and therefore the concept of serious harm as defined in Article 15 of the Qualification Directive should be amended[6].

However, Amnesty International's support of a single procedure as a mandatory model for asylum procedures in the EU Member States is conditional on the actual procedural safeguards contained in the procedure. It is clear that the minimum standards contained in the existing Asylum Procedures Directive are not sufficient in this respect. Amnesty International's views on the most problematic aspects of this directive will be elaborated in

[5] The priority of the refugee definition over subsidiary grounds of protection as already established in the Qualification Directive should be maintained in the single procedure. According to its Article 2 (e) 'a person eligible for subsidiary protection' means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing… (emphasis added). As a person eligible for subsidiary protection can only be a person who does not qualify as a refugee and Member States are under an obligation to examine every request for refugee status as a result of their obligations under the 1951 Geneva Refugee Convention, it follows that refugee status must be examined first.

[6] See infra the section on the granting of protection.

more detail in the following section. Before entering into this debate, however, it is useful to restate the principles which, in Amnesty International's view, constitute minimum standards for fair and satisfactory asylum procedures under international law. These principles should underpin the design for the single asylum procedure :

1. The fundamental principle of *non-refoulement* demands that asylum procedures are adequate to identify effectively all those in need of protection.

2. All asylum-seekers, in whatever manner they arrive within the jurisdiction of a state (including those still at the border or in so-called "international zones"), must be referred to the body responsible for deciding on claims for asylum.

3. The body responsible for deciding on asylum claims must be an independent and specialised authority whose sole and exclusive responsibility is examining and making decisions on asylum claims.

4. Decision-makers must have expertise in international refugee law and international human rights law. Their status and tenure should afford the strongest possible guarantees of their competence, impartiality and independence. Decision-makers should also be properly trained to deal with vulnerable groups, such as victims of torture and traumatized asylum seekers or unaccompanied minors.

5. Decision-makers must be provided with the services of a documentation office whose task should be to impartially collect and provide them with objective and independent information on the human rights situation in asylum seekers' countries of origin or any country to which they might be sent.

6. All asylum-seekers, at all stages of the procedure, must benefit from the right to legal counsel and interpreters, and the right to contact and to have access to UNHCR and to non-governmental organisations.

7. Asylum claims should be examined at first instance through a personal appearance by every asylum-seeker before the decision-makers of the independent body, responsible for deciding on asylum claims, where there is a thorough examination of the circumstances of each case.

8. All asylum-seekers must receive written reasons if their asylum claim is rejected, and have the right to appeal against a negative decision. The appeal must normally be of a judicial nature and must in all cases have suspensive effect on expulsion.

A single procedure in which all protection needs are examined should be adopted within the CEAS. A single procedure must offer sufficient procedural safeguards for asylum seekers with regard to the primacy of refugee status, the examination of the asylum application by an independent and specialised body, access to legal representation and UNHCR and a suspensive right to appeal.

Question 1 - How might a common asylum procedure be achieved? Which aspects should be considered for further law approximation?

The Asylum Procedures Directive can be labelled as being the most problematic legislative instrument in the field of asylum adopted so far. During the final stages of the negotiations in the Council an alliance of NGOs, including Amnesty International, publicly called for a withdrawal of the Commission proposal as the text was considered 'unacceptable as a legal

basis for minimum standards in the European Union"[7]. An action for annulment of the Asylum Procedures Directive was brought by the European Parliament against the Council on 8 March 2006, albeit mainly on institutional grounds[8].

Notwithstanding the adoption of the directive, the EU is still lacking a basic set of guarantees that are considered crucial and essential for its asylum legislation. In spite of its title, the Asylum Procedures Directive does not provide for minimum standards in the area of procedural guarantees but rather in a collection of existing often bad practices that in certain respects breach international refugee and human rights law.

Consequently, the first step to be taken would be to develop and elaborate such procedural standards at EU-level on the basis of the essential principles for fair and satisfactory asylum procedures under international law. This implies that the procedural devices discussed below that are currently prominent in the administrative practice of the Member States and incorporated in the Asylum Procedures Directive as 'minimum standards' should not be part of the common procedure as envisaged in the future CEAS. Equally, essential guarantees with regard to access to the asylum procedure and effective legal remedies should be strengthened in the second phase of harmonization.

Question 2 - How might the effectiveness of access to the asylum procedure be further enhanced? More generally, what aspects of the asylum process as currently regulated should be improved, in terms of both efficiency and protection guarantees?

Access to the asylum procedure/access to protection

The future common asylum procedure needs to sufficiently guarantee all asylum seekers access to a fair and efficient determination of their claim. The common asylum procedure should state this principle in a clear and unambiguous way. In practice, access to the asylum procedure is mostly problematic in border areas and when potential asylum seekers have been detained in application of national immigration legislation. Persons who wish to claim international protection should be able to do so as soon as possible and before a competent and independent asylum body. Immigration and law enforcement authorities that are likely to come into contact with asylum seekers before the competent asylum bodies should be under a clear obligation to refer asylum seekers immediately to the latter authority in order to ensure that their right to access to the asylum procedure, including the right to free legal aid is effectively guaranteed. Equally, clear legal guarantees should be developed in order to inform promptly people arriving at the border or being detained of their right to apply for international protection.

Since the adoption of the RABIT-Regulation[9], intervention teams can be deployed at the external borders of Member States facing an urgent and exceptional pressure, "especially the arrival of large numbers of third country nationals trying to enter the territory of the Member State illegally". Although the regulation applies "without prejudice to the rights of refugees and persons requesting international protection, in particular as regards non-refoulement", no

[7] See ECRE, Amnesty International, Human Rights Watch, Caritas Europa, Churches Commission for Migrants in Europe, ILGA Europe, Medecins sans Frontières, Pax Christi International, Quaker Council for European Affairs and Save the Children, Call for withdrawal of the Asylum Procedures Directive, 22 March 2004.

[8] Case C-133/06 *OJ* 2006 L 108/12. The Opinion of Advocate-General M. Poiares Maduro was published on 27 September 2007 and proposes to annul Articles 29, par. 1 and 2 and 36, par. 3 of the Asylum Procedures Directive.

[9] Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, *OJ* 2007 L 199/30.

concrete measures have been taken to ensure access to a fair asylum procedure when such teams are being deployed.

Another important obstacle to access to the asylum procedure is the use of safe country of origin and safe third country concepts in accelerated procedures or admissibility procedures that effectively prevent an examination of the substance of the claim. The use of such concepts and exceptional procedures should be considerably reduced or withdrawn in the future CEAS (see further question 3).

A personal interview

As the assessment of an asylum application is essentially an assessment of a future risk for the applicant and includes both subjective and objective elements of the fear for persecution, the importance of an in-depth and properly conducted personal interview in a fair and efficient asylum procedure can not be underestimated. EXCOM Conclusions No 8 and 30 endorse the central role of a personal interview in the asylum procedure and the need for an individual thorough assessment of all the relevant facts in cases where there is a risk of refoulement, has been constantly repeated in the case law of the European Court of Human Rights, the UN Human Rights Committee and the UNCAT Committee.

In principle, asylum seekers should never be refused the possibility of a personal interview, unless the applicant opposes an interview or the need for protection of the applicant is so obvious that a positive decision can be taken without even interviewing the applicant. Also there may be circumstances where an interview may be simply impossible because the applicant has a mental or psychological disturbance or is physically unable to participate in an interview for instance. However, the Asylum Procedures Directive allows for a number of exceptions to the entitlement to a personal interview that are not related to the physical or mental ability of the applicant but anticipate the examination of the substance of the asylum application. These include a number of cases where the determining authority, on the basis of a complete examination of information provided by the applicant, considers the application to be unfounded *inter alia* because the applicant is from a safe country of origin or a safe third country or the applicant has made inconsistent, contradictory, improbable or insufficient representations which make the claim clearly unconvincing.

In Amnesty International's view criteria for applying accelerated or prioritised asylum procedures should never be used as justification for omitting a personal interview in the context of an asylum procedure as this would be clearly in contradiction with the above mentioned EXCOM Conclusion No. 30[10]. Moreover, as the assessment of the credibility of the applicant is a central issue in any asylum procedure, refusing an applicant the opportunity for a personal interview would *de facto* deprive the competent authority of an important element in the assessment of the fear for persecution/risk of serious harm.

The right to an effective remedy

The right to an effective remedy before a court or a tribunal must clearly be considered as a fundamental principle in a common asylum procedure. Article 39 of the Asylum Procedures Directive establishes the right to an effective remedy but at the same time Member States are allowed significant discretion with regard to the type of appeal available and whether or not it

[10] See EXCOM Conclusion No. 30 (XXXIV), par. (e): "Recognized the substantive character of a decision that an application for refugee status is manifestly unfounded or abusive, the grave consequences of an erroneous determination for the applicant and the resulting need for such a decision to be accompanied by appropriate procedural guarantees and therefore recommended that: (I) as in the case of all requests for the determination of refugee status or the grant of asylum, the applicant should be given a complete personal interview by a fully qualified official and, whenever possible, by an official of the authority competent to determine refugee status".

has suspensive effect[11]. However, it is nevertheless explicitly stated in Article 39, 3 that Member States shall provide for such rules "in accordance with their international obligations". Article 13 ECHR and the case law of the European Court of Human Rights on the right to an effective remedy are particularly relevant in this respect. Although it was acknowledged that contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision, the Court has nevertheless developed a detailed set of principles which should be properly reflected in the common asylum procedure.

According to this jurisprudence, a remedy before a national authority is considered to be effective when that authority has competence both to deal with the substance of the relevant Convention complaint and to grant appropriate relief[12]. In Amnesty International's view, this implies that the appeal body has the competence to examine both facts and points of law. In order to fully comply with the principle of impartiality and independence, this competence should not be limited to a "marginal appreciation" of the relevant facts. This was reflected in the case *Jabari v. Turkey*, in which the Court held that "given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised and the importance it attaches to Article 3, the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned"[13].

In addition, in *Conka v Belgium* the Court held with regard to expulsion measures against rejected asylum seekers that it is "inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention"[14]. As a result national courts or authorities must be able to suspend measures with irreversible effects. It should be noted that recently the European Court of Human Rights explicitly confirmed the requirement of an effective remedy with suspensive effect under Article 13 ECHR also with regard to asylum procedures conducted in the waiting zone of an airport[15].

The right to an effective remedy is equally guaranteed as part of the general principles of EC law as laid down in the jurisprudence of the European Court of Justice[16] and under the EU Charter on Fundamental Rights. According to Article 47 of the Charter "everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article". These include important guarantees such as the right to a fair hearing within a reasonable time by an independent tribunal as well as the possibility of being advised, defended and represented, and access to legal aid. As a result, Article 47 of the Charter incorporates the safeguards enshrined not only in Article 13 but also those in Article 6 ECHR. Whereas the Strasbourg Court generally refuses to apply the Article 6-safeguards in asylum procedures as they do not concern the determination of civil rights and obligations or of any criminal charge,

[11] According to Article 39, 3 Member States shall provide for rules with regard to (a) the question whether the remedy shall have the effect of allowing applicants to remain in the Member State pending its outcome; (b) the possibility of legal remedy or protective measures where the remedy does not have the effect of allowing applicants to remain in the Member State concerned pending its outcome and (c) the grounds for challenging a decision based on the safe third country rule.

[12] See for instance European Court of Human Rights, *Chahal v. the United Kingdom*, judgment of 15 November 1996, par. 145.

[13] European Court of Human Rights, *Jabari v. Turkey*, Application no. 40035/98, judgment of 11 July 2000, par. 50.

[14] European Court of Human Rights, *Conka v. Belgium*, Application no. 51564/99, judgment of 5 February 2002, par. 79.

[15] European Court of Human Rights, Affaire Gebremedhin (Gaberamadhien) c. France, Requête n° 25389/05, 26 avril 2007, par. 67.

[16] See ECJ, Johnston v Chief Constable of the Royal Ulster Constabulary, C-222/84, Judgment 15 may 1986 : "Community law requires effective judicial scrutiny of the decisions of national authorities taken pursuant to the applicable provisions of Community law".

Article 47 of the Charter no longer makes such distinction and must be observed with regard to asylum applications. Although the Charter was meant to become legally binding with the entry into force of the Constitutional Treaty, it is increasingly gaining legal relevance through the jurisprudence of the European Court of Justice and should be fully taken into account in any further legislative steps to be taken at EU level.

Consequently, a common asylum procedure should explicitly acknowledge that the effectiveness of the appeal is crucial in safeguarding the principle of non refoulement. In line with the case law of the European Court of Human Rights, fundamental principles of EC law as well as the EU Charter on Fundamental Rights, a remedy can only be effective if it has a suspensive effect and allows for a thorough scrutiny of both facts and points of law before a court or tribunal.

An independent and specialised determining authority

According to Article 8, 2 (a) of the Asylum Procedures Directive Member States must ensure that applications taken by the determining authority on applications for asylum are examined and decisions taken individually, objectively and impartially. However, the Directive does not require the determining authority itself to be independent and impartial. At the same time Member States may designate other authorities responsible for examining asylum applications for the purpose of *inter alia* border procedures, Dublin cases or subsequent applications. As stated above, in Amnesty International's view the body responsible for deciding on asylum applications must be an independent and specialised authority. This is crucial to avoid for instance foreign policy considerations contaminating decision making on asylum applications and to guarantee that protection needs of applicants remain at the centre of the decision making process.

Today, determining authorities responsible for taking first decisions that are wholly independent from the executive are an exception in Europe. Independence and impartiality of the determining authorities should be an integral and fundamental part of the future CEAS. At the same time, the specialised determining authority should be responsible in examining all asylum applications without any exception. The current derogations allowed for in Article 8 (2) of the Asylum Procedures Directive should be deleted.

Access to the asylum procedure should be better guaranteed through better information of asylum seekers and intensive training of border guards and law enforcement officials likely to come into contact with asylum seekers first. A personal interview of every asylum seeker should be guaranteed, except where personal circumstances of the asylum seeker make such interview impossible. The bodies responsible for taking a first decision on asylum applications in the Member States must be independent and impartial in all cases. A right to an effective remedy before a Court or Tribunal with suspensive effect and that allows for a thorough scrutiny of both facts and points of law must explicitly be guaranteed in Community law.

Question 3 – Which, if any, existing notions and procedural devices should be reconsidered?

Safe country of origin and safe third country concepts

Member States have increasingly applied various forms of safe third country and safe country of origin concepts in their national asylum systems. The Asylum Procedures Directive consolidates this evolution through provisions on the safe third country, the safe country of origin and the European safe third country concept as well as the adoption of minimum common lists of safe countries of origin and European safe third countries while allowing Member States to continue to apply national lists of safe countries. Such notions have

traditionally been used to restrict access to the asylum procedure by channelling asylum seekers originating from such countries through accelerated asylum procedures.

Amnesty International strongly opposes the use of the safe countries of origin-notion and the adoption of lists of safe countries of origin in asylum procedures as it constitutes discrimination among refugees that is strictly prohibited by Article 3 of the 1951 Refugee Convention[17]. Although the Procedures Directive provides for a possibility for asylum seekers to rebut the presumption of safety as a principle, in practice it may often be an insurmountable hurdle for an asylum-seeker as he may be forced to do so in an accelerated procedure that may not offer sufficient safeguards. As indicated above, as a result of the combined affect of Articles 23, 4 and 12, 2, c of the Asylum Procedures Directive, Member States may even omit a personal interview in cases in which the determining authority considers the asylum application to be unfounded because the applicant is from a safe country of origin. It is hard to see how the presumption of safety could effectively be rebutted if the applicant is denied a personal interview.

The attempts made so far at EU level to adopt a minimum common list of safe countries of origin have all failed as no agreement could be reached between the Member States nor within the Commission on what countries to include in such a list. The fact that Member States seem to have different opinions on what countries can be considered safe is in itself a strong argument against the use of lists of safe countries or even the notion of safe country of origin. These discussions have shown that the designation of the countries to be included in those lists is a highly politicised debate guided by political interests rather than full consideration of human rights standards. Moreover, as the House of Lords rightly noted 'general rules cannot cater for every situation', a country may be safe for some group of asylum seekers but not for others[18]. Amnesty International strongly believes that no country should be labelled safe[19] for the purpose of an asylum procedure and that the decision on each claim for international protection should be based on a full and fair individual assessment of the case.

Similar concerns exist as regards the use of the safe third country concept. Here too the Asylum Procedures Directive does not contain sufficient guarantees as to the observance by Member States in practice of the non-refoulement principle. The application of the safe third country notion raises important questions as regards access to a fair and satisfactory asylum procedure, access to effective and durable protection and risks of chain-refoulement. As the application of the safe third country concept may imply that successive states refuse to examine the asylum application substantively, it also raises serious questions under Article 3 of the European Convention on Human Rights. The issue has been addressed by the European Court of Human Rights in the case of *T.I v. UK,* in which it considered that State responsibility could arise by sending an asylum seeker to a third country under the provisions of the (at that time) Dublin Convention if, in the circumstances, there was a real risk that the applicant would be sent to a country where he faced treatment contrary to Article 3.[20]

Amnesty International recalls that under international refugee law, the primary responsibility for international protection remains with the State where the asylum claim is lodged. Should the safe third country notion be maintained as a tool within the future common asylum

[17] The safe country of origin concept is equally problematic in light of Article 14 of the European Convention on Human Rights according to which the enjoyment of the rights and freedoms in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin.

[18] See House of Lords European Union Committee, Handling EU Asylum Claims : New Approaches Examined (HL Paper 74, 11th Report of Session 2003-04, par. 66.

[19] This includes EU Member States. See also the comments on the definition of refugee/beneficiary of subsidiary protection under question 10.

[20] See European Court of Human Rights, *T.I. v the United Kingdom*, App. No 43844/98, Judgment of 7 March 2000.

procedure, it should be clearly legally defined in accordance with the following necessary safeguards:

- transfer of responsibility can only be envisaged where a meaningful link exists between an asylum applicant and a third country which makes a transfer reasonable
- the third country is determined safe in the individual circumstances of the applicant.
- transfer can only take place if the third country gives its consent to admit or readmit the asylum applicant
- the third country must provide him/her full access to a fair and effective determination procedure.
- the burden of proof regarding the safety of the third country for the particular applicant lies entirely with the country of asylum
- the applicant must be able to rebut the presumption of safety.

The European safe third country concept (also known as the super safe third country concept) in Article 36 of the Asylum Procedures Directive even allows Member States "to provide no or no full examination of the asylum application and the safety of the applicant in his/her particular circumstances in cases where it has been established that the applicant for asylum is seeking to enter or has entered illegally into its territory from a safe third country according to paragraph 2". In order to be considered as safe third country for these purposes, the country must have ratified and observe the provisions of the Geneva Convention without any geographical limitations, have in place an asylum procedure prescribed by law, have ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and observe its provisions, including the standards relating to effective remedies and been designated so by the Council. Contrary to the safe third country concept that allows for a rebuttal of the presumption of safety, albeit under less procedural guarantees, the European safe third country can be bluntly applied without taking into account the individual circumstances of the asylum applicant. The application of such a concept equally risks to be in breach of international human rights law where it effectively bars an asylum seeker from applying for international protection[21].

Ultimately, the application of the notions of safe country of origin, safe third country and European safe third country in practice basically raises fundamental questions as regards access to the asylum procedure[22] and access to protection. The ultimate assessment is whether the third country that is considered responsible for the examination of the asylum application is able to offer protection to the individual. This would necessarily imply sufficient guarantees that the applicants' claim for protection will be assessed in substance by the third country concerned, that the person will be treated during the status determination process according to generally accepted standards and that his or her economic, social and cultural rights under international law will be respected.

Accelerated procedures/admissibility procedures/border procedures

The Asylum Procedures Directive has to a great extent codified an ever growing trend in EU Member States to channel as many asylum applications as possible through accelerated or fast track procedures. Notorious examples are the Netherlands and the UK that have in recent years developed extremely fast procedures that tend to become the rule rather than the exception for examining asylum applications. The Asylum Procedures Directive is problematic

[21] See C. Costello, "The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection*?", European Journal of Migration and Law* 7, 2005, p. 61. According to this author "this mechanism denigrates protection issues to matters of mere border control, effectively allowing illegal entry to determine asylum claims, in contravention of Article 31 of the Refugee Convention".

[22] Amnesty International recalls that in its General Conclusion No. 87, UNHCR's Executive Committee expressly stated that "notions such as "safe country of origin ", "internal flight alternative" and "safe third country" should be appropriately applied so as not to result in improper denial of access to asylum procedures, or to violations of the principle of *non-refoulement* ".

in this respect as it contains a long list of cases in which Member States may accelerate or prioritise an examination procedure[23]. Moreover, although the Directive provides for a basis for the Member States to considerably extend the possibilities for accelerated or prioritised processing of asylum applications, it does not define what the consequences of such acceleration or prioritisation can be. This is indeed left to the discretion of the Member States which obviously risks creating widely diverging practices in the EU and undermines the very idea of a common asylum procedure.

Accelerated asylum procedures typically are characterised by decision-making within an extremely short period, reduced appeal rights or no effective remedy at all and in certain cases no examination of the substance of the asylum claim. In many cases accelerated procedures are generally not appropriate and undermine basic procedural safeguards of asylum seekers and are likely to prevent qualitative decision-making. If some form of accelerated procedure is to be part of the common asylum procedure it would necessarily have to be exceptional.

In Amnesty International's view, the use of accelerated procedures could be appropriate to deal with either manifestly founded cases or manifestly unfounded cases[24]. Where the need for protection is so obvious that a positive decision can be taken *prima facie*, speeding up the procedure is indeed justifiable. The same applies to those cases that can be considered manifestly unfounded, defined as cases that are clearly not related to any ground for granting international protection. Furthermore, even in cases where a more expeditious examination would be acceptable, a number of procedural safeguards need to be guaranteed. These would include as a minimum a complete personal interview by a fully qualified official of the authority competent to determine refugee status, access to legal aid and competent interpretation and access to an effective legal remedy against any negative decision. In Amnesty International's view, any acceleration of processing of manifestly unfounded cases would preferably occur at appeal level, thus ensuring for every case a full and individual examination of the substance of the claim[25]. This is indeed necessary given the "grave consequences of an erroneous determination for the applicant"[26]. Also, applications of vulnerable asylum seekers such as unaccompanied minors, traumatised asylum seekers or victims of torture should always be dealt with in a regular asylum procedure[27].

[23] According to Article 23 of the Asylum Procedures Directive these cases include *inter alia* situations where the applicant is from a safe country of origin or safe third country, where the applicant has presented false information or documents, has not produced information establishing with a reasonable degree of certainty his/her identity or nationality, has made inconsistent, contradictory, improbable or insufficient representations or has failed without reasonable cause to make his/her application earlier.

[24] UNHCR EXCOM Conclusion No. 30 (XXXIV) deals with both manifestly unfounded applications or clearly fraudulent applications. The term clearly fraudulent or abusive application is very vague and can easily be "abused" by states in order to channel more applications through accelerated asylum procedures, for instance where refugees have used false documents in order to escape persecution. As this could be labelled as an abusive or fraudulent claim while in fact the individual is in need of protection, the term is highly confusing especially in the context of manifestly unfounded applications. The terminology used in the EXCOM conclusion adds to that confusion as it notes that "applications which are considered to be so obviously without foundation as not to merit full examination at every level of the procedure" have been termed either "clearly abusive" or "manifestly unfounded". Therefore, preferably the future CEAS should not include any notion of abusive or clearly fraudulent applications as a decisive factor for processing asylum applications in an expeditious manner. See also Amnesty International, *Council of Europe: AI observations on the Report of the Working Group on Human rights Protection in the Context of Accelerated Asylum Procedures (GT-DH-AS) 1st meeting, 6-8th December 2006(AI Index: IOR 61/019/2007)*, 13th July 2007.

[25] For instance by providing shorter but reasonable time limits for appeal. However, reducing time limits for lodging appeals is not the only instrument available to states for speeding up determination procedures. UNHCR EXCOM Conclusion No. 30 suggests also "allocating sufficient personnel and resources to refugee status determination bodies so as to enable them to accomplish their task expeditiously

[26] UNHCR EXCOM Conclusion No. 30 par. (e).

[27] A recent survey of the Council of Europe shows that only a few EU Member States exclude vulnerable categories such as unaccompanied minors or traumatised asylum seekers explicitly from the scope of

Another important procedural device that needs to be seriously reconsidered is the use of inadmissibility criteria as laid down in Article 25 of the Asylum Procedures Directive. In addition to the application of the Dublin Regulation, the Directive allows Member States not to examine whether an applicant qualifies as a refugee *inter alia* when another Member State has granted refugee status, when a third country is considered as a first country of asylum or a safe third country, when the applicant is allowed to remain in another Member State with a status equivalent to refugee status or when he is allowed to remain on grounds which protect him or her against refoulement. Only where there are sufficient guarantees that the applicant for asylum already obtained protection in another State or will obtain protection in that State, transfer of responsibility can be envisaged.

Therefore, an automatic application of these criteria to the extent that it absolves the Member States from any examination of the asylum application is only acceptable in such cases where another (Member) State has effectively granted full refugee status according to the 1951 Geneva Refugee Convention or subsidiary protection status and will continue to do so after the individual has returned to that country. In any case Amnesty International strongly opposes the application of the safe third country notion as one of the criteria allowing no examination of the asylum claim. The question whether a third country is safe for an applicant should be the subject of a substantive determination procedure.

Finally, there is no reason why other or less procedural guarantees should apply when asylum applications are being processed at the border or in transit zones. The current possibilities for Member States to derogate from basic guarantees and principles at these locations, as laid down in Article 35, 2 of the Asylum Procedures Directive should therefore be deleted.

The use of safe countries of origin- or European safe third countries-concepts and lists should be prohibited. Should the safe third country notion be maintained as a tool within the future common asylum procedure, it should be clearly defined in Community law in accordance with the six necessary safeguards as enumerated above. The existence of a safe third country in the particular circumstances of the asylum seeker should always be the subject of a substantive determination procedure. Accelerated procedures can only be appropriate to deal with manifestly founded asylum applications or asylum applications that are clearly not related to any ground for international protection. Possibilities for derogation from basic procedural guarantees for the processing of asylum applications at borders or in transit zones must be deleted.

Question 5 – Possible models for the joint processing of asylum applications/circumstances under which a mechanism for joint processing can be used by Member States.

The Hague Programme called for a study on the appropriateness, the possibilities and the difficulties, as well as the legal and practical implications of joint processing of asylum applications within the Union. Such a study has not been presented yet. This consultation process could have benefited from a comprehensive study presenting an in-depth-analysis of the legal and practical implications of joint processing. In this respect it is too early to answer the question at this moment and Amnesty International prefers not to anticipate on the debate on the need for such a system.

In any case, Amnesty International believes that rather than a system of joint processing being a precondition for the CEAS to materialise, a high common standard of protection, reception conditions and procedural guarantees needs to be achieved before joint processing

accelerated procedures. See Council of Europe, Steering Committee for Human Rights – Working Group on Human Rights Protection in the Context of Accelerated Asylum Procedures, "Compilation of replies received on the questionnaire", G-DH-AS(2007)001 Bil, Strasbourg, 27 July 2007.

of asylum applications within the EU could effectively be considered. The first priority of the EU institutions and the Member States for the CEAS should be to ensure that the fundamentals of that system are in line with international refugee and human rights law and that the system is able to offer protection to those in need. The recent experience with the processing of asylum claims of Iraqi asylum seekers has made clear to all stakeholders involved that the CEAS is nowhere near to even a minimal common understanding of who needs protection within the EU[28]. In those circumstances and without comprehensive research on the various aspects of joint processing and its impact on the level of protection throughout the EU, the issue is still very premature.

2.2. Reception Conditions

It is self-evident that the future common European Asylum System will need to focus on enhancing current standards of reception conditions for asylum seekers throughout the EU. Although a comprehensive overview of the current state of play of implementation of the Reception Conditions Directive is still lacking as the recent study carried out by the European Commission has not been published yet, it is fair to say that reception standards still vary widely within the EU. As rightly indicated by the Commission the wide margin of discretion left to the Member States by several key provisions of the Directive is one of the distinguishing features of this directive. According to the Commission this has led to "negating the desired harmonisation effect" and there is indeed great divergence in the level and quality of reception conditions in the EU Member States. However, while there is certainly value in the Commission's view that "ensuring a high level of harmonisation with regard to reception conditions of asylum seekers is crucial if secondary movements are to be avoided" other factors, such as the presence of family members in other Member States and a higher chance of effectively obtaining protection in another Member State may contribute to secondary movements. Nevertheless the need for upgrading reception conditions throughout the EU that are respecting asylum seekers' economic and social rights is obvious. In this section Amnesty International will mainly focus on the aspects of detention and access to the labour market.

Question 6 : Areas in which the wide margin of discretion for the Member States should be limited to achieve a meaningful level-playing field, at an appropriate standard of treatment ?

From the perspective of coherence of the CEAS it is clear that the essential aspects of any reception system for asylum seekers should be further harmonised. These aspects include areas such as access to the labour market, access to health care, the provision of material reception conditions, essential guarantees for the reception of vulnerable asylum seekers, freedom of movement and the reduction and withdrawal of reception conditions. The existing margin of discretion for the Member States in these areas will have to be narrowed down considerably if some level of harmonisation is to be achieved.

The scope of the Reception Conditions Directive is another area of concern as it should be clarified to include explicitly all applicants for asylum, including those applying for a subsidiary forms of protection[29]. A system applying a single procedure implies that the same reception conditions apply for all applicants for international protection during the procedure. Moreover, the reception conditions granted at EU-level should clearly apply to asylum seekers awaiting either a decision under the Dublin Regulation or their transfer to another EU Member State under that same regulation. Research conducted on the application of the Dublin Regulation has shown that asylum seekers in a Dublin procedure are denied access to regular reception

[28] See for instance Amnesty International, *Iraq. Millions in flight: the Iraqi refugee crisis (AI Index: MDE 14/041/2007)*, September 2007.

[29] Article 3, 4 of the Directive only states that Member State "may decide to apply this Directive in connection with procedures for deciding on applications for kinds of protection other than that emanating from the Geneva Convention for third-country nationals or stateless persons who are found not to be refugees". This should be amended to include an obligation on Member States.

conditions in some Member States[30]. Nevertheless, the Reception Conditions Directive applies to asylum seekers "as long as they are allowed to remain on the territory"[31]. An explicit reference in the Dublin Regulation should be made to provide full reception conditions to asylum seekers while they are waiting for a decision in application of the Dublin Regulation or as long as they have not been effectively transferred to the EU Member State that is responsible for examining their asylum application.

Of particular concern is also the absence of any meaningful standards at EU-level on the provision of adequate treatment to victims of torture and violence and adequate reception for such victims. Obviously Article 20 of the Reception Conditions Directive[32] does not suffice as in most Member States qualified treatment for asylum seekers who have been the victim of torture or violence is not or not sufficiently available[33]. The obligation placed upon the Member States to ensure that victims of torture should receive necessary treatment should be specified both in terms of creating the necessary capacity through competent medical assistance as well as through setting a standard at EU level identifying the components of a necessary treatment[34].

Question 7 : In particular, should the form and level of the material reception conditions granted to asylum seekers be further harmonised ?

Great disparities exist between the form and level of material reception conditions granted to asylum seekers in the Member States. Although it might be impossible to reach full harmonisation of reception conditions of asylum seekers throughout the EU, it is undeniable that in certain EU Member States measures need to be taken to upgrade and further harmonise the level of material reception conditions. This will require adoption of EU common standards at a considerably higher level than the current minimum standards as laid down in the Reception Conditions Directive.

In particular in a system where objective technical criteria determine which Member State is responsible for examining an asylum application this is particularly important in view of asylum seekers' economic and social rights under international human rights law. Article 11 of the International Covenant on Economic, Social and Cultural Rights, establishes the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions. Article 12 of the same Covenant confirms the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The current Dublin Regulation fails to take into account for instance the level of material reception conditions as well as access to health care in the process of determining the Member State responsible for examining an asylum application. In particular as regards reception needs for vulnerable groups such as unaccompanied minors or victims of torture this may be at odds with the Member States' obligations under international law.
The availability and accessibility in practice of an adequate standard of living for the asylum seeker in the responsible Member States should therefore have a more prominent role as regards the application of the Dublin Regulation. This would require the EU to define the objective of ensuring "a standard of living adequate for the health of applicants and capable of ensuring their subsistence" as laid down in Article 13, 2 of the Reception Conditions

[30] See ECRE, "Report on the Application of the Dublin II Regulation in Europe", March 2006, p. 153 and UNHCR, "The Dublin II Regulation. A UNHCR Discussion Paper", April 2006, p. 51.
[31] Article 3,1 of the Reception Conditions Directive.
[32] According to this provision "Member States shall ensure that, if necessary, persons who have been subjected to torture, rape or other serious acts of violence receive the necessary treatment of damages caused by the aforementioned acts".
[33] See International Rehabilitation Council for Torture Victims (IRCT), Comments of the International Rehabilitation Council for Torture Victims (IRCT) on the GREEN PAPER on the future Common European Asylum System, 18 July 2007, p.6.
[34] As to the need for specific measures as regards the identification of victims of torture in the processing of asylum application, see *infra*.

Directive more concretely in terms of availability, accessibility and acceptability in practice. Once such a norm has been adopted, the Dublin Regulation could accordingly be strengthened with an explicit reference to observance in practice of Member States' obligations under EU law with regard to reception of asylum seekers.

Further harmonisation requires also better implementation of the Reception Conditions Directive at a sufficiently high level in the Member States. Even more than two years after the deadline for implementation passed, the Reception Conditions Directive is still not implemented in a number of Member States. In cases where the Commission launched an infringement procedure against a Member State for not complying with its obligations under the Reception Conditions Directive, transfers to such Member States should be automatically suspended.

Question 8 – Should national rules on access to the labour market be further approximated ? If yes, in which aspects ?

Limited research carried out by academics and NGO's has already shown that differences remain between the Member States as regards access to the labour market, notwithstanding the existence of a minimum standard in the Reception Conditions Directive. Some Member States are not complying with the obligation to determine a point in time to allow access to the labour market (with a maximum of one year) for asylum seekers, while in most Member States additional conditions for granting access have been adopted which seriously undermine such access in practice[35]. As this seems to be the most important reason why asylum seekers in practice are denied access to the labour market, this should be tackled first. Amnesty International shares ECRE's analysis that granting access to the labour market within a reasonable period of time can help to prevent exclusion from the host society, to promote self-sufficiency and facilitate integration or re-integration upon return[36]. Any further approximation of national rules with regard to access to the labour market in the context of the CEAS should be aiming at making such access a reality in practice. In order to do so, the existing margin of discretion for the Member States in setting conditions for granting access to the labour market needs to be reconsidered.

Question 9 – Should the grounds for detention, in compliance with the jurisprudence of the European Court of Human Rights, be clarified and the related conditions and its length be more precisely regulated ?

With regard to the grounds for detention of asylum seekers, Article 18 of the Asylum Procedures Directive according to which "asylum seekers shall not be detained for the sole reason that he/she is an applicant for asylum" already marks the limits of this debate. In Amnesty International's view, Article 18 of the Asylum Procedures Directive must be interpreted as an obligation to avoid detention of asylum seekers in principle as detention is in most cases detrimental to a fair and qualitative examination of an asylum application. Amnesty International is opposed to the detention of asylum seekers and refugees except in the most exceptional circumstances as prescribed by international and regional law and standards[37]. Any initiative at EU level to clarify the grounds for detention of asylum seekers

[35] See ECRE, "The EC Directive on the Reception of Asylum Seekers: Are asylum seekers in Europe receiving material support and access to employment in accordance with European legislation?", AS3/11/2005/EXT/SH.

[36] See ECRE, "Information Note on the Council Directive 2003/9/EC of 27 January 2003 laying down Minimum Standards for the Reception Standards of Asylum Seekers", IN1/06/2003/EXT/HM, p. 5.

[37] Criteria for detention of asylum seekers have been identified in UNHCR EXCOM Conclusion No 44 (XXXVII) on detention of refugees and asylum-seekers of 1986. See also Office of the United Nations High Commissioner for Refugees Geneva, *UNHCR Revised Guidelines on applicable criteria and standards relating to the detention of asylum seekers*, February 1999. However, Amnesty International considers these grounds for detention to be rather broad and open to abusive interpretation, in particular with regard to the use of fraudulent documents or cases where asylum seekers have destroyed documents or the possibility to detain to determine the elements on which the claim for refugee status or asylum is based. These criteria may in practice undermine the exceptional nature and

should be based on the principle that detention will only be lawful when the authorities can demonstrate in each individual case that it is necessary and proportionate to the objective to be achieved and that it is on the grounds prescribed by law. In current State practice the grounds for detention of asylum seekers are in reality applied to facilitate immigration or return policies[38], not to guarantee a fair and satisfactory determination of the asylum claim which can be the only objective of an asylum procedure. While States have a sovereign right to control the entry, residence and removal of foreign nationals on their territory, that right must, however, be exercised in accordance with international refugee and human rights law, including Article 31 of the 1951 Refugee Convention.

As the EU Member States increasingly turn to detention of asylum seekers for a variety of reasons and the practice in some Member States is no longer exceptional[39], further clarification of rules with regard to the necessary safeguards related to detention and conditions of detention of asylum seekers should be seriously discussed at EU level. Amnesty International believes that the following elements should be taken into consideration in such debate.

The Asylum Procedures Directive could be strengthened with regard to the safeguards relating to detention of asylum seekers in those exceptional cases where detention would be acceptable. The only existing safeguard against arbitrary detention of asylum seekers in EU law is the obligation for the Member States in Article 18 of the Asylum Procedures Directive "to ensure that there is a possibility of speedy judicial review". Strengthening of safeguards with regard to the detention of asylum seekers should include the following principles:

- a clear presumption against detention of asylum seekers
- alternative non-custodial measures, such as reporting requirements, should always be considered before resorting to detention
- a prohibition on the detention of vulnerable people who have sought asylum, including : unaccompanied asylum-seeking children, torture survivors, pregnant women, those with serious medical conditions, the mentally ill and the elderly
- the decision to detain should always be based on a detailed and individualized assessment, including the personal history of, and the risk of absconding from the asylum procedure presented by the individual concerned. Such assessment should consider the necessity and appropriateness of detention, including whether it is proportionate to the objective to be achieved.
- each decision to detain should be automatically and regularly reviewed as to its lawfulness, necessity and appropriateness by means of a prompt, oral hearing by a court

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the general presumption against detention of asylum seekers. Such risk should be properly taken into account in any future EU debate on grounds for detention.

[38] Amnesty International also opposes the detention of people who have claimed asylum and whose claims have been dismissed by the authorities, unless, for example, the detaining authorities can demonstrate that there is an objective risk that the individual concerned would otherwise abscond, and that other measures short of detention, such as reporting requirements, would not be sufficient. The detention of *inter alia* rejected asylum seekers is the subject of the ongoing negotiations on the proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (Com (2005) 391). For detailed comments on this proposal see Amnesty International EU Office, "Returning "irregular" migrants: the human rights perspective", May 2006.

[39] See for instance Amnesty International, *United Kingdom: Seeking asylum is not a crime – Detention of people who have sought asylum* (AI Index EUR 45/015/2005), June 2005 and Amnesty International, *Italy: Asylum seekers and migrants have rights too*, AI Index EUR 30/007/2005. See also Amnesty International Austria, "Flight is not a crime. Background Paper to the Initiative of Forum Asyl", June 2007

or similar competent independent and impartial body, accompanied by the appropriate provision of legal assistance

- asylum seekers who are detained should be granted access to legal counsel, interpreters, doctors, refugee assisting organisations, members of their families, friends, religious and social assistance in addition to UNHCR and should be able to communicate freely with the outside world

- those detained should have access to appropriate medical treatment, and psychological counselling where appropriate

- any allegations of racism, ill-treatment and other abuses of those held in detention should be investigated immediately in compliance with relevant international standards and those responsible should be dealt with appropriately, including when warranted, by being brought to justice

- any asylum application, including where detention is deemed necessary, should be processed through a fair and effective asylum-determination procedure which includes an "in-country" right of appeal.

It would be particularly important for any future EU legislation to include a clear test of necessity of the detention in those exceptional situations where detention of asylum seekers could be justified. Relevant principles of international law imply that in detention cases the necessity or proportionality of the detention measure must be taken into account as it is an inherent part of the arbitrariness-test. According to the UN Human Rights Committee the meaning of "arbitrary" is to be given a broad application, which goes beyond mere unlawfulness to encompass "inappropriateness, injustice and lack of predictability" (Communication No. 305/1998). This was confirmed in the landmark decision *A.vs Australia* where the Human Rights Council concluded that the Australian Government's policy of mandatory detention of asylum seekers who arrived without documentation infringed Article 9 of the ICCPR[40]. Detention was considered arbitrary because no consideration had been given to the necessity of the detention in the particular case and the detention lasted for many years in very bad conditions[41].

Also, a number of benchmarks established in the case-law of the European Court of Human Rights relating to detention of asylum seekers should be reflected in any future EU legislation. These include the Court's interpretation of a procedure prescribed by law (meaning that it must be precise and accessible to protect the individual from arbitrary detention) and the notion of deprivation of liberty as established in *Amuur v. France*[42] and *Shamsa v. Poland*[43]. As a transit or waiting zone can be considered as a place of detention, whenever an asylum seeker is held there upon arrival, any EU legislation with regard to detention of asylum seekers must unambigously apply to such areas and must be considered under Community law as an integral part of the territory, as established by the European Court of Human Rights.

[40] Article 9, 1 ICCPR states: Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as established by law.

[41] See *A v Australia*, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993. Although the Human Rights Committee stated that it was not arbitrary per se to detain a person requesting asylum " remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context", see par. 9.2 .

[42] European Court of Human Rights, *Amuur v. France*, Judgment of 25 June 1996, par. 43-49. Detention in the transit zone of the airport amounts to deprivation of liberty and the absence of a clear legal regime in the transit zone violates the requirement that deprivation of liberty should always be in accordance with a procedure prescribed by law.

[43] See Cour européenne des droits de l'homme, Affaire *Shamsa c. Pologne*, Requêtes n° 45355/99 et 45357/99, 27 novembre 2003 (only available in French), par. 47.

Jurisprudence of the European Court of Human Rights has also stated that conditions in which detainees are held may amount to a violation of Article 3. As regards the detention of unaccompanied minors seeking asylum, the recent judgement in *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* concerning the detention of a five-year old unaccompanied minor originating from Congo found that the conditions of detention were such that they amounted to inhuman and degrading treatment as prohibited under Article 3 ECHR. The fact that the unaccompanied minor was detained together with adults whereas alternatives for detention were available was particularly taken into consideration. As the Court explicitly pointed to the fact that the minor's detention caused her considerable distress, it concluded that "the second applicant's detention in such conditions demonstrated a lack of humanity to such a degree that it amounted to inhuman treatment"[44]. The Court equally found a violation of Article 5 §1 of the ECHR as the conditions of detention were not adapted to the position of extreme vulnerability in which the applicant found herself as a result of her position as an unaccompanied foreign minor. In Amnesty International's view detention of unaccompanied minors (seeking asylum) should explicitly be prohibited in future EU legislation building on this recent jurisprudence. In *Dougoz v. Greece*, the Court found that the conditions of detention (overcrowding, insufficient sanitary and sleeping facilities etc) in combination with a detention period of 18 months violated Article 3[45]. Reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment regularly contain specific recommendations to States with regard to improvement of conditions in detention centres. Any EU legislation with regard to detention conditions could usefully be built on these recommendations.

As regards the duration of detention, no explicit international law standard or jurisprudence exists setting a clear limit. Generally speaking, the period of detention may have an influence on the assessment of the arbitrariness of the detention measure. As it was indicated by the European Court of Human Rights in *Saadi v. UK*, detention could be arbitrary on account of its length[46], although no clear time limits have been set so far by the Court nor the UN Human Rights Treaty monitoring bodies. However, it is clear that detention should not be for excessive periods and be proportionate for its lawful purpose. As certain EU Member States currently do not have any time limit for detention in their legislation, the merits of including a maximum time limit for those exceptional cases where detention of asylum seekers could be justified, should be assessed. However, as the ongoing discussions on the maximum detention period for 'irregular' migrants in the framework of the draft return directive clearly indicate, setting an acceptable time limit at EU level may prove to be very difficult. Therefore, and only if Member States want to maintain the practice of detention of asylum seeker, one option could be for EU legislation to impose an obligation upon the Member States to determine in national legislation a maximum duration of detention which should be reasonable in its length and at the expiry of which the asylum seeker must be automatically released. Such legislation would necessarily also embody the principle that detention should always be for the shortest possible time and must not be prolonged or indefinite. In addition, automatic judicial review of detention at very short regular intervals should be guaranteed.

Finally, any EU legislation on detention of asylum seekers should also contain a clear definition of detention measures and detention facilities. In Italy, for instance, the distinction

[44] See European Court of Human Rights, *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, Application No. 13178/03, judgment of 12 October 2006, par. 58,

[45] See European Court of Human Rights, *Dougoz v. Greece*, Application No. 40907/98, judgment of 6 March 2001.

[46] See European Court of Human Rights, *Saadi v UK* , Application no. 13229/03, judgment of 11 July 2006, par. 44. In a concurring opinion to the judgment Sir Nicolas Bratza stated : "The detention in the present case lasted for a total of 7 days, which the majority has found not to be excessive. While I can agree that the period of the applicant's detention at Oakington was within the limits of what could be regarded as acceptable, any period of detention significantly in excess of this period would in my view not be compatible with the first limb of Article 5 § 1 (f).

between reception and detention centres is not always very clear[47]. As the Reception Conditions Directive has been transposed, the law provides for reception of asylum seekers upon arrival in "identification centres" or in "first reception and rescue centres". Despite their name many of these centres are in reality detention centres and the legal provisions under which these centres have been operating are unclear. Such lack of clarity as to the legal status of the centre in which asylum seekers are being held may also potentially lead to violations of fundamental rights such as the availability of regular judicial review of the detention measure, detention to be used only as a last resort etc… In order to avoid any legal uncertainty as to the practice of detention and to safeguard the human rights of those subject to detention measures, any future EU legislation should include an obligation to clearly identify detention measures and detention facilities. Accordingly, increased EU-monitoring of the detention conditions, averages of detention periods and the observance of the limited grounds for detention of asylum seekers should be included.

If EU law is to include the grounds for detention of asylum seekers, it should contain a clear presumption against detention and only allow for detention in the most exceptional circumstances as prescribed by international and regional law. A clear test of necessity of detention of asylum seekers must be included. EU legislation should also unambiguously prohibit detention of vulnerable people who have sought asylum including unaccompanied children, torture survivors, pregnant women, those with serious medical conditions, the mentally ill and the elderly.

2.3. Granting Protection

Although the Qualification Directive has created a set of minimum standards for the interpretation and application of the refugee definition in the 1951 Geneva Refugee Convention and subsidiary forms of international protection as well as minimum standards with regard to the rights attached to international protection, a number of its provisions remain problematic from the perspective of international refugee and human rights law. Amnesty International believes that where necessary the EU standards should be raised so as to ensure that the CEAS is fully compatible with international law standards. This should be considered a first priority. This would require amendment of some of the core concepts in the Qualification Directive, whether as an amendment of the existing minimum standards as such or in a new instrument laying down more stringent or indeed common rules of interpretation instead of minimum standards.

Question 10 : In what areas should further law approximation be pursued or standards raised regarding the criteria for granting protection and the rights and benefits attached to protection statuses ?

Amnesty International believes that the current standards laid down in the Qualification Directive should be raised with regard to both criteria for granting protection and the rights and benefits attached to protection statuses. Among the main areas of concern in this area are the following aspects:

<u>Definition of refugee</u>

The current refugee definition in the Qualification Directive does not replicate the precise wording of the refugee definition in the 1951 Geneva Refugee Convention. By excluding EU

[47] See Amnesty International, *Italy. Temporary Stay-Permanent Rights: The treatment of foreign nationals detained in 'temporary stay and assistance centres (CPTAs)* (AI Index: EUR 30/004/2005), June 2005 and Amnesty International*, Invisible children: the human rights of migrant and asylum-seeking minors detained upon arrival at the maritime border in Italy (AI Index EUR 20/001/2006)*, February 2006.

nationals from its scope the current definition of a refugee in the Qualification Directive is clearly in contradiction with Article 3 the 1951 Geneva Convention which prohibits any discrimination based on the ground of nationality. Moreover, pursuant to Article 42 of the 1951 Geneva Refugee Convention, States parties may neither limit the personal scope of Article 1, nor make any reservation to Article 3. The current definition in the directive assumes that current and future EU Member States will never generate refugees or people in need of other forms of protection. However, the future is hard to predict and the work of organisations like Amnesty International shows that no country, including current and candidate EU Member States, can consider itself free from human rights violations[48]. It also sets a bad example for other regions in the world. The current restriction in the definition of a refugee in the Directive should be deleted to bring it fully in line with the 1951 Geneva Refugee Convention, while the same restriction with regard to beneficiaries of subsidiary protection should equally be deleted.

The definition of family member

The definition of family member in the Qualification Directive is restricted to the nuclear family (spouse and minor unmarried children who are dependent) insofar as the family already existed in the country of origin. This is too restrictive in view of the UNHCR Handbook[49] which stipulates that other dependants living in the same household normally should benefit from the principle of family unity. The definition of family members in the Temporary Protection Directive does include such family members[50]. Also families which have been formed during flight or upon arrival in the host state should be taken into account. As far as refugees are concerned, this would be consistent with the call for the consideration of liberal criteria in identifying those family members who can be admitted with a view to promoting a comprehensive reunification of the family in EXCOM Conclusions Nos. 24 and 88.

International Protection needs arising *sur place*

The current Article 5, par 3 of the Qualification Directive may lead to a breach of the Geneva Convention as it allows Member States to systematically reject subsequent applications "if the risk of persecution is based on the circumstances which the applicant has created by his own decision since leaving the country of origin". Amnesty International recalls the fundamental importance of political rights, such as freedom of conscience and expression and that there is no requirement in the Geneva Refugee Convention to assess whether the asylum seeker acted in 'bad faith'. What matters is whether or not the applicant demonstrates a well-founded fear of persecution or a real risk of suffering serious harm. Amnesty International holds that the asylum applicant should be considered as a person in need of international protection if the activities of the asylum seeker *sur place* come to the notice of the authorities of the individual's country of origin, are perceived by them as demonstrative of adverse political or other protected opinion or characteristic and give rise to a well-founded fear of persecution or risk to serious harm. Likewise, asylum applicants should be considered as persons in need of international protection if such activities have not yet come to the attention of the authorities of their countries of origin, but would give rise to a well-founded fear of persecution or risk to serious harm when they come to their attention. This notion should be clearly reflected in any future EU standard.

[48] See Amnesty International, Report 2007.
[49] UNHCR, *Handbook on Procedures and Criteria for determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Reedited, Geneva, January 1992.
[50] See Article 15, 1 of Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, *OJ* 2001 L 212/12 (hereafter Temporary Protection Directive).

Actors of protection

Amnesty International opposes the notion in Article 7 (1) (b) of the Qualification Directive that protection from persecution or serious harm may be provided by parties or organisations controlling the State or a substantial part of the territory of the State.

A *de jure* recognised authority that can be held accountable for its actions both internationally and nationally, and not a quasi-state, should deliver protection. State-like authorities are not or cannot be parties to international human rights instruments and therefore cannot be held accountable for non-compliance with international refugee and human rights obligations.

Similarly, the fact that a territory is under whole or partial control by a UN civilian and/or military administration should never be seen as a guarantee of being able to provide protection. Having regard to international organisations, recent history has proved that these organisations often do not have the necessary means to effectively prevent human rights violations and to ensure a reasonable degree of security. Example can be drawn from the case of Srebrenica where the population has undergone ethnic cleansing and massive violations of human rights while the city was supposedly under protection of the United Nations.

Internal Protection

Article 8, par. 3 allows application of the internal protection alternative even in cases where return to the country of origin is not possible due to technical obstacles to return. The denial of international protection to persons who have no accessible protection alternative must be considered to be in contradiction with Article 1 of the Geneva Refugee Convention and with Article 3 of the ECHR[51]. An internal protection alternative must be legally and safely accessible for the individual concerned. In addition, future Community law with regard to the internal flight alternative should also clearly reflect the principle that there is a strong presumption against finding internal protection to be a viable alternative to international protection if the agent of persecution is, or is associated with, the State. Furthermore, an individual examination must have shown that the human rights situation in the area concerned is stable, that the individual will have real and effective access to protection in that area and is protected against indirect refoulement. Finally, an internal protection alternative must also be reasonable, meaning that it may not cause undue hardship[52].

Membership of a particular social group

In order to be considered as particular social group, Article 10, 1 (d) of the Qualification Directive requires two cumulative conditions to be met: members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it and the group must have a distinct identity in the relevant country, because it is perceived as being different by the surrounding society. The definition in the directive reflects the two main theories of what constitutes a particular social group.

[51] See European Court of Human Rights, *Salah Sheekh v. The Netherlands*, Application No. 1984/04, 11 January 2007, par. 141 where the Court explicitly stated that "as a precondition for relying on an internal flight alternative, certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, to gain admittance and be able to settle there, failing which an issue under Article 3 may arise, the more so if in the absence of such guarantees there is a possibility of the expellee ending up in a part of the country of origin where he or she may be subjected to ill-treatment".

[52] See UNHCR, Guidelines on International Protection: "Internal Flight or Relocation Alternative within the context of Article 1(A)2 of the 1951 Convention and/or 1967 Protocol relating to the status of refugees", par. 7: "Can the claimant, in the context of the country concerned, lead a relatively normal life, without facing undue hardship? If not, it would not be reasonable to expect the person to move there".

However, in reality a group that could be considered as a particular social group within the meaning of the Refugee Convention does not always reconcile both elements of this definition. A group may be defined by an innate characteristic but not necessarily seen as being different by the surrounding society or vice-versa[53]. EU law should clearly reflect that either of both definitions may suffice to qualify a group as a particular social group within the meaning of the Geneva Refugee Convention[54].

Definition of serious harm

The definition of serious harm in the Qualification Directive being the product of a long and difficult negotiation process, the result is at the same time complex and dissappointing. This is in particular the case with regard to Article 15 (b) and (c).

The scope of Article 15 (b) is limited to situations of "torture, inhuman and degrading treatment or punishment in the country of origin". According to the Commission's Green Paper, "persons who are not removable on ill health grounds are not eligible for international protection as currently defined in the first stage legal instruments". Although there have been attempts during the negotiations of the Qualifications Directive to exclude situations such as the one dealt with in *D. v. UK* from its scope, in Amnesty International's view the final text of the Directive does not. However, certain Member States have in their legislation explicitly excluded such cases from the scope of subsidiary protection. As there seems to be a lot of confusion about whether or not such cases come within its scope, as a minimum Article 15 (b) needs to be redrafted so as to unambigously include these cases, in line with the jurisprudence of the European Court of Human Rights.

However by limiting Article 15 (b) to situations of torture and inhuman and degrading treatment or punishment in the country of origin, an opportunity was missed to adopt a more open and flexible instrument that offers protection in all situations where removal would result in a serious violation of other human rights as well (as far as they are not covered by the refugee definition). Persons who may not be removed in application of relevant fundamental rights, additional to the prohibition of torture or inhuman or degrading treatment, such as the right to family and private life[55] or the right to a fair trial[56] are currently not covered by Article 15. As a result, these persons are often left in a legal limbo : while they can not be removed, they are often not granted a secure legal status. Such situations would be avoided by extending the scope of subsidiary protection to all situations where any individual is entitled to a "right of non-return" under international human rights law and international humanitarian law[57]. The original Commission Proposal reflected the

[53] See UNHCR, Guidelines on International Protection : « Membership of a particular social group » within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 7 May 2002, par. 13: "If a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society. So, for example, if it were determined that owning a shop or participating in a certain occupation in a particular society is neither unchangeable nor a fundamental aspect of human identity, a shopkeeper or members of a particular profession might nonetheless constitute a particular social group if in the society they are recognized as a group which sets them apart."

[54] Such an interpretation is supported in *Fornah v. Secretary of State for the Home Department* [2006] UKHL 46.

[55] The European Court of Human Rights has found that, under certain circumstances, the decision to expel an individual may constitute a breach of Article 8. See for instance European Court of Human Rights, *Beldjoudi v. France*, Judgement of 26 March 1992, par. 79 and the above cited case of *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Judgment of 12 October 2006, par. 86).

[56] See European Court of Human Rights, *Soering v. the United Kingdom*, Application no. 14038/88, judgment of 7 July 1989. In this case, the Court held that the right to a fair trial holds such a prominent place in a democratic society that it "does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country" (par. 113).

[57] Amnesty International believes that the evolving nature of State's obligations under international human rights law were better reflected in the Commission's original proposal that referred to a well-

evolving nature of international human rights law and international humanitarian law better by using the expression "violation of a human right, sufficiently severe to engage the Member State's international obligations"[58].

The wording of Article 15 (c) is inherently confusing and raises more questions as to its beneficiaries than it provides for a workable and meaningful standard. In particular the requirement of showing a 'serious and individual threat' by reason of 'indiscriminate violence' is inherently contradictory and could be interpreted as requiring the proof of being singled out which is impossible in such a situation[59]. While further research is needed, it is clear that the protection system within the EU would certainly benefit from a more clear definition of the protection grounds under Article 15.

Recently, difficulties have come to light in the application in practice of Article 15 (c) with regard to asylum applications of Iraqi's. Some Member States do not consider the situation in Iraq to be an internal armed conflict, while questions remain as to what constitutes indiscriminate violence and how an applicant can show a 'serious and individual' threat in a situation of indiscriminate violence[60]. The meaning of 'a civilian's life or person' in this context is also open to debate and restrictive interpretation. In this perspective it should be recalled that situations of generalized violence are also dealt with in the Temporary Protection Directive[61]. This instrument applies to situations of mass influx and protects persons who have had to leave their country or region of origin and are unable to return because of the situation prevailing in that country and refers in particular to (i) persons who have fled areas of armed conflict or endemic violence and (ii) persons at serious risk of, or who have been the victims of, systematic or generalized violations of their human rights. The criteria laid down in this instrument (in particular the inclusion of both areas of armed conflict and endemic violence and systematic or generalized violations of human rights) could usefully inspire the debate about clarification of Article 15 c in this respect.

Amnesty International believes that a more workable and inclusive definition of subsidiary protection is necessary in order to provide the EU with the necessary tools to address situations of indiscriminate or generalized violence or inhuman or degrading treatment or other serious human rights violations properly. Such a definition must be flexible enough in order to enable the EU to keep track of developments in international human rights law and jurisprudence and must obviously uphold the primacy of the 1951 Geneva Refugee Convention. As far as situations of indiscriminate or generalized violence are concerned, the

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founded fear of being subjected to "a violation of a human right, sufficiently severe to engage the Member State's international obligations".

[58] COM(2001) 510 final.

[59] Recital 26 of the Qualification Directive adds to such reading by stipulating : « Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm ». When interpreted and applied in a very strict way, this could render Article 15 c meaningless. It should be noted however, that other Member States such as Belgium and Lithuania have explicitly deleted the word individual in Article 15 c when transposing the provision into national law. See D. Vanheule, "The Qualification Directive: A Milestone in Belgian Asylum Law" in Karin Zwaan (ed.), *The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, Wolf Legal Publishers, Nijmegen, 2007, 74 and L. Jakuleviciene, "Implementation of the EU Qualification Directive in the Republic of Lithuania" in K. Zwaan (ed), ibid., 128.

[60] In a recent judgment of the European Court of Human Rights on the risk of violation of Article 3 ECHR upon return to Somalia of a member of the Ashraf minority, the Court ruled that "it might render the protection offered by that provision illusory if, in addition to the fact that he belongs to the Ashraf – which the Government have not disputed -, the applicant be required to show the existence of further special distinguishing features". The Court comes to this conclusion "on the basis of the applicant's account and the information about the situation in the "relatively unsafe" areas of Somalia in so far as members of the Ashraf minority are concerned" and therefore it finds that "it cannot be required of the applicant that he establishes that further special distinguishing features, concerning him personally, exist in order to show that he was, and continues to be, personally at risk. See European Court of Human Rights, *Salah Sheekh v. the Netherlands*, par. 148.

[61] See Article 2 (b) of the Temporary Protection Directive.

underlying rationale of such definition should be that subsidiary protection should be given to persons fleeing individually from situations in which protection would be granted in case of mass influx.

Cessation and exclusion from international protection

Current provisions in the Qualification Directive on **cessation of and exclusion from refugee status** should be brought in line with the wording and the meaning of the relevant provisions in the Geneva Refugee Convention.

With regard to cessation this means that EU standards should explicitly include the "compelling reasons arising out of previous persecution" exception as has been laid down in Article 1C (5) and (6) of the Geneva Refugee Convention. In certain cases persecution may have been so traumatizing that the individual can not be expected to return to the country of origin, even if the circumstances in connection with which he or she has been recognized as a refugee have ceased to exist and in theory the individual can avail him or herself again of the protection of his or her country. This humanitarian principle should be firmly rooted in the future CEAS.

The exclusion clauses in the Qualification Directive both with respect to the refugee status and the subsidiary protection status present an unfortunate and very confusing mix of concepts of exclusion, cessation, cancellation and revocation. Some of the provisions are inconsistent with the Geneva Refugee Convention and can not be maintained. This is the case for Article 12(2) (b) that could be interpreted as partly lifting the temporal limitation on the application of Article 1 F(b) of the 1951 Geneva Convention included in the words "prior to his or her admission as a refugee". By suggesting that the latter means "the time of issuing a residence permit based on the granting of refugee status" it allows for an interpretation that is broader than intended by the Geneva Refugee Convention. Given the declaratory nature of refugee status, admission must be understood as mere physical presence in the host country. A person who has committed such a crime after his arrival in the asylum state may still have a well-founded fear of persecution and therefore be a genuine refugee according to Article 1A of the Geneva Convention. Crimes committed on the territory of the asylum state are covered by Article 33, 2 of the Geneva Refugee Convention that deprives a refugee of the benefit of the non-refoulement provision, but does not exclude or deprive a refugee from refugee status. A similar confusing and worrying mix of exclusion clauses and exceptions to the non-refoulement principle in Article 33, 2 of the 1951 Geneva Convention is reflected in Article 14 (4) to (6) of the Qualification Directive. This finally results in an extension of the grounds for exclusion which is not in conformity with Articles 1 F and 42 of the Geneva Refugee Convention.

Similar concerns exist with regard to the exclusion clauses applicable to subsidiary protection (□rticle 17 of the Qualification Directive), which are broader than the ones applying to refugees. Although there is no international legal instrument on subsidiary protection comparable to the Geneva Refugee Convention, Amnesty International believes that there is no justification in law or practice for the application of broader exclusion clauses with regard to persons in need of subsidiary protection. As a matter of principle, in a single procedure the same exclusion clauses should be applicable to all protection grounds considered in such procedure.

Given the serious consequences that erroneous application of exclusion and cessation clauses as well as the exceptions to the non-refoulement principle in Article 33, 2 of the Geneva Refugee Convention may have for the refugees concerned, it is crucial that the EU legal framework embodies a clear definition of those concepts that fully corresponds with international law.

Rights and benefits attached to international protection status

Amnesty International believes that there should be no discrimination in the rights attached to refugee status or subsidiary protection status. Amnesty International believes that access to employment, education and long term residence permits are essential elements for the prospect of integration of persons found to be in need of international protection in the society of the host country, provided that adequate programmes are put into place in order to ensure such integration prospects. Therefore existing differences as regards the content of both statuses should be eliminated with the aim of providing the highest possible level of enjoyment of rights by bringing the rights associated with subsidiary protection in line with those associated with refugee status. The future CEAS should not maintain the existing possibility in the Qualification Directive to differentiate between both statuses with regard to crucial rights such as

- maintaining family unity (possibility to define conditions for access to a number of benefits for family members of beneficiaries of subsidiary protection),
- travel documents (possibility to limit the obligation to issue travel documents to beneficiaries of subsidiary protection only for humanitarian reasons)
- access to employment (which can be made dependent on the situation of the labour market in the Member States in the case of beneficiaries of subsidiary protection),
- access to social welfare (which may be limited to core benefits for beneficiaries of subsidiary protection),
- access to health care (which may be limited to core benefits for beneficiaries of subsidiary protection),
- access to integration facilities (which must only be granted to beneficiaries of subsidiary protection when considered appropriate by Member States).

Such differentiation can only contribute to a system of various classes of protected persons, worsening the already weak economic and social position of refugees and other protected persons in European societies.

Beneficiaries of subsidiary protection, like refugees should equally have the possibility to obtain long term residence status after a period of residence in a Member State. Amnesty International therefore welcomes the recent Commission proposal for a Council directive amending Directive 2003/109/EC to extend its scope to beneficiaries of international protection as it will remedy the existing discrimination vis-à-vis other third country nationals under this directive[62]. However, Amnesty International regrets the fact that the transfer of protection between Member States has not been included in the Commission's proposal and believes that this issue should be dealt with under the CEAS as well.

Question 11 + 12 – What models could be envisaged for the creation of a "uniform status"? Might one uniform status for refugees and another for beneficiaries of subsidiary protection be envisaged ? How might they be designed ?/ Might a single uniform status for all persons eligible for international protection be envisaged ? How might it be designed ?

As indicated above, there are no objective reasons why persons recognised as being in need of subsidiary protection should be given fewer rights than refugees with 1951 Geneva Convention status. In light of the single procedure to be developed under the CEAS it would be consistent to have a uniform status granting the same set of rights for all beneficiaries. Member States are under an international obligation to maintain refugee status as a distinct category but nothing prevents states to grant the same rights to persons that do not qualify as refugees but are in need of protection. In Amnesty International's view the option of a single uniform status as interpreted in this sense should be further explored. However, in elaborating this option, the existing good practices in a number of Member States should be

[62] COM(2007) 298 final.

used as a guideline for creating a uniform status at a high level. A single uniform status model should never be a pretext for lowering existing rights attached to refugee status but an opportunity to upgrade the content of the subsidiary protection status in those Member States where such a status is poorly developed.

Core concepts in the Qualification Directive such as the definition of family member, actors of protection, protection needs arising *sur place*, internal protection, membership of a particular social group, exclusion and cessation clauses and the definition of subsidiary protection should be brought in line with international refugee and human rights law. There should be no discrimination in the rights attached to refugee status or subsidiary protection status. Existing possibilities to differentiate between both statuses in the Qualification Directive should be removed, resulting in a uniform status for those granted protection within the CEAS.

Question 13 – Should "further categories of non-removable persons" be brought within the scope of Community legislation ? Under what conditions ?

The issue of non-removable persons is indeed a very important one in Europe today. As the question relates to "further" categories of non-removable persons, this issue should be clearly distinguished from issues related to the scope of subsidiary protection. The latter should include cases such as persons that are not removable on ill health grounds or because removal would result in breaches of the right to family life[63]. In order not to undermine the regime of international protection it is important to clarify what is meant by "further" categories of non removable persons.

There are various reasons why third country nationals are *de facto* or legally non- removable today. In a number of cases people have been wrongfully denied protection because of poor quality decision-making or other flaws in the asylum procedure while they could eventually not be removed due to the situation in the country of origin or habitual residence. Obviously, Member States should re-address their situation immediately and provide protection where necessary. In the long term, putting in place high quality decision-making and fair asylum procedures thus ensuring that those who qualify under one of the grounds for international protection are effectively recognized as such could reduce the number of cases that are today in certain Member States considered as 'non-removable'.

Having said this, Amnesty International acknowledges that in a number of situations third country nationals, including rejected asylum seekers are non-removable for what can be labelled as technical or administrative reasons, for instance because the country of origin refuses to readmit its own nationals, or because the person is not fit to travel. The reason why such persons are not able to return may be of a temporary nature or have a permanent character. As in many Member States third country nationals in such a situation are simply left in legal limbo leading to destitution[64], bringing such categories within the scope of Community legislation could have an added value. Such legislation should as a minimum provide for access to basic economic, social and cultural rights for the third country nationals concerned as guaranteed under international law and provide them with a secure legal status at least until the obstacle to their return no longer exists. The Commission proposal for a Council directive on common standards on return of illegally staying third country nationals already touched upon the issue by imposing an obligation upon Member States to ensure a minimum level of guarantees in case a return decision has to be postponed for *inter alia* technical reasons. Any future EU legislation addressing the situation of non-removable persons should take into account and complement, where necessary, the final result of this

[63] See also Question 10.
[64] See Amnesty International UK, *Down and out in London. The road to destitution for rejected asylum seekers*, November 2006.

ongoing legislative process. However, more fundamentally the question arises whether such situations should be dealt with as part of the CEAS as such or rather as an aspect of the broader issue of rights of migrants under EU law.

Question 14 – Should an EU mechanism be established for the mutual recognition of national asylum decisions and the possibility of transfer of responsibility for protection? Under what conditions might it be a viable option? How might it operate?

An EU mechanism for the mutual recognition of national negative asylum decisions already exists since the Dublin system was established in 1990. Indeed, once an asylum application has been rejected by one Member State this is *de facto* recognised by all other Member States as they should not take into account the same application again. However, until now the mutual recognition of positive asylum decisions was never part of this system. This is in contradiction with a recent and continuous evolution both in the jurisprudence of the Court of Justice and at legislative level to increasingly grant rights of free movement within the EU to legally residing third country nationals. In Amnesty International's view, there are no good reasons why refugees and beneficiaries of subsidiary protection should be treated differently from other third country nationals with respect to EU legislation on free movement of third country nationals. As they have a legal right of residence in the EU, they should be granted the same treatment as other categories of third country nationals that are legally residing in the EU.

As regards refugees this can also be derived from the 1951 Geneva Refugee Convention itself. The latter imposes an obligation upon the States Parties to accord to refugees the same treatment as is accorded to aliens generally, except where the Convention contains more favourable provisions[65]. As indicated above, the recent Commission proposal to extend the scope of the long-term residence directive to refugees and beneficiaries of subsidiary protection is a logical step which is to be welcomed. The latter proposal does not include the transfer of responsibility for protection between EU Member States in case a refugee or beneficiary of subsidiary protection establishes him or herself in another Member State. According to the Commission this issue would merit a separate proposal as transfer of protection may occur even before long-term residence is acquired and it would require a sufficient level of harmonisation of Member States' asylum procedures.

Amnesty International appreciates the legal complexities of creating a system of transfer of responsibility for protection between the Member States, but is of the opinion that such a system is absolutely necessary in a CEAS. As not all EU Member States have ratified the European Agreement on Transfer of Responsibility for Refugees, a number of Member States interpret the scope of this agreement very restrictively and as beneficiaries of subsdiary protection are outside the scope of the European Agreement[66], there are obvious advantages in creating such a system as part of the CEAS.

2.4. Cross-cutting issues

Question 15- How could the provisions obliging Member States to identify, take into account and respond to the needs of the most vulnerable asylum seekers be improved and become more tailored to their real needs? In what areas should standards be further developed?

The needs of vulnerable asylum seekers in the asylum process are sporadically dealt with in the various EU legal instruments relating to asylum. In line with the general minimum standard approach, such provisions go rarely beyond setting the principle that their speficic

[65] See Article 7, 1 of the 1951 Geneva Refugee Convention.
[66] See DRC, MPI and IMES, Study on the transfer of protection status in the EU, against the background of the common European asylum system and the goal of a uniform status, valid throughout the Union, for those granted asylum, 25 June 2004.

needs must be taken into account without setting detailed rules with regard to mechanisms to identify who is a vulnerable asylum seeker, the procedural consequences of identifying a person as a vulnerable asylum seeker or the provision of reception and medical facilities adapted to their vulnerability. As a result of the absence of clear standards in EU legislation, here too, practice varies widely between the Member States.

This needs to be tackled in light of the future CEAS so as to ensure a sufficiently high level of protection for vulnerable asylum seekers in the three areas mentioned (identification, procedural consequences, reception conditions and medical treatment). The category of vulnerable asylum seekers seems to be limited in the Green Paper to traumatised asylum seekers and unaccompanied minors. While Amnesty International agrees with the Commission that these are the most vulnerable categories of asylum seekers, it should be taken into account that other categories of asylum seekers such as the elderly, (mentally) disabled and illiterate are equally vulnerable in a highly bureaucratic and administrative process such as the asylum procedure. Appropriate interview techniques should be developed with regard to these categories as well.

In Amnesty International's view, more detailed rules could be developed at EU level with regard to the assessment of claims based on gender-specific persecution in order to underpin a more harmonised gender-sensitive interpretation of international protection grounds in the CEAS. It should be recalled that extensive guidelines on the assessment of gender-related persecution have already been developed by UNHCR[67]. These guidelines should therefore be the main source of inspiration for (if not be copied into) any specific EU initiative in this field. The issue of the need for detailed rules on child-specific persecution should be carefully examined in close cooperation with UNHCR, as guidelines are in the process of being adopted in this field. UNHCR should always be fully involved in any EU initiative in these fields, which should primarily aim at making UNHCR guidelines more effective and enforceable within the CEAS.

As far as special needs of unaccompanied children in the asylum procedure are concerned, existing EU legislation should be made more consistent and in general standards should be improved. Here too, the guidelines developed by UNHCR with regard to unaccompanied children seeking asylum[68] and to specific recommendations made by other NGOs specialised in the field must form the basis for any legislative initiative. Common standards should be developed at EU level with regard to age assessment of unaccompanied minors and the application of the principle of the benefit of the doubt, the principle that asylum applications of unaccompanied minors should never be processed in accelerated procedures and the principle that unaccompanied minors should always be interviewed by sufficiently qualified staff who has the necessary knowledge of the special needs of minors and be assisted by a equally qualified interpretor. Equally, unaccompanied minors should never be detained.

Also with regard to survivors of torture and traumatized asylum seekers current obligations of Member States under the asylum directives should be further developed in the second stage of the CEAS. Common standards should be developed incorporating five essential principles with regard to the processing of asylum applications of torture survivors[69] :

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[67] UNHCR, Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 7 May 2002.

[68] UNHCR, Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum, February 1997 and UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, Reedited, Geneva, January 1992, par. 213-219.

[69] These principles have been identified by CARE FULL, an initiative of Amnesty International (Dutch section), the Dutch Council for Refugees and Pharos Knowledge Centre Refugees and Health to raise awareness for the vulnerable position of victims of torture and ill-treatment in the asylum procedure. See also CARE FULL*, Medico-legal reports and the Istanbul Protocol in asylum procedures*, Edited by René Bruin, Marcelle Renneman, Evert Bloemen, Utrecht Amsterdam, 2006.

- medico-legal reports are given due weight in the decision-making process. This is currently not the case in a number of EU Member States who apply different practices regarding the role and use of these reports in asylum procedures
- the Istanbul Protocol[70] should be used as a basis and framework for rules on medical examinations and medico-legal reports
- asylum seekers are given sufficient time and facilities to relate their asylum motives and to support their statements, by –amongst others- a medical examination. Asylum applications from survivors of torture and ill-treatment shall not be processed in an accelerated asylum procedure[71]
- acknowledgment of health problems takes place as early as possible in the asylum procedure,
- in case of doubt about the mental health of the asylum seeker, an independent mental health expert provides an opinion on the mental health of the asylum seeker and his or her ability to give accurate and coherent statements during the interview. Asylum authorities are to be trained to recognise the signs of torture or trauma and request medical and or psychological expertise.

As regards training of decision-makers and interpretors with regard to the special needs of vulnerable asylum seekers, opportunities within the European Asylum Curriculum (EAC) as developed within the framework of the General Directors' Immigration Services Conference (GDISC) should be further explored. The close cooperation of NGOs, UNHCR and academic experts in developing the EAC offers a promising model for incorporating the views and experiences of all stakeholders in training programmes for asylum bodies in the EU. This is particularly important when dealing with the most vulnerable categories of asylum seekers.

Question 16 – What measures should be implemented with a view to increasing national capacities to respond effectively to situations of vulnerability ?

Amnesty International agrees with the suggestions made by the European Commission and welcomes the emphasis on the need to reach out to all actors involved, including NGOs. Enhancing national capacities can be done in various ways, but incentives at EU-level in the field of training are crucial at a first stage. As a minimum the CEAS will require the development of specific EU-wide training programmes for all professionals, including medical experts, dealing with vulnerable asylum seekers. Training modules developed in the framework of the EAC as mentioned above should be extended to include professionals in the fields of health and education, psychologists, linguistic experts, cultural anthropologists as well as lawyers, NGOs and social workers. EU initiatives to increase the involvement at the national level of independent medical experts in the assessment of asylum claims of survivors of torture and ill-treatment could be particularly helpful.

Question 18 – In what further areas would harmonisation be useful or necessary with a view to achieving a truly comprehensive approach towards the asylum process and its outcomes ?

As opposed to refugees, family reunification of beneficiaries of subsidiary protection is excluded from the scope of the Council Directive on the right to family reunification[72].This means that family reunification rights of those granted subsidiary protection status depend on national legislation in the Member State concerned. Although international human rights law with regard to the right to family life must, of course, always be observed by States, important differences exist between the Member States as regards safeguards and conditions for family reunification with regard to beneficiaries of subsidiary protection. This important

[70] Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Published by the High Commissioner for Human Rights, United Nations Publications, available at www.ohchr.org.
[71] See also reply to question 3 and footnote 27.
[72] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, *OJ* 2003 L 251/12.

gap should be addressed as soon as possible so as to ensure that both refugees and beneficiaries of subsidiary protection enjoy the same right to family reunification under EC law.

Secondly, as indicated above, the issue of transfer of responsibility for protection between EU Member States is not included in the recent Commission proposal to extend the scope of the long-term residence directive to beneficiaries of international protection. A CEAS should include the full mutual recognition of protection statuses recognised by one Member State in all other Member States.

Any elaboration of common approaches with regard to gender-related and child-specific persecution at EU level should always be done in close collaboration with UNHCR and in full respect of its guidelines.

Procedural safeguards for vulnerable groups such as unaccompanied children and traumatised asylum seekers and victims of torture or ill-treatment should be strengthened through EU legislation. Such legislation must faithfully reflect relevant UNHCR guidelines and recognise the value of the Istanbul Protocol for examining asylum applications of victims of torture. Medico-legal reports should be given due weight in the CEAS.

Gaps in the harmonisation process such as the right to family reunification for beneficiaries of subsidiary protection and full mutual recognition between Member States of protection statuses granted should be tackled.

III. Implementation – Accompanying measures

Question 19 – In what other areas could practical cooperation activities be usefully expanded and how could their impact be maximised? How could more stakeholders be usefully involved? How could innovation and good practice in the area of practical cooperation be mainstreamed?

Practical cooperation in the field of asylum can potentially cover a wide range of activities of asylum authorities. There are obvious advantages in increased practical cooperation between asylum authorities for the purpose of harmonising asylum policy within the CEAS. It could include not only practical cooperation in the field of country of origin information, but also training and technical assistance of other Member States facing particular pressures on their asylum systems. As not much progress has been made with regard to these aspects so far, priority should be given to developing such practical cooperation in these fields first before considering other areas of cooperation.

As it is stated in the Commission Communication on practical cooperation, the key priority of practical cooperation must be improving the quality of decision-making in asylum procedures. A prerequisite for high quality decision-making in the CEAS is reliable, independent and high quality country of origin information that is common to all EU Member States and accessible to both asylum authorities, asylum seekers and their representatives. The adoption of common guidelines on the production of country of origin information is of course an important aspect of such practical cooperation. Common guidelines on fact-finding missions in countries of origin are equally essential so as to promote their acceptance by asylum authorities in other Member States.

Secondly, country of origin information should also be impartial and take into account various sources. UNHCR and NGOs such as Amnesty International often gather invaluable information that may not always be at the disposal of governmental bodies. Asylum bodies in the Member States as well as EU institutions should recognise the specific expertise of NGOs in this field. Amnesty International's worldwide network and frequent fact-finding missions to countries of origin often produce crucial information relevant to the assessment of asylum claims.

In the current state of play, Amnesty International believes that the establishment of a common database of high quality country of origin information should remain a priority for the Member States and the Commission. Such a system should also ensure the accessibility of Country of Origin information to asylum seekers and lawyers and NGOs assisting asylum seekers in the asylum procedure. In some systems, COI is only accessible to the decision-makers or is only partly disclosed to asylum-seekers and often even after a first instance decision has been taken. Such practice not only puts the asylum-seeker in a weaker position, it is also counterproductive and inefficient. However, this does not exclude that so-called sensitive information or information that might endanger the source when made public, could be treated on a more confidential basis and could be behind a password in the joint database. However, the content of the information concerned or at least a short summary of it should be shared with the asylum seeker or his counsellor when a negative decision is being based on that kind of information in order to confront the individual with the information concerned as soon as possible.

Developing a system that makes the most important decisions and judgments in the Member States readily available to all stakeholders involved could be considered as one of the areas for extension of practical cooperation. While the jurisprudence of the European Court of Human Rights and the European Court of Justice is easily accessible and available, this is not always the case for jurisprudence of appeal bodies of the Member States nor first instance decisions.

Another area where practical cooperation between asylum authorities could usefully be considered and strengthened is resettlement. Here too, pooling of resources of Member States in organising selection of persons eligble for resettlement or pre-and post-resettlement orientation would obviously be in the interest of all concerned. Should it be established, a European Asylum Support Office could have a meaningful role here as well[73].

Broadening practical cooperation to include other stakeholders involved should indeed be considered. This should include in particular medical experts in the field of traumatised asylum seekers and survivors of torture and ill-treatment as asylum authorities could benefit to a great extent from their expertise in order to identify such victims as early as possible in the asylum procedure and address their specific needs. As the ultimate aim of practical cooperation is to improve quality of decision-making in the field of asylum, the involvement of border guards and law enforcement officials should primarily be limited to the issue of referral of asylum seekers to the competent asylum authorities.

Question 20 – How might practical cooperation help to develop common approaches to issues such as the concepts of gender- or child-specific persecution, the application of exclusion clauses or the prevention of fraud ?

In Amnesty International's view, practical cooperation would be more suitable to develop common approaches to gender or child-specific persecution than as regards the application of exclusion clauses or the prevention of fraud.

If used in a spirit of strengthening protection, practical cooperation could contribute to developing common approaches with regard to gender or child specific persecution in order to diminish diverging practices between the Member States. The Qualification Directive states that the refugee definition shall be interpreted with an awareness of gender, while the Asylum Procedures Directive does not contain specific safeguards with regard to female asylum seekers. Promotion of best practice in the Member States with regard to gender-related persecution, including sexual violence, forced abortion or sterilisation, female genital mutilation, punishment for transgression of social mores, "honour"-related crimes or trafficking through practical cooperation could usefully feed into the development of common approaches at EU-level.

However, as indicated above, extensive guidelines with regard to gender-related persecution have already been adopted by UNHCR and should thus be the basis for any common approach. Similar guidelines on child-specific persecution are currently being discussed within UNHCR. Practical cooperation in order to develop a common approach in those fields should always be conducted in close cooperation with UNHCR in order to ensure that standards established under international law are not watered down through practical cooperation at EU level. However, in general, the added value of the adoption of common approaches at EU level might be limited as long as they are not legally binding.

With regard to the application of exclusion clauses, Amnesty International believes that practical cooperation can not remedy the fact that relevant provisions in the Qualification Directive are not in line with the Geneva Refugee Convention. As exclusion clauses are to be interpreted restrictively and UNHCR guidelines have been adopted already, practical cooperation on this issue should unambiguously be based on the exclusion clauses in the Refugee Convention as interpreted by UNHCR. As a priority, relevant provisions in the Qualification Directive should be amended as indicated above.

However, as already indicated in the answer to the previous question, Amnesty International believes that as a priority practical cooperation should essentially focus on the pooling of resources with regard to technical aspects of the CEAS such as country of origin information or the organisation of an EU-wide resettlement scheme. In any case, practical cooperation

[73] See also Question 21.

should never be used as a backdoor to undermine core concepts of international protection through the sharing of bad practice between Member States rather than promoting best practice.

Question 21 + 22 - What options could be envisaged to structurally support a wide range of practical cooperation activities and ensure their sustainability? Would the creation of a European Support Office be a valid option? If so, what tasks could be assigned to it? / What would be the most appropriate operational and institutional design for such an office to successfully carry out its tasks ?

Current initiatives at EU level in the field of pratical cooperation are conducted under the GDISC forum or through other structures such as EURASIL, the Committee on Immigration and Asylum or contact committees which often lack proper accountability, transparency or even a legal basis. While it is clear that a structural support of such activities (within the boundaries as set out in the previous questions) is needed in order to come to concrete results, two main options can be envisaged to achieve this. Either the Commission is given the appropriate resources and staff to cope with this additional task or a new structure is being set up to coordinate practical cooperation between the Member States. In both scenarios sufficient guarantees about accountability and transparency must be given. The European Asylum Support Office as suggested by the European Commission in its Communication on practical cooperation could be a viable option if both conditions are met. This should include a full democratic control of the Office's activities by the European Parliament beyond a mere annual debate on its work programme.

At the current level of harmonisation it is clear that such an Office should primarily have an operational and supporting role for practical cooperation between asylum authorities. The 'management' of asylum expert teams[74], coordination of fact-finding missions and management of the Common COI database are a few of the tasks such an office could perform. In addition, it could have a coordinating and at the same time stimulating role with regard to resettlement activities of the Member States in the context of regional protection programmes or a possible future EU-wide resettlement scheme. Finally, permanent monitoring of implementation and application of the EU asylum acquis in practice could equally be an important task for this new structure.

Practical cooperation in the field of asylum should as a priority focus on further developing high-quality country of origin information that is accessible to all actors in the asylum procedure. Resettlement and technical assistance in situations of particular pressure are additional areas where practical cooperation could be envisaged. Such activities could be more efficiently coordinated through a European Asylum Support Office that functions transparently and under full democractic control.

[74] As the EU External Borders Agency FRONTEX and the Rapid Border Intervention Teams do not have a protection mandate, asylum expert teams set up in coordination with UNHCR could have a complementary role in this regard.

IV. Solidarity and Burden Sharing.

There is no concept so much called for and yet so absent in the European Union's asylum policy than solidarity and burden sharing between the Member States. This has in particular come to light during the recurring protection crises in the Mediterranean[75]. Justice and Home Affairs Council conclusions have repeatedly called for solidarity between the Member States to deal with dangerous sea crossings and loss of life at the EU's external border. However, since the early days of intergovernmental cooperation between the EU Member States up to the minimum standard approach adopted under the Amsterdam Treaty, the main focus has been to minimalise potential pull factors and avoid secondary movements of asylum seekers and refugees in the European asylum space. For a long time the creation of a mechanism of allocation of responsibility for examining asylum applications lodged in one of the EU Member States, also remained the only objective of the EU asylum policy. Although since then the competences of the EU have gradually expanded to include all areas of asylum policy, today no mechanism exists to deal with disproportional burdens placed on certain Member States.

Amnesty International recalls that the underlying principles of the Dublin Regulation are problematic in view of the current level of harmonisation of protection standards in the EU and the non-EU states associated to the Dublin system. The Dublin Regulation assumes that all EU Member States, Norway and Iceland (and Switzerland in the near future) have fair and satsfactory asylum procedures and protect refugees and people in need of subsidiary protection against refoulement. However, as the examples of the treatment of Chechen[76] and Iraqi asylum seekers in the EU Member States has illustrated, practices vary greatly among Member States. Such divergences result from differences in asylum procedures combined with a difference in interpretation of protection grounds. While it may be too early to fully assess the impact of the Qualification Directive and the Asylum Procedures Directive, it is highly questionable whether the implementation of the minimum standards adopted will take away existing divergences. The fact remains that refugees have different chances of having their protection status recognised within the EU and the level of protection is different according to the country where their application is examined with no possibility of lodging a new application in another Member State. In addition, the analysis above has shown that certain provisions in both Directives are at variance with international refugee and human rights law and can therefore not be maintained. As long as such differences exist between Member States, any system of allocating responsibility for examining asylum requests within the EU that does effectively exclude any choice of the asylum seeker concerned and is predominantly based on a number of mainly technical criteria, will be inherently unfair as it is in fact creating a protection lottery.

Moreover, if one state passes to another the responsibility to examine an asylum request, and the asylum system in the latter state is inadequate to identify and protect a person at risk, there is a risk that refoulement may result and both states will have violated their obligations under the 1951 Refugee Convention and other international human rights treaties, such as the Convention Against Torture or the European Convention on Human Rights. The European Court of Human Rights in *TI v. the UK* stated explicitly that "where states establish international organisations, or mutatis mutandis international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution"[77]. In Amnesty International's view, a system of allocating responsibility for examining claims in the context of the EU could only

[75] The lack of solidarity between the Member States was painfully highlighted by the recent offer by the US Government to resettle 200 refugees recognised in Malta, while until now only 4 Member States offered intra-EU resettlement to alleviate the burden on Malta for the reception of refugees. See Migration New Sheet, August 2007, p. 21.

[76] See ECRE, Guidelines on the treatment of Chechen internally displaced persons (IDPs), asylum seekers and refugees in Europe, revised March 2007.

[77] European Court of Human Rights, *TI v. UK*, 7 March 2000, p. 15.

be acceptable if and when the same level of protection in line with international refugee and human rights law is in place in all States participating in such a system.

In addition, recent research on the application of the Dublin Regulation has revealed intrinsic flaws in the Dublin Regulation with regard to the right to family life and family reunification, the definition of family member as well as the best interest of (unaccompanied) children. At the same time no effective legal remedy against transfer exists in a number of Member States while some Member States do not undertake a full and fair examination of asylum claims of persons who are returned to their territory under the Dublin Regulation[78]. Another worrying trend is that increasingly detention is being used in order to ensure effective transfer of asylum seekers to the responsible Member State[79]. In a growing number of cases, national courts are preventing transfer of asylum seekers under the Dublin Regulation because of insufficient guarantees with regard to a fair examination of the asylum claim in the responsible Member State[80]. In the short term the relevant problematic provisions in the Dublin Regulation should be amended. A mechanism of automatic suspension of tranfers of asylum seekers under the Dublin system at least in case the Commission started an infringement procedure against a Member State related to the EU asylum acquis should be considered.

Question 23 + 24 – Should the Dublin sytem be complemented by measures enhancing a fair burden-sharing mechanism / What other mechanisms could be devised to provide for a more equitable distribution of asylum seekers and/or beneficiaries of international protection between Member States ?

Amnesty International believes that the suggestion made by the Commission with regard to intra-EU resettlement of beneficiaries of international protection is a valuable one. It could be particularly useful to assist Member States with limited reception capacities or that experience a particular pressure on their national asylum systems. There have been examples in the recent past where EU Member States have resettled small numbers of refugees and beneficiaries of international protection recognised in Malta. At the same time, chances for succesful integration into the Member State that granted status should be taken into account. Intra-EU resettlement should, of course, only be possible with full consent of the individuals concerned.

Granting beneficiaries of international protection full rights of free movement of persons under EC law might be another way of correcting 'burdens' on a number of Member States. In an ideal world, beneficiaries of international protection would have the same integration perspectives, in particular with regard to access to the labour market, education and recognition of diploma's throughout the EU. The reality is that huge disparities exist today between the Member States. As refugees and beneficiaries of subsidiary protection are already in a vulnerable position, their chances to integrate successfully in European society

[78] See UNHCR, "The Dublin II Regulation. An UNHCR Discussion Paper", April 2006 and ECRE, "Report on the Application of the Dublin II Regulation in Europe", March 2006.

[79] See COM(2007) 299 final, Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system, p. 8. In Austria Amnesty International documented several cases of long detention pending application of the Dublin Regulation. These include *inter alia* the case of a 28 year old traumatised Chechen asylum seeker detained for 111 days pending transfer to Poland (eventually the claim was examined in Austria after a successful appeal) and the detention of a minor from Mongolia (upon arrival he was separated from his aunt and her child) who was detained during 1,5 month pending transfer to the Czech Republic (here too, after an appeal procedure, the asylum application is being examined in Austria).

[80] See inter alia Conseil d'Etat, Arrêt n° 162,039 du 28 août 2006 (Belgium with regard to Greece), Rechtbank 's-Gravenhage, regnr Awb 06/16900, 06/16902, 06/16905 en 06/16907 and 11 juli 2006 (The Netherlands with regard to Greece). Recently, the Hungarian Immigration Service withdrew a decision to transfer an Iraqi asylum seeker to Cyprus based *inter alia* on the fact that in 2007 only 1 Iraqi refugee was recognised so far and only 10 % of the applicants received subsidiary protection (information received from the Hungarian Helsinki Committee).

should not be undermined by maintaining barriers to their freedom of movement within the EU.

Enhancing fair responsibility- and burden-sharing between Member States with regard to their responsibility as regards the examination of asylum applications should also be considered. This will in particular be necessary whenever a Member State's asylum system is under particular pressure from high numbers of asylum seekers. This should however never lead to asylum-seekers being transferred to a country that provides less procedural guarantees or generally inadequate asylum procedures. The use of asylum expert teams to assist Member States facing particular pressures should be further examined, also within the context of corrective burden-sharing mechanisms in such cases. Composition, role and competences of the experts concerned should be clearly defined. The use of such experts also presupposes a sufficiently high level of harmonisation of asylum practice as well as regards training of interpreters, caseworkers, decision-makers etc, as otherwise asylum expert teams entail the risk of exporting 'bad' practice from one Member State to another.

Measures must be taken to establish concrete solidarity between the Member States, including through intra-EU resettlement of persons granted international protection based on consent of the individuals concerned and financial and technical assistance to those Member States facing high numbers of asylum seekers for the purpose of providing better protection. The Dublin Regulation should be amended so as to ensure that Member States duly take into account existing differences in the Member States as regards the level of protection, reception conditions and procedural guarantees for asylum seekers.

V. External Dimension of Asylum

5.1. Supporting third countries to strengthen protection

Question 27 – If evaluated necessary, how might the effectiveness and sustainability of Regional Protection Programmes be enhanced ? Should the concept of Regional Protection Programmes be further developed and, if so, how ?

As is the case with the legislative instruments developed during the first phase of harmonisation of the EU asylum policy, thorough evaluation of the regional protection programmes that have only become operational in the beginning of 2007 will be key and should, of course, determine any decision on its continuation, further development and possible modification. In this respect it will be very important to make the results of any ongoing evaluation of the ongoing pilot projects public in order to engage in a constant and open dialogue with all the stakeholders concerned. It is fair to say at this stage that there appears to be a huge difference between the level of ambition as regards the scope of the regional protection programmes as laid down in the 2005 Commission Communication and the scope of the projects actually launched under the heading of regional protection programmes[81].

In particular with regard to regional protection programmes as originally conceived Amnesty International has repeatedly expressed concern about the potentially negative impact of such programmes on the overall system of refugee protection. Whereas keeping refugees close to their regions of origin is seen as a panacea from the perspective of European governments, the presence of a large community of refugees may have a detrimental effect on the political stability of the host societies. The long-term consequences of these programmes should be carefully considered.

At the same time, in absence of any agreed definition under international law, the notion of 'regional protection' raises questions regarding the definition of what constitutes protection under these programmes. In this respect, the launch of a pilot project in Belarus, a country with a very problematic human rights record is questionable, even if it appears to be very limited in scope at this moment.

Also, the potential impact of labelling such countries as 'safe havens' for the processing of asylum applications in the Member States of asylum seekers who transited through these countries should be taken into consideration. While there is no explicit link with external processing, the safe third country concept is eventually applied in practice in the Member States. Whether or not the existence of a regional protection programme has an actual influence on national asylum procedures in practice should equally be part of the evaluation of the concept in light of its further development.

Question 28 + 29 – How might the EU best support third countries to deal with asylum and refugee issues more effectively ? / How might the Community's overall strategies vis-à-vis third countries be made more consistent in the fields of refugee assistance and be enhanced ?

Effective and sufficient assistance to regions in the world hosting large refugee populations should be an important element of the EU's policy. Recent experience with the refugee crisis in Iraq and the neighbouring region has shown that the ability of the EU to react promptly and in a coordinated way to such crises is limited. More coordination between DGs JLS, RELEX and DEV is crucial to increase the effectiveness of the EU's operations in this field, in particular with regard to protracted refugee situations. At the institutional level, more

[81] Currently, only the regional protection programme launched in Tanzania seems to match the concept as described in the 2005 Commission Communication.

consistency could be achieved by more effectively coordinating existing (informal) working groups that are exclusively or partially dealing with the external dimension of the CEAS. For instance, initiatives undertaken within the framework of the High Level Working Group on Asylum and Migration, the European Neighbourhood Policy and the EUROMED cooperation could be better coordinated and made more transparant so as to increase democratic scrutiny.

Second, although the external dimension of Justice and Home Affairs policy is being streamlined in the overall external policy of the EU, this is still predominantly defensive in nature. So far emphasis was much more on the migration management aspect (i.e. preventing irregular migration flows towards the EU and cooperation in the field of return) than on the issue of enhancing protection capacity in relations with third countries. The EU has stated repeatedly that insufficient co-operation in tackling illegal migration could hamper a country developing closer relations with the EU. Also effective co-operation with the EU in readmission of own and third country nationals is increasingly being put forward as a preliminary precondition for opening legal channels for migration[82]. On the other hand, the Hague Programme states explicitly that co-operation on migration issues will be provided to those countries that demonstrate a genuine commitment to fulfil international obligations towards refugees. The "Comprehensive European Migration Policy" as adopted by the December 2006 European Council also mentions the need to work in partnership with third countries "in particular with a view to preventing and combating trafficking and smuggling of human beings, while ensuring effective international protection for persons who may need it…". However, recent cases of refoulement of refugees and asylum seekers by Moroccan authorities, for instance, have not led to any meaningful reaction from the EU institutions[83]. Such an attitude undermines the stated EU goal of strengthening protection capacity in third countries as it is a clear indicator to the countries concerned that the precondition of fulfilling international obligations towards refugees is not taken seriously.

When considering how best to support third countries to deal with asylum and refugee issues more effectively, it is crucial for the EU to acknowledge the 'export value' of the protection standards it applies internally. It is hard to see how effective an EU strategy to enhance refugee protection and asylum systems in third countries can be, if low standards of protection apply within the EU. To maintain the global protection system, it is crucial for the EU to develop a CEAS that is effectively protecting people in need of international protection. That will be a major precondition to generate positive incentives for third countries to comply with their obligations under international refugee and human rights law.

5.2. Resettlement

Resettlement is one of the durable solutions to the situation of refugees within the international protection toolbox and it is Amnesty International's view that it should be an integral part of the EU's CEAS. However, it should be repeated again that resettlement should never be seen as a justification for restrictive measures which inhibit access to fair and satisfactory asylum procedures. Any sustained and substantial EU commitment to resettlement should always be complementary and without prejudice to the proper treatment of individual requests expressed by spontaneous arrivals. This means that failure to access such a resettlement procedure should never be used as a reason to deny an asylum seeker access to a procedure or indeed draw adverse inferences about the genuineness of his/her claim. Amnesty International believes that there are three core dimensions to resettlement as a protection tool :

[82] See the Commission Communiciation on "The Global Approach to Migration one year on: Towards a comprehensive European migration policy", COM(2006) 735", p. 7. Recently, negotiations on readmission and visa-facilitation agreements were concluded with *inter alia* Serbia, Bosnia-Herzegovina, Macedonia and Montenegro. See Commission, IP/07/497, 12 April 2007.

[83] See Amnesty International EU Office, "Respecting human rights when cooperating with third countries in the field of migration", 11 January 2007 available at www.amnesty-eu.be.

- as a durable solution it should be more generally and widely available to refugees, on the basis of need and irrespective of their country of origin;
- as an emergency tool resettlement can play a vital role to protect refugees in acute danger
- states should commit to supporting initiatives for the strategic use of resettlement. Given the important protection role that resettlement as a durable solution can play both in protracted refugee situations as well as acute refugee emergencies, it represents an important expression of international responsibility sharing.

With regard to the selection criteria to be applied within a possible EU-wide resettlement arrangement, Amnesty International reiterates that the following principles should be applied :

- any EU-wide resettlement scheme should be based on the definition of refugees eligible for resettlement contained in UNHCR standards. Such a wide personal scope would allow EU states to select refugees who belong to a vulnerable group but who cannot prove individual threat of persecution
- there should be some element of choice of resettlement country on the part of the refugee
- it should have as its principle focus vulnerable groups and individuals pursuant to the criteria listed in UNHCR's Handbook on Resettlement and UNHCR criteria for specific refugee populations and countries. Specific action could also be undertaken with regard to human rights defenders, as mentioned in the Commission Communication "Improving Access to Durable Solutions"
- UNHCR should have a central role in the implementation of such a scheme
- the resettlement scheme should provide for the unity of families. Every effort should be made to facilitate reunification through resettlement of a family in one country. When a person eligible for resettlement has family members in an EU Member State, this Member State should normally be the first one to consider an application for his/her resettlement if this is the preferred option for the refugee.

Question 30 – How might a substantial and sustained EU commitment to resettlement be attained ?

Amnesty International believes that each of the three core dimensions of resettlement should be taken into account in the debate about an EU commitment to resettlement. The creation of an EU-wide resettlement scheme involving all EU Member States shoud remain the ultimate objective. An EU-wide resettlement scheme, offering expanded resettlement opportunities within Europe would constitute a significant contribution to international protection. In order to be meaningful, this would, of course, require significant commitments both in terms of numerical targets and in terms of financial support to UNHCR and other relevant actors. The added value of an EU-wide resettlement scheme would lie mainly in greater economies of scale by better use of available resources and capacity in the Member States through a more efficient and coordinated use of resources, in particular with regard to the selection of refugees eligible for resettlement. At the same time, the creation of such a scheme would send a powerful message of solidarity to those countries hosting the majority of refugees today.

The current approach, whereby the resettlement component in one of the regional protection programmes is used as a means to raise interest in the Member States, as well as the use of the European Refugee Fund to support financially national resettlement programmes, may be all that is available at the moment. Eventually, creating a legal basis for an EU legal instrument relating to a joint EU-wide resetllement scheme is likely to be the only way to achieve concrete and significant results in this area.

Question 31 – What avenues could be explored to achieve a coordinated approach to resettlement at EU Level ? What would be required at financial, operational and institutional level ?

In Amnesty International's view, the possibilities for a European Asylum Support Office to take up a role in the development of an EU –wide resettlement scheme should be further explored. If a European Asylum Support Office were established, it could indeed take up a role of coordination and support to the Member States as well as a liaison function with UNHCR. The Support Office could be instrumental and useful in coordinating, for instance, Member States' activities with regard to selection of refugees eligible for resettlement in the EU as well as supporting activities with regard to pre-arrival and post-arrival training as well as first reception and integration facilities for the refugees concerned. At the same time, measures should be taken to inform societies and public opinion in general adequately about resettlement programmes. In particular, one should avoid labelling the beneficiaries of resettlement programmes as the "good refugees", while spontaneous asylum seekers would systematically be stigmatised as fraudsters or fortune seekers.

Question 32 – In what other situations could a common EU resettlement commitment be envisaged ? Under what conditions ?

As indicated above, resettlement of refugees is intended to respond to immediate and compelling protection needs arising from an acute protection crisis or, in a protracted refugee situation, to provide access to a durable solution where other solutions (local integration or voluntary repatriation) are not available. In Amnesty International's view, an EU resettlement scheme should cover not only protracted refugee situations but emergency situations as well. The latter may also occur within long-standing refugee situations. The EU resettlement scheme should be flexible enough to respond timely and efficiently to such situations.

This should include situations like today in Syria and Jordan where the presence of large numbers of Iraqi refugees places a heavy burden on the host country[84]. The potentially strategic use of resettlement should equally be acknowledged in an EU commitment to resettlement. A concrete and significant engagement in resettlement as a tangible expression of international solidarity and responsibility-sharing with neighbouring countries can encourage those countries to continue to give access to refugees to their territory, to respect the principle of non-refoulement and guarantee access to fundamental rights to those refugees that will not be resettled.

5.3. Addressing mixed migration flows at the external borders

Question 33 – What further measures could be taken to ensure that protection obligations arising out of the EU acquis and international refugee and human rights law form an integral part of external border management ? In particular, what futher measures could be taken to ensure that the implementation in practice of measures aimed at combating illegal migration does not affect the access of asylum seekers to protection ?

As the European Union's activities in the field of external border control are increasing, the issue of reconciling external border management with ensuring access to protection becomes extremely important. Measures taken with regard to combating irregular migration are diverse and include visa policies, the posting of immigration officers abroad through the

[84] Amnesty International has repeatedly called upon the EU and the Member States to engage significantly in resettlement of Iraqi refugees. See Amnesty International, 'The EU's response to the situation of Iraqi asylum-seekers and refugees in the EU and in the countries neighbouring Iraq', 11 April 2007; 'The protection crisis in the EU as regards Iraqi refugees and at it southern borders', 8 June 2007; Amnesty International, 'Iraq. The situation of Iraqi refugees in Syria. An Amnesty Interational briefing.', 26 July 2007, AI Index : MDE 14/036/2007 and Amnesty International, *Iraq. Millions in flight: the Iraqi refugee crisis (AI Index: MDE 14/041/2007)*, September 2007

Immigration Liaison Officers Network, carrier sanctions, readmission agreements and operations carried out by FRONTEX both at maritime, land and airport entry points. Other legislative instruments adopted in the framework of the EU's external borders management, such as the Schengen Borders Code[85] and the RABIT Regulation[86] can also impact negatively on access to protection in the EU. While most of the measures taken at EU level contain a general reference to protection obligations, little has been done so far to implement concrete measures to ensure that those in need of protection and applying for asylum are given effective access to a fair asylum procedure, including effective legal remedies against negative decisions.

Whatever practical measures can be conceived, training with regard to upholding protection obligations of border guards and other authorities implementing the EU's agenda in the fight against irregular migration will always be crucial. Those likely to come into contact with individuals in need of protection first should be able to identify them and refer them to the authority competent for dealing with asylum applications. At the same time, monitoring of their activities in practice and assessment of their impact on access to the territory and to protection will equally be needed. In general UNHCR's 10 point plan with regard to addressing refugee protection within mixed migration flows represents a fair analysis of where action needs to be taken in order to reconcile the EU's agenda in combating irregular migration with protection obligations[87]. UNHCR is already involved in monitoring and implementing protection-sensitive measures at the Eastern, South-Eastern and Southern borders, in particular through training activities[88]. Efforts should be made to enhance the role of UNHCR as well as specialised NGOs with regard to both crucial aspects of protection-sensitive border management : training and monitoring. With regard to the latter, an increased role for the Commission should be considered as well.

With regard to operations carried out outside the external borders of the EU, the extra-territorial effect of the non-refoulement principle under international refugee and human rights law implies a continued responsibility for EU Member States towards people in need of international protection as soon as such persons come within their jurisdiction. The parameters of extra-territorial jurisdiction under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) have recently been summarized by the European Court of Human Rights in its decision of *Isaak and others v Turkey*[89]. This decision reiterates the understanding of jurisdiction to be focussed on control of the individual with this covering both territorial and extra-territorial situations. Such control can be exercised through "effective control of an area", or by "state agency authority" (i.e. where individuals are under the state's authority and control through its agents operating whether lawfully or unlawfully in another state, or through the acquiescence or connivance of state authorities in the acts of private individuals) acting in another territory. As such, the contracting state is under the obligation to ensure respect and protection of the human rights of the individuals concerned and is accountable for related violations of those individual's human rights as "Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory"[90].

[85] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), *OJ* 2006 L 105/1.
[86] See above footnote 9.
[87] See UNHCR, Refugee Protection and Mixed Migration: A 10-Point Plan of Action, Revision 1, January 2007.
[88] See UNHCR, "Implementing the Ten-Point Plan of Action in Southern Europe: Activities Undertaken by UNHCR to Address Mixed Migration in the Context of the Mediterranean/Atlantic Arrivals", 2 October 2006 and UNHCR, "Ten Point Plan of Action for Refugee Protection and Mixed Migration for Countries along the Eastern and South Eastern Borders of European Union Member States", 29 June 2007.
[89] European Court of Human Rights, *Isaak and Others v. Turkey*, Application no. 44587/98, Decision on admissibility.
[90] Idem. A recent example is the case of the Marine I, where a group of 23 men were held in the custody of the Spanish authorities in Nouadhibou, Mauritania from 12 February 2007 until 18 May 2007

The externalisation of the EU's policy in combating irregular migration can therefore not absolve the Member States from guaranteeing access to protection. The impact of such policy on access to protection, *inter alia* through increased cooperation with third countries in this field, should be properly assessed and measures taken to guarantee continued access for persons in need of international protection in the EU. In particular with regard to search and rescue-operations/ interception at sea carried out in the territorial waters of third countries or at the high seas, effective measures should be taken also at EU level to ensure that Member States continue to comply with their non-refoulement obligations. These should include the crucial question of disembarkation of intercepted persons at "a place of safety".

Question 34 – How might national capacities to establish effective protection-sensitive entry management systems be increased, in particular in cases of mass arrivals at the borders ?

See previous question + section IV.

5.4. The role of the EU as a global player in refugee issues

Question 35 – How could European asylum policy develop into a policy shared by the EU Member States to address refugee issues at the international level? What models could the EU use to develop into a global player in refugee issues?

Amnesty Interational believes that the external dimension of the EU's asylum policy should be directed towards increasing solidarity of the EU and its Member States with those countries and regions hosting the majority of refugees today. One important way of showing solidarity would be for the EU to raise its own standards of protection within the EU and by doing so set an example of good practice. As such, this would already be a major contribution by the EU to the international protection regime. Also increased engagement in resettlement as a tangible expression of international solidarity and responsibility-sharing as well as substantial financial and technical assistance to countries hosting large numbers of refugees would, of course, be essential. The suggested European Asylum Support Office could have a vital role in developing and implementing such a policy.

As the Common European Asylum System (and its external dimension) is developing, a common EU position with regard to refugee issues at the international level would indeed be a logical next step. This would certainly be desirable when dealing with concrete technical or financial support for countries dealing with massive refugee flows or offering resettlement for the most vulnerable refugees. A common European approach or position with regard to specific calls from international organisations with regard to such situations could indeed offer advantages in terms of efficacy and economies of scale. This would essentially require a clear political commitment from the EU Member States to move towards such an approach. Whether it would be possible and desirable for the EU to adopt a common position with regard to, for instance, future EXCOM Conclusions of the UNHCR is highly questionable in the current state of play. So many aspects of the EU asylum acquis are problematic when set against the requirements of the international protection regime, and practices of Member

after having been rescued at sea by the Spanish authorities. On 18 May they were transferred to Nouakchott where they were detained under the jurisdiction of Mauritania. Under international law, as the men were under effective control of the Spanish authorities, the government of Spain had a duty to ensure that their human rights were respected and protected, including their rights to liberty and freedom from arbitrary detention; protection against torture or other ill-treatment; their rights to access to a fair and satisfactory asylum procedure and protection from return to a country or territory where they would be at risk of serious human rights violations. The transfer of the 23 men to the Mauritanian authorities without hearing their asylum claims is a potential breach of Spain's obligations under international law not to return people to a country or territory where there are substantial grounds to believe that the person would be at risk of serious human rights violations. Eventually the 23 men presented their asylum claims to the Spanish embassy in Mauritania.

States are so diverging, that it is difficult to see how the EU could have a common approach at the international level where it is not able to do so at the EU-level.

The external dimension of the CEAS must be directed towards strengthening protection systems in third countries without undermining the EU's responsibilities towards the protection of refugees. The creation of an internal EU common asylum system based on high standards that are firmly grounded in international human rights and refugee law would already be an important contribution to the global protection regime. Significant engagement in resettlement of refugees in close cooperation with UNHCR through the establishment of an EU-wide resettlement programme must be an integral part of the EU's asylum policy. EU initiatives with regard to the fight against irregular immigration must be protection proof. Based on the UNHCR 10 point plan with regard to addressing refugee protection within mixed migration flows, continued training of border guards and law enforcement officials as well as intensive monitoring of EU and Member States-led operations at external borders are paramount.