The Role of the European Union in Protecting the Rights of Asylum Seekers with Disabilities

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1. Introduction

The war in Syria, the harshening of civil conflicts and political divisions in several Mediterranean countries during the aftermath of the Arab Spring, the spread of dictatorial regimes across African countries and the persisting and severe civil repression in Eritrea have contributed to the displacement of millions of people globally[1]. These factors have all facilitated an unprecedented flow of migration towards Europe, which, according to the United Nations High Commissioner for Refugees (UNHCR), is the largest occurred since the World War II[2]. The International Organization for Migration (IOM) affirmed that, in 2015, 1.046.599

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1 In June 2016 the Commission of Inquiry on Human Rights in Eritrea, set up by the United Nations Human Rights Council, released its second report. The Commission concluded that Eritrean officials repeatedly committed crimes against humanity, such as enslavement, imprisonment, enforced disappearances, torture, persecution, rapes, since 1991 (see at http://www.ohchr.org/EN/HRBodies/HRC/CoIEritrea/Pages/commissioninquiryonhrinEritrea.aspx). On the Arab spring and the consequent migration flow on the Italian coasts from North Africa see *inter alia* Nascimbene, Di Pascale 2011.

2 UNHCR, *World Refugee Day: Global Forced Displacement Tops 50 Million for First Time in Post-World War II Era*, available at http://www.unhcr.org/news/latest/2014/6/53a155bc6/world-refugee-day-global-forced-displacement-tops-50-million-first-time.html.

persons reached a European country, by land or sea[3]. In the same year, according to European Union (EU) Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU (Frontex), recently renamed and revamped as European Border and Coast Guard[4], people crossing into the EU totalled more than 1.800.000.

Many of these migrants are refugees, i.e. individuals unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, as recognised under the 1951 Convention relating to the Status of Refugees (hereafter, 1951 Geneva Convention) and its Protocol[5]. Many are asylum-seekers, i.e. individuals who lodge claim for refugee status without having obtained it prior to their arrival. In this respect, Eurostat recorded that, in 2015, the overall number of asylum applications was close to 1.3 million[6]. In 2016, the migratory pressure against the EU borders has not diminished and asylum requests are extremely high in volume. The latest updates from the European Asylum Support Office (EASO), in August 2016, calculated within the so called "EU+ area" (i.e. EU-28 plus Norway and Switzerland), 137.688 applications for international protection (all the data are available at https://www.easo.europa.eu/analysis-and-statistics). This, according to EASO, represents the peak of asylum applications lodged in a single month across in 2016 (albeit the figure is slightly lower than the number registered in August 2015).

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[3] The data are available at http://www.iom.int/news/iom-latest-data-europe-migrant-emergency.

[4] Until September 2016, Frontex was the EU agency supporting the Member States in the border control and monitoring the different routes migrants use. On 14 September 2016, the Council gave its final approval to the European Border and Coast Guard (EBCG). The EBCG replaces Frontex and seeks to reinforce external border control, in order to face the migratory pressure at the external Schengen borders (Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, OJ L 251, 16 September 2016, p. 1 *et seq*.).

[5] Convention relating to the Status of Refugees, Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950 [1950] 189 United Nations Treaty Series 150 and Protocol relating to the Statue of Refugees 1967, [1968] 606 United Nations Treaty Series, http://www.unhcr.org/3b66c2aa10.html (last accessed 10 October 2016). The prohibition of return or *refoulement* as set down in art. 33 of the 1951 Convention provides additional protection for a refugee when in another State. It prohibits State Parties from returning a refugee to «the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion».

[6] See http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum__statistics. See also the data presented and discussed by the EU Fundamental Rights Agency (*Fundamental Rights Report 2016*, at p. 7, http://fra.europa.eu/sites/default/files/fra__uploads/fra-2016-fundamental-rights-report-2016-2__en.pdf).

Even though, «persons with disabilities make up around 15% of the global population, and comprise a significant minority of refugees and migrants»[7], none of the statistics released by international organization or EU bodies include figures on migrants, refugees or asylum seekers with disabilities. Straimer suggests that «disability may interact with asylum in various ways», as it can be either a cause or consequence of displacement[8], and most significantly can «become a multi-fold barrier to accessing both protection and assistance». However, asylum seekers with disabilities have remained largely invisible (Straimer 2011, 537). In a similar vein, in July 2016, the Fundamental Rights Agency of the European Union (FRA), while releasing a thematic focus on migrants with disabilities (the very first of its kind), claimed that there is virtually no information as to whether migrants have pre-existing physical, sensory, intellectual or psychosocial impairments, or have developed a disability during the migration process.

This dearth of data seems to reflect little political awareness of the challenges people with disabilities face in the context of migration, and of their rights. At the international level a general debate and a commitment towards rendering humanitarian action inclusive of persons with disabilities, and towards combating the intersecting forms of discrimination that exacerbate the exclusion of all persons with disabilities, has started to emerge. In 2011, the UNHCR recognized «that the specific needs of persons with disabilities are often overlooked, especially in the early phases of humanitarian emergencies»[9] and called upon States «to protect and assist refugees and other persons with disabilities against all forms of discrimination and to provide sustainable and appropriate support in addressing all their needs».

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[7] This figure was reported in the booklet released in 2011 by the UNHCR (*Working with persons with disabilities in forced displacement*, at http://www.unhcr.org/4ec3c81c9.pdf). The figure was also reported by the Fundamental Rights Agency, *Thematic focus: Migrants with disabilities*, 2016, at http://fra.europa.eu/en/theme/asylum-migration-borders/overviews/focus-disability, and by several authors (e.g. Fay 2015).

[8] For example, Roberts and Harris found that asylum seekers with disabilities experienced isolation which contributed to deteriorating mental health (Robert, Harris 2002). Quinn reports that asylum seekers often experience destitution, «which has severe mental and emotional effects such as acute anxiety and stress, feelings of extreme vulnerability and powerlessness» (Quinn 2014: 59). Morville *et al.* (2014) conducted a study on Danish asylum seekers and found debate that significant ability impairments in tortured as well as non-tortured newly arrived asylum seekers. In 2016, one of Mental Health Europe members (BPtK) reported «50% of migrants and refugees are inclined to suffer from depression and 40% to experience post-traumatic stress which would require suitable psychological support». See MHE position paper at http://www.mhe-sme.org/fileadmin/Position__papers/Position__Paper__The__need__for__mental__health__and__psychosocial__support__for__migrants__and__refugees__in__Europe__.pdf.

[9] UNHCR, *EXCOM Conclusions on refugees with disabilities and other persons with disabilities protected and assisted by UNHCR*, No. 110 (LXI), 12 October 2010 http://www.unhcr.org/excom/exconc/4cbeb1a99/conclusion-refugees-disabilities-other-persons-disabilities-protected-assisted.html.

The growing debate has also prompted the adoption of a non-binding Charter on Inclusion of Persons with Disabilities in Humanitarian Action, in May 2016[10]. The Charter, which stems from the collaboration among different players, such as NGOs, UN agencies and organisations of persons with disabilities, was strongly endorsed by the UN[11], and by the UN Committee on the Rights of Persons with Disabilities (hereafter, UN Committee). By contrast, in the EU policy discourse, as denounced by the European Association of Service Providers for Persons with Disabilities (EASPD), there is virtually no discussion on the rights of migrants with disabilities. Amidst the current migration crisis, this results in a lack of implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD), ratified by the EU alongside its Member States (infra Section 2). The UN Committee on the Rights of Persons with Disabilities in its «Concluding observations on the initial report of the European Union»[12] expressed "deep concern" on the precarious situation of migrants with disabilities, who are «detained … in conditions which do not provide appropriate support and reasonable accommodation». It *inter alia* recommended that the EU mainstream disability in its migration and refugee issue. Analogously, the UN Committee expressed concern about the challenges encountered by refugees arriving in some Member States, and, for instance, recommended Italy adopt appropriate support and rehabilitation services through strengthened systems to migrants with disabilities (in particular psychosocial disabilities)[13].

The European Parliament, in its report on the implementation of the CRPD released in June 2016, requested the Commission and the Council to provide for special care for persons with disabilities when making proposals for resolving the refugee question[14]. The Parliament's report supported the UN Committee's recommendations, urged mainstreaming of the human rights of persons with disabilities who suffer double discrimination, and stressed the need for measures that take into account the specific needs of persons with disabilities.

Against this background, the overall aim of this chapter is to briefly discuss the Common European Asylum System (CEAS) in light of the CRPD. The chapter does not endeavour to investigate the effects of whole bulk of EU migration policies or the EU migration agenda on people with disabilities. Nor does it engage in a lengthy discussion of the CEAS itself. Rather, the chapter, building on

[10] The charter is available at http://humanitariandisabilitycharter.org/.

[11] See http://www.un.org/apps/news/story.asp?NewsID=54025#.WAuQiy0rIdU.

[12] UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of the European Union*, 2 October 2015, at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/226/55/PDF/G1522655.pdf?OpenElement.

[13] UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Italy*, 6 October 2016, at http://tbinternet.ohchr.org/__layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fITA%2fCO%2f1&Lang=en.

[14] European Parliament Committee on Employment and Social Affairs, *Report on the implementation of the UN Convention on the Rights of Persons with Disabilities, with special regard to the Concluding Observations of the UN CRPD Committee* -(2015/2258(INI)), 9 June 2016.

existing literature (*inter alia* Beduschi-Ortiz 2010, Straimer 2011, Conte 2016), attempts to examine the extent to which EU legislation on asylum[15] can be considered compliant with the CRPD[16]. Building on existing scholarship, it focuses on asylum seekers with disabilities, and discusses the protection of their rights within the EU legal framework. Further having recalled the content and the main obligations that stem from the CRPD, as well as, its position in the EU legal order (Section II), the main gaps in terms of legal protection of asylum seekers with disabilities in the CEAS will be examined (Section III). The chapter then concisely examines the Dublin III regulation and discusses whether the EU proposal of May 4, 2016 to amend the regulation (so called Dublin IV) will enhance compliance with the international standards set forth in the CRPD[17]. Finally, the contribution will provide some concluding remarks on the current CEAS and on the challenges in implementing the CRPD in the context of asylum policies will be highlighted.

2. The CRPD in the EU Legal Order and the Obligations it purports in the Context of Migration

The CRPD, approved by the UN General Assembly on December 13, 2006, was ratified by the former European Community (now the EU) alongside its Member States[18], and entered into force for the EU in January 2011. Since then, it has become an integral part of EU law[19], and, by virtue of art. 216(2) TFEU, is binding on the EU and its institutions. In hierarchical terms, the CRPD enjoys a quasi-constitutional status in the EU legal system, beneath the Treaties but above secondary law (Ferri 2010, 47 et seq.; Ferri, Favalli 2016, 542-543). As a consequence, the CRPD embodies the benchmark against which to gauge EU disability policy.

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[15] While acknowledging that the new Long Term Residents Directive (Directive 2011/51/EU amending Directive 2003/109/EC, OJ L 132, 19 May 2011) extends the scope of EU rules on long-term residents so as to include refugees and beneficiaries of subsidiary protection, this chapter does include a discussion of this piece of legislation.

[16] As mentioned above, asylum is granted to people fleeing persecution or serious harm in their own country in compliance with the 1951 Geneva Convention on the protection of refugees.

[17] Proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), Brussels, 5 May 2016, COM(2016) 270 final.

[18] Council Decision 2010/48/EC, OJ L 23, 27 January 2010. The procedure of conclusion was, however, finalized only one year later, on December 23, 2010, when the instrument of ratification was officially deposited. Except for Ireland, which is still in the process of ratifying it, all the Member States have ratified the Convention.

[19] CJEU, C- 337/11, *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab (C-335/11) and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, in liquidation (C-337/11)* ECLI:EU:C:2013:222.

In addition, as the Court of Justice of the European Union (CJEU) has repeatedly held, EU secondary law must be interpreted in light of the Convention[20].

Having regard to its content, the CRPD supports the official recognition of disability as a human rights issue. As commonly acknowledged, it embraces the social model, i.e. the view that disability stems primarily from the failure of the social environment to meet the needs and aspirations of people with disabilities[21]. Its scope is extremely broad, in both ratione personae and ratione materiae. On the one hand, the CRPD provides an open-ended conceptualization of disability in art. 1 (Quinn 2009, 9), and states that: «[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others». On the other hand, the CRPD does not simply prohibit discrimination on the grounds of disability, but covers civil, political, economic, cultural and social rights. It is informed by and built upon general principles, which include: respect for individual dignity, autonomy, and independence; respect for difference and acceptance of disability as human diversity; non-discrimination; equal opportunity; complete and meaningful participation; accessibility; gender equality; and respect for children's rights and support for their evolving capabilities.

As such, the Convention does not include any explicit reference to migrants with disabilities. However, as well as imposing several specific obligations on State Parties, such as the prohibition of any discrimination on the grounds of disability[22], and the implementation of accessibility with regards to the physical environment and information and communications, the CRPD requires them to mainstream the rights of persons with disabilities in all of their policies and programmes. The latter clearly encompass migration and asylum policies. This means that every right set forth in the CRPD must be enjoyed by asylum seekers with disabilities on an equal basis with others. It is evident that asylum seekers must also be provided with reasonable accommodation, where this is necessary to enable them to enjoy or exercise their rights. Reasonable accommodation duties extend across «all human rights and fundamental freedoms». The CRPD also include explicit reference to the obligation on States to introduce reasonable accommodation duties in a number of areas, including that of liberty and security of the person, which is particularly relevant in this context. Art. 14 reads as follows: «(1) States Parties shall ensure that persons with disabilities, on an equal

[20] Among others, CJEU, Case C-363/12, *Z.* v *A Government Department and The Board of management of a community school* ECLI:EU:C:2014:159.

[21] For an overview of the Convention *ex pluribus* see Kayness, French 2008.

[22] The CRPD adopts a very broad notion of discrimination that encompasses «any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field». The denial of reasonable accommodation is also considered a form of discrimination (art. 2 CRPD).

basis with others: (a) Enjoy the right to liberty and security of person; (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty. (2) States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation». It can be inferred that asylum seekers with disabilities in reception and detention centres must be provided with additional, reasonable adjustments where needed (including for instance, assistive devices such as wheelchairs).

Various other articles are of immediate and direct relevance in the context of migration policies, and, in particular, with regard to asylum legislation. Art. 11 CRPD on situations of risk and humanitarian emergencies requires Parties to the Convention to take «all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict [and] humanitarian emergencies». According to Conte the latter provision «constitutes fertile grounds to include the protection of refugees with disabilities within the CRPD's scope» (Conte 2016, 332). Art. 15 CRPD requires States Parties to take effective measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment. Art. 16 CRPD obliges Parties to protect people with disabilities from all forms of exploitation, violence and abuse. Furthermore, and more generally, art. 31 requires States Parties «to undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention». This latter provision has so far been ignored with regards to migrants with disabilities arriving into the EU. As noted above, although the availability of information on the situation of people with disabilities is vital to development of effective strategies, at present there is a clear lack of such data.

All in all, the CRPD constitutes a yardstick for the protection of asylum seekers with disabilities in the EU. In fact, as noted by Conte, persons who forcibly flee from their country of origin are entitled to enjoy the legal guarantees of the 1951 Geneva Convention, but in this case people with disabilities «should also benefit from the rights enshrined in the CRPD, as it applies in situations of risk and humanitarian emergencies» (Conte 2016, 333). The CRPD, which is now an integral part of EU law, therefore provides minimum grounds to be fulfilled by supranational legislation, and by Member States when implementing EU law.

3. Asylum Seekers with disabilities in the EU Legislative Framework: Rights and Procedures

Following the commitment undertaken in Tampere in 1999[23] and since 2003, the EU has established a Common European Asylum System (CEAS), with the intent of adopting a joint approach to asylum (Zagato 2006), to harmonise certain aspects of asylum procedures across Europe, and in order to create fairer and more effective ways to process asylum claims (Cherubini 2015). Three key pieces of legislation which form part of the CEAS will be considered in this section vis a vis the CRPD[24]: the Directive for a uniform status for refugees (Qualification Directive), the Directive on minimum standards on procedures in Member States for granting and withdrawing international protection (Procedures Directive), the Directive laying down minimum standards for the reception of applicants for international protection (Reception Conditions Directive)[25].

3.1. The Qualification Directive

The Qualification Directive lays down standards for the qualification of third-country nationals or stateless persons as refugees or persons eligible for subsidiary protection, and for the content of the protection-granted (Peers 2012). The text of the directive, which builds upon the international standards provided in the 1951 Geneva Convention, approximates the rights granted to the beneficiaries of international protection (i.e. refugees and those qualifying of subsidiary protection), but allows for Member States to set higher standards. The effect of granting refugee status or subsidiary protection within the EU permits the applicant to remain in the country where he or she is present and to access employment, welfare, and healthcare services.

To be declared a refugee and to obtain asylum in the EU, an asylum seeker must establish a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion

[23] Presidency Conclusions, Tampere European Council, 15-16 October 1999, at http://www.europarl.europa.eu/summits/tam_en.htm.

[24] The CEAS also includes the so called EURODAC Regulation (Regulation (EU) No 603/2013 on the establishment of "Eurodac" for the comparison of fingerprints OJ L 180, 29 June 2013), which allows access to the EU database of the fingerprints of asylum seekers in order to prevent, detect or investigate serious crimes, such as murder, and terrorism.

[25] Respectively, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, (recast), OJ L 337 20 December 2011; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) OJ L 180, 29 June 2013; and Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) OJ L180 29 June 2013.

(art. 2(d) of the Qualification Directive, which echoes the wording of the 1951 Geneva Convention). The meaning of persecution is defined in art. 9 to be «an act sufficiently serious» as to be «a severe violation of basic human rights» of the Convention or «an accumulation of various measures, … which is sufficiently severe as to affect an individual in a similar manner». Art. 10 sets out concepts of elements of race, religion, nationality, social grouping and political opinion, which must be taken into account when assessing the reasons for persecution.

According to this provision, a group is to be considered a «particular social group» where two conditions are met. Firstly, its members «share 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». Secondly, «that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society». Disability is not explicitly mentioned amongst the grounds of persecution that qualify for international protection. However, Strainer suggests that claims of persecution for reasons related to the applicant's existing disability may be considered under the ground of membership of a particular social group (i.e. the group of persons with disabilities). He also suggests that person with disabilities, further to the entry into force of the CRPD, can be recognised as a protected group under international law. This Author, however, argues that there is currently no guidance capable of ensuring a «disability-sensitive interpretation» of this provision (Straimer 2011, 540). Conte, by contrast, adopts a more sceptical approach. He claims that the directive constitutes a missed opportunity «to clearly include the vulnerable category of persons with disabilities within the definition of refugee» (Conte 2016, 341). He also affirms that while the «directive explicitly regards acts of a gender-specific or child-specific nature as peculiar forms of persecution», it leaves out «those acts based on disability grounds» (art. 9(2f)).

The lack of any explicit reference to disability may reduce the chances of disabled asylum seekers to be considered eligible for international protection. However, it is suggested here that, should the Court of Justice be asked to interpret the provision in question, it would most likely attempt to provide an interpretation consistent to the CRPD. The CJEU has in fact attempted to interpret EU legislation (mainly in the field on non-discrimination) in light of the CRPD, even though with mixed results (Ferri, Favalli 2016; Waddington 2015). It is therefore probable that, if the Court is confronted in the future with the interpretation of art. 10 of the Qualification Directive and with the meaning of social group, it will adopt what Strainer calls a disability-sensitive interpretation.

The directive explicitly mentions people with disabilities in another provision, in the context of the rules on the content of international protection[26]. Art. 20(3) of the Directive requires Member States to «take into account the specific

[26] Art. 15(c) of the Qualification Directive qualifies the requirement for eligibility for subsidiary protection where there is «serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict».

situation of vulnerable persons such as minors, unaccompanied minors, *disabled people* [emphasis added], elderly people, pregnant women, single parents with minor children, victims of human trafficking, *persons with mental disorders* [emphasis added] and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence». Notably the provision uses two different terms: disabled people and people with mental disorders. The latter could encompass people with intellectual or psychosocial disabilities, creating an overlap between the two categories of people identified in the directive. The extent of the obligation that the States bear in this circumstance is not immediately evident. It is nonetheless apparent that Member States must evaluate the individual situation of the person (art. 20(4)), including his or her own disability. In addition, the directive requires Member States to provide refugees with adequate healthcare, including treatment of mental disorders and acknowledge the special needs of *inter alia* disabled people (art. 30). Strainer suggests that wording of the directive is heavily influenced by the medical model, and by an «image of persons with disabilities as patients». However, the recognition of vulnerability of persons with disabilities seems to be welcomed. If interpreted in light of the CRPD, these provisions can open the door to reasonable accommodation and substantive equality for refugees with disabilities.

3.2. The Asylum Procedures Directive

The Asylum Procedures Directive establishes common standards for asylum procedures. Compared to the previous directive (Directive 2005/85/EC OJ L 326 of 13 December 2005; for a comment see Costello 2006), which was based on a minimum harmonization rationale, the new one attempts to lay down more precise provisions with the view to creating more efficient and quicker procedures. In particular, this directive require that any person who arrives at the frontier of an EU Member State be allowed to make an application for asylum or subsidiary protection, and to remain lawfully in that State while an application for a grant of either status is decided.

The directive requires applicants to be informed «in a language which they understand or are reasonably supposed to understand» about the asylum procedure and its functioning. This clearly affirms that applicants with disabilities must be given information in a format accessible for them (e.g. sign language, braille, or easy-to-read language). Art. 14 of the directive requires, before a decision on asylum is taken, that the applicant is given «the opportunity of a personal interview on his or her application for international protection». There is no unambiguous inclusion of accessibility requirements, but these should be provided taking into account what is provided in arts. 15 and 24 of the directive. Under art. 15(3)(a), Member States must guarantee that interviewers are «sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant's cultural origin or vulner-

ability». The directive explicitly recognises that «[c]ertain applicants may be in need of special procedural guarantees due, inter alia, to their age, gender, sexual orientation, gender identity, disability, [emphasis added] serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence» (Preamble, para 29). It also necessitates Member States to identify, within a reasonable period of time after an application for international protection has been lodged, «applicants in need of special procedural needs» (art. 24(1) of the directive). The assessment should be integrated into national procedures and/or into the assessment that is carried out according to the Reception Condition Directive (infra, Section 3.3). The directive also requires that those applicants should be provided with «adequate support, including sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection». In addition, Member States have to ensure that the need for special procedural guarantees is addressed, at any stage of the procedure, where such a need becomes apparent.

Fahy, from a practical standpoint, affirms that applicants with disabilities face different challenges, including «difficulties in understanding questions and instructions, difficulties in communicating answers intelligibly, behavioural difficulties, difficulties in delivering a coherent and consistent testimony and/or difficulties in recalling and recounting events» (Fahy 2015, 13). As a result, an applicant with disability (especially applicants with intellectual disabilities), if not provided with support, might find it difficult to substantiate his/her asylum request. In this respect, one might argue whether art. 24 of the directive provides sufficient guarantees for such persons. In line with Straimer (2011, 542), Conte affirms that art. 24 is quite vague, but does «set out a clear duty to assist and sustain vulnerable individuals during the intricate asylum procedure» (Conte 2016, 344). It is here suggested that the broad wording of art. 24 covers both accessibility requirements and/or specific reasonable adjustments, and can ensure (if properly implemented by the Member States) that people with disabilities have full and equitable access to the asylum procedure[27]. Especially if interpreted in light of the CRPD, this provision can be read as to impose on national competent authorities a duty to make reasonable procedural accommodations.

3.3. The Reception Conditions Directive

The Reception Conditions Directive lays down harmonised standards for reception conditions for asylum seekers while they wait for the examination of their claim and ensures that applicants have access to housing, food, employment,

[27] Conte also notes that the directive requires persons interviewing asylum applicants to have acquired general knowledge of problems which could adversely affect the applicants' ability to be interviewed, which means that the individual background of the applicant and his/her special requirements must be taken into account (Conte 2016: 345).

as well as healthcare. As highlighted by Thorton, some of the obligations under the Reception Directive include the recognition of a dignified standard of living, some (circumscribed) freedom of movement rights, the right to be provided with some form of shelter, the right to receive certain material reception conditions, a circumscribed right to education for children under 18, and a limited right to work (Thorton 2014, 21 et seq. On minimum condition for reception see Case C-179/11, *Cimade, Groupe d'information et de soutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, 27 September 2012, ECLI:EU:C:2012:594).

Without engaging in a comprehensive analysis of the directive, there are a few strengths of the text that must be highlighted in a disability perspective, while acknowledging that the directive is often a "paper tiger". First, this piece of legislation, similarly to the previously analysed directives, recognises the vulnerability of people with disabilities (art. 21). As Conte highlights, «[t]he Reception Directive expressly mentions persons with disabilities as vulnerable individuals and represents an important step forward for the international protection of refugees with disabilities» (Conte 2016, 347). In a similar vein to the Asylum Procedure Directive, art. 22 of the Reception Conditions Directive requires Member States to assess whether an applicant «is an applicant with special reception needs», and must indicate these needs. It also requires that this assessment is «initiated within a reasonable period of time after an application for international protection is made». Special reception needs must be also taken into consideration throughout the duration of the asylum procedure. According to Conte (2016, 347), these provisions require Member States to «accommodate the … needs of applicants with disabilities», and could be substantially assimilated to a duty to provide reasonable accommodation within the meaning of art. 2 CRPD.

All these rules could generally be considered compliant with the CRPD and represent an important step forward for the international protection of refugees with disabilities. Nonetheless, the FRA has highlighted that their implementation at the Member State level is grossly deficient[28]. Firstly, according to the FRA, «legally defined procedures to identify people with disabilities in reception and detention centres are lacking», and many «people with disabilities are identified on an informal or ad hoc basis». «[A]necdotal evidence based on the low numbers of persons with disabilities recorded suggests that many people with disabilities remain unidentified in practice». This is mostly and quite evidently the case where the disability is not clearly visible. Consequently, reasonable accommodation is not ensured. Secondly, art. 17 of the Reception Conditions Directive requires that «material reception conditions provide an adequate standard of living for all applicants», which «protects their physical and mental

[28] *Supra* nt. 7. It should be noted that a few Member States have not yet implemented the CEAS. In February 2016, the European Commission issued reasoned opinions against several Member States for their non-transposition of the CEAS. See at http://europa.eu/rapid/press-release__IP-16-270__en.htm.

health». It also requires Member States to ensure that such «standard of living is met in the specific situation of vulnerable persons». In the case of detention – which must be as short as possible and occur in specialised detention facilities – Member State must provide particular care to vulnerable people (including people with disabilities). Health, including mental health of asylum seekers in detention, must be ensured (art. 11). Even though these provisions fulfil (at least to some extent) the obligations established in the CRPD, their implementation is problematic. Again the FRA's report affirms that, while some form of psychosocial support and treatment is available, this is still limited and often «staff in primary healthcare facilities lack the necessary training to identify and provide support for people with mental health issues». In October 2016, Mental Health Europe (MHE) issued a position paper on the need to reinforce mental health and psychosocial support for migrants and refugees. MHE claimed that many migrants and refugees still face barriers to accessing mental healthcare and support services, and asked Member States to «invest in the development of culturally appropriate and accessible mental health support in a manner that respects the principle of non-discrimination and with specific attention to the needs of migrant and refugee women and child». Finally, the directive also provides that during the application process the UNHCR may have access to applications and deliver assistance. Although this provision is not strictly related to disability, the work of the UNCHR has so far been important in highlighting asylum seekers with disabilities and their needs. Hence, the provision might contribute, at least to some extent, towards ensuring that procedures are as accessible as possible.

4. The Dublin III Regulation and the proposal for reform in light of the CRPD

The Dublin III Regulation is another important pillar of the CEAS. It determines which EU Member State is responsible for examining individual asylum applications. It includes enhanced procedural safeguards for applicants, including a right to information (art. 4) and a personal interview (art. 5), the right to an effective remedy (art. 27), a revision to the time limits (arts. 21, 22, 23, 24, 25 and 29), and restrictions on detention (art. 28), in line with the Asylum Procedure Directive. The Regulation gives general responsibility to undertake the examination of the asylum application to the Member State in which the applicant has (irregularly) arrived (art. 13). If the applicant has a family member who is a refugee or who has lodged an asylum application, the State examining that application will be responsible (art. 10). In the absence of a family member, responsibility to examine the application falls on to any Member State that issued the applicant with a valid residence permit or valid visa (art. 12). The best interests of the child and respect for family life in principle appear to be protected in the Regulation.

The criteria for establishing the Member State competent to examine the application do not include or mention disability. However, art. 16 of the Regulation affirms that «[w]here, on account of pregnancy, a new-born child, serious illness, severe disability or old age, an applicant is dependent on the assistance of his or her child, sibling or parent legally resident in one of the Member States, or his or her child, sibling or parent legally resident in one of the Member States is dependent on the assistance of the applicant, Member States shall normally keep or bring together the applicant with that child, sibling or parent, provided that family ties existed in the country of origin, that the child, sibling or parent or the applicant is able to take care of the dependent person and that the persons concerned expressed their desire in writing». Hence, when there is «a relationship of dependency» (art. 16) the Member State responsible for examining the dependent person's application is the one where the child, sibling or parent is legally resident, unless health issues prevent the dependent applicant from travelling for a significant period of time (art. 16(2)). If this is the case, the Member State responsible for examining the dependent person's application is the one where the dependent applicant is present (art. 16(2)). This provision mentions severe disability, but there are no specific parameters to qualify the disability. It is apparently up to the Member States to identify what constitutes a severe disability for the purpose of art. 16, thus clearly creating disparities across the EU. Under the Dublin III criteria, to facilitate the process of determining the Member State responsible, Member States must conduct a personal interview of applicants in a language that they understand or are reasonably supposed to understand. Although, similar to art. 14 of the Asylum Procedure Directive, there is no express inclusion of accessibility requirements, this provision should be read as encompassing sign language, and easy to read expressions. For the purpose of this analysis, another provision should be mentioned. Art. 32 of the Regulation requires, where there is a transfer of an asylum seeker from one Member State to the Member state competent to examine the asylum request, that information on any special needs of the person are transferred for the purpose of medical care. This provision, in line with what provided in the Asylum Procedure Directive, is clearly aimed at ensuring that persons with disabilities are provided with the healthcare needed.

The text of the Dublin Regulation is not per se in breach of the CRPD. However, from a disability perspective, it provides insufficient protections capable of effectively vindicating the rights of persons with disabilities. In addition, from a general historical perspective, the Dublin system has been largely ineffective. The regulation is based on the presumption that all Member States operate a fair and effective asylum system, including the provision of suitable reception conditions, respect for the rights of applicants and the grant of protection in accordance with international and European law. However, a common criticism is that major disparities between the different asylum systems still exist and are not

taken into account by the Regulation[29]. In an attempt to address this fundamental deficiency, on May 4, 2016, the European Commission introduced a proposal to reform the current Dublin III Regulation[30].

The so called Dublin IV proposal acknowledges that the Dublin III Regulation has failed to provide effective access to asylum procedures for applicants. The Dublin IV proposal is intended to ensure a fair distribution of responsibilities among Member States and discourage abuses from applicants within the EU. Unfortunately, in order to achieve this objective, the prospective Regulation increases the obligations and sanctions imposed on asylum seekers in order to stop them from moving from one Member State to another (Maiani 2016), rather than emphasising the obligations of the Member States themselves. Such an approach is unlikely to aid in the protection of such persons and the vindication of their human rights. Further, from a disability perspective, there are no significant innovations that would improve the specific protections necessary for such persons. The proposed Regulation does not include any explicit reference to the CRPD, reiterates the dependency relation criteria, again mentioning severe disability with no further explanation, and does not introduce any reference to accessibility or reasonable accommodation. It remains to be seen whether and to what extent this proposal will be modified by the Parliament and the Council, and whether it will ultimately be approved. It is entirely possible that, further to the European Parliament recommendations of 2016, during the legislative process amendments will be introduced to ensure compliance of this new regulation to the CRPD.

5. Concluding Remarks

Under the current CEAS, the various asylum directives, and to some extent the Dublin III Regulation, mention persons with disabilities, and recognize their particular vulnerability. They all provide for procedural safeguards for asylum seekers with special needs. For example, as discussed above, the Reception Conditions Directive necessitates an individual assessment in order to establish the applicant's special needs. Nevertheless, none of these directives explicitly mentions or imposes accessibility requirements, or a duty to provide reasonable accommodation to disabled asylum seekers. The implementation of the provisions within these directives are therefore first and foremost linked to the iden-

[29] For an account of the failures of the Dublin III system see the study commissioned by the European Parliament and authored by Maiani on the reform of the Dublin III (Maiani 2016) at http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571360/IPOL_STU(2016)571360_EN.pdf.

[30] The Dublin IV proposal is part of a reform package that includes proposals to reinforce the EASO and transform it into a European Union Agency for Asylum and to recast the EURODAC Regulation.

tification of people with disabilities. Being identified as a person with a disability is of course crucial in terms of qualification for protection, accessing adequate accommodation and support when filing an asylum application. However, even this initial obligation appears to be deficient, as clearly shown by the FRA.

So far, the CRPD has not been implemented effectively in the context of asylum legislation and the current Dublin IV proposal does not make any clear advances from a disability perspective. More generally, the European Agenda on Migration, which set forth future goals for the EU action «to reap the benefits and address the challenges deriving from migration»[31], focuses on addressing the root causes behind irregular migration in non-EU countries, on dismantling smuggling and trafficking networks, and securing the external borders. It does not properly embrace a comprehensive human rights perspective, and certainly neglects the rights of persons with disabilities within this group. It remains to be seen whether the strengthening the EU asylum policy, a current objective of the Union, will involve the development of new disability provisions, as well as strengthening the Union's compliance with the CRPD within the asylum field, as requested by the CRPD Committee.

[31] Communication from the Commission to the European Parliament, the European Council and the Council, *A European Agenda on Migration*, Brussels, 13 May 2015, COM(2015) 240 final.

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