

**VII.**

**THE “ASYLUM PAYERS”:  
QUESTIONING  
THE ASYLUM SEEKERS’  
OBLIGATION  
TO CONTRIBUTE TO THE  
COSTS OF  
THEIR RECEPTION UNDER  
INTERNATIONAL  
AND EUROPEAN UNION  
LAW**

*Salvatore Fabio Nicolosi\**

SUMMARY: 1. Introduction and Context. – 2. The Practice Related to the Asylum Seekers’ Contribution to the Costs of their Reception in Europe. – 3. International Law and the Economic Treatment of Refugees and their Property. – 3.1. The Refugee Convention. – 3.2. International Human Rights Law. 4. Asylum Seekers’ Financial Contributions to the Costs of their Reception under EU Law. – 5. Testing Asylum Seekers’ Resources in order to Ensure Dignified Standards of Living. – 5.1. The Court of Justice’s Guidelines. – 5.2. The Amendments Suggested by the Proposal to Recast the Reception Directive. – 6. Conclusions.

*1. – Introduction and Context*

The adoption in January 2016 by the Danish Parliament of an amendment to the Aliens Act, known as the “Jewellery Law”<sup>1</sup>, providing for the search and seizure of

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<sup>1</sup> See Bill No. L87 presented by the Danish Government on 10 December 2015, and adopted by the

certain assets of asylum seekers that may serve as a contribution to the costs of their reception, raised several concerns especially as to its human rights implications<sup>2</sup>. The United Nations High Commissioner on Refugees (UNHCR), in fact, questioned the legality of the law, in particular as regards the introduction of the new police search and seizure powers which have been criticized to be “an affront to... dignity and an arbitrary interference with [the] right to privacy”<sup>3</sup>.

This heavily debated law is to be situated within the initiatives undertaken by the Danish government to limit the attractiveness of Denmark as a country of destination for asylum seekers and migrants<sup>4</sup>. More broadly, the Jewellery Law constitutes one of the reactions to the ongoing migratory flows affecting many Member States of the European Union (“EU”)<sup>5</sup>. As stressed by Groenendijk and Peers, similar rules exist in the legislation of several Member States, including Germany, the Netherlands or Sweden<sup>6</sup>. The domestic practice at the European level shows the ex-

Danish Parliament on 26 January 2016. The so called “Jewellery Law” was incorporated into Act No. 102 of 3 February 2016, amending the Danish Aliens Act, whose original text is available at: <[www.retsinformation.dk/forms/R0710.aspx?id=164258](http://www.retsinformation.dk/forms/R0710.aspx?id=164258)>. For comments see IBEN JENSEN and VEDSTED-HANSEN, “The Danish ‘Jewellery Law’: When the signal hits the fan?”, *European Immigration and Asylum Law and Policy*, 4 March 2016, available at: <<http://eumigrationlawblog.eu/the-danish-jewellery-law-when-the-signal-hits-the-fan/>>.

<sup>2</sup> See, e.g., HARTMANN and FEITH TAN, “The Danish Law on Seizing Asylum Seekers’ Assets”, *EJIL: Talk!*, 27 January 2016, available at: <<http://www.ejiltalk.org/the-danish-law-on-seizing-asylum-seekers-assets/>>.

<sup>3</sup> United Nations High Commissioner for Refugees (UNHCR), “Observations on the proposed amendments to the Danish Aliens legislation, L 87, 6 January 2016,” available at: <<http://www.refworld.org/docid/5694ed3a4.html>>.

<sup>4</sup> A series of 34 proposals for legislative amendments and administrative initiatives was tabled by the Danish government on 13 November 2015 as part of the “Asylum Package”. These amendments include also the controversial possibility to postpone from one to three years access to family reunification for aliens with temporary protected status, a form of protection which is different from refugee status. As to the concerns raised by the changes to the Danish Aliens Act, see the Letter from the Council of Europe Commissioner for Human Rights, Nils Muižnieks, CommDH(2016)4, 15 January 2016, available at: <[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CommDH\(2016\)4&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CommDH(2016)4&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true)>.

<sup>5</sup> As highlighted by Eurostat, in the second quarter of 2016, the number of persons seeking asylum in the EU reached 305,700, marking an increase of 6 per cent compared with the first quarter of 2016. For an overall overview of migration and asylum statistics, see the tables and figures updated by Eurostat at: <[http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics)>.

<sup>6</sup> GROENENDIJK and PEERS, “Can Member States seize asylum-seekers’ assets?”, *EU Law Analysis*, 24 January 2016, available at: <<http://eulawanalysis.blogspot.be/2016/01/can-member-states-seize-asylum-seekers.html>>.

istence of a series of national rules concerning the possibility to force asylum seekers to contribute from their own assets and income to the cost of their reception.

Despite triggering initial debates, the issue of the asylum seekers' contribution to the expenses of their maintenance has remained partly unexplored, though constituting a burning topic of the migration and development discourse. Host States claim, in fact, that the cost of reception of asylum seekers may have an impact on the state of national economy, particularly in time of crisis<sup>7</sup>.

Generally, migration constitutes a development vehicle that could be greatly beneficial to countries of both origin and destination<sup>8</sup>. Nonetheless, the impact of the migratory pressure on the EU has been challenging the reception conditions of many Member States, especially in cases of forced migration of persons in need for protection<sup>9</sup>. The difficulties in distinguishing economic migrants from asylum seekers and other people in need for protection in a context of mixed migratory flows<sup>10</sup> has resulted in the adoption of legislative measures aimed at discouraging any possible pull factor in countries of destination.

Recognizing that host countries, as confirmed by the UNHCR, have to pay a high price for receiving asylum seekers<sup>11</sup>, it is pivotal to answer the question

<sup>7</sup> For an economic analysis see in particular AIYAR et al., "Refugee Surge in Europe: Economic Challenges", International Monetary Fund Staff Discussion Note SDN/16/02, 1 January 2016, available at: <<https://www.imf.org/external/pubs/ft/sdn/2016/sdn1602.pdf>>.

<sup>8</sup> See UN General Assembly, Second Committee, 19th Meeting, 27 October 2010, GA/EF/3291. The link between migration and development has been especially explored by CHIMNI, "Development and Migration", in ALEINIKOFF and CHETAIL (eds.), *Migration and International Legal Norms*, The Hague, 2003, p. 255 ff.

<sup>9</sup> International Organization for Migration ("IOM"), *Glossary on Migration*, Geneva, 2004, p. 25, refers to forced migration as a

"general term used to describe a migratory movement in which an element of coercion exists, including threats to life and livelihood, whether arising from natural or man-made causes (e.g. movements of refugees and internally displaced persons as well as people displaced by natural or environmental disasters, chemical or nuclear disasters, famine, or development projects)."

<sup>10</sup> Mixed flows are generally defined by the IOM, *cit. supra* note 9, as "complex population movements including refugees, asylum seekers, economic migrants and other migrants." For references, see in particular, LINDE, "Mixed Migration - A Humanitarian Counterpoint", *Refugee Survey Quarterly*, 2011, pp. 89-99. For further references see EL-ENANY, "The EU Asylum, Immigration and Border Control Regimes: Including and Excluding the 'Deserving Migrant'", *European Journal of Social Security*, 2013, p. 171 ff.

<sup>11</sup> UNHCR Standing Committee, "Social and economic impact of large refugee populations on host developing countries" UN Doc. EC/47/SC/CRP.7, 6 January 1997, para. 28, available at: <<http://www.unhcr.org/en-us/excom/standcom/3ae68d0e10/social-economic-impact-large-refugee->

whether asylum seekers may be legitimately required to contribute to the cost of their reception. Accordingly, the nature and scope of a specific obligation in this regard needs to be properly investigated as well as its compatibility with EU law and the international legal framework.

To this extent, the research will firstly review the most relevant domestic practice at the European level, highlighting the possible risks beyond construing asylum seekers as profiteering from the international refugee protection regime. The scope of the research will be limited to the European context, the latter being one of the regions which are most concerned with migratory flows that are even likely to hinder one of the essential values of the European cooperation, such as the free movement of persons<sup>12</sup>.

Next, the research will examine the international legal framework and notably the Geneva Convention on the Status of Refugee<sup>13</sup> as to the possibility for States to impose on refugees and asylum seekers any obligation to contribute to the cost of their reception. The analysis will also consider States' international duties to respect the property of aliens and that aliens have the right to the peaceful enjoyment of their property under international human rights law.

It will be argued that the tendency to impose an obligation for asylum seekers to contribute to the cost of their reception may undermine the exercise of the right to asylum and can also create discriminations on how property and possessions are protected, if treating asylum seekers radically different from other migrants and from national citizens. Furthermore, the paper will focus on the pertinent rules of the Common European Asylum System ("CEAS"),<sup>14</sup> especially the Reception Di-

[populations-host-developing-countries.html - ga=1.194174126.26314193.1474381000>](#).

<sup>12</sup> See, e.g., FIJNAUT, "The Refugee Crisis: The End of Schengen?", *European Journal of Crime Criminal Law and Criminal Justice*, 2015, p. 313 ff.

<sup>13</sup> Convention relating to the Status of Refugees (Geneva, 28 July 1951), entered into force on 22 April 1954 ("Refugee Convention"), and the Protocol relating to the Status of Refugees (New York, 31 January 1967), entered into force on 4 October 1967.

<sup>14</sup> The Common European Asylum System consists of the following binding acts: Council Regulation 604/2013, OJ L 180/31, 29 June 2013 ("Dublin III Regulation"); Council Regulation 603/2010, OJ L 180/1, 29 June 2013 ("Eurodac Regulation"); Directive 2011/95/EU, OJ L 337/9, 20 December 2011 ("Qualification Directive"); Directive 2013/33/EU, OJ L 180/96, 29 June 2013 ("Reception Directive"); Directive 2013/32/EU, OJ L 180/249, 29 June 2013 ("Procedures Directive"); Council Directive 2001/55/EC, OJ L212/12, 20 July 2001. For an interpretation of the CEAS as an integrated legal system, see extensively BATTJES and SPIJKERBOER, "The Systematic Nature of the Common European Asylum System", in JULIEN-LAFERRIÈRE, LABAYLE and EDSTRÖM (eds.), *The European Immigration and Asy-*

rective, to reach the conclusions on the implications of asylum seekers' obligations to contribute to the costs of their reception.

Ultimately, it will be suggested that a national rule allowing authorities to confiscate all means of an asylum seeker above a fixed amount, is not thoroughly compatible with international and EU law, as it may violate the principle of proportionality and can be detrimental to the effective exercise of the right to asylum.

## 2. – *The Practice Related to the Asylum Seekers' Contribution to the Costs of their Reception in Europe*

A few European States have consolidated rules within their legislation concerning asylum seekers' contributions to the cost of their reception.

The Danish Aliens Act, in fact, even before the recent amendment of January 2016, envisaged that asylum seekers could be required to contribute to expenses associated with their stay for up to three months and the Danish police had the power to find documents that could be relevant for asylum claims. However, as has been underscored, this law was apparently never enforced<sup>15</sup>. Admittedly, the most appalling issue of the recent amendment to the Aliens Act is the possibility for the police to confiscate asylum seekers' assets worth 10,000 Danish kroner (more than 1,340 Euro), such as cash or jewellery, with the exception of items of special sentimental value, such as wedding rings or medals. These seized assets will be used to pay the cost of reception, including accommodation or healthcare services.

Apart from Denmark, similar practices are common to other EU Member States, including those with a long tradition in receiving refugees, such as Germany, where the Federal Law on the reception of asylum seekers (*Asylbewerberleistungsgesetz*), provides that asylum seekers can be forced to contribute from their own assets and income to the cost of their reception<sup>16</sup>. Article 7 of this law exempts only 200 Euros and the goods necessary for exercising a profession or employment. However, as reported by

*lum Policy: Critical Assessment Five Years After the Amsterdam Treaty*, Bruxelles, 2005, p. 263 ff., p. 270, where it is argued that "the conception of European asylum legislation as an integrated system is in some quite important respects necessary to interpret its rules, including claims on protection relevant for international law". For an updated commentary on the CEAS toolbox, see especially HAILBRONNER AND THYM, *EU Immigration and Asylum Law. Commentary*, 2nd edition, Baden-Baden, 2016.

<sup>15</sup> HARTMANN and FEITH TAN, *cit. supra* note 2.

<sup>16</sup> Asylum Seekers' Benefits Act (*Asylbewerberleistungsgesetz - AsylbLG*), 30 June 1993, available at: <<https://www.gesetze-im-internet.de/asylblg/BJNR107410993.html>>.

Groenendijk and Peers<sup>17</sup>, the practice in Germany is rather diversified as the Federal Law allows for differentiated application in the Landers.

In the Netherlands, asylum seekers are required to report whether they have own assets or income a part of which they may have to relinquish in order to contribute to their own reception costs and the reception costs of their family<sup>18</sup>.

In France, the recent reform of asylum legislation has profoundly modified the reception scheme and has included the possibility for asylum seekers to pay a financial contribution for their accommodation, should the accommodated asylum seekers have monthly resources which are above the monthly rate of the Active Solidarity Income (“*Revenu de Solidarité Active*”)<sup>19</sup>. In addition, organizations managing reception facilities are entitled to require a deposit for the accommodation provided, which will be refunded, totally or partially, when asylum seekers leave the reception facility<sup>20</sup>.

Still, in Hungary, the Asylum Act provides material reception conditions free of charge only to asylum seekers who are indigent, while the Asylum Authority may decide to order the applicant to pay for the full or partial costs of material conditions and health care<sup>21</sup>. However, the level of resources is not established in the Asylum Act and applicants have to make a statement regarding their financial situation. Presently, this condition does not pose an obstacle to accessing reception conditions. Access to reception conditions can be reduced or withdrawn in case it can be proven that the applicant deceived the authorities regarding his or her financial situation, although the European Council on Refugees and Exiles (“ECRE”) underscores that there have not been reports that asylum seekers would not be able to access material reception conditions.

A similar practice is common to other countries in Europe, which are not part of

<sup>17</sup> GROENENDIJK and PEERS, *cit. supra* note 6.

<sup>18</sup> See for further see the Country Report elaborated by the European Council on Refugees and Exiles, available at: <<http://www.asylumineurope.org/reports/country/netherlands>> and consult the web site of the Central Agency for the Reception of Asylum Seekers (“COA”).

<sup>19</sup> As of 1 April 2016 the total amount of the Active Solidary Income (“RSA”) is 524.68 Euro for a single adult.

<sup>20</sup> Articles L.744-1 to L.744-10 *Code de l'entrée et du séjour des étrangers et du droit d'asile*, as amended by the Law No. 2015-925 of 29 July 2015, in Official Journal of the French Republic, No. 174, 30 July 2015, p. 12977.

<sup>21</sup> Act LXXX of 2007 on Asylum, available at: <[http://njt.hu/cgi\\_bin/njt\\_doc.cgi?docid=110729.259725](http://njt.hu/cgi_bin/njt_doc.cgi?docid=110729.259725)>, at Sec. 26(2). See also the Country Report elaborated by ECRE, available at: <<http://www.asylumineurope.org/reports/country/hungary>>.

the EU, such as Switzerland, whose legislation requires asylum seekers to report to the Swiss authorities their values from 1,000 Swiss francs (more than 2,700 Euros) in order to contribute to the cost of their asylum applications and the provision of social assistance, while refugees or beneficiaries of other forms of protection are required to pay a tax of 10 per cent on their income as a contribution to the reception costs for a ten-year period<sup>22</sup>.

This set of domestic rules requiring asylum seekers to contribute to the cost of their reception reflects a consolidated European practice. Yet, a careful analysis through the lens of international and European law is necessary to understand whether access to reception conditions can be subject to the payment of a financial contribution or fee.

### 3. – *International Law and the Economic Treatment of Refugees and their Property*

Most of the domestic provisions concerning the reception of asylum seekers in Europe have been influenced by the process of harmonization that has been generated by EU law in the area of asylum<sup>23</sup>. This is the case, for instance, of the recent legislative reform in France, which was adopted in order to comply with the new CEAS legal toolbox<sup>24</sup>. The latter constitutes the legislative framework that must be taken into consideration to understand whether rules and practices on the seizure of asylum seekers' assets and financial contributions to the cost of reception are admissible and in line with EU law.

Nonetheless, before delving into the analysis of EU law provisions, it is crucial to examine the international legal landscape and especially the Refugee Convention,

<sup>22</sup> The most important norms for admission and handling of refugees are contained in the Asylum Act (*Asylgesetz*), 26 June 1998, as amended, *Systematische Rechtssammlung* [SR] 142.31, available at: <<https://www.admin.ch/opc/de/classified-compilation/19995092/201510010000/142.31.pdf>>, unofficial English translation is available at: <<https://www.admin.ch/opc/en/classified-compilation/19995092/201510010000/142.31.pdf>>, and the Foreign Nationals Act (*Bundesgesetz über die Ausländerinnen und Ausländer*), 16 December 2005, SR 142.20, available at: <<https://www.admin.ch/opc/de/classified-compilation/20020232/201510010000/142.20.pdf>>, unofficial English translation available at: <<https://www.admin.ch/opc/en/classified-compilation/20020232/201510010000/142.20.pdf>>.

<sup>23</sup> For a critical discussion see in particular BHABHA, "European Harmonization of Asylum Policy: A Flawed Process", *Virginia Journal of International Law*, 1994, p. 101 ff. For further references see also GUILD and MINDERHOUD (eds.), *The First Decade of EU Migration and Asylum Law*, Leiden, 2012.

<sup>24</sup> See *supra* note 14.

which, as stated by the Court of Justice of the EU, constitutes “the cornerstone of the international legal regime for the protection of refugees”<sup>25</sup>, and, pursuant to Article 78(1) of the Treaty on the Functioning of the EU (“TFEU”), the whole EU policy on international protection “must be in accordance” with the Refugee Convention and other relevant treaties, specifically in the field of human rights<sup>26</sup>.

International law offers a diversified set of rules likely to regulate the economic treatment of refugees. In particular, the simultaneous application of the Refugee Convention’s regime and international human rights instruments confirms that States must treat asylum seekers and their property according to the principle of non-discrimination. The two bodies of law will be subsequently analysed.

### *3.1. – The Refugee Convention*

The Refugee Convention enshrines a number of principles regulating the treatment of refugees and their property. In particular, Article 13 and, more specifically, Article 29 on fiscal charges and Article 30 on transfer of assets are worth mentioning as they set the general framework concerning the economic treatment of refugees.

Article 13 establishes that:

“The Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property”.

This provision echoes the general principle enshrined in Article 7(1) of the Refugee Convention which imposes the obligation to accord to refugees the same treatment which is accorded to aliens generally and introduces a standard of treat-

<sup>25</sup> Case C-175/08, *Aydin Salahadin Abdulla*, ECR, 2010, I-01493, para. 52.

<sup>26</sup> Art. 78(1) TFEU reads as follows:

“The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties”.

ment based on the principle of non-discrimination<sup>27</sup>. More specifically, Article 13 requires States to respect asylum seekers' property rights on the same ground as for other foreigners, not only on tangible property but also on securities, money, bank accounts, with the exception of artistic and industrial property, which is regulated in Article 14<sup>28</sup>.

As regards property rights, Article 7(1) incorporates, as stressed by Hathaway, the duty to comply with international aliens law, including the obligation to provide adequate compensation for any denial of property rights, which renders any confiscatory regime specifically applied against refugees contrary to the Refugee Convention<sup>29</sup>. From this perspective, the practice of Kenya and Uganda aimed at seizing refugees' vehicles without compensation is an example of a practice that can be considered in breach of international law<sup>30</sup>.

Still, as regards the economic treatment of refugees, Article 29 establishes the general rule that States Parties shall not impose on refugees charges or taxes "other or higher than those which are or may be levied on their nationals in similar situations"<sup>31</sup>. Article 30 confirms the right of refugees to transfer all and any type of assets which they have brought to the territory of the hosting State to another country in case of resettlement<sup>32</sup>. In the light of the drafting history of the Refugee Convention, it is clear that Article 29 reiterates the general principle of equal treatment between nationals and refugees as to the obligations stemming

<sup>27</sup> UNHCR, *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary* by Dr. Paul Weis, Geneva, 1990, available at: <<http://www.refworld.org/docid/53e1dd114.html>>, p. 47.

<sup>28</sup> *Ibid.* p. 199.

<sup>29</sup> HATHAWAY, *The Rights of Refugees under International Law*, Cambridge, 2005, p. 523. For further references to the rights of aliens, see generally NASCIBENE, *Il trattamento dello straniero nel diritto internazionale ed europeo*, Milan, 1984.

<sup>30</sup> HATHAWAY, *cit. supra* note 29, p. 523.

<sup>31</sup> Art. 29(1), Refugee Convention.

<sup>32</sup> Art. 30(1), Refugee Convention, which reads as follows:

"1. A Contracting State shall, in conformity with its laws and regulations, permit refugees to transfer assets which they have brought into its territory, to another country where they have been admitted for the purposes of resettlement.

2. A Contracting State shall give sympathetic consideration to the application of refugees for permission to transfer assets wherever they may be and which are necessary for their resettlement in another country to which they have been admitted."

from tax legislation<sup>33</sup>, this corresponds to provisions included in previous refugee law instruments, such as the 1933 Convention<sup>34</sup>. Therefore, as explained by Hathaway, Article 29 follows a standard clause in tax treaties, according to which when a tax is imposed on nationals and aliens in the same circumstances, it must be in the same form, and the relative formalities should not result more onerous for foreigners than for nationals<sup>35</sup>.

Contrariwise, Article 30 constitutes a novelty in the Refugee Convention, as it does not echo any former provision of the previous refugee instruments; it stems from a Belgian proposal within the Ad Hoc Committee<sup>36</sup>. As noted by Grahl-Madsen in his commentary, the provision sets forth a mandatory obligation which does not allow any discretion of the national authorities as to the transfer of the assets<sup>37</sup>. It is worth noting that a proposal to restrict the right of transfer to assets brought as a refugee was rejected by the Conference of Plenipotentiaries<sup>38</sup>, thus the obligation refers also to assets brought by asylum seekers before the refugee status was determined. It follows from the analysis of Article 30 that under international refugee law the property of refugees is protected from any unlawful and undue seizure by the authorities of the host State, even before the refugee status is determined.

In sum, international refugee law requires that refugees and other aliens are subjected to similar treatment, though it is clear that other aliens may not be entitled to the reception conditions which asylum seekers receive. From this perspective, it is also significant to stress that the Danish government has compared the position of refugees to that of Danish citizens claiming for social assistance. Accordingly, Denmark has been applying the same logic of the domestic Active Social Policy Act, according to which social assistance will not be provided to those individuals who have assets likely to cover their economic needs over the amount of 10,000 Danish kroner per person and that are necessary to maintain a basic standard of living<sup>39</sup>.

<sup>33</sup> UNHCR, *cit. supra* note 27, p. 199.

<sup>34</sup> Art. 13 of the Convention Relating to the International Status of Refugees (Geneva, 28 October 1933), entered into force on 22 April 1954.

<sup>35</sup> HATHAWAY, *cit. supra* note 29, p. 531.

<sup>36</sup> UN Doc. E/AC.32/L.24.

<sup>37</sup> GRAHL-MADSEN, *Commentary of the Refugee Convention 1951 (Articles 2-11, 13-37)*, UNHCR, 1963, republished in October 1997, available at: <<http://www.refworld.org/docid/4785ee9d2.html>>.

<sup>38</sup> UN Doc. A/CONF.2/SR.13, p. 7.

<sup>39</sup> Bekendtgørelse af lov om aktiv socialpolitik, LBK No. 468, 20 May 2016, available at:

Nevertheless, despite such measure can be legitimate, a more cautious approach is necessary while equating asylum seekers and citizens applying for social assistance. It must be stressed, in fact, that the Refugee Convention enshrines a number of secondary rights specifically linked with the reception of refugees, which States Parties are obliged to grant in order not to make the international system of refugee protection nugatory. Such rights, including the right to housing, work, education, primarily reflect the humanitarian nature of the international system of refugee protection and the need to facilitate the integration of refugees in the host society. Any seizure of asylum seekers' assets, if arbitrary, risks turning this legal regime into a discriminatory system likely to affect the relevance of the principle of equal treatment. To this extent, this body of law complements the main provisions enshrined under international human rights law<sup>40</sup>, which will be shortly examined in the following subparagraph.

### 3.2. – *International Human Rights Law*

Apart from the specific legal regime established by the Refugee Convention, the right to property is enshrined as a human right in a few other international instruments, such as the International Convention on the Rights of Migrant Workers<sup>41</sup> at the universal level, while at the regional level the right to property is included in the American Convention on Human Rights,<sup>42</sup> the African Charter of Human and Peoples' Rights,<sup>43</sup> the Charter of Fundamental Rights of the EU,<sup>44</sup> and, although not enshrined in the original text of the European Convention on Human Rights ("ECHR"), such right features in the 1952 Additional Protocol I.

The latter instrument plays a pivotal role, owing to the concerns that the issue

<https://www.retsinformation.dk/pdfPrint.aspx?id=180043>.

<sup>40</sup> As to the interplay between international refugee law and international human rights law, see generally CHETAIL, "Are Refugee Rights Human Rights?: An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law", in RUBIO-MARÍN (ed), *Human Rights and Immigration*, Oxford, 2014, p. 19 ff.

<sup>41</sup> Art. 15 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (New York, 18 December 1990), entered into force on 1 July 2003.

<sup>42</sup> Art. 21 of the American Convention on Human Rights (San José, 22 November 1969), entered into force on 18 July 1978.

<sup>43</sup> Art. 14 of the African Charter on Human and Peoples' Rights (Banjul, 27 June 1981), entered into force on 21 October 1986.

<sup>44</sup> Art. 17 of the Charter of Fundamental Rights of the European Union, OJ C364/1, 18 December 2000.

of seizing asylum seekers' assets has raised especially in Europe. Article 1(1) of the latter Protocol reads, in fact, as follows:

“1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”.

Without delving into an extensive analysis on the interpretation of the right to property under the ECHR regime<sup>45</sup>, it is worth mentioning that the provision above confirms that the right in subject is not absolute. The fact that the Refugee Convention and international human rights instruments, such as the ECHR impose a duty to respect foreign nationals and their property according to the principle of non-discrimination does not imply, in fact, that restrictions to property are not allowed in any case.

In a consistent case law, the European Court of Human Rights (“ECtHR”) interpreted the right to property as comprising three distinct rules as key components of such right, namely the general principle of peaceful enjoyment of property, the deprivation of property under certain conditions and State control over the use of property according to the general interest<sup>46</sup>. Admittedly, pursuant to these interconnected rules any interference with the right to property must be interpreted in the light of the fair balance between the fundamental rights of individuals and the public needs<sup>47</sup> and any restriction to the right to property must serve a legitimate aim, including the adoption of measures of economic reform or measures designed to achieve greater social justice<sup>48</sup>. From this perspective, it follows that such a fair balance will not have been struck where the individual property owner is made to

<sup>45</sup> For a more extensive analysis, see especially COLACINO, *La protezione del diritto di proprietà nel sistema della Convenzione europea dei diritti dell'uomo*, Roma, 2007.

<sup>46</sup> See *Sporrong and Lönnroth v. Sweden*, Application No. 7151/75 (A/52), Application No. 7152/75 (A/52), Judgment of 23 September 1982. For a general reference see especially COBAN, *Protection of Property Rights Within the European Convention on Human Rights*, Aldershot, 2002.

<sup>47</sup> *Sporrong*, *cit. supra* note 46, para. 69.

<sup>48</sup> *James and Others v. United Kingdom*, Application No. 8793/79, Judgment of 21 February 1986.

bear "an individual and excessive burden"<sup>49</sup>. A possible restriction to the right to property for reasons related to public economy may be justified but it is hard to accept that the cost of reception conditions can constitute an important public need which can justify the seizure of asylum seekers' personal assets. Similar restrictions can, in fact, result disproportionate through the lens of international law.

Although less affected by asylum applications, unlike Germany, Hungary, Sweden, Austria and Italy<sup>50</sup>, Denmark is certainly one of the highest spenders on the reception of asylum seekers and this has clear economic consequences. Nonetheless, refugees are not to be considered exclusively as a social and economic burden for the host society. As highlighted by the UNHCR, while it is recognized that there may be some negative aspects to the impact of a refugee influx on the economic life of a host country, the economic impact of refugees on host areas is not necessarily negative, as an economic stimulus may be generated, *inter alia*, through the local purchase of food, non-food items, shelter materials by agencies supplying relief items, disbursements made by aid workers, the assets brought by refugees themselves, as well as employment and income accrued to local population, directly or indirectly, through assistance projects for refugee areas<sup>51</sup>.

Such considerations do not aim to deny the heavy price that host societies have to pay in receiving asylum seekers, but they intend to clarify that international law sets forth a system whose primary scope is to protect people in need for protection, emphasizing how a satisfactory solution of the problem cannot be achieved by imposing undue or disproportionate obligations upon asylum seekers, without considering instead international co-operation among States<sup>52</sup>, also at the regional level and more specifically within the EU. In this regard, an effective system of responsibility-sharing based on solidarity mechanisms, which include the relocation of asylum seekers across the EU, is under discussion in the light of the recast process of the Dublin Regulation on the State responsible for an asylum application<sup>53</sup>.

<sup>49</sup> *Sporrong*, *cit. supra* note 46, para. 73.

<sup>50</sup> See statistics on the number of (non-EU) asylum seekers in the EU and EFTA Member States, 2014 and 2015 (thousands of first time applicants), available at: <<http://ec.europa.eu/eurostat/statistics-explained/index.php/>>.

<sup>51</sup> UNHCR Standing Committee, *cit. supra* note 11, para. 6.

<sup>52</sup> Preamble of the Refugee Convention.

<sup>53</sup> European Commission, 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

Without discussing in greater detail the ongoing proposals, it is worth highlighting that an effective system of relocation of asylum seekers must address the different needs for protection in the reception of asylum seekers, such as family reunification and the best interest of the child<sup>54</sup>.

#### 4. – *Asylum Seekers' Financial Contributions to the Costs of their Reception under EU Law*

The international legal framework does not specifically address the issue of the possible asylum seekers' obligation to contribute to their own maintenance, as the Refugee Convention and international human rights rules merely establish a not less favourable standard of treatment than that accorded to aliens generally in the same circumstance.

Nonetheless, within EU law a more detailed set of rules enshrined in the Reception Directive<sup>55</sup> complements the international legal framework as to the reception and treatment of asylum seekers and refugees. Despite the fact that Article 78(1) TFEU enshrines the EU commitment to develop a policy on international protection which must be consistent with the Refugee Convention and other relevant treaties, including the ECHR, the CEAS has evolved as an autonomous body of law with specific rules. It is therefore crucial to explore the regime established by the Reception Directive in order to see whether an obligation for asylum seekers to contribute to the costs of their reception is allowed under EU law and whether it is compatible or raises tensions with the international legal framework.

The current Reception Directive, which replaces former Directive 2003/9,<sup>56</sup>

a stateless person (recast), [COM(2016) 270 final/2], 21 August 2016; see also [COM(2016) 270 final/1], 4 May 2016. For specific references on the recast process of the Dublin Regulation, see MAIANI, "The Reform of the Dublin III Regulation", Study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, 28 June 2016, available at: [http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL\\_STU\(2016\)571360](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2016)571360).

<sup>54</sup> See, in this regard, NICOLOSI, "Emerging Challenges of the Emerging Challenges of the Temporary Relocation Measures under EU Asylum Law", *European Law Review*, 2016, p. 338 ff. On the latter issue, see the contribution by GUALCO in this Volume, p. 175 ff.

<sup>55</sup> For a recent commentary on the Reception Directive, see *inter alia*, PEERS et al., *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition, Vol. 3 – EU Asylum Law*, Boston/Leiden, 2015, p. 497 ff. See also HAILBRONNER and THYM, "Legal Framework for EU Asylum Policy", in ID. (eds.), *cit. supra* note 14, p. 1023 ff.

<sup>56</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the recep-

deals with access to reception conditions for asylum seekers while they wait for the examination of their claim and ensures access to housing, food, healthcare and employment as well as medical and psychological care. This legislative instrument is necessary for a common asylum policy in order to harmonize rules on reception conditions and offer equivalent standards of treatment across the EU, as stated in the 2009 Stockholm Programme<sup>57</sup>.

The relevant provisions on material reception conditions are enshrined in Article 17 which establishes the obligation for Member States to provide “adequate standards of living” for applicants.

Nonetheless, this provision allows some leeway to Member States because all or some of the reception conditions can be made available to those asylum applicants who do not have sufficient means necessary to have adequate standards of living<sup>58</sup>. Secondly and more importantly, Article 17(4) allows Member States to “require applicants to cover or contribute to the cost of the material reception conditions and of the health care”, provided that the applicants have sufficient resources, for example if they have been working for a reasonable period of time. As explained in detail by Groenendijk and Peers through the analysis of the *travaux préparatoires*<sup>59</sup>, such provisions on financial contributions by asylum seekers were also contained in former Directive 2003/9 and in the Commission’s proposal for the original Directive, which carried a specific provision on financial contributions that asylum seekers may be asked to pay whether provided with material reception conditions<sup>60</sup>. Nonetheless, the Commission pointed out that decisions on applicants’ contribution should be taken “individually, objectively and impartially” and rea-

tion of asylum seekers, OJ L 31, 6 February 2003, p. 18.

<sup>57</sup> The Stockholm Programme - An open and secure Europe serving and protecting citizens, OJ C 115, 4 May 2010, para. 6.2, expressly states that:

“it is crucial that individuals, regardless of the Member State in which their application for asylum is lodged, are offered an equivalent level of treatment as regards reception conditions, and the same level as regards procedural arrangements and status determination.”

<sup>58</sup> Reception Directive, Art. 17 (3).

<sup>59</sup> GROENENDIJK and PEERS, *cit. supra* note 6. For a more extensive analysis of the Directive and its legislative history see also SLINGENBERG, *The Reception of Asylum Seekers under International Law*, Oxford, 2014, p. 57.

<sup>60</sup> European Commission, Proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States, 3 April 2001, [COM(2001) 181 final], Art. 19.

sons must be given in order to make possible their review<sup>61</sup>.

The proposal confirmed that the provision on financial contributions was drafted in order to meet the Council's concerns as to the requirement of "inadequate" resources of asylum seekers. During the negotiations several Member States insisted that reference should be made to the general principle of the real need of the applicant<sup>62</sup>, and as explained by Groenendijk and Peers, the proposal regarded the asylum seekers' income, implying that all the income above a certain threshold could be seized by a Member State<sup>63</sup>. The legislative history of the Reception Directive illustrates the difficulty to accommodate Member States' suggestions until the final draft was accepted with the reference in Article 17(4) to access to the labour market for a reasonable period of time as a condition to ask asylum seekers to contribute to the cost of the material reception conditions.

Compared to former Directive 2003/9, the 2013 recast Reception Directive includes among the grounds for reducing or withdrawing material reception conditions, which the Court of Justice of the EU ("CJEU") has considered exhaustive<sup>64</sup>, the circumstance that the applicant has concealed financial resources<sup>65</sup>. In this regard, it must be stressed that, as emphasized by ECRE, the possibility to completely withdraw reception conditions must be taken carefully and a narrow approach must be followed, in order to ensure that applicants have sufficient resources for an adequate standard of living<sup>66</sup>.

Overall, from the proposals elaborated during the negotiations for the Reception Directive adopted in 2003 and its later recast process, some relevant considerations clearly emerged. First, although the issue of financial contributions has been repeatedly discussed during the negotiations, no reference can be tracked as to the seizure of asylum seekers' assets and this also reflects, as mentioned before, the

<sup>61</sup> *Ibid.*

<sup>62</sup> See Council Document 11320/01 ASILE 39, 30 July 2001, p. 33.

<sup>63</sup> GROENENDIJK and PEERS, *cit. supra* note 6.

<sup>64</sup> In Case C-179/11, *Cimade and Gisti*, 27 September 2012, para. 57, the Court stated that "only in cases listed in Article 16 of Directive 2003/9 [corresponding to Article 20 of recast Directive 2013/33/EU] may the reception conditions ... be reduced or withdrawn". For a comparison between former Directive 2003/9 and current Directive 2013/33, see especially SLINGENBERG, *cit. supra* note 59, pp. 80-84.

<sup>65</sup> Reception Directive, Art. 20(3).

<sup>66</sup> See ECRE, Information Note on Directive 2013/33/EU, July 2015, available at: [http://www.ecre.org/wp-content/uploads/2016/07/Information\\_Note\\_Reception-2015.pdf](http://www.ecre.org/wp-content/uploads/2016/07/Information_Note_Reception-2015.pdf), p. 32.

practice of most European States with the exception of the recent Danish "Jewellery Law".

Secondly, based on the Reception Directive, Member States are allowed to ask asylum seekers a financial contribution for the cost of their reception, provided that a preliminary test is made of whether applicants possess sufficient resources to have a standard of living for their health and to enable their subsistence, as set forth in Article 17(3) of the Reception Directive. It is worth stressing that such test must be considered in the light of the system of guarantees that the Directive establishes in favour of asylum seekers, which the European Court of Human Rights ("ECtHR") in its landmark decision in *M.S.S. v. Belgium and Greece*, defined as a vulnerable group<sup>67</sup>.

Before delving into the construction of the test in subject, which will be dealt with in the following section, it must be reiterated that the Directive establishes minimum standards on the reception of asylum seekers. Thus, despite the fact that Member States may follow a minimalist approach while implementing the Directive's provisions, the adoption of less favourable standards than those established by the Directive would not be compatible with EU law<sup>68</sup>. Accordingly, the possible seizure of asylum seekers' assets regulated by domestic rules would infringe EU law insofar as it will introduce other conditions than those set out in the Directive. In this regard, a relevant case law issued by the CJEU confirms that many areas of asylum and migration are not governed by Member States' discretion but by a corpus of uniform EU rules. In its judgment in *Ben Alaya*, for instance, the Court pointed out that although Directives may allow Member States to exercise a measure of discretion, such discretion relates only to the conditions laid down in the relevant Directive<sup>69</sup>.

However, it must be reminded that asylum and migration in EU law are also regulated by the principle of flexible or differentiated integration, according to

<sup>67</sup> *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgment of 21 January 2011. For comments see CLAYTON, "Asylum Seekers in Europe: *M.S.S. v. Belgium and Greece*", *Human Rights Law Review*, 2011, p. 739 ff. The major findings of the ruling in *M.S.S.* have been echoed by the CJEU in its decision in Case C-411/10, *N.S.*, ECR 2011, I-13905, paras. 88-90.

<sup>68</sup> The Reception Directive, Recital 28, establishes that "Member States should have the power to introduce or maintain more favourable provisions for third-country nationals and stateless persons who ask for international protection from a Member State".

<sup>69</sup> Case C-491/13, *Ali Ben Alaya*, 10 September 2014; see also Case C-575/12, *Air Baltic Corporation AS v. Valsts robežsardze*, 4 September 2014; Case C-84/12, *Koushkaki*, 19 December 2013.

which a Member State opts to move forward at different speeds and/or towards different objectives<sup>70</sup>. This is, for instance, the case of Denmark that is not bound by the Reception Directive, because of its opt-out from the EU policies in the area of freedom, security and justice<sup>71</sup>. Although the principle of flexible integration has certainly allowed some progress in many areas of the EU polity, including asylum and migration, it has nonetheless fragmented or limited the outreach of EU law, determining situations in which Member States can exercise their discretionary power regardless of standards set by the EU legislation.

### *5. – Testing Asylum Seekers’ Resources in order to Ensure Dignified Standards of Living*

The Reception Directive, as it has been argued, establishes a legal framework which aims to ensure dignified standards of living for asylum applicants within the EU<sup>72</sup>. Pursuant to Article 3, the scope of the Directive is, in fact, to provide material support for applicants in the territory of a Member State. Such support may be subject to the condition that asylum seekers do not have sufficient means to have a standard of living adequate for their health and to enable their subsistence<sup>73</sup>.

A test is therefore necessary in order for Member States to determine the level of material support that must be provided to asylum applicants and consider whether they have sufficient resources for a dignified standard of living. The exhaustion of this test is a precondition for Member States to consider the possibility to require applicants to contribute to the cost of their material reception.

Unfortunately, as it has been stressed, the determination of the material recep-

<sup>70</sup> For references, see in particular ANDERSEN and SITTE, “Differentiated Integration: what is It and How Much can the EU Accommodate?” *Journal of European Integration*, 2006, p. 313 ff.

<sup>71</sup> For a recent discussion see WIND and ADAMO, “Is Green Better than Blue? The Danish JHA Opt-out and the Unilateral Attempt to Attract Highly Skilled Labour”, *European Journal of Migration and Law*, 2015, p. 329 ff. It must be stressed that Ireland has also opted out, while the UK has opted in and is still bound by former Directive 2003/9.

<sup>72</sup> See in this regard more extensively TSOURDI, “Reception Conditions for Asylum Seekers in the EU: Towards the Prevalence of Human Dignity”, *Journal of Immigration, Asylum and Nationality Law*, 2015, p. 9 ff., and, more recently, ID., “EU Reception Conditions: A Dignified Standard of Living for Asylum Seekers?”, in CHETAIL, DE BRUYCKER and MAIANI (eds.), *Reforming the Common European Asylum System: The New European Refugee*, Leiden, 2016, p. 271 ff.

<sup>73</sup> See Reception Directive, Art. 17(3).

tion conditions is an area with wide divergences at the national level<sup>74</sup>, owing to the fact that the Reception Directive allows Member States to follow a minimalist approach to the Directive's provisions which has been counterbalanced by the most recent case law issued by the Court of Justice.

### 5.1. – *The Court of Justice's Guidelines*

The EU Court of Justice has been paying increasing attention to construing the most delicate provisions of the CEAS and ensuring uniform interpretation throughout the EU. After obtaining jurisdiction over migration and asylum questions in 2005, in fact, the role of the Court of Justice has been notably expanded in the area of asylum, with references for preliminary rulings seeking guidance with the interpretation of the EU asylum legislation<sup>75</sup>.

As regards the material reception conditions, the CJEU had the opportunity to provide useful guidelines that Member States must take into account when considering whether the resources of asylum seekers are sufficient to have dignified living standards. Two recent cases are seminal in this regard. In its judgment in *Cimade and Gisti* the Court of Justice stressed that the asylum seekers may not be deprived even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State of the protection of the minimum standards laid down by the Reception Directive<sup>76</sup>.

This line of reasoning has been more recently echoed in *Saciri*, in which the Court had the opportunity to point out that the minimum standards laid down by the Reception Directive will normally suffice to ensure dignified standards of living across all Member States<sup>77</sup>. Still, the Court stressed that, "although the amount

<sup>74</sup> While referring to a number of Reports from international human rights organisms, including the Commissioner for Human Rights of the Council of Europe, and civil society organizations, TSOURDI, *cit. supra* note 72, p. 19, highlights how many asylum seekers in some Member States face a real lack of reception conditions.

<sup>75</sup> For references see GARLICK, "International Protection in Court: The Asylum Jurisprudence of the Court of Justice of the EU and UNHCR", *Refugee Survey Quarterly*, 2015, p. 107 ff.; BOUTRUCHE ZAREVAC, "The Court of Justice of the EU and the Common European Asylum System: Entering the Third Phase of Harmonisation?", *Cambridge Yearbook of European Legal Studies*, 2010, p. 53 ff.. See also COLLIN, "Recent developments in asylum and immigration law before the Court of Justice", *ERA Forum*, 2009, p. 581 ff.

<sup>76</sup> *Cimade and Gisti*, *cit. supra* note 64, para. 56.

<sup>77</sup> Case C-79/13, *Saciri*, 24 February 2014, para. 35.

of the financial aid granted is to be determined by each Member State, it must be sufficient to ensure a dignified standard of living and adequate for the health of applicants and capable of ensuring their subsistence<sup>78</sup>. The Court set out a number of guarantees aimed at ensuring that particular attention is given to people with special needs: the resources made available must be necessary, for instance, to guarantee family unity and the best interest of the child, which therefore includes the possibility that children can be housed with their parents<sup>79</sup>. Moreover, the allowance received must be also adequate to obtain housing, even in the private market<sup>80</sup>.

Overall, the Court provided national authorities with yardsticks necessary to gauge the level of material support that must be available to asylum applicants in order to ensure dignified standard of living. The approach followed by the Court of Justice therefore diverges from that of certain Member States aimed at inspecting asylum seekers' resources in order to find the surplus necessary to contribute to the cost of their reception. This protective approach is even strengthened by the fact that in *Saciri* the Court made clear that no derogation from the mentioned minimum standards set out in the Reception Directive can be justified on the basis of the saturation of the reception networks<sup>81</sup>.

Another point which is worth mentioning in this context is the emphasis that the Court of Justice paid to the value of human dignity, as enshrined in Article 1 of the Charter of Fundamental Rights of the EU, which was recalled in the two mentioned leading cases concerning the Reception Directive, namely *Cimade/Gisti* and *Saciri*. The argument developed by the Court on the relevance of human dignity in reception conditions emphasizes that the CEAS in general is not only devised to offer an appropriate status of protection to third country nationals but also to guarantee adequate living standards and the enjoyment of fundamental rights<sup>82</sup>.

Considering the arguments developed by the Court of Justice, it would be difficult to frame the issue of the costs of reception within the paradigm based on the

<sup>78</sup> *Ibid.*, para. 40.

<sup>79</sup> *Ibid.*, para. 41.

<sup>80</sup> *Ibid.*, para. 42.

<sup>81</sup> *Ibid.*, para. 50.

<sup>82</sup> In this regard, see TSOURDI, *cit. supra* note 72, which highlighted the “effet utile” of the provision on human dignity, as a parameter which incorporates positive obligations of socio-economic nature, necessary to ensure the enjoyment of basic fundamental rights. For a broader analysis, see also JONES, “Human Dignity in the EU Charter of Fundamental Rights and its Interpretation Before the European Court of Justice”, *Liverpool Law Review*, 2012, p. 281 ff.

migration-development nexus. If disconnected from the purposes suggested by the Court, the test on asylum seekers' resources can serve the wrongful aim of denying access to material support based on the simple verification that an applicant has a limited amount of cash and valuables. The tenet of the legal regime designed by the Reception Directive allows, in fact, possible derogations on the basis of the existence of continuous income or funding, for instance, as clearly mentioned by Article 17(4), if applicants have been working for a reasonable period of time<sup>83</sup>. Accordingly, compliance with the principle of proportionality requires that Member States implement the Reception Directive, taking into consideration the personal situation of asylum applicants and establishing a correct balance with genuine objectives of general interest. Domestic decisions concerning asylum applicants' contribution to the cost of their reception must be fair and respect general principles of EU law<sup>84</sup>.

From this perspective, two orders of considerations are necessary: on the one hand, the test on asylum seekers' resources cannot be applied in order to determine the amount an applicant must contribute to the cost of the reception, without distorting the legitimate aim to ensure that asylum seekers have adequate living standards. Member States must be able to demonstrate that any legislative measure is applied with the intent of ensuring the highest level of protection for asylum seekers. On the other hand, and taking into account the relevance of the principle of proportionality, it seems that any measure aimed at seizing asylum seekers' assets results disproportionate, provided that a specific legal framework establishes less restrictive measures could achieve the same objective, such as limiting or curtailing access to specific benefits<sup>85</sup>.

#### *5.2. – The Amendments Suggested by the Proposal to Recast the Reception Directive*

The debate on the controversial asylum seekers' obligation to contribute to the cost of their reception has been certainly influencing the ongoing further recast process of the CEAS legal toolbox, including the Reception Directive, which the

<sup>83</sup> See Reception Directive, Art. 17(4).

<sup>84</sup> See, e.g., the CJEU's judgment in Case C-141/12, *YS*, 17 July 2014. For a broader examination of the principle of proportionality in asylum procedures, see especially RENEMAN, *EU asylum procedures and the right to an effective remedy*, Oxford, 2014.

<sup>85</sup> GROENENDIJK and PEERS, *cit. supra* note 6.

European Commission recently triggered<sup>86</sup>.

Unlike other EU asylum law instruments, such as the Qualification and the Procedure Directives, which will be transformed into Regulations, the European Commission did not consider “feasible or desirable to fully harmonise Member States’ reception conditions” through a Regulation, as there are still significant differences in Member States’ social and economic conditions<sup>87</sup>.

The amendments concerning the general rules on material reception conditions include a provision which requires the observance of the principle of proportionality “when assessing the resources of an applicant, when requiring an applicant to cover or contribute to the cost of the material reception conditions or when asking an applicant for a refund...”. The provision also establishes that Member States take into account “the individual circumstances of the applicant and the need to respect his or her dignity or personal integrity, including the applicant’s special reception needs”. Moreover, it is established that “Member States shall in all circumstances ensure that the applicant is provided with a standard of living which guarantees his or her subsistence and protects his or her physical and mental health”<sup>88</sup>.

This amendment constitutes a major breakthrough, as it seems to incorporate the Court of Justice’s major findings as to the material reception conditions from a twofold perspective. Firstly, the proposal explicitly mentions the principle of proportionality as a benchmark that Member States must abide by, when assessing the resources of an applicant. Secondly, the proposal makes a clear reference to the need to respect the dignity or personal integrity of the applicant, and requires to

<sup>86</sup> See European Commission, Communication to the European Parliament and the Council, Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe, [COM(2016) 197 final], 6 July 2016 and the following proposals tabled by the Commission on 13 July 2016: Proposal for a Regulation of the European Parliament and the Council establishing a common procedure in the Union and repealing Directive 2013/32/EU, [COM(2016) 367 final]; Proposal for a Regulation of the European Parliament and Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, [COM(2016) 466]; Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), [COM(2016) 465 final]. These proposals complement that concerning the recast of Dublin Regulation, see *supra* note 53.

<sup>87</sup> COM(2016) 465, *cit. supra* note 86, Explanatory Memorandum, p. 6.

<sup>88</sup> *Ibid.*, Art. 16 (5).

take into account the individual behaviour and the particular circumstances of asylum seekers.

Nevertheless, it must be also highlighted that such breakthrough is counterbalanced by the inclusion of a series of amendments that restrict reception conditions. In this regard, draft Article 17(a) raises some concerns and results inherently contradictory as far as it provides, on the one hand, that "Member States shall ensure a dignified standard of living for all applicants", while, on the other hand, it excludes asylum seekers who are not in the Member State designated as responsible by the Dublin Regulation from reception conditions<sup>89</sup>. As emphasized by ECRE, this limitation "contradicts the principle of entitlement to reception conditions as a corollary of asylum seeker status", as elaborated in *Cimade and Gisti*, in relation to which the Court clarified that reception conditions are made available to a person as long as he or she is an asylum seeker with a right to remain on the territory, and that asylum seekers are an indivisible class of persons<sup>90</sup>.

It is not possible to predict the impact of the suggested amendments, owing to the ongoing negotiation process. However, it is recommended that the recast Directive will entirely incorporate the principles set by the Court of Justice in its relevant case law and solve the internal contradiction that could alter the scope of the Directive.

This would disclose the potential of new Article 16 as a necessary step forward against the risks existing beyond the political tendency to construe asylum seekers as profiteering from international protection and to depart from the migration-development nexus which distorts the humanitarian component of asylum seekers' reception.

## 6. – Conclusions

As highlighted in the foregoing analysis, access to reception condition for asylum seekers constitutes one of the most problematic issues for countries of destination, especially within the EU. The Jewellery Law adopted in Denmark and the practice existing in other European States reflect the increasing shift to consider asylum seekers exclusively as an economic burden for host societies. This also explains the tendency to carve out specific obligations for asylum seekers to contrib-

<sup>89</sup> *Ibid.*, Art. 17(a) and Art. 19.

<sup>90</sup> See ECRE, Comments on the Commission Proposal to recast the Reception Conditions Directive COM(2016) 465, October 2016, p. 6.

ute to the costs of their reception.

In an attempt to review the legality of such measures, this analysis has focused on the international legal framework and the CEAS toolbox in order to contextualize the relevant domestic practice at the European level.

As an established rule of international law, aliens, including refugees and asylum seekers, must be treated in full respect for the principle of non-discrimination, especially in cases of limitations to the right to enjoyment of property<sup>91</sup>. From this perspective, the seizure of asylum seekers' assets as a contribution to the cost of their reception may potentially infringe international law in that it disproportionately targets a specific part of the population and the most vulnerable group of aliens, namely refugees and asylum seekers.

From a different point of view, EU law has specifically and exhaustively established the conditions under which the reduction or possible withdrawal of material reception conditions is possible. The Court of Justice of the EU has clarified in a consistent case law that minimum reception conditions serve the primary scope of ensuring that applicants have access to adequate living standards<sup>92</sup>. It would be contrary to the spirit of offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*, as stated in Article 78 TFEU, to arbitrarily deny, limit or withdraw access to reception conditions.

Apart from determining an infringement of the rules enshrined in the Reception Directive, the risk of discriminatory treatment, owing to disproportionate restrictions to access to material reception conditions, may expose States to legal actions before relevant human rights adjudicators, including the European Court of Human Rights, for a disproportionate interference with the fundamental right to property.

Ultimately, even though domestic provisions concerning the possible asylum seekers' contribution to the cost of their reception may play the symbolic role of a deterrent against any pull factor, they risk construing asylum seekers as profiteering from the international refugee protection regime. As a consequence, such a legislative tendency may undermine the exercise of the right to asylum, which is to be understood, as recently maintained by the Supreme Court of Ireland, as "an auton-

<sup>91</sup> In this regard see also JENNINGS and WATTS (eds.), *Oppenheim's International Law, Volume 1 Peace*, 9th edition, Oxford, 2008, p. 912.

<sup>92</sup> See *Cimade and Gisti* case, *cit. supra* note 64; and *Saciri* case, *cit. supra* note 77.

omous right to a status, refugee status, which is a fundamental right"<sup>93</sup>.

Still, the added value of these measures might be also questioned from an economic perspective for at least two reasons which will facilitate the reach of a conclusion as to the migration-development nexus. First, the political logic beyond the adoption of measures concerning the asylum seekers' contributions to their own maintenance seems to ignore the fact that refugees will more than likely use their own assets within the host State, as there is no reason to expect that a refugee will prefer to depend on the social assistance provided by the host State. Second, the economic advantage that can be generated by the measures aimed at seizing asylum seekers' assets would be minimal compared to the enormous costs that States face in order to maintain an efficient asylum system with adequate reception facilities.

As confirmed by the UNHCR, host countries have to pay a high price for receiving asylum seekers<sup>94</sup>. However, the "negative" impact of migratory flows urges States, especially in Europe, to mitigate, to the extent possible, such impact by establishing mechanisms of regional and international cooperation. At a very critical time for the sustainability of the CEAS, in fact, the tendency to establish an obligation for asylum seekers to contribute to the cost of their reception will not erase the flaws of the CEAS, it will rather reiterate the grim picture originally emerging from the developing EU asylum policy, in which, according to Colin Harvey "[t]he asylum seeker is routinely constructed as a threat to the area of freedom, security and justice"<sup>95</sup>.

<sup>93</sup> Supreme Court of Ireland (Ireland), *T.D. v Minister for Justice Equality and Law Reform* [2014] IESC 29, 10 April 2014, para. 143.

<sup>94</sup> UNHCR Standing Committee, *cit. supra* note 11.

<sup>95</sup> HARVEY, *Seeking Asylum in the UK: Problems and Prospects*, London, 2000, p. 331.