



## Discussion Paper

Mutual recognition of positive asylum decisions and the transfer  
of international protection status within the EU

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## Abstract

*The aim of this discussion paper is to look at the whether a legal basis exists for the application of the principle of mutual recognition under International and European Law and explore the consequences of mutually recognising a positive asylum decision within the context of the Common European Asylum System. It will also look at whether there is a need for legislative changes in the area of asylum to make this concept meaningful. The second part of this paper will look at the transfer of international protection status between Member States and whether another instrument is needed in order to provide for this transfer.<sup>1</sup>*

## 1. Introduction

Mutual recognition has become a principle that underlines the basis of much interstate cooperation throughout the EU. It already operates in the area of asylum and migration law, for example in the implementation of return decisions. Mutual trust, an essential component to ensure that mutual recognition remains operational, is the underlying basis for the Dublin Regulation. In order to ensure that the Common European Asylum System (“CEAS”) is truly based on common systems and standards, the next logical step is to ensure and implement the mutual recognition of positive asylum decisions. This was also foreseen in the Action Plan implementing the Stockholm Programme. There is no consensus as to the scope of the mutual recognition of positive asylum decisions, but it will be argued that in order for a uniform status to be truly valid throughout the Union, the status must be fully enforceable in any Member State. This paper will set out the relevant international and regional framework examining whether mutual recognition already takes place and whether there are any obstacles in place that could impede recognition. It will also look at whether another instrument is needed to enable the transfer of a protection status between Member States.

## 2. Origins and ratio of mutual recognition

The principle of mutual recognition is extensively used in many areas of EU law such as civil and criminal law. Under the Tampere Conclusions which established a five year agenda for EU Justice and Home Affairs, it became the ‘corner stone of judicial co-operation’ in both civil and criminal matters.<sup>2</sup> Mutual recognition already occurs in asylum law, for example in the realm of rejected asylum seekers under the Returns Directive and under the lesser used Mutual Recognition of Decisions on the Expulsion of Third Country Nationals Directive.<sup>3</sup> The essence of mutual recognition is the recognition of national standards and decisions by one Member State by other Member States. It obliges States to accept and/or enforce judicial decisions handed down by another Member State and attach the same legal effects to the decision as similar national judicial decisions even though those decisions were made by a different judiciary who based their decisions on laws that may not be applicable in the enforcing Member State. It imposes an obligation on authorities to recognise other Member States standards even if they are from a different system on the basis of mutual trust and one that requires the most minimal formalities.<sup>4</sup>

The principle of mutual trust, the underlying concept which is needed to implement the mutual recognition of decisions, provides that Member States trust other Member States’ legal systems and judicial decisions. In asylum law, this is based on the premise that each Member State will examine asylum seekers’ claims and treat them in accordance with the relevant national, European and international laws.<sup>5</sup> The Dublin Regulation, which determines responsibility for asylum applications to a Member State, operates on the basis of mutual trust between EU Member States; however this does not always happen in practice.<sup>6</sup>

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<sup>1</sup> ECRE would like to thank Madeline Garlick, (Guest Researcher, Migration Policy Institute and PhD candidate, Radboud University, Nijmegen, the Netherlands) and Steve Peers (University of Essex) for providing comments and suggestions on the paper.

<sup>2</sup> European Union: Council of the European Union, Presidency Conclusions, Tampere European Council, 15-16 October 1999, 16 October 1999.

<sup>3</sup> Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals.

<sup>4</sup> Valsamis Mitsilegas, *EU Criminal Law*, Hart Publishing, 2009, pp. 116-120.

<sup>5</sup> In the realm of criminal law, the Council stated that ‘the Union should continue to enhance mutual trust in the legal systems of the Member States by establishing minimum rights as necessary for the development of the principle of mutual recognition and by establishing minimum rules concerning the definition of criminal offences and sanctions as defined by the Treaty’, *Stockholm Programme: an open and secure Europe serving and protecting citizens*, OJ 4.5.2010, C115/1, p12.

<sup>6</sup> This however has its limits, see for example CJEU, *N. S. (C 411/10) v. Secretary of State for the Home Department and M. E. (C 493/10) and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, C-411/10 and C-493/10, 21 December 2011. See also for example, For example see ECRE, AIDA annual report 2013/2014, ‘*Mind the Gap. An NGO Perspective on Challenges to Accessing Protection in the Common European Asylum System*’ and ECRE, AIDA annual report 2012/2013 ‘*Not there yet. An NGO Perspective on Challenges to a Fair and Effective Common European Asylum System*’.

### 3. Origins of mutual recognition of positive asylum decisions

In the Tampere Conclusions, the European Council committed to work towards establishing a Common European Asylum System (CEAS). As part of this, they provided that 'in the longer term, Community rules should lead to a common procedure and a uniform status for those who are granted asylum valid throughout the Union'.<sup>7</sup> Following from this, the Commission released a Communication on what a common asylum procedure and a uniform status valid throughout the Union would entail. It provided that 'the conditions for residence in a Member State will have to be considered' and that a 'uniform status valid throughout the Union might entail the possibility of settling in another Member State after a certain number of years or travelling there to pursue studies or training. The conditions should be equivalent to those imposed on European Union citizens (conditions as to resources or employment might be imposed)'.<sup>8</sup> It also raised the issue that if there was a uniform status valid throughout the Union, there are 'legitimate questions about the need for the continued existence of all the mechanisms for transferring responsibility established by the European Agreement on Transfer of Responsibility for Refugees or by bilateral agreements between Member States'.<sup>9</sup>

Subsequently the Hague Programme foresaw the adoption of measures that would further develop the CEAS.<sup>10</sup> The development of a common area of asylum continues to be foreseen under the Treaty of the Functioning of the European Union (TFEU), Article 78 (1) provides that the 'Union will 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'. In order to achieve this, it states that 'the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a Common European Asylum System comprising (of):

- (a) a uniform status of asylum for nationals of third countries, valid throughout the Union;
- (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection'.<sup>11</sup>

The promotion of a common area of protection and solidarity was also envisaged under the Stockholm Programme. As part of this common area it provided that 'the Commission should consider, once the second phase of the CEAS has been fully implemented and on the basis of an evaluation of the effect of that legislation and of the EASO the possibilities for creating a framework for the transfer of protection of beneficiaries of international protection when exercising their acquired residence rights under Union law'.<sup>12</sup> In the Action Plan implementing the Stockholm Programme it stated that one of the actions will be the 'Commission's communication on a framework for the transfer of protection of beneficiaries of international protection and mutual recognition of asylum decisions'.<sup>13</sup>

The idea that mutually recognizing positive asylum decisions forms part of a single area of protection can also be found in a Communication from the Commission to the European Parliament and the Council on an area of freedom, security and justice serving the citizen. It provided that as part of a 'detailed evaluation on the transposal and implementation of second-phase legislative instruments and of progress in aligning practices and supporting measures... by the end of 2014, the EU should formally enshrine the principle of mutual recognition of all individual decisions granting protection status taken by authorities ruling on asylum applications which will mean that protection can be transferred without the adoption of specific mechanisms at European level'.<sup>14</sup>

More recently, in a Communication from the Commission to the European Parliament and the Council, the Commission set out their political priorities. As part of their efforts to consolidate the CEAS, they envisage new rules to enable the mutual recognition of asylum decisions across Member States as well as a framework for transfer of protection to be

<sup>7</sup> European Union: Council of the European Union, Presidency Conclusions, Tampere European Council, 15-16 October 1999, 16 October 1999 Paras 13 -15.

<sup>8</sup> Communication from the Commission to the Council and the European Parliament Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum, /COM/2000/0755 final/.

<sup>9</sup> Communication from the Commission to the Council and the European Parliament *Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum*, COM (2000) 755 final, June 2001, para 3.3.

<sup>10</sup> The Hague Programme, '*Strengthening freedom, security and justice in the European Union*', Annex 1 to the Presidency Conclusions, European Council, 4/5 November 2004.

<sup>11</sup> European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01, Article 78.

<sup>12</sup> *The Stockholm Programme — An open and secure Europe serving and protecting citizens*, (2010/C 115/01).

<sup>13</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Delivering an area of freedom, security and justice for Europe's citizens, Action Plan Implementing the Stockholm Programme*, COM(2010) 171 final, p55.

<sup>14</sup> Communication from the Commission to the European Parliament and the Council *An area of freedom, security and justice serving the citizen* COM (2009) 0262 final, pp 27 -28.

developed. This would be in line with the Treaty objective of creating a uniform status valid throughout the EU and would reduce obstacles to movement within the EU and facilitate the transfer of protection-related benefits across internal borders.<sup>15</sup>

In the trio Presidency programme of the Italian, Latvian and Luxembourg Presidencies, one of their priority areas 'will be the complex and still unresolved question of the mutual recognition of national decisions on international protection, including the right to work and settle in any EU Member State'. It also foresees the possible development of new rules on mutual recognition of asylum decisions.<sup>16</sup>

#### 4. The principle of mutual recognition of positive asylum decisions in International refugee law

This section will examine whether a legal basis exists that would provide for the operation of mutual recognition in theory under International law. It will then look at the Convention travel document as an instrument that could serve as a means to facilitate the implicit recognition of another States positive asylum decision. Finally, it will set out how the main European Agreement on the Transfer of Protection Status works in practice.

When looking at the principle of mutual recognition and how it would work in a European context, it is necessary to review whether mutual recognition already exists in practice at the international level. This can be done by examining how the status of a refugee in one Contracting State is traditionally recognized by other Contracting States as well as considering how the rights of refugees are accrued. A crucial question when considering the rights of refugees is to look at whether the rights of refugees are linked to the State which determined the refugee's status or whether they are more linked to the person, regardless of their location.<sup>17</sup> The rights of refugees derive from four main sources, customary international law, general principles of law, EU law or from treaties. The majority, however, are found in the 1951 Convention relating to the status of refugees ("the 1951 Refugee Convention") which contains the fundamental principles of refugee protection.<sup>18</sup> It establishes the rights and obligations of refugees as well as a State's obligations towards refugees.

When assessing the question of how States traditionally recognize the status of refugees from another Contracting State it is imperative to consider the declaratory nature of refugee status.<sup>19</sup> The consequence of the declaratory nature of refugee status lends to the belief that the rights of refugees are attached to the individual rather than being linked to the state. Member States can put in place a procedure to assess the validity of the person's refugee status, however, they have no obligation to do so and there is no mention of a procedure in the Convention. Where there is no formal procedure, if a person declares himself to be a refugee on the basis of meeting the definition in Article 1 (A) of the 1951 Refugee Convention, the State is under an obligation to provide the relevant rights to the individual, as well as the individual assuming some responsibilities.

The 1951 Refugee Convention provides for the exercise of certain rights in the territory of another Contracting State to which he/she is not normally resident, for example Article 12 states '[t]he personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence'. Article 14, which deals with artistic rights and industrial property, states '[a] refugee shall be accorded in the country in which he has his habitual residence the same protection as is accorded to nationals of that country'. Article 16 (1), dealing with access to the Courts provides '[a] refugee shall have free access to the courts of law on the territory of all Contracting States'. It can then be assumed that when a refugee exercises one of the above rights in another contracting state to which he is not normally resident, he is doing so on the basis of being declared a refugee in the first contracting State.<sup>20</sup> This view is supported by *ExCom Conclusion No 12 (XXIX) 1978 on Extraterritorial Effect of the*

<sup>15</sup> Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and The Committee of the Regions: *An open and secure Europe: making it happen* COM (2014) 154 final pp 7-8.

<sup>16</sup> The future Italian, Latvian and Luxembourg Presidencies Delegations; 18 month programme of the Council (1 July 2014 - 31 December 2015) p 13 and p 51.

<sup>17</sup> For a comprehensive examination of this issue, see See J. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, 2005, in particular Chp.3.

<sup>18</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

<sup>19</sup> As stated in the UNHCR Handbook on the Procedures and Criteria for Determining Refugee Status; 'A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee' UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, January 1992, para 28.

<sup>20</sup> UN High Commissioner for Refugees, *Note on the Extraterritorial Effect of the Determination of Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, 24 August 1978 (EC/SCP/9, para 14.

*Determination of Refugee Status* and the accompanying note prepared by UNHCR.<sup>21</sup> Moreover, the effective exercise of these rights would be seriously undermined if a person was subject to another determination procedure before being able to invoke them. As stated in the UNHCR explanatory note, 'it should be sufficient for him to submit evidence that he has been recognized as a refugee by another State party to the 1951 Convention and/or the 1967 Protocol'.<sup>22</sup>

As noted in the *ExCom Conclusions*, one of the most essential aspects of refugee status is its international character.<sup>23</sup> During the drafting of the 1951 Convention, consideration was given to whether the definition of the term 'refugee' should be a wide or narrow scope. It was concluded that a restrictive definition should be adopted in order for it to be acceptable to all governments. A narrow definition was adopted to precisely avoid the situation where a person would be considered a refugee in one State but not in another.<sup>24</sup> As a result;

refugee status as determined in one Contracting State should only be called into question by another Contracting State in exceptional cases when it appears that the person manifestly does not fulfil the requirements of the Convention, e.g. if facts become known indicating that the statements initially made were fraudulent or showing that the person concerned falls within the terms of a cessation or exclusion provision of the 1951 Convention.<sup>25</sup>

#### **4.1. The use of the Convention travel document and the extraterritorial nature of refugee status**

The Convention travel document is a helpful illustration of implicit mutual recognition having a basis in law, even if more detailed regulation is needed to give it its intended effect. Article 28 of the Refugee Convention provides that 'Contracting States shall issue to refugees lawfully staying on their territory travel documents for the purpose of travel outside their territory...' The recognition of Convention travel documents from other States is significant. The mere acceptance of the document presupposes the States recognition of the individual's refugee status which was determined by another contracting State party.<sup>26</sup> As a result, if a beneficiary visits another contracting State, their refugee status should be accepted during their stay. In addition, Article 28 (1) empowers States to issue a travel document to refugees on their territory who are unable to obtain a travel document from their country of lawful residence. By allowing States to issue travel documents to persons whom were not subject to a fresh status determination also supports the extraterritorial nature of refugee status. Paragraph 11 of the Schedule also provides for the transfer of responsibility for the issuance of travel documents when they lawfully establish residence in the territory of another contracting State.<sup>27</sup>

There is no mention in the provisions relating to the transfer of status that a fresh determination is necessary for the issuance of a travel document by the second contracting State. Indeed, if this was the assumption the provision would lose its entire meaning. As noted by UNHCR:

In the absence of strong reasons to the contrary, therefore, it would be inconsistent to call into question the refugee status of persons who, as refugees, are considered to have transferred their residence to the territory of another Contracting State in accordance with these same provisions. Such refugee status, based on a determination presumed to have been made in good-faith by another Contracting State, should therefore only be questioned in exceptional cases of serious and justified doubt. It should also be recalled that the person

21 UN High Commissioner for Refugees, *Note on the Extraterritorial Effect of the Determination of Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, 24 August 1978 (EC/SCP/9). The *ExCom Conclusions* at point (c) notes that "several provisions of the 1951 Convention enable a refugee residing in one Contracting State to exercise certain rights as a refugee in another Contracting State and that the exercise of such rights is not subject to a new determination of his refugee status".

22 Ibid, para 15. The question of access to the Courts was given consideration at the Conference of Plenipotentiaries. An amendment was put forward to modify Article 16 to read "in countries other than the one in which he has his habitual residence and if he is considered by such countries as being a refugee under the terms of this Convention». The president of the conference also believed the same amendment could be applied to Articles 12 and 14. However, it was not adopted as it was not considered necessary, many of the representatives believed that it would be sufficient to have regard to the first Contracting States refugee status determination. See Document A/Conf.2/SR.8, pp. 11-12.

23 *ExCom Conclusion No 12 (XXIX) 1978 on Extraterritorial Effect of the Determination of Refugee Status*, point (a). The Preamble of the Refugee Geneva Convention also implies the international character of a refugee.

24 UN High Commissioner for Refugees, *Note on the Extraterritorial Effect of the Determination of Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, 24 August 1978 (EC/SCP/9, para 17. Point (f) of the *ExCom Conclusions* state: The Executive Committee considered that the very purpose of the 1951 Convention and the 1967 Protocol implies that refugee status determined by one Contracting State will be recognised also by the other Contracting States".

25 *ExCom Conclusion No 12 (XXIX) 1978 on Extraterritorial Effect of the Determination of Refugee Status*, point (g).

26 UN High Commissioner for Refugees, *Note on the Extraterritorial Effect of the Determination of Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, 24 August 1978 (EC/SCP/9, para 17 states that "just as a national passport is prima facie evidence of the holders nationality, a Convention Travel Document should be (and in fact is), in the absence of proof to the contrary, accepted as evidence of the holder's refugee status".

27 It states; 'when a refugee has lawfully taken up residence in the territory of another Contracting State, the responsibility for the issuance of a new document, under the terms and conditions of article 28, shall be that of the competent authority of that territory, to which the refugee shall be entitled to apply'. An area that could benefit from further research is the actual practice of Member States or Council of Europe States accepting Convention Travel Documents or issuing them to recognised refugees on their territory who are unable to obtain travel documents from their country of lawful residence.

concerned, prior to being accepted for residence, has been living in the territory of the second Contracting State as a refugee, i.e., as a person who has previously been determined to be a refugee, and has been issued with a 1951 Convention Travel Document. To consider that he is no longer a refugee at the time when he is regarded as having taken up lawful residence in the second Contracting State, in accordance with paragraph 11 of the Schedule, would mean depriving him of a legal status that he has hitherto enjoyed. A refugee should, indeed, be able to travel and to transfer his residence without being in fear of losing his refugee status.<sup>28</sup>

However, neither the 1951 Refugee Convention nor its Schedule provides guidance as to when and under what circumstances lawful residence can be taken up in a second Contracting State.

## 4.2. The 1980 European Agreement on Transfer of Responsibility for Refugees

This instrument was put in place to facilitate the application of Article 28 of the 1951 Refugee Convention as well as paragraphs 6 – 11 of its Schedule when a refugee has lawfully taken up residence in another country. It lays out the conditions under which responsibility for issuing a travel document is transferred from one contracting State to another. According to Article 2 of the Agreement, the transfer of refugee status 'shall be considered to be transferred on the expiry of a period of two years of actual and continuous stay in the second State with the agreement of its authorities or earlier if the second State has permitted the refugee to remain in its territory either on a permanent basis or for a period exceeding the validity of the Travel Document'.<sup>29</sup>

The use and scope of this agreement varies between the participating States.<sup>30</sup> Some States believe that the Agreement only engages the responsibility of issuing the travel document whilst others extend full Convention rights to the individual concerned. Support for the position that the Agreement should be used to transfer full responsibility to the second contracting State can be found in the wording of the title as well as the preparatory works of the Agreement.<sup>31</sup> In addition, Article 5 of the Explanatory Report to the Agreement states that 'although this Article concerns the transfer of responsibility for the issuing of a Travel Document, it is implicit that following such transfer the second State must grant to the refugee the rights and advantages flowing from the Geneva Convention'.

The purpose of the Agreement is not to provide for the movement of refugees to other States, rather, it deals with the practical consequences of a refugee's lawful residence in another contracting State to the one which declared them to be a refugee who is party to the Agreement. It only comes into effect after two years of lawful residence in a contracting state. To date only 11 Member States<sup>32</sup> have signed the Agreement.<sup>33</sup> Member States who are party to the agreement have expressed a wish that any future regulation adopted amongst Member States should be based on the criterion as stipulated in the 1980 Agreement.<sup>34</sup>

## 4.3. The European Agreement on the Abolition of Visas for Refugees

There is also a Council of Europe Agreement on the Abolition of Visas for Refugees.<sup>35</sup> It provides that refugees lawfully resident in the territory of a Contracting Party shall be exempt from the obligation to obtain visas for entering or leaving the territory of another party by any frontier. It also provides that a visa may be required for visits over three months. 23 Council of Europe States have ratified this Agreement. It is arguable that Member States are recognising the status of a refugee that was declared by another Member State when exempting them from the obligation to obtain a visa to enter their territory.

<sup>28</sup> UN High Commissioner for Refugees, *Note on the Extraterritorial Effect of the Determination of Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, 24 August 1978, EC/SCP/9, para 32.

<sup>29</sup> Article 2.

<sup>30</sup> For a comprehensive overview of the European Agreement on Transfer of Responsibility for Refugees, see Nina M; Lassen, Leise Egesberg, Joanne van Selm, Eleni Tsolakis, Jeroen Doomernik, *The transfer of protection status in the EU, against the background of the common European asylum system and the goal of a uniform status, valid throughout the Union, for those granted asylum*, Final Report Tender no. DG.JAI/A2/2003/001, 2004.

<sup>31</sup> Ibid, citing Report on the second meeting of the Ad Hoc Committee on Legal Aspects of Territorial Asylum and Refugees, Strasbourg, 30 September 1977 (EXP/AT.Ré (77) 5), paragraph 5 and Report of the fifth meeting of the Ad Hoc Committee on Legal Aspects of Territorial Asylum and Refugees, Strasbourg, 28 March 1979 (CAHAR (79) 7) at II.

<sup>32</sup> These include Denmark, Finland, Germany, Italy, the Netherlands, Poland, Portugal, Romania, Spain, Sweden and the United Kingdom. In total, 13 Council of Europe States have ratified the Agreement.

<sup>33</sup> It is noteworthy that the States who ratified this instrument believe that it is very useful save for the need for some elaboration in some aspects such as the access to exchange of information and the need for some bilateral procedures to be elaborated. The exchange of information was particularly necessary when dealing with questions over cessation or revocation. Lassen, Egesberg, van Selm, Tsolakis, Doomernik *The transfer of protection status in the EU, against the background of the common European asylum system and the goal of a uniform status, valid throughout the Union, for those granted asylum*, p 113.

<sup>34</sup> Ibid, p 113. They also regretted the fact that not all Member States were party to the Agreement.

<sup>35</sup> Council of Europe, European Agreement on the Abolition of Visas for Refugees, 3 September 1960, ETS 031.

#### 4.4. Practical consequences of mutual recognition of positive asylum decisions under International law

In theory, signatories of the 1951 Refugee Convention should recognize another State's refugee status determination of a refugee. If a refugee moves to a second State, they should be granted certain rights depending on their status within that state. Therefore, any refugee who moves or travels to a second State should be entitled to the rights that are granted to someone who is subject to the states jurisdiction, those who are physically present and to those who are lawfully present. Below is a table which illustrates the different rights which become applicable at different stages of attachment as set out in the 1951 Refugee Convention, (the table of rights only illustrates the rights that should accrue with each level of attachment, it does not include the level of contingency of each right).

Subject to a State's jurisdiction (First tier)	<ul style="list-style-type: none"> <li>» Freedom from discrimination (Article 3),</li> <li>» non-refoulement (Article 33),</li> <li>» respect for personal status (Article 12),</li> <li>» property rights (Article 13),</li> <li>» access to rationing and education systems (Article 20 and Article 22 (2) ),</li> <li>» administrative assistance and access to courts (Article 25 and 16)</li> </ul>
Physically present (Second tier)	<ul style="list-style-type: none"> <li>» Religious freedom (Article 4),</li> <li>» refugee identity documents (Article 27),</li> <li>» freedom from penalization for illegal entry (Article 31),</li> <li>» only justifiable restrictions on internal freedom of movement (Article 26)</li> </ul>
Lawfully present (Third tier)	<ul style="list-style-type: none"> <li>» Self-employment (Article 18),</li> <li>» more ample internal freedom of movement (Article 26),</li> <li>» protection against expulsion (Article 32)</li> </ul>
Lawfully staying (Fourth Tier)	<ul style="list-style-type: none"> <li>» Freedom of association (Article 15),</li> <li>» wage-earning employment (Article 17),</li> <li>» access to housing (Article 21),</li> <li>» benefit of labour and social security laws (Article 24),</li> <li>» intellectual property rights, (Article 14),</li> <li>» travel documents (Article 28)</li> </ul>
Durable residence (Fifth Tier)	<ul style="list-style-type: none"> <li>» Exemption from legislative reciprocity and restrictive measures on employment of non-citizens (Article 7)</li> </ul>

This then leaves two sets of rights untouched, rights that are given to those who are lawfully staying and those who have durable residence. The meaning of the term 'lawfully staying' has given rise to some debate; it was incorporated as the most accurate phrase correlating with the French phrase 'resident régulièrement'.<sup>36</sup> The term must bring more to it than those who are lawfully present, which suggests admission for a temporary period of time. Guy Goodwin-Gill argues that 'evidence of permanent, infinite, unrestricted or other residence status, recognition as a refugee, issue of a travel document or grant of a re-entry visa will raise a strong presumption that the refugee should be considered as lawfully staying in the territory of a contracting state'.<sup>37</sup> Therefore, unless a refugee has unrestricted residence (i.e., those who are lawfully staying or who have durable residence), they will not be able to access the rights which are restricted to those who are lawfully staying and who have durable residence in the second state.

A refugee can enjoy certain rights in another State, but that refugee needs either to be lawfully staying or have durable residence in order to access all rights as set out under the 1951 Refugee Convention. In summation, the practical consequences of mutual recognition of a positive asylum decision under international law are:

- » Another State who is party to the 1951 Refugee Convention recognises the first States grant of refugee status at a minimum, extends the first three tier of rights as per the Refugee Convention to the beneficiary of international protection,
- » Where applicable, another State may be requested to issue a travel document to the applicant in accordance with Article 28 of the 1951 Refugee Convention.

<sup>36</sup> Hathaway, *The Rights of Refugees under International Law*, p 186.

<sup>37</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3<sup>rd</sup> Edition, Oxford, Oxford University Press, 2007, p 527.

## 5. Mutual recognition in EU asylum law

Mutual recognition can be found in many areas of European Union law. It is also applied in areas where there is little harmonization of laws and procedures. It operates on the basis of mutual trust between Member States. Contrary to criminal law where mutual recognition was described as 'journey into the unknown' as it applied without harmonized standards,<sup>38</sup> there are European wide standards in asylum law which are, or should be, implemented by all Member States, therefore, the concept should be easier to transpose.<sup>39</sup> Nevertheless, it is acknowledged that there are serious problems with the implementation of these standards in practice.<sup>40</sup> The sections below look at some of the instruments that already apply elements of mutual recognition, or mutual trust, the element that is needed in order for mutual recognition to work to an aspect of asylum law. It will then explore what are the practical consequences of mutual recognition at the EU level.

### 5.1. Mutual recognition in the Dublin III Regulation

The operation of the Dublin III Regulation<sup>41</sup> is based on the idea of mutual trust.<sup>42</sup> One Member State is allocated the responsibility for taking a decision on an asylum application. This trust is based on the assumption that each Member State will take a decision on an applicant's asylum claim in accordance with relevant International and European law standards.<sup>43</sup> Mutual trust is implied between contracting states. Recital (2) of the Preamble states that all Member States respecting the principle of *non-refoulement* are considered as safe countries for third country nationals. However, this cannot be absolute; Recital (15) provides 'the regulation observes the fundamental rights and principles which are acknowledged in particular in the Charter of Fundamental Rights of the Union'. In addition, Member States have an obligation when carrying out Union law to respect the fundamental rights of the Union as laid down in Article 6 (1) TFEU.<sup>44</sup> Therefore, there is an inherent obligation on Member States when carrying out a transfer under the Dublin III Regulation to verify that the receiving State's judicial procedure and their human rights standards conform to the standards set out in the Charter.

In *MSS v Belgium and Greece*, the European Court of Human Rights (ECtHR) found that mutual trust cannot be absolute, the Court found that 'when they (States) apply the Dublin Regulation [...] the States must make sure that the intermediary country's asylum procedure affords sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Article 3 of the Convention'.<sup>45</sup> In a subsequent case, the Court of Justice of the European Union (CJEU) found in *NS v Secretary of State for the Home Department*,<sup>46</sup> that mutual trust can be rebutted if there are 'substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants...resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter...the transfer would be incompatible with that provision'. It further held that 'it would not be compatible with the aims of Regulation No 343/2003 were the slightest

38 It was also described as such as Member States were not in a position to know how Member State's criminal systems developed. Valsamis Mitsilegas, *EU Criminal Law*, Oxford, Hart Publishing, 2009, p116.

39 In asylum law, even though there are significant differences in the actual implementation of asylum law legislation, every Member State is working from the same base.

40 For example see ECRE, AIDA annual report 2013/2014, 'Mind the Gap. An NGO Perspective on Challenges to Accessing Protection in the Common European Asylum System' and ECRE, AIDA annual report 2012/2013 'Not there yet. An NGO Perspective on Challenges to a Fair and Effective Common European Asylum System'.

41 Regulation (EU) no 604/2013 of the European Parliament and of the Council of 26 June 2013 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).

42 In *NS & M.E* the CJEU stated '[I]t is precisely because of that principle of mutual confidence that the European Union legislature adopted Regulation No 343/2003 and the conventions referred to in paragraphs 24 to 26 of the present judgment in order to rationalise the treatment of asylum claims and to avoid blockages in the system as a result of the obligation on State authorities to examine multiple claims by the same applicant...' CJEU, *N. S. (C 411/10) v. Secretary of State for the Home Department and M. E. (C 493/10) and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, C-411/10 and C-493/10, 21 December 2011, para 79.

43 The Preamble to the Regulation establishing the criteria and mechanism for determining the Member State responsible for examining an asylum application states: The progressive creation of an area without internal frontiers in which free movement of persons is guaranteed in accordance with the Treaty establishing the European Community and the establishment of Community policies regarding the conditions of entry and stay of third country nationals, including common efforts towards the management of external borders, makes it necessary to strike a balance between responsibility criteria in a spirit of solidarity.

44 CJEU, *P, Segi and Others v Council*, Case C-355/04, 2007, the Court at paragraph 51 states "as is clear from Article 6 EU, the Union is founded on the principle of the rule of law and it respects fundamental rights as general principles of Community law. It follows that the institutions are subject to review of the conformity of their acts with the treaties and the general principles of law, just like the Member States when they implement the law of the Union".

45 ECtHR, *M.S.S. v. Belgium and Greece*, Application no. 30696/09, 21 January 2011 para. 342.

46 CJEU, *N. S. (C 411/10) v. Secretary of State for the Home Department and M. E. (C 493/10) and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, C-411/10 and C-493/10, 21 December 2011.

infringement of Directives 2003/9, 2004/83 or 2005/85 to be sufficient to prevent the transfer of an asylum seeker'.<sup>47</sup>

## 5.2. Mutual recognition and the Asylum Procedures Directive and its recast

It is arguable that elements of mutual recognition can also be found in the Asylum Procedures Directive<sup>48</sup> and its recast.<sup>49</sup> Article 25 (1) of the Asylum Procedures Directive and Article 33 (1) of the recast Asylum Procedures Directive provide that where an application is not examined in accordance with the rules as set in the Dublin Regulation, Member States are not required to examine their application for international protection. This is on the assumption that another Member State, the State that is responsible for the applicant, will do so in accordance with the Qualification Directive and its recast. Article 33 (2) (a) of the recast Asylum Procedures Directive and Article 25 (2) (a) of the Asylum Procedures Directive allows a Member State to consider an application inadmissible if another Member State granted international protection to the protection applicant. A Member State applying this provision does so on the basis of another Member States positive asylum decision; it does not question the status's validity and as such is recognising it.

## 5.3. Mutual recognition in the Returns Directive, the Schengen Information System and the Expulsion of Third country nationals

The Returns Directive<sup>50</sup> provides common procedures and standards for the return of third country nationals who are found to be irregularly staying on the territory of the EU. Article 6 of the Directive imposes an obligation to 'issue a return decision to any third country national staying illegally on their territory' subject to a few limited exceptions. Although not explicitly mentioned within the text of the Directive, mutual recognition occurs in the context of returns as Member States are obliged to recognize the return decisions by other Member States. There are, however, limited grounds under which a Member State can override that decision.<sup>51</sup>

Under the Returns Directive, no sharing of information between States is foreseen; it is the accompanying entry ban that triggers the mutual recognition element of the Directive.<sup>52</sup> An entry ban based on the Returns Directive cannot be issued independently; it will always be linked to a return decision.<sup>53</sup> Article 11 (1) stipulates the conditions under which an entry ban will accompany a return decision, it provides 'return decisions shall be accompanied by an entry ban: (a) if no period for voluntary departure has been granted or (b) if the obligation to return has not been complied with. In other cases return decisions may be accompanied by an entry ban'. The scope of the ban provides for the possibility that a ban can be issued to most third-country nationals who are irregularly present on the territory.

An entry ban decision is recorded in the Schengen Information System (SIS).<sup>54</sup> Once registered in the SIS, a third-country national will be refused entry by all States who are party to the Schengen Agreement. The grounds under which an entry ban relating to a return decision can be challenged are set out in Article 13 of the Returns Directive. It allows for third-country nationals to be afforded an effective remedy to appeal or to seek a judicial review of a return decision or of an entry ban decision. However, the Directive is not clear on whether this right of review allows national authorities to review, suspend or withdraw return decisions issued by other Member States. Article 43 of the SIS II Regulation provides the conditions under which a remedy can be sought for individuals who are registered in the SIS. It states that a person can bring an action before the courts or competent authority in any Member State who is bound by the Directive to 'access, correct, delete or obtain information in connection with an alert relating to him'. It also

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47 Ibid, Para 84 and 86.

48 *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, 2 January 2006, OJ L 326.

49 *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)*, 29 June 2013, L 180/60.

50 *Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals*, OJ L 348/98, 24.12.2008. This Directive applies in the Member States of the EU, except for Denmark, the United Kingdom and Ireland. The Directive also applies in Norway, Iceland, Switzerland and Lichtenstein.

51 Ibid, see the reasons listed in Article 6 (2) (3) (4) and (5) of the Directive.

52 Preamble 14 states: '[T]he effects of national return measures should be given a European dimension by establishing an entry ban procedure prohibiting entry into and stay on the territory of all the Member States...'

53 Not every decision taken under the Returns Directive needs to be accompanied by an entry ban.

54 Preamble 18 of the Directive states 'Member States should have rapid access to information on entry bans issues by other Member States'. This information sharing should take place in accordance with Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2000 on the establishment, operation and use of the second generation Schengen Information System (SIS II).

provides that Member States undertake to mutually enforce the final decisions handed down by courts or authorities.<sup>55</sup>

Member States mutually recognise other Member States return decisions when accompanied with an entry ban, even when there are minimum levels of harmonization relating to the return decision. For example, a person can be issued an SIS alert for the irregular stay of an individual on their territory. Despite the fact that there is a definition for 'illegal stay' in the Returns Directive,<sup>56</sup> which is based on Article 5 of the Schengen Borders Code (which regulates the entry conditions for third-country nationals), the meaning of 'illegal stay' is still, to an extent, a question of national law.<sup>57</sup> In addition, Member States enjoy a wide discretion regarding the issuance, withdrawal and suspension of entry bans which results in uneven practice across the EU.<sup>58</sup> Notwithstanding these procedural problems and the lack of harmonization, the Directive is widely used throughout the Union. It results in mutual recognition of negative asylum decisions with unclear provisions as to how these decisions can be challenged in another Member State.

In 2001, a Directive on the Mutual Recognition of Decisions on the Expulsion of Third Country Nationals was adopted<sup>59</sup> to enable Member States to enforce other Member States' expulsion decisions, but there is no express obligation to do so. Whilst the Directive provides an exhaustive list of grounds under which an expulsion can be carried out, the reasons themselves are very broad. In practice, however, this Directive is rarely applied by Member States for a number of reasons including the cost of carrying out expulsion decisions from other Member States. Another problem that States faced when implementing this Directive was the difficulty in dealing with the possible administrative and judicial challenges to a decision taken in another Member State. Although this Directive has not been repealed, the Returns Directive has effectively overtaken this Directive as it covers a lot of the grounds under which a third country national can be expelled in a more comprehensive manner.

#### 5.4. Mutual recognition and the operation of the Convention implementing the Schengen Agreement

It is also arguable that there is implied mutual recognition under the operation of the Convention implementing the Schengen Agreement.<sup>60</sup> As per Article 21 (1), '[A]liens who hold valid residence permits issued by one of the Contracting Parties may, on the basis of that permit and a valid travel document, move freely for up to three months within the territories of the other Contracting Parties, provided that they fulfil the entry conditions referred to...and are not on the national list of alerts of the Contracting Party concerned'. Beneficiaries of international protection can benefit from this free movement travel. The valid travel document is generally the Convention travel document. Member States who admit a beneficiary of international protection onto their territory do so on the basis of another EU Member State's declaration of their international protection status, and as such are mutually recognizing another Member State's granting of protection.

#### 5.5. The amended Long Term Residence Directive

The Long Term Residence Directive<sup>61</sup> was recently amended to extend its scope to beneficiaries of international protection.<sup>62</sup> However, it does not deal with the issue of transfer of refugee status from one state to another. Recital

<sup>55</sup> Article 43 (1) and (2), however, according to research carried out by the Schengen Joint Supervisory Authority, national courts are reluctant to enforce decisions from other courts or relevant authorities which require them to delete or correct an SIS alert, see Evelien Brouwer, *Digital Borders and Real Rights. Effective Remedies for third country nationals in the Schengen Information System*. Leiden/Boston: Martinus Nijhoff Publishers, 2008 526 -527.

<sup>56</sup> Article 3 (2) of the Returns Directive provides that 'illegal stay' means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State'.

<sup>57</sup> As pointed out by Paulien de Morree's chapter 'Mutual Trust in Migration Law: the Returns Directive and Mutual Recognition of Entry Bans' in Hemme Battjes, Evelien Brouwer, Paulien de Morre and Jannemieke Ouwerkerk, *The Principle of Mutual Trust in European Asylum, Migration and Criminal Law*, Meijers Committee, 2011, in the Netherlands, for example, 'irregular stay may result from exceeding the duration of a visa, not correctly reporting departure at the aliens' registration office, or deregistering at the municipal personal records database'. P36.

<sup>58</sup> Hemme Battjes, Evelien Brouwer, Paulien de Morre and Jannemieke Ouwerkerk, *The Principle of Mutual Trust in European Asylum, Migration and Criminal Law*, Meijers Committee, 2011, Utrecht, the Netherlands.

<sup>59</sup> *Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals*.

<sup>60</sup> European Union, *Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders ("Schengen Implementation Agreement")*, 19 June 1990.

<sup>61</sup> *Council Directive 2003/109/EC of 23 November 2003 concerning the status of third-country national who are long-term residents*.

<sup>62</sup> *Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection*.

9 states the 'transfer of responsibility for protection of beneficiaries of international protection is outside the scope of this Directive'. Those in receipt of international protection who move under this Directive are seen as legal migrants, and save for the second Member State's obligations to comply with *non-refoulement*, the rights and obligations flowing from their status remain between the original grantee state and the beneficiary of international protection. The new State has no obligation to apply refugee status extraterritorially; Article 12 of the amended Directive deals with the grounds under which a long term resident can be expelled, in such cases the second Member State should only expel that person to the country that granted international protection, rather than apply the relevant revocation clause where necessary.

Whilst it is welcome that the Long Term Residents Directive as amended has been extended to include beneficiaries of international protection, its practical use in its current form can be questioned. There are stringent conditions that need to be met in order for a person to benefit from the Long Term Residents Directive. The varying waiting times before a beneficiary of international protection can obtain Long Term Residence (LTR) status and the calculation of these times is rather complicated and open to interpretation.<sup>63</sup> In addition, beneficiaries of international protection must have sufficient resources as well as medical insurance and they must abide by certain integration conditions.<sup>64</sup> Furthermore, LTR status can be refused on grounds of public policy or public security.

The interplay and the varying rules between the recast Long Term Residence Directive, the 1951 Refugee Convention, the Qualification Directive and its recast as well as the Family Reunification Directive makes it difficult for a person with international protection to know which conditions apply to them. This uncertainty may lead the beneficiary not to take advantage of the Directive and it also makes procedures unnecessarily complicated for national administrations.<sup>65</sup>

There is also an implicit recognition of another Member State's positive asylum decision in the Long Term Residence Directive as amended. Amended Article 8 (5) provides that where a LTR gets their residence permit issued by a second Member State (i.e. they already had a LTR permit issued by another Member State) the second Member State must enter a remark on the residence permit which acknowledges the first Member States grant of international protection. Before doing so, the second Member State must check whether the long term resident is still a beneficiary of international protection. If their status has been withdrawn, the second Member State will not enter that remark on the residence card. This provision infers an obligation on the second Member State to recognise the first Member States positive decision, the second Member State cannot review the decision, and they can merely ask whether it is still in force. This implicitly amounts to the mutual recognition of another Member State's asylum decision.<sup>66</sup>

## 5.6. Mutual recognition of a positive asylum decision under EU law and its practical consequences

Article 78 (2) (a) TFEU provides that the European Parliament and the Council... shall adopt measures for a CEAS comprising of 'a uniform status for asylum for national of third countries, valid throughout the Union'.<sup>67</sup> In order for a status to be truly *valid* throughout the Union, a beneficiary of international protection should be able to avail himself of all the rights and entitlements attached thereto and be bound by any obligations therein in any Member State. Otherwise the status would just be recognisable rather than valid. Support for this reading can also be found in the Commission Communication which foresees new rules on mutual recognition and a framework for the transfer of protection to fulfil this Treaty objective. The Communication purports that by having such rules it would 'reduce obstacles to movement within the EU and facilitate the transfer of protection-related benefits across internal borders'.<sup>68</sup> This also corresponds with the EU's aim to be seen as a single area of protection. Furthermore, it balances the anomaly which allows Member States to recognise and implement other Member States' return decisions, yet there is no harmonized system to recognize and grant all refugees' rights that were granted protection in other Member States.<sup>69</sup> In order to ensure that beneficiaries of international protection can utilise their status throughout the Union, free movement rights should be extended to them, otherwise, it will remain more of an academic concept rather than an actual useful tool to be implemented in practice.

<sup>63</sup> For a detailed analysis of the calculation of time periods see Steve Peers, *Transfer of International Protection and European Union Law*, International Journal of Refugee Law, Vol. 24 No. 3, (527 – 560), pp 541 -546.

<sup>64</sup> See n (61) Article (5)2.

<sup>65</sup> See Section 8 for a more detailed explanation.

<sup>66</sup> See also, Peers, *Transfer of International Protection and European Union Law*.

<sup>67</sup> Note that section (b) does not foresee a uniform status that is valid throughout the union for those who are beneficiaries of Subsidiary Protection.

<sup>68</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and The Committee of the Regions, An open and secure Europe: making it happen Brussels, 11.3.2014, COM(2014) 154 final p 7.

<sup>69</sup> See Section 5.3 for more information

As per Recital 3 of the recast Qualification Directive, the Directive should be read in light of the 1951 Refugee Convention.<sup>70</sup> Two rights in the 1951 Refugee Convention, the right to freedom of non-political association and the right to engage in wage earning employment are guaranteed to the same extent enjoyed by most-favoured foreigners.<sup>71</sup> In the EU, the most favoured foreigner in a Member State is an EU citizen. EU citizens have the right to move, reside and work in another Member State under the Free Movement of EU Citizens Directive<sup>72</sup> provided they meet a number of criteria. Union citizens have the right of residence on the territory of another Member State for a period of up to three months with no requirement other than that they are in receipt of a valid identity card or passport.<sup>73</sup> This is also applicable to refugees and those in receipt of international protection.<sup>74</sup> In order for refugees to be treated as a most favoured foreigner, they should be able to move, reside and work throughout the EU subject to the same conditions and restrictions as EU citizens.<sup>75</sup>

In addition, under the Qualification Directive and its recast, beneficiaries of international protection should have access to employment, education, social welfare and healthcare under the same conditions as nationals.<sup>76</sup> Nationals of one EU Member State can benefit from free movement under the Free Movement Directive and can access employment in another Member State under the same conditions as citizens from that Member State provided they meet certain criteria.<sup>77</sup> Beneficiaries of international protection should also be able to avail themselves of this, and be subject to the same criteria and conditions as EU nationals if they are to benefit from the same rights and conditions as nationals. Furthermore, as illustrated in Section 4, the rights of refugees are linked to the individual rather than the State. Therefore, once a Member State recognises an individual as a refugee, and given that their status should be valid throughout the Union, coupled with the fact that they should be treated the same as nationals for most rights and entitlements under the recast Qualification Directive, illustrates that the rights, entitlements and obligations of beneficiaries of international protection should be enforceable anywhere within the Union.

The Qualification Directive and its recast provides for a uniform status for refugees and for persons in receipt of subsidiary protection.<sup>78</sup> Unlike the 1951 Refugee Convention, the Qualification Directive and its recast does not adhere to a pyramid like structure of rights. Most fourth tier rights which are limited to those who are 'lawfully staying' under the 1951 Refugee Convention, are linked to the issuance of a residence permit under the Qualification Directive and its recast. However, Member States have the discretion not to link these to the issuance of a residence permit. Recital (40) of the recast Qualification Directive provides 'Member States *may* lay down that the granting of benefits with regard to access to employment, social welfare, healthcare and access to integration facilities requires the prior issue of a residence permit' [emphasis added].<sup>79</sup> In practice this means that they can give these rights even if the beneficiary of international protection is not in receipt of a residence permit. Member States are under an obligation to issue a residence permit as soon as possible after granting international protection to an individual.<sup>80</sup> The residence permit is

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<sup>70</sup> Recast Qualification Directive, Recital 3.

<sup>71</sup> Refugee Convention, Article 15 and Article 17 (1).

<sup>72</sup> *Directive 2004/38/EC of the European parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.*

<sup>73</sup> Article 6 of the Free Movement of EU Citizens Directive.

<sup>74</sup> Article 21 (1) European Union, *Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders ("Schengen Implementation Agreement")*, 19 June 1990.

<sup>75</sup> As per Article 7 of the the Free Movement of EU Citizens Directive, after three months, beneficiaries of international protection would have to meet the same conditions as Union citizens need to meet for a right of residence for more than three months, they would need to:

(a). Be workers or self-employed persons in the host Member State,

(b). Have sufficient resources for themselves and their family members not to become a burden on the social assistance system and to have comprehensive sickness insurance cover in the host Member State,

(c). Are enrolled at a private or public establishment for the principal purpose of following a course of study, including vocational training,

(d). Have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host state during their period of residence.

<sup>76</sup> See Article 26 (2) Article 27 (1), Article 29 (1) and Article 30 (2) of the recast Qualification Directive.

<sup>77</sup> Article 7 Free Movement Directive.

<sup>78</sup> *Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted and recast 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.*

<sup>79</sup> Ibid, Recital 40.

<sup>80</sup> Ibid, Article 24 (1).

granted as a result of a specific Member State's refugee status determination.<sup>81</sup> There is nothing in the Qualification Directive or its recast that stops a Member State from issuing a residence permit on the basis of another Member State's refugee status determination. For example, in the Qualification Directive and the recast, Article 26, which deals with access to employment states 'Member States shall authorize beneficiaries of international protection to engage in employed or self-employed activities subject to rules generally applicable to the profession and to the public service, immediately after protection has been granted'. In theory, they could extend these rights to refugees who were recognized elsewhere.<sup>82</sup>

In relation to mutually recognising another Member State's positive international protection status, there is limited data available on current practice within the EU, but it is clear that certain Member States mutually recognize other State's positive asylum decisions. Belgium confirms the status of a refugee that has been obtained in another Member State as it presumes that it's valid. The confirmation of the status is taken on the basis of the possession of a travel document and on the basis of a questionnaire to which the applicant needs to complete.<sup>83</sup> France acknowledges the right of a person to have their status granted by another country recognized in France, provided they have authorization to stay on their territory.<sup>84</sup> Germany recognises the person's status which ensures that they are not deported to the persecuting country.<sup>85</sup> In practice the effect of the recognition does not allow them to remain in the second Member State; another instrument is needed in order to permit their lawful residence. However, it is clear that there is no general consensus as to the effect of another Member State's positive asylum decision. In *M.C. v Bulgaria* the applicant, having fled Russia, was granted refugee status in Poland and humanitarian status in Germany. Russia issued a warrant for his arrest and he was subsequently intercepted by the Bulgarian authorities on the Bulgarian-Romanian border. The Bulgarian public prosecutor ordered his extradition to Russia which was only stopped after a rule 39 was issued by the ECtHR. Here the Court noted that 'the legal framework of the European Union does not provide, expressly, the establishment of a mechanism of mutual recognition of decisions on asylum made by the respective national authorities in Member States, as was suggested in the Green Paper of the Commission on the future Common European asylum System'.<sup>86</sup> It goes against the very aim of a CEAS to have a system in place whereby a Member State is free to extradite or expel to a third country a third-country national who has obtained refugee status in another Member State and, as a result of the expulsion, is at risk of *refoulement* or onwards *refoulement*. It also goes against a Member State's own obligations to uphold the principle of *non-refoulement*.

In summation, mutual recognition, when read in conjunction with Article 78 TFEU, which provides for a uniform status that is valid throughout the Union, and in light of the 1951 Refugee Convention which provides that refugees must be treated as the most favoured foreigner in terms of wage earning employment, places an obligation on States to extend full rights and responsibilities to a beneficiary of international protection recognized in another Member State. In order to make this workable in practice, a specific instrument should be adopted so that beneficiaries of international protection can benefit from mutual recognition.

## 5.7. Subsidiary Protection and mutual recognition of positive asylum decisions

The above section looked at where refugee status fits in relation to mutual recognition of positive asylum decisions, however it has not looked at the impact of this concept on subsidiary protection. There is no international equivalent to subsidiary protection, it was constructed within the EU to try and harmonise alternate forms of protection. The Lisbon Treaty provides that the Union shall develop a common policy on asylum, subsidiary protection and temporary protection. Article 78 (2) (a) provides that the EU shall adopt measures to ensure there is 'a uniform status of asylum for nationals of third countries, valid throughout the Union'.<sup>87</sup> Whilst Article 78 (2) (b) foresees the adoption of measures to achieve a uniform status of subsidiary protection, it is noteworthy that it omits that it should be 'valid throughout the Union'. Article 2 (b) of the recast Qualification Directive, provides that 'international protection' means refugee status and subsidiary protection status, similarly, Article 2 (c) provides that 'beneficiary of international protection' means

81 For a more comprehensive overview on Member State practice on the issuance of resident permits, see, European Migration Network, *Ad-Hoc Query on the Residence Permit for persons under the International Protection* 15 December 2009.

82 This however, does not happen in practice. In the Study on the transfer of protection status in the EU, against the background of a common European asylum system and the goal of a uniform status, valid throughout the Union, for those granted asylum they examined the scope of transfer of responsibility for protection, there was an examination of selected Member States criteria for considering the transfer of responsibility. For most countries it was after two years of actual and lawful residence, which is in line with both the 1951 Refugee Convention and the European Agreement on the Transfer of Responsibility.

83 European Migration Network, *Ad-Hoc Query on the Practice of Member States being a Party to European Agreement on Transfer of Responsibility for Refugees*, Compilation produced on 6<sup>th</sup> March 2012 pp 2-3.

84 European Commission, DG Home Affairs, *Study on the Feasibility of establishing a mechanism for the relocation of beneficiaries of international protection*, JLX/2009/ERFX/PR/1005, July 2010, p14.

85 European Migration Network, *Ad-Hoc Query on the Practice of EU Member States being a Party to European Agreement on Transfer of Responsibility for Refugees*, 6 March 2012, pp 3-6.

86 ECtHR, *M.G. v Bulgaria*, Application no 59297/12, 25 March 2014, para 46.

87 TFEU, Article 78 2 (a).

a person who has been granted refugee status or subsidiary protection status. The Stockholm Programme calls on the Commission to review the possibility for ‘creating a framework for the transfer of protection of beneficiaries of *international protection*’ (emphasis added).<sup>88</sup> In order to ensure there are truly harmonised asylum systems throughout the EU, those with subsidiary protection status should also benefit from mutual recognition of their statuses.

## 5.8. Possible limitations of mutual recognition of positive asylum decisions

This section will examine whether, and under what circumstances a Member State can refuse to apply mutual recognition on the basis that they refuse to accept another Member State’s decision, i.e. they refuse to implement mutual recognition on the basis of a lack of mutual trust. In criminal law, the most frequent use of mutual recognition is under the European Arrest Warrant<sup>89</sup> which contains a limited number of grounds under which mutual recognition can be rebutted.<sup>90</sup> However, there is no ground contained in any asylum law or other criminal law instrument which allows for a blunt refusal on the basis of a general lack of trust of a country’s judicial system, or on the distrust in other countries’ judicial authorities.<sup>91</sup> Furthermore, under international law, the recognition of an asylum status by another State that is a signatory to the 1951 Refugee Convention can only be called into question in very limited and exceptional circumstances,<sup>92</sup> and given that the CEAS is built on common rules and obligations, if the asylum *acquis* is properly implemented, there should be few grounds under which a positive asylum decision is called into question.

Under existing asylum and criminal law instruments, Member States cannot question the validity of the decision made by another Member State, unless it risks violating certain articles of the EU Charter of Fundamental Rights and/or the European Convention on Human Rights. For example, in criminal law if the punishment accorded was so disproportionate that it meets Article 4 of the Charter threshold or in asylum law if the conditions in a Member State would place an applicant at risk of ‘inhuman or degrading treatment, within the meaning of Article 4 of the Charter’. Not all violations of fundamental rights can result in the suspension of mutual recognition, to allow this would undermine the concept of mutual recognition. This limitation however, would not come into play in the operation of mutual recognition of positive asylum decisions.

The study on the feasibility of the establishing a mechanism for the relocation of beneficiaries of international protection found that certain Member States are not in a position to recognize other Member State’s asylum decisions. They stated that due to the lack of harmonization, or because not all Member States were doing enough to deal with the inflow of applicants claiming protection on their territory, they couldn’t trust other Member States’ decisions. Given that the second phase of the CEAS is completed, in theory Member States asylum systems should begin to become more harmonized.<sup>93</sup> Furthermore, the Dublin III Regulation is operated on the basis that all Member States respect the same standards and will apply the Qualification Directive and its recast in the correct manner. Politically, it would be difficult for States to argue that Member States asylum systems are too different to implement and partake in such an instrument as to do so would undermine the CEAS.

## 6. Transfer of protection of beneficiaries of international protection within the EU

In both the 2014 Commission Communication on an open and secure Europe and in the Stockholm Programme the creation of a framework for the transfer of protection status was referred to. This section will examine what transfer of international protection means in practice, whether such an instrument is needed and how this differs from the mutual

<sup>88</sup> *The Stockholm Programme — An open and secure Europe serving and protecting citizens*; Official Journal C 115, 04/05/2010, 6.2.1 *A common area of protection*.

<sup>89</sup> *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States* (2002/584/JHA).

<sup>90</sup> For a comprehensive overview of rebuttal grounds in the various mutual recognition criminal law instruments which may be a useful resource see J. Ouwerkerk, *Quid Pro Quo? A comparative law perspective on the mutual recognition of justicial decisions in criminal matters* (Tilburg) Intersentia 2011. Some of the grounds under which Member States can refuse to implement a mutual recognition decision relate to the *ne bis in idem*, the age of responsibility, amnestys, immunity provisions, the insufficiency of information delivered by the issuing authorities and the deliverance of a judicial decision whilst the person was *in absentia*. There is no ground which explicitly provides for the mutual recognition principle to be suspended on the basis of a breach of fundamental rights.

<sup>91</sup> Jannemieke Ouwerkerk, *Mutual Trust in the Area of Criminal Law* in Hemme Battjes, Evelien Brouwer, Paulien de Morre and Jannemieke Ouwerkerk ‘The Principle of Mutual Trust in European Asylum, Migration and Criminal Law’; Meijers Committee, 2011, Utrecht, the Netherlands, pp 39 – 41.

<sup>92</sup> *ExCom Conclusion No 12 (XXIX) 1978 on Extraterritorial Effect of the Determination of Refugee Status*, point (g) (n 24).

<sup>93</sup> Some of these instruments have not yet reached their transposition date. However, it is acknowledged that there are difficulties in the actual implementation of those instruments that have been transposed and the first stage of the CEAS. See for example see ECRE, AIDA annual report 2013/2014, *Mind the Gap. An NGO Perspective on Challenges to Accessing Protection in the Common European Asylum System* and ECRE, AIDA annual report 2012/2013 *Not there yet. An NGO Perspective on Challenges to a Fair and Effective Common European Asylum System*.

recognition of positive asylum decisions.

In order to make a beneficiaries status truly valid throughout the Union, they should receive their full set of rights, entitlements and have the same obligations as set out under the Qualification Directive and its recast wherever they decide to move within the Union. The question is then whether the Member State who granted that status remains the primary country responsible for the beneficiary, even if the beneficiary is living in another Member State for an extended period of time, whether the new country automatically assumes the responsibility for the beneficiary when they move to that Member State or whether a second Member State only becomes fully responsible for the beneficiary after a certain period of time. In other words, is there a need to put in place a system that would allow individuals to formally transfer their status to another Member State?

The Amended Long Term Residents Directive stipulates in Recital 9 that the 'transfer of responsibility for protection of beneficiaries of international protection is outside the scope of this Directive'. According to the Directive, any movement that takes place under this Directive by a beneficiary of international protection is as a migrant. An immediate concern for beneficiaries of international protection who move under the amended Long Term Residence Directive will be who is responsible for their status, and at what stage does another Member State become responsible?<sup>94</sup>

Certain practical aspects lend weight to the belief that there should be a system that formally transfers protection between States. For example, it would be practical if the revocation or cessation clause needs to be applied. Article 14 (a) and (b) of the recast Qualification Directive provides that refugee status can be revoked when there are 'reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present' or, having been convicted of a particularly serious crime they constitute a danger to that community. As to what constitutes a 'danger to the security' or a 'particularly serious crime' varies between states.<sup>95</sup> However, it may not make sense if Member State A is reviewing whether revocation should be applied if the beneficiary has been living in Member State B for an extended period of time. In order to make mutual recognition workable in practice, there may need to be an arrangement in place which would stipulate that the country that granted the status has the sole responsibility for revoking or ceasing the status. If the applicant then applies for a transfer of their status, then that Member State would assume that responsibility.

One of the main issues that would need to be considered in the transfer of protection status is the exchange of information regarding the applicant's refugee claim and status. States would need to have a safe and confidential system that would allow them to review the applicant's claim, particularly if a question arose regarding the application of the cessation or revocation clause.<sup>96</sup> The principle of mutual recognition conceives a situation where Member States recognise the validity of decisions from other Member States with a minimum of procedure and formality, under which pretext this instrument would operate. However, when a Member State is applying either the revocation or cessation clause, it needs to look at the reasons why refugee status was granted. This would require an exchange of information between Member States. Further research is needed to examine which instrument would be the most suitable to facilitate this exchange.

Under the Qualification Directive and its recast, beneficiaries of international protection can apply for family reunification. At present it can take months or even years to process an application. It would be practically unworkable and administratively cumbersome if each State that a beneficiary moved to would have to take responsibility or start the family reunification process again. This lends to the belief that one Member State should have the overall responsibility for the beneficiary, and if the beneficiary is living in another country for an extended period of time and wishes to settle there, it would make sense that their status is formally transferred to the second Member State. At such time the second Member State would then become responsible for issues such as a family reunification application, if it is still pending, and evaluating whether a revocation or a cessation clause should be applied.

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94 Only 11 Member States have ratified the European Agreement on the Transfer of Responsibility for Refugees, leaving the majority of states either with their own systems or without any established mechanism to facilitate the transfer. Furthermore, some Member States dispute the content of what protection aspects they are responsible for, which is disconcerting for the protection applicant who moves to a second Member State under the amended LTR Directive. In addition, even if the European Agreement is ratified by all Member States and even if there is consensus as to what protection aspects Member States are responsible for, it does not deal with the transfer of persons with subsidiary protection.

95 For more information, see ELENA *The Impact of the EU Qualification Directive on International Protection* October 2008.

96 Article 11 of the recast Qualification Directive states; A third-country national or a stateless person shall cease to be a refugee if he or she: a) has voluntarily re-availed himself of the protection of the country of nationality; or having lost his or her nationality, has voluntarily re-acquired it, or (c) has acquired a new nationality, and enjoys the protection of the country of his or her new nationality; or (d) has voluntarily re-established himself or herself in the country which he or she left or outside which he or she remaining owing to fear of persecution; or can no longer, because the circumstances un connection with which he or she has been recognized as a refugee have ceased to exist, continue to refuse himself or herself of the protection of the country of nationality, or being a stateless person, he or she is able, because the circumstances in connection which he or she has been recognized as a refugee have ceased to exist to return to the country of former habitual residence.

As a result, it may not be practical to immediately transfer refugee status to another Member State. For example, if a refugee wants to move to another Member State to study but intends to settle in the original Member State, they may not want to transfer their status. By having such a system that would automatically transfer a status would also substantially increase administrative burdens on Member States. It may then be preferable to not transfer the status immediately, but rather, have a procedure in place that allows for a transfer after a certain period of time.<sup>97</sup>

In summation and for the sake of clarity, mutual recognition within the EU foresees beneficiaries of international protection having their status recognised by other Member States which in turn would enable them to benefit from free movement within the EU under the same conditions and subject to the same restrictions as EU nationals. The transfer of protection status within the EU would allow another Member State who did not grant the original protection status become responsible for the international protection beneficiary.

## 7. Practically enforcing mutual recognition of positive asylum decisions and the transfer of status between Member States

This paper has provided examples where mutual recognition has a basis in law under both international and EU law. It also established that in order to give full effect to Article 78 TFEU, a positive asylum decision should be valid and enforceable in any Member State. This however does not happen in practice resulting in a gap between current practice and what should be in place.

As a result it would be preferable that mutual recognition is formally enshrined in an EU legislative instrument to give it its intended effect. It could also set down some rules regarding the enforceability of another Member States positive asylum decision and the rights and entitlements that a beneficiary would be entitled to should they move to a second Member State. This could, for example, be formally incorporated in the recast Qualification Directive. It already postulates that a protection status granted should be effective in the EU as a whole. For example, recital 9 alludes to a 'uniform status' and recital 12 stipulates that there should be a 'minimum level of benefits in all Member States'. Article 1 provides that the purpose of the directive is *inter alia* to lay down standards for a 'uniform status'.<sup>98</sup> As per Article 38 of the recast, the Commission shall report to the European Parliament and the Council on the application of the Directive and shall propose any amendments that are necessary by 21 June 2015. There is therefore an opportunity to raise and address this issue in the coming months.

A new instrument is also needed to formally transfer a positive asylum decision to another Member State; there is a clear gap in the EU asylum *acquis* in relation to this. The European Agreement was not put in place to deal with the Common European Asylum System, it does not deal with beneficiaries of subsidiary protection and it is not ratified by all Member States. An additional benefit of putting in place a new EU instrument would be that the Court of Justice of the European Union would have oversight should any issue arise regarding its interpretation. In the study on the transfer of refugee status, it was suggested that this could be linked back to the Dublin Regulation.<sup>99</sup> This would mean that the Member State under the Dublin III Regulation which was responsible for processing the applicant's claim, and subsequently for the individual when they obtain international protection status, would remain responsible until such time that the applicant wanted or is able to have their status transferred. This is what happens at present but only in countries that have their own system which allows for the transfer of status or in countries that have ratified the European Agreement on the Transfer of Refugee Status.

If a new instrument is created to deal with the transfer of status between States, it may make sense that this instrument also deals with the mutual recognition aspect of a positive asylum decision rather than dealing with it in the recast Qualification Directive.

## 8. The amended Long Term Residence Directive and current protection gaps

The scope of the amended Long Term Residence Directive has been extended to beneficiaries of international protection, but in its current form it cannot be seriously considered as an instrument that would allow for the free

<sup>97</sup> As referred to in Section 4.2, Member States who are party to the European Agreement on the transfer of protection status expressed a wish that any future regulation adopted amongst Member States should be based on the criterion as stipulated in the 1980 Agreement which provides that a transfer happens after two years, nevertheless, this should be the subject of further research given that not all Member States are party to the Agreement and given the fact it doesn't cover subsidiary protection.

<sup>98</sup> Nevertheless, despite this, Recital 13 provides that 'the approximation of rules on the recognition and the content of refugee and subsidiary protection status should help limit the secondary movement of applicants for international protection between Member States, where such movement is purely caused by differences in legal frameworks'.

<sup>99</sup> Study on The transfer of protection status in the EU, against the background of the common European asylum system and the goal of a uniform status, valid throughout the Union, for those granted asylum' p155.

movement of beneficiaries of international protection. The scope of this paper is not to examine the shortcomings of the amended Long Term Residence Directive; this has been extensively documented elsewhere<sup>100</sup> and is also looked at in Section 5.5, but if it is to be seen as a free movement instrument, it needs to be broadened in order to make it more meaningful for beneficiaries of international protection. Nevertheless, it will be used by some beneficiaries of international protection, but without updated rules on the transfer of status to accompany the amended Directive, several problems could arise, a number of which are outlined below.

### ***Differing rules regarding Family Reunification***

Article 16 (1) of the amended LTR Directive provides, in limited circumstances, that certain members of the LTR's family can accompany them to the second Member State. The conditions that the LTR have to meet are set out in Article 4 (1) of the Family Reunification Directive. However, the Family Reunification Directive, as it currently stands, does not apply to those with Subsidiary Protection so they cannot benefit from the family reunification provisions, but Member States can extend these provisions to subsidiary protection beneficiaries. In addition, the special provisions in the Family Reunification Directive that apply to refugees would not be applicable in the second LTR state unless their status is transferred.<sup>101</sup> Given the *ad hoc* and disjointed way Member States deal with the transfer of status, this could create real problems for the family members of the beneficiary of international protection. There is also a time limit to consider before status can be transferred.<sup>102</sup> In addition, the second Member State is only obliged to accept 'core' family members, the second Member State can decide not to admit optional family members that would still be in the first Member State.<sup>103</sup> Another issue to consider is that if the transfer of refugee status took place, pursuant to the Dublin III Regulation, there would also have to be a shift in responsibility for considering any protection claim made by the refugee's family.

### ***Procedural problems***

If a person moves under the amended LTR Directive to a second Member State that is party to the European Agreement on the Transfer of Responsibility for Refugees, in accordance with the provisions therein, the applicant can apply to transfer their status to the second Member State. However, there is no obligation on the second Member State to automatically accept this application. Should they not accept, a question arises as to whether there is an obligation on the first Member State to continue to provide protection and be responsible for a person who is not living within their jurisdiction and does not intend to be for the foreseeable future due to the fact that they have a LTR residence permit in another Member State. Given the complications that could arise in this respect, until such time that there is a working instrument on the transfer of international protection, EU rules should clarify that the person granted international protection retains their status in the first Member State until it is transferred to the second Member State. It should also clarify, for the purposes of the 1951 Refugee Convention, that they are considered lawfully on the territory of the first Member State.<sup>104</sup>

Under the LTR Directive, Member States can give preference to nationals and citizens of EU Member States.<sup>105</sup> There are two problems with this when this provision is applied to beneficiaries of international protection. The first problem is that if it is accepted that mutual recognition applies, it could be argued that under the 1951 Refugee Convention they have durable residence,<sup>106</sup> even if the two year time limit has not passed to transfer the protection status, considering the fact that the LTR permit is valid for five years. Once they have durable residence, they should be treated the same as the most favoured foreigner, which in this instance, is other EU citizens. In addition, under EU law, the Qualification Directive states that beneficiaries of international protection should be given access to employment under the same conditions as nationals. This uncertainty creates confusion for both the Member State and the LTR, and may not even be in line with EU and International law.

<sup>100</sup> See for example, Steve Peers, *Transfer of International Protection and European Union Law*, International Journal of Refugee Law, Vol. 24 No. 3, pp 527 – 560.

<sup>101</sup> Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification, 3 October 2003, OJ L 251, 3; October 2003, pp 12-18, Chapter V of the Directive sets out the family reunification provisions for refugees. Recital 8 states that 'special attention should be paid to the situation of refugees on account of the reasons which obliged them to flee their country and prevent them from leading a normal family life there. More favourable conditions should therefore be laid down for the exercise of their right to family reunification'.

<sup>102</sup> Under the European Agreement of Refugee Status two years of lawful residence is required before a status can be transferred.

<sup>103</sup> Family Reunification Directive, Article 4 (1).

<sup>104</sup> Steve Peers, *Transfer of International Protection and European Union Law*, International Journal of Refugee Law, Vol. 24 No. 3, pp 527 – 560, p560. This is important giving the differing rules in the recast Qualification Directive and the recast Long Term Residence Directive relating to the loss of status due to departure. Article 9 (1)(c) of the recast LTR Directive provides that status can be withdrawn or lost if the applicant in question is absent from the territory for a period of 12 consecutive months. There is no provision in the recast Qualification Directive that provides for the loss of status on the grounds that the individual has left the state which granted it protection.

<sup>105</sup> Article 11.

<sup>106</sup> See Section 4.4 for more information about durable residence.

A person's long term residence status can be withdrawn for a number of reasons as stipulated in Article 9 of the amended LTR Directive. Article 12 (3) (b) provides that if the long term resident who is subject to expulsion is still a beneficiary of international protection in the first Member State, that person shall be expelled to that Member State. This provision could create some uncertainty, particularly if the long term resident has been living in the second Member State for a considerable amount of time. It could be argued that their status has been implicitly transferred to the second Member State as they have been living there with durable residence. Moreover, some Member States accept a transfer of responsibility if a refugee has been lawfully resident for a period of time (generally 18 months to two years) of continuous stay.<sup>107</sup> This could be at odds with the amended Long Term Residence Directive as it does not foresee these agreements in the Directive. However, those in receipt of subsidiary protection would not be able to argue that their status has been implicitly transferred; therefore they would need to move back to the first Member State.

These anomalies could create difficulties and uncertainty for those with international protection who make use of their free movement rights under the Long Term Residence Directive. An EU instrument that would regulate and set out clear rules for such circumstances would solve this issue.

## 9. Conclusion

In order for the Common European Asylum System to be truly harmonised and for a uniform status to be valid throughout the Union, the principle of mutual recognition should be formally enshrined in EU law. This would also balance the anomaly that allows Member States to recognize and implement other Member States return decisions yet does not provide a clear path which allows States to recognize other Member States positive asylum decisions. To ensure the status is fully valid, Member States should extend full rights and responsibilities to all beneficiaries of international protection. A legal instrument needs to be put in place in order to ensure that an applicant's status is mutually recognisable, by doing so it would fully incorporate what has a basis in law (if not always implemented) at the international level and would ensure that beneficiaries are not at risk of being extradited back to their country of origin or a third country when transiting through another Member State. It would also allow the status to become truly valid within the Union. Another instrument is then needed to regulate a transfer of international protection status to a second Member State after a certain period of time where a beneficiary of international protection has moved and settled in a second Member State by virtue of mutual recognition. If the beneficiary intends to settle in the second Member State it makes sense that they should become responsible for that individual's status.

In the more immediate future, beneficiaries of international protection will start to move under the Long Term Residence Directive as amended and will continue to do so under the Family Reunification Directive yet the current provisions regulating the movement and transfer of status between States are insufficient. At a minimum, an instrument is needed to enshrine mutual recognition at the EU level and to regulate transfers between Member States. Beneficiaries of international protection will continue to move to other countries where they have better prospects for integration, and in the full and inclusive spirit of the 1951 Refugee Convention and in light of EU Member States human rights obligations, these two measures should be adopted as soon as possible.

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<sup>107</sup> Nina a . Lassen, Leise Egesberg, Joanne van Selm, Eleni Tsolakis, Jeroen Doornik; *The Transfer of protection status in the EU, against the background of the common European asylum system and the goal of a uniform status, valid throughout the Union, for those granted asylum*, 2004, pp120 -121.



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