

Asylum seekers with special needs

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Introduction

Under the European Council's Stockholm Programme the need to improve protection and increase awareness of vulnerable persons and groups with special needs, whether they be European citizens or third country nationals, is withheld as a key policy priority for the European Union. Immigration and asylum policies are an integral part of this priority.

Regarding the field of asylum, the Reception Conditions Directive is, in the present state of Community Law, the only 1st generation legal instrument that pays specific attention to the situation of vulnerable asylum seekers with special needs.

The Dublin Regulation is silent on the subject and will only be referred to incidentally in the present paper as it falls outside the scope of the Ministerial Conference. The Procedures Directive barely touches upon the issue of taking into account the possible state of vulnerability of the asylum seeker in the framework of the asylum procedure.

The Commission's recast proposals for the Procedures Directive and the Dublin Regulation contrast sharply with this state of affairs. The two draft texts contain specific provisions for the protection of vulnerable asylum seekers. The protective provisions in the recast proposal for the Procedures Directive will be examined in more detail.

Regarding the way in which the situation of vulnerable asylum seekers with special needs should be addressed in the Reception Conditions Directive, the analysis of the 2nd generation instruments proposed by the Commission, and commented upon by the Parliament and the Council brings to light a conceptual problem. This problem concerns the determination of the persons and of the particular needs that should be covered by the recast directives. If one puts aside its political dimensions, this conceptual problem can be solved quite easily on a technical level.

In the framework of one of the Conference's workshops, some attention will also be paid to a new provision on the detention of vulnerable asylum seekers.

Apart from a legal analysis of the legislative instruments, the implementation of the provisions in question by the Member States will also be examined. Even though major shortcomings are found in many Member States, research conducted in 2009 by the Odysseus Academic Network¹

¹ Study conducted by the Odysseus Academic Network for the European Refugee Fund, presented to the European Commission in February 2010 : « *Identification of (Vulnerable) Asylum Seekers with Special Needs* :

has shown that a “reservoir” of good practices exists in some Member States. The diffusion in all Member States of these good practices, which often make sense and some of which are quite simple, would undeniably lead to an improvement of the quality and efficiency of the way in which the special needs of vulnerable asylum seekers are addressed. Some of these good practices will be presented by way of example.

Finally, the necessity of a horizontal and coherent approach to the issues at hand through the various 2nd generation instruments (Reception Conditions Directive, Procedures Directive, Qualification Directive and Dublin Regulation) will be examined.

By way of conclusion, some brief and clear recommendations will be formulated.

1. The Reception Conditions Directive currently in force: failure to implement the relevant provisions.

The aim of the provisions of the current Reception Conditions Directive which specifically protect vulnerable asylum seekers with special needs is to provide the asylum seekers concerned with reception conditions adapted to their needs. In other words, the minimal norms defined in the directive should be adapted in favour of those persons who are particularly weakened or exposed.

Among reception conditions health care is important. For instance, an asylum seeker who has been subjected to torture or other serious forms of violence will need medical treatment that is appropriate to his physical and mental state. Material reception conditions in reception centres, such as accommodation, are also important. A woman placed in a dormitory where only men are lodging is not necessarily a vulnerable person but her specific accommodation conditions may place her in a situation of vulnerability². She may therefore be entitled to accommodation in a single room or in a dormitory where only women, with or without children, are accommodated.

In 2007, the Odysseus Academic Network has issued a report presenting an assessment of the implementation of the Reception Conditions Directive by the Member States³. This report showed

Comparative Study and Recommendations for Law and Practice ». The 6 Member States who took part in the study are: Belgium, Finland, Malta, the Netherlands, Poland and Spain.

² It seems a distinction may be made between a state of vulnerability and a situation of vulnerability. A person having lost the use of his legs or suffering from mental disorders is in a state of vulnerability. The fact for a woman to be accommodated in a dormitory with only men puts her in a situation where she may potentially become vulnerable. The state refers to an intrinsic condition of the person, whereas the situation is not inherent to the person.

³ Reception conditions synthesis report, Study done for the DG JLS of the European Commission during the year 2007, Contract JLS/B4/2006/03.



that the directive's provisions specifically relating to vulnerable asylum seekers were not put into practice by most Member States.

One of the reasons for this shortcoming is that the directive's provision stating as a general principle that the situation of vulnerable asylum seekers should be addressed does not explicitly require the Member States to put into place a procedure to identify this category of asylum seekers, even though one may consider that such a procedure logically follows from the provision in question. This is also the opinion of the Commission in its report of 26 November 2007⁴: *"Identification of vulnerable asylum seekers is a core element without which the provisions of the Directive aimed at special treatment of these persons will lose any meaning"*.

Nevertheless, few Member States have put into place a procedure for the identification of vulnerable asylum seekers.

Due to the lack of such a procedure, many vulnerable asylum seekers are not identified as such and their particular needs are not being addressed.

Indeed, even though certain states of vulnerability are obvious or easily detectable, others are not. Some particular traumas may be difficult to detect, especially traumas resulting from torture or other serious forms of physical, psychological or sexual violence. Acts of torture or violence do not necessarily leave visible traces and, by their very nature, often prevent victims from talking about them.

These considerations show that it is necessary for Member States to provide in their domestic regulations for a procedure through which vulnerable asylum seekers with special needs can be identified.

2. The proposal to recast the Reception Conditions Directive: this proposal solves the procedural problem but poses a conceptual problem

It is clearly stated in the Commission's proposal to recast the Reception Conditions Directive that Member States are under the obligation to put into place, in their own national legislation, a procedure to identify vulnerable asylum seekers with special needs. The Commission's proposal may definitely be followed on this point. But it also poses a conceptual problem.

The problem is indeed how to determine which asylum seekers will be entitled to appropriate reception conditions and what special needs will have to be met⁵.

⁴ Report from the Commission to the Council and to the European Parliament of 26 November 2007 on the application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, point 3.5.1., page 9.

⁵ On these points, the proposal for a Reception Conditions Directive as amended by the legislative resolution of the Parliament of 7 May 2009 is identical to the Commission's proposal.

The Reception Conditions Directive currently in force is directed at vulnerable asylum seekers with special needs. This means that not just any kind of special need should be addressed. Only those special needs resulting from a state or situation of vulnerability require reception conditions to be adapted accordingly. The concept of vulnerability is therefore crucial. It justifies the current directive's specific protective provisions. In the Commission's proposal to recast the directive, the concept of vulnerability is still present but no longer crucial. The crucial concept here is that of special needs. The aim is to take into account (in order to adapt the minimum reception standards) the situation of asylum seekers with special needs without any reference being made to the vulnerability of the persons concerned. The existence of a causal link between the special needs of the asylum seeker and his state or situation of vulnerability is no longer required. This important conceptual shift creates uncertainty as to which persons and which special needs should fall under the recast provision.

This uncertainty can be illustrated with the following example: How to assess the situation of a person who has lost a tooth and asks for his tooth to be replaced (it being understood that the non-replacement of his tooth does not impede mastication and has no influence on his capacity to eat)?

First of all, it should be borne in mind that, regarding health care, Member States only have to provide *emergency care and essential treatment of illness*, according to the current minimal standards of the Reception Conditions Directive. It seems quite obvious that the replacement of a tooth does not fall under this obligation. Should it then be considered as a *special need*?

If we consider the Commission's recast proposal, one can argue that the above request should be addressed, as the scope of the "special needs" is not limited by the condition of "vulnerability". On the other hand, it could also be argued that the particular needs covered by the directive are not to be confused with mere wishes and that the above requests falls under the latter. The question remains open. Under the directive currently in force, which requires a causal link between the particular needs and the existence of a state of vulnerability, it may reasonably be argued that the request should not be addressed as the loss of a tooth does not entail a *special need due to a state of vulnerability*.

Apart from this example, the system put into place by one of the rare Member States providing for an identification procedure in its domestic legal framework should also be mentioned. In this Member State, i.e. Belgium, the law states that the individual situation of asylum seekers has to be examined in order to check whether their reception conditions meet their special needs. The law thus requires identification of special needs of asylum seekers without requiring the existence of a causal link between those needs and a vulnerable state or situation. On this point, domestic law is in accordance with the Commission's proposal rather than with the current directive. Recently, the interpretation of this provision has led to several judicial appeals regarding the definition of special needs and the extent to which special needs have to be addressed. Thus it is possible to consider that the fact of not requiring a causal link between the particular needs invoked by an asylum seeker and a state of vulnerability, will lead to litigation and make the answer to the question raised more uncertain.

Beyond the legal uncertainty illustrated by this example and the existence of judicial litigation in Belgium, the Community legislator has to consider which asylum seekers it wishes to grant



enhanced protection and which are the special needs requiring an adaptation of the minimum reception standards.

This conceptual problem, although in a different way, remains unsolved in the Council's proposed amendments presented in November 2009.

However, on a technical level, the conceptual problem posed by the draft versions of the Commission, Parliament and the Council can be easily solved through the reintroduction of a causal link between an asylum seeker's special needs and his state or situation of vulnerability. It is indeed possible to use a single concept in which the two separate concepts considered above are joined through a causal link, i.e. the concept of *persons with special needs due to their vulnerable state or situation*.

3. Consequences of the obligation for Member States to include an identification procedure in their domestic legal framework

Apart from the conceptual problem, the relevant provisions of the draft versions for a recast of the Reception Conditions Directive will allow for greater awareness of vulnerable persons with special needs.

The obligation of setting up a formal and detailed legal framework defining a set of basic rules for the identification procedure will ensure the transparency and legal certainty of the current system. Such a framework offers a crucial guarantee for the respect of the rights of asylum seekers. At the same time it offers clear guidelines for the work of the personnel in charge of identification. This point should be emphasized. In some Member States having a specific identification mechanism but lacking a legal framework, or where the legal framework remains vague, personnel underline the difficulty of working when there is no clear definition of who does what, when and how. In Belgium, where this practice takes place within a formal and clearly defined legal framework (and where the practice is in accordance with this framework), practitioners have a positive view of this dimension of their work⁶.

An important source of concern remains, namely the practical measures that should be taken for asylum seekers who are identified as vulnerable persons with special needs. Under the terms of the Reception Conditions Directive, the minimum reception standards are to be adapted for the benefit of this category of asylum seekers. As far as health care is concerned, this is especially the case for persons (minors or adults) who have been subjected to torture or other serious forms of violence. In its study assessing the transposition of the Reception Conditions Directive into domestic law, the Odysseus Academic Network has found that in many Member States these persons did not have access, or had insufficient access, to the specific medical treatment required by their physical and/or mental state (among others, due to the lack or insufficiency of

⁶ These factors have been brought to light by the abovementioned study conducted by the Odysseus Academic Framework for the European refugee Fund in 2009 and presented to the European Commission in February 2010.



appropriate medical facilities). This observation shows that mere legal clarifications as to the obligation of Member States to establish an identification procedure are not enough. This point should not be ignored: when a person is identified as having been subjected to acts of torture or other serious acts of violence, this (generally) creates specific expectations on the part of the person concerned. The lack of any response to these expectations in the form of appropriate medical treatment and reception conditions is liable to worsen his psychological frailty and/or physical health state. Moreover, for staff members in charge of the identification and/or reception of this category of asylum seekers, such a situation can also lead to a sense of powerlessness, which may ultimately lead to motivational disengagement. Due care should thus be given to the actual implementation of the provisions aimed at protecting vulnerable asylum seekers with special needs.

4. Detention and the physical and/or mental health state of asylum seekers

In relation to the workshop on alternatives to detention for families with children presented by the Belgian Immigration department, it should be noted that the Commission's recast proposal adds a specific provision to the Reception Conditions Directive aimed at preventing the detention of persons whose physical or mental health may be seriously affected by depriving them of their freedom. This provision applies first and foremost to minors.

In the Stockholm Programme the Council invites the Commission to further reflect on alternatives to imprisonment. In its recast proposal for the Reception Conditions Directive, under the new provisions relating to detention of asylum seekers, the Commission states, *inter alia*, that asylum seekers may only be detained if detention proves necessary and if other less coercive measures cannot be applied effectively.

The Commission's proposal for a recast states that minors shall not be detained unless it is in their best interest and that unaccompanied minors shall never be detained.

Furthermore the European Court of Human Rights has recently been called upon to examine the legality of the detention of minors in two cases. One case concerned a female unaccompanied minor asylum seeker⁷, and the other concerned four minors accompanying their mother who had applied for asylum⁸. Whereas the Court's ruling does not prohibit as a matter of principle the detention of minors, the Court nevertheless considered that in both cases, given the specific circumstances of each case, the detention of minors constituted a breach of article 3 (prohibition of torture, inhuman or degrading treatment or punishment) and article 5 (1) (prohibition of unlawful and arbitrary detention) of the European Convention of Human Rights, because of the specific detention conditions and the absence of any relationship between the ground for detention and the place and conditions of detention.

⁷ ECHR, *Mubilanzila Mayeke et Kaniki Mitunga*, Application no. 13178/03, final Judgment of 12 January 2007.

⁸ ECHR, *Muskhadzhiyeva*, Application no. 41442/07, Judgment of 19 January 2010 (only available in French)



On account of their age, minors form a vulnerable group *per se* among asylum seekers. A recent study⁹ shows that the mere fact of being confined in a space they are not allowed to leave increases the state of vulnerability of minors deprived of their freedom and has a negative effect on their physical and mental health. The pathogenic nature of confinement has also been demonstrated in a study¹⁰ based on a series of visits of detention or transit centres in several EU Member States conducted by the delegates from the LIBE Committee. For its part, the Odysseus Academic Network has found in its assessment of the transposition of the Reception Conditions Directive that in many Member States, detained minors did not have access to the school system, whereas this is a right recognised by the directive in question.

These developments show the importance, insofar as this is still needed, of the debate on the alternatives to detention in the field of asylum, especially where minors are concerned.

5. The recast proposal for the Asylum Procedures Directive: new provisions protecting vulnerable asylum seekers

Whereas in the explanatory memorandum and the preamble the recast proposal for the Asylum Procedures Directive states to be directed at *vulnerable* asylum seekers, the relevant articles of the recast directive refer to asylum seekers *with special needs*. However, this terminological difference raises no conceptual problem comparable to the problem encountered in the recast proposal for the Reception Conditions Directive, as the concept of *asylum seekers with particular needs* is defined in the body of the recast directive. This definition is based on a limitative list of “states” which may lead a person to be considered as an *asylum seeker with special needs*. These states refer for the most part to a possible state of vulnerability¹¹. In this definition, the mental state of the asylum seeker is taken into account, as well as the consequences of torture or other serious forms of violence. This point should be emphasized as the mental state and traumas resulting from acts of torture can negatively affect a person’s ability to remember past experiences, to talk about them or to trust the interviewer and establish a relationship with him.

As for the content of the relevant provisions in the proposal for a recast, one of the aims is to ensure that vulnerable asylum seekers can benefit from special guarantees and support within the asylum procedure, such as obtaining a delay, obtaining the necessary support to prepare their individual interview, the non-application of fast track procedures etc.

⁹ *Becoming vulnerable in detention*, The DEVAS Project, Jesuit Refugee Service, European Regional Office.

¹⁰ *Conditions des ressortissants de pays tiers retenus dans des centres avec une attention particulière aux services et moyens en faveur des personnes aux besoins spécifiques au sein des 25 Etats membres de l’Union Européenne*, PE, Direction Générale des Politiques Internes, IP/C/LIBE/IC/2006-181.

¹¹ For instance, « age » can be understood to refer to the « state of being a minor » or « the state of being elderly ». Both states may be a source of vulnerability for the person concerned.





The training of the personnel responsible for the determination of protection status is also the subject of increased attention in the Commission's proposal, especially to the effect that the situation of vulnerable persons should be taken into account. Personnel should be specifically trained to be aware of the following topics: identification and documentation of symptoms and signs of torture, and gender, trauma and age awareness. Training in interview techniques is also stressed in the proposal. The importance of training will be further emphasised under point 6 (Good Practices).

Moreover, under the recast directive, asylum seekers will be allowed, upon request, to have a medical examination carried out in order to support statements in relation to past persecution and serious harm. Subject to the consent of the asylum seeker, such an examination should also be carried out in cases where there are reasonable grounds to consider that the applicant suffers from post-traumatic stress disorder.

Even though the Commission's proposal requires Member States to address, within the asylum procedure, the situation of vulnerable asylum seekers with special needs, it does not put Member States under the obligation to institute a procedure to identify vulnerable asylum seekers. Only for asylum seekers who have been subjected to torture or other serious forms of violence are Member States required to provide for *further rules and arrangements* for identification and documentation of symptoms of torture and other forms of physical, sexual or psychological violence. This provision seems insufficient: it does not include all the categories of vulnerable asylum seekers as defined in the proposal for a recast and its wording leaves a doubt about the obligation of Member States to institute a genuine identification procedure of such asylum seekers.

Whereas the lack of identification of vulnerable persons, as far as the Reception Conditions Directive is concerned, will deprive the persons concerned from appropriate reception conditions (especially in the matter of health care), this lack will deprive them also of the necessary adjustments to the asylum procedure, as far as the Procedures Directive is concerned. Moreover, non-identification of vulnerable asylum seekers may also compromise their chances of a favourable issue to their claim for international protection, as evidence in support of their claim may be related to the revelation of their state of vulnerability (especially traumas resulting from torture or other serious violence).

However, the necessary clarifications in the recast proposal should be carefully thought out and assessed so as to allow for identification of vulnerable asylum seekers without compromising the efficiency and viability of the common European asylum system.

6. Quality and efficiency of identification procedures: good practices

Following its study of the transposition of the Reception Conditions Directive by the Member States, the Odysseus Academic Network has conducted in 2009 a second study exclusively dedicated to the identification of vulnerable asylum seekers within the framework of the Reception Conditions Directive¹². This comparative study analyses the few identification procedures, more or less formal, that exist at a national level. The study also compares the judicial framework and/or practices used for identification in relevant Member States.

This study has produced an important outcome, namely that there exists a “reservoir” of experiences in the field as far as identification is concerned. These experiences have been described by their practitioners as good practices that are liable to improve the quality and efficiency of the identification system. They are sometimes quite simple and often make sense, and do not necessarily require important financial means. They rely mainly on consciousness-raising, training and involvement of the staff responsible for the identification and/or the reception of vulnerable asylum seekers. They also require due attention to communication between the different actors involved, including asylum seekers. A crucial point to take note of is that these good practices are borne by the state personnel charged with the reception and/or identification of asylum seekers but also by organisations representing civil society.

Finally, even though the good practices mentioned below have been identified within the scope of the implementation of the Reception Conditions Directive, it should be noted that most of these good practices may also be relevant for the recast proposal for the Procedures Directive. By their very nature they can undoubtedly contribute to the efficient implementation of the new provisions protecting vulnerable asylum seekers.

It seems worthwhile to list some of these good practices:

➤ (A) *Observation of asylum seekers*

This observation is not only recommended during the application of the formal identification measures (during the medical examination, the reception and/or identification interview with the personnel concerned: social worker, nurse or other) but also in the asylum seeker’s daily life. The observation of an asylum seeker in his daily life implies his residence in a common reception facility¹³. Depending on the circumstances this observation may produce much information with regard to the aim being pursued. It can take place during daytime and at night. For instance, in Finland, the night personnel is asked to write down in a log book the events of the night such as sleeping disorders of asylum seekers. This log book is then

¹² Abovementioned study carried out by the Odysseus Academic Network for the European refugee Fund in 2009 and presented to the European Commission in February 2010.

¹³ Observation of the asylum seeker can be recommended on a more general level through awareness of all the actors in the field who are in contact with the asylum seeker: authority registering the application, authority determining protection status,... See point 6 on the Procedures Directive.



handed over to the day personnel. The night staff is also made aware of the importance of listening to asylum seekers who may come to see them. It has been observed that it may be easier for asylum seekers to approach and to confide with staff members at that time.

➤ *(B) The involvement of all personnel in reception centres.*

This is mainly the case in Finland, and to a lesser degree in Belgium and Spain. In Finland, whereas some personnel (social worker, nurse or other) are specifically in charge of the identification of vulnerable asylum seekers with special needs, there are instructions for the involvement of the whole of the personnel working in a reception centre. Every staff member (educators, administrative personnel, kitchen personnel, cleaning personnel) is required to pay attention to any asylum seeker who may have special needs. If they detect a problem, it is their duty to inform the staff member in charge of identification. This awareness and involvement of all staff members increases the chance of identifying asylum seekers with special needs. More generally, it contributes to an atmosphere of enhanced benevolence, attentiveness and confidence in which asylum seekers are more at ease to express themselves. This is a way to encourage their involvement in the identification process, as they are not considered passive subjects but persons possessing their own resources which they can draw from¹⁴.

➤ *(C) Mentoring of identification staff (or other staff in contact with asylum seekers) by more experienced colleagues*

Training is a fundamental element for staff in contact with asylum seekers, especially staff responsible for the identification procedure (the more general question of staff training is treated under (G) below). This training can take different forms. In Belgium, mentorship by more senior staff is part of the training of the personnel concerned. Mentoring ensures the transmission of *knowledge, know-how* and *life skills* from more experienced staff to beginning or less seasoned staff.

➤ *(D) Creation of workshops and other activity groups*

In Spain, and especially in Finland, workshops and various activity groups have been put into place, such as artistic workshops, workshops on daily life orientation and activities in which mothers participate together with their children... Asylum seekers who participate in these workshops and activity groups find themselves in a relaxed way in a different environment and around common interests on a voluntary basis. This is also a way for the staff in charge of these activities to create a relation of confidence with asylum seekers. This favours not only observation of the asylum seeker but also leads him to express himself.

¹⁴ The mobilisation of the community of asylum seekers and/or persons in close contact with them is considered below (point (I)).



- (E) *The possibility for staff members responsible for identification to request the opinion or advice from external professionals and/or organisations*

In Belgium, Finland and Spain, the person(s) in charge of identification (social worker, nurse or other) can request the opinion or advice of any external professional or organisation he considers appropriate: psychiatrist, specialised health service, organisations assisting victims of human trafficking, assistance service for minors... This possibility is considered a positive element in the identification practice, as expert advice may be sought from a specialist and the assessment of the asylum seeker's situation does not lie with a single person.

- (F) *A referential set of guidelines for the interview of the asylum seeker*

Some practitioners who conduct interviews with asylum seekers as part of the identification procedure or at other occasions (such as reception of the asylum seeker) use a referential set of guidelines for the interview. These guidelines draw the attention of professional staff on a number of symptoms requiring special attention because they could be indicative of a traumatic situation (sadness, irritability, nervousness, insomnia...). They also recommend to conduct the interview in a non inquisitorial manner, to let the interviewee use his own words, to adopt a benevolent and supporting attitude, to evoke topics of ordinary life during the interview etc... All these attitudes should contribute to the asylum seeker expressing himself more freely. This referential set of guidelines favours staff awareness of some fundamental points and offers a non rigid framework in which to work.

Regarding the form to impart to the interview, note should be taken of several projects initiated by NGOs to facilitate and improve early detection of asylum seekers who have been subjected to torture or other serious forms of psychological, physical and/or sexual violence and/or who are suffering from mental disorders. Among current projects worthy of note are the project of Parcours d'Exil in France and a project in the Netherlands by several organisations (Pharos, MAPP, Care Full, Refugee Council...) known as "The Dutch Approach".

The organisations associated to both projects are currently working on the elaboration and use of questionnaires and checklists established by mental health professionals and aimed at detecting at the earliest possible stage asylum seekers suffering from traumas and/or mental health problems. The questionnaires contain questions on the after-effects of traumas (insomnia, digestive problems, sense of fear, concentration problems...) and the checklist lists observable behaviour (tremor, agitation, noise sensitivity, mental blanks, silence, avoidance of contact, irritability...). Conditions for the presentation and use of these tools have also been defined. When there is a supposition of psychological suffering, Parcours d'Exil proposes therapeutic support whereas the Dutch project conducts additional psychological testing through a specially trained psychiatrist or psychologist. If this testing confirms the existence of a mental health problem, the person concerned will be addressed to a therapeutic facility if possible, depending on availability. Apart from its therapeutic aim, the Dutch project also tends to answer the following question: when an asylum seeker is found to suffer mental health problems, are these problems liable to interfere with his ability to make a comprehensive, consistent and detailed statement during his asylum procedure? If so, and if the asylum seeker agrees, the results of the psychological examination are

communicated to his lawyer, who can then put forward the difficulties of his client. Contact is taken with the asylum authority (immigration and naturalisation department) to inform and alert them on the special situation of the asylum seeker and to ask for the asylum procedure to be adjusted to his situation (interview conducted according to a rhythm taking into account the person's mental health state, in an environment without cause for anxiety etc...). This project goes therefore beyond a mere adjustment of reception conditions to vulnerable asylum seekers, as it aims to include their special needs into the asylum procedure proper. This project and its recent developments will be presented by the Dutch Refugee Council in one of the workshops.

In view of the interview techniques for victims of torture or other serious forms of violence, it is also necessary to examine the specific question of gender-related persecution and violence. *"Gender-related violence directly affects male and female gender identities. The word "gender" refers to the economic, social and cultural characteristics and opportunities deriving from the fact of being a man or a woman. In most societies, this does not merely mean the existence of a biological difference but **corresponds rather to different expectations** regarding one's appearance, qualities, behaviour and job. These expectations often have the strength of internalised norms (...) Gender is thus different from sex on account of its **social and cultural dimensions** as opposed to the biological nature of sex. These distinctive connotations and characteristics **vary according to the society** being considered and evolve with **time**."*¹⁵ Gender-related persecution concerns mainly women through such acts as genital mutilation, rape, forced pregnancy, abortion or sterilisation, ... But men are also concerned. In some parts of the world, problems for homosexual, bisexual and transsexual men first come to mind but heterosexual men may also be victims of gender-related persecution. Gender-related violence has often a strong sexual dimension and concerns the intimate sphere, pertains to what one does not talk about and such violence generates in its victims a deep sense of shame and dishonour. On the other hand, when such persecution or violence comes to light, its victims are often rejected by their community and family. Persons interviewing asylum seekers should be well aware of all these elements. In Belgium, when the authority responsible for determining protection status supposes that an asylum seeker has been persecuted on account of him/her being gay or lesbian, contact is established with the association *Tels Quels*, which furnishes social, administrative and psychological assistance to gays and lesbians and whose members are particularly aware of gender-related problems and possess specific competences to receive and hear asylum seekers. With his/her consent, the asylum seeker meets a member of the association. Gender issues will be examined more specifically in workshop 3 by Judit Wirth, member of the Hungarian female magistrates association.

- (G) *Training all staff members in contact with asylum seekers, especially those in charge of identification*

¹⁵ *Exchange for change, Guide pour l'amélioration de la prise en compte des persécutions liées au genre dans la demande d'asile en Europe*, France Terre d'asile, Commission espagnole d'aide au réfugié et Conseil italien pour les réfugiés, étude co-financée par le Fond européen des réfugiés, 2010.



Practitioners of the participating States and professional actors in the field have unanimously stressed the fact that staff involvement, awareness and training are key elements on which depends the quality and efficiency of the identification system. Training should include subjects such as interview techniques, cultural diversity, exile-related problems, symptoms related to torture and other traumatic experiences, the Istanbul protocol, best practices in other countries, psychological-medical-social networks (which presupposes inventorizing the PSM facilities available in every Member States), etc... Though training should first of all be directed at staff members in charge of identification, it would also be appropriate to extend it to other staff members who are in contact with asylum seekers, including staff responsible for the determination of protection status, as is already the case in the recast proposal for the Procedures Directive. Member States should be able to rely on the EASO to support their training programmes. Issues relating to the treatment of asylum applications from minors and vulnerable persons with special needs, to interview techniques and reception conditions, in particular the special attention that should be given to vulnerable groups and victims of torture, are part of the thematic and specific trainings mentioned in the EASO regulation. In the matter of training, the *European Asylum Curriculum (EAC)* should also be mentioned. The EAC is funded by the European Commission and conceives professional training modules in relation to the asylum procedure, notably on interview techniques (including the following subjects: recognising persons with a trauma, awareness to cultural differences, the importance to treat the applicant with respect), evidence assessment (including the following subject: the consequences of torture), interviewing children (including the following subjects: child development, emotional age of a child applicant, different theories on the best way to interview children) and finally a module on interviewing traumatised persons (including the following subjects: traumatic syndromes such as post-traumatic stress disorder, reasons for which a person may be reluctant to tell his story, the importance and effect of the interviewer's attitude and behaviour on the asylum applicant).

- (H) *Mobilisation of the community of asylum seekers and the persons in close contact with asylum seekers*

The importance of involving asylum seekers into the identification process has already been emphasised. This requires that asylum applicants be recognised as persons who “*have capacities, resources and resilience that can be mobilized*” and not only as passive subjects. This is the approach recommended in the UNHCR’s “*Heightened Risk Identification Tool*”¹⁶. The HRIT is used to identify among displaced persons living in camps or in an urban setting those who find themselves in a situation of heightened risk. The UNHCR recommends to rely, circumstances permitting, on the community of asylum seekers themselves to identify persons in this situation. Even though the context is not the same (displaced persons living in camps or an urban setting), the UNHCR’s approach could be transposed to the procedure that Member States are required to put into place for the purpose of identifying vulnerable asylum seekers with special needs. It could be implemented within common reception facilities on the condition its relevance and feasibility be examined beforehand in function of the characteristics of the community of asylum seekers in reception facilities and the

¹⁶ <http://www.unhcr.org/refworld/pdfid/46f7c0cd2.pdf>.



relational dynamics prevailing in these facilities. In the same way, it could prove useful to rely also on the circle of persons in close contact with the asylum seeker.

A conclusion emerges from the above list of good practices: it would be to the advantage of all Member States if these practices were diffused and shared through forms of operational cooperation.

7. Need for a consistent horizontal approach

Lastly, an important consideration should not be ignored regarding the way to address “generally” the situation of vulnerable persons with special needs, especially in the matter of identification. This consideration¹⁷ is the lack of (or insufficient) coordination between the different 2nd generation instruments proposed by the Commission as far as vulnerable asylum seekers are concerned. This is not only the case of the proposals for a recast of the Reception Conditions and Procedures Directives, which are the subject of the present Ministerial Conference, but also of the proposals for the recast Qualification Directive and Dublin Regulation. Even though the problem arises to some extent separately within the specific framework of each legal instrument, the establishment of links and/or connections between them should be considered. A failure to address the problem horizontally through the different legal instruments will have two consequences:

1° the existence of inconsistencies and unjustified differences between texts.

2° the risk of multiple identification checks, procedures, mechanisms,... This risk may undermine the quality, efficiency and viability of the common European asylum system.

To illustrate this problem, a link between the Reception Conditions Directive and the Procedures Directive may be suggested.

Under the Reception Conditions Directive, the only purpose of the identification of vulnerable asylum seekers is to adjust reception conditions to the special needs of this category of asylum seekers. But the directive does not impose that the identification procedure should also be “used” to determine whether the asylum procedure should be adapted as well. The identification procedure of the Reception Conditions Directive (in its current or recast versions) does not aim to give occasion to decisions “categorising” asylum seekers according to the specific “characteristic” of having been subject to torture. The identification procedure’s only purpose is to be able to decide whether a vulnerable asylum seeker has special needs which should be addressed as far as his reception conditions are concerned.

Of course, if an asylum seeker has been subjected to torture or violence, this information may appear explicitly in his identification procedure file. But this is not necessarily the case. The

¹⁷ Which has been brought to light in a study conducted by the Odysseus Academic Network for the European Parliament: « *Le système européen commun d’asile: état et perspectives* », Part II, Chapter III « *Statut des personnes protégées* », Section II.



person in charge of identification may have detected a set of symptoms requiring psychological support (insomnia, memory and concentration problems, anxiety, isolation...) but not identified the fact that the asylum seeker has been subjected to torture or acts of violence, when the asylum seeker has refrained to talk about such facts.

As such, the idea that the identification of vulnerable asylum seekers imposed by the Reception Conditions Directive may also be "used" for purposes other than adjusting reception conditions is, at least on a formal level, not convincing.

Within the scope of the study conducted by the ERF, actors in the field responsible for identification of vulnerable asylum seekers have strongly insisted that, as far as possible, they should not be charged with other tasks than identifying special needs for the purpose of adjusting reception conditions, should this prove necessary. In most countries participating in the study, social workers, and other staff members in reception centres, are the ones who are on the forefront and whose main task is to assess the needs of individual asylum seekers. More often than not, their permanent daily contact with asylum seekers allow them to detect special needs and difficult or painful situations. If those special needs concern the asylum seeker's physical or mental health, they address him (with his consent) to a qualified professional. They carry out their tasks wholly independently, without having to worry whether their work will benefit the asylum seeker or put him at a disadvantage as far as the asylum procedure is concerned (regarding the merits of the application or the procedure proper).

It does not seem advisable to extend the purpose of the identification of vulnerable asylum seekers prescribed by the Reception Conditions Directive to the effect of determining, for instance, that this identification should also confirm or not that the person has been victim of torture, as this conclusion may be important with regard to the asylum procedure. An asylum seeker (or his lawyer) will still have the possibility to put forward during the asylum procedure that he benefits from reception conditions adjusted to his special needs if this may be relevant for his application (for some special needs, identification of special needs may be irrelevant as far as the asylum procedure is concerned). This supposes however that the asylum applicant is able to put this element forward and/or that his lawyer establishes a link with his client's asylum application, which may not always be the case. Therefore, when, during the identification procedure prescribed by the Reception Conditions Directive, an adjustment of reception conditions is deemed necessary on account of the asylum seeker's physical and/or mental state, the authority in charge of identification should communicate this information, with the asylum seeker's consent, to the authority responsible for determining protection status. Communication of this information will not be in the form of a decision to "categorise" the person concerned as a victim of torture, for instance, but will detail the medical treatment he undergoes and, possibly, the symptoms requiring such treatment. The attention of the asylum authority will thus have been drawn on the asylum seeker's vulnerable state, which may be a relevant element for the asylum procedure.



Conclusions

Several lessons emerge from what precedes, leading to a number of recommendations:

- A conceptual shift in the proposals to recast the Reception Conditions Directive creates a legal uncertainty regarding the identification of the asylum seekers and the determination of the special needs covered by the proposal. This uncertainty should be clarified by reintroducing a causal link between the special needs and a state or situation of vulnerability of the asylum seeker.
- There is a "reservoir" of good practices, sometimes quite simple, often sensible, that are liable to favour the identification of vulnerable asylum seekers with special needs.
- It would be to the advantage of all Member States to diffuse and share these good practices through forms of operational cooperation.
- The projects of, among others, Parcours d'Exil, Pharos, MAPP, Care Full... show that civil society organisations initiate projects that may contribute to improve the quality and efficiency of the identification process. A process of reflection and information exchange should thus be launched between civil society organisations, the Member States and the European institutions.
- The training of personnel should be a priority.
- The problem of identifying vulnerable asylum seekers with special needs should be approached horizontally through the different 2nd generation instruments. To this end actors in the field (state and civil society) should be asked to reflect on relevant ways to establish links between the different identification procedures implied by the implementation of each of the instruments.
- Considering its mission, the European Asylum Support Office appears to be the appropriate organ to reach some of these objectives.