Protect

The Right to International Protection

A Practitioners' Handbook on the Common European Asylum System (CEAS) and EU and Member States' Commitments under the UN Global Compact on Refugees and the UN Global Compact for Safe, Orderly and Regular Migration

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Preface

This Handbook is part of PROTECT The Right to International Protection: A Pendulum between Globalization and Nativization? (www.protect-project.eu), a research and innovation project which is funded by the European Union's Horizon 2020 Framework Programme and coordinated by the University of Bergen (Grant Agreement No 870761). It reflects only the authors' view, and the European Research Executive Agency is not responsible for any use made of information it contains.

The authors, Elspeth Guild, Kathryn Allinson, Nicolette Busuttil and Maja Grundler, wish to express their gratitude to all the colleagues who assisted and advised on the Handbook as it went through different drafts and forms. The authors have worked together as a team, notwithstanding changes of employment and career development over the whole lifetime of the project. We are all equally engaged and committed to the analysis set out here.

We thank the PROTECT project for the opportunity to undertake this practical Handbook addressing how to ensure that the Common European Asylum System (CEAS) is implemented in a manner consistent with Member States' undertaking in the two Global Compacts (the Global Compact on Refugees and the Global Compact for Safe, Orderly and Regular Migration) and human rights law more generally. The Handbook is aimed at a wide public, including refugees and migrants themselves, the safeguarding of whose human rights is a core commitment both of the Compacts and the CEAS. Its purpose is to provide jurists, policy-makers, non-governmental organisations, international organisations and others with a blueprint on how to apply the Compact commitments in a European legal and practical context. Bringing the knowledge and practical experience of states within the UN system, which inform the Compacts, to an EU framework and how to make the commitments real in the Member States is an enormous endeavour. Our contribution here is both a starting place and a contribution to this new legal and policy framework.

The European Parliament has expressed its commitment to the implementation of the Compacts in the field of external migration and asylum (Resolution P9_TA(2021)0242) adopted on 19 May 2021.[1] It has also expressed its intention that the Parliament has an important role in exercising proper scrutiny of EU implementation of both Compacts. This Handbook is designed to simplify the delivery of this commitment.

We are fully aware that the CEAS is the subject of a substantial number of proposed amendments which are currently before the EU legislator. In particular, the EU's New Pact on Migration and Asylum, launched

[1] Para 28: 'Recalls the commitment of the EU and its Member States under the Global Compact on Refugees to share responsibility for the effective and comprehensive protection of refugees and to ease the pressure on host countries; stresses in this regard that the EU and its Member States should increase resettlement pledges, ensuring that resettlement is not made conditional upon the cooperation of the transit country on readmission or border control, and step up safe and legal pathways and preventing forced refugee returns from hosting countries; calls on the EU and its Member States to contribute to more structural and substantial funding of the communities and countries hosting most refugees; reiterates the importance of fully implementing the 23 objectives of the Global Compact for Safe, Orderly and Regular Migration; believes that Parliament must exercise proper scrutiny of EU implementation of both compacts' see European Parliament resolution of 19 May 2021 on human rights protection and the EU external migration policy (2020/2116(INI)) <www.europarl.europa.eu/doceo/document/TA-9-2021-0242_EN.html> (accessed 23 July 2022).

in 2020, proposed many changes to the current system. We were tempted to delay this Handbook to include the conclusions of the negotiations; however, in light of the very limited progress in any changes to the essential elements which we deal with in the Handbook, we chose to push ahead with this project bearing in mind the state of the proposed revisions.

We would particularly like to thank three external reviewers who gave us valuable insights and comments on drafts. These are Dr Madeline Garlick, UNHCR; Professor Constanca Urbano Sousa, Universidade Autónoma de Lisboa; and Catherine Wollard, European Council on Refugees and Exiles. All errors and omissions are, of course, the responsibility of the authors exclusively.

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Acronyms

CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEAS	Common European Asylum System
CED	Convention for the Protection of All Persons from Enforced Disappearance
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CJEU	Court of Justice of the European Union
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CRRF	Comprehensive Refugee Response Framework
CSR51	1951 Convention relating to the Status of Refugees
EASO	European Asylum Support Office
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECRE	European Council on Refugees and Exiles
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
EU	European Union
EUAA	European Union Agency for Asylum
EUAPD	European Union Asylum Procedures Directive
EUCFR	Charter of Fundamental Rights of the European Union
EUQD	European Union Qualification Directive
EURCD	European Union Reception Conditions Directive
ExCom	UNHCR Executive Committee
FRA	Fundamental Rights Agency
GCM	Global Compact for Safe, Orderly and Regular Migration
GCR	Global Compact on Refugees
GCs	Global Compacts (the GCR and the GCM)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ILO	International Labour Organization
IOM	International Organization for Migration
MPRIC	Multi-Purpose Reception & Identification Centre
NGOs	Non-Governmental Organisations
NY Declaration	New York Declaration
OHCHR	Office for the High Commissioner on Human Rights
SDGs	Sustainable Development Goals
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
WTO	World Trade Organisation

1. Introduction

European Union (EU) asylum law can only be understood, and must be interpreted in the context of, existing international commitments on refugees, migrants and human rights. These commitments are manifold and distributed among a range of international legal instruments, jurisprudence and policy guidance. In 2018, the United Nations (UN) General Assembly (UNGA) adopted two instruments, which, although non-binding themselves, unite binding international law and best practice standards related to migrants on the one hand and refugees on the other: the Global Compact for Safe, Orderly and Regular Migration (GCM)[2] and the Global Compact on Refugees (GCR).[3] The Compacts articulate and contextualise the full range of human rights that refugees and migrants are entitled to. In so doing, they provide a framework for states, and the EU, to better realise these rights and fundamental principles through the implementation and interpretation of primary and secondary laws.

This Handbook is concerned with the interaction between EU asylum law and the Global Compacts (GCs). It is based on work conducted for the PROTECT Project,[4] which studies the legal potential and impacts of the GCR and the GCM on the functioning of the international refugee protection system. The Handbook identifies the gaps and synergies between the two GCs and the EU legal framework, primarily the instruments that form the Common European Asylum System (CEAS).[5] Its identification of CEAS provisions that fulfil the Compacts' requirements or diverge therefrom will enable our readers to better understand the relationship between the two regimes. First, the identification of Compact-compliant CEAS provisions can provide the 'anchor' required for the Compacts to be used and cited for their interpretive value by courts in understanding the content of existing obligations. Practitioners can draw upon this Handbook to highlight how the Compacts can augment the protective scope of corresponding CEAS provisions, as interpreted by the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). Second,

[2] Global Compact for Safe, Orderly and Regular Migration, UN doc A/RES/73/195 (19 December 2018) (hereinafter GCM).

[3] Global Compact on Refugees, UN doc A/73/12 (Part II) (2 August 2018) (hereinafter GCR).

[4] PROTECT: The Right to International Protection <https://protectproject.w.uib.no>.

[5] It consists of 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 [2013] OJ L 180 (hereinafter EUAPD); Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L 180 (hereinafter EURCD); Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (recast) [2011] OJ L337/9 (hereinafter EUQD); 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 [2013] OJ L 180 (hereinafter Dublin III Regulation); Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 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 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice [2013] OJ L 180; and the European Union Agency for Asylum (EUAA).

identifying gaps or inconsistencies between the Compacts and CEAS provisions highlights areas that require further action, such as law or policy change.

1.1 The Global Compacts

In September 2016, the UN sought to address the growing concern regarding the rise of forced global movement through the adoption of the New York Declaration (NY Declaration) by the UNGA. The Declaration called for the negotiations of two Compacts – one for safe, orderly and regular migration (which would result in the GCM) and the other for refugees (which became the GCR). While the GCR was firmly in the hands of the UN High Commissioner for Refugees (UNHCR), the GCM was something of a battleground among international agencies, each with its own agenda and vision for the future, including the International Labour Organization (ILO) and the International Organization for Migration (IOM). Eventually, the UN Secretary General's Special Representative for International Migration took control of the GCM.

By December 2018, the text of both Compacts was ready for adoption and most EU Member States endorsed the GCR and the GCM at the UNGA.[6] The two Compacts acknowledge states' shared responsibility for the management of borders[7] and seek to provide a blueprint through which states can respond to the movement of refugees and migrants in line with established obligations under international refugee and human rights law, including the prohibition of *refoulement*. Both Compacts are aligned with the 2030 Agenda for Sustainable Development and the sustainable development goals (SDGs). Goal 10.7 of the UN's 2030 SDGs is the starting place for the Compacts,[8] which tie migration and development together.[9]

The Compacts explicitly articulate the entitlement of all migrants and refugees to the full range of human rights and present a contemporary framework through which states can respect, protect, and promote these rights.[10] At their heart, the Compacts are guided by the principles of non-discrimination and non-regression, respect for the rule of law, and respect for human rights obligations.[11] They both rest on the UN body of international human rights instruments, including, but not limited to, the Universal Declaration of Human Rights (UDHR),[12] the International Covenant

[6] Although the Czech Republic, Hungary and Poland voted against the GCM, whilst a number of other EU Member States, including Bulgaria, abstained from the vote. See United Nations, 'General Assembly Endorses First-Ever Global Compact on Migration, Urging Cooperation among Member States in Protecting Migrants' (19 December 2018) <www.un.org/press/en/2018/ga12113.doc.htm>.

[7] The GCM's Objective 11 speaks of coordinated and cooperative border management, while the GCR emphasises the importance of responsibility-sharing, international solidarity and cooperation (paras 14-16).

[8] 'Facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies,' see United Nations, 'Transforming our World: The 2030 Agenda for Sustainable Development' UN doc A/RES/70/1 (25 September 2015).

[9] Nicola Piper, 'Migration and the SDGs' (2017) 17(2) *Global Social Policy* 231.

[10] Elspeth Guild, Tugba Basaran and Kathryn Allinson, 'From Zero to Hero? An Analysis of the Human Rights Protections within the Global Compact for Safe, Orderly and Regular Migration (GCM)' (2019) 57 International Migration 43; Elspeth Guild, 'The UN Global Compact for Safe, Orderly and Regular Migration: What Place for Human Rights?' (2018) 30(4) International Journal of Refugee Law 661.

[11] Elspeth Guild, Kathryn Allinson and Nicolette Busuttil, 'The UN Global Compacts and the Common European Asylum System: Coherence or Friction?' (2022) 11(2) Laws.

[12] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A(III) (UDHR).

on Civil and Political Rights (ICCPR),[13] the Convention on the Rights of the Child (CRC),[14] the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),[15] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[16] and the Convention on the Rights of Persons with Disabilities (CRPD)[17] (GCR para 5, n5; GCM para 2, n1). In addition, the GCR commences by referencing the UN Charter and the commitment to cooperation among states in the context of their faithful implementation of the 1951 Convention Relating to the Status of Refugees (CSR51) (paras 2 and 5).[18] Further, the GCM affirms its relationship with human rights by stating that it is based on a set of cross-cutting and interdependent guiding principles, including human rights and the rule of law (para 15). In this context, the GCM ensures effective respect, protection and fulfilment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle (para 15, indent 6).

While, as an instrument building on the CSR51 and other elements of international refugee law, the GCR may be considered to form the primary reference point for the CEAS instruments, we explicitly focus on both the GCR *and* the GCM in this Handbook. We consider both the GCR and the GCM in relation to the CEAS because both Compacts come from the NY Declaration, were negotiated at the same time in consultation and are both included in the same UNGA resolution.[19] As such, they were intended to converge. The CSR51 sets out the rights of refugees and this is reaffirmed in the GCR.[20] Migrants have no equivalent UN Convention, so their rights included in the GCM are founded on the totality of UN human rights conventions, which apply to everyone regardless of immigration or nationality status.[21] This is important because human rights standards inform the treatment of all individuals throughout all stages of the asylum process, regardless of the outcome. Human rights standards shape the treatment of those in the process of claiming protection (for example with regard to reception conditions); of those who are granted protection, whether complementary or refugee protection; and those whose protection claims are rejected. Indeed, the CEAS covers the treatment of all applicants for international protection. While statistics on asylum recognition rates should be treated with caution, a significant proportion of applicants will, either at first instance or

[13] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[14] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

[15] International Convention on the Elimination of all Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 (CERD).

[16] United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT).

[17] Convention on the Rights of Persons with Disabilities (13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD).

[18] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (CSR51).

[19] UNGA Resolution, Resolution adopted by the General Assembly (A/RES/73/195) on 19 December 2018 (Annexes 1 and 2).

[20] GCR (n 3) para 5: 'It is grounded in the international refugee protection regime, centred on the cardinal principle of non-refoulement, and at the core of which is the 1951 Convention and its 1967 Protocol'; GCM (n 2) para 4: 'Only refugees are entitled to the specific international protection defined by international refugee law'.

[21] GCM (n 2) para 15(f); See also Elspeth Guild and Tugba Basaran (eds) 'The UN's Global Compact for Safe, Orderly and Regular Migration: Analysis of the final draft, Objective by Objective' (RLI Research Series 2019) <https://rli.sas.ac.uk/sites/default/files/files/Global%20Compact%20for%20Migration_RLI%20blog%20series.pdf> (accessed 22 November 2021).

on appeal, be granted international protection.[22] Thus, migrants are often future asylum-seekers and unrecognised refugees. As such, both GCs are relevant to the application and interpretation of the CEAS.

Further, while the CSR51 forms the cornerstone of the CEAS, the latter also implements the *non-refoulement* obligations of EU states under the CAT,[23] the ICCPR,[24] the Convention on the Elimination of Enforced Disappearances (CED),[25] and the European Convention on Human Rights (ECHR),[26] which are broader in scope than the *non-refoulement* duty in the CSR51. In the EU context, this wider *non-refoulement* obligation is expressed in Article 15 of the EU Qualification Directive (EUQD).[27] While this provision acts as an essential safeguard for individuals in need of protection who do not meet the refugee definition or are excluded from protection under the CSR51, it is well known that protection claims are not always decided correctly and that there is a tendency to 'siphon off those who warrant recognition as Convention refugees into [a] lesser status'.[28] In fact, according to the European Council on Refugees and Exiles (ECRE), persons from the same country of origin and similar situations (such as Syrians) are recognised as refugees at a rate of 100% in some EU Member States but 0.9% in others.[29] In addition, individuals who should have been recognised as beneficiaries of protection may wrongly be refused a protection status. Indeed, the criteria for refugee or subsidiary protection status are interpreted in widely divergent ways across the EU, with the result that the claims for international protection of some people are rejected based on an excessively restrictive approach.[30] As such, an examination of the CEAS cannot be limited to the standards in the GCR; through the GCM, it must also consider those individuals who have been failed by refugee status determination procedures. To fully explore how far the standards in the GCs are reflected in the CEAS, we must consider both the GCR and the GCM.

1.2 The Common European Asylum System: Fundamental and Human Rights Obligations

When the EU Member States endorsed the two Compacts, their actions in the migration and asylum sphere were already significantly determined by EU law obligations that implement international commitments. EU competence was extended to migration and asylum in 1999 when a revision of the treaties took place. A specific commitment was written into the Treaty of Amsterdam,[31] requiring compliance with the principle of *non-refoulement*, the CSR51 and other relevant treaties,

[22] ECRE, 'Asylum statistics in Europe: Factsheet' <https://ecre.org/wp-content/uploads/2020/06/Statistics-Briefing-ECRE.pdf> (accessed 5 May 2022).
[23] CAT (n 16) Art 3(1).
[24] ICCPR (n 13).
[25] International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (CED).
[26] European Convention for the Protection of Human Rights and Fundamental Freedoms Rights, as amended (adopted 4 November 1950, entered into force 3 September 1953) CETS No 005 (ECHR).
[27] n 5.
[28] Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (OUP 2016) 200.
[29] ECRE, 'Refugee Rights Subsiding?: Europe's Two-Tier Protection Regime and its Effect on the Rights of Beneficiaries' (2016) <https://asylumineurope.org/wp-content/uploads/2020/11/aida_refugee_rights_subsiding.pdf> (accessed 19 November 2021) 13.
[30] UNHCR, 'UNHCR Statistical Yearbook 2015' (2017) <www.unhcr.org/statistics/country/59b294387/unhcr-statistical-yearbook-2015-15th-edition.html> (accessed 21 November 2021).
[31] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts [1997] OJ C 340 (Treaty of Amsterdam) Art 73(i).

now contained in Article 78(1) of the Treaty on the Functioning of the European Union (TFEU).[32] In line with its competence in primary legislation,[33] the EU legislator implemented the objectives and obligations as regards asylum through the CEAS - secondary legislation adopted from 2003 onwards, revised in the early 2010s and currently under revision again.[34] While this Handbook focuses on four CEAS instruments – the Dublin Regulation,[35] the Reception Conditions Directive (EURCD),[36] the EUQD,[37] and the Asylum Procedures Directive (EUAPD)[38] – we acknowledge that there are many other EU law instruments which are relevant when discussing EU Member States' obligations towards refugees and asylum-seekers. There is, first of all, the EURODAC Regulation, which is formally part of the CEAS, but is not discussed separately in this Handbook because the fundamental rights issues engaged by this Regulation relate primarily to data protection and data rights, which are not core elements of either the GCR or the GCM.

There are, further, EU law instruments that are not part of the CEAS, but which nevertheless impact the rights of asylum-seekers. For example, the Return Directive,[39] which applies to refused asylum-seekers (and other migrants) who are subject to removal. We touch on this instrument in Section 6 of this Handbook when discussing detention, an issue we have chosen to focus on in addition to examining the above instruments because it can affect asylum-seekers and other migrants at different stages of the asylum and return procedure. Increasingly, the EU legislator is attempting to frame asylum issues as matters of border management to avoid obligations towards refugees and asylum-seekers. Thus, instruments such as the Schengen Borders Code, the Visa Code, and the Frontex Regulation contain provisions which impact asylum-seekers' rights. It is not within the scope of this Handbook to discuss these instruments. Instead, we have chosen to focus on the CEAS because it outlines common standards for the treatment of refugees and asylum-seekers. As a system which explicitly codifies EU Member States' obligations towards refugees and asylum-seekers, it lends itself well to a discussion on whether these obligations are being met in light of the standards contained in the GCs. As is the case for all secondary legislation, where it fails correctly to implement primary law (and international legally binding commitments), it must either be interpreted in a way consistent with primary law (and duties) by the courts, including those arising from international agreements concluded by the EU, or disapplied altogether. At the same time, it should be noted that a Compact-compliant approach to the CEAS alone will not solve the challenge of ensuring protection for asylum seekers' and other migrants' rights, for example, in cases where the CEAS does not establish a relevant obligation which can be interpreted in line with Compact commitments.

Fundamental rights obligations arise out of EU primary law and implement international obligations. We recall that the CEAS and all EU measures relating to migration and asylum must respect the obligation in Article 78 TFEU. This unequivocally establishes that the CEAS must be in accordance with the CSR51 and other relevant treaties, which include the ECHR. In 2000, the EU

[32] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326 (TFEU).
[33] Consolidated version of the Treaty on European Union [2008] OJ C 115 (TEU) Art 3(2); TFEU (n 32) Arts 67(2) and 78.
[34] European Council, 'EU Asylum Reform' (4 October 2021) <www.consilium.europa.eu/en/policies/eu-migration-policy/eu-asylum-reform/#> (accessed 18 November 2021).
[35] n 5.
[36] ibid.
[37] ibid.
[38] ibid.
[39] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals [2008] OJ L 348 (Return Directive).

adopted the EU Charter of Fundamental Rights (EUCFR),[40] which was given full legal effect and equivalence to the EU Treaties in 2009 on another revision of the treaties. Human and fundamental rights are, thus, central to the EU's legal structure.[41] The long history of the EU's gradual incorporation of human rights into its legal order has been well described elsewhere.[42] The EU's language of rights includes both human rights (the UN and Council of Europe's terminology) and fundamental rights (EU formulation), in part to accommodate more rights in the EUCFR than appear in many human rights conventions.[43] Its constituting treaties now include references to fundamental rights and an express reference to the CSR51. The EUCFR includes a right to asylum with due respect for the rules of the CSR51 (Article 18), as well as a provision on protection in the event of removal, expulsion or extradition (Article 19). Moreover, as regards migration, the Treaty on European Union (TEU) states that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities (Article 2).[44] This is augmented by Article 6(3) TEU, which confirms that ECHR fundamental rights are general principles of EU law. Further, the EUCFR integrates the rights protected by the ECHR,[45] and Article 1 commences with the entitlement to human dignity. Thus, we can draw parallels between the fundamental rights obligations underpinning the CEAS and the Compacts' grounding in pre-existing international human rights law and international refugee law obligations.

In addition to being underpinned by a fundamental rights framework, the EU is a structure based on the rule of law. Unlike states, which often adopt constitutions to confirm the state's existence and to regulate the relationship between the state and its citizens, the EU was established by the treaties in the 1950s. The TEU provides in Article 2 that the EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.[46] There has been substantial academic work on the meaning of the rule of law in the EU and its interpretation by the CJEU.[47]

Despite this emphasis on rights in the EU legislative framework, asylum-seekers, refugees and other migrants continue to face serious rights violations within the Union. Findings from earlier work carried out as part of the PROTECT Project identified the absence of political will and scarce effective and functional systems as key challenges that preclude the realisation of these fundamental rights.[48] At the same time, in many EU Member States, rights violations are a

[40] Charter of Fundamental Rights of the European Union [2012] OJ C 326 (EUCFR).
[41] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 [2007] OJ C 306.
[42] Elspeth Guild and Guillaume Lesieur (eds) *The European Court of Justice on the European Convention on Human Rights: who said what, when?* (Martinus Nijhoff Publishers 1998).
[43] Gràinne De Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20(2) *Maastricht Journal of European and Comparative Law* 168.
[44] n 33.
[45] Article 52(3) EUCFR (n 40) provides that the meaning and scope of EU rights corresponding to ECHR rights are the same. This does not prejudice the possibility of EU providing more extensive protection.
[46] TEU (n 33).
[47] Laurent Pech, 'The Rule of Law as a Constitutional Principle of the European Union' Jean Monnet Working Paper 04/09 (2009) <https://jeanmonnetprogram.org/wp-content/uploads/2014/12/090401.pdf> (accessed 18 July 2022); Theodore Konstadinides, *The Rule of Law in the European Union: The Internal Dimension* (Bloomsbury Publishing 2017); Petra Bárd and Wouter Van Ballegooij, 'Judicial Independence as a Precondition for Mutual Trust? The CJEU in Minister for Justice and Equality v. LM' (2018) 9(3) New Journal of European Criminal Law 353.
[48] PROTECT, 'Expert Forum: Opportunity or Threat: Receiving Refugees and Migrants in Europe' (14 November 2020) <https://youtu.be/attyWR2Tyb0> (accessed 18 November 2021).

deliberate deterrence strategy.[49] However, these findings also highlighted how the Compacts could play a potential role in overcoming these challenges, particularly through assisting with the interpretation of existing EU law provisions that already seek to implement international obligations. As soft law instruments which present a migrant- and refugee-specific articulation of pre-existing duties, the Compacts can be used to clarify the meaning of substantive provisions. The application of the guiding principles of the Compacts: human rights, including the rule of law, non-discrimination and non-regression, fit easily into the EU treaty framework.[50] The Compacts, as instruments adopted after the relevant treaty changes and endorsed by all or most Member States, should be taken into account in the interpretation of the CEAS and EU migration law.

The Compacts' added value is the contextualisation of the above core themes and principles so that the CEAS, as secondary law, can be interpreted in line with them. They refine existing obligations to enable the CEAS to be brought in line with primary law. More specifically, the Compacts can fill the (abstract) principles of EU primary law with detailed content by showing how the CEAS instruments, through which this primary law is applied, should be interpreted in practice. There is protective potential within the specific EU legal order, which has its own 'Europeanized'[51] principles: human rights, refugee protection and so forth, but the possibility of the Compacts in this space is to ensure that these overarching principles are applied, in the context of migration, in line with international commitments. Such commitments include international law, as well as authoritative guidance, for example, from UNHCR and the Office for the High Commissioner on Human Rights (OHCHR). Although not legally binding, the Compacts provisions can inform the interpretation and implementation of rights as they apply to migrants and refugees.

Compared to the first phase of the CEAS**, '**the second-phase legislation provides for very limited improvements as regards reception conditions, modest improvements as regards procedures and qualification, no real improvement as regards the Dublin rules'.[52] At the same time, the EU has developed its external border control system both in law and practice in a manner which, despite its obligation to respect the rights of those seeking international protection,[53] in practice fails to do so in many regions (such as the Mediterranean).[54] The CEAS promise of dignified reception conditions and full and fair asylum procedures has come under strain in the amendments of the

[49] Practices such as non-rescue at sea (see e.g. OHCHR, '"Lethal Disregard": Search and rescue and the protection of migrants in the central Mediterranean Sea (May 2021) <www.ohchr.org/sites/default/files/Documents/Issues/Migration/OHCHR-thematic-report-SAR-protection-at-sea.pdf > (accessed 14 June 2022)) or maltreatment of asylum seekers, such as substandard reception conditions (see Chapter 3) and (*de facto*) detention (see Chapter 6) may be considered to be deliberate deterrence strategies.

[50] Bruno de Witte, 'The Relative Autonomy of the European Union's Fundamental Rights Regime' (2019) 88 Nordic Journal of International Law 65; Katja S Ziegler, 'Autonomy: From Myth to Reality – or Hubris on a Tightrope? EU Law, Human Rights and International Law' in Sionaidh Douglas-Scott and N Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Edward Elgar Publishing 2017).

[51] Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (OUP 2017) 214-217.

[52] Steve Peers, 'The Second Phase of the Common European Asylum System: A Brave New World – or Lipstick on a Pig?' (Statewatch 2013) <www.statewatch.org/media/documents/analyses/no-220-ceas-second-phase.pdf> (accessed 19 November 2021).

[53] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders [2916] OJ L 77 (Schengen Borders Code) Art 3.

[54] European Parliament, LIBE Committee, 'Report on the Fact-finding Investigation on Frontex Concerning Alleged Fundamental Rights Violations' (4 July 2021) <www.europarl.europa.eu/cmsdata/238156/14072021%20Final%20Report%20FSWG_en.pdf> (accessed 4 November 2021).

instruments and Member State practices. While the CJEU has provided some fundamental rights-sensitive interpretation of the CEAS instruments, which has softened the harshness of some of the measures, the legislator has failed to follow suit. However, having engaged with and endorsed the two Compacts, it is now time for the legislator, in the next phase of the CEAS, to embrace the GCR and GCM approach to refugee protection and safe, orderly and regular migration.[55]

Non-compliance of the CEAS with the GC standards may be the result of a number of issues, such as flaws in the content and design of CEAS as secondary legislation, its transposition into national legislation and its (mis-)implementation, or a lack of Member State compliance with CEAS rules. In our view, the Compacts can play a role in addressing these challenges. An implementation of the CEAS in line with the GCR will ensure greater respect for Article 78 of the TFEU and consequently the letter and spirit of the CSR51, thus addressing the content and design of the CEAS. Further, a full and comprehensive implementation of the CEAS in line with the GCR and GCM's standards will mitigate against faulty transposition and mis-implementation of the CEAS. Such an implementation is entirely consistent with the commitment of the CEAS to the full application of other relevant internationally agreed human rights standards. Thus, this Handbook questions the extent to which existing EU law reflects EU Member States' commitments towards refugees and migrants, as outlined in the GCs. In so doing, it illustrates which, if any, of the Compacts' elements are reflected in the CEAS and which, if any, call into question the CEAS's conformity therewith. As a result, the Handbook provides guidance as to how EU Member States can ensure compliance with their commitments in the GCs through implementation and interpretation of the CEAS. This research is motivated by the understanding that effective implementation of the CEAS in line with the Compacts – which the EU and most EU Member States[56] undertook to fulfil in cooperation with other stakeholders that include civil society, migrants and refugees, and academics[57] – must be preceded by an initial assessment that highlights areas of alignment and divergence between existing EU law provisions and the Compacts' objectives and commitments.

1.2. Instructions to Readers

1.2.1 Use of Terms

Throughout this Handbook, we use a number of terms that may not be self-explanatory to readers and which we, therefore, seek to clarify in this section.

'Asylum-seekers', 'refugees' and '(other) migrants' are terms we use interchangeably to highlight the fluidity between these categories. As explained above, an individual will start as an asylum-seeker before being recognised as a refugee or being deemed to be a migrant (sometimes due to a lack of adequate procedures). That said, in this Handbook, the term 'asylum-seeker' is equivalent to the term 'applicant' in the EUAPD. It thus denotes 'a third-country national or stateless person who has made an application for international protection in respect of which a final decision has

[55] At the time of writing the proposed CEAS changes contained in the New Pact for Migration and Asylum fail to do so, see European Parliament, 'The European Commission's New Pact on Migration and Asylum: Horizontal Substitute Impact Assessment' (2021) <www.europarl.europa.eu/RegData/etudes/STUD/2021/694210/EPRS_STU(2021)694210_EN.pdf> (accessed 5 November 2021).

[56] Although 19 EU Member States voted in favour of adopting the Compact, three voted against (Czech Republic, Hungary and Poland), five abstained (Austria, Bulgaria, Italy, Latvia and Romania), and one did not cast its vote (Slovakia), see n 6 above.

[57] GCM (n 2) para 44; GCR (n 3) para 3.

not yet been taken'.[58] Meanwhile, the term 'refugee' denotes a person who falls within the personal scope of Article 1A(2) CSR51.[59] individuals receiving subsidiary protection under EU law will be referred to as 'subsidiary protection beneficiaries'.[60]

'Complementarity' (or the adjective 'complementary') is a term we use to indicate that the Compacts complement pre-existing legal frameworks in refugee and human rights law. They do so both by consolidating the binding legal standards in these areas and by adding detailed provisions on how respect for the rights of refugees and migrants can be improved in practice.

'Compact-compliant interpretation' of the CEAS follows from complementarity. We consider whether existing CEAS provisions comply with the binding human rights standards on which the GCs are based, as well as with their detailed non-binding provisions. This allow us to identify instances of non-conformity or non-compliance with the Compacts.

1.2.2 Intended Audience

The present publication is called a Practitioners' Handbook because it is aimed primarily at those representing and working with asylum-seekers and other migrants, as well as those whose work engages with these individuals and their rights on a theoretical level. Thus, our intended audience includes those working in law firms, Non-Governmental Organisations (NGOs) and think-tanks, as well as academics and students. We believe that the Handbook will also be useful for policy-makers at the national and European levels but recognise that this is an audience we may not be able to reach. Therefore, we hope this Handbook will eventually influence policy through the advocacy work of the groups mentioned above.

1.2.3 How to use this Handbook

While the GCR and the GCM also have the potential to inform the interpretation of a range of other EU law instruments related to migration and asylum, such as the Schengen Borders Code, the Visa Code, and the Frontex Regulation, this Handbook covers four of the main CEAS instruments: the Dublin Regulation, the EURCD, the EUQD, and the EUAPD. It further addresses detention as an issue affecting asylum-seekers and other migrants at different stages of the asylum and return procedure. Each chapter provides a general overview of the respective legal instrument before delving into a discussion of the Compact standards relevant to the instruments, according to thematic issues. As such, this Handbook is not designed to be read cover-to-cover but allows readers to jump straight to the instrument and thematic issue of interest. At the same time, it contains enough background information and detail to enable readers who are less familiar with the legal instruments and issues discussed to gain a good understanding of their content and relevance. As a result, readers may notice repetition between sections when reading an entire chapter.

1.3 Our Understanding of the Role of the Compacts

This Handbook is rooted in our reading of the Compacts as instruments that operationalise and contextualise existing state obligations in the migration and *non-refoulement* context. We seek to

[58] EUAPD (n 5) Art 2(c).
[59] n 18.
[60] EUQD (n 5) Art 15.

open pathways for the effective application of human rights standards, improve the impact of domestic implementation and the involvement of civil society actors in the migration and refugee context. This approach is not a question of conceiving the Compacts as a binding Treaty or not; indeed, there is agreement that the Compacts' commitments are not about creating new obligations.[61] Instead, our research focuses on the complementarity of the Compacts with pre-existing legal frameworks in refugee and human rights law and their role in improving respect for the rights of refugees and migrants.[62] Indeed, as explained above, the Compacts are founded upon the refugee protection regime and human rights law obligations. The fact that the Compacts are embedded in these frameworks enables the Compacts to aid the operationalisation of these existing obligations in the migration context within the EU.

We utilise PROTECT's overarching theoretical framework to outline the role of the GCs as an instrument of the global protection system that can be utilised at both the international and regional levels to improve the governance of international migration.[63] The broad principles on which the Compacts are founded are drawn from international law and are aligned with the principles of the CEAS and primary EU law. Thus, we see a bridge between the globalist and regionalist views of international protection and governance. However, at the regional level, we see a divergence between the CEAS and the commitments made in the GCs in the substantive content of rights and obligations. Here, the regionalist approach supersedes the globalist. However, we propose that identifying convergences and divergences can lead to greater alignment between the Compact commitments on the one hand and the CEAS provisions on the other. This is so through the operationalisation of Member State obligations, highlighting the foundational role of human rights and the rule of law in both the Compacts and the CEAS, particularly the commitment to non-regression and non-discrimination and the commitment to cooperation and solidarity.[64]

1.3.1 Operationalising EU Member States' obligations

Our reading of the Compacts concerns the complementarity of the Compacts with pre-existing legal frameworks in refugee and human rights law and their role in improving respect for the rights of refugees and migrants. The Compacts reference the refugee protection regime and human rights law obligations. Utilising the fact that the Compacts are embedded in these frameworks enables us to explore the potential for operationalising them in the migration context within the EU. The emphasis of the GCR on policy and operations is not seen as a weakness but as a strength which can crystallise and operationalise the nature of states' existing obligations towards refugees. In the context of the GCM, the Handbook focuses on its provision of interpretive detail of pre-existing

[61] GCM (n 2**Error! Bookmark not defined.**) para 7; GCR (n 3**Error! Bookmark not defined.**) para 4; See Elspeth Guild and Stefanie Grant, 'Migration Governance in the UN: What is the Compact and What does it mean?' (Queen Mary University of London, School of Law Legal Studies Research Paper No 252/2017 <www.academia.edu/40090081/Migration_Governance_in_the_UN_What_is_the_Global_Compact_and_What_does_it_mean> (accesses 18 July 2022); Vincent Chetail, 'The Global Compact for Safe, Orderly and Regular Migration: A Kaleidoscope of International Law' (2020) 16(3) International Journal of Law in Context 253.

[62] Elspeth Guild, Stefanie Grant and Cornelis A Groenendijk (eds), *Human Rights of Migrants in the 21st Century* (Routledge 2017); See also Guild and Basaran (n 21).

[63] Hakan G Sicakkan, 'Conceptualizing the Right to International Protection: A Cleavage Theory Approach' (PROTECT: Deliverable 1.1 The overall theoretical perspective, 2020) <www.researchgate.net/publication/353120803_Conceptualizing_the_Right_to_International_Protection_A_Cleavage_Theory_Approach?channel=doi&linkId=60e812f51c28af3458569d29&showFulltext=true> (accessed 18 November 2021) 5.

[64] Guild, Allinson and Busuttil (n 11).

obligations and its migrant-specific articulation of these same obligations. We understand the role of the GCM as elucidating the common minimum standards applicable to all migrants.

Coming from this understanding of the Compacts we analyse how these instruments align with what already exists in the EU. What is the potential for the Compacts to inform EU law, policy and practice? Here, we come to a regional legal order which has its own specificities. We acknowledge that the EU has a regional framework in place for refugee protection, which is also self-referential to an extent, but is ultimately designed to be in line with obligations towards refugees. EU law is a pre-existing regime with border management and fundamental rights protections built in, separate from (though intended to be in line with) international human rights and refugee law obligations. As such, the Compacts demonstrate how we can augment this European space in a way that better conforms with international norms. We propose that the Compacts are a means of ensuring that the CEAS is interpreted in line with core international and EU principles.

The framework of the GCR is to determine support requirements for refugees in accordance with an expansive reading of the CEAS, referenced to internationally agreed refugee standards and accompanied by relevant international human rights instruments. It aims to promote international community support to ensure that these requirements are delivered. Thus, the document sets out operational activities required at the national level to address the basic needs of refugees and host communities which may need financial and other forms of support. The most interesting aspect for this analysis is the list of UN-endorsed actions (including reception) to be delivered with the support of the international community (where national capacity is unable to cope) as necessary to refugees.

In turn, the GCM provides a set of minimum standards for everyone, including migrants and those in need of protection. It explicitly articulates migrants' entitlement to the full range of human rights. Whilst human rights treaties do not explicitly include migrants in human rights protection, migrants are included by virtue of being human, based on the universal nature of human rights. Human rights apply to everyone (including migrants) with very limited and defined exceptions.[65] Yet, in practice, we know the rights of migrants are often undermined, challenged and granted on a discriminatory basis, even though this is inconsistent with international human rights law. The GCM provides an articulation of the rights of migrants which can thus be utilised as an interpretive guide as to the content of the human rights obligations also owed to migrants. It brings together the international legal standards relating to migrants into one document.[66] Thus, the GCM sets out common 'principles, commitments and understandings' with regard to existing rules and their interpretation in established areas of international law.

1.3.2 Human rights and the rule of law

As can be seen from the case law of the CJEU, fundamental rights in the form of the EUCFR have been very important to the interpretation of the CEAS. Member States' application of the CEAS measures has been found to be flawed on fundamental rights grounds on numerous occasions. For instance, as regards reception conditions, in *Saciri*, the CJEU held that Article 1 of the EUCFR, under

[65] Guild, Grant and Groenendijk (n 62).

[66] Marion Panizzon and Daniela Vitiello, 'Governance and the UN Global Compact on Migration: Just another Soft Law Cooperation Framework or a New Legal Regime governing International Migration?' (EJIL:Talk! March 2019) <www.ejiltalk.org/governance-and-the-un-global-compact-on-migration-just-another-soft-law-cooperation-framework-or-a-new-legal-regime-governing-international-migration/> (accessed 18 November 2021); Vincent Chetail, 'The Human Rights of Migrants in General International Law: From Minimum Standards to Fundamental Rights' (2013) 28 Georgetown Immigration Law Journal 225.

which human dignity must be respected and protected, precludes the applicants for international protection from being deprived, even for a temporary period of time, of the protection of the minimum reception standards.[67] A fundamental rights compliant interpretation of CEAS instruments has required much modification of Member State practice as regards the treatment of applicants for international protection in particular. As regards the rule of law, it was the CJEU which found unlawful Hungarian border procedures which resulted in the detention of persons (in effect, predominantly those intending to seek international protection) on the basis of their inability to meet their own needs and the absence of an entitlement to effective judicial protection against arbitrary detention.[68] The need for effective judicial control over detention is founded in the rule of law.

1.3.3 Non-regression and non-discrimination

The guiding principles of non-discrimination and non-regression in the GCM (para 5) clarify the nature of states' obligations vis-à-vis the human rights of all migrants. The principle of non-discrimination on the basis of migration status is an innovation within the Compact that can augment the protection of migrants seeking international protection and of refugees within the EU. References to non-discrimination run throughout the Compacts, demonstrating its central position within them and wider human rights law. Non-discrimination is a guiding principle of the GCM with paragraph 15(f) specifying that, in its implementation, states must 'ensure effective respect for and protection and fulfilment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle'. Further, Objective 17 aims to eradicate all forms of discrimination against migrants. Similarly, the GCR calls on states to end discrimination of any kind on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability, age, or other status (para 9).

The commitment to non-discrimination in the Compacts represents an area of divergence with EU jurisprudence which has permitted states to affirm their commitment to non-discrimination whilst continuing to discriminate against third-country nationals and amongst categories of third-country nationals.[69] The Compacts' commitment to end discrimination, and the GCM-expressed duty to avoid discrimination based on migratory status, requires consistency with Article 1(2) of the CERD without distinction on grounds of national origin and greater alignment with the commitments to non-discrimination under the ICCPR.[70] More directly, the GCs provide a new approach to the Article 1(2) CERD carve out of immigration from the scope of non-discrimination. The international community in the GCs has expressed its willingness to fully respect the principle of non-discrimination. This includes the CSR51's non-discrimination clause, which prohibits discrimination among refugees,[71] and which, by implication, requires non-discrimination in the CEAS under TFEU Article 78. Further, reliance on the principle of 'necessity' for permitting differential treatment must

[67] C-79/13, *Saciri and Others* (CJEU, 27 February 2014).
[68] C-924/19 PPU, *FMS* (CJEU, 14 May 2020).
[69] *MA v Denmark*, App No 6697/18 (ECtHR, 9 July 2021) para 177; See for further discussion, Bjarney Friðriksdóttir, *What Happened to Equality?: The Construction of the Right to Equal Treatment of Third-Country Nationals in European Union Law on Labour Migration* (Brill Nijhoff 2017).
[70] ICCPR (n 13) Article 26 'prohibits discrimination in law or in fact in any field regulated and protected by public authorities'. The prohibited grounds of discrimination extend to any 'other status', thus including refugee status or nationality; See also HRC, 'General Comment No 18: Non-Discrimination' UN doc HRI/GEN/1/Rev.6 (12 May 2003) para 12.
[71] CSR51 (n 18) Art 3.

be interrogated.[72] The material scope of the prohibition of discrimination must be interpreted in line with that of the GCM, such that migratory status is not a ground for differential treatment.

The GCM's foundation in international human rights law and the principle of non-discrimination is supplemented by its explicit commitment to upholding the principle of non-regression. The principle of non-regression, also referred to as non-retrogression within international human rights law, acts to ensure that existing levels of protection are maintained once an instrument comes into force. Accordingly, states' commitment to upholding the principle of non-regression in the migration context operates as a prohibition on adopting retrogressive actions. States with higher standards in place than the relevant instrument, in this case the GCM, undertake not to lower extant standards of protection. Further, the principle of non-regression outlines that a state's commitment towards a particular objective prohibits it from taking retrogressive actions.[73] The GCM's basis in non-regression 'resembles a standstill provision where the law at the time of the entry into force of the commitment must be maintained or changed only in the direction of the political commitment which has been undertaken'.[74] In EU law, non-regression is equivalent to stand-still clauses, which exist in a range of areas of EU law and have been widely interpreted by the CJEU.[75]

The principle of non-regression, which is new to asylum law but widely applicable in the legal fields of employment and environment, nationally and internationally, requires that the EU and Member States not reduce standards for applicants applicable at the date of entering into the non-regression commitment (the adoption of the GCR and GCM, December 2018). Thus, the law in force in December 2018 forms the bottom threshold for the application of the non-regression commitment. From that date, any changes to the CEAS (or national laws) must be positive, improving CEAS measures for applicants. Any measure which proposes to reduce existing conditions and procedures for protection will be contrary to the non-regression duty. As such, many of the CEAS reform proposals introduced in the New Pact on Migration and Asylum cannot be said to comply with the principle of non-regression as they introduce regressive practices.[76]

1.3.4 Importance of cooperation and responsibility sharing

A key issue with the CEAS has been its inconsistent and fragmented implementation. Member States have failed to harmonise standards for assessing protection needs and the content of that

[72] See *R (on the application of Saadi and others) v Secretary of State for the Home Department* [2001] EWHC Admin 670.
[73] Lynda Collins, 'Principle of Non-Regression' in Jean-Frederic Orsini and Amandine Morin (eds), *Essential Concepts of Global Environmental Governance* (Routledge 2020).
[74] Elspeth Guild and Raoul Wieland, 'The UN Global Compact for Safe, Orderly and Regular Migration: What Does It Mean in International Law?' in Giuliana Ziccardi Capaldo (ed), *The Global Community Yearbook of International Law and Jurisprudence 2019* (OUP 2020) 197.
[75] C-399/11, M*elloni* (CJEU, 26 February 2013); C-896/19, *Repubblika v Il-Prim Ministru* (CEJU, 20 April 2021) building on C 824/18, *AB and Others* (CJEU, 2 March 2021) para 108; See also C-138/13, *Doğan* (CJEU, 10 July 2014); C-225/12, *Demir* (CJEU, 7 November 2013) and C-561/14, *Genc* (CJEU, 12 April 2016); see for commentary Mustafa Karayigit, 'Vive la Clause de Standstill: The Issue of First Admission of Turkish Nationals into the Territory of a Member State within the Context of Economic Freedoms' (2011) 13(4) European Journal of Migration and Law 411; Kacper Kanka, 'The Standstill Clause Mechanism on the Example of the Tax on Civil Law Transactions as applied to Capital Contributions' (2016) 1(3) Financial Law Review 61.
[76] Theodora Gazi, 'The New Pact on Migration and Asylum: Supporting or Constraining Rights of Vulnerable Groups?' (2021) 6(1) European Papers 167; Daniel Thym (ed), *Reforming the Common European Asylum System: Opportunities, Pitfalls, and Downsides of the Commission proposals for a New Pact on Migration and Asylum* (Nomos 2022).

protection, resulting in secondary movements and large discrepancies in protection.[77] The GCs' commitment to cooperation between states to ensure fairer responsibility sharing and more equitable standards of protection seeks to address this fragmentation. It provides crucial details on the nature of international cooperation between states.

Solidarity underpins the whole EU system, not only the CEAS.[78] In *Germany v Poland,* the CJEU's Grand Chamber confirmed that the principle of solidarity is a general principle of EU law.[79] The CJEU held that the principle of solidarity is not a mere political principle. It is binding not only when drafting new EU legislation but also when assessing its implementation.[80] Moreover, there is a link between the principle of solidarity and the principle of sincere cooperation between the Member States and the EU institutions.[81] The GCs confirm the need for solidarity and responsibility sharing to respond to refugee and migrant movements. In the GCR, the guiding principles outline the arrangements for burden and responsibility sharing,[82] while the GCM's guiding principles include shared responsibility, common understanding and international cooperation.[83]

1.4. Migrants, Applicants for International Protection and Vulnerability

In this Handbook, we look at vulnerability as a transversal theme, given the extent to which it is highlighted in the GCs, yet contrast it with the piecemeal manner in which it is addressed in the CEAS instruments. The different facets of 'vulnerability' as presented in the CEAS engage very little with the capacity of the procedure and the CEAS itself to exacerbate, if not create, vulnerability. We propose that the GCM's premise – that the circumstances under which certain migrants travel and the conditions they face in countries of origin, transit and destination place them in a position of vulnerability (Objective 7) – is at odds with the CEAS presentation of a defined list of categories of 'vulnerable' persons, which are mainly established based on inherent characteristics, such as age, gender or disability, rather than in relation to factors which make individuals situationally vulnerable.[84] At the same time, the CEAS's approach to inherent vulnerability is contradictory, as applicants with the relevant characteristics are only deemed vulnerable 'for the purpose of' the EURCD.[85] Thus, despite the ECtHR's suggestion that all asylum-seekers, as a group, are inherently

[77] Statewatch, 'Whip Greece into shape so we can resume migrant removals, northern Schengen states demand' (7 June 2021) <www.statewatch.org/news/2021/june/whip-greece-into-shape-so-we-can-resume-migrant-removals-northern-schengen-states-demand/> (accessed 5 November 2021).
[78] See C-39/72, *Commission v Italy* (CJEU, 7 February 1973) para 25; C-128/78, *Commission v United Kingdom* (CJEU, 7 February 1979) para 12.
[79] C-848/19 P, *Germany v Poland* (CJEU, 15 July 2021).
[80] Ibid para 41: 'It follows that, as the General Court correctly noted n paragraph 69 of the judgment under appeal, the principle of solidarity underpins the entire legal system of the European Union and it is closely linked to the principle of sincere cooperation, laid down in Article 4(3) TEU, pursuant to which the European Union and the Member States are, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties. In that regard, the Court has held, *inter alia*, that that principle not only obliges the Member States to take all the measures necessary to guarantee the application and effectiveness of EU law but also imposes on the EU institutions mutual duties to cooperate in good faith with the Member States'.
[81] TEU (n 33) Arts 4(3) and 13.
[82] GCR (n 3) paras 2; 3; .5; 7; 13 and paras 14-19 on cooperation including the development of the Global Refugee Forum.
[83] GCM (n 2) Objective 23: International cooperation and global partnerships.
[84] See for example Article 21 EURCD (n 5); For a discussion on inherent and situational vulnerability, see Catriona Mackenzie, Wendy Rogers and Susan Dodds, 'Introduction: What Is Vulnerability, and Why Does It Matter for Moral Theory?' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds) *Vulnerability: New Essays in Ethics and Feminist Philosophy* (OUP 2014).
[85] EURCD (n 5) Arts 2(k) and 21.

vulnerable,[86] in EU legislation, vulnerability is viewed as the exception rather than the reality of all applicants for international protection. The GCM's expansive notion of vulnerability encourages procedures to be utilised to ensure the proper identification of protection needs.[87]

Central here is the meaning of vulnerability in the context of a person in a migratory setting. It is important to bear in mind that when we use the term migratory setting, we seek to place the individual outside his or her country of origin without specifying where or in what capacity the individual is present in another country. Indeed, individuals in migratory settings are not inherently vulnerable by virtue of being migrants. In fact, the more than 1.4 million people who moved in 2019 (before the Covid-19 pandemic dramatically reduced travel) whom the World Trade Organisation (WTO) counts as arrivals for tourism purposes,[88] cannot be described as 'vulnerable' migrants despite some of them falling into the vulnerability categories foreseen in EU asylum legislation. Many of these people will have been children, pregnant women, older people, people with health conditions, etc. However, they were not classified as 'vulnerable' in the migration context because they did not need unanticipated state or civil society assistance (other than anticipated measures such as accompaniment for children travelling alone provided by airlines, wheelchairs provided by airports, etc).

Some academic work on vulnerability has used a taxonomy of inherent versus situational vulnerability.[89] Inherent vulnerability in this framework includes attributes that are very difficult to change (similar to the US concept of immutable characteristics for the purposes of prohibited discrimination, which is not without its critics).[90] In contrast, situational vulnerability depends on the circumstances in which an individual finds him/herself. Nevertheless, it should be noted that a clear distinction between inherent and situational vulnerability is not possible; different types of vulnerability determine and exacerbate one another.[91] For migration purposes, vulnerability is inherently linked with the situation the person is in, as the ECtHR states in *MSS.*[92] While migrants do demonstrate extraordinary adaptability and resilience in the face of state action which seeks to prevent access to the territory, introduces general prohibitions on work and access to social assistance for migrants, and limits health care access to emergency health services, such state action makes migrants vulnerable to harm, pushing them onto more dangerous routes, and making it impossible for them to be self-sufficient or meet daily needs. The task of addressing this kind of vulnerability created by state action has fallen to human rights law, both international and national, as migrants claim the protection of the state which may well be, at the same time, the state which has created the conditions for their vulnerability.[93]

In 2017, OHCHR sought to clarify what vulnerability means in respect of migrants, particularly what principles and guidelines apply to the human rights protection of migrants in vulnerable

[86] *MSS v Belgium and Greece* App No 30696/09 (ECtHR, 21 January 2011) para 232.

[87] GCM (n 2) Objective 7: Address and Reduce Vulnerabilities in Migration: 'We commit to respond to the needs of migrants who face situations of vulnerability, which may arise from the circumstances in which they travel or the conditions they face in countries of origin, transit and destination, by assisting them and protecting their human rights, in accordance with our obligations under international law. We further commit to uphold the best interests of the child at all times, as a primary consideration in situations where children are concerned, and to apply a gender-responsive approach in addressing vulnerabilities, including in responses to mixed movements' (para 23).

[88] WTO, 'International Tourism Highlights: 2020 Edition' (2020) <www.e-unwto.org/doi/pdf/10.18111/9789284422456> (accessed 19 November 2021).

[89] Mackenzie *et al* (n 84).

[90] Jessica A Clarke, 'Against Immutability' (2015) 125 Yale Law Journal 2.

[91] Mackenzie *et al* (n 84).

[92] n 86.

[93] Guild, Grant and Groenendijk (n 62).

situations.[94] The context of this publication was the commencement of negotiations of the two GCs and the need to provide negotiators with the tools necessary for the drafting task. The division between the two Compacts also raised the need to determine what language would be used for which situations. While *non-refoulement* as a legal concept is found in the CSR51 and expresses states' duties of care to those who cannot be returned to their country of origin (or habitual residence) because they are vulnerable to being persecuted, no corresponding term exists to cover a wider range of types of vulnerabilities which migrants may face. To fill this gap for the GCM, OHCHR produced the Principles and Guidelines. The term chosen was 'migrant in a vulnerable situation', and its definition was intentionally wide:

> The concept of a 'migrant' in a vulnerable situation' may be understood as a range of actors that are often intersecting, can coexist simultaneously and can influence and exacerbate each other. Situations of vulnerability may change over time as circumstances change or evolve. The factors that create a vulnerability situation for migrants might be what drives their migration from their countries of origin, occurs in transit and at reception or destination and/or is related to a particular aspect of a person's identity or circumstance. Thus, vulnerability in this context can be understood as situational (external) and/or embodied (internal).[95]

First, in these principles, the geographical remit of vulnerabilities is worth noting. While this includes situations which give rise to a *non-refoulement* duty on states, that is to say the risk of persecution in the state of origin, it also includes hazardous trajectories which become necessary where state measures to prevent border crossing become ever more elaborate.[96] Situations in transit countries are often very problematic (in the European context, this is the case of Libya in particular).[97] However, it should be noted that the use of the concept of 'transit' tends to presume that migrants are able to choose between different options of (onward) travels when, in reality, such choice is often very limited. Migrants who do not have access to officially-sanctioned commercial means of travel may be very dependent on smugglers regarding the mode and destination of travel, rendering their situation much more one of vulnerability than for those who can simply buy a train ticket to a chosen destination. Many narratives of refugees who travel overland indicate that they were unaware of which countries they may have passed through before arriving at a destination chosen by the smuggler.[98] As is apparent in the context of the CEAS, the emphasis on state control over where the correct destination of an applicant for international protection should be for the purpose of making an application for international protection indicates substantial political investment by European states in creating their own order of where asylum-seekers should go and be. For instance, the unwillingness of many applicants for international protection to stay in the country allocated under the Dublin regime indicates that the CEAS rules do not always fit with the objectives of applicants for international protection.[99] This unwillingness

[94] UN Office of the High Commissioner for Human Rights (OHCHR), 'Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations' (February 2017) <www.refworld.org/docid/5a2f9d2d4.html> (accessed 25 October 2021).
[95] ibid.
[96] *ND and NT v Spain* App Nos 8675/15 and 8697/15 (ECtHR, 13 February 2020).
[97] UN High Commissioner for Refugees (UNHCR), 'UNHCR Position on the Designations of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation Following Rescue at Sea' (September 2020) <www.refworld.org/docid/5f1edee24.html> (accessed 27 October 2021).
[98] Ferruccio Pastore, Paola Monzini, and Giuseppe Sciortino, 'Schengen's Soft Underbelly? Irregular Migration and Human Smuggling across Land and Sea Borders to Italy' (2006) 44(4) International Migration 9; Martina Tazzioli, 'Containment through Mobility: Migrants' Spatial Disobediences and the Reshaping of Control through the Hotspot System' (2018) 44(16) Journal of Ethnic and Migration Studies 2764.
[99] C-646/16, *Jafari* (CJEU, 26 July 2017).

is most frequently motivated by the desire to diminish situations of vulnerability by joining close family in another Member State or obtaining decent reception conditions.[100]

Secondly, the OHCHR Principles identify specific aspects of a person's identity or circumstances which put them in a vulnerable situation. Discrimination is highlighted as one of the key issues which result in vulnerability. This includes prohibited grounds such as age, gender, ethnicity, nationality, religion, language, sexual orientation or gender identity or migration status, singly or in combination. Most of these grounds of discrimination are also nexus grounds of persecution for the purposes of CSR51, demonstrating an overlap between *non-refoulement* and vulnerability as grounds for states' protection duties. However, it is important to note that discrimination, and hence vulnerability, based on the above grounds is only made out where such discrimination is tolerated by state authorities, or reasonable accommodation (a core principle of international disability law) is not made for the individual's situation.

The mechanism OHCHR promotes to overcome vulnerability draws on a substantial number of different areas of international law[101] and results in twenty principles to address and diminish vulnerability among migrants. The starting place is the primacy of human rights – where internationally recognised human rights are fully respected and protected by states, including in respect of migrants, the risk that they will find themselves in situations of vulnerability is diminished. Under this heading of human rights protection, the rest of the principles provide specificity: non-discrimination; access to justice; rescue and immediate assistance; border governance; human rights-based returns; ending immigration detention; protecting family unity; child migrants; migrants women and girls; the right to health; the right to an adequate standard of living; the right to work; the right to education; the right to information; monitoring and accountability; human rights defenders; data collection and protection; capacity building and cooperation.

This understanding of what vulnerability is and how it affects migrants is critical to correctly implement EU law. Throughout the different measures we examine in this Handbook to determine a Compact-compliant interpretation of EU law, there are multiple references to specific groups of persons entitled to specific and more favourable treatment to address vulnerable situations, such as pregnant women, minors, etc. These provisions must be read in light of the overarching understanding of vulnerability. While specific accommodation of situations that generally constitute vulnerability is very important, it must also be borne in mind that all migrants may find themselves in vulnerable situations, not least as a result of state action.

1.5. Structure: The Common European Asylum System and the Compacts

The following chapters will analyse the instruments of the CEAS to identify areas of convergence and, thus, where the Compacts can provide interpretive and implementation guidance as to the nature and scope of state obligations. It will also identify areas of divergence and, thus, where policy or legal development is required to ensure the commitments within the Compacts are realised in the implementation of the CEAS. This begins with an analysis of the Dublin III Regulation and the commitments within the Compacts to provide access to asylum and immigration procedures, in line with the prohibition of *refoulement*, through shared responsibility and cooperation that respects the agency of the refugee. The EURCD is then considered in light of the GCR commitments to scaling up reception arrangements with an international allocation of resources. The expansive and

[100] *MSS v Belgium and Greece* (n 86).

[101] Human, but also labour law, refugee law, criminal law, humanitarian law, law of the sea, customary international law and general principles of international law, see OHCHR, 'Principles and Guidelines' (n 94).

consistent application of protection promoted by the GCR and GCM is then compared with the divergent application of the EUQD. The EUAPD is then assessed against states' commitments to provide access to immigration and asylum procedures fully in line with their *non-refoulement* obligations. The final chapter deals with the fragmented rules for detention of applicants for international protection, contrasting these with the GCs' call for detention to be utilised as a last resort.

1.6. Conclusions

We hope this Handbook will prove useful for practitioners, be they in institutions (Member State, EU or international), in NGOs or in private practice, working with those seeking asylum or irregularly present, as well as for judges determining the correct interpretation of national and EU law.

We recognise that we have chosen a moment to examine the CEAS against the GCs when EU law in the area is in flux. However, the argument that it is better to wait until the EU has 'finished' revising the CEAS has been used repeatedly to discourage detailed examination of its compliance with international duties and commitments. As the CEAS has been in constant flux since its inception, now is as good a time as any to examine it. The GCs are new elements which need to be taken into account and thus provide the impetus to assess the CEAS in light of the Compacts.

Finally, the GCM principle of non-regression is particularly important in light of the current EU discussions on the second revision of the CEAS. If this Handbook can assist policy-makers and others in understanding how these principles should operate in respect of these (sometimes interminable) negotiations and discussions, we will indeed be proud to have created it.

2. Dublin III Regulation 604/2013

2.1 Introduction

The Dublin III Regulation is the successor of the Dublin Convention 1990,[102] an international law instrument initially limited to the EU Member States. A version of the 1990 Convention was incorporated into the Schengen Implementing Convention 1990[103] and when the Schengen *acquis* was incorporated into EU law in 1999, it became part of EU law. Its contents were slightly amended and transformed into a regulation in 2003[104] and then updated (re-cast in the terminology of the EU) in 2013. It has been the subject of proposed changes in 2016[105] and 2020, none of which have found favour with the EU legislators.[106]

The Dublin system sets out the rules for the responsibility of a Member State for examining an asylum application made within EU territory. Thus, the Dublin Regulation is considered to be a cornerstone of the CEAS. In this respect, it treats EU Member States (and non-EU participating states like Iceland, Liechtenstein, Norway and Switzerland) as one administrative unit as regards the making of claims for international protection. Three main principles constitute the Dublin system and continue to underpin the Dublin III Regulation. First, anyone[107] applying for asylum anywhere in the EU can apply in only one Member State but is guaranteed a consideration of the claim, although applications may be declared inadmissible under certain circumstances.[108] Any subsequent application made in another Member State should be rejected/declared inadmissible and the individual returned to the first Member State for the completion of the determination of the asylum claim or, if it has been rejected, for the person's expulsion from the EU (the take back principle).

Secondly, the decision regarding which Member State is responsible for determining the application substantively is set out in the Convention (now the Regulation). Special arrangements are contained for unaccompanied minors; thereafter the presence of family members (fairly narrowly defined), who are either beneficiaries of international protection in a Member State or have an outstanding application; and the existence of a residence document or visa (valid or expired) are the primary considerations in determining which state has responsibility. Thereafter, where the individual has arrived irregularly into the area, the normal rule is that the state through which the individual first

[102] Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities [1990] OJ C 254 (Dublin Convention).
[103] 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 [1990] OJ L 239 (Schengen Implementation Agreement).
[104] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 50.
[105] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)' (2016) COM(2016)270.
[106] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum' (2020) COM(2020)609.
[107] EU citizens are excluded from the scope of the Regulation.
[108] EUAPD (n 5) Article 33.

entered is responsible. The list has been carefully drafted with attention to possible areas of ambiguity (Articles 8-13).

There is no express provision for the wishes of an adult applicant to be taken into account regarding where his or her asylum application will be determined beyond the family reunification provision. Further, there is mutual recognition across the Member States of all negative decisions refusing protection to applicants with the consequence that once an applicant has had a negative decision in one Member State, any attempt to make a new application in a second Member State should be rejected. However, positive results of protection are not recognised outside the Member State which took the decision, so someone who has been recognised as a refugee or granted subsidiary protection in one Member State does not benefit from automatic recognition of the status in any other Member State.[109]

Thus, the basis of the Dublin system is the transfer of individuals from one state to another to receive protection (accompanied by some financial assistance for states). In February 2022, the EU opened a temporary protection scheme for Ukrainian nationals (and residents) fleeing the Russian invasion there.[110] This scheme is designed to provide immediate protection including to those who may qualify as refugees or beneficiaries of international protection. In adopting the scheme, the Council chose not to apply Article 11 of the Temporary Protection Directive,[111] the territorial limitation provision, which is mainly a mirror of the Dublin allocation system. This has meant that those covered by the scheme are entitled to move to the Member State of their choice and register for the scheme there. There are significant benefits for both individuals and states in allowing those needing protection to make choices about where they wish to seek it, not least in improving integration outcomes and the free choice distribution of people. While the GCR focuses, in particular, on the allocation of resources to countries providing international protection – itself a very important component of interstate solidarity – allowing people fleeing to make choices about where to live is also an important part of solidarity both among states and with those fleeing. Indeed, it is questionable whether it is consistent with the Compacts for states to seek to pay other states to provide international protection to avoid receiving those in need of protection on their territory. Various forms of this 'offloading' of responsibility have been heavily criticised by UNHCR and UN Special Rapporteurs on human rights grounds.[112] We consider that the most Compact

[109] 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 Text with EEA relevance [2011] OJ L 132 – only where a beneficiary of international protection fulfils the requirements of Directive 2003/109 on long term resident third country nationals as amended by Directive 2011/51 can they acquire a right to move to another Member State under limited circumstances and without recognition of their international protection status.

[110] Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection ST/6846/2022/INIT OJ L 71.

[111] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212 (TPD).

[112] UN High Commissioner for Refugees (UNHCR), 'UNHCR Mission to the Republic of Nauru' (14 December 2012' <www.refworld.org/docid/50cb24912.html> (accessed 17 May 2022); UNHCR, 'UNHCR Updated Observations on the Nationality and Borders Bill, as amended (January 2022) <https://www.refworld.org/pdfid/61e529af4.pdf> (accessed 17 May 2022); Special Rapporteur on trafficking in persons, especially women and children; Special Rapporteur on the human rights of migrants; Special Rapporteur on contemporary forms of slavery, including its causes and consequences and Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 'Letter on the Nationality and Borders Bill' (November 2021) <https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=26788> (accessed 17 May 2022).

compliant approach is one which is flexible, ensuring that those in need of protection are able to access the territory to receive that protection and when on the territory to move voluntarily to the place where they make their claim and the sharing of resources to ensure that states can deliver protection in accordance with their obligations.

States should neither be permitted to 'buy' their way out of providing international protection by providing funding to other states to do it in their place, nor should those seeking protection be locked into one place on account of rules over which they have no say and where their opinion does not count. In this section we will focus on the GCR undertakings regarding the transfer of resources. However, in no way does this endorse or legitimise a 'buy-out' approach to refugee protection.

Particularly relevant to the Dublin III Regulation are the commitments contained in the GCR in paragraphs 31-48, key tools for effective burden and responsibility sharing, and paragraphs 90-93 on resettlement (see Annex I). This is because the Dublin system of compulsorily moving people to states where they are supposed to have their asylum applications determined is unique in the international asylum regime.

The GCR foresees sharing of responsibilities in terms of providing necessary resources to countries which have substantial numbers of applications and, alternatively. re-settlement. The latter comes into play once an individual's protection needs have been recognised, so that, as opposed to the Dublin system, the GCR does not foresee moving *applicants* for protection. The EU's approach of seeking to move applicants for international protection to designated states has been singularly ineffective.[113] Thus, the GCR is a very useful tool to assist Member States in reconsidering how best to implement a system of inter-state responsibility for applicants for international protection in light of international consensus as expressed in the GCR and GCM commitments. The GCM is also useful, not least because of the principles set out therein on human rights compliance, the rule of law, non-discrimination and non-regression, which are all clearly and unequivocally accepted as applicable to all migrants, refugees and applicants. As regards specific objectives, the GCM's Objective 12 is important for this Regulation: strengthening certainty and predictability in migration procedures for appropriate screening, assessment and referral; as is Objective 15: providing access to basic services for migrants, as well as Objective 23: strengthening international cooperation and global partnerships for safe, orderly and regular migration.

2.2 The Dublin System

2.2.1 General Outline of the Regulation

The Dublin III Regulation commences with a commitment that Member States shall examine any application for international protection by a third-country national or stateless person who applies on the territory of any one of them, including at the border or in transit zones (Article 3). This is an significant undertaking and is the only place in the CEAS where it is made. It is consistent with Member States' duties in international law.[114] The provision goes on to state that the application shall be examined by only one Member State in accordance with the criteria set out in the Regulation. This limitation presents three issues. First, it is problematic from the perspective of the

[113] EASO, 'EASO Asylum Report 2020' <www.easo.europa.eu/asylum-report-2020/52-data-dublin-indicators (accessed 17 September 2021) s 5.2 Data on Dublin indicators.
[114] CSR51 (n 18); CAT (n 16); CED (n 25).

CSR51 as it can be seen as constituting a geographical limitation.[115] Secondly, it is problematic from the perspective of recognition rates of applicants from the same country in the different EU Member States.[116] Thirdly, it is problematic as so few applicants are ever subject to a Dublin procedure, notwithstanding how they entered the EU (take back) or their family links (take charge).[117]

If the applicant has moved to a Member State other than the one deemed responsible under the criteria, the applicant is supposed to be sent back to that Member State for determination of the claim. However, if the reception conditions in the designated Member State constitute inhuman or degrading treatment within the meaning of Article 4 EUCFR (Article 3 ECHR), the Member State where the application has been made must take responsibility for its determination.[118] Further, any Member State may send an applicant to a safe third country (see EUAPD chapter).

The applicant has a right to information as soon as an application is lodged (Article 4). This is deemed lodged once the applicant has submitted a form or a report by the authorities has reached the competent authorities of the Member State concerned. The applicant is entitled to six items of information: (1) the consequence of making an application in another Member State, as well as the consequences of moving to another Member State while the application is being considered; (2) the criteria for determining which Member State is responsible and that exceptions to the rule are permitted; (3) an entitlement to a personal interview and the possibility to provide further or additional information (in particular about family members); (4) the possibility to challenge a transfer decision; (5) the right of Member States to exchange personal data for the purpose of the transfer; and (6) the right to access to the applicant's personal data and a right to correction or deletion.

Similarly, the applicant has a right to a personal interview which can only be omitted if he or she has absconded or where the Member State has received all information referred to in Article 4 and determined the responsibility of another Member State. However, in this case, the applicant must have the opportunity to provide further information (Article 5). The interview should take place in a timely manner, in a language the applicant understands or with the aid of an interpreter, under conditions of confidentiality, and a summary must be prepared by the authority of the content of the interview and made available to the applicant and his or her legal advisor.

As regards minors, guarantees are contained in Article 6. The best interests of the child are stated to be a primary consideration. A minor must be represented and four factors should be taken into consideration: (1) the possibility of family reunification; (2) the minor's well-being and social development; (3) safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking; (4) the views of the minor, in accordance with his or her age or

[115] Karin M Zwaan, 'The Aznar Protocol. Diminishing the Geography of Refugee Protection in Europe' Paul E Minderhoud, Sandra A Mantu and Karin M Zwaan (eds) *Caught In Between Borders: Citizens, Migrants and Humans: Liber Amicorum in Honour of Prof Dr Elspeth Guild* (Wolf Legal Publishers 2019).
[116] According to ECRE, persons from the same country of origin and similar situations (such as Syrians) are recognised as refugees at a rate of 100% in some EU Member States but 0.9% in others, see ECRE, 'Refugee Rights Subsiding' (n 29).
[117] EASO 'Asylum Report 2020' (n 113) 5.2 Data on Dublin indicators.
[118] *MSS v Belgium and Greece* (n 86).

maturity.[119] As soon as possible, the authorities should seek to identify the minor's family members, siblings or relatives on the territory of the Member States. [120]

The criteria for responsibility are set out in Chapter III, commencing with minors. Unaccompanied minors should be transferred to the Member State where a family member or sibling is legally present (provided this is in the minor's best interests) (Article 8). Where the applicant has a family member who is a beneficiary of international protection or has an application pending in a Member State, that state should be responsible (Articles 9 and 10). Where the applicant has a valid[121] residence document/visa issued by a Member State, that state is responsible (Article 12). Finally, the most common criterion is the last; if the applicant arrived in the EU irregularly, the state through which he or she first entered the EU is responsible. However, that responsibility ceases 12 months after the date of the irregular external border crossing (Article 13). Where the responsibility of the first Member State has ceased (expiry of the 12-month period) and the applicant has been living in another Member State for five months before making the application, that second Member State is responsible.

Where the applicant is dependent on account of pregnancy or a newborn child or needs the assistance of his or her child, sibling or parent legally resident in a Member State, the Member State where the family member is will be responsible for bringing the family members together (Article 16). Where a Member State chooses to do so, it may decide to determine any application made by an applicant irrespective of the rules (Article 17).

The duty of the Member State responsible, according to the rules, is to take back or take charge of the applicant and there are extensive and complex rules on how the procedure takes place between the Member States. However, the applicant must be notified that he or she is subject to a transfer decision and must be given the opportunity to challenge it, which, if exercised, has suspensive effect. In the context of transfer arrangements, substantial personal data about the applicant can be sent from the authorities of one Member State to those of another (Article 14). The applicant has a right to access to his or her data and to have it corrected or deleted if wrongly collected or used. Further data protection guarantees are found in Articles 38-40.

Section IV sets out the procedural safeguards for the applicant, which include notification requirements and appeal rights with (generally) suspensive effect (Article 27). The appeal right includes a right to free legal assistance where the applicant's means are insufficient to pay. The appeal is to a judicial authority, either a court or a tribunal.

The Regulation also contains an early warning, preparedness and crisis management provision, the objective of which is to enable the Member States to draw up a 'preventive action plan' (Article 33). This occurs where a substantial risk of particular pressure being placed on a Member State's asylum system exists.

2.2.1 The Fundamental Rights Problems of Dublin III: A Case Study

To make clear the practical application of the Dublin system and its impacts on people, we will start with a case study. The facts are taken from an actual case which came before the CJEU.[122]

[119] This is the only reference in the regulation to the applicant's views.
[120] Family member is defined as a spouse, unmarried partner, unmarried minor children (Article 3(g); relative is defined as the applicant's adult aunt or uncle or grandparent present on the territory of a Member State (Article 3(h)).
[121] Provision is made for expired residence documents (within two years) or visas (within six months).
[122] *Jafari* (n 99).

Two Afghani sisters left Afghanistan with their children and travelled through Iran, Turkey, Greece, the former Yugoslav Republic of Macedonia, Serbia and Croatia before arriving in Austria where they applied for international protection. One sister wanted to stay in Austria and the other to travel to Germany on account of the presence of family members in those states. While Croatia was the first EU Member State the sisters had entered, the Croatian authorities had organised transport for them by bus to the Slovenian border. The sisters had entered Slovenia where they were issued police documents stating that their travel destination was, for one of them, Germany and, for the other, Austria. Thus, the Austrian authorities first tried to send the women and their children to Slovenia but that country resisted the transfer. The Austrians then tried Croatia which did not respond to the request. On the expiry of the Dublin III deadline, the Austrians notified the Croatians that they would send the women and children there under the Dublin III rules. The sisters appealed against the Austrian decision and an Austrian court eventually referred preliminary questions to the CJEU.

These facts are not uncommon in Dublin cases. The complexity of moving people from one Member State to another on the basis of the Dublin system is enormous. However, the human cost of the upheaval and the separation of applicants for international protection from family members can be even greater. In this case, not only were there two adults involved, but also a number of children for whom the uncertainty and delay weighed heavily. The risk of being sent to a country through which they had only transited (with or without the connivance of state authorities – an important factor for the inter-state operation of the Dublin system but not for the women and their children), away from the countries where they had close family members was a horrifying prospect for these applicants. Further, the argument that Austria (and Germany, where one of them wanted to go) was less well-placed to accept these women and their children into the asylum system, including providing reception conditions, than Croatia is a difficult one to make. Thus, the system resulted in a traumatic situation for the women and their children and was incompatible with the provision of humanitarian assistance to a country struggling to deal with an influx of refugees (i.e. Croatia).

This case illustrates how, rather than ensuring that each application for international protection is determined by a Member State, the Dublin Regulation may lead to severe delays in examining the application, thus raising concerns with respect to access to the asylum procedure.

2.3 Specific Global Compact Commitments relevant to the Dublin III Regulation

2.3.1 Transferring Resources while Allowing People Choices: Humanitarian, Development and Private Sector Contributions

The GCR sets out a series of key tools for effective burden and responsibility sharing. The principle is not to transfer people to states on the basis of an allocation of responsibility but rather to transfer resources to states which need assistance. Paragraph 32 recognises that countries faced with large-scale refugee situations relative to their capacity need extra assistance to cope. Three kinds of assistance are to be made available. First, humanitarian assistance, which engages states and humanitarian actors to ensure timely, adequate and needs-driven humanitarian assistance, both for emergency responses and protracted situations must be provided. This should include predictable, flexible, unearmarked and multi-year funding delivered fully in line with humanitarian principles. Secondly, development cooperation is targeted. States and development actors are called upon to step up their support of refugees. This should include a high degree of concessionality through bilateral and multilateral channels, and direct benefits to countries, communities and refugees. Development assistance should be effective, provided in a spirit of partnership, and must respect the primacy of country ownership and leadership. Thirdly, there is a

call to maximise private sector contributions. Opportunities should be opened for private sector investment together with states and other relevant stakeholders. In particular, innovative technologies and renewable energies are singled out to focus on closing technology gaps for refugee communities.

The Dublin III Regulation requires the Member States to examine every application for international protection made by an applicant in the territory of the EU, including border and transit zones. However, it limits that examination to one Member State only. There has been much discussion in the EU regarding responsibility sharing and resource sharing. However, perhaps the most interesting approach has been that adopted for those fleeing Ukraine in 2022, where a mix of individual choice and funding has been applied in a very generous manner. While a full analysis of this scheme is beyond the scope of this Handbook it does show that the EU can take more flexible approaches to providing protection than the Dublin Regulation would indicate. The Dublin system, however, is founded on the idea that it is people and not resources who be moved from one Member State to another for the purposes of carrying out an effective asylum determination. This principle is not endorsed by the GCR, which recommends the allocation of resources to assist states with large refugee populations rather than redistributing refugees among states, except in the context of resettlement as a durable solution (paragraph 32, see below). This recognises sovereign state responsibility. The GCR recommends the mobilisation of humanitarian assistance and the engagement with humanitarian and development actors in a timely, adequate and needs-driven manner, which will enable states to deal both with emergency situations and protracted ones. It also calls for engagement with the private sector to encourage contributions to refugee assistance. The qualification of 'unearmarked' to funding does not mean that the funds can be spent for any purpose. As the GCR makes clear, funding expenditure must be used for purposes which are lawful within the objectives of the CSR51 and related documents. The call for 'unearmarked' funding relates to a certain frustration among host states that donors seek to place excessive limitations on the use of funds (i.e. only for one narrow purpose where there may be little demand) rather than permitting all actions to enable the funding of CSR51 rights. This is also required by the GCM objective of achieving greater international cooperation (Objective 23).

A key issue with the CEAS has been its inconsistent and fragmented implementation. Member States have failed to harmonise standards for assessing protection needs and the content of that protection, resulting in secondary movements and large discrepancies in protection.[123] The Compacts' commitment to cooperation between states to ensure fairer burden and responsibility sharing and more equitable standards of protection seeks to address this fragmentation. It provides important detail on the nature of international cooperation between states.[124]

There is a profound difference between the organising principles of Dublin III and the GCR. Yet, there is scope for Dublin III to be implemented in a manner which acknowledges and accommodates the Member States' commitments under the GCR and provides for their application as far as possible.

[123] Statewatch, 'Whip Greece into shape' (n 77); Austria, Bulgaria, Cyprus, Czech Republic, Denmark and Estonia, 'Adaptation of the EU Legal Framework to New Realities' (7 October 2021) <www.statewatch.org/media/2859/eu-12-ms-joint-letter-hybrid-attacks-pushbacks-eu-law-7-10-21.pdf (accessed 2 November 2021).

[124] Examples where Member States have failed to fulfil certain of their obligations under EU law on border controls, asylum and immigration include: C-643/15 and C-647/15, *Slovakia and Hungary* (CJEU, 6 September 2017) para 291; C-715/17, C-718/17 and C-719/17, *Commission v Poland, Hungary and Czech Republic* (CJEU, 2 April 2020) paras 80 and 181.

On humanitarian grounds, Member States are free to refrain from using take back measures to remove applicants to another Member State in difficulty. The two regional courts have used this principle to prevent returns to Greece (see below). The organising principle of the Dublin system is that, in most cases, the criterion of irregular entry will be the determinant of which Member State is responsible for an asylum applicant. Yet, this does not conform to the principle of solidarity, among the Member States or with applicants for international protection. As regards the Member States it means that the vagaries of international crises – where they happen, close to which EU borders – determine where applicants arrive and which state must care for them without any responsibility of other Member States far from the borders of conflicts being engaged. As the Ukraine temporary protection scheme has shown, this does not need to be the case. Indeed, there could be more flexibility even within the Dublin Regulation.

As regards the transfers of funds to support asylum-seekers, the original European Refugee Fund[125] sought to follow the approach of tying funding to applicants and 'rewarding' Member States which were generous in their reception. Sadly, this approach to the funding was not retained in subsequent measures. With regard to funding to support asylum seekers, the third sector's contribution to applicants' integration has emerged as substantial.

NGOs and civil society play a very significant role in assisting families to benefit from take charge transfers where a family or community members have been stranded in different Member States. These kinds of measures and efforts should be encouraged by Member States to achieve a GCR-compliant implementation of Dublin III. Indeed, the GCR recommendation for assistance to include civil society, humanitarian, and development actors is particularly pertinent where Member States are unable to provide appropriate reception conditions to applicants. However, a most unfortunate and GCR non-compliant trend is apparent in some Member States which criminalise NGO assistance of migrants, including applicants (or would-be applicants) for protection. Instead of an approach which excludes the voluntary sector and NGOs from assisting in refugee reception and assistance with the threat of criminal sanctions,[126] these civil society actors should be welcomed to assist. Inclusion of civil society actors in all stages of the migratory voyage is a high priority of the GCs. However, the successful engagement of NGOs and civil society actors in the reception of applicants should not simply be tied to the resumption of Dublin III removals. The GCR call to include a wide range of bodies in assisting in refugee reception and treatment is very useful for EU institutions that provide substantial funding for such reception to enable the Dublin III system to operate smoothly. The EU project to house refugees on the island of Lesvos in newly adapted shipping containers to replace the notorious camp of Moria is a step in the right direction. However, there is no evidence of the engagement of the multiple actors at local, regional and national levels in this project, which the GCR recommends as essential to its success.[127] Further, the very restrictive rules on applicants' movement out of the camps (limited to two days a week with authorisations which must be applied for) diminishes greatly their ability to engage with local actors. The possibility of developing such links is necessary as consistent with the GCR. Replacing the dreadful conditions in the Moria camp must be more than a move to allow other Member States to send applicants back to Greece. It must be focused on the durability of the solution and the GCR commitment to provide more predictability (paragraph 86).

[125] Council Decision 2000/596/EC of 28 September 2000 establishing a European Refugee Fund [2000] OJ L 252; Eiko R Thielemann, 'Symbolic Politics or Effective Burden-sharing? Redistribution, Side-payments and the European Refugee Fund' (2005) 43(4) Journal of Common Market Studies 807.

[126] Liz Fekete, 'Migrants, Borders and the Criminalisation of Solidarity in the EU (2018) 59(4) *Race & Class* 65.

[127] European Commission, 'Memorandum of Understanding: Commission Support for the Situation on the Greek Islands: Questions and Answers' (3 December 2020) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2284> (accessed 20 November 2021).

In summary, the GCR's focus on transferring resources rather than people calls on Member States to improve reception conditions and to draw on humanitarian, development and private sector contributions in this context. This is a way to achieve solidarity between Member States. However, when it comes to solidarity between state authorities and applicants for international protection, a system which is focused only on transferring resources will fall short of the GCs' commitments. Currently, there is no duty for Member States to take into account applicants' perspectives on the Member State in which their application will be processed. This approach overlooks whether they have an interest in having their application determined in a particular Member State, for example because they have a community there, which will enable them to integrate. Thus, from a perspective of solidarity, the Dublin system is flawed and out of step with both the EU's own duty of solidarity and the international community's formulation of solidarity in the GCR and GCM. Indeed, the Compacts also uphold the principle of family unity (GCR para 95; GCM, e.g. para 21(i)), so that despite the focus on transferring resources rather than people, transferring persons to achieve this aim is consistent with the Compacts. How applicants' wishes should be taken into account during the Dublin procedure is discussed further in the next section.

2.3.2 The Personal Interview: A Venue for Applicants to Indicate their Preferences?

Dublin III sets out the applicant's entitlement to a personal interview, which is an inherent condition for providing him or her with information. It is necessary primarily to ensure fairness in a procedure where the state's power is immense but the individual's protection needs may be absolute. The interview should take place in a timely manner in a language the applicant understands or with an interpreter and in conditions of confidentiality. During the interview, the essential information on the applicant and his or her voyage is typically obtained to establish where his or her asylum application should be determined. Thus, this interview could be the place where the individual is given the opportunity to indicate where they want to pursue an application.

The GCR emphasises the importance of including the applicant in all areas relevant to him or her (paragraph 32). This first interview provides a critical stage at which Member States can apply Dublin III consistently with the GCR. In this interview, the Member State should seek to include the applicant in a discussion of where his or her application should be determined. Dublin III establishes the rule that only one Member State will be responsible for determining the asylum application and the result of that determination; given that if that decision is negative it will apply in all Member States, the applicant must be included in the decision as to which Member State will undertake this task in respect of him or her.

Where an applicant does not want his or her application to be considered in the Member State where he or she first made the application – usually as a result of state-caused interruption of a journey – a better approach to solidarity would consist of authorities seeking to facilitate the allocation of the claim to the Member State where the applicant wishes to go. This is by no means a new idea but has been strongly promoted by ECRE and others for many years.[128]

The Dublin III criteria of allocation make this obligatory where there are close family members in another Member State or the applicant had a visa or residence status (even if expired). To give full effect to the GCR recommendation that the refugee should be included fully in all decisions about

[128] ECRE, 'Principles for Fair and Sustainable Refugee Protection in Europe' <https://ecre.org/wp-content/uploads/2017/04/Policy-Papers-02.pdf> (accessed 17 May 2022); Blanca Garcés-Mascareñas, 'Why Dublin "doesn't work"' (2015) 135 notes internacionals CIDOB 1; Richard Williams, 'Beyond Dublin' A Discussion Paper for the Greens/EFA in the European Parliament (2015) < https://www.greens-efa.eu/legacy/fileadmin/dam/Documents/Policy_papers/Migration_asylum/Beyond_Dublin_paper_final.pdf> (accessed 2 June 2022).

his or her future, this list of reasons for relocation to another Member State for determination of the claim should be interpreted as widely as possible. This means it should be interpreted with the greatest possible flexibility, in conjunction with the other Member States to seek to facilitate the applicant's preference (take charge). In the spirit of the GCR, where the applicant does not wish for his or her application to be processed in the Member State of application, the interview is the right moment for the authorities to flexibly apply the criteria for determining the responsible Member State and accommodate the applicant, whenever possible. Article 17, the discretionary clause, allows this outcome even where the criteria cannot be interpreted widely enough to achieve this objective of including the applicant in this most important decision about his or her future. Member States should never omit the personal interview if the consequence would be to exclude the applicant from participating in the process of deciding where his or her application will be determined. This would be contrary to the recommendation of the GCR (paragraph 35).

2.3.3 Certainty and Predictability

Taking applicants' wishes into account and allowing them to remain in the state where the application has been made or to go to another Member State where he or she may have family members would also help Member States achieve the GCM's Objective 12: to strengthen certainty and predictability in migration procedures for appropriate screening, assessment and referral.

For all people, whether they are applicants for international protection or not, the unpredictability of what the state will do is among the most stressful aspects of migration.[129] While the actions of state authorities in migration control may seem coherent to their authors, often, for those who are on the receiving end, they seem arbitrary and incomprehensible. For instance, restrictive family reunification rules which prevent applicants for international protection from remaining in the host state with close family members may seem incoherent to the applicant who is trying to explain that he or she cannot leave the country to seek a specific visa to enter as a family member as he or she fears persecution or torture in the only country to which he or she could go to seek such a visa. Similarly, rules which prohibit businesses from hiring applicants for international protection as highly skilled workers because they are in the asylum stream also often seem unpredictable to employers and applicants for international protection. Often decisions of state authorities regarding which nationalities to prioritise for expulsion seem unpredictable to applicants for international protection.[130] Among decisions which are most problematic regarding predictability are those about detention.[131]

Objective 12 of the GCM concerns the strengthening of certainty and predictability in migration procedures. Predictability needs to be a central plank of all immigration and asylum policies and at all stages of the process. This objective aims to increase certainty and predictability of migration procedures by developing and strengthening effective and human rights-based mechanisms for

[129] ECRE, 'Analysis of Asylum Statistics in Europe' (2020) <https://ecre.org/ecre-analysis-of-asylum-statistics-in-europe/> (accessed 17 May 2022); ECRE, 'Asylum seekers from violence ridden Somalia face asylum lottery in Europe' (2017) <https://ecre.org/asylum-seekers-from-violence-ridden-somalia-face-asylum-lottery-in-europe/> (accessed 17 May 2022).

[130] Stephanie Nebehay, 'U.S. expulsions of Haitians May Violate International Law - UN Refugee Boss' (21 September 2021) <www.reuters.com/world/americas/un-concerned-us-pushbacks-migrants-who-may-need-asylum-2021-09-21/> (accessed 21 October 2021).

[131] Sara Miellet, 'From Refugee to Resident in the Digital Age: Refugees' Strategies for Navigating in and Negotiating Beyond Uncertainty During Reception and Settlement in The Netherlands' (2021) 34(4) Journal of Refugee Studies 3629.

adequate and timely screening and individual assessment of all migrants to identify and facilitate access to the appropriate referral procedures in accordance with international law (paragraph 28).

The GCM predictability commitment proposes that states take a number of measures, most of which are relevant to the Dublin III system:[132]

a) Increase transparency and accessibility of migration procedures by communicating the requirements for entry, admission, stay, work, study or other activities, and introducing technology to simplify application procedures, in order to avoid unnecessary delays and expenses for States and migrants;

The GCR also calls for complementary pathways for admission as additional to resettlement on the basis of three-year strategies (paragraph 94). The establishment of private or community sponsorship programmes in addition to resettlement programmes is recommended. These pathways should include humanitarian visas, humanitarian corridors, and other humanitarian admission programmes; they should also include educational opportunities such as educational visas and scholarships as well as labour mobility opportunities for refugees (paragraph 95).

Transparency in the Dublin III system is often lacking. Notwithstanding the multiple sources of international and EU law[133] establishing obligations to provide clear and accessible information, applicants often struggle to get the information relevant to their situation about the system or to understand it.[134] The efforts that the European Union Agency for Asylum (EUAA) has been taking to improve transparency are very important and GCM-consistent. However, they need to be implemented at the national level.

The Dublin III Regulation's Article 4 duty to provide precise information must be fully and coherently implemented in all Member States. But this, alone, will not constitute a GCM-compliant implementation of the information requirement. Just because a migrant or applicant has arrived irregularly does not mean that he or she does not fulfil the criteria for entry under a complementary pathway – work, study, etc, if he or she were provided with sufficient assistance and support to make the correct application in what are often very complex and inaccessible national regulations. As researchers have shown, many people who may be in asylum procedures may also be 'semi-regularised' as possibilities open up for them.[135] To evaluate the appropriateness of such pathways, applicants need practical and accessible information. Here again the role of civil society actors is central in assisting applicants. In many Member States, the existence of numerous programmes for regularisation could resolve the individual's status outside the refugee protection stream.

c) Establish gender-responsive and child-sensitive referral mechanisms, including improved screening measures and individual assessments at borders and places of first arrival, by applying standardized operating procedures developed in coordination with local authorities, National Human Rights Institutions, international organizations and civil society;

[132] We are not discussing para 28 b) GCM as it primarily deals with training for identification of 'vulnerable' persons, an issue discussed in the chapter on the EUAPD.
[133] See the chapter on the EUAPD.
[134] EASO, 'EASO Asylum Report 2021' (2021) <https://easo.europa.eu/easo-asylum-report-2021/425-guidance-and-research-application-dublin-iii-regulation> (accessed 20 September 2021) s 4.2.5 Guidance and research on the application of the Dublin III Regulation.
[135] Eugenia Markova, Anna Paraskevopoulou and Sonia McKay, 'Treading Lightly: Regularised Migrant Workers in Europe (2019) 16(3) Migration Letters 451.

The inclusion of bodies outside interior, immigration and asylum ministries in screening and assessment at borders and places of first arrival is a very relevant commitment for the EU Member States. Too often, the only authorities which have access to places where applicants for international protection are housed (or detained) are public officials with very limited access for civil society actors.[136] Civil society actors trained in reception are often less intimidating for vulnerable applicants than uniformed border guards (often carrying weapons). Enhancing first reception and contact for applicants with civil society actors or non-interior ministry officials will improve the quality of the procedures and implementation of the GCR and GCM.

d) Ensure that migrant children are promptly identified at places of first arrival in countries of transit and destination, and, if unaccompanied or separated, are swiftly referred to child protection authorities and other relevant services as well as appointed a competent and impartial legal guardian, that family unity is protected, and that anyone legitimately claiming to be a child is treated as such unless otherwise determined through a multi-disciplinary, independent and child-sensitive age assessment;

A continuing problem several Member States is age assessment.[137] The European Asylum Support Office (EASO) – now the EUAA[138] – handbook for national authorities on age assessments has already had two editions and the problems are yet to be solved.[139] The Dublin III commitments to minors, in particular, the duty to take into consideration their views, need to be implemented rapidly to avoid damage caused by lengthy delays in age assessment procedures. UNHCR has strongly recommended a presumption in favour of a minor's statement of his or her age, which can only be displaced by evidence to the contrary consistent with clear and detailed criteria.[140] Not only would the full application of the UNHCR position be consistent with states' duty of cooperation with UNHCR,[141] but it would assist in rapid child-sensitive screening as called for by the GCR and GCM. The improved use of take-charge provisions in Dublin III with enhanced efficiency would be valuable to fulfilling this commitment. Minors should be reunited with their family members as quickly as possible to avoid all the various harm that separation entails, without lengthy and unnecessary age assessment procedures slowing down the process.

e) Ensure that, in the context of mixed movements, relevant information on rights and obligations under national laws and procedures, including on entry and stay requirements, available forms of protection, as well as options for return and reintegration, is appropriately, timely and effectively communicated, and accessible.

Once again, the key issue is the emphasis on full information in a form valuable to the applicant. Although the Dublin III Regulation promises effective information (Article 4) and the guidance provided by EASO on the provision of information is valuable, problems still arise in implementation

[136] UNHCR, 'Policy on Detention Monitoring' (3 December 2015) UNHCR/HCP/2015/7 <www.refworld.org/docid/564199b54.html> (accessed 21 October 2021).
[137] UNICEF, 'Age Assessment: A Technical Note' (January 2013) <www.refworld.org/docid/5130659f2.htmlY (accessed 21 October 2021).
[138] Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, OJ L 468/1.
[139] EASO, 'EASO Practical Guide on Age Assessment: Second Edition' (2018) <www.easo.europa.eu/sites/default/files/easo-practical-guide-on-age-assesment-v3-2018.pdf> (accessed 20 September 2021).
[140]UNHCR, 'UNHCR Observations on the Use of Age Assessments in the Identification of Separated or Unaccompanied Children Seeking Asylum' (1 June 2015) <www.refworld.org/docid/55759d2d4.html> (accessed 21 October 2021).
[141] CSR51 (n 18) Art 35.

by the Member States.[142] The GCM recommendation goes beyond merely providing information about the asylum procedure or the application of the Dublin system; it also extends to other information about regularisation and opportunities in the host State. According to the Council of Europe's European Commission against Racism and Intolerance (ECRI), in its country report on Germany (sixth monitoring cycle) published on 17 March 2020 'civil society organisations informed ECRI that up to one-third of the migrants that contact them without having a legal status are in fact entitled to some sort of residence permit, but are neither aware of their rights nor able to assert them'.[143] This indicates the scale of the problem that migrants and applicants for international protection have even in countries with well-organised and -financed migration and asylum systems.

2.3.4 Meaningful Engagement with Stakeholders

GCR paragraphs 33-44 recommend a multi-stakeholder and partnership approach which acknowledges the primary responsibility and sovereignty of states. It insists on the inclusion of refugees themselves and host communities working together, noting that responses are most effective when they actively and meaningfully engage with those they are intended to protect and assist. The objective is to ensure appropriate, accessible and inclusive responses. This means that states and relevant stakeholders explore how best to include refugees and members of host communities in key forums and processes and ensure accountability. It calls for humanitarian and development actors to work together from the outset of a refugee situation and in protracted situations. These actors should ensure complementarity as regards their interventions, including helping countries which lack institutional capacities to address the needs of refugees.

Local authorities, other local actors and traditional community governance institutions are recognised as first responders to large-scale refugee situations (paragraph 37 GCR). Support by the international community as a whole may be provided to strengthen institutional capacities, infrastructure and accommodation at the local level, including through funding and capacity development where appropriate. Networks of cities and municipalities hosting refugees should be invited to share good practices and innovative approaches to responses in urban settings. Further, parliaments are called upon to work to support these objectives. Civil society organisations operating both at the local and national level should be encouraged in their contribution to assessing community strengths and needs, inclusive and accessible planning and programme implementation and capacity development. Similarly, faith-based actors should be supported in assisting in the planning and delivery of arrangements for assistance to refugees and host communities. Public-private partnerships also have a place, including in the development of new institutional arrangements and methodologies. In particular, they can assist in identifying economic opportunities and private sector facilitation platforms. The GCR also notes the importance of sports and cultural activities, which play a role in social development, inclusion, cohesion and well-being, particularly of refugee children, adolescents and youth.

2.3.5 Resettlement and Local Integration

The GCR at paragraph 86 calls for greater predictability and the engagement of a wide range of actors in three areas: (1) support for countries of origin and host countries where appropriate and

[142] EASO, 'EASO Guidance on the Dublin Procedure: Operational Standards and Indicators' (2020) <https://op.europa.eu/webpub/easo/guidance-on-the-dublin-procedure-operational-standards-and-indicators/en/#chapter-1-2> (accessed 20 September 2021).

[143] ECRI, 'ECRI Report on Germany' (2019) <https://rm.coe.int/ecri-report-on-germany-sixth-monitoring-cycle-/16809ce4be> (accessed 21 October 2021).

upon request to facilitate conditions of voluntary repatriation; (2) offers of resettlement and complementary pathways as an essential element; and (3) support for local integration. As regards resettlement, the GCR states that this is a tangible mechanism for burden and responsibility sharing and a demonstration of solidarity. It allows states to share each other's burdens and reduce the impact of large refugee situations on host countries (paragraph 90). Resettlement programmes need to be predictable, efficient and effective. Resettlement needs to be used strategically to improve the protection environment and contribute to a comprehensive approach to refugee situations. Specific attention should be paid to UNHCR's resettlement criteria from priority situations. This requires investment in robust reception and integration services for resettled refugees and the use of emergency transit facilities or other arrangements for emergency processing for resettlement (paragraph 92). There is a critical shortage of resettlement places needed for highly vulnerable refugee populations worldwide. EU states have committed themselves in the GCR to increasing their resettlement rates and urgently need to deliver on this commitment. Dublin III is not a solidarity instrument, nor is the transfer of applicants in any way equivalent to resettlement. EU states must not be permitted to count transfers of applicants within the EU under these arrangements towards their international obligations under the GCR. However, arguments in favour of resettlement may also be relevant to applicants seeking to move from one Member State to another.

Further, the mutual recognition only of negative decisions but not positive ones of protection means that persons with protection needs recognised by one host state are only allowed to reside in that initial Member State. This remains the case even where there may be good reasons for them to want to go to another Member State (e.g. job opportunities, language affiliation, etc). Member States should consider *de facto* recognition of positive protection decisions to enable refugees and beneficiaries of international protection to resettle where they deem the conditions of integration are most favourable for them in consideration of their personal circumstances. As the joint letter from six state interior ministries (five EU states and Switzerland) to the EU institutions (and the Greek government) of 1 June 2021 indicates, beneficiaries of international protection recognised or granted status by one Member State do, in practice, self-relocate to other Member States, to the annoyance of the authorities of the six states.[144] A GCR-friendly approach to such movement should be seen as a positive development where these beneficiaries are seeking resettlement and their applications should be entertained and considered favourably. Further, Objective 23 GCM on achieving international cooperation promotes such an approach.

According to the GCR, local integration is also key, even if voluntary repatriation is a preferred solution (paragraph 97). The provision of durable legal status and naturalisation is recommended. The GCR recognises that local integration is a dynamic and two-way process requiring both preparedness on the part of refugees to adapt to the host society and a corresponding readiness on the part of host communities and public institutions to welcome refugees and meet the needs of a diverse population (paragraph 98). Strategic frameworks for local integration are required to support local integration processes. These need to address documentation issues and facilitate language and vocational training, including for women and girls. Access to livelihood opportunities for refugees is central.

2.3.6 Making Take Charge Provisions More Effective

[144] Statewatch, 'Whip Greece into shape' (n 77).

The above considerations are relevant to the implementation of Dublin III;[145] they provide a roadmap both within and beyond the first interview for NGOs and humanitarian actors to assist applicants in providing clearer explanations of their reasons either to remain in the host state (i.e. correct a problematic take back decision) or to promote a take charge application. In practice, take charge applications are few (though increasing in number).[146] This is not least because substantial amounts of information and documentation are required concerning the applicant's links with another Member State; such information and documentation is not always immediately available to the decision-making authority in either state. The responsible authorities in the preferred state may need to make inquiries and request documents from many other state bodies, such as social welfare administrations to assist the host state in completing a dossier to take charge. Dublin III Article 16 is explicit about the take charge duty of Member States where an applicant is pregnant, has a newborn child, needs the assistance of a child resident in another Member State or has a sibling or parent legally resident there. The duty needs to be implemented in a GCR and GCM consistent manner. The host Member State needs to be proactive in assisting the applicant to go to the Member State where the Article 16 take charge grounds apply. Beyond that, Member States should interpret Article 16 widely and inclusively to bring families together quickly and effectively. Unnecessary procedures and documentation should be avoided (as is already provided for in the Family Reunification Directive 2003/86 although its provisions are not specifically applicable to take charge situations).[147]

Administrative inertia in the host state and the preferred state of application often results in applications languishing in the systems of two different Member States without resolution. The intervention of NGOs and civil society actors who understand their national systems can be critical to effectively applying the Dublin rules. Member States should support and encourage the activities of such NGOs and civil society actors in both states as consistent with the GCR and GCM commitments to enable applicants to travel safely to the place where the presence of their families and interests will enable them to integrate.

The Dublin III provisions on personal data exchange (Articles 14, 38-40) should be harnessed to improve inter-state exchanges of personal data to facilitate take charge situations. While personal data must always be protected, accessing and exchanging personal data with the applicant's express consent and that of his or her family members and community for the limited purpose of take charge is permissible under EU data protection law. This is necessary for a GCR- and GCM-compliant implementation of Dublin III.

2.3.7 Human Rights, Rule of Law, Non-discrimination and Non-regression

The GCM principles of human rights compliance, the rule of law, non-discrimination and non-regression all need to be part of national implementation of Dublin III. As a mechanism which allocates responsibility to states for the determination of asylum applications, all three principles

[145] See European Parliament, 'Dublin Regulation on international protection applications: European Implementation Assessment' (2020) https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642813/EPRS_STU(2020)642813_EN.pdf (accessed 17 May 2022).

[146] EASO, 'Asylum Report 2020' (n 113) 3.1 Operational support.

[147] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251 (Family Reunification Directive) Article 11(2): 'Where a refugee cannot provide official documentary evidence of the family relationship, the Member States shall take into account other evidence, to be assessed in accordance with national law, of the existence of such relationship. A decision rejecting an application may not be based solely on the fact that documentary evidence is lacking'.

must be applied fully to ensure human rights compliant results. The rule of law requires that decisions on where an asylum applicant is permitted to make an application must not be based on arbitrary considerations alone such as the place and legality of entry into the EU.[148] Non-discrimination should be applied to ensure that applicants in the same situations in different Member States are entitled to the same treatment as regards a possible Dublin take back or take charge requests. The principle of non-regression must be applied to ensure that there is no fundamental rights 'backsliding'. All proposed changes to the CEAS and specifically the Dublin Regulation need to be examined to ensure that the situation of applicants is not subject to deterioration of rights due to the proposals.

All too often, applicants arrive irregularly in one Member State because of the choices made by smugglers and the lack of safe and legal migration routes. The applicants themselves are subject to the Dublin III system which assumes that they are responsible for the choice of Member State of arrival. A GCM consistent implementation of the first Dublin III interview would allow the applicant the opportunity to explain the arbitrariness of his or her place of arrival. Accommodating the information and the applicant's reasons for wishing to move to another Member State would be good practice in accordance with the GCM. Similarly, the establishment of an EU system of humanitarian visas would enable applicants to apply for visas to enter the Member State where they want to have their claim determined, again consistent with the GCM predictability duty.

2.3.8 Preparedness and Crisis Management

Dublin III establishes an early warning, preparedness and crisis management system based on national plans to deal with large inflows of applicants. It is a pity that these plans are called 'preventive action plans' as this gives the impression that the objective is to prevent refugees from arriving in a Member State. A better interpretation of this title is that it is designed to prevent the arrival of large numbers of refugees from becoming a challenge to the host Member State. In any event, the GCR contains many recommendations for dealing with large numbers of refugees (paragraphs 33-44). Most important among these are the solidarity provisions discussed in more depth below (Reception Conditions chapter). Most importantly, a GCR-consistent approach to preparedness is based on good reception, not coercive relocation, of applicants to other states where they do not want to go and may receive a poor reception. UNHCR guidelines designed for the anticipated arrival of substantial numbers of refugees in Greece in 2015 provide an excellent starting place for preparedness which is not based on deflection or coercion.[149] Similarly, UNHCR 2021 guidance for Iraqi displacement explains how to fulfil human rights and refugee protection requirements in the face of substantial new needs.[150]

2.4 Conclusions

As set out in this Chapter, there are numerous ways in which Member States could apply the Dublin III Regulation in a manner which is consistent with the GCR and GCM. While the Dublin III system is based on the principle of moving applicants around, more attention should be paid to moving resources, as recommended in the GCR, to those host states which need assistance in coping with

[148] Evangelia (Lilian) Tsourdi, 'Asylum in the EU: One of the Many Faces of Rule of Law Backsliding?' (2021) 2 European Constitutional Law Review 1.

[149] UNHCR, 'Refugee sea arrivals in Greece this year approach 400,000' (2 October 2015) <www.refworld.org/docid/56138c354.html> (accessed 21 October 2021).

[150] UNHCR, 'UNHCR preparing for huge displacement from Iraq's Mosul' (23 August 2016) <www.refworld.org/docid/57bd405e4.html> (accessed 21 October 2021).

refugee arrivals rather than trying to move people from one state to another against their will. But where applicants have good reasons to seek asylum in another Member State, the opportunity and necessary assistance in making those reasons known to the decision maker need to be improved for the Dublin III system to be implemented in a manner consistent with the GCR and GCM.

Among the most important duties is changing perceptions of the use of the first interview. Instead of focusing on the travel route (to tighten up border controls), this interview should be designed to elicit information from the applicant about why he or she wishes to have his or her asylum application determined in one particular state (or another). Full use of the take charge provisions to bring families and communities together should be made so that applicants find themselves with their families and the support they need. The inclusion of NGOs and civil society actors in assisting applicants to explain their situations and their reasons for seeking asylum in a specific Member State is critical to making the system work in a manner which is more GCR and GCM compliant. Generally, a more inclusive first reception which includes civil society actors and NGOs, not only border guards, would make the system less intimidating for vulnerable applicants. Further, the approach to preparedness for large-scale arrivals needs to be implemented with a view to the GCR commitments, while resettlement within the Dublin III system should include the possibility for those recognised as refugees or granted status as beneficiaries of subsidiary protection to move to other Member States where conditions for integration are more favourable. Such a framework has been adopted under the Ukraine temporary protection scheme and the results already appear to be favourable as regards allowing people to move across the EU and reducing strains on front line states.[151]

[151] ECRE, 'European Ukraine Response: Refugee Arrivals Continue Across Europe' (2022) <https://ecre.org/european-ukraine-response-refugee-arrivals-continue-across-europe/> (accessed 17 May 2022).

3. Reception Conditions Directive 2013/33

3.1 Introduction

The Reception Conditions Directive 2013/33 (EURCD) is a second phase CEAS measure which replaced Directive 2003/9 (the first phase measure).[152] The most significant change between the first and second phases of the instrument was the introduction of detailed detention provisions (see chapter on detention) including a duty on Member States to consider alternatives to detention.[153] Its scope extends to all non-EU nationals (called third-country nationals) who make an application for international protection on the territory, including at the border, in the territorial waters or the transit zones of a Member State, as long as they are allowed to remain on the territory as applicants for protection, as well as to their family members (according to national law). The question of whether such persons are allowed to remain as beneficiaries of international protection is covered by the EUQD, discussed in Chapter 4.

The objective of the EURCD is to lay down standards for the reception of applicants for international protection in the EU Member States (Article 1).[154] The Directive acknowledges that Member States are bound by obligations under instruments of international law to which they are parties. To the extent that the GCR and GCM are complementary to instruments of international law (notwithstanding that they are not legally binding themselves), they can be relevant to the interpretation of the Directive (Recital 10). The standards of reception must be sufficient to ensure applicants a dignified standard of living and comparable living conditions in all Member States (Recital 11). The EURCD is linked to Dublin III on allocation of responsibility for applicants for international protection; the legislator recognises that inadequate and disadvantageous reception conditions among the Member States may constitute a legitimate reason for applicants to move from one Member State to another in search of a dignified standard of life (Recital 12). The relationship of reception conditions to applicants' intra-EU movement (called secondary movement in the EU literature,[155] also known as self-relocation[156]) is important because it reveals a fundamental flaw in the CEAS as a whole. The objective is that common minimum reception

[152] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers [2003] OJ L 31.

[153] Detention was covered in the 2003 directive (Article 14) but without detail.

[154] Directive 2003/9 established only minimum standards for reception, thus the EURCD (n 5), which lays down *the standards* for reception, provides a higher level of harmonisation. It still provides for Member States to establish or maintain higher standards than those required (Article 4).

[155] Madeline Garlick, 'The Road More Travelled? Onward Movement of Applicants for International Protection and Refugees' (2016) 51 Forced Migration Review 42; Elspeth Guild and Sergio Carrera, 'Rethinking Migration Distribution in the EU: Shall we Start with the Facts?' (CEPS 2016) <www.ceps.eu/ceps-publications/rethinking-asylum-distribution-eu-shall-we-start-facts> (accessed 10 November 2021).

[156] Chowra Makaremi, 'The EU Pact on Migration and Asylum: Policy Making in an Era of Alternative Facts' (Books&Ideas 2021) <https://booksandideas.net/the-new-EU-pact-on-migration-and-asylum.html> (accessed 10 November 2021).

standards will suffice to prevent secondary movement. Both the CJEU[157] and the ECtHR[158] have recognised that secondary movement is a legitimate action by applicants when they are faced with conditions which constitute inhuman or degrading treatment in the Member States to which the Dublin system allocates them. In such circumstances not only can the applicant not be sent back to the Member State where the reception conditions constitute a violation of both the EUCFR and the ECHR, but the second Member State to which the applicant has self-relocated must determine the asylum claim.[159]

Particularly relevant to the EURCD are the commitments contained in the GCR in paragraphs 49-82 (see Annex 1). A very brief outline is provided here of the rights, as we will return to them shortly in more depth. In these paragraphs, states commit to easing the burden on host countries and to do so in a way which benefits refugees and host communities. The funding focus of the GCR may be translated into practical action in so far as the funding to be made available to host countries could be earmarked for use to enable actions that the CSR51 and related instruments (cited in the GCR) require to be made available to refugees.[160] These provisions require states to be prepared for refugee arrivals and to have immediate reception arrangements in place. Basic humanitarian assistance must be provided, as well as essential services. Alternatives to camps away from borders are recommended. The GCR also includes provisions on safety and security, registration and documentation, and the duty to address specific needs and systems for identifying international

[157] C-411-10 and C-493-10, *NS and ME (*CJEU*,* 21 December 2011) paras 106 and 107: 'Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an applicants for international protection to the "Member State responsible" within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of applicants for international protection in that Member State amount to substantial grounds for believing that the applicants for international protection would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision. Subject to the right itself to examine the application referred to in Article 3(2) of Regulation No 343/2003, the finding that it is impossible to transfer an applicant to another Member State, where that state is identified as the Member State responsible in accordance with the criteria set out in Chapter III of that regulation, entails that the Member State which should carry out that transfer must continue to examine the criteria set out in that chapter in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application'.

[158] *MSS v Belgium and Greece* (n 86) para 263: 'In the light of the above and in view of the obligations incumbent on the Greek authorities under the Reception Directive […], the Court considers that the Greek authorities have not had due regard to the applicant's vulnerability as an asylum-seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. The Court considers that the applicant has been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention'. The consequence of this violation of Article 3 by the Greek authorities was that MSS could stay in Belgium and could not be forced to return to Greece under the Dublin III Regulation.'

[159] *NS and ME* (n 157) para 107.

[160] The CSR51 definition of a refugee, as clarified by UNHCR in its Handbook, includes everyone who fulfils the conditions of Article 1(A)(2), irrespective of whether a state has considered there application or not, see UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees' (April 2019) HCR/1P/4/ENG/REV.4, (UNHCR Handbook).

protection needs (which will be considered in more depth in the chapter on the EUAPD). The GCR requires support for communities promoting shared and inclusive economic development, humanitarian assistance and education for refugees. Jobs and livelihoods are included, as is the promotion of economic opportunities, decent work and job creation, including recognition of skills, qualifications and language training. In the area of health, it promotes expanded and enhanced national health systems to facilitate access by refugees, women and children as well as other groups. Mental health services are included. The GCR also covers appropriate accommodation, notwithstanding infrastructure challenges. Food security is also addressed, promoting the use of cash transfers or social protection systems. Finally, the GCR calls for good relations and peaceful coexistence, including combatting discrimination and enabling the positive impact of civil society, faith-based organisations, and media, including social media, to be harnessed.

The GCM's paragraph 15 is also relevant to the EURCD in so far as it highlights principles also present in EU law. Specifically, these are the rule of law and due process;[161] human rights consisting of international human rights law and the principles of non-discrimination and non-regression;[162] and gender-responsive and child-sensitive unity of purposes.[163] Also relevant are Objective 4: proof of legal identity and adequate documentation;[164] Objective 7: reduce vulnerabilities in migration;[165] Objective 12: strengthen certainty and predictability in migration procedures, appropriate screening, assessment and referral;[166] and Objective 15: access to basic services.[167] For the EURCD to be consistent with the GCM undertakings, rule of law must be implemented to make the delivery of reception conditions to applicants for international protection consistent and predictable. The administrative systems in the Member States must be sufficiently robust to meet the reception needs of all applicants for international protection and the funding of the systems adequate to ensure that equivalent reception is available to all.

[161] GCM (n 2) para 15: 'Rule of law and due process: The Global Compact recognizes that respect for the rule of law, due process and access to justice are fundamental to all aspects of migration governance. This means that the State, public and private institutions and entities, as well as persons themselves are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international law'.

[162] ibid: 'Human rights: The Global Compact is based on international human rights law and upholds the principles of non-regression and non-discrimination. By implementing the Global Compact, we ensure effective respect, protection and fulfilment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle. We also reaffirm the commitment to eliminate all forms of discrimination, including racism, xenophobia and intolerance against migrants and their families'.

[163] ibid: 'Gender-responsive: The Global Compact ensures that the human rights of women, men, girls and boys are respected at all stages of migration, their specific needs are properly understood and addressed and they are empowered as agents of change. It mainstreams a gender perspective, promotes gender equality and the empowerment of all women and girls, recognizing their independence, agency and leadership in order to move away from addressing migrant women primarily through a lens of victimhood.
Child-sensitive: The Global Compact promotes existing international legal obligations in relation to the rights of the child, and upholds the principle of the best interests of the child at all times, as a primary consideration in all situations concerning children in the context of international migration, including unaccompanied and separated children'.

[164] ibid para 16(4): 'Ensure that all migrants have proof of legal identity and adequate documentation'.

[165] ibid para 16(7): 'Address and reduce vulnerabilities in migration'.

[166] ibid para 16(12): 'Strengthen certainty and predictability in migration procedures for appropriate screening, assessment and referral'.

[167] ibid para 16(15): 'Provide access to basic services for migrants'.

3.2 General Outline of the Directive

The Directive sets out what material reception conditions are (housing, food, clothing provided in kind or as a financial allowance/vouchers and a daily expenses allowance) and their availability to all persons who have made an application for international protection in a Member State. However, making an application is not always straightforward. As appears from numerous judgments of the ECtHR, mainly against Greece, many migrants try to register asylum applications but the authorities refuse to receive them.[168]

In principle, applicants are entitled to free movement within the Member State but this may be modified when they are assigned an area in which to live by the Member State (Article 7). However, there must be a procedure for applicants to seek permission to leave the assigned area and the decision must be justified and individual. This provision is followed by the detention-related ones, which are considered in the final chapter of this Handbook. The EURCD allows Member States to make the provision of reception conditions dependent on actual residence as determined by the Member State.

Articles 12 – 19 cover the modalities of delivery of reception conditions. Article 12 sets out the principle of family unity, 13 medical screening on public health grounds, 14 on schooling and education of minors, 15 on access to employment (with a possibility to apply an EU citizen/resident third-country national priority), 16 on vocational training, 17 setting out general rules on material conditions and health care, 18 on modalities for material reception conditions and 19 on health care. Thereafter, Article 20 sets out the circumstances under which a Member State can reduce or withdraw material reception. These are mainly where the individual leaves his or her place of residence, does not comply with reporting requirements, makes a subsequent application, fails to make an application in time, conceals financial resources or exhibits serious violent behaviour.

The final section covers appeal rights for those subject to decisions to grant, withdraw or reduce reception conditions or limit freedom of movement, which must include an appeal to a judicial instance.[169] Legal aid must be provided for applicants whose resources are limited. The final provisions are directed at Member States regarding the efficiency of the system. This raises rule of law issues as regards access to justice. The CJEU in C-39/21 has been asked a question about the scope of judicial control, but this has not yet been decided at the time of writing.[170]

3.3 Specific Global Compact Commitments relevant to the EURCD

The scope of the EURCD includes everyone who makes an application for international protection and is allowed to remain on the territory of a Member State. Article 5(1) requires Member States to provide information to applicants about where they can seek reception conditions. Article 17 obliges Member States to make reception conditions available but does not specify how. The Directive does not deal with assistance from other Member States or EU institutions when one state faces a large number of arrivals. There is only a reference in Recital 6 to the European Refugee Fund

[168] *AF v Greece* App No 53709/11 (ECtHR, 13 June 2013); *AY v Greece* App No 58399/11 (ECtHR, 5 November 2015)*; BM v Greece* App No 53608/11 (ECtHR, 19 December 2013); *EA v Greece*, App No 74308/10 (ECtHR, 30 July 2015).

[169] This is how the matter of C-233/18, *Haqbin* (CJEU, 12 November 2019) arrived at the courts and was referred to the CJEU.

[170] Case C-704/20, Request for a preliminary ruling from the Raad van State (Netherlands) lodged on 23 December 2020 – *Staatssecretaris van Justitie en Veiligheid v C, B* (pending).

whose resources should be mobilised to provide adequate support. The Achilles heel of state implementation of the Directive has been the inability of some Member States to actually deliver reception conditions in accordance with the Directive to applicants, the case of a number of countries, including Greece (the best-known example), being particularly problematic.

In order to correctly implement the GCR undertakings of the Member States in this regard, the EU needs to apply paragraph 54 GCR and collectively contribute resources and expertise to strengthen national capacities for reception, including the establishment of reception and transit areas. However, the allocation of additional European resources to those Member States with capacity problems must be accompanied by adequate quality control and review. Where reception capacity needs to be increased or upgraded, there needs to be a European commitment to the achievement of the objectives and assurance that the additional funding is being correctly spent. For instance, a fire in Moria camp, Lesvos, Greece, in September 2020 left 12,362 people without shelter. The European Commission awarded € 5 million to Greece to upgrade infrastructure.[171] However, according to media reports, things had not improved a year since the fire.[172] The accommodation was still shockingly inadequate with little access to showers etc, power shortages and no heating in winter. Clearly, it is not only Greece, but the whole EU, which is failing to apply paragraph 54 GCR properly. Instead of seriously addressing the reception conditions issue, the Commission has proposed to align asylum procedures and expulsion to reduce pressure.[173] This seems a rather unambitious approach to achieving the objectives of paragraph 54 considering the EU's economic strength.

3.3.1 Reception and Registration

Paragraphs 54-81 GCR deal with a wide range of reception duties of states. Paragraphs 54-55 recognise the need for states to scale up reception arrangements when faced with large numbers of refugee arrivals. They call for the international allocation of resources to deal with these challenges, in particular, to assist in the establishment of reception and transit areas sensitive to age, gender, disability and other specific needs (through safe spaces where appropriate), as well as providing basic humanitarian assistance and essential services in reception areas. The international community commits to providing assistance, using national delivery systems where feasible but with the possibility of regional or international standby arrangements as well as technical and material assistance to be made available. From an EU perspective, this means the engagement of all Member States to assist any of their number experiencing a substantial influx. In the language of the EU, this constitutes solidarity.

The GCR highlights the importance of correct and sensitive registration procedures that address various groups' specific needs. It singles out children, women at risk, survivors of torture, trauma, trafficking in persons, sexual and gender-based violence, sexual exploitation and abuse or harmful practices, those with medical needs, persons with disabilities, those who are illiterate, adolescents and youth and older persons. The GCR recognises the needs of these groups to correct and issue-sensitive treatment in their registration as applicants for asylum. Notably, Article 6 EURCD sets out

[171] European Commission, 'Construction of New Reception Centres' <https://ec.europa.eu/home-affairs/orphan-pages/page/construction-new-reception-centres_en> (accessed 8 September 2021).
[172] SW, 'Greece: Despite EU Funds, Migrant Conditions Still Lacking' (10 March 2021) <www.dw.com/en/greece-eu-funds-migrants-lesbos-asylum/a-57051718> (accessed 8 September 2021).
[173] European Commission, 'New Pact on Migration and Asylum' <https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/new-pact-migration-and-asylum_en> (accessed 8 September 2021).

the requirements for registration and documentation. To fulfil their commitments under the GCR, when implementing Article 6 of the Directive, the Member States must not only achieve very rapid registration (within three days). They must also ensure that their registration systems comply with the needs of those using them, particularly where they come within one of the groups identified in the GCR. However, at the moment, as is apparent from some cases which have come before the ECtHR, at least one Member State's authorities are still having difficulty registering asylum claims at all (see example from Greece). Meanwhile, the GCM contains an objective to ensure that all migrants have proof of legal identity and adequate documentation (Objective 4). While mainly aimed at countries of origin, for applicants the duties must be fulfilled by the host state on account of the applicants' need for protection from their home state.

The EURCD requires Member States to provide information to applicants on procedures to access reception conditions within 15 days of their application (Article 5). Within three days of lodging an application for international protection the Member States must issue the individual with a document in his or her own name certifying his or her status as an applicant or testifying that the person is allowed to stay on the territory where the application is under examination. This document is the key to proving that the individual is an applicant for international protection and therefore entitled to reception conditions. Article 5(1) indicates that states may make reception conditions available through intermediaries. However, the duty to actually provide reception conditions remains with the state authorities themselves. It is state authorities who must ensure that this is in fact available to those entitled thereto and available from the time when the individual makes an application for protection (Article 17(1)). Thus, under Article 5(1) EURCD, every applicant should, within 15 days of making an asylum application be able to access reception conditions. Yet, Article 17(1) requires Member States to ensure that reception conditions are available to applicants when they make their applications for international protection. Clearly there is a gap here. But even so, this does not mean that the individual will actually get reception conditions within 15 days, as the problem is 15 days after what event. Many Member States divide their application process into two stages – a registration stage where the individual's personal details and information of travel routes are taken, followed by an application stage where the individual provides all details about the claim for protection. The question then arises, when does the Member States' duty to provide reception conditions apply? According to the logic of the CJEU judgment *CIMADE*,[174] as Member States are required to provide reception conditions, including to applicants subject to a Dublin procedure, where there will never be a substantive application, the correct time should be the registration point. This is also supported by the decision in *Saciri*,[175] where the CJEU interpreting the first phase instrument held that reception conditions must be provided from the time the asylum application is made.

Paragraph 58 GCR pertains specifically to registration. The GCR emphasises the need for registration and identification of refugees to facilitate access to basic assistance and protection. In the EURCD, this is reflected in registration procedures which are the key to accessing reception conditions. The Directive's ambiguity mentioned above as regards the state duty to provide reception from the time of registration is clarified here. The GCR requires immediate reception conditions for applicants. While the Directive allows Member States to choose how to deliver reception conditions and a 15-day period for informing applicants about reception providers, the GCR promotes immediate access to reception conditions and evidences states' commitment to scale up capacity in the face of increased numbers of arrivals. The GCR's insistence on immediate access to reception conditions is thus valuable as it supports the argument that they must be available from registration, not from submission of the full claim.

[174] C-179/11, *Cimade and GISTI* (CJEU, 27 September 2012).
[175] *Saciri* (n 67).

The GCM also provides guidance on the need for certainty and predictability for migrants in screening, assessment and referral processes (Objective 12). Among the most important recommendations are to improve transparency and accessibility for applicants within the systems. Inadequacies in the predictability and transparency of asylum systems have devastating effects on applicants as academic researchers highlight in the context of Greece.[176] Predictability requires that the reception conditions are available from registration. As the delay between registration and an appointment to submit a full application is outside the applicant's control, the later date offends this GCM principle.

The Covid-19 pandemic has not helped. As EASO has noted, '[i]n many countries, the national authorities announced the general closure of their facilities to the public or restricted public access without prior notification'.[177] This meant that even those who do not require support to register their claims were unable to register them. A severe reduction in services left applicants without reception conditions even where complete closure did not happen. For instance, registration was suspended in France except for exceptional cases or vulnerable people who were identified via an on-line platform of the ministry.[178] It is not evident how such a system would be able to operate bearing in mind that persons with exceptional cases may also need assistance with translation and from those with advanced technical skills.

3.3.2 Security and Safety

Paragraphs 56-57 GCR focus on safety and security. Timely protection, sensitive security and health assessments of new arrivals are singled out to be supported by the international community with a commitment to strengthen international efforts to prevent and combat sexual and gender-based violence, trafficking and smuggling in persons, promote access to justice, and enable the identification and separation of fighters and combatants at border entry points, as well as assistance for minors formerly associated with armed groups. The question of border procedures is not dealt with in the EURCD,[179] nor are EU measures to support victims of trafficking. The Directive does permit medical screening, though this is not mandatory (Article 13). As regards security in accommodation centres, the Directive permits Member States to determine sanctions for serious breaches of centres' rules (Article 20(4)).

Article 20 of the Directive sets out the reasons for the reduction or withdrawal of reception conditions, including on the ground of excluding persons putting the security of others at risk. The withdrawal of conditions for serious violent behaviour may, however, be a misplaced punishment for action that should be dealt with in the criminal justice system, not the asylum reception conditions venue of administrative law. The provision finishes with an obligation on Member States

[176] Pia Juul Bjertrup, Malika Bouhenia, Philippe Mayaud, Clément Perrin, Jihane Ben Farhat and Karl Blanchet, 'A Life in Waiting: Refugees' Mental Health and Narratives of Social Suffering after European Union Border Closures in March 2016' (2018) 215 Social Science & Medicine 53.
[177] EASO, 'COVID-19 Emergency Measures in Asylum and Reception Systems' (2 June 2020) <www.easo.europa.eu/sites/default/files/covid19-emergency-measures-asylum-reception-systems.pdf> (accessed 8 September 2021).
[178] Asile en France, 'Structure du Premier Accueil des Demandeurs d'Asile (SPADA) en Ile De France' <https://asile-en-france.com/index.php?option=com_content&view=category&id=17&Itemid=171> (accessed 8 September 2021).
[179] See chapter on the EUAPD.

that any reduction or withdrawal of reception conditions must not result in the applicant no longer having access to health care. The Member State must ensure that the applicant continues to have a dignified standard of living. One Member State, however, used Article 20 to deprive applicants of material reception conditions with the effect of depriving them of their most basic needs. This came before the CJEU, which interpreted the EURCD as requiring respect for human dignity in all cases. An applicant can never lawfully be deprived of the means to meet basic needs.[180] The applicant must always have access to housing, food, and health care, as needed. Other grounds for withdrawal of reception conditions, including leaving a place of residence, failure to report when required, making a subsequent application or failing to make an application in time, also risk inconsistency with GCM Objective 12 and the GCR's paragraph 58. To be consistent with the GCR and GCM, no ground for the withdrawal of reception conditions should result in the applicant being rendered destitute. Further, some of these grounds may be at variance with GCM Objective 12 where they are arbitrary or inadequately grounded. As apparent from the Opinion of the UN Committee against Enforced Disappearances[181] inadequate refugee determination systems result in applicants being forced to make subsequent applications in order to present new evidence. It is unjust that this necessity should jeopardise the individual's reception conditions.

3.3.3 Including Civil Society

In paragraphs 64-80, the GCR addresses reception needs from an inclusive societal perspective. It reaffirms the need to include local populations in development strategies and ensure that they, too, benefit from humanitarian action which includes refugees. The inclusion of local populations in the provision of reception conditions is reflected in the EURCD by the inclusion of references to organisations or groups which provide legal assistance and/or available reception conditions, including healthcare; however, this approach is very much incidental (Article 5(1) 2nd indent). Civil society in the Directive is designated exclusively as a provider of reception conditions and services, not as a co-participant also benefiting from improvements in conditions of access to public goods. A better approach for implementation of the Directive, which would also promote the GCR peaceful coexistence objective, would be to use opportunities to improve public services for all. This would also assist in combatting discrimination against applicants, too often perceived as competitors with local communities in access to public services. States committed to implementing the GCM in partnership with civil society, migrant and diaspora organisations, faith-based organisations, local authorities and communities, the private sector, trade unions, parliamentarians, National Human Rights Institutions, academia, the media and other relevant stakeholders. However, a number of EU Member States have used the EU Facilitation Directive[182] to justify harassment and prosecution of civil society actors providing reception conditions to applicants.[183] These practices are inconsistent with both the GCR and GCM.

[180] *Haqbin* (n 169).

[181] *ELA v France*, UN doc CED/C/19/D/3/2019 (Committee on Enforced Disappearances, 25 September 2020).

[182] Council Directive 2002/90/EC of 28 November 2002 Defining the Facilitation of Unauthorised Entry, Transit and Residence (2002) OJ L 328.

[183] Fekete (n 126); Giulia Borri and Elena Fontanari, 'Introduction: Civil Society on the Edge: Actions in Support and Against Refugees in Italy and Germany' (2017) 3 Mondi Migranti 23; Jennifer Allsopp, Lina Vosyliūtė, and Stephanie Brenda Smialowski, 'Picking "Low-hanging Fruit" while the Orchard Burns: The Costs of Policing Humanitarian Actors in Italy and Greece as a Strategy to Prevent Migrant Smuggling' (2021) 27(1) European Journal on Criminal Policy and Research 65.

3.3.4 Education

Paragraph 68 GCR addresses education, committing the international community to provide resources to ensure access for refugee and host community children and youth to primary, secondary and tertiary education. The objective is educational access for refugee children at least three months after arrival. 'Safe schools', flexible certified learning programmes and recognition of equivalency of academic, professional and vocational qualification is the object of support.

Article 14 of the EURCD provides a right for minors (either family members of applicants or applicants themselves) to education. In the Directive, minors are defined as persons under the age of 18 (Article 2(d)). The GCR recommends wide access to education to include adolescents (who may be over the age of 18) and youth, which is a broader term than minor. It further specifies access to primary, secondary and tertiary education – the last of which will mainly be available to young people over 18. While the Directive states that secondary education should not be withdrawn for the sole reason that the minor has reached the age of majority (Article 14(1) indent 3), no mention is made of tertiary education. Indeed, the prohibition of withdrawal of secondary education to the over 18s gives the impression that no education is required to be offered to that category. Paragraph 71 of the GCR includes access to vocational training as an objective. But Article 16 of the Directive only states that Member States may allow applicants to have access to vocational training, irrespective of whether they have access to the labour market. To give the EURCD a GCR-consistent application, Member States should extend access to education for applicants beyond the age of 18, including access to tertiary education and vocational training. In its 2020 Report, EASO noted numerous problems on the ground with the provision of education, from lack of knowledge by public officials that applicant children and youth are entitled to education to problematic curricula.[184]

Both the GCR and the EURCD require that education be provided within three months, but the start date to count those three months differs. For the GCR, it is arrival on the territory, but for the Directive it is the date of application. These may not be the same dates since some applicants do not make their claims until a substantial period after arrival. Indeed, some applicants may have fallen into an irregular status (such as overstayers) before making their applications. Here, assistance can be sought from the GCM Objective 15, paragraph 31(f), which calls on states to provide inclusive and equitable quality education to migrant children and youth and non-discriminatory access to formal schooling. Similarly, the GCR states that '[s]upport will be provided for the development and implementation of national education sector plans that include refugees' (paragraph 69). '[I]nclusive education' means the inclusion of refugee children in local schools alongside children of the host community. This is not consistent with education provided in accommodation centres and hence exclusively limited to children of applicants or children who are applicants themselves. The lack of contact with children in the host community, which such provision of separate education entails, runs counter to the objective of the GCR that educational capacity is enhanced to accommodate host and refugee community children. The GCR calls for special attention to access and delivery of education to refugees on the basis of specific needs. It draws attention, in particular, to girls and persons with disabilities and psychosocial trauma. There is no similar provision in the EURCD, but Member States are not hindered from providing the additional services as recommended by the GCR. Meanwhile, EASO reports that schooling provided in a Hungarian children's home for unaccompanied minors by an NGO was discontinued, according to the authorities, because of low numbers.[185]

[184] EASO, 'Asylum Report 2020' (n 113) s 7.12.9: Access to Education.
[185] ibid.

3.3.5 Jobs and Livelihoods

GCR paragraphs 70 and 71 address jobs and livelihoods. The objective is to promote economic opportunities, decent work, job creation and entrepreneurship for host communities and refugees, including women, young adults, older persons and persons with disabilities. The requirement is to identify employment creation and income generation, map and recognise skills and qualifications among refugees and strengthen these skills through training. Language and vocational training are specifically addressed. Closing technology gaps and building capacities are highlighted. The GCR calls for wide access to economic opportunities. This is not limited to jobs but also entrepreneurship and focuses on decent work.

Article 15 of the EURCD deals with employment. It provides that Member States should provide labour market access to applicants no later than 9 months after the lodging of their applications (so long as a first instance decision has not been taken and the delay is not the applicant's fault). The conditions for access to the labour market are left to Member States but access must be effective. Member States are free to apply EU national and legally resident third-country national priority to jobs. Labour market access should not be withdrawn during appeal procedures. Unlike the Directive, which seems rather grudgingly to allow applicants the possibility to work, the GCR promotes economic activities for refugees as a benefit for both the refugees themselves and the host community. According to EASO, the grudging approach of the Directive is mirrored in national legislation. Their 2020 report on access to employment specifies there is nothing for applicants at all and very little for beneficiaries of international protection as regards assistance in finding employment and improving employability.[186] To apply the GCR commitments in this regard more fully, Member States should take an inclusive approach to the implementation of Article 15, ensuring that applicants have access to job centres, assistance to find jobs and establish businesses and generally encourage applicants to become economically active.

3.3.6 Health Care

The next subject addressed is health care in the GCR paragraphs 72-73. It calls for expanding and enhancing national health systems with facilitated access for refugees. The inclusion of refugees in the provision of health care through training is supported. Additionally, disease prevention, immunisation services and health promotion activities are included, as well as equitable access to adequate quantities of medicines, medical supplies, vaccines, diagnostics and preventive commodities.

The EURCD's Articles 17 and 19 cover access to health care. The necessary adequate standard of living for applicants must guarantee their subsistence and protect their physical and mental health (Article 17(2)). While access to reception conditions, including health care, can be made subject to a means test, it must be provided where the applicant has insufficient resources to pay. Article 19 provides that Member States must ensure that applicants receive necessary health care. This shall include at least emergency care and essential treatment of illnesses and of serious mental disorders. Further, States are required to provide necessary medical or other assistance to applicants who have special reception needs, including appropriate mental health care where needed. Thus, the GCR has a much wider scope regarding access to health care than the Directive. In addition to general health care provision, the GCR requires provision for groups such as women

[186] ibid s 7.12.8: Access to Employment.

and girls, children, adolescents and youth, older persons, those with chronic illnesses including TB and HIV, survivors of trafficking, torture, trauma and violence, including sexual and gender-based violence and persons with disabilities and disease prevention. The Directive does not define what is 'necessary,' leaving it to Member States to decide what, in their opinion, is necessary health care for applicants. To correctly implement the EURCD in a manner consistent with the GCR, states need to interpret 'necessary' health care as that which is consistent with the GCR standard. Examples where such an approach would result in better treatment of applicants include in Greece, where once an applicant gets into the system, they receive a special health care number, but this expires 30 days after a positive decision, leaving the individual without health care.[187] In Croatia, the complexity of the documentation for health care creates problems of coverage even for those who already recognised as beneficiaries of international protection.[188]

3.3.7 Gender and Vulnerability

Women, girls, adolescents and youth are the subject of GCR paragraphs 74-77. The GCR acknowledges the need to address gender-based barriers for refugee women and girls with the objective being equal access to services and opportunities. Enhancing meaningful participation of women and girls in leadership and strengthened access to justice to ensure the security and safety of women and girls is set out as an important objective. The GCR notes that children make up more than half of the world's refugees, and that they have specific needs and vulnerabilities. In particular, addressing these groups' mental health and psychosocial needs is essential and needs to be supported.

Article 21 of the EURCD requires Member States to take into account the specific situation of vulnerable persons, including pregnant women. This is the only reference to women in the Directive. Other groups referenced are minors, unaccompanied minors, disabled people, older persons, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation.

There are two provisions on minors; the only other group with specific obligations is victims of torture (Article 25). Member States are required to ensure that these persons receive necessary medical treatment for the damage caused, in particular, access to appropriate medical and psychological treatment or care. The GCR has more comprehensive provisions, specifically regarding health care and treatment. It also has specific commitments to women and girls which go beyond health care and include access to justice for acts of violence against them. The GCR also calls for special attention to be paid to children, adolescents and youth generally and their mental health. Member States should take the wider GCR commitments as the standard for implementing Articles 21-25 of the EURCD.

3.3.8 Accommodation and Food

In paragraphs 78 – 81, the GCR addresses the issues of accommodation and food security. Accommodation is placed in the context of natural resource management. Access must be

[187] ibid s 4.14.4.6: Health Care.
[188] ibid.

facilitated to appropriate accommodation for refugees—this includes access to water, sanitation and hygiene. Refugees must have access to sufficient, safe and nutritious food with the promotion of self-reliance in food security and nutrition. All appropriate means to deliver food security should be used, including the use of cash-based transfers or social protection systems (including school feeding programmes). Sensitivity to cultural and religious practices is promoted. The GCM also includes Objective 15 on access to basic services for migrants, which includes avoiding discrimination and ensuring safe access to services, including health care and education.

Article 18 of the EURCD sets out extensive provisions on housing – how it should be supplied, the assurance of family life and safety where it is provided in reception centres. Food, clothing and a daily expenses allowance are covered in Article 2(g) as the components of reception conditions. In the GCR, accommodation and food security are covered more extensively in paragraphs 78-81. While the definition of accommodation may seem self-evident, some of the reception centres in the EU, such as that on the Greek island of Lesvos have yet to provide this.[189] Greek authorities' shortcomings are exceptional regarding the terrible conditions, but not from the perspective of sufficiency of accommodation places. According to ECRE, there are enormous problems in finding accommodation as an applicant in France and Spain.[190] In France, according to the 2020 report, first applicants numbered 111,415, while accommodation capacity could house only 86,592 persons. Those unable to find reception accommodation end up living on the streets and seeking shelter where they can find it.

In some Member States, the financial allowances provided to allow applicants to find housing in the private sector are insufficient for them to rent accommodation which meets GCR standards.[191] Member States should apply the GCR standard of accommodation to all situations where applicants are entitled to reception conditions. Similarly, there is no specification about food or clothing in the EURCD. Where Member States provide financial allowances, the amount must be sufficient for the family to ensure a dignified standard of living adequate for the health of the applicants. It must also be capable of ensuring their subsistence and enabling them, in particular, to find housing, including for minor children, to be housed with their parents in order to maintain family unity.[192] The level of assistance for applicants can vary dramatically from one Member State to another, not only as regards the average standard of living but also what the authorities have determined is sufficient for applicants. Frequently this is substantially below the national minimum support for the poor. However, discrimination between applicants and nationals is expressly authorised by Recital 24. While Member States must determine the level of support on the basis of relevant references, these are not specified. Instead, the Recital specifically states that the amount granted does not need to be the same as for nationals. The legal argument here is that the situation of applicants and nationals of the state is such that differential treatment does not constitute discrimination as the groups are not comparable. The GCR takes an entirely different approach. Access to appropriate accommodation is to be delivered both to refugees and host communities (paragraph 78). The

[189] Oxfam, 'Conditions in "Moria 2.0" Camp are Abysmal, say GCR and Oxfam' (21 October 2020) <www.oxfam.org/en/press-releases/conditions-moria-20-camp-are-abysmal-say-gcr-and-oxfam> (accessed 20 November 2021); Rachel Donadio, 'Welcome to Europe. Now Go Home.' (The Atlantic, 15 November 2019) <www.theatlantic.com/international/archive/2019/11/greeces-moria-refugee-camp-a-european-failure/601132/> (accessed 20 November 2021).

[190] ECRE, 'Housing out of Reach? The Reception of Refugees and Asylum Seekers in Europe' (April 2019) <https://asylumineurope.org/wp-content/uploads/2020/11/aida_housing_out_of_reach.pdf> (accessed 9 September 2021).

[191] European Parliament, 'Report on Refugees: Social Inclusion and Integration into the Labour Market' (2015/2321(INI)) <www.europarl.europa.eu/doceo/document/A-8-2016-0204_EN.html> (accessed 20 November 2021).

[192] *Saciri* (n 67).

purpose is to promote integration and sustainable management of natural resources. Treating applicants and host communities equally as regards accommodation to achieve integration is a strategy which will also promote the objective of peaceful coexistence and combating discrimination. Member States should implement the EURCD accordingly. The approach of the GCR should inform Member States as to the level of financial allowances they should make available for applicants; where applicants are housed in reception centres, GCR should inform the quality of provision which is made available to them. Similarly, the GCR's recommendation for the accommodation of cultural and religious practices, including in the area of nutrition, should be taken into account.

3.4. Conclusions

A comparison of the EURCD with the GCR and GCM reveals that there is much Member States should do to implement the Directive in a manner which is consistent with the GCs. There are two main categories of problems in respect of reception conditions. The first and most straightforward (though also the most damaging for applicants) is where Member States simply fail to deliver even the most basic of services and fall well below the standards required by the Directive. These failings should be resolved in two ways. First, the EU needs to ensure that those Member States with reception conditions inadequacies receive sufficient EU financial support to remedy the failure. Effective solidarity measures need to be implemented. Where reception conditions failures result from a lack of political will to improve them (not financial constraints), or even a deliberate deterrence strategy, the European Commission must put pressure on those Member States to improve their compliance. The second category is where the GCR and GCM recommend higher standards than those in the Directive on the basis of international law and internationally adopted instruments to provide clarification in respect of the legal standards. In these cases, the Member States should improve their reception conditions to fulfil both the minimum standards of the Directive and the more generous recommendations of the GCs. The GCR approach of aggregating refugee and host community needs to achieve improvements to living conditions for everyone has many advantages. Implementing such an approach will assist Member States to diminish and abolish differences of treatment in access to basic services between applicants and host communities.

4. Qualification Directive 2011/95

4.1 Introduction

Council Directive 2011/95/EU is a central pillar of the CEAS. This Directive amended Directive 2004/83/EC,[193] revising the title and developing the common policy and uniform status for refugees and those granted subsidiary protection,[194] while outlining the content of each form of protection.[195] The Qualification Directive (EUQD) was intended to harmonise the standards for defining an individual as a refugee and set out who qualifies for other forms of protection due to the serious risks they face on return to their country of origin (subsidiary protection).

The Directive seeks to ensure that persons fleeing persecution are consistently identified and given consistent levels of protection, regardless of the Member State where they lodge their asylum claim.[196] It is intended to provide a degree approximation across the Union.[197] The hope was that this would result in common levels of protection for refugees and those in need of subsidiary protection whilst reducing secondary movements of applicants between Member States.[198] However, there remain many problems in interpreting the EUQD's provisions across the Union.[199]

For example, in the *Elgafaji* case, Mr and Mrs Elgafaji had appealed the decision to deny their application for temporary residence permits despite the risks they faced if they were returned to Iraq due to Mr Elgafaji's work providing security to personnel transport.[200] On appeal, the Raad van State (Council of State) held that there were difficulties in interpreting the Directive's provisions. Staying proceedings, it referred to the CJEU for a preliminary ruling the question of the extent of protection under Article 15(c) of Council Directive 2004/83/EC which covers a 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'. The Court held that protection under Article 15(c) must be

[193] Council Directive 2004/83/EC of 29 April 2004 on the minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304/12 (2004 Qualification Directive).
[194] EUQD (n 5); See Steve Peers, Violeta Moreno-Lax, Madeline Garlick and Elspeth Guild (eds) *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition: Volume 3: EU Asylum Law* (Brill 2015) 66.
[195] EUQD (n 5) Recitals 12 and 49, and Article 1.
[196] See for general discussion, see ECRE, 'Information Note on the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011' (2013) <www.ecre.org/wp-content/uploads/2016/07/ECRE-Information-Note-on-the-Qualification-Directive-recast_October-2013.pdf> (accessed 20 November 2021); See also ECRE, 'The Impact of the EU Qualification Directive on International Protection' (2008) <www.ecre.org/wp-content/uploads/2016/07/ECRE-The-Impact-of-the-EU-Qualification-Directive-on-International-Protection_October-2008.pdf> (accessed 20 November 2021).
[197] EUQD (n 5) Recital 10; see also European Commission, 'Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted' COM (2009) 551 <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0551:FIN:EN:PDF> (accessed 22 November 2021) 6.
[198] EUQD (n 5) Recital 13; See C-364/11, *El Kott* (CJEU, 19 December 2012) paras 66-67: the EUQD governs two distinct forms of protection, refugee status first and secondly subsidiary protection; see also C-604/12, *H.N. v Minister for Justice, Equality and Law Reform and Others (CJEU, 8 May 2014)* para 30: pre-eminence of refugee status.
[199] ECRE, Information Note (n 196).
[200] C-465/07, *Elgafaji* (CJEU, 17 February 2009).

forthcoming where there is a high level of indiscriminate violence during an international or internal armed conflict, which an individual would be exposed to merely by virtue of being present in the territory and irrespective of personal circumstances, but that such personal circumstances increase risk where the level of generalised violence is low.[201] Since key concepts of Article 15(c) have been interpreted differently by different Member States,[202] the CJEU's judgement in *Elgafaji* provided some clarification on the scope of this particular EUQD provision. Generally, the Court's case law ensures more consistent practice across the Union.

With the problem of diverging interpretations of EU asylum law by different Member States in mind, the commitments made by the EU and its Member States in adopting the Compacts marked a pivotal moment in the interpretation and implementation of the EUQD. In particular, the GCR promotes the need to avoid protection gaps between those recognised as refugees and those who qualify for subsidiary protection (see paras 61-3 GCR). The expansive interpretations of who is in need of protection promoted by the Compacts should be widely accepted and utilised when applying the EUQD. Further, the GCR highlights the need for exclusion clauses, another problematic area of the EUQD, to be applied in line with international law obligations on exclusion from refugee protection, *non-refoulement* and the prohibition of torture (in para 5 of the guiding principles), as does the GCM under Objective 21. These provisions are a safety net for people seeking protection that must be considered when excluding an individual from protection and ultimately returning that person. In addition, the GCM highlights that the broader access to rights must be subject to principles of non-discrimination and non-regression, regardless of migratory status (including basic services in Objective 15) and the key role of the right to family reunification found in Objective 5 GCM.

The present chapter identifies areas of convergence and divergence between the commitments in the Compacts and the EUQD to outline how the Compacts can support the implementation of EU asylum law and, in particular, ensure consistent standards for identifying those in need of protection and the content of that protection. The chapter is divided into two thematic sections; the first focuses on who qualifies for protection and the second on what rights those granted protection can access. It highlights areas of controversy in the application of the EUQD and how the Compacts can clarify the content of Member States' obligations vis-à-vis applicants for international protection.

4.2. Who Qualifies for Protection

4.2.1 General Outline of the Directive

The CSR51 provides the cornerstone for the CEAS and the EUQD, particularly regarding who qualifies as a refugee under Article 2 EUQD.[203] As a result, EU measures on asylum must be in accordance with the CSR51 so that the criteria the Directive introduces for the recognition of

[201] ibid paras 39-44.

[202] ECRE, Information note (n 196).

[203] EUQD (n 5) Recitals 3 and 4; TFEU (n 32) Article 78(1); see also cases C-175/08, *Abdulla* (CJEU, 2 March 2010) paras 515-3; C-31/09, *Bolbol* (CJEU, 17 June 2010) paras 36-37; C-199/12, C 200/12 and C 201/12, *X, Y and Z* (CJEU, 7 November 2013) paras 39-40; see also EUQD (n 5) Recital 16 on respecting Article 18 EUCFR (n 40): 'The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union'.

refugees have been adopted in line with Article 1 of the CSR51.[204] The CEAS is intended to guide Member States in applying the CSR51.[205]

Articles 2(f) and 15 introduce harmonised criteria and status for subsidiary protection that are complementary to, not a substitute for, refugee status.[206] Subsidiary protection is inspired by international and human rights law protections.[207] Article 2(f) defines subsidiary protection for third-country nationals who do not qualify for asylum but for whom there are substantial grounds for believing that they face a 'real risk of suffering serious harm' as defined in Article 15. 'Real risk' is the standard of proof required for eligibility for subsidiary protection and this must be more than merely linked to the general situation in the country unless the indiscriminate violence is of a particularly high level.[208] Article 15 defines three specific types of harm which are sufficiently serious to qualify for subsidiary protection, including the death penalty (15(a))[209] and torture or inhumane treatment (15(b))[210]. These grounds align with existing protections from *refoulement* as elucidated under existing international law.[211] However, 15(c) expands these grounds to a *new non-refoulement* ground. 15(c) requires a threat of harm, not necessarily suffering a specific act of violence.[212] This threat must derive from a level of violence, usually an armed conflict.[213] Indiscriminate means irrespective of personal circumstances and encompasses 'acts of violence not targeted at a specific object or individual, as well as acts of violence which are targeted at specific groups but the effects of which may harm others'.[214] Whether the risk should be general or specific is applied on a 'sliding scale: the more specific the threat the lower the level of violence; conversely the level of violence needs to be very high if it is very generalised'.[215]

In addition to defining 'person eligible for subsidiary protection' in subparagraph (f), Article 2 also defines other key terms of the EUQD. After introducing a provision on more favourable standards in Article 3, the EUQD moves on to Chapter II, which deals with the assessment of applications for international protection. Article 4 governs the assessment of the facts and circumstances underlying these applications. It outlines the facts and evidence that should be considered on an

[204] EUQD (n 5) Recital 24.
[205] ibid Recital 23.
[206] ibid Recital 33.
[207] Including Article 3 and Protocols 6 and 13 ECHR (n 26); Article 3 CAT (n 16); Article 7 ICCPR (n 13).
[208] *Elgafaji* (n 200) paras 35, 37 and 43; See also C-285/12, *Diakite* (CJEU, 30 January 2014) para 30: indiscriminate violence 'reaches such a high level that the civilian, if returned, would face a real risk of being subject to that threat;' C-71/11 and C-99/11, *Z and Y* (CJEU, 5 September 2012) para 80 outlines the 'real risk' test; para 76: authorities must 'ascertain whether or not the circumstances established constitute such a threat that they fear acts of persecution; (para 74) should not consider whether they can avoid persecution by concealing the reason for the persecution'.
[209] ECHR (n 26) Article 2.
[210] ibid Article 3; ICCPR (n 13) Article 7; *Sufi and Elmi v The United Kingdom*, App Nos 28 June 2011 (ECtHR, 28 June 2011) para 30.
[211] CAT (n 16) Article 3 CAT; General comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22.
[212] *Elgafaji* (n 200) para 32-34
[213] *Diakite* (n 208) para 35.
[214] UNHCR, 'Safe at Last? Law and Practise in Selected EU Member States with Respect to Asylum Seekers Fleeing Indiscriminate Violence' (2011) <www.unhcr.org/4e2d7f029.pdf> (accessed 20 November 2021) 103.
[215] *Elgafaji* (n 200) para 39; *Diakite* (n 208) para 31; Evangelia (Lilian) Tsourdi, 'What Protection for Persons Fleeing Indiscriminate Violence? The Impact of the European Courts on the EU Subsidiary Protection Regime' in David James Cantor and Jean-François Durieux (eds) *Refuge from Inhumanity?: War Refugees and International Humanitarian Law* (Brill Nijhoff 2014) 277.

objective, impartial and individual basis (Article 4(3)).[216] Article 4(4) includes a presumption that past persecution may be repeated in the future. Failure to produce documentation need not affect the decision so long as applicant credibility is established under Article 4(5).[217] Lack of documentation should not lead to the rejection of an application if applicants have made a genuine effort. The case of *MM* demonstrates that the Member State must work with the applicant so that all elements needed to substantiate the claim are assembled.[218]

Article 5 deals with international protection needs arising *sur place*, thus clarifying that an applicant for international protection need not have left his or her country of origin due to a fear of being persecuted or suffering serious harm.[219] Article 5 further explains that a *sur place* claim may be based on the applicant's activities after leaving the country of origin; however, where the applicant submits a subsequent application based on such actions, the EUQD specifies that Member States should not normally grant that applicant refugee status.

Articles 6 and 7 deal with actors of persecution and protection, respectively. There is a parallel between Articles 6 and 7 in that not only states but other actors may be considered actors of persecution or serious harm, as well as actors of protection. In Article 6, the Directive maintains that non-state actors can be agents of persecution if it can be shown that the state is unable or unwilling to provide protection. This aligns with the protection theory whereby persecution does not have to emanate from the state; where persecution emanates from non-state actors, the question is whether the state can protect the individual.[220] Actors of protection must have considerable control of the state or a substantial part of the territory if they are not an international organisation under Article 7.[221] Protection must be effective and of a non-temporary nature, and the parties providing protection must be willing and able to do so.[222] There is no equivalent of this provision in international law. This is an EU-specific notion that has caused substantial problems in assessing the availability of non-state actor protection.

Article 8 permits Member States to reject applications if it can be shown that in part of the country of origin, there is no real risk of suffering serious harm or being persecuted so long as the applicant

[216] See for example: *Z and Y* (n 208) para 70: the application should be substantiated on both objective and subjective grounds; *Abdulla* (n 203) para 90: assessments of risk of persecution must be carried out with vigilance as what is at issue is the integrity of the person and their fundamental liberties.
[217] *Salah Sheekh v The Netherlands* App No 1948/04 (ECtHR, 11 January 2007) para 148*:* Necessary to give applicants for international protection the benefit of the doubt when assessing credibility of statements etc, due to their circumstances.
[218] C-277/11, *MM* (CJEU, 22 November 2012) paras 65-66: Member States have a duty to cooperate actively with the applicant at the stage of determining the relevant elements of the application where refugee status determination and subsidiary protection are examined separately. The CJEU held that the obligation to cooperate under Article 4(1) of the Qualification Directive cannot be interpreted in that way but in such a separate system the fundamental rights of the Applicant must be respected and in particular the principle of the right to be heard.
[219] UNHCR Handbook (n 160) para 94.
[220] ibid para 65; *D v UK* App No 30240/96 (ECtHR, 2 May 1997) para 49 ; *Sufi and Elmi* (n 210) para 212 ; *Abdulla* (n 203) para 70-73: focus on stability of protection by actors in the country of origin to alleviate the need for international protection; para 71: look to conditions and operations of institutions, authorities and security etc that may be responsible for acts of persecution and extent to which human rights are guaranteed.
[221] European Commission, COM (2009) 551 (n 197) 26; EUQD (n 5) Recital 26.
[222] EUQD ibid.

can 'reasonably' be expected to stay there.[223] Where there is a finding of indiscriminate violence under 15(b) or 15(c), internal protection must be unavailable.[224] To establish if protection against serious harm is available in another part of the country, an examination of the nature of that protection is necessary such that authorities must look to the source of the protection, its effectiveness and durability under Article 7.[225]

Articles 9 and 10 outline important aspects for qualification as a refugee. The focus of Article 9 is on when a severe violation of basic human rights will amount to an act of persecution but is focused on the non-derogable rights under the ECHR, potentially limiting application at the regional level.[226] Instead, the CJEU looks to the severity of the human rights violation.[227] The violation must amount to an afront to human dignity with a well-founded fear of serious harm ensuing therefrom.[228] Article 10 requires that the acts of persecution, or failure to provide protection, must be linked to one of the five CSR51 grounds race, religion, nationality, political opinion and membership of a particular social group.[229]

Cessation of refugee status is discussed under Article 11, which applies where there is voluntary re-availment of nationality or protection from the home country (or a new state of nationality) or an objective change in circumstances occurs in the country of origin, such that refugee status is lost. There is a subjective aspect to this Article, i.e. the individual must be willing and able to access protection from a state, rendering international protection unnecessary. The available protection must be significant and non-temporary, and the factors upon which the fear of persecution was founded must have been eradicated.[230] Similarly, under Article 16, subsidiary protection ceases once the circumstances that motivated the real risk of serious harm no longer exist or have changed to such a degree that protection is no longer required. There is no requirement that individuals re-avail themselves of protection of the country of origin. The change must be significant and non-temporary.[231] Both Article 11 and 16 have a 'compelling reasons' provision as an exemption from cessation such that individuals can refuse to avail themselves of the protection of the country of origin.[232]

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[223] *Salah Sheekh* (n 217) para 141: availability of internal protection when the person is able to settle there, including economic survival; *Sufi and Elmi* (n 210): internal protection through internal relocation or IDP camps requires individualised assessments of whether the individual can cater for their basic needs: food, hygiene, shelter.

[224] UNHCR, 'Safe at Last' (n 214).

[225] EASO, 'Article 15(c) Qualification Directive (2011/95/EU): A Judicial Analysis' (December 2014) <www.easo.europa.eu/sites/default/files/public/Article-15c-Qualification-Directive-201195EU-A-judicial-analysis.pdf> (accessed 20 November 2021).

[226] See *Othman (Abu Qatada) v The United* Kingdom App No 8139/09 (ECtHR, 17 January 2012).

[227] ibid.

[228] Peers *et al* (n 194) 108.

[229] CSR51 (n 18) Article 1(A)(2).

[230] *Abdulla* (n 203) para 73: 'factors which formed the basis of the fear of persecution may be regarded as being permanently eradicated' requires a significant and non-temporary change in circumstances ; paras 65-66: there must be a causal connection between the change in circumstance and the impossibility for the person concerned continuing to refuse to reclaim the protection of their own state; See also C-255/19, *Secretary of State for the Home Department v OA* (CJEU, 20 January 2021), which held that in the context of cessation of refugee status under Article 11 (1)(e), the change in circumstances must remedy the reasons which led to the recognition of refugee status; a country of origin's ability or inability to demonstrate that it can provide protection from acts of persecution constitutes a crucial element' in this assessment.

[231] Such that *Abdulla* (n 203) applies; see Peers *et al* (n 194) 149.

[232] Arts 11(3) and 16(3).

The exclusion clauses in Article 12 set out when a person will be refused refugee status. These make explicit reference to Article 1(D) CSR51 (EUQD Article 12(1)(a), regarding protection from other UN agencies (in particular UNRWA); to the circumstances outlined in Article 1E CSR51 (EUQD Article 12(1)(b), regarding those who have the nationality of that country, albeit without formal citizenship); and to Article 1F CSR51 (EUQD Article 12(2) and (3), regarding exclusion on criminal grounds).[233] Article 12(2) EUQD covers serious international crimes,[234] serious non-political crimes, and acts contrary to the principles of the UN Charter, committed before the time of issuing a residence permit based on the grant of refugee status. The CJEU has held that these provisions must be narrowly construed.[235] Article 17 applies to subsidiary protection and provides a mandatory exclusion clause for those who have committed a war crime or crime against peace or humanity, a serious crime, or acted contrary to UN principles.

Article 14 outlines when Member States must revoke or refuse to renew refugee status where the person ceases to qualify as a refugee in accordance with Article 11 or when they should be excluded under Article 12. Article 14(3) applies to situations where refugee status was obtained erroneously. Article 14(4) sets out the circumstances when a refugee may be refused protection (or it may be revoked) if there are reasonable grounds for regarding the refugee as a danger to the security of the Member State or where he or she has been convicted of a serious crime. Similarly, Article 19 EUQD permits Member States to revoke or refuse renewal of subsidiary protection should conditions under Articles 16 or 17 arise or where applicants have misrepresented or omitted facts.

Article 21 upholds the prohibition of *refoulement*, but it is not set out in absolute terms. Where an individual is deemed to present a danger to the security of the state. Indeed, he or she may be returned, provided this is not prohibited by international law.[236] However, the scope of this article is limited by provisions under Article 4 and 19 of the EUCFR and international law,[237] such that it is effectively neutralised.[238] Article 21(3) permits revocation or non-issuance of a permit to a refugee covered by paragraph 2.

4.2.2. Specific Global Compact Commitments Relevant to the Qualification Directive

[233] The CSR51 (n 18) grounds for exclusion from refugee status under Article 1(F) are exhaustive criteria; CJEU - C-57/09 and C-101/09, *B and D* (CJEU, 9 November 2010) paras 87, 91-97 on the necessity to demonstrate individual responsibility in order for refugee status to be excluded or revoked. Not on membership of a group alone.

[234] As defined under international law, see for example, Rome Statute of the International Criminal Court 2187 UNTS 3.

[235] *Bolbol* (n 203) para 51): only those persons who have availed themselves of the assistance of UNRWA come within the clause excluding refugee status. Exclusion of Article 12(1)(a) EUQD must be construed narrowly. See also *El Kott* (n 198) paras 52-65 – what if they had availed themselves of the assistance? Only if forced out of area of operations or protection has ceased for some other reason. Exclusion clauses must be narrowly construed.

[236] EUQD (n 5) Article 21(2); See also EUCFR (n 40) Article 4: Prohibition of torture and inhuman or degrading treatment or punishment and Article 19: Protection in the event of removal, expulsion or extradition.

[237] CAT (n 16) Article 3 and ICCPR (n 13) Article; EUCFR (n 40) Article 19: Protection in the event of removal, expulsion or extradition.

[238] See TFEU (n 32) Article 78; *Abdulla* (n 203) paras 51-54; *B and D* (n 233) paras 76-8; *Bolbol* (n 203) paras 36-38.

The GCR ensures that the identification of those in need of protection and the provision of that protection is in line with the CSR51 and accompanying human rights instruments. It provides clear guidance on how these processes should operate and the content of rights such that states can operationalise their international legal commitments. The following will highlight the provisions relevant to the qualification for protection as set out in the Compact.

Paragraphs 52-63 set out reception and admission duties of states. Paragraph 58 outlines that 'registration and identification of refugees is key' to ensuring access to protection and the integrity of refugee protection systems.[239] It encourages stakeholders to work with States to strengthen national capacity to develop these systems and, in particular, to be able to respond to those in vulnerable positions, such as women and girls. Paragraphs 59-60 further develop how the system should ensure that protection is provided to those with specific needs, including women, children, survivors of torture, trauma, sexual exploitation, persons with disabilities or medical needs and older persons, without delay through the targeted provision of resources and expertise.

Paragraph 61 is particularly important to ensuring the EUQD complies with GCR commitments when identifying protection needs. It highlights that the processes for the determination of individual protection needs must be 'fair and efficient' and in accordance with applicable international obligations. The processes must 'avoid protection gaps and enable those in need of protection to access it'. Paragraph 61 outlines the need for states to ensure that policies and implementation avoid gaps in protection for those individuals that seek it within a state's territory.

Paragraph 62 further operationalises these commitments, highlighting the role of an 'Asylum Capacity Support Group' to provide technical expertise and support to national authorities to strengthen their asylum systems to improve 'fairness, efficiency, adaptability and integrity'. This support might include sharing good practice, including on case-processing, case management, interview techniques and capacity development. Consistency of these measures will improve protection gaps and ensure the fairness of systems.

Paragraph 63 identifies stakeholders' role in supporting measures to address other protection and humanitarian challenges. These include measures to assist those forcibly displaced by natural disasters, considering national laws and regional instruments as applicable, as well as practices such as temporary protection and humanitarian stay arrangements, where appropriate.

The Comprehensive Refugee Response Framework (CRRF) provides further guidance of relevance to the EUQD. This framework, which operationalises the commitments made within the GCR, sets out concrete steps states should take in responding to large movements of refugees. Paragraph 5 outlines that when large movements start, states need to ensure measures are in place to identify people in need of protection as quickly as possible. Furthermore, paragraph 13 looks to host states' capacities and obligations regarding durable solutions, requiring them to provide legal stay to those seeking and in need of international protection. However, it leaves questions of permanent stay within the host states' discretion.

Regarding the cessation, exclusion and revocation of protection, the GCR focuses primarily on the nature of return. It is founded in international law and explicitly mentions the pre-eminent place of the principle of *non-refoulement* in paragraph 5. Further, the CRRF highlights that steps should be taken to facilitate the return and readmission of those who do not qualify for refugee status (para 5(i)) and that return should occur in a 'safe, dignified and humane manner' and with full respect for human rights in accordance with international law (para 11(b)). However, in so far as the GCR

[239] See Reception Conditions chapter above.

outlines commitments vis-a-vis refugees, it has less detail on those individuals who have not been recognised as, or are deemed to no longer be, refugees.

As a result, it is crucial to turn to the GCM and the commitments set out therein. During the negotiations of the Compacts, UNHCR sought to preserve the role of the CSR51 and its remit over the protection from *refoulement*. As a result, by the final draft, any mention of *non-refoulement* had been removed from the GCM.[240] Instead, the GCM contains a specific objective on vulnerability, highlighting that those forced to move find themselves in positions of heightened vulnerability even if they do not fulfil the definition of a refugee.[241] This led to the concept of 'mixed flows' that includes 'vulnerable migrants' within the scope of both the GCM and the GCR.[242] UNHCR, whilst pushing for a concept of migrants in vulnerable situations, wanted to avoid a concept of 'mixed flows' entering into the Compacts as it blurs the line between refugees and migrants and could risk undermining international refugee law.[243] However, the GCM maintained the objective on vulnerability that preserves the protection of forced migrants beyond the confined scope of the GCR.

The GCM has three significant contributions to make in this regard. The first is in addressing vulnerabilities. Objective 7 focuses on addressing and reducing vulnerabilities in the context of migration, including those not yet recognised as, or no longer, refugees. It acknowledges that situations of vulnerability may take place everywhere (i.e. in countries of origin, transit or destination) and outlines a number of measures whereby states commit to responding to the needs of migrants in such circumstances by assisting them and protecting their human rights. States are invited to pay particular attention to specific categories of 'at-risk' migrants, such as children unaccompanied or separated from their families, victims of sexual and gender-based violence, and workers facing exploitation and abuse. The Objective commits states to respond to the needs of migrants through full protection of human rights.

Secondly, Objective 5, concerning the availability of legal pathways, makes an important contribution for those individuals compelled to leave due to 'compassionate, humanitarian or other considerations' (para g) as well as slow-onset natural disasters, adverse effects of climate change and environmental degradation (para h). Such individuals are likely to not fall under the protections of the CSR51 or that provided by subsidiary protection. However, the GCM identifies the increasing protection needs of this group, highlighting that states should develop national or regional practices and solutions, including through visa options and temporary work permits.

Thirdly, Objective 21 details how states should cooperate to facilitate safe and dignified return. It addresses the process of expulsion, which comprises three measures, notably return, readmission, and reintegration. Regarding return, states commit to facilitating safe and dignified return. They

[240] *Non-refoulement* was explicitly mentioned in Draft 2 but was removed by the final draft, see commentary on Objective 21 in Guild and Basaran (n 21).

[241] UNHCR, '"Migrants in Vulnerable Situations" UNHCR's Perspective' (June 2017) <www.refworld.org/docid/596787174.html> (accessed 20 November 2021); OHCHR,' Report on the Compendium of Principles, Good Practices and Policies on Safe, Orderly and Regular Migration in Line with International Human Rights Law (September 2017) <www.ohchr.org/EN/Issues/Migration/Pages/CompendiumOfPrinciples.aspx> (accessed 20 November 2021); see also Commentary on Objective 7 in Guild and Basaran (n 21).

[242] UN News, 'UNHCR Welcomes Agreement on Migration Compact (19 December 2018) <www.unhcr.org/news/press/2018/12/5c1a7d4e4/unhcr-welcomes-agreement-migration-compact.html> (accessed 20 November 2021).

[243] See Elspeth Guild and Kathryn Allinson, 'Making a Global Compact: The Objectives and Institutions of the Marrakesh Compact' in A Pecoud and H Thiollet (eds), *The Institutions of Global Migration Governance* (Edward Elgar Handbook, forthcoming) 13.

further commit to guaranteeing due process, an individual assessment, and an effective remedy by upholding the prohibition of collective expulsion and the prohibition of return to a risk of serious human rights violations. Under the readmission component, states commit to duly receive and readmit their nationals. Finally, the measures aimed at sustainable reintegration include personal safety, economic empowerment, inclusion, and social cohesion. The implementing actions emphasise gender-responsive and child-sensitive features of return, in line with the rights of the child and the child's best interests, and the right to family life and family unity (in the context of the return of children) as well as procedural guarantees.

4.2.3 Applying the EUQD Consistently with Member States' Commitments in the Compacts

The Compacts commit to ensuring consistent and equitable procedures for individuals when determining protection needs. In particular, they provide guidance on the processes that states have committed to having in place for accessing protection, the importance of avoiding gaps in protection, guidance on the treatment of people in vulnerable situations and ensuring a dignified return should individuals be denied protection. Both Compacts recognise that states' international protection obligations extend beyond the specific definition of a 'refugee'[244] and include people entitled to international protection based on the *non-refoulement* principle under human rights law. These obligations derive from the broader body of international refugee and human rights law that underpins, and should guide, the interpretation and application of the Compacts themselves. In so doing, the Compacts address issues within the EUQD regarding the consistency of assessment standards for people seeking protection, the treatment of people fleeing generalised violence and gaps in protection.

In the application of the EUQD, there is a need for consistency of application for identifying international protection needs that is more aligned with international law, in particular, regarding who is deemed to be an actor of persecution and an actor of protection (and how this is aligned to the act or reason for the persecution), what amounts to serious harm (and how one can qualify for subsidiary protection) and when internal protection is available. As a result of inconsistencies in application, there have been disparate recognition rates for refugees and those in need of subsidiary protection across Member States. As a result, there were calls for harmonisation of assessment standards across Member States to end these disparities in the granting of protection and the form of protection.[245]

The inconsistent application of the thresholds and processes for identifying international protection needs increases the potential for gaps in protection arising. The GCR gives Member States clear instructions on how the EUQD should be interpreted and the systems they should have in place to ensure the protection of those fleeing persecution and violence. Section 1.6 of the GCR on 'Identifying international protection needs' outlines the requirement for fair and efficient determination of individual international protection claims in accordance with 'applicable international obligations' that will avoid protection gaps and enables those in need of protection to access it (para 61). This highlights two key considerations when applying the EUQD.

[244] Jane McAdam and Tamara Wood, 'The Concept of "International Protection" in the Global Compacts on Refugees and Migration' (2021) 23 Interventions 191.

[245] Peers *et al* (n 194) 71; see European Commission, 'Report from the Commission to the European Parliament and the Council on the Application of 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' COM(2010) 314 final, 15.

4.2.3.1 Identifying Protection Needs in Line with International Law

First, states have committed in the GCR to apply domestic or regional processes in line with international law. There are established divergences between the CSR51 and the instruments of the CEAS, including the EUQD, as will be demonstrated. However, the Compacts represent the commitment by the EU to align with the CSR51 despite current divergences. Concerning the articles of the EUQD, this requires that interpretations of problematic terms, such as 'actors of protection' and 'persecution', as well as what can amount to 'serious harm', should be in line with the prevailing interpretations under international law. For example, there have been divergent practices regarding who can be an actor of protection or persecution (Article 6 and 7 EUQD), varying from only states being able to provide protection to holding that clans or tribes can provide sufficient protection.[246] The practice of non-state actors being actors of protection has been critiqued and proved problematic.[247] There have also been disparate interpretations of Article 8 EUQD. Notably, rules on the accessibility and nature of internal protection are not uniform across Member States. The internal flight alternative can be applied only if the applicant can safely travel, gain admittance and be able to settle there (including economic survival).[248] However, its over-expansive use to exclude individuals from protection does not align with international law.[249] Interpretations of Articles 9 and 10 EUQD must ensure that the acts and reasons for persecution are drawn from the CSR51 notion of persecution and Article 9 EUQD must additionally draw on the ECHR. To ensure compliance with the commitments under the GCR, Member States must ensure interpretations are aligned with international law.

4.2.3.2 Avoiding Protection Gaps

The second point relates to avoiding protection gaps in line with paragraph 61 GCR. This, in turn, has two aspects to draw out in relation to the EUQD. First, interpretations regarding the nature of serious harm under Article 15 EUQD and those who will qualify for refugee status should be carefully applied to ensure that no one will fall through the gaps. This includes those fleeing generalised violence and human rights abuses. For example, Article 2(d) EUQD propounds to be in line with the CSR51, but the scope of the article is limited to 'third-country nationals' thus excluding EU citizens. This is incompatible with the principle of non-discrimination[250] and assumes that violations of human rights or threats of serious harm cannot occur in Member States, contrary to CJEU and UNHCR reports.[251] In establishing if an individual is a refugee, Member States should

[246] EASO, Qualification for International Protection (DIRECTIVE 2011/95/EU): A Judicial Analysis' (Decmber 2016) <https://euaa.europa.eu/sites/default/files/QIP%20-%20JA.pdf> (accessed 18 July 2022) 58-59 and 64-66; See also European Commission COM/2010/314 final (n 245) 6.

[247] EASO, ibid 67-71; UNHCR, Asylum in the European Union: A study of the Implementation of the Qualification Directive (2007) <www.unhcr.org/uk/protection/operations/47302b6c2/asylum-european-union-study-implementation-qualification-directive-2007.html> (accessed 20 November 2021); European Commission COM/2010/314 final (n 245) 6; further there is still no definition of 'parties or organisations' though they must be willing and able to provide protection – not clear when this will be reached.

[248] *Hilal v UK* App No 45276/99 (ECtHR, 6 March 2001); *Salah Sheekh* (n 217) para 141.

[249] UNHCR Handbook (n 160) para 91 outlines that fear of persecution need not extend to the whole territory.

[250] CSR51 (n 18) Article 3 prohibits discrimination on grounds of national origin.

[251] FRA, The Situation of Roma EU Citizens Moving to and Settling in Other EU Member States (Nov 2009) <https://fra.europa.eu/sites/default/files/fra_uploads/705-Roma_Movement_Comparative-final_en.pdf> (accessed 20 November 2021); Jane McAdam, 'The Qualification Directive: An Overview' Karin Zwaan (ed),

utilise the UNHCR Handbook to ensure consistency with international legal definitions and avoid protection gaps.[252]

The interpretation and application of Article 15 have been particularly problematic. The EUQD provides for the 'full and inclusive application of the Geneva Convention,'[253] including Article 33 CSR51 on the prohibition of *refoulement*. However, at the international level, the restrictive scope of Article 33[254] has been supplemented by the enhanced protection under Article 3 CAT, Article 7 ICCPR,[255] and EU primary law.[256] Further, the CED, where Article 16 also includes *non-refoulment* of a person at risk of disappearance, demonstrates the continuing migration of *non-refoulement* from the CSR51 definition to that found in the CAT.[257] Protection from torture, cruel, inhuman or degrading treatment and enforced disappearances and denial of the right to liberty and security have become encompassed within *non-refoulement* protection such that whilst the core of the provision has remained static, the personal scope has been fluid.[258] Whilst the case law of the ECtHR and CJEU aligns with the expansive application of the *non-refoulement* principle,[259] concerns about protection gaps remain. Article 21(2) and 14(4) EUQD draw on the exception to the *non-refoulement* rule set out in Article 33(2) of the CSR51, and it is evident that this does not always filter down to the national level.[260] The application of Article 15(c) has also been utilised by Member States to restrict the application of subsidiary protection, despite agreement that 'indiscriminate violence' is already included in Article 3 ECHR and, thus, applies to the interpretation of Article 15(c).[261] Protection under Article 15(c) should therefore be interpreted to encompass such violence

The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States (Wolf Legal Publishers 2007) 10-11.

[252] UNHCR Handbook (n 160); See also UNHCR, 'UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted' COM(2009)551 (21 October 2009) <www.unhcr.org/4c5037f99.pdf> (accessed 2 June 2022); see also UNHCR, 'Asylum in the European Union' (n 247).

[253] EUQD (n 5) Recital 3.

[254] Article 33 is limited to return to persecution based on the refugee definition in Article 1A(2) and cannot be claimed by individuals who are deemed a risk to the security of the state (Article 33(2) and Article 1(F) CSR51), see Jane McAdam, 'The Enduring Relevance of the 1951 Refugee Convention' (2017) 29(1) International Journal of Refugee Law 1, 3.

[255] See Aoife Duffy, 'Expulsion to Face Torture? *Non-refoulement* in International Law' (2008) 20(3) International Journal of Refugee Law 373.

[256] ECHR (n 26) Article 3; EUCFR (n 40) Article 19(2).

[257] CED (n 25) Article 16; See also ECHR (n 26) Article 3 and EUCFR (n 40) Article 4.

[258] Jane McAdam, The Enduring Relevance of the 1951 Refugee Convention' (n 254) 4.

[259] C-404/15 and C-659/15, *Aranyosi and Căldăraru* (CJEU, 5 April 2016) paras 85-87; *Chahal v The United Kingdom* App No 22414/93 (ECtHR, 15 November 1996) para 75-82; see also Kees Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia 2009) 307-314.

[260] C-373/13, *HT* (CJEU, 24 June 2015) paras 70-75*;* Further, in C-391/16 *M and Others* (CJEU, 14 May 2019), the Czech Court asked the CJEU whether Article 14(4) of the EUQD, allowing for revoking, ending or refusing to renew refugee status for reasons of criminal behaviour or a security risk, is invalid in the light of the principle of non-refoulement in human rights law. The case discusses national practices of revoking refugee status in such circumstances despite the conflict with non-refoulement provisions.

[261] *Sufi and Elmi* (n 210) para 226: The Court is not persuaded that Article 3 of the Convention, as interpreted in *NA*, does not offer comparable protection to that afforded under Art 15(c) EUQD. In particular, the threshold set by both provisions may be the same, in exceptional circumstances, in a situation of general violence of such intensity that any person being returned to the region in question would be at risk simply on account of their presence there; See also *OD v Bulgaria*, App No 34016/18 (ECtHR, 10 October 2019) paras 43-46, in which the court discussed the indiscriminate violence in Syria and the effect on Article 3 claims; In

during conflict.[262] However, attempts to rely on restrictive interpretations of protection commitments could result in protection gaps for those fleeing inhumane treatment and generalised violence.

There have been divergent interpretations of what amounts to a 'serious and individual threat […] by reason of indiscriminate violence in situations of international or internal armed conflict', as well as of what constitutes a 'civilian' and an 'armed conflict'.[263] The provision is central to many cases dealing with accessing international protection, in particular reconciling the requirement for an individual threat with a situation of indiscriminate violence.[264] Restrictive and technical interpretations are utilised to the detriment of applicants. Failure to implement these provisions properly can result in a denial of international protection for those facing serious human rights abuses.[265] To avoid protection gaps, such restrictive interpretations must cease; otherwise, states risk people in genuine need of protection from the violence of armed conflict being denied international protection in breach of international human rights and refugee law. Assessment for subsidiary protection should utilise guidance from UNHCR and on the CAT interpretations of torture, cruel, inhumane and degrading treatment,[266] as well as UNHCR guidance on the protection needs of people fleeing armed conflict, ensuring a broad and inclusive application to avoid protection gaps.[267]

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the case of *SK v Russia* App No 52722/15 (ECtHR, 14 February 2017), in which the indiscriminate use of force was the basis for the Article 3 claim. Thus, ECHR Article 3 includes indiscriminate violence and is thus applicable to interpretation of Article 15(c).

[262] In *Elgafaji* (n 200) para 33, 43, the CJEU confirmed that the harm defined in Article 15(c) covers a more general risk than harm under Article (a) or (b). What is required is a 'threat… to a civilian's life or person' rather than specific acts of violence. If the level of indiscriminate violence is sufficiently high, such a threat can be inherent in a general situation of international or internal armed conflict;' See also C-901/19, *CF and DN* (CJEU, 10 June 2021) considering the degree of arbitrary violence necessary in an armed conflict for an assessment of subsidiary protection. The Court held that (drawing on *Elgafaji*) a comprehensive and dynamic cross-analysis of all relevant data must be taken into account with particular consideration of the position of the individual excluding a purely quantitative interpretation.

[263] See for example *Elgafaji* (n 200); UNHCR, 'Safe at Last?' (n 214).

[264] Peers *et al* (n 194) 137.

[265] ibid.

[266] CAT, 'General Comment No. 2: Implementation of Article 2 by States Parties' CAT/C/GC/2 24 (January 2008); CAT, 'General Comment No 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22' A/53/44, Annex IX (9 February 2018) 2; Human Rights Council, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' A/HRC/7/3 (15 January 2008) <www.unhcr.org/refworld/docid/47c2c5452.html> (accessed 20 November 2021); See also Jens Vedsted-Hansen, 'Complementary or Subsidiary Protection? Offering an Appropriate Status Without Undermining Refugee Protection' (2002) <www.unhcr.org/uk/research/working/3c7528894/complementary-subsidiary-protection-offering-appropriate-status-undermining.html> (accessed 20 November 2021).

[267] UNHCR, 'Guidelines on International Protection No 12 on Claims for Refugee Status Related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions' (2016) <www.unhcr.org/publications/legal/58359afe7/unhcr-guidelines-international-protection-12-claims-refugee-status-related.html> (accessed 25 September 2018); See also Jean-Francois Durieux, 'Of War, Flows, Laws and Flaws: A Reply to Hugo Storey' (2012) 31 Refugee Survey Quarterly 161; Vincent Chetail, 'Armed Conflict and Forced Migration: A Systematic Approach To International Humanitarian Law, Refugee Law, And International Human Rights Law' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014).

Further, paragraph 63 GCR highlights that, to avoid protection gaps, states must have a framework to address other protection situations such as those resulting from natural disasters and humanitarian challenges. This can include temporary protection and humanitarian stay arrangements. In line with paragraph 61 GCR, this should ensure that there are no gaps in protection for refugees or migrants in need of international protection. In Objective 5 paras (g) and (h), the GCM requires access to admission, stay and solutions for migrants, 'based on compassionate, humanitarian or other considerations for migrants compelled to leave their countries of origin, due to sudden-onset natural disasters'[268] and well as 'slow-onset natural disasters, the adverse effects of climate change, and environmental degradation'.[269] This sets out how states should respond to those affected by humanitarian crises or natural disasters, including through access to humanitarian visas, work permits and other visa options. Read alongside the commitments in the GCR to avoid protection gaps, this requires that there is provision available for individuals seeking international protection who currently fall outside of the remit of refugee or subsidiary protection status under the EUQD. There is not a sufficient framework in place to ensure that those seeking protection from natural disasters or humanitarian crises can be granted it through fair and effective mechanisms. Procedures should be in place to ensure the best form of protection is available in the form of national or regional protection schemes such as humanitarian visas, temporary protection or work permits.

The GCR also calls for complementary pathways for admission as additional to resettlement on the basis of three-year strategies (paragraph 94). The establishment of private or community sponsorship programmes additional to resettlement programmes is recommended. These pathways should include humanitarian visas, humanitarian corridors, and other humanitarian admission programmes; educational opportunities such as educational visas and scholarships; and labour mobility opportunities for refugees (paragraph 95).

For the moment, the EU has no system of humanitarian visas[270] nor has it contemplated humanitarian corridors, even in the face of the 2021 Afghan crisis. Other humanitarian admission programmes have also been left to the Member States. As a result, humanitarian protection statuses and other leaves to remain based on human rights or security (or other) considerations do exist in many EU countries but under national law. This creates an incoherent system of humanitarian protection, increasing the chances of protection gaps arising between EU Member States. This is not consistent with the GCR and GCM calls for better systems of admission, particularly for those in need of international protection. The inclusion of beneficiaries of international protection in the scope of the revised Blue Card Directive is a step in the right direction but remains a rather isolated example.[271]

In addition, any asylum system should be organised to aid those seeking protection in accessing it, rather than creating barriers to protection. This highlights the need to have measures in place to identify those in need of protection, to avoid restrictive interpretations regarding the risk of persecution and ensure 'fairness, efficiency, adaptability and integrity' of asylum systems, in particular, regarding group-based protection (para 62 GCR). The focus of these systems must be on ensuring legal stay for those seeking and in need of protection.

[268] GCM (n 2) para g.
[269] ibid para h.
[270] C-638/16 PPU, *X and X* (CJEU, 7 March 2017).
[271] European Parliament, 'Revision of the EU Blue Card Directive' (July 2021) <www.europarl.europa.eu/RegData/etudes/BRIE/2017/603942/EPRS_BRI%282017%29603942_EN.pdf> (accessed 21 October 2021).

The GCR sets out the importance of supporting those seeking asylum to fulfil documentation requirements and that this should not be a block to accessing protection through a 'fair and efficient procedure'.[272] These procedures should be aligned with the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, which sets out the basic requirements for asylum determination procedures. This includes:

- Access to a competent official with clear instructions
- Provision of clear guidance to the applicant
- A clearly identified central authority that determines protection needs
- Access to necessary facilities for the applicant
- A successful applicant to be issued with documentation
- An unsuccessful applicant be given time to appeal and the applicant be granted permission to remain whilst the decision is pending.[273]

These requirements are relevant in regard to Article 4 EUQD. The requirements of having made a 'genuine effort', 'satisfactory explanation' and to have made the application 'as soon as possible' under Article 4 are vague and unclear. They have been subject to divergent meanings by Member States.[274] Section 1.4. of the GCR highlights the need to strengthen refugee protection systems and national capacity for registration and documentation. This includes establishing mechanisms for identification, screening and referral of those with specific needs (1.5) and is in line with the importance of granting reasonable time for asylum-seekers to prepare and provide all necessary evidence for the determination procedure.[275] To ensure compliance with the commitments in the Compacts, Member States should cooperate actively with the applicant to develop the application in line with requirements including sourcing documentation[276] and ensuring a fair and efficient procedure in line with the UNHCR Handbook guidance.

4.2.3.3 Denial of Protection in Line with International Law, in a Humane Manner

The cessation, exclusion and revocation clauses within the EUQD have been particularly problematic in case law and implementation by Member States due to a lack of equivalence between the EUQD and the CSR51. Trends from previous years continued pointing towards increased use of status reviews and more rigorous use of cessation and revocation grounds.[277] For example, Member States adopt overly wide grounds for cessation as there is inconsistent application of 'compelling reasons' for cessation.[278] The objective aspect under Article 11 EUQD is

[272] GCR (n 3) section 1.6.
[273] UNHCR Handbook (n 160) 42-47.
[274] Application appears to be focused on identifying a third country where person can be returned, restrictive reading of Article 31(1) of 1951 Convention and undermines refugee status determination, see European Commission COM/2010/314 final (n 245) 4.
[275] ECRE, 'The Way Forward: Towards Fair and Efficient Asylum Systems in Europe' (2005) <www.ecre.org/wp-content/uploads/2016/07/ECRE-The-Way-Forward_Towards-Fair-and-Efficient-Asylum-Systems-in-Europe_September-2005.pdf> (accessed 20 November 2021) 40; ECRE, 'Information Note' (n 196) 5.
[276] *MM* (n 218) paras 66-68.
[277] EASO, 'EASO Asylum Report 2021: Executive Summary' (2021) <www.easo.europa.eu/sites/default/files/EASO-Asylum-Report-2021-Executive-Summary.pdf> (accessed 21 November 2021) 23.
[278] European Commission COM/2010/314 final (n 245) 9.

more problematic when Member States must evaluate if the circumstances due to which the individual was recognised as a refugee still exist. Member States tend to focus on whether the persecution exists, as opposed to whether protection is available, taking an expansive approach to withdrawing refugee status.[279]

Further, Article 12(2) and (3) EUQD relating to Article 1(F) of the CSR51 has proved to be the most controversial regarding when there are deemed to be serious reasons for denying refugee status. Article 12(3) also applies to persons who incite or participate in the commission of the crimes or acts at issue. This expands the remit of Article 1(F) of the CSR51 and narrows the grounds for claiming asylum.[280] In addition, the mandatory exclusion clause in Article 17 EUQD, applying to beneficiaries of international protection, is significantly wider than Article 12 EUQD, applying to refugees, by including exclusion for any serious crime, for crimes committed prior to admission to the Member State and for persons who constitute a danger to the community or security of the Member State.[281] These overly broad grounds for exclusion have been interpreted inconsistently by Member States.

Article 14(4) EUQD is controversial in setting out when a refugee may be refused protection (or it may be revoked) if there are reasonable grounds for regarding the refugee as a danger to the security of the Member State or where he or she has been convicted of a serious crime. This article introduces a hard law obligation to revoke protection and permits states to decide not to grant refugee status on the basis of the CSR51's exception to *non-refoulement*. This is despite the absolute nature of protection from *refoulement* under Article 3 ECHR and CAT, as well as Article 4 EUCFR. There are numerous problems with Article 14, with some Member States conflating exclusion with expulsion, despite Article 14(6) protections, and others giving an expansive interpretation to cessation norms.[282] The exclusion that can result from these articles can lead to forcible return or, where this is unavailable, a denial of all benefits under the EUQD.[283] Finally, the formulation of Article 21 may lead to the erroneous conclusion that the prohibition of *refoulement* may be dispensed with under EU law.

In the exclusion and revocation regime, the reasons for refusing or revoking status for those who have committed crimes should be aligned with international law. Implementation of the commitments in the Compact should see Member States bringing the EUQD in line with international law. In addition to avoiding protection gaps and ensuring a fair and efficient asylum system (para 61-63), the GCR makes clear that interpretations must be in line with existing international refugee and human rights law (para 5). Any return should occur in a safe, dignified and humane manner (CRRF para 5(i)).[284] This requires Member States to ensure that any decision to cease, refuse or revoke protection must not leave an individual without protection from persecution or human rights abuses. The system must fairly decide whether any individual is at such a risk in line with prevailing international law interpretations and fundamental rights protections

[279] ibid.

[280] Elspeth Guild and Madeline Garlick, 'Refugee Protection, Counter-Terrorism and Exclusion in the European Union' (2010) 29(4) Refugee Survey Quarterly 63.

[281] EUQD (n 5) Article 17(1)(b) and (d) and 17(3).

[282] ECRE, 'Information Note' (n 196) 11.

[283] See *M v Ministerstvo* vnitra (C-391/16) and *X* (C-77/17), *X* (C-78/17) *v Commissaire général aux réfugiés et aux apatrides* (CJEU, 14 May 2019) which highlighting the need for a safety net of rights, including those under the CAT, available for those who have been denied international protection and that the EUQD must be interpreted in line with Convention rights protections from *refoulement*.

[284] In line with Article 4 EUCFR (n 40) 'Prohibition of torture and inhuman or degrading treatment or punishment' and Article 19 'Protection in the event of removal, expulsion or extradition'.

under European and international treaties. Further, contrary to the application of Articles 14(4) and 21, the pre-eminence of *non-refoulment* obligations must be preserved (para 5 GCR). Where return is found to be appropriate and in line with international law, the GCR requires that it be conducted in a manner which preserves humanity and dignity and respects the absolute prohibition of *refoulment*.

Furthermore, Objective 21 of the GCM commits States to 'cooperate in facilitating safe and dignified return and readmission'. Where a decision is made that an individual is not in need of protection, states commit to facilitating safe and dignified return and to guarantee due process, individual assessment, and effective remedy by upholding the prohibition of collective expulsion and the prohibition of return to a risk of serious human rights violations. This includes not returning migrants when there is a real and foreseeable risk of death, torture and other cruel, inhuman, and degrading treatment or punishment, or other irreparable harm. This commitment is crucial in the context of return as it reflects the absolute prohibition of *refoulement*, enshrined both in customary and treaty law.[285] Protective provisions enshrined in Objective 21 do not express states' good will or moral duties towards migrants but reflect a set of human rights norms and standards governing expulsion measures. As such, any return decisions made under the EUQD must ensure this is conducted in a safe and dignified manner that follows due process and provides for an individual assessment and access to effective remedies.

4.2.3.4 Reducing Vulnerability

The commitment to reduce vulnerability of those on the move, regardless of migratory status, is central to the GCM which compliments the commitment to avoid protection gaps within the GCR. Under Objective 7, states are required to design and apply certain support measures in the case of 'migrants caught up in situations of crisis', such as consular protection and humanitarian assistance. It is noteworthy that a list of migrants deemed to be in situations of vulnerability is added to sub-paragraph b. It includes older persons, migrants with a disability, victims of violence, and members of ethnic and religious minorities. We must assume this includes migrants who would seek asylum due to their vulnerability. States pledge to establish policies and develop partnerships to identify, assist and protect these migrants. Vulnerability may arise from an individual's temporary or permanent characteristics, such as a disability or illness; it may result from external threats such as floods or earthquakes; migrants may also be rendered vulnerable by state authorities. Policies must be in place to remove the legal and practical impediments within transit and destination states that exacerbate vulnerabilities, particularly for those in mixed movements. States should establish safe, regular, accessible and affordable migration channels and pathways for those seeking international protection. They should work towards eliminating policies and practices that construct migrants' vulnerability.

The requirements under Objective 5 GCM distinguishes between migrants compelled to leave their country of origin due to 'sudden-onset natural disasters and other precarious situations' and those leaving due to 'slow-onset natural disasters, the adverse effects of climate change and environmental degradation, such as desertification, land degradation, drought and sea level rise'. In the first case, according to para 21(g), states should develop existing national and regional practices for admission and stay of appropriate durations by providing 'humanitarian visas, private sponsorships, access to education for children and temporary work permits'. In the latter case, migration due to slow-onset natural disasters, para 21(h) mentions planned relocation and visa options. This is a valuable contribution to addressing the needs of those that fall outside the legal

[285] Arts 6 and 7 of the ICCPR (n 13) and Arts 3 and 16 of the CAT (n 16).

framework for refugees and those in need of subsidiary protection. So far, the EU legislator has yet to adopt a humanitarian visa measure. This remains within EU Member State competence. EU Member States should develop solutions for migrants compelled to leave in these situations to avoid increasing vulnerability and protection gaps.

4.3 The Content of Protection

4.3.1 General Outline of the Directive

The EUQD holds that the protection needs of beneficiaries of subsidiary protection are frequently as compelling and persistent as those of refugees, such that their rights should be protected on an equal footing.[286] The 2011 Directive approximated or brought to a higher level the rights of those with subsidiary protection with the rights of refugees.[287] Recitals 10 and 13 set out the 'need for similar standards, better approximation of what is offered' whilst Recitals 16 and 17 highlight that 'rights are drawn from the charter and international law'. In Articles 20-35, the EUQD outlines access to rights.[288] Based on the principle of non-discrimination (subject to permissible derogations), the rights outlined in Chapter VII should apply equally to those who qualify for refugee status or subsidiary protection (see Article 20(2) EUQD).[289] The 2011 amendments to the EUQD improved compatibility between the CEAS and developments within broader human rights and refugee law and clarified the content of several concepts.[290]

Beneficiaries of protection are entitled to equal access to family unity (Article 23),[291] employment (Article 26),[292] education (Article 27),[293] healthcare (Article 30),[294] and housing (Article 32).[295] However, some differences exist in access to social welfare under Article 29, which sets out access equal to nationals for all protection beneficiaries. However, Member States are permitted to limit the assistance granted to subsidiary protection beneficiaries to core benefits in Article 29(2)). Core

[286] UNHCR, 'Annotated Comments on the EC 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 (OJ L 304/12 of 30.9.2004)' (January 2005) <www.unhcr.org/43661eee2.pdf> (accessed 20 November 2021) Comment on Article 20(2).

[287] Peers *et al* (n 194) 157.

[288] See CSR51 (n 18) articles on content of protection for refugees.

[289] European Commission COM (2009) 551 (n 197) 8 'Explanatory Memorandum'.

[290] See Peers *et al* (n 194) 70; see also ibid European Commission COM(2009) 551, 3 'Explanatory Memorandum'.

[291] The Family Reunification Directive (n 147) must also be taken into account in regard to access to family unity. In particular, Chapter 5, Articles 9 and 10. However, beneficiaries of international protection are outside its scope. See discussion below.

[292] Article 26 EUDQ requires access to employment immediately after the grant of status for all beneficiaries of international protection. Article 26(3) requires states to endeavour to facilitate full access to training courses etc, to overcome obstacles to obtaining work.

[293] Member States should provide full access to the education system for children granted protection under the same conditions as national and under 27(2) EUQD (n 5) access to general education and training is available to adults.

[294] All beneficiaries of protection must have access to healthcare under the same conditions as nationals, including adequate healthcare for special needs.

[295] Member States are required under Article 32 to afford access to accommodation to protection beneficiaries under equivalent conditions to resident third-country nationals.

benefits include income support, assistance in the case of illness or pregnancy, and parental assistance, in so far as those benefits are granted to nationals under national law.[296]

Beneficiaries of international protection are entitled to equal access to integration facilities under Article 34. Member States should ensure the involvement of all stakeholders in the design, implementation and evaluation of integration programmes.[297] Beneficiaries of protection also benefit from freedom of movement within the national territory under the same conditions as third-country nationals legally resident in their territory under Article 33.[298]

However, in considering integration and stay, a number of differences apply between access for those with refugee status and those with subsidiary protection as regards access to documentation.[299] In particular, beneficiaries of refugee status are to be issued with renewable residence permits as soon as possible after protection has been granted, valid for at least three years (Article 24(1)), whilst those with subsidiary protection are to be issued with permits valid for at least one year (Article 24(2)). This difference in length of residence permits is disadvantageous to beneficiaries of subsidiary protection and is without clear justification. Residence permits are critical as many other rights under the EUQD are conditional upon their issuance – delays in issuance result in delays in access to other core rights. Article 25 provides for travel documents to be issued to refugees in accordance with the CSR51 and for those with subsidiary protection when they are unable to obtain a national passport.[300] The condition for subsidiary protection beneficiaries to show they cannot obtain a passport before travel documents are issued to them does not appear to be 'necessary' or 'objectively justified'. This difference in treatment is arbitrary.

There is also substantial divergence in practice between Member States regarding the content of protection granted. The permitted differentiation between refugee status and other forms of protection causes a fragmented system of protection across the EU. The vagueness of the criteria and the ability of Member States to apply them within their domestic context results in people with the same protection needs being granted different protection dependent purely on the EU Member State they find themselves in. For example, in 2015, Syrians were granted almost exclusively refugee status in Germany, Austria, Greece, Bulgaria and Norway, while Sweden, Spain, Cyprus and Malta overwhelmingly granted them subsidiary protection.[301] If the two statuses remain differentiated, then this inconsistency in application has far-reaching implications for people seeking protection and the rights granted to them.

[296] EUQD (n 5) Recital 45.

[297] ECRE, 'The Way Forward' (n 275).

[298] ICCPR (n 13) Article 12: Freedom of movement ; see also EUCFR (n 40) Article 45: Freedom of movement and of residence; Individuals may also be short stay visa holders, which permits freedom of movement within the Schengen area under the Schengen short stay rules, see <www.schengenvisainfo.com/schengen-visa-types/> (accessed 20 November 2021).

[299] See also EUCFR (n 40) Article 42: Right of access to documents.

[300] This is in line with rights under Article 24 to register births and acquire a nationality and access to travel and identity documents is an integral part of ICCPR (n 13) Article 16: 'Everyone shall have the right to recognition everywhere as a person before the law'.

[301] Subsidiary protection rates for Syrians in 2015 were 97.8% in Cyprus, 92.7% in Malta, 90.1% in Spain and 87.5% in Sweden, see in ECRE/AIDA, 'Asylum on the Clock? Duration and review of international protection status in Europe' (June 2016) <https://www.ecre.org/wp-content/uploads/2016/07/AIDA-Briefing-Asylum-on-the-Clock-duration-and-review-of-international-protection-status-in-Europe_-June-2016.pdf> (accessed 2 June 2022) 4.

4.3.2 Specific Global Compact Commitments Relevant to the Qualification Directive

The GCR sets out a programme of protection for those identified as being in need of international protection, providing practical guidance on the nature and content of the rights of refugees. It highlights areas of particular support from the international community to enhance the resilience of host countries and communities. These areas include education, jobs and livelihoods, health, women and girls, children, accommodation, food and nutrition. The GCM also makes a valuable contribution to understanding the nature of rights under the EUQD for those who are not recognised as refugees but equally in need of other forms of protection. Its guiding principles of non-discrimination and non-regression in the GCM (para 5) are important for understanding the nature of Member State obligations toward all refugees and migrants. In addition, a number of objectives within the GCM provide further details on the obligations of states regarding upholding migrants' rights that are relevant to the application of the EUQD. These will be considered thematically below.

Paragraphs 68-69 of the GCR set out the actions states should take to enhance the quality and inclusiveness of national education systems to facilitate access for refugees. Financial support and expertise are highlighted as integral to ensuring that refugee children do not remain outside education for more than 3 months after arrival. Education facilities may need to be expanded, according to para 69, to ensure that they are accessible to refugee children and that additional support is available for their specific needs, including early childhood development and technical and vocational training.

Paragraphs 70-71 of the GCR commit to identifying gaps and opportunities to promote economic opportunities, decent work and job creation to foster 'inclusive' economic growth. Paragraph 71 sets out that states should recognise the skills and qualifications of refugees whilst also providing training (skills, educational, vocational and language) to build the capacities of refugees. It also highlights the importance of access to affordable technology and the internet for refugees to be able to engage realistically in seeking employment. Paras 13(c) and (d) of the CRRF highlight the importance of access to work to ensure empowered refugees are better able to contribute to their communities while making the best use of their skills. Further, Objective 6 of the GCM commits to fair and ethical recruitment to protect migrants from exploitation and maximise their socioeconomic contributions. In particular, paras d and g commit to ethical recruitment processes and ensuring migrant workers have access to contracts, complaint and redress mechanisms. Para j encourages states to ensure migrants working in an 'informal economy' have access to such mechanisms in cases of exploitation and abuse to avoid exacerbation of vulnerabilities. Further, Objective 16 seeks to empower migrants to become active members of society through facilitating access to decent work and employment (para d), and Objective 18 commits states to invest in facilitating mutual recognition of skills and qualifications. Access to durable employment frequently depends on the individual having a durable residence permit. Employers invest in staff they can keep, and the length of residence permit is one such indicator of that. However, as explored below, discriminatory practice in this regard further exacerbates the disadvantaged position of beneficiaries of subsidiary protection.

National health systems are to be expanded and quality enhanced to facilitate access for refugees in paras 72-73. Services are to be strengthened and capacities developed, including through training refugees and members of host communities. Further, para 78-79 support the contribution of resources to strengthen infrastructure to facilitate access to accommodation for refugees and access to key resources such as water, sanitation, and hygiene. Paras 80-81 concern the access to safe, sufficient and nutritious food to increase food security. This requires states to not only provide

targeted food assistance but also to build the resilience of households and access to nutrition-sensitive social safety nets, such as school feeding programmes. Under the GCM, all migrants should have access to basic services regardless of migration status. The commitments in Objective 15 ensure that access to such services is non-discriminatory and migrant-inclusive (para a). Paragraph b stipulates that cooperation between service providers and immigration authorities does not exacerbate vulnerabilities.
The CRRF outlines the support states should provide for refugees' immediate and ongoing needs. Para 7(b) elucidates the requirements for states to deliver assistance through appropriate national and local service providers, including health, education, social services and child protection. The programme of action and the CRRF outline that access to basic rights is intended to enhance local integration and empower refugees as part of durable solutions. Para 13(b) of the CRRF commits host states to foster self-reliance by giving access to education, healthcare and services, and livelihood opportunities without discrimination.

In addition, the GCM acknowledges that documentation is central to the empowerment of migrants and the ability to exercise other human rights. Objective 4 of the GCM outlines the importance of proof of legal identity and access to adequate documentation. States commit to 'fulfil the right of all individuals to a legal identity' and ensure that migrants are issued adequate documentation, such as 'birth, marriage and death certificates, at all stages of migration'. This includes facilitating access to personal documentation through processes that are non-discriminatory (para d) and ensuring that access to basic services is not premised on proof of nationality (para f).

The three-year strategy on resettlement which includes complementary pathways and facilitation of effective procedures and clear referral pathways for family reunification, is set out in para 95 GCR. The availability and flexibility of legal pathways that respond to the needs of migrants in vulnerability are outlined in Objective 5 GCM. In particular, paragraph i commits to family reunification for all migrants to uphold the human right to the family and the best interests of the child. The Objective requires states to review requirements for family reunification to ensure compliance with these rights and revise them should they limit access.

4.3.3 Applying the EUQD Consistently with Member States' Commitments in the Compacts

A lack of consistency in the content of protection across Member States continues and demonstrates the policies of Member States to reduce rights access to limit integration.[302] In practice, the access to rights under the two protection regimes is often inconsistent and falls below the requirements in the EUQD and in international human rights law.[303] Further, there is substantial

[302] See Netherlands – Court of The Hague, 19 October 2020, NL20.15181, NL20.15183, NL20.15188 and NL20.15194 <www.asylumlawdatabase.eu/en/case-law/netherlands-–-court-hague-19-october-2020-nl2015181-nl2015183-nl2015188-and-nl2015194#content> (accessed 20 November 2021).
[303] See European Commission COM (2009) 551 (n 197) section 5.5.11; See *Okpisz v German*y App No 59140/00 (ECtHR, 25 October 2005); C-713/17, *Ayub*i (CJEU, 21 November 2018) concerned a law on needs-based minimum income in Upper Austria which grants refugees on temporary right of residence less social benefits than nationals or refugees with a permanent right of residence. Here the Court highlighted the right of refugees to equal treatment with nationals of the respective state with regard to public relief and assistance; see also C-542/13, *Mohamed M'Bodj* (CJEU, 18 December 2014). The CJEU ruled that the Qualification Directive (2004/83/EC) is to be interpreted as not requiring a Member State to grant the social welfare and health care benefits to a third country national who has been granted leave to reside in the territory of that Member State under national legislation; contrast with C-*571/10*, *Kamberaj* (CJEU, 24 April

divergence across Member States in access to rights for protection beneficiaries.[304] Persons fleeing persecution and other forms of serious harm should have access to an equivalent level of rights. However, the Directive accentuates the divide between formally recognised refugees and applicants for international protection, despite endorsing the view that recognition of refugee status is a declaratory act.[305] The Directive delays the acquisition of rights until Member States grant refugee status, contrary to the CSR51.[306]

By contrast, the Compacts provide valuable detail on the nature of the rights to be granted to people recognised as refugees, those granted subsidiary protection or seeking protection. In drawing on the international human rights framework, the Compacts require that rights are granted equally, regardless of status. The GCM clarifies that those not recognised as refugees are still entitled to access their basic rights and details the content of these rights in the migration context. The GCR provides further detail on the content of the rights accessible to those granted international protection. We understand the role of the GCM as elucidating the common minimum standards applicable toward all migrants, including those recognised as refugees, those in need of subsidiary protection or in the process of having their application considered in line with the principles of non-regression and non-discrimination.[307]

4.3.3.1. Access to Work

Article 26 of the EUQD sets out the requirements for access to work. However, there is a challenge in applying conditions of work under national laws under Article 26(4) EUQD, which could hamper access to work for those lacking documentary evidence of work or qualifications. In addition, availability of work and discriminatory recruitment practices remain a problem for those seeking employment. The GCR highlights the importance of access to work to ensure empowered refugees. It requires states to work to identify gaps in the job market, create employment opportunities and provide training for refugees to enable them to enter employment (paras 70-71). In addition, the GCM highlights in multiple objectives the importance of enabling migrants to access work, ethical recruitment standards and the importance of mutual recognition of skills, as well as the education rights of migrants.[308] Access to work is integral to empowerment and their ability to integrate into host communities (as highlighted in the CRRF).[309] To align with these commitments, states must ensure that recruitment is non-discriminatory, seek to engage refugees in the employment market and recognise qualifications.

4.3.3.2 Access to Basic Services, Including Healthcare, Food and Water

2012) which held that core benefits must be granted equally to nationals of the Member State and third-country nationals who are long-term residents.

[304] European Commission COM (2009) 551 (n 197) section 3.1 p.6; see also ECRE, 'Refugee Rights Subsiding' (n 29) (2016).

[305] EUQD (n 5) Recital 21.

[306] ibid Arts 13, 20-35 contrary to CSR51 (n 18) Arts 7(2), 14, 15, 17, 19, 26, 32; See *Abdulla* (n 203) para 51-3; *Bolbol* (n 203) para 36-7; *B and D* (n 233) para 76-77; see also UNHCR Guidelines on International Protection No. 12 (n 167).

[307] See Introduction, section 1.3.3.

[308] This is echoed in the GCR (n 3) in paras 68-69.

[309] UNGA, 'Resolution adopted by the General Assembly on 19 September 2016: New York Declaration for Refugees and Migrants' A/RES/71/1 (3 October 2016) Annex I 'Comprehensive Refugee Response Framework' (CRRF) para 13 (c and d).

Under Article 30 EUQD, access to healthcare is supposed to be granted to beneficiaries of international protection on an equal footing with nationals, including adequate healthcare for special needs. In addition to healthcare, under Article 32(2) EUQD Member States must endeavour to prevent discrimination and ensure equal opportunities to obtain accommodation. However, direct and indirect discrimination often prevails,[310] and implementation has been problematic in Member States.[311] There is discriminatory practice within Member States which differentiates access to healthcare between nationals, refugees and those with subsidiary protection.[312] This is partly because, according to the Preamble of the EUQD, Member States are permitted to limit social assistance to 'core benefits' which encompass 'at least minimum income support, assistance in the case of illness, or pregnancy, and parental assistance'.[313] This is echoed in Article 29(2) regarding derogations to obligations to provide social welfare. The lack of a definition of 'core benefits' within the EUQD means that the derogation has been interpreted broadly beyond purely social welfare despite the clear direction that healthcare should be provided to beneficiaries of international protection.[314] This is contrary to the GCR requirements on access to healthcare which outlines that access to healthcare should not be granted on a discriminatory basis.

In the GCR, states and the international community have committed to working together to ensure access to appropriate accommodation and bolster national capacity to provide water, sanitation and hygiene (para 79), as well as safe and nutritious food (para 80) through targeted food assistance when required (para 81). The right to health under the International Covenant on Economic, Social and Cultural Rights (ICESCR) is an inclusive right and access to water, sanitation, food and housing are all understood as underlying determinants of health.[315] As a result, these are integral elements that states should work with the international community and relevant stakeholders to ensure access to basic services and health in a non-discriminatory manner.

Further, the GCM guidance on access to basic services (Objective 15) highlights how, regardless of migration status, there should be access to basic services underpinning the GCR protections for refugees. Whilst the GCM does permit more comprehensive access to people who have 'regularly' moved, this still ensures basic access to healthcare for all. Notwithstanding discussions regarding the inadequacy of requiring movement to seek protection to be 'regular', individuals seeking international protection under the EUQD should fall within the expansive interpretation of this objective to ensure comprehensive access to basic services. The foundational position of human rights law, and in particular, non-discrimination, in the GCM acknowledges the need for this access to align with the ICESCR requirements and avoid discrimination on the grounds of migration status.[316]

4.3.3.3 Access to Documentation and Integration

[310] European Commission COM (2009) 551 (n 197) section 3.1.
[311] European Commission COM/2010/314 final (n 245) section 5.5.12.
[312] See *Cyprus v Turkey* App No 25781/94 (ECtHR, 10 May 2001), which considered, under Article 2 ECHR, whether there was a *de facto* equality of access to health services for Northern Cypriots in Southern Cyprus.
[313] EUQD (n 5) Recital 45.
[314] ibid Recital 46 'Access to healthcare, including both physical and mental healthcare, should be ensured to beneficiaries of international protection'.
[315] See CESCR, 'General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12)' E/C.12/2000/4 (1 August 2000) <www.refworld.org/pdfid/4538838d0.pdf> accessed 20 November 2021.
[316] GCM (n 2) paras 2, 4 and 11.

Article 24 of the EUQD sets out the requirements for the renewal of residence permits that goes beyond requirements under the CSR51,[317] providing a subjective claim to territorial protection. However, though the difference in application for refugees and those granted subsidiary protection is problematic given the impact this has on access to rights more broadly.[318] UNHCR has outlined the importance of secure status to facilitate self-reliance and integration.[319] The EUQD does provide that, in addition to access to documentation, beneficiaries of protection should have access to integration facilities[320]. However, nowhere in the EUQD or elsewhere in the CEAS instruments are Member States required to assist with integration beyond these basic facilities. Instead, integration has become an ambiguous concept utilised as a tool to exclude people when they fail to do so adequately.[321]

The GCM in Objective 4 sets out the need for access to documentation, including travel documents and residence permits to empower migrants and ensure their integration.[322] This aligns with commitments within the GCR to provide documentation (para 58) and ensure local integration into the host communities (para 99). The Compacts preserve the right to legal identity and access to travel documents for those with access to protection and those without due to their importance for stability and self-reliance in para 11(c) CRRF. As such, documentation including residence permits, in line with the requirements under the Compacts, should be given to refugees and those with subsidiary protection for 5 years to ensure non-discrimination, equality and durability of protection. This is particularly important for empowering and building integration for durability and contribution of refugees and migrants.

The integration of refugees and those with access to international protection was further synthesised through amendments to Directive 2003/109 (in 2011). The 2011 Directive amended the 2003 rules to include beneficiaries of international protection in the long-term residence of third-country nationals programme. This meant that after 5 years of residence in a qualifying capacity which now included being a beneficiary of international protection, individuals are entitled to permanent durable status. Access to such status is essential to ensuring the integration of third-country nationals. However, both refugees and beneficiaries of international protection are still required to fulfil a number of qualifications under Article 5 of the Directive, including access to stable resources housing and health insurance.[323]

4.3.3.4 Right to Family Life

Rights to family unity under Article 23 EUQD are limited to family members that existed in the country of origin, and do not apply to family units that may have been formed whilst in exile in contravention of Article 8 ECHR.[324] This is also limited to spouses, unmarried partners and minor

[317] CSR51 (n 18) Articles 2-34.
[318] See *Ayubi* (n 303) and C-484/17, *K* (CJEU, 7 November 2018).
[319] Peers *et al* (n 194) 169.
[320] EUQD (n 5) Article 34 and Recital 47 which outlines that such facilities may include 'language training and the provision of information concerning individual rights and obligations relating to their protection status'.
[321] Statewatch, 'Whip Greece into shape' (n 77).
[322] GCM (n 2) Objective 4: 'Proof of legal identity and adequate documentation'.
[323] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (2004) OJ L 16, Article 5, in particular 5(1)(a) 'stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned'.
[324] *Saciri* (n 67).

children, which is more restrictive than the ECtHR.[325] The EU Family Reunification Directive 2003/86 grants a right to family reunification to the spouse and minor children of lawfully resident nationals of non-EU countries.[326] However, specific provisions within the Directive relating to the family reunification rights of refugees derogate from the general provisions of the Directive to ensure access to family reunification for refugees who may be unable to meet the evidential and financial support requirements applicable to other third-country nationals.[327] Yet, since the Directive only applies to refugees and not all beneficiaries of international protection, there is further fragmentation of protection. Member States have utilised this distinction to restrict and delay access to family reunification.[328] Further, the requirements for refugees to access family reunification under the Directive create restrictions on applications, including time limits on when applications must be submitted.[329] These limits are often unrealistic when the status of refugees is determined after a lengthy delay, and they are left with a very short time to gather the documentation to submit for family reunification.

Further, rights to family unity are categorised differently in different Member States, and reunification is often unavailable. For example, in a number of EU countries, national laws and administrative rules do not allow children who turn 18 during the asylum procedure to apply for family reunification with their parents, as at that moment, they are already adults.[330] Such policies have been continuously criticised by civil society[331] and UN agencies.[332] They must now be disapplied due to the judgment in the *A and S* case by the CJEU.[333]

The right to family reunification under Objective 5 of the GCM addresses these serious issues, which are within the scope of the EUQD and the Family Reunification Directive 2003/86. The objective in paragraph (i) commits to family reunification for migrants at all skills levels through appropriate

[325] See *AW Khan v The United* Kingdom App No 47486/06 (ECtHR, 12 January 2010) and *Al-Nashif v Bulgaria* App No 50963/99 (ECtHR, 20 June 2002).

[326] Family Reunification Directive (n 147) Article 1: 'The purpose of this Directive is to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States'.

[327] ibid Articles 9-12. In 2020, some countries introduced measures to regularise the situation of specific groups of foreigners. Some initiated changes to facilitate family reunification for beneficiaries of international protection and provided clarifications on the process through more detailed guidance, while courts remained active in shaping policies and practices on family reunification. EASO, 'Asylum Report 2021: Executive summary (n 277) 23. The CJEU has held that the provisions of the Family Reunification Directive require that states ensure that family reunification is the general rule (C-578/08, *Chakroun* (CJEU, 4 March 2010) para 43) and that the Directive is 'interpreted strictly'.

[328] See for example, the case of case of *MA v Denmark* (n 69), where Syrians were only being granted international protection delaying access to family reunification by up to 3 years.

[329] Family Reunification Directive (n 147) Article 9(2) permits Member States to confine the application of this Chapter to refugees whose family relationships predate their entry; according to Article 12(1) Member States may require the refugee to meet the conditions referred to in Article 7(1) if the application for family reunification is not submitted within a period of three months after the granting of the refugee status. This time period is too short to gather documentation and evidence.

[330] In C-550/16, *A and S* (CJEU, 12 April 2018), the CJEU clearly stated that unaccompanied minors who attain the age of majority during the asylum procedure retains their right to family unification.

[331] UNHCR, 'Unaccompanied and Separated Asylum-seeking and Refugee Children Turning Eighteen: What to Celebrate?' (2014) <www.refworld.org/docid/58514a054.html> (accessed 20 November 2021).

[332] ibid.

[333] C-550/16, *A and S* (n 330).

measures. It acknowledges, in line with Article 23 ICCPR,[334] the rights to family within human rights law and the rights of the child. An GCM-compliant reading of the obligations regarding family reunification requires states to revise processes for family reunification if they are overly restrictive. As a result, procedures and requirements within Member States should be addressed to protect children and provide for broader family reunification rights beyond the immediate family and those that existed in the country of origin. Further, time limits should be interpreted broadly to avoid the 3-month limitations. Applications for child reunification should apply from the date of submission to avoid delays preventing reunification, and the Article 7 requirements under Directive 2003/86 should be restrictively applied. Access to family reunification should not discriminate based upon the nature of protection granted; it should apply equally to refugees and those with subsidiary protection.

The CSR51 is very clear as to which rights refugees are entitled. The EUQD, which takes up the terms of the CSR51 and is based upon international law, builds upon this. Despite the EUQD being intended to build greater harmonisation of higher standards for refugees, the practice continues to demonstrate the disparity in application. As a result, the GCs provide important reaffirmation of the commitment to equal access to rights and detail states' obligations States vis-à-vis the human rights of refugees and migrants.

4.4. Conclusions

An analysis of the EUQD with the GCR and GCM demonstrates that the Compacts can provide much guidance on how Member States can implement the Directive in a manner consistent with their commitments therein and under EU and international human rights law. Of particular concern is ensuring that the application of Articles 2(f) and 15 of the EUQD does not create gaps in protection and is aligned with existing international refugee and human rights law. Further, provisions for addressing those in need of protection from humanitarian and natural disasters should be made. Revocation, refusal and exclusion from protection must also ensure compliance with international law, particularly protection from *refoulement*. These must ensure fair and effective consideration of whether protection needs have changed and the reality of security threats to ensure gaps in protection are not created.

Rights should be applied in a non-discriminatory manner that empowers refugees and beneficiaries of subsidiary protection to fully integrate into their host communities, in particular through equal access to healthcare, education, employment opportunities and accommodation. Access to sufficient documentation, including residence permits, must be equally applied to refugees and beneficiaries of subsidiary protection to ensure the durability of protection. Finally, the GCM, read together with the GCR, make clear the broad family reunification rights for individuals regardless of migratory status and the importance of protection for the rights of children.

[334] The family is the natural and fundamental group unit of society and is entitled to protection by society and the state. The right of men and women of marriageable age to marry and to found a family shall be recognised.

5. Asylum Procedures Directive 2013/32

5.1 Introduction

The Asylum Procedures Directive (EUAPD) establishes common procedures for the grant and withdrawal of international protection, as provided for in the EUQD. As an instrument of the CEAS, adopted pursuant to Article 78(2)(d) TFEU, it is 'based on the full and inclusive application of the Geneva Convention', with respect for the principle of *non-refoulement*.[335] The Directive currently in force focuses on establishing a *common* procedure in the determination of applications for international protection and possible withdrawal. As one of the second phase CEAS instruments, it goes beyond the minimum standards contemplated in the earlier Directive 2005/85/EC and seeks to establish a common asylum procedure and the complete harmonisation of standards in the field of asylum.[336] The impetus for a recast EUAPD was also informed by the widely divergent procedural standards among Member States during the first phase, permitted by the instrument itself which allowed a large margin of discretion; the updated instrument is designed to achieve more consistent application of applicable standards.[337] The original instrument had contributed to a situation whereby similarly situated applicants for protection saw their applications subject to varying standards,[338] resulting in vastly different protection recognition rates among Member States.[339] Accordingly, the EUAPD's primary objective is further developing Member States' procedural standards in asylum procedures 'with a view to establishing a common asylum procedure in the Union'.[340] Simultaneously, the EUAPD's design seeks to minimise the likelihood of secondary movements, where applicants move to a different Member State to pursue their application, by eliminating the differences in Member States' legal frameworks which preclude the equal application of the EUQD's provisions.[341]

The EUAPD is closely related to other CEAS instruments and is equally underpinned by an obligation to prevent instances of *refoulement*. For a beneficiary of international protection to be identified as

[335] EUAPD (n 5) Recital (3); See, for judicial confirmation, *Bolbol* (n 203) para 38; *El Kott* (n 198) para 43. In addition to its inclusion in the CSR51 (Article 33) and instruments of international human rights law (e.g., Article 3 CAT), the obligation is contained in Article 3 ECHR. It is enshrined in the EUCFR in Articles 4 and 19, including in the Treaties and in all CEAS instruments.

[336] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ 2005 L 326; Directive 2005/85/EC set out the minimum standards on procedures in Member States for granting and withdrawing refugee status. It was adopted in 2006, being the last legislative instrument to be adopted during the first phase of the CEAS; See European Parliament, 'Tampere Conclusions 1999 "Common European Asylum System"' <www.europarl.europa.eu/summits/tam_en.htm> accessed 20 November 2021, para 15.

[337] EUAPD (n 5) Recital 7; Communication from the Commission to the European Parliament pursuant to Article 294(6) of the Treaty on the Functioning of the European Union concerning the position of the Council on the adoption of a proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, COM(2013) 411 final, 10 June 2013, para 2.

[338] UNHCR, 'Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice' (March 2010) <www.unhcr.org/uk/protection/operations/4ba9d99d9/improving-asylum-procedures-comparative-analysis-recommendations-law-practice.html> (accessed 17 July 2022) 4.

[339] Elspeth Guild, Cathryn Costello, Madeline Garlick, Violeta Moreno-Lax and Minos Mouzourakis, 'New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection' (CEPS Paper No 77/2015), 5, 9; Elspeth Guild, 'Does the EU Need a European Migration and Protection Agency?' (2016) 28 International Journal of Refugee Law 585, 593–5.

[340] EUAPD (n 5) Recital 12.

[341] ibid Recital 13.

such in terms of the EUQD, their application must first be lodged and assessed in line with the EUAPD. The entitlement to rights under the EURCD requires the individual to be an international protection applicant. The Dublin III Regulation regulates the Member State responsible for determining the application for international protection; this means that the individual must have been admitted to a procedure where they are registered as an applicant for international protection even if the determination of the claim takes place in a different Member State. Accordingly, the first step to entitlement to CEAS rights and the possibility of a substantive assessment of the individual's claim to protection depends on *access* to a procedure. Once access is secured, there is a need for *appropriate procedural safeguards* to ensure that the application is determined in line with principles of good administration. Finally, in the case of a negative decision, the individual requires *access to an effective remedy* to ensure rigorous scrutiny of their claim.

The stakes for the individual in the determination of asylum applications are clearly high. An erroneous decision in the determination of the application for international protection presents a real risk that refugees are returned to situations where they are exposed to persecution and other forms of ill-treatment in breach of the *non-refoulement* obligation. Given 'the grave consequences' for the applicant, access to an asylum procedure, governed by appropriate procedural guarantees, must be in place to identify those in need of international protection.[342] As the Preamble makes apparent, the Directive establishes a common procedure to address a situation where the absence of common standards in asylum determination led to 'considerable disparities' between EU Member States in the grant of protection.[343] As such, the EUAPD seeks to achieve a process where 'similar cases should be treated alike and result in the same outcome'.[344] In so doing, it recalls earlier commitments at the EU level that people in need of international protection must be ensured access to legally safe and efficient procedures.[345] It emphasises that both Member States and applicants have an interest in ensuring the correct recognition of protection needs at first instance.[346]

The EUAPD stands out among instruments providing for refugee protection since it regulates the asylum procedure from the moment an applicant indicates his or her need for protection until a final decision is taken on such an application. It further sets out additional standards to regulate instances where international protection status might be withdrawn. This detailed presentation of the modalities of the procedure and applicable procedural standards is unlike international law which does not prescribe a specific status determination procedure through which States Parties can fulfil their obligations towards refugees and migrants. Indeed, the CSR51 does not prescribe the method for assessment of the application.[347] Guidelines issued by the UNHCR Executive Committee (ExCom) have fleshed out the standards to be followed in the determination of asylum applications. Effective implementation of the Refugee Convention's substantive obligations clearly requires 'properly functioning'[348] and fair asylum procedures at the national level.[349] In that regard, asylum procedures emerge as a precondition to respect for *non-refoulement*.

[342] UNHCR ExCom Conclusion No 34 (XXXIV), 'The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum' (1983) <www.unhcr.org/en-my/578371524.pdf> (accessed 20 November 2021) para 30.
[343] EUAPD (n 5) Recital 7.
[344] ibid Recital 8.
[345] Ibid, recalling the Stockholm Programme.
[346] ibid Recital 22.
[347] Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Fourth edition, Oxford University Press 2021) 54.
[348] UN High Commissioner for Refugees, 'Note on International Protection: Report of the High Commissioner' A/AC.96/1098 (28 June 2011) <www.refworld.org/docid/4ed86d612.html> (accessed 20 November 2021).
[349] Goodwin-Gill and McAdam ibid 528.

Despite the absence of obligations relating to the format of a status determination procedure within the CSR51, international law occupies an essential role in establishing the form and content of the asylum procedures which must be in place to secure the right to *non-refoulement* in practice. These standards, in turn, have informed and shaped the content of fundamental rights within EU law and concomitantly the implementation of the EUAPD. Beyond the Treaty obligation in Article 78 TFEU and EUCFR provisions - on *non-refoulement* and the right to asylum - which shape its interpretation and application,[350] the instrument recalls that Member States are bound by their obligations under international law, including European human rights law.[351] It reaffirms that as a CEAS instrument, the Directive must be consistent with the CSR51's 'full and inclusive application' and the principle of *non-refoulement*, 'ensuring that nobody is sent back to persecution'.[352] On this basis, the standards established by the ECtHR and UN Treaty Bodies, which have proven key in delineating those obligations that must be met in the asylum procedure, occupy an important role. These all serve the purpose of ensuring that persons in need of international protection, including refugees and holders of subsidiary protection, are afforded an opportunity to present and establish their qualification for protection in a procedure that can safeguard against his or her exposure to *refoulement.*[353]

As instruments of international law, the GCs can play an important role in elucidating the obligations under the EUAPD. Although not legally binding, as the Introduction to this Handbook makes clear, the Compacts' provisions can inform the interpretation and implementation of rights as they apply to migrants and refugees. At the same time, it is equally clear that the Compacts cannot fully rectify that which already appears to fall foul of international obligations.[354] Select aspects of the Procedures Directive have, since its first iteration in 2005, repeatedly come under fire for its questionable compatibility with international law.[355] While a number of these problematic provisions were addressed in the recast Directive under consideration here, such as through the strengthening of procedural safeguards,[356] it remains the case that the Directive in its entirety has been considered ill-suited to fully remedy the gaps in protection that can arise.[357] These issues have been extensively addressed elsewhere and are not replicated in detail here. Instead, the focus is on addressing those

[350] E.g. C-239/14, *Tall* (CJEU, 17 December 2015) para 50; C-148/13, C-149/13 C-150/13, *A, B and C* (CJEU, 2 December 2014) para 53; C-175/11, *HID and BA* (CJEU, 31 January 2013) para 58; C-69/10, *Diouf* (CJEU, 28 July 2011) para 34.

[351] EUAPD (n 5) Recital 3.

[352] ibid.

[353] This is without prejudice to the scope of the *non-refoulement* obligation, which applies in all circumstances regardless of one's entitlement to international protection.

[354] On the application of concepts originally specific to the Directive, such as safe third country practices, see, generally, Violeta Moreno-Lax, 'The Legality of the "Safe Third Country" Notion Contested: Insights from the Law of Treaties', in Guy S Goodwin-Gill and Philippe Weckel (eds), *Migration and Refugee Protection in the 21st Century: Legal Aspects – The Hague Academy of International Law Centre for Research* (Martinus Nijhoff, 2015), 665; Cathryn Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?' (2005) 7 European Journal of Migration and Law 35.

[355] See, generally, ECRE, 'ECRE Information Note on the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status' (2006) <https://ecre.org/wp-content/uploads/2016/07/ECRE-Information-Note-on-the-Asylum-Procedures-Directive_October-2006.pdf> (accessed 17 July 2022); Steve Peers, 'Immigration, Asylum and the EU Charter of Fundamental Rights' in Elspeth Guild and Paul Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Brill Academic Pub 2011) 341.

[356] Goodwin-Gill and McAdam (n 347) 448.

[357] Peers (n 52) 10-15.

elements of the Directive where the GCs can provide a blueprint for a more rights-conforming interpretation and implementation of existing obligations. In the face of proliferating state practices that threaten to erode international protection – including through limiting or removing access to procedures,[358] and EU measures that equally appear to erode the right to access asylum[359] – the GCs can help inform how existing obligations can be applied in a manner tailored to the situation on the ground.

Among the GCs' commitments, the GCR contains provisions that directly address areas governed by the EUAPD. Its rootedness in the principle of *non-refoulement* and international refugee legal obligations already establishes the importance of access to adequate procedures (paragraph 5). As detailed in the Introduction, the CSR51 remains the cornerstone of refugee protection. Clearly, under international law, access to adequate procedures means access to a procedure that identifies those to whom international refugee law accords refugee status. In the EU context, this includes those entitled to subsidiary protection. Within the GCs, Paragraphs 58-62 (registration and documentation, addressing specific needs, and identifying international protection needs) address mechanisms for fair and efficient determination of individual international protection claims and contemplate support for national asylum systems. These provisions highlight the requirement to take into account specific needs in processes affecting refugees, including in the determination of the asylum claim. In the context of large-scale movements, the CRRF emphasises that states must ensure adequate asylum procedures to assess protection needs, identify those to whom they owe heightened obligations, and address them appropriately (CRRF paragraph 5). In the GCM, paragraph 15, which affirms the importance of placing individuals at the heart of all processes, regardless of protection needs and migration status, the GCM presents the rule of law and due process as guiding principles. Respect for human rights – particularly the principles of non-regression and non-discrimination – and the emphasis on child-sensitive and gender-responsive migration frameworks shape the interpretation of all GCM commitments. Among these, Objective 7 (address and reduce vulnerabilities in migration), Objective 11 (manage borders in an integrated, secure and coordinated manner), and Objective 12 (certainty and predictability in migration procedures) contain elements that are addressed in the EUAPD and can be relevant for its interpretation.

This Chapter outlines the general framework of the EUAPD. It proceeds to consider how the specific GC commitments can inform the interpretation and application of the Directive, considering contemporary protection challenges.

5.2 General Outline of the Directive

The CEAS contemplates different kinds of procedures: the Dublin procedure, the regular asylum procedure, accelerated procedures, border procedures, admissibility procedures, and appeal

[358] See, for example, ECRE, 'Access to Protection in Europe: Borders and Entry Into the Territory' (2018), <https://asylumineurope.org/wp-content/uploads/2020/11/aida_accessi_territory.pdf> (accessed 17 July 2022); Greek Council for Refugees and Oxfam, 'Diminished, Derogated, Denied: How the Right to Asylum in Greece is undermined by the lack of EU Responsibility Sharing' (2020) <https://oxfamilibrary.openrepository.com/bitstream/handle/10546/621011/bp-diminished-derogated-denied-greece-refugees-020720-en.pdf> (accessed 17 July 2022); ECRE, 'Extraordinary Responses: Legislative Changes in Lithuania, 2021' (2021) <https://ecre.org/wp-content/uploads/2021/09/Legal-Note-11.pdf> (accessed 17 July 2022).

[359] Proposal for a Regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum COM/2021/890 final.

procedures. The following addresses the EUAPD's provisions concerning these procedures, except for the Dublin procedure addressed elsewhere in this Handbook.[360] The EUAPD is divided into five chapters addressing (i) scope and definitions; (ii) basic procedural guarantees; (iii) procedures at first instance; (iv) procedures for the withdrawal of international protection; and (v) appeal procedures. In Chapter III, the EUAPD contains rules on applying first country of asylum, safe country of origin, and safe third country concepts.[361] Chapter VI addresses general and final provisions, including transitional provisions.

5.2.1 Access to an Asylum Procedure

The EUAPD applies to all applications for international protection made in the territory, which includes those made at the border, in the territorial waters, or Member States' transit zones (Article 3). Where applications are made in the territorial waters, applicants 'should be disembarked on land and have their applications examined [in that Member State] in accordance [with the EUAPD]'.[362] The Directive also applies to the procedure for the withdrawal of international protection. However, it does not apply to requests for diplomatic or territorial asylum submitted to Member States' representations overseas (Article 3).[363] Applications for international protection must be dealt with in the territory of the EU Member States they are made in, even if made to officials from another EU Member State carrying out border controls.

All refugee status and subsidiary protection applications are to be determined in line with the EUAPD. Member States may also apply the Directive to applicants for protection that fall outside the scope of the EUQD, such as those who are eligible for national forms of protection.[364]

Member States must designate a determining authority that assumes responsibility for the appropriate examination of applications (Article 4). This must be a quasi-judicial or administrative body competent to take first-instance decisions (Article 2(f)). Such a body must be provided with appropriate means, including sufficient competent personnel and staff must be properly trained, taking into account EASO resources (now EUAA). It must ensure that interviewers have acquired general knowledge of problems that affect the applicant's ability to be interviewed, including previous experiences of torture. A different entity can be responsible for processing requests under the Dublin III Regulation or border procedures, which concern decisions on entry to the territory. In the latter case, the determining authority retains a role since decisions on border procedures are taken based on a reasoned opinion by the relevant authority. EU Member States must still ensure that the authority's personnel have the appropriate knowledge or receive the training necessary for them to fulfil their obligations in implementing the Directive. The Directive's provisions govern access to the procedure and Member States must ensure that once an application is made to the competent authority, this is registered within strict time limits (Article 6). Provision is also made for when applications are made on behalf of dependants or minors (Article 7).

5.2.2 Procedural Safeguards

[360] See Chapter 2.
[361] See, generally, Moreno-Lax (n 354) 665; Costello (n 354).
[362] EUAPD (n 5) Recital 26.
[363] As confirmed in *X and X* (n 270).
[364] This is the case, for example, where Member States have national forms of protection statuses for those whose claim to non-return stems from the unavailability of healthcare. See, European Migration Network, 'Comparative Overview of National Protection Statuses in the EU and Norway' (2020) <https://emn.ie/wp-content/uploads/2020/05/emn_inform_nat_prot_statuses_final.pdf> (accessed 17 July 2022).

The EUAPD provides a crucial safeguard in the form of the right to remain in the Member State pending the examination of the application (Article 9). This right preserves the individual's right to *non-refoulement* as it allows the individual to remain pending the assessment of his or her claim by the responsible Member State. In general, this right to remain subsists until there is a decision by the determining authority. However, two exceptions are noted: (i) in the case of a subsequent application which qualifies under the two exceptions contemplated in Article 41; and (ii) where the individual is to be extradited or surrendered to another Member State pursuant to a European Arrest Warrant, a third country, or an international criminal court or tribunal. Yet, even in these circumstances, protection against *refoulement* remains, as guaranteed in the EUCFR and international human rights law. For effective protection against *refoulement*, the right to remain subsists during appeal procedures. Article 46(5) provides that appeals must have suspensive effect to allow for the individual to remain pending the examination of their appeal.

Chapter II of the EUAPD outlines additional basic principles and guarantees, including additional requirements to be followed in the examination of the application (Article 10) and in the decision to be taken by the determining authority (Article 11). The EUAPD foresees basic guarantees for applicants, including the provision of information and contact with UNHCR (Article 12). UNHCR's role is covered by its own Article in the EUAPD, and Member States are under an obligation to allow UNHCR and its implementing partners access to applicants (Article 29). The above requirements are complemented by the obligations of the applicants which allow Member States to impose reporting requirements, oblige applicants to provide available documents, carry out a search, and record their statements (Article 13).

The role and content of the personal interview are outlined in Articles 14-17. In general, the applicant should be given an opportunity to have a personal interview to outline their entitlement to protection. This safeguard is dispensed with in cases where an applicant clearly qualifies for status based on available evidence or where the determining authority believes that the applicant cannot be interviewed due to enduring circumstances beyond the applicant's control (Article 14(a)-(b)). In this context, medical professionals must be consulted to determine the long-lasting nature of the condition (Article 14(b)). When interviews take place, the EUAPD provides safeguards relating to confidentiality, the interviewer's competence, and the provision of language interpretation to facilitate the applicant's presentation of their claim. While generally, interviews are to be carried out without any accompanying family members (Article 15(a)), Member States may provide rules concerning the presence of third parties at interviews (Article 15(4)). The interview must provide a forum where an applicant is given an adequate opportunity to present the elements needed to substantiate their application as comprehensively as possible (Article 16).

The rules regarding the provision and scope of legal assistance are set out in Articles 19-23, including the provision of legal and procedural information free of charge in procedures at first instance. The Directive contemplates heightened protection for individuals designated as being in need of special procedural guarantees (Article 24). This includes making provision for unaccompanied minors (Article 25).

Additional provisions govern the procedure in the event of the withdrawal of the application, whether in cases of explicit or implicit withdrawal (Articles 27-28). A duty of confidentiality governs the collection of information on individual cases, and Member States cannot disclose details of the application to alleged actors of persecution (Article 30).

5.2.3 The Segmentation of the Asylum Procedure

Once an applicant applies for international protection, the CEAS allows for a number of different procedures to be triggered, with Chapter III determining the scope and content of procedures at first instance. The individual might be subject to a Dublin procedure to determine which Member State is responsible for processing the application.[365] In general, once the responsible Member State is identified, the application may be subjected to a consideration of admissibility to determine whether the application – be it a first time or a subsequent application – will proceed to an examination on the merits (Article 33). Admissibility refers to instances where a Member State may choose to class an application as inadmissible and thereby not examine whether the applicant qualifies for international protection (Article 33-34). This exhaustive list includes instances where the applicant is a beneficiary of international protection in another Member State,[366] has refugee status or 'sufficient' protection in a third country considered a first country of asylum (Article 35), is from a safe third country (Article 38) or has lodged a subsequent application which does not present new elements or findings (Article 40). In the first three cases, Member States must still allow applicants to present their views on admissibility through a personal interview.

If admissibility considerations do not apply, the application is examined substantively to determine qualification for international protection, in line with the EUQD (Article 31). The examination procedure in Article 31 introduces time limits within which the application must be decided, which can be extended to take into account elements such as the complexity of the application and the number of simultaneous applications. It also includes duties to keep the applicant informed of the progress of their application. Member States can choose to prioritise specific applications, such as where the individual is considered vulnerable in terms of the EURCD or is in need of special procedural guarantees, such as unaccompanied minors.

However, the examination procedure can be dealt with under an accelerated procedure if one of the reasons in Article 31(8) subsists. These include instances where the applicant is from a country designated as a safe country of origin. In effect, accelerated procedures are designed to provide for a swifter examination of applications with Member States 'introducing shorter, but reasonable, time limits for certain procedural steps'.[367] Member States may also conduct accelerated or routine examination procedures at the border or in transit zones, if these same reasons exist, in line with Article 43. These include cases where the applicant is from a safe country of origin, as set out in the EUAPD; has acted in bad faith in destroying documents; is considered to frustrate the enforcement of removal action, or has entered the country unlawfully, but not made an application as soon as possible. Border procedures are allowed, albeit in line with the basic principles and guarantees outlined earlier, for decisions on admissibility (Article 33) or merits when the reasons outlined above subsist (Article 31(8)).

Applications may also be considered unfounded or manifestly unfounded (Article 32). Member States have the discretion to consider an application unfounded if the determining authority establishes that the applicant does not qualify for international protection under the EUQD. If the reasons in Article 31(8) are also present, the application can also be deemed manifestly unfounded (Article 32(2)).

[365] As considered in Chapter 2 of this Handbook. It is also possible for admissibility to be considered prior to a Dublin procedure (Article 33(2)(c)).
[366] See C-540/17, *Hamed* (CJEU, 13 November 2019) para 44.
[367] EUAPD (n 5) Recital 20.

Articles 35-39 present the different concepts that can be applied to exclude applicants from the 'basic' examination procedure. These define the concepts of 'first country of asylum', 'safe country of origin', 'safe third country', and 'European safe third country'. As per Article 36, there is no common list of which countries are safe countries of origin and Member States may designate their own national lists while taking a range of sources of information into account. For Member States to apply the safe country of origin concept, they must have adopted rules implementing it.[368]

The rules regarding subsequent applications are outlined in Articles 40-41, which provide for a preliminary examination of whether new elements or findings are in play in the application prior to the substantive examination of the application. In any case, applicants undergoing the preliminary examination procedure are to be provided with the guarantees contemplated in Article 12, including those relating to information, interpreting services, communication with UNHCR and access to their file.

Chapter IV outlines the procedure to be followed in the withdrawal of international protection (Articles 44-45).

5.2.4 A Right to an Effective Remedy

The right to an effective remedy is unequivocally outlined in international and EU law. The EUCFR provides that asylum applicants have a right to an effective remedy against decisions on their applications for international protection since '[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal'.[369] Chapter V of the EUAPD, which has attracted the majority of requests for preliminary references to the CJEU, addresses appeals procedures. Article 46 provides the right to an effective remedy through which Member States must ensure that applicants can have such a remedy against decisions taken on their application for international protection. These include decisions on whether their application is unfounded; decisions on admissibility; decisions taken at the border or in the transit zones; or a decision not to examine the application on account of the concept of European safe third country. A right to an effective remedy also applies against refusals to reopen the examination of an application after its discontinuation, as in the implicit withdrawal or abandonment of the application, and against the decision to withdraw international protection. This is because 'the decisions against which an applicant for asylum must have a remedy under [the EUAPD] […] are those which entail rejection of the application for asylum for substantive reasons or, as the case may be, for formal or procedural reasons which preclude any decision on the substance'.[370] While there is no right to appeal against the decision for the application to be considered in the context of accelerated procedures, such a decision must be subject to a form of judicial review within the framework of the appeal against the refusal of the asylum claim.[371] The right to an effective remedy also subsists against decisions refusing refugee status and granting subsidiary protection. However, Member States may consider an appeal against a decision considering an application unfounded in relation to refugee status inadmissible if the subsidiary protection status offers the same rights and benefits as those offered by refugee status.

[368] C-404/17, *A v Migrationsverket* (CJEU, 25 July 2018).
[369] EUCFR (n 40) Article 47.
[370] *Diouf* (n 250) para 42.
[371] ibid para 58.

To qualify as effective, the remedy must provide a full and *ex nunc* examination of both facts and points of law, including an examination of international protection needs.[372] From a practical perspective, time limits must be sufficient to 'enable the applicant to prepare and bring an effective action'.[373]

The right to remain in the Member State during the examination of the application does not always imply that remedies should have automatic suspensive effect. In general, the remedy must have automatic suspensive effect since Member States shall allow applicants to remain in the territory until the time to lodge an appeal has elapsed and when lodged, until it is decided. However, in appeals against decisions designating applications as manifestly unfounded (with limited exceptions), decisions holding an application inadmissible, decisions rejecting the reopening of an application following implicit withdrawal or abandonment, or a decision not to fully examine a subsequent application, the suspensive effect of the appeal need not be automatic. The possibility remains to request before a court or tribunal a right to stay pending the second instance decision. Where applicants appeal against decisions at first instance which uphold a decision rejecting an asylum application, there is no obligation under the Directive for that remedy to have automatic suspensory effect, even in cases where there is a serious risk of *refoulement*.[374]

5.3. Situating the Procedures Directive within Fundamental Rights Obligations

The EUAPD is embedded in the EU's fundamental rights framework. As such, its interpretation and application are subject to the fundamental rights obligations which bind the EU institutions and the Member States when acting within the scope of EU law, most notably those contained in the EUCFR, the CSR51, the ECHR, and other relevant treaties. While all EUCFR rights must guide the implementation of the EUAPD, the instrument itself refers to eight Charter rights – the right to dignity, the right to be free from torture and ill-treatment, the right to asylum, the prohibition of *refoulement* and collective expulsion, the prohibition of discrimination, the right to equality between men and women, the rights of the child, and the right to an effective remedy.[375] The CJEU has further confirmed that while the right to good administration (Article 41) is addressed to the institutions, bodies, offices and agencies of the EU, as a general principle of EU law it also applies when Member States examine applications for international protection.[376] The CRC is also referenced in the EUAPD, prescribing that the child's best interests must be 'a primary consideration' when Member States apply the instrument.[377] Other core UN treaties, including the ICCPR[378] and the UNCAT,[379] are explicitly referred to, particularly in the context of the European safe third country concept and the designation of safe countries of origin. The CRPD, to which the EU is a party, is also relevant to the interpretation of the EUAPD.[380]

As noted earlier, the EUAPD has been the target of sustained criticism since its first iteration. While discrete elements have been addressed to minimise the possibility that applicants' fundamental rights for international protection are violated in the asylum procedure, serious concerns remain

[372] C-348/16, *Sacko* (CJEU, 26 July 2017).
[373] *Diouf* (n 250) para 66.
[374] Case C-175/17, *X v Belastingdienst/Toeslagen* (CJEU, 26 September 2018) para 48.
[375] EUAPD (n 5) Articles 1, 4, 18, 19, 21, 23, 24 and 47, respectively.
[376] E.g. *Tall* (n 350250) para 50; A, B and C (350) para 53.
[377] EUAPD (n 5) Recital 33.
[378] ibid Annex I.
[379] ibid.
[380] Nicolette Busuttil, 'What Role for the UN Disability Convention in the Protection of Unwanted Migrants?' (2022) 24 International Community Law Review 397.

about the extent to which the instrument can provide holistic protection against the risk of *refoulement*. In particular, the fragmentation of the asylum procedure into different sub-categories with varying degrees of procedural guarantees and allowing for limited rights appears to generate the risk of individuals being wrongly identified as ineligible for international protection. In this context, the following looks at areas where the GCs can provide an interpretation of existing provisions that can minimise such a risk, even if it cannot entirely eliminate it.

5.4 Applying the EUAPD consistently with Member States' Commitments in the Compacts

5.4.1 Access to Effective Procedures

In the European context, the ECtHR has repeatedly maintained that applicants must have access to a procedure that identifies them and assesses their personal circumstances before a possible return.[381] The emphasis is on securing *effective* access, meaning that even when third country nationals without a legal right of residence make applications to other authorities within the Member State, such as examining magistrates deciding on the individual's detention, these must inform the third-country national of the procedure in place for lodging an application. If the individual expresses a wish to apply for international protection, their file must then be transmitted to the competent authority.[382] Failure to do so would 'seriously undermine' the EUAPD's aim which the CJEU confirms as 'guaranteeing effective, simple and straightforward access to the international protection procedure'.[383] Access to the asylum procedure must remain even where Member States declare a state of war, a state of emergency, or an emergency specific to an influx of third-country nationals.[384] Member States cannot deprive irregularly present third-country nationals of effective access to an asylum procedure on their territory.[385] To translate access to procedures into effective access, Member States are not allowed to limit the possibility of making applications to transit zones, particularly where they simultaneously implement a policy of limiting the daily numbers of those authorised to enter them.[386] This right must be safeguarded regardless of the merits and likelihood of success of the application for international protection.[387] The obligation to make access to the asylum procedure effective rather than rhetorical is confirmed by Member States' obligation to provide information on the possibility of applying for international protection in detention contexts and at border crossing points, where they must also ensure that those providing advice and counselling have access to the applicants (Article 8). This obligation is in line with the acknowledgement that 'the lack of access to information is a major obstacle in accessing asylum procedures', such that it is crucial that those subject to removal are guaranteed 'the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints'.[388]

As noted earlier, the GCR is founded on the obligations arising out of international refugee law, within which the principle of *non-refoulement* is the cornerstone. A recurrent theme throughout the GCR is the need to avoid protection gaps so that refugees do not slip through the cracks and find themselves

[381] *Hirsi Jamaa and Others v Italy* App No 27765/09 (ECtHR, 23 February 2012) para 202.
[382] C-36/20 PPU, *Ministerio Fiscal v VL* (CJEU, 25 June 2020) para 83.
[383] ibid para 82; This confirmed the AG's Opinion of 30 April 2020, para 72.
[384] C-72/22 PPU, *M.A. v Valstybės sienos apsaugos tarnyba* (CJEU, 30 June 2022) paras 56-72.
[385] ibid para 75.
[386] C-808/18, *Commission v Hungary* (CJEU, 17 December 2020).
[387] C-821/19, *Commission v Hungary* (CJEU, 16 November 2021) para 135.
[388] *Hirsi* (n 381) para 205.

in situations where they are unable to have a substantive examination of their claim to refugeehood and risk *refoulement*. This commitment is highlighted in the GCR's emphasis on the registration and identification of refugees, which 'facilitates access to basic assistance and protection, including for those with specific needs'.[389] In paragraph 61, this is made explicit in the context of asylum procedures. This acknowledges how '[m]echanisms for the fair and efficient determination of individual international protection claims provide an opportunity for States to duly determine the status of those on their territory in accordance with their applicable international and regional obligations […] in a way which avoids protection gaps and enables all those in need of international protection to find and enjoy it'.[390] Since the GCR is 'grounded in the international protection refugee regime, centred on the cardinal principle of *non-refoulement*, and at the core of which is the 1951 Convention and its 1967 Protocol',[391] appropriate procedures must be in place to ensure that those obligations can be fulfilled and refugees duly identified.[392]

It is indisputable that the international and European framework provides for an explicit right to effective access to asylum procedures. Yet, practice shows that this access is very often unavailable to the individual who wants to make an asylum application. In addition to externalisation practices and forceful prevention of access to the territory to apply for asylum, Member States have also justified limiting access to procedures based on the Covid-19 pandemic or security threats. Existing obligations indicate this is impermissible as protection against *refoulement* is considered absolute. Yet, the GCs can play a role in facilitating states' efforts to make asylum procedures accessible, particularly in situations designated as crises or emergencies.

To facilitate the implementation of these procedures, the GCR contemplates a strong role for UNHCR to support states to discharge their existing obligations towards refugees, including in the processing of asylum claims. Paragraph 62 presents UNHCR as establishing the Asylum Capacity Support Group with the participation of experts from relevant technical areas which can be activated at the request of a concerned state to provide support to relevant national authorities to strengthen aspects of their asylum systems.[393] The strengthening called for relates to ensuring fairness, efficiency, adaptability, and integrity and can include sharing good practices between states related to all elements of their asylum systems. The GCR notes that this includes support for case-processing modalities, which include simplified or accelerated procedures for cases likely to be manifestly unfounded, registration and case management processes, and interviewing techniques.

The CRRF confirms that in the face of 'a large movement of refugees', states receiving refugees are called upon to '[e]nsure, to the extent possible, that measures are in place to identify persons in need of international protection as refugees'.[394] This is foreseen as a priority, which could be carried out 'as appropriate' through cooperation with UNHCR, international organisations, other partners and other states if requested.[395] Here, the CRRF emphasises the need to register individually and

[389] GCR (n 3) para 58.
[390] Recalling UNHCR ExCom Conclusion No 103 (LVI) – Conclusions on the Provision on International Protection Including Through Complementary Forms of Protection (2005) and No 96 (LIV) – Conclusion on the Return of Persons Found Not to Be in Need of International Protection (2003)) <www.unhcr.org/en-my/578371524.pdf> (accessed 20 November 2021).
[391] GCR (n 3) para 5.
[392] The GCR further contemplates the application of group-based protection, including *prima facie* recognition of refugee status. This is not explored here since within the CEAS is governed by the Temporary Protection Directive, first activated in 2022 with respect to Ukrainian refugees, see n 110 and n 111.
[393] 'Asylum Capacity Support Group (ACSG)' (*ACSG*) <https://acsg-portal.org/> (accessed 14 July 2022).
[394] CRRF (n 309) para 5(a).
[395] ibid para 5.

document those seeking protection as refugees, including in the first country where they seek asylum, as quickly as possible upon arrival. Since assistance may be needed, technical and financial support can be coordinated by UNHCR, together with relevant actors and partners.[396]

While Objective 11 deals with the management of borders in an integrated, secure and coordinated manner, the EUAPD's contemplation of border procedures means it can provide further guidance. In particular, paragraph 27(c) calls for the review and revision of relevant national procedures for border screening, individual assessment and interview processes to ensure due process at international borders such that all migrants are treated in accordance with international human rights law, including through cooperation with national human rights institutions and other stakeholders.

In conclusion, in implementing the EUAPD, Member States can cast a wider net to call upon UNHCR and other stakeholders to assist in situations where they consider themselves overwhelmed or face a mass influx. The GCs provide a blueprint through which Member States can implement their existing obligations to ensure effective access to asylum by calling on multiple partners in a spirit of practical cooperation.

5.4.2 Against Fragmentation

The overview of the EUAPD illustrates the extent to which the instrument segments applications for international protection into separate channels, with rules and deadlines that differ according to the category that the individual application is channelled into. While, in principle, a procedure equipped with procedural safeguards is not inherently problematic, the fragmentation of the asylum procedure into distinct sub-procedures increases the procedural complexity of the system and risks creating protection gaps and vulnerability through the design of the system itself. Against this background, the GCM and its objective to strengthen certainty and predictability in migration procedures for appropriate screening, assessment, and referral (Objective 11) can provide inspiration. Despite not being specifically designed for asylum procedures, a commitment to increase legal certainty and predictability of procedures by developing and strengthening effective and human rights-based mechanisms for the adequate and timely screening and individual assessment of all migrants to identify and facilitate access to the appropriate referral procedures, in accordance with international law, can facilitate the implementation of a procedure which is not overly complex and can be navigated by the individual applicant.

The proliferation of different procedures ancillary to the routine examination procedure also raises questions about the extent to which the design of the procedural systems risks creating instances of *refoulement*. The existence of different examination procedures and the additional admissibility, accelerated, border procedures increase the likelihood of individuals being left without an opportunity to claim the protection they are entitled to. In addition, the continued implementation of accelerated procedures with their truncated appeal timelines and the absence of automatic suspensive effect over removal decisions (Article 46(6)) raises questions of conformity with the procedural duties under the *non-refoulement* obligation. The designation of claims as 'manifestly unfounded' belies the complex nature of certain asylum claims.[397]

[396] ibid para 5(d).

[397] For an overview of the use of these special procedures in Member States see, ECRE, 'Accelerated, Prioritised and Fast-Track Asylum Procedures: Legal Frameworks and Practices in Europe' (2017) www.ecre.org/wp-content/uploads/2017/05/AIDA-Brief_AcceleratedProcedures.pdf (accessed 17 July 2022).

While differentiated procedures might not appear inherently problematic, given that procedural safeguards can be put in place, this has not been borne out in practice. Consider how, where an individual already has international protection in another Member State, their application can be deemed inadmissible provided that the living conditions in the Member State which granted refugee status do not expose the individual to a serious risk of suffering ill-treatment contrary to Article 4 EUCFR, in effect, in breach of the *non-refoulement* obligation. At the same time, the threshold for a finding that living conditions expose the individual to such serious harm is a high one; for the CJEU, this arises when an 'applicant would, because of his or her particular vulnerability, irrespective of his or her wishes and personal choices, be in a situation of extreme material poverty'.[398]

The issue of access to justice is critical given the segmentation of the asylum procedure. In practice, procedures such as the admissibility procedure act as further gatekeeping, creating an additional hurdle for the individual to overcome before gaining access to an asylum procedure. Despite the procedural safeguards in place, which in any case are curtailed for those going through admissibility proceedings, additional procedures generate the likelihood of an additional bar to asylum, with the individual precluded from access to a substantive examination of their claim to protection. In the case of accelerated procedures, the speed with which the procedure is undertaken creates a space where applicants are unlikely to have a rigorous examination of their application and can fully participate in the process. In this environment, the GCs can provide inspiration and concrete support. The same observations with respect to the cooperation afforded by external actors made in the previous section can also be utilised to support Member States whose decision to implement special procedures, such as accelerated procedures, is motivated by the need to prioritise efficiency.

5.4.3 Mainstreaming Gender, Age, and Disability Considerations

While the EUAPD foresees heightened protection for individuals designated as in need of special procedural guarantees (Article 24), the fragmentation and complexity of the procedure appear ill-suited to provide the support required for a rights-compliant procedure that can adequately identify those eligible for international protection. Persons with special procedural guarantees are defined as those 'whose ability to benefit from the rights and comply with the obligations provided for in this directive is limited due to individual circumstances' (Article 2(d)). Safeguards include exemptions from accelerated (Article 31) and border procedures (Article 43) in specific circumstances. In this context, it is the determining authority that determines who qualifies as an individual in need of special procedural guarantees. It is clear that self-identification by the individual will not trigger the protection contemplated for this category of individuals. This attention to those in need of specific protection is extended to unaccompanied minors, with Article 25 outlining specific guarantees applicable thereto. These include the appointment of a representative to enable the individual to benefit from the rights and comply with obligations arising from the directive. Minors' special needs in relation to the personal interview and decision-making are also to be taken into account, with an obligation that the child's best interests shall be a primary consideration. To this end, there are restrictions on the application of accelerated, border, and inadmissibility procedures when it comes to minors.

The cross-cutting theme across the GCR and GCM is that migration and asylum processes must take into account the needs of specific populations, particularly those in vulnerable situations, and adapt them accordingly. These commitments are drawn from pre-existing international human rights law

[398] C-297/17, *Ibrahim* (CJEU, 19 March 2019) para 101.

obligations which impose duties on States Parties to support individuals to realise their rights in practice.[399] The GCs foresee processes as being inter alia age-, gender-, and disability-responsive. At face value, it would appear that the EUAPD makes these adjustments. Yet, processes must not stop at identifying specific needs but must go on to address them. As such, states should first ensure that measures in place to identify those in need of international protection provide for adequate, safe and dignified reception conditions, particularly for persons with specific needs, victims of human trafficking, child protection, family unity, and prevention of and response to the sexual and gender-based violence (CRRF para 5(a)).

At the registration stage, states should use the process to identify specific needs and protection arrangements including those with 'special protection concerns' which include, but are not restricted to, women at risk, children, especially unaccompanied ones and those separated from their families, child-headed and single-parent households, victims of trafficking and trauma and survivors of sexual violence as well as refugees with disabilities and older persons (CRRF para 5(f)). As acknowledged in the GCR, specific needs must be addressed once identified. Paragraph 59 presents an inclusive list of persons with specific needs as children, including those unaccompanied or separated, women at risk, survivors of torture, trauma, trafficking in persons, sexual and gender-based violence, sexual exploitation and abuse or harmful practices, and those with medical needs, persons with disabilities, those who are illiterate, adolescents and youth and older persons.[400] In these contexts, the GCR foresees states and relevant stakeholders as contributing resources and expertise for establishing mechanisms for identifying, screening and referring those with specific needs to *appropriate and accessible processes and procedures* (GCR para 60). As can already be seen, the list of individuals who qualify as in situations of vulnerability and in respect of whom the procedure must be adjusted casts a wide net.

The emphasis on gender-responsive, child-sensitive, and people-centred dimension is mainstreamed through the GCM. As guiding principles, paragraph 15 sets out how these must inform the interpretation and implementation of GCM commitments. The GCM recognises that respect for the rule of law, due process and access to justice is fundamental to all aspects of migration governance. Equally, these same principles apply in the context of asylum procedures. While the identification of protection needs goes beyond migration governance and is mandated and shaped by legal obligations, these same guiding principles must, at a minimum, also apply to procedures which are designed to identify refugees. This is closely linked to the commitments in Objective 12, which aims to strengthen certainty and predictability in migration procedures for appropriate screening, assessment, and referral, as noted above.

Through Objective 7, states commit to addressing and reducing vulnerabilities in migration. Among the actions to be taken to realise this commitment, they undertake to establish comprehensive policies and develop partnerships that provide migrants in a situation of vulnerability with necessary support at all stages of migration, through identification and assistance, as well as protection of their human rights. Paragraph 23(b) highlights cases related to women at risk, children, especially those unaccompanied or separated from families, members of ethnic and religious minorities, victims of violence, including sexual and gender-based violence, older persons, persons with disabilities, those discriminated against on any basis, indigenous peoples, workers facing exploitation and abuse, domestic workers, victims of trafficking in persons, and migrants subject to exploitation and abuse in

[399] E.g. the CRPD (n 16) duty to make reasonable accommodation for persons with disabilities (Article 5 CRPD) goes beyond the traditional prohibition of discrimination as a negative obligation. Instead, denial of reasonable accommodation for persons with disabilities is a breach of the prohibition in itself.

[400] This paragraph references A/RES/46/91 which addresses implementation on the international plan of ageing.

the context of smuggling of migrants. Through paragraph 23(c), the development of gender-responsive migration policies that address the particular needs and vulnerabilities of migrant women, girls and boys may include access to justice and effective remedies. In the case of children, states are to establish robust procedures that provide for their protection in relevant legislative, administrative and judicial proceedings, which can include the asylum procedure (paragraph 23(e)). In the identification, referral and assistance of migrants in situation of vulnerability, states are to involve local authorities and relevant stakeholders including legal aid and service providers.

5.4.4 Stakeholder Involvement: Involvement of a Variety of Stakeholders in the Asylum Process

The EUAPD can also accommodate a more participatory procedure which truly allows for the individual applicant to present their entitlement to protection as comprehensively as possible while being provided with the support to do so. The GCR calls for a 'multi-stakeholder and partnership approach'; this recognises that while states are primarily responsible for implementing their legal obligations towards refugees, in line with their sovereign status, a wider group of actors should be involved in the laws, policies, and processes affecting refugees, including refugees themselves.[401] UNHCR is here accorded a crucial role since, in addition to exercising its mandate responsibilities according to international law, they are called upon to 'play a supportive and catalytic role'.[402] In the case of asylum procedures, it is clearly the responsible Member State which must ensure that the identification of refugees takes place following a fair and adequate process. Yet, the status determination process can also bring in other stakeholders who can facilitate a procedure that is genuinely geared at supporting the individual to present their claim. UNHCR already have a mandate to support the asylum procedure pursuant to international law, which is recognised in the EUAPD.[403] Legal representatives already play a crucial role in providing effective legal assistance, once again as a legal obligation. Nonetheless, the procedure could also be widened to normalise the inclusion of a wider variety of actors, including supporters of an individual who can help with the traumatising nature of the asylum interview and experts by experience who can provide peer support. Of course, the individual applicant must be at the heart of the procedure and accorded the strongest voice. Yet, a framework that facilitates this opening up would align with the ethos of the GCR and achieve the purpose of the EUAPD. These stakeholders may include civil society organisations, including those led by refugees[404] and faith-based actors.[405] Research looking into the effect of a greater role for civil society actors in the implementation of the asylum procedure has shown how a more substantial role for 'non-state actors and supranational EU governance seems to improve both implementation of EU asylum legislation and compliance with international refugee law'.[406]

The drive towards cooperation is similarly extended to assistance sought by the Member State. A comparative analysis examining the implementation of Article 43 EUAPD, which looked at seven Member States, identified that among the key challenges is the limited use of external assistance by

[401] GCR (n 3) Section 3.2, paras 33 – 44. This is in line with the commitment in paragraph 2 of the CRRF which calls for a comprehensive refugee response to adopt a multi-stakeholder approach.
[402] ibid para 33.
[403] CSR51 (n 18) Article 35; EUAPD (n 5) Article 29.
[404] GCR (n 3) para 40
[405] ibid para 41
[406] Karin Schittenhelm, 'Implementing and Rethinking the European Union's Asylum Legislation: The Asylum Procedures Directive' (2019) 57 International Migration 229.

national authorities.[407] This is an area where the GCR can prove especially relevant, given that it foresees different modalities for providing assistance at the request of individual states when necessary. The GCM's whole-of-society approach can provide further guidance in how the monitoring and implementation of existing obligations can be done in a cooperative manner that draws upon civil society, refugee-led organisations, faith-based organisations and others to provide assistance including legal information and other forms of support. This option is already contemplated in the EUAPD in the context of legal and procedural information provision. A more holistic approach would seek the inclusion of a broader range of actors who can be actively involved in the procedure, provided this is in line with the applicant's wishes. Such a participatory approach could replicate the participatory approach included in the CRPD for persons with disabilities, whereby civil society - in particular persons with disabilities and their representative organisations – must be involved and allowed to participate fully in monitoring the implementation of CRPD obligation.[408]

5.5 Conclusion

As an instrument, the EUAPD concretely outlines Member States' obligations in providing access to asylum for persons with international protection needs. Its provisions, which seek to guarantee procedural standards and preserve access to justice and a right to an effective remedy, are designed to protect individuals against the risk of *refoulement.* Yet, despite the attempts to provide a common procedure which would allow Member States to apply a fair and effective procedure, the current setup of the EUAPD emerges as flawed. Its design has the capacity to produce the protection gaps that it seeks to rectify. The system's complexity and the imposition of additional hurdles that applicants must overcome before a substantive examination of their asylum claim creates a landscape where the procedure can effectively hinder access to protection rather than facilitate it.

In this context, the GCs can play an important role. By centring the need to avoid protection gaps, recalling the centrality of *non-refoulement,* and adopting a cooperative and collaborative approach to identifying those in need of international protection, the Compacts can facilitate the implementation of a more rights-compliant approach to asylum procedures. The availability of support and the participatory nature of a process that draws upon civil society as well as the individual applicant can result in a procedure that facilitates the unearthing of protection needs. This can follow a process that respects individual dignity, considers individuals' heightened protection needs in specific contexts, and facilitate Member States' endeavours to meet their international and European law obligations.

[407] Petra Baeyens and Jean David Ott, 'The Implementation of Article 43 of Directive 2013/32/EU in Practice: Comparative Analysis' in Wouter van Ballegooij *et al*, *Asylum Procedures at the Border: European Implementation Assessment* (European Parliamentary Research Service 2020) <https://op.europa.eu/publication/manifestation_identifier/PUB_QA0220920ENN> (accessed 13 July 2022) 149.

[408] CRPD (n 17) Art 33.

6. Detention in the Common European Asylum System and the Global Compacts

6.1 Introduction

Detention affects applicants for international protection at different stages of the asylum procedure. Applicants may be detained on arrival, for the purpose of a Dublin transfer, during the asylum procedure and/or the return procedure. Thus, different CEAS instruments and additional EU law, govern under what circumstances applicants for international protection can be detained, under what conditions, and how such detention can be challenged. The provisions regulating the detention of applicants for international protection are distributed among the CEAS instruments. Detention is regulated by the EURCD, the Dublin III Regulation, and the EUAPD. The detention of irregularly staying third-country nationals subject to removal is regulated by the Return Directive, 2008/115. The EURCD defines detention as 'confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement' (Article 2(h)). UNHCR, meanwhile, defines detention of applicants for international protection as 'the deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities'.[409] Thus, although EU law does not define it as such, detention constitutes a deprivation of liberty.[410] As such, in accordance with human rights law, detention is only possible under strictly defined circumstances.[411] Indeed, the EU law instruments listed above contain detailed provisions that regulate the deprivation of liberty and harmonise the grounds on which detention can be used. Their interpretation must be in line with the fundamental rights provided for in EU primary law, including the right to liberty in the EUCFR, which integrates the right as protected by the ECHR.[412]

At the primary law level, Article 6 EUCFR (right to liberty and security) provides that: 'Everyone has the right to liberty and security of person'. Its content corresponds to Article 5 ECHR, which contemplates exceptions to the right to liberty and security and authorises detention on specific grounds. In the immigration context, deprivation of liberty is permissible if it is 'in accordance with a procedure prescribed by law' and constitutes 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'.[413] As such, the standards and procedural guarantees contained in the ECHR equally apply to immigration detention in the implementation of EU law.

Additional fundamental rights regulate the immigration detention context. In particular, the right to dignity (Article 1 EUCFR), the right to the integrity of the person (Article 3 EUCFR), and the

[409] UNHCR, 'Detention Guidelines: Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention' (2012) <www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html> (accessed 2 June 2022) para 5.

[410] See also Case C-601/15 PPU, *JN v Staatssecretaris van Veiligheid en Justitie* (CJEU, 15 February 2016).

[411] ECHR (n 26) Art 5(1).

[412] Article 52(3) EUCFR (n 40) provides that the meaning and scope of EU rights corresponding to ECHR rights are the same. This does not prejudice the possibility of EU providing more extensive protection.

[413] ECHR (n 26) Article 5(1)(f).

prohibition of torture and inhuman or degrading treatment or punishment (Article 4 EUCFR) play a significant role in determining the conditions of detention. The right to an effective remedy (Article 47 EUCFR) plays an additional role and acts as a safeguard against arbitrary detention.

This chapter of the Handbook examines the interplay between EU primary law on detention, EU secondary law on the detention of applicants for international protection, and the GCs. To this end, it first outlines how the GCs address detention and then considers the relevant EU secondary law provisions and how they should be applied to ensure consistency with the Compacts. Finally, the relevant standards are discussed in the context of *de facto* detention with regard to confinement in transit zones and camps.

6.2 Detention in the Global Compacts

The GCs address detention both explicitly and implicitly. Being grounded in international human rights and refugee law, provisions on detention in the relevant human rights and refugee law instruments inform the Compacts' approach to detention. A number of general human rights norms applicable in the context of detention are worth highlighting here. The UDHR prohibits arbitrary detention (Article 9) and affirms the right to liberty (Article 3), as well as the right to freedom of movement within the borders of each state (Article 13). Similar provisions can be found in the ICCPR (Articles 9(1) and 12(1)); the CRC (Article 37(b)); the CRPD (Articles 14(1) and 18(1)); and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) (Articles 16(1), 16(4) and 39(1)). While these instruments do not prohibit detention, they point to the fact that detention should be an exceptional measure. In addition, they clarify that detention must be lawful (ICCPR Article 9(1); CRC Article 37(b); CRPD Article 14(1)(b);[414] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)[415] Article 16(4)) and they lay down the rights of persons detained, for example with regard to access to information, courts and compensation (ICCPR Article 9(2)-(5); CRC Article 37(d); ICRMW Articles 16(5), 16(8) and 16(9)) and with regard to humane treatment during detention (ICCPR Article 10(1); CRC Article 37(c); CRPD Article 14(2); ICRMW Article 17).[416]

In addition, the GCR's rootedness in international refugee law makes it apparent that the detention of refugees is impermissible. Article 26 of the CSR51 clarifies that refugees lawfully in a state's territory have the right to choose their place of residence to move freely within the state's territory. With regard to 'refugees unlawfully in the country of refugee,' Article 31(1) CSR51 clarifies that refugees shall not be penalised on account of their illegal entry or presence. The question of whether detention constitutes a penalty depends on its purpose, character and effect, as well as the intention with which it is imposed.[417] For example, where detention is used as a deterrent, it is contrary to Article 31 of the CSR51 because in this instance, 'its objective is similar to that of penal

[414] In addition, the CED (n 25) clarifies that state-sanctioned detention outside the law is a form of enforced disappearance where it is followed by an acknowledgement of the deprivation of liberty (Article 2).
[415] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 2220 UNTS 3 (adopted 18 December 1990, entered into force 1 July 2003) (ICRMW).
[416] The Optional Protocol to the CAT (n 16) foresees a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment (Article 1).
[417] Cathryn Costello and Yulia Ioffe, 'Non-penalization and Non-criminalization' in Cathryn Costello, Michelle Foster and Jane McAdam (eds) *The Oxford Handbook of International Refugee Law* (OUP 2021) 922.

law'.[418] Article 31 is also relevant to the prolonged situation of detention or situations of encampment. Article 31(2) stipulates that the movement of unlawfully present refugees shall not be restricted unless this is necessary; moreover, such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country. This reflects the requirement of necessity and the short duration of any detention in the immigration context.

In terms of explicit provisions, the GCR calls for support in developing of noncustodial and community-based alternatives to detention, particularly for children (paragraph 60). With regard to reception arrangements, the GCR also calls for 'alternatives to camps' (paragraph 54). This is relevant in the context of discussing detention since 'closed refugee camps, or even camps operating under informal confinement policies, may operate as *de facto* places of detention'.[419]

Meanwhile, through Objective 13, the GCM makes clear that immigration detention is to be used only as a measure of last resort with states committing to work towards alternatives (paragraph 29). In addition, Objective 13 includes a commitment to ensure that any form of detention follows due process, is non-arbitrary, is based on law, necessity, proportionality and individual assessments, is carried out by authorised officials and is for the shortest possible period of time. These safeguards apply regardless of whether detention occurs at the time of entry, in transit, or in return proceedings. They also apply regardless of the type of place where it occurs. The commitment to the use of detention as a measure of last resort is articulated explicitly, together with the commitment to prioritise non-custodial alternatives that are in line with international law. States further commit to taking a human rights-based approach to any detention of migrants.

With regard to children, the GCM draws on the best interests of the child principle and calls on states to ensure availability and accessibility of a viable range of alternatives to detention in non-custodial contexts, favouring community-based care arrangements that ensure access to education and healthcare, and respect their right to family life and family unity. It further calls on states to work to end the practice of child detention in the context of international migration.

The actions foreseen for achieving Objective 13 range from the improvement of independent human rights monitoring to the expansion of alternatives to detention and the formalised exchange of best practices relating thereto. The objective emphasises the commitment to the rule of law. Accordingly, states are to review and revise relevant legislation, policies and practices related to immigration detention to ensure that migrants are not detained arbitrarily, that decisions to detain are based in law, are proportionate, have a legitimate purpose, and are taken on an individual basis, in full compliance with due process and procedural safeguards. Moreover, immigration detention must not be promoted as a deterrent or used as a form of ill-treatment, in accordance with international human rights law.

The GCM acknowledges the role of legal assistance in migrants' effective access to justice. As such, states are to facilitate access to free or affordable legal advice and assistance of a qualified and independent lawyer, together with access to information and the right to regular review of a detention order.

The emphasis on *effective* access to rights is made clear in paragraph 29(e) through which states are to ensure that all migrants in detention are informed about the reasons for their detention in a language they understand. They are to facilitate the exercise of migrants' rights, including the right

[418] ibid.

[419] Maja Janmyr, *Protecting Civilians in Refugee Camps: Unable and Unwilling States, UNHCR and International Responsibility* (Brill 2013) 117.

to communicate with consular or diplomatic missions without delay, legal representatives, and family members, in accordance with international law and due process guarantees.

The GCM acknowledges that detention affects individual levels of health status and is likely to lead to long-term implications. As such, states are to reduce (rather than eliminate, given the context) the negative and potentially lasting effects of detention by guaranteeing due process and proportionality. They are to guarantee that detention must be for the shortest period of time and that it safeguards physical and mental integrity. At a minimum, states are to guarantee access to food, basic healthcare, legal orientation and assistance, information and communication as well as adequate accommodation, in line with international human rights law.

Objective 13 specifies that states are to ensure that all governmental authorities and private actors engaged in administering immigration detention do so in compliance with human rights. They must be trained on non-discrimination, the prevention of arbitrary arrest and detention in migration contexts and be held accountable for violations of abuses of rights.

6.3 Detention in EU Law and Consistency with the Compacts

6.3.1 The Reception Conditions Directive

6.3.1.1 The Grounds for Detention

The EURCD clearly sets out that Member States shall not detain an individual for the sole reason that he or she is an applicant for international protection (Article 8(1)).[420] The EURCD sets out six grounds for detention and provides that these must be laid down in national law (Articles 8(1) and 8(3)). This is an exhaustive list, meaning an applicant may be detained only on one of the six grounds identified therein. Nevertheless, as explained below, 'the grounds are vague and numerous and remain open to interpretation'.[421] The EURCD also stipulates that detention must be deemed necessary, must involve an individual assessment, and alternatives must be considered (Article 8(2)). Where this is the case, detention is permitted:

- To determine or verify an applicant's identity or nationality (Article 8(3)(a));
- To determine those elements on which the application for international protection is based and which could not be obtained in the absence of detention, in particular where there is a risk of absconding by the applicant (Article 8(3)(b));
- To decide, in the context of a procedure, on the applicant's right to enter the territory (Article 8(3)(c);
- For those applicants who are detained subject to a return procedure, detention is permissible in order to prepare the return and carry out the removal process. However, the Member State needs to substantiate on the basis of objective criteria, including that the applicant already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that the application is made merely to delay or frustrate enforcement of the return decision (Article 8(3)(d));
- When required by the protection of national security or public order (Article 8(3)(e));

[420] An applicant for international protection is defined in Article 2(c) of the EUAPD (n 5) as a third-country national or stateless person who has made an application for international protection in respect of which a final decision has not yet been taken.
[421] Peers *et al* (n 194) 521.

- To effect a Dublin transfer provided certain criteria are met (Article 8(3)(f)).

Firstly, it is evident that the grounds for detention enumerated in the EURCD diverge from those foreseen under Article 5 ECHR, which, as explained above, corresponds to Article 6 EUCFR. While Article 5 ECHR provides for a number of scenarios in which detention is permitted, the most relevant in the context of border crossing and asylum is the ground given in subparagraph (f): 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'. Based on this, the grounds for detention in the EURCD seem to go beyond what is permitted by EU primary law, save for Articles 8(3)(c) and 8(3)(d) EURCD. However, the ECtHR has held that 'the detention of potential immigrants, including asylum-seekers, is capable of being compatible with Article 5 § 1 (f),' including where the individual in question has already entered the state's territory.[422]

The main question regarding EU law's consistency with the GCs which arises in relation to the provisions above, then, is whether the enumerated reasons constitute legitimate grounds for detention and whether detention is proportionate. The aims of detention are laid out in the enumerated grounds themselves and are likely to be considered to be legitimate. There is nothing illegitimate about, for example, verifying an applicant's identity or deciding whether he or she can enter the territory. In addition, an overarching aim of all grounds for detention is to ensure the proper functioning of the CEAS,[423] another legitimate aim.

The question of proportionality, however, is not as straightforward. In human rights law, a proportionality analysis consists of three tests: the suitability test, the necessity test, and the 'test for proportionality in the strict sense'.[424] The suitability test examines whether the measures employed are suitable, i.e. able to achieve, the stated aim. The necessity test asks whether there are any alternative measures which could achieve the aim with fewer restrictions.[425] Finally, strict proportionality constitutes a balancing exercise between the rights of the individual and the state interests at stake and 'requires that any detriment to the person not be excessive as compared with the benefits to be obtained'.[426]

First of all, it should be noted that a proportionality analysis will always depend on questions of fact so that no general answer as to the proportionality of the detention of applicants for international protection generally can be given here. Proportionality in the strict sense, in particular, requires an individual assessment of the applicant's circumstances. EU law is consistent with this requirement in so far as it provides for 'an individual assessment of each case' in Article 8(2). However, with regard to suitability and necessity, it is possible to make some general observations.

Determining or verifying an applicant's identity or nationality: It is doubtful whether detention is a suitable means for determining or verifying an applicant's identity or nationality. It is not apparent how detention aids this aim. The CSR51 acknowledges that refugees are likely not to be in possession of identity or travel documents.[427] Thus, verifying his or her identity is often not within

[422] *Saadi v The United Kingdom* App No 13229/03 (ECtHR, 29 January 2008) para 64.
[423] Case C-18/16, *K* (CJEU, 14 September 2017) para 47; cf EURCD (n 5) Recital 2.
[424] Yutaka Arai-Takahashi, 'Proportionality' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 451.
[425] ibid 451- 452.
[426] ibid.
[427] CSR51 (n 18) Arts 25(2); 27; 28(1).

the power of the individual refugee. States seeking this verification may approach the refugee's (assumed) country of origin; however, keeping the applicant in detention will not aid or speed up this process. In this context, it should also be kept in mind that applicants for international protection have the right to privacy under international human rights law (e.g. Article 17 ICCPR) and that their information must not be shared with authorities in the country of origin as this could lead to retaliation against the applicant's family members.[428] As such, it is doubtful whether detention is lawful and necessary in this context. Indeed, the aim could be achieved with fewer restrictions.

When reading Article 8(3)(a) in light of the overarching aim to ensure the functioning of the CEAS, however, different conclusions on suitability and necessity may be reached. Thus, in *K.,* where the CJEU reviewed the validity of detention to verify the nationality or identity of the applicant for international protection in light of Article 6 EUCFR, detention was found to be proportionate to the aim of ensuring the functioning of the CEAS.[429] The case concerned an applicant suspected of having entered the Netherlands on a false passport. When he claimed asylum, he was detained based on the need to verify his identity and nationality and obtain data necessary for assessing his application. The validity of Articles 8(3)(a)-8(3)(b) EURCD was upheld, on the basis that detention is necessary to ensure CEAS functioning by preventing secondary movements. For the CJEU, the existence of the safeguards contained within the Directive meant that the use of detention was regulated by a tightly circumscribed framework.

However, when assessed in light of the GCs' clear commitment to using detention only exceptionally and as a last resort, the judgement in *K.* does not lead to an interpretation of the EURCD which is consistent with the Compacts' aims. If the functioning of the CEAS indeed depends on detaining certain applicants, the commitments under the Compacts suggest that the CEAS ought to be reviewed and amended in order to ensure that detention does not become the norm.

Determining elements on which the application for international protection is based: Article 8(3)(b) EURCD aims to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant.[430] When read in conjunction with the EUAPD's provisions on absconding applicants, it becomes clear that detaining an applicant to assess his or her asylum application is neither suitable nor necessary. It is not suitable because, under the EUAPD, the applications of individuals who abscond may be treated as having been withdrawn (Article 28(1)(b)). Thus, it is the applicant's responsibility to remain in contact with the determining authorities and to provide information. It is not for the determining authorities to ensure that this happens by detaining the applicant. The EUAPD further clarifies that obtaining information from applicants can be achieved with fewer restrictions, such as requests for information and interviews or by imposing reporting requirements or other obligations to communicate. Further, as explained above, information which is not in the applicant's power to provide will not be obtained more effectively

[428] UNHCR, 'Advisory Opinion on the Rules of Confidentiality Regarding Asylum Information' (UNHCR Representation in Japan 2005) <www.refworld.org/docid/42b9190e4.html> (accessed 19 November 2021).
[429] C-18/16, *K* (n 423).
[430] The EURCD does not define 'risk of absconding'. However, as discussed below, the Dublin III Regulation (n 5) (Article 2(n)) and the Return Directive (n 39) (Article 2(7)) do define this term, so that it can be assumed that, *mutatis mutandis*, 'risk of absconding' in the EURCD means 'the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person may abscond'. This, however, is a vague definition as it is not clear which 'objective reasons' indicate this risk.

by detaining the applicant. Thus, detention for the purpose of determining elements on which the application for international protection is based cannot be said to be necessary.

Again, based on the CJEU's findings in *K.*, a different conclusion may be reached when focusing on the functioning of the CEAS as an aim. As mentioned above, however, an asylum regime that depends on detention is inconsistent with the GCs.

Deciding on the applicant's right to enter the territory: A third-country national who presents herself at the EU's external border and asks for asylum is entitled to *non-refoulement* and, by implication, to access to the asylum procedure.[431] Since an application for international protection can only be effectively decided on the territory of a Member State, there should be an assumption in favour of admission. Thus, it is not the detention of an applicant which enables a state to make a decision on admission but existing law and procedures. As such, detention is not a suitable measure to achieve the stated aim. Neither is detention necessary to make the decision.

Preparing the return and carrying out the removal process: It is questionable whether detention, in itself, is able to achieve the return of an applicant. The Return Directive, which is discussed in more detail below, acknowledges that return may be delayed due to problems in obtaining the necessary documentation from third countries (Return Directive Article 15(6)(b)). As with verifying the applicant's identity or elements of his or her asylum application, when it comes to return, detention does not aid the procurement of documents. As such, detention is not necessarily a suitable means to achieve return. Further, the Return Directive itself offers 'voluntary' return as an alternative to forced removal (Article 7), so that detention cannot be said to be necessary in order to effect return.

Protecting national security or public order: Detention is likely to constitute a suitable means to protect national security and public order since a person in detention can no longer threaten either. However, the terms 'national security' and 'public order' are not defined in the EURCD. This appears to leave it to Member States' discretion to decide which behaviours threaten public order and national security and which applicants for international protection should, therefore, be held in detention. However, in *J.N.*, the CJEU gave guidance on determining whether certain conduct threatens national security or public order.[432] The case assessed the validity of Article 8(3)(e) EURCD in light of Article 6 EUCFR. It concerned an applicant who had been living in the Netherlands for several years and who had made several unsuccessful asylum claims. He had been convicted of 21 criminal offences, mainly for theft. When he lodged another asylum claim, he was detained under Article 8(3)(e) EURCD.

The CJEU upheld the validity of this provision. In so doing, it referred to its earlier rulings where it adopted a strict interpretation of the concepts of interference with national security and public order.[433] With regard to the concepts of national security and public order, the Court clarified that

[431] UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (26 January 2007) para 8; Guy S Goodwin-Gill, 'Comments on: The Right to Leave, the Right to Return and the Questions of a Right to Remain' in Vera Gowland-Debbas (ed), *The Problem of Refugees in the Light of Contemporary International Law Issues* (Brill Nijhoff 1996) 99; Vladislava Stoyanova, 'The Principle of Non-Refoulement and the Right of Asylum-Seekers to Enter State Territory' (2008) 3 Interdisciplinary Journal of Human Rights Law 1; Anuscheh Farahat and Nora Markard, 'Forced Migration Governance: In Search of Sovereignty' (2019) 17(06) German Law Journal 923; *Amuur v France* App No 19776/92 (ECtHR, 25 June 1996) para 43.
[432] J*N* (n 410).
[433] C-145/09, *Tsakouridis* (CJEU, 23 November 2010); *HT* (n 260).

'the concept of 'public order' entails […] the existence — in addition to the disturbance of the social order which any infringement of the law involves — of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'.[434] 'National security', meanwhile 'covers both the internal security of a Member State and its external security and that, consequently, a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security'.[435] Even though what exactly constitutes 'the fundamental interests of society' in the definition of public order is not clear, overall, the judgement in *J.N.* helps to clarify under what circumstances detention under Article 8(3)(e) EURCD is necessary. Nevertheless, where 'fundamental interests of society' is interpreted broadly in order to detain more applicants, this will be incompatible with the GCs' approach to detention.

Effecting a Dublin transfer: Article 28 of the Dublin III Regulation specifies that Member States shall not detain a person for the sole reason that he or she is subject to a Dublin transfer. However, Member States may detain the person concerned in order to secure transfer procedures where there is a significant risk of the person absconding. 'Risk of absconding' means the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person who is subject to a transfer procedure may abscond (Article 2(n)). Although this definition is vague as it does not specify what constitutes 'objective criteria' for a risk of absconding, where such a risk exists, detention may be said to constitute a suitable means for achieving a Dublin transfer. However, it is questionable whether detention is necessary. In this context, it is helpful to consult the Return Directive, which suggests solutions other than detention where there is a risk of absconding, such as regular reporting to the authorities, the deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a specific place (Article 7(3)). These less restrictive alternatives to detention should also apply in the context of Dublin transfers, so that detention cannot be said to be necessary to effect such a transfer.

Based on the discussion above, it is doubtful whether all of the EURCD's grounds for detention are consistent with the GCs, particularly with the requirement of proportionality. With regard to the judgement in *K.*, it should be noted that proportionality should not be assumed simply because it is claimed that detention for one of the reasons enumerated in the EURCD is necessary to ensure the functioning of the CEAS. In light of the Compacts' clear requirement that detention must be an exceptional measure, if the functioning of the CEAS depends on the detention of certain applicants, this is a reason to review existing law rather than a reason to continue to resort to detention.

6.3.1.2 Guarantees for Detained Applicants

Article 9 EURCD outlines the guarantees applicable to detained applicants for national protection and incorporates the safeguards provided for in the ECHR and ECtHR jurisprudence, save for the right to compensation for persons detained in contravention to Article 5 ECHR.[436] Thus, the EURCD provides that the applicant shall be detained only for as short a period as possible and shall be detained only for as long as the grounds set out in Article 8(3) EURCD apply (Article 9(1)). Accordingly, administrative procedures relating to the ground for detention must be executed with

[434] *JN* (n 410) para 65.
[435] ibid para 66.
[436] ECHR (n 26) Art 5(5).

due diligence and delays in administrative procedures that are not attributable to the applicant cannot justify ongoing detention.

Detention must be ordered in writing by judicial or administrative authorities, and the detention order must state the reasons in fact and in law on which it is based (Article 9(2)). Further, detained applicants must be informed in writing of the reasons for detention and the procedures for challenging the detention order, as well as of the possibility to request free legal assistance and representation (Article 9(4)), although Member States can limit such assistance and representation (Articles 9(7) and 9(8)). The lawfulness of a decision to detain an individual shall be subject to judicial review, which shall be conducted *ex officio* and/or at the applicant's request (Article 9(3)). Where, as a result of the judicial review, detention is held to be unlawful, the applicant concerned shall be released immediately. In addition, detention shall be reviewed by a judicial authority at reasonable intervals of time, *ex officio* and/or at the request of the applicant concerned (Article 9(5)).

Thus, the EURCD's provisions on guarantees for detained applicants are largely compatible with the relevant standards derived from the Compacts, save for lack of provision for compensation for unlawful detention, which, in addition to the ECHR, is provided for in the ICCPR (Article 9(5)) and the ICRMW (Article 16(9)).

6.3.1.3 Detention of Those in Vulnerable Situations: Minors and Applicants with Special Reception Needs

The EURCD makes provision for vulnerable persons and of applicants with special reception needs who are detained under Article 11. An 'applicant with special reception needs' is a vulnerable person, in accordance with Article 21, who is in need of special guarantees in order to benefit from the rights and comply with the obligations provided for in the EURCD (Article 2(k)). Article 21 EURCD, in turn, states that vulnerable persons include (but are not limited to) minors, unaccompanied minors, disabled people, older people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation.

'Vulnerable' detained applicants generally are not entitled to any special reception conditions; the Directive only requires states to pay special attention to their health, including their mental health, to monitor the health of these applicants and to provide support (Article 11(1)). As mentioned in the chapter on the EURCD in this Handbook, to implement the EURCD in a manner consistent with the GCR, Member States will have to meet the standards of and concrete measures foreseen to achieve health care, including for vulnerable applicants. Further, since the Compacts draw on international human rights law, EU Member States should make special provision for health care (Article 25) and reasonable accommodation of detained persons with disabilities in line with Article 14(2) CRPD.

Provisions on accommodation are made in the EURCD for detained families, who shall be provided with separate accommodation guaranteeing adequate privacy (Article 11(4)) and for female applicants, who must be accommodated separately from male applicants unless the latter are family members and all individuals concerned consent thereto (Article 11(5)).

A group entitled to special provisions, including particular accommodation, under the EURCD are minors. They shall be detained only for the shortest period of time possible, and all efforts shall be made to release detained minors and place them in accommodation suitable for them (Article

11(2)). In addition, minors' best interests must be a primary consideration, and they must have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age. Unaccompanied minors, meanwhile, shall only be detained in exceptional circumstances and released as soon as possible (Article 11(3)). They must never be detained in prison accommodation, must be accommodated separately from adults, and, if possible, they shall be detained in institutions with personnel and facilities that take into account the needs of persons of their age.

Member States must also ensure that Article 37 of the CRC is applied (Recital 18 EURCD), which confirms that detention of children shall be used only as a measure of last resort and for the shortest appropriate period of time, and stipulates that detained children shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. The CRC also provides that every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so. The child shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances. Further, children must be given the possibility to access legal assistance and challenge the legality of their detention.

Overall, it is questionable whether detention can ever be in a child's best interest.[437] Further, since the GCM call for an end to child detention (para 29(h)), Member States should not detain minors. Unlike the GCM, which suggests community-based care arrangements as an alternative to the detention of minors, the EURCD does not explicitly provide for alternatives suitable for minors,[438] so, in this respect, it is inconsistent with the Compact.

Besides with regard to children, detention may be wholly inappropriate also for other vulnerable persons. For example, according to the Recommended Principles and Guidelines on Human Rights and Human Trafficking, trafficked persons should not be held in immigration detention under any circumstances.[439]

The ECtHR confirmed that trafficked persons should not be detained in its judgement in *VCL and AN*.[440] Although the case concerned the criminal prosecution and imprisonment of two trafficked persons, who were minors at the time, rather than the detention of applicants for international protection, the judgement's conclusions are also relevant to trafficked persons detained under the EURCD. The ECtHR found that

> the prosecution of victims of trafficking would be injurious to their physical, psychological and social recovery and could potentially leave them vulnerable to being re-trafficked in the future. Not only would they have to go through the ordeal of a criminal prosecution, but a

[437] International Detention Coalition, 'Never in a child's best interests: A Review of Laws that Prohibit Child Immigration Detention' (June 2017) <https://idcoalition.org/wp-content/uploads/2017/06/Briefing-Paper_Never-in-a-childs-best-interests_June-2017.pdf> (accessed 26 April 2022); UNHCR, 'UNHCR's position regarding the detention of refugee and migrant children in the migration context' (January 2017) <www.unhcr.org/uk/protection/detention/58a458eb4/unhcrs-position-regarding-detention-refugee-migrant-children-migration.html> (accessed 26 April 2022).

[438] Article 8(4) EURCD (n 5) suggests regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place as alternatives to detention, however, these are not child-friendly options.

[439] UN Office of the High Commissioner for Human Rights (OHCHR), Recommended Principles and Guidelines on Human Rights and Human Trafficking, UN doc E/2002/68/Add.1 (20 May 2002) Guideline 2.6.

[440] *VCL and AN v The United Kingdom* App Nos 77587/12 and 74603/12 (ECtHR, 16 February 2021).

> criminal conviction could create an obstacle to their subsequent integration into society. In addition, *incarceration may impede their access to the support and services* that were envisaged by the Anti-Trafficking Convention.[441]

Thus, incarceration as a punishment for a criminal offence impedes trafficked persons' access to support and services. Keeping trafficked persons in detention for the purposes permitted under the EURCD will have the same effect. The GCM obliges states to provide migrants that have become victims of trafficking in persons with protection and assistance, such as measures for physical, psychological and social recovery (para 26(h)). As the judgement in *VCL and AN* confirms, such protection and assistance in hindered by incarceration.

6.3.1.4 Alternatives to Detention

Under the EURCD, Member States must consider alternatives to detention before taking a decision to detain (Recital 15). This is because Member States may detain an applicant only 'if other less coercive alternative measures cannot be applied effectively' (Article (8)(2) EURCD). The same article outlines an indicative list of measures that Member States may adopt as alternatives to detention, including regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place (Article 8(4) EURCD). Moreover, these alternatives must be laid down in national law.

To achieve consistency with the Compacts, Member States should introduce additional alternatives to detention. The GCR calls for community-based alternatives to detention, particularly for children (paragraph 60) and likewise, the GCM advocates for community-based care arrangements, especially in the case of families and children (paras 29(a) and (h)).

6.3.1.5 Detention Conditions

The EURCD requires that, as a rule, detention shall take place in specialised detention facilities rather than in prison accommodation (Article 10(1)). Where this is not possible, however, applicants for international protection must be kept separate from prisoners and from other detained third-country nationals who have not applied for international protection. Detained applicants must have access to open-air spaces (Article 10(2)), and private communications with and visits from family members, legal advisors, UNHCR and other NGOs must be possible (Articles 10(3)-(4)).

Applicants in detention should be treated with full respect for human dignity, and their reception should be specifically designed to meet their needs in that situation (Recital 18). The EURCD notes, however, that it may not be possible to ensure some of the reception conditions guaranteed under the Directive for applicants in detention, 'for example due to the geographical location or the specific structure of the detention facility' (Recital 19). However, any derogation from those guarantees should be temporary, only applied in exceptional circumstances, and be duly justified.

While the detention conditions as foreseen in the EURCD comply with the standards required by the Compacts, explicitly and implicitly, derogations from humane detention conditions are not permitted in international law, not even in times of emergency.[442] Thus, in order to implement the

[441] ibid para 159; emphasis added.

[442] The ICCPR (n 13) allows states to derogate from some of its obligations in times of emergency (Article 4), however, Article 10, which regulates treatment in detention, is not among the derogable provisions (Article

EURCD in a manner consistent with the GCs, Member States must never derogate from the standards required under the Compacts and in international human rights law generally.

6.3.1.6 Judicial Oversight of Detention

As mentioned above, detained applicants must be informed in writing of the reasons for detention and the procedures for challenging the detention order, as well as of the possibility to request free legal assistance and representation (Article 9(4)), although Member States can limit such assistance and representation (Articles 9(7) and 9(8)). The lawfulness of a decision to detain an individual shall be subject to judicial review, which shall be conducted *ex officio* and/or at the applicant's request (Article 9(3)). Where judicial review holds that the detention is unlawful, the applicant concerned shall be released immediately. In addition, detention shall be reviewed by a judicial authority at reasonable intervals of time, *ex officio* and/or at the request of the applicant concerned (Article 9(5)).

Where these standards are implemented in practice, the EURCD is consistent with the Compacts' commitments to access to justice and due process. The GCR highlights the importance of the rule of law (para 9) and access to justice, both generally (para 57) and for women and girls in particular (para 75). Meanwhile, the GCM refers to the rule of law, due process and access to justice as 'fundamental to all aspects of migration governance' (para 15).

6.3.2 The Dublin III Regulation

6.3.2.1 The Grounds for Detention

As mentioned above, one of the grounds for detention enumerated in the EURCD is detention for the purposes of effecting a Dublin transfer. Article 28 of the Dublin III Regulation specifies that Member States shall not detain a person for the sole reason that he or she is subject to a Dublin transfer. However, Member States may detain the person concerned in order to secure transfer procedures where there is a significant risk of the person absconding. 'Risk of absconding' means the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person who is subject to a transfer procedure may abscond. This must be based on an individual assessment and be proportional. However, since it is not clear what constitutes 'objective criteria' for believing that there is a risk of absconding, 'risk of absconding [is] often given a wide interpretation to justify detention'.[443] This is problematic in light of the Compacts conceiving of detention as a measure of last resort because it allows states to use a wide margin of discretion in deciding whom to detain. Indeed, this had 'led to different detention practices across the Member States'.[444]

4(2)); The CRC (n 14), CRPD (n 17) and ICRMW (n 415) do not provide for derogation from detention conditions either.

[443] European Parliament, 'Dublin Regulation on International Protection Applications: European Implementation Assessment' (European Parliamentary Research Service 2020) <www.europarl.europa.eu/RegData/etudes/STUD/2020/642813/EPRS_STU(2020)642813_EN.pdf> (accessed 19 November 2021) 12.

[444] ibid 22.

In 2019, the CJEU clarified in its judgement in *Jawo* that in the context of the Dublin III Regulation, 'to abscond' means to 'deliberately evade' a Dublin transfer.[445] While this judgment did not help to establish the 'objective criteria' for believing that there is a risk of absconding, the 2017 decision in *Al Chodor* held that detention under the Dublin III Regulation is unlawful where the objective criteria for determining the risk of absconding have not been laid down in national law.[446]

Yet, following the *Al Chodor* judgement, 'the codification of criteria for the determination of a "significant risk of absconding" has led to overly broad and often irrelevant indicators being included in legislation. […] For example, [Hungary] deems violations of reception centre house rules as a ground for determining such a risk, while [Germany] considers the payment of substantial amounts of money to smugglers as such a ground'.[447]

As discussed in the context of the EURCD's grounds for detention above, it is questionable whether detention is necessary to effect a Dublin transfer and thus, whether such detention is proportionate. As such, it is doubtful whether detention under the Dublin III Regulation is consistent with the GCs.

6.3.2.2 Guarantees for Detained Applicants and Detention Conditions

The same guarantees and detention conditions which apply under the EURCD also apply in relation to detention under the Dublin III Regulation, including those foreseen for vulnerable applicants (Article 28(4)). As such, the discussion on the relevant sections on the EURCD above are also relevant in the context of persons detained under the Dublin III Regulation.

The Regulation reiterates that detention shall be for as short a period as possible (Article 28(3)) so that where an applicant is detained, the period for submitting a take charge or take back request shall not exceed one month from the lodging of the application and a reply shall be given within two weeks of receipt of the request. The transfer shall then be carried out as soon as practically possible and, at the latest, within six weeks of the acceptance of the request by another Member State. The person in question must be released from detention if these deadlines are not met. Although these rules aim to keep detention as short as possible, the deadlines for the different stages in the procedure during which the applicant may be detained add up to 12-13 weeks (depending on how many weeks there are in the month which may pass until a take charge or take back request is submitted). This cannot be termed a 'short' period of detention, so these provisions of the Dublin III Regulation are inconsistent with the Compacts' requirement to ensure that detention is of short duration.

6.3.2.3 Alternatives to Detention

The Dublin III Regulation provides that the applicant can be detained 'only insofar is detention is proportional and other less coercive measures cannot be applied effectively' (Article 28(2)). This makes it clear that alternatives to detention must be considered before the individual's detention. Individuals subject to Dublin procedures are entitled to all the rights and safeguards in the EURCD. Thus, the requirements for alternatives to detention discussed in Section 3.1.4 above also apply under the Dublin Regulation. To achieve consistency with the Compacts, Member States should

[445] Case C-163/17, *Jawo v Bundesrepublik Deutschland* (CJEU, 19 March 2019) para 56.
[446] Case C-528/15, *Al Chodor* (CJEU, 15 March 2017) paras 45-46.
[447] European Parliament, 'Dublin Regulation Implementation Assessment (n 443) 74.

introduce alternatives to detention in line with those suggested in the Compacts, which should be community-based alternatives and aimed, in particular, at families and children.

In practice, however, an implementation assessment of the Dublin III Regulation shows that Member States do not use alternatives to detention.[448] This is not consistent with the Compacts.

6.3.2.4 Judicial Oversight of Detention

The EURCD's provisions on judicial review of detention also apply to detention under the Dublin III Regulation.

6.3.3 The Asylum Procedures Directive

6.3.3.1 Grounds, Guarantees and Conditions

The EUAPD reiterates that Member States shall not hold a person in detention for the sole reason that he or she is an applicant and refers to the EURCD with respect to grounds for and conditions of detention and the guarantees available to detained applicants, as well as their access to judicial review (Article 26). As such, the relevant sections on the EURCD above are also relevant in the context of persons detained under the EUAPD.

6.3.3.2 Access to the Asylum Procedure and Advice for Detained Applicants

The EUAPD contains a provision on information and counselling in detention facilities and at border crossing points (Article 8). The Directive requires Member States to provide persons held in detention facilities or at border crossing points with information on the possibility of making an application for international protection, however, only where there are indications that an individual wishes to do so. Member States must make arrangements for interpretation to the extent necessary to facilitate access to the asylum procedure and ensure that organisations and persons providing advice and counselling to applicants have effective access to applicants present at border crossing points, including transit zones, at external borders.

Based on the object and purpose the CSR51, in which the GCR is grounded, i.e. the protection of refugees, it is clear that all applicants for international protection must have access to the asylum procedure and detention must not hinder this in any way. Thus, all persons in detention at border crossing points must be given information on making an application for international protection, not only those persons who indicate that they wish to do so.

6.3.4 The Return Directive

6.3.4.1 General Outline of the Directive

Unlike the EURCD, the Dublin III Regulation, the EUAPD and the EUQD, the EU Return Directive is not part of the CEAS. This 2008 instrument is nonetheless discussed here because it is relevant when examining detention. The Return Directive establishes common rules concerning return,

[448] ibid 12.

removal, use of coercive measures, detention and entry bans (Recital 20). The EU Return Directive applies to irregularly staying third-country nationals (Article 2(1)).[449] However, Member States can decide not to apply it to third-country nationals who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained authorisation or a right to stay in that Member State (Article 2(2)(a)). In applying the Directive, Member States must respect the principle of *non-refoulement* (Recital 8; Article 4(4)(b); Article 5) so that the return, and, by extension, the detention of persons at risk of persecution or serious harm is not permitted under the Directive.

The EU Return Directive lays down under what circumstances a return decision shall be issued (Article 6), provides for the possibility of voluntary departure (Article 7), and states that removal, i.e. forced return, is to be carried out where the third-country national in question does not return voluntarily (Article 8). It also regulates under which circumstances removal may be postponed (Article 9), lays down rules for the return and removal of unaccompanied minors (Article 10), and makes provision for entry bans (Article 11). In addition, the Directive contains a number of procedural safeguards (Articles 12-14). For present purposes, the EU Return Directive's provisions on detention in Articles 15- 18 are of particular interest.

6.3.4.2 The Grounds for Detention

Article 15(1) EU Return Directive stipulates that unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures to prepare the return and/or carry out the removal process, in particular when:

(a) there is a risk of absconding or
(b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

Although, based on the phrase 'in particular,' this seems to be an open list of reasons for detention, the CJEU has clarified that it is, in fact, a closed list.[450] Nevertheless, a 2013 evaluation report on the application of the EU Return Directive notes that, at the time, Member States frequently cited other grounds for detaining applicants under the EU Return Directive, including establishing an applicant's identity and the applicant's 'lack of collaboration with foreign representations […] in clarifying documentation,'[451] as well as 'illegal stay'.[452] For example, in Cyprus, the risk of absconding [was] presumed in every case of illegal stay or entry, resulting in automatic detention'.[453]

[449] The Return Directive (n 39) uses the term 'illegal stay' and defines this as '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 (n 53) or other conditions for entry, stay or residence in that Member State' (Article 3(2)).
[450] Case C-357/09 PPU, *Kadzoev* (CJEU, 30 November 2009), stating that the EU Return Directive does not allow detention on grounds of national security or public order; cf Peers *et al* (n 194) 527.
[451] European Commission, 'Evaluation on the application of the Return Directive (2008/115/EC): Final Report' (European Union 2013) 24.
[452] ibid 27.
[453] ibid.

In addition, uncertainties around the questions as to the circumstances under which there is a risk of absconding with regard to a particular individual and when an individual can be deemed to 'avoid or hamper' the preparation of return or the removal process, allows states to potentially apply these detention grounds widely. The definition of 'risk of absconding' in the EU Return Directive is near identical to the definition of the phrase in the Dublin III Regulation.[454] It means the existence of reasons in an individual case based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond. However, as in the Dublin III Regulation, what constitutes 'objective criteria' to believe that an individual may abscond is not clear. Meanwhile, 'avoiding or hampering' the preparation of return or the removal process is not defined in the Return Directive. Seeing as the GCs conceive of detention as an exceptional measure of last resort, to apply the EU Return Directive in a manner consistent with the Compacts, Member States must define more precisely both the 'objective criteria' for believing that an individual may abscond, and what it means to 'avoid or hamper' the return and removal process.

6.3.4.3 Guarantees for Detained Applicants and Detention Conditions

The Directive states that detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence (Article 15(1)). Detention must be ordered by administrative or judicial authorities in writing and reasons for the decision to detain must be given in fact and law (Article 15(2)). Detention shall be maintained for as long a period as the grounds for detention are fulfilled and it is necessary to ensure successful removal (Article 15(5)). Detention may not exceed six months. However, Member States may extend this time limit for a limited period not exceeding a further twelve months in accordance with national law in either of two cases. An extension is possible where, regardless of all their reasonable efforts, the removal operation is likely to last longer owing to a lack of cooperation by the third-country national concerned or delays in obtaining the necessary documentation from third countries (Article 15(6)). In this context, it should be noted that extending detention based on difficulties in obtaining documentation from third countries is not in compliance with the GCM. Objective 21 of the GCM requires states to cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration. Under this objective, it is for states to cooperate on the identification of nationals and issuance of travel documents (para 37(c)) and to foster institutional contacts between consular authorities and relevant officials from countries of origin and destination (para 37(d)). Thus, it is the responsibility of states to ensure that the documentation necessary for return is obtained. Migrants should not be punished with prolonged detention where states fail to achieve this.

When it appears that a reasonable prospect of removal no longer exists or the grounds for detention no longer exist detention ceases to be justified; the person concerned must be released immediately (Article 15(4)). The 2013 evaluation report notes that in Cyprus, France, Greece, Luxembourg, Malta and Slovakia this provision was 'not always respected in practice'.[455] For example, in Slovakia, Greece, Malta and Cyprus, 'it was not general practice to release returnees

[454] Return Directive (n 39) Art 3(7): '"risk of absconding" means the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond';
Dublin Regulation (n 5) Art 2(n): '"risk of absconding" means the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person who is subject to a transfer procedure may abscond'.
[455] European Commission, 'Evaluation on the Return Directive' (n 451) 27.

immediately if there were no reasonable prospect of removal,' while in Slovakia, 'detainees were sometimes re-detained immediately upon release'.[456]

As a rule, detention shall take place in specialised detention facilities (Article 16(1)). However, where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the third-country nationals in detention shall be kept separated from ordinary prisoners. This, too, has not always been respected. The evaluation report notes that in Germany, Belgium and the Netherlands, migrants have been detained alongside ordinary prisoners.[457] In emergency situations, where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or its administrative or judicial staff, such a Member State may, as long as the exceptional situation persists, derogate from these provisions (Article 18(1)).

As noted above, in the context of discussing the EURCD, derogations from humane detention conditions are not permitted in international law, not even in times of emergency.[458] Thus, to implement the Return Directive in a manner consistent with the GCs, Member States must never generally derogate from the standards required under the Compacts and international human rights law.

Third-country nationals in detention shall be allowed — on request — to establish in due time contact with legal representatives, family members and competent consular authorities (Article 16(2)). Further, relevant NGOs must have the possibility to visit detention facilities (Article 16(4)) and third-country nationals kept in detention must be provided with information which explains the rules applied in the facility and sets out their rights and obligations (Article 16(5)). According to the implementation report, these provisions are respected in most Member States, except for Malta which does not allow detainees to contact legal representatives, family members and consular authorities, and in Greece, where the ability to make contact varies among detention facilities.[459]

Like the EURCD, the Return Directive does not provide for compensation for unlawful detention. In this sense, it does not comply with implicit standards required by the GCs.

6.3.4.4 Detention of Vulnerable Persons

Member States must pay particular attention to the situation of vulnerable persons (Article 16(3)). Emergency health care and essential treatment of illness must be provided. Arguably, however, implementing the EU Return Directive consistently with the GCM requires more than mere emergency health care. The GCM speaks of access to 'basic healthcare' for migrants in detention (para 29(f)), which is broader than emergency healthcare. Minors, who constitute an example of vulnerable persons, must have access to healthcare without any qualification (para 29(h)). Similarly, the CRPD requires that persons with disabilities have the right to the enjoyment of the highest attainable standard of health (Article 25) and this also applies to persons in detention (Article 14(2)).

[456] ibid.
[457] ibid 51.
[458] The ICCPR (n 13) allows states to derogate from some of its obligations in times of emergency (Article 4), however, Articles 10, which regulates treatment in detention, is not among the derogable provisions (Article 4(2)); The CRC (n 14), CRPD (n 17) and ICRMW (n 415) do not provide for derogation from detention conditions either.
[459] European Commission, 'Evaluation on the Return Directive' (n 451) 53.

The CRPD also requires reasonable accommodation for persons with disabilities who are detained (Article 14(2)).

The evaluation report on the Return Directive states that in a number of Member States 'health services offered in detention facilities are very basic and in some cases only amount to no more than emergency health care'.[460] Health care provision also varies between different detention facilities in the same country.

Under the Return Directive, unaccompanied minors and families with minors shall only be detained as a measure of last resort and for the shortest appropriate period of time (Article 17(1)). Detained families must be provided with separate accommodation guaranteeing adequate privacy (17(2)). In emergency situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or its administrative or judicial staff, such a Member State may, as long as the exceptional situation persists, derogate from this provision (Article 18(1)). Again, this is not in line with the Compacts, as derogations from humane detention conditions are not permitted in international law, not even in times of emergency.

Minors in detention shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age; they shall have, depending on the length of their stay, access to education (Article 17(3)). Unaccompanied minors shall, as far as possible, be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age (Article 17(4)). The best interests of the child shall be a primary consideration in the context of the detention of minors pending removal (Article 17(5)).

As noted in the context of discussing minors' detention under the EURCD, it is questionable whether detention can ever be in a child's best interest.[461] Further, since the GCM call for an end to child detention (para 29(h)), Member States should not detain minors. Unlike the GCM, which suggests community-based care arrangements as an alternative to the detention of minors, the Return Directive does not provide for alternatives suitable for minors. In this respect, it is inconsistent with the Compact.

In practice, as the evaluation report on the Return Directive notes, 11 Member States and Schengen associated countries do not detain minors, while 15 do so (occasionally).[462] Some of the latter 'do not always use separate detention facilities' for migrants and ordinary prisoners, so that both unaccompanied minors and families with minors may be detained in ordinary prisons, although sometimes in separate accommodation.[463]

Of the countries detaining minors, 11 provide access to leisure activities, such as 'play rooms, sports grounds and television rooms'.[464] However, Estonia, Finland and Portugal were reported not to provide any leisure activities for minors in detention. Access to education is provided in 8 Member States, but Bulgaria, Estonia, Finland, Luxembourg and Portugal do not provide this.[465]

[460] ibid 55.
[461] International Detention Coalition (n 437); UNHCR (n 437).
[462] European Commission, 'Evaluation on the Return Directive' (n 451) 59.
[463] ibid 60.
[464] ibid 61.
[465] ibid 62.

6.3.4.5 Alternatives to Detention

In fact, the Return Directive does not explicitly require states to consider alternatives to detention. However, it specifies that applicants can be detained 'unless other sufficient coercive measures can be applied effectively in a specific case' (Article 15(1)), which presents the obligation to consider alternatives before detaining the individual. In its provisions on voluntary departure, the Directive introduces 'obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, the deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place' (Article 7(3)). These are, effectively, alternatives to detention. The Return Directive stipulates that these obligations 'may' be imposed. As such, the EU Return Directive does not require that these alternatives be laid down in national law or applied in practice.

Nevertheless, to apply the Directive in a manner consistent with the Compacts, Member States must ensure that alternatives to detention exist, and that they are community-based and aimed, in particular, at families and children. The evaluation report on the Return Directive shows that alternatives to detention do exist in EU Member States. These include regular reporting to authorities, residence restrictions, deposits of financial guarantees, electronic monitoring and the obligation to surrender one's passport and documents.[466]

However, the report notes that, at the time, 'most Member States in practice only appl[ied] alternatives to detention in rare cases'.[467] Although the report describes some countries, Estonia, Latvia and Lithuania, as 'particularly diligent users of alternatives to detention,' it notes that other countries, such as Greece, Slovakia and Germany, do not normally use alternatives even if this is permitted by law.[468]

6.3.4.6 Judicial Oversight of Detention

Where detention has been ordered, Member States must either provide for a speedy judicial review of the lawfulness of detention (Article 15(2)), which must be decided on as quickly as possible from the time detention begins, or they must inform the third-country nationals of the possibility, and grant her the right, to take proceedings by means of which the lawfulness of detention shall be subject to a speedy judicial review. This, too, must be decided on as quickly as possible after the launch of the relevant proceedings. In emergency situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or its administrative or judicial staff, such a Member State may, as long as the exceptional situation persists, allow for longer periods of judicial review (Article 18(1)). If the judicial review finds that detention is not lawful, the third-country national concerned must be released immediately (Article 15(2)). In addition, detention shall be reviewed at reasonable time intervals either on application by the third-country national concerned or ex officio (Article 15(3)). In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.

The evaluation report on the Return Directive shows that in about half of the Member States, administrative authorities order detention without involving the judiciary, whereas in the other half of the Member States, judicial review is automatic after a certain number of days.[469] In most of

[466] ibid 29 and 32.
[467] ibid 29.
[468] ibid.
[469] ibid 36.

these countries, judicial review can be said to happen quickly; only in three Member States does judicial review happen after more than four days: in France (5 days), Latvia (10 days) and the Netherlands (28 days).[470] In Germany, Romania, Spain, and Norway, detention can only be ordered by judicial authorities.[471] In the majority of countries which do not provide for automatic judicial review, but where this must be initiated by the individual concerned, judicial review happens within 15 days of the individual requesting this.[472]

The frequency of subsequent reviews varies widely between Member States. For example, in Portugal, detention is reviewed every week, while in Germany and Lithuania, the maximum legal period between reviews is six months, even if, in practice, these periods are significantly shorter.[473]

In terms of practical challenges to detention under the Return Directive, the CJEU has held that detention imposed as a criminal law sanction for failing to comply with an order to leave the national territory is not permissible because this renders the Directive less effective by delaying removal.[474] However, where re-entry bans are breached, the CJEU has held in *Skerdjan Celaj* that Member States may impose criminal law sanctions such as imprisonment[475] This is because, in such a case, the provisions of the Return Directive will have already been applied to an individual who then nevertheless returns in breach of the entry ban.[476] Since the Compacts make it clear that detention must not be promoted as a deterrent, the CJEU's judgement in *Skerdjan Celaj* does not lead to an interpretation of the law consistent with the Compacts.

6.4 De-facto Detention: Confinement in Transit Zones and Camps

The use of immigration detention has increased dramatically in almost all EU Member States since the beginning of the so-called 'refugee crisis'.[477] This is concerning in light of the provisions discussed above, which make it clear that detention should be an exceptional measure of last resort. Immigration detention is particularly problematic where individuals are *de facto* detained but Member States refuse to apply the safeguards foreseen in EU law because the situation is not officially classified as detention. This particularly affects applicants for international protection at the EU's external borders who are held in transit zones or housed in camps.

Under the EUAPD, the examination of an application for international protection, with regard to both admissibility and substance, can take place at the border or in transit zones (Article 43(1)). A decision on the application must be taken within a reasonable time; where such a decision has not been taken within four weeks, the applicant 'shall be granted entry to the territory of the Member State' and the application (continue to be) processed in accordance (Article 43(2)). However, where large numbers of applicants lodge applications at the border or in transit zones, Member States

[470] ibid 37
[471] ibid 36.
[472] ibid 38.
[473] ibid 40.
[474] C-61/11 PPU, *El Dridi* (CJEU, 28 April 2011) para 59; C-329/11, *Achughbabian* (CJEU, 6 December 2011) para 39.
[475] C 290/14, *Skerdjan Celaj* (CJEU, 1 October 2015) para 30.
[476] ibid para 27.
[477] Izabella Majcher, Michael Flynn, Mariette Grange, *Immigration Detention in the European Union: In the Shadow of the "Crisis"* (Springer 2020) 2.

may decide these applications where and for as long as applicants are 'accommodated normally' at locations in proximity to the border or transit zone (Article 43(3)).

During the COVID-19 pandemic, asylum decision-making was temporarily suspended during the first lockdown[478] so that the EUAPD's four-week time limit on detention could not be met. In addition, because hygiene measures such as social distancing are difficult to implement in detention facilities,[479] detained persons could not be considered to be 'accommodated normally' with regard to protecting their health. Further, Dublin transfers and returns effectively came to a halt.[480] Where immigration detainees were not released despite those circumstances, this practice was inconsistent with the Compacts because detention could no longer be justified as the aims it pursued could not be achieved. In this context, it should be noted that some Member States did release immigration detainees during the pandemic,[481] a practice consistent with the GCs' standards regarding detention.

6.4.1 Transit Zones

While the term 'transit zone' is not defined in EU law, in practice, this refers to an area at the external border where temporary accommodation is provided. Applicants for international protection cannot leave the transit zone in the direction of the Member State's territory but may, in theory, leave it by returning to the third country whose border they crossed to reach the transit zone. An example of such a zone is the (now disused) Röszke transit zone on the border between Hungary and Serbia. In *Ilias and Ahmed v Hungary*, a case challenging confinement to this transit zone under Article 5 ECHR, the ECtHR described the Röszke transit zone as a compound with mobile containers and a narrow open-air area surrounded by approximately four-metre high fencing with barbed wire on the top. Police officers and armed security guards guarded the entire zone. At the material time, asylum applicants were held in the designated accommodation area consisting of approximately ten mobile containers (each measuring some 2.5 metres x 5.5 metres) furnished with three to five beds and an electric heater. There was a separate container for sanitary purposes and a bigger container used as a common room furnished with tables and chairs. The accommodation area was surrounded by a narrow open-air strip (approximately 2.5 metres wide and 40-50 metres long). Hot and cold running water and electricity were supplied. Three pork-free meals were available daily to the applicants in a dining container.[482]

According to applicants in the case, 'they had no access to social or medical assistance while in the zone. There was no access to television or the Internet, landline telephone or any recreational facilities'.[483]

[478] ECRE, 'Information Sheet 7 December 20201: Covid-19 Measures and Updates Related to Asylum and Migration Across Europe' <www.ecre.org/wp-content/uploads/2020/12/ECRE-COVID-information-sheet-Dec-2020.pdf> (accessed 19 November 2021).
[479] WHO, 'Preparedness, Prevention and Control of COVID-19 in Prisons and Other Places of Detention: Interim Guidance' (World Health Organization 2020) <https://apps.who.int/iris/bitstream/handle/10665/336525/WHO-EURO-2020-1405-41155-55954-eng.pdf?sequence=1&isAllowed=y> (accessed 19 November 2021).
[480] José A Brandariz and Cristina Fernández-Bessa, 'Coronavirus and Immigration Detention in Europe: The Short Summer of Abolitionism?' (2021) Social Sciences 10(6) 226.
[481] ibid.
[482] *Ilias and Ahmed v Hungary*, App No 47287/15 (ECtHR, 21 November 2019) para 15.
[483] ibid para 16.

Whether confinement to a transit zone constitutes detention has been discussed both by the ECtHR and the CJEU. In *Ilias and Ahmed*, the ECtHR held that the applicants' 23-day confinement to the Röszke transit zone did not amount to a violation of Article 5 ECHR.[484] The Court argued that the applicants were free to leave the transit zone in the direction of Serbia so that they could not be considered to have been *de facto* deprived of their liberty. The fact that they would have had to violate Serbian law to do so and would likely have had insufficient access to asylum procedures in Serbia was not seen as constraining the applicants' agency to leave.

However, in *RR and Others v Hungary*, the ECtHR held that the 4-months-long confinement of a family to the Röszke transit zone at the border of Hungary and Serbia amounted to *de facto* detention and deprivation of liberty.[485] The Court distinguished this case from *Ilias and Ahmed* based on the 'lack of any domestic legal provisions fixing the maximum duration of the applicants' stay, the excessive duration of that stay and the considerable delays in the domestic examination of the applicants' asylum claims, as well as the conditions in which the applicants were held during the relevant period.[486] It pointed out that as 'vulnerable' applicants, the family's pregnant mother and minor children should have been provided with special reception conditions as foreseen under EU law.[487]

The CJEU, meanwhile, considered confinement in the Röszke transit zone in *FMS and Others*.[488] The Court held that confinement of third-country nationals in a transit zone which they 'cannot legally leave voluntarily […] appears to be a deprivation of liberty, characterised by 'detention' within the meaning of [the Return Directive and the EURCD]'.[489] The Court clarified that in accordance with Article 8(3)(c) EURCD (deciding, in the context of the asylum procedure, on the applicant's right to enter the territory), Member States may detain an applicant, however, under Article 43(1) EUAPD, such a border procedure, and thus the detention of the applicant, cannot take longer than four weeks.[490] The Court clarified that the four-week period begins 'on the date on which the application for international protection was made'.[491] The CJEU also clarified that in spite of Article 43(3) EUAPD allowing Member States to continue to examine an application for international protection in transit zones beyond the four-week period where large numbers of applicants lodge applications, this is contingent on these applicants being 'accommodated normally' – a condition that is not met where the applicants are detained.[492] Thus, under the EURCD, read in conjunction with the EUAPD, 'Member State are not authorised to place applicants for international protection in detention at its borders or in one of its transit zones beyond the four-week period'.[493] Further, the Court observed that detention of applicants in transit zones must meet the safeguards of the EURCD, i.e. it be necessary and proportionate, must be ordered by an administrative authority, must be for as short a period of time as possible, and that judicial review of this decision must be available.[494] The CJEU also observed that the same safeguards apply to detention under the Return Directive.[495]

[484] ibid.
[485] *RR and Others v Hungary* App No 36037/17 (ECtHR, 2 March 2021).
[486] ibid para 83.
[487] ibid para 58.
[488] *FMS and Others* (n 68).
[489] ibid para 231.
[490] ibid paras 238-239.
[491] ibid para 240.
[492] ibid paras 244-245.
[493] ibid para 246.
[494] ibid paras 259-262.
[495] ibid paras 273-281.

The ECtHR's judgement in *RR and Others* and the CJEU's findings in *FMS and Others* contribute to an approach to *de facto* detention consistent with the Compacts. By recognising confinement in transit zones as a form of detention, the two Courts ensure that detained applicants can benefit from the necessary safeguards and guarantees foreseen under international and EU law and promoted by the Compacts, and counter the risk of arbitrary detention.

6.4.2 Camps

It remains to be seen whether the conclusions in *FMS and Others* can be applied to the situation of persons housed in camps. Applicants for international protection are housed in camps in so-called 'hotspots' – 'facilities for initial reception, identification, registration and fingerprinting of asylum-seekers and migrants arriving in the EU by sea,' which, so far, exist only at the external borders of the EU in Greece and Italy.[496] This is not to suggest that a conflation of reception and detention only occurs in Italy and Greece. For example, in 2018, Malta 'reinstated a policy of automatic detention of persons disembarking in its ports. Detention is applied *de facto* in the Initial Reception Centre of Marsa and, more recently, in a section of the Safi Barracks detention centres as an extension of the Initial Reception Centre'.[497]

However, hotspots are good examples of *de facto* detention. While the camps in the hotspots are officially reception rather than detention facilities, the conditions there may deprive applicants for international protection of their liberty. Although under the EURCD, Member State may assign applicants for international protection a particular area of residence without this amounting to detention, that area shall not affect the unalienable sphere of private life. Moreover, it shall allow sufficient scope for guaranteeing access to all benefits under the EURCD (Articles 7(1) and 7(2)). Sub-standard reception conditions and lack of privacy due to overcrowding in many of the camps have been extensively documented.[498]

It is not within the scope of this chapter to describe the different camps in detail; instead the focus will be on the new so-called Multi-Purpose Reception & Identification Centre (MPRIC), also referred to as a Closed Controlled Access Centre (CCAS). This is a camp built on Samos following the destruction of Lesvos's Moria camp through fire in September 2020.[499] The MPRIC on Samos functions as a prototype for another four camps planned on Leros, Kos, Lesbos and Chios.[500]

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[496] European Parliament, 'Hotspots at EU External Borders: State of Play' (European Parliamentary Research Service 2018) <www.europarl.europa.eu/RegData/etudes/BRIE/2020/652090/EPRS_BRI(2020)652090_EN.pdf> (accessed 19 November 2021) 2.

[497] European Parliament, 'Dublin Regulation Implementation Assessment (n 443) 40.

[498] ibid; see also e.g. Samos Volunteers, 'The Situation in Samos' available at <www.samosvolunteers.org/situation-on-samos> (accessed 19 November 2021).

[499] European Commission, 'Annex to the Commission Decision approving the Memorandum of Understanding between the European Commission, European Asylum Support Office, the European Border and Coast Guard Agency, Europol and the Fundamental Rights Agency, of the one part, and the Government of Hellenic Republic, of the other part, on a Joint Pilot for the establishment of a new Multi-Purpose Reception and Identification Centre in Lesvos' C(2020) 8657 final (2 December 2020); Samos Volunteers (n 498).

[500] FragdenStaat, 'Prisons in Paradise: How the EU put refugees behind barbed wire' (22 October 2021) available at <https://fragdenstaat.de/en/blog/2021/10/22/how-the-eu-supports-the-construction-of-prison-like-refugee-camps/> (accessed 19 November 2021).

The MPRIC is, in the words of Médecins Sans Frontières 'prison-like'.[501] Indeed,

> Police officers patrol in and around the site day and night. Drones monitor from the air the compound, which is fenced with a double row of chain-link fence and NATO barbed wire. People can only leave the camp with a smart card between 8:00 am and 8:00 pm. The nearest town is over an hour's walk away. Countless cameras transmit people's daily lives in real time to a command center set up for this purpose in the Greek Ministry of Migration, including […] the beds.[502]

The EU's own Fundamental Rights Agency (FRA) has criticised the camp, stating that a 'centre intended for the first identification and registration of new arrival should not look like a prison'.[503] The FRA also raised concerns related to deprivation of liberty, stating that any restriction to the right to liberty and security (Article 6 EUCFR) must be provided for by law, pursue a legitimate objective, and be necessary and proportionate. The centre and the services offered should be planned to allow asylum applicants to move freely inside the camp and to come and go (if necessary facilitated through public transport)'.[504]

Thus, even though 'living conditions are generally set to improve' in the MPRIC as opposed to existing camps,[505] applicants for international protection's freedom of movement will be severely curtailed. Although they will be able to move freely within the MPRIC, the freedom to move beyond its fence is hindered by many factors. These include a night curfew from 8AM to 8PM, regular malfunctioning of the surveillance system that regulates the entrance and exit, and the disproportionate price of bus tickets to reach Vathy town (round trip 3,20€ which represents a large share of the average 70€ of cash assistance people are allowed every month).[506]

Like the applicants in *FMS and Others*, applicants for international protection housed in the MPRIC are 'surrounded by a high fence and barbed wire' and 'their movements within the zone are limited and monitored by the members of the law-enforcement services permanently present in the zone and its immediate vicinity'.[507] Although inhabitants of the MPRIC can, in theory, leave voluntarily, in practice, this is difficult. As such, it may be argued that, like the applicants in *FMS and Others*, they are *de facto* detained.

De facto detention is not compatible with the GCs, which clearly conceive of detention as an exceptional measure of short duration, which must be lawful, for a legitimate purpose, proportionate and necessary, and require states to consider alternatives; in case of the GCR, pursuing 'alternatives to camps away from borders' (para 54) is explicitly required. These preconditions for, and the safeguards accompanying detention, are not present in cases of *de facto* detention.

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[501] MSF, 'MSF reaction to new prison-like centre on Samos, Greece' (17 September 2021) available at <https://prezly.msf.org.uk/msf-reaction-to-new-prison-like-centre-on-samos-greece> (accessed 19 November 2021).

[502] FragdenStaat (n 500).

[503] FRA, 'Establishment of Multi-Purpose Reception and identification Centres: Aide-memoire on issues to consider from a fundamental rights point of view' (February 2021) <https://fragdenstaat.de/anfrage/fra-role-in-joint-pilot-for-the-establishment-of-a-new-mpric-in-lesvos/598354/anhang/1-aide-memoire-fra.pdf> (accessed 19 November 2021) para 2.

[504] ibid para 3.

[505] Samos Volunteers (n 498).

[506] ibid.

[507] *FMS and Others* (n 68) para 226.

6.5. Conclusions

In order to apply EU law on the detention of applicants for international protection and refugees in a manner which is consistent with the GCs, EU Member States must take into account both the Compact provisions which explicitly deal with detention, and the standards implicitly incorporated into the Compacts through refugee and human rights law.

Detention must be an exceptional measure of last resort and of short duration. It must be lawful, pursue a legitimate purpose, must be necessary and proportionate. As such, it must not be promoted as a deterrent or ill-treatment. Detention must be based on an individual assessment, follow due process and entail procedural safeguards. Noncustodial and community-based alternatives to detention must be considered, particularly for children. Where persons are nevertheless detained, they must be treated humanely, be able to access information, courts, free or affordable legal advice and compensation in case of unlawful imprisonment. They have the right to regular review of a detention order and must be able to communicate with legal advisors, family members, NGOs and consulates. They must also be given access to health care, food and adequate accommodation. While the Compacts make clear that child detention ought to be ended, where children are detained, their best interest must be considered, they must have access to education and their right to family life and family unity must be upheld.

Currently, EU law and practice do not adhere to all these requirements. Compliance with the Compacts in the area of detention will require both legal reform and practical implementation of the Compacts' standards. In addition, EU Member States must not attempt to circumvent their legal obligations towards detained persons by constructing the legal fiction that sites of *de facto* detention are, in reality, reception facilities.

7. Concluding Thoughts

In this Handbook, we set out to identify convergences and divergences between the CGs' commitments on the one hand and the CEAS provisions on the other. As explained in the Introduction, the Compacts clarify and refine existing obligations under the CEAS by consolidating the binding legal standards applicable to the treatment of asylum seekers, refugees and (other) migrants while adding detailed provisions on how respect for their rights can be improved in practice. This exercise allows for a detailed examination of each CEAS instrument discussed and for identifying areas of non-compliance with Compact standards.

At the outset, the CEAS determines the allocation of responsibility among the Member States for determining an application for international protection under the **Dublin III Regulation**.[508] The objective is to move the applicant to the Member State responsible. The provisions of this instrument were analysed particularly given EU Member States' reaffirmation, through the Compacts, of their obligations to provide access to asylum and immigration procedures in line with the prohibition of *refoulement*. They were analysed in view of the GCR's objective to ease pressure on host countries and states' commitment to managing borders as a shared responsibility. The GCR in para 32 sets out how the international community should respond to refugee flows, in particular through the allocation of responsibility. The Dublin III Regulation promotes solidarity among Member States without refugee involvement. The GCR, on the other hand, is rooted in the importance of refugee agency. Thus, the Compact promotes the agency of the refugee which is overlooked at all points in the Dublin system. The principle in the GCR is to transfer resources required to states in need of assistance, not the transfer of people, irrespective of state capacity. It calls for greater assistance to states faced with large-scale refugee situations and a multi-stakeholder and partnership approach (GCR para 33).

Through the **Reception Conditions Directive**, the CEAS establishes the applicable entitlements in terms of access to social rights for all those who await the processing of their application for international protection and regulates the use of detention. The Directive lays down 'harmonised' standards for the reception of applicants for international protection and provides for 'vulnerable' applicants. The Compacts mainstream the need for gender-, age- and disability-sensitive procedures and conditions of reception. The GCR in paras 54-55 provides an outline for international commitments with clearly defined measures at the national level for scaling up reception arrangements with the international allocation of resources. It thus encourages collective contributions and expertise to strengthen national capacities alongside quality control and review. In addition, paras 49-82 GCR and Objectives 4,7, 12 and 15 GCM clearly set out the conditions and support that refugees and those seeking protection should be supplied with, which must be taken into account by Member States when applying the EURCD, operationalising legal obligations. The chapter assesses the EURCD's compatibility with the GCs' standards in the context of the reception and registration measures the Directive provides, the safety and security of applicants in this context, the inclusion of civil society in the process, the provision of education, jobs, livelihoods, health care, accommodation and food, as well as the EURCD's approach to women and other 'vulnerable' applicants.

[508] The data collection and identification mechanisms compliance with the Eurodac Regulation are outside the scope of this Handbook since the fundamental rights issues engaged with regard to this Regulation are primarily in relation to data protection and data rights, which are not core elements of either the GCR or the GCM.

The **Qualification Directive** sets out the eligibility criteria for qualification as refugees and beneficiaries of subsidiary protection and the entitlements of those granted international protection status. We examined this instrument's compatibility with the GCR from the perspective of the rights of refugees and beneficiaries of international protection and its compatibility with the GCM and GCR's provisions on the treatment of persons with vulnerabilities and children. We also examine the issue of withdrawal of international protection and the limitations applicable in this context from the perspective of the GCR and GCM. Contrary to EU practice, the GCR promotes the need to avoid protection gaps between those recognised as refugees and those who qualify for subsidiary protection (in para 61-3). The expansive interpretation of who is in need of protection, promoted by the Compacts, should be widely accepted. Further, the GCR highlights the need for exclusion clauses, another problematic area of the EUQD, to be applied in line with international (and EU primary) law in regard to the obligations of *non-refoulement* and the prohibition of torture (in para 5 of the guiding principles and the GCM under Objective 21). This is a safety net for people seeking protection that must be considered when excluding, and ultimately returning, an individual seeking protection. In addition, the GCM highlights that access to rights must be subject to principles of non-discrimination and non-regression, regardless of migratory status (including basic services in Objective 15) and the key role of the right to family reunification found in Objective 5 GCM. This chapter adopted a slightly different structure to the others, given the instrument addresses two separate issues: first, qualification for protection and secondly, the content thereof. These have to be considered separately to capture the complexity of the GC's implications. With regard to qualification for protection, the chapter considered the EUQD's compatibility with the GCs' standards by analysing whether the Directive's criteria for applicants to qualify for refugee status or subsidiary protection status, as well as the criteria for denying protection, are in line with international law; whether the EUQD leaves any applicants unprotected; and whether it takes account of the needs of persons in vulnerable situations. In terms of the content of protection granted under the EUQD, the chapter focused on access to work, basic services, as well as documentation and integration, and the right to family life.

The procedural standards to be followed in the granting and withdrawing of status are prescribed in the **Asylum Procedures Directive**, as are rights of appeal. It seeks to avoid disparities in procedures between different Member States and situations where erroneous decisions on the determination of protection may result in *refoulement*. However, EU procedures all too often seem to end up unfairly 'catching' people out by creating credibility deficits and producing vulnerability and protection gaps. The Directive is assessed against states' commitments to provide access to immigration and asylum procedures fully in line with their *non-refoulement* obligations. The relevant chapter also looks at the use of accelerated procedures and the procedural guarantees in place, given the GCR's attention to procedures that fulfil obligations under international refugee law. In considering the GCR, it draws upon states' commitments to address specific needs and the identification and referral of those within cohorts to whom states owe heightened obligations. The GCM is also relevant here, particularly regarding the commitment to the rule of law. The Compacts promote the need to avoid protections gaps (in para 61) and call on states to ensure that no one is falling through these gaps. The GCR and GCM highlight the needs of specific populations, particularly those in vulnerable situations, and clarify that processes must be established to identify and address their specific needs. These needs must be addressed in the context of asylum procedures to ensure there is suitable protection for those entitled to it.

The final chapter dealt with detention, an issue regulated by numerous provisions in the EURCD, the Dublin III Regulation, the EUAPD and the **Return Directive**. While the EURCD sets out grounds for detention for applicants for international protection, the Return Directive, which is not a CEAS

instrument, is crucial for those migrants who are not recognised as international protection beneficiaries and who do not benefit from a separate right to stay in the EU. A final determination rejecting their application results in their transformation from applicants for international protection into irregularly staying third country nationals subject to expulsion. Rules concerning the detention of applicants for international protection are fragmented among the CEAS instruments and EU primary law, in particular the EUCFR. In practice, across the EU, detention is utilised as a standard means of managing migration, despite international legal standards to the contrary. The use of detention, including *de facto* detention, was interrogated and linked to the GCs' objectives to minimise the use of detention and to provide appropriate detention conditions and safeguards to all migrants, regardless of migration status. The GCs, which call for detention to be utilised as a last resort, confront the need to step out of the detention framework, go back to basics and seek alternatives to detention.

Thus, throughout this Handbook, we have identified numerous examples of CEAS non-compliance with GC standards. We hope that our findings will inspire those practitioners who seek to challenge existing CEAS provisions and perhaps also policy-makers who seek to reform the CEAS, while adhering to the principle of non-regression. We believe that a Compact-compliant interpretation and reform of the CEAS has the potential to meaningfully improve the protection of asylum-seekers, refugees and (other) migrants. The Compacts' rich and detailed provisions provide concrete guidance for a human rights-focused, non-discriminatory protection system grounded in cooperation and responsibility sharing, both between states and between states and migrants.

Annex I: Global Compact on Refugees

I. Introduction

A. Background

1. The predicament of refugees is a common concern of humankind. Refugee situations have increased in scope, scale and complexity and refugees require protection, assistance and solutions. Millions of refugees live in protracted situations, often in low- and middle- income countries facing their own economic and development challenges, and the average length of stay has continued to grow. Despite the tremendous generosity of host countries and donors, including unprecedented levels of humanitarian funding, the gap between needs and humanitarian funding has also widened. There is an urgent need for more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees, while taking account of existing contributions and the differing capacities and resources among States. Refugees and host communities should not be left behind.

2. The achievement of international cooperation in solving international problems of a humanitarian character is a core purpose of the United Nations, as set out in its Charter, and is in line with the principle of sovereign equality of States.[509] Similarly, the 1951 Convention relating to the Status of Refugees (1951 Convention) recognizes that a satisfactory solution to refugee situations cannot be achieved without international cooperation, as the grant of asylum may place unduly heavy burdens on certain countries.[510] It is vital to translate this long-standing principle into concrete and practical action, including through widening the support base beyond those countries that have historically contributed to the refugee cause through hosting refugees or other means.

3. Against this background, the global compact on refugees intends to provide a basis for predictable and equitable burden- and responsibility-sharing among all United Nations Member States, together with other relevant stakeholders as appropriate, including but not limited to: international organizations within and outside the United Nations system, including those forming part of the International Red Cross and Red Crescent Movement; other humanitarian and development actors; international and regional financial institutions; regional organizations; local authorities; civil society, including faith-based organizations; academics and other experts; the private sector; media; host community members and refugees themselves (hereinafter "relevant stakeholders").

4. The global compact is not legally binding. Yet it represents the political will and ambition of the international community as a whole for strengthened cooperation and solidarity with refugees and affected host countries. It will be operationalized through voluntary contributions to achieve collective outcomes and progress towards its objectives, set out in para 7 below. These contributions will be determined by each State and relevant stakeholder, taking into account their national realities, capacities and levels of development, and respecting national policies and priorities.

B. Guiding principles

[509] Article 1 (3), Charter of the United Nations; A/RES/25/2625.

[510] Preamble, recital 4 (United Nations, Treaty Series, vol. 189, No. 2545). See also A/RES/22/2312, article 2 (2).

5. The global compact emanates from fundamental principles of humanity and international solidarity, and seeks to operationalize the principles of burden- and responsibility-sharing to better protect and assist refugees and support host countries and communities. The global compact is entirely non-political in nature, including in its implementation, and is in line with the purposes and principles of the Charter of the United Nations. It is grounded in the international refugee protection regime, centred on the cardinal principle of non-refoulement, and at the core of which is the 1951 Convention and its 1967 Protocol.[511] Some regions have also adopted specific instruments which apply to their own respective contexts.[512] The global compact is guided by relevant international human rights instruments,[513] international humanitarian law, as well as other international instruments as applicable.[514] It is complemented by instruments for the protection of stateless persons, where applicable.[515] The humanitarian principles of humanity, neutrality, impartiality and independence — A/RES/46/182 and all subsequent General Assembly resolutions on the subject, including resolution A/RES/71/127 — as well as the centrality of protection also guide the overall application of the global compact. National ownership and leadership are key to its successful implementation, taking into account national legislation, policies and priorities.

6. It is recognized that a number of States not parties to the international refugee instruments have shown a generous approach to hosting refugees. All countries not yet parties are encouraged to consider acceding to those instruments and States parties with reservations to give consideration to withdrawing them.

C. Objectives

7. The objectives of the global compact as a whole are to: (i) ease pressures on host countries; (ii) enhance refugee self-reliance; (iii) expand access to third country solutions; and (iv) support conditions in countries of origin for return in safety and dignity. The global compact will seek to achieve these four interlinked and interdependent objectives through the mobilization of political

[511] United Nations, Treaty Series, vol. 606, No. 8791.

[512] See the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (United Nations, Treaty Series, vol. 1001, No. 14691); the 1984 Cartagena Declaration on Refugees; and the Treaty on the Functioning of the European Union, article 78, and Charter on the Fundamental Rights of the European Union, article 18. See also the Bangkok Principles on the Status and Treatment of Refugees of 31 December 1966 (final text adopted 24 June 2001).

[513] Including, but not limited to, the Universal Declaration of Human Rights (which inter alia enshrines the right to seek asylum in its article 14) (A/RES/3/217 A); the Vienna Declaration and Programme of Action; the Convention on the Rights of the Child (United Nations, Treaty Series, vol. 1577, No. 27531); the Convention against Torture (United Nations, Treaty Series, vol. 1465, No. 24841); the International Convention on the Elimination of All Forms of Racial Discrimination (United Nations, Treaty Series, vol. 660, No. 9464); the International Covenant on Civil and Political Rights (United Nations, Treaty Series, vol. 999, No. 14668); the International Covenant on Economic, Social and Cultural Rights (United Nations, Treaty Series, vol. 993, No. 14531); the Convention on the Elimination of All Forms of Discrimination against Women (United Nations, Treaty Series, vol. 1249, No. 20378); and the Convention on the Rights of Persons with Disabilities (United Nations, Treaty Series, vol. 2515, No. 44910).

[514] E.g., Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (United Nations, Treaty Series, vol. 2237, No. 39574); Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (United Nations, Treaty Series, vol. 2241, No. 39574).

[515] 1954 Convention on the Status of Stateless Persons (United Nations, Treaty Series, vol. 360, No. 5158); 1961 Convention on the Reduction of Statelessness (United Nations, Treaty Series, vol. 909, No. 14458).

will, a broadened base of support, and arrangements that facilitate more equitable, sustained and predictable contributions among States and other relevant stakeholders.

D. Prevention and addressing root causes

8. Large-scale refugee movements and protracted refugee situations persist around the world. Protecting and caring for refugees is life-saving for the individuals involved and an investment in the future, but importantly needs to be accompanied by dedicated efforts to address root causes. While not in themselves causes of refugee movements, climate, environmental degradation and natural disasters increasingly interact with the drivers of refugee movements. In the first instance, addressing root causes is the responsibility of countries at the origin of refugee movements. However, averting and resolving large refugee situations are also matters of serious concern to the international community as a whole, requiring early efforts to address their drivers and triggers, as well as improved cooperation among political, humanitarian, development and peace actors.

9. Against this background, the global compact complements ongoing United Nations endeavours in the areas of prevention, peace, security, sustainable development, migration and peacebuilding. All States and relevant stakeholders are called on to tackle the root causes of large refugee situations, including through heightened international efforts to prevent and resolve conflict; to uphold the Charter of the United Nations, international law, including international humanitarian law, as well as the rule of law at the national and international levels; to promote, respect, protect and fulfil human rights and fundamental freedoms for all; and to end exploitation and abuse, as well as discrimination of any kind on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability, age, or other status. The international community as a whole is also called on to support efforts to alleviate poverty, reduce disaster risks, and provide development assistance to countries of origin, in line with the 2030 Agenda for Sustainable Development and other relevant frameworks.[516]

II. Comprehensive refugee response framework

10. Part II of the global compact is the CRRF as adopted by the United Nations General Assembly (A/RES/71/1, Annex I). This constitutes an integral part of the global compact.

III. Programme of action

11. In line with A/RES/71/1, the purpose of the programme of action is to facilitate the application of a comprehensive response in support of refugees and countries particularly affected by a large refugee movement, or a protracted refugee situation, through effective arrangements for burden- and responsibility-sharing (Part III.A); and areas for timely contributions in support of host countries and, where appropriate, countries of origin (Part III.B). These parts are to be read as interlinked.

12. While the CRRF relates specifically to large refugee situations, population movements are not necessarily homogenous, and may be of a composite character. Some may be large movements involving both refugees and others on the move; other situations may involve refugees and internally displaced persons; and, in certain situations, external forced displacement may result from sudden-onset natural disasters and environmental degradation. These situations present complex challenges for affected States, which may seek support from the international community to address them. Support for appropriate responses could build on the operational partnerships between relevant actors, including UNHCR and the International Organization for Migration (IOM), engaging their respective mandates, roles and expertise as appropriate to ensure a coordinated approach.

[516] E.g. Sendai Framework for Disaster Risk Reduction 2015 - 2030 and Agenda 2063.

13. The programme of action is underpinned by a strong partnership and participatory approach, involving refugees and host communities, as well as age, gender, and diversity[517] considerations, including: promoting gender equality and empowering women and girls; ending all forms of sexual and gender-based violence, trafficking in persons, sexual exploitation and abuse, and harmful practices; facilitating the meaningful participation of youth, persons with disabilities and older persons; ensuring the best interests of the child; and combating discrimination.

A. Arrangements for burden- and responsibility-sharing

14. Countries that receive and host refugees, often for extended periods, make an immense contribution from their own limited resources to the collective good, and indeed to the cause of humanity. It is imperative that these countries obtain tangible support of the international community as a whole in leading the response.

15. The following arrangements seek to achieve more equitable and predictable burden- and responsibility-sharing with host countries and communities, and to support the search for solutions, including, where appropriate, through assistance to countries of origin. They entail complementary action at the global, region or country-specific levels.

16. In order to ensure full realization of the principles of international solidarity and cooperation, the arrangements are intended to be efficient, effective and practicable. Action will be taken to avoid duplication and to streamline the arrangements within existing processes where this is appropriate, including to ensure appropriate linkages with the Executive Committee of the High Commissioner's Programme (Executive Committee). At the same time, these arrangements will necessarily go beyond existing processes, changing the way that the international community as a whole responds to large refugee situations so as to ensure better sharing of the burden and responsibility resulting from the presence of large numbers of refugees.

1. Global arrangement for international cooperation: Global Refugee Forum

17. A periodic Global Refugee Forum, at ministerial level, will be convened for all United Nations Member States, together with relevant stakeholders, to announce concrete pledges and contributions towards the objectives of the global compact, as set out in para 7, and to consider opportunities, challenges and ways in which burden- and responsibility- sharing can be enhanced. The first Forum will be convened in 2019. Subsequent Forums will be convened every four years, unless otherwise agreed by the General Assembly, in order to ensure sustained momentum and political will. Forums will be co-convened and co-hosted by one or more State(s) and the United Nations High Commissioner for Refugees, with an invitation to the United Nations Secretary-General to participate. Forums would, in principle, take place in Geneva to facilitate the participation of all States. In the years in which Forums take place, there will be no High Commissioner's Dialogue on Protection Challenges.

18. Pledges and contributions made at Global Refugee Forums could take different forms, including financial, material and technical assistance;[518] resettlement places and complementary pathways for admission to third countries; as well as other actions that States have elected to take at the national level in support of the objectives of the global compact. Part III.B below serves as a non-exhaustive guide for areas against which pledges and contributions could be made.

[517] See UNHCR Executive Committee (ExCom) Conclusion No. 108 (LIX) (2008), (f)–(k).
[518] E.g., standby capacity or contributions to Support Platforms (section 2.2).

19. The first Global Refugee Forum in 2019 will be dedicated to receiving formal pledges and contributions. Subsequent Forums will provide an opportunity not only to make new pledges, but also for States and relevant stakeholders to take stock of the implementation of their previous pledges and progress towards the achievement of the objectives of the global compact. This will be complemented by high-level officials' meetings, held every two years between Forums, which will provide an opportunity for "mid-term review". The ongoing stocktaking at Global Refugee Forums and high-level officials' meetings will be key components of the follow up to the global compact (as set out in Part IV below).

2. Arrangements to support a comprehensive response to a specific refugee situation

2.1 National arrangements

20. Drawing on good practices, and recognizing the importance of national leadership, national arrangements may be established by concerned host countries to coordinate and facilitate the efforts of all relevant stakeholders working to achieve a comprehensive response. The composition and working methods of national arrangements would be determined by host States, as would the need for capacity development for relevant national authorities to undertake such work.

21. Such efforts could support the development of a comprehensive plan under national leadership, in line with national policies and priorities, with the assistance of UNHCR and other relevant stakeholders as appropriate, setting out policy priorities; institutional and operational arrangements; requirements for support from the international community, including investment, financing, material and technical assistance; and solutions, including resettlement and complementary pathways for admission to third countries, as well as voluntary repatriation.

2.2 Support Platform

22. In support of national arrangements, host countries would be able to seek the activation of a Support Platform.[519]

23. The Support Platform would enable context-specific support for refugees and concerned host countries and communities. In a spirit of partnership and in line with host country ownership and leadership, its functions would include:

- galvanizing political commitment and advocacy for prevention, protection, response and solutions;

- mobilizing financial, material and technical assistance, as well as resettlement and complementary pathways for admission to third countries, in support of the comprehensive plan (para 21), where applicable, drawing on Global Refugee Forum pledges;

- facilitating coherent humanitarian and development responses, including through the early and sustained engagement of development actors in support of host communities and refugees; and

- supporting comprehensive policy initiatives to ease pressure on host countries, build resilience and self-reliance, and find solutions.

24. Upon the request of concerned host countries or countries of origin, where appropriate, a Support Platform could be activated/deactivated and assisted by UNHCR, in close consultation with relevant States that have committed to contributing in principle, taking into account existing

[519] In line with para 5.

response efforts and political, peacekeeping and peacebuilding initiatives. Criteria for activation would include:

- a large-scale and/or complex refugee situation where the response capacity of a host State is or is expected to be overwhelmed; or

- a protracted refugee situation where the host State(s) requires considerable additional support, and/or a major opportunity for a solution arises (e.g. large-scale voluntary repatriation to the country of origin).

25. Each Support Platform would benefit from the leadership and engagement of a group of States to mobilize contributions and support, which may take different forms (para 23). The composition of this group would be specific to the context. Other relevant stakeholders would be invited to engage as appropriate.

26. Support Platforms would not be fixed bodies or undertake operational activities. They would draw on pre-announced expressions of interest (including at the Global Refugee Forum) and standby arrangements. They would complement and interact with existing coordination mechanisms for humanitarian and development cooperation. In consultation with participating States, UNHCR would ensure regular reporting on the work of the Support Platforms to its Executive Committee, the United Nations General Assembly and the Global Refugee Forums, including to facilitate exchange of information, practices and experiences between different platforms.

27. The strategy for support by a Platform could draw on a wide range of options. It could initiate a solidarity conference to generate support for the comprehensive plan, where this would add value and not duplicate other processes, bearing in mind the call for humanitarian assistance to be flexible, multi-year and unearmarked in line with para 32 below. A solidarity conference would be situation-specific, providing a strategic vehicle to garner broad-based support for host States or countries of origin, encompassing States, development actors, civil society, local communities and the private sector, and seeking financial, material and technical contributions, as well as resettlement and complementary pathways for admission.

2.3 Regional and subregional approaches

28. Refugee movements often have a significant regional or subregional dimension. While the characteristics of regional and subregional mechanisms and groupings vary, they may, as appropriate, play an important role in comprehensive responses. Past comprehensive responses have also demonstrated the value of regional cooperation in addressing refugee situations in a manner which encompasses the political dimensions of causes.

29. Without prejudice to global support, regional and subregional mechanisms or groupings would, as appropriate, actively contribute to resolution of refugee situations in their respective regions, including by playing a key role in Support Platforms, solidarity conferences and other arrangements with the consent of concerned States. Comprehensive responses will also build on existing regional and subregional initiatives for refugee protection and durable solutions where available and appropriate, including regional and subregional resettlement initiatives, to ensure complementarity and avoid duplication.

30. The exchange of good practices among relevant regional and subregional mechanisms will be facilitated by UNHCR on a regular basis in the context of Global Refugee Forums to bring in different perspectives and to encourage coherence.

3. Key tools for effecting burden- and responsibility-sharing

31. The following paragraphs describe tools to operationalize burden- and responsibility-sharing, and underpin the arrangements set out above.

3.1 Funding and effective and efficient use of resources

32. While contributions to burden- and responsibility-sharing by the international community as a whole go beyond funding, the mobilization of timely, predictable, adequate and sustainable public and private funding nonetheless is key to the successful implementation of the global compact, bearing in mind the interest of all relevant stakeholders in maximizing the effective and efficient use of resources, preventing fraud and ensuring transparency. Through the arrangements set out above, and other related channels, resources will be made available to countries faced with large-scale refugee situations relative to their capacity, both new and protracted, including through efforts to expand the support base beyond traditional donors.[520] This includes:

- humanitarian assistance: States and humanitarian actors will work to ensure timely, adequate and needs-driven humanitarian assistance, both for the emergency response and protracted situations, including predictable, flexible, unearmarked, and multi- year funding whenever possible,[521] delivered fully in line with the humanitarian principles;

- development cooperation: States and other development actors will work to step up their engagement in support of refugees, host countries and host communities, and to include the impact of a refugee situation on host countries and communities in their planning and policies. This will involve additional development resources, over and above regular development assistance, provided as grants or with a high degree of concessionality through both bilateral and multilateral channels, with direct benefits to host countries and communities, as well as to refugees. Efforts will be made to ensure that development assistance is effective, in a spirit of partnership and respecting the primacy of country ownership and leadership.[522] Whenever possible, development assistance in favour of countries of origin to enable conditions for voluntary repatriation will also be prioritized;

- maximizing private sector contributions: upon the request of the concerned host country or country of origin as appropriate, the private sector, together with States and other relevant stakeholders, could explore: policy measures and de-risking arrangements; opportunities for private sector investment, infrastructure strengthening and job creation in contexts where the business climate is enabling; development of innovative technology, including renewable energy, particularly with a view to closing the technology gap and supporting capacity in developing and least developed refugee-hosting countries; and greater access to financial products and information services for refugees and host communities.

3.2 A multi-stakeholder and partnership approach

33. While recognizing the primary responsibility and sovereignty of States, a multi- stakeholder and partnership approach will be pursued, in line with relevant legal frameworks and in close coordination with national institutions. In addition to the exercise of its mandate responsibilities, UNHCR will play a supportive and catalytic role.

[520] See, e.g. A/RES/71/127, A/71/353.
[521] See, e.g., A/RES/71/127, A/71/353.
[522] See, e.g., A/RES/71/127, A/71/353, A/RES/69/313.

34. Responses are most effective when they actively and meaningfully engage those they are intended to protect and assist. Relevant actors will, wherever possible, continue to develop and support consultative processes that enable refugees and host community members to assist in designing appropriate, accessible and inclusive responses. States and relevant stakeholders will explore how best to include refugees and members of host communities, particularly women, youth, and persons with disabilities, in key forums and processes, as well as diaspora, where relevant. Mechanisms to receive complaints, and investigate and prevent fraud, abuse and corruption help to ensure accountability.

35. Without prejudice to activities which humanitarian organizations carry out in line with their respective mandates, humanitarian and development actors will work together from the outset of a refugee situation and in protracted situations. They will develop means to ensure the effective complementarity of their interventions to support host countries and, where appropriate, countries of origin, including in those countries that lack the institutional capacities to address the needs of refugees. Support by bilateral and multilateral development and financial actors for the direct benefit of host communities and refugees will be additional and undertaken in partnership, respecting the primacy of national ownership and leadership, and in a manner that does not negatively impact or reduce support for broader development objectives in the concerned country.

36. The United Nations system will be fully leveraged. This will include the contributions of the United Nations Sustainable Development Group and the United Nations Country Team, as well as all relevant agencies to ensure operational cooperation on the ground, in line with the United Nations Secretary-General's reform agenda, notably in the areas of peace, security and development. Guided by the Resident Coordinator, and in furtherance of national development imperatives, United Nations development action in support of host communities and refugees will, where appropriate, be considered in United Nations Development Assistance Frameworks, to be prepared and finalized in full consultation and agreement with national governments.[523] Technical advice and support will also be made available through the United Nations regional offices.

37. Local authorities and other local actors in both urban and rural settings, including local community leaders and traditional community governance institutions, are often first responders to large-scale refugee situations, and among the actors that experience the most significant impact over the medium term. In consultation with national authorities and in respect of relevant legal frameworks, support by the international community as a whole may be provided to strengthen institutional capacities, infrastructure and accommodation at local level, including through funding and capacity development where appropriate. Recruitment of local personnel by humanitarian and development agencies is encouraged in line with relevant laws and policies, while bearing in mind the need for continued capacity of local actors, organizations and structures.

38. Networks of cities and municipalities hosting refugees are invited to share good practices and innovative approaches to responses in urban settings, including through twinning arrangements, with the support of UNHCR and other relevant stakeholders.

39. Likewise, engagement by parliaments as appropriate under relevant national arrangements is encouraged, with a view to supporting the global compact.[524]

40. In recognition of their important work for refugees, as well as host States and communities, and in a spirit of partnership, civil society organizations, including those that are led by refugees,

[523] A/RES/72/279.

[524] A/RES/72/278, noting also the work of the Inter-Parliamentary Union (IPU).

women, youth or persons with disabilities, and those operating at the local and national levels, will contribute to assessing community strengths and needs, inclusive and accessible planning and programme implementation, and capacity development, as applicable.

41. Faith-based actors could support the planning and delivery of arrangements to assist refugees and host communities, including in the areas of conflict prevention, reconciliation, and peacebuilding, as well as other relevant areas.

42. Public-private partnerships will be explored,[525] in full respect of the humanitarian principles, including: possible new institutional arrangements and methodologies for the creation of commercial business venture conditions and financial/business instruments; to support refugee and host community employment and labour mobility; and to enable greater opportunities for private sector investment. The private sector is encouraged to advance standards for ethical conduct in refugee situations, share tools to identify business opportunities in host countries, and develop country-level private sector facilitation platforms where this would add value.

43. A global academic network on refugee, other forced displacement, and statelessness issues will be established, involving universities, academic alliances, and research institutions, together with UNHCR and other relevant stakeholders, to facilitate research, training and scholarship opportunities which result in specific deliverables in support of the objectives of the global compact. Efforts will be made to ensure regional diversity and expertise from a broad range of relevant subject areas.

44. Recognizing the important role that sports and cultural activities can play in social development, inclusion, cohesion, and well-being, particularly for refugee children (both boys and girls), adolescents and youth, as well as older persons and persons with disabilities, partnerships will be pursued to increase access to sporting and cultural facilities and activities in refugee-hosting areas.[526]

3.3 Data and evidence

45. Reliable, comparable, and timely data is critical for evidence-based measures to: improve socioeconomic conditions for refugees and host communities; assess and address the impact of large refugee populations on host countries in emergency and protracted situations; and identify and plan appropriate solutions. Relevant data protection and data privacy principles are to be applied with respect to all collection and dissemination of personal data, including the principles of necessity, proportionality, and confidentiality.

46. To support evidence-based responses, States and relevant stakeholders will, as appropriate, promote the development of harmonized or interoperable standards for the collection, analysis, and sharing of age, gender, disability, and diversity disaggregated data on refugees and returnees.[527] Upon the request of concerned States, support will be provided for the inclusion of refugees and host communities, as well as returnees and stateless persons as relevant, within national data and statistical collection processes; and to strengthen national data collection systems on the situation of refugees and host communities, as well as returnees.

[525] Noting the work of the International Chamber of Commerce and the World Economic Forum, and the model provided by the Business Mechanism of the Global Forum on Migration and Development (GFMD).
[526] Noting the work of the Olympic Refuge Foundation, and the partnership between UNHCR and the International Olympic Committee, and other entities such as Football Club Barcelona Foundation. See also the International Charter of Physical Education, Physical Activity and Sport and A/RES/71/160.
[527] "International recommendations on refugee statistics".

47. Improving data and evidence will also support efforts to achieve solutions. Data and evidence will assist in the development of policies, investments and programmes in support of the voluntary repatriation to and reintegration of returnees in countries of origin. In addition, States, UNHCR, and other relevant stakeholders will work to enable the systematic collection, sharing, and analysis of disaggregated data related to the availability and use of resettlement and complementary pathways for admission of those with international protection needs; and share good practices and lessons learned in this area.

48. To inform burden- and responsibility-sharing arrangements, UNHCR will coordinate with concerned States and appropriate partners to assist with measuring the impact arising from hosting, protecting and assisting refugees, with a view to assessing gaps in international cooperation and to promoting burden- and responsibility-sharing that is more equitable, predictable and sustainable.[528] In 2018, UNHCR will convene technical expertise from international organizations and Member States, and coordinate a technical review of relevant methodologies to build broad consensus on the approach to be taken. The results will be shared and provide the opportunity for formal discussions among States in 2018–2019. The first report will be issued in 2019, coinciding with the first Global Refugee Forum. Subsequent reports will be provided at regular intervals, providing the basis for determining whether there has been progress towards more equitable and predictable burden- and responsibility-sharing in line with para 7 (see also Part IV below).

B. Areas in need of support

49. The areas in need of support, set out in Part B, aim to ease the burden on host countries and to benefit refugees and host community members. Grouped around the pillars of the CRRF, and based on past comprehensive responses, the areas highlight where the international community may usefully channel support for a comprehensive and people- centred response to large refugee situations, adapted to the specific context, and in line with national priorities, strategies and policies. The success of the measures in Part B relies on robust and well-functioning arrangements for burden- and responsibility-sharing (Part A), and a commitment on the part of the international community as a whole to providing concrete contributions[529] to bring these arrangements to life, based on the principle of burden- and responsibility-sharing.

50. Support will be put in place upon the request of the host country, or country of origin where relevant, in line with country ownership and leadership and respecting national policies and priorities. It is recognized that each context is specific and that each State has different frameworks, capacities and resources. Part B is not exhaustive or prescriptive. Part B also is not intended to create additional burdens or impositions on host countries. Indeed, a key objective of the global compact is to ease pressures, particularly for low- and middle-income countries, through contributions from other States and relevant stakeholders.

51. The measures in Part B will take into account, meaningfully engage and seek input from those with diverse needs and potential vulnerabilities, including girls and women; children, adolescents and youth; persons belonging to minorities; survivors of sexual and gender-based violence, sexual exploitation and abuse, or trafficking in persons; older persons; and persons with disabilities.

[528] A/RES/72/150, para 20.
[529] In line with para 4 above.

1. Reception and admission

1.1 Early warning, preparedness and contingency planning

52. Preparedness, including contingency planning, strengthens comprehensive responses to large refugee situations, including over the medium term. Without prejudice to efforts to address root causes, in line with the United Nations Secretary-General's prevention agenda, States and relevant stakeholders will contribute resources and expertise to include preparation for large refugee movements, in a manner consistent with the CRRF where possible, in national, regional, and United Nations-supported preparedness and contingency planning efforts.

53. Under national leadership, capacity development for relevant authorities will be supported, enabling them to put in place risk monitoring and preparedness measures in advance, and to draw on support from a wide range of relevant stakeholders, including the private sector as appropriate. Preparedness measures will take into account global, regional, subregional and national early warning and early action mechanisms, disaster risk reduction efforts, and measures to enhance evidence-based forecasting of future movements and emergencies. They could, where appropriate, also take into account forced internal displacement that may result from a particular situation. UNHCR will strengthen support to concerned countries by sharing information on the movement of people of concern. Support will also be provided in the form of standby capacity, including potential standby service assistance packages and necessary technical and human resources committed in advance.

1.2 Immediate reception arrangements

54. When large numbers of refugees arrive, countries and communities go to great lengths to scale up arrangements to receive them. In support of government strategies to manage arrivals, UNHCR, States, and relevant stakeholders will contribute resources and expertise to strengthen national capacities for reception, including for the establishment of reception and transit areas sensitive to age, gender, disability, and other specific needs (through "safe spaces" where appropriate), as well as to provide basic humanitarian assistance and essential services in reception areas. Efficient mechanisms to pursue alternatives to camps away from borders will be supported, where considered relevant by the concerned host country.

55. Priority will be given to supporting response measures established by concerned States, including through the provision of assistance using national delivery systems where feasible and appropriate. Regional and international standby arrangements for personnel, as well as technical and material assistance, could be activated, in consultation with concerned States. Measures by concerned States to facilitate timely entry for standby and emergency deployments are encouraged.

1.3 Safety and security

56. Security considerations and international protection are complementary. The primary responsibility for safety and security lies with States, which can benefit from the promotion of national integrated approaches that protect refugees and their human rights, while safeguarding national security. The legitimate security concerns of host States are fully recognized, as well as the importance of upholding the civilian and humanitarian character of international protection and applicable international law, both in emergency and protracted situations.[530]

57. At the request of concerned States, and in full respect of national laws and policies, UNHCR and relevant stakeholders will contribute resources and expertise to support protection-sensitive

[530] See article 9 of the 1951 Convention; ExCom Conclusions No. 94 (LIII) (2002) and 109 (LX) (2009); and A/RES/72/150, para 28.

arrangements for timely security screening and health assessments of new arrivals. Support will also be provided for: capacity development of relevant authorities, for instance on international refugee protection and exclusion criteria; strengthening of international efforts to prevent and combat sexual and gender-based violence, as well as trafficking and smuggling in persons; capacity development for community-oriented policing and access to justice; and the identification and separation of fighters and combatants at border entry points or as early as possible after arrival in line with relevant protection safeguards. The development and implementation of programmes for protection and assistance to children formerly associated with armed groups will also be supported.

1.4 Registration and documentation

58. Registration and identification of refugees is key for people concerned, as well as for States to know who has arrived, and facilitates access to basic assistance and protection, including for those with specific needs. It is also an important tool in ensuring the integrity of refugee protection systems and preventing and combating fraud, corruption and crime, including trafficking in persons. Registration is no less important for solutions. In support of concerned countries, UNHCR, in conjunction with States and relevant stakeholders, will contribute resources and expertise to strengthen national capacity for individual registration and documentation, including for women and girls, regardless of marital status, upon request. This will include support for digitalization, biometrics and other relevant technology, as well as the collection, use and sharing of quality registration data, disaggregated by age, gender, disability, and diversity, in line with relevant data protection and privacy principles.

1.5 Addressing specific needs

59. The capacity to address specific needs is a particular challenge, requiring additional resources and targeted assistance. Persons with specific needs include: children, including those who are unaccompanied or separated; women at risk; survivors of torture, trauma, trafficking in persons, sexual and gender-based violence, sexual exploitation and abuse or harmful practices; those with medical needs; persons with disabilities; those who are illiterate; adolescents and youth; and older persons.[531]

60. In support of concerned countries, States and relevant stakeholders will contribute resources and expertise for the establishment of mechanisms for identification, screening and referral of those with specific needs to appropriate and accessible processes and procedures. Multi-stakeholder response teams could be established to facilitate this operationally.[532] This will include the identification and referral of children, including unaccompanied and separated children, to best interests assessment and/or determination, together with appropriate care arrangements or other services.[533] Identification and referral of victims of trafficking in persons and other forms of exploitation to appropriate processes and procedures, including for identification of international protection needs or victim support, is key;[534] as is identification and referral of stateless persons and those at risk of statelessness, including to statelessness determination procedures. The development of non- custodial and community-based alternatives to detention, particularly for children, will also be supported.

[531] A/RES/46/91.

[532] This could include civil society, regional organizations, and international organizations such as UNHCR and IOM.

[533] A/RES/64/142.

[534] In line with the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

1.6 Identifying international protection needs

61. Mechanisms for the fair and efficient determination of individual international protection claims provide an opportunity for States to duly determine the status of those on their territory in accordance with their applicable international and regional obligations (A/RES/72/150, para 51), in a way which avoids protection gaps and enables all those in need of international protection to find and enjoy it.[535] In the context of large refugee movements, group-based protection (such as prima facie recognition of refugee status) can assist in addressing international protection needs, where considered appropriate by the State.

62. Without prejudice to activities carried out under its mandate, UNHCR will establish an Asylum Capacity Support Group with participation of experts from relevant technical areas. Due regard will be paid to regional diversity. The group would draw on pledges and contributions made as part of Global Refugee Forums, whether in terms of expertise or funding. The group could be activated on the request of a concerned State to provide support to relevant national authorities — in line with applicable international, regional and national instruments and laws — to strengthen aspects of their asylum systems, with a view to ensuring their fairness, efficiency, adaptability and integrity. Support could include standby arrangements and sharing of good practices between States on all aspects of asylum systems, including case-processing modalities (e.g. simplified or accelerated procedures for cases likely to be manifestly founded or unfounded), registration and case management processes, interviewing techniques and broader institutional capacity development.

63. In addition, where appropriate, stakeholders with relevant mandates and expertise will provide guidance and support for measures to address other protection and humanitarian challenges. This could include measures to assist those forcibly displaced by natural disasters, taking into account national laws and regional instruments as applicable, as well as practices such as temporary protection[536] and humanitarian stay arrangements, where appropriate.

2. Meeting needs and supporting communities

64. Thorough management of a refugee situation is often predicated on the resilience of the host community. There is also increasing recognition of the development challenges posed by large refugee situations and the advantages of shared and inclusive economic growth in refugee-hosting areas from which all can benefit, in line with the 2030 Agenda for Sustainable Development. The global compact can help attract support to ensure that refugees and their host communities are not left behind in a country's progress towards the Sustainable Development Goals. At the same time, host States that seek to strengthen national policies and institutions for the resilience of local and refugee communities often require sufficient contributions from the international community as a whole to accompany their efforts, until durable solutions can be found. Efforts to support refugees and host communities in no way diminish, and are in fact complementary to, the need to facilitate future arrangements for durable solutions.[537]

65. Without affecting humanitarian assistance, development actors will work in a complementary manner to humanitarian assistance interventions to ensure that the impact of a large refugee situation on a host country is taken into account in the planning and implementation of development programmes and policies with direct benefits for both host communities and refugees. A spirit of partnership, the primacy of country leadership and ownership, and the mobilization of predictable international responses consistent with national development strategies and aligned with the 2030 Agenda for Sustainable Development, are key to ensuring

[535] See above, para 5; ExCom Conclusions No. 103 (LVI) (2005) (s) and 96 (LIV) (2003).

[536] ExCom Conclusions No.: 22 (XXXII) (1981); 74 (XLV) (1994), (r)–(u); 103 (LVI) (2005), (l).

[537] See also ExCom Conclusion No. 109 (LX) (2009).

sustainability. At the same time, host countries need to be able to rely on additional development resources to ensure that communities affected by a refugee situation are not impaired in making progress towards the Sustainable Development Goals.

66. Humanitarian assistance remains needs-driven and based upon the humanitarian principles of humanity, neutrality, impartiality and independence. Wherever possible, it will be delivered in a way that benefits both refugees and host communities. This will include efforts to deliver assistance through local and national service providers where appropriate (including through multipurpose cash assistance), instead of establishing parallel systems for refugees from which host communities do not benefit over time. Increasingly, refugees find themselves in urban and rural areas outside of camps, and it is important to also respond to this reality.

67. The areas set out below require particular support by the international community as a whole in order to enhance resilience for host communities, as well as refugees. They constitute indicative areas relying on contributions from others, including through the arrangements in Part A, to assist in the application of a comprehensive response. They are not intended to be prescriptive, exhaustive, or to create additional impositions or burdens on host countries. All support will be provided in coordination with relevant national authorities in a spirit of close partnership and cooperation, and be linked as relevant to ongoing national efforts and policies.

2.1 Education

68. In line with national education laws, policies and planning, and in support of host countries, States and relevant stakeholders[538] will contribute resources and expertise to expand and enhance the quality and inclusiveness of national education systems to facilitate access by refugee and host community children (both boys and girls), adolescents and youth to primary, secondary and tertiary education. More direct financial support and special efforts will be mobilized to minimize the time refugee boys and girls spend out of education, ideally a maximum of three months after arrival.

69. Depending on the context, additional support could be contributed to expand educational facilities (including for early childhood development, and technical or vocational training) and teaching capacities (including support for, as appropriate, refugees and members of host communities who are or could be engaged as teachers, in line with national laws and policies). Additional areas for support include efforts to meet the specific education needs of refugees (including through “safe schools” and innovative methods such as online education) and overcome obstacles to their enrolment and attendance, including through flexible certified learning programmes, especially for girls, as well persons with disabilities and psychosocial trauma. Support will be provided for the development and implementation of national education sector plans that include refugees. Support will also be provided where needed to facilitate recognition of equivalency of academic, professional and vocational qualifications. (See also section 3.3, complementary pathways for admission to third countries).

2.2 Jobs and livelihoods

[538] In addition to ministries of education and national education planning bodies, this could include the United Nations Children’s Fund (UNICEF), the Connected Learning in Crisis Consortium, the Global Partnership for Education, UNHCR, the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Connected Learning in Crisis Consortium, the UNESCO International Institute for Educational Planning, the UNESCO Institute for Statistics, UNRWA, Education Cannot Wait, the Inter-Agency Network for Education in Emergencies, non-governmental organizations, and the private sector.

70. To foster inclusive economic growth for host communities and refugees, in support of host countries and subject to their relevant national laws and policies, States and relevant stakeholders[539] will contribute resources and expertise to promote economic opportunities, decent work, job creation and entrepreneurship programmes for host community members and refugees, including women, young adults, older persons and persons with disabilities.[540]

71. Depending on the context, resources and expertise could be contributed to support: labour market analysis to identify gaps and opportunities for employment creation and income generation; mapping and recognition of skills and qualifications among refugees and host communities; and strengthening of these skills and qualifications through specific training programmes, including language and vocational training, linked to market opportunities, in particular for women, persons with disabilities, and youth. Particular attention will be paid to closing the technology gap and building capacities (particularly of developing and least-developed refugee host countries), including to facilitate online livelihood opportunities. Efforts will be made to support access to affordable financial products and services for women and men in host and refugee communities, including by reducing associated risks and enabling low-cost mobile and internet access to these services where possible; as well as to support the transfer of remittances. In some contexts, where appropriate, preferential trade arrangements could be explored in line with relevant international obligations, especially for goods and sectors with high refugee participation in the labour force; as could instruments to attract private sector and infrastructure investment and support the capacity of local businesses.

2.3 Health

72. In line with national health care laws, policies and plans, and in support of host countries, States and relevant stakeholders[541] will contribute resources and expertise to expand and enhance the quality of national health systems to facilitate access by refugees and host communities, including women and girls; children, adolescents and youth; older persons; those with chronic illnesses, including tuberculosis and HIV; survivors of trafficking in persons, torture, trauma or violence, including sexual and gender-based violence; and persons with disabilities.

73. Depending on the context, this could include resources and expertise to build and equip health facilitates or strengthen services, including through capacity development and training opportunities for refugees and members of host communities who are or could be engaged as health care workers in line with national laws and policies (including with respect to mental health and psychosocial care). Disease prevention, immunization services, and health promotion activities, including participation in physical activity and sport, are encouraged; as are pledges to facilitate affordable and equitable access to adequate quantities of medicines, medical supplies, vaccines, diagnostics, and preventive commodities.

[539] This could include the private sector and local businesses, as well as the International Labour Organization (ILO), the World Bank Group, the United Nations Development Programme (UNDP), the OECD, UNHCR, the United Nations Capital Development Fund, IOM, workers' and employers' associations, microfinance institutions, and academia.

[540] These efforts also will be guided by R205 — Employment and Decent Work for Peace and Resilience Recommendation, 2017 (No. 205) adopted by the General Conference of the International Labour Organization and the "Guiding principles on the access of refugees and other forcibly displaced persons to the labour market" (ILO, July 2016).

[541] This could include the World Health Organization (WHO); UNHCR; UNICEF; UNFPA; IOM; the Global Alliance for Vaccines and Immunizations (GAVI); the Global Fund to Fight AIDS, Tuberculosis and Malaria; and relevant civil society organizations. See also WHA70.15 (2017).

2.4 Women and girls

74. Women and girls may experience particular gender-related barriers that call for an adaptation of responses in the context of large refugee situations. In line with relevant international instruments and national arrangements, States and relevant stakeholders will seek to adopt and implement policies and programmes to empower women and girls in refugee and host communities, and to promote full enjoyment of their human rights, as well as equality of access to services and opportunities — while also taking into account the particular needs and situation of men and boys.

75. This will include contributions to promote the meaningful participation and leadership of women and girls, and to support the institutional capacity and participation of national and community-based women's organizations, as well as all relevant government ministries. Resources and expertise to strengthen access to justice and the security and safety of women and girls, including to prevent and respond to all forms of violence, including sexual exploitation and abuse, sexual- and gender-based violence and harmful practices, are called for; as is support to facilitate access to age-, disability- and gender- responsive social and health care services, including through recruitment and deployment of female health workers. Measures to strengthen the agency of women and girls, to promote women's economic empowerment and to support access by women and girls to education (including secondary and tertiary education) will be fostered.

2.5 Children, adolescents and youth

76. Children make up over half of the world's refugees. In support of host countries, States and relevant stakeholders[542] will contribute resources and expertise towards policies and programmes that take into account the specific vulnerabilities and protection needs of girls and boys, children with disabilities, adolescents, unaccompanied and separated children, survivors of sexual and gender-based violence, sexual exploitation and abuse, and harmful practices, and other children at risk. Depending on the context, this will include resources and expertise to support integrated and age-sensitive services for refugee and host community girls and boys, including to address mental health and psychosocial needs, as well as investment in national child protection systems and cross-border cooperation and regional partnerships to provide a continuum of protection, care and services for at risk children. Capacity development for relevant authorities to undertake best interests determination and assessment to inform decisions that concern refugee children, as well as other child-sensitive procedures and family tracing, will be supported. UNHCR will work with States to enhance access by refugee boys and girls to resettlement and complementary pathways for admission.

77. The empowerment of refugee and host community youth, building on their talent, potential and energy, supports resilience and eventual solutions. The active participation and engagement of refugee and host community youth will be supported by States and relevant stakeholders, including through projects that recognize, utilize and develop their capacities and skills, and foster their physical and emotional well-being.

2.6 Accommodation, energy, and natural resource management

78. Depending on the context, host countries may seek support from the international community as a whole to address the accommodation and environmental impacts of large numbers of refugees. Accordingly, in support of host countries and in line with national laws, policies and strategies, States and relevant stakeholders will contribute resources and expertise to strengthen infrastructure so as to facilitate access to appropriate accommodation for refugees and host

[542] Including UNICEF and relevant civil society organizations.

communities and to promote integrated and sustainable management of natural resources and ecosystems in both urban and rural areas.

79. This will include contributions to bolster national capacity to address accommodation, water, sanitation and hygiene, infrastructure and environmental challenges in or near refugee-hosting rural and urban areas; and to invest in closing the technology gap and scaling-up capacity development for smart, affordable and appropriate technologies and renewable energy in developing and least developed refugee hosting countries. Environmental impact assessments, national sustainable development projects and business models for the delivery of clean energy that cater more effectively to refugee and host community needs will be actively supported, as will "safe access to fuel and energy" programming to improve the quality of human settlements, including the living and working conditions of both urban and rural dwellers. Technical capacity development will be facilitated, including from the private sector and through State-to-State arrangements. Support will also be provided, as appropriate, to include refugees in disaster risk reduction strategies.

2.7 Food security and nutrition

80. Acknowledging that food and nutrition are priority basic needs, in support of host countries, States and relevant stakeholders[543] will contribute resources and expertise to facilitate access by refugees and host communities to sufficient, safe and nutritious food, and promote increased self-reliance in food security and nutrition, including by women, children, youth, persons with disabilities and older persons.

81. This will include resources and expertise for targeted food assistance to meet the immediate food and nutritional needs of refugees and host communities through most suitable means, including increased use of cash-based transfers or social protection systems, while also supporting access by refugees and host communities to nutrition- sensitive social safety nets, including school feeding programmes. Support will also be provided to build resilience of households and food and agricultural production systems in refugee-hosting areas, including by promoting purchases from local farmers and addressing bottlenecks along the food value chain, taking into account diversity, prevailing cultural and religious practices, and preferences for food and agricultural production. Capacity development for host governments and local communities to withstand shocks and stress factors, which limit the availability of food, including its production, or constrain access to it will be prioritized.

2.8 Civil registries

82. Civil and birth registration helps States to have accurate information about the persons living on their territory, and is a major tool for protection and solutions, including for refugee women, girls and others with specific needs. While it does not necessarily lead to conferral of nationality, birth registration helps establish legal identity and prevent the risk of statelessness. In support of host countries, States and relevant stakeholders will contribute resources and expertise to strengthen the capacity of national civil registries to facilitate timely access by refugees and stateless persons, as appropriate, to civil and birth registration and documentation, including through digital technology and the provision of mobile services, subject to full respect for data protection and privacy principles.

2.9 Statelessness

[543] This could include the World Food Programme (WFP) and the Food and Agriculture Organization (FAO), together with the International Fund for Agricultural Development (IFAD).

83. Recognizing that statelessness may be both a cause and consequence of refugee movements,[544] States, UNHCR and other relevant stakeholders will contribute resources and expertise to support the sharing of good, gender-sensitive practices for the prevention and reduction of statelessness, and the development of, as appropriate, national and regional and international action plans to end statelessness, in line with relevant standards and initiatives, including UNHCR's Campaign to End Statelessness. States that have not yet acceded to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness are encouraged to consider doing so.

2.10 Fostering good relations and peaceful coexistence

84. Recognizing the importance of good relations between communities, pending the availability of durable solutions, programmes and projects will be designed in ways that combat all forms of discrimination and promote peaceful coexistence between refugee and host communities, in line with national policies. Specific programmes and projects will be supported to enhance understanding of the plight of refugees, including through technical cooperation and capacity development for local communities and personnel. Engagement of children, adolescents and youth will be fostered, including through sports and cultural activities, language learning, and education. In fostering respect and understanding, as well as combating discrimination, the power and positive impact of civil society, faith-based organizations, and the media, including social media, will be harnessed.

3. Solutions

85. One of the primary objectives of the global compact (para 7) is to facilitate access to durable solutions, including by planning for solutions from the outset of refugee situations. Eliminating root causes is the most effective way to achieve solutions. In line with international law and the Charter of the United Nations, political and security cooperation, diplomacy, development and the promotion and protection of human rights are key to resolving protracted refugee situations and preventing new crises from emerging. At the same time, addressing the causes of refugee movements can take time. The programme of action therefore envisages a mix of solutions, adapted to the specific context and taking into account the absorption capacity, level of development and demographic situation of different countries. This includes the three traditional durable solutions of voluntary repatriation, resettlement and local integration, as well as other local solutions[545] and complementary pathways for admission to third countries, which may provide additional opportunities.

86. As in previous sections in Part B, the elements set out below are intended to bring greater predictability, and to engage a wider range of States and relevant stakeholders, for the achievement of solutions. In particular:

- support will be provided for countries of origin, and host countries where appropriate, upon their request, to facilitate conditions for voluntary repatriation, including through Global Refugee Forums and Support Platforms;

- offers of resettlement and complementary pathways[546] will be an indispensable part of the arrangements set out in Part A; and

- while local integration is a sovereign decision, those States electing to provide this or other local solutions will require particular support.

[544] See ExCom Conclusion No. 101 (LV) (2004), (k).

[545] See para 100.

[546] Made in line with para 4 above.

3.1 Support for countries of origin and voluntary repatriation

87. Voluntary repatriation in conditions of safety and dignity remains the preferred solution in the majority of refugee situations.[547] The overriding priorities are to promote the enabling conditions for voluntary repatriation in full respect for the principle of non-refoulement, to ensure the exercise of a free and informed choice[548] and to mobilize support to underpin safe and dignified repatriation. It is recognized that voluntary repatriation is not necessarily conditioned on the accomplishment of political solutions in the country of origin, in order not to impede the exercise of the right of refugees to return to their own country.[549] It is equally recognized that there are situations where refugees voluntarily return outside the context of formal voluntary repatriation programmes, and that this requires support. While enabling voluntary repatriation is first and foremost the responsibility of the country of origin towards its own people, the international community as a whole stands ready to provide support, including to facilitate sustainability of return.

88. Accordingly, without prejudice to ongoing support to host countries, the international community as a whole will contribute resources and expertise to support countries of origin, upon their request, to address root causes, to remove obstacles to return, and to enable conditions favourable to voluntary repatriation. These efforts will take into account existing political and technical mechanisms for coordinating humanitarian, peacebuilding and development interventions, and be in line with the 2030 Agenda for Sustainable Development. In some contexts it is useful for relevant States and UNHCR to conclude tripartite agreements to facilitate voluntary repatriation.

89. In addition, States and relevant stakeholders will contribute resources and expertise to support countries of origin upon their request with respect to social, political, economic and legal capacity to receive and reintegrate returnees, notably women, youth, children, older persons and persons with disabilities. This may include support for development, livelihood and economic opportunities and measures to address housing, land and property issues. Contributions will be provided for direct repatriation support to returnees in the form of cash and other assistance, where appropriate. Depending on the context, concerned countries may seek technical guidance on measures to avoid further forced displacement on return (internal or cross-border), and to take into account the situation of internally displaced and non-displaced resident populations.[550] Relevant stakeholders will work with authorities, as appropriate, to support information sharing on protection risks in areas of return and the establishment of systems for analysis of such risks.[551]

3.2 Resettlement

90. Apart from being a tool for protection of and solutions for refugees, resettlement is also a tangible mechanism for burden- and responsibility-sharing and a demonstration of solidarity, allowing States to help share each other's burdens and reduce the impact of large refugee situations on host countries. At the same time, resettlement has traditionally been offered only by a limited

[547] A/RES/72/150, para 39; ExCom Conclusions No.: 90 (LII) (2001), (j); 101 (LV) (2004); 40 (XXXVI) (1985).

[548] In line with ExCom Conclusion No. 101 (LV) (2004).

[549] As recognized, e.g., in ExCom Conclusion No. 112 (LXVII) (2016), (7). See also para 8 on the need for collaboration and action in addressing root causes of protracted refugee situations.

[550] See also A/RES/54/167 on protection of and assistance to internally displaced persons, and subsequent General Assembly resolutions on this subject, including A/RES/72/182.

[551] Including in line with UNHCR's mandate for returnee monitoring: ExCom Conclusions No. 40 (XXXVI) (1985), (l); 101 (LV) (2004), (q); 102 (LVI) (2005), (r).

number of countries. The need to foster a positive atmosphere for resettlement, and to enhance capacity for doing so, as well as to expand its base, cannot be overstated.

91. Contributions will be sought from States,[552] with the assistance of relevant stakeholders,[553] to establish, or enlarge the scope, size, and quality of, resettlement programmes.[554] In support of these efforts, UNHCR — in cooperation with States and relevant stakeholders — will devise a three-year strategy (2019–2021) to increase the pool of resettlement places, including countries not already participating in global resettlement efforts; as well as to consolidate emerging resettlement programmes, building on good practices and lessons learned from the Emerging Resettlement Countries Joint Support Mechanism (ERCM) and regional arrangements. The strategy will identify, build links and provide support to new and emerging resettlement countries, including through expertise and other technical support, twinning projects, human and financial resources for capacity development, and the involvement of relevant stakeholders.

92. In addition, pledges will be sought, as appropriate, to establish or strengthen good practices in resettlement programmes. This could include the establishment of multi-year resettlement schemes; efforts to ensure resettlement processing is predictable, efficient and effective (e.g. by using flexible processing modalities that fully address security concerns to resettle at least 25 per cent of annual resettlement submissions within six months of UNHCR referral); ensuring that resettlement is used strategically, improving the protection environment and contributing to a comprehensive approach to refugee situations (e.g. by allocating places for the resettlement of refugees according to UNHCR's resettlement criteria from priority situations identified by UNHCR in its annual projected global resettlement needs, including protracted situations; and/or e.g. dedicating at least 10 per cent of resettlement submissions as unallocated places for emergency or urgent cases identified by UNHCR); investing in robust reception and integration services for resettled refugees, including women and girls at risk; and the use of emergency transit facilities or other arrangements for emergency processing for resettlement, including for women and children at risk.[555]

93. In specific situations, in light of their proven value, resettlement core groups will continue to facilitate a coordinated response, with due regard to protection needs and security considerations.[556] More generally, all efforts under the global compact will align with the existing multilateral resettlement architecture, including the annual tripartite consultations on resettlement, the working group on resettlement and core groups, with a view to leveraging their added value.

3.3 Complementary pathways for admission to third countries

94. As a complement to resettlement, other pathways for the admission of persons with international protection needs can facilitate access to protection and/or solutions. There is a need to ensure that such pathways are made available on a more systematic, organized, sustainable and gender-responsive basis, that they contain appropriate protection safeguards, and that the number of countries offering these opportunities is expanded overall.

[552] In line with para 4 above.

[553] This could include UNHCR, IOM, civil society organizations, community groups, faith-based organizations, academia, individuals and the private sector.

[554] In line with A/RES/71/1 (n 394), Annex I, para 16.

[555] Issuance of single voyage convention travel documents for the purposes of facilitating evacuation may be required. This could be facilitated by UNHCR on an exceptional basis.

[556] Potentially in coordination with or as part of the Support Platform.

95. The three-year strategy on resettlement (section 3.2 above) will also include complementary pathways for admission, with a view to increasing significantly their availability and predictability. Contributions will be sought from States, with the support of relevant stakeholders,[557] to facilitate effective procedures and clear referral pathways for family reunification, or to establish private or community sponsorship programmes that are additional to regular resettlement, including community-based programmes promoted through the Global Refugee Sponsorship Initiative (GRSI). Other contributions in terms of complementary pathways could include humanitarian visas, humanitarian corridors and other humanitarian admission programmes; educational opportunities for refugees (including women and girls) through grant of scholarships and student visas, including through partnerships between governments and academic institutions; and labour mobility opportunities for refugees, including through the identification of refugees with skills that are needed in third countries.

96. Contributions will be sought to support the sharing of good practices, lessons learned and capacity development for new States considering such schemes (see above, para 47).

3.4 Local integration

97. While voluntary repatriation remains the preferred solution in the majority of refugee situations, it is also important to support countries who elect to resolve a refugee situation locally. Local integration is a sovereign decision and an option to be exercised by States guided by their treaty obligations and human rights principles.[558] A number of States have found it useful to move towards the local integration of refugees, including by providing durable legal status and naturalization, where appropriate, without prejudice to the specific situation of certain middle income and developing countries facing large-scale refugee situations.

98. Local integration is a dynamic and two-way process, which requires efforts by all parties, including a preparedness on the part of refugees to adapt to the host society, and a corresponding readiness on the part of host communities and public institutions to welcome refugees and to meet the needs of a diverse population. In low- and middle-income countries, additional financial and technical support from the international community is required to ensure successful local integration in a manner that takes into account the needs of both refugees and host communities.

99. In support of countries opting to provide local integration, the international community as a whole will, in close cooperation with national authorities of host countries, contribute resources and expertise to assist with the development of a strategic framework for local integration. The capacity of relevant State institutions, local communities and civil society will be strengthened to support the local integration process (e.g. to address documentation issues; facilitate language and vocational training, including for women and girls). Support will be provided for programmes fostering respect and good relations and to facilitate access to livelihood opportunities for integrating refugees, including through analysis of economies in refugee hosting areas, taking into account local labour market assessments and skills profiles, including of women and young adults. Investments in areas where refugees will settle, in support of national development plans and strategies and in line with the 2030 Agenda for Sustainable Development, will be actively promoted, and regional frameworks which may complement national laws in offering pathways to durable legal status or naturalization for refugees will be explored, where appropriate.

[557] Including civil society, faith-based organizations, the private sector, employers, international organizations, individuals and academia.

[558] As stated in ExCom Conclusion No. 104 (LVI) (2005), recital 1.

3.5. Other local solutions

100. In addition to local integration — where refugees find a durable solution to their plight — some host countries may elect to provide other local solutions to refugees. Such solutions entail interim legal stay, including to facilitate the appropriate economic, social and cultural inclusion of refugees, and are provided without prejudice to eventual durable solutions that may become available. Depending on the context and the needs identified by countries electing to provide other local solutions to refugees,[559] States and relevant stakeholders will contribute resources and expertise, including technical guidance on legal and institutional frameworks that foster the peaceful and productive inclusion of refugees and the well-being of local communities, and to address issues such as documentation and residence permits.

IV. Follow-up and review

101. The international community as a whole will do its utmost to mobilize support for the global compact and the achievement of its objectives on an equal footing, through more predictable and equitable burden- and responsibility-sharing. This is a task for all States, together with relevant stakeholders. UNHCR will play a catalytic and supportive role in this endeavour, consistent with its mandate. Follow-up and review under the global compact will be primarily conducted through the Global Refugee Forum (held every four years unless otherwise decided); high-level officials' meetings (held every two years between Forums); as well as annual reporting to the United Nations General Assembly by the United Nations High Commissioner for Refugees. States, UNHCR and relevant stakeholders will seek to coordinate the follow-up of the global compact in ways that foster coherence with other processes and actions related to people on the move.

102. Success under the global compact will be assessed in terms of progress towards the achievement of its four objectives (para 7). Indicators in this regard will be developed for each objective ahead of the first Global Refugee Forum in 2019.

103. The Global Refugee Forums will provide an important vehicle for States and other relevant stakeholders to take stock of progress towards the achievement of the objectives of the global compact. Forums will also provide an opportunity for States and relevant stakeholders to exchange good practices and experiences, both with respect to specific country or regional situations, as well as on a global level, and to review the ongoing efficacy of the arrangements for burden- and responsibility-sharing. The stocktaking at the Forums will be informed by the results of the process coordinated by UNHCR to measure the impact arising from hosting, protecting and assisting refugees (para 48), and a mechanism for tracking implementation of pledges and contributions, as well as measuring the impact of the global compact, established by UNHCR in close consultation with States and other relevant stakeholders.

104. High-level officials' meetings on the global compact will take place between Forums. They will be organized in conjunction with the High Commissioner's Dialogue on Protection Challenges. They will be open to all United Nations Member States and relevant stakeholders, and allow for "mid-term review" of progress, facilitate regular stocktaking and sustain momentum. The first meeting involving relevant officials at high level will take place in 2021.

105. The United Nations High Commissioner for Refugees will provide the annual update, in his/her regular report to the United Nations General Assembly, on progress made towards the achievement of the objectives of the global compact.

[559] See also para 99 for possible areas of support, as relevant.

106. States and relevant stakeholders will facilitate meaningful participation of refugees, including women, persons with disabilities, and youth, in Global Refugee Forums, ensuring the inclusion of their perspectives on progress. A digital platform developed by UNHCR and accessible to all will enable the sharing of good practices, notably from an age, gender, disability, and diversity perspective, in the application of the different elements of the global compact.

85. The global compact has the potential to mobilize all relevant stakeholders in support of a shared agenda and collective outcomes. Together, we can achieve results that will transform the lives of refugees and host communities

Annex II: Global Compact on Migration

GLOBAL COMPACT FOR SAFE, ORDERLY AND REGULAR MIGRATION

INTERGOVERNMENTALLY NEGOTIATED AND AGREED OUTCOME

13 July 2018

We, the Heads of State and Government and High Representatives, meeting in Morocco on 10 and 11 December 2018, reaffirming the New York Declaration for Refugees and Migrants and determined to make an important contribution to enhanced cooperation on international migration in all its dimensions, have adopted this Global Compact for Safe, Orderly and Regular Migration:

PREAMBLE

1. This Global Compact rests on the purposes and principles of the Charter of the United Nations.

2. It also rests on the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the other core international human rights treaties[560]; the United Nations Convention against Transnational Organized Crime, including the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Sea and Air; the Slavery Convention and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; the United Nations Framework Convention on Climate Change; the United Nations Convention to Combat Desertification; the Paris Agreement[561]; the International Labour Organization conventions on promoting decent work and labour migration[562]; as well as on the 2030 Agenda for Sustainable Development; the Addis Ababa Action Agenda; the Sendai Framework for Disaster Risk Reduction, and the New Urban Agenda.

3. Discussions about international migration at the global level are not new. We recall the advances made through the United Nations High-level Dialogues on International Migration and Development in 2006 and 2013. We also acknowledge the contributions of the Global Forum on Migration and Development launched in 2007. These platforms paved the way for the New York Declaration for Refugees and Migrants, through which we committed to elaborate a Global Compact for Refugees and to adopt this Global Compact for Safe, Orderly and Regular Migration, in two separate processes. The two Global Compacts, together, present complementary international cooperation frameworks that fulfil their respective mandates as laid out in the New York Declaration for Refugees and Migrants, which recognizes that migrants and refugees may face many common challenges and similar vulnerabilities.

[560] International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination against Women, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Rights of the Child, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, International Convention for the Protection of All Persons from Enforced Disappearance, Convention on the Rights of Persons with Disabilities.

[561] Adopted under the UNFCCC in FCCC/CP/2015/10/Add.1, decision 1/CP.21.

[562] Migration for Employment Convention of 1949 (No.97), Migrant Workers Convention of 1975 (No.143), Equality of Treatment Convention of 1962 (No.118), Convention on Decent Work for Domestic Workers of 2011 (No.189).

4. Refugees and migrants are entitled to the same universal human rights and fundamental freedoms, which must be respected, protected and fulfilled at all times. However, migrants and refugees are distinct groups governed by separate legal frameworks. Only refugees are entitled to the specific international protection as defined by international refugee law. This Global Compact refers to migrants and presents a cooperative framework addressing migration in all its dimensions.

5. As a contribution to the preparatory process for this Global Compact, we recognize the inputs shared by Member States and relevant stakeholders during the consultation and stocktaking phases, as well as the report of the Secretary-General, "Making Migration Work for All".

6. This Global Compact is a milestone in the history of the global dialogue and international cooperation on migration. It is rooted in the 2030 Agenda for Sustainable Development and the Addis Ababa Action Agenda, and informed by the Declaration of the High-level Dialogue on International Migration and Development adopted in October 2013. It builds on the pioneering work of the former Special Representative of the Secretary-General for International Migration and Development, including his report of 3 February 2017.

7. This Global Compact presents a non-legally binding, cooperative framework that builds on the commitments agreed upon by Member States in the New York Declaration for Refugees and Migrants. It fosters international cooperation among all relevant actors on migration, acknowledging that no State can address migration alone, and upholds the sovereignty of States and their obligations under international law.

OUR VISION AND GUIDING PRINCIPLES

8. This Global Compact expresses our collective commitment to improving cooperation on international migration. Migration has been part of the human experience throughout history, and we recognize that it is a source of prosperity, innovation and sustainable development in our globalized world, and that these positive impacts can be optimized by improving migration governance. The majority of migrants around the world today travel, live and work in a safe, orderly and regular manner. Nonetheless, migration undeniably affects our countries, communities, migrants and their families in very different and sometimes unpredictable ways.

9. It is crucial that the challenges and opportunities of international migration unite us, rather than divide us. This Global Compact sets out our common understanding, shared responsibilities and unity of purpose regarding migration, making it work for all.

Common Understanding

10. This Global Compact is the product of an unprecedented review of evidence and data gathered during an open, transparent and inclusive process. We shared our realities and heard diverse voices, enriching and shaping our common understanding of this complex phenomenon. We learned that migration is a defining feature of our globalized world, connecting societies within and across all regions, making us all countries of origin, transit and destination. We recognize that there is a continuous need for international efforts to strengthen our knowledge and analysis of migration, as shared understandings will improve policies that unlock the potential of sustainable development for all. We must collect and disseminate quality data. We must ensure that current and potential migrants are fully informed about their rights, obligations and options for safe, orderly

and regular migration, and are aware of the risks of irregular migration. We also must provide all our citizens with access to objective, evidence-based, clear information about the benefits and challenges of migration, with a view to dispelling misleading narratives that generate negative perceptions of migrants.

Shared Responsibilities

11. This Global Compact offers a 360-degree vision of international migration and recognizes that a comprehensive approach is needed to optimize the overall benefits of migration, while addressing risks and challenges for individuals and communities in countries of origin, transit and destination. No country can address the challenges and opportunities of this global phenomenon on its own. With this comprehensive approach, we aim to facilitate safe, orderly and regular migration, while reducing the incidence and negative impact of irregular migration through international cooperation and a combination of measures put forward in this Global Compact. We acknowledge our shared responsibilities to one another as Member States of the United Nations to address each other's needs and concerns over migration, and an overarching obligation to respect, protect and fulfil the human rights of all migrants, regardless of their migration status, while promoting the security and prosperity of all our communities.

12. This Global Compact aims to mitigate the adverse drivers and structural factors that hinder people from building and maintaining sustainable livelihoods in their countries of origin, and so compel them to seek a future elsewhere. It intends to reduce the risks and vulnerabilities migrants face at different stages of migration by respecting, protecting and fulfilling their human rights and providing them with care and assistance. It seeks to address legitimate concerns of communities, while recognizing that societies are undergoing demographic, economic, social and environmental changes at different scales that may have implications for and result from migration. It strives to create conducive conditions that enable all migrants to enrich our societies through their human, economic and social capacities, and thus facilitate their contributions to sustainable development at the local, national, regional and global levels.

Unity of Purpose

13. This Global Compact recognizes that safe, orderly and regular migration works for all when it takes place in a well-informed, planned and consensual manner. Migration should never be an act of desperation. When it is, we must cooperate to respond to the needs of migrants in situations of vulnerability, and address the respective challenges. We must work together to create conditions that allow communities and individuals to live in safety and dignity in their own countries. We must save lives and keep migrants out of harm's way. We must empower migrants to become full members of our societies, highlight their positive contributions, and promote inclusion and social cohesion. We must generate greater predictability and certainty for States, communities and migrants alike. To achieve this, we commit to facilitate and ensure safe, orderly and regular migration for the benefit of all.

14. Our success rests on the mutual trust, determination and solidarity of States to fulfil the objectives and commitments contained in this Global Compact. We unite, in a spirit of win-win cooperation, to address the challenges and opportunities of migration in all its dimensions through shared responsibility and innovative solutions. It is with this sense of common purpose that we take this historic step, fully aware that the Global Compact for Safe, Orderly and Regular Migration is a milestone, but not the end to our efforts. We commit to continue the multilateral dialogue at the United Nations through a periodic and effective follow-up and review mechanism, ensuring that

the words in this document translate into concrete actions for the benefit of millions of people in every region of the world.

15. We agree that this Global Compact is based on a set of cross-cutting and interdependent guiding principles:

People-centred: The Global Compact carries a strong human dimension to it, inherent to the migration experience itself. It promotes the well-being of migrants and the members of communities in countries of origin, transit and destination. As a result, the Global Compact places individuals at its core.

International cooperation: The Global Compact is a non-legally binding cooperative framework that recognizes that no State can address migration on its own due to the inherently transnational nature of the phenomenon. It requires international, regional and bilateral cooperation and dialogue. Its authority rests on its consensual nature, credibility, collective ownership, joint implementation, follow-up and review.

National sovereignty: The Global Compact reaffirms the sovereign right of States to determine their national migration policy and their prerogative to govern migration within their jurisdiction, in conformity with international law. Within their sovereign jurisdiction, States may distinguish between regular and irregular migration status, including as they determine their legislative and policy measures for the implementation of the Global Compact, taking into account different national realities, policies, priorities and requirements for entry, residence and work, in accordance with international law.

Rule of law and due process: The Global Compact recognizes that respect for the rule of law, due process and access to justice are fundamental to all aspects of migration governance. This means that the State, public and private institutions and entities, as well as persons themselves are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international law.

Sustainable development: The Global Compact is rooted in the 2030 Agenda for Sustainable Development, and builds upon its recognition that migration is a multidimensional reality of major relevance for the sustainable development of countries of origin, transit and destination, which requires coherent and comprehensive responses. Migration contributes to positive development outcomes and to realizing the goals of the 2030 Agenda for Sustainable Development, especially when it is properly managed. The Global Compact aims to leverage the potential of migration for the achievement of all Sustainable Development Goals, as well as the impact this achievement will have on migration in the future.

Human rights: The Global Compact is based on international human rights law and upholds the principles of non-regression and non-discrimination. By implementing the Global Compact, we ensure effective respect, protection and fulfilment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle. We also reaffirm the commitment to eliminate all forms of discrimination, including racism, xenophobia and intolerance against migrants and their families.

Gender-responsive: The Global Compact ensures that the human rights of women, men, girls and boys are respected at all stages of migration, their specific needs are properly understood and addressed and they are empowered as agents of change. It mainstreams a gender perspective, promotes gender equality and the empowerment of all women and girls, recognizing their

independence, agency and leadership in order to move away from addressing migrant women primarily through a lens of victimhood.

Child-sensitive: The Global Compact promotes existing international legal obligations in relation to the rights of the child, and upholds the principle of the best interests of the child at all times, as a primary consideration in all situations concerning children in the context of international migration, including unaccompanied and separated children.

Whole-of-government approach: The Global Compact considers that migration is a multidimensional reality that cannot be addressed by one government policy sector alone. To develop and implement effective migration policies and practices, a whole-of-government approach is needed to ensure horizontal and vertical policy coherence across all sectors and levels of government.

Whole-of-society approach: The Global Compact promotes broad multi-stakeholder partnerships to address migration in all its dimensions by including migrants, diasporas, local communities, civil society, academia, the private sector, parliamentarians, trade unions, National Human Rights Institutions, the media and other relevant stakeholders in migration governance.

OUR COOPERATIVE FRAMEWORK

16. With the New York Declaration for Refugees and Migrants we adopted a political declaration and a set of commitments. Reaffirming that Declaration in its entirety, we build upon it by laying out the following cooperative framework comprised of 23 objectives, implementation, as well as follow-up and review. Each objective contains a commitment, followed by a range of actions considered to be relevant policy instruments and best practices. To fulfil the 23 objectives, we will draw from these actions to achieve safe, orderly and regular migration along the migration cycle.

Objectives for Safe, Orderly and Regular Migration

(1) Collect and utilize accurate and disaggregated data as a basis for evidence-based policies

(2) Minimize the adverse drivers and structural factors that compel people to leave their country of origin

(3) Provide accurate and timely information at all stages of migration

(4) Ensure that all migrants have proof of legal identity and adequate documentation

(5) Enhance availability and flexibility of pathways for regular migration

(6) Facilitate fair and ethical recruitment and safeguard conditions that ensure decent work

(7) Address and reduce vulnerabilities in migration

(8) Save lives and establish coordinated international efforts on missing migrants

(9) Strengthen the transnational response to smuggling of migrants

(10) Prevent, combat and eradicate trafficking in persons in the context of international migration

(11) Manage borders in an integrated, secure and coordinated manner

(12) Strengthen certainty and predictability in migration procedures for appropriate screening, assessment and referral

(13) Use migration detention only as a measure of last resort and work towards alternatives

(14) Enhance consular protection, assistance and cooperation throughout the migration cycle

(15) Provide access to basic services for migrants

(16) Empower migrants and societies to realize full inclusion and social cohesion

(17) Eliminate all forms of discrimination and promote evidence-based public discourse to shape perceptions of migration

(18) Invest in skills development and facilitate mutual recognition of skills, qualifications and competences

(19) Create conditions for migrants and diasporas to fully contribute to sustainable development in all countries

(20) Promote faster, safer and cheaper transfer of remittances and foster financial inclusion of migrants

(21) Cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration

(22) Establish mechanisms for the portability of social security entitlements and earned benefits

(23) Strengthen international cooperation and global partnerships for safe, orderly and regular migration

OBJECTIVES AND COMMITMENTS

OBJECTIVE 1: Collect and utilize accurate and disaggregated data as a basis for evidence- based policies

17. We commit to strengthen the global evidence base on international migration by improving and investing in the collection, analysis and dissemination of accurate, reliable, comparable data, disaggregated by sex, age, migration status and other characteristics relevant in national contexts, while upholding the right to privacy under international human rights law and protecting personal data. We further commit to ensure this data fosters research, guides coherent and evidence-based policy-making and well-informed public discourse, and allows for effective monitoring and evaluation of the implementation of commitments over time.

To realize this commitment, we will draw from the following actions:

a) Elaborate and implement a comprehensive strategy for improving migration data at local, national, regional and global levels, with the participation of all relevant stakeholders, under the guidance of the United Nations Statistical Commission, by harmonizing methodologies for data collection, and strengthening analysis and dissemination of migration-related data and indicators

b) Improve international comparability and compatibility of migration statistics and national data systems, including by further developing and applying the statistical definition of an international migrant, elaborating a set of standards to measure migrant stocks and flows, and documenting migration patterns and trends, characteristics of migrants, as well as drivers and impacts of migration

c) Develop a global programme to build and enhance national capacities in data collection, analysis and dissemination to share data, address data gaps and assess key migration trends, that encourages collaboration between relevant stakeholders at all levels, provides dedicated training, financial support and technical assistance, leverages new data sources, including big data, and is reviewed by the United Nations Statistical Commission on a regular basis

d) Collect, analyse and use data on the effects and benefits of migration, as well as the contributions of migrants and diasporas to sustainable development, with a view to inform the implementation of the 2030 Agenda for Sustainable Development and related strategies and programmes at the local, national, regional and global levels

e) Support further development of and collaboration between existing global and regional databases and depositories, including the IOM Global Migration Data Portal and the World Bank Global Knowledge Partnership on Migration and Development, with a view to systematically consolidate relevant data in a transparent and user-friendly manner, while encouraging inter-agency collaboration to avoid duplication

f) Establish and strengthen regional centres for research and training on migration or migration observatories, such as the African Observatory for Migration and Development, to collect and analyse data in line with United Nations standards, including on best practices, the contributions of migrants, the overall economic, social and political benefits and challenges of migration in countries of origin, transit and destination, as well as drivers of migration, with a view to establishing shared strategies and maximizing the value of disaggregated migration data, in coordination with existing regional and subregional mechanisms

g) Improve national data collection by integrating migration-related topics in national censuses, as early as practicable, such as on country of birth, country of birth of parents, country of citizenship, country of residence five years prior to the census, most recent arrival date and reason for migrating, to ensure timely analysis and dissemination of results, disaggregated and tabulated in accordance with international standards, for statistical purposes

h) Conduct household, labour force and other surveys to collect information on the social and economic integration of migrants or add standard migration modules to existing household surveys to improve national, regional and international comparability, and make collected data available through public-use of statistical microdata files

i) Enhance collaboration between State units responsible for migration data and national statistical offices to produce migration-related statistics, including by using administrative records for statistical purposes, such as border records, visa, resident permits, population registers and other relevant sources, while upholding the right to privacy and protecting personal data

j) Develop and use country-specific migration profiles, which include disaggregated data on all migration-relevant aspects in a national context, including those on labour market needs, demand and availability of skills, the economic, environmental and social impacts of migration, remittance transfer costs, health, education, occupation, living and working conditions, wages, and the needs of migrants and receiving communities, in order to develop evidence-based migration policies

k) Cooperate with relevant stakeholders in countries of origin, transit and destination to develop research, studies and surveys on the interrelationship between migration and the three dimensions of sustainable development, the contributions and skills of migrants and diasporas, as well as their ties to the countries of origin and destination

OBJECTIVE 2: Minimize the adverse drivers and structural factors that compel people to leave their country of origin

18. We commit to create conducive political, economic, social and environmental conditions for people to lead peaceful, productive and sustainable lives in their own country and to fulfil their personal aspirations, while ensuring that desperation and deteriorating environments do not compel them to seek a livelihood elsewhere through irregular migration. We further commit to ensure timely and full implementation of the 2030 Agenda for Sustainable Development, as well as to build upon and invest in the implementation of other existing frameworks, in order to enhance the overall impact of the Global Compact to facilitate safe, orderly and regular migration.

To realize this commitment, we will draw from the following actions:

a) Promote the implementation of the 2030 Agenda for Sustainable Development, including the Sustainable Development Goals and the Addis Ababa Action Agenda, and the commitment to reach the furthest behind first, as well as the Paris Agreement[563] and the Sendai Framework for Disaster Risk Reduction 2015-2030

b) Invest in programmes that accelerate States' fulfilment of the Sustainable Development Goals with the aim of eliminating the adverse drivers and structural factors that compel people to leave their country of origin, including through poverty eradication, food security, health and sanitation, education, inclusive economic growth, infrastructure, urban and rural development, employment creation, decent work, gender equality and empowerment of women and girls, resilience and disaster risk reduction, climate change mitigation and adaptation, addressing the socioeconomic effects of all forms of violence, non- discrimination, rule of law and good governance, access to justice and protection of human rights, as well as creating and maintaining peaceful and inclusive societies with effective, accountable and transparent institutions

c) Establish or strengthen mechanisms to monitor and anticipate the development of risks and threats that might trigger or affect migration movements, strengthen early warning systems, develop emergency procedures and toolkits, launch emergency operations, and support post-

[563] Adopted under the UNFCCC in FCCC/CP/2015/10/Add.1, decision 1/CP.21.

emergency recovery, in close cooperation with and support of other States, relevant national and local authorities, National Human Rights Institutions, and civil society

d) Invest in sustainable development at local and national levels in all regions allowing all people to improve their lives and meet their aspirations, by fostering sustained, inclusive and sustainable economic growth, including through private and foreign direct investment and trade preferences, to create conducive conditions that allow communities and individuals to take advantage of opportunities in their own countries and drive sustainable development

e) Invest in human capital development by promoting entrepreneurship, education, vocational training and skills development programmes and partnerships, productive employment creation, in line with labour market needs, as well as in cooperation with the private sector and trade unions, with a view to reducing youth unemployment, avoiding brain drain and optimizing brain gain in countries of origin, and harnessing the demographic dividend

f) Strengthen collaboration between humanitarian and development actors, including by promoting joint analysis, multi-donor approaches and multi-year funding cycles, in order to develop long-term responses and outcomes that ensure respect for the rights of affected individuals, resilience and coping capacities of populations, as well as economic and social self-reliance, and by ensuring these efforts take migration into account

g) Account for migrants in national emergency preparedness and response, including by taking into consideration relevant recommendations from State-led consultative processes, such as the Guidelines to Protect Migrants in Countries Experiencing Conflict or Natural Disaster (MICIC Guidelines)

Natural disasters, the adverse effects of climate change, and environmental degradation

h) Strengthen joint analysis and sharing of information to better map, understand, predict and address migration movements, such as those that may result from sudden-onset and slow- onset natural disasters, the adverse effects of climate change, environmental degradation, as well as other precarious situations, while ensuring the effective respect, protection and fulfilment of the human rights of all migrants

i) Develop adaptation and resilience strategies to sudden-onset and slow-onset natural disasters, the adverse effects of climate change, and environmental degradation, such as desertification, land degradation, drought and sea level rise, taking into account the potential implications on migration, while recognizing that adaptation in the country of origin is a priority

j) Integrate displacement considerations into disaster preparedness strategies and promote cooperation with neighbouring and other relevant countries to prepare for early warning, contingency planning, stockpiling, coordination mechanisms, evacuation planning, reception and assistance arrangements, and public information

k) Harmonize and develop approaches and mechanisms at subregional and regional levels to address the vulnerabilities of persons affected by sudden-onset and slow-onset natural disasters, by ensuring they have access to humanitarian assistance that meets their essential needs with full respect for their rights wherever they are, and by promoting sustainable outcomes that increase resilience and self-reliance, taking into account the capacities of all countries involved

l) Develop coherent approaches to address the challenges of migration movements in the context of sudden-onset and slow-onset natural disasters, including by taking into consideration relevant recommendations from State-led consultative processes, such as the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change, and the Platform on Disaster Displacement

OBJECTIVE 3: Provide accurate and timely information at all stages of migration

19. We commit to strengthen our efforts to provide, make available and disseminate accurate, timely, accessible, and transparent information on migration-related aspects for and between States, communities and migrants at all stages of migration. We further commit to use this information to develop migration policies that provide a high degree of predictability and certainty for all actors involved.

To realize this commitment, we will draw from the following actions:

a) Launch and publicize a centralized and publicly accessible national website to make information available on regular migration options, such as on country-specific immigration laws and policies, visa requirements, application formalities, fees and conversion criteria, employment permit requirements, professional qualification requirements, credential assessment and equivalences, training and study opportunities, and living costs and conditions, in order to inform the decisions of migrants

b) Promote and improve systematic bilateral, regional and international cooperation and dialogue to exchange information on migration-related trends, including through joint databases, online platforms, international training centres and liaison networks, while upholding the right to privacy and protecting personal data

c) Establish open and accessible information points along relevant migration routes that can refer migrants to child-sensitive and gender-responsive support and counselling, offer opportunities to communicate with consular representatives of the country of origin, and make available relevant information, including on human rights and fundamental freedoms, appropriate protection and assistance, options and pathways for regular migration, and possibilities for return, in a language the person concerned understands

d) Provide newly arrived migrants with targeted, gender-responsive, child-sensitive, accessible and comprehensive information and legal guidance on their rights and obligations, including on compliance with national and local laws, obtaining of work and resident permits, status adjustments, registration with authorities, access to justice to file complaints about rights violations, as well as on access to basic services

e) Promote multi-lingual, gender-responsive and evidence-based information campaigns and organize awareness-raising events and pre-departure orientation trainings in countries of origin, in cooperation with local authorities, consular and diplomatic missions, the private sector, academia, migrant and diaspora organizations and civil society, in order to promote safe, orderly and regular migration, as well as to highlight the risks associated with irregular and unsafe migration

OBJECTIVE 4: Ensure that all migrants have proof of legal identity and adequate documentation

20. We commit to fulfil the right of all individuals to a legal identity by providing all our nationals with proof of nationality and relevant documentation, allowing national and local authorities to ascertain a migrant's legal identity upon entry, during stay, and for return, as well as to ensure effective migration procedures, efficient service provision, and improved public safety. We further commit to ensure, through appropriate measures, that migrants are issued adequate documentation and civil registry documents, such as birth, marriage and death certificates, at all stages of migration, as a means to empower migrants to effectively exercise their human rights.

To realize this commitment, we will draw from the following actions:

a) Improve civil registry systems, with a particular focus on reaching unregistered persons and our nationals residing in other countries, including by providing relevant identity and civil registry documents, strengthening capacities, and investing in information and communication technology solutions, while upholding the right to privacy and protecting personal data

b) Harmonize travel documents in line with the specifications of the International Civil Aviation Organization to facilitate interoperable and universal recognition of travel documents, as well as to combat identity fraud and document forgery, including by investing in digitalization, and strengthening mechanisms for biometric data-sharing, while upholding the right to privacy and protecting personal data

c) Ensure adequate, timely, reliable and accessible consular documentation to our nationals residing in other countries, including identity and travel documents, making use of information and communications technology, as well as community outreach, particularly in remote areas

d) Facilitate access to personal documentation, such as passports and visas, and ensure that relevant regulations and criteria to obtain such documentation are non-discriminatory, by undertaking a gender-responsive and age-sensitive review in order to prevent increased risk of vulnerabilities throughout the migration cycle

e) Strengthen measures to reduce statelessness, including by registering migrants' births, ensuring that women and men can equally confer their nationality to their children, and providing nationality to children born in another State's territory, especially in situations where a child would otherwise be stateless, fully respecting the human right to a nationality and in accordance with national legislation

f) Review and revise requirements to prove nationality at service delivery centres to ensure that migrants without proof of nationality or legal identity are not precluded from accessing basic services nor denied their human rights

g) Build upon existing practices at the local level that facilitate participation in community life, such as interaction with authorities and access to relevant services, through the issuance of registration cards to all persons living in a municipality, including migrants, that contain basic personal information, while not constituting entitlements to citizenship or residency

OBJECTIVE 5: Enhance availability and flexibility of pathways for regular migration

21. We commit to adapt options and pathways for regular migration in a manner that facilitates labour mobility and decent work reflecting demographic and labour market realities, optimizes education opportunities, upholds the right to family life, and responds to the needs of migrants in a situation of vulnerability, with a view to expanding and diversifying availability of pathways for safe, orderly and regular migration.

To realize this commitment, we will draw from the following actions:

a) Develop human rights-based and gender-responsive bilateral, regional and multilateral labour mobility agreements with sector-specific standard terms of employment in cooperation with relevant stakeholders, drawing on relevant ILO standards, guidelines and principles, in compliance with international human rights and labour law

b) Facilitate regional and cross-regional labour mobility through international and bilateral cooperation arrangements, such as free movement regimes, visa liberalization or multiple- country visas, and labour mobility cooperation frameworks, in accordance with national priorities, local market needs and skills supply

c) Review and revise existing options and pathways for regular migration, with a view to optimize skills matching in labour markets, address demographic realities and development challenges and opportunities, in accordance with local and national labour market demands and skills supply, in consultation with the private sector and other relevant stakeholders

d) Develop flexible, rights-based and gender-responsive labour mobility schemes for migrants, in accordance with local and national labour market needs and skills supply at all skills levels, including temporary, seasonal, circular, and fast-track programmes in areas of labour shortages, by providing flexible, convertible and non-discriminatory visa and permit options, such as for permanent and temporary work, multiple-entry study, business, visit, investment and entrepreneurship

e) Promote effective skills matching in the national economy by involving local authorities and other relevant stakeholders, particularly the private sector and trade unions, in the analysis of the local labour market, identification of skills gaps, definition of required skills profiles, and evaluation of the efficacy of labour migration policies, in order to ensure market- responsive contractual labour mobility through regular pathways

f) Foster efficient and effective skills-matching programmes by reducing visa and permit processing timeframes for standard employment authorizations, and by offering accelerated and facilitated visa and permit processing for employers with a track record of compliance

g) Develop or build on existing national and regional practices for admission and stay of appropriate duration based on compassionate, humanitarian or other considerations for migrants compelled to leave their countries of origin, due to sudden-onset natural disasters and other precarious situations, such as by providing humanitarian visas, private sponsorships, access to education for children, and temporary work permits, while adaptation in or return to their country of origin is not possible

h) Cooperate to identify, develop and strengthen solutions for migrants compelled to leave their countries of origin due to slow-onset natural disasters, the adverse effects of climate change, and environmental degradation, such as desertification, land degradation, drought and sea level rise,

including by devising planned relocation and visa options, in cases where adaptation in or return to their country of origin is not possible

i) Facilitate access to procedures for family reunification for migrants at all skills levels through appropriate measures that promote the realization of the right to family life and the best interests of the child, including by reviewing and revising applicable requirements, such as on income, language proficiency, length of stay, work authorization, and access to social security and services

j) Expand available options for academic mobility, including through bilateral and multilateral agreements that facilitate academic exchanges, such as scholarships for students and academic professionals, visiting professorships, joint training programmes, and international research opportunities, in cooperation with academic institutions and other relevant stakeholders

OBJECTIVE 6: Facilitate fair and ethical recruitment and safeguard conditions that ensure decent work

22. We commit to review existing recruitment mechanisms to guarantee that they are fair and ethical, and to protect all migrant workers against all forms of exploitation and abuse in order to guarantee decent work and maximize the socioeconomic contributions of migrants in both their countries of origin and destination.

To realize this commitment, we will draw from the following actions:

a) Promote signature, ratification, accession and implementation of relevant international instruments related to international labour migration, labour rights, decent work and forced labour

b) Build upon the work of existing bilateral, subregional and regional platforms that have overcome obstacles and identified best practices in labour mobility, by facilitating cross- regional dialogue to share this knowledge, and to promote the full respect for the human and labour rights of migrant workers at all skills levels, including migrant domestic workers

c) Improve regulations on public and private recruitment agencies, in order to align them with international guidelines and best practices, prohibit recruiters and employers from charging or shifting recruitment fees or related costs to migrant workers in order to prevent debt bondage, exploitation and forced labour, including by establishing mandatory, enforceable mechanisms for effective regulation and monitoring of the recruitment industry

d) Establish partnerships with all relevant stakeholders, including employers, migrant workers organizations and trade unions, to ensure that migrant workers are provided written contracts and are made aware of the provisions therein, the regulations relating to international labour recruitment and employment in the country of destination, their rights and obligations, as well as on how to access effective complaint and redress mechanisms, in a language they understand

e) Enact and implement national laws that sanction human and labour rights violations, especially in cases of forced and child labour, and cooperate with the private sector, including employers, recruiters, subcontractors and suppliers, to build partnerships that promote conditions for decent work, prevent abuse and exploitation, and ensure that the roles and responsibilities within the recruitment and employment processes are clearly outlined, thereby enhancing supply chain transparency

f) Strengthen the enforcement of fair and ethical recruitment and decent work norms and policies by enhancing the abilities of labour inspectors and other authorities to better monitor recruiters, employers and service providers in all sectors, ensuring that international human rights and labour law is observed to prevent all forms of exploitation, slavery, servitude, and forced, compulsory or child labour

g) Develop and strengthen labour migration and fair and ethical recruitment processes that allow migrants to change employers and modify the conditions or length of their stay with minimal administrative burden, while promoting greater opportunities for decent work and respect for international human rights and labour law

h) Take measures that prohibit the confiscation or non-consensual retention of work contracts, and travel or identity documents from migrants, in order to prevent abuse, all forms of exploitation, forced, compulsory and child labour, extortion and other situations of dependency, and to allow migrants to fully exercise their human rights

i) Provide migrant workers engaged in remunerated and contractual labour with the same labour rights and protections extended to all workers in the respective sector, such as the rights to just and favourable conditions of work, to equal pay for work of equal value, to freedom of peaceful assembly and association, and to the highest attainable standard of physical and mental health, including through wage protection mechanisms, social dialogue and membership in trade unions

j) Ensure migrants working in the informal economy have safe access to effective reporting, complaint, and redress mechanisms in cases of exploitation, abuse or violations of their rights in the workplace, in a manner that does not exacerbate vulnerabilities of migrants that denounce such incidents and allow them to participate in respective legal proceedings whether in the country of origin or destination

k) Review relevant national labour laws, employment policies and programmes to ensure that they include considerations of the specific needs and contributions of women migrant workers, especially in domestic work and lower-skilled occupations, and adopt specific measures to prevent, report, address and provide effective remedy for all forms of exploitation and abuse, including sexual and gender-based violence, as a basis to promote gender-responsive labour mobility policies

l) Develop and improve national policies and programmes relating to international labour mobility, including by taking into consideration relevant recommendations of the ILO General Principles and Operational Guidelines for Fair Recruitment, the United Nations Guiding Principles on Business and Human Rights, and the IOM International Recruitment Integrity System (IRIS)

OBJECTIVE 7: Address and reduce vulnerabilities in migration

23. We commit to respond to the needs of migrants who face situations of vulnerability, which may arise from the circumstances in which they travel or the conditions they face in countries of origin, transit and destination, by assisting them and protecting their human rights, in accordance with our obligations under international law. We further commit to uphold the best interests of the child at all times, as a primary consideration in situations where children are concerned, and to apply a gender-responsive approach in addressing vulnerabilities, including in responses to mixed movements.

To realize this commitment, we will draw from the following actions:

a) Review relevant policies and practices to ensure they do not create, exacerbate or unintentionally increase vulnerabilities of migrants, including by applying a human rights- based, gender- and disability-responsive, as well as an age- and child-sensitive approach

b) Establish comprehensive policies and develop partnerships that provide migrants in a situation of vulnerability, regardless of their migration status, with necessary support at all stages of migration, through identification and assistance, as well as protection of their human rights, in particular in cases related to women at risk, children, especially those unaccompanied or separated from their families, members of ethnic and religious minorities, victims of violence, including sexual and gender-based violence, older persons, persons with disabilities, persons who are discriminated against on any basis, indigenous peoples, workers facing exploitation and abuse, domestic workers, victims of trafficking in persons, and migrants subject to exploitation and abuse in the context of smuggling of migrants

c) Develop gender-responsive migration policies to address the particular needs and vulnerabilities of migrant women, girls and boys, which may include assistance, health care, psychological and other counselling services, as well as access to justice and effective remedies, especially in cases of sexual and gender-based violence, abuse and exploitation

d) Review relevant existing labour laws and work conditions to identify and effectively address workplace-related vulnerabilities and abuses of migrant workers at all skills levels, including domestic workers, and those working in the informal economy, in cooperation with relevant stakeholders, particularly the private sector

e) Account for migrant children in national child protection systems by establishing robust procedures for the protection of migrant children in relevant legislative, administrative and judicial proceedings and decisions, as well as in all migration policies and programmes that impact children, including consular protection policies and services, as well as cross-border cooperation frameworks, in order to ensure the best interests of the child are appropriately integrated, consistently interpreted and applied in coordination and cooperation with child protection authorities

f) Protect unaccompanied and separated children at all stages of migration through the establishment of specialized procedures for their identification, referral, care and family reunification, and provide access to health care services, including mental health, education, legal assistance and the right to be heard in administrative and judicial proceedings, including by swiftly appointing a competent and impartial legal guardian, as essential means to address their particular vulnerabilities and discrimination, protect them from all forms of violence, and provide access to sustainable solutions that are in their best interests

g) Ensure migrants have access to public or affordable independent legal assistance and representation in legal proceedings that affect them, including during any related judicial or administrative hearing, in order to safeguard that all migrants, everywhere, are recognized as persons before the law and that the delivery of justice is impartial and non-discriminatory

h) Develop accessible and expedient procedures that facilitate transitions from one status to another and inform migrants of their rights and obligations, so as to prevent migrants from falling into an irregular status in the country of destination, to reduce precariousness of status and related

vulnerabilities, as well as to enable individual status assessments for migrants, including for those who have fallen out of regular status, without fear of arbitrary expulsion

i) Build on existing practices to facilitate access for migrants in an irregular status to an individual assessment that may lead to regular status, on a case by case basis and with clear and transparent criteria, especially in cases where children, youth and families are involved, as an option to reduce vulnerabilities, as well as for States to ascertain better knowledge of the resident population

j) Apply specific support measures to ensure that migrants caught up in situations of crisis in countries of transit and destination have access to consular protection and humanitarian assistance, including by facilitating cross-border and broader international cooperation, as well as by taking migrant populations into account in crisis preparedness, emergency response and post-crisis action

k) Involve local authorities and relevant stakeholders in the identification, referral and assistance of migrants in a situation of vulnerability, including through agreements with national protection bodies, legal aid and service providers, as well as the engagement of mobile response teams, where they exist

l) Develop national policies and programmes to improve national responses that address the needs of migrants in situations of vulnerability, including by taking into consideration relevant recommendations of the Global Migration Group Principles and Guidelines, Supported by Practical Guidance, on the Human Rights Protection of Migrants in Vulnerable Situations

OBJECTIVE 8: Save lives and establish coordinated international efforts on missing migrants

24. We commit to cooperate internationally to save lives and prevent migrant deaths and injuries through individual or joint search and rescue operations, standardized collection and exchange of relevant information, assuming collective responsibility to preserve the lives of all migrants, in accordance with international law. We further commit to identify those who have died or gone missing, and to facilitate communication with affected families.

To realize this commitment, we will draw from the following actions:

a) Develop procedures and agreements on search and rescue of migrants, with the primary objective to protect migrants' right to life that uphold the prohibition of collective expulsion, guarantee due process and individual assessments, enhance reception and assistance capacities, and ensure that the provision of assistance of an exclusively humanitarian nature for migrants is not considered unlawful

b) Review the impacts of migration-related policies and laws to ensure that these do not raise or create the risk of migrants going missing, including by identifying dangerous transit routes used by migrants, by working with other States as well as relevant stakeholders and international organizations to identify contextual risks and establishing mechanisms for preventing and responding to such situations, with particular attention to migrant children, especially those unaccompanied or separated

c) Enable migrants to communicate with their families without delay to inform them that they are alive by facilitating access to means of communication along routes and at their destination,

including in places of detention, as well as access to consular missions, local authorities and organizations that can provide assistance with family contacts, especially in cases of unaccompanied or separated migrant children, as well as adolescents

d) Establish transnational coordination channels, including through consular cooperation, and designate contact points for families looking for missing migrants, through which families can be kept informed on the status of the search and obtain other relevant information, while respecting the right to privacy and protecting personal data

e) Collect, centralize and systematize data regarding corpses and ensure traceability after burial, in accordance with internationally accepted forensic standards, and establish coordination channels at transnational level to facilitate identification and the provision of information to families

f) Make all efforts, including through international cooperation, to recover, identify and repatriate the remains of deceased migrants to their countries of origin, respecting the wishes of grieving families, and, in the case of unidentified individuals, facilitate the identification and subsequent recovery of the mortal remains, ensuring that the remains of deceased migrants are treated in a dignified, respectful and proper manner

OBJECTIVE 9: Strengthen the transnational response to smuggling of migrants

25. We commit to intensify joint efforts to prevent and counter smuggling of migrants by strengthening capacities and international cooperation to prevent, investigate, prosecute and penalize the smuggling of migrants in order to end the impunity of smuggling networks. We further commit to ensure that migrants shall not become liable to criminal prosecution for the fact of having been the object of smuggling, notwithstanding potential prosecution for other violations of national law. We also commit to identify smuggled migrants to protect their human rights, taking into consideration the special needs of women and children, and assisting in particular those migrants subject to smuggling under aggravating circumstances, in accordance with international law.

To realize this commitment, we will draw from the following actions:

a) Promote ratification, accession and implementation of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime (UNTOC)

b) Use transnational, regional and bilateral mechanisms to share relevant information and intelligence on smuggling routes, modus operandi and financial transactions of smuggling networks, vulnerabilities faced by smuggled migrants, and other data to dismantle the smuggling networks and enhance joint responses

c) Develop gender-responsive and child-sensitive cooperation protocols along migration routes that outline step-by-step measures to adequately identify and assist smuggled migrants, in accordance with international law, as well as to facilitate cross-border law enforcement and intelligence cooperation in order to prevent and counter smuggling of migrants with the aim to end impunity for smugglers and prevent irregular migration, while ensuring that counter-smuggling measures are in full respect for human rights

d) Adopt legislative and other measures as may be necessary to establish the smuggling of migrants as a criminal offence, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit for the smuggler, and include enhanced penalties for smuggling of migrants under aggravating circumstances, in accordance with international law

e) Design, review or amend relevant policies and procedures to distinguish between the crimes of smuggling of migrants and trafficking in persons by using the correct definitions and applying distinct responses to these separate crimes, while recognizing that smuggled migrants might also become victims of trafficking in persons, therefore requiring appropriate protection and assistance

f) Take measures to prevent the smuggling of migrants along the migration cycle in partnership with other States and relevant stakeholders, including by cooperating in the fields of development, public information, justice, as well as training and technical capacity- building at national and local levels, paying special attention to geographic areas from where irregular migration systematically originates

OBJECTIVE 10: Prevent, combat and eradicate trafficking in persons in the context of international migration

26. We commit to take legislative or other measures to prevent, combat and eradicate trafficking in persons in the context of international migration by strengthening capacities and international cooperation to investigate, prosecute and penalize trafficking in persons, discouraging demand that fosters exploitation leading to trafficking, and ending impunity of trafficking networks. We further commit to enhance the identification and protection of, and assistance to migrants who have become victims of trafficking, paying particular attention to women and children.

To realize this commitment, we will draw from the following actions:

a) Promote, ratification, accession and implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (UNTOC)

b) Promote the implementation of the Global Plan of Action to Combat Trafficking in Persons and take into consideration relevant recommendations of the UNODC Toolkit to Combat Trafficking in Persons and other relevant UNODC documents when developing and implementing national and regional policies and measures relating to trafficking in persons

c) Monitor irregular migration routes which may be exploited by human trafficking networks to recruit and victimize smuggled or irregular migrants, in order to strengthen cooperation at bilateral, regional and cross-regional levels on prevention, investigation, and prosecution of perpetrators, as well as on identification of, and protection and assistance to victims of trafficking in persons

d) Share relevant information and intelligence through transnational and regional mechanisms, including on the modus operandi, economic models and conditions driving trafficking networks, strengthen cooperation between all relevant actors, including financial intelligence units, regulators and financial institutions, to identify and disrupt financial flows associated with trafficking in persons, and enhance judicial cooperation and enforcement with the aim to ensure accountability and end impunity

e) Apply measures that address the particular vulnerabilities of women, men, girls and boys, regardless of their migration status, that have become or are at risk of becoming victims of trafficking in persons and other forms of exploitation by facilitating access to justice and safe reporting without fear of detention, deportation or penalty, focusing on prevention, identification, appropriate protection and assistance, and addressing specific forms of abuse and exploitation

f) Ensure that definitions of trafficking in persons used in legislation, migration policy and planning, as well as in judicial prosecutions are in accordance with international law, in order to distinguish between the crimes of trafficking in persons and smuggling of migrants

g) Strengthen legislation and relevant procedures to enhance prosecution of traffickers, avoid criminalization of migrants who are victims of trafficking in persons for trafficking-related offences, and ensure that the victim receives appropriate protection and assistance, not conditional upon cooperation with the authorities against suspected traffickers

h) Provide migrants that have become victims of trafficking in persons with protection and assistance, such as measures for physical, psychological and social recovery, as well as measures that permit them to remain in the country of destination, temporarily or permanently, in appropriate cases, facilitating victims' access to justice, including redress and compensation, in accordance with international law

i) Create national and local information systems and training programmes which alert and educate citizens, employers, as well as public officials and law enforcement officers, and strengthen capacities to identify signs of trafficking in persons, such as forced, compulsory or child labour, in countries of origin, transit and destination

j) Invest in awareness-raising campaigns, in partnership with relevant stakeholders, for migrants and prospective migrants on the risks and dangers of trafficking in persons, and provide them with information on preventing and reporting trafficking activities

OBJECTIVE 11: Manage borders in an integrated, secure and coordinated manner

27. We commit to manage our national borders in a coordinated manner, promoting bilateral and regional cooperation, ensuring security for States, communities and migrants, and facilitating safe and regular cross-border movements of people while preventing irregular migration. We further commit to implement border management policies that respect national sovereignty, the rule of law, obligations under international law, human rights of all migrants, regardless of their migration status, and are non-discriminatory, gender-responsive and child-sensitive.

To realize this commitment, we will draw from the following actions:

a) Enhance international, regional and cross-regional border management cooperation, taking into consideration the particular situation of countries of transit, on proper identification, timely and efficient referral, assistance and appropriate protection of migrants in situations of vulnerability at or near international borders, in compliance with international human rights law, by adopting whole-of-government approaches, implementing joint cross- border trainings, and fostering capacity-building measures

b) Establish appropriate structures and mechanisms for effective integrated border management by ensuring comprehensive and efficient border crossing procedures, including through pre-screening of arriving persons, pre-reporting by carriers of passengers, and use of information and communication technology, while upholding the principle of non-discrimination, respecting the right to privacy and protecting personal data

c) Review and revise relevant national procedures for border screening, individual assessment and interview processes to ensure due process at international borders and that all migrants are treated in accordance with international human rights law, including through cooperation with National Human Rights Institutions and other relevant stakeholders

d) Develop technical cooperation agreements that enable States to request and offer assets, equipment and other technical assistance to strengthen border management, particularly in the area of search and rescue as well as other emergency situations

e) Ensure that child protection authorities are promptly informed and assigned to participate in procedures for the determination of the best interests of the child once an unaccompanied or separated child crosses an international border, in accordance with international law, including by training border officials in the rights of the child and child- sensitive procedures, such as those that prevent family separation and reunite families when family separation occurs

f) Review and revise relevant laws and regulations to determine whether sanctions are appropriate to address irregular entry or stay and, if so, to ensure that they are proportionate, equitable, non-discriminatory, and fully consistent with due process and other obligations under international law

g) Improve cross-border collaboration among neighbouring and other States relating to the treatment given to persons crossing or seeking to cross international borders, including by taking into consideration relevant recommendations from the OHCHR Recommended Principles and Guidelines on Human Rights at International Borders when identifying best practices

OBJECTIVE 12: Strengthen certainty and predictability in migration procedures for appropriate screening, assessment and referral

28. We commit to increase legal certainty and predictability of migration procedures by developing and strengthening effective and human rights-based mechanisms for the adequate and timely screening and individual assessment of all migrants for the purpose of identifying and facilitating access to the appropriate referral procedures, in accordance with international law.

To realize this commitment, we will draw from the following actions:

a) Increase transparency and accessibility of migration procedures by communicating the requirements for entry, admission, stay, work, study or other activities, and introducing technology to simplify application procedures, in order to avoid unnecessary delays and expenses for States and migrants

b) Develop and conduct intra- and cross-regional specialized human rights and trauma- informed trainings for first responders and government officials, including law enforcement authorities, border officials, consular representatives and judicial bodies, to facilitate and standardize identification and referral of, as well as appropriate assistance and counselling in a culturally-

sensitive way, to victims of trafficking in persons, migrants in situations of vulnerability, including children, in particular those unaccompanied or separated, and persons affected by any form of exploitation and abuse related to smuggling of migrants under aggravating circumstances

c) Establish gender-responsive and child-sensitive referral mechanisms, including improved screening measures and individual assessments at borders and places of first arrival, by applying standardized operating procedures developed in coordination with local authorities, National Human Rights Institutions, international organizations and civil society

d) Ensure that migrant children are promptly identified at places of first arrival in countries of transit and destination, and, if unaccompanied or separated, are swiftly referred to child protection authorities and other relevant services as well as appointed a competent and impartial legal guardian, that family unity is protected, and that anyone legitimately claiming to be a child is treated as such unless otherwise determined through a multi-disciplinary, independent and child-sensitive age assessment

e) Ensure that, in the context of mixed movements, relevant information on rights and obligations under national laws and procedures, including on entry and stay requirements, available forms of protection, as well as options for return and reintegration, is appropriately, timely and effectively communicated, and accessible

OBJECTIVE 13: Use immigration detention only as a measure of last resort and work towards alternatives

29. We commit to ensure that any detention in the context of international migration follows due process, is non-arbitrary, based on law, necessity, proportionality and individual assessments, is carried out by authorized officials, and for the shortest possible period of time, irrespective of whether detention occurs at the moment of entry, in transit, or proceedings of return, and regardless of the type of place where the detention occurs. We further commit to prioritize non-custodial alternatives to detention that are in line with international law, and to take a human rights-based approach to any detention of migrants, using detention as a measure of last resort only.

To realize this commitment, we will draw from the following actions:

a) Use existing relevant human rights mechanisms to improve independent monitoring of migrant detention, ensuring that it is a measure of last resort, that human rights violations do not occur, and that States promote, implement and expand alternatives to detention, favouring non-custodial measures and community-based care arrangements, especially in the case of families and children

b) Consolidate a comprehensive repository to disseminate best practices of human rights- based alternatives to detention in the context of international migration, including by facilitating regular exchanges and the development of initiatives based on successful practices among States, and between States and relevant stakeholders

c) Review and revise relevant legislation, policies and practices related to immigration detention to ensure that migrants are not detained arbitrarily, that decisions to detain are based on law, are proportionate, have a legitimate purpose, and are taken on an individual basis, in full compliance with due process and procedural safeguards, and that immigration detention is not promoted as a

deterrent or used as a form of cruel, inhumane or degrading treatment to migrants, in accordance with international human rights law

d) Provide access to justice for all migrants in countries of transit and destination that are or may be subject to detention, including by facilitating access to free or affordable legal advice and assistance of a qualified and independent lawyer, as well as access to information and the right to regular review of a detention order

e) Ensure that all migrants in detention are informed about the reasons for their detention, in a language they understand, and facilitate the exercise of their rights, including to communicate with the respective consular or diplomatic missions without delay, legal representatives and family members, in accordance with international law and due process guarantees

f) Reduce the negative and potentially lasting effects of detention on migrants by guaranteeing due process and proportionality, that it is for the shortest period of time, safeguards physical and mental integrity, and that, as a minimum, access to food, basic healthcare, legal orientation and assistance, information and communication, as well as adequate accommodation is granted, in accordance with international human rights law

g) Ensure that all governmental authorities and private actors duly charged with administering immigration detention do so in a way consistent with human rights and are trained on non-discrimination, the prevention of arbitrary arrest and detention in the context of international migration, and are held accountable for violations or abuses of human rights

h) Protect and respect the rights and best interests of the child at all times, regardless of their migration status, by ensuring availability and accessibility of a viable range of alternatives to detention in non-custodial contexts, favouring community-based care arrangements, that ensure access to education and healthcare, and respect their right to family life and family unity, and by working to end the practice of child detention in the context of international migration

OBJECTIVE 14: Enhance consular protection, assistance and cooperation throughout the migration cycle

30. We commit to strengthen consular protection of and assistance to our nationals abroad, as well as consular cooperation between States in order to better safeguard the rights and interests of all migrants at all times, and to build upon the functions of consular missions to enhance interactions between migrants and State authorities of countries of origin, transit and destination, in accordance with international law.

To realize this commitment, we will draw from the following actions:

a) Cooperate to build consular capacities, train consular officers, promote arrangements for providing consular services collectively where individual States lack capacity, including through technical assistance, and to develop bilateral or regional agreements on various aspects of consular cooperation

b) Involve relevant consular and immigration personnel in existing global and regional fora on migration in order to exchange information and best practices about issues of mutual concern that

pertain to citizens abroad and contribute to comprehensive and evidence- based migration policy development

c) Conclude bilateral or regional agreements on consular assistance and representation in places where States have an interest in strengthening effective consular services related to migration, but do not have a diplomatic or consular presence

d) Strengthen consular capacities in order to identify, protect and assist our nationals abroad who are in a situation of vulnerability, including victims of human and labour rights violations or abuse, victims of crime, victims of trafficking in persons, migrants subject to smuggling under aggravating circumstances, and migrant workers exploited in the process of recruitment, by providing training to consular officers on human rights-based, gender- responsive and child-sensitive actions in this regard

e) Provide our nationals abroad the opportunity to register with the country of origin, in close cooperation with consular, national and local authorities, as well as relevant migrant organizations, as a means to facilitate information, services and assistance to migrants in emergency situations and ensure migrants' accessibility to relevant and timely information, such as by establishing helplines and consolidating national digital databases, while upholding the right to privacy and protecting personal data

f) Provide consular support to our nationals through advice, including on local laws and customs, interaction with authorities, financial inclusion, and business establishment, as well as through the issuance of relevant documentation, such as travel documents, and consular identity documents that may facilitate access to services, assistance in emergency situations, the opening of a bank account, and access to remittance facilities

OBJECTIVE 15: Provide access to basic services for migrants

31. We commit to ensure that all migrants, regardless of their migration status, can exercise their human rights through safe access to basic services. We further commit to strengthen migrant-inclusive service delivery systems, notwithstanding that nationals and regular migrants may be entitled to more comprehensive service provision, while ensuring that any differential treatment must be based on law, proportionate, pursue a legitimate aim, in accordance with international human rights law.

To realize this commitment, we will draw from the following actions:

a) Enact laws and take measures to ensure that service delivery does not amount to discrimination against migrants on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability or other grounds irrespective of cases where differential provision of services based on migration status might apply

b) Ensure that cooperation between service providers and immigration authorities does not exacerbate vulnerabilities of irregular migrants by compromising their safe access to basic services or unlawfully infringing upon the human rights to privacy, liberty and security of person at places of basic service delivery

c) Establish and strengthen holistic and easily accessible service points at local level, that are migrant inclusive, offer relevant information on basic services in a gender- and disability- responsive as well as child-sensitive manner, and facilitate safe access thereto

d) Establish or mandate independent institutions at the national or local level, such as National Human Rights Institutions, to receive, investigate and monitor complaints about situations in which migrants' access to basic services is systematically denied or hindered, facilitate access to redress, and work towards a change in practice

e) Incorporate the health needs of migrants in national and local health care policies and plans, such as by strengthening capacities for service provision, facilitating affordable and non-discriminatory access, reducing communication barriers, and training health care providers on culturally-sensitive service delivery, in order to promote physical and mental health of migrants and communities overall, including by taking into consideration relevant recommendations from the WHO Framework of Priorities and Guiding Principles to Promote the Health of Refugees and Migrants

f) Provide inclusive and equitable quality education to migrant children and youth, as well as facilitate access to lifelong learning opportunities , including by strengthening the capacities of education systems and by facilitating non-discriminatory access to early childhood development, formal schooling, non-formal education programmes for children for whom the formal system is inaccessible, on-the-job and vocational training, technical education, and language training, as well as by fostering partnerships with all stakeholders that can support this endeavour

OBJECTIVE 16: Empower migrants and societies to realize full inclusion and social cohesion

32. We commit to foster inclusive and cohesive societies by empowering migrants to become active members of society and promoting the reciprocal engagement of receiving communities and migrants in the exercise of their rights and obligations towards each other, including observance of national laws and respect for customs of the country of destination. We further commit to strengthen the welfare of all members of societies by minimizing disparities, avoiding polarization and increasing public confidence in policies and institutions related to migration, in line with the acknowledgment that fully integrated migrants are better positioned to contribute to prosperity.

To realize this commitment, we will draw from the following actions:

a) Promote mutual respect for the cultures, traditions and customs of communities of destination and of migrants by exchanging and implementing best practices on integration policies, programmes and activities, including on ways to promote acceptance of diversity and facilitate social cohesion and inclusion

b) Establish comprehensive and needs-based pre-departure and post-arrival programmes that may include rights and obligations, basic language training, as well as orientation about social norms and customs in the country of destination

c) Develop national short, medium and long term policy goals regarding the inclusion of migrants in societies, including on labour market integration, family reunification, education, non-discrimination and health, including by fostering partnerships with relevant stakeholders

d) Work towards inclusive labour markets and full participation of migrant workers in the formal economy by facilitating access to decent work and employment for which they are most qualified, in accordance with local and national labour market demands and skills supply

e) Empower migrant women by eliminating gender-based discriminatory restrictions on formal employment, ensuring the right to freedom of association, and facilitating access to relevant basic services, as measures to promote their leadership and guarantee their full, free and equal participation in society and the economy

f) Establish community centres or programmes at the local level to facilitate migrant participation in the receiving society by involving migrants, community members, diaspora organizations, migrant associations, and local authorities in intercultural dialogue, sharing of stories, mentorship programmes, and development of business ties that improve integration outcomes and foster mutual respect

g) Capitalize on the skills, cultural and language proficiency of migrants and receiving communities by developing and promoting peer-to-peer training exchanges, gender- responsive, vocational and civic integration courses and workshops

h) Support multicultural activities through sports, music, arts, culinary festivals, volunteering and other social events that will facilitate mutual understanding and appreciation of migrant cultures and those of destination communities

i) Promote school environments that are welcoming and safe, and support the aspirations of migrant children by enhancing relationships within the school community, incorporating evidence-based information about migration in education curricula, and dedicating targeted resources to schools with a high concentration of migrant children for integration activities in order to promote respect for diversity and inclusion, and to prevent all forms discrimination, including racism, xenophobia and intolerance

OBJECTIVE 17: Eliminate all forms of discrimination and promote evidence-based public discourse to shape perceptions of migration

33. We commit to eliminate all forms of discrimination, condemn and counter expressions, acts and manifestations of racism, racial discrimination, violence, xenophobia and related intolerance against all migrants in conformity with international human rights law. We further commit to promote an open and evidence-based public discourse on migration and migrants in partnership with all parts of society, that generates a more realistic, humane and constructive perception in this regard. We also commit to protect freedom of expression in accordance with international law, recognizing that an open and free debate contributes to a comprehensive understanding of all aspects of migration.

To realize this commitment, we will draw from the following actions:

a) Enact, implement or maintain legislation that penalizes hate crimes and aggravated hate crimes targeting migrants, and train law enforcement and other public officials to identify, prevent and respond to such crimes and other acts of violence that target migrants, as well as to provide medical, legal and psychosocial assistance for victims

b) Empower migrants and communities to denounce any acts of incitement to violence directed towards migrants by informing them of available mechanisms for redress, and ensure that those who actively participate in the commission of a hate crime targeting migrants are held accountable, in accordance with national legislation, while upholding international human rights law, in particular the right to freedom of expression

c) Promote independent, objective and quality reporting of media outlets, including internet- based information, including by sensitizing and educating media professionals on migration-related issues and terminology, investing in ethical reporting standards and advertising, and stopping allocation of public funding or material support to media outlets that systematically promote intolerance, xenophobia, racism and other forms of discrimination towards migrants, in full respect for the freedom of the media

d) Establish mechanisms to prevent, detect and respond to racial, ethnic and religious profiling of migrants by public authorities, as well as systematic instances of intolerance, xenophobia, racism and all other multiple and intersecting forms of discrimination in partnership with National Human Rights Institutions, including by tracking and publishing trends analyses, and ensuring access to effective complaint and redress mechanisms

e) Provide migrants, especially migrant women, with access to national and regional complaint and redress mechanisms with a view to promoting accountability and addressing governmental actions related to discriminatory acts and manifestations carried out against migrants and their families

f) Promote awareness-raising campaigns targeted at communities of origin, transit and destination in order to inform public perceptions regarding the positive contributions of safe, orderly and regular migration, based on evidence and facts, and to end racism, xenophobia and stigmatization against all migrants

g) Engage migrants, political, religious and community leaders, as well as educators and service providers to detect and prevent incidences of intolerance, racism, xenophobia, and other forms of discrimination against migrants and diasporas and support activities in local communities to promote mutual respect, including in the context of electoral campaigns

OBJECTIVE 18: Invest in skills development and facilitate mutual recognition of skills, qualifications and competences

34. We commit to invest in innovative solutions that facilitate mutual recognition of skills, qualifications and competences of migrant workers at all skills levels, and promote demand- driven skills development to optimize the employability of migrants in formal labour markets in countries of destination and in countries of origin upon return, as well as to ensure decent work in labour migration.

To realize this commitment, we will draw from the following actions:

a) Develop standards and guidelines for the mutual recognition of foreign qualifications and non-formally acquired skills in different sectors in collaboration with the respective industries with a view to ensuring worldwide compatibility based on existing models and best practices

b) Promote transparency of certifications and compatibility of National Qualifications Frameworks by agreeing on standard criteria, indicators and assessment parameters, and by creating and strengthening national skills profiling tools, registries or institutions in order to facilitate effective and efficient mutual recognition procedures at all skills levels

c) Conclude bilateral, regional or multilateral mutual recognition agreements or include recognition provisions in other agreements, such as labour mobility or trade agreements, in order to provide equivalence or comparability in national systems, such as automatic or managed mutual recognition mechanisms

d) Use technology and digitalization to evaluate and mutually recognize skills more comprehensively based on formal credentials as well as non-formally acquired competences and professional experience at all skills levels

e) Build global skills partnerships amongst countries that strengthen training capacities of national authorities and relevant stakeholders, including the private sector and trade unions, and foster skills development of workers in countries of origin and migrants in countries of destination with a view to preparing trainees for employability in the labour markets of all participating countries

f) Promote inter-institutional networks and collaborative programmes for partnerships between the private sector and educational institutions in countries of origin and destination to enable mutually beneficial skills development opportunities for migrants, communities and participating partners, including by building on the best practices of the Business Mechanism developed in the context of the Global Forum on Migration and Development

g) Engage in bilateral partnerships and programmes in cooperation with relevant stakeholders that promote skills development, mobility and circulation, such as student exchange programmes, scholarships, professional exchange programmes and trainee- or apprenticeships that include options for beneficiaries, after successful completion of these programmes, to seek employment and engage in entrepreneurship

h) Cooperate with the private sector and employers to make available easily accessible and gender-responsive remote or online skills development and matching programmes to migrants at all skills levels, including early and occupation-specific language training, on- the-job training and access to advanced training programmes, to enhance their employability in sectors with demand for labour based on the industry's knowledge of labour market dynamics, especially to promote the economic empowerment of women

i) Enhance the ability of migrant workers to transition from a job or employer to another by making available documentation that recognizes skills acquired on the job or through training in order to optimize the benefits of upskilling

j) Develop and promote innovative ways to mutually recognize and assess formally and informally acquired skills, including through timely and complementary training to job seekers, mentoring, and internship programmes in order to fully recognize existing credentials and provide certificates of proficiency for the validation of newly acquired skills

k) Establish screening mechanisms of credentials and offer information to migrants on how to get their skills and qualifications assessed and recognized prior to departure, including in recruitment processes or at an early stage after arrival to improve employability

l) Cooperate to promote documentation and information tools, in partnership with relevant stakeholders, that provide an overview of a worker's credentials, skills and qualifications, recognized in countries of origin, transit and destination, in order to enable employers to evaluate the suitability of migrant workers in job application processes

OBJECTIVE 19: Create conditions for migrants and diasporas to fully contribute to sustainable development in all countries

35. We commit to empower migrants and diasporas to catalyse their development contributions, and to harness the benefits of migration as a source of sustainable development, reaffirming that migration is a multidimensional reality of major relevance for the sustainable development of countries of origin, transit and destination

To realize this commitment, we will draw from the following actions:

a) Ensure the full and effective implementation of the 2030 Agenda for Sustainable Development and the Addis Ababa Action Agenda by fostering and facilitating the positive effects of migration for the realization of all Sustainable Development Goals

b) Integrate migration into development planning and sectoral policies at local, national, regional and global levels, taking into consideration relevant existing policy guidelines and recommendations, such as the GMG Handbook on Mainstreaming Migration into Development Planning, in order to strengthen policy coherence and effectiveness of development cooperation

c) Invest in research on the impact of non-financial contributions of migrants and diasporas to sustainable development in countries of origin and destination, such as knowledge and skills transfer, social and civic engagement, and cultural exchange, with a view to developing evidence-based policies and strengthening global policy discussions

d) Facilitate the contributions of migrants and diasporas to their countries of origin, including by establishing or strengthening government structures or mechanisms at all levels, such as dedicated diaspora offices or focal points, diaspora policy advisory boards for governments to account for the potential of migrants and diasporas in migration and development policy-making, and dedicated diaspora focal points in diplomatic or consular missions

e) Develop targeted support programmes and financial products that facilitate migrant and diaspora investments and entrepreneurship, including by providing administrative and legal support in business creation, granting seed capital-matching, establish diaspora bonds and diaspora development funds, investment funds, and organize dedicated trade fairs

f) Provide easily accessible information and guidance, including through digital platforms, as well as tailored mechanisms for the coordinated and effective financial, voluntary or philanthropic engagement of migrants and diasporas, especially in humanitarian emergencies in their countries of origin, including by involving consular missions

g) Enable political participation and engagement of migrants in their countries of origin, including in peace and reconciliation processes, in elections and political reforms, such as by establishing

voting registries for citizens abroad, and by parliamentary representation, in accordance with national legislation

h) Promote migration policies that optimize the benefits of diasporas for countries of origin and destination and their communities, by facilitating flexible modalities to travel, work and invest with minimal administrative burdens, including by reviewing and revising visa, residency and citizenship regulations, as appropriate

i) Cooperate with other States, the private sector and employers organizations to enable migrants and diasporas, especially those in highly technical fields and in high demand, to carry out some of their professional activities and engage in knowledge transfer in their home countries, without necessarily losing employment, residence status, or earned social benefits

j) Build partnerships between local authorities, local communities, the private sector, diasporas, hometown associations and migrant organizations to promote knowledge and skills transfer between their countries of origin and countries of destination, including by mapping the diasporas and their skills, as a means to maintain the link between diasporas and their country of origin

OBJECTIVE 20: Promote faster, safer and cheaper transfer of remittances and foster financial inclusion of migrants

36. We commit to promote faster, safer and cheaper remittances by further developing existing conducive policy and regulatory environments that enable competition, regulation and innovation on the remittance market and by providing gender-responsive programmes and instruments that enhance the financial inclusion of migrants and their families. We further commit to optimize the transformative impact of remittances on the well-being of migrant workers and their families, as well as on sustainable development of countries, while respecting that remittances constitute an important source of private capital, and cannot be equated to other international financial flows, such as foreign direct investment, official development assistance, or other public sources of financing for development.

To realize this commitment, we will draw from the following actions:

a) Develop a roadmap to reduce the transaction costs of migrant remittances to less than 3 per cent and eliminate remittance corridors with costs higher than 5 per cent by 2030 in line with target 10.c of the 2030 Agenda for Sustainable Development

b) Promote and support the United Nations International Day of Family Remittances and the IFAD Global Forum on Remittances, Investment and Development as an important platform to build and strengthen partnerships for innovative solutions on cheaper, faster and safer transfer of remittances with all relevant stakeholders

c) Harmonize remittance market regulations and increase the interoperability of remittance infrastructure along corridors by ensuring that measures to combat illicit financial flows and money laundering do not impede migrant remittances through undue, excessive or discriminatory policies

d) Establish conducive policy and regulatory frameworks that promote a competitive and innovative remittance market, remove unwarranted obstacles to non-bank remittance service providers in accessing payment system infrastructure, apply tax exemptions or incentives to remittance

transfers, promote market access to diverse service providers, incentivize the private sector to expand remittance services, and enhance the security and predictability of low-value transactions by bearing in mind de-risking concerns, and developing a methodology to distinguish remittances from illicit flows, in consultation with remittance service providers and financial regulators

e) Develop innovative technological solutions for remittance transfer, such as mobile payments, digital tools or e-banking, to reduce costs, improve speed, enhance security, increase transfer through regular channels and open up gender-responsive distribution channels to underserved populations, including for persons in rural areas, persons with low levels of literacy, and persons with disabilities

f) Provide accessible information on remittance transfer costs by provider and channel, such as comparison websites, in order to increase the transparency and competition on the remittance transfer market, and promote financial literacy and inclusion of migrants and their families through education and training

g) Develop programmes and instruments to promote investments from remittance senders in local development and entrepreneurship in countries of origin, such as through matching- grant mechanisms, municipal bonds and partnerships with hometown associations, in order to enhance the transformative potential of remittances beyond the individual households of migrant workers at skills levels

h) Enable migrant women to access financial literacy training and formal remittance transfer systems, as well as to open a bank account, own and manage financial assets, investments and business as means to address gender inequalities and foster their active participation in the economy

i) Provide access to and develop banking solutions and financial instruments for migrants, including low-income and female-headed households, such as bank accounts that permit direct deposits by employers, savings accounts, loans and credits in cooperation with the banking sector

OBJECTIVE 21: Cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration

37. We commit to facilitate and cooperate for safe and dignified return and to guarantee due process, individual assessment and effective remedy, by upholding the prohibition of collective expulsion and of returning migrants when there is a real and foreseeable risk of death, torture, and other cruel, inhuman, and degrading treatment or punishment, or other irreparable harm, in accordance with our obligations under international human rights law. We further commit to ensure that our nationals are duly received and readmitted, in full respect for the human right to return to one's own country and the obligation of States to readmit their own nationals. We also commit to create conducive conditions for personal safety, economic empowerment, inclusion and social cohesion in communities, in order to ensure that reintegration of migrants upon return to their countries of origin is sustainable.

To realize this commitment, we will draw from the following actions:

a) Develop and implement bilateral, regional and multilateral cooperation frameworks and agreements, including readmission agreements, ensuring that return and readmission of migrants to their own country is safe, dignified and in full compliance with international human rights law, including the rights of the child, by determining clear and mutually agreed procedures that uphold procedural safeguards, guarantee individual assessments and legal certainty, and by ensuring they also include provisions that facilitate sustainable reintegration

b) Promote gender-responsive and child-sensitive return and reintegration programmes, that may include legal, social and financial support, guaranteeing that all returns in the context of such voluntary programmes effectively take place on the basis of the migrant's free, prior and informed consent, and that returning migrants are assisted in their reintegration process through effective partnerships, including to avoid they become displaced in the country of origin upon return

c) Cooperate on identification of nationals and issuance of travel documents for safe and dignified return and readmission in cases of persons that do not have the legal right to stay on another State's territory, by establishing reliable and efficient means of identification of own nationals such as through the addition of biometric identifiers in population registries, and by digitalizing civil registry systems, with full respect to the right to privacy and protection of personal data

d) Foster institutional contacts between consular authorities and relevant officials from countries of origin and destination, and provide adequate consular assistance to returning migrants prior to return by facilitating access to documentation, travel documents, and other services, in order to ensure predictability, safety and dignity in return and readmission

e) Ensure that the return of migrants who do not have the legal right to stay on another State's territory is safe and dignified, follows an individual assessment, is carried out by competent authorities through prompt and effective cooperation between countries of origin and destination, and allows all applicable legal remedies to be exhausted, in compliance with due process guarantees, and other obligations under international human rights law

f) Establish or strengthen national monitoring mechanisms on return, in partnership with relevant stakeholders, that provide independent recommendations on ways and means to strengthen accountability, in order to guarantee the safety, dignity, and human rights of all returning migrants

g) Ensure that return and readmission processes involving children are carried out only after a determination of the best interests of the child, take into account the right to family life, family unity, and that a parent, legal guardian or specialized official accompanies the child throughout the return process, ensuring that appropriate reception, care and reintegration arrangements for children are in place in the country of origin upon return

h) Facilitate the sustainable reintegration of returning migrants into community life by providing them equal access to social protection and services, justice, psycho-social assistance, vocational training, employment opportunities and decent work, recognition of skills acquired abroad, and financial services, in order to fully build upon their entrepreneurship, skills and human capital as active members of society and contributors to sustainable development in the country of origin upon return

i) Identify and address the needs of the communities to which migrants return by including respective provisions in national and local development strategies, infrastructure planning, budget

allocations and other relevant policy decisions and cooperating with local authorities and relevant stakeholders

OBJECTIVE 22: Establish mechanisms for the portability of social security entitlements and earned benefits

38. We commit to assist migrant workers at all skills levels to have access to social protection in countries of destination and profit from the portability of applicable social security entitlements and earned benefits in their countries of origin or when they decide to take up work in another country.

To realize this commitment, we will draw from the following actions:

a) Establish or maintain non-discriminatory national social protection systems, including social protection floors for nationals and migrants, in line with the ILO Recommendation 202 on Social Protection Floors

b) Conclude reciprocal bilateral, regional or multilateral social security agreements on the portability of earned benefits for migrant workers at all skills levels, which refer to applicable social protection floors in the respective States, applicable social security entitlements and provisions, such as pensions, healthcare or other earned benefits, or integrate such provisions into other relevant agreements, such as those on long-term and temporary labour migration

c) Integrate provisions on the portability of entitlements and earned benefits into national social security frameworks, designate focal points in countries of origin, transit and destination that facilitate portability requests from migrants, address the difficulties women and older persons can face in accessing social protection, and establish dedicated instruments, such as migrant welfare funds in countries of origin that support migrant workers and their families

OBJECTIVE 23: Strengthen international cooperation and global partnerships for safe, orderly and regular migration

39. We commit to support each other in the realization of the objectives and commitments laid out in this Global Compact through enhanced international cooperation, a revitalized global partnership, and in the spirit of solidarity, reaffirming the centrality of a comprehensive and integrated approach to facilitate safe, orderly and regular migration, and recognizing that we are all countries of origin, transit and destination. We further commit to take joint action in addressing the challenges faced by each country to implement this Global Compact, underscoring the specific challenges faced in particular by African countries, least developed countries, landlocked developing countries, small island developing States, and middle-income countries. We also commit to promote the mutually reinforcing nature between the Global Compact and existing international legal and policy frameworks, by aligning the implementation of this Global Compact with such frameworks, particularly the 2030 Agenda for Sustainable Development as well as the Addis Ababa Action Agenda, and their recognition that migration and sustainable development are multidimensional and interdependent.

To realize this commitment, we will draw from the following actions:

a) Support other States as we collectively implement the Global Compact, including through the provision of financial and technical assistance, in line with national priorities, policies action plans and strategies, through a whole-of-government and whole-of-society approach

b) Increase international and regional cooperation to accelerate the implementation of the 2030 Agenda for Sustainable Development in geographic areas from where irregular migration systematically originates due to consistent impacts of poverty, unemployment, climate change and disasters, inequality, corruption, poor governance, among other structural factors, through appropriate cooperation frameworks, innovative partnerships and the involvement of all relevant stakeholders, while upholding national ownership and shared responsibility

c) Involve and support local authorities in the identification of needs and opportunities for international cooperation for the effective implementation of the Global Compact and integrate their perspectives and priorities into development strategies, programmes and planning on migration, as a means to ensure good governance as well as policy coherence across levels of government and policy sectors, and maximize the effectiveness and impact of international development cooperation

d) Make use of the capacity-building mechanism and build upon other existing instruments to strengthen the capacities of relevant authorities by mobilizing technical, financial and human resources from States international financial institutions, the private sector, international organizations and other sources in order to assist all States in fulfilling the commitments outlined in this Global Compact

e) Conclude bilateral, regional or multilateral mutually beneficial, tailored and transparent partnerships, in line with international law, that develop targeted solutions to migration policy issues of common interest and address opportunities and challenges of migration in accordance with the Global Compact

IMPLEMENTATION

40. For the effective implementation of the Global Compact, we require concerted efforts at global, regional, national and local levels, including a coherent United Nations system.

41. We commit to fulfil the objectives and commitments outlined in the Global Compact, in line with our vision and guiding principles, by taking effective steps at all levels to facilitate safe, orderly and regular migration at all stages. We will implement the Global Compact, within our own countries and at the regional and global levels, taking into account different national realities, capacities, and levels of development, and respecting national policies and priorities. We reaffirm our commitment to international law and emphasize that the Global Compact is to be implemented in a manner that is consistent with our rights and obligations under international law.

42. We will implement the Global Compact through enhanced bilateral, regional and multilateral cooperation and a revitalized global partnership in a spirit of solidarity. We will continue building on existing mechanisms, platforms and frameworks to address migration in all its dimensions. Recognizing the centrality of international cooperation for the effective fulfilment of the objectives and commitments, we will strive to reinforce our engagement in North-South, South- South and

triangular cooperation and assistance. Our cooperation efforts in this regard will be aligned with the 2030 Agenda for Sustainable Development and the Addis Ababa Action Agenda.

43. We decide to establish a capacity-building mechanism in the United Nations, building upon existing initiatives, that supports efforts of Member States to implement the Global Compact. It allows Members States, the United Nations and other relevant stakeholders, including the private sector and philanthropic foundations, to contribute technical, financial and human resources on a voluntary basis in order to strengthen capacities and foster multi-partner cooperation. The capacity-building mechanism will consist of:

a) A connection hub that facilitates demand-driven, tailor-made and integrated solutions, by:

i. advising on, assessing and processing country requests for the development of solutions
ii. identifying main implementing partners within and outside of the United Nations system, in line with their comparative advantages and operational capacities
iii. connecting the request to similar initiatives and solutions for peer-to-peer exchange and potential replication, where existing and relevant
iv. ensuring effective set-up for multi-agency and multi-stakeholder implementation
v. identifying funding opportunities, including by initiating the start-up fund

b) A start-up fund for initial financing to realize project-oriented solutions, by:
i. providing seed-funding, where needed, to jump start a specific project
ii. complementing other funding sources
iii. receiving voluntary financial contributions by Member States, the United Nations, international financial institutions, and other stakeholders, including the private sector and philanthropic foundations

c) A global knowledge platform as an online open data source, by:

i. serving as a repository of existing evidence, practices and initiatives
ii. facilitating the accessibility to knowledge and sharing of solutions
iii. building on the GFMD Platform for Partnerships and other relevant sources

44. We will implement the Global Compact in cooperation and partnership with migrants, civil society, migrant and diaspora organizations, faith-based organizations, local authorities and communities, the private sector, trade unions, parliamentarians, National Human Rights Institutions, the International Red Cross and Red Crescent Movement, academia, the media and other relevant stakeholders.

45. We welcome the decision of the Secretary-General to establish a United Nations network on migration to ensure effective and coherent system-wide support to implementation, including the capacity-building mechanism, as well as follow-up and review of the Global Compact, in response to the needs of Member States. In this regard, we note that:

a) IOM will serve as the coordinator and secretariat of the network

b) the network will fully draw from the technical expertise and experience of relevant entities within the United Nations system

c) the work of the network will be fully aligned with existing coordination mechanisms and the repositioning of the United Nations Development System

46. We request the Secretary-General, drawing on the network, to report to the General Assembly on a biennial basis on the implementation of the Global Compact, the activities of the United Nations system in this regard, as well as the functioning of the institutional arrangements.

47. Further recognizing the important role of State-led processes and platforms at global and regional levels in advancing the international dialogue on migration, we invite the Global Forum on Migration and Development, Regional Consultative Processes and other global, regional and subregional fora to provide platforms to exchange experiences on the implementation of the Global Compact, share good practices on policies and cooperation, promote innovative approaches, and foster multi-stakeholder partnerships around specific policy issues.

FOLLOW-UP AND REVIEW

48. We will review the progress made at local, national, regional and global levels in implementing the Global Compact in the framework of the United Nations through a State-led approach and with the participation of all relevant stakeholders. For follow-up and review, we agree on intergovernmental measures that will assist us in fulfilling our objectives and commitments.

49. Considering that international migration requires a forum at global level through which Member States can review the implementation progress and guide the direction of the United Nations' work, we decide that:
a) The High-level Dialogue on International Migration and Development, currently scheduled to take place every fourth session of the General Assembly, shall be repurposed and renamed "International Migration Review Forum"

b) The International Migration Review Forum shall serve as the primary intergovernmental global platform for Member States to discuss and share progress on the implementation of all aspects of the Global Compact, including as it relates to the 2030 Agenda for Sustainable Development, and with the participation of all relevant stakeholders

c) The International Migration Review Forum shall take place every four years beginning in 2022

d) The International Migration Review Forum shall discuss the implementation of the Global Compact at the local, national, regional and global levels, as well as allow for interaction with other relevant stakeholders with a view to building upon accomplishments and identifying opportunities for further cooperation

e) Each edition of the International Migration Review Forum will result in an inter- governmentally agreed Progress Declaration, which may be taken into consideration by the High Level Political Forum on Sustainable Development

50. Considering that most international migration takes place within regions, we invite relevant subregional, regional and cross-regional processes, platforms and organizations, including the United Nations Regional Economic Commissions or Regional Consultative Processes, to review the implementation of the Global Compact within the respective regions, beginning in 2020, alternating

with discussions at global level at a four year interval, in order to effectively inform each edition of the International Migration Review Forum, with the participation of all relevant stakeholders.

51. We invite the Global Forum on Migration and Development to provide a space for annual informal exchange on the implementation of the Global Compact, and report the findings, best practices and innovative approaches to the International Migration Review Forum.

52. Recognizing the important contributions of State-led initiatives on international migration, we invite fora, such as the IOM International Dialogue on Migration, Regional Consultative Processes, and others to contribute to the International Migration Review Forum by providing relevant data, evidence, best practices, innovative approaches and recommendations as they relate to the implementation of the Global Compact for Safe, Orderly and Regular Migration.

53. We encourage all Member States to develop, as soon as practicable, ambitious national responses for the implementation of the Global Compact, and to conduct regular and inclusive reviews of progress at the national level, such as through the voluntary elaboration and use of a national implementation plan. Such reviews should draw on contributions from all relevant stakeholders, as well as parliaments and local authorities, and serve to effectively inform the participation of Member States in the International Migration Review Forum and other relevant fora.

54. We request the President of the General Assembly to launch and conclude, in 2019, open, transparent and inclusive intergovernmental consultations to determine the precise modalities and organizational aspects of the International Migration Review Fora, and articulate how the contributions of the regional reviews and other relevant processes will inform the Fora, as a means to further strengthen overall effectiveness and consistency of the follow-up and review outlined in the Global Compact.