

International Refugee Law I: Migration Law vs. Refugee Law International and EU Law Perspectives

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ABSTRACT

International Refugee Law is the totality of all documents and normative acts regulating the special situation of refugees at international, regional or continental level. As such, it can be found within the European Union. Refugee law is not a distinct right, separate from migration law, but rather an integral part of it which is supported by the fact that migration and refugee issues are often dealt with together. Given the situations faced by mankind and the need to provide the most appropriate regulation possible for situations of populations being forced to leave their territory, both international law and existing EU law in this area are becoming increasingly consistent, as demonstrated by the weak form of previous documents when compared with the complexity of the more recent ones. International migration law and refugee law applies to people who have had to move from one territory to another for various reasons, and find themselves in a vulnerable situation where their fundamental rights and freedoms are affected and they need protection through concrete and effective measures. Although at a cursory glance it could be argued that the term refugee is totally different from the term migrant, in reality this is not the case; a refugee is a person who migrates for certain reasons, and therefore conceptually the term refugee is contained in the term migrant or, in other words, a refugee is a migrant who leaves his or her territory because of persecution. In addition to refugees, there are other vulnerable persons in need of protection, such as persons suffering serious harm and in need of subsidiary protection, stateless persons, but also internally displaced populations, some of which do not benefit from adequate rules.

KEYWORDS

protection, migrants, refugees, persons suffering serious harm, stateless persons, internally displaced populations

1. The Difference Between the Terms “Migrant” and “Refugee”

Since time immemorial, man, the being endowed with reason and conscience, has wanted to enjoy a state of well-being throughout life. With the evolution of our society, this state of well-being began to encompass certain milestones we have slowly come

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to call rights, which in modern times have become fundamental human rights, taking on a universal scriptural form with the adoption on December 10th 1948 by the UN General Assembly of the Universal Declaration of Human Rights.¹

This international document centralised the most important benchmarks and requirements which, once fulfilled, are the prerequisites for the attainment of a state of well-being by every human. By way of reminder only, giving the readers the opportunity to study them in detail if they wish so, following in the footnote I would like to give a brief overview of these rights, which is necessary for the sections that follow. Thus, people must be free and equal, and the behaviour of one towards the other must be one of common sense (art. 1); people must be able to exercise their rights without distinction of any kind, irrespective of the criteria that might be invoked to differentiate them (art. 2); people have the right to life, liberty and security of person (art. 3); slavery is strictly excluded (art. 4); freedom from torture, cruel, inhuman or degrading treatment or punishment (art. 5); the right to legal personality (art. 6); equality before the law without distinction (art. 7); the right to seek just satisfaction before a court of law when one's rights are violated (art. 8); the exclusion of arbitrariness in matters of arrest, detention or exile (art. 9); the right of access to an independent and impartial tribunal when subject to criminal charges (art. 10); the right to be presumed innocent (art. 11, para. 1); the right to be held criminally responsible only for acts prescribed by law and to be punished only by penalties prescribed by law (art. 11 para. 2); the right to a personal and family life, home and correspondence without arbitrary interference (art. 12); the right to freedom of movement (art. 13); the right to asylum (art. 14); the right to citizenship (art. 15); the right to marry and found a family (art. 16); the right to own property (art. 17); the right to freedom of thought, conscience and religion (art. 18); the right to freedom of opinion and expression (art. 19); the right to freedom of peaceful assembly and association (art. 20); the right to take part in the government of one's country and to hold public office in it (art. 21); the right to social security (art. 22); the right to work with all its attributes (art. 23); the right to rest and recreation (art. 24); the right to a reasonable standard of living (art. 25); the right to education (art. 26); the right to participate freely in cultural life and scientific progress (art. 27); the right to social and international organisation (art. 28).

In addition to summarising these rights, I would also like to draw attention to some extremely important points in the content of the declaration. First of all its preamble states that it is essential that human rights are protected by the authority of law, but it is well known that this authority is determined and imposed by each individual country. Then, according to the last sentence of Article 2 these rights are exercised in a particular country or territory and their political, legal or international status must not adversely affect the exercise of these rights. According to the right to freedom of movement provided for in Article 13, any person may choose to reside within the frontiers of a state, while having the right to leave any country, including their own, and to return to their country. This right is distinct from the right to be

1 United Nations General Assembly, 1948.

a citizen of a particular country as regulated by art. 15, which takes the existence, exercise and protection of rights and obligations between the citizen and the country of which he or she is a citizen to another level, for example, in accordance with art. 21, it gives the citizen the right to participate in the government of the country of which he or she is a citizen and to be elected to its highest authorities.

Having said this, a number of conclusions can easily be drawn from the whole of the declaration: people live their lives in certain countries and territories where they exercise their fundamental rights, and the existence of a closer link with a particular country or territory, such as through citizenship, ensures that these rights are better exercised because they are protected at the highest level.² Having the right and the possibility to leave the country or territory in which they live, or being forced to do so and establish their residence in another country, the exercise of the rights of the “person leaving the territory”³ suffers, and their level of protection is downgraded, because in the new country or territory, by not being a citizen they no longer enjoy the same level of protection, but a lower one. When people leave a country in which they are citizens and move from to another country, it should be ensured that in this new country, in this new territory, the exercise of rights should continue to exist at a certain level in order to be effective, but this is not a simple matter.

An initial problem is that people who leave the territory they live in sometimes do not leave the country they live in, and in other situations they leave both the territory and the country; a second problem is that people leave the territory and the country for different reasons; and a third is that people who leave territories and countries may have closer or minimal ties with them. As a result of these situations, in a broad sense, people who leave their territory acquire a different status and a different approach in the community, and as such are referred to differently.

A first term used for such people is *migrant*, and in order to understand it more deeply we have turned to the way the notion to which it refers – *migration* – is explained in French, referring to an important work published in France.⁴ The term migration therefore refers to the movement in space of the population, of people, which is not a phenomenon of our times or of contemporary times, because the movement in space of populations has been going on since ancient times, for example the exodus of the Jews from Egypt, or their deportation to Assyria. The phenomenon was also present in the Middle Ages, being closely linked to the great invasions that took place in the

2 For example, in Romania, according to art. 1 paras. 1 and 3 of Law No. 21 of 1 March 1991 on Romanian nationality, Romanian nationality is the connection and belonging of a natural person to the Romanian state, so thus Romanian citizens enjoy the protection of the Romanian state; A similar understanding is reflected at the European level in the European Convention on Nationality, adopted under the auspices of the Council of Europe; as a simple example I would give the steps taken by each state to protect through repatriation their own citizens stranded in the Gaza Strip after the outbreak of war between Israel and Hamas.

3 As different terms are used for people leaving a country to settle in another one, what will be explained in the following sections, seemed to me to be the most appropriate and comprehensive notion to use now.

4 Encyclopaedia Universalis, 2002, pp. 119–125.

4th and 5th centuries and the Crusades, as well as being found in contemporary eras, as we know well. In the latter two periods, however, the phenomenon of migration differs from that of earlier periods in terms of the gradual formation of states and the emergence of national sentiment, which has led to a distinction between international migration and internal migration, the former having gained momentum in the 19th century with the growth of steamship navigation and the development of railways, and being determined by a number of factors such as demographic, economic, political and religious factors, and which led, for example, to the migration of Europeans to the American continent. As for internal migration, this took place from rural areas to cities. The phenomenon of migration in the 20th century was largely determined by all that the two world wars generated and caused.

This can be summarised by saying that migration has many different causes, and referring to the few mentioned above, it should be emphasised that in the cited work an interesting distinction is made between spontaneous migration, which is the result of a momentary decision made by a migrant, and migration caused by an external intervention, which in most cases is organised, and of which there are two relevant and widely known examples, namely the deportation to Siberia of Russians convicted for political reasons and of common crimes, and the transfer to North America and then to Australia of British convicts. At other times, organised migration was not about the use of force, but the promise by a state leadership of land grants, tax exemptions or military services to attract nationals of other states to populate or repopulate territories. Keeping things in proportion, new countries such as the United States, Canada, Argentina, Brazil, etc. were populated in this way, with the help of state administrations, emigration agencies, shipping and railroad companies, etc.

The duration of migration can be permanent, when migrants leave their own country with the intention of settling permanently in another, or temporary, when migrants return to their own countries after a period of time.

In terms of destination, migration is internal if it takes place within the borders of the same country, and external, which of course involves crossing the borders of a country. Internal migration can take many forms including, as relevant examples, the migration of a rural population to the cities, and alternative migration for work or leisure. External migration can be continental or transcontinental and even transoceanic, although whatever form it takes should not allow it to be confused with colonization.

Of course, of greatest interest is international migration, which has several important forms of manifestation, one of which is transatlantic migration, which began in the 16th century with the discovery of America, and which led the Spanish, Portuguese, French, English and Dutch to cross the Atlantic Ocean to their new territories. To these must be added the people from Africa who were unwillingly transported across the oceans to be used as a labour force. From the 19th centuries onwards, transatlantic migration took place in huge proportions, with mainly Europeans migrating to the United States and Canada, but also to Australia, and later even to Brazil and Argentina, with origins from across Europe.

It is worth mentioning here that armed conflicts have played an important role in migration, due to, on the one hand, the departure of civilians from war zones and, on the other, the flow of workers to cities to work in armaments factories. A famous example of this is the exodus of Polish people before the German invasion, and the deportation of Polish people to Western territories who were replaced by German settlers, and the transfer of Germans to other countries. It is estimated that more than 30 million Europeans were displaced or deported since the outbreak of war in 1943. Similarly in the Far East, with the invasion of China by Japan, the civilian population shifted to Indochina and Burma, and the number of Chinese settlers reached 30 million.

After the end of the Second World War, the economic prosperity and industrial development of some countries created a phenomenon known as reverse migration, in the sense that countries that had lost population up to this point began to regain it, a relevant example being France, which received large numbers of workers from the countries around it.

In a similar scenario, migration is also presented in another equally prestigious study,⁵ in which another term of interest for the theme of this chapter has been analysed, namely that of the *refugee*, on which I will elaborate. The authors of the paper⁶ have shown that refugees can be any homeless, involuntary migrants who have crossed the border and no longer enjoy the protection of their former government. Here it should be noted that before the 19th century movement from one country to another did not require passports or visas, since the right of *asylum* was commonly recognised and granted. Although there have been several waves of refugees throughout history there was no refugee problem before the emergence, fixing and closing of state borders in the late 19th century.

For many centuries refugee movement has been the result of religious and racial intolerance, and among the famous and relevant examples in history are the expulsion of Jews from Spain at the end of the 15th century, the exodus of the Huguenots from France in 1685, and the evacuation of Jews from Germany, Austria and the Czech Republic in the 1930s. In political terms, refugee movements in the modern period were due to the oppression of non-conforming minorities by state leaders. In this regard, after the Revolution and the Civil War in Russia between 1917 and 1921, more than 1.5 million people, opponents of communism, left the country, then between 1915 and 1923 more than one million Armenians left Turkey, many Spaniards moved to France between 1936 and 1939 because of the civil war, the flight of the Chinese to Taiwan and Hong Kong from 1949 onwards, and many more examples of this kind which have been being numerous and scattered throughout history, right up to the great landmark of the Second World War, which, as we have seen above, involved massive population movements.

5 The New Encyclopaedia Britannica, 2003, Vol. 6, pp. 136–137.

6 The New Encyclopaedia Britannica, 2003, Vol. 9, p. 998.

Going through the explanations of migration and migrants, then those on refugees, we see that refugees are nothing other than migrants who move from one territory to another for special, and I would say, particular reasons.

In order to further clarify these notions, I have turned to another study, this time of a linguistic nature,⁷ on the basis of which I will mention that *migration* is essentially a mass movement of a population from one territory to another, determined by economic, social, political or natural factors, while *refuge* is the withdrawal from an occupied territory, flight from danger in search of support or shelter.

The final conclusion would be that a large-scale movement of people from one territory to another is called migration, and when migration is not voluntary nor spontaneous on the part of the migrants who freely decide to migrate, but it takes place forcibly, against the will of individuals, regardless of the source of the compulsion, then the migrants become known as refugees.

Bearing in mind this distinction, which brings with it certain specific features of migration, namely refuge, the point of reference in this respect is, as mentioned above, the Second World War and the fact that the international community has established that such persons, or even more so, such categories of persons, must be able to exercise their fundamental rights. The States of the world have concluded treaties, conventions, agreements and protocols to establish a system of protection for all migrants in general and refugees in particular. All international or regional regulations of this kind constitute migration and refugee law.

In addition to refugees, migration also includes other categories of people who leave their territory, such as “internally displaced populations”, which has already been mentioned, and “stateless persons”, etc., which will be considered in the following sections.

2. Coverage of International Migration and Refugee Law

First of all I believe that some clarifications should be made, namely, in view of the terminology developed above, which shows that refugees are a component of migration, and due to the latter having the widest scope and consistency, it seems natural to analyse international migration law and then refugee law.

2.1. International Migration Law

An initial international document with reference to migration is the Convention concerning Migration for Employment adopted in Geneva on 1st July 1949,⁸ which establishes a form of cooperation between the member states of the International Labour Organisation and the International Labour Office, as well as with other organisations, the creation of a competent and free of charge assistance service for

7 Romanian Academy, 2009, pp. 653, 935.

8 International Labour Organization, 1949.

immigrant workers, and accurate information about it. It also establishes the obligation to combat misleading propaganda on migration, to facilitate the departure, travel and reception of migrant workers, and to ensure good health conditions and necessary medical care. An important aspect of the convention is that all member states are obliged to put authorised migrant workers on an equal footing with nationals with regards to facilities arising from the provision of work. The provisions of the Convention also covers family members of migrant workers, as well as categories of persons to whom they do not apply. As will be seen below, these issues will be extensively regulated in another international document.

Another international document is the Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, adopted in Geneva on June 24th 1949,⁹ which establishes obligations on member states to combat illegal migration for the purpose of work, putting in place measures both with regard to workers who work illegally and employers who have recourse to irregular labour. It should be noted that the rules of this convention will also be covered in another document.

The most extensive and complex regulation concerning persons who migrate for work is the UN Convention on the Protection of the Rights of Migrant Workers and Members of their Families, adopted by the UN General Assembly Resolution 45/158 of 1990.¹⁰

From its very beginning, in Part I – Scope of application and definitions, the Convention states that it applies to all migrant workers and members of their families without any distinction of any kind based on sex, race, colour, language, religion, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status (art. 1 para. 1), and with regards to the temporal dimension, the Convention covers the entire migration process, including preparation, departure, transit, period of stay and activity, and return to the State of origin or residence (art. 1, para. 2). The Convention also indicates the persons to whom it does not apply (art. 3), such as persons performing official functions, persons sent to participate in development and cooperation programs, investors, refugees and stateless persons, students and trainees, seafarers and offshore workers not residing in the state of employment, for whom other specific regulations exist.

The Convention further defines the term migrant worker as a person who is to be employed, is employed or has been employed in a remunerated activity in a state of which he or she is not a national, and it also defines and clarifies other terms which are included in the term migrant worker, namely frontier worker, seasonal worker, seafarer, offshore worker, itinerant worker, project-tied worker, specifically employed worker, self-employed worker, each of these terms differing from the others in the specific nature of the work and the length of the worker's stay in the state in which he

9 International Labour Organization, 1975.

10 United Nations General Assembly, 1990.

or she works (art. 2), and also giving shape to the term family member (art. 4), which does not entail further discussion.

The Convention also refers to legal migrants, i.e. those authorised by the State of employment to enter its territory and carry out an activity, and illegal migrants, that is persons who do not meet the previous legality requirements (art. 5).

Part II – non-discrimination with respect to rights – consists of a single article (art. 7), which establishes the obligation for States Parties to respect and ensure the exercise of rights without any discrimination.

In Part III – the human rights of all migrant workers and members of their families – the Convention also regulates a first right (art. 8), which in a way, underlies the Convention and the whole issue, namely the right to leave any state, including the state of origin, but also to return to and remain in the state of origin, the accepted restrictions being related to the protection of national security, public order, public health or morals or the rights and freedoms of others, followed by the right to life (art. 9), prohibition of torture or cruel, inhuman or degrading treatment or punishment (art. 10), prohibition of slavery and servitude, forced and compulsory labour (art. 11), which does not refer to forced labour regarded as the punishment for a crime and does not include work of a person in detention, work in cases of emergency or calamity, and work regarded as a normal civil obligation that is imposed on other citizens of the state. Next comes the right to freedom of thought, conscience and religion (art. 12), the limitations of which are similar to those already set out above, the right to hold opinions without interference, the right to freedom of expression, which is subject to specific restrictions (art. 13), the right to privacy with all that this entails (art. 14), and the right to property (art. 15).

A broader approach concerns the right to liberty and security of the person (arts. 16–17), which entails protection by the state against all forms of violence, threats and intimidation by any perpetrators, and requires that the identity of migrants and their family members be verified in accordance with the law, arbitrary arrest and detention being excluded. When deprived of their liberty in accordance with the law, they have the right to be informed, in a language they understand, of the reasons for their arrest and of the charge against them, and to be brought before a judge or officer authorised to exercise the judicial power in order to be tried within a reasonable period of time or to be released, it not being the rule that they should be deprived of their liberty pending trial, but release may be subject to certain safeguards. At the same time, in the event of the deprivation of liberty for whatever reason, the consular or diplomatic authorities of the state of origin or the state representing the interests of the detained persons must be informed without delay of their situation, if so requested, and persons deprived of their liberty have the right to communicate with these authorities without delay, as well as the right to be informed of this right and of all rights deriving from other treaties. They also have the right to apply to a court to have their detention ordered, under which procedure they have the right to an interpreter, and if it is found that unlawful detention has taken place they are entitled to compensation. The convention further states that migrants and members

of their families who are deprived of their liberty must be treated with humanity and respect, and in places of detention they should as a rule be separated from convicted persons and treated differently from non-convicted persons, also minors should be separated from adults and tried as soon as possible. As far as the execution of a prison sentence is concerned, it is established that it should lead to their reformation and social rehabilitation, and during the period of detention they should have equal rights with nationals.

Concerning access to justice in the Convention (arts. 18–19) it is established that the migrants and the members of their families have the right to equality before the courts and tribunals with nationals of the state in which they are working, and that when they are subject to a criminal charge they have the right to a fair and public hearing by a competent, independent, impartial and legally established tribunal; and they also benefit from the presumption of innocence; and the minimum guarantees established by the Convention being the following: to be informed promptly and in detail in a language which they understand, of the nature and cause of the accusation in order to have adequate time and facilities for the preparation of their defence, to be able to communicate with their chosen counsel; to have the case tried expeditiously, to be present at the trial; to have the right to defend themselves in person or through legal assistance without payment by them, of which they must be informed; to examine and have examined both prosecution and defence witnesses under equal conditions; to have the free assistance of an interpreter if they do not speak the language used in court; and to have the right to silence and to not be self-incriminated. It also provides for the right to appeal to a higher court, the right to compensation for miscarriages of justice, *ne bis in idem*, the legality of incrimination and punishment, and the fact that humanitarian considerations arising from the status of the person should be taken into account when determining and imposing a sentence.

Furthermore, in the Convention (art. 20) it is established that the non-fulfilment of contractual obligations by a migrant or a member of his or her family may not lead to his or her imprisonment, or the withdrawal of an authorisation of residence or work permit or expulsion, unless the fulfilment of the obligation was a condition for obtaining the permit or authorisation, after which importance is attached to the documents of these categories of persons by making their confiscation and destruction a condition for their confiscation (art. 21). The measure of expulsion is regulated in detail by the Convention (art. 22), which stipulates that migrants and members of their families may not be subject to collective expulsion, each case of expulsion being individual. Expulsion is permitted, but only on the basis of a decision taken by a competent authority in accordance with the law. The expulsion decision must be communicated to them in a language they and their family members understand, in writing, together with the grounds on which it is based, and they must be informed of these rights. If this decision is not final, the person concerned has the right to submit the reasons why he or she should not be expelled and the right to have the decision reviewed by a competent authority, unless it is related to national security. Pending the review of the expulsion decision, the person concerned has the right to apply for

a suspension of the expulsion. If an expulsion decision has been enforced and then annulled, the person concerned is entitled to compensation and the annulled decision will not prevent their return to that state. Where expulsion is ordered, a person shall be given the necessary time to receive his or her salary entitlements and to fulfil the related obligations. A person to be expelled may apply for entry to a state other than his or her state of origin. Expulsion does not entail costs for the person expelled and does not affect the rights of other migrants or their family members.

As migrants and their family members are entitled to the protection and assistance of the consular or diplomatic authorities of the state of origin, or of a state representing their interests, this right is not limited in any way in the case of expulsion (art. 23).

An interesting right contained in the Convention (art. 24), which shows the inferior level at which the migrant and their family members are placed and should also give us food for thought, is the right to recognition of everywhere as a person before the law.

Given that the purpose of migrants is to work, it naturally regulates everything that work entails (art. 25), from remuneration to any conditions of employment, which places them on the same level as nationals from the state of employment, and ensures the continuation of their right to work and their right to participation in trade union activities or any other similar associations (art. 26), any restrictions being based on their necessity under the rules of a democratic society, in the interests of national security, public order, and the protection of the rights and freedoms of others.

On social security (art. 27), the Convention also grants migrants and their families a high level of protection, equal to that of nationals, including the right to medical care (art. 28), especially emergency care, which cannot be refused on the grounds of any irregularities relating to their stay in the country or their employment.

Since all aspects of life also take place during the period of migration, the Convention stipulates that the child of a migrant worker has the right to a name, birth registration, nationality (art. 29) and education (art. 30), where he or she is treated equally with nationals of the state concerned, without being affected by any irregularity concerning residence or employment.

Through the Convention cultural identity (art. 31) is respected and even encouraged, and with regards to the end of the period of residence and work in another state, it is established that migrant workers and their family members have the right to transfer their earnings, savings, effects and personal property (art. 32).

After establishing the obligation of states to communicate all these rights to migrants and members of their families (art. 33), the Convention sets out another very interesting obligation incumbent on migrants, which in recent times has often been violated by them, at least according to media reports,¹¹ namely the obligation

11 See for example the acts of violence by Romanian immigrants in Leeds against property and law enforcement; Express, 2024.

to respect the laws and regulations of any state of transit and employment, and to respect the identity of the inhabitants of these states (art. 34).

Before moving onto the next Part, it should be emphasised that the aim here is not to regularise migrant workers or family members whose situation is irregular, but to ensure sound and fair conditions for international migration (art. 35).

Part IV of the Convention – Other rights of migrant workers and members of their families who are documented or in a regular situation – regulates rights that are closely linked to the fact that people migrate to the accepting state in order to work. Some of the rights already covered are reproduced here with certain nuances, but new rights are also provided for. First of all, it is specified that these rights are for legal migrants in the accepting state (art. 36), i.e. those with residence and work documents that comply with the legislation of the state of employment, not illegal migrants, so that the right to information on these conditions is applicable to their admission, i.e. their stay, paid activities, the requirements they must meet, and the authority to which they can address themselves (art. 37).

Migrants have the right to be temporarily absent, but also to move freely within the territory of the accepting state and to choose their residence, the only restrictions being those of public order (arts. 38–39). Next comes the right to form associations and trade unions, which again is only subject to public order restrictions (art. 40), and the right to take part in the public affairs of their state of origin, to vote and stand for election in elections in their state, and to have political rights in the state of employment, if that state grants them such rights (arts. 41, 42). Further on (art. 43), it is stated that migrant workers shall benefit from equal treatment with the nationals of the state of employment regarding their access to educational institutions and services, vocational guidance and placement, vocational training and retraining, housing, social and health services, cooperatives and self-managed enterprises and cultural life. As is only natural, attention has also been paid to the families of migrants by facilitating the reunification of their members, who enjoy equal treatment with migrants, with an emphasis on the integration and education of their children (arts. 44–45). In order to live their lives properly and carry out their work in good conditions, migrants have the right to bring or take their personal effects, household effects, and work equipment without paying taxes, subject to legislative provisions to the contrary (art. 46), and also to transfer their earnings and savings (art. 47), and with respect to the income derived by them or members of their families, although double taxation is accepted if it is provided for by certain conventions, the level of taxation may not be more onerous than that of nationals in similar circumstances, and the same situation applies with respect to deductions or exemptions which are applicable to such nationals (art. 48).

If migrant workers are granted separate residence and employment authorisations, respectively, they must be of equal duration and facilitate, where appropriate, the choice of activity or the finding of another (art. 49), with the proviso that in the event of a migrant worker's death, the authorisation should be maintained for family members if the law of the state so permits, and if not, that a reasonable period of

time should be allowed for them to leave the state of employment after settling their affairs there (art. 50), with the specification that they should only be interdependent in exceptional circumstances (art. 51). The state of employment must allow migrant workers to choose their own work, even to work on their own account, but restrictions and conditions are permitted when certain jobs are limited, when a certain qualification is required, when work is limited in time, when nationals of the state of employment have priority (art. 52), and all this also benefits family members of migrant workers who are personal holders of a residence and work authorisation (art. 53). Migrant workers are also placed on the same footing as nationals of the state of employment with regard to dismissal, unemployment benefits, access to work programs to combat unemployment, access to alternative employment, the right to address the competent authorities if the terms of their contract have been breached by their employer (art. 54), and in the performance of a certain paid activity (art. 55). Expulsion is also included in this part of the Convention, where reference is made to the previous regulation and two clarifications are included to the effect that expulsion may not be carried out in order to deprive the migrant of the rights deriving from the authorisation to stay and work, and that the analysis preceding the decision to expel a person must take account of humanitarian considerations and the length of time the migrant has been present and residing in the state of employment (art. 56).

The Convention regulates in Part V– provisions applicable to certain categories of migrant workers and members of their families – a number of rights intended for certain categories of migrant workers and members of their families who are also legally resident. The rights contained in the preceding parts are fully recognised, with the following modifications (art. 57). The categories of migrant workers envisaged here by the Convention are seasonal workers, itinerant workers, project workers, specified-employment workers and self-employed workers, for whom the Convention makes certain adjustments or indicates the rights they are entitled to, based on their specific nature and the work they perform, which will not be repeated here (arts. 58–63).

With Part VI– the promotion of sound, equitable, humane and lawful conditions in relation to international migration of workers and members of their families – the Convention establishes the need for consultation and cooperation by the state parties concerned in relation to the regulatory field, pointing out that attention must be paid not only to the needs and resources of labour, but also to all the needs of migrant workers and their family members. It is therefore necessary to develop appropriate services for migrant workers and their family members through which policies on this form of migration can be formulated and of course, implemented. To ensure information exchange, consultations and cooperation with other states in the field covering all aspects of this migration are ensured, to which reference has already been made, as well as consular and other services to meet the social, cultural and other needs of migrant workers and members of their families (art. 64–65).

As for the recruitment of workers for employment in another state, the Convention (art. 66) states that this activity may be carried out only by public services or public

bodies of the state in which such operations take place, those of the state of employment if there is an agreement between the states concerned, by a body established on the basis of a bilateral or multilateral agreement, and by potential employing agencies or persons acting on their behalf if, in accordance with the legislation of the states concerned, they have acquired the necessary authorisations, approvals and are under the supervision of the public authorities of the state parties concerned.

Upon the expiration of authorisation of residence or employment, or when in an irregular situation, migrant workers and members of their families should return to their state of origin, which should be done in an orderly manner and through the cooperation of the state parties (art. 67). In order to prevent and eliminate illegal or clandestine movements or the employment of migrant workers in irregular situations, both state parties and states of transit must cooperate and take measures to combat the dissemination of misleading information on emigration and immigration, to detect and eradicate illegal or clandestine movements, and to sanction those involved, to impose penalties on all those who resort to violence, threats or intimidation against migrant workers or members of their families who find themselves in an illegal situation, and to eliminate the employment on their territory of migrant workers in an unlawful situation and to penalise the employers of such workers, who must not however, affect the rights of migrant workers deriving from their employment in relation to their employer (art. 68). If migrant workers and members of their families are found in an illegal situation in the territory of a state, that state must take measures to put an end to that situation, and if the situation is regularised in accordance with national legislation and existing agreements, the circumstances of their entry into the territory of that state, the duration of their stay, their family situation and other relevant considerations must be taken into account (art. 69). The working and living conditions of migrant workers and members of their families must be the same as those of their own nationals (art. 70).

This part of the Convention focuses on the repatriation of the bodies of deceased migrant workers or members of their families, who shall, when appropriate, be assisted in matters of compensation for the prompt settlement of any issues arising there from under national law and any existing agreements (art. 71).

The Convention also has a Part VII, entitled the application of the Convention, which regulates in detail the establishment, composition, organisation and functioning of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, composed of 14 experts of high standing, reputation, moral character, impartiality and recognised competence in the field covered by the Convention. Of relevance in this section, is the way in which the Committee works with state parties through the UN Secretary-General, in that state parties submit a report for consideration on the legislative, judicial, administrative and other measures they have taken to implement the provisions of the Convention. The Committee shall examine the reports and transmit appropriate observations to the state parties concerned, which may in turn submit observations. The Committee shall be assisted in its work by the International Labour Office, other specialised agencies and bodies

of the United Nations, as well as intergovernmental organisations or other bodies. The annual reports of the Committee shall be transmitted by the Secretary-General of the United Nations to the Economic and Social Council, the United Nations Commission on Human Rights, the Director-General of the International Labour Office and other relevant organizations (Arts. 72–78).

Part VIII – General Provisions – it is stated that this Convention does not affect the right of each state party to determine the criteria governing the admission of migrant workers and members of their families, except in matters relating to their legal status and treatment states, where parties must abide by the Convention. Moreover, the Convention does not interfere with more favourable rights and freedoms granted to migrant workers and members of their families under national laws or other agreements. The rights covered by the Convention may not be waived or derogated from, and states parties to the Convention must ensure that, if the rights and freedoms covered by the Convention are violated, an effective legal remedy is available, irrespective of who has committed the violation, including state officials, and that redress for such conduct is available, as well as remedies, together with a commitment to adopt such legislative and other measures as may be deemed necessary to give effect to the provisions of the Convention (art. 79–84).

The last part of the convention, IX – final dispositions – establishes the depositary of the convention in the person of the Secretary General of the United Nations, that this convention is open for signature by all states, that it is subject to ratification, but also to adherence to by any state, regulating both the procedure of adherence, as well as the procedure of denunciation of the convention, which respectively are the reservations that states can make to the text of the convention (art. 85–93).

It can therefore be seen that the Convention is the cornerstone in the field of international migration, emphasising and supporting legal migration, with some tacit acceptance of illegal migration, although this is not supported or encouraged in the wording. The Convention is based on the rights recognised in the Universal Declaration of Human Rights, but qualified here and developed in the light of the specific scope of the area covered, namely migrants and their family members residing and working legally in another state. In many cases, when regulating the rights of migrants, the Convention does not refer to their levels of protection, but as has been pointed out in several places above, it nevertheless refers by comparison to the level of protection provided to the nationals of the state of employment, its own people, without making any further reference to lower levels of protection, and therefore it can be stated that the Convention places on an equal footing, in terms of the rights conferred therein, citizens, nationals of the state of employment, migrant workers and members of their families lawfully present in the territory of that State, or whose stay and gainful activity have become lawful in the meantime.

2.2. International Refugee Law

As mentioned above, a landmark event in the refugee situation was the Second World War, which at a European level, generated large population movements. At the end of

the Second World War, in view of the humanitarian disaster, the Convention relating to the Status of Refugees was concluded in Geneva on July 28th 1951.¹² Since this Convention will be the subject of a detailed analysis in the next chapter, only an overview will be provided here.

First of all it must be mentioned that this is not the first international act concerning refugees, for example art. 1 let. A of the Convention lists other earlier ones, but the Geneva Convention is the most wide-ranging, complex and stable act. Then, in the preamble to the Convention, the principle is reaffirmed that human beings, without any distinction between them, must enjoy fundamental rights and freedoms, which is why this Convention has sought to revise and codify previous international agreements on this subject in order to provide the instruments and protection that refugees need. Another important aspect of the Geneva Convention is that from the outset, it is made clear that granting the right of asylum can entail difficult tasks for the various states, which can only be achieved through international solidarity. It also emphasises the social and humanitarian character of the refugee situation.

With regards to the content of the Articles, it is necessary to make a brief mention of the term refugee, which is closely related to this chapter and its preceding sections and which, according to art. 1 let. A para. 2, shall apply to a person who owing to events occurring before January 1st 1951, and to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or who, not having any nationality and being outside the country of his or her former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return. It should be noted that the term refugee as used in the Geneva Convention merely confirms the points made above from a terminological point of view.

A final aspect of a general nature that results from the content of the Geneva Convention is the different level of protection offered to refugees depending on each fundamental human right or freedom included in its content. This degree of protection varies from the highest level which is equal to the protection offered by a state to its own citizens, for example the right to religion provided for in art. 4, to the lowest level which is equal to the protection afforded to foreigners in general by that country, as is clear from art.13 on the right to movable and immovable property. There are also intermediate levels of protection, such as those afforded in the country of domicile or residence, as in art. 12 on personal status, or those afforded to citizens of a foreign country, as in art.15 on the right of association.

The Geneva Convention was supplemented and amended by the Protocol relating to the Status of Refugees, concluded in New York on January 31st 1967.¹³ In connection to this, it should be pointed out here that this act extended the application of

12 United Nations, 1951, Convention Relating to the Status of Refugee.

13 United Nations, 1967, Protocol Relating to the Status of Refugees.

the Convention to other persons in temporal terms, i.e. any person in the situation described in art. 1 of the Geneva Convention, which was referred to earlier, being considered a refugee, but not only as a result of events occurring before January 1st 1951, and also excluding the geographical limitation as set out in art. 1, paragraphs 2 and 3 of the Protocol. A detailed analysis of the Protocol as an integral part of the Geneva Convention will be made in the following chapter, establishing the manner of cooperation of national authorities with the United Nations, the relationship between international and national rules on the subject, and the modalities of accession or denunciation of the Protocol and, by implication, of the Convention.

Another important regulation is the New York Declaration on Refugees and Migrants, adopted by the UN General Assembly by resolution 71/1 on September 19th 2016.¹⁴

Due to the fact that the declaration is first and foremost concerned with refugees, it seemed more appropriate to set out the statement on it here, even if it also refers to migrants, whose issue has been dealt with in the previous section.

In the introduction of this document, considered to be a political declaration of the 193 heads of state and government, the need for its adoption was pointed out, recognising that since ancient times mankind has been on the move, with people migrating in search of economic opportunities and horizons, others to escape conflict, poverty, food insecurity, persecution, terrorism, human rights violations, abuse, climate change, natural disasters, and other environmental factors, etc. Following this and noting the large number of migrants at that time, participants agreed that orderly, controlled migration is more beneficial for the whole of humanity than forced and irregular migration, which brings with it complex challenges. While expressing solidarity with all those who are forced to uproot themselves, it was also recognised that the increased number of migrants creates very serious problems for both destination and transit states, and that no state can manage such movements alone, and therefore argued that greater international cooperation is needed to assist affected countries and communities. Extremely importantly, it was also agreed to address the root causes of large movements of refugees and migrants in particular through enhanced efforts aimed at early crisis prevention, preventive diplomacy, conflict prevention and peaceful conflict resolution, better coordination of humanitarian action, development efforts and peace building, the promotion of the rule of law at national and international level and the protection of human rights, while also addressing poverty, instability, marginalisation, exclusion, lack of development and economic opportunities, in relation to which some of the successes achieved such as the Sendai Framework for Disaster Risk Reduction 2015-2030 were also listed. Proclaiming freedom and equality in dignity and rights and advocating the prohibition of discrimination of any kind together with the firm condemnation of any acts contrary to them, the participants made a series of commitments that cover refugees and migrants together as well as each group separately. The commitments made by

14 United Nations General Assembly, 2016, New York Declaration for Refugees and Migrants.

the authors of this declaration emphasise the human side of the refugee and migrant issue by practically covering the rights stipulated in the conventions analysed in this chapter. These commitments gave shape to new directions for action to improve the situation of refugees and migrants and to develop non-binding guiding principles for migrants in vulnerable situations. Essentially these relate to the development of sustainable approaches leading to the resilience of both refugees and the communities hosting them, the provision of additional and predictable funding but also support for the development of hosting in particular states, the finding of additional ways for refugees to be admitted to third countries, including through the use of resettlement, and the development and application of a broader refugee response framework that can be applied in both long-standing and new situations.

This declaration practically took another step forward by ensuring the conditions for the elaboration of the Global Refugee Pact, which would not create new legal norms and would not introduce fundamental elements of refugee protection, but would provide the framework for their implementation, based on the principles of international cooperation and responsibility sharing. In addition to this, the declaration also foresaw the adoption of a Global Compact for Safe, Orderly and Orderly Migration, which would contain a set of principles, commitments, understandings between member states on all international migration and make a meaningful contribution in all aspects of its management.

The New York Declaration therefore set out by consensus of the participants the political and concrete actions by Member States together with other stakeholders to produce positive effects on the way the international community as a whole responds to migration and refugees.

The Global Compact for Safe, Orderly and Orderly Migration adopted in Marrakesh on December 19th 2018¹⁵ is to some extent the sequel to the New York Declaration (which will be covered in the next section) representing the commitment of the signatory states to improving cooperation in the field of international migration as migration affects countries, communities, migrants and their families. The Pact aims to review all measures in the field of migration on the basis of the experiences gained up to the date of its adoption, thereby providing a 360 degree vision of international migration. The Pact then emphasises that safe and orderly migration works for all if it is carried out in a well-informed, planned and consensual manner. At the outset of the Pact, the principles underlying the document are set out, namely: people-centred, international cooperation, national sovereignty, the rule of law and due process, sustainable development, human rights, respect for human rights, respect for gender, respect for the rights of the child, and the approach by all governments and society as a whole. The pact also brings to the attention of the international community twenty-three objectives, the most important of which I consider to be saving lives and achieving coordinated international efforts on missing migrants, followed by the eradication of human trafficking, which are then developed one by one.

15 United Nations, 1999, Regulations, Rules and General Principles of International Law.

3. EU Protection

The international regulations on migration in all its forms have not remained without an echo at EU level, where the legal provisions relating to this phenomenon have merely adapted them to continental and Union particularities, creating mechanisms that give them a very good practical applicability.

In the following section, the relevant normative acts in chronological order will be presented in a more or less extensive form, as appropriate, with an emphasis on directives, due to the effects they have had or should have had on the legislation of Member States and in order to highlight how the concepts, procedures, and regulations in this area, which raise so many problems and sometimes puts Member States in extreme situations, without even considering its enormous human dimension. Finally, however, with the 2024 migration reform, in addition to the adopted directive, which remains in force and is to be implemented, the adopted regulations will also be presented, whose provisions, together with those of the directive, are intended to create a comprehensive legislative framework on migration, some of which take over many of the institutions provided for in previous directives, while others regulate complementary institutions and procedures.

The first document to which I feel I should refer is The European Convention on the Legal Status of Migrant Workers, adopted in Strasbourg on November 24th 1977,¹⁶ regulates the situation of migrant workers who are nationals of Council of Europe member states, first of all by laying down the forms of recruitment, which is conducted through the official bodies of the party states, the costs of the entire procedure not being borne by the migrant worker. In order to recruit migrant workers, they may first have to undergo a medical, professional and vocational examination. Migrant workers are guaranteed both the right of exit and the right of admission under the Convention. They will at the same time be provided with a precise employment contract or specific offer even before their departure to the receiving state, and will receive information on all aspects of the elements of their life and work. Where collective recruitment takes place, travel expenses should be borne by the employer. If a Contracting Party State has admitted a migrant worker, he or she will be granted both a work permit and a residence permit in the receiving state. Migrant workers and members of their families will receive all the assistance they need to settle and adapt to their new state, and during their stay in the receiving state migrant workers will be supported by the Contracting Parties in recovering the amounts due in respect of maintenance obligations for persons remaining in the state of origin, and for family reunification. The provision of housing is one of the aspects covered by the Convention, as is the training of migrant workers and their family members, with the proviso that children are given the opportunity to learn their mother tongue. The rules of the Convention concern working conditions, the transfer of savings, social security and

16 Council of Europe, 1977, European Convention on the Suppression of Terrorism.

health care. Since this is in the field of labour law, the convention lays down rules on the termination of employment, dismissal and reinstatement. Migrant workers have the right of access to the administrative and judicial authorities of the receiving State during their stay, and during the course of their work.

Looking at the content of the Convention and the rules contained in subsequent European documents, it can be seen that it is one of the first forms of regulation at European level of legal migration for the purpose of work.

After many years Council Directive 2003/9/EC of 27th January 2003 establishing minimum standards for the reception of asylum seekers in member states¹⁷ was adopted. With reference to the Directive, it should firstly be emphasised that through asylum a person can obtain the right to settle in the territory of another country in order to receive protection, shelter and refuge, which is a first form of international protection for people in special situations. Then, as the title says, the aim of the Directive is to establish minimum standards for the reception of asylum seekers in member states, which is why it applies to all third country nationals and stateless persons who lodge an application for asylum at the border or on the territory of a member state, as long as they are allowed to remain on the territory of the member state as asylum seekers, and also to their family members if they have been included in that application (art. 1–3).

Once an application for asylum has been filed, asylum seekers are informed by the member states within a reasonable time, but not more than 15 days from the date of submission of the application to the competent authority, of the advantages and obligations they have, of the organisations or groups of persons that can assist them in the following, usually in written form and in a language they understand, but may also be given orally (art. 5).

Within three days, applicants must receive from the member states a document which serves the dual purpose of certifying their status as asylum seekers and authorising them to remain in the territory of that state until their asylum application has been decided. As regards the freedom of movement within the territory of the member state concerned, member states may decide to grant freedom of movement, but also to restrict it in cases where the applicant is in detention or has filed an application at the border. The document issued must be valid throughout the procedure. Member states may also provide applicants with travel documents if it is necessary for the applicant to reach the territory of another member state (art. 6). As has already been mentioned, asylum seekers can, as a rule, move freely within the territory of the member state or within a limited area. Applicants may be assigned a place of residence where, under certain circumstances they should stay, and which may only be left on the basis of an authorisation, which is not required for their presence before the authorities. Applicants must always notify the authorities of any change of place of residence (art. 7). Where member states offer an applicant a residence,

17 European Union, 2003, Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers.

it must be capable of ensuring the unity of the whole family residing in the territory of the member state (art. 8). For public health reasons, member states may require the applicant to undergo medical examinations (art. 9).

This document also pays particular attention to minors, whether they are asylum seekers or family members of asylum seekers, by allowing access to the education system under similar conditions for children of member state nationals. Education will take place during the time until the enforcement of a removal order, it may be limited to state institutions and may take place in accommodation centres. Minors may also be offered access to secondary education if they have reached the age of adulthood. Access to education may not be postponed for more than 3 months from the date of the application for asylum, which may be extended to 1 year if access to the education system is facilitated. If access to the educational system is not possible due to the minor's situation, then other means of education may be offered (art. 10).

An applicant may be allowed access to the labour market, but member states may set a time limit within which access may not take place, which may not exceed one year from the date of submitting the asylum application, and the delay is not attributable to the applicant, conditions under which access to the labour market is allowed, and priority access to the labour market for certain categories of persons such as Union citizens (art. 11). Asylum seekers also have the right to access vocational training even if they do not have access to the labour market (art. 12).

Member states must adopt provisions on material reception conditions in order to guarantee an adequate standard of living to ensure the health and subsistence of asylum seekers from the moment they submit their applications. Accommodation can take place in a variety of locations, ranging from centres for asylum seekers to private hotels, and the personal financial contribution of the asylum seeker can range from not being necessary at all, if the asylum seeker's material condition or situation does not allow it, to paying the full costs. Particular attention should be paid to the organisation of asylum centres (art. 13–14). Asylum seekers are offered not only emergency care, but also the basic treatment of illnesses (art. 15).

The benefit of reception conditions may be limited or withdrawn by member states when the asylum seeker: leaves the place of residence determined by the competent authority without informing it or obtaining its permission, fails to comply with the obligation to report to the authorities, fails to provide the requested information, fails to attend personal interviews within a reasonable time set by national law, has made another application in the same member state, and has concealed the fact that he or she has financial resources and has not benefited adequately from reception conditions. Member states may also refuse reception conditions if an asylum seeker cannot demonstrate that his or her application was lodged as soon as possible. Decisions to limit, withdraw or refuse reception conditions, together with related sanctions where appropriate, must be objective, impartial and reasoned (art. 16).

Persons with special needs enjoy slightly differentiated treatment (art. 17–20). Thus, in the case of minors, the well-known principle of the best interests of the child takes precedence, and they benefit, where necessary, from rehabilitation, mental

health and qualified assistance services, while in the case of unaccompanied minors, the necessary representation by a guardian or other body responsible for the protection of minors or other such form of representation is provided as soon as possible. The situation of minors shall be regularly assessed. Minors shall be placed, for the duration of the procedure, together with adult family members, either in a foster family, or in specialised accommodation for minors, or in other places suitable for minors. The placement of minors in adult centres may only be made if the minor has reached the age of 16. The brothers and sisters of minors must be kept together with the minor. Member states must make efforts to trace their family members. Staff dealing with these categories of minors must have specialised training.

Victims of torture or violence must also receive appropriate treatment for the harm caused by such acts (art. 20).

Where negative decisions have been taken against asylum seekers, they must be subject to appeal before a judicial body, while access to legal aid must also be available in accordance with national rules (art. 21).

For the reception system covered by this Directive to be effective, member states must regularly inform the Commission about applicants, reception conditions must be subject to monitoring and control, and the staff involved must be qualified (art. 22–24).

Council Directive 2004/83/EC of April 29th 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,¹⁸ supplements the provisions of the above-mentioned Directive, completing the legal framework necessary to deal with the issue of persons in need of and seeking protection at EU level in a uniform manner. It should be mentioned that this Directive refers to two different forms of protection and, in order to understand and distinguish between them, it is necessary to know the meaning of two concepts. Thus, “refugee” means

‘any third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country’ or any stateless person in such a situation. Also, “person eligible for subsidiary protection” means “any third-country national or stateless person who does not qualify as a refugee but in respect of whom there are serious and substantial grounds for believing that, if returned to his or her country of origin or, in the case of a stateless person, to the country of former habitual residence, he or she would face a real risk of suffering serious

18 European Union, 2004, Directive 2004/83/EC 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.

harm and is unable or unwilling to avail himself or herself of the protection of that country.’ (art. 2)

In the procedure following the submission of an application for international protection, an individual evaluation of the facts and circumstances either provided by the applicant, or apparent from the documentation provided, relating to the applicant’s age, background, including relevant family members, identity, nationality or nationalities, country or countries, place or places of previous residence, previous asylum applications, itinerary, etc., is first carried out. The fear of persecution may also result from events occurring after the applicant has left the country of origin. States, parties or organisations, non-governmental agencies may be both agents of persecution or serious harm and agents of protection, depending on their activity in relation to the rights and freedoms of the applicant. There is a possibility that a particular person, although seeking international protection, may not need it because in a particular part of his or her country he or she has no reason to fear persecution or serious harm, and the applicant may remain in that part of his or her country of origin (art. 4–8).

To be considered a refugee, a person must fulfil several conditions. Firstly, he or she must suffer acts of persecution, which in turn must be sufficiently serious by their nature or repeated nature, so as to amount to a serious violation of fundamental human rights or an accumulation of various measures. Acts of persecution may take the form of violence of any kind, legal measures of whatever nature if they are discriminatory, prosecution or punishment if they are disproportionate or discriminatory, a lack of legal remedies, being held liable for a refusal to perform military service if covered by exclusion clauses, acts against persons on the grounds of sex, and acts against children (art. 9). The grounds for persecution must be based on race, religion, nationality, membership of a particular social group and political opinion (art. 10).

The Directive also lays down the situations in which refugee status ceases, i.e. if he or she has voluntarily re-availed him or herself of the protection of the country of which he or she is a national, has voluntarily regained his or her nationality after having previously lost it, has obtained a new nationality and enjoys the protection of the country from which he or she had acquired it, he or she has voluntarily returned to the country which he or she had left or outside where he or she had remained for fear of persecution, the circumstances in connection with which he or she was recognised as a refugee have ceased to exist and he or she can no longer refuse to avail himself of the protection of the country of which he or she is a national or in which he or she used to have his or her habitual residence after having been a refugee. All these circumstances are of an alternative nature, and member states shall examine whether they are of a definitive nature (art. 11). Recognition as a refugee is excluded if a national or stateless person has been granted another protection or assistance by a UN body, agency or institution (other than the UNHCR, but the competent authorities of the country in which he or she has taken up residence) that considers he or she has the same rights as if he or she were a national of that country, has committed a crime

against peace, has committed a war crime or a crime against humanity, has committed a serious non-political crime outside the country of refuge before being admitted as a refugee or acquiring a residence permit, or has been guilty of acts contrary to the purposes and principles of the United Nations. These situations of exclusion also concern those who commit acts of instigation or complicity (art. 12).

Refugee status is granted to any third-country national or stateless person who fulfils the above conditions. Member states shall revoke refugee status, order its cessation or refuse to renew it if, after having granted refugee status, they establish that the refugee should have been excluded from refugee status, that there has been a distortion or omission of certain facts, or that false documents were used which played a determining role in the decision to grant refugee status. Member states may also revoke, cease or refuse to renew refugee status if there are reasonable grounds for considering him or her a danger to the security of the member state in which he or she is present or has been convicted by a final judgment of a particularly serious crime constituting a danger to the society of that state, and if the procedure has not yet been concluded, member states may decide not to grant refugee status if they find that such circumstances have arisen (art. 13–14).

The second, subsidiary, form of protection is granted to a person who has suffered serious harm consisting of the death penalty or execution, torture or inhuman or degrading treatment or punishment, serious threats to the life or person of a civilian, as a result of generalised violence arising from internal or international armed conflict (art. 15). A third-country national or stateless person ceases to be eligible for subsidiary protection if the circumstances that gave rise to the grant of protection have ceased to exist or have changed to such an extent that protection is no longer needed. Here too, member states must ensure that the change of circumstances is permanent (art. 16). A person is excluded from the category of persons eligible for subsidiary protection if his or her conduct is reprehensible and he or she subscribes to the circumstances for which exclusion from refugee status is also ordered and provisions apply accordingly (art. 17). The granting of subsidiary protection status, as well as the revocation, cessation or refusal to renew it, are subject to the same conditions as for refugee status (art. 19).

The content of international protection largely covers the same issues as Directive 2003/9/EC (the principle of non-refoulement, information of persons, maintenance of family unity, residence permit, travel documents, access to employment, access to education, social protection, health care, the situation of unaccompanied minors, access to housing, freedom of movement, access to integration facilities, and repatriation), in some cases with a slightly broader content, generated by the status of the refugee or person granted subsidiary protection, so that a review of them would be exhaustive and would make it difficult to identify the aspects that are relevant to the issue addressed. Just by way of example, it should be pointed out that the residence permit is granted for a period of at least three years and is renewable (art. 20–34).

As in the previous Directive, there are provisions on the cooperation between member states, the specialisation of staff carrying out tasks in this area, and the

communication of information to the European Commission, its transposition etc. (arts. 35–40).

Another legislation adopted in this area is Council Directive 2005/85/EC of December 1st 2005 on minimum standards on procedures in member states for granting and withdrawing refugee status,¹⁹ the explanatory memorandum of which states that the European Union's objective of establishing an area of freedom, security and justice open to those who are compelled to seek protection within the Union requires a common asylum policy and a Common European Asylum System based on the Geneva Convention and its successor instruments, founded on the principle of non-refoulement, which means that no one shall be sent back to persecution. The aim of this directive is both to establish minimum standards and a minimum framework for the procedures for granting and withdrawing refugee status in order to limit the secondary movement of asylum seekers between member states, and to create an effective channel of access to procedures with all that this entails for each applicant, with particular attention being paid to the situation of unaccompanied minors, where the best interests of the child must be paramount. This directive raises the question of the admissibility of asylum applications from the point of view of the applicant's safety in his or her country of origin, the possibility for member states to consider a third country as a safe country of origin, and the common criteria for granting such status, with the proviso that all of this is subject only to a presumption *juris tantum* regarding the safety of the country concerned. In light of these considerations, it has been pointed out that there are situations in which member states should examine the substance of asylum applications, and in which they should not have such obligations. It has also been pointed out that this Directive does not affect the fulfilment of member states' responsibility to maintain public order and internal security, but also that the measures that states must take in this area may be in accordance with the principle of subsidiarity, given that the Directive seeks to respect the principle of proportionality in order to achieve its own objective.

After reiterating its purpose (art. 1) and defining certain terms (art. 2), the Directive states that its scope covers all applications for asylum lodged in the territory of the member states, including at the border or in transit zones, and the withdrawal of refugee status without regard to diplomatic or territorial asylum (art. 3).

In order to ensure that the provisions of the Directive are properly and effectively applied, member states are required to designate a determining authority (art. 4), provided that asylum applications lodged in one member state but addressed to another member state are decided by the member state on whose territory the application is lodged. The Directive allows States to designate a completely different authority to deal with certain situations, namely: transferring the applicant to another state, deciding on the asylum application on the basis of national security provisions, carrying out a preliminary examination in case of a new application, and in the case of procedures

19 European Union, 2005, Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status.

initiated at the border, refusing permission to carry out specific procedures in the border area and when the applicant has come from a safe third country.

As the Directive sets minimum standards, it is natural that member states may set or maintain more favourable standards regarding the procedures covered by the Directive (art. 5).

The procedure is initiated by an application for asylum, which must be lodged in person and at a specified location. However there are certain exceptions, such as in the case of dependants of the person submitting the application for their benefit, from whose consent is still required. Although the situation of minors is a special one, member states may nevertheless determine the cases in which a minor may submit an application in his or her own name or through a representative or in which the application of an unmarried minor is considered to be a valid application (art. 6).

As a general rule, applicants are allowed to remain in the member state in order to carry out the procedure until a decision is taken, with the mention that this is not a right to a residence permit. However there are exceptions, such as the surrender or extradition of a person to another member state, a third country, or an international criminal court (art. 7).

When examining applications, it is necessary that their submission in the shortest possible time does not lead to a rejection, and that decisions on asylum applications are taken after a proper examination of them, i.e. applications must be examined and decisions must be taken individually, objectively and impartially, provided that accurate and updated information is obtained from a variety of sources by staff familiar with the relevant standards (art. 8). The decisions of the decision-making authority must be in writing, and must state the reasons in fact and in law, as well as being open to appeal, which must be brought to the attention of the applicant. The obligation not to state the reasons for the decision may exist if the applicant is granted comparable status, and the obligation to communicate all information relating to the decision and the appeal in writing does not exist if this has occurred in a previous procedure, even the adoption of a single decision is allowed if it concerns all the dependants (art. 9).

The guarantees granted to asylum seekers concern informing them in a language they understand about all aspects of the procedure, providing the services of an interpreter, giving them the possibility to communicate with the UN High Commissioner for Refugees, communicating the decision taken within a reasonable time, and providing information about the outcome of the decision in a language they understand (art. 10). Asylum seekers have a number of obligations, including the obligation to cooperate with the competent authorities by informing them of their presence, presenting themselves to the authorities, handing over relevant documents, informing the competent authorities of their current residence or address and any changes to them, accepting to receive communications at the latest of these, submitting to body searches, and photographing and recording their own statements (art. 11).

An important part of the procedure is the personal interview (art. 12–14) which takes place before a judgment can be given. This interview may be conducted by the applicant, by any adult dependant of the person who made the application, or by a minor.

The personal interview may be omitted if a positive decision is expected, if a meeting with the applicant has already taken place, if the application is considered unfounded on the basis of the information provided by the applicant, or of course if it cannot actually take place. It is important to note that the absence of a personal interview does not prevent the determining authority from making a decision, nor does it negatively influence the way in which the application is dealt with, although this can be taken into account. The interview is conducted individually with the person requesting the application, but in exceptional circumstances he or she may be accompanied by family members, in conditions of confidentiality by a highly trained person, in the presence of an interpreter to facilitate good communication, or other third parties if their presence is regulated and necessary. A report on the interview and the information obtained during the interview is drawn up and the interviewees have access to it, they can approve or refuse to approve it, which does not prevent the determining authority from taking a decision on the asylum application.

The Directive also regulates the right to legal assistance and representation (art. 15–16) which is generally provided for a fee and at the applicant's own expense, and confers access to a legal adviser or other counsellor. It is free of charge if the determining authority has given a negative decision and the applicant so requests. Member states may provide that legal assistance and representation shall be free of charge only before the courts or tribunals for persons who lack sufficient resources, or for access to legal advisers or other counsellors specifically designated for this purpose by national law or only in appeal proceedings. However, member states must ensure that legal assistance and representation are not arbitrarily limited. Member states may also provide for the manner in which requests for legal assistance and representation are to be made and dealt with, as well as financial limits and certain time limits in the case of free legal assistance and representation, or even that applicants should not receive more favourable treatment than their own nationals in similar cases. Member states may also require reimbursement of all or part of the costs incurred if the applicant's financial situation improves, or if the decision was taken on the basis of false information provided by the applicant. Legal assistance and representation consists of the right of the legal adviser or other counsellor to have access to the information in the applicant's file, which is restricted if it could jeopardise the national security of the organisations or persons providing it, or of the person or persons to whom it relates, or if it would prejudice the investigation; the right of access to restricted areas such as places of detention, transit areas for the purpose of consultation with the applicant, the restriction being possible for the purposes of security, public order, administrative management of the area or efficient examination of the application, provided that the restriction does not make it impossible for the adviser to have access to the applicant. Member states may provide for the presence of the advisers or counsellors at the interviews with the applicant, without their absence preventing the authorities from conducting the personal interview with the applicant.

As indicated above, particular attention is given by the Directive to unaccompanied minors (art. 17) who are immediately provided with representation or assistance

by a representative for the examination of the asylum application, the representative having the opportunity to inform the minor on how to prepare for the interview, which the representative may attend to ask questions and make comments, without the representation of the minor during the interview excluding the obligation to attend the interview. Member states are exempted from the obligation to appoint a representative for a minor, for when the minor will reach the age of adulthood before a decision is taken, if he or she receives the services of a legal adviser or other specialised adviser free of charge, if he or she is or has been married and if the minor is 16 years of age or older. In the latter situation, however, a representative will be appointed if the minor is unable to support his or her asylum application alone. If the application is made by an unaccompanied minor, the interview must be conducted by a person specialised in the needs of minors and the decision must be drafted by such a person. Member states may conduct medical examinations of minors to determine their age, in which case they must be informed in advance in a language they understand about the purpose, the method of examination, the consequences of the examination and the consequences of refusing to have the examination. Minors must give their consent to medical examinations in person or through their representatives, and if the medical examination is refused, the decision to reject the asylum application cannot be based solely on refusal, nor can such a refusal prevent the authorities from taking a decision on the minor's asylum application.

The Directive expressly provides that member states shall not detain a person for the sole reason that he or she has submitted an asylum application. If detention is nevertheless used, it must be replaced as soon as possible by judicial supervision (art. 18).

Member states may regulate by national law the withdrawal or abandonment of the asylum application (art. 19–20). If the application is explicitly withdrawn, a decision to discontinue or reject the application or to discontinue the examination without taking a decision on the application must be regulated. If the application is implicitly withdrawn or the applicant implicitly renounces the application, a decision to discontinue the examination or to reject the application must also be taken. An implicit withdrawal or implicit abandonment of the application for asylum shall be presumed where the applicant has not supplied information essential to his or her application, has not appeared for a personal interview unless such conduct was involuntary or the applicant has absconded or has left without permission from the place where he or she was detained or living without contacting the competent authority within an acceptable period of time, or has not complied with reporting duties or other obligations to communicate. Member states should provide for the possibility for such an applicant to subsequently request the reopening of his or her case, for which a time limit may be set, and for the possibility to resume the procedure from the place where it was stopped. Member states must also ensure that such a person is not subject to expulsion, contrary to the principle of non-refoulement.

According to the Directive the UN High Commissioner for Refugees directly or through an organisation working on his or her behalf must be authorised by member

states to have access to asylum seekers and transit zones, to have access to information on asylum applications and all that follows on the basis of such applications, provided that the applicant gives his or her consent to present his or her views (art. 21).

During the procedure of gathering information, member states must ensure the protection of the applicant, as such they shall not provide data and information to the alleged perpetrator of the persecution (art. 22).

A significant part of the Directive deals with first instance proceedings (arts. 23–36), where certain procedures are regulated, as well as some concepts of great importance in their conduct.

In order to ensure the fluency and understanding of the entire procedure legislated here, it should be considered necessary to first refer to the explanations given in the Directive with reference to certain concepts. The first is the concept of “first country of asylum”, according to which a given country may be considered to be the first country of asylum for a particular asylum seeker if he or she has been recognised as a refugee in that country and is still able to avail him or herself of the protection granted or enjoys some protection in that country, even if it is known under another title, or protection which includes the principle of non-refoulement, but only if he or she is readmitted to that country (art. 26). The second concept is that of a “safe third country” and means that the competent authorities of a state are confident that in that country an asylum seeker will benefit from respect for the following principles: the life and liberty of asylum seekers are not endangered on grounds of race, religion, nationality, membership of a particular social group or political opinion; the principle of non-refoulement is respected in accordance with the Geneva Convention; the prohibition of expulsion, as laid down in international law, with violation of the right not to be tortured and subjected to cruel, inhuman or degrading treatment respected; there is a possibility to apply for refugee status and to benefit from protection. An application of the concept, in turn, can take place if rules in national law establish the need for a link between the asylum seeker and that country, on the basis of which the asylum seeker would go there, if there are rules on the methodology by which the competent authorities of a state determine that a particular country can be covered by the concept, if rules are developed in accordance with international law allowing for an individual examination on the basis of which it can be determined that a particular country is safe for a particular applicant and giving that applicant the right to challenge the safe country concept. When a decision is made using this concept, the authorities of a member state must inform the applicant accordingly and provide him or her with a document informing them that the authorities of a third country have been informed that their application has not been examined on its merits. If that country does not allow the asylum seeker to enter its territory, member states must allow the asylum seeker to follow a procedure that complies with all the guarantees set out in the Directive. Member states must inform the Commission which countries have been granted the safe third country concept (art. 27).

The third is the concept of “safe country of origin” which means that a country can be considered as such for a particular asylum seeker, after the individual

examination of the application and only if he or she is a national of that country or is a stateless person and has previously had a stable residence in that country, i.e. has not shown serious reasons for considering that country not to be a safe country of origin in his or her particular circumstances (art. 31). It should also be noted that at EU level, the Council, on a proposal from the Commission and after consulting the European Parliament, adopts a minimum common list of third countries which member states consider to be safe countries of origin, but member states may also adopt legislation allowing them to designate at national level countries other than those on the minimum list, although in both cases each country on the list must meet the conditions and offer the guarantees laid down by the directive (arts. 29–30).

The fourth is the concept of a “safe European third country”, which in turn means a country that has ratified and complies with the provisions of the Geneva Convention without any geographical limitations, has an asylum procedure laid down by law, has ratified and complies with the European Convention for the Protection of Human Rights and Fundamental Freedoms, and has been designated as such by the Council. Moreover, the Council has the power, on a proposal from the Commission and after consulting the European Parliament, to adopt or amend a list containing such countries. Where the determination of an asylum application is based on the safe European third country concept, member states will proceed as in the case of an applicant to whom the safe third country concept has been applied (art. 36).

The procedure now starts with the submission of an application for asylum, which member states deal with in an examination procedure in accordance with the principles and guarantees of the Directive (art. 23). The examination procedure must be carried out quickly, properly and completely. If a six-month period is exceeded and a solution has not yet been found and given, the member state will inform the applicant of this delay or inform them of the time by which a solution is expected to be given. The examination procedure may be accelerated as appropriate in certain special situations, where member states may prioritise or accelerate certain procedures and the cases outlined in the Directive would theoretically lead to the rejection of the application. In addition to the examination procedure, which is considered to be a general common procedure, member states may regulate special derogating procedures (art. 24) consisting of a preliminary examination for the settlement of cases where new applications have subsequently been made, procedures for the settlement of cases taking place at the border, and derogations when the procedure is centred on the concept of a safe European third country.

According to the Directive, an asylum application can be considered inadmissible by member states (art. 25) when: another member state has granted refugee status; a country which is not a member state is considered as the applicant’s first country of asylum; a country which is not a member state is considered as a safe third country for the applicant; the applicant is allowed to remain in the member state concerned for other reasons, receiving a status equivalent to refugee status; the applicant is allowed to remain in the member state concerned for other reasons which preclude return pending the outcome of a procedure to determine his or her status; the applicant has

submitted an identical application after a final decision has been taken; a dependant of the applicant submits an application although he or she has given his or her consent to their own case being dealt with in an application made on his or her behalf.

An application is unfounded (art. 28) only if the determining authority has established that the applicant does not qualify for refugee status, but also in cases where the applicant has not fulfilled the obligations laid down for him or her by the Directive referred to above.

As regards subsequent applications (arts. 32–34), the Directive provides that the member state may provide that a subsequent application may be examined as part of the examination of the previous application or as part of the examination of the decision, if it is subject to appeal, provided that the new application can be considered at that stage. Member states may also receive a subsequent application if there has been a withdrawal or abandonment of the first application, but also after a decision has been taken on the previous application. If a subsequent application is submitted, it is subject to a preliminary examination as to whether any new facts or elements have come to light which are relevant to establish whether the person qualifies as a refugee. If the preliminary examination establishes that the conditions for refugee status appear to be fulfilled, the application will proceed to the next stage, i.e. it will go through the examination procedure. A subsequent application may be examined if it is found that there are grounds for reopening a procedure. Member states may decide to examine the application further only if the applicant has been unable, through no fault of his own, to inform the authorities of the circumstances of the case as set out above. A subsequent application may also be submitted by a dependant of the person who submits an asylum application, if the situation of the dependant justifies a separate application. Member states may maintain or adopt the procedure for subsequent applications if the applicant intentionally or owing to serious negligence fails to go to a reception centre or to appear before the competent authorities at the appointed time. For the processing of subsequent applications, Member States must provide all necessary guarantees on the one hand, and may lay down certain conditions on the other hand.

The procedures to be carried out at the border (art. 35) have a derogatory character from the usual ones and should mainly refer to the fact that persons who have made an application at the border may stay in the border area or transit zones, but as stated above, only for the purpose of the procedure; applicants are informed about their rights and obligations, have access to an interpreter; applicants are interviewed before the competent authority takes a decision in such procedures on their asylum application by persons qualified in this field; applicants may consult legal advisers or other counsellors, and if they are minors they have the benefit of an appointed representative. If the competent authority refuses to allow entry, it must also state the reasons in fact and in law why the application for asylum is unfounded or inadmissible. The decision on the application must be taken within a reasonable time limit, which in this case is much shorter, i.e. four weeks, failing which the applicant is allowed to enter the territory of the member states in order for his application to be

processed under common procedure. Border procedures are only used if the number of arrivals is not high and if applicants are accommodated in border or transit zones.

Refugee status can be withdrawn (arts. 37–38), and such a procedure can start when new facts or information come to light that lead to a reassessment of the validity of refugee status. As part of the procedure for the withdrawal of refugee status, the Directive stipulates that member states must ensure that the refugee benefits from certain guarantees such as: being informed in writing of the reassessment of the refugee status, the opportunity to present the reasons for maintaining his or her refugee status in a personal interview or in a written statement, as appropriate. In addition to these guarantees, member states must ensure that the competent authority is able to obtain accurate and updated information on the situation in the country of origin of the refugee from various sources, including the UN High Commissioner for Refugees, which may also be obtained from the perpetrator of the persecution, but in such a way that the latter does not learn about the refugee, the reassessment of his or her status or endanger the refugee, his or her dependants and family members in the country of origin. Once the procedure has been completed, the decision to withdraw refugee status must be communicated to the refugee in writing, must state the reasons in fact and in law, and the refugee must be informed of the appeal. Member states may decide that the refugee's refugee status lapses if the refugee has ceased to be a refugee and has unequivocally renounced recognition as a refugee.

The Directive under review also regulates appeal procedures (art. 39), governed by the principle of the right to an effective remedy, stating that member states must ensure that asylum seekers have an effective remedy before a court or tribunal if their application has been dismissed as inadmissible, if the decision was taken following a procedure at the border or in transit zones, when it was based on the use of the safe European country concept, when there is a refusal to reopen the examination of the application after the conclusion of the procedure, when a decision has been taken not to examine a subsequent application, when a decision has been taken not to allow entry to the territory of the state when the application was made at the border or in the transit zone, and when a decision has been taken to withdraw refugee status. For the conduct of such a procedure, states may establish time limits, but also rules such as whether or not the granting of an appeal allows the refugee to remain in the territory of that state, the provision of a subsequent appeal or the provision of interim measures in case the initial appeal does not allow the refugee to remain in the territory of the state. If an applicant has been granted rights and benefits, but under a different status, then he or she will also benefit from a subsequent appeal where a court or tribunal decides that the initial appeal is inadmissible or unlikely to succeed on the grounds of insufficient interest of the applicant to pursue the procedure. Of course, member states may also provide for rules on the implicit withdrawal by an applicant of an appeal or the implicit renunciation by the applicant of that appeal, as well as the procedural steps to be followed.

In addition to the procedural rules developed at length in Directive 2005/85/EC, there are other European legislative acts.

It should be mentioned first of all, that the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, was signed in Dublin on June 15th 1990,²⁰ and it is this that establishes the commitment of the member states to examine the application of any foreigner who applies for asylum at their borders or on their territory, but also states the fact that that application will be examined by a single member state in accordance with national law and international obligations. It is also provided that any member state has the right to examine an asylum application lodged by an foreigner, even if it is not its responsibility according to the criteria laid down in the convention, in which case the responsible member state is relieved of its obligations which are taken over by the new state, but also that any member state retains the right to send an asylum seeker to a third state in accordance with the provisions of the Geneva Convention, in accordance with its national law.

The state responsible is determined as soon as the asylum application is submitted on the basis of a number of criteria (arts. 4–8) such as: the existence in a member state of a family member belonging to the applicant who has acquired refugee status; the possession of a valid residence permit; the possession of a valid visa; the member state where the applicant first entered illegally; the member state responsible for controlling the entry of aliens into the territory of the member states; the first member state with which the asylum application is submitted, etc. The powers and obligations of the responsible member states similar to those set out above are set out in the Convention, with the natural specificity of the field covered.

The provisions of the Dublin Convention have been further developed on certain levels by means of other legislative acts such as Council Regulation (EC) No. 2725/2000 of 11 December 2000 concerning the establishment of “Eurodac” for the comparison of digital fingerprints for the effective application of the Dublin Convention,²¹ which established a Central Unit, a computerised central database for the processing of dactyloscopic data, and the means of transmission of data between the member states and the central database.

Similarly, Council Regulation (EC) No. 343/2003 of 18th February 2003 established the criteria and mechanisms for determining the member state responsible for examining an asylum application submitted in one of the member states by a third-country national,²² which took over and regulated the issues covered by the Dublin Convention in more detail.

20 European Union, 1997, Agreement establishing the World Trade Organization.

21 European Union, 2000, Council Regulation (EC) No. 2725/2000 on the establishment of ‘Eurostat’.

22 European Union, 2003, Council Regulation (EC) No. 343/2003 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.

Another important European regulation concerning persons in need of international protection is Directive No. 2011/95/EU of the European Parliament and of the Council of 13th 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 the content of the protection granted,²³ which is in fact a recast of Directive No. 2004/83/EC analysed above, and which is why, as will be seen below, it takes over most of the previous regulations, with Annex II to the new directive even establishing a correspondence between them.

This new directive on the subject was necessary, as is clear from the explanatory memorandum, for reasons of clarity, in order to contribute further to the implementation of the common asylum policy (paras. 1 and 2), with the main objective of ensuring that all Member States apply common criteria for identifying those persons who are in genuine need of international protection, ensuring a minimum level of benefits for such persons in the Member States (para. 12). This directive also refers to two categories of persons who would require international protection, namely refugees and persons eligible for subsidiary protection, both of which defined here, but since the two definitions are similar to those provided in Directive No. 2004/83/EC, they will not be repeated here.

The content of the new directive will be summarised below, as it often repeats the provisions of the other directive verbatim in an attempt to highlight the new features.

Directive No. 2011/95/EU also allows Member States to adopt or maintain more favourable standards for the two categories of persons in need of international protection (art. 3).

When assessing applications for international protection, the assessment of facts and circumstances (art. 4) is similar to the previous regulation. The same applies to the need for international protection arising outside the country of origin (art. 5), with differences here taking the form of the use of different terms; for example, the new regulation refers to “a well-founded fear”, whereas the previous regulation refers to “justified fear”, which is essentially the same thing. The agents of persecution or serious harm (art. 6) remain unchanged in their regulation, but the agents of protection do (art. 7), because in addition to stating that protection can only be provided solely by the state, political parties or organisations, including international ones, that control the state or a significant part of it, it specifies that they are agents of protection if they are willing and able to provide protection. It also emphasises that such protection must be effective and not temporary. There are also improvements regarding protection within the country (art. 8), as Member States may determine that an

23 European Union, 2011, Directive 2011/95/EU 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 on the content of the protection granted.

applicant does not need international protection, if they have no well-founded reason to fear persecution or serious harm, and if they have access to protection against such persecution or harm, even if only in one part of their country, but only if they can travel safely and legally and will settle in that area. Furthermore, the examination of this data must be based on accurate and up-to-date information obtained from relevant sources such as the UN High Commissioner for Refugees and the European Asylum Support Office. Regarding the first category of persons requiring international protection, namely refugees, acts of persecution and grounds for persecution (art. 9–10), between which there must be a close connection, have not undergone any legislative changes. If the conditions set out in the directive, mentioned above, are not met, exclusion occurs (art. 12), which allows any third-country national or stateless person to be excluded from recognition as a refugee, with no differences between the two regulations, just as there are no differences in the granting of refugee status (art. 13). As for the cases where a third-country national or stateless person ceases to be a refugee (art. 11), there is only one change in the new directive. This concerns the fact that when the circumstances that led to a person with citizenship being recognised as a refugee no longer exist and, as such, they can no longer continue to refuse to seek protection from their own country of nationality, or the circumstances that led to a stateless person being recognised as a refugee have ceased to exist and they can return to the country where they had their habitual residence, refugee status ceases. By way of exception, if any of them can invoke compelling reasons arising from previous persecution, which cause them to refuse to benefit from the protection of the country of which they are a citizen, and in the case of a stateless person, the country where they usually resided, refugee status does not cease. With regard to the revocation, cessation, or refusal to renew refugee status (art. 14), the provisions of this directive are the same as those of the old directive, containing both mandatory and optional cases for maintaining the status granted.

The second category of persons in need of international protection covered by this new directive are “persons eligible for subsidiary protection”, a concept that differs slightly from that in the previous directive through the introduction of the term “eligible”, which simply differentiates them from *refugees* in that they do not meet the conditions to be classified in this category that enjoys primary protection. This second category of persons in need of subsidiary or secondary protection, are those covered by serious harm (art. 15) regulated in the same way in both directives. The cessation of a person’s eligibility for subsidiary protection (art. 16) is slightly adjusted in the new directive in that, as in the case of refugees, the cessation does not apply to a beneficiary of subsidiary protection if they can invoke compelling reasons resulting from previous persecution, which justify their refusal to benefit from the protection of the country of which they are a citizen, and in the case of a stateless person of the country where they normally resided, a provision that forms a new paragraph 3. The exclusion (art. 17) from the category of persons benefiting from subsidiary protection is similar to that in the previous directive. The status conferred by subsidiary protection,

in its components granting subsidiary protection status (art. 18), revocation, cessation or refusal to renew subsidiary protection status (art. 19) contain no changes.

The content of international protection granted to the two categories of persons contains slight changes, the first of which are found in the general rules (art. 20) in that paragraphs 6 and 7, which refer to the reduction of benefits granted to a refugee and to a person benefiting from subsidiary protection, have been removed if this is intended to create the conditions necessary for their recognition as such persons. Protection against return (art. 21) and information (art. 22) have similar content in both directives, but family unity (art. 23) is different in the new directive, in that in paragraph 2 there were two more subparagraphs, the first of which established that with regard to the family members of those benefiting from subsidiary protection status, Member States have the possibility to lay down conditions for the applicability of these benefits, an aspect supplemented by the following subparagraph, which requires Member States to ensure that the benefits granted guarantee an adequate standard of living. The new directive and the previous one contain the same rules on the issuance of residence permits (art. 24) and travel documents (art. 25). Concerning access to employment (art. 26), there are differences between the two directives in that paragraph 3 of the previous directive concerning the possibility for Member States to take into account the rules generally applicable in that sector of activity, namely public services, the situation of the labour market, and their obligation to ensure that these persons have access to employment under the conditions in question, which has not been included. Similarly, paragraph 4 has been amended in the sense that the new directive requires Member States to make every effort to facilitate full access for beneficiaries of international protection to the activities regulated under this article, such as vocational training, professional training, etc., which is stricter than the similar obligation in the previous directive. Similarly, access to education (art. 27) has been amended in the sense that the paragraph which required Member States to ensure equal treatment between persons subject to international protection and their own nationals in procedures for the recognition of diplomas, certificates, or other official qualifications, is no longer maintained, but its content is found in a more developed form in a new article on access to procedures for the recognition of qualifications (art. 28), which in addition to establishing the obligation of Member States to ensuring equal treatment in these procedures, also regulates the obligation of States to make every effort to facilitate access for beneficiaries of international protection who cannot provide documents certifying their qualifications, to the bodies competent for the assessment, validation, and accreditation of prior learning, while also referring to Directive No. 2005/36/EC of 7th September 2005 on the recognition of professional qualifications. Social protection (art. 29) has retained its regulation, but healthcare (art. 30) has been slightly modified in paragraph 2, which represented a derogation from paragraph 1, providing for the possibility for Member States to limit healthcare for beneficiaries of subsidiary protection to basic benefits on an equal footing with their own nationals. With regards to unaccompanied minors (art. 31), the amendment in the new directive consists of an elaboration of paragraph 5, which established

that when international protection is granted to an unaccompanied minor and the identification of family members has not yet begun, Member States shall proceed to identify them as soon as possible, but only after granting international protection to the minor, continuing the identification process if it has already begun. Furthermore, the collection, processing and dissemination of information on the minor's relatives must be confidential if their life or physical integrity is threatened, especially when they have remained in the country of origin. Access to housing (art. 32) contains a new paragraph 2 establishing the possibility for Member States to have a national practice of dispersing beneficiaries of international protection, while at the same time having an obligation to prevent discrimination and provide equal opportunities in terms of access to housing. Freedom of movement within the Member State (art. 33) retains its content, but access to integration facilities (art. 34) has undergone slight changes both in structure, with a single paragraph and in content, in the sense that Member States must ensure access to integration programs or create preconditions for guaranteeing access to such programs, with no changes regarding repatriation (art. 35).

Administrative cooperation between its two segments (art. 36) relating to the creation of a national contact point within each Member State designed to cooperate with the Commission and its staff (art. 37), relating to the qualification of persons involved in this field have not undergone any changes, and the final provisions (arts. 38–42) are specific to the content and new vision of the directive, with the proviso that the previous directive is expressly repealed here.

The reform of Directive No. 2004/83/EC through Directive No. 2011/95/EU has inevitably led to a reform of the procedural directives that facilitated its implementation. The first of these is Directive No. 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection,²⁴ which reformed Directive No 2005/85/EC discussed above, and which was a first measure on asylum procedures, as stated in the explanatory memorandum to the new directive. The main objective of the new directive is to develop standards for procedures in Member States for granting and withdrawing national protection in order to establish a common asylum procedure in the European Union, which is also reflected in the stated purpose of the directive (art. 1).

The first differences between the two directives appear right from the definitions section (art. 2), given that the vision of European legislators has changed for the better, with new elements being introduced. By way of example, it should be pointed out that the concept of “applicant in need of special procedural guarantees” has been defined as a “person eligible for subsidiary protection”, “international protection”, etc., which did not exist in Directive No. 2005/85/EC, but were still used in Directive No. 2011/95/EU, so that they could continue to be used in the scope of application (art. 3), given that the new directive applies to applications for international protection and not to asylum applications, as was the case in the previous one. By regulating

24 European Union, 2013, Directive 2013/32/EU on common procedures for granting and withdrawing international protection.

the authorities responsible for this matter (art. 4), the new directive refers to two of them, namely the deciding authority and an authority other than the former, as in the previous directive, except that the situations falling within the competence of an authority other than the deciding authority are limited to only two cases, namely the processing of cases under EU Regulation No. 604/2013 (which establishes the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States)²⁵ and the granting or refusal of permission to enter the procedure carried out at the border, if the conditions for its implementation are met, and only if there is a reasoned opinion from the decision-making authority. Developments regarding the specialisation and training of the staff of the competent authorities in this field are more extensive, and a new provision has been added, establishing that when an application for international protection is lodged in one Member State but is addressed to the competent authorities of another Member State, it shall be dealt with by the authorities of the Member State where it was lodged. The new directive also provides for the possibility of Member States to establish or maintain standards more favourable than those laid down in this directive (art. 5).

In the next chapter on fundamental principles and guarantees, interesting changes have been made to access to the procedure (art. 6), which seeks to speed it up from the outset by setting short deadlines for the registration of an application for international protection, which is initially three working days, or which is six working days if the application is addressed to other authorities competent to receive but not register them, so that ultimately the possibility of extending the deadline to ten working days is established if several simultaneous applications are submitted by a large number of third-country nationals or stateless persons. Member States are also required to ensure that the staff of the authorities competent to receive such applications are well informed and trained and that a person who has applied for international protection has the effective opportunity to submit the application as soon as possible, with the result that Member States may consider that an implicit withdrawal of the application has taken place, a situation which will be addressed a little later. New provisions have been introduced regarding applications submitted on behalf of dependents or minors (art. 7), which establish the rule that every adult with legal capacity has the right to submit an application for international protection on their own behalf, with the exception of applications submitted by an applicant on behalf of persons dependent on them, provided that they give their consent to the application being submitted on their behalf at the time of submission or at the latest by the time of their interview, having been informed in advance of the consequences of submitting an application on their behalf and of their right to submit a separate application. If consent is not given,

25 European Union, 2013, 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 (recast) (replacing Regulation (EC) No. 343/2003).

it is possible to submit an application on one's own behalf. The minor has the right to submit an application for international protection on their own behalf if they have the legal capacity to act under the law of the Member State, either through their parents, other members of their family, an adult who is responsible for them, a representative, or even through the bodies referred to in Article 10 of Directive No. 2008/115/EC of 16th December 2008 on common standards and procedures in Member States for returning third-country nationals who have stayed illegally,²⁶ aspects which may be developed in domestic legislation. The new directive stipulates that information and counselling for persons who wish to apply for international protection (art. 8) must take place even in detention centres, border crossing points, or transit zones if there is information that such an application will be made, Member States are required to facilitate access to the procedure, but also to ensure effective access for organisations and persons providing advice in such situations to applicants.

The right to remain in the Member State during the examination of the application (art. 9) is regulated in both directives, referring to the permission to remain on its territory solely for the purpose of the procedure, until the decision is taken by the determining authority, without this constituting a right to receive a residence permit. Exceptions to this right apply in cases where a person submits a subsequent application, which will be discussed in more detail below, but also in cases of surrender or extradition to another Member State on the basis of a European arrest warrant, to a third country or to an international criminal court for other reasons, provided that this does not lead to the direct or indirect return of the person.

The requirements for examining applications (art. 10) are set out in both directives, in a more developed form in Directive No. 2013/32/EU, thus in addition to the obligation on Member States to ensure that applications for international protection are not rejected or excluded from examination on the sole ground that they were not submitted as soon as possible, the steps to be followed by the determining authority in examining applications have also been regulated, whereby it must first verify whether applicants meet the conditions for obtaining refugee status and only then whether they are eligible for subsidiary protection. The proper examination with a view to the issuing of a decision by the determining authority is also more comprehensive in the new directive because in addition to examining applications and taking decisions on an individual, objective, and impartial basis, obtaining accurate and up-to-date information, knowledge of the relevant standards by the staff of the authorities, it has also been added that the staff examining the applications and taking the decisions also have the possibility to consult experts on medical, cultural, religious, child, gender equality, and other issues. With regards to access to general information from the authorities examining the application and the adoption of rules on the translation of documents, these issues have been taken over from the old directive. The requirements regarding the decision of the determining authority (art. 11) are

26 European Union, 2008, Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals.

regulated similarly in both directives and recall that they refer to the communication of decisions in writing, their justification in fact and in law, the communication of information about the possibilities of challenging them, the absence of an obligation to communicate information if it has been communicated previously, and the adoption of a single decision for all dependants when the application is based on the same grounds unless this would lead to the disclosure of an applicant's personal situation or jeopardise their interests, especially if the persecution was based on gender, sexual orientation, gender identity, age, etc.

If we refer to the guarantees granted to applicants (art. 12), these are similar to those in the previous directive and in short, reiterate that they refer to informing applicants in a language they understand about everything involved in the procedure, providing an interpreter, the possibility of communicating with the UNHCR or another organisation for advice, communicating the decision within a reasonable time, informing them of the outcome of the decision in a language they understand, to which the new directive has added access for applicants and their advisers to accurate and up-to-date information obtained by the authorities and data obtained from consulting experts.

The regulations concerning the obligations of applicants (art. 13) are the same, though slightly more extensive in terms of the obligation to cooperate and body searches, but not essential in nature. The others, concerning informing the authorities of their presence and appearing before them, handing over documents, providing information about their current residence or address and receiving correspondence there, being photographed and having their oral statements recorded if they have been informed in advance, have not been amended.

Some interesting changes in the new directive concern the personal interview (art. 14). Thus, in addition to making the adoption of a decision conditional on a prior interview, it has also been established that when the interview concerns the substance of the application for international protection, it must be conducted by staff of the determining authority and not by other authorities, but by way of exception, if a large number of persons are seeking international protection, and the decision-making authority and its staff are unable to conduct the interviews, Member States may provide for the temporary involvement of staff from another authority in conducting these interviews, subject to prior training. In order to conduct interviews, it is also necessary to obtain general information on issues that could affect the applicant's ability to be interviewed if they have been subjected to torture in the past. The new regulation also allows any adult dependent on the applicant who has also submitted an application to participate in a personal interview, and these rules apply equally to minors. There are also changes regarding cases in which the personal interview may be omitted on the merits of the application, which are now only two in number and include the adoption of a positive decision, namely that the applicant cannot or is unable to attend the interview due to circumstances beyond their control. If the interview cannot take place for this latter reason or with the person dependent on the applicant, the applicant or the dependent person should be allowed within reason

to submit new information. In general, the absence of a personal interview does not prevent the determining authority from deciding on the application for international protection, and when the absence is due to circumstances beyond the applicant's control, this situation should not adversely affect the authority's decision. However, the applicant's failure to attend the interview may be taken into account unless there are valid reasons preventing him or her from attending. The requirements relating to the personal interview (art. 15) have been subject to new regulations concerning the conduct of the interview in conditions that allow the applicant to present all the reasons for his or her application and which, in addition to the competence of the person conducting the interview and the interview being conducted by a person of the same sex, also provide for the provision of an interpreter to ensure proper communication between the applicant and the person conducting the interview, in the language preferred by the applicant, the prohibition of the person conducting the interview from wearing military uniform, and interviews with minors to be conducted in a manner appropriate to them. Otherwise, the regulations concerning the conduct of the interview without the presence of family members except in exceptional cases, its confidentiality, and the presence of third parties at the interview are those of the previous directive. The content of the personal interview (art. 15) is a new regulation and concerns the possibility for the applicant to present the necessary elements to support their application as fully as possible, and to provide explanations regarding missing elements, inconsistencies, and contradictions in their statements. There are also regulatory changes regarding reports on personal interviews and their recording (art. 17), under which Member States are required to ensure that the personal interview is the subject of a detailed and factual report containing all the necessary elements or a transcript, but also the possibility of providing for audio or audio-video recording of the interview. These regulations also provide for the possibility of the applicant to make comments or clarifications, either verbally or in writing, on the content of the report or transcript, which are brought to their attention, a right that may be waived if the interview is recorded and the recording is admissible as evidence in appeals. For the same reasons, the applicant and his or her counsel are also granted the right to access the report, transcript, or recordings when the application is decided on its merits or, at the latest, on appeal. If the applicant refuses to confirm that the content of the report or transcript accurately reflects the interview, the reasons for the refusal shall be recorded in his or her file, but this shall not prevent the deciding authority from taking a decision.

The medical examination (art. 17) is also a new provision and involves the identification of signs of persecution or serious harm that have occurred in the past, provided that the applicant consents. It may be ordered by the determining authority, but Member States may also require the applicant to undergo such an examination. A refusal to undergo the medical examination will not prevent the determining authority from taking a decision on the application for international protection. Medical examinations are carried out by qualified medical professionals and are paid for from public funds. If the medical examination is not provided for in national law,

applicants may nevertheless undergo such an examination on their own initiative and at their own expense.

Legal assistance, as a general concept, has received increased attention in the directive, as it is broader in scope and introduces new elements. The first section of this issue concerns the provision of free legal and procedural information in first instance proceedings (art. 19). This means that applicants are provided with free legal and procedural information, which, in the event of a negative decision, also covers the reasons for the decision and available remedies. Legal assistance and representation may also be granted in proceedings at first instance, but Member States may provide in their legislation that this shall not take place in cases where the appeal which the applicant wishes to bring has no real prospect of success, in which case there is an obligation to ensure that an appeal against such a decision is available before a court on the one hand, and on the other hand that the Member State must ensure that there is no arbitrary restriction of free legal assistance and representation and no impediment to effective access to justice. The provision of free legal and procedural information and the granting of legal aid and free representation may be subject to certain conditions (art. 21). One of these conditions is that Member States may provide that all such free services are to be provided by non-governmental organisations, experts from government authorities, or specialised state services. Furthermore, it may be provided that these free services are granted to persons who do not have sufficient resources or through legal advisers or other specially appointed advisers. Another limitation of these services would be to grant them only for appeal proceedings, thereby depriving applicants who are no longer in the territory of the respective state of their benefits. Member States may also impose financial limitations, with fees and costs being granted as in the case of their own nationals but may also provide for full or partial reimbursement of costs when the applicant's financial situation improves. The right to legal assistance and representation at all stages of the procedure (art. 22), including the situation after a negative decision has been taken, is available to applicants at their own expense and consists of consultation with a legal adviser or other counsellors authorised for that purpose, in accordance with national law, in matters relating to applications for international protection, but Member States may allow non-governmental organisations to provide legal assistance and representation free of charge. The scope of legal assistance and representation (art. 23) primarily concerns the advisor's access to the information in the applicant's file on which the decision will be based. Restricting access to this information may be permitted on an exceptional basis if disclosure of the information or sources would jeopardise the national security of organisations, persons providing the information, or persons to whom the information relates, or if it would jeopardise investigations into applications for international protection or international relations between states. However, Member States may ensure access to information and sources for certain authorities and lay down in their national legislation certain procedures to ensure that the applicant's right of defence is respected, including by allowing access for his or her counsel, if he or she has been security cleared, where the information is relevant to

the examination of the application or to a decision to withdraw international protection. Member States shall also ensure that the adviser has access to restricted areas, such as specialised accommodation centres, for the purpose of consulting with the applicant, allowing the applicant to attend the personal interview accompanied by the adviser, with the proviso that the advisor's intervention may be limited to the end of the interview, adopting rules governing the presence of advisors at interviews conducted during the procedure, and requiring the applicant to be present at the personal interview even when their advisor is present and to answer the questions asked in person.

A new section refers to applicants who need special procedural guarantees (art. 24), a case that is assessed after submitting an application for international protection within a reasonable time, being integrated into the procedures already established, without the need to devise a separate administrative procedure. When such applicants have been identified, they will be supported in order to benefit from their rights and to comply with the obligations set out in the directive throughout the asylum procedure. If such support cannot be provided in accelerated procedures or in border procedures (which will be discussed below), especially if the applicant needs special procedural safeguards as a result of torture, rape, or other serious forms of psychological, physical, or sexual violence, these procedures will not be followed, in which case at least the safeguards relating to the right to an effective remedy (which will also be mentioned later) will be provided. These special safeguards will also be provided if information subsequently emerges regarding their necessity, without necessarily reopening the procedure.

Guarantees for unaccompanied minors (art. 25) are regulated in both directives, but more extensively in Directive No. 2013/32/EU, when in cases where it is naturally necessary, reference is also made to Directive No. 2013/33/EU (which will be further analysed). The provisions on ensuring the representation and assistance of unaccompanied minors by a representative, the representative's ability to inform the minor about everything involved in the personal interview and its consequences, the representative's ability to ask questions and make comments during the interview, the presence of the unaccompanied minor at the interview even if the representative is absent, have been supplemented with provisions on informing the minor about the appointment of the representative and the performance of their duties in accordance with the principle of the best interests of the child, on the need for the representative to have the necessary expertise in this regard, and on the replacement of the representative only if necessary. It is also interesting that it has been stipulated that organisations or persons who may come into conflict with unaccompanied minors cannot be their representatives. The new directive provides for a single case in which no representative will be appointed for an unaccompanied minor, namely the possibility of reaching the age of 18 before a decision is taken at first instance. The provisions stipulating that the interview of an unaccompanied minor must be conducted by a person with knowledge of the minor's special needs and that the decision on the asylum application of an unaccompanied minor must be drafted by an official with

the necessary knowledge in this regard, are similar in both directives. With regard to the medical examination to determine the age of unaccompanied minors, it has also been established that this shall be carried out if, on the basis of general statements or other relevant indications, Member States have doubts about the applicant's age, with the proviso that if, after the medical examination, doubts remain, the applicant shall be considered a minor. It has also been provided that the medical examination shall be carried out with respect for human dignity, using minimally invasive procedures, and by medical professionals who will ensure that a reliable result is obtained. Aspects relating to the information provided to unaccompanied minors, the expression of consent to undergo a medical examination, the invalidity of a decision to reject an application for international protection on the grounds of refusal to undergo a medical examination, not preventing the decision-making authority from deciding on the application for international protection when the minor refuses to undergo a medical examination, taking into account the best interests of the child when implementing the directive, are also similar to those in the previous directive. For the first time the new directive regulates the procedure to be followed when, during the asylum procedure, Member States identify a person as an unaccompanied minor, in which case they may continue the examination procedure specific to first instance procedures when the applicant comes from a country considered a safe country of origin (a concept that will also be addressed in first instance procedures), the applicant has lodged a subsequent application for international protection that is not inadmissible (a concept that will also be addressed in first instance procedures), and there are serious reasons to consider the applicant a danger to national security or public order, or he or she has been forcibly expelled for such reasons. Also in such a situation, the border procedure may be continued when an unaccompanied minor has been identified if: he or she comes from a safe country of origin; he or she has submitted a subsequent application; he or she may be considered a threat to national security or public order or has been forcibly expelled for serious reasons of security or public order; there are reasons to believe that a third country, which is not a Member State, is a third country alone for the applicant; the applicant has misled the authorities by presenting false documents; the applicant has destroyed or removed identity or travel documents in bad faith, which would have contributed to establishing his or her identity or nationality, the latter two cases may be taken into account strictly in individual cases and if the applicant attempts to conceal relevant elements that could lead to a negative decision and only if the applicant has been given the opportunity to justify these actions, even by consulting their representative. At the same time, in the case of an unaccompanied minor discovered at a later stage, Member States may: consider the application inadmissible if a country that is not a Member State is considered a safe country for the applicant, provided that this is in the best interests of the child; not grant legal aid and free representation, but offer the possibility of an effective remedy if the minor's representative has legal training in accordance with national law.

In all cases involving unaccompanied minors, they must at least be guaranteed the rights set out in the section on the right to an effective remedy if their application has been rejected as unfounded or inadmissible, when their application for the reopening of the case has been rejected, after it has been discontinued, if a decision has been made not to examine at all or in full, as will be seen in this procedure.

Detention (art. 26) is regulated in both directives, though slightly differently in the new directive, which prohibits the detention of a person solely on the grounds that they have applied for international protection, referring here also to Directive No. 2013/33/EU, as well as ensuring a rapid judicial review in the event of detention.

Before addressing the issue of first instance proceedings, this directive, like the previous one, regulates several situations that would effectively prevent the continuation of such proceedings, but not their initiation. The first concerns the explicit withdrawal of the application (art. 27), which stipulates that in such a situation, Member States must ensure that the responsible authority can either adopt a decision to discontinue the examination of the application or reject it, or discontinue the examination without adopting a decision, followed by the obligation to record this information in the applicant's file. Similar to the previous directive, in the case of the implicit withdrawal or implicit abandonment of the application (art. 28), Member States must take measures to ensure that the deciding authority also adopts a decision in accordance with the situation that has arisen, in the sense of terminating the examination or rejecting the application, except that under the new regulation, the latter solution may only be adopted if the determining authority considers the application to be unfounded following an examination of its merits on the basis of art. 4 of Directive 2011/95/EU discussed above. The implicit withdrawal or renunciation by the applicant of the application for international protection may be presumed when: the applicant has not complied with requests to provide essential information under those provisions of Directive No. 2011/95/EU; has not appeared for the personal interview (set out above), unless he or she demonstrates within a reasonable time that the circumstances arose for reasons beyond his or her control; has absconded or left without permission the place where he or she was staying or was detained without contacting the competent authority within a reasonable time or has not appeared regularly before the authorities, or has not fulfilled his obligation to communicate, both within a reasonable time, unless the impossibility of doing so was due to circumstances beyond his control. In order to implement these provisions, Member States may set deadlines or guidelines. Member States shall also ensure that the applicant has the right to request the reopening of his or her case or to submit a new application, which shall however, avoid the procedure for subsequent applications that will be presented below. Similarly, as a new element in this directive, Member States may stipulate a period of at least nine months after which the case cannot be reopened or the new application can be treated as a subsequent application with all the consequences that this entails, but also that the case can only be reopened once. It is also important that Member States must ensure that such a person is not expelled contrary to the principle of non-refoulement. Finally, as in the old regulation, these provisions allow

Member States to determine that the deciding authority should resume the review of the case from the point at which it was interrupted. The Directive also stipulates that these regulations do not affect EU Regulation 604/2013.

As in the previous directive, the new regulations highlight the role of the UNHCR (art. 29) and the organisations acting on its behalf in the territory of the Member State, i.e., to have access to applicants, information, and to present their opinions.

The method of collecting information on individual cases (art. 30) is regulated in the same way as in the previous directive, essentially referring to the non-disclosure of information on individual applications for international protection and the prohibition of obtaining information from the alleged perpetrators of serious harm in a manner that would inform them of the application and inevitably endanger the applicant and his or her family members.

The regulation of procedures at first instance begins with the examination procedure (art. 31), which introduces several new elements, including the comprehensive regulation of the time limit for its completion and a reduction in the number of cases in which the procedure is accelerated. Therefore, the examination procedure, which is based on compliance with the principles and guarantees presented above, involves processing applications for international protection as quickly as possible, in an appropriate and comprehensive manner. The initial six-month time limit for completing the procedure, as provided for in both directives, begins when the state responsible for examining the application is determined on the basis of EU Regulation No. 604/2013, and the applicant is present in the territory of that state and has been taken into custody by the competent authority, conditions which should be considered to be cumulative. The extension of the deadline by a new period of up to nine months has also been regulated, if there are complex factual and legal elements, a large number of nationals or stateless persons simultaneously request international protection, or the applicants fail to comply with their obligations under art. 13 (referred to above). The six- and nine-month time limits may be extended by three months in exceptional situations based on duly justified circumstances, when a proper and complete examination of the application for protection is necessary. The Directive also provides for the postponement of the conclusion of the examination procedure without prejudice to art. 13 and 18 of Directive No. 2011/95/EU, when the determining authority is unable to take a decision within the time limits referred to, due to an uncertain situation in the country of origin, which is of a temporary nature. In such a situation, Member States are required to review the situation in the country of origin every six months and to inform the applicants concerned, as well as the Commission, within a reasonable time, of the reasons for the postponement. The maximum time limit for completing the procedure is set by the directive as 21 months from the date of submission of the application, with the proviso that the starting point of this time limit differs from that set for the six-month time limit, being earlier than the latter. However, Member States may exceed the six-month time limit for postponing the conclusion of the procedure and the maximum time limit of 21 months if a proper and complete examination of the application for international

protection is necessary. As in the previous directive, it has been established that when a decision cannot be taken within the initial six-month period, the applicant shall be informed of the delay, provided with information on the reasons for the delay and the estimated time frame for a decision to be taken on his or her case. Priority in the examination of an application has been separated from the acceleration of the procedure, and for the first step, the likelihood that the application is well-founded or that the applicant is vulnerable under art. 22 of Directive No. 2013/33/EU or belongs to the category of applicants who need special procedural guarantees, such as unaccompanied minors, is taken into account. The examination procedure may be accelerated and carried out at the border or in transit zones in the following cases: when submitting the application and presenting the facts, the applicant has only invoked aspects that are not relevant for examining the conditions necessary to benefit from international protection; the applicant comes from a safe country of origin (a concept that will be explained shortly); the applicant has misled the authorities with regard to their identity, nationality, and the authenticity of their documents by presenting false information or documents or by concealing information and documents that would have had a negative impact on the decision; the applicant is likely to destroy or remove in bad faith those identity or travel documents that would have helped establish their identity or nationality; the applicant's statements are inconsistent, contradictory, false, implausible, and contradict well-verified information from their country of origin, which makes their application for international protection unconvincing; the applicant has submitted a subsequent application for international protection that is not considered inadmissible (as will be seen below); the applicant's request was only to delay or prevent the enforcement of a decision that had been made or was about to be made, which would lead to their expulsion; the applicant entered the territory of the Member State illegally or extended his or her stay illegally and, in addition, without good reason, did not report to the authorities or did not submit his or her application as soon as possible in relation to the circumstances of his entry into the territory; the applicant refuses to comply with the obligation to have his or her fingerprints taken in accordance with the relevant European legislation; on reasonable grounds, the applicant may be considered a threat to national security or public order, or the applicant has been forcibly expelled on serious grounds of security and public order under domestic law. The adoption of a decision by accelerating the procedure may be subject to reasonable time limits.

A new section on unfounded applications (art. 32) has been introduced in this directive, similar to the section on unfounded applications in the previous directive, under which Member States may consider an application to be unfounded if the determining authority has established that the applicant does not meet the conditions for international protection under Directive No. 2011/95/EU. In the case of such applications, for which the conditions for accelerated examination are met, Member States may also consider them unfounded if they are defined as such in national law.

The section on inadmissible applications (art. 33) is found in both directives, but with a reduction and modification of the cases in which an application may be

considered as such. Under both regulations, an application is considered inadmissible if it is not examined in accordance with EU Regulation No. 604/2013. The possibility for states to consider an application inadmissible concerns cases where: another Member State has granted international protection; a country that is not a Member State is considered to be the applicant's first country of asylum (a concept that will be addressed below); a country that is not a Member State is considered a safe third country; the application is considered as a subsequent application when no new information has emerged regarding the examination to determine whether the applicant meets the conditions for international protection under Directive No. 2011/95/EU; a person dependent on the applicant submits an application after having agreed to have their situation dealt with in an application made on their behalf, and there are no factual elements relating to that person that would justify a separate application. For the first time, special rules are provided for the interview on the admissibility of the application (art. 34), which stipulate that applicants shall be given the opportunity to express their views on the grounds for considering their applications inadmissible, and that the interview shall take place before the determining authority takes a decision on the matter. Member States may provide that staff of authorities other than the determining authority may conduct such an interview, provided that they have received basic training in this field.

As has been seen so far, there are several concepts whose definition and application determine the correctness of the resolution of an application for international protection. The first of these, with similar provisions in both directives, is "the concept of the first country of asylum" (art. 35), according to which a country can be considered as such for a particular applicant if he or she has been recognised as a refugee in that country and can still avail him or herself of the protection offered or if he or she benefits from sufficient protection in that country on other grounds, including the principle of non-refoulement, both options being conditional on his or her readmission to that country. Furthermore, in order to apply these provisions, states may also consider those relating to the concept of a safe third country. It is important to note that applicants have the possibility to challenge the application of the concept of first country of asylum to their personal situation. The concept of "safe country of origin" (art. 36) is regulated in both directives, with differences in their structure, and is considered to exist if the applicant is a national of that country or is a stateless person who previously had stable residence in that country and has not presented serious reasons for that country not to be considered safe in relation to his or her personal situation and the conditions that must be met in order to be eligible for international protection under Directive No 2011/95/EU. In the case of this concept, Member States may lay down rules and procedures for an application in their national legislation. At the same time, the directive also establishes the manner in which Member States may maintain and adopt legal provisions for the designation of safe countries of origin at a national level (art. 37), as well as the fact that their situation must be reviewed periodically. The assessment of a country as a safe country of origin must be based on several sources of information, in particular

those provided by other Member States, EUAA, UNHCR, the Council of Europe, and other relevant international organisations, after which Member States must communicate to the Commission which countries are considered as falling into this category. The concept of a “safe third country” (art. 38) is regulated in both directives with a single amendment, which will be highlighted as such. Therefore, the concept of a safe third country can only be applied if the competent authorities are certain that, in a given country, the applicant will be treated in accordance with the following principles: life and liberty are not threatened on grounds of race, religion, nationality, membership of a social group, or political opinion; there is no risk of serious harm as defined in Directive No 2011/95/EU (a new principle introduced in this directive); the principle of non-refoulement is respected; the prohibition of expulsion in violation of the right not to be tortured or subjected to cruel, inhuman, and degrading treatment is respected; there is a possibility of being recognised as a refugee and benefiting from international protection. The application of this concept of a safe third country is subject to the rules laid down in domestic law concerning; the need for a link between the applicant and the third country in question; the methodology by which the competent authorities ensure that this concept can be applied, which includes examining in each individual case the safety of the country for a particular applicant, and the designation by the Member State of countries considered safe; their compliance with international law, in the sense of allowing an individual examination of a particular situation to determine whether the concept of a safe third country can be applied and ensuring that the applicant has the opportunity to challenge the application of the concept in his case, as well as the link between him and that country. When a decision is taken based solely on the application of this concept, Member States are required to inform the applicant and provide him or her with a document informing the authorities of the third country that the application has not been examined on its merits. It is important to note that if the third country does not allow the applicant to enter its territory, Member States must allow the applicant to follow a procedure in accordance with the fundamental principles and guarantees set out at the beginning of the directive. When applying this concept, Member States must also inform the Commission of the countries considered to be safe third countries.

This new directive introduces a new concept through its regulations, namely that of a “safe European third country” (art. 39), under which a country can be considered as such if it has ratified and complies with the provisions of the Geneva Convention without geographical limitations, has a legally established asylum procedure, has ratified the ECHR and complies with its provisions, including standards relating to legal remedies. The application of the provisions relating to this concept allows Member States not to carry out a partial or full examination of the applicant’s request if it has been established that he or she is attempting to enter or has entered their territory illegally from a safe European country. Of course, the provisions of the directive establish the possibility of the applicant to challenge the application of this concept in his or her personal situation. Member States may lay down rules for the implementation of the concept, relating to the consequences of the decisions taken,

in compliance with the principle of non-refoulement, but also derogations from its application on humanitarian, political or public international law grounds. Even when a decision based on this concept is implemented, Member States must inform the applicant and provide them with a document informing the authorities of the third country that their application has not been examined on its merits. Member States shall also ensure that, if a safe European third country does not take back the applicant, they have the possibility to apply for a procedure in accordance with the principles and guarantees of the Directive and are required to inform the Commission of the countries to which this concept applies.

The procedure for subsequent applications (art. 39) is regulated in both directives, with certain differences and more extensively in the directive under review and assumes that a person who has submitted an application for international protection in a Member State is making new statements or submitting a subsequent application in the same Member State. In such a situation, the Member State will verify the new statements or elements of the subsequent application in the context of the examination of the previous application or the decision that is the subject of a judicial or administrative appeal, if at that time the authorities can take into account and consider the elements on which the new statements or applications are based. In the procedure for determining the inadmissibility of an application, a subsequent application for international protection is first subject to a preliminary examination to determine whether there are any new elements or data relating to the examination to establish whether the applicant meets the conditions for international protection. If the answer to this question is affirmative, the application is further examined in the light of the fundamental principles and guarantees laid down in the Directive. It should be noted that nothing prevents Member States from providing for other grounds for the further examination of a subsequent application. At the same time, states may provide for the application to be further examined if the applicant was unable, for reasons beyond his control, to bring new facts to light during the previous procedure, particularly in the context of an effective remedy, as regulated by the directive. When a subsequent application is not further examined, it is considered inadmissible, as was seen in the section on inadmissible applications. The directive also stipulates that the subsequent application procedure may be applied where a dependent person submits an application after having consented to the settlement of his or her case in an application submitted on his or her behalf, and where an unmarried minor submits an application after an application has been submitted on his or her behalf, as has been seen in the sections dedicated to these circumstances. In these two cases, the preliminary examination will also verify whether there are any facts that would justify a separate application. In the transfer procedure based on Regulation (EU) No. 604/2013, subsequent statements and applications submitted in the Member State making the transfer will be examined by the Member State responsible under that Regulation.

Alongside the negative consequences that subsequent applications may have, there are also exceptions to the right to remain (art. 40), not provided for in the previous directive, which mean that a person must leave the Member State. The cases in

which this occurs are: the submission of a new subsequent application which is no longer subject to examination, and which was made to delay or prevent the enforcement of a decision that would lead to his imminent expulsion from the Member State; the lodging of a subsequent application after a final decision has been taken to consider the first subsequent application inadmissible, or after a final decision has been taken to reject that application as unfounded. However, a return decision shall not be taken if it would lead to a breach of the Member State's international or European Union obligations. When making an exception to the right to remain on their territory, Member States may derogate from: the time limits applicable, especially in cases where the procedure is accelerated because the applicant is trying to delay or prevent the enforcement of a previous or imminent decision that would lead to expulsion; the time limits normally applicable in admissibility procedures, which have been outlined above; the procedure set out in the section on the right to an effective remedy.

The amendments in the new directive also mean that an applicant's failure to report to a reception centre or to the authorities is no longer regulated, and the procedural rules (art. 42) specific to subsequent applications have undergone several changes. These procedural rules are primarily intended to provide safeguards for applicants who submit subsequent applications. They also provide for Member States to lay down rules in their national legislation on preliminary examination, requiring the applicant to indicate the facts and provide evidence to justify a new procedure, allowing the preliminary examination to be carried out on the basis of written information alone, without a personal interview, with the exception of dependants and unmarried minors who have submitted a new application. At the same time, these rules must not make it impossible for the applicant to access a new procedure, or lead to the effective cancellation or drastic restriction of access. On the other hand, Member States must ensure that the applicant is informed of the outcome of the preliminary examination, the reason why his or her application is not being further examined, and the possibilities for appealing against the decision or requesting its review.

First instance procedures also include border procedures (art. 43), which are regulated in both directives, in a more restricted form and, naturally, with amendments in the second directive. According to these provisions, Member States may regulate: the adoption of decisions at the border or in transit zones on the admissibility of an application lodged in such places, which is in fact inadmissible; the substance of an application subject to the accelerated procedure. The directive stipulates that in border procedures, the decision must be taken within a reasonable time, not exceeding four weeks, otherwise the applicant must be allowed to enter the territory of the Member States so that his or her asylum application can be examined in accordance with the other provisions of the directive. If a large number of nationals or stateless persons submit applications for international protection at the border or in transit zones, border procedures may also be applied during the period when applicants are accommodated in places near the border or transit zone.

Both Directive No. 2013/32/EU and the directive reformed by it regulate the procedures for withdrawing international protection and refugee status under the previous directive, with the terminology being adapted to the new content and concepts. The first aspect concerns the withdrawal of international protection (art. 44), which may be examined when new elements or information come to light indicating that there are grounds to review the validity of international protection.

Procedural rules have also been laid down in the Directive for the withdrawal of international protection (art. 45) on the basis of which Member States must provide certain guarantees in this case, such as informing the beneficiary in writing that the competent authority is reviewing the conditions that led to the granting of such status and giving them the opportunity to present the reasons as to why their international protection should not be withdrawn in a personal interview or in a written statement. The rules of procedure also provide that Member States shall ensure that a competent authority obtains accurate and up-to-date information on the situation in the countries of origin of these persons and that this information is not obtained from the persecutor in a manner that would inform him or her that a particular person is the beneficiary of international protection and thereby place the beneficiary in danger. At the same time, Member States shall ensure that the decision of the competent authority is communicated in writing, that the decision is substantiated in fact and in law, and that it contains information on how to challenge it. If international protection is withdrawn, it is necessary to provide the beneficiary with legal assistance in accordance with the provisions of the Directive, as set out above. By way of derogation from all the procedural aspects outlined above, Member States may provide that international protection shall lapse if the beneficiary has renounced it or has become a citizen of the Member State concerned.

Similarly to the previous reformed directive, the last procedures included in the directive refer to appeals, except that the new regulations are more comprehensive. These procedures focus on the right to an effective remedy (art. 45) which must be brought before a court if it is directed against: a decision considering the application for international protection to be unfounded or inadmissible, taken at the border or in transit zones, or deciding not to conduct an examination by applying the concept of a safe European third country; a refusal to reopen the examination, if it is in a situation of the explicit or implicit withdrawal or abandonment of the application; a decision to withdraw international protection, within the framework of the procedure that has just been examined. In terms of its characteristics, an effective remedy must allow for a full and *ex nunc* examination of the facts and points of law by a court of first instance. Member States may set reasonable time limits and other rules necessary for the applicant to exercise their right. The directive also establishes that Member States may even provide for an *ex officio* review of decisions taken in border and transit zone procedures.

Furthermore, Member States may require applicants to remain on their territory until the time limit for exercising that right has expired or, if that right has been exercised, until the appeal has been decided. Similarly, it is the court that determines

whether or not the applicant remains on the territory of the Member State, if the decision taken has such a consequence and the law of the State does not provide for the right to remain, when: a decision has been taken to consider the application unfounded (in accordance with the provisions of the sections on unfounded applications and applications for which the procedure has been accelerated or examined at the border) or inadmissible; applications for the reopening of the case after it has been discontinued have been rejected; a decision has been taken not to examine or not to fully examine an application from a national under the procedure for determining a European safe third country. The directive stipulates that a court may decide that a particular applicant for international protection may remain on the territory of a Member State only in the case of procedures carried out at the border, if the applicant is provided with the necessary interpretation, legal assistance, and at least one week to prepare their application and submit arguments to the court in favour of granting their right to remain in the territory of the Member State until the procedure is resolved, and if the court examines the negative decision of the determining authority both in fact and in law. Member States may also allow the applicant to remain in their territory until the procedure determining whether the applicant may remain in the territory has been completed.

On the other hand, Member States may set time limits for the court to review the decision taken by the determining authority. Finally Member States may lay down in their national legislation the conditions under which an applicant is deemed to have withdrawn or implicitly abandoned their appeal and the rules on the procedure to be followed in such a situation. The general and final provisions (arts. 47–54) essentially refer to the possibility for public authorities to challenge administrative or judicial decisions in accordance with domestic law, respect for confidentiality during proceedings, cooperation between Member States and communication with the Commission, the preparation of a report on the application of the Directive, the conditions for transposition, transitional provisions, and the fact that the previous reformed Directive No. 2005/85/EC is repealed, so that any reference to that directive in any legislative act is deemed to refer to Directive No. 2013/32/EU.

European legislation on international protection has been supplemented by the adoption of Directive No. 2013/33/EU of the European Parliament and of the Council of 26th June 2013, laying down standards for the reception of applicants for international protection,²⁷ which is a recast directive introducing several substantive amendments to Directive No. 2003/9/EC, which it repeals. With regard to this new directive, given the aim of this chapter to present how European legislation in this area has been supplemented and developed, but also given that, unlike Directive No. 2013/32/EU, which has not been recast or repealed, but continues to apply, Directive No. 2013/33/EU was reformed and repealed by legislation adopted in 2024, and as such, an exhaustive presentation of it is not useful. Nevertheless, in order to highlight the legislative

27 European Union, 2013, Directive 2013/33/EU laying down standards for the reception of applicants for international protection (recast).

progress that has been achieved through it, the new elements it has brought should be briefly outlined here.

Therefore, considering the new institutions legislated through it and the legislative changes made, the new elements can be seen in the definitions section (art. 2), where terms and concepts that were not found in the previous directive have been explained. Within the general provisions on reception conditions, in the section on documents (art. 6), the last paragraph is newly introduced and refers to not requiring excessive and unnecessary documentation, and in the section on residence and free movement (art. 7), the new directive no longer includes the provision whereby Member States may require an applicant to remain in a place determined in accordance with national law. The most significant new element in the regulation is detention (art. 8–11), which, in addition to a section with this title, also presents other institutions that give it a unified whole regarding guarantees for applicants in detention, conditions of detention, detention of vulnerable persons, and applicants with special reception needs. The section on the schooling and education of minors (art. 14) has been expanded with two additional paragraphs, the first concerning the possibility for states to prohibit access to secondary education solely on the grounds that the minor has reached the age of majority, and the second concerning the fact that minors are entitled to preparatory courses, including language courses, if these facilitate their access to and participation in the education system. The section on employment (art. 15) has also been amended by setting a deadline of nine months from the date of submission of the application for international protection to the date when applicants have access to the labour market, as well as the conditions under which this occurs. The general rules on material reception conditions and medical care (art. 17) has undergone only a minor change in the last paragraph, which was expanded to include the provision of material reception conditions in the form of financial allowances or vouchers. The following sections have undergone minor structural or terminological changes, but a new section on the assessment of the special reception needs of vulnerable persons (art. 22) has been introduced. The development of regulations without any substantial changes, concerned minors, namely unaccompanied minors (art. 23–24), and victims of torture or violence (art. 25) has obtained a new regulation concerning the training of personnel dealing with them. With regards to legal remedies (art. 26), there are new regulations concerning cases where legal aid and free representation are either granted or not, the setting of financial limits, and the conditions for reimbursement of expenses. The other provisions in the final sections are similar in content to those in the reformed directive.

These few references, which at first glance appear telegraphic, are nevertheless intended to achieve the transition to the new legislative act which, as already mentioned, reformed and at the same time repealed Directive No. 2013/33/EU. This is EU Directive No. 2024/1346 of the European Parliament and of the Council of May 14th 2024, establishing standards for the reception of applicants for international

protection.²⁸ It is part of a broader legislative package, consisting of the aforementioned directive and several other regulations, which have aimed to bring about a comprehensive reform of the field of international protection.

The explanatory memorandum to this directive notes that, in addition to the desire for a common asylum policy and references to the Geneva Convention and the New York Protocol, which are also found in other directives on the subject, reference here is also made to the Common European Asylum System (hereinafter CEAS), which although has made progress, still shows significant differences between Member States, with consequences in terms of secondary movements and the unequal treatment of applicants wherever they lodge their application for international protection in the Union. Obviously, the explanatory memorandum is as usual extensive, but it is believed that the issues referred to here need to be highlighted, since they are succinctly supplemented by the subject matter of the directive (art. 1), which calls for the establishment of standards for the reception of applicants for the international protection in Member States, as in the previous, repealed directive.

With regard to the definition of certain concepts and terms (art. 2), the new directive differs in that it addresses several new concepts such as daily allowance, risk of absconding, and absconding, and the concept of public custody practically replaces that of detention, introduced in the previous directive with a new broad section to which was briefly referred to above, but which will be presented in detail here, because it replaces detention as terminology and more.

Similar to the old directive, the scope (art. 3) directs the regulations of the directive towards all third-country nationals and stateless persons, with two conditions: firstly that they submit an application for international protection on the territory of a Member State, at the external border, in its territorial sea or in transit zones; and secondly that they are allowed to remain in that territory as applicants. The directive also covers the applicant's family members, on the sole condition that they are included in the application for protection, excluding other categories of persons such as those seeking diplomatic asylum. An important point to note here is that Member States may decide to apply the provisions of the directive to forms of protection other than those established by Regulation (EU) No. 2024/1347, which will be discussed later.

At the same time, as is always the case with directives, including the previous one, Member States are allowed to adopt more favourable regulations through domestic legislation (art. 4), on the simple condition that they are compatible with the directive.

The conditions for receiving applicants contain general provisions which first address information (art. 4), as in the previous directive, but in a more comprehensive and modern way. Thus as soon as possible and in a timely manner, nationals must receive from Member States information on the reception conditions regulated by this directive, on their national reception system, in order to be able to exercise their

28 European Union, 2024, Directive (EU) 2024/1346 laying down standards for the reception of applicants for international protection.

rights and fulfil their obligations arising therefrom. The information on reception conditions in this directive may be standardised and subject to a model developed by the European Union Agency for Asylum, within a maximum period of three days, in accordance with Regulation (EU) No. 2024/1348, which will be presented later. The information must also include details of organisations or groups of persons providing assistance and legal representation for a fee or free of charge. The information may be provided in writing, in a form that is easily understood by the applicants, in a language they can understand, but it may also be provided orally or even visually, through pictograms or video materials. In the case of unaccompanied minors, the content and manner of conveying information must be adapted to their age, and take place in the presence of their representative, in written, oral, or visual form, especially if the language they understand is rare, and provided that the minor confirms that they understand what is being communicated. If the information is provided orally or visually, it shall also be provided in writing in the case of minors, unless it is clear that this is no longer necessary.

In the new directive, the rules on documents (art. 4) are more concise and provide, on the one hand for the issue of the document referred to in art. 29:1 of Regulation (EU) No. 2024/1348 to applicants, and on the other, limiting Member States' ability to require applicants to provide numerous and unnecessary documents or to fulfil administrative requirements in order to grant them their rights. Where applicants need to be present in another Member State for serious humanitarian or other imperative reasons, Member States may issue them with travel documents whose validity is strictly limited to the purpose and duration for which they were issued.

A new feature of this directive was the regulation of reception systems (art. 7), which incorporated some of the provisions of the section entitled "Residence and freedom of movement" from the previous directive, while other provisions were included in the section entitled "Restrictions on freedom of movement" in the new directive, as will be seen below. The first aspect concerns the possibility for applicants to move freely within the territory of the Member State, and the second aspect concerns the possibility for Member States to organise their reception centres as they wish, provided that they comply with the provisions of the directive, including the distribution of applicants in accommodation facilities on their territory, in order to be able to manage their asylum and reception systems, as long as this does not restrict the exercise of applicants' rights. The actual presence of applicants in the accommodation where they have been represented may be a condition for ensuring the material reception conditions by Member States. Similarly they may establish mechanisms for assessing and addressing the needs and presence of applicants in accommodation facilities, but also require applicants to provide their contact details and notify any changes thereto. It is also important to note that the directive does not oblige Member States to take administrative decisions within the provisions of this article.

The distribution of applicants within a specific geographical area (art. 8) is also a newly introduced section, which aims to limit the right of free movement of

applicants to a specific geographical area in order to ensure the rapid processing of their applications, for the geographical distribution of those applicants and even for the entire duration of the international protection procedure, these are aspects about which applicants are informed. The geographical area must ensure that applicants have access to the rights and guarantees to which they are entitled under this Directive, be large enough to allow access to the necessary public infrastructure and not affect their private life. Even in this situation, Member States are not obliged to take administrative decisions. Permission to leave the geographical area temporarily may be granted by Member States if the applicant requests it on the grounds of urgent and serious family reasons, or for medical treatment that cannot be provided in the geographical area established. Leaving the geographical area without permission only allows the Member State to apply sanctions in accordance with this Directive. An applicant who leaves the area to appear before the authorities and courts is not required to request permission but must inform the competent authorities of this fact. If during an appeal or judicial review, it is established that the applicant has been deprived of the exercise of his or her rights in that area, his or her allocation to that area shall no longer apply. It is important to note here that the provisions of this article will only apply once the Member State has laid down the conditions for its application in national law and then informed the Commission and the Asylum Agency on the basis of Chapter 5 of Regulation (EU) No. 2021/2303.²⁹

Although the following section on “restrictions on free movement” (art. 9) appears to be a continuation of the section on “residence and freedom of movement” in the previous directive, in addition to taking up only a few ideas, it also regulates new issues. Firstly, the provisions of this section allow Member States to decide that a particular applicant should reside in a specific place for the accommodation of applicants, if there are reasons of public order or risks of absconding, and the location allows this to be done effectively, especially in the case of applicants who are required to be present in that Member State or who have been transferred to the Member State where they are required to be present after absconding to another Member State. The obligation to be present is assessed in accordance with art. 17(4) of Regulation (EU) No. 2024/1351, which will be addressed after this directive. A possible temporary stay outside the designated place may be granted by Member States at the applicant’s request, in which case decisions shall be taken objectively and impartially, taking into account the applicant’s personal circumstances, and if they contain a negative response, they must be justified. When the applicant has to appear before the authorities and courts, he or she does not have to ask for permission but is required to inform the authorities of such movements. Finally decisions concerning the obligation to remain in a certain place or permission to leave that place must be proportionate, relate to the applicant’s situation, be justified in fact and in law, and applicants must

29 The referral is made to: European Union, 2021, 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.

be informed of their adoption and content in a language they understand, in a clear and easily understandable form. These decisions must be subject to *ex officio* review by a judicial authority, especially when they apply for a period of more than two months.

Being taken into public custody (art. 10), the new concept that was introduced in this directive, takes over the sections on detention from the previous directive, where as was seen above, it was first introduced in the brief presentation of the latter. Although the regulations concerning public custody procedures are separated into four articles, it can be understood that they are interdependent, correlate with each other, and together regulate an institution recently considered by European legislation, which could simply be called public custody. Before addressing public custody procedures, it would be appropriate to show what this refers to, and the definition can be found, as mentioned above, in the definitions in the directive, where ‘taking into public custody means any measure of isolation of an applicant by a Member State in a specific place, where the applicant is deprived of his or her freedom of movement’ (art. 2(9)). The first procedure regulated is taking into public custody, where on the one hand, it is stated that this is not punitive in nature, i.e., it is not a sanction or punishment for the applicant, and on the other hand it is established that the measure must not be taken solely on the grounds that the person is an applicant or because of the applicant’s nationality. At the same time, it appears that this measure must also be taken as a last resort, i.e., when less coercive measures cannot be effectively applied. If an applicant is taken into public custody on the basis of existing possible data, it must also be determined whether he or she belongs to the category of applicants with special reception needs, a situation regulated further on in the directive, and if the assessment of the applicant has not been completed, it must be expedited and its results must form the basis for the termination or modification of public custody. The Directive establishes the grounds on which an applicant may be taken into public custody as follows: to establish or verify his or her identity or nationality; to establish the elements on which the application for international protection is based and which could not be achieved without taking him or her into custody, especially if there is a risk of absconding; when it is necessary to comply with the obligations imposed on the applicant, within the restrictions on free movement, if the applicant has not complied with them and there is a risk of absconding; when it is necessary to decide on the applicant’s right to enter the territory if the procedure is carried out at the border; if the return procedure is initiated on the basis of Directive No. 2008/115/EC of the European Parliament and of the Council, with all the requirements and consequences that this entails; in order to protect national security or public order in accordance with Article 44 of Regulation (EU) No. 2024/1351, with the proviso that all these grounds must be included in the domestic legislation of the Member States. Equally, Member States must provide for alternative measures in their national legislation, such as regular contact with the authorities, the provision of a financial guarantee, and the obligation to remain in a specific place.

For applicants under public custody, the directive also provides for safeguards (art. 11). The first refers to the shortest possible duration of public custody and its maintenance only for as long as necessary, based on the reasons presented above. Administrative procedures relating to detention must be carried out with care, and delays in these procedures that are not attributable to the applicant cannot justify the continuation of public custody. Public custody must be ordered in writing, must be justified in fact and in law, and must contain explanations as to why no alternative measures can be taken. Rapid judicial review must be ensured if the detention is ordered by the administrative authorities, and the procedure may be initiated *ex officio* or at the request of the applicant. Judicial review conducted *ex officio* or at the request of the applicant must be completed as soon as possible and, as a rule, within 15 days, or exceptionally within 21 days. Failure to comply with these time limits shall result in the immediate release of the applicant. At the same time, applicants must be informed immediately in writing and in a language they understand, of the reasons for their detention, the procedures laid down in domestic law for challenging the detention decision, and the possibility of requesting free legal assistance and representation, access to which must be provided free of charge by the Member States. It is also required that the detention be reviewed by a judicial authority at reasonable intervals, either *ex officio* or at the request of the applicant, especially if the duration is prolonged and if new elements arise that could call into question the legality of the detention. In the case of unaccompanied minors in such a situation, judicial review shall be carried out *ex officio* at regular intervals. If the detention is found to be unlawful, the applicant must be released immediately.

The conditions for taking into public custody (art. 12) provide for the placement of applicants in specialised centres, and if these do not exist, placement may be carried out in a prison, provided that the applicant is separated from other detainees and the provisions of the directive are applied. The separation will also apply to other nationals in public custody, and if this is not possible, the provisions of the directive must be applied. Applicants must have access to open spaces during public custody. Member States must ensure that representatives of the UNHCR or organisations acting on its behalf can communicate with and visit applicants, while respecting their privacy. The same opportunities must be provided to family members, legal or other advisers, and representatives of relevant non-governmental organisations. These opportunities may be restricted if, under domestic law there is an objective need based on security, public order, and the management of the centre, but only if these restrictions do not drastically limit or even prevent access. Member States must provide applicants in public custody with all information relating to the applicable legislation, their rights and obligations, in a language they understand, and the derogation from this obligation applies to situations where the applicant is detained at the border or in a transit zone, provided that the duration is as short as possible and that the derogation does not apply in the cases provided for in art. 43 of Regulation (EU) No. 2024/1348.

In the case of applicants with special reception needs (art. 13), their placement in public custody has several particularities. A first category of applicants with special

reception needs are those with health problems, which is why, if taking them into custody would seriously endanger their physical and mental health, they are not taken into public custody. There are exceptions to this rule, which require the monitoring of applicants and the provision of necessary and timely support, taking into account their individual situation and state of health. The second category of applicants with special needs is minors, for whom the rule is also that they are not taken into public custody, but are placed in appropriate accommodation, in accordance with the provisions of this directive, which will be referred to shortly. In cases where there are families with minors among the applicants, alternative methods must be used, based on the principle of family unity, and they must be placed in suitable accommodation. There are exceptions here too, involving taking families into public custody, but only as *ultima ratio*, if it has been established that alternative measures cannot be applied, when it is in their best interests in accordance with the provisions of the directive, and if one of the following two cases applies: the minors are accompanied, and the parent or guardian is taken into public custody; the minors are unaccompanied and are taken into public custody to ensure their protection. If minors are taken into public custody, it must be for a short period of time, minors must not be placed in prisons or other similar institutions, they must be released as soon as possible and placed in accommodation suitable for minors. Accommodation for minors must be staffed by qualified personnel and adults must not be accommodated there. Separate accommodation for minors may include exceptions regarding the use of common areas. It should be emphasised that all these activities are subordinate to the best interests of the child, which implies, among other things, ensuring the right to education, unless the period of custody is too short and this right cannot be exercised, participation in other activities such as leisure, play, recreation, etc. As regards families in public custody, the provisions of the directive stipulate that they must be provided with separate accommodation to ensure their privacy, and if they include minors, the accommodation must be in centres suitable for minors. Male and female applicants must be accommodated separately, but they may also be accommodated together if they are members of the same family and all those concerned have given their consent to live together. Another situation in which unaccompanied minors may be taken into custody and accommodated in facilities suitable for unaccompanied minors is when this occurs at the border or in the transit zone, with the exception of the situations provided for in art. 43 of Regulation (EU) No. 2024/1348, but the period must be reasonable, as short as possible, and limited to exceptional situations. In the event of such a derogation, Member States must inform the Commission and the Asylum Agency.

The provisions of the previous directive concerning families (art. 14) and medical examinations (art. 15) are also included in the new directive, with a clear focus on maintaining family unity, but also on subjecting applicants to medical examinations for reasons of public health.

Similar provisions are included in both directives with regards to the schooling and education of minors (art. 16), on which basis Member States are required to

provide the same level of access to education as for their own nationals if applicants have minors or are minors themselves. To this end, the specific needs of minors in exercising their right to education and health must be taken into account, and the education of minors must be integrated with that of Member State nationals, be of the same quality, and ensure continuity. Minors cannot be denied access to secondary education simply because they have reached the age of majority. Access to a general education system should happen as soon as possible and within a maximum of two months from the date of application, taking into account school holidays, with the mention that education can also be provided outside the general education system on a temporary basis. Furthermore, if the specific situation of the minor does not allow for their integration into the general education system, then Member States must find other ways to educate minors. In the same context, minors should benefit from preparatory courses, including language courses, in order to be integrated into the education system.

The section on employment is also regulated in the previous directive (art. 17), but in the latter the provisions are much broader, introducing new elements.

Access to the labour market is granted to applicants in accordance with domestic law within a maximum of six months from the date of registration of the application for international protection, this period may be extended if the competent authority has taken an administrative decision to that effect or if the extension is due to the applicant. Access to the labour market shall not be granted or shall be withdrawn if the Member State has accelerated the examination of an application on the merits pursuant to art. 42:1 (a)–(f) of Regulation (EU) No. 2024/1348. On the other hand, for reasons related to labour market policies or the level of youth unemployment, if there is a vacancy that can be filled by its own nationals, other EU citizens, other third-country nationals, and stateless persons legally residing in the Member State, the applicant's application for employment in that position may be rejected. Member States shall ensure that applicants who have access to the labour market are treated in the same way as their own nationals in general terms, with regards to employment conditions, freedom of association, education and vocational training, recognition of diplomas, access to appropriate assessment systems, etc. Restrictions on equal treatment may occur through their exclusion from: participation in the management of public law bodies and the exercise of a function governed by public law; the granting of subsidies and loans related to education and vocational training; education and vocational training not provided under an employment contract. With regards to the recognition of diplomas and access to appropriate assessment systems, a restriction may be imposed for a period of at least three months from the date on which the application was registered. Applicants also enjoy equal treatment with Member States' own nationals in terms of their entitlement to social benefits, but those that do not depend on periods of professional activity or contributions may be excluded. It is important to note that the right to equal treatment in relation to employment does not confer a right of residence on a national if in accordance with Regulation (EU) No. 2024/1348, the applicant's right to remain in the territory of the Member

State has been withdrawn. The recognition of qualifications obtained abroad for applicants who cannot provide supporting documents for their qualifications should be facilitated by Member States. Finally, it should be emphasised that access to the labour market cannot be withdrawn during the period of appeal, when the applicant has the right to remain in the territory of the Member State concerned and during the proceedings, until notification of a decision rejecting the appeal.

Language courses and vocational training (art. 18), as another section regulated in the directive, takes over a previous section of the old directive and introduces a new element concerning language courses. According to this section, applicants are guaranteed access to language courses, civic education, and vocational training if these are useful to them, even if they do not have access to the labour market. Applicants are required to cover or contribute to the cost of these courses, only if they have sufficient financial means.

The general provisions on material reception conditions and medical assistance (art. 19) are regulated in both directives in a similar manner, with minor changes introduced by the latter directive. According to these provisions, Member States must ensure that applicants have access to material reception conditions from the moment they submit their application for international protection in accordance with art. 26 of Regulation (EU) No. 2024/1348, and that these conditions provide them with an adequate standard of living, especially if they have special reception needs or are in public custody. Member States may make the full or partial provision of material reception conditions dependant on applicants not having sufficient resources to ensure an adequate standard of living. The obligation for applicants to bear or contribute to the cost of material reception conditions and medical care, or to reimburse the cost thereof, may only apply if they have sufficient resources to do so. In such a case, Member States must comply with the principle of proportionality. Where Member States provide material reception conditions in the form of financial allowances or vouchers, their value must be set either by law or in practice, in such a way as to ensure an adequate standard of living, which may be lower than that provided to nationals, and Member States must inform the Commission and the Asylum Agency of the levels set.

The new directive regulates, as the previous one did, the material conditions of reception (art. 20), similarly, with non-substantive changes and a few additions. These conditions directly concern accommodation in kind, which must ensure applicants an adequate standard of living and take place in premises specifically designated for the accommodation of applicants, in accommodation centres, houses, apartments, hotels, etc. Within the accommodation facilities, it is necessary to guarantee the protection of privacy, the possibility of communicating with relatives, counsellors, representatives of the UNHCR, other relevant bodies and organisations, as well as their access to applicants. At the same time, the provision of material reception conditions must take into account issues related to gender and age, the situation of applicants with special reception needs, the prevention of aggression and violence, the existence of specific facilities for mothers and their minor children, and the situation of dependent adult

applicants who should be accommodated together with their relatives already present in the territory of the Member State. With regards to the transfer of applicants from one location to another, the directive stipulates that this should only take place, when necessary, with applicants having the opportunity to inform their advisors of this fact. Those responsible for providing material reception conditions must be adequately trained, and Member States may even involve asylum seekers in the management of material resources and the non-material aspects of their lives. The directive also provides for the possibility of states to grant material reception conditions that differ from those already set out, on an exceptional basis, for as short a period as possible, where an assessment of the applicant's special reception needs is required, where the accommodation capacities normally available are temporarily exhausted, or where the large number of applicants makes them insufficient. Where material reception conditions are below the level set by the Directive, Member States must immediately inform the Commission and the Asylum Agency so that the contingency plan can be activated, but also when the reasons for activating it have ceased to exist.

As a new feature compared to the previous directive, a new section has been added concerning the conditions for admission to a Member State other than the one in which the applicant is required to be present (art. 21), which occurs when a decision has been made to transfer the applicant to the Member State responsible in accordance with Regulation (EU) No. 2024/1351, which is required to ensure reception conditions that comply with the standards of living required by European legislation. This situation is brought to the applicant's attention.

Medical assistance (art. 22) is regulated in both directives, the latter being slightly more comprehensive, where it establishes the obligation of Member States to ensure that applicants, wherever they are, receive medical assistance provided by general practitioners or specialists, that it is of adequate quality, including at least emergency care, the basic treatment of illnesses, especially serious mental disorders, and sexual and reproductive health services essential for the treatment of a serious physical condition. Medical assistance for children must be at the same level as that provided for children who are nationals. In the case of applicants with special reception needs, medical assistance must be adapted to those needs.

A slightly broader version also regulates the limitation or withdrawal of material reception conditions (art. 23), which provides for the possibility for Member States to do so when the applicant: leaves the geographical area or place of residence established without the necessary permission, or absconds; does not cooperate with the authorities or does not comply with the established procedural requirements; has submitted a subsequent application in accordance with art. 3(19) of Regulation (EU) No. 2024/1348; has concealed the fact that he or she has financial resources, thereby unduly benefiting from material reception conditions; or has seriously or repeatedly violated the rules of the accommodation centre, behaved violently or threateningly within it; does not participate in mandatory integration measures, except in circumstances beyond the applicant's control. If the Member State has taken a decision to restrict material reception conditions for the first two and last grounds, and these

have ceased to exist, Member States may restore all or part of the material conditions, and the decision taken shall be notified to the applicant. Decisions to limit material conditions must be taken objectively and impartially, after a thorough examination of the applicant's case, and must state the reasons on which they are based, taking into account the principle of proportionality, especially if the applicant concerned has special reception needs.

This directive pays particular attention to applicants with special reception needs (Chapter IV), which were also covered by the previous directive, but are now more developed and refer back to the terminology used in Directive No. 2003/9/EC instead of "vulnerable people".

First, the persons most likely to be applicants with special reception needs are listed (art. 24), namely: minors; unaccompanied minors; persons with disabilities; elderly persons; pregnant women; lesbian, gay, bisexual, transgender, and intersex persons; single parents with minor children; victims of trafficking in human beings; persons suffering from serious illness; persons with mental disorders including post-traumatic stress disorder; persons who have suffered torture, rape, or other serious forms of psychological, physical, or sexual violence.

The directive further regulates, in a more extensive form than in the previous one, the assessment of special reception needs (Article 25), which must be individualised and carried out as soon as possible after the submission of an application for international protection. It may be integrated into existing national procedures or into the assessment provided for in art. 20 of Regulation (EU) No. 2024/1348. The assessment identifies special reception needs, taking into account visible signs, statements or the behaviour of the applicant, statements of the parents or representative of the applicant. The assessment must also be completed as soon as possible, with the directive setting a deadline of 30 days from the date of submission of the application for international protection or a deadline provided for in art. 20 of Regulation (EU) No. 2024/1348. It is clear that if special reception needs are identified at a later stage of the international protection procedure, Member States must assess and address them. Moreover, the support provided to this category of applicants must take into account their special reception needs throughout the international protection procedure, and their situation must therefore be monitored accordingly. The provisions of the directive in this section also apply to staff assessing special reception needs, in relation to which it stipulates that they must: receive training to enable them to identify signs of special reception needs; include in the applicant's file information on the nature of the special needs including a description of the visible signs indicating them the measures established to respond to the special needs; refer applicants to the competent doctor and psychologist for further assessment, if their consent is obtained beforehand or afterwards, in which case an oral translation of the information provided to applicants may be used, carried out by specialised translators or, in their absence, by any other adult. The Directive prohibits the assessment procedure from taking the form of an administrative procedure, from being intended for categories of applicants

other than those with special needs, and from affecting the assessment carried out on the basis of Regulation (EU) No. 2024/1347.

The situation of minors is also regulated in the new directive (art. 26), similarly to the previous directive, with a small addition to the provisions. Here too, the focus is on the best interests of the child, which are considered a priority for Member States, who must ensure a standard of living adequate for the child's physical, mental, spiritual, moral, and social development, for the child's development in all areas. The factors underlying the analysis of the best interests of the child relate to: family reunification, the minor's well-being and social development, his or her safety and security, and the minor's views in accordance with his or her age and maturity. Member States are required to ensure that minors have the opportunity to participate in various leisure, recreational, and outdoor activities, but also that they have access to school materials. When minors have been victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman, and degrading treatment, or armed conflict, Member States must ensure that they have access to rehabilitation services, mental health care, and qualified assistance designed for such victims. The accommodation of minors is specific and requires them to live with their parents, an adult family member responsible for them, or their unmarried brothers and sisters. The directive prohibits persons working with minors from having a criminal record involving children and also stipulates that they must receive initial and ongoing training and respect the confidentiality of data relating to their work.

The section on unaccompanied minors (art. 27) is found in both directives, but it is much more developed in the current one. In the case of this category of applicants, an important role is played by the representative who is assigned to an applicant if he or she claims to be a minor or there are objective reasons to believe that he or she is a minor. The provisions of the directive establish the appointment of a provisional representative and then the appointment of a permanent representative within 15 working days from the date of submission of the application for international protection. The permanent representative may be the same person as that referred to in art. 23:2 of Regulation (EU) No. 2024/1348. In order to fulfil this obligation, Member States must include in their contingency plans (which will be discussed shortly) measures to ensure the appointment of representatives and persons acting in a temporary capacity if they are faced with a large number of applicants who are unaccompanied minors. If the contingency plans are not sufficient to cope with a large number of requests, the appointment of representatives may be postponed by ten working days, and the number of unaccompanied minors who can be assigned to a representative may be increased from a maximum of 30 minors, as stipulated in the directive, to 50 unaccompanied minors, a situation about which the Commission and the Asylum Agency must be informed. If there is evidence to suggest that the applicant is undoubtedly over 18 years of age, the Member State is not required to appoint either a temporary guardian or a representative. Member States shall ensure that the temporary guardian and the representative are informed of their appointment, and that the minor is informed of the persons appointed. After their appointment, the temporary guardian

and the representative shall meet with the minor and take into account his or her views on his or her needs, their duties ending if, on the basis of art. 25:1 of Regulation (EU) No. 2024/1348, the competent authorities consider that the applicant is not a minor or ceases to be an unaccompanied minor. When an organisation is appointed as a temporary guardian or representative, it in turn appoints a natural person to perform the tasks set out in the directive.

The obligation to provide information is also incumbent upon the competent authorities, except that in their case it concerns: informing the unaccompanied minor that a representative has been appointed and how he or she can lodge a complaint against that representative in conditions of trust and safety; informing the authority responsible for ensuring reception conditions that a representative has been appointed for the minor; and informing the representative of relevant matters concerning the minor. The temporary guardian or representative may be replaced only when necessary, especially when they have not performed their duties properly. It is important to note that organisations or individuals who are or could be in conflict with the interests of the minor are not to be appointed as temporary guardians or representatives. In the same vein, states must establish administrative or judicial authorities to supervise the performance of tasks by persons with a temporary role and representatives, in accordance with the provisions of the directive, but also to examine complaints lodged by minors against persons with a temporary role and representatives.

Concerning the placement of minors, the directive stipulates that this must extend from the date of their admission to the territory of a Member State until the date on which they must leave that territory and must take place: with adult members of their family; in a host family; in specialised centres for minors; in other accommodation suitable for minors. Minors may be placed in accommodation centres intended for adults if they are at least 16 years old and this is in the best interests of the child. For the same reasons, brothers and sisters from the same family should be kept together. It should also be noted that as soon as a request for protection is made by an unaccompanied minor, Member States shall start searching for the minor's family members with the help of international organisations or other relevant organisations, with all activities being carried out in confidence, if there is a possible threat to the life or physical integrity of a minor or close relatives, especially if they have remained in the country of origin.

Aspects relating to victims of torture or violence (art. 27) have been regulated similarly in both directives and aim to ensure medical and psychological treatment, the provision of necessary care for the harm caused, rehabilitation and counselling services, in cases where applicants have been subjected to human trafficking, torture, rape, serious psychological, physical, or sexual violence, etc. The provisions require the provision of oral translation for this category of victims and rapid access to the specific services mentioned above. Here too, it is established that the staff dealing with such victims have appropriate initial and ongoing training and are bound by confidentiality regarding their work.

There are few differences between the provisions of the two directives concerning appeals (art. 28), a section requiring Member States to ensure that decisions on the granting, withdrawal, or reduction of benefits, on the refusal to grant permission to temporarily leave the geographical area to which applicants have been assigned, and on restrictions on freedom of movement affecting applicants individually, may be subject to appeal under the procedures provided for by national law or at least to appeal or judicial review in fact and in law before a judicial authority. In such proceedings, Member States must provide free legal assistance and representation, including all related services, if they are necessary for effective access to justice. These legal services shall be provided by legal advisers or other qualified persons in accordance with national law, provided that their interests are not or cannot be in conflict with those of the applicant. Free assistance and representation may not be granted if the applicant has sufficient financial resources or if it is considered that the appeal or judicial review has no real chance of success, especially if it is at its second or higher instance.

However, the decision not to grant free legal aid and representation must be open to challenge when taken by authorities other than judicial authorities. With regards to the costs of legal assistance and representation, the directive stipulates that Member States may impose financial limits or time limits on their provision, provided they do not arbitrarily restrict access to these services, and that equal treatment with their own nationals may be established with regards to fees, costs, and other reimbursements. Reimbursement, whether total or partial, of the costs incurred for free legal assistance and representation, may take place, but only depending on the applicant's financial situation, as stipulated in Regulation (EU) No. 2024/1348, or when the provision of these services was based on false information provided by the applicant. The Directive also provides for Member States to establish all necessary and specific procedural rules from the submission of the application to the provision of these legal services.

The last chapter of the directive, entitled “Measures to increase the efficiency of the reception system”, first contains regulations on the establishment of competent authorities (art. 30) by each Member State to fulfil the obligations arising from the directive, as well as their obligation to inform the Commission if any changes occur in this regard. Member States are then required to establish a system for the guidance, monitoring, and control (art. 31) of reception conditions in accordance with the standards developed by the Asylum Agency in accordance with art. 13 of Regulation (EU) No. 2021/2303. Contingency planning (art. 32) is the next section under which Member States, after consulting with the relevant entities, shall establish the measures necessary to ensure good reception conditions for applicants in accordance with the provisions of the Directive. A contingency plan may be drawn up using a template developed by the Asylum Agency and must be reviewed at least once every three years, with any changes or its activation being notified to the Agency. Regarding staff and resources (art. 33), the provisions of the directive emphasise the importance of continuous training and the integration of staff training into the European asylum

training program. At the same time, Member States must ensure that all necessary resources, such as staff, translators, and interpreters, are available to implement the directive. Monitoring and evaluation (art. 34) allow for the Commission to draw up a report on the application of the directive, proposing any necessary amendments where appropriate, and communicating it to the European Parliament and the Council. At the request of the Commission, Member States shall provide the information necessary for the preparation of the report, and the timetable for the fulfilment of the tasks by all those involved shall be established here. Under the section on transposition (art. 35), Member States must adopt all the laws and administrative measures necessary to comply with the Directive, indicating the relevant articles, and immediately communicate the legal provisions adopted to the Commission. As already mentioned at the beginning, with the entry into force of this new directive (art. 37), Directive No. 2013/33/EU (art. 36) is repealed, with the proviso that this does not affect the obligations of Member States under the previous directive, especially since the effect of its repeal is set to take effect on June 12th 2026.

In addition to Directive (EU) No. 2024/1346 presented above, the 2024 European legislative reform on international protection is supplemented by several regulations to which, as has already been seen, the directive itself refers to in certain situations. Although unlike directives, they will be presented in summary form, important general information about the role and innovations brought about by the regulations can be found on the official website of the Commission.³⁰

The first of these is Regulation (EU) No. 2024/1351 of the European Parliament and of the Council of May 14th 2024, on the management of asylum and migration, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No. 604/2013,³¹ which replaces the current Dublin III Regulation. This new regulation established, within the common framework for the management of asylum and migration in the Union (art. 3 et seq.), a solidarity mechanism for the functioning of the common asylum system (art. 6 et seq., art. 55 et seq.), and the criteria and mechanisms for determining the Member State responsible for examining an application for international protection (art. 16 et seq.) were laid down. A large part of these provisions refer to the powers of European institutions and the relations between them and Member States with a view to the joint and effective management of migration, but another part, contained in art. 16–55, concerns the procedure carried out by a Member State when it receives an application for international protection, where the institutions referred to in the above-mentioned directive are taken over (such as the right to legal advice, individual interviews, minors, etc.), but also new ones (such as the transfer of an applicant between Member States), which are applied within the framework of the procedure.

30 European Commission, 2025, Pact on Migration and Asylum: legislative files in a nutshell.

31 European Union, 2024, Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No. 604/2013.

The next in the adopted legislative package is Regulation (EU) No. 2024/1348 of the European Parliament and of the Council of May 14, 2024, establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, which, as its title indicates, amends and repeals Directive No. 2013/32/EU,³² with the proviso that although it has entered into force, it will only apply from June 12th 2026, the date until which the directive will remain in force and produce the effects established therein. This regulation incorporates the provisions of the repealed directive, updates them to reflect current issues raised by the granting of international protection, restructures them, and adopts new provisions such as the adequate capacity of a Member State at European Union level and the procedure to be followed when such capacity is reached.

Regulation (EU) No. 2024/1349 of the European Parliament and of the Council of May 14th 2024, establishing the border return procedure and amending Regulation (EU) 2021/1148,³³ is essentially a supplement to the previous regulation. Its provisions apply to third-country nationals and stateless persons whose applications, which have been subject to a procedure at the border, are rejected, which means, first, that they are not allowed to enter the territory of the Member State concerned, staying in places located at the external border or other spaces for a short period of time, namely 12 weeks, after which, if they have not done so in the meantime, they are given a deadline for voluntary departure, otherwise they are removed or returned.

Another European legislative act adopted in 2024 is Regulation (EU) No. 2024/1359 of the European Parliament and of the Council of May 14th 2024, on addressing crisis and force majeure situations in the field of migration and asylum and amending Regulation (EU) 2021/1147,³⁴ laying down temporary measures for exceptional crisis and force majeure situations in the field of migration and asylum in the Union. These measures are intended to meet the requirements of necessity and proportionality, while being appropriate for achieving the stated objectives of ensuring the protection of the rights of applicants and beneficiaries of international protection in accordance with international and European asylum law. The provisions of the regulation establish that a crisis situation exists when: there are massive flows of third-country nationals or stateless persons into a Member State, by any means of communication, which, given the characteristics of that State, would render the well-prepared asylum system dysfunctional; a third country or a hostile non-state actor induces and assists the movement of third-country nationals or stateless persons to the external borders or

32 European Union, 2024, Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU.

33 European Union, 2024, Regulation (EU) 2024/1349 of the European Parliament and of the Council of 14 May 2024 establishing a return border procedure, and amending Regulation (EU) 2021/1148.

34 European Union, 2024, Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147.

to a Member State in order to destabilise the Union or the Member State. On the other hand, force majeure is considered as abnormal and unforeseeable circumstances beyond the control of a Member State, the consequences of which could not have been avoided despite all due diligence, preventing that Member State from fulfilling its obligations under the relevant European legislation. These situations involve the Commission and the Council, but also other Member States through them, on which occasion the necessary derogations and solidarity measures between Member States will be established.

Regulation (EU) No. 2024/1358 of the European Parliament and of the Council of 14 May 2024 on the establishment of “Eurodac” for the comparison of biometric data in order to effectively apply Regulations (EU) 2024/1351 and (EU) 2024/1350 of the European Parliament and of the Council and Council Directive 2001/55/EC and to identify illegally staying third-country nationals and stateless persons and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes, amending Regulations (EU) 2018/1240 and (EU) 2019/818 of the European Parliament and of the Council and repealing Regulation (EU) No. 603/2013 of the European Parliament and of the Council³⁵ has been adopted because, by creating the system to which it refers: it ensures the proper application of previous regulations by supporting the asylum system; it contributes to the control of illegal immigration into the Union, the detection of secondary movements, and the identification of persons who are staying illegally; it ensures the protection of children; it allows Member States to compare data with that stored in Eurodac and thereby, to correctly identify persons in the database; it supports the objectives of the European Travel Information and Authorisation System and the Visa Information System, all in full respect of human dignity, fundamental rights, and principles as recognised to date.

Identical to the previous one, Regulation (EU) No. 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No. 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817³⁶ is meant to strengthen control of third-country nationals crossing the EU’s external borders to figure out if the people being screened might be a threat to internal security. Screening involves a thorough check of these nationals, including a preliminary medical check, a preliminary vulnerability check, identification or identity verification, biometric data recording, security checks, completion of a screening form, and referral to the appropriate procedure.

Regulation (EU) No. 2024/1347 of the European Parliament and of the Council of 14 May 2024 on standards for the qualification of third-country nationals or stateless

35 European Union, 2024, Regulation (EU) 2024/1358 of the European Parliament and of the Council of 14 May 2024 establishing a framework for screening of third-country nationals crossing the external borders and amending Regulations (EU) 2016/399 and (EU) 2019/815.

36 European Union (2024) Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 establishing a union framework for safe and sustainable return and reintegration, and repealing Regulation (EU) 516/2014.

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, amending Council Directive 2003/109/EC and repealing Directive 2011/95/EU of the European Parliament and of the Council³⁷ takes over, in an updated form and in line with the new realities, the concepts and procedures established by the directive it repeals, mentioned above, which, as we have seen, originate from an older directive. Therefore, it regulates the conditions that nationals of member countries or stateless persons must meet, in order to benefit from international protection, creating a uniform status for persons in need of subsidiary protection, which involves granting international protection. The new legislative act also establishes that a person's need for international protection outside their country of origin arises from a well-founded fear of persecution or a real risk of serious harm due to events that occurred after the applicant left their country of origin or due to their activities, after leaving their country of origin, due to the expression or continuation of the convictions, beliefs, or orientations they had in their country of origin.

The last of these legislative acts is Regulation (EU) No. 2024/1350 of the European Parliament and of the Council of 14 May 2024 establishing a Union Resettlement and Humanitarian Admission Framework, and amending Regulation (EU) 2021/1147³⁸ which, in general terms, establishes the procedure whereby a third-country national or a stateless person from a third country to which that person has been forcibly or voluntarily displaced as the case may be, is to be admitted to the territory of a Member State on the basis of a recommendation from the UNHCR, a Member State, the Asylum Agency, or a relevant international body. These regulations provide the framework for the legal and safe arrival of such persons, enhances the European Union's contribution to international initiatives on resettlement and humanitarian admission with a view to increasing the total number of places available for this purpose, and contributes to strengthening the Union's partnerships with third countries in regions where large numbers of persons in need of international protection have been displaced.

4. Other Persons in Need of International Protection

In addition to the categories of persons addressed so far, who are vulnerable in the exercise of fundamental rights and freedoms, we have identified two other categories of persons, namely stateless persons and internally displaced persons, both of whom require adequate protection measures.

37 European Union, 2024, Regulation (EU) 2024/1347 of the European Parliament and of the Council of 14 May 2024 establishing a solidarity mechanism addressing situations when a Member State is confronted with disproportionate migratory flows or specific pressures on its asylum system.

38 European Union, 2024, Regulation (EU) 2024/1350 of the European Parliament and of the Council of 14 May 2024 establishing a Union Resettlement and Humanitarian Admission Framework, and amending Regulation (EU) 2021/1147.

4.1. Stateless Persons

It is clear from the data contained in the previous sections that international and European regulations, when dealing with asylum seekers, refugee status or subsidiary protection, have always taken into account citizens of other states, but also stateless persons who habitually reside in other states.

The vulnerability of stateless persons arises from the fact that as already stated, not having a nationality, they do not enjoy the highest level of protection afforded by a state to its own citizens. This is also the reason why the Convention on the Reduction of Statelessness was adopted in New York on August 30th 1961,³⁹ establishing measures to ensure that as many persons as possible have the nationality of a state, which is why the birth of a person in the territory of a given state requires the granting of nationality, and the convention lays down the procedures to be followed for granting it both by right and on application. For the purposes of the Convention, a child found in the territory of a contracting State is considered to have been born in the territory of that state, just as a child born on board a ship or aircraft is considered as being born in the territory of the state under whose flag the ship is sailing or the state where the aircraft is registered. Citizenship is also recognised for a person whose parents are nationals of a particular state. Under the Convention, loss of nationality is conditional on regaining another nationality, and deprivation of nationality is limited to a few specific cases.

Another international document intended to regulate and improve the status of stateless persons is the Convention relating to the Status of Stateless Persons adopted in New York on September 28th 1954,⁴⁰ which determines the persons to whom it applies and the exclusion of others by the protection granted. It provides that the personal status of a stateless person shall be governed by the law of the country of domicile, or failing that, by the law of the country of residence and that all his or her civil rights shall be subject to the formalities of that law, provided that those rights are recognised in the law of that state. The Convention then goes on to regulate fundamental rights more fully or more briefly, before finally stopping at the expulsion and neutralisation of stateless persons.

4.2. Internally Displaced Persons

Internally displaced persons have a contradictory characteristic: on one hand, they are citizens of a state or persons domiciled or residing in the territory of that state, they do not leave the territorial limits of that state, and on the other hand, they are displaced to areas in the territory of that state other than where they used to live, which is why they are in vulnerable situations, the exercise of their fundamental rights and freedoms is affected, and they need protection.

Unlike stateless persons, their situation is not regulated by any international document such as treaties, conventions, protocols, etc., but with the Report of the UN

39 United Nations, 1961, Convention on the Reduction of Statelessness.

40 United Nations, 1954, Convention relating to the Status of Stateless Persons.

Secretary-General's Representative on Internal Displacement of February 11th 1998, the Guiding Principles on Internal Displacement⁴¹ were drawn up, which show the extent of the phenomenon and the seriousness of the situation. The principles, 30 in number, are divided into several sections and are intended to identify the rights and guarantees relevant to the protection of persons against forced displacement, their protection, assistance during displacement, return, resettlement and reintegration. The principles are consistent with fundamental human rights and freedoms and provide guidance for all entities faced with such situations. In their essence the principles translate fundamental human rights and fundamental freedoms into the particular situations of internally displaced populations.

At a regional level, and of particular significance, we find the Kampala Convention adopted on December 6th 2012 by the African Union⁴², which seeks to promote and strengthen regional, national measures to prevent or alleviate, prohibit and eliminate the root causes of internal displacement, as well as to provide durable solutions, establish a legal framework of solidarity, cooperation, promotion of durable solutions and mutual support between states parties in such situations, which contains their obligations and responsibilities in the event of internal displacement of populations for their protection.

The current situation in the Gaza Strip, where the Palestinian population is in a critical situation within its own territory, demonstrates the need and calls for the adoption of European or international documents to protect the fundamental rights and freedoms of the displaced people.

41 United Nations Commission on Human Rights, 1998, Guiding Principles on Internal Displacement.

42 African Union, 2009, African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention).

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