

# The EU Asylum System: Challenges and Shortcomings

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In June 2013, the EU agreed on the remaining legislation establishing the second phase of the Common European Asylum System.<sup>1</sup> What impact will this have on the issue of asylum – and will it achieve its intended objectives?

## Overview

The starting point for any discussion of asylum is the 1951 UN Convention on the Status of Refugees (referred to as the “Geneva Convention” in EU law), along with the 1967 Protocol to that Convention.<sup>2</sup> This issue is also affected by other international human rights treaties, in particular the European Convention on Human Rights, which, according to the European Court of Human Rights, bans the return of a person to a state in which there is a real risk of suffering torture or other inhuman or degrading treatment as set out in Article 3 ECHR.<sup>3</sup> The Geneva Convention does not address all situations in which persons might need some form of protection from return to their country of origin, so the

concept of “subsidiary protection” (i.e. protection outside the scope of that Convention) has been developed. EU law has focused on refugee and subsidiary protection issues, but furthermore there are other forms of protection based on national law and practice, not harmonised by EU law.<sup>4</sup> The Court of Justice has confirmed that Member States can establish and retain such non-harmonised forms of protection, provided that there is no confusion with refugee status.<sup>5</sup>

At the Tampere European Council of 1999, EU leaders decided that the EU should aim to establish a Common European Asylum System (CEAS), starting with a first round of legislation in the “short term” (which became known as the “first phase” of the CEAS), with the intention to establish, “in the longer term,” a “common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union.”

The first phase of legislation to establish the CEAS was adopted between 2003 and 2005, and consisted of: a Directive on the qualification for and content of refugee and subsidiary protection status (the “qualification Directive”);<sup>6</sup> a Directive on procedures for applying for refugee status (the “procedures Directive”);<sup>7</sup> a Directive on reception conditions for asylum-seekers (the “reception Directive”);<sup>8</sup> and a Regulation setting out rules to allocate responsibility

<sup>1</sup> Directive 2011/95, OJ 2011 L 337/9 (qualification Directive); Directive 2013/33 on reception conditions (OJ 2013 L 180/96); Directive 2013/32 on asylum procedures (OJ 2013 L 180/60); the revised Dublin Regulation (Reg. 604/2013, OJ 2013 L 180/31); and a revised Eurodac Regulation (Reg. 603/2013, OJ 2013 L 180/1). The EU also established a European Asylum Support Office: see Reg. 439/2010 (OJ 2010 L 132/11). This contribution is an updated version of part of chapter 26 of Barnard & Peers, *European Union Law* (OUP, 2014).

<sup>2</sup> All Member States have ratified both measures.

<sup>3</sup> See generally G GOODWIN-GILL and J MCADAM, *The Refugee in International Law*, 3rd ed. (OUP, 2007).

<sup>4</sup> See the study by the European Migration Network, *The Different National Practices Concerning Granting of non-EU Harmonised Protection Statuses*, online at: <http://emn.intrasoft-intl.com/Downloads/prepareShowFiles.do?entryTitle=3%2E%20EMN%20Studies>.

<sup>5</sup> Joined Cases C-57/09 and C-101/09 B and D [2010] ECR I-10979.

<sup>6</sup> Directive 2004/83, OJ 2004 L 304/12.

<sup>7</sup> Directive 2005/85, OJ 2005 L 326/13.

<sup>8</sup> Directive 2003/9, OJ 2003 L 31/18.

for each asylum-seeker to a single Member State (the “Dublin Regulation”).<sup>9</sup> In order to facilitate the application of the latter Regulation, there was also an earlier Regulation establishing “Eurodac,” a system for storing and comparing asylum-seekers’ fingerprints.<sup>10</sup> There is also a Directive providing for a ready-made system of EU-wide “temporary protection” in the event of a mass influx of people, but this Directive has never been used in practice.<sup>11</sup>

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Ultimately, the EU set a deadline of 2012 to establish the second phase of the Common European Asylum System, and established the twin objectives of raising the level of protection and reducing the large divergences between Member States’ recognition rates (i.e. the percentages of persons whose application for refugee or subsidiary protection status is successful).<sup>12</sup> Following the entry into force of the Treaty of Lisbon, the objectives agreed in Tampere are now reflected explicitly in Article 78 TFEU, which requires that:

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

the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.”

To that end, the EP and the Council have powers to adopt legislation in many fields of asylum and refugee law. In the event, as noted above, the EU adopted all the legislation to establish the second phase of the CEAS by the summer of 2013. The impact of this legislation, once fully implemented,<sup>13</sup> remains to be seen, but as a whole it provides for further harmonisation of national law and additional protection of human rights, taking a modest but significant step towards raising standards in this field, and potentially reducing the divergences in Member States’ recognition rates somewhat.<sup>14</sup>

#### Qualification for International Protection

The EU’s asylum legislation raises a large number of issues, including, first of all, issues concerning the definition of refugee and subsidiary protection status. As regards both types of protection, a protection need may arise following the applicant’s departure from the country of origin (known as protection *sur place*).<sup>15</sup> Also, the “actors of persecution or serious harm” need not be the State, but may also be private parties, if it can be “demonstrated” that the State, or parties controlling the State, is “unable or unwilling” to provide protection against non-state agents.<sup>16</sup> This rule changed the more restrictive interpretation of the Geneva Convention in several Member States, which had traditionally recognised as refugees only those persons fleeing persecution by the State. There is a parallel rule on “actors of protection,” which provides that protection can “only” be provided by states or parties, including international organisations, controlling all or a substantial part of a state’s territory, provided that such bodies are “willing and able to offer protection.” Such protection must be “effective and of a non-tem-

<sup>9</sup> Reg. 343/2003, OJ 2003 L 50/1. The Regulation replaced the Dublin Convention (OJ 1997 C 254/1).

<sup>10</sup> Reg. 2725/2000, OJ 2000 L 316/1. The Eurodac system began operations on 15 Jan 2003 (OJ 2003 C 5/2).

<sup>11</sup> Directive 2001/55, OJ 2001 L 212/12. This Directive was not updated in the second phase of the CEAS.

<sup>12</sup> See the Stockholm programme (OJ 2010 C 115).

<sup>13</sup> The qualification Directive had to be applied by December 2013, and the Dublin III rules by 1 January 2014. The asylum procedures and reception conditions directives must be applied by July 2015.

<sup>14</sup> See S PEERS, E GUILD, M GARLICK, and V MORENO-LAX, *EU Immigration and Asylum Law: Text and Commentary*, 2nd edition, volume 3 (Martinus Nijhoff, forthcoming 2014).

<sup>15</sup> Art. 5, Directive 2011/95.

<sup>16</sup> Art. 6, Directive 2011/95.

porary nature,” and is “generally provided” when the actors of protection “take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and when the applicant has access to such protection.”<sup>17</sup> Furthermore, Member States can apply a concept usually known as an “internal flight alternative,” if there is a part of a protection-seeker’s country of origin which is generally safe,<sup>18</sup> and if that person “can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there,”<sup>19</sup> taking account of the case law of the European Court of Human Rights.<sup>20</sup>

The core definition of a “refugee” is a person who has “a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group.”<sup>21</sup> The EU Directive expands upon both the concept of persecution and the grounds of persecution.<sup>22</sup> On the first point, in a case concerning members of the Ahmadiyya community, who faced attacks and criminalisation in Pakistan if they professed their beliefs in public, the Court of Justice clarified the concept of “persecution.” Even though these asylum-seekers could possibly have avoided persecution in their country of origin by refraining from proselytising to believers in the dominant religion there, and from otherwise practising their beliefs in public, the Court ruled that such persons should not be expected to refrain from public displays of their religion in their country of origin.<sup>23</sup> On the second point, the 2011

amendments to the Directive strengthened the rules relating to gender-based persecution.<sup>24</sup>

As for the definition of subsidiary protection, it must be granted where there are “substantial grounds...for believing” that the person concerned faces a “real risk” of “serious harm,” which consists of: (a) the death penalty or execution; or (b) torture or other inhuman or degrading treatment or punishment; or (c) a “serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.”<sup>25</sup> While the first two criteria are based on the established case law of the European Court of Human Rights (discussed above), the meaning of the third criterion was unclear, particularly since it is quite clearly contradictory: how could a person face an “individual” threat by reason of “indiscriminate violence”? The Court of Justice answered this question in a case about Iraqis who feared violent retaliation because they were linked to the American forces then occupying Iraq.<sup>26</sup> In the Court’s view, an “individual” threat could include “harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place...reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred to in Article 15(c) of the Directive.”

Once an applicant has been granted refugee or subsidiary protection status, he or she (along with his or

<sup>17</sup> Art. 7, Directive 2011/95. This provision was amended by the 2011 Directive to raise the standards of protection and reduce divergences of interpretation. For instance, some Member States had argued that protection could be provided for by clans: see the Commission’s report on the implementation of Directive 2004/83 (COM (2010) 314, 16 June 2010).

<sup>18</sup> Art. 8, Directive 2011/95. More precisely, there must be “no well-founded fear” of persecution and no “real risk of suffering serious harm,” or “access to protection against persecution or serious harm as defined in Article 7.”

<sup>19</sup> Again, the 2011 Directive amended this rule in order to raise the standards of protection and reduce divergences of interpretation.

<sup>20</sup> See the judgment of that Court in *Salah Sheekh v Netherlands* (ECHR 2007-I), particularly as regards the ability to travel and settle in the safe part of the country.

<sup>21</sup> Art. 2(d), Directive 2011/95, echoing Art. 1A(2) of the Geneva Convention.

<sup>22</sup> Arts. 9 and 10, Directive 2011/95.

<sup>23</sup> Joined Cases C-71/11 and C-99/11, *Y and Z*, judgment of 5 Sept. 2012, not yet reported. See also, as regards sexual orientation, the judgment of 7 Nov. 2013 in *Cases C-199/12 to 201/12 X, Y, and Z*, where the Court ruled that criminalisation of sexual orientation could constitute persecution, where the law in question was applied in practice.

<sup>24</sup> While the 2004 Directive stated, as regards the concept of “particular social group,” that “gender-related aspects can be considered, without by themselves alone creating a presumption,” the 2011 Directive provides that “[g]ender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group” (emphases added).

<sup>25</sup> Arts. 2(f) and 15, Directive 2011/95.

<sup>26</sup> Case C-465/07 *Elgafaji and Elgafaji* [2009] ECR I-921. See, subsequently, the interpretation of the concept of “internal armed conflict” in Case C-285/12 *Diakite*, judgment of 30 Jan. 2014, not yet reported.

her family members) is entitled to the benefits set out in the qualification Directive, which include a residence permit, access to employment and self-employment, equal treatment with nationals as regards social welfare and health care, and equal treatment with legally resident third-country nationals as regards accommodation.<sup>27</sup> While the first-phase Directive left Member States with an option to give fewer such rights to beneficiaries of subsidiary protection, the second-phase Directive only permits lower standards for such persons as regards social welfare and residence permits.<sup>28</sup>

### Reception Conditions for Asylum-seekers

The Directive on reception conditions regulates such issues as the employment, health care, education, and welfare of asylum-seekers during the process of deciding on their application. The second-phase Directive improves standards as compared to the first-phase Directive, particularly as regards employment, permitting Member States to require an asylum-seeker to wait up to nine months for employment access, whereas the first-phase Directive had permitted a wait of up to twelve months.<sup>29</sup> It also inserted detailed rules on detention of asylum-seekers into the Directive. These differ somewhat from the rules on detention of irregular migrants in the returns Directive, in that the grounds for detention are different and there is no express time limit on detention. However, the rules on legal safeguards and detention conditions are quite similar.<sup>30</sup>

### Asylum Procedures

Next, the rules on asylum procedures address such issues as legal aid, interviews, the right to an effective remedy (in particular, as regards the suspensive effect of appeals), and special procedural rules such as accelerated procedures, the “safe country of origin” concept, and the “safe third country” concept (which allow Member States to presume that some countries of origin or transit are safe for all asylum-

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seekers). The second-phase Directive improved standards as regards, for instance, setting a six-month time limit (subject to exceptions) to make a first-instance decision on an application, reducing the number of possible cases subject to accelerated procedures, strengthening the right to an effective remedy, and abolishing the option to apply lower standards as regards the “safe country of origin” concept.

### Responsibility for Applications

Finally, there has been continued controversy concerning the application of the “Dublin” rules on responsibility for asylum applications, in part because the criteria for responsibility (which, in turn, assign that responsibility based on family reunion, the issue of a visa or a residence permit, or evidence of crossing a border or remaining on the territory illegally) shifted the burden of dealing with asylum applications towards the EU’s external eastern and southern land and sea borders, mostly consisting of poorer Member States. Furthermore, there were widespread concerns that some Member States were systematically not applying many of the basic standards of the Geneva Convention, the ECHR, and EU law as regards reception conditions, qualification for status, and asylum procedures. Ultimately, the European Court of Human Rights ruled that Greece frequently

<sup>27</sup> Arts. 20-34, Directive 2011/95.

<sup>28</sup> Arts. 24 and 29, Directive 2011/95.

<sup>29</sup> Art. 15, Directive 2013/33; compare to Art. 11, Directive 2003/9.

<sup>30</sup> Arts. 8-11, Directive 2013/33.

breached Article 3 ECHR (the ban on torture or other inhuman and degrading treatment) due to its low standards on reception conditions (interpreting the ECHR on this point in light of the reception Directive) and asylum procedures, and that Belgium breached Article 3 ECHR by returning an asylum-seeker to Greece despite its knowledge that such breaches were taking place.<sup>31</sup>

## The second phase of the CEAS is a further step towards establishing a “common” policy, with a view to both reducing divergences in national policy and increasing standards of human rights protection

In turn, the Court of Justice ruled that while the EU rules were based on mutual trust that each Member State would comply with its human rights obligations, it was possible that the CEAS might “experience major operational problems in a given Member State, meaning that there is a substantial risk that asylum seekers may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights.” But the Dublin system could not be suspended following *any* breach of those human rights obligations, but rather where there “are substantial grounds

for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants,” leading to a breach of the ban on torture or other inhuman and degrading treatment set out in Article 4 of the EU’s Charter of Fundamental Rights. So EU law also prevented sending asylum-seekers to Greece pursuant to the Dublin rules.<sup>32</sup> While the Commission proposed to amend the Dublin rules to set out a detailed system for suspending its application in such cases, the final amendment to the legislation only transposed the main elements of the Court’s judgment into the text of the revised Regulation.<sup>33</sup>

### Conclusions

The second phase of the CEAS is a further step towards establishing a “common” policy, with a view to both reducing divergences in national policy and increasing standards of human rights protection. Although the second-phase legislation and the case law of the Court of Justice to date both point clearly in the direction of an increasing level of both protection and harmonisation, the EU will still clearly fall short of establishing a “uniform” concept of asylum law, even following the implementation of the second-phase legislation, in light of the possible exceptions from the standard rules and the likelihood of continuing national divergences in their application.

<sup>31</sup> *MSS v Belgium and Greece*, judgment of 21 Jan. 2011, not yet reported.

<sup>32</sup> Joined Cases C-411/10 *NS* and C-493/10 *ME*, judgment of 21 Dec. 2011, not yet reported.

<sup>33</sup> Art. 3(2), Reg. 604/2013.