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The future of asylum in the European Union

Problems, proposals and human rights

Flora A.N.J. Goudappel
Helena S. Raulus *Editors*

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Preface

Asylum law in Europe is currently undergoing great changes. A bit more than a decade ago, with the adoption of the Treaty of Amsterdam, the Community gained competence to adopt measures in asylum, in connection with the Area of Freedom, Security and Justice policies.[1] This has resulted in the building of the Common European Asylum System (CEAS) by the Union.

The goal of the CEAS could be described as creating a European-wide fair, efficient and flexible asylum system. The current framework of CEAS is based on the following main aspects: allocating responsibility for asylum seekers to an appropriate Member State[2]; and creating common standards for processing asylum-seekers,[3] their reception conditions[4] and their qualification as a refugee in the Member States.[5] To continue the development of the CEAS further, the Commission opened a public consultation in the Green Paper in 2007.[6] As a result the Asylum and Immigration Pact was adopted by the Council of Ministers which

[1] Article 63 EC Treaty. Now the Union has competence to adopt measures on asylum under Article 78 TFEU, the powers have changed considerably here. Previously the Community could only adopt minimum harmonisation measures, whereas now the Union can adopt uniform measures.

[2] 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, OJ 2003/L50/p. 1 ff., the so-called Dublin Regulation .

[3] Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ 2005/L326/p. 13 ff.

[4] Council Directive 2003/9 laying down minimum standards for the reception of asylum seekers, OJ 2003/L31/p. 18 ff.

[5] Council 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 and the content of the protection granted, OJ 2004/L304/p. 12 ff.

[6] Green Paper on the future Common European Asylum System, Brussels, 6 June 2007, COM(2007) 301 final.

encourages the construction of "Europe of Asylum"[7] leading to setting up the European Asylum Office, solidarity between Member States on processing asylum applications and creation of a single asylum procedure. By using these means in particular it should be possible to achieve the aims set out in the Green Paper, inter alia, "to establish a level playing field, a system which guarantees to persons genuinely in need of protection access to a high level of protection under equivalent conditions in all Member States while at the same time dealing fairly and efficiently with those found not to be in need of protection."[8]

The EU developments must take into account that asylum law has its underpinnings in international human rights law. All the Member States of the Union are parties to the 1951 Convention relating to the status of refugees and to its 1967 Protocol.[9] Furthermore, the European Convention on Human Rights (ECHR)[10] and, in particular, the jurisprudence of the European Court of Human Rights (ECtHR), has been influential in shaping the standards for the protection of asylum seekers and refugees in Europe.

The Member States are currently debating and new measures are being proposed on how to achieve the bold aims of the renewed CEAS. These aims include creating a single asylum procedure and making sure that the international obligations are respected and potentially also strengthened by the Union. To join in this conversation, the Erasmus School of Law organized a conference "The future of asylum in the European Union. Proposals, problems and interaction with international human rights standards" in April 2009. Scholars and practitioners from many different Member States were invited to discuss the implications of recent developments in EU asylum law and the participants were asked to contribute their views in this book. Even though this book is published two years after the Conference, the building of the Common Asylum System is still discussed in the Union structures and the main discussion points from the Conference are still applicable. The rebuilding of the CEAS is in no means an easy task. These questions for the Conference and the following publication could also be framed using the words of the opening speaker of the Conference, the Dutch State Secretary for Aliens' Affairs at the time, Ms. Nehabat Albayrak:

> ... I would like to give you several questions for further consideration during this conference. First of all: what more can we do to harmonise the European asylum policy, for it to become a reality? Which concrete obstacles have to be overcome? How can we realise that we actually protect the people for whom the asylum policy is intended? Given the large number of well-informed specialists, I would even stimulate you to also think about the long term. How should we proceed [after the Stockholm Programme, after 2014]?

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[7] The European Pact on Immigration and Asylum, Commitment 4.

[8] Green Paper, *supra* n. 6, p. 2.

[9] Resolution 2198 (XXI) adopted by the United Nations General Assembly, available from http://untreaty.un.org/cod/avl/ha/prsr/prsr.html. There are altogether 144 States parties to this Convention.

[10] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, available from http://conventions.coe.int/treaty/en/treaties/html/005.htm.

In the organisation of the Conference and process of editing of the book we, the editors, would like to thank following persons. Our student assistants, Caroline Peters and Eva Hendriks, for the original Conference organisation, gathering background materials and for general support. Our other student assistant, Alex Verhoeff, for the painstaking work on changing and bringing the footnotes together.

Rotterdam, April 2011

Dr. Flora A. N. J. Goudappel
Dr. Helena S. Raulus

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The Future of Asylum in the European Union? Proposals, Problems and Interaction with International Human Rights Standards

Flora A. N. J. Goudappel and Helena S. Raulus

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1.1 State Sovereignty and Asylum Law

The general principle in immigration is that a State is sovereign to decide who is allowed to enter and stay in its territory. Asylum law is an exception to this, here sovereignty is curtailed under international obligations: all the Member States of the Union are parties to the 1951 Convention relating to the Status of Refugees and

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the attached 1967 Protocol,[1] and under this regime, the Member States have undertaken the obligation to grant protection for persons who are persecuted in their home States. The category of persons who are entitled to this protection is limited though; according to the 1951 Geneva Refugee Convention only persons facing persecution or having a well-founded fear of persecution in the State of nationality or habitual residence and who due to this fear are unwilling or unable to return to that State, must be given this protection.[2] This protection principle is enforced by Article 33 of the Convention which contains the non-refoulement principle. Under this provision the participating States have undertaken the obligation not to return a refugee to the territories where his or her life or liberty would be threatened.

However, the Member States have retained their sovereignty in interpretation and application of the Convention obligations. They still decide who is allowed to enter and stay in their territory as a refugee by applying independently the notion of well-founded fear of persecution. According to the statistics available from the Eurostat, States have very differing views on how to apply the Convention and whether they grant protection for persons coming from the crisis zones.[3] To a limited extent, the United Nations High Commission for Refugees (UNHCR), the UN Refugee Agency, can oversee that the Convention obligations are respected and, for example, it has published guidelines on the criteria to be used when States are trying to establish whether to grant a person a refugee status.[4] Similarly, the European Convention on Human Rights (ECHR) as interpreted by the European Court of Human Rights (ECtHR) places obligations on the Member States on who is entitled to asylum.[5]

1.2 Building of Common European Asylum System: from Mutual Trust to Minimum Harmonisation

This main premise that the Member States are sovereign to decide on the interpretation and application of the Refugee Convention is also reflected in the development of the Common European Asylum System (CEAS). The first

[1] Resolution 2198 (XXI) adopted by the United Nations General Assembly, available from http://www.unhcr.org/3b66c2aa10.html (accessed 14 August 2011). Altogether 144 States are parties to the Convention, and the Protocol. 141 States are parties to the both, three States being only parties to the Convention or to the Protocol separately, source: http://www.unhcr.org/3b73b0d63.html (accessed 14 September 2011).

[2] Article A(2) of the Convention.

[3] For 2010 statistics on the EU Member States, see for example http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-QA-10-042/EN/KS-QA-10-042-EN.PDF (accessed 14 August 2011).

[4] The UNCHR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf (accessed 14 August 2011). The Handbook was first adopted in 1979 and re-edited in 1992. See Chap. 8, Ascoli, for further discussion.

[5] Under Article 3 prohibition of torture and inhumane treatment, the ECtHR case law on asylum is raised for discussion in many papers in this book. See, for instance, Chap. 3, Bruin, Chap. 6, O'Dowd and Chap. 10, Vedsted-Hansen for different aspects of the ECHR. See also below discussion on the recent ECtHR case law on the Dublin system.

instrument adopted in asylum law was the Dublin Convention,[6] which was subsequently turned into the Dublin II Regulation,[7] on determining which Member State has the responsibility for processing asylum seekers in the Union.[8] The aim of the Dublin system is to prevent multiple asylum applications by an asylum seeker in various Member States, in other words, prevent asylum shopping in the Union area.[9] Therefore, under the Dublin criteria a single Member State is allocated responsibility for processing asylum seekers entering into the EU.[10] In the Stockholm Programme, which sets the new priorities for the Area of Freedom, Security and Justice, the Dublin system is still referred as "the cornerstone" of the common asylum system.[11]

The Dublin system is based on the mutual trust principle: the national authorities of the Member State where an asylum seeker submits the application are required to transfer the asylum seeker back to the Member State responsible under the rules.[12] The Regulation sets out for the national authorities or courts the obligation to decide whether the asylum seeker is to be processed in that or another Member State and following that, if another Member State is deemed responsible, the procedures for the transfer.[13] A Member State may accept the responsibility for the asylum seeker even if it was not responsible under the Regulation,[14] however, this is only specifically allowed for humanitarian reasons, that is, for family reunification or cultural reasons.[15]

Importantly, mutual trust does not take any account of the divergences between the national systems. There is no explicit exception granted on the basis of divergences between the national systems, and the executing authorities or courts are not required to review the law or decision-making processes of the State responsible under the Regulation. As a result, the national authorities or courts making the decisions on whether to transfer an asylum seeker are not required to consider whether the return has implications for the status of the asylum seeker

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[6] The Dublin Convention, Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, signed in 1990, OJ 1997/C254/pp. 1–12.

[7] 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, OJ 2007/L50/pp. 1–10.

[8] The Dublin system is also applied in Norway, Iceland and Switzerland.

[9] See Dublin II Regulation, Summaries of EU Legislation, http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l33153_en.htm (accessed 14 August 2011).

[10] See also Chap. 7, Raitio.

[11] European Council, "The Stockholm Programme—An Open and Secure Europe Serving and Protecting Citizens", OJ 2010/C115/pp. 1–38.

[12] Article 3(1) and Article 17 of the Regulation.

[13] See Articles 17 and 18 of the Regulation.

[14] Article 3(2) of the Regulation.

[15] Article 15 of the Regulation.

on the basis of procedural, substantive or even human rights protection considerations.

This has resulted in a situation that the potential asylum seekers might not be recognised as such in the Member State where they are to be returned. As mentioned earlier, States, including the Member States of the Union, interpret the 1951 Convention in a diverging manner. However, at the same time, each Member State has undertaken the obligation to respect the non-refoulement principle of those persons they consider as qualifying as refugees. Questions have arisen in national courts on the application of the Dublin system that if the Member State where the asylum seeker applied for asylum considered a person as entitled to protection as a refugee, but the Member State responsible under the Dublin system did not, would this constitute a breach of non-refoulement and therefore a breach of the 1951 Refugee Convention? In that case the asylum seeker would be in the eyes of the Member State authorities returned back to the State of persecution. The UK courts in the early cases decided that this would be a breach of non-refoulement and refused to make the transfer unless the asylum seekers were safe from refoulement in the Member States responsible under the Dublin system as well.[16] This approach has also received recognition in obiter from the ECtHR.[17] Initially, one of the problems of the Dublin system was the reluctance of the national courts and authorities to effect the transfers to other Member States.[18] In order for the Dublin system to function properly, the national courts need to trust that the asylum seekers' claims will be duly processed by the other Member State authorities.

The lack of procedural harmonisation may also create hesitation for national authorities or courts obliged to transferring asylum seekers. The conditions and procedural rights guaranteed for the asylum seekers while they are waiting for the asylum decision vary considerably between the Member States. While the international obligations here are not as clear what asylum seekers can expect from their host States, for instance, the UNHCR Handbook is not binding on the States, some indications are available from the ECtHR.[19]

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[16] *R v. Secretary of State for the Home Department, ex parte Adan and R v. Secretary of State for the Home Department ex parte Aitseguer, House of Lords, [2001] 2 WLR 143–169*, per Lord Slynn of Hadley, at pp. 144–145, "It seems to me that the Secretary of State may not send back an applicant if the Secretary of State considers that the other state's interpretation would lead to an individual being sent back by that state to a state where he has established a fear of persecution which the Secretary of State finds to be covered by the Convention."

[17] *T.I v. the UK*, European Court of Human Rights, Application No. 43844/98, p. 15, "The Court finds that the removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision expel, exposed to treatment contrary to Article 3 of the Convention. Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims." See also Chap. 3 by Bruin, who discusses these cases.

[18] See Chap. 7, Raitio.

[19] See Chap. 10, Vedsted-Hansen.

To support the Dublin system, the Community adopted at the following stage the common minimum harmonisation Directives on processing asylum seekers,[20] their reception conditions[21] and their qualification as a refugee in the Member States.[22] These level the playing field and provide some indications for the common standards. However, as pointed out by the contributions to this book, all these are minimum harmonisation measures leaving a wide margin of flexibility for the Member States and there are many provisions where the Member States may choose to lower the standards of protection. For instance, Vedsted-Hansen discusses the optional clauses under these Directives[23] and da Lomba discusses the particular problem of refugees *sur place* under the Qualification Directive in her contribution.[24] There are even doubts expressed whether these provisions fully comply with the standards required under international law.[25]

Although it can be argued that the Qualification Directive sets out equally vague conditions for a person to be recognised as a refugee[26] as the 1951 Convention and therefore, the divergences remain between national systems interpreting the provisions, there are some advances here. First, the Directive also grants subsidiary protection for persons who are in a real risk of suffering serious harm.[27] Second, being a Union law measure, the European Court of Justice is involved in the interpretation of the Directive. National courts can ask preliminary rulings from the Court of Justice on how to interpret the provisions of this and any other Directive in asylum law.[28] The Court of Justice gave already in *Elgafaji*[29] instructions for national courts on how the concept of subsidiary protection is to be

[20] Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ 2005/L326/p. 13 ff.

[21] Council Directive 2003/9 laying down minimum standards for the reception of asylum seekers, OJ 2003/L31/p. 18 ff.

[22] Council 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 and the content of the protection granted, OJ 2004/L304/p. 12 ff.

[23] See Chap. 10.

[24] See Chap. 4.

[25] See Chap. 10, Vedsted-Hansen and Chap. 4, Da Lomba.

[26] Article 1(c) defines a refugee as "a 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 a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it."

[27] Article 2(c) and Article 15 (c) of the Qualification Directive.

[28] Article 267 TFEU now grants a normal jurisdiction for the Court of Justice to give preliminary rulings. Previously, under the EC Treaty, the right to ask preliminary rulings was limited to the highest national courts, see Article 68 EC Treaty.

[29] *Case C-465/07 Meki Elgafaji, Noor Elgafaji v Staatssecretaris van Justitie [2009] ECR I-00921*. On Elgafaji, see Chap. 7, Raitio, and Chap. 10, Vedsted-Hansen.

viewed. In a more recent case of *B*,[30] the Court answered the question of whether and under what criteria a person can be excluded from protection as a refugee if there is a suspicion that the person has committed a "serious non-political crime" or "acts against purposes of the United Nations."[31] Therefore, through the Court of Justice it is possible to achieve uniformity for the qualification of a refugee or any other concept employed by the asylum Directives.

However, the national authorities may not be prepared to alter their views on how asylum or subsidiary protection obligations are to be viewed. As has been pointed out by Vested-Hansen, the Dutch authorities in *Elgafaji* arguably adopted a stricter interpretation of subsidiary protection than the Court of Justice.[32] It remains for the national authorities to interpret the facts of the case and through this there is a possibility for the authorities to take different views on factual situations and how they fit into the legal provisions. However, if these national interpretations vary too much or the national authorities depart from the line taken by the Court of Justice, it is possible for the Commission to bring enforcement proceedings against a Member State for not complying with the Directives[33] and enforce the EU obligations against the Member State. Here, it is hoped that the Commission will take a pro-active role to guard that the Union criteria will develop objectively, consistently and with respect to the protection of fundamental rights.

Meanwhile, divergences continue to exist and as a result the Dublin system has been fiercely criticised.[34] As an alternative for the Court of Justice proceedings, it is possible for individuals to bring the proceedings to the ECtHR on the application or interpretation of the asylum acquis by the Member State authorities. There are, indeed, currently 960 cases pending in the ECtHR on the application of the Dublin

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[30] *Joined Cases C-57/09 and C-101/09 Bundesrepublik Deutchland v B*, judgment of 9 November 2010.

[31] See Articles 12(2)(b) and (c) of the Qualification Directive. The Court of Justice answered here that the person is not necessarily excluded from the protection on the basis that the person is or has been a member of an organisation listed on Common Foreign and Security Policy (Common Position 2001/931/CFSP) lists on combating terrorism. There needs to be serious reasons for the person to have committed such acts and individual responsibility must be attributed to the person concerned.

[32] See Chap. 10, Vedsted-Hansen.

[33] Under Article 258 TFEU.

[34] See for example, UNCHR Discussion Paper, "The Dublin II Regulation", April 2006, http://www.unhcr.org/refworld/docid/4445fe344.html (accessed 14 August 2011); ECRE, "Report on Application of Dublin II Regulation in Europe", March 2006, available from http://www.ecre.org/topics/areas-of-work/protection-in-europe/135.html (accessed 14 August 2011). From academic writers, see for example Brandl, "Distribution of Asylum Seekers in Europe? Dublin II Regulation Determining the Responsibility for Examining an Asylum Application", in de Sousa and De Bruyncker, The Emergence of European Asylum Policy, (2003) Bruylant, Hurwich, "The 1990 Dublin Convention: A Comprehensive Assessment", (1999) 11 IJRL, pp. 648–677, Marx, "Adjusting Dublin Convention: New Approaches to Member State Responsibility for Asylum Applications", (2001) 3(1) EJML, pp. 7–21, and Noll, "Formalism and Empiricism: Some Reflections on the Dublin Convention on the Occasion of Recent European Law", (2001) 70 Journal of International Law, pp. 161–182.

system.[35] These cases concern the return of the asylum seekers to third countries and whether there have been breaches of principle of non-refoulement, and the access of asylum seekers to asylum procedures as well as generally treatment of asylum seekers. Most cases concern Greece, which has reportedly had problems relating to the treatment of asylum seekers and access of asylum seekers to asylum procedures.[36] Two cases are worth mentioning here. First, the ECtHR has given interim judgments and suspended the application of the Dublin system and halted the return of asylum seekers to Greece, Italy and Malta. One such example concerned a transfer of an Afghan asylum seeker from Hungary to Greece, because it could be proven that Greece would not give proper treatment to him. The young Afghan applicant had requested for asylum in Greece and while the application was pending he was left to live in the streets homeless without any social or legal assistance. In addition, he was arrested and detained in jail and mistreated by the police.[37] Second, in M.S.S. versus Belgium and Greece,[38] the first case to be decided on the point of transfer of asylum seekers to another Member State, the ECtHR decided that transfer of an asylum seeker from Belgium to Greece was not compatible with the ECHR obligations. Both Greece and Belgium were condemned on the basis of Articles 3 and 13 ECHR. Greece was held liable on the basis of the detention conditions that asylum seekers are subjected to, the actual living conditions which the applicants find themselves in and the lack of procedural guarantees. The Court recognised that the living conditions as well as procedural guarantees were provided under both national law as well as EU Directives; however, it noted how in practice the Greek authorities had failed the applicant. Belgium was held responsible for returning the applicant to Greece even though it could be proven that the Belgian authorities had relevant knowledge of the situation in Greece regarding the conditions facing the applicant as well as the possibility that there would be refoulement of the applicant back to Afghanistan. Finally, Belgium was also held in breach for not providing adequate remedy to appeal against the expulsion order.

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[35] European Court of Human Rights, Fact Sheet, "The Dublin Cases", August 2010, http://www.echr.coe.int/NR/rdonlyres/26C5B519-9186-47C1-AB9B-F16299924AE4/0/FICHES_Dublin_Cases_EN.pdf (accessed 14 August 2011).

[36] See for example ECRE, Letter to Jacques Barrot, Vice-President of the European Commission, "RE: The treatment of asylum seeker in Greece and reform of the Dublin Regulation", 3 April 2008, available from http://www.statewatch.org/news/2008/apr/eu-greece-ecre-dublin-letter.pdf (accessed 14 August 2011), and more recently, ECRE, Letter to the European Council, "Stop sending asylum seekers to Greece", 29 October 2010, press release available from http:irishrefugeecouncil.ie/media/ECRE-Stop-Transfers-Greece-press-release.pdf (accessed 14 August 2011); or UNCHR, "Observations of Greece as a country of asylum", December 2009, http://www.unhcr.org/refworld/docid/4b4b3fc82.html (accessed 14 August 2011).

[37] See for example, ECRE Information Note, ECRE Interim Measures (rule 39) to stop Dublin transfers according to which transfers to Greece, Malta and Italy have been halted by the ECtHR, available from http://cmr.jur.ru.nl/cmr/docs/ecre.rule39.pdf (accessed 14 August 2011).

[38] Case of M.S.S. versus Belgium and Greece, Application No. 30696/09, Judgment of 21 January 2011, see also Press Release issued by the Registrar of the Court, No. 043, 21 January 2011, "Belgian authorities should not have expelled asylum seeker to Greece".

1.3 From Minimum Standards to Uniformity: New TFEU Provisions and European Asylum Support Office

At the Union level the problems on application of the common asylum system and that the Member States do not grant the same level of protection for the asylum seekers have been recognised. The CEAS has entered the second stage and asylum Directives are proposed to be recast, strengthening the protection of asylum seekers and qualification for refugees.[39] The Commission has taken the initiative and the new proposals aim for considerable strengthening of the common asylum system.[40]

These new measures will be adopted under the new TFEU provisions which allow the Union to adopt measures which set out the "uniform standards" in asylum protection.[41] This means that the new measures can also potentially aim for further uniformity than the previous minimum harmonisation provision under the EC Treaty. Furthermore, for the first time qualified majority voting with the full involvement of the European Parliament is applied in adoption of all asylum measures.[42] This could mean that it is possible to raise the protection standards to a higher level because individual Member States do not hold the veto power anymore and the European Parliament might intervene in the negotiation process if the result is not satisfactory. In addition, the binding Charter of Fundamental Rights now obliges the EU legislation in asylum to take into account that there is a right to asylum as well as it contains the principle of non-refoulement, consolidating these principles into the core of Union law.[43]

However, it must also be recognised that by simply creating further obligations under Union law for the Member States cannot solve these problems. The Dublin system of allocating responsibility to a single Member State has created pressures in particular for the Southern Member States. In most cases, Dublin gives the responsibility for the Member State which border a person first crossed when entering into the Union. Most irregular arrivals come from Africa or Middle-East[44] and they cross the Union borders from South: Greece, Malta or

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[39] Proposed new measures are: COM(2008)820 final on Dublin Regulation, COM (2008) 815final on minimum conditions for reception conditions, COM(2009)554 final on minimum standards on procedures in Member States for granting and withdrawing international protection, COM(2009)551final on minimum standards on qualification and status of third country nationals or stateless persons as beneficiaries of protection and the content of the protection granted.

[40] See Chap. 7, Raitio, for the recast Dublin Regulation, Chap. 10, Vedsted-Hansen, for recast minimum procedures and qualification Directive proposals, and Chap. 9, Vandvik, for reception conditions reform.

[41] Article 78(2) TFEU.

[42] Previously Article 67(4) EC Treaty allowed qualified majority voting with the involvement of the European Parliament on when the Council had previously adopted by unanimity Community legislation defining the common rules and basic principles in asylum.

[43] Articles 18 and 19 of the Charter.

[44] See Chap. 7, Raitio, and Chap. 9, Vandvik.

Italy.[45] As a consequence, the asylum systems in these Member States have become overwhelmed and the Member States cannot deal with the number of arriving migrants, including asylum seekers. This was also noted by the European Parliament when it discussed the ECtHR decision in *M.S.S. versus Belgium and Greece*.[46] Similarly, the ECtHR also noted that the Union legislation and the national legislation that are in place in Greece would comply with the fundamental rights standards for the protection of asylum seekers. However, the Member State practice is not in compliance with the legislative provisions.

Therefore, in addition to the formal unification of the asylum systems, to support the actual realisation of the rights under the Directives, there is a need for practical support for the Member States facing pressures in trying to comply with the legislation. The Member States agreed in 2000 to set up the European Refugee Fund and according to the new Decision[47] on the priorities of the Fund, it is aimed at improving in the Member States "the grant of reception conditions for refugees, displaced persons and beneficiaries of subsidiary protection, to apply fair and effective asylum procedures and promote good practices in the field of asylum so as to protect the rights of persons requiring international protection and enable Member States asylum systems to work efficiently."[48] The majority of the early funds will be distributed for the Member States under the objective criteria relating to the number of asylum seekers.[49] For instance, the UNHCR is working with the funding provided by the European Refugee Fund to assess the implementation of the Asylum Procedures Directive.[50]

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[45] According to the IND statistics presented at the conference, Italy does not have that many asylum applicants. However, there are according to the statistics many irregular immigrants arriving through Italy. The problem could be that Italy is not allowing these persons the entry to the asylum procedures. Some statistical confirmation for this can be seen for example from UNHCR Report, Asylum Levels and Trends in Industrialised Countries 2009, http://www.unhcr.org/4ba7341a9.html (accessed 14 August 2011), according to which there has been 42% decrease in asylum applications in Italy, p. 5. See further on this Chap. 8, Ascoli.

[46] European Parliament, State of European asylum system, after the recent decision of the European Court of Human Rights, 75518, 15 February 2011, http://www.europarl.europa.eu/en/media-professionals/content/20110215SHL18429/html/State-of-European-asylum-system-after-the-recent-decision-of-the-European-Court-of-Human-Rights-75518 (accessed 14 August 2011).

[47] Decision 573/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Refugee Fund for the period of 2008–2013 as part of the General Programme "Solidarity and Management of Migration Flows" and repealing Council Decision 2004/904/EC, OJ 2007/L144/pp. 1–21.

[48] See European Commission, The European Refugee Fund III, http://ec.europa.eu/home-affairs/funding/refugee/funding_refugee_en.htm (accessed 14 August 2011).

[49] For the period of 2008–2013 the Fund has 628 million Euro and 566 million Euro will be distributed to the Member States. 62 million Euro is reserved for other Union actions, such as supporting practical cooperation between Member States, ibid.

[50] See further Chap. 5, Hövell.

To help the national authorities further in implementation of the CEAS, the Union has established the Common European Asylum Office (EASO)[51] which started its operation in 2010 in Valletta, Malta. The main role of the EASO is to "facilitate, coordinate and strengthen practical cooperation among Member States" on asylum.[52] It also provides the Union with scientific and technical assistance in regard to the policy and legislation. It can, therefore, provide information to the Union about all matters relating to asylum. For this purpose the EASO can provide information about the best practices,[53] or about the countries of origin.[54] Added value to the information provided by the EASO is that it also has direct link with the UNHCR. The EASO is obliged to work in cooperation with the UNHCR,[55] in its work the EASO is to use the UNHCR guidelines,[56] and the UNHCR representative sits on the management board of the EASO.[57]

The EASO has a specific role in helping the Member States, where a Member State is subject to a particular pressure from the Dublin system. It can gather and analyse information about the situation in that Member State.[58] The EASO can, furthermore, provide operational support by, for instance, helping Member States on initial analysis of the asylum applications or making sure that appropriate reception facilities are made available by Member States.[59]

Therefore, the unification of asylum procedures, treatment of asylum seekers and recognition of persons requiring international protection can also be helped by the practical measures that the Union has adopted in this regard. The EASO may prove to be an influential body in raising the common standards on asylum protection by providing help to those Member States where the system is the weakest. The links with the UNHCR are also important in this regard. These may ensure further the Member State compliance with the international protection provisions.

1.4 The External Borders and Return Operations

So far this Chapter has concentrated on the internal functioning of the CEAS. What remains to be analysed separately is the access of the asylum seekers to the Union territory and asylum procedures. The basic premise here is that the

[51] Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ 2010/L132/pp. 11–28.

[52] Article 2 of the Regulation.

[53] Article 3 of the Regulation.

[54] Article 4 of the Regulation.

[55] Recital (10) and Article 50 of the Regulation.

[56] Article 12(2) of the Regulation.

[57] Articles 25(4) and 27 of the Regulation, as a non-voting member. The representative can also sit in the Executive Committee, only without the right to vote, Article 29(2) of the Regulation and sit in the Consultative Forum, Article 51 of the Regulation.

[58] Article 9 of the Regulation.

[59] Article 10 of the Regulation.

responsibility for controlling the external border is still a matter for the Member States.[60] Although the Union has adopted new measures on external borders, and for example, FRONTEX[61] has been established, the premise is still the same. Under the TFEU the Union competence is limited in this respect. The Union can develop common policies on border control mechanisms or visas, as well as treatment of aliens who have already crossed the borders,[62] but there is no general competence to adopt common policies on controlling who can enter into the Union.

In this regard, the common policies on asylum only start taking effect when a person has been admitted by the Member State authorities to asylum procedure. The Charter of Fundamental Rights only grants right to asylum and does not mention the right to access to asylum procedures.[63] Similarly, Article 78 TFEU does not mention the right to access to asylum procedures as one of the common policies to be developed by the Union.[64] This is mirrored by the asylum instruments to date. Both the Asylum Procedures Directive[65] and the Qualification Directive[66] take effect from the point in time when a person has submitted his or her application. Therefore, under Union law it remains the Member State's competence to organise that the person has access to the asylum process and in this respect to comply with the protection afforded by the 1951 Refugee Convention and ECHR.

Furthermore, the Union is more involved in the development of return policies for irregularly arriving migrants. In 2008, the Return Directive[67] was adopted which sets out common standards and procedures for returning illegally staying

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[60] See also Inex, Interview with Director of FRONTEX, Mr. Laitinen, 12 May 2010, http://migrantsatsea.files.wordpress.com/2010/11/inex-laitinen-interview-12may20101.pdf (accessed 14 August 2011).

[61] http://www.frontex.europa.eu/ (accessed 14 August 2011) for information on FRONTEX. See further Chap. 6, O'Dowd, on the role of FRONTEX.

[62] Article 77 TFEU.

[63] Article 18 of the Charter: "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention…".

[64] In Article 78 TFEU we find provisions for developing uniform status on asylum and subsidiary protection for nationals of third countries, common system of temporary protection for displaced persons in the event of a massive inflow, common procedures for granting or withdrawing of asylum or subsidiary protection status.

[65] See especially Article 3 which states that the "Directive shall apply to all applications made in the territory…".

[66] The only mention of an asylum application is made in Article 1(g) of the Directive which states that "'application for international protection' means a request made by a third country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately".

[67] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ 2008/L348/pp. 98–107.

third country nationals.[68] While this Directive does not allow the return of asylum seekers, it still maintains the principle that asylum seekers are only granted protection once they have been able to apply for asylum.[69]

There is a danger here that these type of return policies will mount to the so-called "push back operations". There are precedents where the Member States of the Union have been summarily returning irregularly entering persons to states such as Turkey (from Greece) or Libya (from Italy).[70] The problem here is that in these cases it is not investigated by the authorities whether there are mixed with irregularly entering migrants also persons who have valid claims for asylum, in other words, whether there is a so-called mixed flow. Especially, the "push back operations" by Italy to Libya have been contested by the UNCHR and currently, cases on this policy are also pending in the ECtHR.[71] What has been particularly problematic here is that Libya is not a party to the 1951 Refugee Convention and the 1967 Protocol and therefore, although Italy and Libya would have bilateral agreements on the treatment of persons returned to Libya, Libya is not under the international obligation to grant protection to asylum seekers and to apply non-refoulement. Therefore, in adopting these types of neighbourhood policies the Union must make sure that the principles on access to asylum procedures and non-refoulement are respected also by Member State authorities.

1.5 Conclusions

All in all, as this short introductory presentation and more fully the book itself shows, there is still much to do in the CEAS "to establish a level playing field, a system which guarantees to persons genuinely in need of protection access to a high level of protection under equivalent conditions in all Member States while at the same time dealing fairly and efficiently with those found not to be in need of protection."[72] It is likely that the negotiations for the creation of a single asylum procedure will take years to come. Asylum is a highly political issue. The EU policies are reflecting the current anti-immigration attitudes from the Member States.[73] In the Stockholm Programme asylum policies are afforded only a page

[68] Article 1 of the Directive.

[69] Recital (9) of the Directive: "a third country national who have applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force".

[70] See Chap. 8, Ascoli, and Chap. 3, Bruin.

[71] See Submission by the Office of the UNCHR in the Case of Hirsi and Others versus Italy (Application no. 27765/09).

[72] Commission Green Paper on the Future of Common European Asylum System, COM(2007)301 final.

[73] Discussed also by O'Dowd in Chap. 6.

and a half and it mainly reiterates that asylum policies need to be strengthened in accordance with the 1951 Refugee Convention. Otherwise, the policies in the Stockholm Programme[74] seem to be concentrating on securing external borders, returning illegal migrants and creating a buffer zone with the neighbourhood region where the persons arriving to Europe can be processed. In this regard, the Programme invites the creation of Regional Protection Programmes with third countries.[75]

Yet, the pressure is still mounting. The Commission has taken a very active role in its new proposals to strengthen the CEAS. It is trying to give substance to the obligations that the Member States need to respect in order to get the single asylum procedure system working. However, as discussed here, simply raising the standards of the Union legislation is not enough. The Union has employed softer measures to also take into account the difficulties faced by the Member States that end up receiving most of the asylum seekers and refugees. These may further help in practical application of the fundamental rights protection standards. In addition, the Union must try to make sure that the Member States are complying with the standards, by enforcement through Union law, if necessary.

If the Member States do not hold on to the international human rights standards in the application of the CEAS, the ECtHR has now shown that it will get involved to ensure that the Member States of the Union are not breaching these obligations. The transfers of asylum seekers are within the Union being frozen and the ECtHR is placing an obligation for the Member State authorities to review the situation in the Member State where the asylum seeker is to be transferred. While this could be construed as a condemnation of the CEAS, it should not be read so harshly. The ECtHR is not saying that there is a major problem with the CEAS itself, but rather that the system as it stands, does not comply with the ECHR standards. The immediate remedy would be simple. The Member State that wishes to transfer an asylum seeker needs to review objectively the situation of the Member State where the transfer is to be made. It cannot simply trust that the other EU Member State is respecting the standards of the treatment of asylum seekers or respecting the principle of non-refoulement. The Member State must take into account the evidence if it tells that the situation is not safe for the asylum seeker and not to return the person in that case.

Furthermore, it needs to be realised that the external border policy is still in the hands of the Member States. The Union action is far too limited here for it to be able to intervene and it is difficult for the Union to strengthen the right of asylum seekers to access the asylum procedures in the borders or international sea areas. This is a crucial piece that is still missing from the CEAS and meanwhile as this is the situation, the only ECtHR is able to intervene if there are problems. Perhaps, once more cases reach the Court of Justice, the situation will change. It may start interpreting the right to asylum as including the right to access to asylum procedures. Without it, the right to asylum under Union law is here simply very limited.

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[74] *Supra* n. 11, Sect. 1.2.

[75] *Supra* n. 11, Sect. 1.2, p. 33.

Chapter 2
Conference on Recent Developments in European and International Asylum Policy and Law

Nebahat Albayrak

Contents

2.1 Introduction

We recently celebrated the birth of Gerrit Gerritszoon, better known as Desiderius Erasmus, one of the greatest thinkers of his time, and name giver to the Erasmus University, Rotterdam. Erasmus held the view that 'In a free state, the tongues too should be free.' Centuries later, in 1951, the same body of thought was included in the Convention on Refugees. One of the underlying principles in this convention is that asylum must be granted to anyone who is prosecuted in his or her own country on account of his or her political beliefs.

Much has happened between 1951 and 2009. The world has changed; it has become smaller. Nowadays, most refugees are mainly on the run due to war and

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