

Beyond Fortress Europe?

How European Cooperation Strengthens Refugee Protection

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Abstract: It is often said that European cooperation on asylum has led to the development of 'Fortress Europe', as asylum policies have become more restrictive and asylum seekers find it increasingly difficult to reach European territory and benefit from effective protection. There can be little doubt that there have been restrictive asylum policy trends in most, if not all, destination countries and there are many examples of how existing laws have failed asylum seekers in need of protection. We argue, however, that there is little evidence for the claim that steps towards a common European asylum policy have been responsible for, or exacerbated, such developments. On the contrary, we argue that European cooperation on asylum has curtailed regulatory competition among the Member States and that in doing so it has largely halted the race to the bottom in protection standards in the EU. Rather than leading to policy harmonisation at the 'lowest common denominator', EU asylum laws have frequently led to an upgrading of domestic asylum laws in several Member States, strengthening protection standards for several groups of forced migrants even in those cases where EU laws have been widely criticised for their restrictive character. It is reasonable to expect that the ongoing 'communitarisation' of asylum policy will improve Member States' implementation records of EU asylum law and further improve refugee protection outcomes in Europe.

Introduction

There is a widely held view that European cooperation in general and moves towards a common EU asylum policy in particular have had a negative impact on protection regimes in Europe, leading to more restrictive asylum policies and making it increasingly difficult for asylum seekers to reach European territory and benefit from effective protection. This has become known as the 'Fortress Europe' thesis (Geddes 2000; Luedtke forthcoming). This thesis argues on a theoretical

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level that Member State cooperation on asylum and refugee matters has fostered restrictiveness through processes of ‘venue shopping’ (Guiraudon 2000; 2001), ‘securitisation’ (Huysmans 2000; Kostakopoulou 2000; Bigo 2001) and the legitimisation of ‘lowest common denominator standards’ (Guiraudon 2001; Lavenex 2001). On an empirical level, aspects of EU asylum and refugee policy have been criticized for their undermining of the rights of asylum seekers and refugees through the establishment of restrictive EU laws in areas such as ‘safe third country’ policy, detention and return policy. There can be little doubt that there have been restrictive asylum policy trends in most, if not all, destination countries and many examples of how existing laws have failed asylum seekers in need of protection. We argue, however, that there is little evidence for the argument that in Europe steps towards a common European asylum policy have been responsible for such restrictive developments. On the contrary, we argue that European cooperation in this area has curtailed regulatory competition and in doing so it has largely halted the race to the bottom in protection standards in the EU. Rather than leading to policy harmonisation at the ‘lowest common denominator’, EU asylum laws have led to an upgrading of domestic asylum laws in several Member States, strengthening protection standards for groups of forced migrants even in the case of EU laws that have been widely criticised for their restrictive character. While there currently remain significant variations in Member States’ implementation of EU asylum law, we expect that the ongoing ‘communitarisation’ of asylum policy will improve Member States’ implementation records of EU asylum law and strengthen refugee protection outcomes in Europe.

Theorising the Impact of European Cooperation on Asylum Policy

There is near consensus among the relevant commentators with regard to the assessment of the impact of European cooperation on asylum and refugee policy since the start of such cooperation in the 1980s. The literature generally agrees that asylum policy harmonisation has resulted in increased restrictions of access to asylum procedures and weaker procedural safeguards (Hathaway 1993; Guiraudon 2000, Huysmans 2000, Boccardi 2002, Guild 2006). The theoretical frame that has been developed to account for the negative impact of European cooperation on refugee protection is seen as being based on three key dynamics: 1) the external restrictionism inherent in internal market liberalisation; 2) the ‘venue-shopping’ and securitisation logic of European asylum policy making and 3) the legitimating cover that European cooperation provides for the restrictive initiatives of the Member States.

First, restrictive measures at the EU's external border are often seen as a counterbalance to internal liberalization. The European Union's asylum initiatives have often been seen as sitting somewhat uneasily with the overwhelmingly economic nature of the European integration project (Hathaway 1993; Lavenex 2000; Boccardi 2002; Guild 2006). Chalmers (2006: 606) notes that the common policy towards non-EU nationals 'has been framed to a large extent by the economic benefits or costs these are perceived to entail'. As a result, rather than undertaking the construction of a European-wide protection space, cooperation on asylum issues was directed towards the adoption of compensatory measures which were to pave the way for the complete abolition of internal border checks. Hathaway was one of the first scholars emphasising the discursive connection between the completion of the single market programme and the need for stricter controls when in 1993 he wrote: 'European Community governments have seized upon the impending termination of immigration controls at the intra-Community borders to demand enhanced security at the Community's external frontiers' (Hathaway 1993: 719).

Second, there have arguments based on the dynamics of venue-shopping and securitisation. A substantial body of work has developed exploring the way in which the emergence of asylum policy at the EU level has assisted national authorities in overcoming international and domestic constraints in their attempt to pursue restrictive policy goals. These constraints include national constitutions, jurisprudence and laws and, albeit to a lesser extent, international legal instruments and courts (Guiraudon 2000: 258-9; Joppke; Hansen). Hathaway (1993: 719) writes: 'Collaborating within a covert network of intergovernmental decision-making bodies spawned by the economic integration process itself, governments have dedicated themselves to the avoidance of national, international, and supranational scrutiny grounded in the human rights standards inherent in refugee law'. This, he argues, 'breaks with the tradition of elaborating norms of refugee law in an open and politically accountable context' (Hathaway 1993: 719). Guiraudon (2000: 252) has pursued this argument advancing the notion of 'venue shopping', which refers to the process by which strategic actors (such as security-minded interior ministry officials) seek venues of decision-making in which they are shielded from actors with other preferences. The early institutional design of European cooperation on refugee issues has been regarded as an essential factor contributing to the increased autonomy enjoyed by executive authorities. The inter-governmental origins of EU policy-making in Justice and Home Affairs (JHA) resulted in an enduring marginalisation of supranational institutions, first under the Maastricht Third Pillar and subsequently under the transitional framework established by the Amsterdam Treaty, which has allowed Member States to shield their restrictive policy agenda against interference from

actors with a more integrationist or humanitarian view of immigration and asylum issues (Hathaway 1993; Pollack 1999; Guiraudon 2000; Kostakopoulou 2000; Tallberg 2002). Different institutions may be more or less favourable towards particular policy frames (Baumgartner and Jones 1993). In the asylum field, '[t]he image of migratory flows jeopardising internal security is often integrated into the vocabulary of law and order' (Anderson 1995: 164-5). The argument here is that the institutional dominance of JHA officials in supranational cooperation has promoted the 'securitisation' of asylum and refugee issues at the EU level (see e.g. Guiraudon 2000; Kostakopoulou 2000; Huysmans 2000; Bigo 2001). The conceptualisation of migration and asylum as potentially destabilising phenomena, in a similar fashion to terrorism and transnational crime, allows national security agencies to advance their traditional solutions – those of external border control and internal police surveillance.

A third argument focuses on the impact that European cooperation is expected to have on the asylum systems of EU Member States, by legitimising the lowering of domestic standards. It is argued that national officials who participate in EU asylum policy-making can legitimate restrictive reforms at home by the 'need' to bring national policies into line with European initiatives (Joppke 1998; Lavenex 2000). According to Lavenex (2001: 861), the main impetus for restrictions in Europe has come from traditional destination countries, but EU cooperation has also contributed to limit liberal regimes in other receiving Member States in which asylum issues had previously been less politicised. The tightening of asylum laws in one country has subsequently led to 'snowball effects', whereby other Member States have felt compelled to revise their policies in order not to become magnets for asylum seekers (Guiraudon 2001: 50). A number of commentators stress that, within the context of the abolition of internal border controls, this spiral of restrictionism has been reinforced by the adaptive pressures exerted from the EU level (Hathaway 1993; Lavenex 2001: 861-2; Guild 2006). Moreover, Lavenex (1999: 73) points out that the opening up of the iron curtain led the EU Member States 'to develop a vivid interest in tightening those newly liberalised borders'. The identification of Central and East European countries (CEECs) as safe third countries was to allow for the de facto transplantation of a restrictive EU asylum regime to the then candidate countries within the overarching context and with the help of the political leverage of the prospect of membership (Lavenex 1999; Byrne et al. 2002).

However, this theoretical account of the expected negative impact of European cooperation in this area can be challenged. It also needs to be balanced by pointing towards some important

countervailing dynamics. First, a number of caveats to the account outlined above are necessary. We might ask, for example, whether we should necessarily expect a quid pro quo between internal liberalisation and external restrictiveness. In other areas of the Single Market, steps towards the free movement of goods, capital and services have (with few exceptions) not undermined Europe's general openness vis-à-vis the rest of the world. With regard to the idea of venue-shopping, one can point to recent steps towards the communitarisation of EU asylum and refugee policy which has substantially increased transparency while broadening the participation of actors involved in asylum policy, reducing venue-shopping opportunities and securitisation dynamics (Boswell 2007). As for legitimising the lowering of domestic standards argument, one would of course expect such processes of legitimisation to occur despite the absence of explicit EU cooperation as states frequently refer to the policies of other countries in order to justify domestic reforms.

Second, the adoption of common EU standards can be expected to limit regulatory competition and the 'race to the bottom' in protection standards. Public policy making on asylum takes place in an environment of extensive collective action problems (Suhrke 1998; Thielemann and Dewan 2006). The relative distribution of asylum seekers across Europe has been highly volatile and uneven. This has fuelled regulatory competition as states have sought to limit their relative responsibilities with regard to asylum seekers and refugees by adopting policy measures that were more restrictive than those of other states in their neighbourhood in an attempt to deflect asylum flows to these other countries. Policy harmonisation, i.e. the setting of common minimum European standards, are an effective way of putting an end to such regulatory competition and the continuous downgrading of protection standards. Moreover, Member States are at liberty to adopt higher standards than those outlined in the EU legislation. As stated in the Preamble to the Procedures Directive, for example, 'It is in the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions for third country nationals or stateless persons who ask for international protection' (Council Directive 2005/85/EC). Furthermore, minimum standards legislation customarily contains provisions ('stand-still clauses') prohibiting Member States from lowering their current domestic standards in the implementation of the Directive (Costello 2005: 53).

Third, we do not expect that European cooperation will always lead to common policies that reflect standards at the level of the 'lowest common denominator' among the Member States. Instead, we expect (even under unanimity voting in the Council) that in many cases common

policies will be adopted at levels which will require at least some Member States to upgrade their domestic policies. There are a number of institutional mechanisms that can explain this. One such mechanism is that of conditionality. It is often said that the EU enlargement process is the Union's most effective foreign policy tool providing it with considerable leverage over the domestic reform process in accession states. When a country seeks to become a new member of the EU, its government makes a commitment not only to fulfil the Copenhagen criteria but also to accept the entire existing *acquis communautaire*. This means that accession countries are required to adapt their domestic laws in preparation of membership (or closer ties with the EU more generally), a requirement known as conditionality (Smith 1998; Schimmelfennig and Sedelmeier; Hughes, Sasse and Gordon 2004). The EU asylum *acquis* constituted an important element in the negotiations on accession of the Eastern European countries after the collapse of communism (Byrne, Noll and Vedsted-Hansen 2002; Vedsted-Hansen, Byrne and Noll 2004). Until the mid-1990s Eastern European states, which had been sheltered by the Iron Curtain during the Cold War, had less developed domestic asylum systems for asylum-seekers and refugees than countries in Western Europe. As a result new EU Member States and those still in the accession process have been encouraged (and sometimes coerced) to upgrade their own domestic asylum systems in line with established international and EU protection standards. In addition to the 'hard' incentives that conditionality provides, 'soft' incentives also play a role in the evolution of domestic standards. Even without legal compliance and enforcement mechanisms, regulatory standard setting in the EU frequently involves the upgrading of domestic rules in some of the Member States. Low standard states frequently agree to common rules that reflect the higher standards of other Member States as the experience with Single Market regulations has shown. Mechanisms for such dynamics include reputational concerns (Heritier 2001), policy learning (Dolowitz D. and D. Marsh 2001) and the use of compensation and package deals (Thielemann 2005). One such compensation instrument is the European Refugee Fund (ERF),³ which distributes money from the common EU budget to encourage efforts of the Member States in receiving and bearing the consequences of receiving refugees and displaced persons (Thielemann 2005: 807–824). The recent Commission Green paper on the future of EU asylum policy is explicit about the Fund's purpose, stating that 'ways must be explored to ensure ERF funding can be put to better use in order to complement, stimulate and act as a catalyst for the delivery of the objectives pursued, to reduce disparities and to raise standards (Commission 2007: 11). Even though questions have been raised about the ability of the ERF to fully achieve all its objectives given its currently small size and problematic allocation rules (Thielemann 2005), the Fund has transferred significant

³ Established in 2000 on the basis of Article 63(2) (b) of the EC Treaty, OJ L 252/12 of 6 October 2000.

resources and can be expected to have helped some countries to accept and finance adaptation to higher European standards.⁴

The Evolution of the Common European Asylum System

Before illustrating how European cooperation on asylum has limited regulatory competition, halting the race to the bottom in protection standards as well as upgraded standards of protection in several Member States, it might be useful to remind ourselves of the principle legislative instruments adopted thus far in the process of the formulation of the Common European Asylum System.

The objective of the Common European Asylum System (CEAS) is to establish a common asylum procedure and a uniform protection status applicable throughout the European Union. These objectives were defined first in the Tampere Programme in 1999 and then confirmed and elaborated in the Hague Programme of 2004. The ‘ultimate objective’, as stated by the European Commission in its Green Paper on the future Common European Asylum System, is to create 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’ (Green Paper on the future Common European Asylum System, Brussels, 6.6.2007 COM(2007) 301 final, 2). The first stage of the establishment of the CEAS was designed to result in the achievement of a set of minimum standards on specific areas of asylum policy applicable in the legal systems of all Member States. Four main legislative instruments have been adopted. These comprise Directive 2003/9 laying down minimum standards for the *reception* of asylum seekers (OJ L 31, 6.2.2003, p. 18), Directive 2004/83 on minimum standards for the *qualification* of persons as refugees or those in need of subsidiary protection (Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ L 304, 30.9.2004, p. 12), Directive 2005/85 on minimum standards on *procedures* in Member States for granting and withdrawing refugee status (O J L 326, 13.12.2005,

⁴ There are other less well known resource-sharing schemes which can be expected to have a similar impact in persuading Member States to maintain or upgrade existing domestic standards. This includes (sometimes controversial) assistance measures to secure the EU's external borders (e.g. through FRONTEX operations) as well as initiatives that have provided technical assistance through training programmes, secondment of national officials, etc. (Dymerska 2007).

p. 13) and finally the Directive on common standards and procedures in Member States for returning illegally staying third country nationals (OJ L 348, 24.12.2008, p. 98). All four instruments will be analysed below.

Assessing the impact of European Cooperation on Asylum Policies

Ultimately, the question of the impact of European cooperation on asylum and refugee policy is an empirical one. The following section will analyse the EU's four key legislative instruments that aim to harmonise European asylum policies. In each case, we will analyse the legislation's purpose and remit, why certain aspects of the EU law have been criticised, and the extent to which EU provisions have weakened or strengthened pre-existing national asylum laws and protection standards in the 27 Member States. It will be shown that although valid criticisms have been raised against EU asylum provisions, there is very little evidence to suggest that Member States' pre-existing protection standards have been downgraded as EU law has been transposed at the national level. At the same time, there are numerous concrete examples of national asylum laws being forced to upgrade to comply with more stringent EU rules.

a) The Reception Directive

Traditionally, 'states have strong reservations about granting important rights to asylum seekers because no final decision has been taken yet on the substantive issue of their application' (Lambert, 1995, 103). Nevertheless, the Tampere Conclusions of 1999 provided that the Common European Asylum System should include the establishment of common minimum standards of reception conditions for asylum seekers (Tampere Presidency Conclusions, October 1999). In due course, the Council adopted Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (Reception Directive), now binding upon the Member States, excluding Denmark and Ireland. The Directive was to be transposed by Member States by 6 February 2005. The Preamble to the Directive states that it seeks to lay down minimum standards for the reception of asylum seekers 'that will normally suffice to ensure them a dignified standard of living and comparable living conditions in all Member States' (Recital 7). The objective of harmonising the conditions of reception is to 'help to limit the secondary movements of asylum seekers influenced by the variety of conditions for their reception' (Recital 8).

Key criticisms

As well as welcoming many of the Directive's provisions, the UNHCR and others raised four key criticisms. First, the Directive applies only to those applicants making a request for 'international protection', which is to be understood as a claim under the 1951 Refugee Convention (Article 2 (b)). UNHCR insists that an asylum application refers not only to a request for protection under the Refugee Convention, but also claims for subsidiary or complementary forms of protection and that these applicants should be guaranteed an equivalent level of protection to those applying for refugee status. Second, on the topic of 'Residence and free movement' of asylum seekers on Member State territory, UNHCR expressed concern at the wide scope for discretion in implementation of the Directive. Article 7(1) states that 'Asylum seekers *may* move freely within the territory of the host Member State [emphasis added]' and Article 7(2) provides that 'Member States *may* decide on the residence of the asylum seeker for reasons of public interest, public order, or when necessary, for the swift processing and effective monitoring of his or her application'. UNHCR noted that the 'may' clauses in this article could lead to the implementation of many exceptions by Member States. The UNHCR regretted the inclusion of Article 16 on the 'Reduction or withdrawal of reception conditions', which allows Member States to 'withdraw reception conditions' in cases where an asylum seeker 'abandons the place of residence determined by the competent authority' or where she 'does not comply with reporting duties or with requests to provide information or to appear for personal interviews concerning the asylum procedure' (Article 16(1)(a)). UNHCR stated that cases of abuse of a states' asylum system should be dealt with through the established asylum procedure and not through alterations in reception conditions. The protection of human dignity is to be ensured for all individuals, including asylum seekers who have breached measures related to the processing of their claims (UNHCR, 2003). Third, the Directive permits Member States to use vouchers as a means of providing material reception conditions. UNHCR expressed reservations with regard to voucher systems 'due to the observed prejudices and discrimination against asylum-seekers who are obliged to use vouchers for shopping' (UNHCR, 2003). Fourth, of particular concern to the UNHCR was also Article 16(2) which permits Member States to 'refuse conditions in cases where an asylum seeker has failed to demonstrate that the asylum claim was made as soon as reasonably practicable after arrival in that Member State'. The UNHCR stated that this provision 'may constitute an obstacle for asylum-seekers to have access to fair asylum procedures' who 'may lack basic information on the asylum procedure and be unable to state their claims formally or intelligibly without adequate guidance (including legal advice and representation). These difficulties would be exacerbated where

asylum-seekers arrive with insufficient means and are denied assistance through rigid application of the “reasonably practicable” criteria’ (UNHCR, 2003).

While these criticisms show that the provisions of the reception directive did not go as far as some human rights advocates had hoped, there is little in these critiques to suggest that EU law constitutes a down grading of existing national standards. Article 4 explicitly permits Member States ‘to introduce or retain more favourable provisions in the field of reception conditions’. Moreover, it will be shown below that key elements of the reception directive have triggered an upgrading of domestic standards during the transposition process of the directive in several Member States.

How the Reception Directive has strengthened aspects of refugee protection in relation to previous domestic standards

To what extent does EU law on reception conditions reflect the lowest common denominator of standards that previously existed in the Member States? Or is there evidence of EU standards in the area of reception that are higher than in some Member States? The task of agreeing common minimum standards for harmonisation of reception conditions was always going to be difficult. As Nicola Rogers has noted, achieving adequately high standards which secure humane conditions for all asylum applicants ‘is largely dependent on the Member States making compromises in areas of social law which to date they, they have long jealously guarded’ (Rogers, 2002, 216). To assess the impact of the reception directive on national law, a various comparative studies on the transposition of the Directive have been carried out (Odysseus Academic Network 2006; COM(2007) 745 final).

The Odysseus Network has noted that the Reception Directive ‘led to the adoption of more favourable provisions at national level than the ones applicable before its adoption in 10 Member States’ (Odysseus Academic Network, 2006, 11). In Austria, Belgium, Cyprus, Estonia, Greece, Italy, Latvia, Luxembourg, Portugal, Slovenia and to a lesser extent Finland, Hungary and Slovakia, the study determined that the Directive led to the legal rules on reception conditions becoming ‘more clear and precise’. This was particularly the case with regard to provisions on the definition of vulnerable groups and provisions on unaccompanied minors, access to the labour market in Estonia, Hungary Luxembourg, Slovenia and Poland, access to healthcare in Latvia and Slovenia, education of the children of asylum seekers in Latvia (Odysseus Academic Network,

2006, 112). Asylum seekers have been given the opportunity to enter the labour market in Estonia, France, Latvia, Poland and Slovakia pursuant to the implementation of the Directive, while in Spain, the procedure for asylum seekers to receive work permits has been simplified (Odysseus Academic Network, 2006, 112-3). For child asylum seekers, their right to access education has been clarified in Lithuania, Poland and Slovakia following the transposition of the Directive. The Netherlands is slowly raising the level of welfare benefits and in France, asylum seekers ‘in-waiting’ are benefit from temporary allocations of welfare pursuant to implementation. The report notes an unexpected positive outcome of implementation in Malta, where Article 11(1), which states that ‘Member States shall determine a period of time, starting from the date on which an application for asylum was lodged, during which an applicant shall have access to the labour market’, has been interpreted as an obligation to release an asylum seeker from detention after one year in order to allow them the opportunity to work (Odysseus Academic Network, 2006, 113).

The report concludes quite clearly that in Belgium, Estonia, Spain, France, Hungary, Latvia, Portugal, Malta, The Netherlands and Slovakia, the transposition of the Directive ‘led to the adoption of more favourable provisions than those applicable before its transposition’. While access to employment improved in Estonia, Spain, France, Latvia, Greece and Slovakia, for the other countries, advances were made on the following points:

- an increased awareness of the special needs of asylum seekers and of the limits to the administration’s discretionary power in Hungary
- a better guarantee of material reception conditions in Portugal
- asylum seekers in Belgium were better informed
- family unification in the Netherlands
- access to education for the children of asylum seekers in Lithuania, Poland and Slovakia
- a review of the welfare benefits system (amount of benefits provided in the Netherlands and the length of provision in France)
- legal aid for asylum seekers in Lithuania
- access to healthcare in Lithuania

(Odysseus Academic Network, 2006, 114).

The Odysseus study concluded that the Directive ‘did not have “perverse effects” of a lowering of higher national standards as would have been possible in the absence of a standstill clause’ except

in Austria and in the United Kingdom where the report states that ‘only a few elements of a (potentially) restrictive nature have been introduced’. These consist of limitations on access to employment in Austria and harsher penalties in the UK (Odysseus Academic Network, 2006, 114). Only one Member State, Slovakia, is found to be ‘a clear case of reduction of the reception conditions’ following transposition (Odysseus , Academic Network, 2006, 114-5). However, generally the positive impact of the Directive is more visible in the new Member States than in the old ones. As mentioned above, in Malta there were no reception condition measures in place prior to the adoption of the Directive (Odysseus Academic Network, 2006, 111). The Odysseus Network concluded that ‘the progress accomplished at national level is due to the action of the European Community, which has contributed positively to International Refugee Law with the Directive on reception conditions complementary to the Geneva Convention’ since the latter is principally concerned with recognised refugees. The report states that ‘the positive effects of its transposition overshadow its negative effects’ (Odysseus Academic Network, 2006, 114). Further, the Network stated that ‘this positive evaluation contradicts the simplistic criticism often levelled at the Directive regarding its level of standards without bearing in mind the extremely diverse situation across the Member States’ (Odysseus Academic Network, 2006, 11).

b) The Qualification Directive

The Qualifications Directive sets out the rules and principles to be applied by Member States in their identification of refugees and those deserving of subsidiary protection status. The Directive, having been adopted at the Justice and Home Affairs Council of 29 April 2004, entered into force on 20 October 2004 and its deadline for transposition was 10 October 2006. The ‘main objective’ of the Directive is stated in the Preamble as being ‘to ensure that Member States apply a common criteria for the identification of persons genuinely in need of international protection, and...to ensure that a minimum level of benefits is available for these persons in all Member States’ (Recital 6, Qualification Directive). Disparities in the legislation and legal practice of EU Member States have meant that a refugee’s chances of finding protection can vary dramatically from one Member State to another. According to Vice-President Franco Frattini, the former Commissioner for Justice, Freedom and Security, the Directive should reduce “the current great variances in recognition rates between Member States”⁵ and end what some have called the EU’s ‘asylum lottery’⁶.

⁵ Europa press release, IP/06/1345, Brussels, 10 October 2006.

⁶ ECRE press release of 4 November 2004: ‘Europe Must End Asylum Lottery.’

Key criticisms

Critiques of the Directive have highlighted two elements of the Directive which have been seen as having the potential to undermine existing protection standards. These are provisions on ‘internal protection alternative’ and the so-called ‘exclusion clauses’.

According to the UNHCR, ‘Article 8 of the Qualification Directive omits what is considered by UNHCR, legal experts and States party to the 1951 Convention to be an essential, and even pre-conditional, requirement of an internal protection alternative, i.e. that the proposed location is practically, safely and legally accessible to the applicant’ (UNHCR 2007:10).⁷ The Directive therefore allows Member states to refer to internal protection alternatives even when, due to technical obstacles, applicants cannot actually return to the region which is deemed safe. In such cases applicants are often granted only a ‘tolerated’ status with restricted social rights (Elena 2008:5). Even though the UNHCR found that several Member States had not transposed the Directive’s provisions concerning internal protection alternatives (UNHCR 2007: 10), the fact remains that these provisions appear out of line with the established jurisprudence of States party to the 1951 Convention and recent case-law of the European Court of Human Rights.⁸

The other main criticism of the Directive concerns provisions to exclude asylum seekers from refugee status (Articles 12 and 14). Article 14 creates a distinction between exclusion and revocation of status, and uses it to permit states to conflate the Convention grounds for exclusion with expulsion. These provisions allow Member States to adopt dangerously broad interpretations of what constitutes a “serious non-political crime” that can lead to exclusion. Critics are concerned that Member States will use Article 14 to improperly exclude people from refugee recognition based on criteria that lead only to expulsion under the Convention (Elena 2008: 7). According to the UNHCR, existing standards for application of the exclusion clauses have been eroded by the Directive (UNHCR 2007: 13).

How the Qualification Directive has strengthened aspects of refugee protection in relation to previous domestic standards

7 UNHCR Guidelines on International Protection No. 4: ‘Internal Flight or Relocation Alternative’ within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 23 July 2003, at: <http://www.unhcr.org/publ/PUBL/3f28d5cd4.pdf>.

8 Salah Sheekh v. the Netherlands, ECHR, Application No. 1948/04, 11 January 2007.

Despite the above criticism, even among the most vocal critiques the assessment of the impact of the Qualifications Directive has in parts been very positive. The introduction of more detailed rules of evidentiary assessment and a clearer definition of persecution have been widely welcomed. Transposition also significantly advanced standards in some Member States where non-state actors of persecution were recognised for the first time, or subsidiary protection was introduced as a concept (Elena 2008: 5).

Subsidiary protection

The Directive's provisions on subsidiary protection have been welcomed (UNHCR 2007: 11). They represent the first supranational legislation in Europe defining qualification for subsidiary protection, and create an obligation to grant this status to those who qualify. Many EU Member States had pre-existing national provisions to afford individuals some form of complementary protection status. However, large variations existed as to the scope and the rights attached to this status. The Qualification Directive sets minimum standards for the definition and content of subsidiary protection status. As is the case for other provisions of EU asylum law, Member States may maintain or introduce standards more favourable to the applicant (UNHCR 2007: 66). The Directive strengthens existing refugee law in its attempts to define persecution by providing a non-exhaustive list of persecutory acts, including 'acts of sexual violence' (Article 9(2)(a)) and 'acts of a gender-specific nature' (Article 9(2)(f)) neither of which are found in the Refugee Convention though the law has developed gradually in recognition of the need to protect individuals from return to such treatment. Teitgen-Colly has stated that, alongside the reference to the ECHR in Article 9(1)(a), their inclusion 'demonstrates the intention of the Union to allow for forms of persecution which, although they are not new, have not always been considered as such' (Teitgen-Colly; 2006, 1530).

Moreover, the Directive introduces a completely new aspect into the scope of refugee law by widening the scope for subsidiary protection to cases in which there is 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' (Article 15c). According to Teitgen-Colly, 'individual' has to be 'understood as a requirement for personal or individual threats, meaning threats likely to create subjective fears in each person exposed to them' (Teitgen-Colly; 2006,1529). The development here is the absence of a requirement of a discriminating factor for the perpetration of

the violence. Perhaps more importantly, it is the lowering of the required threshold level of 'severe violation' to 'serious harm' that creates the potential for a real widening of the scope of protection for those seeking asylum in Europe.

The Qualification Directive has also been praised for recognising the fact that persons fleeing the indiscriminate effects of violence associated with armed conflicts, but who do not fulfil the criteria of the 1951 Convention, nevertheless require international protection (UNHCR 2007: 81). It has initiated an approximation of criteria for the recognition of subsidiary protection status.⁹ Finally, the transposition of the Qualification Directive has resulted in a subsidiary protection status for the first time in countries such as the Slovak Republic. In doing so, the Directive has expanded the scope of international refugee protection (UNHCR 2007: 81-2).

Non-state persecution

In the area of non-state persecution, the Qualification Directive again goes further than the Refugee Convention. Before the adoption of the Directive, the issue of who can perpetrate persecution for the purposes of refugee recognition was possibly the clearest example of differences in legal interpretation amongst the Member States. All EU states agreed that state or de facto authorities, who control the whole or a significant part of the territory, could be agents of persecution. However, whilst most Member States went further and also recognized non-State actors as agents of persecution if the state was unwilling or unable to provide protection, a minority of Member States (including Germany and France) only accepted persecution by non-State actors where the persecution was instigated, condoned or tolerated by the State, i.e. in cases where the state could be shown to be complicit in the persecution and/or unwilling to provide protection. Hence, a minority of states would deny refugee status where a person risked persecution by non-state actors and the state was simply unable to provide protection, or where no state authorities existed to provide protection.¹⁰

The Qualification Directive, sought to ensure a common concept of the sources of persecution and serious harm (Recital 18). In line with the jurisprudence of the European Court of Human

⁹ See ECJ judgement *Elgafaji*, http://www.cir-onlus.org/C0465_2007_EN_0%5B2%5D.pdf

¹⁰ Germany had the most restrictive interpretation. See Klug, A., 50 Jahre Genfer Flüchtlingskonvention - Flüchtlingsrechtliche Relevanz der 'nichtstaatlichen' Verfolgung in Bürgerkriegen - die Rechtsprechung des BVerwG im Vergleich zur Praxis anderer europäischer Staaten. NVwZ-Beilage I 2001, 67.

Rights and the guidance of UNHCR, the Qualification Directive clarifies that actors of persecution or serious harm include non-State actors if it can be demonstrated that the State is either unable or unwilling to provide protection. The inclusion of non-state actors of persecution in the Qualification Directive has broadened the refugee definition in countries that previously did not provide protection against such persecution. This has allowed ‘increased protection against groups such as clans, tribes, criminal organisations, rebel groups, and perpetrators of domestic violence’ (Elena 2008: 5).

According to the UNHCR, ‘the Qualification Directive has resulted in much greater conformity of legal interpretation on non-State actors of persecution or serious harm [...]. The shift to a focus on the availability of protection, rather than the actor of persecution or serious harm, should be commended. - In France and Germany, the Directive has enlarged the scope of grounds for granting protection and thereby reinforced the protection system.’ (UNHCR 2007: 9) In Germany, the introduction of the concept of non-State actors of persecution is widely seen as having enlarged the scope of protection. This is reflected in the sharp rise in decisions by the authorities granting refugee status to Somalis since this provision has entered into force under German law (UNHCR 2007: 46).

c) The Procedures Directive

The Procedures Directive was formally adopted on the 1 December 2005. The 1999 Tampere Presidency Conclusions had called for the formulation of ‘common standards for a fair and efficient asylum procedure’. Asylum procedures relate to the processing of asylum applications. The key elements that fall under the topic of asylum procedures include the question of access to procedures, procedural guarantees such as the opportunity to communicate with the relevant authorities, access to an appeal process as well as the procedure for the withdrawal of refugee status. In due course, the Commission adopted a proposal for a Council Directive on minimum standards on asylum procedures in Member States (2001 OJ C62 E/231). Under Article 67 EC, the Council’s voting on the proposal was to be on the basis of unanimity, with the European Parliament being consulted. At Tampere, the European Council emphasised its absolute respect for the right to seek asylum. This is expressed in the Preamble to the Procedures Directive, which affirms the EU’s commitment to its international responsibilities, stating that in agreeing to create the CEAS in line with its obligations under the Refugee Convention, the EU was ‘thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution’ (Recital 8).

It is also proclaimed that '[t]his Directive respects the fundamental rights and observes the principles recognised in particular by the [European Charter]' (Recital 8), which recognises the 'right to asylum' and protects the right of the applicant to *non-refoulement*.

Key criticisms

Much criticism asserting a breach of the EU's obligations under the Refugee Convention, and of its obligations under international human rights law, has been railed against the Directive. In 2004, a coalition of non-governmental organisations demanded that the Directive be withdrawn, noting 'with deep regret that the most contentious provisions are all intended to deny asylum seekers access to asylum procedures and to facilitate their transfer to countries outside the EU' (ECRE *et al.*, 2004). In addition, the UN High Commissioner for Refugees strongly asserted his opposition to the Directive, warning that 'several provisions...would fall short of accepted international standards...jeopardizing the lives of future refugees' (UNHCR, 2004). Furthermore, condemnation of the Directive has come from within the EU institutions, most vehemently from the European Parliament (European Parliament, 2000).

The Directive has been criticised on a number of grounds. A major concern is related to its use and expansion of the 'safe country' concept (Costello, 2005). All three derivative concepts, the 'first country of asylum' (Article 26), the 'safe third country' (Article 27) and the 'safe country of origin' (Article 31), feature in the Directive and Article 36 introduces a new notion of a 'European safe third country' whereby applicants arriving from designated non-EU, European countries, having 'entered illegally' or are 'seeking to enter' a Member State illegally, may be refused access to asylum procedures.

In a report on the Procedures Directive published in 2006, ECRE criticised not only the standards of the Directive, but also its language for being at times 'incoherent and ambiguous' (ECRE, 2006, 2). It raised particular concerns regarding certain provisions, including the restriction on the right to remain in the state pending examination of the application to first instance decisions (Article 7), and the non-suspensive effects of appeals (Article 39), the restrictions on the right to an interpreter (Article 10(1)(b)), the wide scope for the application of accelerated procedures (Article 23(4)) to 'manifestly unfounded' claims (Article 28(2)), the discretion given to states to derogate from the basic principles and guarantees of Chapter II (Article 24), which include guarantees such as a right for applicants to be informed 'in a language which they may reasonably

be supposed to understand' of their rights and obligations in relation to the asylum procedure to be followed (Article 10(a)), the right to an interpreter 'for submitting their case to the competent authorities whenever necessary' (Article 10(b)), the right to 'communicate with the UNHCR' (Article 10(c)), the right to be 'given notice in reasonable time' on the outcome of their application (Article 10(d)) and the right to be informed of this result 'in a language that they may reasonably be supposed to understand' (Article 10(e)). ECRE also voiced concern over the permitting of border procedures in Article 35(2) which derogate from the principles and guarantees of Chapter II outlined above and which permit confinement at the border without the possibility of judicial review for up to four weeks (Article 35(4)) (ECRE, 2006, 4-5).

How the Procedures Directive has strengthened refugee protection in relation to earlier domestic standards

The 'safe third country' provisions in the Directive can be seen as having undergone rights-enhancement during the negotiations on the Directive, which puts a question mark on the prevalent views in the literature that allege the overall rights-restricting nature of the Directive. Concerns voiced by UNHCR and shared by the Commission 'and in particular one Member State' were voiced in relation to the safe third country notion. (UNHCR; 1997, 29) As Doede Ackers reports, 'There were drafting sessions which resulted in considerably improving the text on rules with respect to the individual consideration in safe third country cases'. Initially the text provided only that Member States were obliged to lay down "rules setting out the matters which shall be the subject of an individual examination". Eventually, it evolved into "rules, in accordance with international law, allowing an individual examination [as to] whether the third country concerned is safe for a particular applicant, which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment" (D. Ackers; 2005, 30).

Further, the Commission presented some points demonstrating that there are some rights-enhancing aspects to the Directive. It stated that the first instance procedures are fully in accordance with the essential rights provided for in Section 192 of the UNHCR Handbook on procedures and criteria for determining refugee status (1979) (D. Ackers; 2005, 32). What is more, on appeal, the provisions it includes on judicial scrutiny go beyond the Handbook in requiring Member States to ensure an effective remedy before a court or tribunal. The Handbook only

refers to ‘a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system’.

In a report published by the Refugee Council in 2007 on the UK’s implementation of the Procedures Directive, a number of provisions of the Procedures Directive are highlighted as being welcome improvements on the standard of refugee protection in Europe. Although the Refugee Council finds a number of areas for concern, it is not possible to conclude from the report that the overall impact of the Directive is negative. The Refugee Council welcomes Article 8 on the ‘Requirements for the examination of applications’. Article 8(1) states that ‘Member States shall ensure that applications for asylum are neither rejected nor excluded from examination on the sole ground that they have not been made as soon as possible’. The Refugee Council reflected positively on the level of expertise required of asylum decision makers in the Directive. Article 8(2)(b) requires Member States to ensure that ‘precise and up-to-date information is obtained from various sources, such as the [UNHCR], as to the general situation prevailing in the countries of origin of applicants for asylum’. The Refugee Council make clear that the standards of the Directive would require an improvement of standards in the UK. Article 8(1) for example, states that ‘Member States shall ensure that applications for asylum are neither rejected nor excluded from examination on the sole ground that they have not been made as soon as possible’. The Refugee Council welcomed the UK government’s ‘intention to amend the Immigration Rules to reflect’ the requirements of this provision’ (Refugee Council, 2007, 4).

The Refugee Council’s report on the UK’s implementation of the Procedures Directive highlights the importance of the implementation stage in order to determine the actual impact of the asylum Directives on refugee protection in Europe. Much rests on the interpretation of the provisions of the Directive as to whether they result in an upgrading of domestic standards. For example, the Refugee Council, commenting on the UK’s Implementation Paper on the Procedures Directive expresses concern at the British Immigration Authority’s opinion that asylum seeking children are to be looked after by local authorities and that this apparently consists of a fulfilment of the UK’s obligations under Article 17(1)(a), which requires Member States to ensure that ‘a representative represents and/or assists the unaccompanied minor with respect to the examination of the application’. The Refugee Council noted the inadequacy of leaving this task to local authorities, which ‘feel unable to recommend one legal representative over another’ due to ‘the requisite experience, and/or training, as well as a duty to remain impartial regarding signposting to private companies without a competitive tendering process’ (Refugee Council, 2007, 7). It is perhaps in

such cases that the role of the European Court of Justice will be important in ensuring the correct and uniform interpretation and application of the Directives across the Member States.

The Refugee Council's report on the UK's implementation of the Procedures Directive demonstrates that despite the inclusion of exceptions to guarantees, these are by no means made use of by states. For example, the Refugee Council welcomed the British Immigration Authority's decision 'not to make use of the exemptions to the obligation to appoint a representative' as well as the Immigration Rules reflection of 'existing policy to make it clear that interviews of unaccompanied children must only be conducted by specially trained Case Owners' and that decisions are also taken by such individuals (Refugee Council, 2007, 7). It is clear therefore that the inclusion of derogations and possibilities for lowering standards present in the Directive have not necessarily been taken advantage of by states during implementation, as was feared by many when the Directive was agreed.

Despite the assertion from a number of NGOs, including Amnesty International and ECRE, as well as many academic commentators that Member States with higher standards of protection are now free to lower their standards pursuant to the agreement of the Directive, Ackers points out that 'the negotiations have not indicated that Member States have considered that this is an option for them. Most Member States attempted to make the text reflect what they were doing at the time...Moreover, it must be conceded that several Member States will have to raise their standards to comply with certain' of the Directive's provisions (D. Ackers; 2005, 32). Moreover, it is clear that at the stage of implementation, the Directive has required the improvement of standards in some areas and that Member States have not necessarily taken advantage of the opportunities for derogation provided for in the Directive.

d) The Return Directive

The Directive on common standards and procedures in Member States for returning illegally staying third country nationals ('the Directive') was approved by the European Parliament on 18 June 2008, formally adopted by the Council on 9 December 2008 and published in the Official Journal on 24 December 2008. The Directive applies to all EU Member States except the United Kingdom, Ireland and Denmark.¹¹ It also covers Iceland, Norway, Switzerland and Liechtenstein

¹¹ In accordance with Article 5 of the Protocol on the position of Denmark annexed to the Treaty of the European

The Return Directive¹² is the most ambitious asylum instrument that the EU has adopted concerning return until now. It is also the first major legal instrument on migration to be adopted by co-decision and therefore has been described as a ‘test case’ of how the procedure will work in this policy area (Canetta 2007: 446). The Directive provides for a set of rules to be applied throughout the return and removal process, for example concerning the form of the relevant decisions, the use of coercive measures, detention, safeguards pending return, etc. A number of provisions included in the legislation have been assessed very negatively by civil society organisations, in particular its rules on detention and entry bans (see e.g. Amnesty International 2008; ECRE 2008).

Key criticisms

Deprivation of liberty constitutes an extreme sanction, which is usually used in connection with the punishment of criminal offences (ECRE 2005; Hailbronner 2007). The Returns Directive has been criticised for doing little to harmonise Member States’ standards as regards administrative detention, establishing disproportionate maximum deadlines and allowing for the detention of children (UNHCR 2008; Amnesty International and ECRE 2008). Although Member States are required to lay down a maximum deadline for detention which should not exceed six months, the directive allows for the possibility of extending this period for up to 12 months in the event of uncooperative behaviour on the part of the person concerned or when there are delays in obtaining documentation from third countries. This maximum period has been viewed by many as excessive and a potential breach of the human rights of individuals who have not committed a crime. The fact that children and families can be detained (Article 17), albeit under some additional safeguards, has also attracted criticism.

The rules on the establishment of entry bans have also been strongly criticised, since they may impair the ability of individuals to seek and enjoy protection from persecution in the EU (UNHCR 2005, 2008; Amnesty International and ECRE 2008). Article 11 of the Returns Directive provides for a mandatory entry ban when no period for voluntary departure has been granted or if the obligation to return has not been complied with. In other cases, Member States

Union, this Member State will decide within a period of six months from the adoption of the Directive whether to implement it in its national law.

¹² Directive 2008/115/EC of 16 December 2008. Official Journal L348/98.

have discretion to decide whether to issue an entry ban or not. The maximum duration of the prohibition of re-entry is to be five years, unless the person concerned represents a threat to public policy, public security or national security, in which cases it can be extended (Article 11.2). Member States remain free to refrain from adopting, withdraw or suspend entry bans in individual cases for humanitarian reasons, as well as to withdraw or suspend them on individual basis or for certain categories of cases for other reasons (Article 11.3). Individuals are to be granted an effective remedy to appeal against an entry ban, although not necessarily before a court (Article 13.1).

How the Return Directive has strengthened aspects of refugee protection in relation to previous domestic standards

Member States have increasingly resorted to detention with a view to facilitate the removal process – also in the case of asylum seekers - throughout the EU (ECRE 2005; European Parliament 2005; Hailbronner 2005, 2007). Apart from this general trend, however, national practices concerning administrative detention have shown considerable diversity (IOM 2004; Hailbronner 2005). Whilst some Member States do not generally hold asylum claimants in custody during the procedure (e.g. Germany), others allow for the detention of asylum seekers simply on the grounds of irregular entry (e.g. Malta). The maximum length of detention also varies widely. Seven Member States did not have in place any time limits for pre-removal detention. In the remaining Member States, detention deadlines have ranged from 32 days in France to 20 months in Latvia (Hailbronner 2005; European Parliament 2007; JRS 2007). Although national legislation generally provides that the confinement of returnees should take place in special facilities, different to those in which ordinary prisoners are detained, this is not always the case in practice or in all EU countries – in Ireland, for example, returnees are regularly held in prisons (Hailbronner 2005: 144). Significant differences also prevail in the Member States as for whether the detention of vulnerable groups, such as minors, is allowed (Hailbronner 2005; European Parliament 2005). The Directive subjects detention to the principle of proportionality, providing that deprivation of liberty is justified ‘only to prepare return or carry out the removal process and when the application of less coercive measures would not be sufficient’ (Recital 16). Detention orders that are not issued by judicial authorities have to provide for the possibility of judicial review, although no deadlines are specified (Article 15.2). Custody should be maintained by as short a period as possible, and only as long as removal arrangements are in progress and executed ‘with due diligence’ (Article 15.1).

Member States also tend to impose entry bans as a means of reducing the ability of migrants to enter their territory again after they have been expelled. On these grounds, the EMN (2007: 25) has described entry bans as ‘[t]he most effective and sustainable measure of Forced Return’. Current national practices prohibit returnees from coming back to the host Member State for variable periods, which generally last several years (EMN 2007: 25). National authorities in Austria, Denmark, France, Germany, Latvia, Lithuania and the UK have the possibility of prohibiting re-entry indefinitely – although their domestic legislation also provides for shorter bans. In Belgium, the Czech Republic, Italy, Slovakia, Slovenia and Spain entry bans can last up to 10 years, whereas in other Member States, such as Malta and The Netherlands, such bans do not exist (IOM 2004). In Germany, Italy and Greece transgressing an entry ban constitutes a criminal offence which may be punished with imprisonment.¹³ The grounds for withdrawing such bans vary across countries, but tend to be restrictive. In Belgium, for example, re-entry is in principle only allowed if the alien meets the costs of removal.¹⁴ Again, like with the other Directives, Member States can adopt or maintain more favourable provisions, as long as these are compatible with the legislation. A statement by the Council annexed to the text at the moment of adoption also declares that the implementation of the Directive will not be used in itself to justify the lowering of domestic standards.

In summary, while there are powerful constraints on the downgrading of existing standards in the Member States, we can expect several protection-enhancing dynamics from the adoption of the Directive. In states where currently entry bans can last indefinitely, Member States will have to change their national legislations in order to establish upper time limits. Moreover, in several states will be forced to change their rules on re-entry bans to shorten the maximum period of applicability and to grant third country nationals the right to appeal against entry ban decisions.

Conclusion

In this paper we have sought to question the argument that European cooperation has been responsible for the decline in refugee protection standards and the creation of ‘Fortress Europe’. We have shown theoretically and empirically how European cooperation and the development of

¹³ EMN (2007), country reports on Germany, Italy and Greece.

¹⁴ EMN (2007), country report on Belgium.

the common asylum law on the basis of EU minimum standards in this area has curtailed regulatory competition and in doing so it has largely halted the race to the bottom in protection standards in the EU. Rather than leading to policy harmonisation at the ‘lowest common denominator’, EU asylum laws have frequently led to an upgrading of domestic asylum laws in several Member States, strengthening protection standards for several groups of forced migrants, even in the case of EU laws that have been widely criticised for their restrictive character. While many aspects of EU asylum law reflect restrictive trends similar to those in other parts of the world, some EU provisions have clearly had a positive impact not only on countries in Central and Eastern Europe, but also in some of the older Member States. While there currently remain significant variations in Member States’ implementation of EU asylum law, we expect that the ongoing ‘communitarisation’ of asylum policy will help to improve Member States’ implementation records of EU asylum law and further strengthen refugee protection outcomes in Europe. The EU might have disappointed some of those who had hoped that it would do more to address the shortcomings of the international refugee regime. However, the evidence presented in this paper has shown that the effects of European cooperation on asylum and refugee matters have not been invariably and uniquely negative and that, in fact on balance, regional cooperation has strengthened rather than undermined refugee protection in Europe.

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